



**NOVAMIGRA**

NORMS AND VALUES IN THE  
EUROPEAN MIGRATION AND REFUGEE CRISIS

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# Talking of Values: Understanding the Normative Discourse of EU Migration Policy

On (Value-Based) EU Policies on Migration

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## Executive Summary

With respect to migration, the period 2014-2017 was characterised by reactionary policies and the outburst of populist discourses, the rise and fall of the 'Welcome' culture, a growing debate on sharing responsibility, the raising of fences and border closures and political divisions within the Union. Since values lie at the core of the European project, the question of whether those values are indeed common, has also risen to the forefront.

The purpose of the present research is to identify which norms and values are mobilised in the institutional narratives (put forth in the official documents) and whether they are shared across institutions, at least as regards the official discourse. Therefore, the focus of this inquiry is on the narratives produced by the institutions regarding migration and asylum policy, the values put forth as their underlying basis and not on the policies themselves. Based on an extensive research on official documents, agendas and discussions, as well as public statements of representatives of these institutions, the report analyses the narrative of the various institutions as regards values. The documents were selected on the basis of key moments where the different institutions either put forth a narrative in response to events, or initiated dialogue around policy proposals, or put forth a concrete policy in place structured around a specific narrative. In this respect, research undertaken by WP1 has assisted us in contextualizing the origins of values and set the conceptual basis for identifying the background understanding on values through the distinction of value-based and right-based narratives. The research was complemented by data derived from informal semi-structured interviews with policy makers and researchers involved in migration and refugee policy issues.

By looking at the institutional position on migration and asylum that has been formulated over the past decade, migration does not appear to be a priority for EU Institutions until 2011. In that sense, the period since 2011 and especially 2015-2016 has been a gamechanger, with more institutions taking an active stance on migration. The European Commission sought to protect the Schengen area and ensure burden-sharing on asylum seekers. The European Parliament highlighted the need for a humanitarian approach towards asylum seekers. The Justice and Home Affairs Council reflected national concerns over security but also willingness and capacity to host refugees. The European Council aimed to balance the different perspectives regarding relocation and burden-sharing.

However, changes observed also in EU's approach between 2014 and 2017. Loss of life at sea, which was critical in mobilizing institutions and policy makers, became a security issue, intrinsically linked with reduction in arrivals and in secondary movement within Schengen. The securitization discourse was further strengthened due to the rise of populist and far right parties in Europe. Within this trajectory, the importance of the values highlighted by institutions also changes. Solidarity starts as unconditional and becomes bounded by responsibility; loss of life at sea is a trigger but derives also from the respect to the fundamental right to life; the fundamental right of free movement is linked with externalization policies that are discussed under a narrative of saving lives at sea. Values and rights remain constant but often their lack of definition enables a flexible application in relation to policies resulting in their instrumentalisation, at least at a discourse level.

Going deeper in the value landscape, this report shows that the values of saving lives at sea, solidarity, responsibility-sharing (or burden-sharing) and human rights are rather crucial in EU's policy formation. At times, there is a clear overlap and in some cases divergence, since migration is neither experienced nor understood the same by all Member States. More specifically, research reveals in many cases these common values were left vague and undefined, with Member States not sharing the same understanding of the core principles of the Union, and thus the values being subject to different interpretations. An example of this is saving lives at sea whereby the legal and ethical responsibility is utilised to support the deterrence policies and partnership with Libya. Solidarity occasionally refers to Member-States, others to the countries of origin and sometimes to refugees. European institutions have a coordinated response as regards Schengen and the right to free movement, which arises as the dominant right to be protected as intrinsic to the Union and its preservation. However, they have different starting points on how that right should be protected in the face of irregular migration and asylum-seeking flows. Human rights undergo the same process, since they seem to be applicable to everyone, but when a choice needs to be made, apart from Parliament, all other institutions tend to prioritise the rights of EU citizens.

There is a clear value framework in the institutional narrative, since values depart from the human rights framework, international obligations and a general acceptance of certain fundamental rights that the EU is built upon. Despite the challenges that values face between 2014 and 2017, our inquiry shows that values are important in three ways. First, they provide the limits within which both institutional narratives as well as policy proposals move. Secondly, by adopting and advocating these values to third countries, the EU projects soft power that is crucial in the externalisation of migration management. Thirdly, the story of the European Union is one of unity of states brought together by common values that construct a shared identity. Values thus serve many purposes: they reflect the legal framework, the operational limits and assist in the construction of what it means to be European. Simultaneously they can be instrumentalised and this is also their greatest contribution from a policy perspective. However, this does not mean that values with respect to the European institutions do not contradict the reality on the ground. EU affirms for instance the principles of saving lives at sea, which derives from the fundamental right to life, and at the same time limits its search and rescue operations in the Mediterranean, employs policies of deterrence in third countries, enforces tough border controls and therefore constructs the narrative of 'threat' on the borders of the states. At the same time though, prevention of arrivals through 'soft' power may seem (and likely is) cruel and inhumane, but not necessarily outside the boundaries of norms and laws. In that sense, inclusionary values may well serve exclusionary policies.



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## Abstract

The rise of far-right populist parties and the emergence of the refugee crisis were important developments that posed a normative challenge for the EU. Since values lie at the core of the European project, the research aims to identify the norms and values that were mobilised in the institutional narratives regarding migration and to understand whether they have changed over the years and if they are shared across institutions as regards the official discourse. To do so, first it identifies the institutional positions on migration that have been formulated over the past decade. Then, it looks briefly at the key events between 2014 and 2017 that drew the focus and necessitated a response from the institutions and examines what triggers more often institutional narratives as well as policies. WP1 has assisted us in contextualizing the origins of values, while informal semi-structured interviews of policy makers and researchers involved in migration complement the analysis. The core part of this study identifies the main values as they appear in the institutional narrative. The values identified were that of solidarity, of responsibility-sharing, of saving lives at sea, of human rights and the right to free movement. The study discusses how the values are approached by the Institutions, and where possible, the policies that appear to stem from or be in line with the institutional normative discourse.

## Introduction

In 2015, more than one million irregular migrants<sup>2</sup> arrived in the European Union (EU), with the overwhelming number having entered through Greece. The challenge of balancing humanitarian responses and legal obligations while ‘ending’ irregular migratory journeys have been continuous for the EU, particularly since 2011. A patchwork of policies emerged in response to the increasingly high number of deaths at sea, the refugee crisis of 2015, search and rescue operations in the Mediterranean in 2016-2017 and the challenge of integration in Member States. The period 2014-2017 was characterised by reactionary policies, the rise and fall of the ‘Welcome’ culture, a growing debate on sharing responsibility, the raising of fences and border closures, political divisions within the Union and a growing determination of Member States to focus on deterrence and prevention of irregular migration cloaked in humanitarian discourse.

An underlying question throughout has been what norms and values are integrated in the discourse of policy makers and European institutions. The underlying assumption is that the normative discourse in fact influences policy proposals regarding migration and asylum policy. Values lie at the core of the European project and have acquired a critical role in the European integration and EU governance “post Lisbon” Treaty (2009). The Treaty functioned as an opportunity to legally affirm common values held by all EU Members. The refugee crisis of 2015-2016, combined with a steady rise of populist parties across several Member States, posed a challenge to the process of Europeanisation, which is grounded on norms, projected values and legal processes. It also revealed different understanding of some of these values by Member States, e.g. solidarity. More often than not, values were left vague and undefined, allowing for different interpretations and at times also implementation. European values were invoked during the financial crisis, the refugee crisis, even the role of Europe in the foreign policy domain (e.g. the civil war in Syria). Values are utilized also as a tool to produce policy responses and to initiate policy narratives by institutions and actors involved in drafting policy proposals and policy actions. Since 2015, the question of whether those values are really ‘shared’ by Europeans and to what an extent they are indeed common, has risen to the forefront, largely due to the growing divisions between the Visegrad Four, North and South Europe. A geographical and political divide has emerged, with significant implications in finding a joint way forward as regards migration and asylum policy. However, beyond individual Member States, at an institutional level this division is far less visible prior to 2017.

The purpose of the present research is to identify which norms and values are mobilised in the institutional narratives (put forth in the official documents) and whether they are shared across institutions, at least as regards the official discourse. The key question in other words, is whether the values and normative commitments fulfil a central argumentative role in the institutional narrative and policy proposals and if so, which values and norms can be identified? An effort was made to identify which drivers-events and/or actors appear to initiate institutional efforts for policy proposals. In some cases, a correlation between events and institutional narratives is possible, largely identified within the narrative itself (for example the European Council meeting following the November 2015

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<sup>2</sup> Throughout the document the term irregular migrant reflects irregular entry in the EU and thus reflects asylum seekers and forced migrants as well as economically motivated migration.

terrorist attack in Paris). In other cases, events such as escalating death toll in the Mediterranean, appear to influence the agenda of the institutions. Rather than seeking to make direct linkages, which would be in many cases assumed but not necessarily accurate, we opted to identify broadly the drivers of institutional narratives, by looking at the documents, meetings' outcomes and policy proposals introduced by the European institutions themselves.

The aforementioned questions are addressed **by focusing on the narratives of key EU Institutions** instrumental in either proposing and/or initiating policy. This is done by looking at the broader normative language of the documents and where possible how it relates to specific policy proposals and/or events. Thus, the focus is on the narratives produced by the institutions regarding migration and asylum policy, the “values” put forth as their underlying basis and not on the policies themselves.

## Research Design

Methodologically, the report analyses the narrative of the various institutions as regards values, on the basis of selected documents. Narratives are “problem-setting” (Maricut, 2017), i.e. they identify a policy issue (or problem) and link it to proposed solutions. This is achieved through a specific framing of the issue, usually linked with ideas, and in the case of migration also values and/or norms. Narratives thus, serve a specific purpose, to “fix the assumptions for decision-making under conditions of high-ambiguity” (Roe, 1994:37). This is done eventually by putting forth the issue, framing it in a specific manner and propose policies and/or decisions that address the issue at hand. However, from the perspective of policy makers, narratives are “institutionally constructed” (Maricut, 2017:163), i.e. they are a direct result of the institution that constructs the story and are usually in line with the institution's end goals and overall agenda. Migration policy has a long history in the making within the EU and its institutional actors, and the refugee crisis of 2015 did not alter the institutional approach and/or direction but rather reinforced it. In other words, the narratives that appear in the official documents, agendas and discussions, as well as public statements of representatives of these institutions, reflect largely the way migration is understood by said institution.

What role for values then in this setting? Since values can be specified but also implied in the narrative, **an interpretative approach** was undertaken when combing through the official documents. Nonetheless, there is a roadmap to the “value-basis” of the EU as whole, through the European Charter on Fundamental Rights, and the Lisbon Treaty of 2009. As the analysis will show, a normative frame is engrained at the heart of the different institutions in question in the research but the values and norms discussed are approached differently or with different weight attributed to them. They serve a purpose in the setting of the narratives and the policies proposed, they function as a key “justification” at times and a reminder of the core purpose of the EU- to safeguard the Union. With this in mind, we look at the normative references in place and specifically which values are highlighted by the institutions, how they are articulated between institutions and where possible, what policies are recommended. Values are critical but also instrumental in putting forth the narrative for specific policy proposals. An example of this is saving lives at sea (see Chapter 5) whereby the legal and ethical responsibility is utilised to support the deterrence policies and partnership with Libya. It can be discussed whether a political instrumentalisation infringe on the importance of values. As the paper will discuss, values hold consistently an important as well as an instrumental role in the Institutional narratives- they set the

parameters within which European policy is designed and applied on migration. The problem is that often values remain vague and undefined, and as such flexibility exists both in their interpretation but more critically, in the policies that project them.

The timeframe of the research, in line with the overall focus of the NOVAMIGRA project is the period 2014-2017. We start the year before the crisis with the latter approached here as a moral, political and management rather than one of numbers. Throughout that period, specific institutions put forth different and/or similar approaches and policy reactions, revealing gradually a division between Member States on the one hand and the supranational level on the other. Within the supranational level, institutions also revealed diverging priorities on migration. The European Commission (EC) sought to protect the Schengen area and ensure burden-sharing on asylum seekers. The European Parliament, through the committee on Civil Liberties, Justice and Home Affairs (LIBE) highlighted the need for a humanitarian approach towards asylum seekers. The Justice and Home Affairs Council (JHA Council) reflected national concerns over security but also willingness and capacity to host refugees. The European Council a collective body that defines the European Union's overall political direction and priorities, sought to balance the different perspectives, however at times it was clear that it was at odds with the EC proposals, particularly on relocation and burden-sharing.

It is impossible to map the entirety of documents and narratives produced by the aforementioned institutions, nor necessarily useful for the purpose of this research. Instead, in the first phase of the research a mapping of key events, meetings and policy proposals took place (see Annex 1). The purpose was to identify key moments where the different institutions either put forth a narrative in response to events (e.g. the shipwrecks in the Lampedusa in 2014, the opening up of the Western Balkan route etc.), initiated dialogue around policy proposals (e.g. the proposed changes in the Common European Asylum System, relocation etc.) or put forth a concrete policy in place structured around a specific narrative (e.g. EU-Turkey Statement). A preliminary coding of documents included reports, press releases and communications correlating with events and/or summits identified in the timeline. Documents were also identified through a search in the various institutional databases available online, drawing on some preliminary “value” based words: solidarity, responsibility, freedom of movement, fundamental rights (which include human rights), saving lives at sea, and also the word “values” itself. Documents were then reviewed and interpreted with the purpose of identifying first the narrative and what value(s) was promoted. Summaries were then produced analysing the approach of each institution, which would eventually be synthesized in this paper alongside interviews and literature review.

The second phase of the research was based on an analysis of public documents available by the relevant institutions, as well as literature focusing on the EU institutions and migration policy. The research undertaken by WP1 has assisted us in contextualizing the origins of values of the European Charter on Fundamental Rights such as dignity, freedoms, equality and solidarity (Parolari et al, 2019); and it also set the conceptual basis for identifying the background understanding on values through the distinction of “value-based” and “right-based” narratives (Philips and Düwell, 2018). The former is defined as “the basis of duties, norms, rights, and human rights. Values (e.g. equality, solidarity, justice) are regarded as general aims. Furthering/realizing them is often regarded as a duty, and norms and rights, including human rights, are viewed in the light of how they further/realize values” (Philips and

Düwell, 2018:15). The rights-based approach instead refers to “rights, which have associated duties, are regarded as the fundamental normative concept. Values are based on a fundamental commitment to rights. When we talk of freedom(s) or equality, we may call them values, but it is really rights and the duties associated with them, and especially human rights, that give content to what we mean” (Philips and Düwell, 2018:17).

During the write up we sought to complement the analysis with informal semi-structured interviews of policy makers and researchers involved in migration and refugee issues. Their direct engagement and/or consultative role at times in the period 2014-2017 offer a glimpse into the institutional narratives constructed in an effort to address the refugee crisis within the EU. The European Parliamentary elections affected more than originally envisaged the willingness of policy makers to speak, and those who did so, wanted complete anonymity. In the end three interviews took place with experts from think tanks and four interviews with staff in the European institutions. Their views are not directly quoted but incorporated in the analysis<sup>3</sup>. It is however worth noting that there was a convergence on two issues: all expressed the belief that values lie at the heart of the European migration policy as put forth by the institutions, meaning that the narrative is not only instrumental but also a result of norms engrained at the heart of the European project; and all agree that the flexibility in how certain values can be interpreted, allows for digression in practice.

How are values understood and discussed in the NOVAMIGRA project? Our starting point is that values are incorporated in the constitutional makeup of the Union. The Treaty of Lisbon (2009) in Article 2 stated that: “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. These values, but also rights<sup>4</sup> are often referred to as EU values, or European values. Thus, we incorporate here the approach put forth by Philips and Düwell (2018) that “European values are values that the EU endorses, things that the EU regards as fundamentally important. Or also, values that political institutions and citizens across the EU endorse” (Philips and Düwell, 2018:12).

Values and/or rights appear time and time again in the narratives and function as the core of this paper. Solidarity and responsibility-sharing are perhaps the most fundamental ones and the most difficult to analyse since they appear as one sometimes while others they are differentiated. Saving lives at sea is a humanitarian and legal responsibility but acquires a value basis as does freedom of movement of the Schengen area. Finally, human rights may not be values *per se* but they do determine the framework of operation and their application is often linked to values, particularly those of solidarity and responsibility.

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<sup>3</sup> All participants requested full anonymity, i.e. no reference to name, affiliation or type of institution. Since the discussions were not recorded and only handwritten notes were maintained, we opted to incorporate their perspective in the analysis. Institutional representatives are identified as staff in the EU Institutions and migration researchers as experts.

<sup>4</sup> For a distinction but also different benefits of a value-based and rights-based approach see Philips and Düwell (2018).

To understand the value-based narrative, Chapter 1 looks briefly at the institutional positions on migration and asylum that have been formulated over the past decade and the EU Charter on Fundamental Rights and the Lisbon Treaty - two critical documents in the constitutional make-up of the EU. This is important in understanding that the current outlook of the EU Institutions, the narrative used and in many cases the policies adopted, were cultivated long before the refugee crisis. What is new is the visible tension within the supranational structure and the also very visible division between national and supranational interest. Chapter 2 looks briefly at the key events between 2014 and 2017 that drew the focus and necessitated a response from the Institutions, while Chapter 3 examines what triggers more often institutional narratives as well as policies. Chapters 4, 5, 6 and 7 break-down the key narratives offered and the value basis of the actors in question. The report concludes by looking at three key questions: Is there a value framework on migration and asylum policy in the EU? Have the values projected by the institutions changed during and after the refugee crisis? And is there a role for values in future migration policy?

## 1. The Institutional perspective on migration and asylum

Migration policy in the EU is a direct result of the gradual abolition of internal borders within the European Community. The eventual establishment of the Schengen area had a spill-over effect in other areas, with the freedom of movement acquiring since the early days a security dimension “intimately linked to the construction of an EU citizenship and to the flow of migrants, both within and from outside the EU” (Wolff, 2010:24). Migration and asylum constituted the core of the third pillar, with Justice and Home Affairs established under the Maastricht Treaty of 1993. The onset of a common policy on migration and particularly on irregular migration can be traced as early as the intergovernmental fora like Trevi and the Schengen group (Huysmans, 2000:755) that fed a security-oriented approach into the early negotiations on Schengen. The “protection” of Schengen necessitated strong external borders and reinforced border controls as well as a balance between national interests, not always in line with one another.

Migration and asylum policy have emerged largely as a necessity to the governance of the Schengen space, but also as a reaction to events in the neighbourhood and beyond.

Overall, EU migration policy seeks to balance between deterrence of irregular arrivals and protection (through asylum) of those in need. It is a fine balance and at times impossible to achieve, as 2015 showed. However, it is worth noting that until 2011 and the aftermath of the Arab Spring, the deterrence-protection nexus was largely an abstraction; a notion discussed and often visible in the policies proposed (e.g. the second review of the Common European Asylum System is an example) but one that the EU and the Member States had not been called to enforce fully. Frontline Member States and specifically Italy, Spain and Greece had been on the receiving end of irregular arrivals since the 1990s, yet in most cases they managed migration through bilateral partnerships or on their own (Dimitriadi, 2016a). Migration did not appear to be a priority for EU Institutions until 2011 and the Arab Spring. In that sense, the period since 2011 and especially 2015-2016 has been a gamechanger. For the first time the institutions were called to decide and/or advice amidst continuous irregular arrivals, seeking overwhelming asylum, within a geographical space regulated by abolition of border controls.

The narrative around migration per institution was constructed long before the refugee crisis (Maricut, 2017) and is to an extent influenced by the governance structure of migration. Two distinct but complementary systems of governance according to Fabbrini (2015) exist within the EU: one is based on the “community method”, with the Commission proposing legislation and policies and the European Parliament and Council adopting them through co-decision (Ordinary Legislative Procedure). The second governance structure is intergovernmental, i.e. the European Council, and focused (until recently) on issues fundamental to state power (security, foreign policy, security related elements of JHA Council, and the economic policy of the Eurozone).

