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Article 72 TFEU in the Context of Migration Instrumentalization: Opening the Door to Restrictions of the Right to Asylum?

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Abstract

The so-called instrumentalization of migration has regained attention with Russia and Belarus pushing migrants towards EU borders. Some EU Member States have responded by severely restricting the right to asylum. A possible legal basis for such derogations from the CEAS is Article 72 TFEU. By applying a doctrinal analysis, this research examines the legal nature and scope of Article 72 TFEU and its interrelation with Article 18 CFR in the context of instrumentalization.

It is argued in this thesis that Article 72 TFEU primarily obliges the EU legislator to consider the Member States' responsibilities for maintaining law and order. A Member State can only invoke it for derogations as an *ultima ratio*. It must demonstrate that there is a serious and concrete threat to its internal security and the derogation measure must be able to combat that threat. The Member State has to inform the EU and other Member States ahead of its derogation and its measure must be proportionate. The latter requires that there is no secondary law already addressing the situation sufficiently, and that the measure must be limited in time and in accordance with fundamental rights.

This is where Article 18 CFR comes into play. As argued in this thesis, it entails an individual right to asylum. The principle of non-refoulement is the essence of the right, but it also includes a right to seek asylum. Preventing migrants from making asylum applications and pushing them to third countries violates the right to asylum in most cases.

Against this background, the framework for derogations is extremely narrow. However, recent ECtHR jurisprudence and a seemingly changed view in the European Commission are likely to encourage Member States to continue derogating from the CEAS. This poses a threat to the guarantees of the right to asylum.

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
APD	Asylum Procedure Directive
App	Application
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
e.g.	Exempli gratia
ECHR	European Charter of Human Rights
ECTHR	European Court of Human Rights
edn	Edition
eds	Editors
ETS	European Treaty Series
EU	European Union
GC	Grand Chamber
ibid	Ibidem
n/no	Number
OJ	Official Journal
para	Paragraph
SBC	Schengen Borders Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNTS	United Nations Treaty Series
v	Versus

1. Introduction

1.1. Problem Statement

When Poland's prime minister Donald Tusk announced that Poland would suspend the right to asylum for protection seekers coming to Poland through Belarus¹, Politico claimed Tusk "*lit a stick of dynamite under the EU's migration policy*"². Indeed, at first sight, the measure seems like a blatant violation of Article 18 of the Charter of Fundamental Rights ("CFR") and the Common European Asylum System ("CEAS"). However, it was not met with as much opposition as one might have expected. On the contrary, at a European Council meeting, Tusk managed to rally support for it.³ A political endorsement does not make a measure lawful, but it highlights a broader shift in the EU's asylum politics, that was also displayed in the Commission's recent Communication on the "*weaponization*" of migration.⁴

The term "*weaponization*", or "*instrumentalization*" of migration usually refers to a situation in which a hostile state attempts to strategically use migration to destabilize another state.⁵ It is not a new phenomenon, but Belarus' and Russia's use of this "strategy" brought new attention to it. Belarus issues tourist visas to international protection seekers, coordinates their travel to Belarus, and then pushes them towards the EU's borders to increase pressure on the EU, allegedly as a response to the EU's sanctions against the country.⁶ Russia seemingly operates similarly at the Finish border.⁷

¹ Adam Easton and Ian Aikman, 'Poland suspends migrants' right to apply for asylum' (BBC 27 March 2025) <<https://www.bbc.com/news/articles/c8719dl587zo>> accessed 16 April 2025.

² Nicholas Vinocur and Zoya Sheftalovich 'Politico Brussels Playbook: Tusk hijacks EU migration debate' (Politico EU 14 October 2024) <<https://www.politico.eu/newsletter/brussels-playbook/tusk-hijacks-eu-migration-debate/>> accessed 20 June 2025.

³ European Council, '*European Council Conclusions 17 October 2024*' EUCO 25/24, CO EUR 20 CONCL 5, conclusion para 38.

⁴ Communication from the Commission to the European Parliament and the Council, '*Countering hybrid threats from the weaponization of migration and strengthening security at the EU's external border*' 11 December 2024, COM (2024) 570 final.

⁵ Jari Pirjola, 'Hostile Instrumentalized Migration and the Right to Seek Asylum: Reflecting the European Legal Framework' (2025) 27 *European Journal of Migration and Law* 1, 2.

⁶ Aleksandra Ancite-Jepifánova, 'Migrant Instrumentalisation: Facts and Fictions' [2023] *Verfassungsblog* <<https://verfassungsblog.de/migrant-instrumentalisation-facts-and-fictions/>> accessed 16 April 2025. Felix Peerboom, 'Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to "Weaponised" Migration' (2022) 2022 7 *European Papers - A Journal on Law and Integration* 583, 586.

⁷ Easton and Aikman (n 1).

As a reaction, the affected border states introduced emergency laws.⁸ There are reports that these have led to migrants being repeatedly pushed from one state to another and of them being left in dire conditions between the borders.⁹ Nevertheless, the Member States deem their measures to be justified: They claim Article 72 TFEU allows them to derogate from CEAS rules that would otherwise prohibit such measures.¹⁰

1.2. Research Question and Scope

Against this backdrop, this thesis answers the questions:

"What is the legal nature and scope of Article 72 TFEU? Can it be used to restrict the right to asylum in situations of instrumentalization and if so, how?"

The invocation of Article 72 TFEU is analyzed particularly for instrumentalization situations because it has not yet been conclusively discussed whether the Member States are allowed to introduce national measures to combat it. Furthermore, the Commission Communication raises the question whether the EU institutions perceive such measures as legal. Additionally, the derogations have the potential of severely violating fundamental rights which makes an answer to the question whether the Member States can do so legally urgent.

Analyzing all the derogation measures' impact on different fundamental rights would go beyond the scope of this thesis. Therefore, the example of measures such as the one taken by Poland that derogate from Articles 6-9 of the Asylum Procedure Directive ("APD") by restricting the right to apply for asylum was chosen to highlight how the legality of derogation measures would have to be assessed. This example is particularly interesting because it firstly connects the analysis of Article 72 TFEU to the unresolved question of what the scope of Article 18 CFR entails and secondly to recent, controversial ECtHR jurisprudence.

⁸ Pekka Pohjankoski, 'A Borderline Case' [2023] *Verfassungsblog* <<https://verfassungsblog.de/a-borderline-case/>> accessed 16 August 2025; Aleksandra Ancite-Jepifánova, 'From the EU-Belarus Border to Strasbourg' [2025] *Verfassungsblog* <<https://verfassungsblog.de/eu-belarus-border-migrant-instrumentalisation/>> accessed 16 April 2025. Regarding Lithuania's measures see Peerboom (n 6) 588-593.

⁹ Human Rights Watch, 'Violence and Pushbacks at Poland-Belarus Border' <<https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>> accessed 3 August 2025; Amnesty International, 'Latvia: Return home or never leave the woods: Refugees and migrants arbitrarily detained, beaten and coerced into "voluntary" returns (Report 12 October 2022)' <<https://www.amnesty.org/en/documents/eur52/5913/2022/en/>> accessed 23 March 2025; Sarah Ganty, Aleksandra Ancite-Jepifánova and Dimitry V Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"' (2024) 16 *Hague Journal on the Rule of Law* 739; Mirko Forti, 'Belarus-Sponsored Migration Movements and the Response by Lithuania, Latvia, and Poland: A Critical Appraisal' (2023) 2023 8 *European Papers* 22; Lena Riemer, 'Taking Back Control?' [2024] *Verfassungsblog* <<https://verfassungsblog.de/taking-back-control/>> accessed 7 January 2025.

¹⁰ See in detail Part 1.1 of this thesis.

1.3. Methodology

To answer these questions, a doctrinal analysis is conducted.¹¹ This includes a critical examination of Article 72 TFEU and Article 18 CFR. This method is best suited to establish the legal nature and scope of Article 72 TFEU. Furthermore, it provides the tools to assess the scope and restriction possibilities of Article 18 CFR.

1.4. Sources

Apart from the law itself, CJEU case law on Article 72 TFEU will be analyzed. This is further supplemented by the analysis of secondary sources and documents such as the Commission Communication. To assess Article 18 CFR, case law and literature on the Article will be analyzed.

1.5. Structure

The questions will be answered by first analyzing Article 72 TFEU's legal nature (2.1. and 2.), the conditions for its invocation (2.3.), and what those findings mean for instrumentalization situations (2.4.). Secondly, it will be elucidated whether a restriction of the right to asylum is possible under Article 72 TFEU. To do so, the scope of Article 18 (3.1.), as well as the possibilities of restricting it will be elucidated. (3.2.).

¹¹ In regard to the methodology see: Laura Lammasniemi, 'Legal Research Methods and Approaches', *Law Dissertations* (2nd edn, Routledge 2021) 66–67; Jan M Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research' in Edward L Rubin, Hans-W Micklitz and Rob van Gestel (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 207–227.

2. Article 72 TFEU – One Norm, Many Questions

Article 72 TFEU states “*This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*” It has been invoked by Member States to defend national measures that derogate from the CEAS¹², for instance when they reintroduced border controls¹³, removed individuals deemed to be security threats¹⁴, or refused the relocation of migrants.¹⁵ It has also been raised to dispute the applicability of EU law.¹⁶ In *MA*, it became relevant in the instrumentalization context for the first time.¹⁷

2.1. Three Different Views on the CJEU’s Case-Law

The wording of Article 72 TFEU does not indicate anything regarding its legal nature.¹⁸ However, the CJEU has dealt with Article 72 TFEU in several cases, which serves as a starting point for the analysis. Sometimes the CJEU only briefly mentioned the article¹⁹, without making comments on the legal nature. However, in *NW*²⁰, *Commission v. Poland, Hungary and Czech Republic*²¹, and *Commission v. Hungary*²² the CJEU went into more detail.

Nevertheless, the CJEU has not yet answered every question surrounding Article 72

¹² Anuscheh Farahat and Lisa Steurer, ‘Grenzgänger’ [2025] Verfassungsblog <https://verfassungsblog.de/migration_notlage_schengen_zuruckweisungen/> accessed 9 August 2025; Georgios Athanasiou, ‘The Other Side of Article 4(2) TEU?’ [2025] European Law Blog <<https://www.europeanlawblog.eu/pub/y9rhzh0v/release/1>> accessed 29 April 2025.

¹³ CJEU, Case C-9/16 *A* [2017], ECLI:EU:C:2017:483; Case C-18/19 *WM v. Stadt Frankfurt am Main* [2020], ECLI:EU:C:2020:511; Case C-143/22 *ADDE and others v. Ministre de l’Intérieur* [2023], ECLI:EU:C:2023:689; Case C-278/12 *PPU Atiquallah Adil v. Minister voor Immigratie, Integratie en Asiel* [2012], ECLI:EU:C:2012:508; Case C-554/19 *FU* [2020], ECLI:EU:C:2020:439; Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz* [2022], ECLI:EU:C:2022:298.

¹⁴ CJEU, Case C-159/21 *GM v. Országos Idegenrendészeti Főigazgatóság and others* [2022], ECLI:EU:C:2022:708.

¹⁵ CJEU, Joined Cases C-715/17; C-718/17; C-719/17 *Commission v. Poland, Hungary and Czech Republic (Temporary Mechanism for the Relocation of Applicants for International Protection)* [2020], ECLI:EU:C:2020:257.

¹⁶ CJEU, *WM* (n 13) para 23.

¹⁷ CJEU, Case C-72/22 *PPU MA* [2020], ECLI:EU:C:2022:505.

