Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2021, n. 2

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Freedom Security Justice
European Legal Studies

Indice-Sommario
2021, n. 2

numero monografico

VERSO UN QUADRO COMUNE EUROPEO ED UNA NUOVA *GOVERNANCE* DELLA MIGRAZIONE E DELL'ASILO

TOWARDS A COMMON EUROPEAN FRAMEWORK AND A NEW GOVERNANCE OF MIGRATION AND ASYLUM

CAPTURED BETWEEN SUBSIDIARITY AND SOLIDARITY: ANY EUROPEAN ADDED VALUE FOR THE PACT ON MIGRATION AND ASYLUM?

Luisa Marin*
Emanuela Pistoia**

1. Introduction: the new Pact on migration and asylum in its context

Solidarity amongst the Member States is a highlight of the New Pact on Migration and Asylum proposed by the Commission on 23 September 2020,[1] in partial replacement

Double blind peer reviewed article.

* European University Institute. She acknowledges funding from the European Union's Horizon 2020 research and innovation programme, Marie Skłodowska-Curie grant agreement No 891762. (The views expressed here do not necessarily reflect those of the funding institution). E-mail: luisa.marin@eui.eu.

** Associate Professor, University of Teramo. Though the article is the product of a discussion between the co-authors, section 4 is common, sections 2.2, 2.3, 3, 3.1, 3.2, 3.4, were written by Luisa Marin, and sections 1, 2.1, 2.4, 3.3, by Emanuela Pistoia. The usual disclaimer applies. E-mail: epistoia@unite.it.

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, of 23 September 2020, COM(2020) 609 final. The New Pact includes three entirely new pieces of legislation, including repeal of the Dublin III regulation, two pieces of legislation which amend proposals put forward in 2016 and several soft-law tools. The proposed new acts are as follows: Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], of 23 September 2020, COM/2020/610 final (hereinafter "Asylum and Management"); Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, of 23 September 2020, COM/2020/612 final (hereinafter "Screening"); Proposal for a

of the unsuccessful proposal on a recast "Dublin" regulation put forward by the Juncker Commission on 4 May 2016.[2] With the refugee crisis, precisely as with the eurozone crisis, solidarity has been highly invoked in Brussels as well as in European capitals, as the value needed to fill the shortcomings revealed by the current legislation.[3]

Despite this major effort, the new Pact has met criticisms by academia and practitioners: many have argued that the proposed New Pact appears disappointing and short-sighted precisely in terms of "solidarity and fair sharing of responsibility", which the Treaties identify as leading principles in the overall development of the asylum system.[4] This essay contributes to this debate by establishing a connection between solidarity and subsidiarity, more precisely between solidarity and the European added value required of any legislative proposal. Since the New Pact on Migration and Asylum is being proposed more than twenty years after Tampere and brings about a major reform of the legislation in force, it can be justified provided that it constitutes an added value to the *status quo*, in particular by tackling the challenges that today have emerged and have

---

Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, of 23 September 2020, COM/2020/613 final (hereinafter "Crisis and *force majeure*"). The proposed amendments of earlier proposals are as follows: Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union repealing Directive 2013/32/EU, of 23 September 2020, COM/2020/611 final (hereinafter "Amended common procedure"; Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation; (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on request for comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, of 23 September 2020, COM/2020/614 final.

[2] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, 4.5.2016. Comments in P. DE PASQUALE, *Verso la refusione del regolamento* "*Dublino III*", in *Studi sull'integrazione europea*, 2018, p. 267; G. MORGESE, *Principio di solidarietà e proposta di rifusione del regolamento Dublino*, in E. TRIGGIANI, F. CHERUBINI, E. NALIN, I. INGRAVALLO, R. VIRZO (a cura di), *Dialoghi con Ugo Villani*, Bari, 2017, p. 471. On the substantial amendments made by the European Parliament: M. DI FILIPPO, *The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns*, in *Revista de Derecho Comunitario Europeo*, 2018, p. 41.

[3] 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, pp. 1-2. G. CAGGIANO, *L'insostenibile onere della gestione delle frontiere esterne e della competenza di "Paese di primo ingresso" per gli Stati frontalieri nel Mediterraneo*, in *Gli Stranieri*, 2011, p. 45 ff.; F. MAIANI, *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden-Boston, 2016, p. 473.

[4] M. BORRACCETTI, *Il Patto europeo sull'immigrazione e l'asilo e la sua (solo) annunciata discontinuità*, in *diritticomparati.it*, 5 novembre 2020; P. DE PASQUALE, *Il Patto sulla migrazione e l'asilo: più ombre che luci*, in *I Post di AISDUE* II (2020), aisdue.eu, 5 ottobre 2020; C. FAVILLI, *Il patto europeo sulla migrazione e l'asilo: "c'è qualcosa di nuovo, anzi d'antico"*, in *Questione giustizia*, 2 ottobre 2020; F. MAIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in eumigrationlawblog.eu, 31 October 2020; G. MORGESE, *La solidarietà tra Stati membri dell'Unione europea nel nuovo Patto sulla migrazione e l'asilo*, in *I Post di AISDUE* II (2020), aisdue.eu, 23 ottobre 2020.

been identified as such in practice.[5] In particular, it will be assessed whether and to what extent the proposals of the Commission do support sufficiently States placed at the external borders of the Union, with regard to the situation on the ground in their territory. As an ever-larger number of protection-seekers arrive in Europe irregularly by land or by sea, it is the frontline States which should be the main beneficiaries of European inter-state solidarity.

The first part of the essay lays the foundations of this subsidiarity-based assessment of solidarity: it will initially point out some key features of subsidiarity and solidarity respectively, to then show that the Commission's proposals can be deemed to pass the European added-value test only if adequate solidarity is achieved. This entails putting forward a new role for subsidiarity: from being a tool aimed at limiting the exercise of the Union's shared competences, with a view to leaving the largest possible room for national legislation, to being a spur for the Union's law-makers to make the best use of the Union's competences in this area (yet obviously in compliance with other applicable principles, including proportionality).

In the second part of the essay, the aspects of the proposed New Pact featuring a limited degree of solidarity will be explored. They are likely to undermine the objective of the reform of the current "Dublin III" system,[6] which implies maintenance of as many asylum systems as the Member States, with no mutual recognition of the status of international protection, and no freedom of circulation for the beneficiaries, let alone the building of one sole status with effects throughout the Union. We aim at demonstrating that, in today's asylum policy, subsidiarity and solidarity are interlocked, so that requiring a "European added value" of the new rules calls for increasing the degree of solidarity. Only this argument can square the circle between subsidiarity and solidarity, and can ensure at least the good functioning of the current pillars of the Union's asylum policy, recalled above, and the right to seek asylum which is its cornerstone (Article 78, para. 1 TFEU).

2. Subsidiarity and solidarity in EU asylum and migration law

2.1. Assessing subsidiarity in the legislative proposals encompassed in the New Pact

The principle of subsidiarity is famously used in areas of non-exclusive competences to draw a line between the national level and the Community/Union level, this line being identified by considering what level is more suited to achieving a given objective *of the*

[5] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, pp. 1-2.

[6] Regulation (EU) No 604/2013 of the European Parliament and of the Council, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, of 26 June 2013, in OJ L180, 29 June 2013, pp. 31-59.

Union.[7] Since the *British American Tobacco* case, the Court of Justice has been assessing subsidiarity by using the cross-border nature of the objectives of a legislative proposal as a major benchmark.[8] Against this background, it goes without saying that *the Union* is always in the preferred position[9] every time the said objective is harmonization or any other transnational feature, such as a solidarity-based system of asylum and border management. Hence, the principle of subsidiarity, which has been conceived to keep the room potentially left to Union competences under control, ended up automatically attesting a role for the Union whenever an objective which is transnational in nature is pursued.[10]

This purely formal approach adopted by the Court of Justice is to be acknowledged as the ultimate reason for the broad recognition of a mainly political *milieu* of subsidiarity,[11] and/or for prevalence of political control of respect for it over judicial scrutiny of it.[12] Unfortunately, since its introduction the political control has failed to make substantial progress and the role of subsidiarity has not grown.[13]

The focus on the transnational nature of the objective to be achieved, in combination with a theoretical *ex ante* appraisal of the best-suited level to pursue it, has a major flaw on the logical side. It dissolves the famous dual-step test which subsidiarity traditionally requires into a single-step test, since assessment of insufficiency of action at the national level is actually absorbing that of the better suitability of the Union level, known as

[7] The use of the Union's objective as the only benchmark for subsidiarity (both for the national level and for the Union's level) is critically highlighted in G. DAVIES, *Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, pp. 67-72.

[8] Court of Justice, Fifth Chamber, judgment of 29 April 2004, *British American Tobacco (Tobacco Advertising II)* case C-222/01. On the cross-border nature of the activity which was the object of the regulation contested on grounds of subsidiarity as a favourable argument see Opinion of Advocate General POIARES MADURO, delivered on 1 October 2009, in case C-58/08, *Vodafone Ltd*, para. 34. On the case-law of the Court, see F. IPPOLITO, *Fondamento, attuazione e controllo del principio di sussidiarietà nel diritto della Comunità e dell'Unione europea*, Milano, 2007; S. MONTALDO, *Amici mai, odiarsi mai: il controllo sull'applicazione del principio di sussidiarietà alla lice della prassi della Commissione e della Corte di giustizia*, in *Federalismi*, 29 giugno 2016, pp. 10-17.