The Lisbon Treaty had serious ramifications in the governance of Area of Freedom, Security and Justice (AFSJ) with migration being a critical component. The monopoly of the JHA Council came to an end, with the role of the European Commission and the European Parliament significantly enhanced. This was (during the Stockholm programme) an overall positive development. The Treaty on the Functioning of the European Union in 2007 (TFEU) created a solid normative basis and an institutional pluralism in the AFSJ that was not as evident before, in the hope also that “the liberties and fundamental rights of the individuals who constitute the final addressees and beneficiaries of these very policies” (Carrera, 2011) would be protected. This, however, raises a question which links also to the question of values. Who are these beneficiaries whose liberties and rights should be protected? The EU citizens or anyone present irrespective of status within the European space? The institutional priorities show a mash between convergence and divergence, with all agreeing that human rights are applicable to everyone, but when a choice needs to be made (with the exception of European Parliament), all others tend to prioritise the “rights” of EU citizens. The tension between “human rights” and “citizens’ rights” is spelled out in the Charter and shows that Europe of citizens is inclusive but at the same time, exclusive. “Under this respect, the *Charter* is more similar to national constitutions, that include both human rights and citizen’s rights, than to international human rights instruments” (Parolari et al, 2019:39). According to a migration expert interviewed, this is also implied in the narrative of the European Council especially in late 2015 onwards.

As this governance of migration took shape from the origins of the EU throughout the period of institutional formation until the Lisbon Treaty, the different actors (Parliament, European Commission and JHA Council) approached migration and asylum from a different starting point. As the paper will highlight the institutions did and do converge on the values they project, however there is different level of intensity as regards certain values. For example, all institutions discuss solidarity but as regards freedom of movement there are far fewer references in the LIBE than in the European Council documents looked at in the period in question. Schengen and the protection of free movement is not treated as crucial or essential but as the most fundamental aspect of the EU. In other words, irrespective of how migration and asylum are approached all three Institutions agree that free movement of European citizens must be guaranteed and protected as the fundamental principle of the EU. Thus, Schengen is approached as a fundamental right for the EU citizens that must be guaranteed and ensured amidst the refugee crisis.

Migration and asylum policy in the EU evolved over a long period of time. Irregular migration has been a consistent focus, as outlined in the earlier section for the JHA Council, however asylum acquires a

prominent place only since 1999 and the European Council in Tampere. Asylum policy has since developed through multiannual programmes. In Tampere on 15 and 16 October 1999, 15 Member States agreed to the establishment of a Common European Asylum System (CEAS), to be implemented in two phases (Tampere Programme 1999-2004). The basis of the CEAS was the Geneva Convention of 1951 and the guarantee of protection particularly through the non-refoulement clause. The instruments born out of Tampere, included the European Asylum Dactyloscopy Database (EURODAC) Regulation, the Reception Conditions Directive, the Dublin Regulation, the Qualification Directive and the Asylum Procedures Directive.

The Tampere Council established minimum standards for Member States with the long-term purpose to achieve harmonization across the EU. Since then two multiannual programs, the Hague Programme (2005-2009) and the Stockholm Programme (2010-2014) have taken place, focused on implementation and improvement of the CEAS. Their aim was the establishment of a common asylum procedure, to curtail “asylum shopping” within the Schengen area. In theory, if all Member States offer the same procedures, standards and result in similar decisions, then there is no reason for migrants to attempt secondary movement within Schengen. The rationale to an extent makes sense, though it fails to take into account a critical element; not all Member States have the same capacity (financial, personnel), experience and willingness. Perhaps most critically not all Member States link asylum with integration (Greece is a notable example). To assist with monitoring of the implementation of the CEAS and assist with harmonization (primarily through training of national staff), the Hague programme established the European Asylum Support Office (EASO).

The underlying basis of the CEAS has been from the early days that the Member States are “safe countries” by virtue of their membership to the EU and this was confirmed in discussion with senior staff in the EU Institutions. This has been the ground upon which the Dublin Regulation was built upon, allowing for intra-EU transfers to first countries of arrival as well as family reunification. By the time the Stockholm programme was announced (2010-2014) not all Member States could fully meet that criteria. The European Court of Human Rights played a critical role in challenging the presumption of safety through the case of *M.S.S. vs Belgium and Greece*. The Court’s decision resulted in a temporary suspension of transfers under Dublin to Greece, a suspension that remained in place until 2016.

Under Stockholm, the focus shifted to increasing mutual trust between Member States. The Recast phase of the CEAS instruments did not see major modifications, however as noted by Wagner et al (2019), “a proper evaluation of these recast instruments was never finalized because of the emerging ‘refugee crisis’ in 2015” (Wagner et al, 2019:16). Migration policy was and remains reactive, and this is evident in the period 2015-2017 when two major reform proposal packages on migration were submitted by the European Commission to the Council and Parliament, in response also to the refugee crisis.

It should be noted that the EU has fallen short of developing emergency instruments as regards migration and asylum. The only exception was the introduction of the Temporary Protection Directive (TPD). Its origins can be found in the 1990’s and the Treaty of Amsterdam (1999). In response to the war in former Yugoslavia and the influx of refugees to the EU, Article 63 (2) of the Treaty introduced the temporary protection during mass displacement. The TPD that came into force in 2001, part also

of the CEAS established under Tampere, sought “i) to establish minimum standards for giving temporary protection in the event of a mass influx, and; ii) to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons” (Beirens et al, 2016:1).

Unlike asylum processing, the TPD introduces measures to respond to mass influx with an in-built solidarity mechanism. The “mass influx” was left undefined in the document, to be established by Council decision following recommendation from the Commission. Crucially, the underlying basis of the TPD was solidarity; though the term is left undefined, the measures that indicate solidarity are specified: financial assistance through AMIF as well as in terms of actual reception of displaced persons. The TPD was the first solidarity mechanism on migration and one that remained unused during the refugee crisis. Only two countries have ever requested for its activation, Italy and Malta in 2011 amidst the turmoil of the Arab Spring but the Commission did not submit a relevant proposal to the Council, according to a migration expert interviewed by partly arguing that it is unclear whether arrivals constituted a mass influx. Thus, the flexible language of the TPD allowed for varied interpretations of its critical element. Failure to activate the emergency mechanism revealed that not all Member States nor institutions understand mass influx the same way and perhaps not all are as willing to show solidarity.

When in 2015 the European Agenda on Migration—the third programme on migration—was announced, there were renewed calls to activate the TPD, however it was not a decision Member States wanted to make. According to one of the senior staff in the European Institutions interviewed, activating the TPD would have set an unwelcome precedent for the future as regards emergency measures.

Nonetheless, the European Agenda on Migration sought to offer a more holistic proposal for migration and asylum, blending in measures to counter irregular migration, bolstering the focus on legal avenues of entry and legal economic migration, and reiterating the importance of asylum. Its implementation took place amidst a period of crisis, not only in terms of flows but also at the political level. The rise of far right and/or nationalist parties across various Member States, meant that the reform of the CEAS, which the European Commission strongly pushed for, was not adopted by the time the European Parliament elections took place (26 May 2019). Broad agreement had been found between co-legislators on the Qualification Regulation, the Reception Conditions Directive, the EURODAC Regulation and the (new) Union Resettlement Framework. No agreement had been found on the European Union Agency on Asylum, the Procedures Regulation and the Dublin Regulation, with Member States divided over the way forward.

### 1.1 Justice and Home Affairs Council

Of the three actors that have long been involved in migration policy, the JHA Council is perhaps the most influential. The JHA Council was established formally in 1994 but the influence of justice and particularly home affairs officials/ministers pre-exist the institutional set up. Home Affairs representatives, often coming from Ministries of Interior or Citizens Protection, came to dominate the governance structure developed around Schengen and eventually also migration (Carrera et al, 2013b). This is crucial as regards the eventual handling of the refugee crisis but also the broader normative approach of the institutions. Migration and particularly irregular migration first and

foremost involve countries of origin, transit and destination. It can be argued that it is a foreign policy matter primarily since irregular movement's root causes lie outside the borders of the EU. Yet, it is home affairs representatives that influenced the Schengen governance in the 1990s, orienting the discussion in the security rather than humanitarian dimension. In this framework, the Dublin Convention of 1990 (into force in 1997) sought to function as a balance to the abolition of internal border controls by ensuring that the external borders function as gate keepers (Triandafyllidou and Dimitriadi, 2014) to the Schengen area.

In the post Maastricht period, the linkage between migration, asylum and security further consolidated, particularly following September 11 2001, the Madrid 2004 and the London 2005 terrorist attacks. Terrorism was (and is) discussed not only in reaction to an event but also as a potential side-effect of internal free movement and externally fragile borders. However, the implication of irregular border movement has always been that it functions as a source of insecurity and thereby a "threat" (Huysmans, 2006). Since the JHA is comprised of security professionals, its focus on migration and asylum has been consistently structured around addressing 'bogus refugees' (through Dublin and its implementation), ensuring absence of internal border controls is countered through shifting the burden on the external borders and even moving beyond. Regarding the external borders and beyond, the Council has had a crucial role in influencing policy, particularly as regards incorporating the security dimension. It has also been instrumental in influencing the European Commission and the respective Directorate-General on migration (former Home Affairs, now Migration and Home Affairs).

## 1.2 European Commission

The European Commission's position on migration has been described as "hovering between vision and Realpolitik" (Papagianni, 2006:234). The high point of its liberal tradition came with the Tampere Programme (Servant, 2018) and it has since consistently sought to function as a balance between the security-oriented approach of the Council and the humanitarian perspective of the Parliament, adopting both perspectives as regards irregular migration but also protection of asylum seekers. The Treaty of Lisbon in 2009 significantly empowered the European Commission in the area of freedom, justice and security. This is more evident post 2011, when the EU Institutions responded to an evolving emergency at the external borders and the Commission acquired a strengthened role in migration governance<sup>5</sup>.

In the spring of 2011, amidst the Arab Spring, Italy received an estimated 30,000 Tunisians. Largely left on its own to handle the influx, Italy granted temporary protection permits, which enable travel within the Schengen area. The expectation was that since Tunisians have significant diaspora in France, they would seek to travel there (Triandafyllidou and Dimitriadi, 2013). As hundreds boarded the trains from Ventimiglia to Nice (the closest border between Italy and France), French authorities began reintroducing border controls along the route as well as returning Tunisian migrants arriving on French

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<sup>5</sup> The Directorate-General Migration and Home Affairs undertakes the responsibility both for the monitoring of the implementation by Member States of Regulations and Directives issued regarding migration and asylum as well as the implementation of the Schengen Acquis..

soil to Italy. The deputy mayor of Nice at the time, declared that “It is a little too easy for Italy to be generous with the territory of others” (Erlanger, 2011).

The European Commission during that period did not focus on identifying measures for burden-sharing with Italy, as one would perhaps expect, but rather sought to ensure a key role in the Schengen governance. In its communication on May 5<sup>th</sup> 2011 (IP/11/532 and MEMO/11/273), in a silent nod to the Franco-Italian dispute, the European Commission noted that “while the current crisis confirms the need for increased solidarity at the European level and better sharing of responsibility, it must be recognised that the EU is not fully equipped to help those Member States most exposed to massive migratory movements”. In that same Communication on migration, the Commission announced its intention to look into the possibility of introducing a coordinated process for the reintroduction of border controls<sup>6</sup>. This placed the Commission at the centre of not only the legislative proposal but also the monitoring and evaluation of the Schengen governance package.

Although both the TFEU and events of the Arab Spring strengthened the Commission and the Directorate-Generals role particularly in setting the agenda, it worth noting that the Commission has neither the power to veto decisions, nor alter them. The implication here is significant in relation to values: the institution is constrained by its very role and it can neither propose too restrictive policies on migration (which Parliament would reject) nor policies that can appear to effectively encourage asylum seeking flows and/or migration (which both the JHA and the European Councils would reject). To this, we should add the role of the President in shaping the institution. Under President Juncker, for example, the Commission is seen as fairly political according to one of the migration experts interviewed, often at the expense of functioning as an interlocutor between the Parliament and the Council. This resulted in the Commission often adopting the JHA Council proposals in an effort to ensure national governments will support the legislative and policy changes put forth.

### 1.3 European Parliament

Where does the European Parliament fit in the institutional puzzle of the governance of migration? The European Parliament has been perhaps the staunchest supporter of the humanitarian approach to migration and asylum but the least influential institutionally until recently. Following the Maastricht Treaty, the European Parliament created a standing committee that would address the issues discussed in the new Justice and Home Affairs Council. The Committee on Civil Liberties and Internal Affairs (LIBE) “is responsible for the vast majority of the legislation and democratic oversight of Justice and Home Affairs policies. Whilst doing so, it ensures the full respect of the Charter of Fundamental Rights within the EU, the European Convention on Human Rights and the strengthening of European citizenship”. The explicit reference to the Charter and the Convention give a clear indication of the direction of LIBE, which since its inception sought to ensure the protection of the fundamental rights within the EU. According to Maricut (2017) prior to the Lisbon Treaty that strengthened significantly the role of the Parliament, “it was the Parliament’s exclusion from decision-making in the Justice and

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<sup>6</sup> The European Council of 23-24 June 2011 called for such a mechanism and invited the Commission to submit a proposal in September 2011.

Home Affairs that forced it to seek a different narrative to legitimize its relevance [...] and thus turned into a human-rights advocate” (Maricut, 2017:170). In the post Lisbon Treaty Europe, the parliamentary accountability is at the heart of the Area of Freedom Security and Justice (AFSJ) by formally recognising the European Parliament as co-legislator. According to Carrera et al (2013b) the Treaties and the EP Rules of Procedure “expressly confer upon LIBE the responsibility to hold the Council and Commission accountable in AFSJ decision-making, and to protect fundamental rights as laid down in the Treaties and the now legally binding EU Charter of Fundamental Rights” (2013b: 4).

By becoming co-legislator over security-related (i.e. old Third Pillar-related) policy areas, and giving the EP a binding say in the conclusion of international agreements on JHA, the Lisbon Treaty not only formalizes LIBE’s role as a decision-maker on AFSJ matters but also grants it powers over the internal and external security agenda in addition to the protection of fundamental rights. Here, again, a common component with the Commission and the Council is the protection of Schengen and the right of free movement; a critical aspect of the internal security agenda. However, the LIBE Committee has pushed under the consultation process and particularly under the review of the CEAS to protect the human rights of asylum seekers, with an explicit focus on reception conditions and the asylum process (See Ripolli & Trauner, 2014). It is a position the LIBE Committee upheld also throughout the refugee crisis, with Parliament producing critical policy recommendations for the review of the CEAS drawing from the Lisbon Treaty (particularly the solidarity Article), encouraging burden sharing and arguing for a more humanitarian approach to migrants and asylum seekers.

#### 1.4 The European Council

In contrast to the previously mentioned institutional actors, the European Council is a very recent arrival in the governance of migration and asylum. Without direct involvement on the day-to-day management of migration, it was always seen as the balanced body that strikes a compromise between national interests and supranational aspirations. Its role on migration until recently was minimal, as evident from the agendas and communiqués issued of past meetings in the period before 2011. As migration acquired prominence and moved beyond the domain of AFSJ into the foreign policy dimension, the European Council became more involved. 2011 was a turning point for the European Council as regards migration and in the annual summary produced by the European Council President (at the time Herman Van Rompuy) this is indirectly acknowledged. In discussing the European Council approach, the then President notes that “I had identified the topic nine months earlier, but it had gained a sense of urgency in the wake of the Arab spring” (General Secretariat of the Council, 2012a).

2011 was a year dominated by the Arab Spring and particularly situation in Libya, the beginning of the Syrian conflict and within Europe, the Eurozone crisis. Thus, migration was finally on the agenda and remained for the years to follow but in spite of looking inward, an effort was made in putting forth policies that focus on the countries of origin and transit (strengthening of the Global Approach to Migration and Mobility (GAMM) and role of the External Action Service). The European Council turned to the effective management of the external borders, presented as essential to the free movement of European citizens and a cardinal achievement of European integration (General Secretariat of the Council, 2012a). The European Council introduced a safeguard to the Schengen mechanism and for the first time supported the idea that a successful migration policy begins outside Europe’s borders. The European Council tends to either reaffirm the JHA Council’s proposals with a focus on a security

approach- strengthening external borders, the Schengen governance package, while turning increasingly outwards. In 2012 for example, migration and particularly irregular migration is discussed within the EU's Global Approach to migration and Mobility (*Ibid*). The European Council further underlined the importance of solidarity and cooperation in the management of external borders, asylum and the fight against illegal immigration (*Ibid*: 48). Solidarity remains undefined in the Conclusions of the European Council meetings and utilized vaguely. Cooperation in the management of external borders is an indirect reference to FRONTEX as well as the partnership framework developed with third countries in the Southern neighbourhood. The themes repeat themselves once more in 2015 amidst the refugee crisis, with solidarity<sup>7</sup> being the most tested concept within the European Council and where the national and the supranational interests eventually clashed. Thus, although the European Council did not seek (nor need to) have a specific approach to migration, in the period 2014-2017 it reveals the growing conflict between national and supranational but also serves as a forum where the idea of European "values" is indirectly challenged.

## 1.5 Conclusion

This very brief sketch of the perspective held by EU institutions as regards migration and asylum in the period pre and post Lisbon Treaty reflects three things. First, deeply entrenched approaches developed and cultivated over time as regards the "value" axis around which each Institution tackles migration and asylum. At times, there is a clear overlap and in some cases divergence. Secondly, the Institutions traditional have a coordinated response as regards Schengen, which arises as the dominant "right" to be protected as intrinsic to the Union and its preservation. They, nonetheless, have different starting points on how that right should be protected in the face of irregular migration and asylum-seeking flows. Thirdly, all institutional actors are reactive in their approach to migration and asylum. Apart from LIBE that situates itself early on in the arena of fundamental rights, the Council, the Commission and the European Council place migration at the core of their agenda largely in response to the Arab Spring of 2011. Although migration pre-exists 2011 and is part of the Area of Freedom, Security and Justice, it does not dominate it to the extent evident in the post-2011 world. Nonetheless, it is an area of contestation between Institutions even prior to 2014 and particularly since 2009.

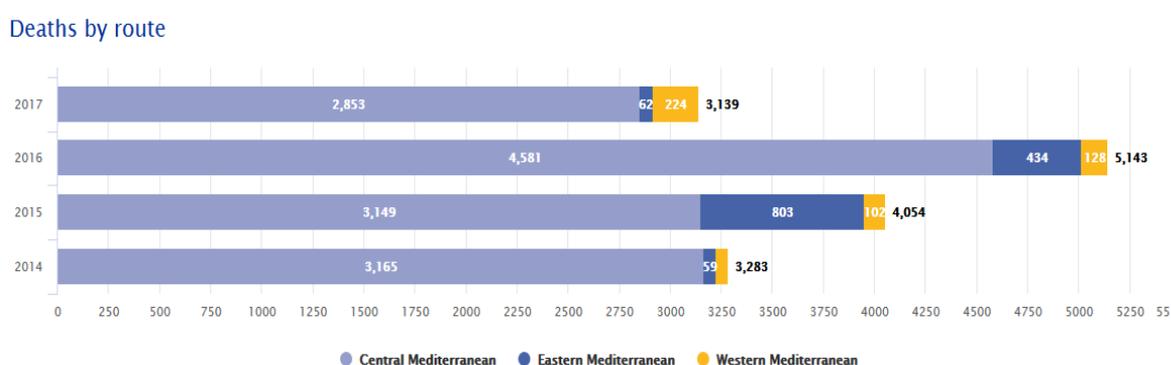
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<sup>7</sup> As the reader may observe, EU use of solidarity sometimes refers to the solidarity of Member-States and others it refers to refugees. This duality in the meaning of solidarity is analysed in detail in Chapter 3.

## 2. Mapping the crisis, talking of values

The term ‘crisis’ has been used extensively in the past few years; economic crisis, migration crisis, political crisis. What became known as the European refugee crisis of 2015-2016, was in many ways a humanitarian crisis, reflected in the loss of life in the Mediterranean (see Chart 1).

### Deaths by route



Source: adapted from the Missing Migrants database, International Organisation for Migration<sup>8</sup>

The origin of the crisis, however, is the Arab Spring of 2011. Events in 2011 spilled over to Libya and Syria, resulting in civil wars that continue to this day. The Syrian Civil War produced one of the largest refugee movements in recent years. An estimated 11 million Syrians have fled their homes since the outbreak of the civil war in March 2011. In the eighth year of war, the majority have sought refuge in neighbouring countries or within Syria itself. According to the United Nations High Commissioner for Refugees (UNHCR), 4.8 million have fled the country. Turkey is host to the largest number of Syrian refugees (3.6m officially registered) with Lebanon, Jordan, Iraq and Egypt following. Another 6.6 million are internally displaced within Syria.

