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CORE ANALYSIS

Sketches of fairness in EU and international law. Focus on the asylum and migration pact

Leandro Mancano

Edinburgh Law School, The University of Edinburgh, Edinburgh, UK
Email: leandro.mancano@ed.ac.uk

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Abstract

This article proposes a framework to understand questions of fairness in EU law. It builds on the scholarly literature on the meaning and scope of this concept, to then consider its relevance to legal orders and specifically the European Union's. Having set out an umbrella definition of fairness as a legal principle, the article applies it to a specific example: namely, the system of border procedures introduced by the new asylum and migration pact. The objective of this paper is twofold. Firstly, it aims to provide a blueprint for discussing issues of fairness in the EU beyond a specific area of law and policy. Secondly, in concretely adapting that blueprint to the specificities of the 'case study' analysed in the paper, it sheds light on the degree of its (un)fairness.

Keywords: fairness; migration and asylum; right to liberty; effective protection; borders

1. Introduction

Sketches of Spain represents a prime example of Miles Davis's lyricism. It selects some examples from Spanish music, and combines them with a seemingly different genre to create a harmonious result which defeats the apparent heterogeneity of its constitutive elements. Defining a coherent and comprehensive notion of fairness, and applying it to a certain legal phenomenon, can be as daunting a task. Unlike Davis's music, which could count on his own brilliance, this paper more modestly aims to draw what really are mere sketches of fairness, and apply them to the system of border procedures established by the European Union (EU) migration and asylum pact.[1] In doing so, this paper places itself at the intersection between two important debates: the role for fairness in the EU legal order, and the assessment of EU laws and policies in migration and asylum. As to the former, questions of fairness have been raised in relation to different areas of EU law: just to name a few, competition law,[2] social rights and citizenship,[3] data protection,[4] consumer protection.[5] The variety of the research reveals how extensively fairness permeates the EU as a whole. Despite not being mentioned among the

[1]See Pact on Migration and Asylum – European Commission.

[2]A Lamadrid de Pablo, 'Competition Law as Fairness' 8 (2017) Journal of European Competition Law and Practice 147.

[3]See, for example, J Viehoff and K Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity and Choice' in G de Búrca, D Kochenov and A Williams (eds), *Europe's Justice Deficit* (Hart Publishing 2015) 283.

[4]G Malgieri, 'The Concept of Fairness in the GDPR: A Linguistic and Contextual Interpretation' (2020) Proceedings of FAT* '20, January 27–30 5.

[5]I Graef, D Clifford and P Valcke, 'Fairness and Enforcement: Bridging Competition, Data Protection, and Consumer Law' 8 (2018) International Data Privacy Law 200.

Union's values, fairness is inextricably linked to most – if not all – the concepts enumerated in Article 2 TEU.[6] Subject-specific analyses revolve around provisions of primary and secondary EU law which, expressly or by implication, engage fairness on different levels and to different degrees. For example, one of the pre-conditions for a member state's compliance with the rule law lies in the protection, by that member state, of judicial independence and the individual right to a fair trial.[7] The connection of fairness with the EU values and the law that implements them[8] explains its ubiquitous nature in EU law. Victim of its own success, however, the ubiquitous nature of fairness has occasioned two distortions in the attempts to study it. On the one hand, discussions on fairness in EU law tend to be restricted to the area they focus on. On the other, broader theorisations that are directly concerned with fairness often have their centre of gravity in some other concepts. Solidarity is a case in point.[9]

Those distortions affect EU migration and asylum law too, and border controls in particular. Externally, the European Border and Coast Guard – better known as Frontex – has been described as the epicentre of the EU rule of law crisis[10] and part of a broader system of lawlessness.[11] That crisis touches upon different rights[12] and manifests itself in a number of ways: inter alia, the impunity of actors involved in border controls,[13] the criminalisation of solidarity via deterrence of search and rescue (SAR) operations conducted by private parties,[14] the dubious legality of soft law agreements with third countries.[15] Likewise, practices at the EU internal borders have drawn criticisms in many respects,[16] including vis-à-vis the democratic

[6]Article 2 TEU reads as follows: 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.

[7]See Article 47 of the EU Charter of Fundamental Rights (CFR or the Charter).

[8]See C-284/16 *Achmea* EU:C:2018:158, para 34: 'EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected.'

[9]A Sangiovanni, 'Solidarity in the European Union' 33 (2013) Oxford Journal of Legal Studies 213.

[10]L Marin, 'Frontex at the Epicentre of a Rule of Law Crisis at the External Borders of the EU' 33 (2024) European Law Journal 11.

[11]D Kochenov and S Ganty, 'EU Lawlessness Law: Europe's Passport Apartheid from Indifference To Torture and Killing' (2023) Jean Monnet Working Paper No 2/2022 (NYU Law School), available at SSRN: <https://ssrn.com/abstract=4316584>.

[12]N Vavoula, *Immigration and Privacy in the Law of the European Union. The Case of Information Systems* (Brill 2021); R Mungianu, *Frontex and Non-Refoulement*, *The International Responsibility of the EU* (Cambridge University Press 2016).

[13]G Raimondo, *The European Integrated Border Management: Frontex, Human Rights, and International Responsibility* (Hart Publishing 2024); M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); S Ganty, A Ancite-Jepifánova and D Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by 'Instrumentalisation' (2023) 18 MOBILE Working Paper Series (University of Copenhagen) available at SSRN: <https://ssrn.com/abstract=4660096> <https://doi.org/10.2139/ssrn.4660096>.

[14]S Carrera, V Mitsilegas, J Allsopp and L Vosyliūtė, *Policing Humanitarianism: EU Policies against Human Smuggling and Their Impact on Civil Society* (Hart 2019).

[15]V Moreno-Lax, 'EU Constitutional Dismantling Through Strategic Informalisation: Soft Readmission Governance As Concerted Disintegration' 30 (2024) European Law Journal 29.

[16]CA Groenendijk, E Guild and PE Minderhoud, *In Search of Europe's Borders* (Kluwer Law International 2003); D Bigo and E Guild, *Controlling Frontiers : Free Movement into and within Europe* (Ashgate 2005); E Guild, E Brouwer, K Groenendijk and S Carrera, *What is Happening to the Schengen Borders?*, CEPS, No. 86/December 2015; K Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?' 10 (2) (2004) European Law Journal 150.

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regression caused by the Schengen governance,[17] the inadequacy of the EU institutions' response to situations of crisis,[18] the drawbacks engendered by the 'contradictory driving forces for Schengen integration'.[19] Fairness as such barely figures in those valuable and insightful studies. At best, questions of fairness in EU migration and asylum law have been addressed from the backdoor of solidarity.[20] Therefore, there exists a clear gap in the literature as regards both a systemic understanding of fairness in the EU legal order and its application in the context of migration and asylum law.

Against that background, this paper raises the following question: is the migration and asylum pact, and specifically its system of border procedures, fair towards third-country nationals (TCNs)? This question is particularly important for two reasons. As the principle of fairness pervades EU law across the board, we must place that concept on centre stage and attempt to develop an overarching framework to discuss issues related to it. Secondly, pursuant to the Treaty on the Functioning of the EU (TFEU), the Union 'shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.[21] The connection between fairness and the EU's *policy* must not be read as leaving the law out of the equation. There would be little point in devising a fair policy, if that fairness was not reflected in the law substantiating it.[22] The existence of an *explicit* obligation of fairness in primary law makes the assessment of those legal areas particularly relevant.

The question raised in this paper could not be answered without defining how the fairness of a legal framework should be assessed, and how that principle could be operationalised. Therefore, the article is structured into two main parts. Firstly, the paper engages with the philosophical and the legal debate on fairness, and coherently combines different literatures into a new framework that is suitable for the structural features of the EU as a polity. The second part applies the framework devised in the first part to the specific 'case study' adopted here, with the view to assessing the fairness of the border procedures established by the new asylum and migration pact. This article proposes an original approach to discuss the legal meaning and scope of fairness in the EU, and adapts that definition to the characteristics of the area analysed in this research. It sets out a blueprint for understanding what fairness entails legally, and shows how to adjust it to the specific polity and field under consideration. In doing so, this research offers a normative perspective which can take the analysis of legal phenomena beyond a strictly doctrinal approach and can also be relevant to actors and policies beyond the EU and migration and asylum. Thereby, this paper significantly advances the debate about these areas and the EU as a sui generis legal system.

[17]D Curtin and H Meijers, 'The Principle of Open Government in Schengen and the EU: Democratic Retrogression?' 32 (2) (1995) Common Market Law Review 403.

[18]D Thym and J Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics' 5 (2020) European Papers 1143.

[19]G Cornelisse, 'What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders' 51 (3) (2014) Common Market Law Review 741.

[20]E Kuĵçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' 22 (2016) European Law Journal 456; V Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' 24 (2017) Maastricht Journal of European and Comparative Law 761.

[21]TFEU, Art 67(2).

[22]The question concerning the distinction between law and policy is different, and falls outside the scope of this research. Among a plethora of contributions on the relationship between law, principles and policy, see S Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge University Press 2011); FAR Bennion, 'Legal Policy' in FAR Bennion (ed), *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press 2009); N MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1994).

