



## City Research Online

### City, University of London Institutional Repository

---

**Citation:** Fahey, E. ORCID: 0000-0003-2603-5300 (2019). Hyper-legalisation and delegalisation in the AFSJ: on contradictions in the external management of EU migration. In: Carrera, S., Santos Vara, J. and Strik, T. (Eds.), Constitutionalising the External Dimensions of Eu Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered. (pp. 116-134). Cheltenham, UK: Edward Elgar. ISBN 9781788972475

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <https://openaccess.city.ac.uk/id/eprint/23645/>

**Link to published version:**

**Copyright:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

**Reuse:** Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

---

City Research Online:

<http://openaccess.city.ac.uk/>

[publications@city.ac.uk](mailto:publications@city.ac.uk)

---

**CH. 7: HYPER-LEGALISATION AND DELEGALISATION IN THE AFSJ: ON  
CONTRADICTIONS IN THE EXTERNAL MANAGEMENT OF EU MIGRATION IN  
SANTOS VARA, CARRERA AND STRIK (EDS.) *CONSTITUTIONALISING THE  
EXTERNAL DIMENSIONS OF EU MIGRATION POLICIES IN TIMES OF CRISIS*  
LEGALITY, RULE OF LAW AND FUNDAMENTAL RIGHTS RECONSIDERED (EDWARD  
ELGAR, FORTHCOMING)**

**Elaine Fahey\***

**ORCID ID:** 0000-0003-2603-5300

*Abstract*

The EU governance of migration has distinct internal and external facets, which may be viewed as innately contradictory. On the one hand, for example, there is legal competence for enhanced measures to combat illegal immigration but on the other hand, it is to manage efficiently migration flows, yet with fairness towards third country nationals. These contradictions define the EU's Area of Freedom Security and Justice more generally, as a complex and evolving site of tremendous injustice and crisis. In times of crisis, there is an increasing number of soft law tools in EU external migration, used to enable flexibility, deploying management lexicon, principles and tools as a means to avoid or minimize the need for 'hard' binding law (e.g. frameworks, compacts, action plans), in a process of 'hyper-legalisation' of external migration. Often, it results from the multiplicity of constitutional competences applying in external migration. It mirrors well other crisis-ridden subjects of EU law, in particular as to the financial crisis. On the other hand, there is also a trend in significant recent caselaw towards the 'de-legalisation' of migration policy, putting key legal and policy questions in forms beyond review and outside of the treaties, as in the financial crisis as well as other leading cases. They explicitly detail the nature of the contradictions at the heart of the external dimension to the AFSJ in the area of migration and the problematic nature of EU law-making. They also provide reason for concern about basic conceptualisations of the rule of law therein. The key decisions arbitrarily decide the scope of 'non-legislative', 'non-application' and 'European' as to EU law. They emphasise the contradictions at the heart of the AFSJ, increasingly excluded through judicial review.

---

\* Professor and Associate Dean (International), Institute for the Study of European Law (ISEL), City Law School, City, University of London. Email: [Elaine.fahey.1@city.ac.uk](mailto:Elaine.fahey.1@city.ac.uk). Thanks to Juan Santos Vara and participants at the Jean Monnet Chair workshop in Salamanca in October 2017 and the reviewers for their helpful comments and remarks. Thanks to Mohini Mann for research assistance. All errors and omissions are those of the author.

## 1. Introduction: the evolving contradictions of the AFSJ

Justice and Home Affairs (JHA hereafter) constitutes one of the most dynamic policy fields of EU integration having grown exponentially in policy content and in terms of institutional structure.<sup>2</sup> The institutionalisation of JHA during the period of the evolution of the third pillar still remained tied to the commonality of the single market and the development of policies to support the internal borders structure. EU JHA rests upon a neo-functionalist logic which evolved with the coming into force of the Treaty of Amsterdam and the creation of the Area of Freedom, Security and Justice (AFSJ) which communitarised parts of the third pillar and incorporated the Schengen acquis into the EU's legal order. It resulted in the pillar structure being eliminated and decision-making becoming regularised and subject to qualified majority voting. The latest evolution of JHA has seen its development as a space of integration and protection, giving effective access to justice, improved safeguards against crime and terrorism and a right to circulate freely within the Schengen area, enforced by a range of agencies and policies generally.

The AFSJ as set out in Article 3(2) TEU as an 'area' and as expanded in Title V of the TFEU (Articles 67-89), arguably represents one of the broadest, most controversial and perhaps complex policy fields of EU law and governance. It is broadly defined, extraordinarily wide and spans a vast portfolio of civil and criminal law concepts. In almost every iteration, it crosses national, regional, international law, with a vast array of sources, that increasingly overlap internal and external policies and fields. These characteristics have also earned it harsh critique. No longer solely the purview of the Member States, its evolution has unfolded ungracefully, with immense conflict, reflecting its complexity. It has been criticised as a subject lacking any thematic or institutional unity, possessing and contributing to the EU's perceived democratic deficit and lacking any meaningful transparency.<sup>3</sup> It is an area which has been expanding at a rapid pace, despite the sensitivity and complexity of its remit, evolving rapidly through a diversity of legal instruments, significant Council programmes which often set the conceptual and thematic agenda more than usual (e.g. Tampere, Stockholm) and communications. It is also an area which by its very name engenders much controversy. In the Treaty of Amsterdam, the aim was to maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons was assured, in conjunction with respect to external border controls, asylum, immigration and the prevention and combating of crime, aims which increasingly appear to conflict and misalign.

The AFSJ has been gradually through the treaties 'regularised' as a legal and institutional space, most recently in the Treaty of Lisbon during the period of the Stockholm Programme. This has entailed that the jurisdiction of the Court of Justice over its policies has evolved,<sup>4</sup> the Parliament is involved as co-legislator within the ordinary legislative process<sup>5</sup> and ordinary enforcement procedures will apply, giving a role for the Commission in its enforcement.<sup>6</sup> There are a plethora of entities involved now in the form of agencies and other actors.<sup>7</sup> Indeed, the AFSJ has become increasingly subject to a vast array of ordinary principles of EU institutional and constitutional law, including fundamental rights. Its provisions are also now inextricably linked with Article 6 TEU on the Charter of Fundamental Rights and the European convention for the Protection of Human Rights and Fundamental Freedoms, Article 15(3) TFEU on access to the institutions documents, Article 16 TFEU on the protection of personal data and Article 18 to 24 TFEU on non-discrimination and citizenship of the Union.<sup>8</sup> The balance

---

<sup>2</sup> J. Monar, 'Justice and Home Affairs' (1999) 37 JCMS 155.