Until 2014, the Central Mediterranean<sup>9</sup> was the main entry point to the EU. The number of migrants and asylum seekers arriving in Italy by sea reached a total of 170,100 by year end 2014, four times the number registered in 2013, when the Italian authorities recorded 42,925 arrivals (IOM, 2015). In the period 2011-2014 the Central Mediterranean route was the most heavily affected by arrivals of mixed migratory flows<sup>10</sup>. The Greek-Turkish border functioned as the main entry point to the EU in the period 2015-2016, predominantly for Syrian arrivals and continues to be a key entry point at the time of writing (Dimitriadi, 2017).

Between 2013 and 2014, the Libya-Italy passage drew attention largely due to the high number of deaths at sea. Changing smuggling practises from Libya, resulted in 3805 deaths at sea, with perhaps the most known the October 3<sup>rd</sup> shipwreck near the Italian island of Lampedusa, with more than 360

<sup>8</sup> <https://missingmigrants.iom.int/region/mediterranean>

<sup>9</sup> Two are the key routes for irregular entry to the EU since 2011- the Central Mediterranean and the South-eastern Mediterranean routes. The Central Med route refers to the passage from (mainly) Libya to Italy and occasionally Malta. The South-eastern Med route refers to the Greek-Turkish borders (maritime and land borders).

<sup>10</sup> Mixed migratory flows refers to arrivals consisting of migrants, asylum seekers, prima facie refugees, victims of trafficking as well as vulnerable groups (women, elderly, minors, persons with disabilities).

deaths reported and 155 survivors. A second shipwreck took place days later in the same area. Italian Deputy Prime Minister Angelino Alfano called for European assistance to handle the continuing arrivals and stated that “We hope the EU realises that this is not an Italian but a European disaster” (Davies, 2013). The Italian government at the time, sought to utilise the escalating death toll in the Mediterranean to push forward a European response- including a burden-sharing on search and rescue at sea. The Dublin Regulation is intrinsically linked with Search and Rescue, since the country of disembarkation automatically becomes responsible for the processing of asylum applications. This has been a consistent issue of the frontline maritime states.

The European Commission, through Cecilia Malmström (at the time European Commissioner for Home Affairs) issued an immediate response. The Commissioner called for an increase in search and rescue patrols by FRONTEX and noted that “we have to act at European level to show concrete solidarity both with migrants and with countries confronted with extreme migratory pressure”. Solidarity here, a core value of the EU, is both in relation to the migrants but also the Member States facing high number of arrivals and this will be a dominant narrative of the institutions in the 2015-2016 period as we will see. However, in the document solidarity is left undefined. The Memo references the need for Member States to increase their resettlement quotas, but also to finalise Mobility Partnerships with third countries and give more funding to the European Commission. There is little concrete evidence of a coordinated policy response, unlike the Memo concludes by suggesting that events in Lampedusa should function as a wakeup call, “to increase solidarity and mutual support and to prevent similar tragedies in the future” (European Commission, 2013a). In fact, a common criticism of the EU approach on migration and asylum is that, despite the various opportunities to solidify policy responses and create a truly comprehensive approach to migration after the Arab Spring, “there is little to suggest that a new approach has actually emerged” (Geddes and Hadj-Abdou, 2018:146).

One of the immediate responses of Italy was the operation ‘Mare Nostrum’, drawing from what it called its historical commitment in the Mediterranean. The operation was unprecedented in scale and scope. It included the participation of personnel, naval units and aircraft from the Italian Navy, the Army, Air Force, Carabinieri, Customs Service, Coast Guard, as well as Police officers on board the Units, and other national agencies. Monthly cost was estimated at 9 million Euro making it unsustainable in the long run, however the aim was from the beginning to integrate Mare Nostrum into a broader EU Operation in the Mediterranean, ideally under the auspices of the Common Security and Defence policy (CSDP). In the absence of commitment from Member States, Italy had to eventually stop the operation with FRONTEX taking over patrolling in the area, in a much more limited way with Operation Triton.

The institutional response to the Lampedusa tragedy was the setup of Task Force Mediterranean (TFM). The TFM was announced following the JHA Council of 7-8 October 2013 and was welcomed at the October European Council of that same year. Thus, it should be seen as a direct response to events by these two institutions. The European Parliament also responded to the tragedy by passing a resolution. The opening of the resolution references firstly the Convention for the Protection of Human Rights and Fundamental Freedoms, and explicitly notes “the principle of solidarity and fair sharing of responsibility is laid down in Article 80 of the TFEU”. The resolution highlighted the importance “of

responsibility-sharing in the field of asylum” and recommended among other things<sup>11</sup> to create “a mechanism based on objective criteria to reduce the pressure on those Member States receiving higher numbers of asylum seekers and beneficiaries of international protection, in either absolute or proportional terms” (European Parliament, 2013). It is a call that will be made again in 2015 by the Parliament.

The TFM sought to propose measures that would offer a comprehensive approach to migration management. It did so by linking the external with the internal migration policy covering countries of origin, transit as well as measures within the EU. The significance of the TFM recommendation is less in their originality and more on their influence. What would eventually be the strategic priorities of President Juncker in the European Agenda on Migration, had already been identified and laid out in the communication on the work of the TFM. Hence, the narrative on migration and asylum of 2015, drew largely on the events and work undertaken in 2013-2014.

## 2.1 2014-2017: the refugee crisis and its aftermath

The term ‘refugee crisis’ refers to a very specific period and reflects the crisis framework upon which policy responses were eventually built upon. A crisis of numbers first and foremost triggered institutional responses, both in terms of loss of life at sea but mainly in the number of border crossings in the summer of 2015. It was also a management crisis, particularly on the ground in Greece and the Western Balkan route, and one that continued until 2017 at least, in Greece. Finally, the period 2015 initiated a political crisis in the EU that has yet to be resolved. The gradual divisions between East and West, North and South have resulted in bringing to the surface a fact that has been persistent since the early days of the European Union: migration is neither experienced nor understood the same by all Member States. Not all are affected similarly or equally, and do not appear to share the same understanding of the core principles of the Union, particularly in this case solidarity.

The section does not attempt to lay out the crisis as it unfolded. There is a wealth of research that has been produced since 2015 both cataloguing events and on the ground responses, as well as the journey itself while bearing witness to the aspirations of the 1,5 million that entered the EU (Crawley and Skleparis, 2017; Squire, et al, 2017; Papataxiarchis, 2016). Instead, we will seek to briefly sketch out the main policy responses- the big elements standing out of the EU toolbox as it developed in the period in question, and the main events, which formed also the basis for identifying the appropriate documents for analysis.

The years of crises are 2015-2016, with Europe receiving in 2015 the highest number of asylum applications in its recent history; with “431 thousand applications in 2013, 627 thousand in 2014 and

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<sup>11</sup> 47 recommendations were made by TFM covering five broad areas/themes: Actions in cooperation with third countries; (2) Regional protection, resettlement and reinforced legal avenues to Europe; (3) Fight against trafficking, smuggling and organised crime; (4) Reinforced border surveillance contributing to enhancing maritime situational picture and to the protection and saving of lives of migrants in the Mediterranean; (5) Assistance and solidarity with Member States dealing with high migration pressure. (European Commission, 2013b).

around 1.3 million in both 2015 and 2016” (Luedtke, 2019:21), the EU struggled over burden-sharing, solidarity, domestic politics and national interests. Greece was the focal point of entry in 2015-2016. 885,386 migrants utilised the Eastern Mediterranean Route, of which 496,340 were Syrians, 213,635 Afghans and almost 93000 Iraqis (Frontex Risk Analysis for 2016, 2016). Their destinations were mostly EU Member States in the north of Europe, with Germany, Sweden, Austria as top destinations of preference. Size of arrivals and number of asylum applicants were critical triggers in initiating policy responses as well as generating a broader discussion on asylum policy.

In **May 2015** the European Commission launched the European Agenda on Migration. The Agenda outlined the priorities on migration (legal and irregular) for the next five years focusing on combatting smuggling and setting up a border management system that would assist frontline Member States facing disproportionate migratory pressure: the hotspot approach. The latter is a migration management tool to ensure that those who reached the EU external borders are registered and identified before processing their asylum claims<sup>12</sup>. In the Agenda, the hotspots are those borders facing “disproportionate pressure”, where migration management policy is to be implemented (Council of the European Union, 2015i). Disproportionate pressure is left undefined, although the hotspots in Italy and Greece, fit the description of borders facing “disproportionate” pressure; and thereby would be required to implement the new approach.

The **hotspots**, situated at entry points (in Greece for example they are the five islands of northern Aegean<sup>13</sup>) bring together different border actors- FRONTEX, national police and/or coastguard, first reception services (where applicable), representatives of the national asylum service as well as the European Asylum Support Office (EASO). Additionally, EUROPOL and the European Union's Judicial Cooperation Unit (EUROJUST) are deployed as advisory bodies on dismantling trafficking and smuggling networks based on information provided by the migrants during screening interviews. Thus, a more direct link between security actors, asylum, and reception is established.

In May 27<sup>th</sup> 2015, the European Commission put forward a first package of measures to address the migration crisis. This included the **emergency relocation proposal** for 40,000 people in need of international protection, from Italy and Greece to other Member States, a recommendation to Member States to resettle 20,000 people in need of international protection from outside the EU, an EU action plan against migrant smuggling, guidelines on fingerprinting and a public consultation on the future of the blue card directive. Of these, relocation was perhaps the most “radical” proposal, arguably evidence of concrete solidarity amongst Member States. It also evolved into one of the most contested policy proposals put forth, revisited in terms of numbers and procedure. The final proposal sought relocate 120,000 recipients of international protection from Greece and Italy in the September 22<sup>nd</sup>, 2015 Justice and Home Affairs Council.

Between May 13<sup>th</sup> 2015, when the Agenda was publicly presented, and December 17<sup>th</sup> 2015 (last European Council of the year), more than 26 meetings of different institutions (JHA, EU Council,

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<sup>12</sup> There is significant divergence between how the Commission presented the hotspot approach and how the system was implemented in Greece and Italy.

<sup>13</sup> Leros, Samos, Chios, Kos, and Lesbos.

Foreign Affairs Council) and informal meetings of Heads of States took place. The volume alone was unprecedented in comparison to previous years and indicative of the concern of both Member States and Institutions not only in relation to the influx but also unilateral policies undertaken by Member States, starting from Germany's unilateral decision to suspend Dublin Regulation for the Syrians<sup>14</sup> as well as the Hungarian decision to erect barriers with Serbia. Hungary's decision to build a border fence in the summer of 2015 was the first step in a series of measures undertaken in Hungary that would not only raise "alarm" in Brussels but would eventually result in the European Commission initiating infringement procedures against Hungary<sup>15</sup>.

By early 2016, the emphasis shifted to the border. The President of the European Council in the press briefing noted that "the future of Schengen is at stake and time is running out. Every week decisions are taken in Europe, which testify to how grave the situation is: reintroduction of border controls, or "technical barriers" at the borders. This is a clear demonstration that we need to regain the control of our external border" (European Council, 2015a).

Externalisation of migration and asylum management also emerged as the way forward. As early as September 2015, heads of State discussed a potential partnership with Turkey, the main transit country to the EU and a host already to more than 2 million Syrians at the time. At the same time, neither the European Commission nor Member States like Germany wanted to show support for the raising of fences on EU soil (i.e. Hungary's policy). The alternative solution was to encourage and support measures outside the Union, initially looking to Turkey but also North Africa and the Sahel region (Dimitriadi et al, 2018). In October 2015 the Joint Action Plan was announced. The second section of the Plan was dedicated to preventing irregular migration with both sides committing to various steps, including exchange of liaison officers through FRONTEX, strengthening information exchange but also with Turkey committing to "in line with the Visa Roadmap requirements, pursue the progressive alignment of Turkish visa policy, legislation and administrative capacities notably vis-à-vis the countries representing an important source of illegal migration for Turkey and the EU" and "Step up cooperation and accelerate procedures in order to smoothly readmit irregular migrants who are not in need of international protection and were intercepted coming from the Turkish territory in line with the established bilateral readmission provisions" (European Commission, 2015I). The Joint Action Plan was originally announced *ad referendum* and stayed at that level for almost two months because political negotiations continued between the EU and Turkey, regarding incentives (see Dimitriadi et al, 2018: 11).

The Joint Action Plan paved the way for the eventual deal of March 2016, the EU-Turkey Statement (European Council, 2016). After relocation, the Statement is perhaps the second most critical policy undertaken by the EU in its effort to respond to the refugee crisis. It was probably the most criticised and contested policy; part of a period of "radical experimentation" (Parkes, 2017:10) in the EU, which is ongoing. The accelerated border procedure on the Greek islands, the notion that Turkey should be

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<sup>14</sup> Though it's worth noting that Dublin was suspended for Greece already since 2011!

<sup>15</sup> Infringement procedure was launched in response to the March 2017 law passed in Hungary that allows for the detention of adult refugees, refugees with families and unaccompanied minors over 14 without the possibility of any legal remedy.

treated as ‘safe third country’ despite the geographical limitations it maintains on the 1951 Convention, the conditions on the Greek islands, and the gradual de facto shift from individualized assessment of asylum to nationality determination as criteria for admissibility, have all been extensively discussed and critiqued by NGOs and political parties in Europe (see Amnesty International, 2016; Human Rights Watch, 2016) . One of the most problematic elements of the Statement was the de facto conditionality between resettlement and the forced return of asylum seekers from Greece to Turkey (see Human Rights Watch, 2016). For the resettlement of Syrians, an equal number of returns should be undertaken by Greece. Even Turkey was critical, with most notable the statement by President Erdoğan who on 24 June 2016 noted that: “The EU bloc's bad humanitarian and immoral approach to immigrants has led to a serious debate about the trustworthiness of the European Union” (Daily Sabah, 2016). Irrespective of Turkey’s willing cooperation in exchange of 3+3 billion EURO and visa liberalization promises, Europe’s normative value significantly reduced following the Statement (Dimitriadi et al, 2018).

Two days prior to the Statement, on March 16 2016, the Council accepted the draft amending budget proposed by the Commission (submitted on 9 March 2016). It agreed to make available €100 million in commitments and €80.2 million in payments from the 2016 EU budget to support Greece and other Member States overwhelmed by the refugee crisis. Hailed as a concrete example of solidarity, financial support to Greece would reach in total over €816.4 million in emergency assistance since the beginning of 2015. The emergency funding was on top of the €613.5 million already allocated to Greece under the national programmes for 2014-2020 (€328.3 million from AMIF and €285.2 million from ISF) (European Commission, 2018).

Throughout 2016 and 2017 institutions sought to monitor progress on the EU-Turkey Statement, as well as moving discussion forward on the proposal to reform the CEAS (May 4<sup>th</sup>, 2016) and reform of FRONTEX into a European Border and Coastguard Agency. In 2017, the institutional focus shifts to the Central Mediterranean route, with a particular interest in counter-smuggling and trafficking from Libya, prolongation of internal border controls (for Austria, Germany, Denmark, Sweden and Norway) and the limited progress on the reform of Dublin.

## 2.2 Drivers of institutional narratives

Looking at the documents in the period 2014-2017, in many cases the opening statements refer to the increasing and continuous loss of life at sea, need for assistance to EU Member States as well as the need to address irregular migration in a way that safeguards also the rights of migrants and asylum seekers. The loss of life at sea, and what it signifies also for European “values” was one of the main triggers it seems of many meetings and efforts to adjust policy responses. Interviews with senior staff and experts on migration also noted that the rise of populist and/or far-right parties across Europe was critical in mobilizing institutions and policy makers. Both drivers, in their own way, posed fundamental challenges towards the values of the EU but also revealed the shortcomings of policies as regards balancing the normative framework with the need to safeguard Schengen and the right of free movement. Both also fueled a shift from a humanitarian approach evident in the summer of 2015 in the institutional narrative to a security dominated discourse in 2016-2017.

In 2015 and following the end to Operation Mare Nostrum, tragedy struck again, when 800 were reported dead in the worst shipwreck recorded to this day in the Central Med. The Special Meeting of the European Council, requested by the Italian Prime Minister, focused on ways of curtailing loss of life at sea. Urging the EU summit, Mr. Renzi said: “It is unthinkable that in the face of such a tragedy, there isn't the feeling of solidarity which Europe has shown in other instances” (BBC, 2015). In response, Home Affairs Commissioner Avramopoulos presented in a joint JHA & Foreign Affairs Councils meeting a 10 point plan for immediate actions to be taken in response to the crisis situation in the Mediterranean. The plan received the full backing of Foreign and Interior Ministers. Similarly, the European Council in its Conclusions stated in the introduction to the Conclusions that the EU’s “immediate priority is to prevent more people from dying at sea” and “We have therefore decided to strengthen our presence at sea, to fight the traffickers, to prevent illegal migration flows and to reinforce internal solidarity and responsibility” (General Secretariat of the Council, 2015a), largely adopting the 10 point plan of LIBE also issued a stern rebuke in the European policy regarding search and rescue at sea. Many of these points would be repeated in the institutional discourse throughout 2015-2017, with most documents recognizing the priority to save lives at sea, in turn linked to policies targeting smuggling and strengthening intra-EU solidarity. In a strong wording the Rapporteur of the Committee called the European Council to adopt a “plan to manage refugee flows with compassion. However, we have been here before - Member States have abandoned the principle of “responsibility sharing” when the media spotlight has dimmed - this time it must be different, and the Civil Liberties Committee will do its part” (European Parliament, 2015). The reference to abandoning the principle of “responsibility sharing” likely refers to the diminished focus migration received post Arab Spring, despite the increasing number of arrivals to Italy.

A similar call to action prompted by loss of life at the border is evident in 2015, with the death of Aylan Kurdi in 2015 and later the death of 71 migrants in a lorry in Austria.

Nonetheless, the narrative shifts as we move further into 2015. The gradual reintroduction of border controls by Member States, largely due to the lack of registration in Greece, the Hungarian fences<sup>16</sup>, the November 2015 terrorist attacks in Paris and the Christmas events in Cologne (the New Year gang assaults on women) allowed for the further securitisation<sup>17</sup> of migration. This was noted also by interviewees, who pointed to a reinforcement of the discourse on border controls in the institutional narrative by 2016. Loss of life at sea became a security issue, intrinsically linked with reduction of arrivals and secondary movement within Schengen. The securitisation discourse was further strengthened due to the rise of populist and far right parties in Europe. The correlating response of the Institutions was to also shift the policy discourse towards the protection and guarantee of Schengen, as a pre-requisite for a balanced migration and asylum policy but primarily as a fundamental right of EU citizens. Reverting to Schengen, offered a middle-of-the road approach between those

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<sup>16</sup> In July 2015 Hungary began building a barrier along the border with Serbia (completed by September that year). This was soon followed by the building of a fence along the border with Croatia and closure of the border in October 2015.

<sup>17</sup> Securitization of migration is to a large extent the result of the quest of internal security agencies (national police forces, border guards, customs etc.) to find their internal enemies beyond the borders, in what have been terms networks of crime (migrants, asylum seekers, diasporas etc.). (Bigo, 2000:171). Securitisation is constructed through speech art.

reluctant to engage in European cooperation on migration and the need to maintain the gains of harmonization of asylum policy of previous years. The shift is perhaps best evident in the hotspots. Originally envisaged as registration points from where relocation would take place, by early 2016 the hotspots become screening centers seeking to fast track identification, asylum processing and returns.

Within this trajectory, as the following chapters will discuss the importance of the values highlighted by institutions also changes. The official communications show that the value-basis tends to remain consistent, however values are approached differently over a period of time: solidarity starts as unconditional and becomes bounded by responsibility; loss of life at sea is a trigger but derives also from the respect to the fundamental right to life; the fundamental right of free movement is linked with externalization policies that are discussed under a narrative of saving lives at sea. Values and rights remain constant but often their lack of definition enables a flexible application in relation to policies resulting in their instrumentalization, at least at a discourse level. The question immediately rises is what these values and rights are.

