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published in
Contemporary Challenges to EU Legality
2021

DOI (link to publisher)
10.1093/oso/9780192898050.003.0003

document version
Publisher’s PDF, also known as Version of record

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Link to publication in VU Research Portal

citation for published version (APA)

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Challenges to EU Legality in the Field of Asylum and Migration Law

Evelien Brouwer*

1. Introduction

With the adoption of the Tampere conclusions in 1999, the heads of state of the then 15 Member States of the EU provided the basis for the legislative framework for a common EU asylum and migration policy.1 Since then, immigration law, traditionally perceived as belonging to the legislative area in which Member States retained their sovereignty, has been extensively ‘Europeanized’ whether it concerns asylum and refugee law, freedom of movement of migrant workers, family reunification, or return and detention of third-country nationals. As highlighted by Groenendijk, among others, there are few decisions related to migration law which are not covered by EU law.2 Even nationality law, one of the preserved fields of national sovereignty, is ‘touched’ by general principles of EU law, as we know since the famous Rottmann and Tjebbes cases on the protection of the fundamental right of EU citizenship.3 Due to this Europeanization or application of ‘EU legality’, general principles of EU law, including effectiveness, proportionality, and the right to effective judicial protection, have been incorporated in asylum and migration laws. Even where these EU rules offer Member States much leeway for a restrictive application, in its case-law the Court of Justice of the European Union (CJEU) has limited this discretionary power by treating EU immigration and asylum as ‘normal EU laws’. This case-law, as will be dealt with in Section 2, has often resulted in a stronger legal protection for third-country nationals.

More recently, this ‘strengthening effect’ of EU legality for third-country nationals is being challenged by several developments in the EU. First, especially since the influx of asylum seekers in 2015–2016, we have seen that Member States

* The author thanks in particular Joanne Scott and Claire Kilpatrick for their useful comments during the EUI seminar organized to discuss drafts of this publication, February 2019. Of course, any errors remain my own.

3 Case C-135/08, Rottmann (EU:C:2010:104); Case C-221/17, Tjebbes (EU:C:2019:189).
are able to deviate from shared obligations and responsibilities due to the lack of political will of the Commission and other Member States to combat this, but also due to the lack of effective EU tools to enforce the implementation of EU laws. An important exception in this regard has been the actions by the Commission against Hungary, the Czech Republic, and Poland. This resulted in the judgments in April 2020 in which the CJEU found that the three countries failed to fulfills their obligations from Decisions 2015/1523 and 2015/1601, which were adopted during the asylum crisis in order to relocate people from Greece and Italy to the other Member States.\(^4\) Whereas the Common European Asylum System (CEAS) provides harmonized rules on asylum reception, procedures, and qualification for international protection, it is clear that EU Member States have failed to offer an effective and shared approach to migration.\(^5\) Aside from the adoption in 2015 of emergency measures, providing for the relocation of asylum seekers from the overburdened countries Greece and Italy, EU policies have been increasingly focused on the strengthening of external border controls, including the use of technologies, joint maritime operations, and cooperation with third states. On the ‘inside’, Member States persist with the continuation of the ‘Dublin system’, a mechanism to determine the responsible Member State for an asylum application, which in practice results in lengthy procedures, costly decision-making, and only in relatively few cases leads to actual Dublin transfers; this approach is also reflected in the New Pact on Migration and Asylum, presented by the European Commission in September 2020.\(^6\) Here we see that ‘EU legality’ fails because of, on the one hand, the insistence of Member States on applying the rather bureaucratic rules of the Dublin Regulation and, on the other hand, the lack of means to ensure the implementation of the underlying goals of Dublin and CEAS. These goals are swift determination of asylum claims and offering protection to those in need of international protection.

Another challenge to EU legality is related to one of the underlying principles of EU cooperation: the principle of mutual trust. Within the Area of Freedom, Security and Justice (AFSJ) several instruments, including the European Arrest Warrant (EAW), the Dublin Regulation, and the Schengen border and visa policy,

\(^4\) Joined cases C-718/17, C-719/17, and C-715/17, Commission v. Hungary, Czech Republic, and Poland (EU:C:2020:257).


are based on mutual trust. In these cases, national authorities, and to an even greater extent national courts, are confronted with a difficult balancing act between the implementation of mutual trust and the protection of fundamental rights. In its case-law, the CJEU has defined conditions and criteria where trust may be ‘rebutted’, especially in cases dealing with the EAW and the Dublin Regulation. Despite this case-law, achieving a balance between mutual trust and fundamental rights remains a complicated task for national courts. Furthermore, there are other, less documented, areas of law in which the mutual recognition of national decisions, connected with the wide discretionary power of national authorities, may result in the violation of fundamental rights. This concerns, in particular, decision-making with regard to the refusal of entry and residence of third-country nationals based on public order and security grounds. As will be dealt with in Section 3.A, the combination of national sovereignty with regard to the definition of ‘inadmissible aliens’ and the obligation of mutual enforcement of national entry bans and public order considerations, affects the right of effective judicial protection of third-country nationals.7

A third development challenging ‘EU legality’ concerns the externalization of border and immigration control and the deliberate choices of Member States and EU institutions to exclude migration and asylum measures from the applicability of EU law.8 This externalization is, of course, most visible in the bilateral agreements between the EU and third states on border control and the interception of irregular immigrants by third states, such as the EU-Turkey Statement of 2016. As we will see later (in Section 3.C.1), by denying the status of this bilateral agreement as an EU act, the CJEU legitimized the exemption of Member States’ responsibility under EU law. Another example of a formal and narrow interpretation of EU law concerns a judgment of 2017, in which the CJEU concluded that the issuing of a humanitarian visa would not fall within the scope of the Visa Code. The goal of this contribution is to illustrate that ‘EU legality’ is a double-edged sword. The first part of this chapter describes how the CJEU, by the mere application of general principles of EU law, offered in its case-law important tools or criteria strengthening rights, and legal protection for third-country nationals. The second part focuses on developments and examples of case-law by the CJEU, with regard to mutual trust and the use of public order criteria in immigration law and the externalization of EU measures. In this more recent case-law, the CJEU seems to take a more restrictive role with regard to the interpretation and meaning of EU values and principles in immigration law cases. I will argue that this approach further challenges

the applicability of general principles of EU legality, including the right to effective judicial protection for third-country nationals.9

