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Complementary Pathways: Pledging Protection at the Edges of EU Law

Alezini Loxa*

Abstract

In September 2020, the EU Commission published the New Pact on Migration and Asylum in order to offer ‘fresh start’ for EU migration law and policy. Complementary pathways for admission to EU territory were among the proposals set out in the Pact. This article takes stock of the different measures suggested by the Commission to create such complementary pathways. It suggests that the aim of creating complementary pathways remains to a large extent declaratory, it is devised in discretionary operational measures with loose grounding in EU law and reproduces systemic deficiencies that have characterized EU asylum law in the past decades.

Keywords: Complementary Pathways, EU Law, EU Migration Policy

1. Introduction

In 2020, the EU Commission published the New Pact on Migration and Asylum (hereinafter ‘the Pact’) to offer a ‘fresh start’ to address the task of building a migration system that ‘manages and normalises migration for the long term and which is fully grounded in European values and international law’.¹ The aim of this article is to present and analyse the proposals of the Commission on complementary pathways -as they appeared in the Pact and were specified in a Commission Recommendation issued in 2020 (resettlement, other humanitarian admission schemes, family reunification and labour and education related pathways)- and their interaction with EU law.²

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¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM (2020) 609 final p. 2.

² Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways C/2020/6467 [2020] OJ L 317/13.

According to the United Nations High Commissioner for Refugees (UNHCR), complementary pathways for admission are ‘safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.’³ Complementary pathways refer to different practices that allow an individual to leave a country and lawfully travel and establish themselves to another country.⁴

The EU legal migration framework provides legal channels of entry to specific categories of regular migrants.⁵ In contrast to that, there are very few ways of entering EU territory as a person in need of protection. Legal scholarship has long identified the tension characterizing EU asylum law in its pledge to offer protection and the containment practices used to ensure that people in need of protection have no legal means to flee and reach EU territory.⁶ People wishing to cross EU borders need to hold a valid visa in case they come from countries where such visa is required.⁷ At the same time, due to carrier sanctions regimes, individuals who do not hold the necessary documents for entering EU territory, will not be allowed to travel to begin with.⁸ Essentially people in need of protection need to physically reach EU territory to be able to claim protection there.⁹ Their travel would be more often than not irregular. This should not come as a surprise. Article 31 of the Geneva Convention on Refugees provides that refugees

³ UN High Commissioner for Refugees (UNHCR) (2019), *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations*.

⁴ Global Compact on Refugees, General Assembly Official Records, Seventy-third Session Supplement No. 12 A/73/12 (Part II), New York, 2018 para 95 mentions among others family reunification, community sponsorship, humanitarian visas, humanitarian admissions, education and labour related opportunities.

⁵ These are researchers and students, intra-corporate transferees, highly skilled workers, seasonal workers and family members of regular migrants or EU citizens. More analysis on the relevant framework is provided in Sections 2.1.3 and 2.2.

⁶ Tsourdi, E. and Costello, C. (2021). *The Evolution of EU Law on Refugees and Asylum in: The Evolution of EU Law*. P. Craig and G. de Búrca (Eds), Oxford University Press; Moreno-Lax, V. (2017) *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford University Press; Noll, G. (2000). *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Brill Nijhoff.

⁷ Article 1 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1; Article 6 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification)[2016] OJ L 77/1; Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81/1.

⁸ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45.

⁹ Article 3 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

should not be penalized for illegally entering a state's territory, thereby acknowledging that seeking asylum can require breaching immigration rules.¹⁰

People in need of protection do embark on irregular and perilous journeys to reach protection. The question that is constantly returning in local, regional, and global agendas is how to put in place mechanisms that allow people in need of protection to safely and orderly reach territories where they can seek such protection.¹¹ In the Editorial to this Special Issue, and in her contribution, Stoyanova traces the appearance of 'complementary pathways' back to different authoritative soft-law documents. The New York Declaration, the Global Compact on Refugees, the UNHCR Three-Year Strategy and Roadmap 2030 all refer to complementary pathways as part of the strategies that can allow organized movement of refugees and offer sustainable solutions to refugee protection through international cooperation.¹²

Against this background, complementary pathways have been transplanted to the EU policy discourse and refer to the creation of legal channels for entry that can be used by people in need of protection. Currently, resettlement represents one way for lawful entry to EU territory,¹³ whereas different practices, such as community sponsorship and humanitarian visas have been exercised at member state level.¹⁴

This article will take stock of and categorise the different measures suggested by the Commission to create complementary pathways. While elements of such proposals have been on the table for the past decades under different names (for example humanitarian visas, humanitarian corridors, protected entry procedures),¹⁵ the Article will focus on the measures

¹⁰ Convention Relating to the Status of Refugees, 28 July 1951, UNTS vol. 189 p. 137.

¹¹ See early studies Noll, G., Fagerlund J and Liebaut F. (2002). *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, European Union; van Selm, J. and others (2004), *Study on the Feasibility of Setting up Resettlement Schemes in EU Member States or at EU Level, against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, Office for Official Publication of the European Communities.

¹² United Nations General Assembly, New York Declaration for Refugees and Migrants, Resolution adopted by the General Assembly on 19 September 2016 A/RES/71/1; Global Compact on Refugees 2018; UNHCR (2019). *The Three Year Strategy on Resettlement and Complementary Pathways*; UNHCR (2022). *Third Country Solutions for Refugees: Roadmap 2030*.

¹³ See more details in Section 2.1.1

¹⁴ An overview of different practices is provided in Feith Tan, N. 2021. Community Sponsorship in Europe: Taking Stock, Policy Transfer and What the Future Might Hold, *Frontiers in Human Dynamics* 3, pp. 1-7; Iben Jensen, U. (2014). *Study for the LIBE Committee, Humanitarian Visas: Option or Obligation?*, European Parliament, European Union.