<sup>3</sup> R. Colson, 'Review: *EU Justice and Home Affairs Law* by Steve Peers and *The External Dimension of the European Union's Area of Freedom, Security and Justice* by Marise Cremona, Jörg Monar, and Sara Poli (eds) (2012) 31 *Yearbook of European Law* 540-546.

<sup>4</sup> See Protocol No. 36

<sup>5</sup> See Article 294 TFEU; see also the role for national parliaments: Article 12 TEU and Protocols Nos 1 and 2.

<sup>6</sup> E.g., see the Justice Scoreboard of the Commission, charting the implementation of AFSJ laws.

<sup>7</sup> see Europol, The European Police College, Eurojust, the EU Fundamental Rights Agency, Frontex, European Asylum Support Office for example. See previously as to the Court A. Hinerajos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2009)

<sup>8</sup> S. Douglas-Scott, 'The Problem of Justice in the European Union' in P. Eleftheriadis and J. Dickson (eds) *Philosophical Foundations of EU Law* (OUP 2012) Ch. 16; D. Acosta Arcarazo, C. Murphy (eds) *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014); A. Hinerajos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2009).

between the A, F, S and J of the AFSJ, however, is notoriously a delicate and controversial debate that often does not take place in every iteration of the law-making process.<sup>9</sup> Instead, an evolving scholarship considers the AFSJ as a major site of injustice and inhumanity, despite its institutionalisation, its communitarisation and its embedding of fundamental rights values.<sup>10</sup> This injustice and inhumanity arguably has the many contradictions of the AFSJ at its core. On the contrary, the AFSJ appears increasingly as a complex riddle of contradictions and contestations. It is an area beset by crises similar to many other fields of EU law- specifically as to migration.<sup>11</sup> One of the most sensitive and contradictory aspects of the EU's AFSJ exemplified best in external migration policy is its creation of an ostensibly borderless space for freedom, security and justice, developing on from its internal market, enabling deeper integration and a fuller realisation of rights and EU wide justice. It is contradictory because it has been partially 'institutionalised' through shared competences, minimum standards legislation and the institutionalisation of mutual recognition without any objective or finality.<sup>12</sup> As Thym outlines, the construction of personhood, citizen and fundamental rights is especially contradictory in EU migration, which lacks any uniform category of rights bearer.<sup>13</sup> Accordingly, flux surround the idea of personhood here and exacerbates further the contradictory core of the AFSJ. As a result, there are competing visions evident here as a result, varying from the security driven to the exclusionary.<sup>14</sup>

This chapter focusses hereafter on external migration as a significant policy component of the AFSJ embodying well the contradictions at the heart of the AFSJ. The contradictions outlined here will be argued to pose significant tensions in the general process of the constitutionalisation of external migration outlined overall in this publication and in the Introduction. The chapter thus overall isolates and also maps the specific contradictions in law, policy and practice which are of major significance to current issues surrounding EU external migration policy, as one of the most active sites of law-making in the AFSJ. The chapter reflects upon the character of contradiction in EU external migration law, policy and practice through reflecting upon the phenomena termed and developed here as 'hyper-legalisation' and 'de-legalisation', drawing insights from critical EU studies literature but also mainstream political science and international human rights law scholarship. A diversity of genres of such scholarship, albeit not necessarily all, nowadays study EU external migration law, focussing increasingly upon its contradictory core. It is done here in particular with respect to three leading cases of the last year before the EU courts. The cases selected here consider the Common Visa Code, the Temporary Relocation Mechanism and the EU Turkey Statement as multifarious examples of EU external migration law and policy in action, mostly in crisis related areas. In each instance, 'hyper-legalisation' and 'de-legalisation' feature prominently before the CJEU and result in outcomes severely limiting the scope of EU law. They are argued not necessarily to be polar opposites or even a dichotomy and sometimes more of a sliding scale of contradictions. However, they share striking similarities as to outcomes or results. 'Hyper-legalisation' and 'de-legalisation' as a spectrum of judicial action effectively put external migration beyond judicial review in several high profile recent external migration cases, warranting scrutiny here as an important development of AFSJ law.

*Section II* develops the contradictions in law, policy and practice in the AFSJ and migration thereafter. *Section III* develops the contradictions between hyper-legalisation and de-legalisation in EU external

---

<sup>9</sup> E.g. Douglas-Scott, *ibid.*

<sup>10</sup> I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP, 2016).

<sup>11</sup> P. Kjaer, 'European crises of legally-constituted public power: From the "law of corporatism" to the "law of governance"' (2017) 23 *Eur Law J* 417–430.

<sup>12</sup> Although see its breakdown recent where the Irish High Court refuses to surrender a Polish national to Poland on the basis of the independence of the judiciary no longer being guaranteed, warranting a reference to the CJEU: High Court judge seeks EU ruling on effect of Polish law changes (12 March 2018) < <https://www.irishtimes.com/news/crime-and-law/courts/high-court/high-court-judge-seeks-eu-ruling-on-effect-of-polish-law-changes-1.3424530> > accessed 15 March 2018.

<sup>13</sup> D. Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU law' in L. Azoulai, S. Barbou des Places & E. Pataut, *Constructing the Person in EU Law: Rights, Roles and Identities* (Hart, 2016), 112.

<sup>14</sup> See also C Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016), 17.

migration. *Section IV* outlines three leading decisions of the CJEU recently in the area of EU external migration, followed by in *Section V* analyses and future reflections. The chapter seeks firstly to outline the nature of the contradiction at play here, firstly, generally in the AFSJ and secondly, in migration.

## 2. Contradictions in law, policy and practice

### A. AFSJ Contradictions

The AFSJ is arguably also beset by significant contradictions in law, policy and practice that are worth articulating. Firstly, there is a reasonable amount of legislation, but not so many Court decisions, in contrast with the internal market. Secondly, it is also a fiendishly complex area in the sense that there is significantly more treaty law, protocols and decisions in particular on the AFSJ than on legislative matters *stricto sensu*, not necessarily reflecting more law and policy but rather the incomplete nature of integration, active differentiation practices and partial institutionalisation. Thirdly, where there is caselaw with respect to the AFSJ, some of it is characterised as generating extraordinary levels of injustice (e.g. EU-Turkey Statement decision)<sup>15</sup> as opposed to the history of free movement law as a provider of rights and redress. Yet, fourthly, at the same time, much substantive AFSJ law-making is now conducted using maximalist harmonisation and nearly always increasingly using external norms.<sup>16</sup> Fifthly, despite significant shifts in law, policy and the treaties as to the AFSJ, an awkward stand-off between institutions, law-makers, translates and factions of scholars (e.g. law not political science) exists whereby some explicitly embrace only the lexicon of the AFSJ others reference only the JHA. This coding question might appear like a trivial remark and pedantic and yet affects the transparency and traceability of considerable amounts of law-making. It constitutes a difficult substantive theme because of the highly proceduralised contours of much AFSJ law. One may indeed argue that those speaking about the JHA are those aiming to reverse ‘Europeanisation’ or even ‘Lisbonisation’ of these areas and make use of instruments which alienate EU treaties and the checks and balances inherent to the AFSJ. Sixthly, *more* law-making in substantive areas of policy beyond procedural rules has also coincided with a period of *hyper-legalisation and de-legalisation*, with a plethora of soft law instruments and instruments designed to evade judicial review being deployed to manage core aspects of AFSJ migration policy in times of crisis, elaborated below in more detail. This raises the question as to how to analyse effectively the legal output from this era, at a very difficult point in time, where the atypical modes of analysis and ways of thinking about law-making show themselves to be less than accurate or precise.