### 2.3 Talking of values (and rights)

When referring to European values at an institutional level, documents tend to refer either to rights, norms and issues that guarantee the “Union” of Europe. As of the early 2010s the discourse of the European Commission, Council of the European Union and European Council produced a framing of values as shared values, common values, indeed “universal values”. The aim was to foster inclusiveness, unity as well as project a specific set of values; useful as regards migration and asylum. In relation to external policies, values allow for the development of “soft power” projected by the EU to third countries which are undergoing a process of “Europeanisation” to their institutions (e.g. Turkey). For asylum, common values form the basis for the establishment of a common asylum system. Thus, values “can act as potential lines of transnational alliances between various actors, be they among civil society organisations, professional bodies, political parties, or more classically Member States through their representatives” (Dratwa, 2014). While this notion of shared values is heavily encouraged by EU Institutions and relevant bodies, a parallel process is underway since 2011; politicisation. Perhaps best analysed by de Wilde (2011), politicisation in the EU is associated with “both an increased level of resistance against the EU and its policies, but also an increased utilisation of these political institutions by societal groups to achieve desired goals” (de Wilde and Zürn, 2012:140). This process of politicisation also utilises values, though not necessarily in a uniform way. Rather, in the current context, it reflects inherent conflict within the European integration project: on the one hand, the expansion of European integration and the parallel rise in Euro-scepticism or resistance of certain (national) publics, interests and identities (e.g. Hungary as regards migration). This is important in relation to the drivers for institutional narrative mobilisation. Börzel and Risse (2018) argue that right-wing political parties in various Member States successfully mobilized national identities and anti-immigrant sentiments by further politicising the asylum and migration topic. According to this perspective, “The very process of politicisation prevented the successful formulation of a European response to the refugee flows” (Börzel and Risse, 2018:87 quoted in Drawta, 2014). Instead what emerged was a normative narrative often at odds with policies in place.

How do institutions talk of values? At its most basic form, communications, press statements and 'reports refer to the 'common' and/or 'shared' values or 'European values'. At times the discussion on values tends to interchange with the usage of the term 'rights'. Both can be used to refer and reflect on the behavior of specific actors (bodies, Member States, institutions). Policies, and particularly legislative proposals-i.e. rules, are institutionalised and formalized manifestation of these rights. At times, there is specificity in the values discussed while other times there is vague usage of terms. Both approaches serve a purpose. When the narrative aims for specificity, it is possible to offer narrow definitions of terms' approaches utilized in the documents (as evident in the relocation discussions). For most of the normative language used in relation to migration, an ambiguity exists, allowing for a flexible interpretation and thus manifestation through the relevant laws and policies.

The European Union's fundamental values according to the TEU Art 2 are "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Solidarity is also referenced multiple times throughout the TFEU, though there is still no singular notion of what constitutes solidarity (Thym, and Tsourdi, 2017; Moreno-Lax, 2016).

The European Charter on Fundamental Rights is the bedrock of the value framework reflected in the Treaty as well as in the legislative proposals put forth for migration and asylum. Its significance should not be underestimated when looking at values. The Directorate-General (hereafter "DG") for Justice is tasked with preparing the annual report on the implementation of the EU Charter, a strong signal that it is not only "on paper" but should also be fully implemented by Member States and institutions, according to one of our interviewees. The European Union Agency for Fundamental Rights based in Vienna and (jointly with the DG for Employment and Social Affairs) with the European Institute for Gender Equality based in Vilnius also monitor the implementation of the Charter as well as rules and norms agreed upon within the EU.

In the review of the various documents issued by the institutions, five interrelated values and/or rights were identified: **Saving lives at sea; Solidarity; Responsibility-sharing (or burden-sharing) and Human rights**. We would posit that **freedom of movement (Schengen area)** should also be included mainly because the narrative of the institutions places critical importance on safeguarding it, elevating it to a fundamental right of EU citizens that must be protected at all costs. Seen as the bedrock of the EU, it thus, acquires the same status as "values"- functioning as a guiding principle, and a parameter for policy making. We need to reiterate that values here have a dual role. On the one hand, they can be normative pre-agreed rules and rights (such as protection established through the full endorsement of the Geneva Convention of 1951) that de facto require acceptance of the *ethos* they are based on. On the other hand, they can be values forming the basis of the EU that translate into rules and rights (i.e. a normative framework of implementation).

The following sections will seek to map out the value basis of the institutions through their official narratives. In other words, how do institutions "talk" of values? Most of the time the narrative constructs a story, in which policy proposals are centered. What emerges is a continuum of policy

discourse within institutions (see also Section 1) but also between institutions during the refugee crisis and in the post-crisis period.

### 3. The value of Solidarity

The European Court of Justice (ECJ) has recognized the principle of solidarity as “a general principle inferred from the nature of the Communities” and based on mutual trust between Member States. Article 80 of the TFEU institutionalises the EU principle of solidarity in the field of border management, immigration and asylum in the following wording: “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain measures to give effect to this principle”.

The value of solidarity in theory should be reflected not only in the discourse but also legislative proposals and policies. There are two dimensions to solidarity projected by the narratives of the institutions: intra-EU solidarity (between Member States) and external solidarity, between the EU and third countries that are partners (or would-be partners) in migration management. As we will see further on, solidarity towards migrants and refugees is considered part of the EU’s external solidarity. Nevertheless, it is rather often the case that the use of solidarity on EU documents targets primarily the Member States or third countries on how to address the refugee issue, and not the refugees per se.

How is solidarity defined? Surprisingly none of the institutions attempt a definition of solidarity with the exception of the LIBE Committee in Parliament. In a working document on solidarity and fair sharing of responsibility drafted in July 2015 and presented in LIBE’s meeting in February 2016 solidarity is defined as the “unity or agreement of action that produces or is based on community of interests, objectives, and standards. In the context of the EU’s policies on asylum and immigration, the principle of solidarity is intended to ensure that support is given to those Member States which, on account of geographical and demographic factors, carry a heavier burden of responsibility than others”. According to this definition, solidarity is based on *unity* in order to defend the *interests of the community*. Community in this case appears to refer to the EU and its Member States but also the Schengen area and its members. The LIBE Rapporteurs attach to those values a legal responsibility, which translates values as the application of the rights-based approach.

Perceived as the vital pre-requisite of responsibility-sharing, solidarity reflects the legal obligation of member-states, as instructed by Article 4(3) of the Treaty of EU. Thus, solidarity is at the basis of the whole of the Union system and a failure by the Union and its Member States to implement solidarity, which by their very accession to the Union the Member States have accepted, strikes at the fundamental basis of the Union legal order. The principle of solidarity is set out in Article 80 of the Treaty on the Functioning of the European Union (TFEU) (building on the former Article 63, par.1 and 2 TEC3). It covers not only asylum policies - as was the case before the Treaty of Lisbon - but “equally immigration and border control policies” (Metsola and Kyenge, 2015a:4). Without disregarding the monetary assistance as a form of solidarity, the authors attest that the implementation of solidarity

and responsibility-sharing aims to have practical application in order to “enhance the quality and functioning of the Common European Asylum System in full respect for fundamental rights” (*Ibid*).

On this ground, the Rapporteurs confirm our observations regarding the dual role of solidarity. In particular, the authors distinguish between internal and external solidarity, which was also noted by some of our interviewees. Thus, internal solidarity “relates to the solidarity shown from one Member State to another Member State, or from the European Union as a whole towards one of its Member States, or from EU citizens towards third country nationals present in the EU”. In contrast, external solidarity refers to “solidarity by the EU towards those people, not on the territory of the EU, who are affected by war, persecution, hunger or violent conflicts in their country of origin, those who are at risk of losing their lives in makeshift boats crossing the Mediterranean, and to solidarity with third countries that currently receive on their territories and in their communities huge numbers of refugees fleeing war, persecution and hunger in neighbouring countries” (*Ibid*: 3). This division between external and internal solidarity appears sporadically in the policy narratives of the institutions, particularly the European Commission, DG Home Affairs and European Council. It is far less dominant in the JHA Council, which is to be expected as its purview is the internal domain of the EU.

### 3.1 Internal Solidarity

The increased migratory flows of 2014 drastically contributed in highlighting the role of solidarity. Together with the help of EASO in the countries of first reception, the progress report on the TFM notes that “The European Commission is starting to use Article 33 of the recast Dublin Regulation with the aim of strategically framing solidarity measures available at the EU level for the benefit of Member States under pressure” (European Commission, 2014a). Solidarity in this case is linked with the application of the Art 33 of the Dublin regulation, which refers to the mechanism for early warning, preparedness and crisis management. The mechanism requires that the Member State facing disproportionate pressure or problems in its asylum system, draws up a preventive action plan monitored by the Commission and the Council. Art 33 §4, states that “The European Parliament and the Council may, throughout the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate”. Solidarity is left undefined and to a large extent voluntary.

In October 2014 the JHA Council held a meeting identifying ways to cope with the migratory pressures. This was the second act following the informal meeting of JHA Ministers in Milan in July 2014, where a decision was made to “develop a common narrative and action at the EU level” (General Secretariat of the Council, 2014a). The commitment indicated the effort of the member-states to unite in order to overcome the polarisation triggered within the EU. According to the Council’s conclusions, the adequate way to achieve this unity should be based “along the principles of solidarity/responsibility”, since “these migratory flows do not only affect countries on the frontline but Europe as a whole” (*Ibid*). The three pillars for future policies should be “action in cooperation with third countries, reinforced management of external borders and Frontex”, as well as internally “action at Member States’ level: reception and fingerprinting” (Justice and Home Affairs, 2014a). Solidarity, in this case, seems to refer to the member-states and aims in reinforcing their unity through the implementation of the European policies on migration. This will eventually translate into a **conditional form of solidarity**, bound by responsibility sharing that begins first within each Member State (see responsibility below). It is also

used by the JHA Council as core principle which should accompany the cooperation with third countries.

The call to action was needed, largely due to the absence of concrete solidarity, a major theme in 2014 between Member States. The Italian Operation Mare Nostrum in the Central Mediterranean sea had been suspended due to high cost<sup>18</sup> but also voices within the European Council that perceived the operation as a pull factor. The move from an operation that signalled to collective responsibility (to one of a limited operation under the auspices of FRONTEX (Operation Triton), was indicative of a broader shift to limited interventions. Despite the outcry caused by the end of Mare Nostrum (see ECRE, 2014), Italy perceived the new operation as “Europe doing its share” (ECRE, 2014). This indicates that solidarity is intrinsically linked with responsibility-sharing and its tangible manifestation (see below discussion on responsibility-sharing) that goes beyond financial contributions.

In the European Agenda on Migration ), solidarity acquires an added weight- which is also reflected in the policy narrative of the institutions. Hundreds of migrant deaths precede the Agenda alongside an unfolding humanitarian crisis on the Greek-Turkish maritime border. The Agenda strongly incorporates the value of solidarity and hints that it should become the new norm in migration management. The wording in the introduction is indicative of the EC approach under the Presidency of Jean-Claude Juncker, a staunch supporter of solidarity: “We need to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance with the principles of solidarity and shared responsibility.” (European Commission, 2016a:2). The Agenda further notes that “It would be an illusion to believe that this is a short-term need which will not return” (European Commission, 2016a:10-11). Moreover, it continues by arguing that “Every crisis will be different, but the EU needs to heed the lesson and be prepared to act in anticipation of a crisis, not just in reaction” (*Ibid*). In this respect, the implementation of a long-term plan on migration requires the collaboration of all member-states, and it is precisely the value of solidarity on which this collaboration will be based on.

### 3.1.1 Physical manifestation of solidarity: relocation

Relocation was the first concrete proposal for addressing the emergency in 2015. Intra-EU transfers of asylum seekers is not a new idea. Already in 2013 the TFM urged Member States to voluntarily commit “to more intra-EU relocation of beneficiaries of international protection. [...] Member States with a low migration pressure are particularly encouraged to show solidarity in this manner. International Organisations, such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), can play an important role in this field” (European Commission, 2013a:20).

Relocation became the litmus test of European solidarity. On the 22<sup>nd</sup> of April, the European Council meeting highlighted the need to “reinforce internal solidarity and responsibility and committed itself in particular to increasing emergency assistance to frontline Member States and to considering options for organising emergency relocation” (Council of the European Union, 2015a). This stance was further

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<sup>18</sup> 9 million euro per month

enhanced by the European Parliament on the 28<sup>th</sup> of April 2015, which repeated the EU's obligation to respond to the tragedies in the Mediterranean with solidarity and responsibility sharing (*Ibid*). Two weeks later, on the 27<sup>th</sup> of May 2015, the Commission introduced the first package of policies, aiming to fulfill the **practical expression** of solidarity as it was proposed in the Agenda (European Commission, 2015a:1). The proposal included policies on the relocation of 40,000 Syrian and Eritrean nationals distributed by Italy and Greece to the rest of member-states over the next 2 years, with member-states receiving “€6,000 for each person relocated on their territory” (*Ibid*). An additional policy included the resettlement of 20,000 people in clear need of international protection over the next 2 years; reflecting the external dimension of solidarity. The addition of a financial “incentive” is interesting and an indication that the Commission did not perhaps feel confident physical redistribution of asylum applicants would be well-received without the financial assistance. Those Member States participating in the resettlement program would be financially supported by the Commission (*Ibid*). The Commission's promotion of the value of was further evident in its willingness to include those applicants who arrived in the frontline countries from the 15<sup>th</sup> of April 2015 onwards in the relocation scheme, a “date around which the tragic events occurred prompting the European Council to decide to reinforce internal solidarity and responsibility and committed in particular to increase emergency assistance to front line Member State” (European Commission, 2015b:7). As one of the interviewees noted, the EC assumed that relocation would work smoothly and was confident it would be approved and implemented by Member States, the reality on the ground showed that this was not the case, with relocation falling well short of its initial target by 2018 when it concluded. This raises the question of how solidarity is understood by the European Commission and the Member States. The failure of relocation in terms of numbers and the delays in implementing the scheme, indicate unwillingness and hesitation by Member States to partake in a responsibility-share mechanism that was meant to function as a pilot to a permanent mechanism. According to the Commission, Member States had pledged the relocation of 63,302 persons from Greece and 34,953 from Italy. However, in 2017 when the relocation scheme concluded 31,503 had been relocated from both countries with another 4,000 roughly pending for transfer. Well below the planned figure, the rationale was that the EU-Turkey Statement of March 2016 reduced significantly arrivals and thus eligible persons for relocation. In reality, relocation was always limited to very few nationalities due to the criteria imposed (e.g. only nationalities meeting the 75% threshold of positive decisions across the EU were eligible).

Together with relocation and resettlement policies, other initiatives included the Action Plan against migrants' smuggling, the open consultation for the improvement of the Blue Card Directive and the new Operational Plan for Operation Triton, which extended the area for search and rescue operations (*Ibid*:2). The aforementioned policies were suggested on the basis of solidarity with the frontline countries, i.e. the focus was on intra-EU solidarity.

The European Commission framed the value of solidarity as crucial component of the European identity. This was reflected in the statement by President Jean-Claude Juncker, who referenced the European past and need to protect the right to asylum, “We Europeans should know and should never forget why giving refuge and complying with the fundamental right to asylum is so important. [...] If ever European solidarity needed to manifest itself, it is on the question of the refugee crisis. It is time to show collective courage and deliver this European response now” (European Commission (2015c:1). The reference to the “fundamental right to asylum” is a direct reference to solidarity as inscribed in

the Refugee Convention of 1951, which also forms the basis of the CEAS (see also p.37). After all, European identity is not constructed only based on the values that operate within EU but endorses broader liberal ideals and international frameworks, such as the right to seek asylum (General Secretariat of the Council, 2015a).

The pressure of the migratory flows in the frontline countries forced the European Council on the 25th of June to support the rapid relocation procedures and called the JHA Council to adopt the decision based on consensus. Two weeks later, the informal meeting of Home Affairs ministers agreed to the resettlement of 20,000 people in need for protection, but it could not reach an agreement for the suggested relocation of 40,000 refugees. Several delegations stressed the necessity to strike the right balance between solidarity and responsibility (Council of the European Union, 2015b:30) and according to the Latvian minister of Interior Rihards Kozlovskis *“it must be recognized that different views continue to exist about the details of the Commission’s proposals for relocation of asylum seekers. We still have work to do to reach an agreement that can be implemented in practice. The solution must be practical”* (Justice and Home Affairs, 2015a) (italics author’s own). The solution was found in its next meeting on the 20th of July 2015, when the Council agreed for the relocation of the 32,256 refugees (the remaining 7,744 persons being relocated by the end of 2015) and the resettlement of “22,504 displaced persons from outside the EU who are in clear need of international protection” (Council of the European Union, 2015c). According to the meeting’s outcomes, solidarity and responsibility were key features, which urge the Council to reach a decision on relocation and resettlement, taking into consideration “the conclusions adopted by the European Council, on 25-26 June 2015, which, in the light of the current emergency situation and of the EU commitment to reinforce solidarity and responsibility” (Justice and Home Affairs, 2015b:3-5).

On September 2015 the Commission specified a set of actions that should be implemented with regards to the European Agenda on Migration and issued another Communication to provide information on its ongoing progress. There, it noted that solidarity and responsibility of member-states are of great importance in order to manage the external Schengen borders; an important step so as to restore confidence and enhance EU credibility (European Commission, 2015d:3). Successful examples of relocations were promoted as the necessary means for EU to re-build trust and attain its goals in strengthening the official channels for migration. Additionally, swift returns and agreements for re-admission were also emphasized as means for disturbing the smugglers’ networks (*Ibid*:7).

### 3.1.2 Responsibility-sharing (conditional solidarity)

When looking at the value of solidarity a shift appears to take place in the policy narrative of the institutions by early autumn of 2015. Solidarity is increasingly bound to the responsibility of member-states to implement the rule of law and rarely presented as a value on its own. Rather, solidarity is projected as means or a necessary condition to achieve a certain goal. This goal can be also translated to a value.

According to those interviewed, this is evident in the case of the hotspots. Already proposed in the Agenda and an accompanying communication clarifying the purpose of the hotspots, by late summer 2015 institutions are increasingly concerned with the delays in Greece to apply the approach proposed.

The concern is in the registration of arrivals, which is minimal at the time in Greece (see Dimitriadi, 2017).

The introduction of hotspots highlights a mixture of values-based and rights-based approaches. Following the first session of the European Council meeting, President Tusk underlined that “I am also convinced that there will be no solidarity on relocation so long as migrants are not properly registered” (General Secretariat of the Council, 2015b). By conditioning solidarity on migrants’ registration, President Tusk adopted an exclusionary value-based approach on values, in which the latter (solidarity) derives from and is subject to the former (registration). This conditioning of solidarity is deeply connected with the notion of security. Registration is the first step for EU to distinguish those who “seek shelter from war and persecution” and those who “seek a better life”, from those “few who seek to destroy our values” (ibid). This way, it is not just that solidarity is conditional, but also that solidarity is conditional on the guarantee that the security dimension is addressed, which seems to be a running theme particularly in 2016. Nevertheless, we should not ignore the fact that solidarity here is used in a rather specific manner, in the sense that it is supposed to offer specific institutional provisions. This understanding of solidarity, would probably characterize the rights-based approach on values, where the value of solidarity is not informal but rather it is institutionalized, expressed in a specific practical form and grants specific provisions (Philips and Düwell, 2018:18-20).

Along similar lines, the Commission also stressed that solidarity is bound by responsibility in the application of the common EU rules. According to one of interviewees in EU institutions, the Commission sought to reiterate that for solidarity to exist, responsibility must begin by taking care of one’s own house first. Although the earlier example shows that migrants and refugees should be responsible in respecting EU’s security by registering themselves when they cross the border, responsibility is always referred in the EU’s discourse to the Member States. To this end, the Commission initiated infringement procedures where necessary to enforce the rules and is implementing a “Hotspot approach in frontline Member States to assist them in applying common EU asylum rules” (European Commission, 2015c:2). Similarly, the activation of the EU civil protection mechanism, providing “material assistance, expertise, intervention teams and modules, and specific equipment for disaster-stricken countries” (European Commission, 2015e:2) – a practical form of solidarity – presumes that the rule of law is applied by the Member States in need of assistance.

The conditional approach to the value of solidarity through responsibility-sharing is also evident in the September 2015 narratives. Two extraordinary meetings took place in September 2015, dealing with the relocation of refugees from Greece and Italy to other Member States. In particular, on September 9, the increase of migratory flows forced the European Commission to amend the suggested numbers from 40,000 to 120,000 refugee relocations.

