



Department of Political Science

Master's degree in Policies and Governance in Europe

EU Law and Regulation

Emergency tools in the EU Asylum Framework. An (adequate) response to past failures?

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INTRODUCTION

In October 2024, the leader of the new far-right Patriots alliance in the European Parliament, writing for the coalition, declared the New Pact on Migration¹ and Asylum dead.² Not long afterward, the Netherlands' newly installed government, led by the notorious anti-immigrant PVV party, formally requested Brussels' permission to opt out of the New Pact on Migration and Asylum.³ It does not end here; Poland and Hungary openly vowed their intention not to implement the Pact's key measures.⁴ Donal Tusk, Poland's current Prime Minister has recently promised to find ways to exempt the country from participating in any refugee relocation mechanism.⁵ Hungary's Prime Minister, Viktor Orbán, lambasted the Pact as “another nail in the coffin of the European Union,” declaring that “unity is dead”⁶ and that Hungary “will never give in to the mass migration frenzy.”⁷ The Pact has not yet entered into force; it is scheduled to become operational in 2026. These *early* expressions of opposition from national leaders are worrying and have raised questions on whether the Union's capacity to manage dissent in a political field that creates much polarization.

The EU's New Pact on Migration and Asylum, formally proposed in 2020 and negotiated through 2023,⁸ aspires to overhaul the bloc's malfunctioning asylum system. This new Pact comes with promises: a more coherent and effective framework for managing asylum in the

¹ European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, 23 September 2020. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0609>

² Genovese, V. (2024). *Far-right Patriots' chief declares death of EU migration pact as group's leaders meet in Brussels*. Euronews. <https://www.euronews.com/my-europe/2024/10/16/far-right-patriots-chief-declares-death-of-eu-migration-pact-as-groups-leaders-meet-in-bru#:~:text=said%20Annemans>

³ Henley, J. (2024). *Dutch government led by far-right PVV asks EU for opt-out from asylum rules*. The Guardian. <https://www.theguardian.com/world/2024/sep/18/dutch-government-geert-wilders-pvv-brussels-opt-out-eu-asylum-rules#:~:text=The%20new%20Dutch%20coalition%20government,out%20on%20asylum%20rules>

⁴ Chiappa, C. (2024). *Unlikely allies Viktor Orbán and Donald Tusk rail against EU migration deal*. POLITICO. <https://www.politico.eu/article/viktor-orban-donald-tusk-eu-migration-deal/#:~:text=Polish%20Prime%20Minister%20Donald%20Tusk,to%20exempt%20Poland%20from%20it>

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ De Bruycker, P. (2024). Genealogy of and futurology on the pact on migration and asylum. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/genealogy-of-and-futurology-on-the-pact-onmigration-and-asylum/>

EU.⁹ It offers new technologies on how to operate border control and asylum procedures, proposes a new comprehensive approach to solidarity, and offers a new strategy for responsibility sharing between Member States.¹⁰ Furthermore, the Pact's legislative package introduces faster and more coordinated procedures at EU external borders, a permanent system for relocating or supporting asylum-seekers among Member States, and a dedicated *Crisis and Force Majeure Regulation*¹¹ to govern the EU's response during extreme influx situations.¹² At the core of it, the motto is that no country will be 'left alone under pressure'¹³ in a migration crisis. This is because the Pact promises to remedy the legal gaps and collective-action failures that have plagued EU asylum policy.¹⁴

The need for the implementation of this new tool is a consequence of the failure of the EU's previous tools during recent refugee emergencies. In 2015–16 over one million asylum-seekers came to Europe, overwhelming the Common European Asylum System and the Union as a whole.¹⁵ Reception facilities in frontline states, and even in Northern destination were swiftly overrun, and national border closures began to threaten the integrity of Schengen.¹⁶ Despite the existence of multiple mechanisms available, such as the Dublin III Regulation,¹⁷ the Temporary Protection Directive,¹⁸ or Article 78(3) TFEU¹⁹ which provides the legal basis for

⁹ European Commission. (2024). *Pact on Migration and Asylum*. Directorate-General for Migration and Home Affairs. Retrieved from https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en

¹⁰ Ibid.

¹¹ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L 1359, 22.5.2024.

¹² Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC). Pag. 3-8

¹³ European Commission. (2024). *Pact on Migration and Asylum*. Directorate-General for Migration and Home Affairs. Retrieved from https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en

¹⁴ Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC). Pag. 26-28

¹⁵ Baczyńska, G., & Landauro, I. (2023). *Poland, Hungary stand alone in opposing EU migration reform*. Reuters. <https://www.reuters.com/world/europe/eu-looks-future-summit-migration-enlargement-2023-10-06/#:~:text=The%20EU%20has%20tightened%20its,across%20the%20Mediterranean%20in%20201>

¹⁶ Ibid.

¹⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013

¹⁸ 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, OJ L 212, 7.8.2001

¹⁹ European Union. (2008). Consolidated version of the Treaty on the Functioning of the European Union: Article 78. Official Journal of the European Union, C 115, 76–77. Retrieved from <https://eur->

the implementation of provisional measures during sudden inflows of people, the Union was not able to mount a fair and effective response.²⁰ These institutional mechanisms had failed to contain the crisis, and solidarity and responsibility-sharing became fractured throughout the Union.²¹ In 2022, however, the EU provided a much swifter and unified response to the displacement of many Ukrainians after the invasion from Russia.²² For the first time since its adoption in 2001, the Temporary Protection Directive had been finally activated and efficiently granted immediate rights to millions of displaced persons without requiring individual asylum determinations.²³

These experiences have prompted a broader re-evaluation of the European Union's approach to managing migration emergencies. They call into question the underlying causes of the inefficiency and fragmentation that have long characterised the EU's asylum tools.²⁴ After decades of development in migration policy since the foundations laid by the Treaty of Amsterdam, concerns arise to whether this New Pact on Migration and Asylum can offer a coherent and durable solution to the structural and political shortcomings of its predecessors.²⁵ Accordingly, this thesis will examine whether the new Crisis and Force Majeure Regulation provides a meaningful resolution to the shortcomings of the EU's past crisis-response tools, or whether it merely reproduces the same flaws under a new label. In doing so, the analysis will assess to what extent the Regulation overcomes the pattern of "governing through crises" and breaks the path-dependent tendencies of EU asylum law.

lex.europa.eu/eli/treaty/tfeu/2008/art_78/oj/eng; Saliba, S. (2015, May 13). Non-refoulement, push-backs and the EU response to irregular migration. European Parliamentary Research Service. Retrieved from <https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration>

²⁰ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

²¹ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

²² Küçük, E. (2023). Temporary protection directive: testing new frontiers?. *European Journal of Migration and Law*, 25(1), 1-30. Pag. 12-14

²³ Ibid.

²⁴ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

²⁵ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

1.2. Research question and objectives.

The purpose of this thesis is to examine the *Crisis and Force Majeure Regulation*,²⁶ introduced in 2024 as part of the European Union's New Pact on Migration and Asylum, as a new crisis-management instrument in EU asylum law, and to assess how this measure aims to address the legal and structural shortcomings of earlier EU migration crisis tools. Specifically, Article 78(3) TFEU,²⁷ the Temporary Protection Directive,²⁸ and the Dublin III Regulation.²⁹ Through an assessment of the structure and applications of these tools, this thesis will assess whether the Crisis and Force Majeure Regulation will provide a more meaningful resolution in the policy framework for managing migration emergencies within the EU, thereby addressing the limitations of its predecessors.

Therefore, this thesis will answer the following question:

How the Crisis and Force Majeure Regulation provide a meaningful resolution to the legal and political failures of previous EU emergency migration tools and practices?

1.3. Methodology

This thesis adopts a qualitative, document-based legal analysis to examine the Crisis and Force Majeure Regulation (Regulation (EU) 2024/1359)³⁰ in the context of EU asylum policy's historical development. The research scrutinizes the legal structure of the Regulations, both the Crisis and Force Majeure Regulation and the previous tools, meaning their mechanisms, procedures, and derogations it establishes, and evaluates their consistency with overarching legal principles and frameworks in EU asylum law, and apart from the new regulation, it will

²⁶ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L 1359, 22.5.2024.

²⁷ European Union. (2008). Consolidated version of the Treaty on the Functioning of the European Union: Article 78. Official Journal of the European Union, C 115, 76–77. Retrieved from https://eur-lex.europa.eu/eli/treaty/tfeu_2008/art_78/oj/eng; Saliba, S. (2015, May 13). Non-refoulement, push-backs and the EU response to irregular migration. European Parliamentary Research Service. Retrieved from <https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration>

²⁸ 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, OJ L 212, 7.8.2001

²⁹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013

³⁰ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L 1359, 22.5.2024.

analyze their implementation. As the Regulation is not yet in force, the study will assess how the Regulation is framed in law and policy and how it responded to the limitations of the previous tools.

1.3.1 Content and Sources

The analysis will draw information from a wide range of official documents, EU's institutional commentaries, and scholarly materials. Primary sources include EU legal texts of the regulations relevant to the analysis which have been aforementioned, and other relevant legislation, which include Court cases, Articles of the Treaties, Directives, Regulations, and communications. These texts are examined to detail the provisions addressing "situations of crisis" and "force majeure," and to map out the special regimes and derogations introduced. By closely reading such provisions and their recitals, the thesis identifies how the Regulation is structured to handle emergencies, such as responsibility-sharing and expedited measures, and how these aim to fill the limitations of its predecessors. In addition, EU policy documents and communications are analyzed to understand the policy framing behind the law. This includes reviewing European Commission Communications, explanatory memoranda to the legislative proposal, Council conclusions, and related strategy papers that situate the Regulation within the New Pact on Migration and Asylum.

This thesis will make use of path dependency and historical institutionalism as a guiding theoretical lens. These political science frameworks are applied to *interpret* the findings of document analysis rather than standalone data sources. Path dependency theory is used to explore how past policy decisions and institutional paths have shaped the present regulatory choices. Using this lens, the thesis examines the institutional context behind the Regulation: it considers milestones like the 2015 refugee crisis, the application and limitation of its predecessors, and the political impetus for the New Pact on Migration and Asylum. This will help us understand why the Crisis Regulation took its particular form and what it aims to solve.

1.3.2 Limitations

At the time of writing this thesis, the Regulation in question has yet to come into force. This analysis, then, precludes any empirical evaluation of its practical implementations and possible outcomes in times of emergency. Therefore, the thesis will mainly focus on the Regulation's design which aims at providing an evaluation on its implementation or future predictions on possible outcomes. This approach is thereby confined, or limited to, a theoretical perspective,

as any assessment of practical effectiveness or unforeseen implementation challenges remains premature. Furthermore, it is important to mention that the Regulation's novelty means that secondary literature and scholarly commentary are still scarce. Migration is a well-studied and researched topic, and there is substantial work already in progress on this new pact. However, the limited availability of existing scholarships means that further research will be necessary in the future to substantiate and refine the conclusions put forward in this thesis.

CHAPTER 1

THEORETICAL FRAMEWORK

Introduction

This chapter outlines the theoretical lens through which the EU's new Crisis and Force Majeure Regulation will be analysed. This thesis does not seek to test a single grand theory but instead adopts a historically informed and normative approach to make sense of the development of EU migration policy. Drawing on insights from EU law, political science, and institutional theory, it constructs a conceptual toolkit for analysing how legal and policy responses to migration have evolved. The focus lies on the emergency tools introduced by the New Pact on Migration and Asylum, using a theoretical framework foregrounded on historical institutionalism, with special attention to path dependency, as the primary lens. It aims to use path dependency work to contextualize the progression of asylum law towards the writing of the new Crisis and Force Majeure regulation, whilst looking at the broader discourse on migration as a crisis, the reliance on emergency governance for matters of migration.

Therefore, the discussion is structured into two four central parts. First, Crisis and Emergency Law in the Union examine the Union's approach to migration "crises", including the historical framing of migration as an emergency, the evolution of EU emergency measures, and the use of extraordinary legal tools (and associated criticisms). Next, a section on path dependency as an analytical lens explains how past institutional choices channel and limit current policy options in EU asylum law. Finally, a brief bridging discussion then links these theoretical insights to the present study, explaining how they will guide the analysis.

1. Crisis and Emergency Law in the Union

From the time of the Treaty of Amsterdam, the European institutional discourse on migration has increasingly prioritized *securitization*, strengthening border control as a central mechanism to manage and deter irregular migration.³¹ This securitized approach began in the '90s with the tightening of visa policies and progressively evolved to include physical infrastructure aimed at restricting access to the EU's internal borders.³² Some of the most notable examples include the 33-kilometer fence constructed by Bulgaria along its border with Turkey³³ and the fortified, double-layered barriers surrounding the Spanish enclaves of Ceuta and Melilla on the border with Morocco.³⁴ Another example is the establishment of the *European Border Surveillance System* in 2013, which marked a significant step towards the "combating against"³⁵ irregular migration. It introduces new monitoring technologies with the specific purpose of detecting and therefore preventing irregular border crossings, particularly in the Mediterranean.³⁶

Studies in discursive institutionalism have shown that the ideas and frames through which policymakers perceive events influence the solutions they consider acceptable.³⁷ It is not a novelty that migration has been consistently constructed and reproduced discursively as a crisis, both within institutional rhetoric and in the wider public sphere.³⁸ Since 2015, this representation has become entrenched in both official communication and media narratives,³⁹

³¹ Huysmans, J. (2000). The European Union and the securitization of migration. *JCMS: Journal of common market studies*, 38(5), 751-777.

³² Wass Widinghoff, A. (2023). *Access to Asylum in Melilla Analysing 'What's the problem represented to be' in the Screening Proposal of the EU Pact on Migration and Asylum* (Master's thesis, UiT Norges arktiske universitet).

³³ Nenov, S. (2014, July 14). *Bulgaria's fence to stop migrants on Turkey border nears completion*. Reuters. <https://www.reuters.com/article/world/bulgarias-fence-to-stop-migrants-on-turkey-border-nears-completion-idUSKBN0FM1ZE>

³⁴ Euractiv. (2024, September 15). Morocco blocks mass migration attempt into Spain's Ceuta enclave. Euractiv. <https://www.euractiv.com/section/politics/news/morocco-blocks-mass-migration-attempt-into-spains-ceuta-enclave/>

³⁵ Bullen, M., & Bullen, M. (2024). *The rise of digital border surveillance and the Militarization of Migration Control* - LSE International Development. LSE International Development - Social, political and economic transformation in the developing world. <https://blogs.lse.ac.uk/internationaldevelopment/2024/06/20/the-rise-of-digital-border-surveillance-and-the-militarization-of-migration-control/>

³⁶ European Commission. (n.d.). *Eurosur*. Migration and Home Affairs. https://home-affairs.ec.europa.eu/policies/schengen/old-border-crossing/eurosur_en

³⁷ Schmidt, V. A. (2008). Discursive institutionalism: The explanatory power of ideas and discourse. *Annu. Rev. Polit. Sci.*, 11(1), 303-326.

³⁸ Bousiou, A., & Papada, E. (2020). Introducing the EC hotspot approach: A Framing Analysis of EU's most Authoritative crisis policy response. *International Migration*, 58(6), 139-152.

³⁹ *ibid.*

leading to a persistent state of perceived exceptionality.⁴⁰ The volume of migration towards Europe has varied drastically over time and will continue changing as the world continues to experience economic, political, and social changes. However, it is the framing of these movements that have often catalysed the invocation of extraordinary legal and policy measures,⁴¹ and can also be used to explain the shifts in political movements towards the far-right in European governments.⁴² The shift towards a more negative, reactive, and alarming narratives became most pronounced during the 2015–2016 period, when the EU faced an unprecedented number of asylum applications, largely from individuals coming from conflict zones such as Syria, Afghanistan, and Iraq.⁴³ The European Commission’s Agenda on Migration of 2015⁴⁴ framed the situation as a crisis, a challenge to the Union’s border control and asylum systems.⁴⁵ It is undeniable that operational strain on national systems was real, the institutional narrative emphasized logistical failure and imbalance in responsibility-sharing, with minimal engagement on the structural root causes of displacement.⁴⁶ As Bousiou and Papada have noted, Commission communications largely omitted references to the geopolitical or humanitarian contexts of origin countries, such as the Syrian civil war or the ongoing instability in Yemen.⁴⁷ Instead, policy discourse centred on border fortification, deterrence, and containment, reinforcing the idea of migration as an external threat to be managed.⁴⁸ This framing did not remain confined to EU institutions. Media coverage across Europe frequently employed terms such as “flood,” “wave,” and “invasion” to describe the arrival of migrants, particularly those arriving irregularly by sea.⁴⁹ As noted by Musarò⁵⁰ and by Georgiou and

⁴⁰ Verleyen, E., & Beckers, K. (2023). European refugee crisis or European migration crisis? How words matter in the news framing (2015–2020) of asylum seekers, refugees, and migrants. *Journalism and Media*, 4(3), 727–742.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Verleyen, E., & Beckers, K. (2023). European refugee crisis or European migration crisis? How words matter in the news framing (2015–2020) of asylum seekers, refugees, and migrants. *Journalism and Media*, 4(3), 727–742.