These contradictions are argued to matter, both substantively and procedurally, also methodologically, because they influence and affect our means of studying the rule of law applicable to the AFSJ. This chapter as a result reflects upon the idea of measurements and standards in this field of law of many contradictions with respect to the rule of law

### B. EU External migration contradictions

To depict migration as the unfinished business of globalisation is understood to be somewhat of a cliché.<sup>17</sup> Nevertheless, there is arguably no greater global challenge in policy terms than migration because of the formidable conceptual puzzles that it poses however long it has been an integral part of human activity on earth.<sup>18</sup> The interests of emigration and immigration countries have seemed mostly impossible to align.<sup>19</sup> International migration has had to remain subservient to the will of the collection of States with authority over settled populations within defined boundaries to act.<sup>20</sup> Consequently, there

---

<sup>15</sup> Case T-257/16 NM v European Council ECLI:EU:T:2017:130; Appeal Case before the Court of Justice C-208/17 P.

<sup>16</sup> See E Fahey, ‘Joining the dots: external norms, AFSJ directives & the EU’s role in the global legal order’, in (2016) 41 *European Law Review*, 105.

<sup>17</sup> See G. Appave, ‘Emerging legal issues in international migration’ in B. Opeskin, R. Perruchoud, and J. Redpath-Cross (eds.) *Foundations of International Migration Law* (CUP 2012) Ch. 15, 417.

<sup>18</sup> Thym, above (n 13), 1; B. Opeskin, R. Perruchoud and J. Redpath-Cross ‘Conceptualizing International Migration Law’ in B. Opeskin, R. Perruchoud, and J. Redpath-Cross (eds.) *Foundations of International Migration Law* (CUP 2012) 1.

<sup>19</sup> A. Bradford, ‘Sharing the Risks and Rewards of Economic Migration’ (2013) 80 *University of Chicago Law Review* 29.

<sup>20</sup> See F. Kratochwil, ‘Of Systems, Boundaries and Territoriality: An Inquiry into the Formation of the State System’ (1986) 39(1) *World Politics* 27.

is no comprehensive universal legal framework governing the mobility of human beings.<sup>21</sup> Instead, there are numerous scattered pieces of a legal and normative framework (e.g. ‘giant unassembled jigsaw’<sup>22</sup>) to be found within global and regional instruments and many informal and non-binding understandings amongst States drawn from a corpus of law spawned mostly in the Post-War period.<sup>23</sup> The search for international migration law also raises the bigger question of global migration governance as far as it arises from globalisation and the basic need to solve problems that transgress the borders of the Nation State. Indeed as Trachtman states, migration is not yet a field of international law per se because its conceptual linkages with other fields of international law are problematic and difficult to separate from human rights, trade, taxation, security etc.<sup>24</sup>

From a strictly legal perspective, there are many contradictions at the core of EU migration law, which reflect in various ways the broader conceptual challenges of regulating migration. The EU’s laws on migration including as to third country nationals is formally an integral part of the AFSJ. However, the EU governance of migration has distinct internal and external facets which may be viewed as legally and constitutionally contradictory. There is legal competence for enhanced measures to combat illegal immigration but also to manage efficiently migration flows, but with fairness towards third country nationals.<sup>25</sup> And the only external competence explicitly transferred to the EU under Title V TFEU is as to readmission and contrasts with the silence of the Treaties on other fields of migration covered by Article 79 TFEU, relying to some extent on implied external competences.<sup>26</sup> Moreover, EU external competences to promote legal migration and integration are concurrent competences with regard to Member State powers, which poses considerable issues also for coherence in practice.<sup>27</sup> The AFSJ is also supposed to remain accessible to those whose circumstances lead them justifiably to seek access to EU territory.<sup>28</sup> Although there are difficulty balancing acts embodied therein, the EU has sought to strive to be a safe haven for those fleeing persecution.<sup>29</sup> However, unrecognised refugees and asylum seekers have been assimilated into the generic category of Third Country Nationals, rendering their entry irregular or illegal unless they demonstrate compliance with general admission criteria. On the other hand, the EU border *acquis* contains general references to human rights and refugee law, giving the impression that special treatment must be accorded to those in search of international protection, in accordance with international and European standards.<sup>30</sup> In particular, the transnational nature of migration and need for international responses highlight the need for an effective external dimension to EU migration policy, currently lacking from the perspective of individual rights protection, in the eyes of many.<sup>31</sup> As a result, there is naturally an inherent contradiction, whereby, for example, pre-entry control is in patent disconformity with the fundamental rights *acquis*, structurally biased towards security and control.<sup>32</sup>

As outlined above, there is an emerging literature on critical EU Studies which is important to note, which has sought to target the place of practice and methodology to overturn key assumptions as to EU integration.<sup>33</sup> It seeks to bring EU studies scholars closer to the social phenomenon that they want to

---

<sup>21</sup> G. Appave, ‘Emerging legal issues in international migration’ in B. Opekin, R. Perruchoud, and J. Redpath-Cross (eds.) *Foundations of International Migration Law* (CUP 2012) Ch. 15, 390.

<sup>22</sup> R. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 4.

<sup>23</sup> See R. Plender, *International Migration Law* (Springer, 2<sup>nd</sup> ed. 1988), referring to 900 pages of hard and soft law .

<sup>24</sup> See J. Trachtman, ‘Is Migration a Coherent Field of International Law? The example of Labor Migration’ (2018) *AJIL Unbound* 481, 481.

<sup>25</sup> D. Thym, ‘EU Migration Policy and its Constitutional Rationale’ (2013) 50 *Common Market Law Review* 709; J. Weiler, ‘Thou Shalt not Oppress a Stranger’ (1992) 3 *European Journal of International Law* 65. See also Ch. 4, Cardwell and Ch. 6 Conway, in this volume.