With the European parliament adopting<sup>19</sup> the Commission’s suggestion, the second extraordinary JHA Council meeting in 22 September 2015 moved also to the same direction. Once again, solidarity and burden-sharing were the key elements. According to the Council’s conclusions, “the Council noted the

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<sup>19</sup> With the exception of Denmark and UK, and Ireland expressing its positive intention.

willingness and readiness of Member States to take part, in accordance with the principles of solidarity and fair sharing of responsibility between the Member States, which govern the Union policy on asylum and migration, in the relocation of 120,000 persons in clear need of international protection” (Council of the European Union, 2015a:8). In case that member states are not able to implement these decisions, they should notify the Council and the Commission. Interestingly, the Council underlines that the reasons for potential inability should be “compatible with the fundamental values of the Union enshrined in Article 2 of the Treaty on European Union” (*Ibid*). This indicates that the policy narrative remains solidly grounded on the value-basis constructed in the TFEU.

This conditionality that binds responsibility reveals also the divergent approaches of the Institutions. For LIBE, solidarity is unconditional; a result of membership to the EU and it is reflected in the way the Committee approached the decision of some member states to abstain from relocation. On December 2015, Sweden formally requested the suspension of its obligations under the Council Decisions (EU) 2015/1523 and (EU) 2015/1601. LIBE Rapporteur Ska Keller noted that Sweden rejects the Commission’s proposal for relocating asylum seekers from Italy and Greece (see also European Commission, 2015f) by arguing that “Sweden has done more than most other Member States to protect refugees”. Rapporteur Keller called all member-states to “fulfil their commitment to solidarity and responsibility sharing and, therefore, no Member State should be suspended from its obligation of relocation” (European Commission, 2015f). Moreover, the Rapporteur noted that it is “regrettable that Council Decision (EU) 2015/1601 allows for the possibility for the Council to take implementing decisions on relocations without consulting the European Parliament, and that, consequently, the Council has decided unilaterally to suspend Austria from its obligation of relocation” (*Ibid*). Here, the Council and the Commission to an extent (that supported the decision) differentiate from the Committee in indirectly supporting conditionality in solidarity.

Nonetheless, the Rapporteur agrees that despite some Member States opting out, relocation remains the best example of what constitutes a practical expression not only of internal solidarity but also responsibility-sharing, with EASO ensuring that asylum and reception systems are not abused (Metsola and Kyenge, 2015a:7). Relocation may be “a temporary derogation from the Dublin rules” (*Ibid*:12) but it is also an act of solidarity, “a tool for solidarity and responsibility sharing” (Metsola et al, 2016a:6). LIBE’s narrative acknowledges that the relocation mechanism is an emergency measure during an emergency situation. In line with the Commission, the Rapporteurs call for the establishment of a permanent relocation scheme for applicants and beneficiaries in need for international protection, which can result both in preventing irregular migration and in preventing “situations of violence, exploitation and abuse” (Metsola and Kyenge, 2015a:5). Through this, an indirect nod to gains for Member States is made. This suggests that irrespective of the value narrative, incentives (in this case reduction of arrivals) remain crucial in achieving physical manifestation of solidarity and responsibility-sharing. This is not surprising. It is worth remembering that the EU is made up of 28 Member States and some have never had to face either irregular migration or asylum applications that were disproportionate to their capacity.

LIBE references the concern over secondary movements and takes an innovative approach to the relocation policies suggesting the preferences of the applicants should be taken into consideration (Metsola and Kyenge, 2016a:13). Similarly, they propose a permanent binding quota system, which

should operate irrespectively of emergency situations. In this, the LIBE Committee is in line with the European Commission; both institutions were projecting a pan-European solution based on a physical manifestation of solidarity. This is where they also differentiate in 2015 with the European Council and JHA Council; both are bounded more by national interests. Nonetheless, even in the LIBE Committee the narrative gradually solidifies to a link between solidarity, responsibility and burden-sharing. The same view was also adopted by the Commission, which related burden-sharing with EU's sustainability. In the fear of secondary movements, the Commission explained that "actions of individual Member States cannot satisfactorily reply to the common challenges all Member States are confronted with in this area" (European Commission, 2015b:7-8). Nevertheless, it clarified that those who "will fall outside the relocation scheme [...] remain under the responsibility of Italy and Greece" (*Ibid* :8).

The European Commission proposed a second, complementary, package of proposals on the 9<sup>th</sup> of September 2015. Most notable was the suggestion for relocating 120,000 people in need of international protection from Greece, Italy and Hungary to the rest of the member-states, moving well beyond the 40,000 suggested in May. For the European Commission this was an accompanying measure to seven more suggestions<sup>20</sup>. The Commission further suggested the introduction of a Permanent Relocation Mechanism for all Member States, which "can be triggered any time by the Commission to help any EU-Member State experiencing a crisis situation and extreme pressure on its asylum system as a result of a large and disproportionate inflow of third country nationals" (European Commission, 2015c:1-2). Although no direct reference to solidarity is made, indirectly the proposed mechanism was based on responsibility and solidarity. The permanent relocation mechanism would be part of the reform of CEAS, a two-phase proposal initiated by the Commission that would yield limited results by 2019 when this report was written. Since the fundamental basis of CEAS is responsibility-sharing, it is worth discussing separately when looking at the policy narrative on values of the Institutions.

### 3.1.3 Common European Asylum System and the value of fairness

The Common European Asylum System is grounded on the notion of solidarity and responsibility-sharing. It is, in that sense, a tangible example of how a specific value translates into a legislative framework and thus binds Member States through the law. The two interlinked values are less a by-product of the TFEU and more of the Geneva Convention of 1951 that forms the basis for CEAS. All instruments designed are structured around the notion that asylum is a right and non-refoulement an undeniable principle, signatories must abide by. Therefore, even though asylum is a right, the underlying ethos of the refugee regime is a reciprocal commitment to the principle of non-refoulement. As the preamble to the 1951 Convention makes clear, the premise of the refugee regime is international cooperation. Cooperation is achieved through the states reciprocally committing to provide protection to refugees. The regime thus, comprises of two sets of obligations: asylum and

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<sup>20</sup> The initiation of the temporary solidarity clause; the boost of effectiveness of the return policies through the Return Handbook and the EU Action Plan on Return; the Communication on Public Procurement rules for Refugee Support Measures in order to cover the immediate needs of asylum seekers ; the external dimension of the refugee crisis through diplomatic initiatives with regards the conflicts in Syria, Iraq, and Libya; the increase in funding the Trust Fund for Africa in order to tackle the root causes of migration; the introduction of a common European list of Safe Countries of Origin.

burden-sharing. Asylum is an obligation that states undertake in solidarity to the refugees who are entering their territory. The legal framework thus, is bound to the solidarity principle. Burden-sharing is reflected in the obligation that states enter again willingly to assist through resettlement those in the territory of states unable (or unwilling) to offer protection. As the Convention reflects the value of “internal” and “external” solidarity, in a similar mirror image so does the Common European Asylum System (CEAS).

When Institutions discuss the CEAS the differentiated approach to solidarity and responsibility sharing becomes more evident. For the Commission and the LIBE Committee, CEAS was in troubled waters even prior to the refugee crisis, though 2015 revealed the full extent of the inadequacies of the system. For the JHA and the European Council, there is less willingness to reform the CEAS in a way that establishes a true responsibility sharing mechanism. Rather, the failure of CEAS is attributed to the unwillingness of some Member States to fulfil their responsibilities (i.e. Greece in this case with failure to register arrivals and provide reception conditions). Following the European Agenda on Migration, and the relocation discussions, the Commission initiated two rounds of proposals for the reform of CEAS in May and July 2016.

In its April Communication, the Commission clarified that “EU needs a robust and effective system for sustainable migration management for the future that is fair for host societies and EU citizens as well as for third country nationals and countries of origin and transit” (European Commission (2016b:2). In order to be successful, “this system must be comprehensive, and grounded on the principles of responsibility and solidarity” (*Ibid*:2). The communication suggests the shift that had already taken place in late 2015 in various Member States (e.g. Hungary’s fences, reintroduction of Schengen border controls) impacted the way the Commission formulated its proposals. A balance seemingly is struck. The values of responsibility and solidarity are maintained but their sustainable application is linked to fairness for EU citizens and migration management. Both are indirect nods to Schengen and the external border controls, issues highly on the agenda of Member States at the time.

Taking into consideration the migratory flows towards Europe the Commission admitted that in cases of sudden influx of migrants, the Dublin System increases the pressure to the frontline countries and challenges their reception capacities. This “partly explains why over the past years there has been increasing disregard of EU rules” (*Ibid*:4). This is crucial as regards the value basis of policies proposed. One of the consistent concerns of the European Commission has been the application of the legal framework by Member States; a concern initially raised in discussions in the JHA Council between Ministers during 2015. For intra-EU solidarity to be successful, rules must be respected by all Member States, including those on the frontline. In this, the Dublin system was the most problematic in terms of application, long before the refugee crisis. The Communication underlined the delays in processing asylum applications and transfer requests resulting in “shift of responsibility between Member States after a given time” (European Commission, 2016:2). To deal with these deficiencies, the Communication suggested to reinforce the Eurodac system, to achieve greater convergence in the Union’s asylum system, to prevent the outbreak of secondary movements, to introduce a new mandate for the asylum agency but mostly to establish a sustainable system which will ensure “ensuring a high degree of solidarity and a fair sharing of responsibility between Member States through a fair allocation of asylum seekers” (*Ibid*:6).

The LIBE Committee has long been in favour of revising CEAS and particularly Dublin. Rapporteurs noted that “the Dublin system was not designed to share asylum burdens and responsibility among Member States. Rather, its main purpose is to create a mechanism that swiftly assigns responsibility for processing an asylum application to a single member State” (Metsola and Kyenge, 2016b:3-4). This is crucial criticism leveled at Dublin striking at the core of the value basis of CEAS. Implicitly the LIBE committee stated that the central policy on asylum was not designed for responsibility-sharing, despite being portrayed as such in the official narratives. They suggested a reform of Dublin regulation, in which asylum-seekers would apply to Europe as a whole and be subsequently allocated in each member-state until the latter reached its respective threshold. As it is illustrated, LIBE’s Rapporteurs favor a more centralized system compared to the current system of individual responsibility of member-states on relocation (*Ibid*:7). Such a mechanism would also facilitate the eventual establishment of a European asylum, based on shared recognition of international protection awarded. It would be a significant step to what exists today; shared recognition of rejected asylum applications but absence of a European asylum common and valid for all Member States. The two Rapporteurs call the EU to show solidarity both to frontline member-states and migrants, since “the rationale of using solidarity and responsibility-sharing measures is to enhance the quality and functioning of the CEAS” (Metsola and Kyenge, 2016a:15).

The Communication issued on April 2016 set the basis for reforming the CEAS, and triggered the first package of reforms in May of the same year, which aimed to “form the medium term response to future migratory challenges” (European Commission, 2016c:1). Although reforms included the strengthening of the EURODAC system and the transformation of EASO into a “into a fully-fledged European Union Agency for Asylum” (*Ibid*), the most crucial policy change dealt with the **introduction of the fairness mechanism**. The fairness mechanism reflected a corrective action by allocating asylum applications from frontline countries to the rest of the member-states, when these exceed a specific number in proportion to the country’s size and wealth. The fairness mechanism reflected the principle of fairness, which was often put forth by the Commission as a guiding principle for responsibility-sharing and solidarity. Thus, **solidarity, responsibility and fairness become bound together creating an interlinked conditionality for the application of each value**. Beyond the actual proposals, this binding of the different values/principles was evident in the public discourse of representatives of the institutions. For example, Commissioner for Migration and Home Affairs, Dimitris Avramopoulos, argued that, “The time has come for a reformed and more equitable system, based on common rules and a fairer sharing of responsibility” (*Ibid*).

The fairness mechanism provides a balance between internal solidarity of member-states and equal distribution of responsibility. In this respect, it is quite interesting that in case a country does not participate in the fairness mechanism, then “it would have to make a solidarity contribution of €250,000 for each applicant for whom it would otherwise have been responsible under the fairness mechanism, to the Member State that is reallocated the person instead” (*Ibid*:2). The imposition of sanctions is useful as regards the application of the value narrative. Instead of a penalty fee, the Commission calls the sanction “**solidarity contribution**”, a framework used to describe the economic contributions and EU funding to member-states for covering the needs triggered by the increased influx of refugees. As such, we can see that solidarity is used both as a value for encouragement but also as a forewarning in the Commission’s discourse. The need for such a mechanism also indicates that solidarity mechanisms were not necessarily welcomed by all Member States, with the Visegrad Group and particularly Hungary as the most well-known example of opposition to such proposals.

The construction of a holistic and long-term approach on migration required additional measures, introduced in the second package of CEAS's reforms in July 2017, which aimed at further harmonizing EU policies (European Commission, 2016d:2-3). With the second package of CEAS's reforms the Commission suggested to: replace the Asylum Procedures Directive with a Regulation in order to standardise the procedural arrangements in the member-states; replace the Qualification Directive with a Regulation in order to harmonise the standards for recognising those who are in need of international protection across the member-states; revise the Reception Directive in order to set uniform reception conditions; introduce a structured Union Resettlement framework in order to ensure legal and safe channels for migrants coming to Europe (*Ibid*). These proposals sought to creating "a fully efficient, fair and humane asylum policy – one which can function effectively both in times of normal and in times of high migratory pressure" (European Commission, 2016e :1). The Commission accompanied the proposals with specific measures emphasising that this second round of amendments is necessary for the development of a fairer migration framework (European Commission, 2016f).

Again, fairness seems to be a principle guiding the Commission in proposing these set of changes in CEAS. The Commission clarified that "A fair and efficient common procedure throughout the Union means: Simpler, clearer and shorter procedures" (European Commission, 2016g:1). However, fairness does not seem to form a value on its own, but it is used as a bridge for connecting the values of solidarity and responsibility. As the First Vice-President Frans Timmermans stated, "The EU needs an asylum system which is both effective and protective, based on common rules, solidarity and a fair sharing of responsibility" (*Ibid*). In similar vein, the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos stated that the Commission's objective is "to have a common system which is quick, efficient and based on harmonised rules and mutual trust between Member States" (*Ibid*). However, both values seem to apply only in those cases when the rule of law is respected, and migration is not only considered legitimate but authentic (i.e. in contrast to 'bogus asylum seekers').

In December 2016, the Council reached a *partial general approach* on the Proposal recasting the EURODAC Regulation and the Proposal transforming the EASO into a European Union Agency for Asylum (EUAA). The partial general approach indicates difficulties reaching an agreement. In February 2017, Rapporteur Cecilia Wikström, in the LIBE report on the proposal package devoted a great share in discussing reforms on Dublin regulation that would result in responsibility-sharing.

The re-imposition of internal EU border controls by the member-states signaled the malfunction of Dublin, which continues to this day. The latter does not stand alone, but is grounded in Schengen, designed to prevent secondary movement within a borderless Union. Reintroduction of border controls indicates not only a break in Dublin but also in trust between Member States. In case of non-reform, the Rapporteur notes that "it could very well be the beginning of the end for the Schengen system ensuring free movement of people in Europe" (Wikström, 2017). The Rapporteur criticises the Commission's suggestion for 'introducing an "opt-out" from the corrective allocation system, which would have allowed Member States to buy themselves out of the corrective allocation by paying 250,000 euros per applicant' (*Ibid*). As the author claims, it is "unacceptable to put such a price tag on human beings, and I therefore suggest deleting the provision" (*Ibid*). Rapporteur Wikström continues on the same line by suggesting that, "I am concerned by the comments of several leading politicians stating that they would ignore democratic decisions by the EU if these were not in line with their

national preferences. In view of these comments, I have suggested introducing conditionality between the proper participation in the corrective allocation mechanism, and the European Structural and Investment Funds. It would not seem logical to allow Member States to benefit from the solidarity of others whilst ignoring their own commitments under our commonly agreed rules" (*Ibid*:88). This harsh criticism strikes back to what the Union projected as its core values so far and is indicative of the digression between the value framework and its implementation. As noted in the beginning, this is partly due to the vagueness of the values. A flexible approach to solidarity would allow some Member States to contribute financially and others to participate in relocation schemes. However, such an approach is fraught with problems, as there is little guarantee that the Member States will continue to pay and/or receive refugees. In other words, solidarity is neither guaranteed nor necessarily enforceable and this is evident in the initial proposal package. Within the context of the refugee crisis, the Rapporteur relates the democratic governance of the Union with solidarity and responsibility.

### 3.1.4 Financial Solidarity

Throughout 2016 and 2017 particularly, providing economic assistance to address the refugee crisis and the challenges in EU's security was another form of practically expressing solidarity within the member-states (European Commission, 2015e:2). The connection of economic support with the value of solidarity becomes apparent when it comes to the Proposal for a Council Regulation on the provision of emergency support within the Union issued in March 2016. There, the EU clarified that "EU funds were not designed in order to fund the member-states humanitarian needs but specific policies dealing with integration (through the Asylum, Migration and Integration Fund), the protection of borders (through the Internal Security Fund) and the fight against poverty (through the European Fund for the Most Deprived)" (European Commission, 2016h:2-3). Nevertheless, the context of the refugee crisis resulted in policy change. In particular, the DG ECHO which used to provide humanitarian funding to third countries changed its mandate, "acting in a spirit of solidarity" (*Ibid*), providing economic assistance to frontline member-states.

The discussion around funding is also useful in understanding how solidarity is framed internally and externally. This was addressed more explicitly by LIBE's Rapporteurs Roberta Metsola and Kashetu Kyenge. In line with the value of solidarity, financial assistance can be divided in internal and external, with the former referring to the Member states and the latter to third countries. Between 2014-2020 "the main EU financial instruments in the Home Affairs' field are the Asylum, Migration and Integration Fund ("AMIF") and the Internal Security Fund ("ISF") – which comprises an instrument on borders and visa and one on police cooperation – both managed by DG Home Affairs (HOME). [...] AMIF and ISF have replaced the General Programme for Solidarity and Management of Migration Flows ("SOLID funds") that covered the 2007-2013 funding period" (Metsola et al, 2016a: 3-4). Of those, AMIF supports "actions addressing all aspects of migration" (*Ibid*). In this respect, it is quite crucial that one among the four objectives of AMIF is "to enhance solidarity and responsibility-sharing between the Member States, in particular towards those most affected by migration and asylum flows, including through practical cooperation" (*Ibid*). The target group for assistance are the Member States, with AMIF the pinnacle of intra-EU financial solidarity.

EU funding policies bind the values of solidarity and responsibility-sharing on a **rights-based approach**. This is quite clear in LIBE's recommendation as regards funding, where it urges the member-states to

“Fully protect and ensure the human rights of migrants”, as well as to ensure that resource allocation “fully takes account of the EU and Member States” commitments to protect human rights” (*Ibid*:10). More precisely, “EU funding should be used to proactively support a rights-based approach to migration, which includes non-discriminatory service provision and activities” (*Ibid*).

According to the Commission, “A common policy on asylum [...] should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” (European Commission, 2016i:18). Discussing about the common policy on asylum and the third-country nationals eligible for international protection, the Parliament adopted the Commission’s proposal for regulation on the former reading, by issuing some amendments. One of the first amendments deals with the values projected in this regulation. In particular, the Commission suggested to include the financial implications of solidarity between the member-states on the legislation, while the Parliament erased the reference. As the latter justified, “Genuine solidarity involves the proper distribution of those seeking international protection across the Member States. Financial solidarity should not be a preferred form of solidarity” (Fajon, 2017a). The fact that this proposal was put forth and rejected indicates a different approach between the Commission and the LIBE Committee as regards solidarity and its manifestation. The proposal was met also with significant resistance from Member States. The Czech senate rejected the permanent relocation mechanism arguing that EU has already mechanisms to deal with situations of emergency. It also criticized the unclear criteria regarding relocation processes concluding that this legislation will not solve the problem of increased migratory pressures (Senate of the Parliament of the Czech Republic, 2016a). Hungary also rejected it (Hungarian Parliament, 2016a). Italy rejected it as well by arguing that the proposal reproduces the deficiencies of the Dublin regulation (Italian Senate, 2016a). Poland and Romania rejected it on the basis that the solidarity contributions of member-states which cannot serve their share on relocation is an informal financial penalty which violates the principle of subsidiarity (Sejm of the Republic of Poland, 2016a).

Most of the countries rejecting the proposal suggested that a mechanism already existed providing solidarity between Member States. However, the LIBE Rapporteurs argued that there was “no specific pillar equivalent to the objective of enhancing solidarity and responsibility-sharing between the Member States” in the asylum system thus far, nor in the pillars of the Agenda (Metsola et al, 2015a). Although the Parliament welcomed the emergency relocation measures, the Rapporteurs mark that both policy and operational developments are needed for establishing European long-term migration governance. For this, they recommend that “No conditionality should be attached to humanitarian assistance [...], and EU funding should be used to proactively support a rights-based approach to migration, which includes non-discriminatory service provision and activities” (Metsola et al, 2016:5). In this, the LIBE Committee breaks from the other institutions and especially the Commission that pushes for a conditionality element to be introduced.

