

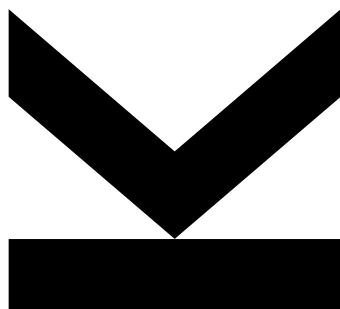
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# The Integration of the Common European Asylum System



Master's Thesis

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# Abstract

Since its inception, the European Union has gone through an unprecedented process of integration. From an economic cooperation between six countries it grew into a political union of twenty-eight member states. Asylum became a policy field of the EU relatively late, but a lot of integration took place and today, incomplete as it is, the Common European Asylum System is a large policy field and a priority for the EU. This thesis asks the question what the most important theories of European integration—neofunctionalism, intergovernmentalism, institutionalism and governance—can contribute to explaining why asylum was integrated, how it happened and why the CEAS became the way it is. For the most inclusive perspective, this thesis looks at as many instances of policy-making as possible. The answer still fits well with previous, narrower analyses as well as the overall theme of the study of European Integration: it is complicated. No theory can explain everything, but all theories can contribute something to the whole picture.

# Abstrakt

Seit der Gründung der Europäischen Integration hat die EU einen einzigartigen Integrationsprozess durchgemacht. Sie hat sich von einer wirtschaftlichen Kooperation von Sieben Ländern in eine politische Union von achtundzwanzig Mitgliedsstaaten entwickelt. Asyl wurde erst relativ spät ein Politikfeld der EU, aber in kurzer Zeit ist extrem viel Integration passiert und heute ist das Gemeinsame Europäische Asylsystem, obwohl unfertig, ein wichtiges Politikfeld und eine Priorität für die EU. Diese Arbeit fragt was die wichtigsten Integrationstheorien—Neofunktionalismus, Intergouvernementalismus, Institutionalismus und Gouvernance—dazu beitragen können zu erklären, warum Asyl kommunitarisiert wurde, wie das passiert ist und wie das Europäische Asylsystem so wurde wie es im Moment ist. Um eine möglichst breite Perspektive zu haben beschäftigt sich diese Arbeit mit so vielen Rechtsakten der EU wie möglich. Das Ergebnis bestätigt was frühere, engere Analysen des Themas und das Studium von europäischer Integration generell aufzeigen: es ist komplex. Keine Integrationstheorie kann alles erklären, aber jede Theorie kann einen Teil der Antwort beitragen.

Key words: European Union, European Integration, Common European Asylum System, Asylum, neofunctionalism, intergovernmentalism, governance

“your magic binds again  
what convention strictly divides”<sup>1</sup>

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<sup>1</sup> From the lyrics of Beethoven’s ‘Ode to Joy’, a melody nowadays most commonly known as the anthem of the European Union.

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# 1. Introduction and Overview

Europe has experienced an unprecedented process of integration since the founding of the European Communities in the 1950s, when France and Germany were brought to the table and coal and steel were put under a common regulation to ensure a lasting peace in Europe. The European Union (EU) (via its predecessors) has grown both in size and complexity since then. Many countries have joined, and the EU has moved from its initial goals to becoming a common market, and further yet to becoming a political and social union. This European integration brought with it many new policy areas on the EU level. One of these policy fields is migration, and as a particular kind of migration, asylum. It made the agenda in an unplanned fashion, then became a common interest of the member states and nowadays is an almost fully developed policy field of the EU, complete with a Commissioner, an office, a fund and various agreements and directives. Moreover, it is a decided aim of the EU to create the Common European Asylum System (CEAS), but so far, the completion of this has been unsuccessful, despite the deadline for it being set years ago. Up to this point, the EU mainly has achieved some common standards in the member states, keeping many people from entering the EU through rigorous control of the southern border and agreements with neighbor states, as well as regulations about where asylum requests are to be processed. Then in 2015, the refugee crisis<sup>2</sup> in Europe accompanying the Syrian civil war was merciless in bringing to light some of the many flaws of asylum in Europe: lack of solidarity among the member states who put national, short-term interests above common ones, an unfairly large burden on the Southern member states through the Dublin system leading to all but its suspension, an unfair distribution of refugees in Europe, the unravelling of Schengen, grossly varying standards of asylum and worst of all, death at the external border. The EU's response was far from reassuring, and it did not seem as if the union had control over the situation, or was coping well. After all, a million refugees should not pose a problem for a community of half a billion people and one of the richest regions in the world, after all. And yet, it did. A few times, it looked as if the crisis would tear the EU apart altogether. The number of refugees has declined since 2015 though, and by definition, a crisis, while bad, is only a temporary situation. That does not mean that a European solution to asylum is no longer needed, however. The crisis will in fact not be over until there is peace in Syria, the deal that the EU has struck with Turkey does not seem to be built on a solid foundation and most importantly, migration and asylum will still be a challenge even once the present refugee crisis

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<sup>2</sup> I am aware that the word 'crisis' might have negative connotations for some, but in this thesis, it is merely a term to describe a temporary, uncommon situation that, for one reason or another, was a severe challenge.

is over. There are many other armed conflicts that force people to flee, economic inequality continues to make Europe a destination for many people looking for opportunities, and climate change might create a wholly new reason for fleeing one's home and seeking shelter. Migration is one of the key challenges of this century, therefore, asylum will continue to be relevant for the European Union. And the scale of it, as well as the degree to which integration has progressed in Europe now, makes a common aim and a common asylum system the best solution for Europe. The CEAS, or at least a common solution, was prioritized again in the wake of the crisis, but so far, it has not been achieved and many obstacles remain in its way.