<sup>26</sup> P.G. Andrade, ‘The Legal Feasibility of the EU’s External Action on Legal Migration: The Internal and the External Intertwined’ (2013) 15(3) *European Journal of Migration and Law* 263, 267-268. See the extraordinary findings of the General Court on the inability of the EU institutional legal services to deal with competence questions in the rush to reach agreement on the EU-Turkey settlement: E.g. T-851/16 *Access Info Europe v. Commission* ECLI:EU:T:2018:69, para. 110.

<sup>27</sup> See Thym, above (n 25).

<sup>28</sup> Tampere Milestones, 15-16 October 1999, para 3.

<sup>29</sup> See A *European Agenda on Migration* COM(2015) 240, p.1.

<sup>30</sup> See V Moreno-Lax, *Accessing Asylum in Europe :Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017), 462.

<sup>31</sup> See Andrade (n 25).

<sup>32</sup> *Ibid*, 477.

<sup>33</sup> See R. Adler-Nissen, ‘Towards a Practice Turn in EU Studies: The Everyday of European Integration’, (2016) (54) *Journal of Common Market Studies* 87.

study and argues for the use of approaches which bring scholars closer to the people who construct, perform and resist the EU on a daily basis. In doing so, it looks to disorder and order EU studies. It thus increasingly reflects critically upon the subjects and objects of the EU law-making and integration processes. As a result, it seeks to challenge the orthodoxy of integration narratives but without adopting Euroscepticism as its end goals. This is of significance for the analysis of EU external migration law, where the CJEU in a range of its most highest profile cases has taken a very specific path of review of litigation in a highly sensitive field at a time of crisis and put the individual beyond redress. More specifically, mainstream EU political science literature has also become highly critical of EU migration law and policy in its manifold iterations in recent times. For example, leading political science scholars of EU external governance now characterise EU migration policy as a whole and abject failure in totem, amounting to ‘organised hypocrisy’.<sup>34</sup> It seeks to critique EU external migration law and governance as ‘failing forwards’ in integration terms.<sup>35</sup> It joins with a wave of contemporary scholarship which is critical of EU integration as a trajectory, flowing from its handling of the migration crisis. International migration law has also evolved into a discipline which takes an extremely sceptical approach as to the EU on its bona fides as a human rights actor in migration. It has evolved from being the subject of critique of its cosmopolitanism,<sup>36</sup> excluding foreign ‘others’ from its landmass to simply being an instrument of injustice production.<sup>37</sup> Whilst it is difficult to label such specialist literature as critical studies per se or to look at it as exceptional in its critique, given the provenance of the human rights scholars there, it is entirely focussed upon examining the contradictory core of EU external migration law as a state of affairs. Finally, it is worth remarking on how the latest EU scholarship on migration law seeks to target directly the constructivist dimensions thereof, critically examining assumptions embedded in the ambiguities at the heart of EU external migration law.<sup>38</sup> It thus warrants a very critical look at the parameters of the analytical idea.

These constitutional contradictions and tensions underline the challenges that the EU faces in evolving law-making and developing its imperfect competences, which straddle as outlined above an uneasy balance between internal and external objectives and limitations.

### 3 Contradictions of hyper-legalisation and de-legalisation in EU External Migration

#### 3.1. On hyper-legalisation

In times of crisis, there is an increasing number of soft law tools in EU external migration, used to enable flexibility, deploying management lexicon, principles and tools as a means to avoid or minimize the need for ‘hard’ binding law (e.g. codes, frameworks, compacts, action plans, communications and press releases). This trend is compounded by the increasingly self-referential nature of EU migration law, referring to the Charter of Fundamental Rights not Public International Law, where the autonomy of EU law paradoxically reinforces this view.<sup>39</sup> While non-legal scholarship on ‘crisis’ focusses upon the nature of turns to governance rather than law, this trend as to a morass of tools mirrors important trends in EU economic law on legal parameters in an era of crisis.<sup>40</sup> Whatever the actual content of the output- this account deliberately reflects on the broadest possible spectrum of soft to hard law- its result has been a plethora of measures with legal effects, whose character has shifted

---

<sup>34</sup> See S. Lavenex, ‘“Failing Forward” Towards Which Europe? Organized Hypocrisy in the Common European Asylum System’ (2018) *Journal of Common Market Studies*, forthcoming.

<sup>35</sup> *Ibid*

<sup>36</sup> E.g. Seyla Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (Oxford University Press 2006); see also Costello, above.

<sup>37</sup> See Mann (n 10).

<sup>38</sup> E.g. B. Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU migration law* (Hart, 2018), Ch. 1.

<sup>39</sup> See most eloquently throughout Moreno-Lax, above (n 29), Introduction.

<sup>40</sup> C. Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ 35 *Oxford Journal of Legal Studies* (2015) 325; E. Fahey & S. Bardutzky, ‘Judicial Review of Eurozone Law- The Adjudication of Postnational Norms in the EU Courts, Plural. A Casestudy of the European Stability Mechanism’ (2013) *Michigan Journal of International Law Online*.



dramatically over a short period of time.<sup>41</sup> Often, they reflect the diverse, contradictory and complex set of competences of the EU in migration.<sup>42</sup> Sometimes they can reflect incomplete institutionalisation processes.<sup>43</sup> Thus the EU has here introduced waves of legislation and law-making packages in recent times.<sup>44</sup> This diversity of instruments involved is significant because of their cumulative and quantitative nature but it is also an empirical question of dispute, not one which this account may resolve definitively nor dispose of here. This state of affairs is argued to be capable of being labelled here in a process of ‘hyper-legalisation’ of external migration.<sup>45</sup>

*Hyper-legalisation* is thus understood here as a surge in the incidence of the creation of law-like instruments, soft law, hard law, legal instruments with legal effects and the general generation of rules and other norms in a field, with legal or law-related components. It may also relate to the contours of legalisation and their constructive understanding, procedurally or substantively e.g. as to territoriality. It may be ascribed to be ‘hyper’ precisely because it is an extreme surge in quantity and it may be represented as ‘legalisation’ specifically because it attributes legal effects and legal qualities to EU migration policies not previously existing, in a diversity of ways which are extreme, as the cases outlined here will show. The rise in highly differentiated nomenclature of instruments, sheer quantity of new legal instruments in EU external migration introduced in a concentrated time period, the rise of specialist and mainstream critique of EU external migration law and policy all cumulatively support these claims made here as to hyper-‘legalisation’. This ‘hyper-legislation’ generates legal issues, select external migration litigation, to be considered here, and many rule of law issues for obvious reasons. For example, in 2016 alone, there were three highly significant decisions of the Grand Chamber or General Court, arguably on the parameters of the rule of law in EU external migration.<sup>46</sup> It is a development often reflecting the need for urgent action in distinctive time-periods but also requiring distinctive normative analysis.