The LIBE went a step further than other institutions, by incorporating the civil society under the financial solidarity umbrella, underlining **the crucial role of civil society** in the refugee crisis. LIBE suggested that this should not be limited in assisting but to engage civil society organizations in developing Union’s actions and national programs. According to the Rapporteurs’ statement, “Civil society, including NGOs, plays a significant role in safeguarding, promoting and implementing migrants’ rights. Hence, they should be supported’ (*Ibid*:10). Therefore, it calls on the EU to ensure their permanent funding in order to continue their operation. Within this framework, “The

implementation of rights-based provisions in current EU directives should be backed up further by EU funding. Funding should also be made available to tackle exploitation and abuse of undocumented migrants based on the Employers Sanctions Directive” (*Ibid*:8). Solidarity for the first time, is not aimed at Member States or asylum seekers but at the civil society that functions not only as a crucial service provider to migrants but often as a way for their voice to be heard.

Solidarity undeniably forms the basis for the unity of the Member States. It is a value that is not only projected in the policy narrative of the institutions but often translates into policy. Nonetheless, it is neither commonly understood nor fully embraced by all. The refugee crisis of 2015-2016 tested for the first time the value of solidarity among Member States but also in relation to the refugees. A shift takes place, from an unconditional solidarity to one bounded by the rule of law, responsibility and fairness. Both responsibility and fairness are values in their own right and critical in the EU. The shift most likely began at the national level and translated to the supranational first through the Council, spilling over to the Commission and the EU Council. LIBE in contrast, remains consistent in its approach to solidarity and responsibility not only in 2015 but even before the crisis emerged.

### 3.2 External Solidarity

Internal solidarity is one crucial aspect of the EU migration and asylum governance. External solidarity is the second element. As the section discusses, solidarity is almost always conditional in relation to third countries, bounded by another crucial value/principal of the EU; respect of the rule of law (which in turns links with respect of human rights).

The external dimension of solidarity was first formulated under the GAMM. The GAMM is implemented through several political instruments (bilateral and regional policy dialogues and action plans), legal instruments (such as visa facilitation and readmission agreements), operational support and capacity-building (including via EU agencies, e.g. FRONTEX, EASO) as well as the wide range of programme support that is made available to third country administrations and other stakeholders, such as civil society, migrant associations and international organisations. The Commission as well as individual Member States offer financial assistance for the implementation of the GAMM, which provides the roadmap for the management of migration and asylum with third countries of origin and/or transit. What is important about the GAMM is its geographical focus. Through the Eastern Partnership (e.g. Georgia), the Western Balkans (e.g. Kosovo), South Mediterranean countries (e.g. Jordan), sub-Saharan countries (e.g. Nigeria) and Asia (the US and Russia are also included in the GAMM but are the least relevant in relation to migration), the GAMM seeks to address through different instruments all the regions that either receive or produce migration (including forced movement).

The GAMM makes two explicit references to the value of solidarity. The first applies to the refugees, reflecting the ethos of the Geneva Convention of 1951. In the third pillar titled “Promoting international protection and enhancing the external dimension of asylum policy” the 2011 Communication states that “The EU needs to enhance solidarity with refugees and displaced persons and such efforts should become an integral part of the GAMM”. The second reference to solidarity pertains to the internal solidarity of Member States. When discussing thematic priorities, the GAMM states that the EU “will continue to improve the efficiency of its external borders on the basis of

common responsibility, solidarity and greater practical cooperation. It will also reinforce its operational cooperation geared towards capacity-building with its partner countries”. Here solidarity is conditional with responsibility and cooperation, reflective of the internal dimension of migration.

By 2015, the external dimension acquires prominence. External solidarity is referenced in the Joint Communication of September 9, 2015 “protecting people in need, deploying urgent humanitarian assistance, securing access to asylum, and addressing root causes, in particular conflict, political violence, abuse of human rights and poverty, is essential” (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2015a:3). Commission President Jean-Claude Juncker two months later, stated that migration and displacement of populations “is a global problem and this global problem is inviting us to give a global and common answer” (Juncker, 2015a). This cooperation should, nevertheless, be based on “a rights-based approach encompassing human rights” (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2015a:3). Thus, external solidarity is conditional, replicating essentially the framework set out in 2011 under the GAMM. This is important in showing a level of continuity in the way migration policy is approached by the institutions as regards third countries. How is this external solidarity achieved? The Council proposed already in 2014 “Action in cooperation with third countries, reinforced management of external borders and Frontex” (Council of the European Union, 2014a). This policy narrative of conditional solidarity focused on border management precedes, remains and is reinforced throughout the crisis and its aftermath with the LIBE Committee warning the EU and the member-states to take “into account the record of those countries in breaching the human rights of migrants” (*Ibid*:5).

External solidarity is structured on a rights-based approach and in 2016 takes an unusual form through the EU-Turkey cooperation that begins in the autumn of 2015 and peaks with the EU-Turkey Statement of March 2016. The first meeting of Heads of States with Turkey in November 2015 signals a shift from the internal notion of solidarity among the countries of the EU to an external approach regarding third countries. Turkey is portrayed as a respectful partner, which has shown “solidarity to more than 2 million refugees” (General Secretariat of the Council, 2015c). Lest we forget, that Turkey had undergone significant Europeanisation process in its migration and asylum institutions as per accession process. The Law on Foreigners and International Protection (LFIP) and the Temporary Protection Regulation (TPR-effective since 2014) provide the legal basis of refugee status giving temporary protection primarily to Syrians and international protection to applicants and refugees of other nationalities in Turkey. The TPR enabled the EU-Turkey Statement, since article 6 of the TPR guarantees in theory protection from *refoulement* to persons granted temporary protection<sup>21</sup>. Together with the EU, Turkey jointly committed to ‘confront and surmount the existing risks and threats in a concerted

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<sup>21</sup> An exception to this rule was introduced by way of emergency decree in October 2016, providing that a deportation decision “may be taken at any time during the international protection proceedings” against an applicant for reasons of: (i) leadership, membership or support of a terrorist organisation or a benefit-oriented criminal group; (ii) threat to public order or public health; or (iii) relation to terrorist organisations defined by international institutions and organisations. The reform was consolidated by Law No 7070 on 1 February 2018. Deportation decisions have been increasingly issued to Syrians on the basis of the abovementioned provisions in 2018, similar to persons seeking international protection in Turkey. (AIDA, <https://www.asylumineurope.org/reports/country/turkey/protection-refoulement>).

manner to reinforce the European Project' (General Secretariat of the Council, 2015d:1). The value of solidarity stands central both in the narrative and the collaboration. The Action Plan and Statement are largely grounded on the notion that the EU should show solidarity to Turkey that carries a disproportioned number of Syrians in its territory. Nevertheless, it seems to be also a conditional solidarity which directs the counties in a result-oriented action to stem "the influx of irregular migrants" (*Ibid*). Although burden-sharing is again an important component in this equation, the control over the borders seems to be more important, with solidarity instrumentalised. Through the usage of external solidarity Member States achieve the protection of borders. Consecutively, the protection of borders signals the safeguarding of Schengen, which is considered a fundamental right for EU citizens (see section on Schengen). This is evident in President Tusk's remarks, when he states: "Let us not be naïve, though. Turkey is not the only key to solving the migration crisis. The most important one is our responsibility and duty to protect our external borders. We cannot outsource this obligation to any third country. I will repeat this again: without control on our external borders, Schengen will become history" (General Secretariat of the Council, 2015e).

The Commission, in its April progress report to the Parliament on the EU-Turkey Statement, stated that no "blanket" return policy of undocumented migrants and asylum seekers will be applied since, "it is a fundamental requirement flowing from the European Convention on Human Rights and the Charter of Fundamental Rights that every case needs to be treated individually" (European Commission, 2016j:3). From a value perspective the reference to the Convention and Charter is crucial in reaffirming that the European "value" framework remains intact when applicable to third countries. Referring to the 1:1 policy, the Commission stated that "resettlement and humanitarian admission are equivalent to relocation, as all are concrete expressions of solidarity with other Member States or third countries" (*Ibid*:5). Nevertheless, solidarity seems to serve a *quid pro quo logic*, since "On the understanding that Turkey takes the necessary measures to fulfil the remaining requirements, the Commission will make a legislative proposal to lift the visa requirements for Turkish citizens at the end of April 2016" (*Ibid*:7). Similar to the European Council (General Secretariat of the Council, 2016a), the Commission also expects from Turkey to fully respect the fundamental rights, the implementation of democracy and the rule of law in order "to prepare for the decisions on the opening of the new chapters in the accession negotiations as soon as possible" (European Commission, 2016j:8).

Already from the European Council's meeting in June 2015, one aspect of state's responsibility was to use the **more-for-more principle** as leverage "for implementing existing readmission agreements and concluding new ones" (General Secretariat of the Council, 2015f:3). The implementation of the more-for-more principle is marked in other meetings of the European Council and pre-exists the crisis. Nevertheless, we observe that over the time it is overshadowed by the EU-Turkey Joint Action Plan. This change marks an additional change in the European Council's discourse. From the unilateral attempt of EU to manage the migration issue and increase its leverage in the returns and re-admissions through the more-for-more principle, collaboration with Turkey seems to be "part of a comprehensive cooperation agenda based on shared responsibility, mutual commitments and delivery" (General Secretariat of the Council, 2015g). This **shared responsibility**, depends on fairness and extends beyond the resettlement and returns to the physical patrolling of the border. EU-NATO agreement to join forces in stemming the arrival of migrants from Turkey to the Aegean islands on 18<sup>th</sup> of February 2016, signals another important moment, when responsibility acquires a more important role in the

European Council's discourse. Together with the recommendations dealing with the effective collaboration between EU and NATO and the implementation of the EU-Turkey Action Plan, the European Council underlined that "humanitarian assistance should continue to be provided to Syrian refugees and to the countries neighboring Syria. This is an urgent global responsibility. In this context, the European Council welcomes the outcome of the Conference on supporting Syria and the Region in London on 4 February and calls on the Commission, Member States and all other contributing countries to rapidly implement their commitments" (General Secretariat of the Council, 2016b). Following the second meeting of heads of state or government with Turkey, the global level of responsibility in humanitarian support to Syrian refugees is scaled down to the collective EU responsibility for assisting Greece. This targets the operation of hotspots, protection of borders, full implementation of the relocation process, provision of reception facilities obstruction of secondary flows of irregular migrants and asylum-seekers (General Secretariat of the Council, 2016c).

The narrative of the European Council seems to follow a value-based approach, where the introduction of the relevant policies is subjected to the (global and European) basis of **collective responsibility**. Therefore, it is quite interesting the shift towards the rights-based approach when the European Council addresses Turkey's domestic affairs. After the meeting with Turkey, President Tusk marked that "We also discussed with Prime Minister Davutoğlu the situation of the media in Turkey. We all know how important freedom of speech and expression are, these are fundamental human rights. [...] I am saying all this because we cannot stay indifferent to the concerns raised in this context about what is now happening in Turkey" (General Secretariat of the Council, 2016d). This discourse is further adopted by the European Council in its conclusions following the EU-Turkey statement on the 18<sup>th</sup> of March 2016, claiming that "The EU reiterates that it expects Turkey to respect the highest standards when it comes to democracy, rule of law, respect of fundamental freedoms, including freedom of expression" (General Secretariat of the Council, 2016e). External solidarity is also bounded by conditions- in this case respect and application of the rule of law.

The stabilization of the Eastern Mediterranean route shifted the EU's attention to the Central Mediterranean, bringing to the forefront the Union's collaboration with Libyan authorities and coastguard. This was the focus of the Malta summit on the 3<sup>rd</sup> of February 2017. The EU declared its willingness to stabilize the situation in Libya and help the country to improve its reception facilities and at the same time protect the EU's external borders (General Secretariat of the Council, 2017a). The European Council clearly underlined that "We reaffirm our determination to act in full respect of human rights, international law and European values, and in conjunction with UNHCR and IOM" (General Secretariat of the Council, 2017b). Although the heads of states or governments do not clarify which are the European values they refer to, human rights and international law are the instruments that will indicate the way to act. Therefore, the rights-based approach is also the driving logic of the Malta summit in February 2017.

Resettlement is another practical manifestation of external solidarity but also collective responsibility. Referring to the urgency for speeding up the resettlement process under the EU-Turkey statement, "the Council underlined the need to work towards a credible Humanitarian Admission Scheme to resettle Syrian nationals in Turkey to the EU" (Justice and Home Affairs, 2016a). Already from its first article, the scheme highlights the creation of a system of "solidarity and burden sharing with Turkey

for the protection of persons forcefully displaced to Turkey as a result of the conflict in Syria". As we comment on other parts of this report, solidarity is firstly used as a policy directive to further strengthen collaboration among the member-states or between EU and a third-country (here Turkey) and to a lesser extent as a value of political altruism towards a suffering population (here the refugees). This is channeled and expressed in EU's official documents and marks the rights-based approach for the upcoming resettlement policies. The dual role of solidarity is better portrayed in the aftermath of the JHA Council meeting on the 22<sup>nd</sup> of September 2015, when President Jean Asselborn stated that, "We have an agreement in the Council by a very large majority, a majority going beyond that required by the Treaties. Today's decision reminds us that the European Union is founded on solidarity between member states, but also on solidarity with people in need of protection" (Council of the EU, 2015d). In what concerns resettlement, the Council underlined its objective in protecting the refugees and "granting them the right to stay and any other rights similar to those granted to a beneficiary of international protection [...], in line with the Geneva Convention on the Status of Refugees" (Justice and Home Affairs, 2015b:6).

#### 4. Saving lives at sea

Beyond solidarity and responsibility sharing, the importance of saving lives at sea is highlighted directly or indirectly across all Institutions examined in this research. It derives from the legal obligations all Member States accept by signing legal instruments such as the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR Convention), and the 1982 UN Convention on the Law of the Sea (UNCLOS) that prescribe rescue operations by any vessel in the maritime waters. The importance of saving lives also derives de facto from the human rights framework, which is horizontally integrated in the EU and its Member States. Respect and protection of human rights is indeed a precondition of membership but beyond that, at its most basic level there is a duty to respect the right to life (Article 2 of the Charter of Fundamental Rights of the EU and the European Convention on Human Rights) and the duty to save lives at sea (enshrined in multiple maritime law treaties, such as the 1974 SOLAS Convention, the 1979 SAR Convention and the 1982 UNCLOS).

The discussion around saving lives at sea has progressed parallel to the loss of life at sea and at border crossings and this was highlighted also by our. In 2013 and 2014 the shipwrecks in the Central Mediterranean triggered a humanitarian approach to saving lives- through enhanced Search and Rescue operations either by individual Member States (e.g. Italy) or through FRONTEX. Top priority of the TFM was "to prevent deaths at sea and to prevent such human tragedies from happening again" (European Commission, 2013a:2). Although solidarity and responsibility-sharing were highlighted as the guiding principles of TFM, they were linked to the principle of saving lives. The role of Frontex seems rather crucial in "assisting member-states and saving migrants lives, mostly by contributing to national efforts such as the Italian Mare Nostrum" (*Ibid*:16-17).

The institutional narrative acknowledges the importance and significance and the need to indeed guarantee the protection of lives in the maritime border crossings. It does not however engage in a discussion the same way as with solidarity and responsibility. Saving lives at sea, does not stand alone as a singular priority. The narrative discusses saving lives in tandem with preventing irregular journeys,

reducing border crossings and undertaking search and rescue operations. Saving lives is linked with various policies that increasingly look outwards, to third countries (thereby linked with the notion of external solidarity as well as externalisation). In its effort to draw the policies for rescuing people in Central Mediterranean, the European Council in 2013 stressed that “increased engagement with third countries in order to avoid that migrants embark on hazardous journeys towards the European Union should be a priority” (European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2017a:2). Building on this, subsequent Communications issued by the Commission underlined that the EU should assist other countries such as Algeria, Egypt and Tunis in developing their own asylum systems. Steps towards this direction would “promote both practical cooperation and a common approach toward better migration management, saving lives at sea in full respect of human rights in line with international and EU standards” (*Ibid*:14). The same goes also for the improvement of the Libyan coast guard and its training in search and rescue operations (*Ibid*).

Saving lives stands both as an EU policy and as a “value”, or better as a duty correlative to the right to live, which subsequently can be considered as a dimension of the value of human dignity. To this end, the statement and resolution introduced by the European Council and the Parliament in April 2015 respectively showed “the consensus for rapid action to save lives” (European Commission, 2016a:3) among the European institutions. The European Agenda on Migration identified saving lives as a key priority of the EU. As the Agenda highlighted, “Europe cannot stand by whilst lives are being lost” (*Ibid*:3). A series of policy measures were introduced most pre-existed but strengthened with the most obvious being the role of FRONTEX. Following the Italian “Mare Nostrum” operation, Frontex’s role was upgraded in exercising the joint operations of Triton and Poseidon. The underlying argument was that the increase in Frontex budget served both for supporting the borders of the member-states under pressure and also saving migrant lives. Furthermore, saving lives at times was linked with the principles of solidarity and responsibility. In the Valetta Summit Political Declaration, the EU highlights that it is the aforementioned principles that elevate saving lives into a key priority.

Combatting smuggling was put forth as an argument for saving lives. Smuggling was linked with trafficking- a linkage that remains contested -and addressing both was portrayed as a way of controlling the external borders while saving lives. According to the Commission, it portrayed “first and foremost a way to prevent the exploitation of migrants by criminal networks” (*Ibid*:8). This discourse, which inserts an element of victimisation from which migrants should be protected (see Carling, 2005) has been reinforced over the past couple of years. In order to protect migrants actions against smugglers were combined with sanctions to employers who offer illegal employment to third-country nationals (*Ibid*:8-9). The usage of saving lives can be seen throughout the Action Plan, with particular references regarding the destruction of boats used by smugglers always come after the security and safety of people (European Commission, 2015g:4). Lastly, control over both EU and third-countries’ borders was an additional measure for saving migrants’ lives. Thus, in terms of the value-based and rights-based distinction discussed by Philips and Düwell (2018), saving lives is elevated into a principle and acquired a value-based approach, while at the same time, EU narratives show that saving lives acquires an additional rights-based approach, since it derives from legal obligations and the incorporation of the human rights dimension. Although it is not clear whether EU defends saving lives from a value-based

or a right-based background, it is quite clear that saving lives is instrumentalised in order to put forth a set of derrence policies that are justified under humanitarianism.

As the crisis was unfolding, the burden seemed to move from search and rescue operations to the fight against smuggling networks (*Ibid*:2). Nevertheless, the value of saving lives continued to occupy EU's policies. The Commission's Communication in 2017 stated that, "The EU maintains its humanitarian imperative to save lives at sea" (European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2017a:6). Aiming to tackle the smuggling networks, the EU Action Plan against smuggling followed a similar path by highlighting its scope to "prevent the loss of lives caused by smugglers and traffickers" (*Ibid*:3). On the 20th of April 2015 the JHA Council & Foreign Affairs Council jointly met and briefed by the European Commission on the latter's immediate action plan to tackle the unfolding situation in the Mediterranean. Ministers agreed to "fight against trafficking of human beings, to strengthen EU action to save lives at sea as well as enhance support for countries on the front line" (Council of the EU, 2015e). Saving lives at sea here falls under a broader umbrella of measures that seek to deter entry and will become dominant in the institutional narrative by 2016 as regards the Central Mediterranean route. Particularly as regards Libya, the European Council already since December 2016, "underlined the need to enhance support for the Libyan coastguard, including through EUNAVFOR MED operation Sophia" and that "initiatives need to be taken to offer assisted voluntary return opportunities to migrants stranded in Libya and curtail dangerous journeys" (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2017a:3). Saving lives thus, is approached through prevention of journeys (in this case in cooperation with the Libyan coastguard), intensifying combatting smuggling and trafficking, returning those already stranded in Libya (thereby limiting departures).