Wrapping one's mind around this complex situation brings forth several important questions: Why was the EU an important actor in a matter that is usually a core competence of the state? Why was the EU not at a point where it could deal with the situation properly? And how can the EU make sure that when the next crisis hits, it does not repeat past mistakes? By learning from history. This is, in the most basic sense, what this thesis is about: Studying history to identify and analyze failures and chances, to improve asylum in the EU. Given the continuing significance of asylum, the position the European Union is in as a peaceful and prosperous place and the destructive consequences a crisis such as the one in 2015 could have the importance of this cannot be denied.

To study any policy field of the EU, scholars usually turn to European integration theory. The beginning of this field in the 1950s and 60s marked theories of integration that attempted to outline how the early European Economic Communities (EEC) could grow from narrow aims to something much broader. Much like the EEC, the academic field has grown into a multi-faceted discourse with a variety of integration theories that, unlike on other fields, all still hold relevance. Asylum is a field that has been studied less and over a shorter period of time than for example the common market, and much of the research either lumps asylum together with family unification and economic migration, looks at the development of the CEAS too narrowly (excluding decisions affecting asylum prior to the CEAS) or takes a rather large step back to study it through the lens of European Integration. Finally, much of the literature does not include decisions made during or in the wake of the 2015 crisis. This is where I found my niche and my research question:

*What can the major theories of European integration contribute to explaining the many instances of policy-making cumulating in the current state of the Common European Asylum System?*

To answer this question, I collected all instances of policy making that directly or indirectly concerned asylum in the EU, grouped them together, analyzed them for their nature, cause and trigger, actors, outcome and importance, and then checked them against the narrative of the



various European integration theories to find out which one contributed to which instance of policy-making. The EU's extensive publications as well as some secondary sources provide this information. The result is a complete and comprehensive overview, a completed puzzle of sorts, that shows the bigger picture of asylum in the EU: what works and what does not, which actors are most important, what causes and triggers change and what makes policy-making fail.

This thesis is organized in three main parts. The first introduces the thematic matter of this thesis: asylum and asylum in the EU. It provides important definitions, presents the collected *acquis* and policy-making instances on asylum in the EU and provides an overview over the current status of the CEAS, what it is and what it is not. The second part describes the major theories of European integration: their point-of-view and what they bring to the field. This chapter is as much a theoretical basis as it is an overview over the literature. Against this backdrop, the third part describes the process of my research in more detail and then presents the results of it.

## 2. Asylum and the European Union

This first part constitutes the basis for the subsequent chapters of this thesis. It discusses key terminology on asylum and asylum in the European Union (EU), introduces the acquis of the EU on the matter and then delves deeper into the Common European Asylum System (CEAS): what it is and what it is not.

### a. Key Asylum Terminology

The most basic definition that this thesis works with is that of **asylum**. To get a hold of this concept, I chose to look towards the EU's own European Migration Network (EMN)'s definition because it is the EU's workings that are the subject of this thesis. The EMN defined asylum as "*a form of protection given by a State on its territory, based on the principle of non-refoulement and internationally or nationally recognised refugee rights [...], which is granted to a person who is unable to seek protection in their country of citizenship and/or residence, in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*".<sup>3</sup> Asylum therefore is the protection of someone by a foreign country, when said person's own country persecutes them based on one or more of several grounds.<sup>4</sup> As such, asylum is a particular type of migration (the movement of people for more than one year<sup>5</sup>): forced migration, as opposed to voluntary migration, i.e. to seek better economic circumstances. Asylum is not however a synonym of forced migration, because the latter also means migration within a country's borders and migration caused by natural and environmental disasters, nuclear or chemical accidents, famine and relocation because of development projects.<sup>6</sup> These limitations are partially addressed by two other forms of international protection that the EU acknowledges: **subsidiary (humanitarian) protection** and temporary protection. Subsidiary (or as it is known in some EU countries) humanitarian protection applies to people who do not qualify for asylum but who would still face serious harm if they returned to their country of origin or residence.<sup>7</sup> The EU defines serious harm as the death penalty, torture or the threat of their life because of an armed conflict in the country of origin<sup>8</sup>. **Temporary protection** is granted to a group of third country nationals who cannot

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<sup>3</sup> European Migration Network 2018, 35