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Part I – Defining Fairness

2. Introducing (some) terms of the debate

Fairness has been the subject of extensive debate in political philosophy,[23] legal theory and many substantive areas of policy.[24] It has different value in different cultures,[25] and there probably is no persuasive way of 'tidying up the many considerations that we ordinarily adduce when discussing' it.[26] Like other principles often referred to in the context of both EU and international law, such as trust or solidarity, it represents an overarching idea, applicable in different domains[27] and across them.[28] It informs the structure of a society and the interaction between societal actors along different axes,[29] and is fundamentally aspirational in nature.[30] To start with dictionary definitions of 'fair', the adjective is described as 'marked by impartiality and honesty',[31] or 'the quality of treating people equally'.[32] In this understanding of fair treatment, fairness is seen as requiring non-arbitrariness and that like situations be dealt with alike. This approach resonates with many philosophical accounts[33] as well as with EU law across the board. Such a definition of fairness evokes the values of the rule of law, justice, non-discrimination and equality, and is reflected in the numerous provisions of primary and secondary law that give effect to them. Only to mention the most obvious examples, we can refer to the principle of non-discrimination and the legislative instruments implementing it,[34] or the protection against arbitrary detention enshrined in the right to liberty.[35]

Another – non-mutually exclusive – perspective on fairness focuses on how claims are accommodated,[36] with authors equating it to 'appropriate concession in the context of a mutually beneficial cooperative arrangement'.[37] To frame issues of fairness in a way that, at least in part, maps onto the *summa divisio* between its substantive and procedural versions, we can identify two main scenarios: fair division of something (where the fairness is embodied by the outcome and/or the act of dividing itself), and fair response -which could be negative or positive, depending on the conduct of the interlocutor.[38] The EU's budget is an area where the complementarity between those two aspects is most visible in the Union, as the allocation of resources to member states can

[23]J Broome, 'Fairness' 91 (1990) Proceedings of the Aristotelian Society 87; A Ryan, 'Fairness and Philosophy' 73 (2006) Social Research 597.

[24]D Kahneman, JL Knetsch and RH Thaler 'Fairness and the Assumptions of Economics' 59 (1986) The Journal of Business 285; HE Arnett 'The Concept of Fairness' 42 (1967) The Accounting Review 291.

[25]See E Porter, 'Globalization and Fairness', in J Dator, R Pratt and Y Seo (eds), *Fairness, Globalization, and Public Institutions* (University of Hawai'i Press 2006), 33, and S Inayatullah 'Culture and Fairness: The Idea of Civilization Fairness', ibid., 31.

[26]Ryan (n 23) 602.

[27]Economics, law, or sport.

[28]Contract law, competition law, administrative law.

[29]Among institutions, among the institutions and the individuals, and among the latter.

[30]It tells how a society should work, as opposed to describe how it currently operates.

[31]See the Merriam Webster at Fair Definition & Meaning – Merriam-Webster.

[32]See the Cambridge Dictionary at FAIR | English meaning – Cambridge Dictionary.

[33]See for this J Wolff, 'Fairness, Respect, and the Egalitarian Ethos' 27 (1998) Philosophy and Public Affairs 97; TM Scanlon *What We Owe to Each Other* (Harvard University Press 1998).

[34]Non-discrimination is both a fundamental objective of the EU (see Arts 3(3) TEU and 10 TFEU) and a general principle running through the entirety of the EU legal system, as apparent from Arts 18, 19, 36, 37, 40, 45, 95, 107, 157, 200, 214 TFEU. Among the many examples of legislative measures, see Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

[35]Art 6 CFR.

[36]J Broome, 'Fairness' 91 (1990–1991) Proceedings of the Aristotelian Society, New Series 87; B Hooker, 'Fairness' 8 (2005) Ethical Theory and Moral Practice 329; P Tomlin, 'On Fairness and Claims' 24 (2012) Utilitas 200.

[37]C McMahon, *Reasonableness and Fairness: A Historical Theory* (Cambridge University Press 2016) 22.

[38]J Elster, 'Fairness and Norms' 73 (2006) Social Research 365–6.

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now be affected by their compliance with the rule of law.[39] Other examples of the systemic importance of a response and the required features thereof can be found in provisions on penalties for violations of EU law (including competition rules),[40] and the principle of proportionality of criminal penalties.[41] Questions of redistributive justice and allocation, therefore, lie at the core of the debate on the meaning and scope of fairness. As known, however, the choice of the 'right' criterion for division constitutes one of the most contentious aspects of discussion. Distributing burdens and benefits on 'good reasons' – for example, effectiveness or efficiency – might not be fair in and of itself. Likewise, there are situations – like lotteries – that are not concerned with fairness and yet, we would not necessarily label their outcomes as unfair.[42] In certain contexts, the link between fairness and justice brings consideration of solidarity into the conversation. This is apparent from Union law, as shown inter alia by the rules on budget, as well as the requirement that the EU policies on migration and asylum be governed by the principle of solidarity and fair sharing of responsibility between the Member States.[43]

Rawls is one of the scholars that has made the connection between fairness and justice most explicit, as he famously devised an account of justice *as* fairness.[44] Rawls's focus is on justice of social institutions and their practices, and specifically the distribution of primary goods understood as not only wealth, but also rights and liberties.[45] Several aspects of his account evoke the terms of the debate introduced so far. In his view, questions of fairness are likely to emerge when conflicting claims 'are made upon the design of a practice'.[46] Rawls's approach builds on 'the elimination of arbitrary distinction' and the establishment 'of a proper balance between competing claims'.[47] His idea of fairness 'involves the mutual acceptance, [. . .] of the principles on which a practice is founded, and [. . .] the exclusion from consideration of claims violating the principles of justice'.[48] He argues that 'acting unfairly is but taking advantage of loop-holes or ambiguities [. . .] insisting that rules be enforced to one's advantage when they should be suspended [and] acting contrary to the intention of a practice'.[49] Therefore, fairness is also ensured through the appropriate response against unfair behaviour – identified primarily by the perversion of the objectives of a 'practice' and the disregard for the principles underpinning it. The mutual acceptance of principles governing a practice, and the importance of balancing competing claims *appropriately* when designing it, presupposes the existence of some sort of group of reference within which such claims emerge. Who are the subjects of the interaction – or else, what is the group of reference? Although Rawls uses the ambiguous and widely defined term 'persons', in other works he consistently talks about 'citizens'.

[39]Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1 (Rule of Law Conditionality Regulation) and Case C-157/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97.

[40]Arts 103(2) and 260(2) TFEU.

[41]Art 49 CFR.

[42]Ryan (n 23) 602.

[43]Art 80 TFEU.

[44]See, primarily, J Rawls, 'Justice as Fairness' 67 (1958) The Philosophical Review 164; J Rawls, *A Theory of Justice* (Harvard University Press 1999). In reflecting of some of the criticisms raised by other scholars on his account, Rawls refined and expanded on certain aspects thereof over the years. See in particular J Rawls, *Political Liberalism* (Columbia University Press 2005).

[45]Rawls, *A Theory of Justice* 6; Rawls, *Political Liberalism* 258.

[46]Rawls, 'Justice as Fairness' (n 44),172.

[47]Ibid., 165. The two fundamental tenets of Rawls' theory read as follows: First, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. Inequality is allowed only if there is reason to believe that the practice with the inequality, or resulting in it, will work for the advantage of every party engaging in it. Rawls itself admits his ambiguous use of the term 'person', intended as not only individuals but also nations or firms.

[48]Ibid., 193.

[49]Ibid., 180.

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Furthermore, his understanding of justice as fairness governs the interaction – via cooperation or competition – of free 'persons' that have no authority over one another.[50]

Rawls's framework of fairness has been applied in areas as different as contract law,[51] international criminal law,[52] environmental law,[53] international negotiations[54] and international law[55] – just to name a few. In devising a Rawlsian theory of international law, Franck argued that the fairness of 'any [. . .] legal system, will be judged, first by the degree to which the rules satisfy the participants expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process'.[56] Franck posits that a debate about fairness presupposes two elements: moderate scarcity and community. Without the former, there would be no need to engage in a discussion of mechanisms of distribution of 'fair share' of goods and the allocation of rights and duties. Without the latter, there cannot be such a discussion: any meaningful discourse about fairness presupposes the identification of an 'irreducible core of shared assumptions about fairness'.[57] In Rawls's wake, Franck's approach presupposes the existence of a community – if a global one – in which the applicable rules are assessed against a benchmark of fairness. Franck's framework is enlightening particularly because it connects the debate on fairness to law as a societal tool to achieve a negotiated balance between order and change. Or, to put it differently, between a view of legitimacy as process fairness (the agreed rules will be respected and enforced), and distributive justice as moral fairness.[58] These two dimensions seem to come together in the EU, where every area of law and policy must be consistent with its value-laden legal foundations enumerated in Article 2 TEU.

The previous discussion is particularly relevant to understanding questions of fairness in 'social institutions and their practices' – ie, a polity like the EU, its laws and policies and particularly asylum and migration. More specifically, this paper addresses questions of how to fairly allocate rights, how to fairly restrict them and according to what procedures. In order to do that, we must first distinguish between different levels of analysis. Investigating the fairness of a polity,[59] for example, deals with different questions from those concerning the legal system as a whole or the justice system more narrowly.[60] When the focus is on an area of law in particular, fairness can be assessed in different scenarios, although is inevitably linked to said systemic aspects. The fairness of the law-making process is distinct from the fairness of the content of a given measure, but the two cannot be compartmentalised entirely. The specific measure might, in turn, establish procedures to achieve a certain result,[61] and/or set out substantive conditions for those purposes,[62] or yielding it directly.[63] These situations map onto some of the themes discussed above, such as fair play/fair outcomes, or

[50]Ibid., 178 and 183.

[51]J Klijnsma, 'Contract Law as Fairness' 28 (2015) Ratio juris 68.

[52]LN Sadat, 'A Rawlsian Approach to International Criminal Justice and the International Criminal Court' 19 (2010) Tulane Journal of International and Comparative Law 261.

[53]S Hsu, 'Fairness Versus Efficiency in Environmental Law' 31 (2004) Ecology Law Quarterly 303.

[54]C Albin, *Justice and Fairness in International Negotiation* (Cambridge University Press 2001).

[55]T Franck, *Fairness in International Law and Institutions* (Oxford University Press 1997).