¹⁵ See de Boer, T. and Zieck, M. 2020. The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU. *International Journal of Refugee Law* 32, pp. 54-85, Section 2.2 on past resettlement schemes; Moreno-Lax, V. (2022). The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law' in: *Research handbook on EU migration and asylum law*. E.

suggested following the 2020 Pact and specified in a Commission Recommendation issued in the same year.¹⁶ It will examine whether these proposals pursue the creation of specific legal channels at EU level for people in need of protection, and it will investigate their interaction with EU law. The analysis will allow us to reflect on whether these proposals represent the intended ‘fresh start’ for EU asylum law, whether they have the potential of consolidating refugee protection, or whether they continue towards the path of degeneration of EU asylum law, which, as Tsourdi and Costello pointed out, moves towards ‘a general flight from law’.¹⁷

2. The Many Faces of Complementary Pathways

In September 2020, the Commission, under the leadership of Ursula von der Leyen presented the Pact. The aim of that document was to set out the Commission’s legislative and political agenda on issues related to migration and asylum. The Pact built on the reform of the Common European Asylum System that was proposed in 2016 by the Juncker Commission, while suggesting different proposals for the future EU migration policy.¹⁸ To this day, very few instruments have been adopted, while agreement was recently reached on certain legislative proposals that were part of the reform package.¹⁹

In the Pact, the Commission referred to the aim of promoting ‘sustainable and safe legal pathways for those in need of protection and to attract talent to the EU’.²⁰ Already in this excerpt, it becomes clear that the policy goal of complementary pathways is intended to cover a broader range of population movement. The EU approach to complementary pathways refers not only to legal channels for people in need of protection, but also to legal channels for migration related to education and work. In this Section, I will engage with the different operational measures suggested by the Commission as means to create protection and non-

Tsourdi and P. De Buycker (Eds), Edward Elgar Publishing, Sections 3.1 on protected entry procedures; Iben Jensen (n 14).

¹⁶ Commission Recommendation (EU) 2020/1364.

¹⁷ Tsourdi and Costello (n 6) p. 794.

¹⁸ Communication from the Commission to the European Parliament and the Council, Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe COM(2016) 0197 final

¹⁹ European Commission Factsheet , A New Pact on Migration and Asylum, State of Play, 23 March 2023, FS/23/1850. Only the recast Blue Card Directive and the European Union Asylum Agency Regulation 2021/2303 have been adopted. According to the Factsheet, political agreement has been reached on the Qualification Regulation, the revised Reception Conditions Directive, and the Resettlement Framework Regulation.

²⁰ New Pact on Migration and Asylum, COM (2020) 609 final p. 3.

protection related pathways. It should be noted that it is not always easy to draw a clear line between the two.

Indicatively, in the 2020 Recommendation which emphasised the need to create pathways for people in need of protection, there are also references to access to education and labour related pathways,²¹ which primarily fall under the Commission's plan of Attracting Skills and Talent in the EU.²² In the analysis, I will go further than presenting the different pathways by discussing their interaction with EU law. More specifically, I will look at whether the different measures aim to create new channels (and if so if they could lead to an EU legal framework) and how they interact with existing EU law. Section 2.1 will present the measures suggested as means to create legal entry for people in need of protection and Section 2.2. will present the measures suggested as means to create legal entry for work and education.

2.1 Protection Related Pathways

The creation of protection related complementary pathways is set in light of international solidarity owed by the EU to both people in need of protection and non- EU countries hosting people in need of protection.²³ In order to develop such pathways, the Pact and the 2020 Recommendation refer to three types of measures: resettlement, humanitarian admission schemes, and family reunification. Examining each of these measures in the following sections will highlight that there is little 'fresh' about these policies and that they show limited potential for creating effective legal entry channels to the EU.

2.1.1 Resettlement

Resettlement is the first policy promoted at EU level to create complementary pathways. According to the UNHCR '[r]esettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status.'²⁴ It is important to note that in UNHCR documents, resettlement is considered different from complementary pathways. It does not refer to the creation of legal channels for people seeking protection, but rather '[i]t exchanges inadequate protection in the country of refuge for adequate protection in another state'.²⁵ Since resettlement is offered to people whose protection needs are already recognized, it is thought

²¹ Commission Recommendation (EU) 2020/1364 point 19.

²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Attracting skills and talent to the EU COM(2022)657 final

²³ Commission Recommendation (EU) 2020/1364 Recitals 1,2 and 4.

²⁴ UNHCR (2011). *Resettlement Handbook*, Revised edition.

²⁵ Boer and Zieck (n 15) p. 57.

of as a practice which is different from and additional to complementary pathways as part of the strategies suggested by the UNHCR to achieve durable solutions to the refugee problem.²⁶ This does not fit squarely with the Commission's approach, which blurs the line between resettlement and complementary pathways.

In the past decades, the Commission attempted to harmonize resettlement,²⁷ whereas after 2015 ad-hoc schemes on resettlement were coordinated at European level.²⁸ Following the Pact, the Commission suggested the continuation of such resettlement schemes and their formalization in connection with the proposed Regulation for a Union Resettlement Framework.²⁹ The proposed Regulation on Resettlement was published in 2016 with the aim of providing a harmonised EU approach and a unified procedure for resettlement at EU level. Persons selected for resettlement would be granted protection in an EU member state in accordance with the Common European Asylum System (CEAS). The proposal was part of the CEAS reform package, and political agreement between the Parliament and the Council was reached at the end of 2022.³⁰

The text of the 2016 proposal defined resettlement as 'the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the member states with a view to granting them international protection.'³¹ The relevant measures would cover not only people who already enjoy a refugee status in a third country, but also people in need of protection in general. In this sense, EU resettlement could function as a complementary pathway for people whose refugee status has not been recognized.

²⁶ See UNHCR (2019). *The Three Year Strategy on Resettlement and Complementary Pathways*.

²⁷ See Communication from the Commission to the European Parliament and the Council of 2 September 2009 on the establishment of a joint EU resettlement programme, COM(2009) 447 final. For an analysis of past schemes see Moreno-Lax (n 12) pp. 290-296.