<sup>4</sup> European Migration Network 2018, 35

<sup>5</sup> European Migration Network 2018, 225

<sup>6</sup> European Migration Network 2018, 168

<sup>7</sup> European Migration Network 2018, 373

<sup>8</sup> European Parliament and Council Directive 2011/95/EU, V 15 (a) (Recast Qualifications Directive)

return to their own country, but whose numbers would make it difficult for the asylum applications to be processed quickly.<sup>9</sup>

Similarly, the EU defines applicants<sup>10</sup> and beneficiaries of international protection, and distinguishes in the latter case between beneficiaries of subsidiary protection<sup>11</sup> and **refugees**<sup>12</sup>. The most important definition of this term was formulated by the United Nations High Commissioner for Refugees (UNHCR) for the Convention (1951) and Protocol (1967) relating to the Status of Refugees (commonly referred to as the Geneva Convention).<sup>13</sup> Though arguably outdated (i.e. because it does not include environmental causes)<sup>14</sup> the definition stated by the UNHCR is still vital in the global context. The EU relies strongly to it for the whole asylum process, and bases its own definition of a refugee on it.<sup>15</sup> A refugee is “*either a third-country national who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom [...] [reasons of exclusion do] not apply*”.<sup>16</sup> This definition of a refugee does not make someone a refugee (fulfilling the requirements does), it affirms the status.<sup>17</sup> Several things are worth pointing out about the broken-down elements of this definition: the well-founded fear is a relatively vague term, not specifying what weight subjective fear and objective reasons should have. It therefore falls to the authorities to decide how much importance they put in the subjective element of fearing persecution.<sup>18</sup> What constitutes as persecution has also been left vague; although the room for interpretation has a ceiling: the threat to one’s life or freedom is a threshold above which persecution is not left up for interpretation. Below that, scholars and authorities move between this threshold and any violation of some human rights in certain situations to determine what persecution is.<sup>19</sup> Furthermore, the Geneva convention’s definition of a refugee applies only if the persecution happens because of race, religion, nationality, political opinions or being a member of a specific

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<sup>9</sup> European Migration Network 2018, 378

<sup>10</sup> European Migration Network 2018, 27

<sup>11</sup> European Migration Network 2018, 44

<sup>12</sup> European Migration Network 2018, 43

<sup>13</sup> UNHCR 2010, n.p.

<sup>14</sup> Oswald 2007

<sup>15</sup> European Parliament and Council Directive 2011/95/EU, (3)

<sup>16</sup> European Migration Network 2018, 310

<sup>17</sup> Cherubini 2016, 9

<sup>18</sup> Cherubini 2016, 12f.

<sup>19</sup> Cherubini 2016, 15ff.

social group. Race is a rare reason for persecution in practice, religion a very common one; nationality is to be understood wider than citizenship and overlaps with race; political opinion includes all actions that can be seen as an act against the state, and membership of a particular social group has widened considerably over the years: nowadays, asylum based on this is granted to (among others) women, homosexuals or people who are HIV positive.<sup>20</sup> There are situations though where the right to asylum does (no longer) apply: if a refugee goes back to their original country, changes nationality or is no longer persecuted, the right to asylum can cease to exist. Furthermore, the Geneva convention does not apply in the first place to people who have committed war crimes, crimes against humanity or other severe crimes.<sup>21</sup>

Another key term for this thesis is that of the **asylum procedure** or procedure for international protection. This is the main subject of the CEAS and includes all steps of the legal process between an application for asylum and the final decision regarding international protection.<sup>22</sup> The key principle of the asylum procedure globally and in the EU as well is that of **non-refoulement**. It establishes that no refugee may be returned to a place where their lives or freedom would be threatened by persecution because of the grounds of asylum.<sup>23</sup> As the asylum procedure in the EU is described later in this part of the thesis (see section 2.D.i.), important terminology regarding the application, the procedure and the outcome is explained when it first comes up. The EMN's definition of asylum further above referred to asylum as protection given by a state on its territory. From this perspective, the European dimension is particularly interesting because even per the EU's definition, it is the state that gives asylum, not the EU; and yet it plays a large role. Like with the asylum procedure, key terms regarding the European dimension in the asylum procedure are explained where they occur.

## **b. European Union Basics**

The European Union usually needs no introduction, but a brief look at its most important actors in the decision-making process as well as the formal workings of this process is still useful to be reminded of the basics.

The **European Commission** is head of the executive branch of the EU. It has as many members as the EU has member states (currently), and each Commissioner presides over a directorate-general (DG) that provide expertise and develops legislation in a variety of policy fields. Asylum belongs to the Commissioner for Home Affairs and the DG HOME. The

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<sup>20</sup> Cherubini 2016, 18ff.