⁴⁴ European Commission. (2015, May 13). *Managing migration better in all aspects: A European Agenda on Migration* [Press release].

https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_15_4956/IP_15_4956_EN.pdf

⁴⁵ Ibid.

⁴⁶ Bousiou, A., and Papada, E. 2020. “Between Emergency and Normalcy: The Hotspot Approach in the EU Migration Governance.” *Journal of Borderlands Studies* 35 (4): 617–636.

⁴⁷ Bousiou, A., and Papada, E. 2020. “Between Emergency and Normalcy: The Hotspot Approach in the EU Migration Governance.” *Journal of Borderlands Studies* 35 (4): 617–636.

⁴⁸ Ibid.

⁴⁹ Verleyen, E., & Beckers, K. (2023). European refugee crisis or European migration crisis? How words matter in the news framing (2015–2020) of asylum seekers, refugees, and migrants. *Journalism and Media*, 4(3), 727–742.

⁵⁰ Musarò, P. (2017). Mare Nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, 39(1), 11–28.

Zaborowski⁵¹ these metaphors reinforced the perception of loss of control and the erosion of internal order. The image of “crisis” became a powerful narrative device, allowing national and supranational actors alike to justify extraordinary measures, from temporary border closures within the Schengen Area to emergency derogations from standard asylum procedures.⁵² Even as total numbers of asylum seekers declined in subsequent years, the language of emergency has remained remarkably stable in both political rhetoric and policy documents. As De Genova argues,⁵³ the “crisis” is less a description of any specific set of facts than it is a mode of governance, meaning, a way of managing migration through a permanent state of exception. EU migration governance, in this view, operates in what Agamben⁵⁴ called a “state of exception,” where normal legal standards are suspended or weakened under the guise of responding to an ongoing threat.

The resilience of this discursive framework can be understood through the lens of discursive institutionalism, as developed by Vivien Schmidt.⁵⁵ Her theory emphasizes that institutions do not simply respond to material conditions but are shaped and reshaped by the discourses through which policy actors interpret those conditions.⁵⁶ Discursive institutionalism draws a crucial distinction between coordinative discourse⁵⁷ (the internal policy coordination among elites) and communicative discourse⁵⁸ (the justification of policy to the public). In the context of EU migration, both forms of discourse have reinforced a securitized and managerial view of migration, legitimizing exceptional instruments and crisis governance. Schmidt’s uses her theories to analyse European policy making during the time of the Eurozone crisis.⁵⁹ Specifically, she states that instead of reforming the EU Treaties to address structural deficiencies in economic governance that, according to her, were the cause of the worsening of the crisis, EU opted instead to stretch and reinterpret existing legal and policy frameworks.⁶⁰ This process, change “by stealth”, occurred through narrative innovation rather than legal

⁵¹ Georgiou, M., & Zaborowski, R. (2017). *Media coverage of the “refugee crisis”: A cross-European perspective*. Council of Europe.

⁵² Ibid.

⁵³ De Genova, N. (2016). The European question: Migration, race, and postcoloniality in Europe. *Social Text*, 34(3), 75-102.

⁵⁴ Agamben, G. (2008). *State of exception*. University of Chicago press.

⁵⁵ Schmidt, V. A. (2008). Discursive institutionalism: The explanatory power of ideas and discourse. *Annu. Rev. Polit. Sci.*, 11(1), 303-326.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Schmidt, V. A. (2018). Reinterpreting the rules ‘by stealth’ in times of crisis: a discursive institutionalist analysis of the European Central Bank and the European Commission. In *Europe's Union in Crisis* (pp. 118-138). Routledge.

⁶⁰ Ibid.

transformation.⁶¹ This strategy allows institutions to incrementally adjust policy without formally acknowledging the legal or political implications of doing so, maintaining an illusion of continuity and legality while engaging in substantial functional transformation.⁶² A similar dynamic is observable in migration policy. Rather than substantially reforming the Common European Asylum System, institutional actors have repeatedly framed migration as a series of recurring emergencies that justify the deployment of exceptional tools within the bounds of existing legal.⁶³ Repeatedly framing inflows as exceptional crises can cultivate a permanent emergency mindset, normalizing the use of extraordinary measures.⁶⁴ Scholars have cautioned that viewing migration through a continual crisis lens can risk making exception the rule, undermining incentives to invest in sustainable, rights-based policies for the long-term.⁶⁵ Exceptional responses often are born in direct interdependence with crisis narratives, meaning that how a situation is described (“emergency” vs “routine”) enables certain legal responses and forecloses others.⁶⁶ These revisionary strategies and the systematization of narratives of crisis, prompted the EU to deploy operational procedures of emergency, which will be assessed in more depth in the following chapters.

1.1 The State of Emergency law in the EU

As Auer and Scicluna argued, emergency politics within the EU is characterised by practices that bypass or stretch legal norms, justified by their alleged necessity.⁶⁷ Their theory includes both supranational exceptionalisms, where institutions such as the European Central Bank or Commission expand executive discretion beyond the black letter of the treaties, and

⁶¹ The term “change by stealth” is drawn from Vivien A. Schmidt’s work on discursive institutionalism, referring to policy transformation that occurs not through formal treaty revision, but via the reinterpretation and repurposing of already existing rules. In the EU context, this often involves the strategic use of discourse by institutional actors to justify exceptional measures under the guise of continuity. It is used here to describe how EU migration governance has evolved through emergency narratives rather than structural reform Schmidt, V. A. (2018). Reinterpreting the rules ‘by stealth’ in times of crisis: a discursive institutionalist analysis of the European Central Bank and the European Commission. In *Europe’s Union in Crisis* (pp. 118-138). Routledge.

⁶² Ibid.

⁶³ Helluin, A. (2021). A “New” pact on Migration and Asylum? The European migration policy path-dependency. EUROPEUM Institute for European Policy. <https://www.europeum.org/en/articles-and-publications/policy-brief-a-new-pact-on-migration-and-asylum-the-european-migration-policy-path-dependency/>

⁶⁴ Auer, S., & Scicluna, N. (2021). The Impossibility of Constitutionalizing Emergency Europe 1. *JCMS: Journal of Common Market Studies*, 59, 20-31.

⁶⁵ Auer, S., & Scicluna, N. (2021). The Impossibility of Constitutionalizing Emergency Europe 1. *JCMS: Journal of Common Market Studies*, 59, 20-31.

⁶⁶ De Genova, N. (2016). The European question: Migration, race, and postcoloniality in Europe. *Social Text*, 34(3), 75-102.

⁶⁷ Auer, S., & Scicluna, N. (2021). The Impossibility of Constitutionalizing Emergency Europe 1. *JCMS: Journal of Common Market Studies*, 59, 20-31.

intergovernmental exceptionalism, wherein Member States act outside the EU legal framework via international agreements.⁶⁸ These mechanisms have not only been implemented in the context of migration, but in crisis such as the eurozone crisis and Covid as well.⁶⁹ A key concern raised in this context is the erosion of legal coherence and democratic accountability.⁷⁰ The EU's reliance on ad hoc legal justifications, what has been termed integration through crisis, has prompted a structural misalignment between legal frameworks and political practices.⁷¹

As aforementioned, at its core, EU emergency law refers to the body of rules that can be invoked to address serious, often sudden, threats to the Union's essential functions or the stability of its Member States.⁷² In the context of migration these measures typically fall into two broad categories: the first involves emergency competences embedded in the Treaties, such as Article 78(3) TFEU,⁷³ the second comprises of directives and regulations, such as Temporary Protection Directive (Directive 2001/55/EC)⁷⁴ and the Dublin III regulation.⁷⁵ This is in light of the implementation of the New Pact on Migration and Asylum.⁷⁶ As argued by De Witte,⁷⁷ these mechanisms do not operate as a coherent system. There is no single, consolidated legal regime to declare or manage emergencies, rather, the EU responds to crises through a patchwork of legal pathways.⁷⁸ As Nicolosi⁷⁹ points out, the EU law does, in principle, permit actors across the multilevel administrative structure to adopt urgent measures in response to crises, even if doing so entails temporary departures from established legal norms. He further

⁶⁸ Auer, S., & Scicluna, N. (2021). The Impossibility of Constitutionalizing Emergency Europe 1. *JCMS: Journal of Common Market Studies*, 59, 20-31.

⁶⁹ Auer, S., & Scicluna, N. (2021). The Impossibility of Constitutionalizing Emergency Europe 1. *JCMS: Journal of Common Market Studies*, 59, 20-31.

⁷⁰ Ibid.; Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4)

⁷¹ De Witte, B. (2022). Guest Editorial: EU emergency law and its impact on the EU legal order. *Common market law review*, 59, 3-18. Pag. 11-13

⁷² De Witte, B. (2022). Guest Editorial: EU emergency law and its impact on the EU legal order. *Common market law review*, 59, 3-18.

⁷³ Article 78 of the Treaty on the Functioning of the European Union (TFEU), OJ C 202, 7.6.2016

⁷⁴ 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, OJ L 212, 7.8.2001

⁷⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013

⁷⁶ European Commission. (2020). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609 final, 23 September 2020.

⁷⁷ De Witte, B. (2022). Guest Editorial: EU emergency law and its impact on the EU legal order. *Common market law review*, 59, 3-18.

⁷⁸ Ibid.

⁷⁹ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

delineates that certain crises happen unpredictably, thus demanding swift improvisation, while others, though pressing, may fall within the scope of pre-existing contingency mechanisms.⁸⁰ Therefore, he argues, the qualification of a certain event as an emergency can determine the scope and nature of permissible responses, particularly about the extent to which Member States may lawfully derogate from their obligations under EU law.⁸¹

The large arrivals that took place in 2015 is an interesting case study, because during this time, the narrative centred matters of urgency and security, which served to justify the recourse to exceptional measures within existing legal and institutional frameworks. This is exemplified by the work of Bousiou and Papada,⁸² on the institutional responses during the 2015 period of the migration crisis, which did not signal a genuine rethinking of EU migration strategy. Instead, Council decisions issued between 2015 and 2017 primarily relied on ad hoc emergency measures, as by the implementation of the hotspot approach, without any meaningful reform of the Union's normative or operational asylum framework.⁸³ The definition provided by the European Commission goes as follows: "first reception facilities – aim to improve coordination of the EU agencies' and national authorities' efforts at the external borders of the EU, in the initial reception, identification, registration and fingerprinting of asylum-seekers and migrants."⁸⁴ In theory, these structures are there to support Member States experiencing disproportionate migratory pressure, but in practice, the policy narrative underlying this system constructs migration primarily as a problem of management, particularly in relation to the incapacity of frontline Member States to handle large volumes of arrivals.⁸⁵

Rather than catalysing meaningful structural reform or burden-sharing mechanisms, the hotspot system effectively recentralised control at the external borders while reinforcing the Dublin logic of first-country responsibility.⁸⁶ It placed disproportionate procedural and infrastructural burdens on countries such as Italy and Greece, often with limited solidarity from

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Bousiou, A., & Papada, E. (2020). Introducing the EC hotspot approach: A Framing Analysis of EU's most Authoritative crisis policy response. *International Migration*, 58(6), 139-152.

⁸³ Ibid., pag. 140-143

⁸⁴ European Parliament. (2020). *Hotspots at EU external borders: State of play* (Briefing No. EPRS_BRI(2020)652090). European Parliamentary Research Service.

[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2020\)652090](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)652090)

⁸⁵ Bousiou, A., & Papada, E. (2020). Introducing the EC hotspot approach: A Framing Analysis of EU's most Authoritative crisis policy response. *International Migration*, 58(6), 139-152.

⁸⁶ Bousiou, A., & Papada, E. (2020). Introducing the EC hotspot approach: A Framing Analysis of EU's most Authoritative crisis policy response. *International Migration*, 58(6), 139-152. Pag. 146

other Member States, despite initial rhetoric on equitable responsibility.⁸⁷ Moreover, and not surprisingly, these hotspots have been long criticised for producing substandard reception conditions, overburdened administrative procedures, and systemic violations of fundamental rights.⁸⁸ Reports from NGOs, international organisations, and EU bodies (such as the FRA and UNHCR) have documented cases of prolonged detention, lack of access to legal assistance, and failure to identify vulnerabilities among newly arrived migrants.⁸⁹ In several instances, living conditions in hotspot facilities, particularly on Greek islands, fell below the minimum standards required by the Charter of Fundamental Rights of the European Union and international human rights law.⁹⁰

As Auer and Scicluna observe,⁹¹ the EU's crisis management approach often sidesteps treaty reform or democratic deliberation in favour of executive decision-making, justified through a "no alternatives" narrative. In this regard, emergency measures have tended to persist beyond their initial justification, becoming embedded as semi-permanent features of EU governance without sufficient legal or democratic legitimisation.⁹² According to the authors, the EU lacks a clearly designated authority empowered to declare, manage, and terminate states of emergency.⁹³ The authors call it the "bureaucratic rule by nobody"⁹⁴, as power is dispersed among institutions and levels of governance, no single actor bears full responsibility. In a national constitutional system, there are bodies that typically endow executives with emergency powers subject to checks and balances, the EU's hybrid nature prevents such consolidation.⁹⁵

⁸⁷ Ibid.

⁸⁸ Ibid.; Moreno-Lax, V. (2024). Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU. *European Papers-A Journal on Law and Integration*, 2024(1), 179-208.

⁸⁹ Moreno-Lax, V. (2024). Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU. *European Papers-A Journal on Law and Integration*, 2024(1), 179-208.; Hotspot Italy: Abuses of refugees and migrants under EU's approach to managing migration - Amnesty International Ireland. (2016, November 9). Amnesty International Ireland. <https://www.amnesty.ie/hotspot-italy-abuses-refugees-migrants-eus-approach-managing-migration/>; European Parliamentary Research Service (EPRS). (2020). *Hotspots at EU external borders*. European Parliament Briefing, PE 652.090, September 2020

⁹⁰ Aberg, K. (2022). Detecting vulnerability in Greek hotspots – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/detecting-vulnerability-in-greek-hotspots/>

⁹¹ Auer, S., & Scicluna, N. (2021). The Impossibility of Constitutionalizing Emergency Europe 1. *JCMS: Journal of Common Market Studies*, 59, 20-31.

⁹² Ibid., pag. 22

⁹³ Ibid., pag. 27-29

⁹⁴ Ibid., pag. 28

⁹⁵ Ibid., pag. 27-29

Thus, emergencies may call for extraordinary actions, depending on the gravity and the qualification of such event, which in turn will determine their legal and political management within the EU migratory asylum system. If this is not well managed, which we will analyse in the next sections, can, and has, raise significant questions about the integrity of the Union's constitutional order, the limits of supranational authority, and the democratic legitimacy of emergency governance. As this thesis will explore in subsequent chapters, these questions are particularly salient in the context of migration law, where crisis-driven legal innovations, in this case the proposed Crisis and Force Majeure Regulation within the new Pact on Migration and Asylum, both reflect and reproduce this emergency paradigm.

2. Looking into Institutional Change

2.1 Learning from Crises vs. Path Dependence

Historical institutionalists⁹⁶ argue that institutional evolution and policy design follow a path-dependent direction, whereby early decisions have a self-reinforcing effect that limit the scope of future outcomes. As Paul Pierson⁹⁷ has famously articulated, the outcomes that are established during critical junctures tend to trigger feedback loops that consolidate a given trajectory, which render change from the status quo difficult over time.⁹⁸ He defines critical junctures as periods of heightened uncertainty in which the decisions of key actors determine the path of institutional development over other possible choices.⁹⁹ In other words, once actors make decisions during such moments, those decisions tend to lock in a particular direction for future politics.¹⁰⁰ This implies that policy development is not made in a vacuum but is heavily shaped by previous political decisions and institutional practices.¹⁰¹ A historical institutionalist lens thus prompts inquiry into the origins of current arrangements, asking *how particular trajectories came into being and why certain choices were made over others*.¹⁰² Furthermore,

⁹⁶ Pierson, P., & Skocpol, T. (2002). Historical institutionalism in contemporary political science. *Political science: The state of the discipline*, 3(1), 1-32.