2. EU Legality as a Challenge to Migration Law

A. Principles of Fundamental Rights, Effectiveness, and Proportionality

*European Parliament v. the Council* concerns one of the first judgments in which the CJEU confronted Member States with the extent of obligations included by the EU legislator itself, and thus the consequences of ‘EU legality’ in EU migration law.10 In this case, the CJEU dealt with the claim of the European Parliament that Directive 2003/86 on the right to family reunification for third-country nationals legally residing in the EU11 (the Family Reunification Directive (FRD)) was to be annulled because of violation of fundamental rights and the obligation to protect the rights of the child. Although the CJEU rejected this claim by concluding that the Directive was not unlawful, this judgment provided important considerations, limiting the powers of Member States to adopt or apply a restricted family reunification policy. First, the CJEU held that as the FRD includes precise positive obligations with corresponding and clearly defined individual rights, Member States are obliged to protect the right to family reunification in determined cases, without being left a margin of appreciation.12 Second, the CJEU underlined the obligation of Member States to respect the principles included in the Directive, such as the principle of proportionality and the obligation to decide in the best interest of the child.13 In a later judgment, *O, S, and L*, the CJEU referred directly to the right to family life as protected in Article 7 of the Charter on Fundamental Rights (CFR) and the right of the child, protected in Article 24 CFR, thus stressing the obligation of Member States to apply the FRD in accordance with fundamental rights.14

In *Chakroun*, the CJEU further applied the principle of effectiveness to the FRD.15 In this judgment, the CJEU declared that the FRD precluded the (at that time) Dutch use of a reference level of income (120 per cent of national minimum income) as the sole means of proving the ‘stable and regular resources’ of the person living within the EU, necessary to allow that person’s family reunification

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11 OJ 2003 L 251/12.

12 Ibid. para. 60.

13 Ibid. paras 66, 73.


15 Case C-578/08, *Chakroun* (EU:C:2010:117).
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with a third-country national from outside the EU. The CJEU, quoting its decision in European Parliament v. Council, emphasized that the EU Directive includes ‘precise positive obligations’ while respecting Article 8 of the European Convention on Human Rights (ECHR). According to the CJEU, where authorization of family reunification is the general rule, on the basis of the FRD, the margin for manoeuvre left for Member States may not undermine the objective of the Directive and its effectiveness.\(^\text{16}\)

The effectiveness test was also applied by the CJEU in *K and A*, which dealt with the Dutch requirement for third-country nationals to pass an integration test abroad before being allowed family reunification.\(^\text{17}\) The CJEU was asked whether this requirement was compatible with Article 7(2) FRD, which allows Member States to require third-country nationals to comply with ‘integration measures in accordance with national laws’. As the content of ‘integration measures’ was not further defined by the EU legislator, the aim of this provision was not clear. On the one hand, it was interpreted (among others by the Dutch government) as a legal basis allowing further restrictions to family reunification. On the other hand, it was argued that this implied a duty for the state to take a more active role in supporting the integration of third-country nationals. The CJEU held that as such the Dutch requirement was not in violation of Article 7(2) FRD and thus allowed the requirement to pass the integration test as a condition for the exercise of the right to family reunification. However, it did so by underlining the principle of proportionality as one of the general principles of EU law. This principle implies that the conditions imposed on applicants for such requirements of integration should not exceed what is necessary to achieve its aims. Therefore, national authorities must take into account the individual circumstances of the cases, including age, level of education, or health of the applicants, while respecting the objective of the FRD, which is to promote family life.\(^\text{18}\) According to the CJEU, this condition is supported by the obligation in Article 17 FRD to examine applications for family reunification on a case-by-case basis.\(^\text{19}\)

Within the framework of the Citizenship Directive 2004/38,\(^\text{20}\) the CJEU dealt in *Coman* with the refusal of a residence right to a third-country national spouse of an EU citizen because of the non-recognition of same-sex marriages in a Member State.\(^\text{21}\) In this case, the CJEU addressed in particular the tension between public policy and the national identity of individual Member States on the one hand, and the goals of Article 4(2) of the Treaty on European Union (TEU) and Article 21 of the Treaty on the Functioning of the European Union (TFEU), on the right to

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\(^{16}\) Ibid. paras 41 and 43.


\(^{18}\) Ibid. paras 51, 56.

\(^{19}\) Ibid. paras 58–60.

\(^{20}\) OJ 2004 L 158/77.

\(^{21}\) C-673/16, *Coman* (EU:C:2018:385).
free movement, on the other. According to the CJEU, ‘spouses’ in Articles 2(2)(a) and 7 of the Citizens Directive would also cover spouses in same-sex marriages lawfully conducted in another Member State. Therefore, within the scope of this Directive, residence rights of family members of EU citizens who want to return to the Member States of their nationality cannot be made subject to the stricter conditions of that latter state. The CJEU underlined that Member States’ discretion to define the scope of the freedom of movement is limited by fundamental principles of EU law, including the fundamental right to private life and family life, and the principle of effectiveness.22

B. The Right to Effective Judicial Protection

Of even more ground-breaking importance for national migration laws, has been the case-law of the CJEU underlining the right to effective judicial remedies of third-country nationals when assessing national decisions or measures within the field of migration and asylum policies.

Dealing with EU legislation in general, the close connection between effective implementation of EU rules and the individual right of access to legal protection in order to safeguard that implementation, was emphasized at an early stage by both the EU legislator and the CJEU. The EU legislator provided in the first place for a ‘judicial dialogue’ between national courts and the CJEU, by the instrument of preliminary procedures in (now) Article 267 TFEU to ensure a coherent and equivalent implementation of EU law in cooperation with the CJEU. Article 19 TEU, on the role of the CJEU, obliges individual Member States to ensure in their national legal systems the availability of remedies ‘to ensure effective legal protection law in fields covered by EU law’.23 Already in 1986, in Johnston the CJEU had held that this ‘requirement of effective judicial control reflects general principles of law’, referring to constitutional traditions of the Member States and Articles 6 and 13 ECHR.24

With the inclusion of Article 47 on the right to effective judicial protection in the CFR, which became binding in 2009, the EU legislator explicitly chose to combine the guarantees of the right to fair trial in Article 6 ECHR with the right to effective

