

## The Establishment of the European Union Agency for Asylum

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**1. The establishment of the Agency.** – Regulation (EU) No. 2021/2303<sup>1</sup>, adopted under Article 78(1)(2) of the Treaty on the Functioning of the European Union ('TFEU'), established the European Union Agency for Asylum ('EUAA' or 'Agency'), which took over the functions of the European Asylum Support Office ('EASO')<sup>2</sup>, replaced as of 19 January 2022<sup>3</sup>.

The establishment of the Agency has been decided with the purpose of implementing the principle of sustainable and fair sharing of the burden of international protection under Article 80 TFEU, called for by the Commission in its 2016 communication "Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe"<sup>4</sup>, under the push by the European Council for a change in the management of asylum<sup>5</sup>.

EASO, set up in 2010<sup>6</sup>, was limited in scope to the support of the practical cooperation among Member States ('MSs')<sup>7</sup>, and thus did not guarantee the "efficient functioning of the asylum and reception systems of Member States"<sup>8</sup>. The soaring migratory flows towards Europe in the following years proved CEAS had "structural

<sup>1</sup> Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021, *on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*. Notably, one of last acts signed by the President of the European Parliament Mr. David M. Sassoli. Unless different mention, all recitals and articles referred to in this paper are those of Regulation (EU) 2021/2303.

<sup>2</sup> Article 1.

<sup>3</sup> Articles 72 and 73. The regulation entered into force on the twentieth day of its publication of the Official Journal of the EU, and it was published on the 30<sup>th</sup> of December 2021, OJ L 468/1. See also EUAA, *New EU Agency for Asylum starts work with reinforced mandate*, 19 January 2022, available at [www.euaa.europa.eu](http://www.euaa.europa.eu).

<sup>4</sup> Communication from the Commission to the European Parliament and The Council, 6 April 2016, COM(2016) 197 final, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*. Under the call by the European Council, the Parliament also adopted a resolution in that direction on 12 April 2016, P8\_TA(2016)0102, *The situation in the Mediterranean and the need for a holistic EU approach to migration*.

Both ECHR (Article 3) and the EU Charter of fundamental rights (Articles 18 and 19) protect the right to asylum, relating to the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, as well as Article 78 TFEU.

<sup>5</sup> Conclusions of the European Council of 18 and 19 February 2016, EUCO 1/16 CO EUR 1 CONCL 1, para. 9, p.5.

<sup>6</sup> Under Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010, *establishing a European Asylum Support Office*. EASO began working on 1 February 2011.

<sup>7</sup> On EASO, see F. COMTE, *A New Agency is Born in the European Union: The European Asylum Support Office*, in *European Journal of Migration and Law*, 2010, p. 373 ff.; FERNANDEZ-ROJO, *From EASO to the European Agency for Asylum: Business as Usual?*, in *EU Immigration and Asylum Law and Policy*, 15 October 2018, in [www.emigrationlawblog.eu](http://www.emigrationlawblog.eu); S. SCHNEIDER, C. NIESWANDT, *EASO - Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration*, in *Österreichische Zeitschrift für Soziologie*, 2018, p. 13 ff.; P. NICOLSI, *Alla ricerca di un controllo strutturato sul mandato operativo dell'Ufficio europeo di sostegno all'asilo*, in *Rivista di diritti comparati*, 2020, p. 214 ff.

<sup>8</sup> Recital No. (5).

weaknesses” to be tackled by developing EASO into a fully-fledged agency<sup>9</sup> and expanding the tasks previously assigned to it<sup>10</sup>.

The Agency is vested with legal personality<sup>11</sup> and enjoys legal, administrative, and financial autonomy<sup>12</sup>. Protocol No. 7 on the Privileges and Immunities of the European Union applies to the Agency and its staff<sup>13</sup>.

Quite curiously for the country that hosted the signing of the 1990 Dublin Convention and the launch of the Dublin system, Ireland opted out of the regulation establishing the EUAA.<sup>14</sup>

**2. Structure.** – The Agency is composed<sup>15</sup> of a Management Board, an Executive Director and his Deputy, a fundamental rights officer, and a Consultative Forum. Its seat is in Malta<sup>16</sup>.