⁹⁷ Pierson, P. (2000). Not just what, but when: Timing and sequence in political processes. *Studies in american political development*, 14(1), 72-92. Pag. 75

⁹⁸ Capoccia, G., & Kelemen, R. D. (2007). The study of critical junctures: Theory, narrative, and counterfactuals in historical institutionalism. *World politics*, 59(3), 341-369.

⁹⁹ Ibid., pag 344-348

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

it argues that once a specific legal instrument has been put into place, it generates increasing returns.¹⁰³ This means that the more a legal instrument becomes embedded into a legal system, the more disruptive and costly it becomes for it to either be changed or removed all together.¹⁰⁴ Timing and sequencing are therefore crucial, as even seemingly minor or incidental decisions can yield enduring consequences.¹⁰⁵

As formulated by Levi's,¹⁰⁶ change is hard to come by. According to her, when an institution embarks on a specific path, for instance, a legal framework, the cost of going outside of that path increases substantially.¹⁰⁷ This is because embarking in a specific path entail creating strong structural entrenchments that inhibit simple or rapid reorientation.¹⁰⁸ She then argues that it is because of these dynamics that institutional change tends to occur incrementally, with transformations typically confined to rare moments of rupture or crisis.¹⁰⁹ Outside these critical junctures, policies tend to evolve through processes of adjustment and layering, constrained by past frameworks, norms, and cognitive commitments.¹¹⁰ According to Hanrieder,¹¹¹ institutional layering refers to "a pattern of change whereby new institutional elements are introduced on top of or alongside existing ones".¹¹² This form of change occurs when reformers are either unable or unwilling to modify the existing core structures, often constrained by powerful actors or legal barriers that make change difficult.¹¹³ Thus, it is then easier to bring new elements added to existing ones, rather than changing the existing framework.¹¹⁴ These additional components could, but not always, alter or partially modify an institutional path.¹¹⁵ This very much resembles the work of Vivien Schmit when she referred to change 'by stealth'.¹¹⁶ In Schmidt's view, such transformations are achieved through

¹⁰³ Pierson, P. (2000). Increasing returns, path dependence, and the study of politics. *American political science review*, 94(2), 251-267.

¹⁰⁴ Ibid., pag. 257

¹⁰⁵ Ibid., pag. 263-266; Pierson, P. (2000). Not just what, but when: Timing and sequence in political processes. *Studies in american political development*, 14(1), 72-92.

¹⁰⁶ Levi, M. (2009). Reconsiderations of rational choice in comparative and historical analysis. *Comparative politics: Rationality, culture, and structure*, 24, 117-133. Pag. 120

¹⁰⁷ Ibid., pag. 120

¹⁰⁸ Ibid., pag. 120

¹⁰⁹ Levi, M. (2013). Can nations succeed?. *Perspectives on Politics*, 11(1), 187-192. Pag. 188-190

¹¹⁰ Hanrieder, T. (2014). Gradual change in international organisations: Agency theory and historical institutionalism. *Politics*, 34(4), 324-333. Pag. 326

¹¹¹ Ibid.

¹¹² Ibid., pag. 327

¹¹³ Ibid., pag. 327

¹¹⁴ Ibid., pag. 327

¹¹⁵ Ibid., pag. 327

¹¹⁶ Schmidt, V. A. (2018). Reinterpreting the rules 'by stealth' in times of crisis: a discursive institutionalist analysis of the European Central Bank and the European Commission. In *Europe's Union in Crisis* (pp. 118-138). Routledge.

narrative innovation that redefines the meaning of existing rules, allowing institutions to shift practice while preserving the appearance of legal and political continuity.¹¹⁷

Path dependency is not only shaped by the formal structures that constitute it. It is also constructed by the interests and ‘acceptance’ that legitimize a certain path.¹¹⁸ According to Pierson,¹¹⁹ political actors often align their policy strategies with what they believe will be broadly accepted or supported in the future. This is not just a matter of coordination, is about the self-reinforcing and legitimizing of a certain path through acceptance and future expectations.¹²⁰ When policymakers can anticipate that a certain policy decision will gain wider acceptance by colleagues, the public, and institutions, they will adapt their behaviour accordingly.¹²¹ Political interests are a strong predictor for the evolution of certain policy systems, and not surprisingly, it is very self-evident when the topic of interest is migration. Policy decisions are taken because those actors in power can predict which decisions can maximise their influence and power, and taking different paths may disrupt exactly that. Challenges to established frameworks may not be well received and rejected.¹²² Stakeholder interests and normative consensus are, indeed, a cause of inertia. Hannan and Freeman¹²³ define structural inertia as the strong resistance organizations exhibit toward structural change, even in dynamic or uncertain environments. This inertia arises because organizations develop stable routines, relationships, and internal systems that are difficult and costly to alter.¹²⁴ Similarly to what argued by Pierson, Hannan and Freeman content that established structures or institutional routines, if changed, can face substantial risk, which they define as loss of legitimacy and deminished access to resources.¹²⁵ As a result, institutions may be less prone to implement change to already established systems, and therefore, remain static.

Pierson also argues that rather than fluidly adapting to new problems, systems can exhibit considerable inertia, tending to stick with known solutions unless jolted by a major exogenous

¹¹⁷ Ibid.

¹¹⁸ Pierson, P. (2000). Increasing returns, path dependence, and the study of politics. *American political science review*, 94(2), 251-267. Pag. 257

¹¹⁹ Ibid., pag. 254

¹²⁰ Ibid., pag. 254

¹²¹ Ibid., pag. 254 & 257

¹²² Ibid., pag. 262

¹²³ Hannan, M. T., & Freeman, J. (1984). Structural inertia and organizational change. *American sociological review*, 149-164.

¹²⁴ Ibid., pag. 152-153

¹²⁵ Ibid., pag. 150-153

shock.¹²⁶ Change, when it comes, is usually incremental, unless a profound critical juncture is reached that breaks the old path and sets a new one entirely.¹²⁷ Andrew Geddes observes that European Union migration policy has been shaped by migration policies implemented between the 1990s and early 2000s, which subsequently led to a path of dependencies that proved challenging to disentangle from.¹²⁸ Early policy decisions, which particularly emphasized control, security, and deterrence, created EU-wide institutional and political commitments that, over the years, proved difficult to reverse, even in the face of policy failure.¹²⁹ The persistence of prioritizing already existing frameworks, in spite of crises such as the 2015 refugee arrivals, led EU institutions to remain in a position of institutional lock-in.¹³⁰ Moreno-Casas defines institutional lock-in as the phenomenon in which entities remain stuck, or locked in, in a suboptimal trajectory over a certain period of time despite knowing how their ongoing structures lead to ineffective outcomes.¹³¹ As Geddes continues to argue, EU migration and asylum policy have long been influenced by the discourse of security, border management, and the need to control irregular migration.¹³² There has been no significant transformative change to the existing policies of migration since the 1990s; instead, a deeper layering of institutions and involvement of new actors, including EU agencies, international organizations, and NGOs, has occurred.¹³³ The locking into a specific path, then, according to Geddes, has not happened only because of an increase in the complexities of the European institutional and legal migration system but also because of the increasing political resistance against migration and the entrenchment of securitization narratives surrounding this topic.¹³⁴

3. Bridging the theory

The theoretical insights presented in the preceding chapter, particularly those concerning emergency law, institutional path dependence, and incremental change, will be used to assess how the Crisis and Force Majeure Regulation, under the New Pact on Migration and Asylum, came to be, and whether it tackles the failures of its predecessors. These include Article 78(3)

¹²⁶ Pierson, P. (2000). Increasing returns, path dependence, and the study of politics. *American political science review*, 94(2), 251-267. Pag. 263

¹²⁷ Ibid., pag. 263

¹²⁸ Geddes, A. (2018). The politics of European Union migration governance. *J. Common Mkt. Stud.*, 56, 120. Pag. 120

¹²⁹ Ibid., pag. 122-124

¹³⁰ Ibid., pag. 122-124

¹³¹ Moreno-Casas, V. (2024). A coevolutionary approach to institutional lock-in. *Review of Evolutionary Political Economy*, 1-15. Pag. 496-499

¹³² Ibid., pag. 124-128

¹³³ Ibid., pag. 128-129

¹³⁴ Ibid., pag. 128-129

TFEU,¹³⁵ the Temporary Protection Directive (2001/55/EC),¹³⁶ and the Dublin III Regulation (604/2013).¹³⁷ On the one hand, EU asylum law has long been shaped by an emergency-driven logic, whereby moments of perceived crisis give rise to exceptional measures often implemented within ad hoc legal frameworks, as seen by the regulation preceding the Crisis and Force Majeure. On the other hand, policy responses to situations of emergency have rarely proven to lead to a break from the past. As it will be assessed in the next chapters, change has frequently been embedded in a path-dependent policy environment shaped by pre-existing legal instruments, institutional inertia, and entrenched political compromises. This thesis will evaluate whether this new tool, the Crisis and Force Majeure regulation, simply *layers* upon the existing system, a pragmatic but limited adjustment constrained by earlier choices, or does it represent a more fundamental institutional shift prompted by a critical juncture? The literature reviewed in this chapter provides the analytical vocabulary to ask such questions. It sensitizes us to the possibility that even ambitious-sounding reforms may be shaped by policy legacies and institutional inertia, potentially limiting their transformative potential. Conversely, it also points to windows of opportunity (critical moments) when normative frameworks can be reoriented, an angle the thesis will explore when assessing whether the Pact's emergency provisions merely codify established crisis-management practices or break new ground.

CHAPTER 2

THE CORE LEGAL INSTRUMENTS OF EU MIGRATION GOVERNANCE

This chapter will examine the European Union's legal tools used for migration, specifically it aims to analyse how these tools were designed, how they functioned to deal with emergencies; and what lessons can emerge from their use. This sets the stage for evaluating the basis on which the Crisis and Force Majeure Regulation. Each section below maps a key "emergency"

¹³⁵ Article 78 of the Treaty on the Functioning of the European Union (TFEU), OJ C 202, 7.6.2016

¹³⁶ 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, OJ L 212, 7.8.2001

¹³⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013

tool, its operation, shortcomings, and relevant case law, to understand the gaps the new Pact aims to fill.

1. Article 78 TFEU and the Concept of Provisional Measures

Article 78(3) TFEU¹³⁸ serves as the EU's primary law basis for emergency action in asylum crises. It permits the Council to adopt provisional measures to support one or more Member States facing “an emergency situation characterized by a sudden inflow of nationals of third countries”¹³⁹. From the outset, the EU committed to base its asylum policy on international obligations. Article 78(1) explicitly mandates that the Union's standard policy on asylum and subsidiary protection ensure compliance with the 1951 Geneva Refugee Convention and the principle of non-refoulement¹⁴⁰. In other words, EU asylum law must respect fundamental human rights standards. The 1999 Tampere Programme, the Council's roadmap for justice and home affairs, similarly emphasised that the EU should “manage high influxes of displaced persons”¹⁴¹ by supporting Member States under pressure.¹⁴² Together, these developments demonstrate that Article 78 TFEU emerged from an explicit Union-level response to migration and refugee movements, aiming to establish a coherent legal framework rather than leaving each country to act independently.¹⁴³ In practical terms, Article 78(3) TFEU empowers the Union to manage emergencies through law,¹⁴⁴ allowing temporary derogations from the ordinary asylum rules to assist a Member State overwhelmed by inflows, embodying an “accommodations model”¹⁴⁵ of emergency governance, i.e. bringing crisis response within the legal order rather than resorting to extra-legal measures.¹⁴⁶ Importantly, measures under Article

¹³⁸ European Union. (2008). Consolidated version of the Treaty on the Functioning of the European Union: Article 78. Official Journal of the European Union, C 115, 76–77. Retrieved from https://eur-lex.europa.eu/eli/treaty/tfeu_2008/art_78/oj/eng; Saliba, S. (2015, May 13). Non-refoulement, push-backs and the EU response to irregular migration. European Parliamentary Research Service. Retrieved from <https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration>

¹³⁹ De Witte, B. (2022). Guest Editorial: EU emergency law and its impact on the EU legal order. *Common market law review*, 59, 3-18.

¹⁴⁰ European Union. (2008). Consolidated version of the Treaty on the Functioning of the European Union: Article 78. Official Journal of the European Union, C 115, 76–77. Retrieved from https://eur-lex.europa.eu/eli/treaty/tfeu_2008/art_78/oj/eng; Saliba, S. (2015, May 13). Non-refoulement, push-backs and the EU response to irregular migration. European Parliamentary Research Service. Retrieved from <https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration>

¹⁴¹ EUAA, '2.1 The Common European Asylum System and current issues' in *Asylum Report 2020*, January 2022.

¹⁴² Ibid.

¹⁴³ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

78(3) TFEU are adopted by the Council on a Commission proposal (after consulting the European Parliament), using qualified-majority voting even if some states dissent,¹⁴⁷ which can arguably allow for a faster collective action when taking politically contentious decisions, especially when consensus is lacking.

1.1 Article 78(3) TFEU in Emergency Measures

Paragraph (3) of Article 78 TFEU provides a specific emergency mechanism. It states that “in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries”,¹⁴⁸ the Council may adopt provisional measures for their benefit.¹⁴⁹ Those measures are to be taken “on a proposal from the Commission”¹⁵⁰ and by qualified majority in the Council, after consulting, however, without the necessity of agreement from the European Parliament.¹⁵¹ This procedure is extraordinary, as instead of ordinary co-decision, where the Council can act, only in consultation with the Parliament, and can adopt decisions (which however, are neither regulations nor directives) for a limited duration.¹⁵² Article 78(3) TFEU requires that any measures be provisional, the emergency measures may depart from normal asylum law only for a limited time.¹⁵³ Advocate General Bot and the Court have observed that such measures “must not be intended to definitively eliminate, replace or amend”¹⁵⁴ the existing CEAS legislation. In his analysis, Nicolosi¹⁵⁵ puts forward a clear distinction in the reasonings of the

¹⁴⁷ *Slovak Republic and Hungary v Council of the European Union*, C-643/15 and C-647/15, European Union: Court of Justice of the European Union (CJEU), 6 September 2017, <https://www.refworld.org/jurisprudence/caselaw/ecj/2017/en/118705>, para.11

¹⁴⁸ European Union. (2008). Consolidated version of the Treaty on the Functioning of the European Union: Article 78. Official Journal of the European Union, C 115, 76–77. Retrieved from https://eur-lex.europa.eu/eli/treaty/tfeu_2008/art_78/oj/eng

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.; European Council on Refugees and Exiles (ECRE). (2021, December). ECRE Comments on the Commission Proposal for a Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland COM(2021) 752. Retrieved from https://ecre.org/wp-content/uploads/2021/12/ECRE-Comments-COM_FINAL.pdf

¹⁵³ Article 77(3) TFEU, *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 115, 9.5.2008; Ovádek, M. (2017). *The EU as the Appropriate Locus of Power for Tackling Crises: Interpretation of Article 78(3) TFEU in the case Slovakia and Hungary v Council*. Verfassungsblog. Retrieved from <https://verfassungsblog.de/the-eu-as-the-appropriate-locus/>

¹⁵⁴ Opinion of Advocate General Bot, 26 July 2017, Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European Union*, ECLI:EU:C:2017:618, paras. 75 – 78, available at: <https://bit.ly/3orP00I>; European Council on Refugees and Exiles (ECRE). (2021, December). *ECRE Comments on the Commission Proposal for a Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland COM(2021) 752*. Retrieved from https://ecre.org/wp-content/uploads/2021/12/ECRE-Comments-COM_FINAL.pdf

¹⁵⁵ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

CJEU in the judgement of *Slovak Republic and Hungary v Council*¹⁵⁶ between Articles 78(2) and 78(3) TFEU. He argues that the Court, in reference to Article 78(2) TFEU, serves a more structural function, aiming to establish stable, long-term asylum rules designed to prevent such emergencies from severely disrupting the broader policy framework, whilst Article 78(3) TFEU is intended for exceptional situations that require a prompt and targeted response, a sort of crisis management tool to be used when already existing systems are not sufficient.¹⁵⁷ In this Court case,¹⁵⁸ it is specified that an emergency may arise with the sudden and unforeseen influx of third-country nationals, whose arrival is disrupting national asylum systems.