[9] R. SCHÜTZE, *Subsidiarity after Lisbon: reinforcing the safeguards of federalism?*, in *Cambridge Law Journal*, 2009.

[10] For the absence of a role of the principle of subsidiarity as a tool to contain Union competences and protect national powers in case an objective of transnational nature is pursued, G. DAVIES, *Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time*, pp. 74-75. See also *ibidem*, pp. 66, 68.

[11] D. WYATT, *Subsidiarity. Is it too vague to be effective as a legal principle?*, in K. NICOLAIDIS, S. WEATHERILL (eds.), *Whose Europe? National models and the Constitution of the European Union*, Oxford, 2003, p. 86. B. BERTRAND, *Un principe politique saisi par le droit. La justiciabilité du principe de subsidiarité en droit de l'Union européenne*, in *Revue trimestrielle du droit européen*, 2012, p. 329,

[12] I. COOPER, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, in *Journal of Common Market Studies*, 2006, pp. 281-304; S. MONTALDO, *Amici mai, odiarsi mai*, p. 17. The prominence of the preliminary political control entrusted to national Parliaments is to actually change the meaning of subsidiarity, particularly to turn it into an essentially procedural principle: M. DOUGAN, *Presentation. Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently"*, 2018, pp. 2-3 in https://ec.europa.eu/info/sites/default/files/dougan-notes-for-task-force-march-2018_en.pdf.

[13] S. MONTALDO, *Amici mai, odiarsi mai*, p. 24.

European added value, or the other way round.[14] This is the consequence of the automatism previously highlighted.

Instead, once the national level has been deemed insufficient to achieve the objective of a given Union measure, for instance because of its transnational nature, a separate scrutiny is needed on whether the measures that the Union would be taking can actually better attain their objective. The only possibility for such a scrutiny to be genuine, not a useless duplication of the former, is to concentrate on the content of the proposed Union measures. More precisely, the advantages and the disadvantages of the two levels should be weighed up: this is nothing but the so-called comparative test enshrined in subsidiarity.[15] Indeed, this methodology has no correspondence in the current practice of the Commission and the Court of Justice, the reason being that they have always favoured a formal approach on subsidiarity, as recalled above. If such a formal approach is understandable in terms of judicial review, it is much less so when taken by the political institution entrusted with implementation of the treaties and advancement of European integration. [16]

Indeed, as required in Article 5 of Protocol 2 on the application of the principles of subsidiarity and proportionality, each of the proposals encompassed in the Pact on Migration and Asylum includes an explanation of its compatibility with the principle of

[14] On the dual-step test (including the link between the two steps) see especially H. BRIBOSIA, *Subsidiarité et repartition des competences entre la Communauté et ses Etats membres*, in *Rev. Marché Unique eur.*, 1992, p. 165 ff.; P.A. PILLITU, *Sull'interpretazione del principio di sussidiarietà*, in *Jus*, 1994, p. 437; G. DE BURCA, *Reappraising Subsidiarity's Significance after Amsterdam, Harvard Jean Monnet Working Paper* 7/99; P. DE PASQUALE, *Il principio di sussidiarietà nella Comunità europea*, Napoli, 2000; A. ESTELLA, *The EU Principle of Subsidiarity*, Oxford, 2002; F. IPPOLITO, *Fondamento, attuazione e controllo del principio di sussidiarietà*, pp. 165-175. In striking contrast, in support of subsidiarity as requiring a single-step test, D. WYATT, *Could a "yellow card" for national parliaments strengthen judicial as well as political policing of subsidiarity?*, in *Croatian Yearbook of European Law and Policy*, 2006, pp. 5-7.

[15] Some authors advocate the need to investigate the efficiency of the Union level in terms of comparison between the potential achievements of Union measures and the national interests potentially sacrificed in exchange (see G. DAVIES, *Subsidiarity: the Wrong Idea*, p. 83). They attribute this assessment to proportionality rather than subsidiarity, particularly to a third element of proportionality, i.e. pure proportionality (N. EMILIOU, *The Principle of Proportionality in European Law: A Comparative Study*, Dordrecht, 1996, p. 139 ff.; J.H. JANS, *Proportionality revisited*, in *Legal Issues of Economic Integration*, 2000, p. 239; J. SNELL, *True Proportionality and Free Movement of Goods and Services*, in *European Business Law Review*, 2000, pp. 50-57; G. DAVIES, *Subsidiarity: the Wrong Idea*, p. 71; S. BARBOU DES PLACES, *Revisiting Proportionality in Internal Market Law: Looking a the Unnamed Actors in the CJEU's Reasoning*, in U. LINDERFALK, E. GILL-PEDRO (eds.), *Revisiting Proportionality in International ad European Law*, Leiden-Boston, 2021, p. 14; D. HARVEY, *Federal Proportionality Review in EU Law: Whose Rights Are They Anyway?*, *Ibidem*, pp. 29-52), or federal proportionality (R. SCHÜTZE, *Subsidiarity after Lisbon*, p. 532). For the sake of brevity, we leave it to a future different essay to elaborate on differences with those concepts. Suffice it to point out that our approach on subsidiarity is very close to the substantive meaning of an economic nature, i.e., regulatory efficiency, described as one of the three distinct understandings of subsidiarity in M. DOUGAN, *Presentation*, p. 2. On the belonging of "regulatory efficiency" to subsidiarity rather than proportionality (and conferral) see V. DELHOMME, *How to turn subsidiarity into an effective tool? – Reflections on the Communication of the European Commission on the principles of subsidiarity and proportionality*, in *European Law Blog*, 19 March 2019.

[16] This approach is upheld also in legal literature: T. KONSTADINIDES, *Subsidiarity and the monitoring of the jurisdictional limits of the Community legislative process*, in T. KONSTADINIDES (ed.), *Division of powers in EU law. The delimitation of internal competences between the EU and the Member States*, Alphen aan den Rijn, 2009, pp. 118 and 123.

subsidiarity. They typically insist on the cross-border nature of their objectives as the reason to require Union action. This is the argument almost identically developed with regard to the "Asylum Management" and the "Crisis and *Force Majeure*" proposed regulations. The objective of the former is to ensure "the correct application of (…) [the] rules [set out in Regulation (EU) No 604/2013], which will limit unauthorised movements of third-country nationals between Member States."[17] The objective of the "Crisis and *Force Majeure*" proposal is to provide special rules capable of accomplishing a fair sharing of responsibility among the Member States in cases of extraordinary influxes of immigrants.[18] In the "Screening" proposal, the need for measures taken at the Union level is due to the objective to strengthen controls on the external border, which is in the interest of all Member States.[19] The "Amended common procedure", in combination with the "Screening" proposal, is aimed at creating "a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return."[20]

In all cases, the Commission deems the subsidiarity assessment is fulfilled by simply underlining the undeniable cross-border nature of the objectives the new measures are aimed at. In none of those proposals is the content of the proposed measures discussed through the prism of subsidiarity. Once it is demonstrated that an action at Union level is necessary to achieve the objectives set out in each of them, the subsidiarity test is automatically passed, no matter *what* action is being proposed. No attention whatsoever is attached to the actual ability of the proposed measures to attain the said objective(s), as compared to actions that the Member States have already taken or could be taking shortly.

By contrast, in accordance with the described non-purely formal approach on subsidiarity, our aim is to understand whether and to what extent the proposed measures are capable of achieving the Union objectives in this policy field. We still want to answer the question as to *whether* the Union should take action, which is the genuine subsidiarity question, rather than the question as to *how* such action should be shaped, which is what proportionality is about.[21] Yet the "if" question becomes partial and short-sighted if it is answered only on formal grounds. This leads straight to the minimization of the role of subsidiarity in designing the sharing of the competences between the Union and the Member States. In complex matters, especially if harmonisation is not at issue but the objective to be achieved is still transnational in nature, a mature and fully-fledged appraisal of subsidiarity cannot but extend to the content of the impending Union

[17] Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], p. 9.
[18] Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, Brussels, 23.9.2020, COM(2020) 613 final, p. 7.
[19] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders, p. 8.
[20] Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union, p. 6.
[21] R. SCHÜTZE, *Subsidiarity after Lisbon*, p. 532.

measures.[22] It would still be answering the question as to *whether* the Union should take action, thereby restricting national autonomy, yet with regard to a *specific* Union action.[23]

2.2. The principle of subsidiarity as the European added value of a measure

In this section, we will look more thoroughly at the most recent interpretation of the principle of subsidiarity in the actual practices of the European policy enacted by the Commission, which is the institution which promotes the general interests of the Union, according to the mandate stated in Article 17 of the TEU. As anticipated in the introduction, this recent interpretation marks a firm step forward in the direction of re-thinking the principle of subsidiarity and turns it into a valuable tool in the law-making process. The Commission is recognized at global level as a leading body in setting standards of good governance and better regulation, and this path was already established by the Prodi Commission.[24]

As mentioned in Section 2.1, contrary to expectations, the enhancement of political control upon subsidiarity accomplished in the Lisbon Treaty did not bring any substantial change to its role. With the exception of the so-called "Monti II Regulation",[25] the Early Warning Mechanism failed to improve identification of the balance between the Union and the national level of action.[26] In the last two years, the procedure provided for by Protocol II has even seemed to be "dormant."[27] Certainly this is also an expression of many different understandings of subsidiarity, together with external factors related to the functioning of the Early Warning Mechanism.