¹⁸ Walter Obwexer and Bernd-Christian Funk, ‘Gutachten völker-, unions-, und verfassungsrechtliche Rahmenbedingungen für den beim Asylgipfel am 20. Jänner 2016 in Aussicht genommenen Richtwert für Flüchtlinge’ (2016) 16 <https://static.uni-graz.at/fileadmin/projekte/refugee-law-clinic/Gutachten_Richtwert_Fluechtlinge_Endversion.pdf>.

¹⁹ E.g. CJEU Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2022], ECLI:EU:C:2010:363 para 64; *A* (n 13) paras 33, 50; *ADDE and others* (n 13) para 45; *FU* (n 13) paras 34-37; *GM* (n 14) paras 84-85; *Atiquallah Adil v. Minister voor Immigratie, Integratie en Asiel* (n 13) paras 52-54; Joint Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017], paras 306-308.

²⁰ Later confirmed and referred to as „settled case-law” in *WM* (n 13) paras 27-29.

²¹ CJEU, *Commission v. Poland, Hungary and Czech Republic* (n 15).

²² CJEU, Case C-808/18 *Commission v. Hungary (Reception of Applicants for International Protection)* [2020], ECLI:EU:C:2020:1029.

TFEU and it has raised new questions itself. The article continues to be interpreted differently in scholarship. As the analysis will show, the different views can be divided into three categories: Some read Article 72 TFEU as solely reminding the EU institutions of the division of competences.²³ Others view it as a “conflicts of norm” rule that allows derogations from EU law.²⁴ The third view combines the other two: It classifies Article 72 TFEU as having two functions, primarily as a reminder to the EU legislator but exceptionally also as a derogation norm.²⁵

2.1.1. A Reminder for the EU Institutions

Viewing Article 72 TFEU as confirming the division of competences between the Member States and the EU institutions for the maintenance of law and order, would mean that it entails an obligation for the EU legislator to consider Article 72 TFEU when drafting secondary law, by including provisions that ensure that the Member States can conform with their national obligations.²⁶ Once an area of migration law has been harmonized, Member States could then only derogate to the extent the secondary law provides for.²⁷ Read like this, Article 72 TFEU would address the EU legislator, not the Member States.²⁸ It would also serve as a tool to interpret secondary law, particularly the derogations therein.²⁹

If the EU legislator failed to ensure that the Member States can conform with

²³ E.g. Evangelia (Lilian) Tsourdi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’ (2021) 17 European Constitutional Law Review 471, 1831–1835; Constantin Hruschka, ‘Dobrindts Rechtsbruch’ [2025] Verfassungsblog <<https://verfassungsblog.de/zuruckweisung-grenze-kontrolle-dobrindt/>> accessed 16 August 2025. Farahat and Steurer (n 12).

²⁴ See e.g. the Member States’ arguments in *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) paras 141, 213; *NW v. Landespolizeiinspektion Steiermark* (n 13) paras 55, 83; *Commission v. Poland, Hungary and Czech Republic* (n 15), para 142. Ágnes Tóttós, ‘The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule: Hungary Seeking Derogation from EU Asylum Law’ (2021) 9 Hungarian Yearbook of International Law and European Law 212, 225–229; Pohjankoski (n 8); Matthias Rossi, ‘Artikel 72 AEUV Nationale Zuständigkeiten’ in Christian Callies and Matthias Ruffert (eds), *EUV AEUV Kommentar* (6th edn, C.H. Beck 2022) paras 1, 5. Obwexer and Funk (n 18) 17. This view was expressly rejected by the Advocate Generals in: Joined Cases C-715/17; C-718/17; C-719/17 *Commission v. Poland, Hungary and Czech Republic (Temporary Mechanism for the Relocation of Applicants for International Protection)* [2020], ECLI:EU:C:2019:917, Advocate General Sharpston para 212; and in CJEU, Case C-808/18 *Commission v. Hungary (Reception of Applicants for International Protection)* [2020], ECLI:EU:C:2020:493, Advocate General Pikmäe paras 100-101.

²⁵ Hubert de Verdélhan, ‘Art. 72 TFEU as Seen by the Court of Justice of the EU: Reminder, Exception, or Derogation?’ (2025) 2024 9 European Papers - A Journal on Law and Integration 1330. Daniel Thym, *European Migration Law* (1st edn, Oxford University Press Oxford 2023) 273.

²⁶ Farahat and Steurer (n 12).

²⁷ Ibid; Hruschka (n 23).

²⁸ Röben, ‘Artikel 72 AEUV’ in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (85th edn, C.H. Beck 2025) paras 8, 17.

²⁹ Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz* [2022], ECLI:EU:C:2021:821, Advocate General Øe paras 53-61; C-18/19 *WM v. Stadt Frankfurt am Main* [2020], ECLI:EU:C:2020:130, Advocate General Pikmäe paras 41-42.

their national responsibilities to maintain law and order, the Member States could seek the annulment of the secondary law under Article 263 TFEU, by arguing that it violates Article 72 TFEU.³⁰

An argument in favor of this view is that if Article 72 TFEU were to be read as a general clause that allows for derogations from the CEAS, the “Common” European Asylum System would no longer be common, as Member States could derogate in different ways from different norms. The lack of solidarity that is frequently attested to EU asylum law³¹ would increase even more. It is therefore persuasive to argue that the legislator would not have inserted a norm in the TFEU that allows for far reaching derogations.³² Some of the CJEU’s case law seems to further support this interpretation:

In *A*, the CJEU stated that the wording of Article 72 TFEU and Article 21(a)-(d) of the 2006 Schengen Border Code (“SBC”) confirmed “*that the abolition of internal border controls has not affected the responsibilities of the Member States with regard to the maintenance of law and order*”.³³ A similar formulation can be found in *Adil*³⁴, as well as in *FU* in regard to Article 23(a) and (c) SBC.³⁵ The Court thereby reaffirmed that the SBC respects Article 72 TFEU and the division of competences by incorporating a clause that ensures that Member States can maintain law and order in their territory.

The formulation in *ADDE* that, “*the application [...], of the common standards and procedures laid down in Directive 2008/115 is not such as to make it impossible to maintain public order and safeguard internal security within the meaning of Article 72 TFEU*”³⁶ supports such an interpretation.

In several cases, the CJEU analyzed in detail in how far secondary law allowed for derogations already, respectively, in how far secondary law considered the Member States’ competence to maintain law and order:

For instance, in *Slovakia and Hungary v. Council*, the CJEU rejected the argument raised by Poland, that the Council’s Relocation Decision was disproportionate since it did not allow Member States to ensure their responsibilities laid down in Article 72 TFEU. The Court explained that the Decision required the consideration of national security

³⁰ Advocate General Sharpston (n 24) para 202; Tsourdi (n 23) 1832–1833; de Verdelhan (n 25) 1342; Thym, *European Migration Law* (n 25) 273.

³¹ See, for instance Eleni Karageorgiou and Gregor Noll, ‘What Is Wrong with Solidarity in EU Asylum and Migration Law?’ (2022) 4 *Jus Cogens* 131; Iris Goldner Lang, ‘No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?’ (2020) 22 *European Journal of Migration and Law* 39.

³² Farahat and Steurer (n 12).

³³ CJEU, *A* (n 13) para 50.

³⁴ CJEU, *Atiquallah Adil v. Minister voor Immigratie, Integratie en Asiel* (n 13) paras 52-53.

³⁵ CJEU, *FU* (n 13) paras 34-37.

³⁶ CJEU, *ADDE and others v. Ministre de l’Intérieur* (n 13) para 45.

and public order throughout the relocation procedure.³⁷ The CJEU also rejected the Member States' arguments that the procedures laid down in the Relocation Decision only insufficiently secured the Member States' security interests.³⁸

Furthermore, in *NW*, the German government argued that Article 72 TFEU allowed for a derogation from the time limits that the SBC sets for the reintroduction of border controls.³⁹ The CJEU, unlike the Advocate General⁴⁰, rejected this view and explained how the SBC aimed to strike a fair balance between the free movement of persons and the Member States' interest "*with respect to external border controls, asylum, immigration and the prevention and combating of crimes.*"⁴¹ According to the CJEU, that the EU legislator inserted a possibility to reintroduce border controls but restricted it timewise, showed that the legislator had considered the Member States' interests and competence sufficiently and that there was no need for derogations.⁴²

In *Commission v. Hungary*, the CJEU stated that "*it should be stressed that the EU legislature took due account of the exercise of the Member States' responsibilities under Article 72 TFEU*" by incorporating norms into the secondary law that ensure that the Member State can maintain law and order.⁴³ A similar formulation can be found in *Commission v. Poland, Hungary and Czech Republic*.⁴⁴

The fact that, in all these cases, the CJEU emphasized that there are derogation possibilities in secondary law and that the legislator had sufficiently considered the Member States' responsibilities when drafting the secondary law seems to imply that Article 72 TFEU is indeed addressed to the EU legislator, and that the Member States cannot circumvent the derogation limits laid down in secondary acts by invoking Article 72 TFEU.

However, there is a crucial part of the CJEU case-law this view cannot explain: The CJEU consistently states that while Article 72 TFEU does not provide a general derogation possibility, a derogation would be possible under exceptional circumstances.⁴⁵

³⁷ CJEU, *Slovakia and Hungary v. Council* (n 19) paras 306-308.

³⁸ *ibid* paras 308-309.

³⁹ CJEU, *NW v. Landespolizeinspektion Steiermark* (n 13) paras 55, 83.

⁴⁰ Advocate General Øe, *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz* (n 29) paras 53-61.

⁴¹ CJEU, *NW v. Landespolizeinspektion Steiermark* (n 13) para 88.

⁴² *ibid* paras 83-90.

⁴³ CJEU, *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22), para 221.

⁴⁴ CJEU, *Commission v. Poland, Hungary and Czech Republic* (n 15) para 153.

⁴⁵ This is also acknowledged by Farahat and Steurer, who deem Art. 72 TFEU to be an expression of competences norm: Farahat and Steurer (n 12).

2.1.2. A Derogation Norm

To explain this, one could view Article 72 TFEU as allowing Member States to unilaterally derogate from secondary law in cases in which they deem this necessary to maintain law and order, even if it is a harmonized area of law.⁴⁶

This is the view of some Member States: In *Commission v. Poland, Hungary and Czech Republic*, the Member States argued that Article 72 TFEU was to be interpreted as allowing them to disapply secondary law, as they believed this was necessary to prevent people allegedly posing a threat from entering.⁴⁷ Poland argued that Article 72 TFEU does not serve to call into question the validity of an act of EU law, but that it meant that in case of a conflict of norms, the Member States' responsibilities for law and order takes precedence over secondary law.⁴⁸ This would allow the Member States to derogate from EU law in many different circumstances. Such an interpretation would lead to a circumvention of the limits to derogations laid down in secondary law. It would jeopardize the primacy of EU law and the functioning of the CEAS.⁴⁹

While interpreting Article 72 TFEU as a general derogation norm is therefore an untenable position, supporters of the view that Article 72 TFEU is a – narrowly read – derogation norm have the CJEU's wording as a strong argument on their side: The CJEU called Article 72 TFEU a derogation norm in several cases.⁵⁰

In *Commission v. Hungary*, the CJEU stated "the derogation provided for in Article 72 TFEU must be interpreted strictly [...]. It is accordingly for the Member State [...] to prove that it is necessary to have recourse to that derogation [...]."⁵¹ A similar formulation can be found in *MA*.⁵²

The CJEU's terminology in these cases makes it hard to argue that Article 72 TFEU is nothing more than a reminder for the institutions. At the same time, the fact that no Member State has so far sufficiently invoked Article 72 TFEU demonstrates how restrictively it is interpreted by the CJEU. This is where the third view comes into the picture.

⁴⁶ In favor of such a reading: Tóttős (n 24). Pohjankoski (n 8). CJEU, Case C-72/22 PPU *MA* [2020], ECLI:EU:C:2022:431, Advocate General Emiliou paras 115-116.