Therefore, Article 78(3) TFEU is activated by crises that overwhelm a state's capacity to process asylum claims under the usual rules rather than by routine or modest fluctuations. In light of the 2015 migration crisis, the weaknesses of Article 78 TFEU became apparent, particularly in its ability to enforce collective decisions. As assessed in the analysis section of this thesis, there were problems of resistance to compliance among Member States and issues with solidarity and responsibility sharing, and therefore, deeper structural tension within the EU's emergency governance framework.

2. The Temporary Protection Directive (2001/55/EC)

The Temporary Protection Directive (TPD) 2001/55/EC¹⁵⁹ was the EU's first attempt to legislate a response to mass refugee influxes. The demand for this directive arose in the 90s following the internal conflicts of the Balkan region, specifically the crisis of the Kosovo.¹⁶⁰ The TP directive created a framework aimed at offering immediate, group-based protection to displaced persons when the standard asylum system was unable to cope.¹⁶¹ At the time, it reflected a new archetype of emergency governance used in EU asylum law, which focused on an emergency model of governance aimed at reducing the administrative burden of processing

¹⁵⁶ Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631

¹⁵⁷ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

¹⁵⁸ Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631. Para. 77 & 72

¹⁵⁹ 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, OJ L 212, 7.8.2001

¹⁶⁰ Küçük, E. (2023). Temporary protection directive: testing new frontiers?. *European Journal of Migration and Law*, 25(1), 1-30. Pag.5

¹⁶¹ Ibid., pag. 5-9

asylum applications individually.¹⁶² This tool would provide protection status to groups of displaced people when the demand for asylum was too great for countries to deal with singularly, filling the gaps on the incapacity of a country to deal swiftly against a large number of applications.¹⁶³

The Directive defines temporary protection as an urgent and provisional measure granted to nationals of third countries who are unable to return to their country of origin and is intended to be activated in situations involving a mass influx, or the anticipation of such an influx, of displaced persons.¹⁶⁴ Such protection includes residency rights,¹⁶⁵ access to employment,¹⁶⁶ social welfare,¹⁶⁷ medical care,¹⁶⁸ and opportunities for family reunification,¹⁶⁹ for a duration of 1 to 3 years (depending on extensions), and most importantly, it prohibits the refoulement of those who can benefit from these protections and mandates for the opening of borders as to ensure a safe access into EU territory.¹⁷⁰ This is clearly extremely beneficial as it grants protection to individuals who may pursue unsafe routes to enter the EU, to be then faced with closed borders once arrived.¹⁷¹ The beneficiaries are typically people fleeing conflict or endemic violence who may qualify as refugees, but who are granted protection without undergoing individual asylum determination during the emergency.¹⁷² This mechanism aims

¹⁶² Ibid., pag.1-2

¹⁶³ Ibid., pag. 1-2

¹⁶⁴ 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, OJ L 212, 7.8.2001; Thym, D. (2022). *Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'* – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/#:~:text=,the%20need%20to%20go>

¹⁶⁵ 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, OJ L 212, 7.8.2001. para. 4

¹⁶⁶ Article 12 of 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, OJ L 212, 7.8.2001

¹⁶⁷ Article 13 of 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, OJ L 212, 7.8.2001

¹⁶⁸ Ibid.

¹⁶⁹ Article 15 of 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, OJ L 212, 7.8.2001

¹⁷⁰ Article 2 and Article 6 of 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, OJ L 212, 7.8.2001

¹⁷¹ Küçük, E. (2023). Temporary protection directive: testing new frontiers?. *European Journal of Migration and Law*, 25(1), 1-30. Pag. 5

¹⁷² Ibid., pag. 3

both to protect people en masse and to relieve pressure on asylum authorities (by postponing or obviating thousands of individual interviews and decisions).¹⁷³ Crucially, the TPD also provides for burden-sharing measures as all Member States (with the exception of Denmark, which has opted out) are supposed to partake in receiving the protected persons. The Directive itself stops short of imposing binding quotas, but it sets up a process whereby states indicate their reception capabilities and are encouraged to show solidarity by taking displaced persons from the most affected state(s).¹⁷⁴

Within the document of Directive (2001/55/EC) there is no specific definition or provision of a threshold by which a Member State can declare a state of crisis. Instead, activation is contingent upon a Council implementing decision, adopted by a qualified majority based on a proposal from the Commission or a Member State.¹⁷⁵ This can offer some flexibility; however, as it will be assessed in the next section, it can also create significant legal ambiguity on its activation and application. Some scholars¹⁷⁶ have proposed evaluative indicators to assist in determining whether a “mass influx” has occurred. As cited by İneli Cığır,¹⁷⁷ scholars such as Skordas have suggested that relevant metrics might include the rate of increase in arrivals over a given period, the number of Member States affected, and the proportional relationship between the number of arrivals and a Member State’s population size and its available resources. However, İneli Cığır continues to argue, even with such analytical frameworks, it still does not provide a clear triggering threshold, and it is not clear when such relevant metrics indicate ‘mass’ or a state of emergency.¹⁷⁸ This, as expected, has led to discontent amongst academics on how this ambiguity leads to considerable discretion on political actors and

¹⁷³ Thym, D. (2022). *Temporary Protection for Ukrainians: the Unexpected Renaissance of ‘Free Choice’* – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/#:~:text=,the%20need%20to%20go>

¹⁷⁴ Thym, D. (2022). *Temporary Protection for Ukrainians: the Unexpected Renaissance of ‘Free Choice’* – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/#:~:text=,the%20need%20to%20go>

¹⁷⁵ Article 4 of 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, OJ L 212, 7.8.2001

¹⁷⁶ İneli Cığır. (2022). *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022* – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Policy. <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

European institutions.¹⁷⁹ In fact, Küçük¹⁸⁰ observes that the Directive entrusts each Member State with the autonomous assessment of its own reception capacity, which forms the basis for any subsequent relocation of displaced persons. There are no uniform criteria guiding these assessments, nor are Member States obliged to justify or substantiate the capacities they declare.¹⁸¹ As a result, national determinations vary widely and are often shaped by the prevailing political context or economic conditions rather than consistent legal standards.¹⁸² Its voluntary and non-standardised nature significantly undermined its effectiveness in managing large-scale emergencies, and in fact, the Temporary Protection Directive stood as a dormant, untested tool for two decades and activated in 2022 following the Russian invasion of Ukraine.¹⁸³

3. The Dublin III Regulation: Derogations and Crisis Clauses

The Dublin III regulation (Regulation No. 604/2013)¹⁸⁴ is the foundation of the EU's asylum system for allocating responsibility for asylum claims, although set to be replaced in 2026 under the New Pact on Migration and Asylum. The Dublin III regulation was not built to be an emergency instrument, but its functioning in times of crisis revealed the extent to which the EU was able to rely on its legal instruments to manage sudden pressures on European asylum systems. This regulation centres on the legal premise that the first Member states in which an asylum seeker enters is, usually, the one responsible for processing their application, unless conditions such as family ties or other exception criteria may apply.¹⁸⁵ The regulation originated as an intergovernmental agreement between Member States during the Dublin

¹⁷⁹ Ibid.

¹⁸⁰ Küçük, E. (2023). Temporary protection directive: testing new frontiers?. *European Journal of Migration and Law*, 25(1), 1-30. Pag. 12-14

¹⁸¹ Ibid.

¹⁸² İneli Cığır, M. (2022). Reasons for the activation of the Temporary Protection Directive in 2022: A tale of double standards | Asile. Asile. <https://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/#:~:text=requires%20the%20number%20of%20displaced,proposed%20new%20indicators%20to%20guide>

¹⁸³ Ibid.

¹⁸⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013

¹⁸⁵ European Commission. (n.d.). *Country responsible for asylum application (Dublin Regulation)*. Migration and Home Affairs. Retrieved May 22, 2025, from https://home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu/country-responsible-asylum-application-dublin-regulation_en

Convention of 1990¹⁸⁶ and put in practice in 1997,¹⁸⁷ and later replaced by the Dublin II regulation (Regulation, No. 343/2003)¹⁸⁸ in 2003, and parallel to its conception, the establishment of the Dublin agreement coincided with the Union's effort to abolish the internal borders under the new Schengen agreement.¹⁸⁹ This created a pressing need to develop a mechanism which would determine which Member State would be responsible for examining an asylum application.¹⁹⁰ This new system aimed to address two novel but core challenges that came with freer movement within the Union. The first challenge was the phenomenon of 'refugees in orbit',¹⁹¹ which refers to a situation in which the asylum seeker is repeatedly transferred between Member States without any of them assuming the responsibility for assessing their asylum claim and placing them in a legal limbo in which the right to asylum is not granted.¹⁹² The second phenomenon is referred to as 'asylum shopping',¹⁹³ in which applicants may decide to seek and apply for asylum in the Member States offering more favourable conditions, leading to multiple applications. Thus, by ensuring that it is one Member State, first country of entry, the Union sought to streamline application processes and facilitate a faster processing system in an EU without borders.¹⁹⁴

This allocation of responsibility has been widely criticized from the time the Dublin regulation has been put to use; specifically, once it was clear that it was border Member States to bear disproportionate pressure once unpredicted mass influxes of people came to European borders.¹⁹⁵ Not only that, but once border countries were facing disproportionate pressure, others were shielding themselves from responsibility, a phenomenon called 'market deflection'.¹⁹⁶ These systemic shortcomings, both in terms of burden allocation and lack of

¹⁸⁶ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, (97/C 254/01) OJ C 254, 19.8.1997

¹⁸⁷ Cellini, M. (2017). Filling the gap of the Dublin system: A soft cosmopolitan approach. *Journal of Contemporary European Research*, 13(1). Pag. 947

¹⁸⁸ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003.

¹⁸⁹ Armstrong, A. B. (2019). *You shall not pass! How the Dublin system fueled fortress Europe*. *Chi. J. Int'l L.*, 20, 332. Pag. 350

¹⁹⁰ Ibid., pag. 353-356

¹⁹¹ Ibid., pag. 352

¹⁹² Ibid., pag. 352

¹⁹³ Ibid., pag. 352

¹⁹⁴ Ibid., pag. 349-351

¹⁹⁵ Hruschka, C. (2016, May 17). *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>

¹⁹⁶ Armstrong, A. B. (2020). *You shall not pass! How the Dublin system fueled Fortress Europe*. *Chicago Journal of International Law*, 20(2), 332–387. <https://cjl.uchicago.edu/print-archive/you-shall-not-pass-how-dublin-system-fueled-fortress-europe>

solidarity, have not only limited the effectiveness of the Dublin system but have also served as a central impetus for the establishment of the New Pact on Migration and Asylum. A more detailed examination of these limitations, and their influence on the shift toward a new governance framework, will be undertaken in the analysis section that follows.

3.1 Crisis and Emergency Management in Dublin III

The Dublin III Regulation did include a specific “crisis management” provision, Article 33,¹⁹⁷ often called the *Early Warning and Preparedness Mechanism*.¹⁹⁸ It was adopted as a softer, cooperative solution, a tool to assist and reinforce a Member State under pressure rather than to relieve it of responsibility.¹⁹⁹ In its original form, the proposal was more ambitious. It had envisioned for the Dublin III Regulation a more robust system of safeguards for Member States by introducing of a clause allowing for the temporary suspension of Dublin transfers²⁰⁰, that is, the transfer of an asylum seeker from the Member State in which the application was lodged to the Member State deemed responsible under the hierarchy of criteria established by the Dublin framework.²⁰¹ This, however, was met with strong opposition as Council discussions mentioned that such proposal could create a ‘pull factor’ for migrants and encourage member states to shirk their obligations.²⁰² The final version of the Regulation adopted a framework, the Early Warning and Preparedness Mechanism, intended to identify and address the underlying structural and operational weaknesses within a Member State’s national asylum system before the escalation into a state of emergency.²⁰³ This approach was completed by

¹⁹⁷ Article 33 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013.

¹⁹⁸ Armstrong, A. B. (2019). *You shall not pass! How the Dublin system fueled fortress Europe*. *Chi. J. Int'l L.*, 20, 332. Pag. 357-358

¹⁹⁹ Mouzourakis, M. (2014). We need to talk about Dublin. *Responsibility under the Dublin system as a blockage to asylum–burden sharing in the European Union. Refugee Studies Centre Working Paper Series*, 105. Pag. 14

²⁰⁰ A Dublin transfer refers to the physical relocation of an asylum applicant to the Member State deemed responsible for examining the substance of their asylum claim under the criteria established by the Dublin Regulation. This transfer occurs following the conclusion of a Dublin procedure, which determines the appropriate Member State responsible for processing the application in accordance with the established hierarchy of responsibility criteria. European Commission. (n.d.). *Dublin transfer*. European Migration Network Asylum and Migration Glossary. Retrieved May 22, 2025, from https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/dublin-transfer_en

²⁰¹ Mouzourakis, M. (2014). We need to talk about Dublin. *Responsibility under the Dublin system as a blockage to asylum–burden sharing in the European Union. Refugee Studies Centre Working Paper Series*, 105. Pag. 13

²⁰² Ibid., pag. 13

²⁰³ European Commission. (2013, June 10). *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining*

enhanced references to the principles of solidarity amongst Member States and the protection of fundamental human rights.²⁰⁴ Additionally, with the inclusion of Article 3(2)bis, the Regulation sought to uphold and equivalent standard of protection for asylum applicants to that which the Commission's suspension clause would have afforded.²⁰⁵ In doing so, the drafters aimed to achieve the core objectives of the original proposal through preventive, cooperative, and rights-based mechanisms, rather than through formal derogation from Member States' responsibilities under the Dublin framework.²⁰⁶

In more detail, this Early Warning and Preparedness Mechanism allows a Member State under pressure on their asylum system to notify the Commission and other states that its ability to meet Dublin obligations is at risk, thus this must happen before an emergency situation takes place.²⁰⁷ In response, the European Asylum Support Office steps in to analyse the situation, and subsequently, the Commission may escalate its involvement by requesting the submission of a crisis-specific action plan, while remaining under the institutional supervision of both the Commission and the Council.²⁰⁸ Within this plan, the Member State is required to provide a detailed strategy on how they plan to tackle and improve their crisis management strategy, how they are to do that in compliance with EU asylum law, and, crucially, how they plan to safeguard the rights and dignity of applicants throughout the process.²⁰⁹ The aim is to unveil the root causes of the dysfunctions and coordinate a capacity-building or contingency strategy prior to the escalation of a crisis beyond manageable limits.²¹⁰ Unlike other emergency measures outside the Dublin Regulation (for example, ad-hoc relocation decisions under TFEU Article 78(3)), Article 33 does not itself create new obligations for other states to take over

an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM(2013) 416 final)

²⁰⁴ Ibid.

²⁰⁵ European Commission. (2013, June 10). *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (COM(2013) 416 final). Pag. 61

²⁰⁶ Ibid., pag. 61

²⁰⁷ Ibid., pag. 17

²⁰⁸ European Commission. (2013, June 10). *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (COM(2013) 416 final). Pag. 2

²⁰⁹ Bakshi, G. (2020). Adieu Dublin! But what's next? *European Law. Blog*.
<https://doi.org/10.21428/9885764c.2b678a5f>

²¹⁰ ECRE Comments on Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Pag. 35

asylum cases; it instead operates through monitoring, planning, and peer support to maintain the Dublin system's integrity during times of exceptional pressure.²¹¹ It does not itself redistribute asylum seekers or halt responsibilities; rather, it aims to prevent system collapse through coordination and planning.²¹² Thus, it does not immediately shift the burden away from the affected country, it instead provides a coordinated EU "support package".²¹³

Even if Dublin III introduces crisis-management tools, these remain reactive in nature and fail to address the core structural imbalance of the system, namely, the disproportionate responsibility placed on border Member States through the first-entry criterion. The core principle of Dublin, at the face of crisis, demonstrated to not be apt for dealing with such events; it generated asymmetrical pressure of significant difference between Member States, that felt constrained to trigger ad hoc responses only when the broader functioning of the system is at risk.²¹⁴ These institutional ambiguities, and the deeper asymmetries they obscure, will be examined in further detail in the analysis section that follows.