The practices considered here generally probably deploy soft law here to a significant extent and it is thus worth digressing upon its merits. Soft law by its name suggests some element of normative expectations about compliance, softness and legality itself.<sup>47</sup> It is an entity which is beyond the lexicon of many disciplines, or certainly at the margins, despite it being a rapidly developing medium thereof.<sup>48</sup> States have been shown increasingly rely upon soft law to either hedge against or directly backtrack on what they see are activist courts or politically undesirable developments. Much global governance continues to be treated by international lawyers as more or less irrelevant informal action producing mere soft law. This level of profound disagreement arguably stymies our analytical and theoretical frames. Attempts to use soft law or new governance methods or informal methods of peer review and learning across networks of regulators or models of regulation have drawn more from administrative law rather than public international law have largely had limited success.<sup>49</sup> Soft law has played a positive role in being flexible enough to meet the requirements of good governance in contexts where competing goals are being pursued.<sup>50</sup> Similar to international law, soft law in EU law has an infinite

---

<sup>41</sup> Editorial comments: Tinkering with EMU' (2018) 55 Common Market Law Review, Issue 3, pp. 709–718.

<sup>42</sup> See Moreno-Lax, above (n 29).

<sup>43</sup> See E. Fahey (ed), *Institutionalisation beyond the Nation State* (Springer, forthcoming 2018), Introduction.

<sup>44</sup> See M. Den Heijer, J. Rijpma, & T. Spijkerboer, ‘Coercion, prohibition and great expectations: The continuing failure of the Common European Asylum System’ (2016) 53 CMLR, 607-642; See also C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016)

<sup>45</sup> Kilpatrick, above, (n 33); Costello, *ibid*, 2015.

<sup>46</sup> Case C-638/16 PPU *X and X v. Etat Belge* ECLI:EU:C:2017:173; Case T-257/16 NM v European Council ECLI:EU:T:2017:130; C-643/15 *Slovakia v. Council* ; Case C-647/15 *Hungary v. Council* ECLI:EU:C:2017:63.1.

<sup>47</sup> D. Shelton (ed), *International law and Domestic legal Systems Incorporation, Transformation and Persuasion* (OUP 2011); M. Koskenniemi, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law (Report of the Study Group of the International Law Commission, 2006).

<sup>48</sup> See T. Gammeltoft-Hansen, S. Lagoutte & J. Cerone, ‘Introduction: Tracing the Roles of Soft Law in Human Rights’ Lagoutte, S., Gammeltoft-Hansen, T., Cerone, J., *Tracing the Roles of Soft Law in Human Rights* (OUP, 2016)

<sup>49</sup> C. Sabel and J. Zeitlin ‘Learning from Difference: the New Architecture of Experimentalist Governance in the EU’ (2008) 14 *ELJ* 271; See A M Slaughter *A New World Order* (2004) Jean Galbraith and David Zaring ‘Soft Law as Foreign Relations Law’ (2014) 99 *Cornell L Review*; Gregory Schaffer and M Pollack ‘Hard Law v. Soft Law’ (2010) *Alternatives, Complements and Antagonists in International Governance* (2010) 94 *Minnesota Law Review* 706; Berman, Herdegen, Lindseth; H. Koh ‘Twenty First Century International Law-Making’ (2013) 101 *Georgetown Law Journal* 725.

<sup>50</sup> Faye Jacobsen, Anette, ‘Soft law in participation rights: Tools in development’ in S. Lagoutte, T. Gammeltoft-Hansen, J. Cerone, (eds.), *The Role of Soft Law in Human Rights* (OUP 2016), Ch. 13.

variety of sorts.<sup>51</sup> It is often classified using functional and purposive criteria. The mechanisms for its enforcement vary dramatically but its stance to enhance the effectiveness of EU law is perhaps debateable. The delicate role of courts here in enforcing its effectiveness is essential but probably also its greatest challenge in the EU legal order. This entails that any trend of de-legalisation is highly problematic, warranting further discussion here.

However, somehow in EU external migration, this is an entirely different narrative where the need to establish quickly administrative processes or mitigate the absence of agreement between Member States on migration compels its development. Still, they are fundamental debates and demonstrate the controversies at play needing more reflection.

### 3.2. De-legalisation

Contrariwise, this account also wishes to advance the simultaneous assertion that there is increasingly a ‘*de-legalisation*’ of migration policy, where EU courts increasingly put key legal and policy questions in forms *beyond* review and outside of the treaties, as in the financial crisis.<sup>52</sup> De-legalisation is understood here as the practice of putting issues, laws, practices and litigation beyond the scope of genuine and meaningful judicial review. It is at once both the relative, opposition and genus if hyper-legalisation, albeit that they are claimed to represent an analytical spectrum or continuum of related activity. Three recent contemporary decisions of the Grand Chamber of the CJEU and General Court all in the area of EU external migration in 2016-2017 are argued here to demonstrate the analytical challenges of de-legalisation in this new era: *X & X v. Belgium*,<sup>53</sup> *NM v. European Council*<sup>54</sup> and *Slovakia v. Council*.<sup>55</sup> The cases deal with a diverse array of migration issues and instruments. Of the three cases, two are Grand Chamber cases and they serve to demonstrate a consistent formulation of analytical approach at the highest EU judicial level. The level of the decision-maker is also of note because it signifies the docket selection taking place and the concerted effort by the Court to actually develop such caselaw. The selection of cases here is arguably incomplete on any view, however compiled, serves amply to highlight well the contradictions at play. The litigants vary significantly, from Member States to individuals but the majority are individual applicants. All are cases in the field of external migration and, although tightly circumscribed time-wise, are thus highly significant for the consistency of the outcome reached. It demonstrates a specific form of analytical framework, where key legal instruments are judged to have no legal effect or not to be justiciable. The decisions often demonstrate both de-legalisation and hyper-legislation to various degrees but it is the similarity of the outcomes or results which is the critical point of reflection at the highest judicial level in external migration and not the opposition thereof. In other words, both can be argued to be evident in all of the cases considered.

## 4. Between Hyper-legalisation and De-legalisation in recent EU external migration law

### 4.1.. *X and X v. Belgium*

In *X and X v. Belgium*,<sup>56</sup> the CJEU in Grand Chamber considered a preliminary ruling on the interpretation of the Visa Code Article 25(1)(a) of Regulation No. 810/2009 of the European Parliament and Council of 13 July 2009, a highly ‘legalised’ area of secondary law.<sup>57</sup> The applicants were Syrian nationals who had been refused visas in Aleppo at the Belgian Embassy for visas with a limited

---

<sup>51</sup> O. Stefan, ‘The Enforcement of EU Law and Values: Ensuring Member States’ Compliance’ in A Jakab, & D. Kochenov, (eds.). (OUP 2017); O. Stefan, ‘European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects’ (2012) 75 *Modern Law Review* 879-89; L. Senden, *Soft Law in European Community Law* (Hart 2004).