²⁸ Resettlement of people from Middle East, Horn of Africa, and North Africa under Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme [2015] OJ L 148/32; Second resettlement scheme from Turkey, Lebanon, Jordan and Central Mediterranean under Commission Recommendation (EU) 2017/1803 of 3 October 2017 on enhancing legal pathways for persons in need of international protection [2017] OJ L 259/21 and resettlement carried on the basis of the EU-Turkey Statement.

²⁹ Commission Recommendation (EU) 2020/1364 recital 12. Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM(2016)0468 final - 2016/0225 (COD) (Proposed Regulation).

³⁰ See Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Admission Framework and amending Regulation (EU) N0 2021/1147 of the European Parliament and the Council - Amended mandate for negotiations with the European Parliament, 12681/22, Brussels 20 December 2022 for the most recent text of the Proposed Agreement (Amended Proposal)

³¹ Art 2 of Proposed Regulation.

After the agreement reached in December 2022, some conceptual clarity is restored, and the definition of resettlement became aligned with the UNHCR approach. In the text that is now part of the Amended Proposal,³² the Regulation was renamed into ‘Union Resettlement and Humanitarian Admission Framework’ and introduced three distinct definitions on resettlement, humanitarian admission, and emergency admission.

In the Amended Proposal resettlement refers to admission to an EU member state from a third country, following referral from the UNHCR, of third country nationals or stateless persons who are eligible under the Regulation ‘and who are granted international protection and have access to a durable solution in accordance with EU and national law’.³³ Humanitarian admission refers to the admission following request by a Member state, referral from the UNHCR, the European Union Agency for Asylum or another relevant international body of ‘third-country nationals or stateless persons, from a third country to which they have been forcibly displaced, to the territory of the Member states and who, at least, on the basis of an initial evaluation that they fulfil the eligibility criteria under Article 5(1a) [refugee status], they do not fall under the refusal grounds and are granted international protection status or humanitarian status under national law that provides rights and obligations equivalent to the subsidiary protection status’.³⁴ Humanitarian admission thus creates an entry channel for people in need of protection. Such an entry channel could lead to either international protection under EU law or to a humanitarian status under national law, which would provide protection at least equivalent to subsidiary protection. Finally, the Amended Proposal introduces emergency admission as ‘admission through resettlement or humanitarian admission of persons with urgent legal or physical protection needs or with immediate medical needs’.³⁵

The proposal sets out both eligibility criteria and refusal grounds for beneficiaries of resettlement.³⁶ Eligibility for resettlement exists when a beneficiary would qualify for refugee or subsidiary protection status under the Qualification Directive and simultaneously falls in one of the vulnerability categories provided in Article 5(1b) of the Amended Proposal.³⁷ These

³² For clarity I will use the term Proposed Regulation for the text issued by the Commission in 2016 and Amended Proposal for the text where political agreement was reached. The Commission has not issued an amended proposal. The new text appears in Council Document no 12681/22 of 20 December 2022 as Amended mandate for negotiations with the European Parliament.

³³ Article 2(1) Amended Proposal.

³⁴ Article 2(2) Amended Proposal.

³⁵ Article 2(3) Amended Proposal.

³⁶ Articles 5 and 6 Amended Proposal.

³⁷ These are women and girls at risk, minors, survivors of violence or torture, including gender-based violence; persons with legal/physical protection needs, including protection from refoulement; persons with medical needs, persons with disabilities, persons with lack of foreseeable alternative durable solution.

vulnerability categories overlap with the UNCHR resettlement submission categories.³⁸ Eligibility for humanitarian admission is based on an initial evaluation that a person would fall into the categories of refugee or subsidiary protection status, that they would fall within one of the vulnerability categories and that they would be family members of a person residing in an EU member state.³⁹ The formulation on the relevant Article does not provide clarity on whether humanitarian admission would require that a person is vulnerable and at the same time a family member of a person residing in the EU member states or whether one of these conditions could be alternatively met by a beneficiary.⁴⁰

Further to this unclarity, the extension of eligibility grounds to cover people with family members in an EU member state is welcome but confusing. As we will see in Section 2.1.3, people with family links to EU or third country nationals resident in the EU, already enjoy legal channels to entry. In this, the proposal does not clarify how humanitarian admission would interact with the existing system on family reunification, or whether it would perhaps broaden the categories of people falling under the former.

The Amended Proposal further set out a series of refusal grounds. First, there are grounds aligned to the exclusion grounds of the Qualification Directive and the Schengen Border Code, which appear with a different standard of proof. Specifically, the Qualification Directive provides for exclusion from protection status if there are ‘serious grounds’ for considering that a person has committed international crimes, serious crimes or acts contrary to the principles and purpose of the United Nations. In contrast to that, the proposed Regulation mentions ‘reasonable grounds’, thereby lowering the standard of proof for exclusion.⁴¹ The Amended Proposal also provides for refusal of people for whom there are reasonable grounds to believe that they are a danger to the community, public security, public policy or public health of the member state examining the resettlement file; persons who have been granted international protection or national humanitarian status in a member state; or persons who member states

³⁸ UNHCR (2011). *Resettlement Handbook*, p. 243.

³⁹ Article 5(1)(a) Amended Proposal.

⁴⁰ Article 5(1)(a) Amended Proposal states that ‘they also fall within at least one of the categories referred to in points (a) and (ab) of paragraph 1b’. Point (a) of Paragraph 1b refers to the vulnerability categories and point (ab) refers to family members of third country nationals or stateless persons legally residing in a Member State or of Union citizens.