22 Ibid. paras 48–53.
23 See e.g. Case 64/16, Associação Sindical dos Juízes Portugueses (EU:C:2018:117): ‘The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter’ (para. 35) and ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’ (para. 36).
24 Case C-222/84, Johnston (EU:C:1986:206) paras 18–21.
remedies, as protected in Article 13 ECHR. In Maaouia, the European Court of Human Rights (ECtHR) had explicitly excluded immigration law decision-making from the scope of Article 6 ECHR.\(^\text{25}\) Therefore, the inclusion of Article 47 in the CFR was a major development for immigration law procedures covered by EU law, the practical effect of which became clear in several judgments of the CJEU. Important judgments in this area dealt with, for example, the Dublin Regulation and the Visa Code. Both concern EU instruments of which the Member States had generally assumed that, even if the EU legislator included ‘a right to appeal’ in the text itself, Member States retained the discretionary power to decide upon the scope and content of these remedies. In Ghezelbash, the CJEU underlined the importance of a legal remedy for the asylum seeker against the incorrect application of Dublin criteria when dealing with a decision that the asylum seeker was to be transferred to another ‘Dublin state’\(^\text{26}\). In this case, the CJEU deviated from its earlier Abdullahi judgment.\(^\text{27}\) In Abdullahi, dealing with the interpretation of the former Dublin II Regulation, the CJEU had denied the right of appeal against transfer decisions based on the application of Dublin criteria. The CJEU explains this deviation in Ghezelbash by referring to the fact that, in contrast to the former Dublin II Regulation, Article 27 of the Dublin III Regulation 604/2013\(^\text{28}\) explicitly provides the right to have an effective remedy, and that Dublin III provides ‘various rights and mechanisms guaranteeing the involvement of asylum seekers in the process for determining the Member State responsible,’ such as the right to obtain information or to have a personal interview.\(^\text{29}\) In a later judgment, the CJEU also affirmed the right of asylum applicants to obtain legal remedies against transfer decisions which are based on the expiry of the Dublin time limits.\(^\text{30}\)

In the El Hassani case, the CJEU was asked to provide an explanation of the right to legal remedy against a (short-term) visa refusal or, with other words, the scope and content of Article 32(3) of the Visa Code,\(^\text{31}\) according to which ‘Applicants who have been refused a visa shall have the right to appeal.’\(^\text{32}\) The CJEU held that, contrary to the perception prevailing at that time, this provision does not entail a discretionary power for Member States, by explicitly underlining the close relationship between Article 32 Visa Code and Article 47 CFR.\(^\text{33}\) According to the CJEU, even if it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, this

\(^{25}\) ECtHR, Maaouia v. France, Appl. no. 39652/98, 5 October 2000.


\(^{27}\) Case C-4/11, Bundesrepublik Deutschland v. Kaveh Puid (EU:C:2013:740) and Case C-394/12, Abdullahi v. Bundesasylamt (EU:C:2013:813).

\(^{28}\) OJ 2013 L 180/31.


\(^{30}\) Case C-201/16, Shiri (EU:C:2017:805).


\(^{32}\) Case C-403/16, El Hassani (EU:C:2017:960).

\(^{33}\) Ibid. paras 33–42.
is based on the condition ‘that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).’\(^{34}\) Where ‘in examining a visa application the national authorities have a broad discretion as regards the conditions for applying the grounds of refusal laid down by the Visa Code and the evaluation of the relevant facts, the fact remains that such discretion has no influence on the fact that the authorities directly apply a provision of EU law.’\(^{35}\) This means that the CFR applies, including the right to effective judicial protection in Article 47 CFR. Therefore, Article 32(3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires Member States ‘to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are a matter for the legal order of each Member State in accordance with the principles of equivalence and effectiveness.’\(^{36}\)

These repeated references by the CJEU to the application of Article 47 CFR in EU immigration law, and thus to the effects of ‘EU legality’, obliged Member States to change their national laws and procedures to safeguard the right to effective judicial protection of third-country nationals.

### 3. Challenges to EU Legality: Mutual Trust and National Sovereignty and Externalization

In the preceding sections I described the importance of EU law as a legality constraint and the role of the CJEU as ensuring that immigration rules are implemented in accordance with general principles of EU law. The following sections deal with different mechanisms within the EU by which Member States evade their responsibilities under EU law, challenging the principle of EU legality on the basis of the principle of mutual trust. Section 3.C describes the effect of the externalization of migration control.

Cases dealing with the mutual recognition of immigration law or judicial decisions, establish the tension between the EU principle of mutual trust, on the one hand, and other general principles of EU law, including the right to effective judicial protection. In their landmark judgments in 2011 dealing with the Dublin Regulation, both the ECHR and the CJEU have underlined that mutual trust cannot be considered irrebuttable.\(^{37}\) National authorities and courts have the duty to assess whether exceptions to mutual trust are necessary to safeguard the

\(^{34}\) Ibid. para. 26.

\(^{35}\) Ibid. para. 36.

\(^{36}\) Ibid. para. 42.

\(^{37}\) Case C-411/10, N.S. v. SSHD (EU:C:2011:865); ECHR, M.S.S. v. Belgium and Greece, Appl. no. 30696/09.
absolute right in Article 3 ECHR and Article 4 CFR, on the protection against inhuman or degrading treatment. In later judgments, this exception to mutual trust was further defined with regard to specifically vulnerable persons, such as individuals with health problems and children. Nevertheless, the criteria and conditions under which Member States must refrain from ‘mutual trust’, also outside the scope of the Dublin Regulation, remain difficult for national courts to assess and apply. The next sections (Sections 3. A and 3. B) focus on two examples of mutual trust in immigration law not related to the Dublin Regulation: the interpretation of public order grounds in immigration law decisions and visa refusals based on bilateral representation agreements within the scope of the Visa Code. I will argue that the application of mutual trust combined with a lack of harmonization of laws or uniform interpretation of definitions within the aforementioned fields, may affect the effective judicial protection of third-country nationals.