The Management Board is composed of one representative of each MS, two representatives of the Commission, and one observing representative of the United Nations High Commissioner for Refugees (‘UNHCR’), who does not participate in meetings dealing with merely internal matters. All members and the Chairperson of the Management Board are appointed for four years<sup>17</sup>.

The Management Board is deputed to policy-making through general orientation and political oversight over the workings of the Agency, explicated in multiannual and annual programmes<sup>18</sup>. It is also tasked with budgetary powers<sup>19</sup>, and with transparently setting rules, organisational aspects, requirements, and procedures in any field of activity of the Agency, pursuant to the autonomy granted to it. The Management Board appoints the Executive Director, his Deputy, the fundamental rights officer, and an independent accounting officer, and adopts annual reports on the activities of the Agency and on the situation of asylum in the EU<sup>20</sup>. External functions of the Agency are also ultimately assigned to the Management Board<sup>21</sup>.

The Management Board may delegate appointing powers to the Executive Director and may also establish an Executive Board to assist the Director in his duties<sup>22</sup>.

The Executive Director is an independent<sup>23</sup> temporary agent of the Agency, appointed by the Management Board on a proposal by the Commission taking into

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<sup>9</sup> Being an agency entails being provided with its own staff and autonomously managing financial and human resources. See Recitals No. (8), (47), and (49).

<sup>10</sup> Recital No. (6) and (7).

<sup>11</sup> Article 59(1)(2).

<sup>12</sup> Recitals No. (47) and (49).

<sup>13</sup> Article 61.

<sup>14</sup> Recital No. (63).

<sup>15</sup> Article 39.

<sup>16</sup> Article 59(5). It is in MTC Block, Winemakers Wharf, Grand Harbour, Valletta.

<sup>17</sup> Article 40.

<sup>18</sup> Article 42.

<sup>19</sup> Articles 52 ff.

<sup>20</sup> Articles 41 and 69.

<sup>21</sup> Article 41(1)(ab) and 41(1)(ac).

<sup>22</sup> Article 41(2)(3).

account the opinion of the European Parliament<sup>24</sup>. He is appointed for five years, renewable for five more years<sup>25</sup>. Likewise, he may be removed from office upon a decision of the Management Board on a proposal by the Commission<sup>26</sup>.

He is the legal representative of the Agency<sup>27</sup> and he is tasked with carrying out day-by-day, executive, and administrative functions: he implements the decision adopted by the Management Board, he prepares documents for the Management Board, he is entrusted with operational tasks and, in general, with fulfilling the duties conferred upon him by the regulation<sup>28</sup>. The Executive Director takes part, with no right to vote, in the meetings of the Management Board. The incumbent Executive Director is Nina Gregori, from Slovenia<sup>29</sup>.

The fundamental rights officer is an independent officer, with consultative functions<sup>30</sup>, responsible for ensuring compliance with fundamental rights and for implementing the complaint mechanism<sup>31</sup> set up for individuals to report concrete fundamental rights violations committed by the Agency, its personnel, or a Member State, including seconded experts<sup>32</sup>. The fundamental rights officer reviews the complaints and, if admissible, ensures their registration and the follow-up by the appropriate authority. It is provided that if a complaint is made against the Agency, the Executive Director must follow up on the complaint; if it concerns a Member State, the Executive Director must make sure that the concerned Member State follows up on the complaint.

The complaint mechanism is administrative in nature: it does not preclude access to other administrative or judicial remedies, nor it constitutes a means to challenge national judicial decisions<sup>33</sup>.

The Executive Director and Management Board of the Agency are advised by a Consultative Forum<sup>34</sup>, whose composition, decided by the Management Board<sup>35</sup>, should reflect the instances of civil society “with a view to exchanging information and pooling in the field of asylum”<sup>36</sup>.

National authorities are required to cooperate in good faith with the Agency and “exchange all necessary information in a timely and accurate manner”<sup>37</sup>, through

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<sup>23</sup> Article 47(2).