⁴¹ Ineli-Ciger, M. 2022. Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework. *European Journal of Migration and Law* 24(1), pp. 27-55. See also UNHCR (2016), Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, UNHCR's Observations and Recommendations p. 7.

have already refused to admit in the past years for reasons related to public security or because there existed a Schengen Information System alert for them.⁴²

Moreover, member states enjoy discretion to expand refusal on more grounds under Article 6(2) of the Amended Proposal. These relate to persons who have not given or who have withdrawn their consent to be admitted; persons who have committed crimes which would be punishable ‘with a maximum [sic] sentence of at least one year of imprisonment had they been committed in the Member state examining the admission file, unless the prosecution or the punishment would have been statute barred or, in case of a conviction for such a crime, an entry relating to that conviction would have been removed from the national criminal record, according to the law of the Member State examining the admission file’; persons who refuse to participate in a pre-departure orientation programme, and people in relation to whom Member states cannot provide the adequate support needed on the basis of their vulnerability.⁴³

Further, the Amended Proposal introduced the procedures under which resettlement and humanitarian admission would take place. Under Article 7, the Council will adopt a two-year Resettlement and Humanitarian Admission Plan which will mention, among others, the numbers of persons to be admitted through the scheme. To ensure clarity and differentiation between resettlement and humanitarian admission, the Amended Proposal provides that the numbers of persons to be admitted via resettlement should represent at least 60% of the total amount that will include humanitarian admission and emergency admission.⁴⁴ The relevant plan will also include details about the participating member states and their contributions to the number of persons to be admitted (including the numbers for resettlement, humanitarian admission, and emergency admission each of them commit to).⁴⁵

Regarding resettlement, member states shall follow referral by the UNHCR under Article 10 of the Amended Proposal. Regarding humanitarian admission, member states may request the UNHCR, the European Union Agency for Asylum or any other international body for referral, but they may give preference to people with family links in the member state, with demonstrated social links or characteristics that can facilitate their integration, or with vulnerabilities.⁴⁶

⁴² Article 6(1) Amended Proposal.

⁴³ Article 6(2) Amended Proposal.

⁴⁴ Article 7(2)(a) Amended Proposal.

⁴⁵ Article 7(2) (b) Amended Proposal.

⁴⁶ Article 10(1a) Amended Proposal. Note that the text that appears on the relevant Document under Article 10 has two paragraphs numbered 1a.

Overall, the proposed Regulation sets out the procedure that would be applicable to future resettlement schemes and creates a new pathway for humanitarian admission. Both resettlement and humanitarian admission will continue to operate as schemes of discretionary nature. The Amended Proposal emphasizes both in the recitals and in the text of the Regulation that it does not establish a right for third country nationals or stateless persons to request admission or to be admitted, neither does it create an obligation for member states to admit people.⁴⁷ This Regulation rather sets out the procedure to be applied to state actions of discretionary nature. Moreover, in case of humanitarian admission, member states have discretion to attribute rights via a national law humanitarian status. While the Amended Proposal demands that such status should provide equivalent rights and obligations to those of subsidiary protection under EU law, the issue which is raised is whether in enjoying such status, they would be able to claim protection under the EU Charter of Fundamental Rights (the Charter).⁴⁸

In the initial Proposal, the Commission had suggested that the selection of countries and regions from which resettlement would occur should consider the cooperation of these third countries with the EU in the area of migration.⁴⁹ Specifically, the proposal introduced conditionality between carrying resettlement and ensuring that the third states takes all measures necessary to avoid the creation of flows to Europe by reducing the number of people embarking on irregular crossings; ensuring that the country can qualify as a first country of asylum or safe third country; increasing the capacity for the protection and reception of refugees; increasing the rates of readmission of people from the EU. The relevant provision, which was criticized for instrumentalising resettlement as a tool for migration control,⁵⁰ is no longer part of the Amended Proposal. As Bratanova van Harten suggested, this revision of the text makes the link

⁴⁷ Recital 19 Proposed Regulation; Recital 19, Article 1(2) and (2a) Amended Proposal.

⁴⁸ This relates to whether this national status would be considered to come within the scope of EU law. The definition of what national measures come within the scope of EU law under Article 51(1) of the Charter, even in areas which are harmonized is not always easy. See for example Judgment of 19 November 2019, TSN, C-609/17 and C-610/17, ECLI:EU:C:2019:981; Judgment of 7 July 2022, *Coca-Cola European Partners Deutschland*, C-257/21 and C-258/21, ECLI:EU:C:2022:529, where the Court had to evaluate national measures adopted under Article 15 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9. This provision allows member states to introduce laws more favourable to the protection of workers than those provided in the Directive. In these cases, the Court held that the relevant national provisions are not considered to be within the scope of EU law.

⁴⁹ Article 4(d) Proposed Regulation.

⁵⁰ ECRE (2016), Untying the EU Resettlement Framework: ECRE'S Recommendations on Breaking the Link with Migration Control and Preserving the Humanitarian Focus of Resettlement. See also UNHCR (2016), Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, UNHCR's Observations and Recommendations.

between legal pathways and the reduction of irregular migration ‘less conspicuous and reproachable from a human rights law perspective’.⁵¹

Furthermore, the reframing of the proposed Regulation to cover both resettlement and humanitarian admission is welcome. Under the proposal, resettlement is put forward as replacing territorial asylum procedures to the extent that it allows the transfer of people as recognized refugees to the EU,⁵² and humanitarian admission appears as complementary pathway, to the extent that it allows the creation of legal channels for people in need of protection. Despite the small scale and discretionary nature of this framework, it is the sole proposal that could lead to the creation of complementary pathways. But how would such a creation interact with EU asylum law?