A. The Use of the ‘Public Order’ Criterion in EU Migration Laws

The rules on entry conditions at the external borders of the EU are included in Article 6 of the Schengen Borders Code (SBC). One of these criteria entails that third-country nationals should not be reported for the purpose of refusal of entry in the Schengen Information System (SIS), as provided in Regulation 1987/2006. Although the relationship between the different rules applying is not clear, SIS alerts for the purpose of refusal can be based on two grounds mentioned in Article 24(1) (a) and (b): either an ‘entry ban’ which follows a return decision on the basis of the Return Directive 2008/115, or a national decision based on public order or national or public security grounds. This second category of public order and security grounds can be based on either a conviction by a Member State of an offence, punishable by a term of imprisonment of at least one year, or when there are serious grounds for believing that the individual ‘has committed serious criminal offences or concerning whom there are clear indications of an intention to commit such offences on the territory of a Member State.’ These grounds, already included in the Schengen Convention of 1990, have been criticized for providing a wide and disproportional basis for refusal of entry and expulsion. For example, a conviction

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40 Regulation 1987/2006, OJ 2006 L 381/4. This Regulation has been recently amended by SIS II Regulation (EU) 2018/1861, OJ L 312/14, adding a new category for SIS alerts, namely for third-country nationals who circumvented or attempted to circumvent EU or national laws on entry or stay, and adding the criterion that a SIS alert will take effect in SIS as soon the third-country national has left the territory of the Member States.
41 OJ 2008 L 348/98.
for a minor crime in one of the Schengen States may result in a long-term banishment from the whole Schengen territory. Furthermore, the public order and security grounds provide states a wide margin of appreciation of not only who is to be considered as a risk in terms of committing a serious crime, but also what is to be considered a serious crime.

The power of states to issue a SIS alert is restricted by two conditions, added in the SIS II Regulation of 2006. First, before issuing a SIS alert for the purpose of refusal, Member States must determine whether the case is ‘adequate, relevant, and important enough’ (Article 21 SIS II Regulation) and, second, a SIS alert ban based on Article 24(1)(a) (public order and security grounds) must be based on an individual assessment. Therefore, any decision to report a person as ‘inadmissible’ into the SIS is bound by the purpose of the SIS (to ‘ensure a high level of security within the area of freedom, security and justice of the European Union, including the maintenance of public security and public policy and the safeguarding of security in the territories of the Member States’) and the principle of proportionality.

A more recent instrument, which involves the recording of national criminal convictions and which may be used for immigration control, concerns the ECRIS-TCN. The ECRIS-TCN Regulation 2019/816, adopted in April 2019, provides for a centralized system containing information on third-country nationals following national decisions related to criminal convictions or prosecutions. This may include criminal convictions of third-country nationals based on violations of national immigration laws. Following Article 7 of the Regulation, information in ECRIS-TCN can be requested for criminal proceedings or ‘for any of the other purposes mentioned in this provision, if provided by national law’. These ‘other purposes’, as described in the Regulation, may include security clearances, vetting for voluntary activities involving contacts with children or vulnerable persons, and also ‘visa, acquisition of citizenship and migration procedures, including asylum procedures’. This means that national immigration and asylum authorities may, if provided by national law, check ECRIS-TCN and may decide to use information on criminal records from other Member States in their immigration law decision-making.

In my view, this use of SIS and ECRIS-TCN is an example of ‘liminal legality’ within the scope of EU law, meaning that the identity of acts or actors are insufficiently clear. EU law requires Member States to report third-country nationals issued with an entry ban into SIS, or to store information on criminal convictions of third-country nationals into ECRIS-TCN, without harmonizing the specific grounds for such an entry ban or conviction. With regard to the entry bans in SIS, this results in a compulsory refusal of entry or stay for the Schengen territory, whereas information in ECRIS-TCN may be used for immigration law purposes.

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This use of ECRIS-TCN reinforces national sovereignty at two levels: with regard to the reporting of individuals in ECRIS-TCN and with regard to the use of this large-scale database. This brings me to the necessity of a uniform interpretation of ‘public order grounds’ in EU immigration law and the interpretation by the CJEU in its case-law, including the more recent judgments of 12 December 2019.

2. Interpretation of ‘Public Order’ in CJEU Case-law

In different EU immigration laws, entry or residence permits of third-country nationals can be rejected or withdrawn on the basis of public order and security grounds. Whereas the EU Citizenship Directive 2004/38, following previous case-law by the CJEU, includes the more detailed criterion that the freedom of movement and residence of EU citizens and their family members may only be restricted if the personal conduct of the individual represents ‘a genuine, present, and sufficiently serious threat to public policy’, there is a lack of clarity about the scope and content of public order criteria with regard to third-country nationals who fall outside the scope of this Directive. Initially, this problem seemed partially solved by the judgment Zh. and O., in which the CJEU addressed the ‘public order criterion’ when dealing with an entry ban following a return decision on the basis of the Return Directive. On the basis of the Return Directive 2008/115, when a return decision is issued to an irregular migrant, normally a period is granted for voluntary return, except if there is a risk of absconding or ‘risk for public policy’, in accordance with Article 7(4) of the Return Directive. If no voluntary period for return is granted, the return decision will be followed by an entry ban to be reported into SIS II. For the assessment of the decision whether or not a third-country national should be granted a voluntary period of return, the CJEU has been asked by national courts for an interpretation of ‘the risk for public policy’. In Zh. and O., the CJEU applied the same criteria as with regard to EU citizens on the basis of the Citizenship Directive, stating that the ‘risk to public policy’ must be assessed on a case-by-case basis in order to ascertain whether the personal conduct of the third-country national concerned poses ‘a genuine and present risk to public policy’. The CJEU held that while ‘Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another’, these requirements must be interpreted strictly ‘to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union’. Furthermore, according to the CJEU, the evaluation of a public order risk requires the same individual assessment as provided in the Citizenship Directive. Following this judgment, Member States are required to assess, on a case-by-case

43 OJ 2004 L 158/77.
44 Case C-554/13, Zh. and O. (EU:C:2015:377).
basis, whether the personal conduct of the third-country national concerned poses a genuine, present, and sufficiently serious threat to public policy. Finally, the CJEU made clear that this decision must be based on an individual examination of the case concerned and respect the principle of proportionality.

In the Zh. and O. judgment, the CJEU did not explicitly state that ‘public order’ must be treated as an autonomous concept, to be applied in the same way within all EU immigration laws. As such, it was not clear whether the criteria based on the Citizens Directive should also be applied to other EU instruments dealing with third-country nationals. It was only with regard to the scope of ‘public security’, in the Fahimian case of 2017, that the CJEU held that Member States when dealing with applications for student visas have a wider discretionary power than that based on the Citizenship Directive. This lack of clarity was one of the reasons why, in 2018, the Dutch highest administrative court submitted preliminary questions dealing with the interpretation of ‘public order’ in decisions based on the FRD and the SBC.