---

[22] Interestingly, F. IPPOLITO, *Fondamento, attuazione e controllo del principio di sussidiarietà*, p. 173, underlines that not only does subsidiarity require a comparison between the national and the European level, but that comparison should clarify the breadth of the Union's action.

[23] The present essay focuses on the Union's level of action. Therefore, we will not be considering other aspects of subsidiarity assessment which pertains to the national level of action, such as whether parallel or satellite agreements amongst some Member States may make the national level more suitable than the Union level. In the asylum policy, this point is particularly interesting since a few Member States did put in place a parallel solidarity tool in September 2019, known as the La Valletta Declaration. Against the inclusion of coordinated action in the appraisal of the national level of action as long as coordination is not carried out in the Union's institutional and legal framework, see F. IPPOLITO, *Fondamento, attuazione e controllo del principio di sussidiarietà*, pp. 168-172. Yet the author's argument was presented ahead of the developments on "external differentiated integration" that have occurred in recent years.

[24] A. SCHOUT, S. SCHWIETER, *Two decades of Better Regulation in the EU Commission – Towards evidence-based policymaking?*, The Hague: Clingendael Policy Brief, December 2018.

[25] See I. COOPER, *National parliaments in the democratic politics of the EU: the subsidiarity early warning mechanism, 2009-2017*, in *Comparative European Politics*, 2019, pp. 919-939; D. FROMAGE, V. KREILINGER, *National parliaments' third yellow card and the struggle over the revision of the Posted Workers Directive,* in *Journal of European Legal Studies*, 2017, pp. 126-160.

[26] P. KIIVER, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, Routledge, 2012; F. FABBRINI, K. GRANAT, "*Yellow Card, But No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, 2013, p. 115 ss; M. CARTABIA ET AL. (eds.), *Democracy and Subsidiarity in the EU*, Bologna, 2013.

[27] T. JAROSZYŃSKI, *National Parliaments' Scrutiny of the Principle of Subsidiarity: Reasoned Opinions 2014–2019*, in *European Constitutional Law Review*, 2020.

After an initial period in which some "yellow cards" were activated, but without the procedure unfolding its potential in a systemic way, we identify the contribution of the Juncker Commission to "better regulation" as a substantive step forward in the carving out of an active definition of subsidiarity, developing the idea of the European added value of a proposal as a substantive component of the principle of subsidiarity.[28] It is precisely this interpretation of subsidiarity as requiring substantive assessment, and thereby compelling a given proposal for legislation by the Union to carry a European added value, which will be crucial to frame a new contribution to the debate on the Pact in an original way. In particular, the European added value test of a proposed measure is a crucial aspect of the assessment of compliance and implementation of the subsidiarity principle because it is a test of the effectiveness of a European measure.

In this regard, the 2016 inter-institutional agreement[29] provides a new impetus to the paradigm of European added value (EAV), in particular requiring the use of the same methodologies for impact assessments, both for the Commission and the European Parliament.[30] Later on, in 2017, the Commission published further guidelines on better regulation which developed the subsidiarity principle as articulated in a double test: the first, aimed at examining whether the objective of the measure cannot be achieved at the level of Member States (negative dimension); the second, aimed at examining why European intervention, by virtue of its size or effects, would produce benefits, compared to intervention at the State level (positive dimension).[31]

Furthermore, specifying its interpretation of subsidiarity (Article 5, par. 3, TEU), the Commission has identified some guiding questions for these assessments. In particular, the cost-benefit question seems particularly relevant for an evaluation of the measures of the Pact: "does national intervention or the absence of a European initiative conflict with the treaties or can it significantly harm the interests of some Member States?"[32] Besides a clear economic rationale, an expression of a paradigm of regulatory efficiency, this question can have a more substantive interpretation: it could be interpreted as a cost-benefit analysis in relation to the achievement of public goods. This approach, acknowledging the political nature of this question, is in harmony with the assessment that the Commission should carry out in explaining its subsidiarity scrutiny.

This question could be used precisely for a wide-ranging reflection on the Pact and its proposals, which takes into consideration the quantity and quality of the national

[28] Cf. "Better Regulation Toolbox", 2015, available on the website of the European Commission. For earlier reflection, see European Parliament, Reflection paper on the concept of European Added Value, Strasbourg, 2010, which defined European added value as the little sister of the principle of subsidiarity. For an overview on the European added value, see A. SCHOUT, D. BEVACQUA, *EU Added Value – Fact-based policy or politicised facts?*, The Hague: Clingendael Policy Brief, December 2018.

[29] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, JO L 123 du 12.5.2016, p. 1-14.

[30] It is worth remembering that both the European Parliament that the Commission have created the *added value unit* and other internal structures to contribute in a structural manner to implementation of this principle.

[31] This is precisely the consolidation of the traditional structure of the subsidiarity scrutiny.

[32] "Better Regulation Toolbox of 2017", available on the official webpage of the Commission.

contribution necessary in terms of the proper functioning of European policies, without forgetting that European States are not exposed to the phenomenon of migration in an equal manner. Secondly, this question should also be given a strong contextual dimension: what should the European added value of a given initiative be, after several decades of practice with the legislation in force have demonstrated the shortcoming of the current instruments, also in relation to the 'refugee crisis'? Therefore, European integration requires policies aiming at re-balancing the geographical peculiarities, and hence correcting the divergences which are implied in geography and geo-politics: these policies must be inspired by the principle of loyal cooperation, as a general principle, and by solidarity and fair sharing of responsibilities; in the next section, we will elaborate on the nature of the principle of solidarity in EU asylum law, in relation to the core features of integration in this domain.

2.3. The principle of solidarity in EU asylum law

In the context of migration and asylum, integration has been initiated as inter-governmental cooperation (before and) with the Treaty of Maastricht. The same could be said for the policy on border management, which has been originated also thanks to a spillover process on the free movement of individuals, one of the pillars of the internal market.

This inter-governmental DNA is visible in the main legislation of those policies: for example, the Schengen Borders Code rests upon this inter-state cooperation logic, in the sense that every Member State is carrying out border controls also on behalf and to the benefit of the other Member States, or, as the Court of Justice has explained, to the benefit of the whole Union.[33] So, with the EU policy on external borders there is an element of delegation between Member States; secondly, there is the acceptance, by a given Member State A, of a function to be performed and, therefore, of a burden to be borne, also to the benefit of the whole Union, especially meaning the association of all the other Member States minus Member State A. The same applies to EU asylum law.

In a totally different perspective, geography and geo-politics cause EU States not to be affected by migration fluxes in the same manner. Furthermore, thanks to the progresses made with integration with the EU common visa policy, migration patterns, including irregular migration, have changed. Without the common EU visa policy, some migrants

[33] The reference is to Recital 6 of the Schengen Borders Code, which states the following: "Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations."
See also: Court of Justice, Grand Chamber, judgment of 26 July 2017, *Jafari*, C-646/16, para. 85: "Recital 25 of the Dublin III Regulation thus refers, inter alia, to the direct link between the responsibility criteria established in a spirit of solidarity and common efforts towards the management of external borders, which are undertaken, as stated in recital 6 of the Schengen Borders Code, *in the interest not only of the Member State at whose external borders the border control is carried out but also of all Member States which have abolished internal border control*."

would manage to reach Hamburg or Amsterdam by plane and perhaps with a false visa. In other words, irregular migration to the EU has also intensified because of the limited options for regular migration, and because of the effectiveness of the EU visa policy, which involves private actors (e.g., air companies).

This inter-governmental matrix was at the origin of the Dublin Regulation, which was grafted on the legacy of the Dublin Convention of 1990 and, in spite of successive reforms, has never been radically abandoned in favour of a more "balanced" and distributive approach, nor of a supra-national one, based on delegation to a supranational body.[34] The intergovernmental matrix of the Dublin regulation has been implicitly acknowledged by the Court of Justice, which refused to uphold the argument that the Dublin regulation bestows rights upon protection-seekers.[35] In 2015 Steve Peers wrote about the Dublin system that "a radical reform of the Dublin rules was never seriously considered."[36] Its main pillar is still the first entry criterion, which places on frontline States the burden of managing the controls on external borders and its consequences, which is the arrival of irregular migrants in mixed flows; as we know, in mixed flows we also find protection-seekers, and granting asylum is a fundamental right enshrined in the Charter and codified in international instruments.

If this is the way the first decades of integration have developed, and the first milestones in legislation have been set, it is nevertheless important to refer to the treaty framework in order to find the key to the solutions of the current challenges.