[56]Ibid., 9.

[57]Ibid., 16.

[58]Ibid., 22–3.

[59]See, among many, S Verba, 'Fairness, Equality, and Democracy: Three Big Words' 73 (2006) Social Research 499. The authors argue that a polity is fair when citizen voice – as defined in the article – is equal.

[60]F Wilmot-Smith *Equal Justice. Fair Legal Systems in an Unfair World* (Harvard University Press 2019).

[61]As discussed in the next chapters, EU law establishes different sets of procedures for TCNs wanting to enter to EU's territory, from those concerning to the acquisition of a visa to those related to application for international protection made at a member state's borders.

[62]As known, a visa can be granted, just like international protection or entry clearance for holiday purposes, if the person concerned fulfils certain requirements.

[63]For example, the EBCG Regulation establishes directly, state-by-state, the annual contribution to the Guard in terms of standing corps through long-term (Annex II) or short-term (Annex III) secondment, or reserve for rapid reaction (Annex IV).

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procedural/substantive fairness. Fairness can also play a decisive role in judicial reasoning. This is not only to do, as often mentioned in the literature, with courts embedding policy considerations in their judgments. It also concerns the interpretation and application of the law consistently with its spirit.[64] The assessment of fairness of a polity, of law-making, of a specific measure or of judicial reasoning must not be conflated. That is not to say that those levels of analysis should be treated as watertight compartments, however. The fairness of law-making is likely to impact the fairness of the area to which that law will apply. Likewise, the overall fairness in a certain law or policy field can tell us something about the fairness of a polity where those laws and policies are being developed. The judicial interpretation and application of the relevant rules and principles can also play a major role in an evaluation of fairness of a legal phenomenon and/or the system more broadly.

Against that background, a workable definition of fairness comprises at the very least the following elements. Firstly, it entails the non-arbitrary accommodation of claims emerging *during* the designing of a practice by equal persons in a community *as well as* in the context of its implementation by the competent authorities. Secondly, the designing and implementation of the practice must comply with its intentions and the mutually accepted principles underlying it. Thirdly, fairness presupposes a response to unfair behaviour, defined as violations of those principles and intentions. It is important to clarify that, consistently with Rawls's theory, the approach to fairness defined in this research focuses on the 'equal basic liberties', which include the freedoms specified by the liberty, the integrity of the person and the rights and liberties covered by the rule of law.[65] The priority of liberty -required under 'reasonably favourable conditions' – implies 'that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties, and never [. . .] for reasons of public good'.[66] This is, of course, without prejudice to the extension of the proposed approach beyond the scope of this paper. It is argued that these three (minimum) requirements of fairness have the advantage of being applicable to the different levels of analysis of fairness outlined above.

How would that definition apply to the EU as a polity first, and to the specific subject of this paper more specifically? Firstly, the competing claims (different views) are those of the 'equal persons' (decision-makers) involved in the designing of its practices (including the law and policy of EU border controls). Under the Treaties, the principle of equality applies to both the member states and their citizens.[67] The different bodies of EU law-making -and, through them, EU citizens –[68] are also in a position of equal footing, with the member states having accepted the primacy of EU law and Treaty-based counterpoints to that.[69] Consistently with its founding values, the accommodation of competing claims in the EU must be non-arbitrary, non-discriminatory (unless otherwise justified), and solidarity-orientated. Secondly, in the Union, the EU values constitute the mutually accepted principles on which its practices (laws and policies) must build. Thirdly, as hinted above, effective mechanisms to react to unfair behaviour – of which the EU legal order features different types – must be provided and deployed. Those three requirements must be respected, *within their mandates*, by the 'persons' – institutions, bodies and agencies – in charge of making, interpreting and implementing the law. The Court of Justice's judgement on the legality of the Rule of Law Conditionality Regulation is a perfect showcase for fairness in EU law as conceptualised in this paper, as it brings together the

[64]See, on these issues, Bennion (n 22) S Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge University Press 2011) chapter 1; TRS Alla, 'Justice and Fairness in Law's Empire' 52 (1993) Cambridge Law Journal 64; R Dworkin, *Law's Empire* (Fontana 1986); CR Sunstein, 'Two Conceptions of Procedural Fairness' 73 (2006) Social Research 619.

[65]Rawls, *Political liberalism* (n 44), 291.

[66]Ibid., 295–7.

[67]Arts 4(2) and 9 TEU.

[68]Although, one could object to the accuracy of that argument on the basis of the inversely proportional system of representation with which MEPs are elected.

[69]See, for example, Art 4(2) TEU.

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accommodation of claims, the role for compliance and the importance of a response: 'the Union budget is [an instrument] for giving practical effect [...] to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law [...T] he implementation of that principle, through the Union budget, is based on mutual trust between the Member States [.M]utual trust is itself based [...] on the commitment of each Member State to comply with [...] the values contained in Article 2 TEU'.[70] As the values permeate EU law, a breach of a value (such as solidarity) through violation of norms meant to give effect to it (eg, those budget-related) can affect mutual trust to the extent that, in certain cases, it can lead to the suspension of *other* measures expressing the same value which the member states in question had violated in the first place.

The challenge, when assessing fairness in the context of border controls, is that in many cases it affects especially persons who are not – unlike citizens – considered part of the community strictly speaking, and who are often excluded from most questions about allocation of benefits (but not duties). This consideration is inextricably linked to, and compounded by, every polity's sovereign right to decide who can access its territory and on what conditions. That is not to say that an assessment of fairness in this area is impossible, but only that the specific features of the legal framework under consideration must be borne in mind.[71] Against that background, this paper proposes an integrated approach to the use of fairness: that is, evaluating the consistency of the details of a 'practice' (the system of border procedures) with its intentions (the objectives), and the compatibility of both with the mutually accepted principles underlying it (the EU values). To be sure, gauging the fairness of the substantive and procedural conditions for exercising control, or the conditions imposed on the control subject, will not always be a straightforward task. This is even more so as the system of border procedures established by the pact builds on a wide spectrum of sources, pursues different objectives, targets a diverse range of third-country nationals, and involves different levels of governance and actors. Two main allies can come to our rescue. Firstly, there is the 'structured network of principles' that makes the EU legal order work.[72] For example, proportionality is particularly helpful, as the same framework simultaneously pursues different – and possibly conflicting – objectives. Secondly, as further specified below, the principles that constrain the sovereign right mentioned above will be key, and especially what we can call 'universal principles' – ie, those applicable regardless of the fact that the person invoking and potentially benefiting from them belongs to the 'community'.

In this section, we have seen how many of the themes characterising the philosophical debate on fairness resonate with systemic features of the EU legal order. We have attempted a workable definition of legal fairness, identified the relevant levels of analysis, and related that to the specific context of the EU and border controls. Before moving to the specific discussion of the border procedures, we must zoom in on the different types of fairness existing in EU law. The following – brief – taxonomy focuses on examples where fairness is explicitly referred to in the relevant provision of primary or secondary law. By understanding the nature of these different kinds of fairness featured in the EU legal order, we can learn lessons for the purposes of the discussion carried out in this paper.

[70]Case C-157/21 *Hungary v European Parliament and Council* (n 39), para 147.

[71]'Specific' must not be understood as 'unique'.

[72]The 'essential characteristics of EU law [particularly primacy and direct effect] have given rise to a *structured network of principles*, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other [...] This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU'. Opinion 2/13 (*Accession to the ECHR*), ECLI:EU:C:2014:2454, paras 166–8.

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3. Fairness in EU law

The previous section has engaged with the philosophical debate on fairness, and linked the main themes of the discussion to the EU as a polity. We have provided a workable definition of fairness, and applied it to Union law and policy making. We have also highlighted the need to adjust that framework to the features of the specific area under consideration – in this case, border procedures applied to TCNs. Furthermore, we have emphasised the importance of thinking about fairness 'in context': in the case of the EU, that means being aware of its relationship with other fundamental aspects of the EU as a legal order, such as its values, fundamental principles and objectives. Now, we zoom in on the different manifestations of fairness in EU law. These are not restricted to EU citizens and can protect persons as well as systems or structures such as markets. Broadly, we can identify three main applications of fairness in EU law. Firstly, the systemic dimension of fairness manifests itself in competition law,[73] with the latter linking closely to the prevention of abuse and the achievement of a fairer society.[74] At the same time, it is also important that the enforcement of rules of competition is fair, regard being had to procedural safeguards and the right to a good administration. Secondly, fairness plays a part horizontally in relations between private parties - and particularly so in situations marked by an imbalance of contractual power. For example, personal data must be processed fairly.[75] In the context of employment relationships, the right to fair and just working conditions – rooted in human dignity –[76] is protected especially in the form of conditions that respect workers' health, safety and dignity, as well as the establishment of maximum working hours, rest periods and paid leave.[77] Thirdly, the vertical dimension concerns the interaction between public authorities and the individual. Everyone has the right to fair compensation being paid in good time for their loss in case of dispossession of their property on grounds of public interest.[78] The right to property, which constitutes the logical *prius* of the right to fair compensation, requires that the dispossession achieve a fair – ie, proportionate- balance between the individual rights and the interest of the community.[79] Of different sorts, but still within the vertical scenario, there are exquisitely procedural rights. As regards the right to a good administration at the EU level, every person has the right to have their affairs handled impartially, fairly and within a reasonable time.[80] The duty to act fairly consists of – inter alia – the obligation to give careful consideration to the factual and legal elements of the claimant's case.[81] Furthermore, everyone has the right to a fair trial held by an independent and impartial tribunal established by law.[82] That right is the cornerstone of any system based on the rule of law, and includes aspects such as the principle of equality of arms and adversarial proceedings.[83]

Before going any further with closer consideration of some of those examples, we must resist the temptation to take any of the understandings of fairness mentioned above and transplant it *sic et simpliciter* to the border procedures laid down in EU asylum and migration law. The extreme

[73]TFEU, Art 101(3). As regards the common agricultural policy, Art 39 TFEU states that the objectives of the latter shall be to 'increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour' and 'thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture'.