<sup>21</sup> Cherubini 2016, 29

<sup>22</sup> European Migration Network 2018, 294

<sup>23</sup> European Migration Network 2018, 273

Commission's role in the EU is that of 'thinking European', of mapping out the EU's future paths, external representation, monitoring of policy, drafting legislation and agenda-setting, as the Commission has the exclusive right to propose legislation.<sup>24</sup>

The **Council of the European Union** (also called the Council of ministers, or just Council) is one of the two co-legislators of the EU. It is the direct representative and responsibility of the national governments and though there is technically only one Council, in practice the ministers of the member states are divided into their areas of expertise. The Council discusses and votes on proposed legislation, though that is a complex process that more often than not is mostly the task of working groups and the Committee of Permanent Representatives (Coreper). The latter especially is a major institution behind the scenes: Coreper's national civil servants often discuss and decide on legislation so that the actual vote in the Council becomes a mere formality.<sup>25</sup>

The **European Parliament** is the second co-legislator of the EU. Unlike in the Commission and the Council, citizens are represented proportionally in the Parliament: in population size as well as party preferences. As such, the Parliament has party fractions on the left-right scale much like a national parliament and represents the interests of European citizens. The Parliament is the only directly elected institution of the EU, and because it has vastly gained importance over the decades (at first, it was only to be consulted but had no power to decide), it gave the EU more democratic legitimacy. Nowadays, the Parliament holds wide-reaching powers: for most legislation, it is co-legislator in the bicameral 'co-decision'. For some international agreements it must be consulted, for others (like trade or enlargement agreements) the Parliament's consent is necessary. Furthermore, the Parliament must approve the budget and it has a (very real) hand in appointing and (potentially) in firing the Commission.<sup>26</sup>

The **Court of Justice of the European Union** (CJEU) is the judicial branch in the institutional setting of the EU. It has two main courts dealing with different areas and the twenty-eight judges each are nominated by the member states. The CJEU's tasks are to interpret the rather vague EU treaties, to make sure that legislation is not in conflict with the treaties, to decide on disagreements between member states and to try cases against European institutions. The latter can, under certain circumstances, even involve a private citizen, companies.<sup>27</sup>

In a wider sense, the EU has many more institutions, such as the European Council (of the heads of state, not to be confused with the Council of Ministers), the European Central Bank,

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<sup>24</sup> Wallace and Reh 2015, 74ff.

<sup>25</sup> Wallace and Reh 2015, 79ff.

<sup>26</sup> Wallace and Reh 2015, 87ff.

<sup>27</sup> Wallace and Reh 2015, 90ff.

the agencies and many others, but as they are not important to the legislative process, they will be explained when they come up.

**Europeanization** or European Integration is a process through which national politics increasingly receive a European, supranational component. Principles, goals and legislature of the EU constrict and guide what national governments can do in fields that have been or are europeanized, although in the particular institutional setting of the EU, the member states still decide. But the EU sets the stage.<sup>28</sup> Albeit a simple definition, the concept is key for the study of the EU and its effects, and also key for this thesis.

Currently, the EU has five modes of policy-making, all of which were important at specific points in time. They also vary in terms of how they produce policy, type of output, role of actors and policy areas. This is why it is not necessary to know them all for studying asylum. Legislation on asylum is nowadays decided under the most common policy mode: the **regulatory mode**. Implicitly, the previous paragraphs on the European institutions have already described this mode of governance. In the simplest terms, it is the European Commission that drafts and proposes legislation to the Council and the Parliament. Both co-legislators discuss a proposal in several readings, with the Council representing national interests and the Parliament making factors other than economic ones (social, environmental, etc.) part of the discussion, all the while keeping in mind the interests of European citizens. In the Council, a qualified majority is required (a certain percentage of citizens as well member state's governments represented)<sup>29</sup> while the Parliament decides by a simple majority<sup>30,31</sup>.

The output of all of this is something that is commonly referred to as **acquis communautaire**, or just **acquis**. It is the subject of this thesis, therefore it is important to know what it entails. In general, the **acquis** refers to binding privileges and responsibilities of all member states of the EU. In particular, that involves the treaties, legislation adopted according to the treaties (i.e. regulations and directives), the decisions of the Court of Justice and furthermore declarations and resolutions of the EU, instruments of specific policy fields and international agreements concluded by the EU.<sup>32</sup>

The **acquis** specifically on asylum comprises mainly of **directives**. Directives are binding legal acts that set goals decided on through co-decision. Unlike with regulations, it is up to the member states though to decide how to translate the goals set out in the directives into national legislation. Regulations do not leave such room for interpretation, whereas decisions (i.e. by

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<sup>28</sup> Bach 2000, 11

<sup>29</sup> Wallace and Reh 2015, 83

<sup>30</sup> Wallace and Reh 2015, 89

<sup>31</sup> Wallace and Reh 2015, 103f.