<sup>24</sup> Article 46(2)(3).

<sup>25</sup> Article 46(4)(5).

<sup>26</sup> Article 46.

<sup>27</sup> Articles 47(4) and 59(4).

<sup>28</sup> Article 47.

<sup>29</sup> She already was the Executive Director of EASO, having taken up her duties on 16 June 2019. See EUAA, *Nina Gregori takes up duties as Executive Director of EASO*, available at [www.euaa.europa.eu](http://www.euaa.europa.eu).

<sup>30</sup> Article 49(5).

<sup>31</sup> Article 49.

<sup>32</sup> Article 51.

<sup>33</sup> Recital No. (45).

<sup>34</sup> Article 50.

<sup>35</sup> Article 50(3).

<sup>36</sup> Recital No. (40).

<sup>37</sup> Article 4.

national contact points<sup>38</sup> and the Agency's liaison officers<sup>39</sup>. Failure to do so may result in the Member State being reported to the Management Board and the Commission<sup>40</sup> for the adoption of adequate recommendations.

**3. Functions.** – The Agency is charged with supporting Member States in applying the Common European Asylum System (CEAS)<sup>41</sup>, by providing them with independent<sup>42</sup> practical, legal, technical, advisory, and operational assistance, aimed at the largest harmonisation possible of rights, obligations, conditions, and procedures of asylum applications.

The Agency does not replace national agencies and authorities, which remain responsible and accountable for the management of asylum applications.

The action of the Agency must comply at all times with relevant international and Union law, holding in particular consideration the special needs of people in a vulnerable situation and the rights of children<sup>43</sup>. All persons may resort, directly or through a party representing the victim<sup>44</sup>, to the complaint mechanism described above to ensure the respect of their fundamental rights.

The Agency splits its functions under “three pillars”<sup>45</sup>, namely technical support, operational and technical assistance, training of national officials.

1) For the purpose of furnishing technical support, EUAA collects, analyses, and publishes data on third countries<sup>46</sup> and on the implementation of Union law on asylum<sup>47</sup>. The Agency draws and gathers such information from any available source, especially from international bodies, civil society – through the Consultative Forum – Union bodies, offices and agencies, European networks on third countries and fact-finding missions<sup>48</sup>.

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<sup>38</sup> Articles 3 and 24.

<sup>39</sup> Article 7(5).

<sup>40</sup> Article 4(5).

<sup>41</sup> CEAS is the self-standing and comprehensive set of rules aimed at implementing the common asylum policy under Article 78 TFEU, following the conclusions of the European Council adopted in Tampere on 15 and 16 October 1999, which set CEAS as one of the milestones for the effective creation of a Union of Freedom, Security and Justice. CEAS is comprised of the “Asylum Procedure Directive” (No. 2013/32/EU), the “Reception Conditions Directive” (No. 2013/33/EU), the “Qualification Directive” (No. 2011/95/EU), the “EURODAC Regulation” (No. 603/2013), “Dublin Regulation” (No. 604/013), and the “EASO Regulation” (No. 439/2010, now replaced by “EUAA Regulation”, No. 2021/2303).

<sup>42</sup> Articles 1(3) and 7(6).

<sup>43</sup> In addition to the right to family reunification and other rights expressly recognised by EU law, the Agency shall abide by the United Nations Convention on the Rights of the Child, adopted with General Assembly resolution No. 44/25 of 20 November 1989.

<sup>44</sup> Article 51(2).

<sup>45</sup> EUAA, *What We Do*, available at [www.euaa.europa.eu](http://www.euaa.europa.eu).

<sup>46</sup> Articles 5 and 9. For example, assessing and providing up-to-date and precise analysis of the life in third countries (so-called COI, i.e., Country of Origin Information, reports), particularly useful for members of the judiciary when asked to assess the existence of a threat to the life and freedom of the applicant, when asked to analyse their application following a reject decision of first instance by the territorial commission. See EASO, *Judicial practical guide on country of origin information*, Luxembourg, 2018, available online at [www.euaa.europa.eu](http://www.euaa.europa.eu).