In this context, among the core Treaty provisions governing migration and asylum policies, we have the principle of solidarity and fair sharing of responsibilities between Member States (Article 80 TFEU). Furthermore, Article 78, para. 3 TFEU regulates what usually admits exceptions to the law: emergency situations. The Treaty indeed provides 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, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament." In other words, in the treaty framework, we have at least two specific provisions, additional to the general principle of EU law, including loyal cooperation, that govern asylum and border policies. On the one side, we have the indication that solidarity *and* fair sharing of responsibilities should govern the policies, though it is not engraved in stone how solidarity materializes, and neither is the fair sharing of responsibilities;[37] on the other

[34] See M. MOUZOURAKIS, *"We Need to Talk about Dublin": Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union*, in *Refugee Studies Centre, Oxford Department of International Development, University of Oxford*, December 2014.
[35] Court of Justice, Grand Chamber, judgment of 10 December 2013, Case C-394/12, *Abdullahi* (see E. CANNIZZARO, *Interessi statali e diritti individuali nella politica dell'Unione relativa a visti, asilo e immigrazione*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, Turin, 2014, pp. 236-238.
[36] Quote from S. PEERS, *The Dublin III Regulation*, in S. PEERS, V. MORENO LAX, M. GARLICK, E. GUILD (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Leiden-Boston, 2015, p. 347.
[37] On the complexities of defining a content for solidarity see the essays of A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar, 2018. Specifically on

side, we know that the Treaty indicates that in emergency situations a State can be relieved and supported in its tasks by the other States.

This premise has the aim to illustrate that the rules governing migration and borders, by not establishing a centralized supranational system reorganizing the national ones, have had the effect of consolidating structural unbalances which pre-existed integration: in other words, geography, and geopolitical factors, to a great extent outside the influence of the EU or of the Member States, cause migration not to affect and concern the States in an equal manner. The consolidation of the EU *acquis* on connected policies (e.g., border checks, visa) has also played its role, by exacerbating an unbalance already existing. It should be recalled that, for some States, migration has become a concern after accession: in Malta irregular migration became an issue mainly after joining the EU;[38] more in general, it became more attractive to migrants after accession.[39]

It is precisely in this context that solidarity plays and should play a role. However, because of the structural features of integration in this precise policy domain, there is a strong normative component in this function of the principle of solidarity. Solidarity is enshrined in the treaties as a core principle, not simply for European integration, and, as explained above, in particular for asylum and migration policies.

As recalled above, Article 80 TFEU states that the policies of asylum and migration are "governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

In the last few years, the principle of solidarity has been playing a role in relation with two factors: the first one is the crisis of the Dublin system, which, as recalled by Peers, has not been substantially affected since its early days, irrespective of known problems; the second one is the changes in migration fluxes after 2015, in particular with the so-called "migration crisis." Actually, this external factor has originated a migration "governance crisis" or "reception crisis."[40] Both elements insist on one core problem: the lack of a functional asylum system within the EU, which is a long-standing issue, recognized as such also by the European Commission.[41]

---

solidarity in asylum law, see E. KARAGEORGIOU, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, Lund, 2018.

[38] L. LEMAIRE, *Islands and a Carceral Environment: Maltese Policy in Terms of Irregular Migration*, in *Journal of Immigrant & Refugee Studies*, 2014, issue 2, pp. 143-160. See also C. MAINWARING, *Small States and Nonmaterial Power: Creating Crises and Shaping Migration Policies in Malta, Cyprus, and the European Union*, in *Journal of Immigrant & Refugee Studies*, 2014, issue 2, pp. 103-122.

[39] AARON GEORGE GRECH, *Did Malta's Accession to the EU Raise its Potential Growth? A Focus on the Foreign Workforce*, in *Journal of Economic Integration*, Vol. 32, No. 4 (December 2017), pp. 873-890.

[40] D. THYM, *The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy*, in *Common Market Law Review*, 2016; M. DEN HEIJER, J. RIJPMA, T. SPIJKERBOER, *Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, p. 607; G. CAMPESI, *Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Border*, in *Refugee Survey Quarterly*, 2018, pp. 44-70.

[41] As reported in the Commission's documents discussed in S. FRATZKE, *Not Adding Up: The Fading Promise of Europe's Dublin System*, Brussels: Migration Policy Institute, 2015. See also M. MOUZOURAKIS,

Actually, it is here suggested that something similar has happened in the context of the economic and monetary union, *mutatis mutandis*, for different reasons. In that context too, integration has suffered from structural unbalances.[42] As in the context of asylum, in the EMU too when a crisis situation has emerged, solidarity has been invoked as the value to mitigate the effects or consequences of incomplete integration or structural unbalances.[43] It is therefore important to reflect upon the meaning of solidarity in the context of asylum and migration, in the perspective of the governance of the EU: solidarity is transnational and systemic, and is built upon a strong inter-state component, but goes beyond it. It is transnational because it goes beyond the inter-state dimension and reaches out to other States' communities as well; it is systemic in the sense that it concerns persons, third-country nationals first, and citizens of the Member States, and States and sub-national communities and governance institutions.[44]

It is therefore important to understand that, against those premises concerning the foundations and the core rules governing the functioning of the European rules, solidarity in migration, asylum and border policies has a strong component of corrective justice.[45] In particular, it has performed and must perform the function of correcting disequilibria and disparities created by the rules posited within the framework of the Union: it is precisely those rules which have created forms of interdependence between States and have definitively moved the equilibriums existing before integration in those domains. The current *status quo* has, in its foundational elements, created disequilibria that must be addressed with strong measures of solidarity inspired by corrective justice mechanisms. Leaving aside the discussion on whether solidarity within the EU can or should have a redistributive component, we should at least accept solidarity as a corrective instrument for the unbalances created by integration.[46] Of course, financial solidarity is an expression of it, but it is to be observed that it does not cover all the scope of the impact of migration and asylum on a State, and therefore cannot be deemed an

"We Need to Talk about Dublin". See also H. VAN OORT, H. BATTJES, E. BROUWER, *Baseline study on access to protection, reception and distribution of asylum seekers and the determination of asylum claims in the EU*, CEASEVAL Research on the Common European Asylum System, 2018(01). Available at: http/ceaseval.eu/publications.

[42] E.O. ERIKSEN, *Solidarity and the Future of Europe*, *EuVisions*, 8 May 2018.

[43] For example, among politicians see: E. MACRON, *Discours du Président de la République, Emmanuel Macron, à la Pnyx, Athènes le jeudi 7 septembre 2017*; solidarity also features centrally in the speeches of the former President of the Commission J.-C. Juncker on the State of the Union 2017 and 2018: solidarity is invoked both as solidarity from the EU to states, and thus as vertical solidarity, but also as horizontal solidarity, between states.

[44] See also V. MORENO LAX, *Solidarity's Reach: Meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 744; S. MORANO-FOADI, *Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures*, in *European Journal of Migration and Law*, 2017, pp. 223-254; E. TSOURDI, *Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System*, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 667-686.

[45] P. ELEFTHERIADIS, *Solidarity in the Eurozone*, *Bank of Greece Working Paper*, no. 256/ 2019. See also P. ELEFTHERIADIS, *A Union of Peoples: Europe as a Community of Principle*, Oxford, 2020; P. ELEFTHERIADIS, *Corrective Justice Among States*, in *Jus Cogens*, 2020, pp. 7-27.

[46] *Ibidem*, and A. SANGIOVANNI, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, pp. 1-29.

expression of corrective solidarity, since it does not succeed in correcting the unbalances created by the combined effect of migration and integration.

2.4. Connecting the dots between subsidiarity and solidarity in EU asylum law

Though in Article 80 TFEU solidarity is clearly a benchmark for the EU legislator, to date it has failed to set powerful standards, if any.[47] The same applies to the Court of Justice, which has never had the occasion to review the legality of a piece of legislation of the Union on the ground of solidarity. When requested to provide an interpretation of the Dublin III Regulation, the Court has constantly missed the opportunity to use solidarity as an interpretative tool, including to fill gaps.