Saving lives is also intrinsically linked with search and rescue operations that became controversial in 2017 and remain to this day. The need to avoid criminalising humanitarian assistance' (European Commission, 2013a:15) was already underlined by the TFM and the European Commission highlighted that "The international obligation concerning rescue of migrants in distress at sea should be recalled" (*Ibid*:15). The reference to international obligations is an important reminder that there is a legal framework that largely dictates action at sea. This seems a rather important development if we take into consideration that "Triton and Sophia Operations have resulted in more than 200,000 migrants having been rescued at sea" (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2017a:5), while a number of NGOs have funded ships for search and rescue operations. LIBE Committee Rapporteurs have also highlighted that saving lives is not only an action of solidarity but **primarily a legal obligation** and as a result assistance by NGOs in sea rescuing should not be punished, and all operations should "ensure that migrant lives are protected" (Metsola and Kyenge, 2016a:12). Though beyond the scope of this research, it is important to acknowledge the progression from saving lives to criminalizing assistance at sea. In March 2017, the European Commission published its evaluation of the Facilitation Directive<sup>22</sup> and Council Framework Decision 2002/946/JHA. It concluded that there is no need to revise the EU facilitation acquis, but clearly

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<sup>22</sup> The purpose of the Facilitation Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of framework Decision 2002/946/JHA in order to prevent that offence(see <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0090>).

acknowledged that some actors, including civil society organisations involved in search and rescue operations at sea, perceive a risk of criminalisation of humanitarian assistance (European Union Agency for Fundamental Rights, 2018). This is partly due to the way Member States select to apply the Facilitations Directive, which explicitly prohibits criminal proceedings initiated against those who undertake rescue or who assist those seeking humanitarian assistance. Following events in the Central Mediterranean, in July 2018, the European Parliament formulated guidelines for Member States to prevent humanitarian assistance from being criminalised. However, FRA research has highlighted the risk that EU Member States' domestic legislation on the facilitation of entry and stay of irregular migrants may lead to the punishment of those who provide humanitarian assistance, as well as private entities carrying out SAR operations at sea.

Since the summer of 2017, the Italian authorities have started taking measures, including preventing disembarkation of vessels carrying rescued migrants, seizing ships and launching criminal as well as administrative investigations against NGOs that are deemed to go beyond the scope of the rescue-at-sea activities prescribed in the Code of Conduct (Statewatch, 2017)<sup>23</sup>. Italy is not alone in undertaking legal proceedings but it is the first to link search and rescue with reception. In the opening article of the Code of Conduct it states that “the protection of human life and the rights of the people is the main objective of the Italian authorities in rescuing migrants, in the full respect of international conventions and, nevertheless, the rescuing activity cannot be separated from a reception path, sustainable and shared with other Member States, in accordance with the principle of solidarity referred to in art. 80 of the TFEU” (*Ibid*). Thus, the Italian position makes an explicit reference to solidarity as regards saving lives at sea. Since the latter results in disembarkation which in turn results in reception (and often integration) inevitably the question of solidarity re-emerges. Italy is not alone in its current controversial stance towards criminalisation of SAR by NGOs. Malta in 2018 initiated investigations and blocked search and rescue operations by NGOs off their coasts and in the adjacent airspace. Greece filed criminal charges against volunteers involved in search and rescue in the Aegean. After two years, the founder of the non-profit Team Humanity was acquitted on appeal, however recently an application has been submitted to the European Court of Human Rights challenging Greece's crackdown on NGOs rescuing refugees at sea.

**Saving lives at sea** and disrupting the smugglers' networks are quite important missions that EU claims to be devoted to, especially in the aftermath of shipwrecks and international agreements with third countries (European Council, 2017a). The narrative of saving lives at sea becomes the center piece in the narrative built around the EU-Libya cooperation; the latter is portrayed as a way of first and foremost saving lives, which is a “humanitarian imperative” (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2017a) and reducing dangerous journeys. Undeniably though, saving lives shifts from being a legal and moral obligation to an instrument for advocating for specific policies. Saving lives is instrumentalized and utilized to develop narratives of deterrence, externalization and securitization.

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<sup>23</sup> Code of Conduct for NGOs involved in search and rescue activities was drawn up last summer, in consultation with the European Commission and some of the relevant NGOs.

## 5. Human Rights

Human rights are perceived as a subcategory of fundamental rights together with citizens' rights. Human are defended and projected vividly by the European Institutions not only in the period in question but since the early days of the Union. The discourse of 2014 and 2017 reinforces their core role and significance, with every policy proposal and/or decision grounded on the need to guarantee rights. Interestingly, they are rarely defined but often referred while discussing events and/or policies proposed. At times, they serve also in establishing the boundaries from which the EU and its Member States cannot stray from. Often, the two concepts are used interchangeably.

Human rights present a particularity which cannot be observed when addressing other values. Specifically, human rights may refer to specific values, such as human dignity, but they can also reflect a broader framework synonymous to humanitarianism. The "rights" framework is laid out in the Charter for Fundamental Rights and the European Convention on Human Rights, both incorporated in the Treaty of the EU. Therefore, institutional narratives are dominated by a "rights-oriented" discourse whereby it is the EU's inherent duty to protect and defend the human rights. Each legislative act or proposal includes a section in which it states precisely the points that the respective legislations are in accordance with the Charter and the Convention where applicable. In this respect, protection of human rights becomes not only horizontally integrated throughout the period 2014-2017 in all communications and policy documents but is also directly linked with values since the two (rights and values) do not simply coexist; rather, values translate to rights and rights often derive from a higher value framework. This view is also supported by Parolari et al (2019) study on the *Charter*.

How does this materialise in practice? In many cases, references to human rights complement the overall value landscape. However, in some cases, references to human rights serve as constructing also the value framework of specific policies. This is evident, for example, after the shipwreck in Lampedusa, and the work of the TFM. The TFM raised some issues of concern regarding particularly irregular migration. The protection of human rights underscores the entire narrative of the TFM and is instrumentalised in "justifying" specific policy recommendations<sup>24</sup>. Human rights become perhaps more prominent in the discourse pertaining to cooperation with third countries. Indeed, a crucial element of externalisation of migration control for the EU is that the third countries incorporate fully the human rights dimension in their respective policies (European Commission, 2013a:6). Through this process "Europeanisation" of migration policy becomes central to externalisation of migration governance. EU's role should not be limited in protecting the human rights only upon the process of collaboration with third countries but it should also "fostering respect for the human rights of all migrants in partner countries and regions with a particular focus on vulnerable groups and the special rights of asylum seekers and refugees" (*Ibid*:8). Cooperation with third countries included a series of actions regarding the return of irregular migrants and it is in this area where the human rights dimension becomes central. When it comes to returns of undocumented migrants, the TFM stressed

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<sup>24</sup> This is rather evident by the declaration of the TFM where it states that, "All actions under this communication will have to be fully compliant with international human rights standards, including the Charter of Fundamental Rights of the European Union, the European Convention for the protection of Human Rights and Fundamental Freedoms, the 1951 UN Refugee Convention, the principle of non-refoulement and the applicable EU acquis" (European Commission, 2013a:3).

that these should take place “in a humane and dignified manner in full compliance with the EU Charter of Fundamental rights, the relevant EU *acquis* and international human rights standards” (*Ibid*:11). Following the TFM, the European Agenda on Migration also addressed the topic of returns from a human-rights perspective. Though the Agenda promoted swift returns, it also argued for the need to ensure humane and dignified treatment of returnees (European Commission, 2016a:9-10). An effective return system was a priority for the European Agenda on Migration since the collective lack of returns is perceived to this day as an incentive for irregular migration (European Commission, 2015h:2).

Although the TFM and the European Agenda on Migration touched upon the return of undocumented migrants, return policies have long preoccupied the EU. The most important efforts consist of the Return Directive set out in 2008 (European Commission, 2008), the Action Plan on Returns introduced in 2015 and the Handbook on Returns in 2017. Together with these documents, renewed action plans and subsequent communications addressing further developments complement the picture.

In March 2014 the Commission issued a Communication regarding the developments in EU return policies. It examined the Return Directive, and the plans for the production of a Return handbook. Return policies are closely related with policies on reintegration and readmission and, therefore, were parts of the broader framework of GAMM as well as the EU’s toolbox for asylum and migration policy. The Communication on EU Return Policy reported a decline in the number of apprehensions of undocumented migrants since 2008 due to the economic crisis and the effective border controls in Europe, as well as the betterment of the economic conditions in migrants’ countries of origin. However, the same could not be said about the ratio between those migrants who were issued a return decision and those who actually returned in their countries of origin (European Commission, 2014b:3). In this respect, the Communication commented on specific return policies, both past and future, for those with no legal right to stay in Europe. As the Communication on EU Return Policy stated, these return policies would ensure respect “for the fundamental rights and dignity of the individuals concerned, in line with the EU Charter of Fundamental Rights, the European Convention on Human Rights and all other relevant international human rights conventions” (*Ibid*:2). The reference to the legal instruments guaranteeing dignity and protection of human rights is not without purpose. Rather, it serves as a reminder to Member States that there are specific legal obligations that must be adhered in all aspects of migration policy including return procedures. This can be taken a step further, and assume that it is not only about respect of the rule of law but about the European identity itself- which is largely build upon norms, values and rights.

Another issue often dealing with human rights is the return policies. Returns are discussed by all institutions and to this day remain one of the critical and perhaps most problematic issues of migration policy in the EU. Return is linked with reception- the former initiates a process whereby an asylum application can be submitted with positive or negative results. A second alternative is reception of migrants that opt out to the asylum system and may be eligible for return. Thus, the reception system should be designed to screen those eligible for return and identify those who had their asylum application rejected. The hotspot approach proposed in 2015 was envisaged to facilitate such screening. By the autumn of 2015 the hotspots in Greece transformed into a hybrid type of facilities- blending detention with temporary accommodation. Reports issued by the Rapporteurs Roberta

Metsola and Kashetu Kyenge consecutively stressed the need to emphasize respect for human rights in migration-related policies. The authors were particularly concerned for migrants and refugees' human rights protection during the rescue operations, reception conditions and returns (Metsola and Kyenge, 2016a). As they claimed, hotspots' operation should be "in full respect for the fundamental rights of all migrants" (Metsola and Kyenge, 2015a:8). The Council of the EU also called for the organisation of facilities to temporarily accommodate arrivals, in line with the EU acquis (Justice and Home Affairs, 2015c:4). The reference to the EU acquis or the Charter of Fundamental Rights in other documents, is used as means of moral justification for the reception, return, readmission and relocation policies. It is also through this set of rights that the rest of the values projected by the JHA Council (see above) are being triggered.

One of the main purposes of the hotspots is to identify eligible migrants for returns and facilitate these returns, where possible. The most crucial instrument for returns is the Return Directive. The key principle, from which all relevant provisions of the Directive derive, is set out in Article 6(1): Member States are obliged to issue a return decision to any third-country national staying irregularly on their territory. Although some exceptions to this general rule are permitted (Article 6(2-5)), the Return Directive is based on the principle that Member States shall issue return decisions to irregularly staying third-country nationals and provide for the enforcement of those decisions when needed (C-38/14). Several aspects of the application of the Directive have been clarified by judgements issued by the EU Court of Justice (e.g. asylum seekers are exempt until their first instance decision is issued, Arslan case). Interestingly, the Commission acknowledges that the Return Directive lacks specifications on the conditions during the period of detention, such as room size, access to healthcare and facilities, etc. Treatment is covered under the humane and dignified manner prescribed in international legal instruments however it is worth noting that Member States have applied the Return Directive rather differently particularly as regards length and standards of detention. The problem remained unsolved, with the Commission framing in later reports the protection of "international human rights standards [which] goes along with fighting ill treatment, torture, extortion and inhumane treatment" as of "paramount importance" (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2017a:10). The Return Directive facilitated return policies before the migration crisis. However, the increased migratory flows forced the European Council to ask the Commission for a more comprehensive plan regarding short-term and mid-term measures for countries of origin, member-states and EU institutions. Following the protection of returnees' rights as they were expressed in the Return Directive, the Action Plan on Returns emphasised that respective return policies have to comply "with international human rights standards, in particular the Charter of Fundamental Rights of the European Union, the European Convention for the protection of Human Rights and Fundamental Freedoms, the 1951 UN Refugee Convention and its 1967 Protocol, and with the principle of *non-refoulement*, as guaranteed in the applicable EU legislation" (European Commission, 2015h:2).

The Action Plan on Returns, introduced in September 2015, offered 36 actions for improving the EU's return system. However, its impact was rather limited, partly because the Return Directive contained an already robust set of norms addressing multiple aspects of the return decision including the needs of vulnerable population (e.g. minors). Apart from commenting on the Return Directive, the Communication on EU Return Policy also addressed the Commission's future plan. The future plan

consisted of the production of a Return Handbook, based on recommendations from the Fundamental Rights Agency in order to ensure the protection the human rights of returnees (European Commission, 2014b:8). In this context, Frontex was considered an important actor in the field of returns and, therefore, its operations should be “in line with Union acquis and the EU Charter of Fundamental Rights” (*Ibid*:11). The Commission also argued that “Member States confronted with a sudden and unexpected arrival of large numbers of migrants are allowed flexibility regarding the conditions of closed detention of migrants” (European Commission, 2015h:4). In contrast to the usual rhetoric of EU’s unquestionable trust in human rights, flexibility in the reception centers seems to blur the picture. Nevertheless, the same does not apply in the Commission’s communication regarding the procedures for renting apartments and settling asylum seekers within urban centers. There, it underlines that “the basic principles of Union law in this area – the principles of non-discrimination on the basis of nationality, equal treatment and transparency – apply, should the concrete project have a certain cross-border interest” (European Commission, 2015i:3).

Return is one of the main tasks of Frontex and its transformation to the European Border and Coast Guard Agency (“EBCG”) in September 2016 (European Union, 2016a) was discussed in relation to the protection of human rights acquiring a value-basis. The protection of human rights was among the most important values following the establishment of the EBCG in September 2016. According to the EBCG’s regulations, attention to the protection of human rights derives from the laws and founding declarations of the EU and particularly, the Treaty of the European Union, the Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Union acquis and specific international and UN conventions against discrimination (*Ibid*: 13-18). This does not remain on a conceptual level. In fact, since its inception, a continuous question has been how to ensure human rights and fundamental rights are horizontally integrated and also monitored in Frontex’s operations. LIBE’s meeting on November 10, 2015 is indicative of such concerns. The Committee consulted the Special report of the European Ombudsman which urged Frontex to establish a complaint mechanism. The proposed mechanism would invite complaints from third country nationals and from national police authorities for human right abuses during the arrests of the former, establishing a closer cooperation between the European Ombudsman and Frontex (Metsola and Keller, 2015a:1-18). The Ombudsman’s suggestions were rather specific and linked the protection of fundamental rights with border-management policies. In the eventual upgrade of Frontex to the EBCG, the rights-based approach met its practical implementation with the introduction of the position of fundamental rights officer, responsible to “monitor and ensure the protection of fundamental rights” (European Union, 2016a:18). Additionally, in cases of emergency, the EBCG regulations suggest the intervention of migration management support teams, which include personnel “with expertise in child protection, trafficking in human beings, protection against gender-based persecution and/or fundamental rights” (European Union, 2016a:61).

The way human rights appear in the institutional narratives reflect a set of formal conventions, rules and regulations. For this, it would be fair to say that human rights are seen from a rights-based approach. On this ground, an additional aspect on migrants’ returns which employs a rights-based approach deals with the principle of non-refoulement. All the documents discussed so far note that in cases where migrants’ returns cannot be voluntary, the return system should be in line with “fundamental rights and the principle of non-refoulement” (European Commission, 2016a:9-10). Both

function as a “moral compass” for all policy proposals submitted regarding migration and particularly CEAS and returns. Migrants’ smuggling is another point that EU institutions address in respect to the protection of human rights. According to the Commission’s documents and the TFM, the fight against migrants’ smuggling should incorporate “a human rights dimension in compliance with the EU Charter of Fundamental Rights” (European Commission, 2013a:14). Similar declarations were further issued in the EU Action Plan on Smuggling in 2015 (European Commission, 2015g:5).

Lastly, the issue of family re-unification consists another topic which raises attention with regards to the protection of human rights. According to the Commission, the respective directive on the aforementioned topic should be “in accordance with fundamental rights and, in particular, the right to respect of private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy, as enshrined in the European Convention of Human Rights and the EU Charter of Fundamental Rights” (European Commission, 2014c:3). Family re-unification draws from the right to family life, which is one of the core principles in the EU, reiterated time and again across institutions and official documents (European Commission, 2015b:8).

References on human and fundamental rights seem to serve a dual scope: on the one hand, they project the aims and ambitions of the respective policy proposals, and on the other hand, they justify both legally and ethically implementation measures. This does not necessarily mean that human rights are instrumentalised. Rather they serve a practical purpose- of forming the parameters within which policies can be proposed and implemented. They also serve as a reminder that there is a normative and value basis in the policies discussed and proposed. In other words, they do not exist in moral vacuum but rather derive and are influenced by a normative, and ethical framework. An example of this, is the emergency support proposal. In March 2016, the Commission proposed the provision of emergency support in the affected Member States. The proposal sought to provide economic support “aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity” (European Commission, 2016h:9). Human dignity is not only defined by the EU Charter of Fundamental Rights but, according to the article 2 of the proposal, this will be implemented “in compliance with the fundamental humanitarian principles of humanity, neutrality, impartiality and independence” (*Ibid*). Similarly, this was evident in the European Council’s discourse, especially when addressing voluntary returns and re-integration programmes (General Secretariat of the Council, 2015h:7). This was also evident in the narrative on stateless persons. In particular, the JHA Council and the Representatives of the governments of the member-states “Acknowledge the importance of identifying stateless persons and strengthening their protection, thus allowing them to enjoy core fundamental rights and reducing the risk of discrimination or unequal treatment” (General Secretariat of the Council, 2015i). In similar vein, the Council’s President Jean Asselborn marked that, “We have undertaken today to act together on behalf of stateless persons: those who do not have rights, who cannot participate in any political system and who do not have access to any social benefits” (General Secretariat of the Council, 2015i). By referring to the condition of the stateless during its meeting in December 2015, the JHA Council conceived the role of the EU as the defender of those with no rights. Thus, it projected a very specific role deriving from the very values and norms the EU and its Member States endorse.

Human rights in fact, tend to be a condition for cooperation with third countries, framing through a rights-based narrative the externalisation policies of the EU. In the Valletta Summit on Migration in

November 2015, European and African leaders supported the protection of human rights during search and rescue operation, reception processes as well as during returns and readmissions. This seems to follow a rights-based approach, since these are justified by the “obligation of each state under international law including Article 13 of the Cotonou Agreement for its signatory parties to readmit its own nationals in full respect of human dignity and of the principle of non-refoulement” (Council of the European Union, 2015f). Moreover, the Summit called the participants to pay attention to vulnerable groups and unaccompanied minors. Nevertheless, the Valetta Summit was also important for an additional reason: it underlined that responsibility does not only deal with reception processes, but also with integration practices. Understanding migration in a long-term perspective, the Summit highlighted the responsibility of the host societies to integrate migrants and fully protect their rights.

Throughout 2016 and 2017 institutional narratives not only project human rights as central to all policies and legislation submitted, but also as critical to the cooperation with third countries. Reference to human rights, rule of law and application of legal conventions can be found in the Valetta declaration, the Joint Action Plan with Turkey on November 2015, the EU-Turkey Statement of March 2016 and most JHA, LIBE and European Council communications. On November 15, 2017, the Commission issued a progress report on the European Agenda on Migration. Migratory flows in Eastern Mediterranean route reduced significantly following the EU-Turkey statement and the close of the Western Balkan route. The Central Mediterranean route accounted for the largest flows, with an upward shift also noticeable in the Western Mediterranean. The gap between narrative and practice is evident in the Central Mediterranean. To deal with the increasing migratory flows in the Central Mediterranean route, the EU looked to Libya. Amidst a civil war ongoing since the Arab Spring of 2011, Libya has always been critical in the Central Mediterranean route as a country of destination but also transit for migrants and asylum seekers.