<sup>47</sup> Article 6.

<sup>48</sup> Article 9.

All information gathered on third countries shall merge into a “common analysis” developed together with MSs, aimed at assessing the situation in relevant countries of origin. The Agency shall then develop guidance notes based upon the common analysis, explicitly taking into account the UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers, also for the purpose of delineating the concept of safe third country<sup>49</sup>. In order to gather sufficient and real data on migratory fluxes, the Agency is also to work in close collaboration with the European Border and Coast Guard Agency<sup>50</sup>.

The Agency reports about its analysis to the European Parliament twice a year<sup>51</sup>.

The Agency can adopt guidance notes<sup>52</sup>, common terms of reference<sup>53</sup>, operational standards, indicators, and best practices, to be exchanged among Member States. To help MSs manage asylum applications, and for the purpose of responding to MSs’ queries, the Agency is to develop ICT, databases<sup>54</sup> and other tools<sup>55</sup>, and is tasked with providing legal advice and assistance in planning national contingency plans for the case of disproportionate pressure on national asylum systems<sup>56</sup>.

As of 31 December 2023<sup>57</sup>, EUAA will be mandated to monitor the application of CEAS by MSs, in close cooperation with the Commission<sup>58</sup>, through the analysis of information provided by MSs and collected by the Agency as to the preparedness and capacity of MSs to implement CEAS, and through on-site visits, short-notice visits, case sampling, and information from other intergovernmental and national bodies<sup>59</sup>. The monitoring mechanism should lead to the adoption of draft recommendations by the Executive Director in consultation with the Commission<sup>60</sup> taking into account MSs’ comments, and subsequent adoption of recommendation by the Management Board of the Agency, establishing the measures that ought to be taken to address the reported shortcomings and the time limit for their implementation. Recommendations are sent over to the Parliament and the Commission is kept informed about their implementation and may organise on-site visits to verify it.

Where the concerned State does not comply with the recommendation, the Commission may step in and address its own recommendations to the MS and the

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<sup>49</sup> Recitals No. (17) and (18), and Article 12.

<sup>50</sup> E.g., when collecting data on migratory fluxes, see Article 5. The Border and Coast Guard Agency was established by Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019, *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*.

<sup>51</sup> Article 5(3).

<sup>52</sup> Article 11(1).

<sup>53</sup> Article 9(2)(c).

<sup>54</sup> Article 6(3): databases are to collect national decisions on applications, national law, and case law on asylum. For instance, a case law database for national and European decisions, which may be filtered on the basis of countries of origin, Relevant Legislative Provisions, country of decision and so on.

<sup>55</sup> Such as operational standards, indicators, and guidelines on asylum-related matters. All tools are intended to be non-binding. See recital No. (19).

<sup>56</sup> Article 6.

<sup>57</sup> Recital No. (68) and Article 73.

<sup>58</sup> Article 14.

<sup>59</sup> Recitals No. (20) and (21), and Article 14(4).

<sup>60</sup> Article 15(4).

Agency. Said recommendations are also transmitted to the Parliament and the Council<sup>61</sup>. Should the MS concerned not comply with the Commission's recommendations within the set time limit, the Commission may ask the Council to adopt an implementing act "identifying measures to be taken by the Agency to support that Member State and requiring that Member State to cooperate with the Agency in the implementation of those measures"<sup>62</sup>. When such decision is adopted, the Executive Director must draw up an operational plan within three days, to be agreed upon with the concerned MS within three more days<sup>63</sup>.

Such mechanism is conceived in more general terms as the means whereby the Agency can obtain cooperation from MSs whose asylum or reception system is ineffective and under disproportionate pressure<sup>64</sup>.

Similarly to other international monitoring mechanisms<sup>65</sup>, the Agency is authorised to carry out thematic or specific monitoring over a specific MS<sup>66</sup> so that every Member State is monitored every five years<sup>67</sup>. Such thematic or specific monitoring should not be carried out in the same year as the general monitoring of all operational and technical aspects of the CEAS of that Member State.