CHAPTER 3

THE CRISIS AND FORCE MAJEURE REGULATION

Regulation 2024/1359,²¹⁵ adopted on 14 May 2024, establishes a framework for dealing with "exceptional situations of crisis, including instrumentalization, and force majeure, in the field of migration and asylum".²¹⁶ Its legal basis is Article 78(3) TFEU, which expressly authorizes the EU to adopt provisional measures by a qualified majority when a Member State is

²¹¹ Ibid., pag. 35

²¹² Ibid., pag. 35

²¹³ Mouzourakis, M. (2014). We need to talk about Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union. Refugees Studies Centre.

²¹⁴ Mouzourakis, M. (2014). We need to talk about Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union. Refugees Studies Centre.; Maiani, F. (2020, October 20). *A "Fresh Start" or One More Chunker? Dublin and Solidarity in the New Pact*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

²¹⁵ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L 1359, 22.5.2024.

²¹⁶ European Parliament and Council of the European Union. (2024, May 14). *Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147*. Official Journal of the European Union, L 2024/1359, 1–24. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401359, pag 2.

confronted with a sudden inflow of third-country nationals and needs support.²¹⁷ The Regulation amends existing EU migration instruments (notably the Asylum and Migration Management Regulation 2024/1351²¹⁸ and the Returns Regulation 2024/1348)²¹⁹ to ensure that Member States have temporary tools to manage mass arrivals or external instrumentalization of migration²²⁰ while maintaining core rights.²²¹ The Regulation's objectives to enhance the preparedness and resilience of the Union's migration and asylum system, enabling swift operational coordination and targeted capacity support in times of crisis.²²² It seeks to give effect to the EU principle of solidarity and fair responsibility-sharing by providing full support to affected Member States through a dedicated solidarity mechanism, called the Solidarity Pool.²²³ To these ends, the Regulation empowers the Union to adopt temporary measures that build upon the ordinary asylum framework by allowing specific procedural derogations and mobilising relocation and other support when certain crisis conditions are met²²⁴. Crucially, all such measures must be necessary, proportionate, and time-limited, and must fully respect the fundamental rights of persons and international obligations.²²⁵ The measures can apply only "to the extent strictly required by the exigencies of the situation, in a temporary and limited manner".²²⁶

Thus, this Regulation is meant for dealing, within the boundaries of European law, with extraordinary influxes or disruptions that gravely overwhelm normal asylum management.²²⁷ According to Article 1(4) of the Regulation, a crisis is characterized by three criteria: (1) the

²¹⁷ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre., pag. 14

²¹⁸ Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L 1351, 22.5.2024,

²¹⁹ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L 1348, 22.5.2024, p. 1. <https://eur-lex.europa.eu/eli/reg/2024/1348/oj>

²²⁰ Instrumentalization is intended as the deliberate use of migrants by third countries or non-state actors to destabilize the EU or its Member States by pressuring their migration and asylum systems. European Parliament. (2022). Proposal for a Regulation on situations of instrumentalisation in the field of migration and asylum. Legislative Train Schedule. Retrieved from <https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-instrumentalisation-in-the-field-of-migration-and-asylum>

²²¹ European Parliament and Council of the European Union. (2024, May 14). *Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147*. Official Journal of the European Union, L 2024/1359, 1–24. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401359, pag 2.

²²² Ibid., pag. 2

²²³ Ibid., pag.2

²²⁴ Ibid, pag. 11 & 14.

²²⁵ Ibid., pag. 11

²²⁶ Ibid., pag. 11

²²⁷ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

large-scale arrivals of third-country nationals or stateless persons onto a Member State's territory (by land, sea, or air), including arrivals after search-and-rescue disembarkations;²²⁸ (2) these arrivals cause the Member State's asylum, reception and/or return systems to become non-functional despite being readiness (with the State's size, population, GDP and other factors considered);²²⁹ and (3) this dysfunctionality may be so severe as to have serious consequences for the overall functioning of the Common European Asylum System.²³⁰ By contrast, force majeure in this context is defined as "abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided despite all due care"²³¹ and which prevent that Member State from fulfilling its obligations under the normal asylum circumstances. The classic understanding of force majeure is to have crisis management responses that must be implemented in exceptional events such as natural disasters, pandemics, and in this case, it is the sudden security emergencies that cripple a country's ability to apply EU asylum rules.²³²

1. Activation criteria

The process begins with the affected Member State. A Member State that "considers itself to be in a situation of crisis or force majeure"²³³ must submit a reasoned request to the European Commission. The request should describe the situation in detail and indicate which specific emergency measures (derogations and/or solidarity assistance) it seeks.²³⁴ In other words, the onus is on the overwhelmed State to trigger the EU intervention, the Commission cannot act on its own motion to declare a migration crisis in a Member State without being asked.²³⁵ Thus,

²²⁸ İneli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.; Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L 1359, 22.5.2024

²³² İneli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²³³ European Parliament and Council of the European Union. (2024, May 14). *Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147*. Official Journal of the European Union, L 2024/1359, 1–24. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401359, pag 4.

²³⁴ Ibid., pag. 4

²³⁵ İneli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

governments retain the judgment to admit they are facing a crisis, but it may be that in practice, political dynamics will likely influence when a state is willing to make such a request.

This activation process ensures both EU-level oversight and national initiation. It is designed to balance *speed* with *safeguards*, aiming at responding within roughly one month of a Member State raising the alarm, a full EU-supported crisis plan can be in place.²³⁶ Indeed, the total decision time of four weeks is itself a crucial procedural tool, indicating the emphasis on rapid response.²³⁷ Article 1 stresses that any emergency measures enacted should be strictly required by the exigencies of the situation and respect fundamental rights and the Charter.²³⁸ In practical terms, that means the Commission and Council should tailor the Solidarity Response Plan and derogations so that they solve the immediate problem without unduly undermining applicants' rights or the integrity of the CEAS beyond what is needed for the emergency.²³⁹

Two additional procedural tools are worth noting. First, even before the Council formally decides, the requesting Member State is allowed to take certain urgent measures for a very short period.²⁴⁰ For example, if a country is awaiting approval to derogate from the normal asylum registration timeframe, it may already delay registrations for up to 10 days pending the decision.²⁴¹ This provides a small breathing space in the heat of a crisis. Second, the Regulation builds in continuous monitoring and review, where the Commission and Council must keep the situation under review and can adapt or terminate the emergency measures if they are no longer necessary.²⁴² Any Council implementing decision will likely include an "end date" or criteria for deactivation, and it can be revoked or not renewed if the crisis subsides.²⁴³ This encourages an eventual return to normal rules, a key rule-of-law concern to avoid permanent "emergency"

²³⁶ Ineli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²³⁷ European Parliament and Council of the European Union. (2024, May 14). *Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147*. Official Journal of the European Union, L 2024/1359, 1–24. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401359, pag 7.

²³⁸ Ibid., pag. 6

²³⁹ Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC). Pag. 15-17

²⁴⁰ Ineli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

status.²⁴⁴ Some commentators²⁴⁵ have called for clearer exit strategies in every Solidarity Response Plan to prevent protracted emergencies.

2. Derogations and Emergency Procedures under the Regulation

When a crisis or force majeure situation is declared under the Regulation, a suite of temporary measures becomes available.²⁴⁶ These measures fall into two broad categories: (a) derogations from standard EU rules (to give affected states more flexibility or relief), and (b) emergency solidarity tools and procedures (to more rapidly manage the flow of people, whether by distributing responsibility or by streamlining protection).²⁴⁷ Crucially, all such measures are temporary and exceptional, capped at 12 months unless renewed, and must respect certain safeguards and fundamental rights guarantees.²⁴⁸

Under the APR, an asylum claim must ordinarily be registered within 5 working days of being made (with a small extension if the claim is made to an authority not competent to register).²⁴⁹ In a crisis or force majeure scenario, Article 10(1) of the Crisis Regulation allows the Member State to extend the registration deadline up to 4 weeks.²⁵⁰ This is a significant relaxation, acknowledging that overwhelmed authorities may simply be unable to process new arrivals immediately. The Regulation does insert safeguards here, for instance, even during the extended period, basic needs of applicants must be met and vulnerable persons identified must receive appropriate support.²⁵¹ Furthermore, if the Council authorizes this derogation, it can be applied for the duration of the crisis, but if no Council decision has been adopted yet, the Member State can still delay registrations for up to 10 days on its own authority as an emergency.²⁵² Article 11(1) permits extending the maximum length of the border procedure by

²⁴⁴ Ibid.

²⁴⁵ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre., pag. 27.

²⁴⁶ Ineli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²⁴⁷ Ineli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²⁴⁸ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre., pag. 13.

²⁴⁹ Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC). Pag . 10-11

²⁵⁰ Ibid., pag. 11

²⁵¹ Ibid., pag. 11

²⁵² Ibid., pag. 11

an additional 6 weeks.²⁵³ Correspondingly, the linked return procedure at the border (under the Return Procedures Regulation 2024/1349) would also be protracted, keeping individuals at or near the border for longer if their asylum is rejected.²⁵⁴ This extension has raised concerns since it potentially implies prolonged detention or confinement of asylum seekers in border facilities for that extended period.²⁵⁵ The drafters justify it as necessary when there are extraordinary numbers of cases to examine, but it tests the boundaries of what is humane and legal under EU and international law.²⁵⁶

If the crisis is the result of instrumentalization by a third country, Article 11(6) states that a Member State can apply border procedures to all arriving asylum applicants, regardless of nationality, except vulnerable cases such as unaccompanied minors under 12 and their families.²⁵⁷ It effectively allows a temporary suspension of regular admission into territory for the majority of asylum seekers, containing them in border zones while their claims are processed.²⁵⁸ The humanitarian and legal implications of this are profound, as it edges towards derogating the right to seek asylum on territory by keeping people at the border en masse.²⁵⁹ The Regulation's recitals caution that even in instrumentalization scenarios, fundamental rights must be upheld, and persons subject to instrumentalization should be identified and treated appropriately.²⁶⁰ Nonetheless, critics note that detaining large numbers of people for extended periods in border camps (potentially over four months) under Article 11 measures could breach

²⁵³ Ibid., pag. 15

²⁵⁴ Ibid., pag. 15

²⁵⁵ Ineli-Ciger, M. (2024). Navigating the labyrinth of derogations: A critical look at the crisis Regulation – EU immigration and asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/#:~:text=Articles%202,1>

²⁵⁶ Ibid.

²⁵⁷ Article 6 and Article 7 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L 1359, 22.5.2024.

²⁵⁸ Ibid.

²⁵⁹ Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC). Pag . 10-11

Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC).

²⁶⁰ Ibid.

the European Convention on Human Rights and EU Charter rights if not carefully managed.²⁶¹ These derogations are thus among the Regulation's most controversial innovations.

3. Solidarity mechanism

The Crisis and Force Majeure Regulation introduces a renewed framework for implementing solidarity among Member States in times of migratory pressure. The Regulation attempts to give this principle practical effect by moving beyond ad hoc relocation efforts and embedding a standing, predictable mechanism into the ordinary legislative structure of the Common European Asylum System.²⁶² At its core, the Regulation sets out a compulsory solidarity mechanism that is activated in situations defined as crisis or force majeure.²⁶³ The system is structured to offer flexibility to Member States in how they contribute to burden-sharing. Instead of relying solely on relocation as it was set out by Dublin, which proved politically divisive in previous efforts, the Regulation allows Member States to choose between different types of contributions.²⁶⁴ These include relocating applicants for international protection or beneficiaries of temporary protection, offering financial contributions to support frontline states, or providing operational support, including through personnel or infrastructure.²⁶⁵ This multi-modal approach is designed to balance the need for collective action with the political sensitivities that have historically hindered solidarity efforts. The Regulation also includes a distribution key to determine each Member State's expected share of responsibility, taking into account population size and GDP.²⁶⁶ However, while these metrics aim to ensure fairness and proportionality, the possibility to offset obligations via financial or operational support leaves open the question of whether solidarity has been reduced to a transactional model.²⁶⁷ The Commission's goal was to establish a flexible yet binding framework to overcome the failures

²⁶¹ Ineli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²⁶² Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC). Pag . 10-11

Neidhardt, A. (2024). *The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?* Policy Study. Brussels: Foundation for European Progressive Studies (FEPS), Friedrich-Ebert-Stiftung (FES), and European Policy Centre (EPC).

²⁶³ Ibid., pag. 11-13

²⁶⁴ Ibid., pag. 11-12

²⁶⁵ Ibid., pag. 11-12

²⁶⁶ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

²⁶⁷ Ibid.

of previous relocation schemes, which suffered from widespread non-compliance, particularly among Central and Eastern European states.²⁶⁸

Importantly, the Regulation introduces a solidarity forum, convened by the Commission, which plays a coordinating role in matching needs and offers. In crisis situations, the Commission issues an implementing act outlining the solidarity measures required and the Member States' expected contributions.²⁶⁹ If a Member State fails to offer what is deemed its fair share, the Commission can reassign responsibilities, although the extent of enforcement remains politically delicate.²⁷⁰ While this provides a procedural scaffold for solidarity, critics have questioned whether it offers sufficient guarantees to prevent free-riding or evasion of obligations.²⁷¹ On one hand, the use of a Regulation as the legal instrument ensures direct applicability in national law, enhancing legal certainty and avoiding the ambiguity of soft law.²⁷² On the other hand, the Regulation's reliance on a system of choices, matched through Commission coordination and guided by indicative targets, suggests a continued reluctance among Member States to accept a fully automatic relocation system.²⁷³

CHAPTER 4

FROM REPETITION TO REFORM? TRACING INSTITUTIONAL LEGACIES IN THE CRISIS AND FORCE MAJEURE REGULATION

The analysis is structured in three thematic sections corresponding to key legacy issues: (A) responsibility allocation and the Dublin legacy; (B) inertia in activating emergency protection; and (C) emergency governance in the new Pact. Each section evaluates how the new Regulation seeks to break or reform these patterns, and whether it succeeds in doing so meaningfully. Throughout, concepts from path dependency theory, increasing returns, coordination effects, adaptive expectations, critical junctures, and institutional layering, are used to assess whether the Crisis and Force Majeure Regulation represents a path-breaking reform or merely an

²⁶⁸ Ibid.

²⁶⁹ Ineli-Ciger, M. (2024, June 10). *Navigating the labyrinth of derogations: A critical look at the crisis regulation*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.; Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

adaptation within an entrenched trajectory. Relevant CJEU case law, legal commentary, and EU documents are integrated to support the analysis.

1. Responsibility Allocation and the Dublin Legacy

As analysed in the previous section, the Dublin III system has long allocated responsibility for asylum seekers primarily to the Member State of first entry into the EU. This design has created an institutional lock-in of structural asymmetry, whereby certain states, notably EU border states in the south and east, as well as popular initial entry-points, consistently bore a disproportionate responsibility for processing asylum claims without witnessing much regulation reform.²⁷⁴ The persistent divide between individual and collective responsibility models in EU asylum governance is particularly evident in moments of crisis, where the failure to operationalise, solidarity becomes most acute.²⁷⁵ Although Article 80 TFEU enshrines the principle of solidarity and fair sharing of responsibility, Member States have consistently rejected binding instruments such as mandatory relocation schemes or centralised asylum processing.²⁷⁶

Once the 2015 refugee crisis started, it became evident that the Dublin Regulation alone was inefficient in distributing the demand for asylum across Member States. In response, the European Commission's 2016 proposal introduced a "corrective allocation" mechanism designed to automatically redistribute asylum seekers from overburdened states once a certain threshold was reached.²⁷⁷ This aimed to relieve frontline countries and ensure fairer burden-sharing.²⁷⁸ The proposal built on emergency relocation decisions taken at the height of the crisis in 2015, when EU interior ministers, by majority vote, agreed to relocate 160,000 asylum seekers from Italy and Greece across the Union.²⁷⁹ The Dublin system did not create a clear-

²⁷⁴ Maiani, F. (2020, October 20). *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

²⁷⁵ Mouzourakis, M. (2014). *We need to talk about Dublin: Responsibility under the Dublin system as a blockage to asylum burden-sharing in the European Union* (Working Paper No. 105). Refugee Studies Centre, University of Oxford. <https://www.rsc.ox.ac.uk/files/files-1/wp105-we-need-to-talk-about-dublin.pdf>

²⁷⁶ Ibid., pag. 6

²⁷⁷ Hruschka, C. (2016). *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission* – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/#:~:text=The%20Commission%20proposes%20the%20abolition,of%20a%20corrective%20allocation%20mechanism.>

²⁷⁸ Ibid.