⁴⁷ CJEU, *Commission v. Poland, Hungary and Czech Republic* (n 15), paras 134-135.

⁴⁸ *ibid* para 137.

⁴⁹ *ibid* para 143. de Verdelhan (n 25) 1334–1335.

⁵⁰ CJEU, *Landespolizeidirektion Steiermark* (n 13) para 86; *MA* (n 17) para 71; *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) paras 214-215; *Commission v. Poland, Hungary and Czech Republic*, (n 15) para 144; Case C-823/21 *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* [2020], ECLI:EU:C:2023:504 paras 66-67.

⁵¹ CJEU, *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para 67.

⁵² CJEU, *MA* (n 17) para 71.

2.1.3. A Norm with Two Functions

According to this view, Article 72 TFEU primarily obliges the EU legislator to sufficiently consider the Member States' responsibility for maintaining law and order. Normally, the Member States cannot invoke Article 72 TFEU to derogate, they must use the tools secondary law gives them. However, as an *ultima ratio*⁵³ under exceptional circumstances, Article 72 TFEU provides a derogation possibility.⁵⁴

As highlighted above, the CJEU repeatedly stated that secondary law normally sufficiently considers the Member States' responsibility for the maintenance of law and order, while simultaneously emphasizing that under exceptional circumstances, the Member States could derogate from secondary. That this can be understood as the derogation being the *ultima ratio*, is demonstrated best by the CJEU's following statement in *Commission v. Poland*: "There is nothing to indicate that effectively safeguarding the essential State functions [...], such as that of protecting national security, could not be carried out other than by disapplying Decisions 2015/1523 and 2015/1601." In view of the Court, "disapplying" secondary law clearly is only possible if there is no other solution. This third view therefore reflects the case law most accurately.

2.2. Article 72 in the Constitutional Framework of the Treaties

However, that the CJEU views Article 72 TFEU as having this double function, does not mean that this is how the article should be interpreted. By comparing it with other derogation norms and by determining its place in the framework of the Treaties on the division of competences, it can be assessed whether the CJEU's view of Article 72 TFEU's legal nature is persuasive.

2.2.1. A Derogation Norm Like Any Other?

If Article 72 TFEU does not have any similarities with other derogation norms, this would be a strong indicator that it cannot be a derogation norm and vice versa.⁵⁵ While the CJEU mentioned several times that the derogations that exist in the Treaty are "Articles 36, 45, 52, 65, 72, 346, and 347 TFEU"⁵⁶, thereby implying that Article 72

⁵³ Similar terminology is used by Tóttós (n 24) 229.

⁵⁴ In favor of such a view: de Verdelhan (n 25); Daniel Thym, 'Nun also doch? Zurückweisungen von Asylbewerbern aufgrund einer „Notlage“ [2024] Verfassungsblog <<https://verfassungsblog.de/nun-also-doch-zurueckweisungen-von-asylbewerbern-aufgrund-einer-notlage/>> accessed 24 July 2025 also argues that the CJEU's position is to be understood as a middle ground. A detailed argumentation for this view Thym, *European Migration Law* (n 25) 273–275.

⁵⁵ Against a comparability of Art. 72 TFEU and the derogation possibilities for the four freedoms: Farhat and Steurer (n 12).

⁵⁶ CJEU, *Landespolizeidirektion Steiermark* (n 13) para 86; *MA* (n 17) para 71; *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) paras 214–215; *Commission v. Poland, Hungary and Czech Republic* (n 15) para 144; Case C-823/21 *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) paras 66–67.

TFEU is similar to those other provisions, it did not explain how and why that would be the case.

The other derogation norms have in common that they allow for derogations if there is a serious risk for a state's public order or security, which could be an argument in favor of interpreting Article 72 TFEU as a derogation norm, since it also refers to Member States' law and order responsibilities.

However, the derogation norms laid down for the four freedoms are only applicable if there is no harmonized secondary law. If Article 114(1) TFEU has been used as a legal basis for measures that aim at harmonizing the internal market, and that also fall within the scope of one of the freedoms, the derogation norm for said freedom cannot be invoked anymore.⁵⁷ Instead, a derogation is only possible within the narrow scope of Article 114(4), (5) TFEU.

A comparison of the circumstances under which the Member States try to invoke Article 72 TFEU and Article 114(4), (5) TFEU shows similarities: In both cases, there is a shared competence, the EU has made use of it, and the Member State wants to derogate from the secondary law, despite the derogation possibilities laid down there being *leges speciales* to the derogation provided for in the Treaties.⁵⁸ Therefore, some of the underlying logic of Article 114 TFEU can be transferred to Article 72 TFEU: For Article 72 TFEU, as well as Article 114 TFEU, a secondary measure normally balances the different interests at play, but, under certain circumstances, allows for a derogation, particularly when it was not foreseeable for the legislator, that certain safety risks would arise.⁵⁹

Transferring Article 114 TFEU's logic to Article 72 TFEU would mean that if there are rules for derogations in secondary law, the Member States could normally not circumvent those by invoking Article 72 TFEU, however, if there was a serious threat to the maintenance of law and order, they could. For the other derogation norms, as well as for Article 72 TFEU, the CJEU has emphasized that while it is up to the Member States to determine their public policy and security interests, they cannot unilaterally determine the scope of such derogations themselves.⁶⁰

⁵⁷ Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 209; Korte, 'Artikel 114 AEUV Beschlussfassung; Einzelstaatliche Regelungen; Schutzklausel' in Christian Callies and Matthias Ruffert (eds), *EUV AEUV Kommentar* (6th edn, 2022) paras 28–29.

⁵⁸ Thym, *European Migration Law* (n 25) 274.

⁵⁹ Farahat and Steurer (n 12); Ellen Vos and Maria Weimer, 'Differentiated Integration or Uniform Regime? National Derogations from EU Internal Market Measures' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar Publishing 2017) 305.

⁶⁰ Bruno de Witte, 'Exclusive Member State Competences. Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The division of competences between the EU and its Member States* (Hart Publishing 2017) 64–65; See for Article 72 for instance CJEU, *Commission v. Poland, Hungary and Czech Republic* (n 15) paras 145–146; *Commission v. Hungary* (Reception of

The fact that Article 72 TFEU does not provide a concrete procedure for how to involve the institutions in the procedure, does not mean that it cannot be a derogation possibility like Article 114(4) TFEU – when the CJEU says that Member States cannot unilaterally determine the scope of the derogations, it does not necessarily refer to a pre-emptive control through the institutions, but also to judicial control by the Court itself.⁶¹

That the situation of invoking Article 72 TFEU is more like the one when Article 114 TFEU is invoked, does not contradict the finding that the CJEU cites Article 72 TFEU as a derogation norm alongside those for the four freedoms. The Court does not say that the circumstances under which they can be invoked are necessarily the same. Instead, it seems as if the CJEU names all these in one list to make clear three things: They can serve as derogation norms, the invocation of all of them is particularly relevant if there is a severe risk to a state's internal security and they all must be interpreted strictly. Therefore, the way the CJEU applies the four freedoms can also provide some guidance on how to interpret Article 72 TFEU.

Seeing these similarities could lead to understanding Article 72 TFEU as a derogation norm just like any other. However, the fact that, unlike other derogation norms, Article 72 TFEU has never been successfully invoked⁶² hints at the exceptional character of Article 72 TFEU – the threshold for its invocation seems higher, which indicates that Article 72 TFEU is not an ordinary derogation norm.

These findings support the assessment of Article 72 TFEU being a norm with two functions, and that the derogation function can only be invoked under exceptional circumstances, as an *ultima ratio*.

2.2.2. Reluctant Competence-Sharing as an Explanation for Article 72's Unique Legal Nature

That the CJEU applies a stricter threshold to Article 72 TFEU but also does not negate that it can exceptionally allow for derogations can be explained by the tension that is inherent to competences that touch upon Member States' internal security interests. Somewhat paradoxically, while the Member States are reluctant to let the EU regulate such areas, they still transferred competences to the EU to do so. This paradox is crucial in understanding Article 72 TFEU's nature. The competences conferred to the EU under Title V TFEU are apt to tangent Member States' security interests, since the

Applicants for International Protection (n 22) paras 215-216; *WM* (n 13) para 42. For the four freedoms see for instance CJEU, Case *C-137/17 Van Gennip and others* [2018], ECLI:EU:C:2018:771 para 57; Case *C-106/22, Xella Magyarország Építőanyagipari Kft. V Innovációs és Technológiai Miniszter* [2018], ECLI:EU:C:2023:568 para 66.

⁶¹ de Witte (n 60) 64.

⁶² Thym, *European Migration Law* (n 25) 273.

Member States transferred shared competences (Article 4(2)(j) TFEU) to the EU to create the Area of Freedom, Security and Justice (“AFSJ”) in this Title. That the Member States did so necessarily means that the EU can issue measures that tangent security interests, otherwise the conferral of competences would not make any sense.⁶³ Article 72 TFEU therefore cannot be read as a broad derogation norm for the Member States.⁶⁴ If Article 72 TFEU were to be read in such a way, this would render the rule that a Member State cannot act upon a shared competence once the EU did so, Article 2(2) TFEU, ineffective. Furthermore, it would allow Member States that have been outvoted in the Council to disapply that act. That would contradict the principle of primacy⁶⁵ of EU law and the legislative process’ rules. Normally, only a qualified majority in the Council is required, Article 16(4) TEU. A Member State is therefore also bound by acts it did not vote for. It could circumvent this, if any security matter allowed for it to disapply EU law.⁶⁶

A comparison with Article 4(2) TEU further affirms this interpretation: Article 4(2) TEU also serves to protect the Member States’ security interests, Article 72 TFEU is often understood as a concretization of it.⁶⁷ Reading Article 4(2) TEU as a competence reservation clause has repeatedly been rejected, since it would contradict provisions of the TFEU that touch upon those matters.⁶⁸ Instead, it is understood as telling the EU how to enact its competences – by considering the Member States’ security interests.⁶⁹

These arguments support the CJEU’s finding that Article 72 TFEU addresses the EU legislator, who, to comply with Article 72 TFEU, must consider the Member States’ security interests when drafting secondary law.⁷⁰

But what about its supposed second function as a derogation norm?

That Article 72 TFEU resembles other derogation norms and that the Member States felt the need to incorporate it into the Treaties, show that retaining control over security issues was particularly important to them. This is not surprising, since the responsibility for the outer and inner security is a matter particularly closely connected

⁶³ Röben (n 28) paras 11, 16.

⁶⁴ de Verdelhan (n 25) 1332, 1337–1338.

⁶⁵ CJEU, *Commission v. Poland, Hungary and Czech Republic* (n 15) para 143.

⁶⁶ de Verdelhan (n 25) 1338.

⁶⁷ Rossi (n 24) para 1; Stefan Kadelbach, ‘The Law of the European Union and National Exceptions of the Member States’ 17 <<https://www.justdigi.ee/sites/default/files/documents/2024-02/Kadelbach%20anal%C3%BC%C3%BCs.pdf>> accessed 24 August 2025; Daniel Thym, ‘Rechtsgutachten über die Anforderungen und Rechtsfolgen des Artikels 72 EU-Arbeitsweisevertrag für die ausnahmsweise Abweichung vom EU-Asylrecht’ [2023] SSRN Electronic Journal 9 <<https://www.ssrn.com/abstract=4647561>> accessed 16 August 2025; Obwexer and Funk (n 18) 16–17.

⁶⁸ de Witte (n 60) 70–71.

⁶⁹ *ibid* 72.