In its judgments of 12 December 2019, the CJEU decided that both with regard to the FRD and the SBC the concept of ‘threat to public policy’ does not ‘necessarily have to be understood as referring exclusively to individual conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member States concerned’. Therefore, according to the CJEU, the public order criterion on the basis of the FRD and the SBC should not necessarily be the same as that applied on the basis of the Citizenship Directive. The CJEU takes a formal approach, referring on the one hand to the legal texts of the FRD, and on the other, in the case of border controls, to the wide discretion of the national authorities to determine whether a third-country national is a threat to public policy within the meaning of Article 6(1) SBC. It seems disappointing that the CJEU did not use this opportunity to ensure a uniform interpretation of ‘public order grounds’ in EU migration law. It is arguable that when the protection of public order within the EU is at stake, and it is necessary to assess the nature and scope of the threat the presence of an individual on the territory would involve, the nationality or status of this person is irrelevant. With regard to the implementation

46 In Case 240/17, E. (EU:C:2018:8). Furthermore, in para. 49, the CJEU repeated the criteria with regard to the scope and definition of ‘public order’ as developed in Zw. and Zo.
49 Joined cases C-381/18 and C-382/18, G.S. and V.G. (EU:C:2019:1072) para. 54, dealing with the FRD and Case C-380/18, E.P. (EU:C:2019:1071) paras 28–29, dealing with the SBC.
of the FRD, the objective of which is the protection of the right to family reunification, one may also question why the CJEU did not use the same reasoning as in the Zh. and O. case. As we have seen, in this case the CJEU argued that because of the involvement of fundamental rights when the expulsion of third-country nationals is at stake, the same public order criterion must be applied as in the Citizenship Directive. But the justification in the case of border controls is also disputable. The SBC explicitly states that border control is in the interest of all the states which have abolished internal border control and to prevent any threat to the internal security, public policy, public health, and international relations of all these Member States.51 Considering this goal, it is illogical that national authorities should be able to apply their own interpretation of threats to public order or security.

With regard to both the FDR and the SBC, the CJEU did, however, stress the obligation for both authorities and courts of a more individual examination. Referring to the EU principle of proportionality, the CJEU held that the application of public order grounds cannot go beyond what is necessary to ensure that public policy is safeguarded. According to the CJEU dealing with the rejection of an application for family reunification on the basis of FRD this means that national authorities cannot ‘automatically take the view that a third-country national is a threat to public policy … merely because he or she has been convicted of some or other criminal offence’.52 This means, according to the CJEU, that taking into account Article 17 FRD, there must be an individual assessment ‘taking due account of the nature and solidity of that person’s family relationships, of the duration of his or her residence in the Member State and of the existence of family, cultural and social ties with his or her country of origin’. With regard to the refusal of entry based on the SBC in the absence of a conviction, the CJEU held that, based on the principle of proportionality, ‘the infringement which the third-country national at issue is suspected of having committed must be sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that national’s stay on the territory of the Member States being brought to an immediate end’.53 Furthermore, national authorities may only invoke a threat to public policy if there is a ‘consistent, objective and specific evidence that provides grounds for suspecting that that third-country national has committed such an offence’. This criterion adds to the one the CJEU formulated in the aforementioned Fahimian case dealing with the notion of public security. In this case, the CJEU underlined that Member States in order to determine whether an applicant for a student visa ‘represents a threat, if only potential, to public security’, should ‘perform an overall assessment of all the elements of that person’s situation’. According to the CJEU, such ‘evaluations involve predicting the foreseeable conduct of the applicant for the visa,

51 Preamble 6 and Art. 6(1)(e) SBC.
52 Joined cases C-381/18 and C-382/18, G.S. and V.G. (EU:C:2019:1072) paras 65–70.
and must be based inter alia on an extensive knowledge of his country of residence and on the analysis of the various documents and of the applicant’s statements.\(^{54}\) Therefore, even if aforementioned case-law does not provide clear rules on the content and the conditions for further substantiation of the public order grounds in immigration law decisions, it underlines the requirement of case-by-case decision-making and the necessity to comply with the principle of proportionality. For third-country nationals, it nevertheless remains difficult to challenge the wide discretionary powers with regard to the application of public order grounds, especially when—as seen in the previous sections on the use of SIS and ECRIS-TCN—such decisions are based on public order grounds from other Member States.

### B. Visa Representation in the Visa Code and Access to Legal Remedies

Another example of how mutual trust may challenge fundamental rights of third-country nationals, concerns the cooperation of Member States based on the Visa Code. In July 2019, the CJEU published a judgment dealing with the right to effective judicial remedies in the case of visa representation.\(^{55}\) The Visa Code allows Member States, on the basis of bilateral agreements, to decide that visa applications for one state can be submitted to and be decided by another state. This means, in practice, that if in a third country a Member State is represented by another Member State, visa applications for the former state must be submitted in the latter state. Based on Article 8(4) of the current Visa Code, the Member State may even agree that the latter state may reject a visa application. For years, there has been a discussion on whether a visa applicant in the case of a rejection by the representing state has the right of appeal in the represented state (or state of destination) or whether the applicant should lodge an appeal in the representing state.\(^{56}\) Article 32(3) only provides that appeals must ‘be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State.’ The European Commission and several Member States have argued that the representing state is the state taking the final decision. However, in practice, this interpretation causes problems for an applicant whose visa for the Member State of destination has been refused by the embassy representing that Member State: as the applicant must lodge an appeal in the second state, there may be problems with regard to language, higher fees, role sponsors, etc.

\(^{54}\) Case C-544/15, Fahimian (EU:C:2017:255) paras 40–43.

\(^{55}\) Case C-680/17, Vethanayagam (EU:C:2019:627).