²⁷⁹ European Parliamentary Research Service. (2015). *Legislation on emergency relocation of asylum-seekers in the EU*. EPRS Briefing, PE 569.018, September 2015. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569018/EPRS_BRI\(2015\)569018_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569018/EPRS_BRI(2015)569018_EN.pdf)

cut division between frontline and non-frontline states, however. Member States such as Germany,²⁸⁰ and Sweden (thought changing its internal policies on migration now)²⁸¹ had remarkably shown solidarity and accepted large numbers of people requesting asylum. Nonetheless, the corrective allocation faced stiff opposition. Hungary, Slovakia, Romania, and the Czech Republic voted against the mandatory quotas, but were outvoted under qualified majority rules.²⁸² These Eastern EU state coalitions, led by nationalist and anti-immigration parties, refused to accept any EU-imposed quotas, deemed a direct violation of sovereignty and public will.²⁸³ Hungary's government under Viktor Orbán, for example, not only voted against the 2015 emergency quotas but later challenged them in the Joined Cases C-643/15 and C-647/15²⁸⁴ and openly declared it would not comply with relocation targets.²⁸⁵ Poland's post-2015 government similarly renounced the scheme, despite initially voting in favor under the previous administration.²⁸⁶ Tusk warned EU leaders that if unanimity on Dublin reform could not be reached within six months, alternative approaches would be sought.²⁸⁷ In effect, this meant conceding to the hardline bloc, where the EU almost had to "scrapping mandatory quotas" because Hungary, Poland and the Czech Republic were blocking progress.²⁸⁸

Clearly, at the time of the crisis, there was a lack of coherent, harmonised EU asylum system, with asylum policy remaining fragmented along national lines. The Dublin framework not only could it not enforce solidarity, but it also lacked the authority or flexibility to reconcile deeply conflicting national interests.²⁸⁹ Therefore, the European Parliament, in November 2017,

²⁸⁰ Ibid.

²⁸¹ Crouch, D. (2022). *Sweden slams shut its open-door policy towards refugees*. The Guardian.

<https://www.theguardian.com/world/2015/nov/24/sweden-asylum-seekers-refugees-policy-reversal>

²⁸² Traynor, I. (2015). *Refugee crisis: East and west split as leaders resent Germany for waiving rules*. The Guardian. <https://www.theguardian.com/world/2015/sep/05/migration-crisis-europe-leaders-blame-brussels-hungary-germany>

²⁸³ Ekblom, J. (2019). *Poland, Hungary broke EU laws by refusing to host migrants: court adviser*. Reuters. <https://www.reuters.com/article/world/poland-hungary-broke-eu-laws-by-refusing-to-host-migrants-court-adviser-idUSKBN1XA1S4/>

²⁸⁴ Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631.

²⁸⁵ Bayer, L. (2017). *Hungary says refugee ruling 'raped' EU law*. POLITICO.

<https://www.politico.eu/article/hungary-says-ecj-ruling-on-refugee-quotas-has-raped-eu-law-asylum-seekers-italy-greece-relocation-scheme/>

²⁸⁶ BBC News. (2017). *EU to sue Poland, Hungary and Czechs for refusing refugee quotas*. <https://www.bbc.com/news/world-europe-42270239>

²⁸⁷ Rankin, J. (2017). *EU could "scrap refugee quota scheme"*. The Guardian.

<https://www.theguardian.com/world/2017/dec/11/eu-may-scrap-refugee-quota-scheme-donald-tusk#:~:text=In%20effect%20this%20means%20scrapping,bodies%2C%20including%20the%20European%20Commission.>

²⁸⁸ Ibid.

²⁸⁹ Maiani, F. (2020). A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

decided to take a transformative stance in its negotiations and proposed a landmark legislative resolution, *the Wikström report*, advocating a fundamental overhaul of Dublin.²⁹⁰ As Maiani²⁹¹ argues, MEPs proposed to remove entirely the first-entry rule as the default mechanism for assigning responsibility and instead allocate asylum seekers across Member States based on capacity and “genuine links”. This meant turning the so-called corrective relocation into a default, mandatory distribution of asylum applicants to the “least-burdened” Member State.²⁹² The Parliament understood that there was a need for a stronger solidarity-based system as it was clear that the first entry rule did not lead to fruitful outcomes.²⁹³ Parliament’s vision also expanded criteria to consider asylum seekers’ family ties and other connections, giving them some say in destination, in order to make the system more humane and workable.²⁹⁴

This inertia is evident in high-level outcomes. Nearly eight years after the proposal of the Wikström report, it is known that its recommendations were never implemented.²⁹⁵ The result of these stalemates was that no general Council position on Dublin reform could be agreed for years.²⁹⁶ Negotiations effectively froze as a blocking minority of states refused to budge on the core issue of sharing responsibility. The required majority for adoption under qualified majority voting was unattainable not just because of the Visegrád four, but also due to tacit support or ambivalence from other governments wary of the domestic political cost of accepting more asylum seekers.²⁹⁷ The political will for accepting asylum seekers was extremely limited, as anti-migration discourses dominated public and political arenas across much of the European Union.²⁹⁸ In such a context, Member State governments had little electoral or strategic incentive to pursue substantive reform of the existing legal framework. As described by Pierson,²⁹⁹ if actors had the understanding of a policy to be accepted in the future, they would

²⁹⁰ Maiani, F. (2017). The Report of the European Parliament on the reform of the Dublin system: certainly bold, but pragmatic? – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic/>

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Maiani, F. (2017). The Report of the European Parliament on the reform of the Dublin system: certainly bold, but pragmatic? – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic/>

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Huysmans, J. (2000). The European Union and the securitization of migration. *JCMS: Journal of common market studies*, 38(5), 751-777.

²⁹⁹ Pierson, P. (2000). Increasing returns, path dependence, and the study of politics. *American political science review*, 94(2), 251-267. Pag. 257

take that path. In this case, that meant regulatory status quo, thereby avoiding politically contentious debates over responsibility-sharing and institutional redesign of Dublin and anti-migratory national policies. Austria, for instance, under a conservative-populist coalition, from late 2017, aligned with the quota-skeptical camp.³⁰⁰ Others like Denmark, which opted-out,³⁰¹ and the UK, pre-Brexit, also opted-out,³⁰² collectively decided to stand aside from relocation efforts entirely. Italy's position evolved as well. Firstly, while the centre-left Renzi government in 2015–2016 strongly pushed for relocation,³⁰³ by 2018 the new populist government (featuring the anti-migrant Lega) took a harder line in EU talks, demanding tougher external border measures and refusing any scheme it saw as inadequate, which further complicated consensus.³⁰⁴

Negotiations at the Council level did not revise Dublin rules but rather emphasized controlling external borders and only voluntary forms of solidarity. When key actors benefit from an existing policy path, they will block changes that threaten their interests.³⁰⁵ In this case, many Member States benefited from the first-entry system of Dublin III, or at least, they calculated that it spared them from potentially larger asylum intakes.³⁰⁶ The inertia was also caused by the fact that Dublin also provided a formal legal basis to decline participation in broader burden-sharing measures.³⁰⁷ Indeed, Dublin's rigidity incentivized asylum seekers themselves to move irregularly toward preferred countries, which then prompted those countries to demand even stricter enforcement of Dublin or anti-secondary movement measures, rather than offering

³⁰⁰ Sahloul, A. (2019, August 16). *Austrian elections demonstrate success of aestheticized populism* - Atlantic Council. Atlantic Council. <https://www.atlanticcouncil.org/blogs/new-atlanticist/austrian-elections-demonstrate-success-of-aestheticized-populism>; Austrian coalition puts Europe's human rights values to the test. (2020, October 28). Human Rights Watch. <https://www.hrw.org/news/2017/12/20/austrian-coalition-puts-europes-human-rights-values-test>

³⁰¹ Nielsen, M. L., & Singh, R. (2024). *The brief – The curious case of Denmark's migration opt-out*. Euractiv. <https://www.euractiv.com/section/politics/opinion/the-brief-the-curious-case-of-denmarks-migration-opt-out/>

³⁰² Taylor, R., & Taylor, R. (2016). *Quitting the EU wouldn't give Britain more control over refugee and migrant flows* - LSE BREXIT. LSE BREXIT -. <https://blogs.lse.ac.uk/brexit/2016/02/23/quitting-the-eu-wouldnt-give-britain-more-control-over-refugee-and-migrant-flows/>

³⁰³ Reporter, G. S. (2018,). *We will hurt EU if migrant crisis is not fixed, says Italian PM Matteo Renzi*. The Guardian. <https://www.theguardian.com/world/2015/jun/15/we-will-hurt-eu-if-migrant-crisis-is-not-fixed-says-italian-pm-matteo-renzi>

³⁰⁴ Giuffrida, A. (2018). *Italian government approves Salvini bill targeting migrants*. The Guardian. <https://www.theguardian.com/world/2018/sep/24/italian-government-approves-bill-anti-migrant-measures-matteo-salvini>

³⁰⁵ Hanrieder, T. (2014). Gradual change in international organisations: Agency theory and historical institutionalism. *Politics*, 34(4), 324-333. Pag. 327

³⁰⁶ Guiraudon, V. (2018). The 2015 refugee crisis was not a turning point: Explaining policy inertia in EU border control. *European Political Science*, 17, 151-160.

³⁰⁷ Ibid.

to relieve pressure on the frontlines.³⁰⁸ Therefore, *why change how things are?* There was clearly little political incentive to accept migrants. In 2015, the general consensus was that this was a crisis and a matter of security, as Orbán would emphasize in his speeches, mass immigration was an ‘existential threat to Europe’s Christian identity and way of life’.³⁰⁹ MEPs from the European Conservatives and Reformists,³¹⁰ and the Europe of Nations and Freedom all attacked refugee-sharing.³¹¹ Their fear was protection of national sovereignty and security, which directly influenced Member State’s home policies and helped stiffen the spines of like-minded governments in the Council.³¹²

The institutional inertia was undoubtedly rooted in political calculations and narratives that favored continuity. This context highlights the relevance of examining how institutional inertia may have been addressed through the implementation of the new regulation, a question that the following section seeks to explore.

1.1 The New Regulation’s Response. Mandatory but Flexible Solidarity

Five years after the 2015 refugee crisis, and after opening the doors to a million of Ukrainians seeking refuge, the proposed Regulation on Crisis and Force Majeure as part of the 2020 New Pact on Migration and Asylum seeks to address the structural asymmetry left by Dublin III, by introducing solidarity mechanisms that are both mandatory in nature and flexible in form. It operates in tandem with the proposed Asylum and Migration Management Regulation, which is effectively “Dublin IV” under a new name.³¹³ As mentioned prior in the chapters, under the Pact framework, responsibility-sharing is meant to be revitalized through a system of compulsory contributions by all Member States whenever a state faces migratory pressure or a

³⁰⁸ Maiani, F. (2020, October 20). *A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

³⁰⁹ Karnitschnig, M. (2015). *Orbán says migrants threaten ‘Christian’ Europe*. POLITICO. <https://www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis/>

³¹⁰ ECR Policy Group on Migration // ECR Group. (n.d.-b). ECR Group. https://ecrgroup.eu/campaign/ecr_policy_group

³¹¹ Euronews. (2019). *The Brief: Europe of Nations and Freedom - a closer look*. Euronews. <https://www.euronews.com/my-europe/2019/05/21/the-brief-europe-of-nations-and-freedom-a-closer-look>

³¹² Guiraudon, V. (2018). *The 2015 refugee crisis was not a turning point: Explaining policy inertia in EU border control*. *European Political Science*, 17, 151-160.

³¹³ Pollet, K. (2016). *ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and Migration Management*. COM(2020) 610 2020/0279 (COD)

crisis.³¹⁴ Rather than imposing a fixed relocation quota alone, the Pact allows states to choose from a menu of solidarity contributions, for example, relocating asylum seekers from the pressured state, “return sponsorship” (whereby a Member State takes charge of returning a certain number of persons with final negative asylum decisions from the pressured state), or other forms of material or technical assistance.³¹⁵ This design is explicitly billed as “mandatory but flexible solidarity”³¹⁶ where every Member State must contribute in some way (no outright opt-outs), but they retain some discretion as to how. In the event of a declared emergency, the Regulation stipulates that a requesting state may draw upon the resources available in the new *Solidarity Pool*, where countries contribute either financially (and their contributions are based on population and GDP), or by taking applicants.³¹⁷ Should these resources prove inadequate, the state is entitled to access additional contributions as outlined in the Solidarity Response Plan, where contributing states may be required to take on responsibilities above their fair share, with mandatory responsibility to meet the needs set out in the Plan.³¹⁸ Countries are then rewarded for contributing more than their fair share could, for instance, be relieved from contributing to the Solidarity Pool for five years.³¹⁹ Furthermore, in cases of 'extraordinary mass arrivals,' where a member state's asylum and reception systems are overwhelmed, the Regulation permits the suspension of the 'first country of entry' obligation, thereby relieving the member state from its take-back responsibilities.³²⁰

Importantly, the new system attempts to rebalance Dublin without entirely overturning its foundation. As ECRE observes, “the fundamental principle does not change”,³²¹ meaning the new AMMR still largely pinions responsibility initially on the state of first entry or first application.³²² In this sense, the reform does not wholly escape the legacy of Dublin's allocation, it however, aims to mitigate the inequities of that rule through solidarity after the

³¹⁴ European Council on Refugees and Exiles (ECRE). (2021). *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)*. February 2021. Available at: <https://ecre.org/wp-content/uploads/2021/03/ECRE-Comments-RAMM.pdf>. Pag. 16-17

³¹⁵ Ibid., pag. 70-72

³¹⁶ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre. Pag., 16

³¹⁷ Pliszka, I. (2025). *The New Pact on Migration and Asylum: What Changed and What Does This Mean for International Refugees?*.

³¹⁸ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre. Pag., 16

³¹⁹ Ibid., pag., 16

³²⁰ Ibid., pag. 16

³²¹ European Council on Refugees and Exiles (ECRE). (2021). *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)*. February 2021. Available at: <https://ecre.org/wp-content/uploads/2021/03/ECRE-Comments-RAMM.pdf>. Pag. 17

³²² Ibid.

fact.³²³ What we see is that this new regulation has been implemented alongside the old Dublin. As Hanrieder³²⁴ has observed, the implementation of new regulations alongside existing frameworks, often referred to as 'layering,' typically occurs when an institution encounters significant resistance or is unable to alter a core component of its structure, in this case, the Dublin Regulation. This phenomenon arises when, on the one hand, a particular actor, or in this context, a Member State, seeks to maintain a privileged position within the system and utilizes its veto powers to obstruct reform, while on the other hand, there are challengers who seek to challenge and amend the established system.³²⁵ Whether one can argue that the EU itself is a challenger who aims to improve its system, it is anyway evident that, within this dynamic, the group most affected by these institutional barriers is asylum seekers.

The critical question is whether the Crisis and Force Majeure Regulation is able to overcome self-reinforcing resistance and alter the expectations and behaviour of Member States that have long benefited from asymmetric responsibility.³²⁶ It is surprising as it seemed that EU was locked in their inefficiency, even while knowing it. Much of the efforts to depart from the Dublin framework in 2015 was met with institutional inertia and political resistance.³²⁷ On the one hand, it can be argued that this new regulation can pose as an example of how institutional layers, while providing slow change, can bring regulatory restructuring. Building on an existing framework rather than complete replacement proved to be politically palatable.³²⁸ Integrating to the first entry rule a new system of flexible solidarity helped accommodate divergent national interests by allowing Member States to choose whether to process asylum requests or contribute to the overall EU system through alternative financial means.³²⁹ Consequently, those countries less willing to accept migrants could still comply without hosting individuals, while frontline states gained a formal mechanism to request assistance. It was not this easy however, as this reform still faced controversy. Unsurprisingly, Poland and Hungary voted against it outright, but it was still passed with a qualified majority.³³⁰

³²³ Ibid., pag. 17

³²⁴ Hanrieder, T. (2014). Gradual change in international organisations: Agency theory and historical institutionalism. *Politics*, 34(4), 324-333.