2) The Agency is specifically mandated to assist MSs facing disproportionate migratory pressure by providing operational and technical assistance<sup>68</sup> upon request by Member States or on the Agency's own initiative when a MS' asylum system is subject to disproportionate pressure. The State's request or the Agency's proposal is followed by a thorough assessment of the actual needs of the requesting State by the Agency. The decision on the provision of operational and technical assistance is adopted within three days of the date of the request or of the date on which the Member State agrees to the Agency's proposal<sup>69</sup>. If needed, the Executive Director may send experts to better assess the situation. In this case, the time limit for the adoption of the decision on the provision of operational and technical assistance is extended to five days.

The decision involves the adoption of an operational plan, to be drawn up in cooperation with the host State and binding on the Agency, the host Member State and third-party participating Member States<sup>70</sup>.

Operational assistance may involve the deployment of asylum support teams<sup>71</sup>, funded by the Agency<sup>72</sup>, which are composed of the Agency's staff, and experts from

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<sup>61</sup> Article 15(8).

<sup>62</sup> Recital No. (23) and Article 22.

<sup>63</sup> Article 22(2).

<sup>64</sup> Article 22(1).

<sup>65</sup> For a general review on international monitoring mechanisms, see P. ALSTON, J. CRAWFORD, *The Future of UN Human Rights Treaty Monitoring*, 2009; O. DE SCHUTTER, *International Human Rights Law*, 2020; N. S. RUBIN, R. L. FLORES, *The Cambridge Handbook of Psychology and Human Rights*, 2020.

<sup>66</sup> Article 15(1)(b).

<sup>67</sup> Article 15(1).

<sup>68</sup> Articles 16 f.

<sup>69</sup> Article 17(5).

<sup>70</sup> Article 18.

<sup>71</sup> Articles 19 and 20.

<sup>72</sup> Article 28.

the MS concerned or seconded by other MSs<sup>73</sup>, to be deployed within seven days from the date on which the operational plan is adopted. To this end, the Agency shall establish an “asylum reserve pool” constituting a reserve of at least 500 personnel ready for deployment<sup>74</sup>. Asylum support teams are placed under the coordination of one or more coordinating officers, allowed to receive instructions only from the Executive Director, who may also authorise them to assist in the settlement of disputes concerning the implementation of the operational plan<sup>75</sup>.

Operations are intended to be temporary.

The host MS is responsible to make good any damage caused by the asylum support team but may ask the Agency or the sending MS for reimbursement, when the damage is caused by gross negligence or wilful misconduct<sup>76</sup>. Similarly, it is provided that all MSs and the Agency shall waive any claim in respect of suffered damage, except where such damage is inflicted because of gross negligence or wilful misconduct<sup>77</sup>. Claims for compensation that are not settled by negotiations are submitted to the Court of Justice of the European Union<sup>78</sup>.

Within the operational assistance pillar, the Agency is mandated to provide assistance with disembarkation and relocations<sup>79</sup>, to draft decision opinions, to assist second-instance decision-makers and to work with authorities to improve procedures and conditions, to assist MSs in applying operational standards, indicators, guidelines, and best practices through technical and operational expertise<sup>80</sup>.

In addition, the Agency is tasked with the reinforcement of migration management support teams<sup>81</sup>, composed of experts from the Agency, the Europol, the European Border and Coast Guard Agency and other relevant EU bodies, deployed to assist States at hotspot areas at their request, by carrying out registrations, conducting interviews, providing interpreting and identification assistance. 2,000 personnel are ready to be deployed to assist national authorities in dealing with applicants in support of “Dublin units”<sup>82</sup>. The Commission sets the terms of cooperation at the hotspot area and is responsible for the coordination of the migration management support teams, provided that each Union body acts in accordance with its own mandate and powers<sup>83</sup>.

The provisions related to operational assistance to MSs under disproportionate pressure, as well as those related to recommendations adopted under the monitoring mechanism, shall enter into force as soon as Dublin III Regulation is replaced or, at the

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<sup>73</sup> Article 19.

<sup>74</sup> Article 19(6).

<sup>75</sup> Article 25.

<sup>76</sup> Article 26(1)(2).