\(^{56}\) In 2019, the Visa Code was amended by Regulation 2019/1155 of 20 June 2019, OJ 2019 L 188/25. Following this amendment, visa representation, including refusals on behalf of the represented state, becomes the more general rule.
access to legal aid, etc.\textsuperscript{57} Therefore it has been submitted that the state of destination, or the state on whose behalf the visa application has been rejected, should be considered to be the state taking the final decision. In several reports it was documented that the right to effective judicial protection was affected by the obligation to start procedures in another EU state, especially where applicants already have contacts or representatives in the state of destination. In 2017, a Dutch court submitted preliminary questions to the CJEU in the \textit{Vethanayagam} case, concerning the visa application of a national from Sri Lanka. The case was especially interesting because the visa refusal was taken by the Swiss embassy in Colombo on behalf of the Dutch authorities, based on an agreement between the Netherlands and a non-EU state. In its preliminary questions, the Dutch court submitted the question whether the Visa Code allows a sponsor to bring an appeal in its own name against a visa refusal (which in the Netherlands is allowed and is used by lawyers, for example, and also by employers of the applicants). Furthermore, the national court requested from the CJEU an interpretation of ‘final decision’ in Article 8(4) of the Visa Code and asked whether a reading of Article 32(3), on the basis of which an appeal can only be lodged in the representing state, would be in accordance with the right to effective judicial protection. Finally, the court requested that the fact that Switzerland, as a non-EU state, is not bound by the same standards as other EU Member States should be taken into account when answering the questions related to the right to appeal. In the judgment, the CJEU took a formal approach, deviating in all answers from the opinion of Advocate-General Sharpston.\textsuperscript{58} First, the CJEU decided that, despite the procedural autonomy of Member States (to which the Advocate-General referred in her opinion), the Visa Code would not allow sponsors to bring an appeal in their own names. Second, the CJEU found that where there is a bilateral representation arrangement providing that the consular authorities of the representing Member State are entitled to take decisions refusing visas, ‘it is for the competent authorities of that Member State to decide on appeals brought against a decision refusing a visa’. And, third, a combined interpretation of Article 8(4)(d) and Article 32(3) of the Visa Code according to which an appeal against a decision refusing a visa must be conducted against the representing state, is compatible with the fundamental right to effective judicial protection.

Addressing the question related to Switzerland as a non-EU state, the CJEU referred to the fact that Switzerland is bound by the ECHR and to the text of the Preamble to the EU Swiss Association Agreement which states that the Schengen cooperation is based on principles of freedom, democracy, rule of law, and


respect for fundamental rights. Accordingly, the CJEU found that the interpretation of the Visa Code, on the basis of which one must lodge an appeal against the representing state (including a non-EU state such as Switzerland), is consistent with the fundamental right of effective judicial protection.\footnote{Case C-680/17, Vethanayagam (EU:C:2019:627) para. 88.} The CJEU did not mention any of the points submitted by the Advocate-General related to the fact that Switzerland as a non-EU state is not bound by general principles of EU law such as effectiveness and proportionality and the right in Article 47 CFR. Therefore, the CJEU did not take into account that, as stated earlier, Article 13 ECHR does not provide the same scope of protection as Article 47 CFR and Article 6 is not applicable in immigration law procedures. Furthermore, the CJEU did not address the point raised by the Advocate-General that Swiss courts cannot submit preliminary questions to the CJEU.\footnote{See Opinion of Advocate General Sharpston, at para. 82. I referred to this problem when dealing with mutual trust and the issue of ‘variable geometry’ in EU law: Brouwer, ‘Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust’, in E. Brouwer and D. Gerard (eds), Mapping Mutual Trust, Understanding and Framing the Role of Mutual Trust in the EU, Florence/Fiesole: EUI Working Papers MWP 2016/3, at 65.} That this non-observance of EU principles is not a theoretical problem was illustrated in the underlying case where the applicant had to pay a preliminary sum for the costs of the proceedings on the basis of Swiss law and at the same time was refused any financial aid to cover these costs. As has been ruled by the CJEU in \textit{DEB},\footnote{Case C-279/09, DEB v. Germany (EU:C:2010:811) paras 59–63.} such denial of financial aid may result in a breach of the right to effective judicial protection in Article 47 CFR.\footnote{C-225/19 and C-226/19 based on the preliminary questions of the District Court Den Haag zp Haarlem, 31 July 2018, AWB 17/15895 and AWB 18/7781.} Taking into account the conclusions in \textit{El Hassani}, where the CJEU affirmed the importance of effective judicial protection in accordance with Article 47 CFR, the \textit{Vethanayagam} judgment seems to be a deviation from the CJEU’s own previous case-law.

In this regard, it is relevant to refer to a comparable problem on the basis of the Visa Code, which concerns the consultation procedure. According to Article 22, Member States may submit a list of third countries to the European Commission and require that if nationals from one of these countries apply for a visa for another Member State, the visa authorities of the issuing state must consult the authorities from the former state first. If the consulted state subsequently objects against the issuing of a visa, the consulting state must refuse the short-term visa even if the applicant does not intend to visit the objecting state. This cooperation is based on interstate trust. In practice, it means that the consulting state may refuse a visa on public order or public security grounds without knowing the grounds of objection of the objecting state. In March 2018, the Dutch District Court submitted preliminary questions to the CJEU in two cases in which the Dutch visa authorities had refused a short-term visa to third-country nationals following objections from other Member States (Hungary and Germany, respectively).\footnote{Case C-680/17, Vethanayagam (EU:C:2019:627) para. 88.} In these cases,
the Dutch authorities did not provide information on the reasons for refusal and claimed they had no discretion to issue a visa in the face of the objection of another state. Furthermore, the applicants were referred to the objecting states with regard to their right to appeal under Article 32 of the Visa Code, despite the fact that due to the absence of a formal decision, it was difficult if not impossible for the applicants to lodge legal proceedings in the respective states. In its judgment of 24 November 2020, answering these preliminary questions, the CJEU emphasized that to ensure that the right to judicial protection is effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision itself, or by requesting and obtaining notification of those reasons. With regard to the role of the courts, the CJEU made a distinction between on the one hand the review by courts of the Member State which adopted the final decision of refusing a visa, which concerns the examination of the legality of that decision, and on the other hand the review of the merits of the objection to the issuing of a visa raised by another Member State. The CJEU emphasized the obligation of the Member State refusing a visa, to ensure that the rights of defence and the right to a remedy of the visa applicant are guaranteed. This includes the obligation to indicate in the visa refusal decision, the identity of the Member State which raised that objection, the specific ground for refusal on the basis of that objection, and, ‘where appropriate’, the essence of the reasons for that objection. According to the CJEU, the courts of the Member State adopting the final decision, cannot examine the substantive legality of the objection raised by another Member State to the issuing of the visa. However, to enable the visa applicant to exercise in accordance with Article 47 CFR, his or her right to challenge such an objection, the Member State which adopted the final decision refusing a visa, should provide information on the authority the applicant may contact in order ‘to ascertain the remedies available in that other Member State’.