⁷⁰ de Verdelhan (n 25) 1339.

to a state's sovereignty.⁷¹ It is possible that situations arise that a legislator did not foresee.⁷² Particularly if such a situation seriously threatens the safety of a Member States' citizens or the functioning of the State, but it is not covered by the derogations laid down in the secondary law act, it cannot be expected that the Member State waits until the EU changes the secondary law, particularly since the legislative procedure, especially for migration-related topics is often lengthy and difficult.⁷³ If migration were to pose a severe threat to the safety of EU citizens, the need to protect their fundamental rights would be a further argument for an exceptional derogation possibility.

The view, that, next to primarily serving as a reminder to the EU institutions, Article 72 TFEU also entails a theoretical possibility for derogations, particularly for unforeseeable situations, is therefore the most convincing.

Categorizing Article 72 TFEU as a reminder for the EU institutions to sufficiently consider the Member States' interests in the legislation, and as exceptionally allowing for derogations therefore means that normally, if a Member State deems a measure to insufficiently consider its security interests, it must file an action for annulment. It cannot simply derogate.

If, however, the Member State is convinced that the requirements for a derogation possibility are met, it can disapply said rule. The Member State carries the risk that it comes to an infringement procedure because the Commission does not agree with it. It then would have to convince the CJEU that the requirements for a derogation under Article 72 TFEU are met.⁷⁴

2.2.3. Interim Conclusion

Article 72 TFEU is a norm with two functions. Its primary function is to remind the legislator that it must implement in its secondary law provisions that ensure that

⁷¹ *ibid* 1331.

⁷² Farahat and Steurer (n 12).

⁷³ For the New Pact, for instance, the Commission sent a proposal in July 2016, but the Pact was only adopted in 2024, see European Council; Council of the European Union <<https://www.consilium.europa.eu/en/policies/eu-migration-asylum-reform-pact/timeline-migration-and-asylum-pact/>> accessed 21 August 2025 (Timeline – Migration and Asylum Pact) The proposal for emergency measures in cases of instrumentalization never became law: European Parliament, 'Proposal for a Regulation on situations of instrumentalization in the field of migration and asylum' (Legislative Train Schedule 20 June 2025) <<https://www.europarl.europa.eu/legislative-train/theme-a-global-europe-leveraging-our-power-and-partnerships/file-instrumentalisation-in-the-field-of-migration-and-asylum>> accessed 19 August 2025.

⁷⁴ Daniel Thym, 'Kippt in Brüssel das individuelle Asylrecht?' [2025] *Verfassungsblog* <<https://verfassungsblog.de/kippt-in-brussel-das-individuelle-asylrecht/>> accessed 11 August 2025.

the Member States can carry out their responsibilities to maintain law and order and to safeguard their internal security. Under exceptional circumstances and as an ultima ratio, Article 72 TFEU has a second function as a derogation norm.

2.3. Unclear Requirements for Invoking Article 72 TFEU

However, a Member State would have to show that the conditions for the invocation of Article 72 TFEU are met. According to the CJEU, those conditions are to be interpreted strictly,⁷⁵ but it did not explain what precisely they are. Since the Member States so far always failed to demonstrate the first requirements, the CJEU's analysis could stop there. The text of Article 72 TFEU does not give many indications what the requirements for its invocation are either. However, some requirements are implied in the case law, and the Commission, as well as some scholars, particularly *Thym*, have suggested requirements for the invocation.

Regardless of the invocation conditions, it has been pointed out that the wording of Article 72 TFEU allows only for derogations from provisions that are based on Title V.⁷⁶ Such a reading is in line with the CJEU's emphasis that Article 72 TFEU does not contain a general derogation possibility.

2.3.1. Serious Threats to National Security as Grounds for Derogations

2.3.1.1. Terminology

To successfully invoke Article 72 TFEU, a Member State must show that the situation in question affects "*the maintenance of law and order and the safeguarding of internal security*". In its case-law, the CJEU does not say much about how to interpret these terms.

However, there is rich case-law on the interpretation of the *ordre public* clauses for the four freedoms. Even though the CJEU has not explicitly said so, this jurisprudence can be applied to interpret Article 72 TFEU's terminology, particularly because in the German and French version of the TFEU, the clauses' wording is the same in Article 72 TFEU and for the four freedoms.⁷⁷ The public order is deemed to be threatened if there

⁷⁵ CJEU, *MA* (n 17) para 7; *Commission v. Poland and Hungary* (n 15), para 144; *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) para 215; *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para 67; *NW v. Landespolizeidirektion Steiermark* (n 13) para 86.

⁷⁶ Matthias Lehnert and Robert Nestler, 'Der Mythos von der Notlage' [2024] Verfassungsblog <<https://verfassungsblog.de/der-mythos-von-der-notlage/>> accessed 24 July 2025; Advocate General Emiliou, *MA* (n 46) para 114.

⁷⁷ Advocate General Sharpston, *Commission v. Poland, Hungary and Czech Republic* (n 24) paras 196-199; *Thym, European Migration Law* (n 25) 273-274. *Thym*, 'Rechtsgutachten über die Anforderungen und Rechtsfolgen des Artikels 72 EU-Arbeitsweisevertrag für die ausnahmsweise Abweichung vom EU-Asylrecht' (n 67) 9; Walter Obwexer and Daniel Thym, 'Rechtsgutachten zu

is a threat to state interests of fundamental importance, required is an actual and sufficiently serious threat to a fundamental interest of society.⁷⁸ The term public safety covers the internal and external security of a state.⁷⁹ A threat to law and order or public security therefore must be similarly serious.

2.3.1.2. Threshold for the Seriousness of a Threat

The mere claim that there is such a threat is insufficient. The CJEU rejected Poland's claim that the Member States have a wide margin of discretion and must only show the plausibility of a risk.⁸⁰ Instead, the burden of proof for showing that a derogation is necessary falls on the Member State in question: It has to show that there is a concrete and serious risk of harm to law and order.⁸¹ Whether this is the case cannot be determined unilaterally by each Member State, without any control by the EU.⁸² This is convincing if one draws a comparison to the four freedoms – for Article 36 sentence 1 TFEU, for instance, it is established case-law that, while the Member States have discretion when it comes to how they want to address such threat, the requirements have to be interpreted autonomously under EU law.⁸³

Allowing a derogation under Article 72 TFEU is an exception to principles that lie at the core of EU law and are essential for it functioning properly, such as the primacy of EU law. The functionality of the AFSJ would be severely compromised if Member States could derogate from EU law without even having to show that there is a real and severe risk.⁸⁴ This threshold is therefore convincing.

As the CJEU has confirmed multiple times, even if a Member State can show a threat to public safety, a broad and general reference to the Member States' responsibility to maintain law and order does not suffice.⁸⁵ Article 72 TFEU does not

den Anforderungen des Art. 72 AEUV für eine Fristhemmung bei der Bearbeitung von Familiennachzugsanträgen' 17–18

<https://www.bmi.gv.at/114/files/Gutachten_AEUV/Rechtsgutachten_zu_den_Anforderungen_des_Art_72_AEUV_bf_20250604.pdf> accessed 19 July 2025.

⁷⁸ Stefan Leible and Thomas Streinz, 'Artikel 36 AEUV Ausnahmen' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (85th edn, 2025) para 20.

⁷⁹ *ibid* 21.

⁸⁰ CJEU, *Commission v. Poland, Hungary and Czech Republic* (n 15) para 137.

⁸¹ *ibid* para 147; CJEU, *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para 68; MA (n 17) para 73.

⁸² CJEU, *Commission v. Poland and Hungary* (n 15) para 146; *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) para 216.

⁸³ Similarly Röben (n 28) paras 9, 12; Affirming that this can be transferred to Article 72 TFEU: Markus Kotzur and Nassim Madjidian, 'Artikel 72 AEUV' in Rudolf Geiger, Daniel-Erasmus Khan and Lando Kirchmair (eds), *EUV, AEUV: Vertrag über die Europäische Union - Vertrag über die Arbeitsweise der Europäischen Union* (7th edn, C.H. Beck 2023) para 2.

⁸⁴ de Verdclhan (n 25) 1338–1339.

⁸⁵ CJEU, *WM* (n 13) paras 27–29; *GM* (n 14) paras 84–85; *NW v. Landespolizeidirektion Steiermark* (n 13) paras 84–86; *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para 69; MA (n 17) para 72; *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) para 215.

confer a power to the Member States not to apply EU law, simply by relying on the national security obligations.⁸⁶ This would contradict the conferral of power to the EU in Title V. To invoke Article 72 TFEU, a Member State must demonstrate a clearly defined case.⁸⁷

The Member State has to specify the impact that the alleged offences may have had and how a derogation from the specific secondary law norm was therefore required.⁸⁸ They must show why a specific situation or person poses a security threat.⁸⁹

2.3.2. Information Obligation

The Commission⁹⁰ and some scholars⁹¹ argue that an additional requirement for a derogation is that a Member State must inform the Commission and other Member States ahead of derogating. While Article 72 TFEU does not lay down such a condition, it can persuasively be derived from the principle of sincere cooperation, Article 4(3) TEU⁹²: The EU institutions might want to react to the situation by issuing emergency measures based on Article 78(3) TFEU to prevent national derogation measures and to find a European solution.⁹³ Furthermore, other Member States can be severely impacted by a Member States' derogation, as it could lead to an influx of migrants in their state. They therefore need to be informed to be able to prepare.

2.3.3. Proportionality as a Limitation

Even if a Member State can show such a threat, its derogation measure must also be proportionate.⁹⁴ The CJEU has mentioned that the derogation has to be necessary, however, there are persuasive arguments that it must also meet the proportionality *stricto sensu* threshold.⁹⁵ This is again supported by a comparison with the four freedoms, where the CJEU established a proportionality requirement for

⁸⁶ CJEU, *WM* (n 13) paras 26-29; *GM* (n 14) para 84; *NW v. Landespolizeidirektion Steiermark* (n 13) para 86; *MA* (n 17) para 71; *Commission v. Poland, Hungary and Czech Republic* (n 15) para 145.

⁸⁷ CJEU, *MA* (n 17) para 70.

⁸⁸ CJEU, *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) paras 217-218; *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para 69; *MA* (n 17) para 73.

⁸⁹ Advocate General Pikmäe, *Commission v. Hungary (Reception of Applicants for International Protection)* (n 24) para 75.

⁹⁰ Commission, *Countering hybrid threats* (n 4) 8.

⁹¹ Thym, *European Migration Law* (n 25) 275; Obwexer and Funk (n 18) 46.

⁹² Daniel Thym, 'Article 72' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *Treaty on the Functioning of the European Union – A Commentary: Volume I: Preamble, Articles 1-89* (Springer International Publishing 2021) 1408; Thym, *European Migration Law* (n 25) 275.

⁹³ Similarly Advocate General Emiliou, *MA* (n 46) para 119.

⁹⁴ de Verdellan (n 25) 1360; Obwexer and Thym (n 77) 17-18.

⁹⁵ Advocate General Emiliou, *MA* (n 46) para 118.

derogations as well.⁹⁶ Furthermore, proportionality is a general principle of EU law.⁹⁷ Since there are conflicting interests that need to be balanced if a Member State wants to derogate, it is applicable.