Boer and Zieck have engaged in an analysis regarding the lack of procedural rights and legal remedies that characterize resettlement.⁵³ Unlike CEAS, which contains procedural and substantive rights for applicants of international protection, Boer and Zieck have suggested that ‘resettlement – due to its essentially discretionary nature – appears to take place in a legal void, that is, it appears to suffer from arbitrariness in the selection of refugees and a lack of procedural rights and legal remedies for the refugees involved in the resettlement process.’⁵⁴ The authors made this suggestion regarding resettlement as currently practiced at EU level before engaging with whether the proposed Regulation could rectify this situation. While the authors engaged with the initial text proposed in 2016, their suggestions remain valid. As they emphasized, even if adopted, the discretionary nature of resettlement and humanitarian admission will be left ‘wholly intact’.⁵⁵ Furthermore, the proposed framework does not create any procedural rights for the people selected for resettlement or humanitarian admission. Moreno-Lax has also suggested that the entire procedure as designed falls foul of Articles 41 and 47 of the Charter.⁵⁶

Despite this flaw by design, the potential adoption of the Regulation and the procedural coordination of national resettlement schemes and humanitarian admission would bring this practice well within the scope of EU law, and relatedly, it would trigger the application of the Charter. So even if the proposed Regulation explicitly excludes the creation of a right to

⁵¹ Bratanova van Harten E., The new EU Resettlement Framework: the Ugly Duckling of the EU asylum acquis?, EU Law Analysis Blog, 3 February 3 2023.

⁵² Ziebritzki, C. (2020). The Objective of Resettlement in an EU Constitutional Perspective in: *Humanitarian admission to Europe : the law between promises and constraints*. M.C Foblets and L. Leboeuf (Eds), Nomos.

⁵³ Boer and Zieck (n 15).

⁵⁴ *ibid* p. 54.

⁵⁵ *ibid* p. 68.

⁵⁶ Moreno-Lax (n 15) p. 295.

resettlement or admission, respect for the right to family life, non-discrimination, and procedural rights such as the right to effective remedies and the right to good administration could be of relevance in framing the future of refugee protection.⁵⁷ As Bratanova van Harten commented, '[o]nce the EU Resettlement Framework Regulation becomes part of the EU asylum acquis, eventually, it may have the potential to prove that there is beauty even in imperfection'.⁵⁸

2.1.2 Other Humanitarian Admission Schemes

Further to resettlement, the Commission suggested the need to use other 'humanitarian admission models'.⁵⁹ But what would these models be? Certainly, one such admission model could be created by the revised Resettlement and Humanitarian Admission Framework Regulation. Other than that, the Commission pledged its support to member states in case they wanted to establish community or private sponsorship schemes and mentioned the aim of developing a 'European model of Community sponsorship'.⁶⁰

According to the 2020 Recommendation, community sponsorship refers to the practice of private sponsors, individuals and non-profit organizations playing a structured role in 'welcoming and integrating' people in need of international protection.⁶¹ The term community sponsorship has no uniform definition. According to Feith Tan the concept can be understood both as form of resettlement and as a complementary pathway, as it can cover both the admission and the integration of asylum seekers and refugees.⁶²

When community sponsorship operates as resettlement, the focus is solely on integration support for refugees who have already been admitted to a state. Civil society actors are involved to provide support after arrival to refugees who have entered a state through existing resettlement channels.⁶³

In contrast to this, community sponsorship can also exist as an autonomous complementary pathway.⁶⁴ Community sponsorship can be a complementary pathway when it involves the

⁵⁷ Boer and Zieck (n 15) pp. 79–83.

⁵⁸ Bratanova van Harten (n 51).

⁵⁹ Commission Recommendation (EU) 2020/1364 Recital 23 and point 11.

⁶⁰ Commission Recommendation (EU) 2020/1364 Points 13-16 and 18 and New Pact on Migration and Asylum, COM (2020) 609 final p. 23.

⁶¹ Commission Recommendation (EU) 2020/1364 Recital 27.

⁶² Feith Tan (n 14) p. 2.

⁶³ Feith Tan (n 14) p. 3 with reference to the German Neustart in Team programme, and similar community sponsorship programmes in Ireland, the United Kingdom and Spain.

⁶⁴ *ibid* p. 5 with reference to humanitarian corridors in Belgium, France, Italy, and Germany's Federal Länder Sponsorship Scheme on family reunification of Syrians.

creation of a legal entry procedure for people in need of protection distinct from other channels of admission.⁶⁵ As such, it can involve the controlled arrival of refugees to EU territory. Feith Tan mentions that such schemes operate within existing legal frameworks of national law. In the case of new pathways, sponsors select beneficiaries who get a visa to enter the member state. Following, the beneficiaries are supported through the national asylum system to secure a legal status.⁶⁶ When it comes to resettlement related schemes, sponsors become involved in the integration of the beneficiaries after arrival.⁶⁷

Aside from -again- purely discretionary programmes operating in member states under schemes set up in national law, no further details have been released in relation to other types of admission that could be explored at EU level. The development of an EU approach to community sponsorship is mentioned *in passim* and does not show potential of leading to any hard law measure that could create legal pathways regulated under EU law.

What is more, it would be safe to assume that the option of humanitarian visas that had long been discussed, as a means for safe entry to EU territory is now off the table from the perspective of EU law as it stands.⁶⁸ Member states can issue humanitarian visas to persons in need of protection to create legal entry channels under national law. However, the Court of Justice of the EU has erased such a potential pathway from the current EU framework. In case *X and X v Belgium*, the Court found that Article 25 of the Visa Code, which provides that member states can issue a visa for humanitarian grounds does not apply to admission with the purpose of seeking asylum.⁶⁹ Specifically, the Court held that the Visa Code covers situations where applicants intend to stay in an EU member state for a short period of time (90 days in any 180 day period). As a result, applications for a visa in order to reach EU territory and lodge an application for asylum fall outside the scope of EU law and can only be examined under national law.⁷⁰ The definite answer of the Court together with the similar approach of the European Court of Human Rights means humanitarian visas can only be granted under national

⁶⁵ Feith Tan (n 14) p. 2.

⁶⁶ *ibid* 5.

⁶⁷ *ibid* 6.

⁶⁸ Iben Jensen (n 14).

⁶⁹ Judgment of 7 March 2017, *X and X*, C-638/16 PPU, ECLI:EU:C:2017:173.

⁷⁰ For a longer analysis see Law, S. (2020) Humanitarian Admission and the Charter of Fundamental Rights in: *Humanitarian admission to Europe : the law between promises and constraints*. M.C. Foblets and L. Leboeuf (Eds), Nomos.

law at the discretion of member states.⁷¹ The creation of humanitarian visas as a pathway under EU law would require the revision of the relevant EU acquis.