C. Externalization: Keeping EU Measures Outside the Scope of EU Law

1. Ceci n’est pas une Acte d’EU: The EU-Turkey Statement

In the decision on the EU-Turkey Statement of 18 March 2016, the General Court dismissed an action for annulment of this bilateral agreement. The annulment claim was submitted by a Pakistani asylum seeker who had entered Greece by boat from Turkey on 19 March 2016 and applied for asylum in Greece on 11 April 2016. On the basis of the EU-Turkey statement, which provided for the return of irregular migrants to Turkey, he faced expulsion to this third country. The General Court of the European Union, General Court, T-192/16, NF v. European Council (EU:T:2017:128), Order of 28 February 2017.

Court’s dismissal was based on the ground of lack of jurisdiction, following the European Council’s argumentation that the ‘Statement’ was adopted by the heads of states of the EU Member States, and not by the European Council on behalf of the EU. The General Court reached this conclusion despite the numerous references to the EU as ‘co-author’ of the agreement, not only in the statement itself, but also in several EU reports dealing with the alleged ‘success’ of this cooperation with Turkey for the closure of the EU’s external borders. According to the General Court, the statement would not involve an EU act but an ‘intergovernmental act’ by heads of states during a session parallel to the summit of the European Council. Furthermore, according to the General Court, the expression ‘Members of the European Council’ and the term ‘EU’, contained in the EU-Turkey statement as published in Press Release No 144/16, must be understood as references to the Heads of State or Government of the EU. In September 2018, the CJEU rejected the appeals against the decisions of the General Court as manifestly unfounded.

The approach by the European Council and its legitimization by the General Court has been criticized by different organizations and commentators. First, because the framing of the agreement as a non-EU act creates a legal limbo by which EU Member States cannot be held responsible under EU law. Furthermore, by adopting this measure, EU Member States agreed to cooperate with a non-EU state for the effectuation of their external border policies, whereas Turkey is not bound by the same EU and international standards of refugee protection. Various reports have shown that Turkey has violated the human rights of refugees and asylum seekers, including by detaining them and forcibly returning them to the country of origin. The refusal of the General Court to recognize this agreement as an act of the EU means, in practice, that third-country nationals are denied the possibility to challenge—under EU law—human rights violations on the basis of this cooperation.

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65 Ibid. para. 75.
68 Ibid. para. 69.
69 Case C-208/17, C-209/17, and C-210/17 Order of 12 September 2018 (EU:C:2018:705).
71 For a description of the situation of migrants and refugees readmitted to Turkey, see Ulusoy and Battjes, ‘Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement’, VU Migration Law Working Paper Series No. 15, 2017.
This brings me to a second example of externalization and the consequences of the limited interpretation of the Visa Code by the CJEU in *X and X v Belgium* in 2017.

2. And this is not the Visa Code: The Issuing of Humanitarian Visas

The case of *X and X v Belgium* concerned preliminary questions from the Belgian court dealing with the interpretation of Article 25(1)(a) of the Visa Code. This provision allows Member States to issue a Schengen visa with ‘territorial limited validity’ if one or more of the conditions for a short-term visa are not fulfilled, if this is considered ‘necessary on humanitarian grounds, for reasons of national interest, or because of international obligations’. In the submitted case, a visa application by a Syrian family was rejected by the Belgian embassy in Lebanon. In its preliminary questions, the Belgian court asked the CJEU whether the Visa Code requires a Member State to issue a visa with limited territorial validity applied for ‘where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established’. The CJEU did not answer this question, but instead focused on the scope of competence of EU law, stating that the Visa Code is based on Article 62(2)(a) and (b) of the former EC Treaty. According to the CJEU, no legislation has been adopted on the basis of Article 79(2)(a) TFEU with regard to the issuing of long-term visas and residence permits to third-country nationals on humanitarian grounds. The CJEU reasoned that the particular situation of the Syrian family, applying for visas with a limited territorial validity to be able to apply for asylum in Belgium, would not be covered by EU law. As the purpose of this visa application was to apply for asylum in Belgium, and therefore differed from a short-term visa application, the Visa Code did not apply. Therefore, the provisions of the Charter did not apply to the situation at stake. According to the CJEU, the issuing of humanitarian visas is a matter of national sovereignty ‘as European law currently stands’.

With this conclusion, the CJEU explicitly excluded the issuing of humanitarian visas from the scope of EU law and provided a narrow and, in my view, incorrect interpretation of Article 25 of the Visa Code. This provision does offer a legal basis to issue visas not only on humanitarian grounds, but also ‘because of international obligations’. These obligations include the principle of *non-refoulement*, protected in Article 4 of the Charter, Article 3 ECHR, and the Refugee Convention. In practice, as has been submitted before the CJEU, different EU Member States did issue Schengen visas with limited territorial validity on the basis of the Visa Code, with the purpose of granting them international protection within their territory. But

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72 Case C-638/16 PPU, *X and X v Belgium* (EU:C:2017:173).
73 Ibid. paras 40 and 44.
74 Ibid. paras 43 and 47.
75 Ibid. para. 45.
also with regard to other purposes of long-term residence, such as family reunification, Article 22 has been used by Member States to grant a territorial limited visa, to allow the applicants to apply for these residence permits within the territory of that state. The decision of the CJEU could also be contested on the basis that as a territorial limited visa has been ‘formally submitted’ on the basis of Article 25 of the Visa Code, from that moment the Visa Code—and thus EU law—applies. Furthermore, the CJEU failed to take into account the general principles of EU law included in Articles 2 and 3 TEU with regard to the protection of fundamental rights and international obligations, and in Article 78(1) TFEU describing the goal of ‘offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement’ in accordance with the Geneva Convention. Instead, the CJEU pointed to the fact that the Procedure Directive (Directive 2013/32) and the Dublin Regulation (Regulation 604/2013) explicitly exclude asylum applications at embassies and consulates abroad, in order to substantiate its conclusion that in this case EU law does not apply.\textsuperscript{77} However, the current case did not question the applicability of the Procedure Directive or the Dublin Regulation. The question, as submitted by the Belgian court, dealt with the obligation of Member States under Articles 4 and 18 of the Charter when dealing with applications based on Article 25 of the Visa Code. Even if Article 25 offers Member States a wide margin of appreciation to decide whether or not to issue a humanitarian visa, under specific circumstances this discretionary power may turn into a positive obligation when the absolute right of non-refoulement is at risk.\textsuperscript{78} It was precisely because of these circumstances that the Belgian court asked for clarification of the meaning of the words ‘international obligations’ in Article 25, and why the Advocate General found that Member States do have an obligation to issue humanitarian visas.