2.3.3.1. When is a Secondary Law Provision “Insufficient”?

To show that a derogation is necessary⁹⁸, a Member State must show that the situation is not adequately solved by secondary law.⁹⁹ The CJEU has not sufficiently explained yet when it would deem a situation not to be sufficiently covered by secondary law. This can reasonably be understood as covering situations the legislature did not foresee when drafting the secondary law act in question.¹⁰⁰

More contentious is the question whether a derogation is also possible if a Member State deemed the derogations provided for in secondary law to be insufficient or ineffective.¹⁰¹ Some argue for this possibility at least to bridge the time until the EU legislator fixes it¹⁰² or if the legislator fails to act.¹⁰³ According to Advocate General Emiliou in *MA*, if the Member State wants to successfully prove this, it has to show why the derogation in question does not allow for ensuring the maintenance of law and order under consideration of the specific circumstances.¹⁰⁴

The CJEU would be well-advised to only accept this as a ground for derogations under a very strict threshold, since it could be abused by the Member States. They might be inclined to deem secondary law to not be working sufficiently simply because they politically oppose it, as many of the previous Article 72-cases have shown.¹⁰⁵ Furthermore, the balance secondary law seeks to strike by including limited derogation possibilities would be set aside if Member States could simply decide that it does not deem such derogations sufficient. So far, the CJEU found such claims to be unsubstantiated.¹⁰⁶ This suggests that if the CJEU were to accept such an insufficiency-claim at all, the threshold for it would be high.

⁹⁶ CJEU, C-178/84, *Commission of the European Communities v Federal Republic of Germany* [1987], ECLI:EU:C:1987:126 para 39; C-333/08, *European Commission v French Republic* [2010], ECLI:EU:C:2010:44 para 90.

⁹⁷ Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439, 442.

⁹⁸ Advocate General Emiliou, *MA* (n 46) para 121.

⁹⁹ CJEU, *MA* (n 17) para 74; Daniel Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (*EU Migration Law Blog*) <<https://eumigrationlawblog.eu/does-the-commission-cross-the-rubicon-legalising-pushbacks-on-the-basis-of-article-72-tfeu/>> accessed 14 January 2025.

¹⁰⁰ Farahat and Steurer (n 12).

¹⁰¹ Tóttós (n 24) 221; Obwexer and Funk (n 18) 40.

¹⁰² Tóttós (n 24) 231; Seemingly in favor of this Advocate General Emiliou, *MA* (n 46) para 132.

¹⁰³ Obwexer and Funk (n 18) 46–47.

¹⁰⁴ Advocate General Emiliou, *MA* (n 46) para 122.

¹⁰⁵ Against such a ground for derogation also Lehnert and Nestler (n 76).

¹⁰⁶ For instance, in *Slovakia and Hungary v. Council* (n 19) para 309.

2.3.3.2. Temporal Restriction of the Measure

Furthermore, even though this requirement is not expressly laid down in the CJEU's jurisprudence, it is persuasive to require the derogation to be of a temporary nature.¹⁰⁷ This is convincing firstly, because a Member State normally invokes Article 72 TFEU by declaring to be in some kind of emergency. The term emergency itself suggests that the situation is temporary.¹⁰⁸ Once the emergency is over, there is no justification for derogations from EU law. Secondly, if a Member State could derogate from EU law without any time constraints, this would further fragment the CEAS. This time-element is therefore a requirement of the *stricto sensu* requirement.

2.3.4. Fundamental Rights as a *Schranken-Schranke*

Since Article 72 TFEU only allows for a derogation from Title V of the TFEU and fundamental rights are not laid down there, scholars argue that Member States cannot use Article 72 TFEU to broadly derogate from fundamental rights. Instead, if a Member State's derogation tangents fundamental rights, it must comply with the requirements laid down for restricting these.¹⁰⁹

This requirement is constitutionally required: Article 51(1) sentence 1 CFR states that the CFR is addressed to the Member States when they implement EU law. While the case law on what "implementing" means in this context is complicated and not always coherent¹¹⁰, it is settled case law that, if a Member State derogates from the four freedoms, it must comply with the CFR.¹¹¹ The fundamental rights serve as a *Schranken-Schranke* in this context.¹¹² The same should apply to derogations from secondary law based on Article 72 TFEU.

Otherwise, the Member State could circumvent fundamental rights it would have been bound by if they derogated within the framework of the secondary law. Advocate General Emiliou in *MA* laid down what such a fundamental rights assessment could look

¹⁰⁷ Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99). de Verdclhan (n 25) 1361.

¹⁰⁸ de Verdclhan (n 25) 1361.

¹⁰⁹ Marlene Stiller, 'How the EU Commission Backs up Pushbacks at the EU-Belarusian Border' [2025] Verfassungsblog <<https://verfassungsblog.de/how-the-eu-commission-backs-up-pushbacks-at-the-eu-belarusian-border/>> accessed 5 May 2025; Commission *Countering hybrid threats* (n 4) 6; Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74); *ibid*; Lehnert and Nestler (n 76); Advocate General Emiliou, *MA* (n 46) para. 118; Thym, *European Migration Law* (n 25) 275.

¹¹⁰ Overview of the jurisprudence: Thomas Kingreen, 'Artikel 51 EU-GRCharta Anwendungsbereich' in Christian Callies and Matthias Ruffert (eds), *EUV AEUV Kommentar* (6th edn, C.H. Beck 2022) paras 7–23.

¹¹¹ CJEU, Case C-112/00, *Schmidberger v. Republic of Austria* [2003], ECLI:EU:C:2003:333 para 74; Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991], ECLI:EU:C:1991:378 paras 30–31; Case C-260/89 *ERT* [1989], ECLI:EU:C:1991:254 para 43.

¹¹² Kingreen (n 110) 19.

like in the context of Article 72 TFEU.¹¹³ What exactly it entails, depends on the derogation measure in question, the scope of which fundamental right is affected and in how far the right can be restricted.¹¹⁴

If a Member State derogates from secondary law and thereby also restricts a fundamental right, it can only do so if it can demonstrate that such a restriction is justified.¹¹⁵ What this means in the context of Article 18 CFR will be elucidated in section 3.

2.3.5. Interim Conclusion

To successfully derogate from Title V TFEU, a Member State must show that there is a serious and concrete threat to its security interests and that its derogation measure would combat this. It must inform the EU and other Member States ahead of its derogation and the measure must be proportional. The latter means that the Member State must demonstrate that its aim cannot already be achieved by derogation possibilities laid down in secondary law. It further has to limit the measure timewise, and it must be in accordance with fundamental rights.

2.4. Testing the Theory: Invoking Article 72 TFEU in Instrumentalization Situations

What do those findings now mean for Member States like Poland or Lithuania who want to combat the instrumentalization of migration by limiting access to their territory and restricting or suspending the possibilities of making asylum applications? In Lithuania, some protection seekers could factually not make an application for international protection¹¹⁶ since, if the person was not particularly vulnerable, these would not be accepted if the person entered the territory illegally.¹¹⁷ Poland temporarily suspended the right to make an asylum application for those arriving via the border to Belarus, which essentially led to a closing of the border.¹¹⁸ By either not letting protection seekers enter or by refusing to let them make an application for protection, both countries derogate from Article 6-9 APD.¹¹⁹

For such derogations to be legal, the Member States would have to show that Belarus sending migrants to their borders poses an actual and sufficiently serious threat to their security. In *MA*, Lithuania failed to prove this. According to the CJEU, the

¹¹³ Advocate General Emiliou, *MA* (n 46) paras 134-143.

¹¹⁴ *ibid* para. 134.

¹¹⁵ Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74); Obwexer and Funk (n 18) 43. For an analysis of what that means in the context of Article 18 CFR, see Part 2.

¹¹⁶ CJEU, *MA* (n 17) para 24.

¹¹⁷ *ibid* paras 13-14.

¹¹⁸ Riemer (n 9).

¹¹⁹ *ibid* paras 53-56 explicitly referring to Article 6 and 7.

Member State did not demonstrate why the migrants posed a serious threat, it merely referred to security interests in a general manner.¹²⁰

To successfully argue this, the Member States would have to show that the number of people arriving makes it impossible to process them and to know who is entering the country and that this actually leads to an increase in crime and that this is so severe that it threatens the maintenance of law and order.¹²¹ While it is true that Belarus intentionally sends migrants towards the border, the number of people that arrive is disputed.¹²² It therefore is questionable whether the situation is one where processing the migrants and ensuring that they do not pose a security threat is impossible. Even if a Member State managed to show a concrete security threat,¹²³ it would additionally have to show that restricting Article 6-9 APD would improve the situation. This is doubtful, since it is the government in Belarus that orchestrates the migration. It will not necessarily feel pressured to stop doing so just because the Member States are trying to stop the entry of migrants. On the contrary, it could even lead to the use of more force to make the migrants enter the EU, nevertheless.

However, the Member States might find "argumentative fuel" in the Commission's Communication. The Commission highlighted that Russia and Belarus' behavior was a threat to the EU's security¹²⁴ and that these countries were abusing the right to asylum. By describing the instrumentalization of migrants as part of hybrid warfare tactics¹²⁵ and by pointing out individual migrants' alleged role in threatening the EU's security¹²⁶, the Commission supports the Member States' view of being severely threatened. Since it is the Commission who primarily starts infringement procedures, the fact that it seemingly supports these positions, could encourage Member States to derogate from secondary law.¹²⁷

The Member States would have to show that they informed the EU and other Member States about the planned derogation. Poland, for instance, was very vocal in asking for support and a change in the EU's approach before it introduced its law¹²⁸, so this criterion would be met.

The Communication might also be viewed by the Member States as supporting

¹²⁰ *ibid* paras 72-73.

¹²¹ CJEU *Commission v. Hungary (Reception of Applicants for International Protection)* (n 22) paras 217-220.

¹²² Ancite-Jepifánova, 'Migrant Instrumentalisation' (n 6).

¹²³ This is doubted by some, e.g. *ibid*; Aleksandra Ancite-Jepifánova, 'Seven Months in the Freezing Forest' [2022] *Verfassungsblog* <<https://verfassungsblog.de/seven-months-in-the-freezing-forest/>> accessed 7 January 2025; Also Amnesty International (n 9).

¹²⁴ *Commission Countering hybrid threats* (n 4) 1.

¹²⁵ *ibid* 1-2.

¹²⁶ *ibid* 2.

¹²⁷ Stiller (n 109).

¹²⁸ Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74).

their claim that the next requirement, that secondary law does not already regulate the situation sufficiently, is met. In *MA*, the Court denied this by pointing to the border procedures Article 43 APD already allows for.¹²⁹ As the EU legislator has introduced the new Crisis Regulation¹³⁰ and added an instrumentalization provision in the SBC¹³¹. there will be secondary law specifically regulating the situation of instrumentalization. The new Article 5(4) SBC, for instance, allows for the temporarily closing or limiting of the opening hours of specific border crossing points in an instrumentalization situation. The Crisis Regulation provides a whole array of measures in an instrumentalization situation, for instance derogation measures such as Article 11, that allows for the extension of the duration and a widening of the scope of border procedures. Those laws have been drafted with the situation along the Belarus' border in mind.¹³²

This will make it more difficult for Member States to argue that secondary law does not consider the situation sufficiently. They would have to show that all these measures are still not enough to combat the mass influx that results from the instrumentalization and that measures like completely closing the borders are necessary, even if they restrict the right to asylum, which the aforementioned rules do not allow for. While this seems unlikely to succeed, the Commission highlighted that under exceptional and stringent conditions, Member States could invoke Article 72 TFEU to go further than what is provided for by secondary law,¹³³ thereby implying that even with those new rules, there might still be room for derogations.

It is not entirely clear what motivated the Commission to issue these statements, that have the potential to undermine the CEAS and fundamental rights. One should not dismiss them as non-binding and as the Commission only wanting to appease its Member States.¹³⁴ Even if that were the case, the harm is already done: The

¹²⁹ CJEU, *MA* (n 17) para 74.

¹³⁰ Regulation (EU) 2024/1359 of the European Parliament and the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, hereinafter "Crisis Regulation".

¹³¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) as amended by Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024, hereinafter "Schengen Border Code".