The weakness of Article 80 TFEU is due to the ambiguity of the concept as implemented in the secondary legislation, with the full endorsement of the Court of Justice. With regard to the Common European Asylum System as a whole, the Court of Justice apparently followed in the political institutions' footsteps by interpreting solidarity as burden-sharing and due diligence in complying with the related obligations,[48] whereas solidarity and burden-sharing may well be different if not conflicting concepts, for the simple reason that the criterion whereby a burden is shared may not be solidarity. As shown above, under a teleological and systematic method of interpretation, solidarity is meant at *lightening* the burden of those States which, for reasons independent of their action and intention, are naturally placed in such a position as to bear most of it.[49] Interestingly, this is the sole meaning of solidarity acknowledged in the proposals for reform put forward by the Commission in 2016 and in 2020 respectively.[50]

On other occasions, the term "solidarity" has been taken to mean corrective solidarity: it is the case of the preamble of the two September 2015 Decisions, which are commonly seen as quintessential solidarity,[51] and the proposed solidarity contributions in

[47] G. MORGESE, *La solidarietà tra Stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018, p. 51.
[48] Court of Justice, Grand Chamber, *Jafari*, par. 88. "Burden-sharing solidarity" is the kind referred to in the preamble of the Dublin III Regulation in connection with the responsibility criteria laid down thereafter: Regulation 604/2013, recital 25.
[49] G. MORGESE, *La solidarietà tra Stati membri*, pp. 52-53. Within the asylum and immigration policy, solidarity is believed to take the further different shape of mutual assistance in Article 78, para. 3 TFEU: G. MORGESE, *La solidarietà tra Stati membri*, pp. 54-55. Here we limit ourselves to the broad distinction between corrective solidarity, which includes mutual assistance, and mere burden-sharing.
[50] Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, of 6 April 2016, COM(2016) 197 final, pp. 3-4; 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, esp. p. 5.
[51] Council Decision 2015/152/EU, "Establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", of 14 September 2015, in *OJ L239*, 15 September 2015, p. 146, recital 3; Council Decision 2015/1601/EU, "Establishing provisional measures in the area of international protection for the benefit of Italy and Greece", of 22 September 2015, in *OJ L248*, 24 September 2015, p. 80, recital 3. See the acknowledgement in Court of Justice, Grand Chamber, judgment of 6 September 2017,

the New Pact. In the Dublin III Regulation, corrective solidarity can be identified in the process of the early warning mechanism laid down in Article 33 and in the measures that could be deemed appropriate in that framework.[52] To put it in a nutshell, with the endorsement of the Court of Justice, under the umbrella of "solidarity" the EU secondary legislation generally accomplishes burden-sharing and only occasionally makes an effort to strike a balance amongst the Member States by providing some support to those in receipt of a disproportionate number of applications for international protection. Only this second interpretation can be considered an expression of corrective solidarity.

This ambiguity has been decisive in making Article 80 TFEU entirely unfit for (partially) fixing the much-discussed flaws and gaps in the current legislation. Those flaws and gaps are disrupting enforcement of the right to seek asylum laid down in the Geneva Convention on the rights of refugees, for the respect of human rights as the core values of the European integration and not least for the good functioning of the Dublin as well as the Schengen rules. In other words, since 2015 the prevailing interpretation of solidarity has undermined the achievement of the objectives of the policies set out in Chapter 2 of Title V TFEU.

Since it requires Union action to be preferred to national action only insofar as it constitutes an added value, the principle of subsidiarity is a tremendous incentive to safely switch to a concept of corrective solidarity, as described in Section 2.3, throughout the whole asylum policy. Solidarity as "duty to do one's homework" in accomplishing the sharing of the burden laid down in secondary law is nothing but a duplication of the general duty of loyal cooperation[53] which makes Article 80 TFEU entirely superfluous. Solidarity as burden-sharing admittedly enshrines an added value of EU law, since the Member States could hardly achieve that on their own. However, this is true mainly in terms of building a rule of law-inspired community, namely one where the States entrusted with processing asylum applications and granting international protection are clearly identified, so that no protection-seeker is left "in orbit" and asylum-shopping is neutralized. The objectives of the New Pact on Migration and Asylum, particularly those of the "Asylum Management", "Crisis and *Force Majeure*" and screening and border procedure proposals are far more ambitious. The nature and size of contemporary influxes of protection-seekers create such imbalances amongst the Member States that, as a matter of fact, those down-sized concepts of solidarity are entirely unfit for those objectives. In the contemporary scenario, they actually jeopardize the very objectives of the common asylum policy as stated in Article 78 TFEU. Indeed, keeping the Member States placed at the external border of the Union under pressure inherently hinders the efficiency of the local asylum procedures and consequently actual respect for the right to asylum enshrined in the Geneva Convention on the rights of refugees. The pressure on the external border famously spills over the internal borders, thereby adversely affecting the good functioning

S*lovak Republic and Hungary v Council of the European Union*, joined cases C 643/15 and C 647/15, paras 251-253.

[52] Regulation 604/2013, Article 33, para. 4 and recital 22.

[53] G. MORGESE, *La solidarietà tra gli Stati membri*, p. 52.

of the applicable Schengen rules and also jeopardizing the objective of the border control policy to guarantee the absence of any control on persons, regardless of their nationality, at the internal borders. Instead, in the current migratory situation, an interpretation of solidarity in line with the common literal meaning of providing support to the Member States naturally in need is necessary to achieve the objectives set out in Articles 77 and 78. Otherwise, no new EU legislation is justified. Against this background, we will now review some key parts of the proposed New Pact, to find out whether they actually accomplish the announced solidarity, which is the condition for them to be able to pursue their stated objectives and consequently the objectives of the border checks and the asylum policy.

3. The new proposals of the Commission betwixt subsidiarity and solidarity: hunting for the European added value

The aim of this section is to test out the ideas developed above, in particular by discussing some of the most relevant measures of the Pact through the prism of European added value: some questions will guide our investigation in order to explore whether the measures proposed manage to achieve the objective stated. Therefore, we will not engage here in a detailed assessment of all those measures. Instead, our analysis will therefore test if the measures proposed reach the target of enforcing solidarity at least between Member States, by adequately fulfilling the rationale of corrective justice it embeds.[54] This corrective dimension is not a detail; instead, it is necessary to fulfil the meaning of the subsidiarity principle which, otherwise, becomes an empty box and a formal accomplishment for the Commission. If that were the case, then we should be aware of the risk that the EU is running, which is that of stressing the distance between the Union and its citizens, since it will be perceived as ineffective in its action, eventually undermining the overall legitimacy of European integration.

Two measures of the new Pact aim at stressing the containment function of the European external borders: these are the proposal for a pre-entry screening and the "amended border procedures";[55] the latter initiative interacts with the 2016 proposal for a regulation on asylum procedures, which is not withdrawn.[56] As known, some external borders are more under pressure than others because migration fluxes mainly originate from the Global South and the Middle East. If the containment function is carried out by

[54] P. ELEFTHERIADIS, *Solidarity in the Eurozone*, and P. ELEFTHERIADIS, *Corrective Justice Among States*, p. 7 ff.
[55] Respectively, European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM (2020) 612 final, 23.9.2020, and European Commission, Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM (2020) 611 final, 23.9.2020.
[56] Amended Proposal Procedure Regulation, COM (2020) 611 final.

States, this means that some State administrations (frontline States) are loaded with additional administrative, organizational, and logistic tasks, precisely for the aim of containing migration. However, as is well known, the containment function of borders presupposes, on the one side, very efficient administrative organizations in border management, asylum and returns; on the other side, it necessarily presupposes the cooperation of several Third Countries in accepting back migrants who departed from those States, but perhaps have the citizenship of a different one.[57] It is therefore important to assess to what extent the measures proposed by the Pact achieve at EU level what the Member States cannot achieve *uti singuli*, on their own, in order to see whether the EU intervention is justified in light of subsidiarity, because it brings an added value. This assessment will be done in particular by elaborating on the institutional and administrative dynamics these measures create or presuppose.

3.1. Pre-entry screening

We were explaining that both measures (pre-entry screening and border procedures) target migrants crossing borders without authorization, including persons who are disembarked following a SAR operation, and migrants applying for international protection at the external border crossing points or in transit zones. The screening procedures will expand the existing informal debriefing moment,[58] and should help accelerate the process of determining the status of a person; more importantly, the screening should define the procedure to be applied to that person after the screening phase,[59] and should point out any element of the case that could lead to the accelerated asylum procedure or to a border procedure.[60]

The proposal is based on a presumption of non-entry and it does not specify if migrants are detained (in the territory of Member States) during screening. As one of the purposes of screening is to avoid absconding and screening must take place in locations situated at or in the proximity of borders,[61] then it must be presumed that persons should not be able to move freely in the territory of the State. In a recent ruling, the Court of Justice deemed that reception of migrants in closed transit zones was to be qualified as detention.[62]

---

[57] J.-P. CASSARINO, L. MARIN, *The New Pact on Migration and Asylum: Turning European Union Territory into a non-Territory*, in *EuLawAnalysis*, 30.11.2020, eulawanalysis.blogspot.com/2020/11/the-new-pact-on-migration-and-asylum.html.

[58] See L. JAKULEVIČIENĖ, *Re-decoration of existing practices? Proposed screening procedures at the EU external borders*, blogpost, 27.10.2020.

[59] Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, of 23 September 2020, p. 4.

[60] It is known that border procedures report success rates which are significantly lower than ordinary procedures. See ECRE, *Border procedures: Not a Panacea*, Policy Note 21/2019, www.ecre.org/wp-content/uploads/2019/07/Policy-Note-21.pdf.

[61] Proposal Screening Regulation, COM (2020) 612 final, Recital 8.

[62] CJUE, judgment of 14 May 2020, *F.M.S. et al.*, joined cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367.

So, one first consequence of the new screening procedure is that it requires State administrations to keep migrants at their borders, and to arrange reception facilities for them for screening and border procedures. The EU proposal requires the States most hit by irregular migration, also after a SAR operation, to keep migrants in border zones without indicating clearly if this must be detention or not.