[74]P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012); Lamadrid de Pablo (n 2).

[75]CFR, Art 8(2).

[76]S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021) Art 31 889.

[77]CFR, Art 31.

[78]CFR, Art 17(1).

[79]See S Peers et al (eds), *The EU Charter of Fundamental Rights*, Art 17(1) 508–11. Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planz ü ge v Republik Österreich* EU:C:2003:333.

[80]CFR, Art 41(1).

[81]S Peers et al (eds), *The EU Charter of Fundamental Rights*, Art 41. Art 41(2) CFR also lists, in a non-exhaustive manner, what kind of specific rights would be covered by the right to a good administration.

[82]CFR, Art 47.

[83]See S Trechsel and S Summers, *Human Rights in Criminal Proceedings* (Oxford University Press 2006) particularly ch 4.

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opposite position should not be espoused either. Looking at how fairness unfolds in other fields of EU law might provide useful insight. This is true especially in light of the existence of certain universal rights that constraint polities' sovereign rights related to border controls.

These reflections find great resonance in the horizontal application of fairness. That scenario is structurally different from border controls, because the types of relationship between the parties involved in either situation are not comparable. There are interesting elements, however, that can be drawn from the meaning of fairness in contractual relationships. For example, the Unfair Terms Directive imposes certain obligations of good faith and transparency in contracts concluded between a seller or supplier and a consumer, with the view to addressing the significant imbalance between such parties in a contractual relationship.[84] The Unfair Commercial Practices Directive defines commercial practices as unfair if they are contrary to the requirements of professional diligence and materially distort economic behaviour of the average consumer:[85] in particular, through misleading[86] and aggressive practice[87] affecting the consumer's freedom of choice. This would be the case of factually incorrect information, which was however presented in a way that led the consumer to take a decision they would not have otherwise.[88]

As regards data processing by controllers and processors in particular, two concepts are worth mentioning: procedural fairness and fair balancing between different – conflicting – interests. The former consists of transparency, timeliness and burden of care, whereas the latter comprises proportionality and necessity. According to Malgieri, the difference between 'mere' transparency or lawfulness and 'fair' transparency or lawfulness is the adoption of additional safeguards that can effectively rebalance the unfair imbalance between the data controller and the subject in specific circumstances.[89] Fairness also entails consideration of 'the substantial circumstances at stake', such as expectations of the individuals, effects on the data subjects, actual interests of the parties.[90] Valcke *et al* also highlight the relationship between the implementation of fairness by controllers and processors and the trust of data subjects.[91] From these examples, fairness plays the role of 'enhancer' of other principles to inject greater balance in an asymmetric relationship. Fair processing also entails that a data subject should not be misled in concluding a contract which authorises the processing of certain personal data which the control subject might have refused to agree to – in other words, the data controller must demonstrate that the data subject had 'information relating to all the circumstances surrounding that processing, in an intelligible and easily accessible form, using clear and plain language, allowing that person easily to understand the consequences of that consent, so that it is given with full knowledge of the facts'.[92] This, *a contrario*, echoes Rawls's view of unfairness as exploiting loopholes or ambiguities to defeat the purposes of a practice. At the intersection between copyright law and data protection, the Court has also stated that EU law must be transposed and interpreted by member states in a way that ensure a *fair* balance between different fundamental rights protected by the EU legal order.[93]

[84]Council Directive 93/13/EEC on unfair terms in consumer contracts, [1993] OJ L 95/29, Arts 3–5.

[85]Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), [2005] OJ L/149/22, Art 5.

[86]Directive 2005/29/EC, Art 6.

[87]Directive 2005/29/EC, Art 8.

[88]See Graef et al (n 5).

[89]G Malgieri (n 4).

[90]Ibid., 6 and 10.

[91]D Clifford and J Ausloos, 'Data Protection and the Role of Fairness' ((August 3, 2017)) 29/2017 CiTiP Working Paper 42.

[92]Case C-61/19 *Orange Romania* ECLI:EU:C:2020:901 para 52. For a judgement on the (un)fairness of the balance struck by the national legislation on the period of time for which the data subject could access information about the recipients of their own data, on the one hand, and the interest of the controller of not being imposed an disproportionate burden, see Case C-553/07 *Rijkeboer* ECLI:EU:C:2009:293.

[93]Case C-275/06 *Promusicae* ECLI:EU:C:2008:54, para 70; Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596, para 72.

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How could the foregoing analysis relate to EU migration and asylum law, and the system of border procedures more specifically? Firstly, fairness requires compliance with the agreed principles underpinning a 'practice', as well as the intentions thereof. As we can presume that the objectives stated in the Treaties align with the EU values, we must consider whether: the objectives pursued by the relevant measures governing border procedures are consistent with those set in primary law; and, whether the details of the legal framework and its implementation are capable of achieving those objectives in compliance with the EU's values. As regards the parameters of that assessment, fairness can work to balance an asymmetrical relationship such as that between public authorities and the individual. While border controls are expression of a core sovereign right, it is also true that states and the EU collectively have accepted universally applicable constraints on that right (such as non-refoulement). Secondly, and relatedly, an assessment of fairness entails consideration of how competing claims are balanced. This is especially the case when it comes to border procedures, as they address different groups of people and pursue different objectives. The structured network of principles moving EU law, and particularly the principle of proportionality, can be particularly helpful to assess the accommodation of competing claims. Thirdly, fairness presupposes a response to violations of the principles and intentions of the practice. In the context of EU law and border procedures, this amounts in particular to a system of effective legal protection. Part II applies the framework developed in this Part to the system of border procedures as follows. As mentioned above, an assessment of legal fairness can concern different 'moments' such as the law-making, the judicial interpretation, the implementation. Given the recent nature of the pact, the main focus is on the relevant legislative instruments. The assessment of fairness requires an analysis of the designing of the practice, the accommodation of claims and the response to unfairness. In relation to border procedures, those three aspects are best evaluated by looking at the system of sources, conditions for implementing the procedures, and mechanisms of scrutiny. We have argued that, beyond a certain level of abstraction, what is fair depends -at least to an extent – on the specific question under consideration. The assessment of fairness relies on the parameters –the 'constraints' mentioned above- deemed most relevant to each of those scenarios, with the view to drawing conclusions on the overall fairness of this law. On that basis, the discussion on sources pays particular attention to legal certainty and accessibility to the legal information, understood both as accessibility to the source itself and to the substantive content thereof. As regards the conditions for the performance of the border procedures, the research considers the implications of the pact for the right to seek asylum, non-refoulement and the right to liberty. Finally, when it comes to mechanisms of scrutiny, the article investigates the effects of the new legislative measures in terms of accountability and effective judicial protection.

Part II – Border Procedures in the Asylum and Migration Pact

The recently agreed migration and asylum pact has significantly changed the legal landscape of migration and asylum law. The following measures operate together to establish a complex system of border procedures: the Screening Regulation;[94] the Asylum Procedure Regulation (APR);[95] the Return Border Procedure (RBP) Regulation;[96] and the Crisis Regulation.[97] Consistently with the account of fairness proposed in this article, the analysis revolves around three main aspects of that system: the sources, the conditions for applying the procedures, and the pathways to scrutiny. In order to understand whether those procedures are fair to TCNs, we ultimately aim to answer the question as to whether the framework is consistent with its intensions and underlying principles. In order to do that, we must first consider the alignment between the objectives of those measures and the corresponding 'intentions' established in the Treaties.

[94]Regulation (EU) 2024/1356 (or Screening Regulation).
[95]Regulation (EU) 2024/1348 (or APR).
[96]Regulation (EU) 2024/1349 (or RBP Regulation).
[97]Regulation (EU) 2024/1359 (or Crisis Regulation).

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Broadly, the objectives scattered throughout the different policy areas governed by the TFEU and TEU are detailed expressions of the fundamental macro-objectives stated in Article 3 TEU -and, specifically, of the Union's overarching goals of promoting peace, its values and the well-being of its people.[98] The Treaties organise objectives in concentric circles, with Title V TFEU elaborating on the aims related to the creation of the area of freedom security and justice (AFSJ).[99] The constitution of the AFSJ must respect fundamental rights and the different legal systems and traditions of the Member States.[100] The common policy on asylum, immigration and external border controls in particular must be based on solidarity between Member States and be fair to TCNs.[101] In that regard, the Union shall gradually introduce an integrated management system for external borders.[102] It must develop a common asylum policy, to offer appropriate status to TCNs requiring international protection and ensure compliance with the principle of non-refoulement.[103] It must frame a common immigration policy, aimed to the efficient management of migration flows and the combating of illegal immigration and human trafficking.[104]

As secondary EU law increasingly governs the management of mixed migration flows, the same piece of legislation can pursue a heterogeneous set of objectives – just like those referred to above. This is certainly the case for the instruments considered in this paper, and the system of border procedures they set out. Firstly, the Screening Regulation establishes a screening mechanism, with the view to facilitating the proper identification of TCNs and their efficient referral to the appropriate procedures.[105] In doing that, the Regulation should contribute to identifying vulnerable persons, countering secondary irregular movement within the Union, and achieving the objectives of border controls more broadly (including reducing illegal migration and combating crime).[106] When performing border controls and the screening procedures, Member States must act in compliance with relevant Union and international law, and particularly: the rights of applicants for international protection (especially non-refoulement), the best interest of the child enshrined in Article 24(2) CFR, human dignity and non-discrimination.[107] Secondly, a humane, fair and efficient asylum policy is a complementary component of the EU's AFSJ.[108] The APR aims to ensure timeliness and effectiveness of the asylum procedures, equity and equality in treatment, clarity and legal certainty for applicants. A more consistent system applied across the Union has also the objective of reducing secondary movement.[109] Interestingly, the APR clearly identifies a series of conditions for asylum procedures to be fair: effective access to the procedure; an effective opportunity to present all elements available to the applicant; an effective right to a personal interview (subject to limited exceptions) and time to prepare and consult a legal advisor, access to free legal assistance,[110] and a rigorous examination of the application, taken impartially and objectively based on relevant, precise and up-to-date information.[111] Effective access to the examination procedure should also be available to persons at border crossing

[98]The 'autonomous' nature of EU's objectives, and standalone effects they may produce in terms of obligations on Member States, is however an underexplored topic.