<sup>32</sup> European Migration Network 2018, 123

the CJEU) are binding for those who they concern. These three legal acts have consequences if not adopted. Meanwhile recommendations and opinions are not binding.<sup>33</sup>

**Migration** is a core policy field of the EU, of which Asylum is just one field. Before diving into the material, it is helpful to locate it within policy on migration of the EU. According to the European Agenda on Migration, the EU works on four policy fields (pillars) of migration: reducing the root causes and incentives for illegal migration, securing the external borders while also making sure that no one (or fewer) die trying to cross them, the CEAS, and schemes for legal migration (labor migration, family unification, students). Additionally to the internal perspective, there is also the external dimension constituting of agreements with third-countries.<sup>34</sup>

### c. Development of the *Acquis Communautaire* on Asylum

The development of the EU's *acquis* on asylum is often considered to have happened in three phases. The first happened from 1999 until 2004, when formal competences for the EU had been decided on, but were not in effect yet. From 2008 to 2013, the EU developed the main components of its *acquis* on asylum, and finally everything decided in the wake of the 2015 refugee crisis is considered a phase of its own, but not necessarily a third phase. The collection of *acquis* at hand follows this scheme, although it also includes an additional phase, or a pre-phase of sorts: everything in EU law that led up to asylum entering the sphere of EU policy-making. The major legislative acts came later, that is true, but since asylum did not just appear on the EU's agenda, it is particularly interesting to study how something fundamentally national became supranational. To take the embeddedness in context a step further, this section also describes the documents from which the EU draws the principles of its asylum procedure. As such, it provides context and basics, an overview over the legislative steps of asylum on the European level as well as an assessment of what existing literature has concluded on European Integration in this field. It is important to keep in mind though that this is the *acquis* on asylum specifically, internally and externally, but not on the three other pillars of migration in the EU. Therefore, legal migration, fighting root causes as well as border management (including the work of the Border and Coast guard, and the external borders) are not considered here.

#### i. 1948 to 1967: Defining Standards (the Guiding Documents)

Modern-day asylum first appeared after World War II in the United Nation's non-binding **Universal Declaration of Human Rights** (UDHR). Article 14 (1) states that “[e]veryone has

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<sup>33</sup> European Union 2018, n.p.

<sup>34</sup> European Commission 2015, 6ff.

*the right to seek and to enjoy in other countries asylum from persecution*<sup>35</sup>. Undeniably, the UDHR is an influential document, but for the definition of an asylum system, it is merely the very basis.

Much more significant in practice is the United Nation's **1951 Convention Relating to the Status of Refugees** (also known as the Refugee Convention or Geneva Convention) and its **1967 Protocol**. This convention is at the core of asylum in the European Union because all member states have signed the convention, and because the EU uses it as a reference point for the CEAS, as the Tampere Programme that founded the CEAS refers to it as such: the EU agreed "*to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention*"<sup>36,37</sup>. In the very basic sense, the convention does two things: it defines what refugees are (see section 2.A. for a brief dissection of that) and it lays out principles for the handling of refugees. However, the convention is not only vague at times, it also does not in fact grant asylum. That right belongs to the state, and it is therefore up to the state to decide if, how and whom to grant refugee status. That is not to say that the convention can do nothing; because it has established certain obligations of the states. The key principle is the aforementioned *prohibition of refoulement* (banning the state from returning a person to persecution).<sup>38</sup> Non-refoulement leads to another obligation of the state: that of a *fair procedure*. After all, the only way to make sure an asylum seeker is not returned into danger is to assess their refugee status, and that has to happen based on a fair procedure.<sup>39</sup> One way to work around refoulement is to send refugees to *safe third countries* (based on citizenship or residence, family ties or international agreements to burden-sharing). The refugee convention explicitly allows that if national or international organizations consider a country indeed as safe.<sup>40</sup> Another potential situation where refoulement might not apply is that of a *mass-influx* of people. However, it is common practice that states do not turn away such an influx and at least temporarily provide help (the EU's Temporary Protection Directive is an example of this).<sup>41</sup> Finally, the state is not allowed to punish refugees for illegally crossing its borders and it has to guarantee them freedom of movement.<sup>42</sup> With this convention being a point of reference for the CEAS, these obligations all turn up in European law (see section C of this chapter) and are touched upon again later in this chapter. It is important to keep in mind though

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<sup>35</sup> United Nations (2010), Article 14 (1)

<sup>36</sup> Council of the European Union (1999), A II 13

<sup>37</sup> Hatton 2005, 108

<sup>38</sup> Cherubini 2016, 47

<sup>39</sup> Cherubini 2016, 63

<sup>40</sup> Cherubini 2016, 82f.

<sup>41</sup> Cherubini 2016, 93

<sup>42</sup> Cherubini 2016, 95



that the refugee convention does not tell countries how to process asylum applications, it only lays out key principles and definitions<sup>43</sup>.