³²⁵ Ibid., pag. 27

³²⁶ Parusel, B. (2025). The EU's new asylum system and its uncertain future. *Politics and Rights Review*. <https://politicsrights.com/new-asylum-system-uncertain-future/>

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

Furthermore, by layering on a novel framework on how the asylum should be dealt in Europe, the EU tries to legally obligate every state to pitch in when another is in crisis. It seeks to generate new feedback effects: if the system works, frontline states will begin to trust that they will receive help when needed, and other states will adjust to the norm that solidarity is a matter of compliance to the established regulation.³³¹ This could create adaptive expectations in favour of cooperation (i.e. states expect that others will help, making them more willing to uphold their own obligations). Indeed, the CJEU's³³² rulings upholding the legality of relocation and condemning non-compliance send a judicial signal that burden-sharing can be enforced as a matter of EU law, potentially strengthening the credibility of the new mechanism's obligations.³³³ Over time, should the solidarity mechanisms be effectively activated and enforced, it is conceivable that a positive feedback loop may emerge, whereby participation in solidarity efforts generates political benefits, such as mitigating unmanaged secondary movements, alleviating humanitarian pressures at the borders, and more importantly, improve solidarity between Member States, it could also incentivize states to sustain their commitment to this revised framework.

On the other hand, there are reasons to question whether the cycle is truly broken. This phenomenon aligns with what institutional theorists refer to as *drift*, which is a mode of change in which formal regulatory frameworks remain ostensibly stable, yet their practical relevance diminishes over time due to a failure to adapt meaningfully to evolving conditions.³³⁴ Rather than being the result of overt reforms or landmark events, drift occurs through a combination of internal inaction, often enabled by veto players or revisionist actors, and external shifts that render existing legal instruments increasingly inadequate.³³⁵ In this context, limited or symbolic modifications to existing regulations, which some scholars are already observing in the transition from the Dublin system to the new Crisis and Force Majeure Regulation, may

³³¹ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre. Pag., 16

³³² Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631.

³³³ Fremer, I. (2020, June 5). *European Union: Court of Justice rules against Poland, Czech Republic, and Hungary for noncompliance with migrant relocation obligations*. Global Legal Monitor, Law Library of Congress. <https://www.loc.gov/item/global-legal-monitor/2020-06-05/european-union-court-of-justice-rules-against-poland-czech-republic-and-hungary-for-noncompliance-with-migrant-relocation-obligations/>

³³⁴ Hanrieder, T. (2014). Gradual change in international organisations: Agency theory and historical institutionalism. *Politics*, 34(4), 324-333. Pag. 327

³³⁵ Ibid., pag. 326-327

reflect institutional stagnation rather than substantive reform.³³⁶ The same scholars³³⁷ are describing the structural continuity between the two frameworks as being an attempt to layer new regulation with inefficient or altogether absent results. Karageorgiou and Noll³³⁸ observe that the Pact “maintains the Dublin rationale” and only adds a complex flexible solidarity mechanism of voluntary pledges and mandatory quotas.³³⁹ Solidarity without meaningfully sharing protection responsibilities, so much so that there is speculation of the relocation quota may be then used to set up detention centres for migrants.³⁴⁰ If frontline states perceive that the mandatory solidarity is too “flexible” in practice (allowing others to contribute little of real impact), the old grievances may persist.³⁴¹ Maiani³⁴² calls it “a slightly milder version” of past proposals. States can choose cash over relocation, and they may even seek reductions of their obligations.³⁴³ He argues that this could lead to countries at the EU’s external borders will continue shouldering disproportionate caseloads and that non-compliance yields few real sanctions.³⁴⁴ To add onto that, Helluin³⁴⁵ argues that the Regulation essentially codifies minor modifications while preserving the foundational architecture of Dublin, particularly stating that the new Pact is a demonstration of the Union reinforcing path-dependent institutional inertia rather than departing from it. She argues that contrary to its claims of reform, the Pact appears oriented more toward restoring political consensus and mutual trust among EU Member States than toward enhancing the legal protections afforded to asylum seekers.³⁴⁶

³³⁶ Karageorgiou, E., & Noll, G. (2022). What is wrong with solidarity in EU asylum and migration law?. *Jus Cogens*, 4(2), 131-154.

³³⁷ Helluin, A. (2021). *A “New” pact on Migration and Asylum? The European migration policy path-dependency*. EUROPEUM Institute for European Policy. <https://www.europeum.org/en/articles-and-publications/policy-brief-a-new-pact-on-migration-and-asylum-the-european-migration-policy-path-dependency/>

³³⁸ Karageorgiou, E., & Noll, G. (2022). What is wrong with solidarity in EU asylum and migration law?. *Jus Cogens*, 4(2), 131-154. Pag. 150

³³⁹ Ibid., pag. 132-136

³⁴⁰ Migration Policy Group. (2024, April 23). *Reflection paper on the new EU Pact on Migration and Asylum*. <https://www.migpolgroup.com/index.php/2024/04/23/reflection-paper-on-the-new-eu-pact-on-migration-and-asylum/>

³⁴¹ Maiani, F. (2020, October 20). *A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Helluin, A. (2021). *A “New” pact on Migration and Asylum? The European migration policy path-dependency*. EUROPEUM Institute for European Policy. <https://www.europeum.org/en/articles-and-publications/policy-brief-a-new-pact-on-migration-and-asylum-the-european-migration-policy-path-dependency/>

³⁴⁶ Ibid., pag. 1-2

This development may illustrate how institutional layering does not necessarily enhance policy effectiveness; instead, it can introduce additional legal complexity into an already challenging regulatory framework, thereby potentially undermining compliance and uniform implementation across Member States.³⁴⁷ Matters of crisis-specific exceptions, centralized governance tools and can complicate the implementation of this new regulation and thus, does not provide much hope for its long-term implementation.³⁴⁸ Taken together, these elements suggest that of the new Crisis and Force Majeure regulation and the AMMR do not constitute a genuine normative departure, but rather a re-legitimation of previous logics through modest revisions. Indeed, the most conspicuous innovation appears not to lie in rights-enhancing mechanisms, but in the further entrenchment of securitized and externalized migration governance.³⁴⁹ Moreover, Helluin³⁵⁰ continues to argue, that the continued reliance on the contested concept of safe third countries undermines the principle of individual assessment enshrined in the 1951 Geneva Convention and opens the door to erroneous and potentially dangerous refoulement practices often based on generalized diplomatic or political assessments that fail to capture the complexities of internal displacement, conflict, or legal repression.³⁵¹

2. Inertia and Exceptionalism: Temporary Protection and Crisis Activation

A second significant institutional legacy in EU asylum governance is the inertia in activating emergency protection measures, coupled with a pattern of exceptionalism that treats some situations as exceptional cases outside the ordinary asylum rules. The TPD was never activated for over twenty years, despite multiple refugee influx situations (e.g., Iraq 2003, Libya 2011, Syria 2013-2016) that seemingly fit its purpose.³⁵² This “non-implementation” was not due to lack of need but rather to political reluctance and procedural hurdles.³⁵³ Scholars³⁵⁴ identified

³⁴⁷ Helluin, A. (2021). A “New” pact on Migration and Asylum? The European migration policy path-dependency. EUROPEUM Institute for European Policy. <https://www.europeum.org/en/articles-and-publications/policy-brief-a-new-pact-on-migration-and-asylum-the-european-migration-policy-path-dependency/>

³⁴⁸ Ibid.

³⁴⁹ Ibid., pag. 1-3

³⁵⁰ Ibid.

³⁵¹ Ibid., pag. 2

³⁵² İneli-Ciger, M. (2022). *Reasons for the activation of the Temporary Protection Directive in 2022: A tale of double standards*. ASILE Project. <https://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/>

³⁵³ Ibid.

³⁵⁴ Ibid.; Arenas-Hidalgo, N. (2022, October 4). *The eternal question: What does “mass influx” really mean? Reflections after the first activation of the Temporary Protection Directive 2001/55*. ASILE Project. <https://www.asileproject.eu/the-eternal-question-what-does-mass-influx-really-mean-reflections-after-the-first-activation-of-the-temporary-protection-directive-2001-55/>; Küçük, E. (2023). Temporary protection directive: testing new frontiers?. *European Journal of Migration and Law*, 25(1), 1-30.;

several reasons: the Directive's definition of "mass influx" was vague, triggering it required a Council decision by qualified majority (difficult to secure when influx affected some states more than others), some Member States feared that activating it would create a "pull factor" encouraging more arrivals, and others were wary of the rights the TPD would grant (residence, access to work, etc.) which they perceived as too generous.³⁵⁵ There EU was locked in: there was a pervasive political unwillingness to utilize the TPD mechanism, especially when a crisis predominantly affected a few frontline states.³⁵⁶ Instead, of reforming the system that was not serving the outcome it was supposed to provide, the EU tended to resort to ad hoc measures. In 2015, rather than activating the TPD for Syrians, the EU opted for the relocation scheme (under Article 78(3)) and struck a one-off deal with Turkey in 2016 to stem the flow, leaving most refugees to apply for asylum under routine procedures in Greece and elsewhere.³⁵⁷ Article 78(3) TFEU itself, which allows the Council to adopt provisional measures to assist Member States facing an emergency influx, was thus used in a limited, selective way,³⁵⁸ and even that faced heavy politicization as discussed.³⁵⁹ Other emergency avenues, such as discretionary protective arrangements, were largely absent; instead, de facto exceptionalism occurred (e.g. suspension of Dublin transfers to Greece after 2011 due to humanitarian issues,³⁶⁰ or leniency in some rules during crises)³⁶¹ without a formal, collectively agreed upon emergency framework. The inertia around the TPD is a case of institutional lock-in due to of reluctance; once it became clear that activating the Directive required unanimous agreement in the Council and implied an EU-wide commitment to refugees, political will was lacking.³⁶² The TPD became a forgotten instrument, emblematic of a gap between law and practice in the CEAS.

This activation paralysis changed dramatically in 2022 with Russia's invasion of Ukraine. The mass displacement of millions of Ukrainians into the EU triggered what can be seen as an

³⁵⁵ Ineli-Ciger, M. (2022, October 6). *Reasons for the activation of the Temporary Protection Directive in 2022: A tale of double standards*. ASILE Project. <https://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/>

³⁵⁶ Ineli-Ciger, M. (2016). *Time to activate the Temporary Protection Directive: Why the Directive can play a key role in solving the migration crisis in Europe*. *European Journal of Migration and Law*, 18(1), 1-33. Pag., 29-33

³⁵⁷ Ibid. Pag., 11-13

³⁵⁸ Ardittis, S. (2016). *Should Greece be reinstated in the Dublin system?* Global Policy Journal. <https://www.globalpolicyjournal.com/blog/14/09/2016/should-greece-be-reinstated-dublin-system>

³⁵⁹ Traynor, I., & Kingsley, P. (2015). *EU governments push through divisive deal to share 120,000 refugees*. The Guardian. <https://www.theguardian.com/world/2015/sep/22/eu-governments-divisive-quotas-deal-share-120000-refugees>

³⁶⁰ Ardittis, S. (2016). *Should Greece be reinstated in the Dublin system?* Global Policy Journal. <https://www.globalpolicyjournal.com/blog/14/09/2016/should-greece-be-reinstated-dublin-system>

³⁶¹ Ibid.

³⁶² Ineli-Ciger, M. (2016). *Time to activate the Temporary Protection Directive: Why the Directive can play a key role in solving the migration crisis in Europe*. *European Journal of Migration and Law*, 18(1), 1-33. Pag., 29-33

exogenous shock to the EU's migration regime an unforeseen crisis of such magnitude and political salience that it unfroze previous constraints³⁶³. It was not until in March 2022 that the Council reached unanimous consensus to activate the Temporary Protection Directive, which offered immediate protection to Ukrainians (and certain others) fleeing the war³⁶⁴. The fact that consensus was reached and so swiftly stands in stark contrast to past hesitance. Why this time? Multiple factors made Ukraine a critical juncture: the sheer scale of displacement into bordering EU states like Poland was beyond what those states could handle through normal asylum processing³⁶⁵. Importantly, those states that in 2015 opposed solidarity, were now frontline states themselves (Poland, Hungary), finally getting the EU closer to aligning their incentives with an EU-wide response. Moreover, the political optics were favorable, and European publics and governments showed broad sympathy for Ukrainian refugees, lowering the usual reluctance.³⁶⁶ Path dependency here can show how the Ukraine crisis constituted a “large, rapid, discontinuous change” in the context, breaking the old pattern, where Member States would often block collective solidarity-driven protection measures. The Council Decision of 4 March 2022 gave immediate temporary protection rights to millions, bypassing lengthy asylum procedures³⁶⁷. It represented a clear departure from the past inertia: what had been de facto politically impossible was now achieved virtually overnight, suggesting that when a critical juncture occurs, the EU system can indeed switch paths. This positive experience was a reactive sequence in the constructive sense, from a prior reluctance that was overcome in reaction to a unique crisis, which in turn influenced policymakers' perceptions of the instrument.

2.1 Any departure at all?

One of the key features of the new Crisis and Force Majeure Regulation directly (at least in the initial proposal) was to create a new category of immediate protection status to be granted in

³⁶³ Ineli-Ciger, M. (2022, March 7). *5 reasons why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Ineli-Ciger, M. (2022). *5 reasons why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

³⁶⁷ Ibid.

situations of mass influx.³⁶⁸ The idea was essentially to codify a mechanism like the TPD within the EU's legislative framework for future crises. In fact, the original Commission proposal in 2020 controversially suggested repealing the Temporary Protection Directive and replacing it with this new immediate protection status (Article 11 of the proposal), which indicates there was a consensus for a need for a new mechanism after, as the TPD had not been as successful as hoped for in previous crises.³⁶⁹ In the legislative negotiations, it was ultimately decided to retain the TPD alongside the new Regulation and not replace it.³⁷⁰ For example, if a crisis is declared under the Regulation, it can recommend expedited asylum procedures or other special measures in addition to any temporary protection status.³⁷¹ If TPD is activated, the Regulation can still supplement it by providing extra support (with some coordination, such as ensuring that the same persons aren't counted twice for different measures).³⁷²

There was ultimately no substantive departure from the original Temporary Protection Directive within the new Crisis and Force Majeure Regulation. The Temporary Protection Directive demonstrated its ability to deal with large waves of migration in the 2022 and therefore, the directive will remain applicable once in 2026 the new Crisis and Force Majeure will come in action. The activation of the TPD during Ukrainian displacement is an example of a critical juncture for the European asylum system. It demonstrated the Directive's capacity to respond to large-scale displacement efficiently, while simultaneously reinforcing Member States' acceptance of the instrument's legitimacy and applicability. Once this positive precedent was set, particularly with the backing of Eastern Member States that had previously resisted broad solidarity measures, the political incentive to retain the TPD rather than overhaul the framework increased significantly. Policy changes, in this case, happened when political actors were able to align their interest, and put an end to a dormant directive. The Eastern states to support a stronger system of solidarity, as they were at the forefront of the crisis. Therefore, if there is stronger consensus and support for the activation and application of the directive, there was no urgent need to depart from it, or change the framework all together.

³⁶⁸ Pollet, K. (2016). ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and Migration Management. COM(2020) 610 2020/0279 (COD). Pag., 17

³⁶⁹ De Bruycker, P. (2024, May 6). Genealogy of and futurology on the pact on migration and asylum. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/genealogy-of-and-futurology-on-the-pact-on-migration-and-asylum/>

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

The comparison between the EU's response in the 2015 crisis and the 2022 Ukrainian displacement can teach how the inefficiencies explained above of the TPD laid more in the political struggle for its implementation than its structural inefficiencies. Firstly, Member States had often been reluctant in 2015 to implement the TPD due to concerns about potential *pull factors*, fearing that displaced persons might be drawn preferentially to states offering protection.³⁷³ However, as Ineli Ciger argues, such concerns were notably absent in 2022 when the TPD was activated for those fleeing Ukraine.³⁷⁴ In fact, the European Commission explicitly encouraged Member States bordering Ukraine to grant entry to all those escaping the conflict, which is the opposite approach taken at the southern borders where deterrence and pushbacks dominate the operational response.³⁷⁵ Secondly, scholarly³⁷⁶ critiques have pointed to potential racial and ethnic biases influencing activation decisions. This could be demonstrated by the willingness of Eastern Member States to show solidarity in 2022, possibly because of the ethnical, cultural, and religious affinities that these countries have with Ukraine.³⁷⁷ This could also explain why the Council Implementing Decision 2022/382³⁷⁸ limited the scope of temporary protection to Ukrainian nationals, their family members, and not to third-country nationals and stateless persons with international protection or permanent residence in Ukraine, unless their country of origin was unsafe for return.³⁷⁹ Despite being displaced by the same conflict, particularly TCNs were excluded from the Directive's protection.³⁸⁰ Only few Member States granted protection to third-country nationals who did

³⁷³ Ineli Ciger, M. (2022). *Reasons for the activation of the Temporary Protection Directive in 2022: A tale of double standards* | Asile. Asile. <https://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/#:~:text=requires%20the%20number%20of%20displaced,proposed%20new%20indicators%20to%20guide>

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Ibid.; Skordas. (2022). *Temporary Protection and European racism*. Asile.