[99]To recall, Art 3(2) TEU states that the 'Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.

[100]TFEU, Art 67(1).

[101]TFEU, Art 67(2).

[102]TFEU, Art 77(1).

[103]TFEU, Art 78(1).

[104]TFEU, Art 79(1). This provision also refers to the fair treatment of third-country nationals residing legally in Member States.

[105]Screening Regulation, recital 2.

[106]Screening Regulation, recitals 7, 6 and 3 respectively.

[107]Screening Regulation, recitals 5, 25 and 26 respectively.

[108]APR, recital 4.

[109]APR, recitals 3 and 5.

[110]APR, recitals 13–16.

[111]APR, recital 38.

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points and in detention facilities.[112] As regards asylum border procedures more specifically, these aim to quickly assess 'whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, in a manner that fully respects the principle of non-refoulement, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection'.[113] As apparent from the preamble of the APR, the fairness of the procedures rests, for the most part, on the effectiveness of its constitutive components. This aspect is highly relevant for the detailed analysis of the framework developed below and fits in with the approach to fairness proposed in this article. In fact, effectiveness is essential to ensure that the intentions and underlying principles of a practice are respected. When the same instrument (or set of instruments) pursues different objectives, and in the absence of any information on implementation due to their recent nature, the details of the framework are key to understanding how those different objectives have been accommodated. The RBP Regulation takes a similar tone to that of the Screening and AP Regulations. It establishes procedures applicable to TCNs whose application for international protection has been rejected in accordance with asylum border procedures, while also reiterating that member states are bound by international law instruments and provisions on fundamental rights (particularly as regards the best interest of the child).[114] The same holds true for the Crisis Regulation, which sets out procedures for the adoption of emergency measures in exceptional situations (including derogations from provisions of asylum law). As such, the Regulation upholds the respect for the fundamental rights of TCNs and the principles recognised by the Charter.[115] The extent to which that statement of intent is reflected in the provisions of the Regulation is discussed in the next sections. Overall, it is clear that the objectives pursued by these instruments do not depart from those stated in the Treaties. Consistently with the integrated approach to migration proposed by the Commission, each measure straddles the scope of the different provisions of the TFEU mentioned above and simultaneously cover issues of asylum, irregular migration and external border controls. Given the diversity of goals pursued by the Regulations, a careful assessment of how different claims are accommodated is key to the overall assessment of fairness carried out in this paper.

4. Sources of border procedures. The role for the EU and the discretion of Member States

The focus of this section is on sources 'internal' to the measures considered.[116] In the new system of border procedures created by the pact, the Screening Regulation comes first logically and chronologically. The Regulation governs the screening of TCNs who have crossed the external borders illegally, have applied for international protection during border checks, or have been disembarked after a SAR operation.[117] The screening takes place before entry and aims to facilitate the referral of the TCN to the appropriate procedure. More specifically, the competent authorities must carry out a preliminary health check, and they must check for indications that the person is stateless, vulnerable, victim of torture or inhuman treatment, or has special needs within the meaning of the Return Directive, Article 25 Reception Conditions Directive[118] and Article 20 APR.[119] Under the Return Directive, the category 'vulnerable persons' covers minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological,

[112]APR, recital 33.
[113]APR, recital 58.
[114]RBP Regulation, recitals 4–5.
[115]Crisis Regulation, recital 8.
[116]For the purposes of this section, some measures are more relevant than others. Specifically, the discussion here does not cover the Asylum Procedure Regulation.
[117]Or, who have been found to stay illegally in the EU and there are no indications they have been subject to border controls.
[118]Directive (EU) 2024/1346 (or Reception Conditions Directive).
[119]Screening Regulation, Art 12.

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physical or sexual violence.[120] While the Reception Conditions Directive merely refers back to the APR, the latter only mentions applicants who might have been victims of torture, rape or another serious form of psychological, physical, sexual or gender-based violence.[121] The definitions provided for in those instruments do not exactly overlap, which can create issues of legal certainty and gaps of protection. One of the objectives of the Regulation is to identify vulnerable persons, so that their special needs are fully taken into account in the determination of the applicable procedure.[122] To ensure the widest possible scope of protection and pursue that objective more effectively, the different scopes of the concept of 'vulnerable persons' should be interpreted 'cumulatively'.

While this example refers to a specific (however important) aspect of interaction between sources within the Screening Regulation, more structural questions emerge from the sources relevant to the application of the Crisis Regulation. The latter sets out rules for the adoption of exceptional measures in situations of crisis or force majeur, consisting essentially of derogations from certain provisions of EU asylum law, and/or solidarity measures for the management of the situation. The first step in the framework governed by the Regulation is the reasoned request for such measures, sent by the Member State(s) concerned to the Commission.[123] In the request, the Member States must include a number of sources – ie, information – which vary depending on whether they claim to be experiencing a situation of crisis, instrumentalisation or *force majeur*. The way we interpret the nature and role for these sources is key to the assessment of fairness: a successful request from a Member State will lead to derogations from provisions of asylum law (as detailed below), which will in turn impact the position of the TCNs concerned. As such, a fairness-orientated construction of these provisions would warrant a restrictive interpretation of the grounds on which such derogations could be invoked. This is particularly the case when it comes to situations of crisis. In its request, the Member State must describe how, as a result of the situation, its asylum and reception system has become non-functional, as well as the measures taken to address the situation and a justification proving that that system, although well-prepared and notwithstanding the measures already taken, is unable to address the situation.[124] Therefore, a finding that such a situation exists presupposes in particular the well-preparedness of the invoking state, and the dysfunction caused to both its asylum and reception system. To determine the level of fairness of the law in action, we will have to assess how the Commission will interpret those requirements, and how it will 'weigh' the information provided by the Member State. We must also acknowledge that the assessment cannot be mono-dimensional and consider exclusively the implications for fairness to TCNs. An excessively restrictive interpretation of the described legal requirements would undermine the effectiveness of the Regulation, which would also be legally unsound. It is argued, however, that fairness would require the rigorously upholding of the conditions stated in the Regulation, and particularly the need for the state to have been well-prepared, and the cumulative nature of the impact on the asylum *and* the reception system.

In that regard, the sources relied on by the Commission to decide on the state's request include information and data contained in its annual asylum and migration report related to the Member State(s) concerned.[125] If the Commission deems the situation under consideration as constituting a case of crisis or *force majeur*, it will adopt an implementing decision for those purposes.[126] Alongside the adoption of the implementing decision, the Commission must propose that the

[120]Directive 2008/115/EC (or Return Directive), OJ L 348/98, Art 3.

[121]APR, Art 20(4).

[122]Screening regulation, recital 7.

[123]Crisis Regulation, Art 2.

[124]Crisis Regulation, Art 2(2)(a)(i).

[125]See Regulation (EU) 2024/1351 (or Asylum and Migration Management Regulation), Art 9.

[126]Regulation (EU) 2024/1359 addressing situations of crisis and *force majeure* in the field of migration and asylum and amending Regulation (EU) 2021/1147.

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Council itself adopt an implementing decision. The Council implementing decision must state the grounds on which it is based and the timeframe for its application, and must identify the specific provisions from which the Member State is allowed to derogate. We must highlight the lack of any details concerning the methodology of the assessment, which leaves the Commission the widest discretion in the use of the data.[127] While the provisions of a margin of manoeuvre in this regard is understandable, the absence of constraints stands out. Such implementing decisions can significantly impact the right to asylum, which is a principle binding the Union as well as the Member States and which constrains their sovereign right to decide on entry of TCNs. The mentioned provisions raise issues of clarity. Excessively vague concepts and procedures are unsuitable grounds for restricting individual rights. They can result in situations of arbitrariness, which would in turn be difficult to reconcile with fairness itself. That being said, both the Commission proposal and the Council implementing decision must respect the principles of necessity and proportionality. Once again, the assessment of the implementation will be key. While some of the questions around legal certainty can be potentially addressed by means of a fairness-orientated interpretation as proposed above, the broad discretion left to the Commission in its assessment might be harder to scrutinise.

5. Conditions and modalities of border procedures

A. Step 1. The screening

As mentioned, the system of border procedures established by the pact starts with the screening. To assess the consistency of the rules with the intentions and underlying principles of this 'practice', it is worth reminding ourselves of the objectives of the measures: facilitating the identification of TCNs (and vulnerable persons in particular) to refer them efficiently to the appropriate procedures, as well as contributing to achieving the objectives of border control in compliance with Union and international law. There are certain aspects of the framework that might jeopardise the proper identification and referral to the appropriate procedure. The two goals are inextricably linked, as the correct referral can only follow proper identification. Closer consideration of the undermining factors must be prefaced by an important observation. Pursuant to the Screening Regulation, the categories of TCNs subject to the screening must not be allowed to enter the Member State. The Member States must ensure that the TCN 'remains available' for the screening, which must take place at an adequate and appropriate location designated by them. In practice, this is very likely to result in a generalised used of detention of TCNs, including of most applicants for international protection. Consistently with the right to liberty as enshrined in the Charter and the European Convention of Human Rights (ECHR),[128] EU asylum law as it currently stands also allows for detention of asylum-seekers for the purposes of identification. However, it subjects deprivation of liberty to the principles of necessity and proportionality,[129] and presupposes an individual assessment.[130] Realistically, it is unlikely that this provision of the pact will be found in breach of Art 6 CFR.[131] The fact that the procedures must be completed within seven days probably militates in favour of its legality as well.[132] That being said, the mandatory and

[127]With specific regard to instrumentalisation, the Commission must indicate in an implementing decision why measures under Art 6(3) AMM Regulation are not sufficiently to address the situation. Crisis Regulation, Art 3.