¹³² Communication from the Commission to the European Parliament and the Council, '*Striking a balance on migration: an approach that is both fair and firm*', 12 March 2024, COM (2024) 126 final, 11-12; Stiller (n 109); Mirko Forti, 'Weaponisation of Migrants? Migrants as a (Political) Weapon and the EU Regulatory Response: What to Expect Now' (*EJIL: Talk!*, 10 March 2022) <<https://www.ejiltalk.org/weaponisation-of-migrants-migrants-as-a-political-weapon-and-the-eu-regulatory-response-what-to-expect-now/>> accessed 24 August 2025; Felix Peerboom, 'Rising Tensions at the EU's External Borders with Russia: The Unwanted Return of Instrumentalised Migration and Problematic Responses' (*EJIL: Talk!*, 8 December 2023) <<https://www.ejiltalk.org/rising-tensions-at-the-eus-external-borders-with-russia-the-unwanted-return-of-instrumentalised-migration-and-problematic-responses/>> accessed 24 August 2025.

¹³³ Commission *Countering hybrid threats* (n 4) 2.

¹³⁴ Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74).

Communication will most likely serve as motivation for Member States to introduce harsh measures, by thinking that the Commission backs or at least tolerates their behavior.¹³⁵ Such a calculation might not be wrong, considering how the Commission mostly turned a blind eye and did not start infringement procedures in regard to the unlawful extensions of border controls or the measures Poland and Lithuania have implemented so far.¹³⁶

Lastly, the Member State would have to show that its measure is of a temporary nature, for instance by including time limits into their laws.

Even if the Member States managed to prove that all these requirements are met, the question is what the last requirement, having to respect fundamental rights, means for them. Since this cannot be answered in general, but depends on the concrete right, a detailed analysis of the right in question, here the right to asylum, is required.

¹³⁵ Athanasiou (n 12); Stiller (n 109); Ganty, Ancite-Jepifánova and Kochenov (n 9) 764–765.

¹³⁶ Thym, 'Nun also doch?' (n 54); Ancite-Jepifánova, 'Migrant Instrumentalisation' (n 6); Iris Goldner Lang, 'Instrumentalisation of Migrants: It Is Necessary to Act, but How? – EU Immigration and Asylum Law and Policy' <<https://eumigrationlawblog.eu/instrumentalisation-of-migrants-it-is-necessary-to-act-but-how/>> accessed 4 August 2025.

3. Restricting Article 18 CFR by Invoking Article 72 TFEU – Or is it the Other Way Around?

To assess whether Poland and Lithuania's derogations from the APD are compatible with Article 18 CFR, the scope of that Article and whether the Member States' measures restrict it must be analyzed.

If the rights to access asylum procedures and enter the territory are laid down in the APD, but do not fall within the scope of Article 18 CFR, the derogating Member State would not be restricted by Article 18 CFR. If they do fall within the scope of Article 18 CFR, the question is whether the Member State can justify such a restriction.

3.1. Article 18 CFR's Blurry Scope

Article 18 CFR states: "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.*" Just from the wording itself, it cannot be said which rights it includes. Since the CJEU's jurisprudence on the article is sparse, and often conflates the scope of Article 18 with protections laid down in secondary law¹³⁷, there are still many open questions about the content.¹³⁸ The vague formulation raises three questions that are relevant for in the context of Member States derogating from Article 7-9 APD: Does Article 18 CFR contain an individual right? How is the reference to the Geneva Convention to be understood? If it is an individual right, does the scope of it cover the rights laid down in the APD?

3.1.1. An Individual Right or A Principle?

Whether Article 18 CFR includes an individual right to asylum has already been debated when it was drafted¹³⁹ and its vague formulation makes scholars question it to

¹³⁷ CJEU, *MA* (n 17) paras 61-68; *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para. 44; C-821/19, *European Commission v Hungary (Criminalisation of Assistance to Asylum Seekers)* [2021], ECLI:EU:C:2021:930 paras 99, 132; C-460/23, *OB* [2025], ECLI:EU:C:2025:392 paras 57-59.

¹³⁸ Obwexer and Funk (n 18) 25; Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 *European Law Journal* 94, 96.

¹³⁹ See the overview over the discussions in Norbert Bernsdorff, 'Artikel 18 Recht auf Asyl' in Jürgen Meyer and Sven Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union* (6th edn, Nomos 2024) paras 7-10; María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law' (2008) 27 *Refugee Survey Quarterly* 33, 42-45; Daniel Thym, 'Chapter 18 Legal Framework for EU Asylum Policy' in Daniel Thym and Kay Hailbronner (eds), *EU immigration and asylum law: article-by-article commentary* (3rd ed, C.H. Beck Nomos Hart 2022) para 63.

this day.¹⁴⁰ Some view it as a principle within the meaning of Article 52(5) CFR.¹⁴¹

However, the Article's location in the chapter "freedoms" indicates that it is a right: Such freedoms are normally understood as individual rights in modern constitutions.¹⁴² That Article 18 CFR does not start with "*Everyone has a right...*" is not indicative of whether it is a right; other individual rights do not contain this formulation either.¹⁴³ Furthermore, the Article is titled *right to asylum*.¹⁴⁴ The fact that, in the final draft, it was decided to refer to the right *to* asylum further supports viewing it as an individual right.¹⁴⁵

Therefore, individuals arriving from Belarus and trying to enter Poland or Lithuania could invoke Article 18 to challenge the countries' measure and the Member States must oblige with those individual rights. But even if Article 18 CFR is an individual right, its precise scope and therefore also what the border states must comply with, remains unclear.¹⁴⁶

3.1.2. The Reference to the Geneva Convention: Non-Refoulement as the Essence of Article 18 CFR

How one interprets the scope of Article 18 CFR heavily depends on the understanding of the reference to the Geneva Convention. Most crucially, the Geneva Convention codifies the principle of *non-refoulement* in Article 33(1). It states that an individual must not be returned to unsafe territories, where his/her life or freedom would be threatened.

By some, the reference is understood as the protection of Article 18 CFR not going further than the guarantees laid down in the Geneva Convention,¹⁴⁷ which would mean that it does not include an individual right to asylum, since the Geneva Convention

¹⁴⁰ Overview over the conflict: Matthias Klatt, 'Artikel 18 Recht auf Asyl' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos 2015) para 3; Bernsdorff (n 139) paras 7–9.

¹⁴¹ Nicolosi (n 138) 105; Bernsdorff (n 139) paras 7–9; Matthias Rossi, 'Artikel 18 Asylrecht' in Christian Callies and Matthias Ruffert (eds), *EUV AEUV Kommentar* (6th edn, C.H. Beck 2022) paras 2–3.

¹⁴² Thomas Groß, 'Migrationsrelevante Freiheitsrechte der EU-Grundrechtecharta' [2013] ZAR 106, 109.

¹⁴³ E.G. the right to marry and the right to found a family, Article 9; the freedom of the arts and sciences, Article 13; the freedom to conduct a business, Article 16.

¹⁴⁴ Maarten de Heijer, 'Article 18 CFR - Right to Asylum' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: a commentary* (2nd edition, Hart Publishing 2021) para 18.28; Groß (n 142) 109; However: Bernsdorff (n 139) para 13.

¹⁴⁵ Gil-Bazo (n 139) 43–45.

¹⁴⁶ Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99).

¹⁴⁷ In favor of such an interpretation for instance Rossi (n 141) para 1; Bernsdorff (n 139) para 14; Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 41); Hans D Jarass, 'Artikel 18 Recht auf Asyl', *Charta der Grundrechte der Europäischen Union: unter Einbeziehung der sonstigen Grundrechtsregelungen des Primärrechts und der EMRK* (4th edn, C.H. Beck 2021) para 2.

does not either.¹⁴⁸ Advocates of this view point out that states have repeatedly objected to the idea of an international right to asylum that includes a right to enter the country.¹⁴⁹

Others view the reference as ensuring a minimum standard the EU and the Member States cannot undermine, but not as Article 18 not going further than that.¹⁵⁰ An argument in their favor is that the *non-refoulement* principle is already laid down in Articles 19 CFR, so inserting a right to asylum with the same content would have been unnecessary.¹⁵¹ Furthermore, the formulation “*with due respect*” to the rights laid down in the Geneva Convention does not indicate a limitation to those rights – it merely requires that they must not be violated.¹⁵² The French formulation “*Le droit d’asile est garanti dans le respect des règles de la convention de Genève [...]*” further supports such a reading. While the German version “*Das Recht auf Asyl wird nach Maßgabe des Genfer Abkommens [...] gewährt*” can more easily be interpreted as the right not granting more than the rights laid down in the Geneva Convention, it also does not prohibit reading it as not being limited to it. The reference to the Geneva Convention should therefore be understood as the right not to be made subject to a refoulement forming the essence of the right to asylum, but not as all it entails.¹⁵³

Whether one agrees with the first or with the second view becomes crucial if a Member States’ measure does not conflict with the principle of *non-refoulement*. If Article 18 contains more than the principle of *non-refoulement* the Member States’ measures could fall within the scope of Article 18, nevertheless.

3.1.3. A Right to Seek Asylum

Which other rights Article 18 CFR entails is far from settled. Fairly undisputed is that, once someone made an application for asylum, the person enjoys certain procedural rights.¹⁵⁴ What is still highly contentious, however, is, whether, Article 18 CFR includes a right to seek asylum – meaning a right to access asylum procedures by entering the country and making an asylum application – and, if that is the case, whether it also includes a right to enjoy asylum, meaning that, if an individual fulfils the

¹⁴⁸ Obwexer and Funk (n 18) 5.

¹⁴⁹ de Heijer (n 144) para 18.25.

¹⁵⁰ Groß (n 142) 108–109; de Heijer (n 144) para 18.29–18.30; Tending into this direction: Thym, ‘Kippt in Brüssel das individuelle Asylrecht?’ (n 74).

¹⁵¹ de Heijer (n 144) para 18.06; The CJEU has affirmed that Article 18 and 19 include the principle of non-refoulement as a fundamental right on several occasions, for instance in C-352/22, *A v Generalstaatsanwaltschaft Hamm* [2024], ECLI:EU:C:2024:521 para 51; C-69/21, *X v Staatssecretaris van Justitie en Veiligheid* [2022], ECLI:EU:2022:913 para 55.

¹⁵² de Heijer (n 144) para 18.29.

¹⁵³ Similarly *ibid.*

¹⁵⁴ Thym, ‘Does the Commission Cross the Rubicon? Legalising “Pushbacks” on the Basis of Article 72 TFEU’ (n 99).

requirement for international protection, s/he also has a right to be granted asylum. The answer to the first question is the one crucial to determine whether the right to make an asylum application as laid down in the APD falls within the scope of the right to asylum.

By referring to the drafting history and the reference to the Geneva Convention, Article 18 CFR is often understood as not granting an individual right to be taken in, as long as the refusal does not violate the *non-refoulement* principle.¹⁵⁵

However, that the content of the right was disputed during the legislative process cannot be read one-sided as supporting a narrow reading, parts of the drafting history also imply a broad reading. For instance, the language was changed from right *of* asylum to right *to* asylum, and from *in accordance* with the rules of the Geneva Convention to *with due respect*.¹⁵⁶ The disputes during the drafting process therefore do not clearly point in either direction, it is merely an explanation for why the language of the Article might have stayed vague.

The reference to the TFEU and TEU could help narrowing down Article 18 CFR's scope, particularly if secondary law can be deemed to concretize the right.¹⁵⁷ But, even if it does, that does not mean that everything laid down in secondary law is directly demanded by Article 18 CFR – the legislator is free in granting a higher protection level than the Article demands.¹⁵⁸ The scope of Article 18 CFR and the rights laid down in secondary law therefore are not necessarily identical.

However, for Article 6 APD, the CJEU has expressly stated that it gives concrete form to the fundamental right enshrined in Article 18 CFR. The Court went on to say that this meant that a third-country national had the right to make an application for asylum by expressing the wish to be granted international protection and that this also applies if the person entered the territory of the Member State illegally.¹⁵⁹ It also stated in more general terms that the APD gave "*specific expression*" to Article 18 CFR.¹⁶⁰ These are clear indicators of the right to asylum including a right to access asylum procedures and to enter the territory of the country.

