



Author: Martin Westlund

# EU Migration Governance: Competences, Human Rights Justifications and the Internal-External Divide

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## 1 EU Competence and Political Discretion in Migration

Migration is a shared competence between the EU and its Member States, yet the breadth of EU legislative powers means that little in this field remains purely national in character. Articles 77–79 TFEU confer far-reaching legislative powers on the EU institutions. These provisions empower the Union to adopt measures on border control, asylum, and immigration, including the harmonisation of national laws and the establishment of common procedures. Member States only retain competence over the volume of admission of third-country nationals and aspects of integration policy.

EU primary law establishes rather vague and open-ended standards, granting political actors wide discretion to shape migration policy – even within a formally rights-based framework. On the one hand, Article 79 TFEU emphasises control-oriented goals such as preventing irregular migration and strengthening external borders. On the other hand, Article 78 TFEU imposes binding obligations relating to international protection, including non-refoulement and compliance with international law. These objectives are not hierarchically ordered but must be balanced in the legislative process, leaving significant room for political decision-making. As Thym observes, the Treaty drafters made a conscious choice to lay down broad competences, thereby allowing EU institutions to develop migration policy gradually without politically

cumbersome Treaty revision.<sup>1</sup> This structural flexibility is particularly consequential in crisis situations, where the political sensitivity of migration tends to favour executive decision-making over deliberative or rights-oriented procedures.<sup>2</sup>

## 2 Human Rights Justifications in EU Migration Law

Human rights play a formally important but practically limited role in EU migration governance. While the EU Charter of Fundamental Rights and international human rights obligations are part of the EU's constitutional framework, they function primarily as background principles rather than operative decision-making criteria. Legislative acts in the field of migration routinely invoke human rights dimensions — references to dignity, non-refoulement, and the right to asylum appear in recitals and preambles — but these invocations do not consistently translate into rights-based reasoning in practice.

The activation of the Temporary Protection Directive (TPD) in 2022 for persons fleeing Ukraine illustrates this pattern.<sup>3</sup> EU institutions and Member States framed the response primarily through humanitarian considerations, solidarity, security, and European political responsibility, rather than explicit human rights claims.<sup>4</sup> Human rights were acknowledged in passing, as a contextual backdrop, but the activation decision was grounded in geopolitical and solidarity arguments. The Directive itself is constructed around the category of 'displaced persons' rather than 'refugees', which enables the EU to offer protection without committing to a stronger rights-based narrative.

This approach has concrete consequences. Sweden and Finland demonstrate different reception policies.<sup>5</sup> Finland adopted a relatively inclusive approach, granting personal identity numbers, access to municipal registration, and healthcare largely on equal terms with citizens. Sweden applied a more restrictive interpretation, initially excluding beneficiaries from population registration, limiting adults to emergency healthcare, and providing only minimal financial support comparable to that of asylum seekers. These divergent outcomes illustrate how the absence of binding human rights standards enables wide variation in the level of protection actually afforded.

## 3 The Internal-External Divide and Accountability Gaps

A central tension in EU migration governance lies in the divergence between the EU's internal constitutional role and its external geopolitical conduct. Internally, the EU develops and harmonises law through formal legislative procedures subject to parliamentary oversight and judicial review. Externally, it operates in a space where legal constraints are considerably weaker and political bargaining plays a stronger role. This produces what might be described as an 'internal–external divide' in human rights protection: standards applicable within the EU legal order are frequently not mirrored in the EU's dealings with third countries.

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<sup>1</sup> D Thym, *European Migration Law* (Oxford University Press, 2023) 29.

<sup>2</sup> D Thym, "'The Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 *Common Market Law Review* 1545–1548; B de Witte and E Tsourdi, 'Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council' (2018) 55 *Common Market Law Review* 1458; A Wallerman Ghavanini, 'The CJEU's Give-and-Give Relationship with Executive Actors in Times of Crisis' (2023) 2 *European Law Open*.

<sup>3</sup> Council Implementing Decision (EU) 2022/382 (Ukraine TPD activation); Commission Communication COM/2022/107 final, *European Solidarity with Refugees and those Fleeing the War in Ukraine*.

<sup>4</sup> M Westlund and O Chernenko, 'Why the Temporary Protection Directive was Activated: Solidarity, Geopolitics, and Humanitarian Considerations' (2026) 2 *Europarättslig tidskrift*.

<sup>5</sup> M Westlund and O Chernenko (2026).

The EU–Turkey Statement of 2016 exemplifies this dynamic. This arrangement outsourced responsibility for Syrian refugees to Turkey in exchange for financial and political concessions, bypassing formal legislative procedures and the safeguards they entail. When affected individuals sought judicial review before the CJEU, the Court declared it had no jurisdiction, on the basis that the Statement was attributable to Member States rather than EU institutions.<sup>6</sup> As a result of the accommodating reasoning of the Court, informal migration arrangements structured in a legally ambiguous manner effectively evade both parliamentary oversight and judicial scrutiny, while producing concrete effects on the rights of individuals.

Geopolitics further conditions these dynamics. The swift activation of the TPD for Ukrainians reveals that EU migration policy serves both humanitarian and strategic functions. The proximity of Ukraine to EU political and economic structures, combined with the need to demonstrate unity against Russia’s invasion, shaped a response that blended solidarity narratives with migration governance.<sup>7</sup> Similar situations have thus produced markedly different legal responses, depending on the geopolitical alignment of the affected population.

## 4 Conclusions and policy recommendations

Three main conclusions can be drawn from this overview. First, the EU has broad and flexible powers in migration, which gives political actors significant room to act, especially in times of crisis, with only limited control from the courts. Second, human rights justifications play a limited role in EU migration measures. Human rights are often mentioned as general principles, but are not framed as the motives for the migration policies. Third, migration measures carried out outside the EU often avoid the usual systems of oversight and accountability. This creates a gap in the protection of rights that is not addressed by the EU’s internal legal framework.

Reform should therefore focus on three areas. One concerns the reception conditions under the Temporary Protection Directive. The Directive should be revised to include binding minimum reception standards that covers registration, healthcare, housing, and social support so that the level of protection does not depend on Member State political priorities. These standards should be clearly defined and enforceable, ensuring a consistent baseline of protection across the Union and reducing disparities in national implementation.

The second concerns the external dimension of EU migration law. Oversight of external migration arrangements must be strengthened. The European Court of Auditors should play a more active role in assessing whether EU funding used in cooperation with third countries complies with fundamental rights standards. This would help ensure that budgetary control is linked to rights protection. Also, the European Parliament should make more assertive use of its prerogatives to scrutinise and challenge informal instruments, including by demanding transparency, debating their content, and conditioning funding or cooperation on respect for rights. A key recommendation is to establish an independent monitoring mechanism for the EU’s external migration activities. Building on the model proposed in the Migration Pact for border procedures, such a mechanism should systematically assess compliance with fundamental rights, including non-refoulement and access to remedies, in cooperation with third countries.

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<sup>6</sup> Cases T-192/16 *NF v European Council*; T-193/16 *NG v European Council*; T-257/16 *NM v European Council*.

<sup>7</sup> M Westlund and O Chernenko (2026).