[128]See also Art 5(1)(f) ECHR, which allows detention of a person to prevent his effecting an unauthorised entry into the country.

[129]See the current Reception Conditions Directive, recital 15 and Art 8. This reflection the test for restrictions of Charter rights established in Art 52(1) CFR.

[130]Reception Condition Directive, Art 8(2).

[131]See Case C-601/15 PPU *J.N.* EU:C:2016:84, where the Court found that the possibility to detain an asylum seeker on security grounds did *not* make the Reception Condition Directive in breach and 52(1) CFR.

[132]Screening Regulation, Art 8(3).

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generalised nature of the 'holding' raises questions of compatibility with proportionality and necessity, and therefore with fairness more broadly.

Against that background, there are three main elements that can undermine the proper identification and referral of TCNs. Firstly, the Regulation establishes a strong presumption against entry – even when a Member State has favourably assessed the situation of the TCN concerned. In fact, the screening must also apply to the persons falling under Article 6(5)(c) SBC who have made such an application. These are the TCNs who do not fulfil the conditions of entry but *may be* authorised to enter on humanitarian or public interest grounds.[133] Despite the person having already been granted leave to enter by the Member State on one of those grounds, the Screening Regulation mandates the state to apply the screening procedure to that person nonetheless. This clause is particularly unfortunate, as it overrides a decision already made by a Member State, which presumably had already taken into account the implications of that authorisation of entry – including on humanitarian grounds. To the contrary, the provisions on assistance provided by the EU Asylum Agency or the EBCG is under-prescriptive. Those agencies *can* assist the Member States with the screening,[134] but they are under no obligation to do so under any circumstances. The lack of a more forceful wording is probably explainable with the intention to avoid unwelcome inroads into Member States' autonomy, but it might be the TCNs who will pay the price for that (especially in situations where a Member State is under particular pressure). Such consequences could impact the quality of the conditions of 'holding' pending the screening, as well as the quality and the accuracy of the screening itself.

Secondly, beyond the health and vulnerability checks mentioned above, the screening consists of searches in databases for verification of identity and security.[135] Therefore, a decision will rely significantly on the interoperability of those databases, as the competent authorities will be able to access the Visa Information System,[136] the Entry-Exit System (EES),[137] and the European Travel Information and Authorisation System (ETIAS).[138] The Regulation, however, is not clear as to what the screening authorities should be specifically looking for. In that regard, it must be emphasised that a new character has recently entered the scene of immigration-related databases: the risk indicators. Pursuant to a recent amendment to the VIS Regulation, the Commission must adopt delegated acts to *further* define the risks of security, illegal immigration, or high epidemic which must inform the decision making of visa authorities. Such a risk-definition exercise is based on a series of criteria and information, which include: statistics generated by the Entry-Exit System (EES)[139] or the VIS indicating *abnormal* rates of overstaying, refusals of entry or of visa applications[140] for a specific group of visa holders; statistics generated by the VIS and the EES indicating correlations between information collected through the application form and overstaying by visa holders or refusals of entry.[141] The Commission must adopt an implementing act to specify the risks on which the specific risks indicators mentioned above are based.[142] A nearly identical legal framework applies to the ETIAS. The Commission must adopt delegated acts to further define the risks related to security or illegal immigration or a high epidemic risk. Differently from the VIS Regulation, however, the risk indicators, established by the ETIAS

[133]Screening Regulation, Art 6.

[134]Screening Regulation, Art 8(9).

[135]Screening Regulation, Art 14 and Arts 20–3. The Screening Regulation provides for other types of purpose limitations. For example, the data from the ECRIS-TCN can only be retrieved on convictions related to terrorist offences and other serious criminal offences.

[136]Regulation (EC) No 767/2008 (VIS Regulation), OJ L 218/60.

[137]Regulation (EU) 2018/1240 (or ETIAS Regulation), OJ L 236/1.

[138]Regulation (EU) 2017/2226 (EES Regulation), OJ 327/20.

[139]Regulation (EU) 2017/2226 on the Entry/Exit System, [2017] OJ 327/20.

[140]In this specific case, the refusal must be due to a security, illegal immigration or high epidemic risk.

[141]VIS Regulation, Art 9j(2).

[142]VIS Regulation, Art 9j(3).

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Central Unit, consist of a combination of data including a series of information such as age, sex, nationality, education or occupation.[143] The role that such risk indicators might play in the screening is unclear. Even though they were not *directly* relied on by the competent authorities, they might still impact the outcome of the process. They might have previously led to a refusal of a visa or a travel authorisation, and used to attach a label to the person concerned. The combination between the type of non-transparent sources such as delegated acts, the type of information underlying it and their impact on the person concerned is likely to impact the fairness of the screening procedure. Statistics and correlation so (un)defined are tools for profiling, which in turn will orient the decision-makers on the applications for visas and travel authorisations. Furthermore, the legal framework grants incredibly broad executive discretion to the Commission.

Thirdly, the TCNs must be provided with information about their rights and obligations under EU law. However, Member States must provide information *where appropriate* about the conditions for entry and stay under the SBC, the obligations under the Return Directive, the conditions for relocation or other existing solidarity mechanisms.[144] The difference between the two obligations to provide information is not insignificant. The 'where appropriate' is probably to be read as 'where applicable'. However, the meaning of the actual text leaves a considerably wider discretion to the national authorities, without a justifiable rationale behind it. In creating an unnecessary distinction in the type of information shared with the TCN, it might in certain cases affect the information provided by the person concerned and affect the accuracy of the referral. Lastly, when the screening is completed or the deadline expires, the TCN will be referred to the competent authorities.[145] Where the screening ends at the expiry of the deadline, the referral will likely be made on the basis of incomplete information, which might in turn undermine the person's right to access asylum procedure.

B. Step 2. Asylum border procedures

The new APR allows Member States to make much wider use of asylum border procedures. This expresses a core feature of the pact, consisting of mandatory (for the Member States) and systematic prevention of entry of TCNs. Let us remember that the APR identifies a series of requirements characterising the fairness of asylum procedures, predicated upon compliance with Union law more broadly. The questions of fairness arising in relation to these procedures resonate with those discussed in the previous sections and concern more specifically: legal certainty, the right to liberty, and the fairness of the procedures themselves. Firstly, the APR provides for a mandatory accelerated procedure in a large number of cases, but there are no provisions on how that procedure should be conducted and how it would be different from border procedures.[146] Secondly, a Member State can apply border procedures following the screening of certain categories of applicant.[147] In some cases, the Member State *must* apply the border procedures.[148] The consequences of applying such procedures are not insignificant. The border procedure shall

[143]ETIAS Regulation, Art 33(4).

[144]Screening Regulation, Art 11.

[145]Screening Regulation, Art 18.

[146]APR, Art 42. For example, where an applicant does not fulfil the conditions for entry set in the SBC and has not been otherwise allowed to access the state's territory.

[147]APR, Art 43(1).

[148]This is particularly the case if: the TCN comes from a country for which the rate of acceptance of applications is 20 per cent or lower, there are reasonable grounds to consider the person a danger to national security or public order of the member state. See APR, Art 42(1)(c), (f), (j). The last ground mentioned in the text is also one of the scenarios where the accelerated procedure can be applied to minors. See APR, Art 42(3)(b). APR, Art 44 establishes a series of groups, among those mentioned above, to whom the border procedure should be applied as a matter of priority. There are exceptions to the Member States' obligation to apply such procedures. See APR, Arts 47 and 48.

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be as short as possible, without prejudice to its fairness. We should not generally presume that the lengthier the examination, the fairer the procedure – and vice versa. In practice, however, the relation between time and fairness can be important, and constitutes a decisive aspect in the assessment of the Member States' compliance with that principle. The person subject to such procedures must not be authorised to enter the territory. This obligation, which follows the obligation of the same kind established in the context of the screening, will likely result in a seamless and extended period of deprivation of liberty. The border procedures can last for 12 weeks maximum, which can be prolonged to 16 weeks if the Member State to which the person is relocated is applying the border procedure.[149] The quasi-indiscriminate use of detention, its maximum length, and the overall duration thereof resulting from the combined operation of the different instruments of the asylum pact impact negatively the fairness of the legal framework.

To be sure, the Member States have specific obligations when it comes to reception standards of vulnerable people and especially families with minors.[150] If the Commission has reasons to believe a member state is not complying with such obligations, it must issue a recommendation to suspend the border procedures and the Member State must take 'utmost account' of that.[151] The Member State will still be subject to the obligation of standards of reception, and must report to the Commission on the measures taken to give effect to the recommendation. It is plain to see, however, that an obligation to take into account is no obligation to cease to apply the procedure, and will leave the Member States free to continue to implement it in situations where it would be not be suitable for the circumstances of the applicant.