A third guiding document for asylum in the EU is the **Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR) by the Council of Europe (a European institution independent from the EU). It does not speak of asylum, but it is relevant nonetheless because it refers to torture, inhuman or degrading treatment or punishment, and to the death penalty. If a person claims to be threatened with any of these dangers, the ECHR is very similar to the Refugee convention. It establishes the principle of *par ricochet*, which is nothing else than non-refoulement, and it binds states to provide the right to a fair assessment of risk.<sup>44</sup>

The final guiding document is the **Charter of Fundamental Rights of the European Union**, signed in 2000 and binding since the Lisbon treaty. Article 18 enshrines the right to asylum as defined by the Geneva convention, and like the ECHR, the charter prohibits refoulement to a situation where a person would be faced with torture, inhumane treatment or the death penalty.<sup>45</sup>

## ii. 1985 to 1998: Making it onto the Agenda (the pre-Phase)

The Treaty of Rome founded the European Economic Community (EEC), meaning that it did set the stage for what was to follow. However, it had virtually no impact on refugees, therefore it is omitted here<sup>46</sup>. It is no surprise of course that asylum was not an early responsibility of the EEC and the European Communities (EC): they were focused on economic issues after all, and asylum is by default a national issue as it concerns the borders of a state, and who may cross them and stay in its territory.<sup>47</sup> Nonetheless, this notion unraveled and asylum made the EU's agenda eventually.

This officially happened in the 1980s when the then-EC worked to complete the Single Market (which formally transpired through the **Single European Act** in 1986) and pondered the consequences of this. On the same day in June 1985, the Commission published a White Paper, and five member states of the EC signed an agreement in the town of Schengen. These two events are significant, because for the first time, they point out a link between the single market and immigration policy. The **Commission's White Paper**<sup>48</sup> on the single market

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<sup>43</sup> Hatton 2005, 108

<sup>44</sup> Cherubini 2016, 125ff.

<sup>45</sup> Charter of Fundamental Rights of the European Union, Art. 19

<sup>46</sup> Cherubini 2016, 129f.

<sup>47</sup> Andreopoulos 2018, n.p.

<sup>48</sup> White Papers are papers by the European Commission containing concrete plans for policy in the EU. They are usually based on earlier Green Papers by the Commission. See here for a detailed explanation: [https://eur-lex.europa.eu/summary/glossary/white\\_paper.html](https://eur-lex.europa.eu/summary/glossary/white_paper.html)

acknowledges that the single market would require the end of border controls at the internal borders, and that this would need the member states to harmonize their laws in certain policy fields, one of them explicitly being asylum (because of the free movement of people). On the same day as this white paper was published, the first of two **Schengen agreements** was signed. It is an intergovernmental agreement (meaning it was done independently from the treaties) that decided to end checks at the internal borders of initially five member states, and to transfer them to the external borders instead.<sup>49</sup> For this reason already, Schengen is remarkable: the member states agreed to let a supranational organization interfere with the control of their borders, a task that is usually an entirely national matter. This was also the decisive factor for migration, because Schengen furthermore states that such an arrangement would require the states to harmonize conditions regarding non-EC citizens, among them asylum seekers. Therefore, though not explicitly a goal of Schengen, a common policy on migration was no longer unthinkable, as the nature of the Schengen agreement made it feasible.<sup>50</sup> Despite this extended freedom of movement, Schengen also explicitly describes the need to fight abuse of asylum, the most common scheme to do this being multiple applications in different member states for the most favorable outcome (asylum shopping). To prevent this, Schengen defines which state is responsible to process an application by drawing on proximity and first-entry to determine this. Multiple applications were thus formally made illegal. Therefore, the Schengen agreement was the first legislative step on asylum in the then-EC. To give the member states time to adapt their legislation, Schengen only came into force in 1990 for the initial participants with the Schengen implementation agreement.<sup>51</sup>

The single market was not the only way through which asylum made the agenda of the EU, however. It also did via a decade-long intergovernmental cooperation of the interior ministers in the Council working together on issues of security, to compensate for the lack of checks on the internal borders in the **Trevi-group** (which would later become the Area of Freedom, Security and Justice<sup>52</sup>) and its ad-hoc sub-groups. The **ad-hoc group on immigration** was set up in late 1986 (one year after the White Paper and Schengen) with the purpose of assisting the Trevi-group on migration matters, one of these being asylum. In that field, the focus lay on tackling the issue of asylum abuse, as their work program, the so-called **Palma document**, stated in 1989. The significance of this ad-hoc group lies with the second of the two drafts for conventions they produced; a document that, like Schengen, would determine which member

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<sup>49</sup> Cherubini 2016, 132f.

<sup>50</sup> Lavenex 2015, 369f.

<sup>51</sup> Cherubini 2016, 133ff.

<sup>52</sup> Lavenex 2015, 369

state is responsible for an asylum application, but unlike Schengen, would operate under the EC treaties and therefore apply to all member states. This draft soon after became the first of three **Dublin Conventions**. The Dublin convention constitutes a key principle of asylum in the EU: whichever EU country an asylum seeker enters first must process the asylum application. Furthermore, Dublin also introduced the exchange of information on asylum applications in order to achieve its objective, the prevention of asylum-shopping. One thing to keep in mind about the Dublin Conventions is that they, unlike Schengen, are not entirely the result of intergovernmental negotiations (that being agreements between the member states, without interference of the EC), because the European Commission took part in drafting them.<sup>53</sup> The first Dublin regulation was revised twice (Dublin II in 2003<sup>54</sup> and Dublin III 2013<sup>55</sup>) and another revision or even a replacement are discussed now, but so far its key principle remains intact.<sup>56</sup>