<sup>77</sup> Article 26(3)(5).

<sup>78</sup> Article 26(4).

<sup>79</sup> Article 2(1)(s).

<sup>80</sup> Article 13(5).

<sup>81</sup> Recitals No. (33) and (34) and Article 21.

<sup>82</sup> Article 21(3). See A. SCHERRER, *Dublin Regulation on international protection applications*, 2020, available at [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>83</sup> Article 21.

latest, on 31 December 2023<sup>84</sup>. The implementation of all provisions related to the Dublin III Regulation is delayed to the entry into force of “a new legal act currently under negotiation” which will replace the Dublin III regulation<sup>85</sup>.

3) The third pillar among the Agency’s function is the training of national officials and their national instructors. Such training has already been delivered to 50,000 participants, through separate modules certifying the degree of training. The Agency is not only mandated to provide information and training to its staff and to national officials and trainers<sup>86</sup>, but also to verify such training.

**4. The external dimension of the Agency.** – The Agency is assigned external cooperation functions with the UNHCR, “other relevant international organisations”<sup>87</sup>, and third countries<sup>88</sup>, through working arrangements subject to the Commission’s prior approval<sup>89</sup>, and by participating in the implementation of international agreements concluded by the EU<sup>90</sup>. However, its external functions are limited to operational cooperation, and any legislative initiative or external capacity is excluded.

The UNHCR and other international bodies also represent a valuable source of information for the Agency<sup>91</sup>, and may provide cooperation through their experts when collecting information<sup>92</sup> or assisting Member States in managing applicants. Likewise, the Agency is required to consult the UNHCR, other organisations, as well as judicial associations and expert networks when developing operational standards, indicators, and best practices<sup>93</sup>.

When providing operational and technical assistance to a Member State where the UNHCR operates, the Agency must also coordinate with the UNCHR as regards the implementation of the operational plan, in accord with the host Member State<sup>94</sup>.

The Agency is open to the participation of Iceland, Norway, Liechtenstein, and Switzerland through the conclusion of specific arrangements<sup>95</sup>. In particular, said countries should be admitted participating in the meetings of the Management Board as observers<sup>96</sup>.

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<sup>84</sup> Article 73.

<sup>85</sup> Recital No. (68).

<sup>86</sup> Article 8. The content and the form of the training are to be developed with Member States, the European Border and Coast Guard Agency, the European Union Agency for Fundamental Rights, academic institutions, judicial associations, and training networks and organisations.

<sup>87</sup> Recital No. (37) and Article 4(3).

<sup>88</sup> Article 35. Cooperation with third countries can take place through the appointment of liaison officers (Article 36), who should enjoy the “highest possible protection” and shall be deployed only in third countries “whose migration and asylum management practices comply with non-derogable human rights standards”.

<sup>89</sup> Articles 35(2), 37(2), 38.

<sup>90</sup> Article 35(4).

<sup>91</sup> Articles 9 and 14(4).

<sup>92</sup> Article 10.

<sup>93</sup> Article 13(3).

<sup>94</sup> Article 18(3).

<sup>95</sup> Article 34.

<sup>96</sup> Recital No. (65).

The Agency is also entrusted with assisting MSs in cooperating with third countries in the fields within its mission<sup>97</sup>.

**5. Conclusions.** – The newly-born Agency is provided with all the means of a full-fledged agency and should thus successfully replace EASO in providing a much needed practical and operational assistance to those countries that are not able to adequately deal with migratory pressures, relieving them of an administrative burden that is thus distributed and allocated to all MS, ultimately benefiting those seeking relief and asylum.

Significantly contingent upon the long-awaited reform of the Dublin system, the Agency is envisaged as one of the cornerstones of the new CEAS. Its creation represents a step further in the actual implementation of the principles of burden-sharing of international protection and European solidarity, which may thus find some degree of effectiveness in a field where relocations on a voluntary basis have proved not decisive and negotiation-based solutions have so far drained large amounts of time and energy in exchange for little result.

*Febbraio 2022*

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<sup>97</sup> Article 35(1).