The proposal indicates, however, that screening should take place in 5 days, which can exceptionally become 10 in exceptional circumstances, or 3 days, if the screening takes place within the territory. This is a very short time framework, which must be respected by State administrations of frontline States, i.e., the States most hit by migration fluxes. Therefore, what we are looking at here is a situation jeopardizing the dignity and rights of migrants, on at least two accounts: first, by equating implicitly all migrants who have crossed the border in an irregular manner, including protection-seekers; second, by requesting States to keep all these persons, who probably have different needs, in locations at or close to the borders.

In this context, it is doubtful that we can find an added value in this measure, precisely because it creates additional administrative, organizational, and logistic efforts for States, which must keep migrants at the external borders or, if not possible, in a close-by area.[63] In another perspective, screening is very probably going to pose new challenges for the dignity and human rights of the migrants. At the same time, it is not clear how this measure is bringing an added value to the *status quo*, and especially, how it is going to support the tasks of frontlines States, which are already burdened with the first reception of migrants and protection-seekers.

Some aspects are worrisome: the first one is the choice of the European legislator not to specify the formal nature of the detention of migrants, thus leaving the Member States with discretion on how to achieve the goal, but also with the responsibility of respecting the fundamental rights of migrants without a clear unified approach set by the European legislator.[64] The second aspect is that of guarantees for migrants. Screening should be terminated if the checks are not completed within the deadlines:[65] if States respect this provision, then the remaining question will be to what procedure they will be submitted.

Indeed, though it is not presented as a formal administrative procedure, and it ends in a debriefing form, screening is not as neutral as it could look. The screening might indeed end up with a non-entry decision,[66] which is therefore adopted without adequate

[63] Article 4 of the Proposal Screening Regulation does not allow migrants or protection-seekers to enter the territory of the Member State. In Proposal Screening Regulation, COM (2020) 612 final.

[64] This issue has relevance in relation with the Charter of Fundamental Rights, Article 51, para. 1, as interpreted by the Court of Justice in the *Akergberg Fransson* case. On the external dimension of the migration control, see M. DEN HEIJER, *Europe and Extraterritorial Asylum*, Hart, 2012; J. RIJPMA, *External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory,* in *European Papers*, 2017, pp. 571-596; on the extraterritorial application of the Charter, see E. CANNIZZARO, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels*, in *European Journal of International Law*, 2014, no. 4, pp. 1093-1099, at p. 1095.

[65] See Article 14(7) of the Screening Proposal.

[66] Article 14(1) of the Screening Proposal; confirmed by recital 40 of the 2020 Amended Proposal Procedure Regulation.

guarantees for the migrant, in terms of communication and legal assistance. Secondly, another aim of the screening is to point out any element which might suggest referring the protection-seeker to an accelerated examination procedure, or to the border procedure: screening has the purpose to channel protection-seekers toward procedures which are less complete in terms of procedural guarantees. In another perspective, it does not relieve most affected Member States of their tasks; instead, it burdens them with additional administrative responsibilities which have organizational consequences,[67] not to mention the impact on the protection-seekers concerned.

Overall, it seems possible to conclude that several elements make us doubt the added value of the screening procedures in light of the subsidiarity principle. The most affected States are additionally burdened by screening, and migrants should be kept in locations at the borders or areas nearby. In another perspective, the fundamental rights of migrants appear under jeopardy, and this will have consequences in terms of effective enforcement;[68] at the end of the day, it is precisely the Member States that are left with the duty of assuring efficient administrative procedures while respecting the fundamental rights of migrants.

3.2. Border procedures as designed in the Pact

Though already present in the Procedures Directive of 2013,[69] border procedures are developed in the Pact into a "border procedure for asylum and return", and a more developed accelerated procedure, which, next to the ordinary asylum procedure, comes after the screening phase. The Commission aims to merge asylum with the return procedure while keeping migrants at the external borders. This proposal too, which amends the 2016 proposal for a Procedures Regulation, is meant to strengthen the containment function of borders.

The scope of this measure is significantly broadened, since the border procedure is mandatory for protection-seekers who arrive irregularly at the external borders and if (a) they represent a risk to national security or public order; or (b) the applicant has provided false information or documents or withheld relevant information or documents;[70] or (c) the applicant comes from a Third Country for which the share of positive decision in the total number of asylum decisions is below 20 percent.[71] At first sight, we can observe that States have a great amount of discretion by deciding how the conditions governing the scope of the border procedures are met.

---

[67] For example, in Italy it is recurrent practice to hold the debriefing in the hotspot and then transfer the protection-seeker to the reception centres. See the investigation conducted by ASGI at inlimine.asgi.it/appositi-locali-per-il-trattenimento-dei-richiedenti-asilo-in-hotspot/.

[68] G. CAMPESI, *The EU Pact on Migration and Asylum*.

[69] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, JO L 180 of 29.6.2013, p. 60-95.

[70] About this criterion, it is possible to doubt the real capacity of migrants to understand the implications of their actions, in terms of providing information or regarding the documents they travel with.

[71] According to Article 41(3) of the Amended Proposal Procedure Regulation.

In this case too, the strengthening of the containment function of the borders is achieved because protection-seekers are not granted access to the EU. Precisely as in the context of the screening procedures, not granting access to the EU requires States to create and organize the facilities necessary for containment of protection-seekers at the external borders for prolonged periods. Again, it must be a location at or close to the external border, where migrants are apprehended or disembarked.

Besides containment, all the other functions of the asylum policy are compressed or sacrificed. For example, the Commission frames as a guarantee all situations in which the border procedure shall not be applied,[72] on medical grounds, or if the "conditions for detention (…) cannot be met and the border procedure cannot be applied without detention."[73]

An important means for the effectiveness of the measure lies in the seamless link between asylum and return, in the sense that when an application is rejected in an asylum border procedure, the return procedure applies immediately. The right to effective remedy is limited but assured to one instance, as stated in Article 53(9). The right to remain, pending a challenge against a negative decision, is also narrowly constructed, in the case of border procedures, to include only a first remedy against the negative decision (Article 54(3) read together with Article 54(4) and 54(5)). Furthermore, EU law allows Member States to limit the right to remain in case of subsequent applications and provides that there is no right to remain in the case of subsequent appeals (Article 54(6) and (7)).

More in general, this proposal extends the circumstances where the applicant does not have an automatic right to remain: this represents an aspect which affects significantly and in a factual manner the capacity to challenge a negative decision in a border procedure.

All in all, it is precisely in the practice of enforcement that the instruments of the asylum system show their weakness, in the sense that often States do not succeed in enforcing the standards set by EU law. In practice, rights can be enforced only if legal assistance is provided, and NGOs and civil society can have access to detention facilities, and this is often scarcely or poorly enforced by Member States.

To conclude, with pre-entry screening and the reformed border procedures, the EU is asking the Member States most concerned by migration fluxes to consolidate the containment function of the external borders. Whether this is going to be successful or not will not only be a merit of those Member States, since effective and smooth returns presuppose the cooperation of Third Countries. However, there is enough evidence and experience showing that Third Countries have their own migration and economic policies, and these cannot be successfully influenced only by the incentives offered by the EU.[74] A second aspect which must be stressed is that this strengthening of the containment function of borders will entail situations of prolonged detention or reception of migrants

[72] Amended Proposal Procedure Regulation, pp. 14-15.
[73] Amended Proposal Procedure Regulation, p. 15.
[74] J.-P. CASSARINO, *Readmission, visa policy and the 'return sponsorship' puzzle in the new Pact on migration and asylum*, in *ADIM Blog*, November 2020.

and protection-seekers in border areas.[75] Next to the additional administrative and organizational efforts demanded of frontline Member States, who are usually the most hit by the migration phenomenon, these new measures require efficient administrative systems in border management, asylum and return, in order to meet the challenges of the procedural complexities and also the necessary respect for the fundamental rights of migrants and protection-seekers. However, this aspect raises several concerns that have been stressed above. It is therefore to be regretted that measures proposed by the Commission will burden frontline States even more, and will (probably) jeopardize the rights of the migrants and protection-seekers concerned by leaving them at the external borders, in a policy that seems to expand the hotspot model, and more in general is based on confinement in peripheral territories of the EU. In this perspective, in the screening and border procedure it is not possible to find a European added value.

3.3. The mirage of solidarity with the reformed Dublin system and the myth of relocations between Member States

The heart of the New Pact's solidarity is famously Part IV of the "Asylum Management" proposal. Given that the Dublin criteria have changed only slightly[76] and consequently the criterion of the State of first arrival is still prominent for those who arrive irregularly, including following search and rescue at sea, the key concept is that of "solidarity contributions" applied to the benefit of the Member States under migratory pressure or subject to disembarkations following search and rescue operations (Article 45). "Solidarity contributions" are also the core of the "solidarity mechanism" applicable in situations of crisis (Article 2 of the "Crisis and *Force majeure*" proposal). "Solidarity contributions" are overall of six types: four are ordinary (Article 45, para. 1) and two extraordinary, insofar as they can be used only in special circumstances (Article 45, para. 2). The four ordinary types of solidarity contributions are as follows: relocation of asylum seekers who are not subject to the border procedure (see above, Section 3.2); return sponsorship of illegally staying third-country nationals; relocation of beneficiaries of international protection who have been granted international protection less than three years prior to a certain date related to the granting of their status;[77] capacity-building measures (not to be used in situations of crisis, as laid down in Article 2, para. 1 of the "Crisis and *Force majeure*" proposal). The two types of solidarity contributions applicable only exceptionally are relocation of applicants for international protection subject to the border procedure and relocation of illegally staying third-country nationals.