The next stepping stone towards a common asylum policy was a new treaty: the Treaty on European Union (TEU), more commonly known as the **Maastricht Treaty**, was signed in 1992. This treaty not only founded the EU, it also created two new pillars in addition to the EC's formal competences in pillar one. Pillar three institutionalized the previously ad-hoc work of the Trevi-group and was now Justice and Home Affairs (JHA). It differentiated from the policy fields in the first pillar by still being entirely intergovernmental and therefore between the member states alone (while policy fields in the first pillar were subjected to the community method). Asylum is a part of this policy field, and it was therefore in the third pillar of the EU. This meant several things: for once, asylum was now finally in the treaties and therefore officially on the EU's agenda as a common interest.<sup>57</sup> Also, it meant that the member states had started surrendering control of migration to the EU. But it also meant that, as a third pillar policy area, cooperation on asylum was still intergovernmental and while having given up some control, the member states were still mostly in charge. The right to initiative now belonged to the Commission, but any policy needed unanimous support of the Council (as the representative of the member states' governments). The Parliament was only to be consulted and the Court had no competences. The Maastricht Treaty did provide the Council with the option to transfer asylum into the first pillar (the Community Pillar), but it chose to keep asylum between the member states. Still, as asylum was now a common interest, the Commission and the member states were expected to further the EU's interests (mainly the free movement of people) through cooperation in this field as well. The Commission tried to push forward the ad-hoc's first

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<sup>53</sup> Cherubini 2016, 136ff.

<sup>54</sup> Council Regulation (EC) No 343/2003 (Dublin II)

<sup>55</sup> European Parliament and Council Regulation (EU) No 604/2013 (Dublin III)

<sup>56</sup> European Commission 2016, n.p.

<sup>57</sup> Lavenex 2015, 370

proposal on the external borders, but that eventually failed. The Council on its part attempted to adopt **minimum procedural standards** for asylum applications, and while this passed, it still gave the member states a wide scope. Furthermore, the Council also attempted to **harmonize the definition** of a refugee, and while this passed as well, the member states failed to come through. Furthermore, the Council did achieve advances for burden-sharing in the case of temporary influxes and financial assistance.<sup>58</sup> Finally, with the so-called **London resolutions**, safe third countries were defined, also safe countries of origin, and manifestly unfounded claims for asylum. In all of these instances, asylum would not be granted, because the applicant either had no true claim, or he or she came from a country where it was safe. None of these measures were binding however, and asylum remained largely differentiated in the EU.<sup>59</sup> Therefore, even with asylum becoming part of the treaties with the Maastricht Treaty, the EU's influence on asylum policy in the member states remained minimal (except for Dublin). There were common trends (like the tightening of conditions), but this had more to do with a higher number of applications across Europe in general, not with convergence of policy.<sup>60</sup>

### iii. 1999 to 2007: Between Intergovernmentalism and Communitarization (the 1<sup>st</sup> phase)

The first true phase of asylum in the EU began with the **Treaty of Amsterdam**, signed in 1997 and effective in 1999. It began to amend the weaknesses that the intergovernmental procedures had (ambiguous legal framework, absence of democratic validation, lack of national ratification) for JHA, by replacing it with the Area of Freedom, Security and Justice (AFSJ) that was about to be developed.<sup>61</sup> For migration, this meant that, by including the agreement in the treaty, Amsterdam brought Schengen into the fold of EU law, albeit with opting-out options.<sup>62</sup> Also, the treaty picked up on the Council's earlier passed up on chance to communitarize asylum and did exactly that by moving it (and many fields of JHA) to the first pillar. Groundbreaking as this was, it needs to be taken with a grain of salt, because asylum was not yet fully communitarized. The Treaty of Amsterdam set out a transition period of five years (until 2004), in which several measures had to be adopted for asylum.<sup>63</sup> However, during this transition period, a special mode of governance applied; one that gave the Parliament only a consultation role, took away the exclusive right for agenda-setting from the Commission (to share it with the Council) and left the decision-making with unanimous votes in the Council.

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<sup>58</sup> Cherubini 2016, 138ff.

<sup>59</sup> Hatton 2005, 108

<sup>60</sup> Hatton 2015, 612

<sup>61</sup> Lavenex 2015, 370f.

<sup>62</sup> Cherubini 2016, 146

<sup>63</sup> Lavenex 2015, 371

The Court of Justice also played no role. Therefore, while co-decision was planned for the future, the member states made sure that they would decide over the first measures of asylum on the EU level.