2.1.3 Family Reunification

The 2020 Recommendation invokes family reunification as the third means to create complementary pathways.⁷² The facilitation of family reunification refers to humanitarian admission, such as family-based sponsorship.⁷³ The basic question that is raised in relation to family reunification is to what extent this type of pathway refers to something different, or more extensive, than the options already enjoyed by family members of people with lawful residence in the EU.

Under the current EU framework, family reunification is available under the Family Reunification Directive (FRD) and the Citizen's Rights Directive (CRD).⁷⁴ A person in need of protection who has family members in the EU already enjoys legal channels of access to EU territory by virtue of these instruments. The legal channels available and the scope of people who can make use of them is dependent on the legal status of the sponsor-family member resident in EU territory.

An overview of these Directives points to existing channels of entry under the following scenarios. First, if the sponsor is a national of an EU member state who has exercised their free movement rights, then the persons who are entitled to join them under the CRD are the following: the spouse; the partner with whom the EU national has contracted a registered partnership, if the legislation of the host member state treats registered partnerships as equivalent to marriage; the direct descendants who are under 21 years of age or who are dependent on the EU national or on the spouse or partner; and the dependent direct relatives in the ascending line of the spouse or the partner.⁷⁵ The CRD further provides that member states shall facilitate entry and residence for family members who do not fall under the above

⁷¹ See also Spijkerboer T. 2018, Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice. *Journal of Refugee Studies* 31(2) pp. 216-239. *M.N. and Others v Belgium* [GC] Application no 3599/18.

⁷² Commission Recommendation (EU) 2020/1364 Recital 31 and point 12.

⁷³ Commission Recommendation (EU) 2020/1364 point 12.

⁷⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

⁷⁵ Article 2(2) Directive 2004/38.

categories, but who are nevertheless dependent or members of the household of the EU national, and to the partner with whom the EU national has a durable relationship.⁷⁶

If the sponsor is a third country national with a residence permit for a period of one year or more in an EU member state, or if they are a refugee, then the FRD regulates the rights of their family members. Family members who are entitled to join the sponsor are the spouse and the minor children of the sponsor or their spouse (the age of majority is defined by national law and the children must not be married).⁷⁷ Member states may also allow the reunification of dependent relatives in the ascending line of the sponsor or the spouse; adult unmarried children of the sponsor or their spouse who are dependent on them due to their health status; partners either in a long-term relationship or bound by a registered partnership and their minor children or adult children who are dependent on them due to their health.⁷⁸

Chapter V of the FRD relaxes the requirements for family reunification of refugees. In that case, member states have discretion to authorize family reunification for more family members than the ones mentioned under Article 4 FRD, if the family members are dependent on the refugee. Moreover member states do not have discretion to set integration conditions for accepting reunification with minor children above the age of 12.⁷⁹ In cases of unaccompanied minors, the FRD further provides that member states shall authorize family reunification for their first degree relatives in the ascending line without regard to conditions of dependency, and that they may authorize family reunification for the minor's legal guardian or for any member of their family in case where the refugee has no relatives in the direct ascending line or where such relatives cannot be traced.⁸⁰

As we see, the existing legal framework covers extensive categories of family members of people who reside in the EU. The people who are not covered by the framework are EU nationals who have not exercised their free movement rights and people who enjoy temporary or subsidiary protection status, or who have not yet been recognised as refugees.⁸¹ Family reunification for family members of such individuals can be regulated by national law. When the Commission mentions the creation of complementary pathways for family reunification, it does not disregard the existing framework in place. Rather it refers to the need for simplified

⁷⁶ Article 3(2) Directive 2004/38.

⁷⁷ Article 4(1) Directive 2003/86.

⁷⁸ Article 4(2) and (3) Directive 2003/86.

⁷⁹ Article 10(1) and (2) Directive 2003/86.

⁸⁰ Article 10(3) Directive 2003/86.

⁸¹ Article 3(2) Directive 2003/86.

procedures under the FRD, and the extension of family reunification under national schemes for those who do not fall under the scope of the FRD.⁸² In this case, the Commission does not seem to envision the creation of pathways for family members at EU level, but rather suggests -as in the case of community sponsorships- that such pathways could be promoted at national level.

What is more, clarity is needed on how the existing framework would interact with the proposed resettlement framework. The proposed Regulation on resettlement includes in its scope of humanitarian admission family members of third country nationals or stateless persons or Union citizens legally residing in the member states.⁸³ Further it refers to the possibility of admission for family members of third country nationals or stateless persons to be admitted.⁸⁴ The family members that could be beneficiaries of admission are the following: the spouse or partner in a stable relationship where the law or practice of member states treats unmarried couples in a way comparable to married under its law relating to third country nationals or stateless persons; the minor children provided that they are unmarried; the father, mother or adult responsible for the unmarried minor; the siblings; third country nationals or stateless persons who are dependent on their a child or parent for assistance as a result of pregnancy, a new born child, serious illness, severe disability or old age if the family ties existed in the country of origin and the family member can take care of the dependent person and expresses their desire in writing.

There is lack of clarity on whether these beneficiaries should enjoy legal pathways as members of the family of the person who is to be resettled, and/or by virtue of a link with a person who already is residing in EU territory. In the first case a pathway would be created for family members of people falling under humanitarian admission. In the latter case, if people become beneficiaries of humanitarian admission because they are family members of a person who already has legal residence in the EU, such a pathway already exists as was discussed above. On this matter UNHCR had emphasized that resettlement of family members should cover people who would otherwise have no legal right to join their family under national or regional legislation.⁸⁵ The Amended Proposal mentions in a Recital that the admission of family members of people who already reside in the EU should be without prejudice to the FRD and the CRD, and that the focus should be on family members who fall outside the scope of those

⁸² Commission Recommendation (EU) 2020/1364 point 12.