In the "Asylum Management" proposed regulation, solidarity contributions are not in operation on a regular basis. They apply towards those Member States in whose

[75] G. CAMPESI, *The EU Pact on Migration and Asylum*.
[76] T.M. MOSCHETTA, *L'impasse Dublino: l'incompiuta riforma dei criteri di competenza nella proposta di regolamento su asilo e immigrazione*, in *I Post di AISDUE* II (2020), aisdue.eu, 26 novembre 2020.
[77] The date of the adoption by the Commission of an implementing act "laying down the solidarity contributions for the benefit of the Member State under migratory pressure to be taken by the other Member States", in pursuance with Article 53, para. 1.

harbours third-country nationals and stateless persons are disembarked following search and rescue operations (SAR) (Arts. 47-49), provided that the Commission's Migration Management Report (Article 6, para. 4) acknowledges that they are subject to "recurring arrivals" (Article 47, paras 1 and 2), and towards those Member States which are under migratory pressure (Arts. 50-53), provided that this situation is acknowledged in the Commission's Report on Migratory Pressure (Article 51). The concept of "migratory pressure", including the procedure aimed at its acknowledgment,[78] extends to situations of crisis as defined in Article 1, para. 2 of the "Crisis and *Force majeure*" proposal. In both cases solidarity contributions are active following a complex procedure whose success is to a great extent determined by the goodwill of the Member States and whose goal is accordingly to have the Member States develop such goodwill. Significantly, this articulate procedure is also applicable in situations of crisis, the only adjustments regarding abbreviation of terms.

However, apart from situations of crisis, there is a certain category and a certain number of asylum seekers in whose connection relocations do not apply. In the two situations envisaged in the "Asylum Management" proposed regulation (SAR operations and migratory pressure), the most striking exclusion concerns asylum seekers who are subject to a border procedure. As explained earlier, this procedure is employed for applicants who are not authorized to enter Member States' territory, including after disembarkation following an SAR operation (Article 41, para. 1 of the proposed "Asylum Procedure" regulation), in three circumstances: the applicant misled national authorities as he/she presented false information or documents or omitted information or documents on his/her identity or nationality which could adversely affect the decision on his/her application; the applicant can be considered a threat for the national security or public policy of the Member States, for serious reasons; the applicant is a national (or, if stateless, is habitual resident) of a third country with a low rate of success in terms of obtaining international protection (more precisely, a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs).

Asylum seekers who make their application following disembarkation would typically be those who tried their luck across the Mediterranean, or the Aegean, or the Atlantic Ocean towards the Canary Islands. Those who file their application at a land border or in a transit zone, given that relocations are operative only in case of migratory pressure within the terms described above, would typically be amongst the thousands of desperate human beings who "play their game", i.e. make repeated attempts to irregularly cross the external border and often even internal borders towards Northern Europe or

[78] In alleged situations of crisis, the migratory pressure should be assessed in the previous month instead of in the previous 6 months: Article 2, para. 2 of the "Crisis and *Force majeure*" proposal.

France or the United Kingdom, are repeatedly pushed back at the former and/or at the latter, crowd reception centres or live outdoors or in occasional shelters in the countryside or in woods. In other words, asylum seekers who cannot be relocated following an SAR operation and in case of migratory pressure because they are due to go through a border procedure are amongst those in whose connection solidarity is needed to limit secondary movements and possibly apply the relevant Dublin criteria, as well as to deal with the external and internal borders in accordance with the objectives of the Schengen Border Code and Article 77 TFEU. What is more, in the light of current figures, they could reasonably be the vast majority of migrants rescued at sea.[79] Their exclusion from relocation undermines the objectives of the New Pact and particularly the objectives of the "Asylum Management" proposed regulation.

This shortcoming of the proposed rules, with the related misuse of the Union level that is deemed to fail the subsidiarity test, is particularly serious in the first situation envisaged in the "Asylum Management" proposal, i.e., with regard to solidarity for disembarkations following SAR operations. Art. 47, para. 2 lays down that, in favour of the Member State with recurring arrivals, the Commission's report on Migration Management should only allow relocations of protection-seekers who are not subject to border procedure and capacity-building measures: neither return sponsorship nor the other type of relocation. Hence, solidarity proves really poor, which opens up serious questions as to whether activating the Union level of action is worth it.

Moreover, the complex solidarity procedures respectively laid out in Article 47 and in Article 52 structurally allow structural solidarity gaps, unless all the Member States are fully collaborative.

Under the procedure laid out in Article 47 of the "Asylum and Management" proposal, all Member States are required to put forward their solidarity plans to the benefit of States of disembarkation in response to the Commission's request for solidarity contributions made in pursuance of the Commission's report on Migration Management. In this report, solidarity contributions are implemented in accordance with the distribution key established in Article 54. However, the Commission is allowed to make a further attempt to seek solidarity contributions (by convening the Solidarity Forum laid down in Article 47, para. 5) only if those made available by the Member States in their solidarity plans prove "significantly lower" than the total contributions identified in the Migration Management report.[80] Full solidarity should obviously require contributions in compliance with the key established in Article 54. Hence, one could expect the Commission to be able to convene the Solidarity Forum if quotas in line with this key are not achieved. Instead, by allowing the Commission to convene the Solidarity Forum only in connection with an (undefined) lower threshold, this procedure is structured in such a

[79] A. DI PASCALE, *Il nuovo Patto*, p. 5. Criticism on this point also from G. MORGESE, *La solidarietà tra Stati membri dell'Unione europea nel nuovo patto*, p. 22.

[80] A Solidarity Forum is also to be convened in the framework of the migratory pressure procedure. Yet the Commission is allowed to take that step where it "considers that the solidarity contributions indicated in the Solidarity Response Plans *do not correspond to the needs* identified in the report on migratory pressure provided for in Article 51" (Article 52, para. 4).

way as to leave room for a "solidarity gap." This solidarity gap is also a subsidiarity gap: if States of disembarkation receive no substantial help from the new procedure, the goal of the proposed new regulation would be missed. The Union's level of action is activated to the detriment of the national level with no advantage whatsoever *for the Union*. Furthermore, at this stage (i.e., following the Migration Management report) States may well include "capacity building measures" in their solidarity plans, yet no limits, conditions or prerequisites of any kind are established.

The Solidarity Forum is the second attempt to achieve solidarity both in the procedure applicable to recurring arrivals following SAR operations (Article 47) and in that applicable in case of migratory pressure, including in situations of crisis (Article 52). The Forum could prove unsuccessful as long as the number and types of solidarity contributions put forward in this context could still be significantly lower or less "solidarity-friendly" than those requested in the Migration Management report (Article 48, para. 2) or in the Migratory Pressure report (Article 53, para. 2)[81] respectively. Specifically, relocation proposals could be poor. At this point the Commission has to adopt an implementing act.

In the procedure applicable towards Member States which face recurring arrivals following SAR operations, the Commission's implementing act should establish "a solidarity pool for each Member State expected to be faced with disembarkations in the short term." This solidarity pool could include capacity-building measures replacing relocations to the extent of a shortfall of up to 30% of the total number of relocations identified in the Migration Management Report. This is a further gap in terms of the type of solidarity which makes a difference for frontline States. If the 30% threshold is reached, the Commission should adjust solidarity contributions until relocations or return sponsorship or a combination of the two cover 50% of the share identified in accordance with the distribution key laid down in Article 54 (Article 48, par. 2, ult. comma). This means first that the solidarity gap in terms of the major solidarity contributions can structurally hit 50%. Second, the relocation quota could be very low or even vanish altogether.

Likewise, in the procedure applicable to the benefit of States under migratory pressure, including States in a situation of crisis, the Commission is authorized to adjust the solidarity contributions by the Member States only if those indicated feature a shortfall of greater than 30% of the total number of solidarity contributions identified in the Migratory Pressure report. The Commission can oblige the Member States to provide solidarity contributions until they cover 50% of their share identified in accordance with the distribution key laid down in Article 54 (Article 53, para. 2). This share can include both types of "ordinary" relocations (Article 45, para. 1, *a)* and *c)*), return sponsorship and capacity-building measures. In situations of crisis, the 50% share does not include capacity-building measures and it covers relocation of applicants for international

[81] Article 53, para. 2, second and third sub-paragraphs is not applicable in situations of crisis: see Article 2, para. 2, of the 'Crisis and *Force Majeure* Proposal'.

protection subject to the border procedure and relocation of illegally staying third-country nationals.