<sup>52</sup> Bardutzky and Fahey, above (n 34).

<sup>53</sup> Case C-638/16 PPU *X and X v. Etat Belge* ECLI:EU:C:2017:173.

<sup>54</sup> Case T-257/16 *NM v European Council* ECLI:EU:T:2017:130.

<sup>55</sup> C-643/15 *Slovakia v. Council* ; Case C-647/15 *Hungary v. Council* ECLI:EU:C:2017:63.1

<sup>56</sup> Case C-638/16 PPU *X and X v. Etat Belge* ECLI:EU:C:2017:173.

<sup>57</sup> 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) OJ L 243, 15.9.2009, p. 1–58.

territorial validity. The question arose as to the obligations arising from the Charter of Fundamental Rights and EU law and whether they should have been issued visas on humanitarian grounds. In his Opinion, AG Mengozzi strongly recommended the issue of visas on humanitarian grounds to the Syrian family in considering they had no alternative options available to them.<sup>58</sup> He highlighted the unique position of the Court in this case where the Court ‘has the opportunity to go further...by enshrining the legal access route to international protection.’<sup>59</sup> However, the CJEU held that the proceedings were not governed by EU law, specifically not its Charter in Articles 4 and 18 thereof.<sup>60</sup> It held that the Visa code was intended to be application for issuing short stay visas and to allow interpretations otherwise, i.e. to allow third country nationals to lodge applications for visa in order to obtain international protection would undermine the general structure of the system set out in Regulation 604/2013, establishing criteria for determining states responsible for examining an application for international protection. It was held that the referring court was wrong to state it was a short-term visa in the first instance where it should have been submitted that it was a short-term visa to gain entry into the territory for an application for international protection by third country nationals. The Court also held that the ‘Rights under the Charter did not apply because the rules surrounding longer-term visas for third-country nationals were not under the scope EU law.’<sup>61</sup>

This conclusion on the interpretation of the EU visa code was reached in view of the wording, since the visa code only provides for visas valid for no more than 90 days in any 180-day period. Therefore, ultimately it could not cover a situation to enable third country nationals to stay longer in a Member State and thereby impose a de facto duty on Member States to consider asylum applications when lodged in their overseas embassies. Therefore, the Court held Member States did not need to grant a humanitarian visa to third country nationals, outside of its territory and national authorities were free to consider such applications, without considering EU law. Since no measure has been adopted by the EU legislature in relation to Member States issuing long-term visas to third country nationals on humanitarian grounds, the application of the Syrian family fell entirely within the scope of national law.<sup>62</sup> The ruling of the Court and the application of the Charter in this case has been subject to significant criticism with regard to its existing caselaw. Specifically, it appears to be at odds with its previous case law in its jurisprudence on the scope of Article 51 of the Charter.<sup>63</sup> The Court could have concluded that the issues at hand fell within the scope of application of EU law and thus have reached a conclusion in this manner.<sup>64</sup> The threshold for triggering the application of the Charter can be rather low as demonstrated in these cases. Especially when determining which national measures fall within the scope of EU law, the Court seemed to stretch the concept quite far. Generally, these judicial disputes laid focus on the strength of the link between national legislation and EU law, whereas the present case dealt with the situation which emanated from the application of an EU regulation. It is an important decision rejecting the expansion of the scope of EU law and its ostensible ‘extra-territoriality’ to some degree.

The decision has also been criticised for its ‘mismatch’ with ECHR/ Strasbourg caselaw,<sup>65</sup> specifically as to the discretionary power conferred to Member States in determining asylum applications. As a result, the CJEU compounds the paradoxical nature of the situation where those seeking asylum must enter the Member States’ territory to be able to lodge asylum applications, yet to enter the Union, the EU Member States are simultaneously making it increasingly difficult to gain access. Some suggest to

---

<sup>58</sup> Opinion of AG Mengozzi ECLI:EU:C:2017:93.

<sup>59</sup> Opinion of AG Mengozzi ECLI:EU:C:2017:93.

<sup>60</sup> Case C-638/16 PPU *X and X v. Etat Belge* ECLI:EU:C:2017:173Para 45.

<sup>61</sup> Bulletin: EU Charter of Fundamental Rights European Human Rights Law Review 2017 (3) 238-240

<sup>62</sup> Press Release No 24/17 Luxembourg (7 March 2017) Judgment in Case C-638/16 PPU <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170024en.pdf>> accessed 15 March 2018.

<sup>63</sup> Cf C-617/10 Åklagaren v Åkerberg Fransson ECLI:EU:C:2013:105.

<sup>64</sup> Ibid; C-206/13 Cruciano Siragusa v Regione Sicili; Case C-195/12 Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne; M Ovádek, ‘The CJEU on Humanitarian Visa: Discovering ‘Un-Chartered’ Waters of EU Law’ <<http://verfassungsblog.de/the-cjeu-on-humanitarian-visa-discovering-un-chartered-waters-of-eu-law/>> accessed 15 March 2018.

<sup>65</sup> S. Morgades-Gil, ‘Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?’ (European Papers, 15 October 2017) <[http://europeanpapers.eu/en/europeanforum/humanitarian-visas-and-eu-law-do-states-have-limits-to-their-discretionary-power#\\_ftn28](http://europeanpapers.eu/en/europeanforum/humanitarian-visas-and-eu-law-do-states-have-limits-to-their-discretionary-power#_ftn28)> accessed 15 March 2018. Cf Case C-411/10 and C-493/10, N.S. and M.E ECLI:EU:C:2011:865

have ruled otherwise could have created more problems than it could have solved by substituting action on the part of the EU legislature and leaving it to the European judges to attempt to save a contradictory system which merits review.<sup>66</sup> Still, the net outcome is overwhelmingly of both de facto and de jure de-legalisation. It is a highly significant decision for de-legalisation in the field of human visas relating to the Common Visa Code, a highly legalised part of EU law. The de facto extra-territoriality and non-application of the Charter here demonstrates the boundaries of de-legalisation- even in a highly legalised regime. It draws further attention to the nature of the outcome as one putting the questions beyond the scope of EU law, in a contradictory morass. It exemplifies well the spectrum of hyper-legalisation and de-legalisation at play.

This leads to the next key recent decision in *NM v. European Council*.