<https://www.asileproject.eu/temporary-protection-and-european-racism/>; Sow, M. J. (2022). Ukrainian refugees, race, and international law's choice between order and justice. *American Journal of International Law*, 116(4), 698-709.

³⁷⁷ Vitiello, D. (2022). *The Nansen Passport and the EU Temporary Protection Directive: reflections on solidarity, mobility rights and the future of asylum in Europe*. European Papers. <https://doi.org/10.15166/2499-8249/542>

³⁷⁸ 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, OJ L 71, 4.3.2022

³⁷⁹ Ineli Ciger, M. (2022). *Reasons for the activation of the Temporary Protection Directive in 2022: A tale of double standards* | Asile. Asile. <https://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/#:~:text=requires%20the%20number%20of%20displaced,proposed%20new%20indicators%20to%20guide>

³⁸⁰ Ibid.

not hold international protection or a residence permit in Ukraine.³⁸¹ These motivations could be rooted in discrimination or political preference, though hard difficult to prove definitively, but it is still valid to question equitable application of EU asylum instruments. Though, it is important to consider the sheer scale and speed of displacement from Ukraine. Within just days of the Russian invasion, more than 650,000 people crossed into the EU via its eastern borders, with the Council estimating potential arrivals of 2.5 to 6.5 million individuals over the course of 2022 and the years after.³⁸² Given that most displaced persons were entering through Poland, the Council expressed concern about that Member State's capacity to manage such an influx, therefore why the TPD was activated.³⁸³

3. Emergency governance in the new Pact

In March 2020, when Greece faced a surge of migrants coming from the border with Turkey, the Greek government summarily invoked Article 78(3) TFEU and issued an emergency decree as justification to suspend asylum applications for one month, even though that Treaty article empowers only the Council (not individual states) to adopt emergency measure.³⁸⁴ In a decree that openly defied EU law and international law, Greece halted its asylum procedure and authorized immediate returns of border crossers, effectively legalizing pushbacks in its domestic law.³⁸⁵ Greece's exceptional decision to suspend the processing of asylum claims constituted a breach of both the fundamental right to asylum, enshrined in Article 18 of the EU Charter of Fundamental Rights,³⁸⁶ and the principle of non-refoulement, protected under Article 19.³⁸⁷ These two principles represent foundational elements of both EU and international refugee law, and neither the 1951 Refugee Convention nor relevant EU secondary legislation provides a legal basis for the suspension of asylum procedures, even under extraordinary circumstances³⁸⁸. Article 78(3) TFEU does not grant Member States autonomous

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ergin, A. D. (2020). *What happened at the Greece-Turkey border in early 2020?* Verfassungsblog.

<https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/>

³⁸⁵ Gkliati, M. (2022). The next phase of the European border and coast guard: responsibility for returns and push-backs in Hungary and Greece. *European Papers-A Journal on Law and Integration*, 2022(1), 171-193. Pag. 176

³⁸⁶ Article 18 of the Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389.

Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016P/TXT>

³⁸⁷ Article 19 of the Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389.

Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016P/TXT>; Ergin, A. D. (2020). *What happened at the Greece-Turkey border in early 2020?* Verfassungsblog. <https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/>

³⁸⁸ Ergin, A. D. (2020). *What happened at the Greece-Turkey border in early 2020?* Verfassungsblog. <https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/>

authority to enact emergency measures, rather, it stipulates that any provisional measures in response to a crisis must be adopted by the Council upon a proposal from the European Commission and following consultation with the European Parliament.³⁸⁹ Greece's action thus bypassed the prescribed institutional procedure, amounting to a unilateral departure from the EU legal order.³⁹⁰ Equally telling was the EU institutions' response. The European Commission took no infringement action against Greece,³⁹¹ which could have then signalled that such derogations might be tolerated in the name of emergency. Only later did legal analyses, and the UNHCR,³⁹² state that Article 78(3) cannot be invoked to suspend the right to asylum or bypass non-refoulement under EU and customary law.

As discussed until now, it can be said that the 2015 refugee influx constituted a critical juncture that exposed the weaknesses of the EU's asylum regime and triggered demands for reform. The Dublin III, the TPD had not been proven useful as regulatory tools, and Article 78 TFEU was invoked outside of its scope. The crisis thus catalysed reforms that were cumulative extensions of the EU's asylum acquis, reinforcing the trajectory of integration. The new Regulation responds by embedding such contingency tools *within* the formal legal order, thereby standardizing crisis responses. Under the Regulation, Member States are expressly authorized to derogate from certain ordinarily binding rules, such as extending the time for registering asylum applications or prolonging asylum border procedures when faced with exceptional influxes.³⁹³ This is important because it means that these derogations are no longer a matter of national discretion alone, but rather, they are defined and circumscribed by EU legislation.³⁹⁴ The Regulation specifies the scenarios that qualify (e.g. mass arrivals overwhelming a state's system, instrumentalization of migrants as a political tactic, or genuine force majeure events like pandemics or natural disasters) and links them to tailored exceptions. Importantly, it insists that any derogations from normal asylum rules under its regime the fundamental rights of the individual must respect necessity and proportionality, remaining temporary and limited to what

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ European Council on Refugees and Exiles (ECRE) (2023). Greece: Infringement Letters from the European Commission, NGOs Urge More Oversight on Greek Islands, Joint Civil Society Rule of Law Submission, Hundreds of Thousands 'Prevented' Entry. Published on 3 February 2023. Available at: <https://ecre.org/greece-infringement-letters-from-the-european-commission-ngos-urge-more-oversight-on-greek-islands-joint-civil-society-rule-of-law-submission-hundreds-of-thousands-prevented-entr/>

³⁹² United Nations High Commissioner for Refugees. (2006). *Guidelines on the application in mass influx situations of the exclusion clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*. <https://www.refworld.org/docid/43f48c0b4.htmlrefworld.org+1refworld.org+1>

³⁹³ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre. Pag. 10-13

³⁹⁴ Ibid.

the crisis demands.³⁹⁵ These safeguards were included to prevent the abuse of emergency powers and to ensure that core rights (like the right to asylum and non-refoulement) are not jettisoned at the first sign of strain.³⁹⁶

In doing so, it “layers” new crisis-management provisions onto the existing EU asylum system. The Regulation shift creates a system that is more predictable and clearer, which can, in turn, increase compliance and coordination between and within Member States.³⁹⁷ It is not about discarding the existing legal structure that was before, but as we have seen become pattern in European asylum law, it is about strategically building upon previous practices to establish a more coherent response mechanism that creates stronger consensus and solidarity between Member States.³⁹⁸ Critics³⁹⁹, however, have already started arguing that these new permanent rules for emergency situations may contribute to the construction and systematization of emergency policies as a new normative framework. Indeed, an analysis by the Jacques Delors Centre noted ⁴⁰⁰that the instrumentalizations proposal (merged into the crisis law) risked giving states a “disproportionate tool for derogating from existing asylum law”⁴⁰¹ which could be “exploited by member states seeking to restrict access to protection” ⁴⁰², potentially undermining EU fundamental rights standards.⁴⁰³ The Regulation explicitly acknowledges that Europe may face recurring situations of crisis and even mentions scenarios such as the instrumentalization of migrants by third countries and other force majeure events.⁴⁰⁴ As Nicolosi⁴⁰⁵ warns, this can lead to a constant readiness to derogate from ordinary standards, a mindset where migration is governed through emergency logic rather than through stable rules.

³⁹⁵ European Council on Refugees and Exiles (ECRE). (2021). *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)*. February 2021. Available at: <https://ecre.org/wp-content/uploads/2021/03/ECRE-Comments-RAMM.pdf>. Pag. 17-18

³⁹⁶ Ibid.

³⁹⁷ Neidhardt, A. H. (2024). *The Crisis and Force Majeure Regulation: Towards Future-proof Crisis Management and Responses?*. European Policy Centre.

³⁹⁸ Ibid.

³⁹⁹ Arenas-Hidalgo, N. (2022). *The eternal question: What does “mass influx” really mean? Reflections after the first activation of the Temporary Protection Directive 2001/55*. ASILE Project. <https://www.asileproject.eu/the-eternal-question-what-does-mass-influx-really-mean-reflections-after-the-first-activation-of-the-temporary-protection-directive-2001-55/>

⁴⁰⁰ Rasche, L. (n.d.). The instrumentalisation of migration – how should the EU. Jacques Delors Centre. <https://www.delorscentre.eu/en/publications/the-instrumentalisation-of-migration>

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ De Bruycker, P. (2024). *Genealogy of and futurology on the pact on migration and asylum*. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/genealogy-of-and-futurology-on-the-pact-on-migration-and-asylum/>

⁴⁰⁵ Nicolosi, S. F. (2022). Addressing a crisis through law: EU emergency legislation and its limits in the field of asylum. *Utrecht Law Review*, 17(4).

Not only that but, but his study observes, the “manifold crises have left their imprint”⁴⁰⁶ on the reform process, such that an “emergency-driven approach has surfaced as a mandatory route for the future of the CEAS”,⁴⁰⁷ and that the EU has largely embraced the logic of governing by exception that first emerged in 2015. Therefore, the concept of “activation” can thus either empower timely responses but also provide political cover to declare emergencies frequently.⁴⁰⁸

Let us take, for example, the Pact’s new Crisis and Force Majeure and screening rules effectively codify the 2015 “hotspot” model as permanent law. In practical terms this means that every person irregularly crossing an EU external border, including those that are rescued at sea, are to be subjected to a “swift” multi-step screening in border-area facilities.⁴⁰⁹ As Moreno-Lax⁴¹⁰ notes, the process is explicitly “skewed towards expulsion/non-admission”⁴¹¹ rather than genuine access to protection. Arrivals face immediate identity, health and security checks, biometric registration and a very brief “de-briefing” (no more than five days) without any legal counsel or individualized assessment.⁴¹² Those who unpromptedly declare a protection claim during screening are sent into a new border procedure for asylum, but even this is tightly constrained, as there is no obligation to inform people of their right to apply.⁴¹³ Both Moreno-Lax⁴¹⁴, and Bousiou, and Papada⁴¹⁵ worry that this formalized very problematic practices in which human-rights and granting of fair conditions are not respected. These border facilities become, de facto, detention centres, which now are embedded into EU law, which will only increase the detention of asylum seekers.⁴¹⁶

This suggests a concern that learning effects have occurred in the wrong direction where, rather than Member States learning to improve compliance, they have learned that pushing the boundaries yields concessions. The Regulation might be seen as entrenching a path where executive flexibility remains high, the path has merely been formalized. If the prevailing

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Moreno-Lax, V. (2024). Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU. *European Papers-A Journal on Law and Integration*, 2024(1), 179-208.

⁴¹⁰ Ibid.

⁴¹¹ Ibid., pag. 197

⁴¹² Ibid., pag. 197

⁴¹³ Ibid., pag. 197

⁴¹⁴ Ibid.

⁴¹⁵ Bousiou, A., & Papada, E. (2020). Introducing the EC hotspot approach: A Framing Analysis of EU’s most Authoritative crisis policy response. *International Migration*, 58(6), 139-152.

⁴¹⁶ Moreno-Lax, V. (2024). Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU. *European Papers-A Journal on Law and Integration*, 2024(1), 179-208.

political norm is to let states take hard measures in crises, then having a legal form for it might not significantly will not bring any substantial change. Therefore, the new Pact could be essentially formalizing pre-existing practices rather than devising an entirely novel strategy. It is clear that the EU's response to migration crises continues to be shaped by the logic of flexibility, discretion, and derogation and as crises become more embedded in the EU's migration discourse, it is unsurprising that governing through exceptionalism is being normalized and becoming a more entrenched part of the legislative framework. The Crisis and Force Majeure Regulation could have represented a momentum for institutional learning and detaching from its past policies. However, it seems that the EU will only witness an expansion of the Common European Asylum System through the integration of emergency mechanisms.

CONCLUSIONS

The design of the Crisis and Force Majeure Regulation ultimately followed a path-dependent trajectory of what has been the European asylum policy, rather than a new reset. Drawing from the insights of the historical institutionalists that have been referenced in this analysis, the thesis understands institutional evolution as shaped not by sudden rupture but by layered adjustments, path dependencies, and feedback effects that entrench earlier policy choices and shape the conditions under which legal reform is negotiated. the approach for this new regulation has been shaped by early regulation choices in the history of European asylum policy, which have created increasing returns and institutional lock-ins that have been hard to depart from. As Helluin⁴¹⁷ observes, the relative stagnation of EU asylum policy since 2015 raises critical concerns regarding the Union's capacity for institutional adaptation. On the one hand, the sheer volume of asylum seekers created an external pressure on the system; and on the other, the erosion of inter-Member State solidarity and a growing mistrust in the capacity of EU institutions to coordinate an effective response.⁴¹⁸ The events of 2015 arguably represented a critical juncture that could have prompted a substantive reconsideration of the prevailing model of asylum governance. Yet, rather than diverging towards a more innovative model, the EU's Union's response largely reinforced existing trajectories, layering modifications thereby

⁴¹⁷ Helluin, A. (2021). *A "New" pact on Migration and Asylum? The European migration policy path-dependency*. EUROPEUM Institute for European Policy. <https://www.europeum.org/en/articles-and-publications/policy-brief-a-new-pact-on-migration-and-asylum-the-european-migration-policy-path-dependency/>

⁴¹⁸ Ibid.

entrenching pre-existing frameworks rather than embracing meaningful reform and path.⁴¹⁹ Helluin⁴²⁰ also points out that what has drastically changed from the '90s until today is the increase in experimentation with increasingly externalized migration practices, such as partnerships and deals with third countries, or building of either hotspots or migratory centres outside the Union.

This *doubling down*, or in other words, strengthening the commitment into trying to externalize migration policies further emphasizes the EU's locking into measures of deterrence, security, which may risk standing against its principles of democratic values and human rights. This new regulation, while being presented as a novel legal solution to the issues that have been analysed until now, ultimately risks reproducing the same foundational flaws in the asylum logic of the EU, specifically, in how it frames migration as a security problem. This systematization of the *problem of securitization* within the legislative design, will continuously work to perpetuate discourse of irregular migration as criminal, disorderly, and an external threat to be dealt with.⁴²¹ There have not been clear demonstrations of a fundamental restructuring of the basis for the allocation of responsibility of migration, to build a new design for a stronger solidarity framework.⁴²² Rather, it has layered on new aspects onto the new regulation, partially modifying the fundamental structure. Therefore, this analysis contents that the Crisis and Force Majeure Regulation may be better understood not as a turning point, but as a manifestation of long-standing institutional inertia and because of systemic locking into discourse of securitization and deterrence. It has layered on new aspects that aim to clarify where ambiguity from previous crisis tools, yet it fails to reorient the foundational goals of EU migration governance.

⁴¹⁹ Hanrieder, T. (2014). Gradual change in international organisations: Agency theory and historical institutionalism. *Politics*, 34(4), 324-333. Pag. 327

⁴²⁰ Ibid.

⁴²¹ Huysmans, J. (2000). The European Union and the securitization of migration. *JCMS: Journal of common market studies*, 38(5), 751-777.

⁴²² Maiani, F. (2020). A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact – EU Immigration and Asylum Law and Policy. Odysseus Network. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

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[06/#:~:text=The%20EU%20has%20tightened%20its,across%20the%20Mediterranean%20in%202021](https://www.reuters.com/world/europe/eu-looks-future-summit-migration-enlargement-2023-10-06/#:~:text=The%20EU%20has%20tightened%20its,across%20the%20Mediterranean%20in%202021)

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