Interestingly, one month earlier, the CJEU had found that the fact that EU law leaves Member States the sovereign power of whether or not to provide protection did not mean that this power did not fall within the scope of EU law. This was underlined by the CJEU when dealing with the sovereignty clause in Article 17(1) of the Dublin Regulation in C.K. v. Slovenia.\textsuperscript{79} The CJEU ruled that the application of the sovereignty clause is part of EU law and therefore involves an interpretation of EU law within the meaning of Article 267 TFEU. The discretion allowed to Member States by this sovereignty clause is ‘an integral part of the system for

\textsuperscript{77} Case C-638/16 PPU, X and X v. Belgium (EU:C:2017:173) para. 49.
\textsuperscript{79} Case C-578/16 PPU, C.K. and Others v. Slovenia (EU:C:2017:127) para. 53.
determining the Member State responsible developed by the EU legislature ("the Dublin system"). Therefore, according to the CJEU, a Member State also implements EU law, within the meaning of Article 51(1) of the Charter, when it makes use of that clause. In my view, in X and X v. Belgium, the CJEU could have reasoned, along the same lines, that the decision to issue or not to issue a limited territorial visa or humanitarian visa, as applied for under the Visa Code, always falls within the scope of EU law. Dealing with the question of the availability of legal remedies and the sovereign clause in the Dublin Regulation, the CJEU applied a comparable line of reasoning in MA v. UK. In this judgment of 2019, the CJEU emphasized the ‘absolute discretion’ and ‘prerogative’ of Member States to decide to examine an application for asylum for which it is not responsible under the applicable criteria of the Dublin Regulation. This means, that where in this case, UK, was ‘designated’ as the responsible Member State for the asylum claim on the basis of these criteria, but notified its intention to withdraw from the EU, the determining Member State is not obliged to use the discretionary clause as provided in the Dublin regulation, and to examine the asylum application itself. Therefore, the CJEU held that the right to an effective remedy in Article 27(1) of the Dublin III Regulation does not require Member States to make a legal remedy available against the decision not to use the sovereignty clause in Article 17(1).

4. Conclusion

The ‘Europeanization’ of immigration and asylum laws has generally resulted in the strengthening of the legal position of third-country nationals. Although this effect of ‘EU legality’ was not foreseen by the EU legislator while drafting different instruments of immigration law, the CJEU repeatedly made it clear that these laws should be implemented in accordance with general principles of EU law. This active approach of the CJEU resulted in a continuing line of jurisprudence, stressing the principle of effectiveness and proportionality in EU immigration law decision-making, for example when dealing with the right to family reunification. Furthermore, the CJEU clarified the content of vague provisions dealing with the right to legal remedies in, for example, the Dublin Regulation or the Visa Code, underlining that these provisions must be interpreted in accordance with the guarantees of the right to effective judicial protection in Article 47 CFR.

Aside from this strengthening effect for the legal position of third-country nationals, in this chapter different, and more recent, challenges to ‘EU legality’ and the protection of fundamental rights have been identified. Current EU laws offer Member States leeway to exclude their responsibility with regard to the legal

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80 Case C-661/17, M.A. v UK (EU:C:2019:53) paras 58–61.
81 Ibid. para. 86.
protection of third-country nationals, either by the externalization of immigration policies or by the mutual enforcement of national immigration decisions. This exclusion of EU legality, either by ‘re-nationalization’ or externalization, as such affects the effectiveness of the protection of fundamental rights and principles under EU law. By withdrawing national or EU acts from the scope of EU law, it becomes difficult, if not impossible, to hold individual Member States responsible for non-implementation of EU standards, including the protection of the human rights of migrants. This is illustrated by the example of entry bans and the use of information systems. Whereas EU law obliges Member States to report entry bans or to exclude immigrants from the EU territory, the definition of ‘inadmissible aliens’ and the use of ECRIS-TCN almost fully remains within the sovereignty of the national state. Another example concerns the obligation of consultation in short-term visa procedures. According to the Visa Code, national authorities have retained the power to block, on the basis of national and often non-transparent grounds, third-country nationals from entry to and residence in the whole Schengen area.

These aforementioned challenges to EU legality became visible in more recent judgments of the CJEU. In contrast to its former decisions, underlining the obligations of Member States under general principles of EU law, the CJEU seems to have taken a more restrictive approach. Member States are given further discretionary power to exclude their responsibility under EU law by formal and narrow readings of the applicable laws. With its judgment on the EU-Turkey agreement and on the non-applicability of the Visa Code on the issuing of humanitarian visas, the CJEU established a less rigorous scrutiny at the cost of general principles of EU law within the field of externalized EU migration and asylum policies. The conclusions of the CJEU with regard to visa representation and, more recently, the visa consultation system, illustrate the limitations to third-country nationals’ access to effective judicial protection in practice. Furthermore, in response to questions from national courts on the concept of ‘public order’ in EU migration laws, the CJEU did not really provide any more clarity, but focused instead on procedural guarantees; this may be to the benefit of the discretionary power of national authorities, but to the cost of the legal protection of third-country nationals.

Nevertheless, to conclude, one could argue that it is a matter of a glass which is half full or half empty. As we have seen, the CJEU’s case-law provides important standards by referring continuously to the application of general principles of EU law. Based on principles of effectiveness and proportionality, this means that in national immigration law procedures, national authorities remain obliged to make balanced decisions, on a case-by-case basis, and taking into account the objectives of the EU laws involved. Access to legal remedies may be hampered by choices of the EU legislator or national authorities; however, the right to effective judicial protection as a general principle of EU law to be protected in immigration law procedures remains undisputed. Hopefully, in future, the CJEU will continue to safeguard the objectives and coherence of EU law by underlining the obligations of EU
Member States in respecting the fundamental rights and legal protection of third-country nationals. Regardless of which approach the CJEU chooses, it is clear that national courts will continue to have an important role in protecting EU principles and the right to effective judicial protection within the field of asylum and immigration law.