#### 4.2. *NM v European Council*<sup>67</sup>

As is arguably well known, an ‘agreement’ with Turkey in 2015 was reached on the return of irregular migrants who crossed from Turkey to the Greek Islands. The taxonomy thereof has become a defining moment of AFSJ law and policy in this field:- one which is highly contestable and complex.<sup>68</sup> It arose from a first meeting of the heads of state or Government who provided a press release, entitled ‘Meeting of Heads of State of Government with Turkey- EU-Turkey statement 29/11/2015’ which stated that it was the leaders of the European Union who had met with the ‘Turkish counterpart’.<sup>69</sup> A second meeting of the heads of State or Government generated a press release ‘Statement of the EU Heads of State or Government 7/3/2016’. A third meeting on 18 March 2016 produced an ‘EU-Turkey Joint Statement in Press Release No. 144/16’. It provided for nine action points in order to break the business model of smugglers and offer migrants an alternative to putting their lives at risk. It foresaw the return of all new irregular migrants towards Europe crossing from Turkey in to the Greek Islands as and from 20 March 2016. It further established that for every Syrian repatriated in Turkey another Syrian would be resettled from Turkey to an EU Member State. It further provided for the disbursement of funds in the form of the Facility for Refugees in Turkey and to expedited Turkish accession to the EU.<sup>70</sup> This extraordinary document has thereafter been the subject of recent litigation.<sup>71</sup> Litigation was brought by three asylum seekers who arrived in Greece by boat and risked being returned to Turkey pursuant to the statement if their request was rejected. They sought the annulment of the agreement concluded between the European Council and the Republic of Turkey.

The General Court in its now infamous decision in *NM v. European Council*,<sup>72</sup> held the EU-Turkey statement to be a non-EU agreement and instead to be a European agreement between EU Member States and Turkey, made at the margins of the European Council’s meeting in March 2016. Pursuant to Article 263 TFEU the Court held that it lacked jurisdiction to review the Statement on the basis that the statement was not an international agreement of the EU and that an EU institutions had not sought to conclude the agreement. This is an important context, where again in emergency situations the EU resorts to putting key legal and policy questions in forms which are *beyond* review and indeed outside

---

<sup>66</sup> P. Koutrakos, ‘Editorial: A Realist Court?’ (2017) 42 (3) European Law Review 311-312.

<sup>67</sup> Case T-257/16 *NM v European Council* ECLI:EU:T:2017:130; Appeal Case before the Court of Justice C-208/17 P.

<sup>68</sup> EU-Turkey Statement 114/16 18 March 2016. C. Costello ‘It need not be like this in Forced Migration Review (2016) <<http://www.fmreview.org/destination-europe/costello.html>> last accessed 15 March 2018; S Peers, The EU-Turkey Refugee Deal: A Legal Assessment (18 March 2016) <<http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html>> last accessed 15 March 2018.

<sup>69</sup> Case T-257/16 *NM v European Council* ECLI:EU:T:2017:130 (General Court, 28 February 2017) para 53.

<sup>70</sup> A subsequent report on the implementation of the EU-Turkey Statement saw the Commission emphasise how the number of irregular entries into Greece has fallen and how the agreement could be used as a model with other transit countries, such as Libya. Managing the Refugee Crisis: The EU Facility for Refugees in Turkey (European Commission 26 June 2017); Report from the Commission to the EU Parliament, the European Council and Council, Fifth Report on the progress made in the implementation of the EU-Turkey Statement COM (2017) 204 final (2 March 2017); EU-Turkey Joint Action Plan (15 October 2015).

<sup>71</sup> The document was disseminated as a statement with the aim of preventing irregular migrants reaching the EU from Turkey and establishing a resettlement mechanism based on the transfer of one vulnerable Syrian from Turkey to the EU for every irregular Syrian being returned to Turkey from Greek Islands.

<sup>72</sup> Case T-257/16 *NM v European Council* ECLI:EU:T:2017:130; Appeal Case before the Court of Justice: C-208/17 P, pending.

of the treaties, as has previously happened in the financial crisis.<sup>73</sup> It arguably sought to take the ‘Union’ out of the ‘EU’ through significant levels of legal gymnastics.<sup>74</sup> Unsurprisingly, the decision remains under appeal but also the subject of related litigation on the definition of the public interest in EU law.<sup>75</sup> This later caselaw already appears to expose the hasty, executive-dominant and unruly nature of EU competences here. It also thus far appears to reinforce the (rotten) core of the decisions taken, striving for de-legalisation in the face of hyper-legalisation of migration.<sup>76</sup>

This leads to the last most recent and significant CJEU decision, *Slovakia and Hungary v. Council*.

#### 4.3. *Slovakia v. Council ; Hungary v. Council*<sup>77</sup>

The most significant EU migration crisis instruments were introduced in 2015, perhaps the strongest evidence of hyper-legalisation so far, and arguably de-legalisation also. Firstly, two emergency instruments were introduced for the relocation of 160,000 asylum seekers from Greece and Italy to other Member States. The UK, Ireland and Denmark did not take part in the relocation arrangements whereas Slovakia and Hungary, part of the Visegrad bloc of states opposed to relocation quotas, brought actions to the CJEU to challenge the legality of the second schemes based on mandatory quotas defined according to the Member States reactive absorption capacities, in Decision 2015/1601 of 22 September 2015 as to the relocation of 120,000 applicants.<sup>78</sup> The Decision was adopted as part of a framework of emergency or expedited ‘crisis’ law. The decision arrangements were adopted on the basis of Article 78(3) of the TFEU which affords the Council significant powers to adopt provisional measures on the basis of a proposal from the Commission after consulting the European Parliament, to the exclusion of national parliaments. Recital 22 of the contested decision provide that a period of 24 months was reasonable to management the crisis impacting Italy and Greece in particular. The Grand Chamber of the CJEU in *Slovakia v. Council* held in its decision of 6 September 2017 inter alia that the measures had to be classified as ‘non-legislative acts’ because they had not been adopted following a non-legislative procedure. The Court held that a restrictive interpretation of the concepts of provisional measures was not consistent with Article 78(3) TFEU and that a period of 24 months was limited in the circumstances. Rather, it had to be interpreted sufficiently broadly to enable the EU institutions to adopt all measures necessary and was a legitimate derogation as a result.<sup>79</sup>

Despite the clear political and implementation challenges, the relocation decision provided for a tangible framework to implement solidarity and fair sharing of responsibility between States, pushed through by the Court. Another take on the decision is to view it as necessary to overcome the structural legislative deficiencies which currently plague the Common European Asylum System (CEAS). It can be thus seen as an attempt to regulate intra-EU relocation ‘to implement Dublin at all cost’, which also speaks to the imperfection of the construction of the relocation decision. Perhaps the resistance the Union has faced with its implementation by Member States, although a temporary measure, can be seen as telling towards the attitudes towards the overall system as a whole.<sup>80</sup> The CJEU decision has repercussions for future actions by the Union against Member States for their failure to comply with its obligations, e.g. the European Commission’s launch of infringement proceedings against Hungary on

---

<sup>73</sup> Bardutzky and Fahey, above (n 34).