C. Step 3. Return border procedures

The Return Border Procedure (RBP) Regulation applies to TCNs whose application for international protection has been rejected in accordance with asylum border procedures. In that context, the TCNs must reside at the proximity of the external borders for a period of up to 12 weeks, with calculation starting from the moment where the TCN will no longer be allowed to remain. The person must be given a period of voluntary departure unless they are at risk of absconding or pose a threat to public policy, public or national security.[152] Otherwise, the person can be placed in detention for the whole duration of the RBP. This can add to the period of detention the person might have already spent during screening and asylum border procedures. The grounds of detention change slightly, depending on whether or not the person was detained during the asylum border procedures: in the first case, they can be deprived of liberty for preventing entry or preparing return; in the other case, detention can be in order if the person is at risk of absconding, obstructs the return process or poses a risk to public policy, or public or national security.[153] While the latter scenario resonates with the grounds stated in the Return Directive,[154] the former case is particularly problematic as it allows for potentially a three-month detention period on the basis of administrative convenience. That ground is also difficult to square with the requirement that a period of voluntary departure must be given – except for the cases mentioned above. In principle, a TCN could find themselves in a situation where they have been granted a period of voluntary departure, but they are being detained, since Arts 4(5) and 5(2) RBP Regulation do not dovetail. What is more, the relevant provisions of the Return Directive apply to the RBP, including where a return decision cannot be enforced within the time limits set in the RBP Regulation. This means that the 18-month maximum period of detention established in the Return Directive could then apply, on top of the 12 weeks of deprivation of liberty already applied

[149]APR, Art 51.
[150]APR, Arts 53(2)(b) and 54(2).
[151]APR, Art 45(4).
[152]RBP Regulation, Art 4.
[153]RBP Regulation, Art 5.
[154]Return Directive, Art 15.

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in the context of the asylum border procedures. As for TCNs whose application has been rejected under the asylum border procedure and have no right to remain,[155] Member States can prolong the maximum duration of holding or detention by further six weeks.[156] In addition, Member States can derogate from certain important provisions of the RBP, if they are found to be in a situation of crisis. This legal framework must be read jointly with the Screening and AP Regulations. The assessment of these measures taken individually raises serious questions of compliance with the requirement of necessity, proportionality and legal certainty inherent in the right to liberty.[157] Their integrated analysis compounds those concerns further, and cast doubts on the fairness of the legal framework.

D. The wild card. The Crisis Regulation

The Crisis Regulation can alter the picture drawn in the previous sections, as it lays down rules for the adoption of measures – including of a temporary nature – in case of exceptional situations of crisis and force majeure. A preliminary observation is in order, with regard to the personal scope of the derogations applicable in a case of instrumentalisation. Such a situation would arise where a third country or a hostile non-state actor encourages or facilitates the movement of TCNs to the EU external borders, with the aim of destabilising the EU or a Member State, and where such actions are liable to put at risk essential functions of a Member State. Importantly, a Member State can *only* apply for derogations in relation to instrumentalised TCNs apprehended at the external borders in connection with an unauthorised crossing. The extent to which a Member State will be able – or willing – to distinguish between TCNs who are being instrumentalised, and those who are not, remains to be seen. Therefore, should the Commission find a case of instrumentalisation and the Council follow suit with an implementing decision, the derogations are likely to be generally applied to the TCNs concerned.[158]

Beyond the adoption of solidarity measures that can be requested by the Member State,[159] the most controversial part of the Crisis Regulation concerns the possibility to derogate from certain provisions of EU asylum law. There are four main types of such derogations. Firstly, in a situation of crisis or *force majeur*, the state can register the claim up to four weeks after the application was made.[160] The persons concerned must still be able to access and exercise their rights under EU asylum law effectively.[161] Secondly, in a situation of crisis or *force majeur*, Member States can extend the maximum duration of border procedures for the examination of the application by further six weeks.[162] Thirdly, in a situation of crisis that is not instrumentalisation-driven, a

[155]RBP Regulation, Art 6. This category includes applicants whose application has been rejected before the adoption of the Council Implementing Decision referred to in Art 4(3) of Regulation (EU) 2024/1359.

[156]Detention must be included in the calculation of the maximum period under the Return Directive. Where a procedure to obtain a derogation has already been initiated pursuant to Art 2 Crisis Regulation, the Member States can submit a request to apply the derogations provided for in Art 6 of the RBP Regulation in the context of that procedure. See RBP Regulation, Art 7.

[157]Case C-241/21 *I. L. v Politsei- ja Piirivalveamet*, EU:C:2022:753 paras 47–8.

[158]Generally, the derogations and solidarity measures apply for three months, and can be extended once by three months following confirmation by the Commission that the situation persists. Furthermore, a Member State can request that the Commission proposes an extension or amendment for a further period of three months, which can be extended by further three months following Commission confirmation as stated above. In total, the derogations and solidarity measures can apply for a maximum duration of 12 months. See Crisis Regulation, Art 5. Similarly, the Commission must submit a proposal to the Council to repeal the implementing decision if it considers that the situation of crisis or *force majeur* no longer exist. See Crisis Regulation, Art 6(3).

[159]See Crisis Regulation, Arts 7 and 8.

[160]When submitting the reasoned opinion, the Member State can state that it considers it necessary to apply this derogation before receiving authorisation to do so, but in any event it cannot for longer than 10 days – unless receiving explicit authorisation from the Council in this sense.

[161]Crisis Regulation, Art 10.

[162]However, the period must not be used in addition to the period under Art 51(2), third subparagraph APR.

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Member State can apply border procedures to TCNs from a country whose rate of acceptance of asylum application is 50 per cent or lower (compared to the 20 per cent normally established by the AP Regulation).[163] Fourthly, in a case of crisis caused by instrumentalisation of migrants, the Member State can apply border procedures to decide on the merit of *all* the TCNs concerned, as opposed to specific categories stated in Article 44(1)(b) APR.[164] In the wake of the point made above, this derogation will likely apply to all the TCNs arriving at the border when a finding of instrumentalisation is made, as a result of the difficulty to distinguish in practice between instrumentalised and non-instrumentalised migrants.[165] The Member States must not use this extended application of border procedures where there are medical reasons, or where the necessary support to people with special needs cannot be provided.[166]

The derogations from asylum law allowed in a situation of crisis or *force majeur* amplify the problematic aspects of the recently enacted reforms. Alongside the uncertainty related to how strictly the Commission will assess the Member States' fulfilment of the criteria required by the Regulation, the types of derogations have serious implications for fairness. Firstly, the much more extensive use of border procedures will likely lead to a wider use of detention. This will add to periods of deprivation of liberty 'ordinarily' allowed under the measures discussed above – which are themselves difficult to reconcile with the principles of proportionality and necessity. Secondly, the extended application of border procedures widens the possible restriction on the applicants' access to legal assistance and information, which might jeopardise the fair examination of their asylum claim. Even when the procedures will not apply indiscriminately, as is the case for derogations based on instrumentalisation, Member States will be allowed to resort to them vis-à-vis TCNs coming from a country where one person out of two is granted international protection.

However problematic, the system of border procedures probably accommodates the conflicting claims in a non-discriminatory and non-arbitrary manner. In the legal framework, the EU's and states' interest to prevent entry is often used to justify restrictions on individual rights without side-lining them entirely. This is not to say, however, that the law is consistent with its objectives and underlying principles, and therefore fair. Certain structural features emerging from the analysis point to the contrary. In several respects, the system of border procedures introduces mechanisms of general and indiscriminate application and thus drastically reduces the role for individualised examination of the specific circumstances of the case. That is particularly true for the use of detention, which might be enforced for years due to the interaction between the instruments discussed above. As the different steps of this new system work together, it is important to consider its overall fairness. The discussed issues of appropriate identification and referral occurring in the context of the screening, for example, could have an impact on the effective enjoyment of the right to asylum, considered in its different components, and ultimately

[163]This figure is based on the latest available yearly Union-wide average Eurostat data.

[164]This asylum border procedure can be extended to the applications are registered in the period during which the derogation is applicable.

[165]However, and based on the indication contained in the Council implementing decision, Member States must either: exclude from border procedures minors under 12 and their family members as well as person procedural or reception needs; or cease to apply those procedures when those persons – and vulnerable TCNs – are likely to have submitted a well-founded application. Interestingly, Art 11(7) Crisis Regulation stipulates that 'This paragraph shall be without prejudice to the mandatory nature of the border procedure as referred to in Art 46 of Regulation (EU) 2024/1348'. The latter provision, however, is nothing to do with that but it rather concerns the number of adequate capacity at Union's level.

[166]Crisis Regulation, Art 11. Other derogations are stipulated in Arts 12 and 13 Crisis Regulation, but their link with external border controls is fainter. In particular, a Member State can enjoy an extension of time limits set out for take charge requests, take back notifications and transfers in a situation of crisis (non-instrumentalisation) or *force majeure* set in the AP Regulation – by four, two, one months or one year, depending on the circumstances. Fourthly, the Member State can derogate from the obligation to take back an applicant in a situation of extraordinary mass arrivals – including in situations where the derogating state is identified as responsible pursuant to the AP Regulation. The arrival must be of such a scale and intensity that could create a serious risk of serious deficiencies in the treatment of applicants, thereby creating a serious risk that the CEAS is rendered non-functional. This derogation is not applicable to situations of instrumentalisation either.

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affect compliance with the principle of non-refoulement. The next section focuses on the last part of the assessment of fairness, and considers the mechanisms enabling a response to unfairness within the meaning of this paper.

6. Pathways to scrutiny

The new framework of border procedures lays down a series of pathways to scrutiny. They can be 'institutional', in the sense that they are engaged at the initiative of an EU institution or a Member State, or 'individual', when they are activated by a natural person or an organisation. To start with the former, a series of monitoring obligations are established in the context of the Crisis Regulation. While both the Commission and the Council monitor the persistence of a situation of crisis or *force majeur*, the Commission must specifically focus on compliance with fundamental rights and humanitarian standards. It can also ask the EU Asylum Agency to initiate monitoring.[167] The Commission must also report to the EP and the Council every three months on the application of the decision and the effectiveness of the measures, and the continuing respect for the principles of proportionality and necessity.[168]

The Screening Regulation features the most important provisions in relation to institutional scrutiny. Each Member State will have to establish an independent monitoring mechanism, focusing on activities of national authorities. The mechanism must oversee the compliance of the screening authorities with the right of access to asylum procedures, non-refoulement, the best interest of the child and the relevant rules on detention, as well as ensure that allegations of fundamental rights breaches are dealt with effectively. To that end, Member States must establish a system for investigating allegations of violations. The mechanism will consist of on-the-spot checks and random and unannounced checks, and its members must have access to the relevant locations and documents *insofar as necessary*.