⁸³ Article 5(1b) (ab) Amended Proposal.

⁸⁴ Article 5(1)(c) Amended Proposal.

⁸⁵ UNHCR's Observations and Recommendations (n 48) p. 6.

Directives or of relevant national law.⁸⁶ However Article 10 of the Amended Proposal provides that member states may give preference to admission of people who have family links with third country nationals or stateless persons or Union citizens legally residing in a member state.⁸⁷ Attention should be paid so that member states do not use humanitarian admission to provide legal entry to family members who would otherwise already enjoy legal entry under the existing EU acquis or national law. In that way member states could circumvent the purpose of humanitarian admission, which is to create pathways for people who would not otherwise have the possibility to enter lawfully.

2.2 Pathways for Work and Education

Next to the protection-related pathways discussed in the previous section, the Pact also referred to the creation of legal pathways for study or work. Such pathways already exist under EU Law. EU migration law regulates the admission of migrants under a sectoral regime which provides entry and residence to specific categories of third country nationals: researchers and students,⁸⁸ intra-corporate transferees⁸⁹, highly skilled workers,⁹⁰ and seasonal workers.⁹¹ These sectoral instruments also provide for specific rights attached to each category of migrants. In parallel, the Single Permit Directive and the Family Reunification Directive regulate horizontally the rights of all migrants legally resident in the EU regardless of whether they enjoy residence rights under national or EU law.⁹²

⁸⁶ Recital 12 Amended Proposal.

⁸⁷ Article 10 (1a) (a) Amended Proposal.

⁸⁸ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L 132/21.

⁸⁹ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1.

⁹⁰ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/ 17 and Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1.

⁹¹ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375.

⁹² Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1.

Against this background, it is admittedly confusing to discuss the creation of pathways to attract talent and skill instead of discussing how the current framework is achieving or not these objectives. It is equally confusing to discuss the possibility of exploring labour and education related opportunities for people in need of protection, without engaging on whether or how they could use the existing admission channels.

Despite this confusion, the Commission emphasized the need to cooperate with third countries in view of matching migration with existing labour market needs. According to the Commission the creation of such pathways is linked to the reduction of irregular migration, undeclared work, and labour exploitation.⁹³ In this context, the Commission put forward two ideas: Talent Partnerships and an EU Talent Pool. Both ideas were further discussed and fleshed out in a recent Commission Communication on Attracting skills and talent to the EU.⁹⁴

Talent Partnerships refer to bilateral or multilateral soft-law agreements with third countries which can cover various types of mobility (temporary, long-term, circular). These soft law agreements would include the participation of many in a single Talent Partnership per third country, in a way that would match labour needs and skills on both sides.⁹⁵ As to the Talent Pool, the Commission suggested the creation of this platform as a tool for international recruitment with the aim of launching it by mid-2023.⁹⁶ The EU Talent Pool would operate as a web-based platform and matching tool. In that platform candidates from non-EU countries would upload their profiles and qualifications and would then be found by prospective employers.⁹⁷

It needs to be emphasized that such measures would not create pathways. Migrants would enjoy a legal channel to entry either under the existing EU framework on regular migration, or under national labour migration laws. While such operational measures can facilitate contact between migrant workers and perspective employers, they do not create new legal channels for entry, nor do they expand in anyway the channels available. Next to these specific tools, the Commission also suggested the creation of legal pathways for categories of migrant workers who are not covered by the current EU framework. The need to attract low and medium skilled workers was recognized, and the Commission suggested that it would explore the possibility of

⁹³ New Pact on Migration and Asylum, COM (2020) 609 final Section 6.6.

⁹⁴ Attracting skills and talent to the EU COM(2022)657 final.

⁹⁵ *ibid* pp. 11-12.

⁹⁶ *ibid* p.17.

⁹⁷ *ibid* p. 15. See also EU Talent Pool Pilot for people fleeing the war in Ukraine.

taking action as regards care-workers.⁹⁸ For now, it is unclear whether this would mean the adoption of another sectoral Directive on admission of care workers.

Overall, the reference to complementary pathways for work and education are not intended to cover -at least not primarily- people in need of protection. To the extent that they can fall under these instruments, people in need of protection could try to safely enter the EU by using the legal alternatives provided under migration law. However, this is rarely the case.

Vankova has recently investigated the possibility of using work related avenues as a legal pathway to entering the EU for people in need of protection.⁹⁹ Specifically, she examined whether the EU migration framework could provide an adequate basis for entry and stay in the EU for people in need of protection.¹⁰⁰ In doing so, she concluded that the current legal framework could create legal entry channels for ‘a very small proportion of persons in need of international protection, namely highly-skilled refugees, in a limited number of Member states’.¹⁰¹ This is due to legal and practical barriers created by the EU legal migration *acquis* for people in need of protection.¹⁰²

Furthermore, by a comparison of different EU law provisions in place, Vankova highlighted that using labour channels as means of accessing protection could undermine the rights of refugees.¹⁰³ Indicatively, family reunification for refugees takes place under more lenient requirements as was discussed in Section 2.1.3. If refugees were to enter the EU by use of the labour channels available, then they would forego the special protection they are entitled to under the FRD. Despite this, an added value of such pathways, according to Vankova, could exist for people enjoying subsidiary protection status, or who are asylum seekers.¹⁰⁴ In any case, as Vankova suggested, such an approach (using available legal channels for entry in order to access protection in the EU) would require the consideration of protection safeguards that can ensure that ‘the rights of its beneficiaries are respected and that these pathways “yield a net benefit to refugees in their search for a solution to their plight.”’¹⁰⁵

⁹⁸ Attracting skills and talent to the EU COM(2022)657 final, Section 4.

⁹⁹ Vankova, Z. 2022. Work-Based Pathways to Refugee Protection under EU Law: Pie in the Sky? *European Journal of Migration and Law* 24(1), pp. 86-111.

¹⁰⁰ *ibid* 90.

¹⁰¹ *ibid* 111.