¹⁵⁵ Bernsdorff (n 139) para 23; de Heijer (n 144) para 18.25; Obwexer and Funk (n 18) 6; Overview of the dispute: Groß (n 142) 108–110 who rejects this restrictive reading of the right.

¹⁵⁶ Gil-Bazo (n 139) 42–45; Groß (n 142) 109; For the changes in the text see the previous draft text: Praesidium of the Convention on the Charter of Fundamental Rights, 'Note from the Praesidium Draft Charter of Fundamental Rights of the European Union – Proposed Articles (Articles 10 to 19) 11 October 2000, CHARTE 4137/00 CONVENT 8, 6.

¹⁵⁷ de Heijer (n 144) para 18.42-18.43; Klatt (n 140) para 1.

¹⁵⁸ Jarass (n 147) para 14.

¹⁵⁹ CJEU, *A v Generalstaatsanwaltschaft Hamm* (n 151) para 51; *Commission v. Hungary (Declaration of Intent Prior to an Asylum Application)* (n 50) para 43.

¹⁶⁰ CJEU, Case C-216/22 *A.A. v Federal Republic of Germany* [2024], ECLI:EU:C:2024:122 para 39.

Another argument for Article 18 CFR entailing a right to enter and make an application for asylum is that if it did not grant these rights, the procedural rights inherent to Article 18 CFR would be rendered ineffective in many cases, as protection seekers would be kept from accessing them.¹⁶¹ That would contradict the purpose of the article. Furthermore, without assessing an asylum claim, it cannot be guaranteed that a person is not exposed to unsafe circumstances if barred from entry. Not letting someone enter or assessing his/her claim would bear an inherent risk of a violation of the *non-refoulement* principle.

The Court found that making it impossible for third-country nationals to make an asylum application would deprive them from the effective enjoyment of their right “as guaranteed by Article 18 of the Charter, to seek asylum”.¹⁶² This means that the right to asylum, unlike the *non-refoulement* principle, does not only protect from being pushed back to unsafe territories. Everyone who makes an application for asylum in principle must be allowed to enter a country and be allowed to stay for the procedure which determines whether s/he qualifies for international protection.¹⁶³

3.1.4. Interim Conclusion

Article 18 CFR is an individual right. The standards laid down in the Geneva Convention, particularly the principle of *non-refoulement*, are crucial to the right to asylum¹⁶⁴ and should be viewed as the essence of the right, but they are not all that Article 18 CFR entails.¹⁶⁵ It also includes a right to enter a state to access asylum procedures, as well as the right to stay during the procedure.

¹⁶¹ See in this regard the very detailed analysis of how Member States keep protection seekers from accessing the procedure and the rights attached to it Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, ‘The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and the EU Asylum Policy’ (Social Science Research Network, 1 January 2008) 6–13 <<https://papers.ssrn.com/abstract=3877165>> accessed 8 August 2025; Groß (n 142) 109; Thym, ‘Kippt in Brüssel das individuelle Asylrecht?’ (n 74); Advocate General Emiliou, *MA* (n 46) 136-137; Advocate General Pikmäe, *Commission v. Hungary (Reception of Applicants for International Protection)* (n 24) para 102.

¹⁶² CJEU, *European Commission v Hungary (Criminalisation of Assistance to Asylum Seekers)* (n 137) para 132; C-132/22 *European Commission v Hungary (Reception of Applicants for International Protection II)* [2024], ECLI:EU:C:2024:493 paras 105-108.

¹⁶³ Klatt (n 140) paras 9–10. Similarly: Groß (n 142) 109.

¹⁶⁴ Jan Bergmann, ‘Artikel 18 Recht auf Asyl’ in Jan Bergmann and Klaus Dienelt (eds), *Ausländerrecht* (15th edn, C.H. Beck 2025) para 1; Similarly Stiller (n 109). CJEU C-673/19 *M, A, T v Staatssecretaris van Justitie en Veiligheid* [2021], ECLI:EU:C:2021:127 para 40.

¹⁶⁵ de Heijer (n 144) para 18.05-18.07.

3.2. Are the Member States Violating Article 18 CFR?

3.2.1. In Principle: Yes

Therefore, derogations from Article 6- 9 APD like the emergency laws of Lithuania and Poland restrict the scope of Article 18 CFR. If the refusal to let an individual enter and make an asylum application would amount to him/her being pushed back to unsafe territories, Article 18 would be restricted, since this would be a violation of the principle of *non-refoulement*.

In the cases of migrants passing through Belarus and being denied entry at the EU external border, the answer seems simple – Belarus is not a safe third country¹⁶⁶, forcing a person to return to the territory of Belarus would therefore be a violation of the *non-refoulement* principle. Since this is an absolute right, and, according to this paper, constitutes the essence of the right to asylum, a restriction of it could not be justified. If one stopped the analysis here, it would mean that the behavior Poland, Lithuania and other border states engage in is unlawful.¹⁶⁷

3.2.2. Or not? The ECtHR's Recent Case Law

However, the ECtHR's decision in *N.D. and N.T. v. Spain*¹⁶⁸ might change this assessment. The Court held that not every state behavior that amounts to a pushback is a violation of the prohibition of collective expulsion, Article 4 of Protocol No. 4: In the case, a group tried to take down fences to enter Spanish territory from Morocco. These attempts were coordinated by smuggling networks. At least on one occasion, those migrants who succeeded crossing the fence and accessed Spanish territory, were returned to Morocco by Spanish police without being able to make an asylum application and without the authorities assessing the individual cases.¹⁶⁹ The ECtHR decided that in case of "a large number of migrants" trying to enter "in an unauthorised manner", Article 4 of Protocol No. 4, which prohibits a return without individual assessments of the case¹⁷⁰, was not violated by Spain:¹⁷¹ According to the Court, a state could make the acceptance of a protection application conditional on individuals coming in through official border crossing points, as long as there were sufficient crossing points that asylum seekers had genuine and effective access to, and if the migrants did not have

¹⁶⁶ Ancite-Jepifánova, 'Seven Months in the Freezing Forest' (n 123); Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74).

¹⁶⁷ Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99).

¹⁶⁸ *N.D. and N.T. v. Spain* (Apps nos 8675/15 and 8697/15, ECtHR [GC] 14 February 2020)

¹⁶⁹ *ibid* paras 24-27.

¹⁷⁰ *Sultani v. France* (App no, 45223/05, ECtHR, 20 September 2007) paras 81-84.

¹⁷¹ ECtHR, *N.D. and N.T. v Spain* (n 168) paras 166, 206.

cogent reasons for not using them.¹⁷² If a person did not use these legal entry possibilities, the ECtHR deemed the expulsion a consequence of the person's own conduct.¹⁷³ In later cases, the Court indicated that this "own conduct" criterion might even be transferrable to the principle of non-refoulement deriving from Article 3 ECHR.¹⁷⁴ It is not clear which factors were decisive for the Court's decision¹⁷⁵, but it could be interpreted as allowing for protective measures that include refusing entry when there are possibilities to cross the border at other locations and particularly when it is a big group of migrants that uses force.¹⁷⁶ The ND and NT judgement has been severely criticized,¹⁷⁷ among others, precisely because of this unclear language that leaves the question open whether it was the specific situation at hand that led to the decision or if the Court deemed such an "own conduct" exception to be a separate new criterion that can be transferred to other cases.¹⁷⁸

Furthermore, the Court completely dismissed plausible reports that indicate that it is very difficult for migrants to get to open border points and that it is partially due to the EU's externalization policies that Libyan officials deter migrants from approaching border crossing points.¹⁷⁹ It is also still unclear what the exact requirements would be, meaning how many border check points would have to be kept open, and when a migrant would be viewed as having cogent reasons for not using the official check points.¹⁸⁰ Furthermore, in practice it will be almost impossible for an individual to prove that s/he had cogent reasons for not coming through an official border point, since the people might be expelled precisely because of this new criterion and are thereby prevented from pleading their case.¹⁸¹ Referring to the own conduct of a person would also undermine the absolute nature of the non-refoulement principle – it is not absolute, if the conduct of a person can strip him/her of protection. Furthermore, it bears the risk

¹⁷² *ibid* paras 206-232; Also confirmed in *A.A. and Others v. North Macedonia* (Apps no 55798/16 and others, ECtHR, 5 April 2022) para 123.

¹⁷³ ECtHR, *N.D. and N.T. v Spain* (n 168) para 231.

¹⁷⁴ *M.B. and R.A. v. Spain* (App no 20351/17, ECtHR, 5 July 2022) paras 19-20; *M.A. and Z.R. v. Cyprus* (App no 39090/02, 8 October 2024) para 107; Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99).

¹⁷⁵ Thym, *European Migration Law* (n 25) 273.

¹⁷⁶ Barbara Mikołajczyk, 'Polish Law Restricting the Right to Asylum at Borders – EU Immigration and Asylum Law and Policy' <<https://eumigrationlawblog.eu/polish-law-restricting-the-right-to-asylum-at-borders/>> accessed 4 August 2025.

¹⁷⁷ Maximilian Pichl and Dana Schmalz, "'Unlawful" May Not Mean Rightless.' [2020] *Verfassungsblog* <<https://verfassungsblog.de/unlawful-may-not-mean-rightless/>> accessed 29 August 2025. Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (*EU Migration Law Blog*, 1 April 2020) <<https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/>> accessed 3 August 2025.

¹⁷⁸ Markard (n 177).

¹⁷⁹ Pichl and Schmalz (n 177); Giulia Ciliberto, 'A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in *N.D. and N.T. v Spain*' (2021) 21 *Human Rights Law Review* 203, 213-217.

¹⁸⁰ Ciliberto (n 179) 216.

¹⁸¹ Pichl and Schmalz (n 177).

that Convention States would feel encouraged to transfer this exception to other situations. For instance, if someone committed a crime, is that not also his/her own conduct? Would it then be lawful for a state to remove this person from its territory, even if this meant the person would potentially be put in danger?¹⁸² This would be diametral against the long-standing interpretation of Article 3 ECHR¹⁸³ and it would ignore that Article 3 ECHR does not include an exception like Article 33(2) Geneva Convention.

While it is to be hoped that the ECtHR would put a stop to such interpretations, it was the Court itself that opened the Pandora's box with its "own conduct" criterion. Even "just" applying the own conduct criterion to collective expulsions will lead to violations of the non-refoulement principle: If there is no assessment of individual cases at the border, it cannot be guaranteed that the persons rejected will not be exposed to threats to their life and freedom.¹⁸⁴

Why is this relevant for the EU-Belarus border situation? There are currently three instrumentalization cases pending in front of the ECtHR¹⁸⁵: In all of them, the applicants argue that Article 3 ECHR and Article 4 Protocol 4 ECHR were violated, since they were forced to return to Belarus without being able to apply for asylum.¹⁸⁶ If the Court saw the fact that they arrived at the borders in larger groups, organized by the Belarussian government as comparable, pushbacks in these cases might be viewed to be lawful as well.¹⁸⁷ While the *ND and NT* judgement is already not convincing, applying it to cases of instrumentalization would be even less persuasive. It is inherent to the concept that it is a foreign actor, often another State, that uses migration to destabilize another state – the fact that it is coordinated like that contradicts the idea of an "own conduct" of the migrants. However, the same could have been said about the situation in *ND and NT*, since it was smuggling groups that organized the attempts to cross the Spanish border, and Moroccan officials that kept the migrants from accessing border checkpoints, but the ECtHR blamed the migrants' own conduct anyway.

¹⁸² See *ibid* who share a similar concern.