<sup>74</sup> Carmelo Danis ‘Taking the ‘Union’ out of ‘EU’: The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law’ (2017) *EJILtalk!* <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/> (20 April 2017); see also C. Costello ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explores’ (2012) 12 *Human Rights Law Review* 287.

<sup>75</sup> E.g. T-851/16 *Access Info Europe v. Commission* ECLI:EU:T:2018:69.

<sup>76</sup> I.e., T-851/16, *ibid.*

<sup>77</sup> C-643/15 *Slovakia v. Council* ; Case C-647/15 *Hungary v. Council* ECLI:EU:C:2017:631

<sup>78</sup> *Ibid.* Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ L 248, 24.9.2015, p. 80–94.

<sup>79</sup> *Ibid.*, paras 75-81.

<sup>80</sup> *Ibid.*

14<sup>th</sup> June 2017 for its failure to adhere to its obligations under the Council decision 1601/2015. The repercussions of this judgment seen in light of the global debate on responsibility sharing which currently faces similar resistance, demonstrates the extent of the issues at hand. The New York Declaration for Refugees and Migrants has led to two new Global Compacts in 2018, not yet adopted) which demonstrate a reluctance by States to engage in binding commitments even at a global level.<sup>81</sup> The scale of the broader challenges is unenviable and as contradictory as at EU level.<sup>82</sup> Nevertheless, the outcome here is again one of ostensible de-legalisation in the face of hyper-legalisation. The Court's definition of 'legislative measures' may paradoxically encourage de-legalisation even in the face of hyper-legalisation.

This leads then to a discussion of broader issue at play.

##### 5. Analysis and future reflection points: between, beyond and outside de-legalisation and hyper-legalisation?

This chapter has sought to frame the contradictions at the heart of external migration here as a sliding scale of hyper-legalisation and de-legalisation, which is evident in a series of high profile cases putting external migration beyond judicial review. Hyper-legalisation, as has been argued here, appears as a useful term to depict the growing mass of law and law-like and law-related instruments, often with tangible and/ or meaningful legal effects which surrounds EU external migration law. It is inextricably linked to de-legalisation through judicial review. From a methodological perspective, perhaps early indications are that a 'court-centric' approach to the emerging trends of hyper-legalisation and de-legalisation is not yet conclusive. However, there is now a sizeable body of high level caselaw adopting a similar approach. Analytically, it is an approach which is highly internalised, which looks at EU law questions from perhaps a limited set of established parameters. It closes EU law off to litigants as to scope, form and content and is very revealing as a state of affairs. The caselaw outlined here draws attention to the impossible dilemmas of contradictions in external migration. Hyper-legalisation reflects a difficult balance between soft and hard law and the need for a delicate consideration and reflection upon the role of courts. Recent caselaw shows a very specific formulations of executive dominant law-making being sanctioned and the selection here of such cases is thus increasingly regular before the EU courts. The outcome of this contradictory morass of hyper-legalisation and de-legalisation is that litigants are placed outside the scope and protection of EU law and judicial protection generally. It is a disturbing set of developments, which warrant careful reflection going forward. It exacerbates the challenges of the AFSJ as an evolving field but also fits within its contradictory trajectory to date. Levels of resistance to the CJEU still remain low.<sup>83</sup> In this field they are relatively non-existent. However, there is as of yet a small body of esoteric AFSJ caselaw emerging. Nevertheless, it has the capacity to generate significant tensions as a result of its contradictory core. Both represent a sliding scale rather than polar opposites, with an elided outcome putting external migration beyond the view of courts. One may say that the chapter also demonstrates the paradox of both de-legalisation and hyper-legalisation as a phenomenon of EU law, together, apart and also 'in-between'.

This leads to the broader issue that the AFSJ as a field is one with very limited caselaw and very few litigants ready and able to take litigation. In external migration this is understandable, given that many migrants are not best placed to take sophisticated litigation, being without resources, knowledge, organisation and the capacity to instruct litigators. De-legalisation trends are very worrisome whereby the contradictory core of the AFSJ is overlooked in judicial review and is put beyond judicial review. The impossible contradictions at the core of Borderless Europe come starkly into play here. Its conflict with the reality of security dominating all else is probably at the heart of explaining many of the

---

<sup>81</sup> S. Craig, 'Searching for Solidarity through Intra-EU Relocation: Slovak Republic & Hungary v. Council of the European Union' (OxHRH Blog, 19 October 2017) <<http://ohrh.law.ox.ac.uk/searching-for-solidarity-through-intra-eu-relocation-slovak-republic-hungary-v-council-of-the-european-union>> accessed 15 March 2018.

<sup>82</sup> T. Gammeltoft-Hansen, and E. Guild and V. Moreno-Lax, and M. Panizzon, and I. Roele, 'What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (October 11, 2017).

<sup>83</sup> See A. Hofmann, 'Resistance Against the Court of Justice of the European Union' iCourts Working Paper Series No. 121/2018.

outcomes reached. To focus upon de-legalisation alone is perhaps difficult as far as it puts focus upon the type of instruments deployed and their characterisation. Hyper-legalisation alone focusses upon the quantity and morass of rule-making, which strictly speaking, comes in an infinite variety thus far. The question remains as to what role the EU courts can play going forward in the AFSJ if this status quo, of hyper-legalisation and de-legalisation is to remain. De-legalisation appears mired in less than convincing legal narratives, which often disrespect the rule of law and human rights. The outcome of this judicial review exacerbates rather than cures the challenges posed by hyper-legalisation and de-legalisation. The contradictions now at the heart of the AFSJ appear more vivid and unsolved, than ever. It all perhaps returns to the question here of institutional balance and which checks and balances can be insured in this different era. The executive dominance of EU migration law appears now policed through light-touch adjudication. The future thus unfortunately appears grim where such precedents can be readily transferred onwards to other domains. National judicial ‘push back’ against the contradictions of the AFSJ is only recently starting to take effect (e.g. as to the arrest warrant).<sup>84</sup>

In more general terms, it is difficult to say that the external dimension of EU migration is truly constitutionalised at this point in time. In fact, perhaps the isolated judicial review cases reached here suggest an entirely different picture, where the rule of law appears eroded and the individual becomes more and more obscured and distant from meaningful protection. Nonetheless, the broader point made here as to the contradictory and irreconcilable core of the AFSJ remains the meta-level stumbling-block. Also, the unsatisfactory esoteric character of migration in more general terms at international level, straddling the margins of international law sub-fields and disciplines, remains an acute challenge. To some extent, migration as a policy field merely exemplifies rather than explains the general trend of the continuum of contradiction utilised here.

---

<sup>84</sup> See above, n12.