The Joint Communication “Managing flows, saving lives” (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2017a) illuminates best how rights and values construct a specific narrative, grounded on humanitarianism. The Joint Communication opens up with a brief description on the increase in migratory movement in the Central Mediterranean with the first paragraph concluding “The human suffering and cost of this is intolerable”. The text gradually builds a specific framework: an EU and its Member States that seek to manage flows and save lives in the Central Mediterranean. The EU Trust Fund for Africa is the key source of funding for measures supporting the Libyan coastguard, as well as civil society and NGOs addressing needs of migrants. The Malta declaration opens with the statement that the EU and its Member States reaffirm their determination “to act in full respect of human rights, international law and European values, and in conjunction with UNHCR and IOM” (General Secretariat of the Council, 2017b). A series of measures have been implemented since 2017 that seek to foster and support a migration management and asylum system in Libya, which in theory will be consistent with the main international standards and human rights. The reality is starkly different (see Human Rights Watch, 2019). Beyond the Central Mediterranean, targeting on the root causes of migration, EU intensified its discussions with Morocco, strengthened the role of the European Border and Coast Guard Agency and funded a number of jobs in Africa and succeeded in arresting a great number of smugglers (European Commission, 2017a). As with solidarity and responsibility sharing, human rights increasingly are discussed in relation to third countries, with the EU looking outwards for its migration and asylum management.

## 6. Schengen and the right to free movement

If solidarity, responsibility, human rights and saving lives derive from a normative or rights-based framework, Schengen stands out in the discussion of norms and values. A conception, a vision, and perhaps the Union's highest achievement<sup>25</sup>, Schengen cannot be characterized a value in itself. Nonetheless, if we accept that values "refer to something that is (objectively) valuable or good, or that is (subjectively) regarded as valuable or good" (Philips and Düwell, 2018:10), Schengen acquires a value-basis since it is associated with the right to free movement; it is the one element all Institutions and Member States agree should be protected, prior during and after the refugee crisis. Our observation was confirmed in discussion with staff at EU Institutions that inadvertently referred to Schengen when asked about EU values. When pointing out that Schengen is not a value, they would discuss the freedom of movement not only as a right but as the link that maintains the Union. As such, its "value weight" is as high as norms and values.

The free movement of persons is a fundamental right guaranteed by the EU to its citizens and it has also become a critical element of the identity of the EU. In other words, how the EU defines itself is linked to the Treaty-based values that determine also rational and goals of the bureaucratic mechanisms; but it is also linked to the structures built that encourage and perpetuate some of these values. Perhaps more than any of the other values and rights discussed, freedom of movement in a space where borders have been abolished is critical to the vision of united Europe. Whereas solidarity is discussed as an internal but also externally applicable value, human rights apply to all and should be also embraced by partner countries, Schengen is neither a transferable value nor a value that can be projected outside the EU. It is uniquely internal and not even applicable to all Member States of the EU. Thus, it is also the only one that applies singularly to those residing within the Schengen space. It is not surprising then, that President Tusk argued that "it is our first obligation to protect the European community, and to guarantee public order" (General Secretariat of the Council, 2015j). His statement reflects the importance of Schengen, not as a fundamental right or a transferable value per se, but as quintessential to the European community, its unity and cohesion.

The discussion around Schengen and migration is linked to how migration was perceived since the early days of the Union as a security issue. Securitisation of migration has broader political implications since the state, by determining who is a "threat", shapes the political debate in terms of threat and survival (Huysmans, 2006). Not all actors can securitise an issue effectively and it is noteworthy that in the EU context, securitisation is no longer limited to individual Member States, but was rather embedded in the language and institutions of the EU's AFSJ. Securitisation of migration is not a product of 9/11 or the 2004 and 2005 terrorist attacks in Europe. Rather, it pre-exists these events and can be traced all the way back to the early days of the Union (Huysmans, 2006). The management of irregular migration was from the early days seen as the counterweight to free internal movement within the Schengen area.

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<sup>25</sup> The Schengen area is considered one of the EU's highest achievements and in the 2018 Eurobarometer survey on Schengen most respondents living in countries inside the Schengen area tended to agree with that statement. Special Eurobarometer 474-Survey requested by the European Commission, Directorate-General for Migration and Home Affairs and co-ordinated by the Directorate-General for Communication.

There are two key difficulties with the management of mobility around and within Schengen. The first is a matter of geography; the Schengen borders (8,000 km of external land borders and 43,000 km of sea borders) are extensive and not always easy to patrol particularly as regards the maritime border. The second difficulty arises from the fact that “Member States are unequal both in terms of the volume of irregular migrants and asylum seekers they receive and actual capacity but also in terms of political will to deal with the issue. The Nordic countries are physically far removed from the issue of irregular arrivals and especially maritime arrivals, in contrast to Europe’s southern borders. Southern countries, on the other hand, tend to receive a significantly lesser share of asylum applicants than their northern European partners” (Triandafyllidou and Dimitriadi, 2014). This division was evident in the refugee crisis. The South was overwhelmed with arrivals and the pressure placed on reception systems. Almost all entries in 2015 took place through the Greek-Turkish maritime border, triggering daily search and rescue operations but with very few registrations. The *de facto* opening of the Western Balkan route, facilitated by the announcement from Germany that all Syrians will be accepted and the *de facto* suspension of the Dublin Regulation, resulted in a speedy onward movement, which in turn triggered a Schengen crisis. Countries of destination, such as Austria, Germany, Hungary, Netherlands and Sweden began functioning as first arrival countries, having to both receive but also screen and register the migrants—originally the responsibility of front-line states.

The Schengen crisis of 2015-2016 inevitably became a test of the value of responsibility but also of free movement, since the protection of EU’s external borders is part and parcel with the protection of Schengen. This is reaffirmed in the package proposal of on the EBCG whereby its establishment will not only “improve the internal security of the European Union” but most importantly, will “safeguard the principle of free movement of persons” (European Commission, 2015j). The Commission’s Proposal for the Regulation on the EBCG aimed to bring border management “to a new level of responsibility and solidarity” (European Commission, 2015k:3), aspiring to provide a coherent framework for an integrated management system for the external borders. Based on shared responsibility, the aim of the new agency was to manage the external borders by “ensuring a high level of security within the EU, while safeguarding free movement within the EU” (Justice and Home Affairs, 2016b). This nexus between internal freedom and security was also discussed in subsequent meetings (Justice and Home Affairs, 2016c).

Border management is repeated throughout the period in question, from the reports and statements of the TFM in 2014 to the Malta declaration of 2017. The need to protect Schengen by strengthening external border checks comes to dominate institutional discourse and spills over to the external policy framework. As regards the Member States, the JHA Council as early as 2014 built on the TFM results and suggested that external border checks that undertake reception and fingerprinting policies would provide for better protection of Schengen (Council of the European Union, 2014a) Particular attention is paid to Italy and Greece. The Council urged the two countries to intensify the “establishment of hotspots [...], to manage and to regain controls of the external borders and increase coordination of actions relating to border management”, while making use of possibilities provided by the EU acquis (General Secretariat of the Council, 2015k).

Nevertheless, the protection of borders should not be a unilateral decision; rather, it should be a collective decision which respects the EU asylum policies and the Schengen treaty (Justice and Home

Affairs, 2015c). Thus, Schengen brings together the value of responsibility and solidarity since both are utilized to frame the narrative on border controls. Schengen represents the European ideals. Security and respect of rules are not contradictory to the freedom of movement; on the contrary, the former becomes pre-condition for the latter. Solidarity is also intrinsically linked with **border-controls** and **Schengen** since it enables member-states to achieve the protection of borders. Consecutively, the protection of borders signals the safeguarding of Schengen, which is not only key issue for EU but it portrays the cornerstone of its internal freedom. This is evident in President Tusk's remarks, when he states: "The most important one is our responsibility and duty to protect our external borders. We cannot outsource this obligation to any third country. I will repeat this again: without control on our external borders, Schengen will become history" (General Secretariat of the Council, 2015e).

Border protection should not endanger the free mobility within EU. According to Jean Asselborn, Luxembourg's Minister for Immigration and Asylum and President of the Council, "Europe must remain open, but an open Europe means that the rules which we ourselves have established must be respected, and that everyone must work together to ensure that this happen" (Council of the European Union, 2015g). Similar was the President's speech in December's 2015 meeting, when he underlined that "We must protect the Schengen "acquis" for all its member. Today everyone expressed a strong wish to ensure that free movement within Schengen is preserved. But Schengen will only work if the rules are respected" (Council of the European Union, 2015h), indirectly referencing solidarity and responsibility sharing. Nevertheless, the terrorist attacks in November 2015 moved the burden to further securitization with Member States required to "carry out systematic checks on all persons, including persons enjoying the right of free movement under EU law (i.e. EU citizens and members of their families who are not EU citizens) when they cross the external border" (General Secretariat of the Council, 2016f).

The most vocal institution as regards the area of free movement was the European Council usually through its President, Donald Tusk. During the first meeting of the European Council following the death of 800 people in the Mediterranean, border control referred to the countries of origin (General Secretariat of the Council, 2015a). The heads of state looked outwards for the protection of the external borders however, the development of the refugee crisis marked a shift in the narrative. From the protection of borders in the countries of origin, border control referred to the protection of the European borders. This is evident in September 2015 meeting, when President Tusk remarked on the need of "gaining again control over Europe's external borders" (General Secretariat of the Council, 2015l). The European Council to an extent led the securitization of migration through the perpetuated narrative that Schengen was under threat. However, it's worth reflecting that the European Council is comprised of heads of state that bring national interests to the table, similar to the JHA Council. Thus, national concerns over the migration crisis in Germany, Austria, but also France and the Visegrad group of states inevitably influenced both to the narrative as well as policies advocated, as did the rise of populist parties across Europe in the period 2016-2017. After all, the "common European Spirit" (General Secretariat of the Council, 2015m) is bounded by rules, solidarity and responsibility. Although Schengen is usually conceived as an official agreement among specific member-states, at the same time it acquires a distinct role in EU's discourse on values regarding the freedom of internal mobility, trust and unity of the respective members. Therefore, quite often Schengen acquires a value basis, a common good to be safeguarded.

Though moderate in the approach and quite removed from securitization, even LIBE Rapporteurs Roberta Metsola and Kashetu Kyenge reported that Schengen abolishment of internal borders is inextricably linked with the respective protection of the external borders. For this reason, the authors call the member-states to implement properly and effectively the measures agreed for the protection of the external borders (Metsola and Kyenge, 2016a). The closure of Austrian borders was a major incident which triggered debates within the European Parliament. The first Vice-President of the Commission, Frans Timmermans and Commissioner Dimitris Avramopoulos sent a letter to the President of the European Parliament, Martin Schulz, informing that Austria decided to impose controls to its borders with Hungary and probably with Slovenia, Slovakia and Italy. Germany too proceeded in a similar action. As the Rapporteurs note, this action was justified as an extreme measure under Schengen. The upcoming risk from this action was illustrated by the Commission on September 15, 2015, after the introduction of border controls from Austria. There it states that the temporary closing of borders is part of the Schengen agreement, as it was the case for Germany on September 13, 2015, but the following actions would concentrate in moving back to the open borders in Schengen (Timmermans and Avramopoulos, 2015a). In its Communication regarding the progress of the European Agenda on Migration, the Commission referred again to “the temporary reintroduction of border controls under the Schengen Border Code” invoked by several member-states. According to the Commission, “This can be justified in exceptional crisis situations and notably for serious threats to public policy or internal security in a given Member State. But it can never be more than a short-term measure before the situation is stabilized” (European Commission, 2015d). Stability here implies that the frontline states perform their responsibility and guard effectively (i.e. with few irregular entries) the external borders. To this end, the measures undertaken with Turkey (Joint Action Plan and EU-Turkey Statement) in 2015 and 2016 sought to facilitate border controls by reducing arrivals but also placing part of the responsibility of the EU Border to a partner country. Similarly, by 2017 the EU looks to Libya and the Maghreb countries to carry the burden of responsibility for border management. Thus, whereas in 2015 the focus is on the internal border, by 2016 and 2017 the focus shifts and Schengen is “protected” through partnerships with third countries.

## Conclusion

The purpose of the present research was to identify which values are mobilised in the institutional narratives (put forth in the official documents); if and how they are used to justify EU policies in the domain of migration and asylum; whether these values are shared across institutions and if they have changed during and after the refugee crisis.

The research covered the period of 2014-2017, though where relevant from as early as 2011 onwards were incorporated. This is no way an exhaustive analysis neither of the institutions nor of their narratives as it would be a daunting task within the timeframe of this research. Nonetheless, by looking at the official releases, press memos, communications, reports and minutes of meetings a picture of the story formulated and narrated by the different Institutions emerges as regards values and migration.

There is a clear value framework in the Institutional narrative, deriving from the human rights framework, international obligations and a general acceptance of certain fundamental rights that the EU is built upon. The Treaty of the European Union serves as the foundation of the value based narratives, as does the Charter on Fundamental Rights and the Convention on Human Rights. The influence of the European Court of Justice as well as the European Court of Human Rights can also be glimpsed in the narrative at times, particularly as regards asylum, rights of asylum applicants and obligation of Member States.

Are values important for the EU Institutions? We would argue that they are in three ways. First, they provide the limits within which both institutional narratives as well as policy proposals move. Secondly, by adopting and advocating these values to third countries, the EU projects soft power that is crucial in the externalisation of migration management. Thirdly, the story of the European Union is one of unity of states brought together by common values that construct a shared identity. Values thus serve many purposes: they reflect the legal framework, the operational limits and assist in the construction of what it means to be European. Simultaneously they can be instrumentalised and this is also their greatest contribution from a policy perspective; facilitated largely by the vagueness of the term that remain undefined, the implication is that values can be used to justify policies that often seem to contradict them.

EU policy on migration has often been criticised for being inherently contradictory to the discourse it is based. Institutions speak of values but the reality on the ground often is very different. EU affirms for instance the principles of saving lives at sea, which derives from the fundamental right to life, and at the same time limits its search and rescue operations in the Mediterranean, employs policies of deterrence in third countries and enforce tough border controls. The contradiction is inherent in liberal democracies. There is a large literature in migration studies looking at these contradictions of liberal regimes as regards migration, in relation to exclusionary politics, but also rise of populist parties. Liberal norms have been attributed with producing more open migration policies, focusing on rights, integration, inclusion and if one would extend this to refugees, the undeniable right to seek protection (see for example Freeman 1995; Brubaker, 1995; Hollifield 1992; Adamson et al, 2011). For Joppke (1998), the question of why states accept unwanted migration is also partly answered through the

political setup. Liberal democracies rely on the rule of law and for him it is partly in the legal rather than the political process of why states accept unwanted migration. Liberal states in other words, are internally impaired in placing excessive controls to curtail irregular entry and/or stay, restricted by the very rights and responsibilities they accept. Though Joppke (1998) writes for irregular economic and family migration, his argument is equally relevant if not more so as regards asylum seekers arriving today in Europe. The concern of EU Member States is on the irregular manner of entry, which constructs the narrative of “threat” on the borders of the states. Prevention of arrivals through “soft” power may seem (and likely is) cruel and inhumane, but not necessarily outside the boundaries of norms and laws.

In this hypothesis, there is less contradiction between the talk of values and the policies on the ground. If liberal democracies are inherently constrained by the norms and values they adopt, these same values and norms can serve in an inclusive but also exclusionary fashion. They apply to those reaching and/or within the EU space and even more specifically the Schengen space; they also apply to those chosen by the Member States (through resettlement and relocation). They apply only in part to those outside the EU (in that violation of international laws is prohibited) and those who may seem eligible for return; in this case values are exclusionary and serve to demarcate the boundaries of the Union. The instrumentalisation of values can be a result of multiple factors; a reaction to an imagined or perceived threat (see Tsoukala, 2005), a result of a populist resurgence in Europe not only linked to right-wing populism but the overall assumption that this is the popular will of the EU citizens or the gradual dominance of an “identity liberalism” (Adamson et al, 2011: 846) that seeks to allow entry and residence (as well as integration) to those deemed compatible with the liberal way of life. An extreme version of the appropriation of liberal norms by institutional actors in order to serve the latter’s illiberal exclusionary purposes, such as the rejection of the EU asylum policy (including relocation), was applied by Victor Orban who based the narrative on the failure of integration “in countering arguments for successful integration, we must also point out that if people with diverging goals find themselves in the same system or country, it won’t lead to integration, but to chaos. It’s obvious that the culture of migrants contrasts dramatically with European culture” (VisegradPost, 2017). Though Victor Orban’s stance is well on the far-right side of populism, exclusionary policies within and outside the EU increasingly seek to determine who best “fits” European societies.

The exclusionary application of values was also visible in relocation. The until-recently uncontested right to asylum, became tied to one’s nationality. The requirement that only nationalities over the 75% recognition threshold would be eligible to apply, resulted in a sudden drop in the recognition rates of Afghans that nonetheless comprised almost 20% of arrivals to countries like Greece in 2015-2016. The best example though of how rules and values can be applied in an exclusionary fashion is the EU-Turkey Statement. Collective expulsions are prohibited by European and international law. The Statement instead prescribed individual assessment of all asylum applications and return only of those whose application was deemed inadmissible (applicable only for Syrians) and/or unfounded or who opted out of the asylum process. For the Greek Asylum Service to fast track decisions, one had to first be registered. In response, the Reception and Identification Service registered arrivals by nationality rather than date of arrival. Syrians were prioritised by virtue of country of origin, while other nationalities including Afghans waited for months to be registered. The immediate effect- for non-

Syrians having arrived in 2015 and 2016- was that their asylum applications took at least two years to be processed (Dimitriadi, 2016b).

If values are not only incorporated in the narrative but also accepted by every EU Institution, have they changed over time and after the refugee crisis? Research showed that not only have values remained the same but, in some cases, acquired prominence, e.g. solidarity. On the one hand this is to be expected. The EU did not have to face a question of solidarity prior to the Eurozone crisis and the refugee crisis (or Brexit). Recent crises have tested both the understanding and influence of values with the latter gradually becoming conditional on other values and/or rights, with a convoluted relationship emerging. For example, all institutions agree on the value of solidarity. In principle, all Member States agree by virtue of membership to the EU. In practice, however, the value of solidarity is understood differently between Member States and some institutions. The European Commission assumed that solidarity would be unconditionally given to a member in crisis. Some Member States (e.g. Germany, Sweden) initially adopted this perspective, with others understanding that solidarity can be flexible and variant. By 2017 it is less clear whether solidarity should be presumed and a question that this paper does not answer but emerged from the research is to what an extent is solidarity in fact conditional on geography and distance. Is it possible that the furthest removed is a crisis, the less Member States feel compelled to show solidarity since they are unaffected? And if this hypothesis stands, does this mean that the value of solidarity is not in fact accepted by all? What constitutes solidarity and responsibility-sharing? Can it exist in a flexible manner or does it need to be specific and delineated?

This was recently tested in the Aquarius incident of 2018 (and again in 2019 with the disembarkation of vessels in Lampedusa), where Italy refused the disembarkation in Italian ports of a ship carrying 629 rescued migrants. Both Italy and Malta argued they were in line with international law in refusing disembarkation. The only country to step in for assistance was Spain, another frontline State also on the receiving end of asylum seekers. The Member States of northern and western Europe remained silent. One could argue they failed to show solidarity to Italy, however for most Member States, Italy was absconding its responsibility in allowing disembarkation in its ports. The numbers were also significantly low in comparison to 2015; i.e. there was no sense of urgency.

The limitations of the EU Institutions become apparent when asking questions regarding norms and values, both in theory but also in practice. Institutions can recommend, initiate reforms and preserve the value framework as much as possible. They also share a similar if not the same understanding of the core values as regards migration. Nonetheless, there is a clear gap between the values and the direction of policies in place (or proposed) with the latter still largely determined and influenced by national interests and politics. As crucial as the institutional narrative is in structuring policy, national politics and discourse determine how receptive the former will be at a national level. Thus, in the relationship between institutional policies, narratives and values, we need to acknowledge the limits of the institutional governance, particularly on an issue such as migration policy that remains intrinsically tied to national policies and politics.

Annex I

## ANNEX I- SHORT TIMELINE OF KEY EVENTS/MEETINGS



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## About NOVAMIGRA

Several, partly interconnected crises have profoundly challenged the European project in recent years. In particular, reactions to the arrival of 1.25 million refugees in 2015 called into question the idea(l) of a unified Europe. What is the impact of the so-called migration and refugee crisis on the normative foundations and values of the European Union? And what will the EU stand for in the future?

NOVAMIGRA studies these questions with a unique combination of social scientific analysis, legal and philosophical normative reconstruction and theory.

This project:

- Develops a precise descriptive and normative understanding of the current “value crisis”;
- Assesses possible evolutions of European values; and
- Considers Europe’s future in light of rights, norms and values that could contribute to overcoming the crises.

The project is funded with around 2.5 million Euros under the European Union’s Horizon 2020 research and innovation programme for a period of three years.

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