¹⁸³ *Soering v. the United Kingdom* (App no. 14038/88, 7 July 1989).

¹⁸⁴ Anna Lübke, 'The Elephant in the Room' [2020] Verfassungsblog <<https://verfassungsblog.de/the-elephant-in-the-room/>> accessed 30 August 2025.

¹⁸⁵ *C.O.G.C. and others v. Lithuania* (Apps no 17764/22 and others, ECtHR); *R.A. v Poland* (App no 42120/21, ECtHR); *H.M.M. v. Latvia* (App no 42165/21, ECtHR).

¹⁸⁶ ECtHR, 'Grand Chamber hearing concerning alleged "pushbacks" at the Lithuanian-Belarusian border' Press Release ECHR 042 (2025) 12 February 2025 < <https://hudoc.echr.coe.int/eng-press?i=003-8156398-11432818>>; 'Grand Chamber hearing concerning alleged "pushbacks" at the Polish Belarusian border' Press Release ECHR 040 (2025) 12 February 2025 <<https://hudoc.echr.coe.int/eng-press?i=003-8155927-11431988>>; Grand Chamber hearing concerning alleged "pushbacks" at the Latvian-Belarusian border' Press Release ECHR 041 (2025) 12 February 2024 <<https://hudoc.echr.coe.int/eng-press?i=003-8156289-11432664>>.

¹⁸⁷ Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99); Athanasiou (n 12); Ciliberto (n 179) 217.

It therefore does not seem unlikely that the Court would apply the criterion to instrumentalization situations. This does not automatically mean that Poland and Lithuania's measures are lawful under EU law: There is no automatism that the CJEU would adopt the ECtHR's approach. In *MA*, the Advocate General expressly refused such a transfer and pointed towards the very specific facts of the *ND and NT* case, thereby rejecting reading the "own conduct" as a new criterion that applies more generally.¹⁸⁸ The Commission however, seems to be advocating for reading it as the own conduct of a person leading to the person not being protected by the principle of *non-refoulement* in instrumentalization situations.¹⁸⁹ For the reasons laid down above, such an adoption in EU law would not be desirable, and it is also not required by Article 52(2), which only refers to the ECHR as a minimum protection standard.¹⁹⁰ Still, in the current political climate, it cannot be ruled out that the CJEU might be inclined to adopt the approach.

If the CJEU did do so, the principle of *non-refoulement* and the prohibition of collective expulsions would no longer "stand in the way" of restricting the right to asylum.¹⁹¹ For those who view Article 18 as containing nothing more than a prohibition of refoulement, that would mean that in this scenario, a derogation from the APD's obligations to grant migrants entry to access to the procedure, make an asylum application and stay during the procedure, would not violate Article 18 CFR, as the right to *non-refoulement* would not be deemed to be violated. For those however, who deem Article 18 to encompass such rights, there still would be other requirements the Member State had to comply with, namely those laid down in Article 52(1) CFR.¹⁹²

3.3. Article 52 (1) CFR as an Additional Limitation for Derogations

According to Article 52(1) CFR, any limitations of the right to asylum would have to be provided for by law and the essence of the right would have to be respected. It furthermore would have to be proportional, meaning limitations may only be made if they are necessary and meet objectives of general interests recognized by the EU or the need to protect rights of others.¹⁹³

3.3.1. Provided for by Law

Since Lithuania and Poland both issued emergency laws that provided for the

¹⁸⁸ Advocate General Emiliou, *MA* (n 46) para 143.

¹⁸⁹ Commission *Countering hybrid threats* (n 4) 7; Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74); Stiller (n 109).

¹⁹⁰ Advocate General Emiliou, *MA* (n 46) para 143.

¹⁹¹ Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99).

¹⁹² Rossi (n 141) para 11 who does not view Article 18 as containing an individual right and therefore sees no need to apply Article 52; Thomas Groß, 'Europäische Grundrechte als Vorgaben für das Einwanderungs- und Asylrecht' (2001) 34 *Kritische Justiz* 100, 104.

¹⁹³ Advocate General Emiliou, *MA* (n 46) para 137.

derogation measures, these measures were provided for by law.

3.3.2. Determining the Essence of the Right

It is not entirely clear what the “essence of the right” is supposed to be, but it is usually deemed to be respected if a measure does not deprive a right of its substance.¹⁹⁴ It can either be understood as being absolute or relative.¹⁹⁵ The latter analyses the essence for each individual case. However, that would essentially be a proportionality test, which Article 52(1) CFR names as a separate requirement. Understanding the essence of a right in an absolute manner is therefore more persuasive.¹⁹⁶ It has already been laid out that the essence of Article 18 CFR is the principle of *non-refoulement*. Violating it would therefore violate the essence of a right. If the ECtHR’s jurisprudence were to be transferred to instrumentalization situations and adapted by the CJEU, the measures would not be violating the *non-refoulement* principle and therefore respect the essence of the right.

3.3.3. Proportionality as a Final Hurdle for Derogations

To comply with the principle of proportionality, the Member States must show that the restrictions are suitable and necessary: keeping migrants from entering would have to secure the internal security, there could not be a less-invasive measure and there must be an appropriate balance between this aim and the restriction of the right.

As laid down above, it is doubtful whether restricting the right to asylum would combat the instrumentalization of migration – some reports in literature severely question how the governments are depicting the situation on the ground¹⁹⁷ and the government of Belarus would not necessarily stop sending migrants, it might even use more force to push them over the border to the EU. Even if a Member State could show their measure led to a decrease in the migration influx, it is not necessary to completely prevent migrants from entering.

The APD, for instance, allows for making it mandatory to apply for asylum in specific border posts, but only if this does not render the right to asylum ineffective – these posts must be within reach for migrants.¹⁹⁸

While the respondent States in the pending instrumentalization cases in front of

¹⁹⁴ Angela Schwerdtfeger, ‘Art. 52 GRC Tragweite Und Auslegung Der Rechte Und Grundsätze’ in Jürgen Meyer and Sven Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union* (6th edn, Nomos 2024) para 34.

¹⁹⁵ Thomas Kingreen, ‘Art. 52 EU-GRCharta Tragweite und Auslegung der Rechte und Grundsätze’ in Christian Callies and Matthias Ruffert (eds), *EUV AEUV Kommentar* (6th edn, C.H. Beck 2022).

¹⁹⁶ Schwerdtfeger (n 194) para 34.

¹⁹⁷ Ancite-Jepifánova, ‘Migrant Instrumentalisation’ (n 6). Ganty, Ancite-Jepifánova and Kochenov (n 9) 749–752.

¹⁹⁸ Forti (n 9) 233.

the ECtHR argued that they provided genuine and effective access, whether this is actually the case is doubted in scholarship.¹⁹⁹ A complete denial of entry, or the condition to only use border posts that are difficult to reach, would therefore be more invasive to the right than necessary and therefore disproportional.

3.3.4. Interim Conclusion

Fundamental rights have a dual role in derogation situations: While the Member States might want to derogate from them, they at the same time restrict the derogation possibilities. If a Member State wants to derogate from the rights provided for in Article 6-9 APD, it cannot violate the principle of *non-refoulement*, which is the essence of the right to asylum. Returning someone to Belarus in principle violates this principle. However, if the ECtHR "own conduct" jurisprudence were to be transferred to instrumentalization cases and if the CJEU would also adapt this case-law, the Member States could more easily derogate from its obligation to allow entry and access to asylum procedures without violating the *non-refoulement* principle. They would still have to comply with the requirements laid down in Article 52(1) CFR. A complete denial of accepting asylum applications would be disproportional.

¹⁹⁹ Ancite-Jepifánova, 'From the EU-Belarus Border to Strasbourg' (n 8).

4. Conclusion

To now answer the question: "*What is the legal nature and scope of Article 72 TFEU?*", it can be maintained that the article is primarily a reminder for the EU institutions to sufficiently consider the Member States' security interests when drafting secondary law. However, as an *ultima ratio*, it also functions as a derogation norm, but only to derogate from the Articles laid down in Title V of the TFEU, and only if there is a severe and concrete risk to law and order or public security, which is addressed by secondary law insufficiently, if the derogation measure is of a temporary measure, if the Member State has informed the EU and other Member States of its intended derogation and if it respects the limits fundamental rights require. This high threshold for the invocation of Article 72 TFEU has never been met by any Member State. Particularly once the Crisis and Force Majeure Regulation is applicable, the window for successfully invoking Article 72 TFEU will become even smaller.

The second part of the research question: "*Can it be used to restrict the right of asylum in situations of instrumentalization and if so, how?*" must be answered the following: The Member States cannot invoke Article 72 TFEU to derogate from and restrict Article 18 CFR itself directly. However, theoretically, they can derogate from secondary law provisions that are also included by the scope of Article 18. Fundamental rights therefore have a dual role in derogation situations: While the Member States might want to derogate from them, they also restrict the derogation possibilities. In the case of instrumentalization, preventing individuals from entering at the EU's outer border and to send them back to Belarus, which is not a safe country, violates the principle of *non-refoulement* and therefore also the right to asylum which is not possible under Article 72 TFEU. However, if the ECtHR's "own conduct" case law will be extended to cases of instrumentalization and adapted by the CJEU, pushing back migrants to Belarus would not automatically result in a violation of the *non-refoulement* principle. Still, the right to enter a state, make an asylum application and stay during the procedure, is protected by the scope of Article 18. If a Member State restricts these rights, it therefore must comply with Article 52(1) CFR. A complete denial to accept asylum applications would violate the proportionality principle and could not be justified.

So, in practice, successfully invoking Article 72 TFEU to derogate from the right to asylum is almost impossible. However, the fact that the Commission seemingly "endorsed" invoking Article 72 TFEU to derogate from the right to asylum could mean that the Commission will be reluctant to start infringement procedures against Member States who do so. If the Member States feel like there are no consequences to invoking Article 72 TFEU, even if the requirements for it are not met, they will feel more empowered to do so, and the invocation of Article 72 TFEU will be extended to other

fields of migration law. Germany already mentioned it in the context of its border controls²⁰⁰, and Austria proclaimed that invoking Article 72 TFEU justifies its restriction of family reunification.²⁰¹ It is beyond the scope of this thesis to analyze the role of Article 72 TFEU in these contexts, but it remains to be hoped that the courts in those countries will start preliminary procedures and that the CJEU will take the chance to further clarify the conditions for the invocation of Article 72 TFEU and to renounce invoking Article 72 TFEU simply for political reasons.

To come back to the quote in the beginning: Indeed, a stick of dynamite has been lit under the EU's migration policy, but Donald Tusk was by no means the first or the only one to do so.²⁰² One of the first sticks has already been lit when Greece forcefully kept protection seekers coming through Turkey from entering the EU, and another when the EU institution's embraced this.²⁰³ Regardless of what the CJEU and ECtHR will eventually decide: There have been multiple detonations already which have weakened the right to asylum.²⁰⁴ It leaves one wondering what will be left of its guarantees if the Commission does not cut the fuses immediately by sanctioning Member States' behavior at the Belarussian border.

²⁰⁰ Hruschka (n 23).

²⁰¹ Austrian Parliament, 'Parlamentskorrespondenz Nr. 319 Nationalrat beschließt "Pause" für Familienzusammenführung' <https://www.parlament.gv.at/aktuelles/pk/jahr_2025/pk0319> accessed 21 August 2025 (Press Release 25 April 2025).

²⁰² Peerboom (n 132).

²⁰³ Goldner Lang (n 136); Thym, 'Kippt in Brüssel das individuelle Asylrecht?' (n 74); Peerboom (n 6) 597.

²⁰⁴ Mikolajczyk (n 176); Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU' (n 99); Ancite-Jepifánova, 'Migrant Instrumentalisation' (n 6); Peerboom (n 6) 599.

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