¹⁰² Vankova (n 99) this relates for example to requirements of having secured a work contract, state restrictions like labor market tests and the requirement of a valid travel document.

¹⁰³ *ibid* 110.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* 93 reference omitted.

3. Declaratory Proposals, Discretionary Operations and Limited Potential for Offering Protection

The analysis above engaged with the different EU policy proposals falling under the umbrella of complementary pathways from 2020 to this day. All the relevant proposals are discretionary, based on operational cooperation between the member states and third countries, and there seems to be a lack of will for the proposal or adoption of hard law instruments at European level. Even under a changed EU policy discourse, which emphasizes the need for complementary pathways, the analysis above reflected the ‘fundamental mismatch’ Moreno-Lax has identified between the hard law nature of Article 18 of the Charter on the right to asylum, and the soft law nature of mechanisms supposed to ensure its effective implementation.¹⁰⁶

The Amended Proposal on Resettlement and Humanitarian Admission is the only policy that has some potential to operate as a complementary pathway and to secure channels for people in need of protection. However, its discretionary nature and the lack of legal safeguards, limit the hope for a viable alternative that could guarantee the rights of asylum seekers. At this stage it should be mentioned that the value of the proposed Regulation lies not so much in the opening of channels to entry (which would remain discretionary). Rather, its value lies on the fact that it could bring national resettlement and humanitarian admission practices within the scope of application of EU law, and thereby open the road for judicial review in light of the Charter.

The references of the Commission to other humanitarian admission schemes merely suggests that member states could engage in the creation of legal pathways. However, this is already the case under national law. In this regard, and with the option of an EU humanitarian visa impossible under the current legal framework, it is unclear what EU law could add to that or what the Commission proposes.

Further, when it comes to family reunification as a complementary pathway there is a lot of unclarity on whether the Commission suggests the creation of a new legal channel, which would extend the scope of the current framework on family reunification under EU law. The mentions

¹⁰⁶ Moreno-Lax (n 15) p. 98.

to family reunification as a complementary pathway, when it is an already existing pathway, and the complicated way in which family reunification appears under the proposed Resettlement and Humanitarian Admission Regulation and does not allow the drawing of definite conclusions.

Finally, when it comes to the use of pathways related to work or study to reach EU territory, it is clear that such channels of legal entry are not intended to cover -at least not primarily- people in need of protection. To the extent that they can fall under these instruments, people in need of protection could try to safely enter the EU by using the legal alternatives provided under migration law. But this was already a legal alternative for the very few refugees that can meet the requirements set by the legal migration *acquis*.

Overall, all EU attempts to engage in some sort of responsibility sharing for people in need of international protection have led to ample production of instruments of soft law nature which escape accountability and judicial oversight,¹⁰⁷ and do not go further than coordinating member states cooperation. What is more the use of the term ‘complementary pathways’ to refer both to legal entry of people in need of protection and to legal entry of any migrant blurs the boundaries of migration and asylum law and shifts the focus away from the professed need to devise mechanisms that can actually facilitate access to international protection for those in need.

4. Conclusion: Managing Asylum at the Edges of EU law

While the new Pact aimed at offering a ‘fresh start’ for the management of migration at EU level, nothing fresh seems to be characterising the EU approach to complementary pathways.¹⁰⁸ This pessimistic picture is related to EU asylum law more generally. Looking at the evolution of EU asylum law in the past decade, Tsourdi and Costello suggested that it ‘reveals stasis, and lack of fundamental policy shifts in spite of policy failures’.¹⁰⁹ They further suggested that it is

¹⁰⁷ Tsourdi and Costello (n 6) p. 821; Moreno-Lax (n 15) p. 302.

¹⁰⁸ See also Rasche, L., Welfens, N. and Engler M., The EU Migration Pact at Two: What Remains of the Fresh Start?, Hertie School Jacques Delors Centre Policy Brief, 14 September 2022.

¹⁰⁹ Tsourdi and Costello (n 6) p. 815.

characterized by a general flight from law and return towards administrative cooperation between the member states.¹¹⁰

Similar considerations apply to the policy of complementary pathways. Far from a ‘fresh start’ complementary pathways function as ‘a simple adjustment of EU law which involves no additional integration’.¹¹¹ This flight from law and the establishment of common approaches and goals without regard to legal guarantees comes with the risk of diluting the very EU framework on asylum. As Moreno Lax has pointed out

it is difficult to reconcile the duty to adopt binding legal measures (“in accordance with the ordinary legislative procedure” [Articles 77(2) and 78(2) TFEU]) for the management of refugee inflows (in partnership with third countries and governed by the principle of solidarity), so as to fulfil the overarching obligation to regulate the entry of (all and any) “persons crossing external borders” (for the purposes of the Schengen cooperation), with the voluntary character of the relevant initiatives adopted so far on the admission of asylum seekers to the territory of the EU Member States.¹¹²

Against this background, complementary pathways appear as a reconfiguration of the EU migration policy’s past, they are set against a broader background of ‘degradation’ of the legal guarantees EU law offers (by the entrenchment of soft law) and further protract the tensions and deficiencies characterizing EU asylum law and identified in scholarship for the past decades.¹¹³

¹¹⁰ *ibid* p. 823.

¹¹¹ Loxa, A. and Stoyanova V. (2022). Migration as a Constitutional Crisis for the European Union, in: *Migrants’ Rights, Populism and Legal Resilience in Europe*. S. Smet and V. Stoyanova (Eds), p. 159, Cambridge University Press.

¹¹² Moreno-Lax (n 15) p. 303.

¹¹³ Indicatively Carrera, S., Santos Vara, J. and Strik T. (Eds) (2019), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar Publishing 2019; Loxa and Stoyanova (n 111); Costello, C. 2020. Overcoming Refugee Containment and Crisis. *German Law Journal* 21(1), pp. 17-22; Scipioni, M, 2018. Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis. *Journal of European Public Policy* 25(9) pp. 1357-1375.