In the absence of implementation (especially at national level), three main remarks are worth making at this stage on the fairness of the monitoring framework. The first consideration is to do with legal certainty. As stated in the Screening Regulation, the future monitoring mechanism will have to live together with other, existing monitoring mechanisms – such as those established within the EU Asylum Agency or the EBCG Regulations.[169] Coordination among them on the ground will be key to avoiding conflicts and inconsistencies in approaches. Such coordination should also aim to ensure that TCNs are clear as to what pathway of scrutiny is the most suitable for their specific situation or grievance.

Secondly, the APR states that Member States must provide for monitoring of fundamental rights during border procedures which meets the standards of the monitoring mechanisms under the Screening Regulation. However, a comparable obligation is not established vis-à-vis return border procedures. This is particularly disappointing, as the pact leaves an unjustified hole in the system of responses to legal unfairness. Thirdly, one of the obligations related to the establishment of the monitoring consists of ensuring its independence. In this regard, the FRA will issue general guidance on the establishment of the mechanism, and can assist for those purposes at the request of the Member States.[170] Since the independence of the monitoring will be a pre-condition for its fairness, the Member States' set-up thereof will have to be closely monitored (pun intended).

The provisions on non-institutional pathways to scrutiny are no less problematic. Under the Screening Regulation, persons providing assistance and counselling must be given access to the screening. Member States can limit – but not severely restrict – such access when objectively

[167]This takes place pursuant to Art 15(2) of Regulation (EU) 2021/2303.
[168]Crisis Regulation, Art 6. See also Art 17(6).
[169]Screening Regulation, Art 10.
[170]Screening Regulation, Art 10(2).

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necessary for the security, public order or *administrative management of the facility* where the screening is performed.[171] The same provision applies to access to applicants in detention[172] or at border transit zones,[173] as well as to cases where the Member States are derogating from certain provisions of EU asylum law on the basis of the Crisis Regulation.[174] While public security or public order seem legitimate – if broad – grounds on which access can be limited, the same may not hold true for the management of the facility. If anything, it explicitly allows limitations for a very broadly-worded reason based on matters of administrative convenience. To be sure, those restrictions do not apply to the access to applicants of the UN High Commissioner for Refugees, including at the borders and in transit zones.[175] The limitations on scrutiny in practice might still be significant, as the High Commissioner alone might not be able to ensure the same 'coverage' as that resulting from granting access to other bodies (and alongside the High Commissioner itself).

When it comes to pathways to scrutiny afforded to the person concerned, the pact features a series of provisions on 'traditional' remedies – that is, against decisions strictly related to international protection[176] or intra-EU transfer.[177] However, there is no possibility to appeal the outcome of the screening, the use of asylum border procedures, or the decision not to be granted entry. Strictly speaking, this aspect of the framework is not in *direct* conflict with the right to an effective remedy, to the extent that there is no established right to a specific type of asylum procedure – as long as it is fair – or to be granted entry.[178] To borrow from the ECtHR's approach to Article 6 ECHR, one might also argue that the assessment should focus on the overall fairness of the procedure: such fairness would be ensured if a wrong occurred at a certain stage was subsequently 'corrected'. Given the highly interdependent nature of the different steps of border procedures, questions can be raised about the suitability of such an interpretation by analogy. On a more specific note, the information indicated in the initial screening form must be recorded 'in a way that is amenable to administrative or judicial review' during asylum or return procedures. However, this obligation does not concern information such as the reason for irregular arrival or entry, any comments and other relevant information, information on routes travelled or suspected smuggling or trafficking in human beings.[179] There seems to be no justifiable grounds for leaving that information out of potential challenges, or requests for revision. Quite the contrary, it might provide important material to define the individual situation of the person undergoing the screening.

The system of response to unfairness arising from the implementation of border procedures is rather 'patchy'. At the very least, we can safely say that the introduction of such procedures established is not matched by a power of scrutiny attributed to the person concerned. Apart from certain aspects of the framework which will be fleshed out by the national implementation, the different measures itself leaves gaps in protection that seem not to be sufficiently justified and thus border on arbitrariness, or might appear disproportionate. Whether or not these elements would survive a test of legality before the Court of Justice is difficult to say. The integrated analysis of the Regulations, however, leaves the impression that the legal framework has limited the response to unfairness to the greatest possible extent of the legally defensible.

[171]Screening Regulation, Art 8(6). Emphasis added.
[172]RBP Regulation, Art 6(3).
[173]APR, Art 30(3).
[174]Crisis Regulation, Art 11(10) second subparagraph.
[175]APR, Art 6(1).
[176]APR, Section III and Chapter V.
[177]Asylum and Migration Management Regulation, Art 43.
[178]Unless there were cogent reasons to do (for example, in case of vulnerable persons). The different instruments provide for exceptions in this regard.
[179]Screening Regulation, Art 17.

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7. Conclusions

This paper has set out a framework to understand questions of fairness in EU law, and applied that to the system of border procedures established by the new asylum and migration pact. This case study has been particularly suitable for our purposes, since the Union has an explicit obligation of fairness to TCNs when establishing its policy on external border controls, asylum and migration. This research has addressed a gap in the existing literature and attempted to define a blueprint for discussing the content and use of fairness in light of the characteristics of the EU legal order. By building on accounts developed in philosophical and legal literature, we have shown that substantive and procedural fairness informs EU law across the board. While the subject of an assessment of legal fairness can vary – from a polity more broadly to a specific policy area – compliance with that principle presupposes at least the following elements in both the designing and implementation of a 'practice': non-arbitrary accommodation of claims; consistency with the intentions and the mutually accepted principles underlying it; the deployment of an effective response to unfair behaviour, defined as violations of those principles and intentions. We have also seen that the specific parameters of the assessment are context-specific and depend on the issue under consideration. The proposed approach has proven particularly relevant to the scope of this paper. In the Union, fairness requires investigating whether the details of a legal framework or its implementation can pervert the objectives it is meant to achieve, or clash with the Union's values under Article 2 TEU as well as the law that implements them. As regards the evaluation of fairness of border procedures, the Article has argued that a polity's sovereign right to decide who is entitled to enter its territory must be reconciled with universally applicable principles mutually agreed by the EU institutions and its Member States. These include particularly the principles constraining that sovereign right, which correspond to rights of third-country nationals protected by Union law such as the right to asylum, the right to liberty and non-refoulement.

Against that background, our roadmap to fairness has consisted of the following steps. Firstly, we have examined the consistency between the objectives of the system of border procedures and those set in the relevant Treaty provisions. This part has revealed overall correspondence between the goals set in secondary and primary law. In the absence of any implementation, we have then assessed the compliance of the detailed rules of the framework with its objectives as well as the mutually agreed principles underlying it. Coherently with our approach to fairness, the evaluation has honed in to three main aspects: the system of sources; the conditions for applying the procedures and the conditions imposed on the persons concerned, and the pathways to scrutiny. The paper has shown that the system of border procedures is particularly problematic in a number of respects. The different measures work together to identify the person concerned and refer them to the appropriate procedure. This will entail, in many cases, the examination of asylum claims at the borders and, in case of a rejected application, return border procedures. In a situation of crisis or *force majeur*, Member States will be allowed to derogate from some fundamental aspects of EU asylum law. While the Regulations do not seem to accommodate arbitrarily the different claims involved in their scope of application, on closer inspection those instruments place fairness under significant pressure. The chain of border procedures starts with the screening of the TCN. It goes without saying that an appropriate referral presupposes a correct identification of the person's identity and needs. Different aspects of the Screening Regulation risk undermining that objective, particularly the use of interoperable databases as well as reliance on statistics and indicators established through non-transparent sources. The following step – should border procedures continue – consists of the examination of the asylum claim in accordance with rules derogating from the *lex generalis* established by the APR. Member States are under no obligation to cease to apply such special procedures in case of a negative opinion from the Commission. While an ex-post response might deal with the inappropriate application of asylum border procedures, such a response would not undo the possible damage already done. In case of rejection of the claim, the implementation of return border procedures will lead to additional and potentially very long

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periods of detention. Pursuant to the Crisis Regulation, that framework can be subject to further exceptions and derogations. Not only such derogations might, in certain cases, increase the chances of an incorrect decision on the person's application. They will build on the view formed by the Commission on the basis of very vague criteria and unclear methodology. Such an integrated system of border procedures will unfold against two core principles: presumption against entry and generalised use of detention at the borders. In that context, the pathways to scrutiny are fraught with obstacles: extremely broad grounds for restricting access to holding facilities go hand in hand with patchy monitoring obligations. What are the implications of the foregoing for the EU's migration policies, or the EU as an actor and as a polity more broadly? On a systemic level, the Regulations heavily rely on non-transparent sources and profiling – especially visible through the use of databases – and broadly –worded grounds for the adoption of restricting measures. The system of border procedures shows that the Union is prepared to strain fairness as far as legally defensible – if not, in certain cases, beyond that. Whether this is a temporary price to pay to weather through an era of destabilisation, or a more permanent shift toward greater unfairness, only time – and the implementation – will tell. While this is only a first step in operationalising fairness in EU law, this paper hopes to open a more extensive debate on the meaning and scope of such a fundamental concept.

Competing interests. None.

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