3.4. The promises for solidarity with the return sponsorship mechanism

Another measure of the Pact relevant for our narrative on solidarity and subsidiarity is the mechanism for return sponsorship.[82] As will be recalled, in 2015 the Council adopted a couple of decisions establishing a system of relocations between Member States with the aim of supporting frontline States, such as Italy, Greece, and originally, also Hungary. That was the most advanced attempt at realizing intra-state solidarity in asylum; for a number of reasons, including also on administrative cooperation grounds, it met with limited success.[83]

The Pact makes a new effort to organize intra-state solidarity with the proposal under discussion, because the Commission tries to push some Member States out of their comfort-zone: yet it does so precisely renouncing the possibility of implementing a mandatory principle of corrective solidarity. Interestingly, the Commission tries to link this cooperation on relocations with the effectiveness of returns. In particular, the Commission tries in a first instance to involve non-frontline States in cooperation for repatriation.[84]

After the path of returns was unsuccessfully pursued for eight months, this commitment will turn into cooperation in a form of non-compulsory intra-state solidarity: with this mechanism, the Commission tried to keep States in a path of reciprocal cooperation, aiming, at first, at returns, and, secondly, if that target could not be attained, at taking charge of a migrant who could not be repatriated via relocation.[85] In other words, the Commission tried to bring back inter-state solidarity, after the experiment of the 2015 Council Decisions, and after the recovery attempted with the declaration of La Valletta.[86] It is undoubtedly an effort aimed at creating forms of solidarity in the governance of migration, an attempt to *proceduralize* solidarity and to bring it under the scrutiny and management of the Commission.[87]

Yet, it must be clear the return sponsorship mechanism offers only a limited added value, for two reasons: first, this mechanism of cooperation on returns adds an additional layer of cooperation to a necessary one: the returning State is seeking the cooperation of a third country which should readmit the returnee; on top of this, the sponsoring State

[82] Article 55 of the Asylum Management Proposal.
[83] See E. GUILD ET A., *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, Study for the LIBE Committee, 2017.
[84] Article 55, section 1 of the Asylum Management Proposal.
[85] Article 55, section 2 of the Asylum Management Proposal.
[86] See E. PISTOIA, *Il nuovo Patto e la gestione degli sbarchi*, in *ADiM Blog, Analisi & Opinioni*, November 2020.
[87] Article 55, section 2 of the Asylum Management Proposal.

offers (some) support to the sponsored State. Secondly, the timing is uncertain[88] and the return sponsorship does not discharge the benefiting State from taking care of the migrant for almost a year.[89] Again in the first perspective, it is not clear what is the added value of involving a second Member State in a return procedure, considering that the sponsoring State can offer support in a minimalistic manner, which cannot be considered an authentic expression of corrective solidarity. For example,[90] the sponsoring State can provide counselling on return and reintegration, or provide logistical, financial and other material or in-kind assistance for voluntary returns; a support measure can also consist in leading or supporting the policy dialogue and exchanges with the authorities of third countries for the purpose of facilitating readmission; additionally, administrative, organizational and logistic assistance and cooperation during the travel or the enforcement of return can also be considered as valid supporting measures.

All considered, the sponsoring State is free to choose among a wide range of measures which implement a minimalistic expression of solidarity which does not relieve the most affected States of their duties. The effectiveness of the return sponsorship mechanism has therefore been questioned, since it has been shown that, for example, the countries of southern Europe are the best equipped in terms of cooperation and readmission agreements with third countries:[91] it is therefore not easy to identify the added value of an additional administrative layer in this already complex sequence of steps.

Once again, the Commission has preferred to a path that could offer an authentic added value the shortcut on which States could agree upon more easily: however, the uncertainties about the mechanism devised are important, and it is not difficult to envisage a complex political negotiation on this proposal.

4. Conclusions: any added value for the Pact?

The aim of this article was to demonstrate that, in the context of migration control and asylum, respect for the principle of subsidiarity is intertwined with the implementation of the principle of solidarity. This also proves that the principle of subsidiarity should be 'practiced' in different manners by the European institutions. If it is acceptable that the European Court of Justice has a deferential approach toward the European legislator as to substantive assessment of the principle, it is nevertheless to be recalled that the Council, and even more the European Parliament and the national parliaments, have a crucial role to play as to the substantive implementation of subsidiarity. In this perspective, one cannot doubt that, in principle, the EU level is better

[88] See M. BORRACCETTI, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato?*, in *Diritto, Immigrazione e Cittadinanza*, 2021, n. 1, p. 1 ff.
[89] Article 55, section 4 of the Asylum Management Proposal.
[90] Article 55, section 4 of the Asylum Management Proposal.
[91] J.-P. CASSARINO, *Readmission, visa policy and the "return sponsorship" puzzle*.

suited than the national level to setting up a solidarity mechanism capable of overcoming the imbalances and the inefficiencies of the Common European Asylum System. Nor can one question that in principle the Union is in a better position than the Member States to attain the specific objective of each legislative act encompassed in the Pact for Migration and Asylum. However, the institutions required to scrutinize the implementation of the principle of subsidiarity should not limit themselves to such a formal appraisal, which instead can be deemed perfectly appropriate in case of judicial review. The Commission, the national parliaments, the European Parliament and the Council should fully take on their responsibility to identify the level of action which is more suitable in terms of achieving the objectives of each proposed legislative act and those of the relevant Union policy. In this perspective, testing the European added value of the proposed acts is key. A political appraisal thereof requires looking at the content of the proposals to ascertain whether they do make the Union level more suitable than the national level to attain their objectives.

Precisely in the context of migration and asylum, it is here argued that subsidiarity and solidarity are intertwined. This is the effect of the initial inter-governmental matrix of the core legislation in the field, namely the Dublin Regulation and the Schengen Border Code, based on a logic of inter-state cooperation. The progressive development of the Union *acquis* has strengthened interdependences among States, while limiting the possibilities of access of third-country nationals (TCN) to the EU, as well as movements of migrants within the EU (secondary movements): this has happened thanks to implementation of visa policies and EURODAC, and also with the consolidation of European integrated border management, just to name the most fundamental developments. In other words, the thesis put forward here is that the EU *acquis* in this respect has consolidated and strengthened the unbalances previously existing between Member States. Therefore, reforms which do not radically depart from those consolidated models, e.g., the first entry criterion, do require the adoption of instruments axed on the paradigm of corrective solidarity among States.

Our analysis of some crucial measures proposed with the Pact show that these have a limited added value in respect of the national intervention of the Member States, as it has been demonstrated that these measures do not cover the breadth of the scope of the European intervention in this field. Secondly, they don't bring the needed added value, an expression of solidarity inspired by corrective fairness, to the intervention of the national administrations. The European proposals indeed rely again on strong decentralization of administrative, organizational and management tasks incumbent upon the most affected Member States, i.e., frontline States. The screening and amended border procedures proposals aim at strengthening the containment function of external borders: they do not alleviate the situation of frontline States; instead, they appear to even aggravate that burden; similarly, the new asylum management proposal, read together with the return sponsorship mechanism, does not manage to achieve corrective redistribution of the burden that frontline States must sustain. Relocations are still mainly left to "cooperative" Member States, and the procedures whereby they become available

are intricate and to some extent even unpredictable; hence return sponsorship can hardly be seen as solidarity, since it relies on bilateral administrative cooperation between States.

To conclude, the overall paradigm behind the "new" Pact seems to be old and conceals the idea that the EU considers Lesvos and Lampedusa mainly a Greek and Italian question: more than 20 years after Tampere, this cannot and should not be the case. Persisting on this path is dangerous, especially for the Union, since it threatens the *acquis* on connected policy domains – Schengen above all – and does not contribute to the objective of consolidating the EU into an Area of Freedom, Security and Justice: if European integration does not shorten the distance between the Union and its citizens, that distance can only grow.

ABSTRACT: Solidarity is a core value of European integration which is highly invoked at the political level as the 'binder' to fix the several crises the EU has faced. It has been as well put forward as a core pillar of the Pact on Migration and Asylum. Despite the narrative of the Commission stressing the novelty of the Pact, yet the Pact has been criticized, by scholars and practitioners alike, as being short-sighted on solidarity. The aim of this article is to contribute to the current debate on the Pact by demonstrating that by being modest on the implementation of the principle of solidarity, the Commission is also not fulfilling the principle of subsidiarity. The article proceeds by first unpacking the principle of subsidiarity, particularly its side of requiring a European added value of legislative proposals, which has been recently highlighted. It develops then an analysis on the meaning of the principle of solidarity, which should have a corrective dimension in the sense of fairly redistributing the effort between Member States. It emerges that, in today's asylum policy, subsidiarity and solidarity are interlocked, so that requiring a "European added value" of the new rules calls for increasing the degree of solidarity. In the second part, the article analyses the Commission's proposals on the screening, the new border procedures, the asylum management, and the return sponsorship mechanism, to show where the low degree of solidarity that they enshrine corresponds to a failure of the positive dimension of the subsidiarity test.

KEYWORDS: Asylum – Pact – solidarity – subsidiarity – added value.