Following the Treaty of Amsterdam, the Council and the Commission prepared the **Vienna Action Plan** in (1998) to set out the way to create the AFJS.<sup>64</sup> Based on this action plan was the **Tampere Programme**, the first of several programs mapping out the creation of a European asylum system that enshrines the right to seek asylum and implements the Geneva Convention. This can be considered the founding of the CEAS. The Tampere Programme maps out the following ideas of what the CEAS should look like:

- In the short term, the Council was urged to finalize its work on the Eurodac legislation (the fingerprint database), to agree on a temporary protection scheme based on burden-sharing, and to start thinking on a financial reserve in case of sudden mass-influxes of refugees.
- In the medium term, the CEAS should include legislation to determine which member state is responsible for an asylum application, common standards for the asylum procedure, minimum conditions for the treatment of asylum seekers, and harmonized recognition rates and what the refugee status entails. Furthermore, the CEAS should be complemented by subsidiary protection.
- In the long term, the CEAS was envisioned to be a shared asylum procedure of all member states and a uniform status for refugees in the whole EU.<sup>65</sup>

The five years of the Tampere Programme until the transitory phase ended in 2004 indeed saw many of these objectives introduced into legislation. First of all, the Council introduced the so-called **Eurodac database**, in which the fingerprints of asylum seekers are saved for the purpose of preventing asylum-shopping and executing the Dublin regulation.<sup>66</sup> Secondly, in 2000 the Commission and the Council agreed to replace the previously ad-hoc financing schemes with the five-year long **European Refugee Fund** (ERF), a fund meant to allocate monetary resources to member states who provide asylum and who deal with large-influxes of people. As such, the fund is an element of burden-sharing.<sup>67</sup> Thirdly, the Council finished work on the **Temporary Protection Directive** in 2001, through which a member state can be relieved of the strain of a sudden influx of people through resettlement via burden-sharing.<sup>68</sup> That same

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<sup>64</sup> Cherubini 2016, 146f.

<sup>65</sup> Council of the European Union 1999, A II 13-17, 4

<sup>66</sup> Council Regulation (EC) No 2725/2000

<sup>67</sup> Thielemann 2005, 807

<sup>68</sup> Hatton 2015, 613f.

year saw the signing of the **Treaty of Nice**. It prepared the union for the big eastern enlargement and as such, dealt far less with the policy fields of the EU than the previous treaties. However, by trying to keep the EU capable of acting even after the enlargement, it was decided that the Council would vote by qualified majority (no longer unanimously) in the future. This also applied to asylum and at least in theory was a step towards easier decision-making.<sup>69</sup>

The medium-term goals of the Tampere Programme were attempted to be tackled soon after. The **Reception Conditions Directive** aimed to set common standards for how asylum applicants had to be treated in each member state regarding aspects like freedom of movement, education or family. This did initially not refer to cases of mass-influx.<sup>70</sup> The already existing regulation for which member state was responsible for processing asylum applications, Dublin, was replaced by **Dublin II**. The new version operated under community law.<sup>71</sup> The **Qualification Directive** aimed to harmonize the status of a refugee in the EU, so that the member states work by the same standards when determining the refugee status. Also, the Qualification Directive first introduces subsidiary protection in the EU.<sup>72</sup> The final directive on asylum followed in 2005 with the Asylum Procedures Directive. This aimed to harmonize the last objective of the medium-term goals of the Tampere Programme: common standards for the asylum procedure in all member states. This included for example a time-limit for how long the process can take and the right to legal assistance.<sup>73</sup> A look at the aims set out in the Tampere Programme (see table 1) combined with the directives that followed reveals that, at least in theory, the EU had at this point completed the legislation necessary for the CEAS. However, these directives only set minimum standards, and were a far cry from a true harmonization of asylum in Europe.<sup>74</sup>

	<i>Objective</i>	<i>Legislation</i>	<i>Number</i>	<i>Recast</i>
<i>short-term</i>	<i>Identification of Asylum Seekers</i>	Eurodac	2725/2000/	-
	<i>Temporary Protection</i>	Temporary Protection Directive	2001/55/EC	603/2013
	<i>Financial Aid</i>	ERF/AMIF	Renewed Regularly	
<i>medium-term</i>	<i>Determination of Responsibility</i>	Dublin II	343/2003	604/2013
	<i>Common Procedural Standards</i>	Asylum Procedures Directive	2005/85/EC	2013/32/EU
	<i>Minimum Standards for Reception</i>	Reception Conditions Directive	2003/9/EC	2013/33/EU
	<i>Recognition Rates and Status</i>	Qualifications Directive	2004/83/EC	2011/95/EU
	<i>Subsidiary Protection</i>			

<sup>69</sup> Treaty of Nice, Art. 40a (2)

<sup>70</sup> Cherubini 2016, 234ff.

<sup>71</sup> Cherubini 2016, 144

<sup>72</sup> Council Directive 2004/83/EC

<sup>73</sup> European Commission 2018, n.p.

<sup>74</sup> Hatton 2015, 613

<i>long-t.</i>	<i>Uniform Status for Refugees</i>	Qualifications Directive	2011/95/EU
	<i>Common Procedure</i>	-	-

Table 1: Goals and Measures of the CEAS

Usually, the first phase of the CEAS is said to have ended here with the replacement of the Tampere Programme with its follow-up. However, due to the focus of this thesis on policy-making, the end of the first phase is moved a little to when the next change in the political decision-making process occurred. 2004 saw the introduction of **the Hague Programme**; the guiding document for the second official stage of the CEAS. The Hague Programme first asked for the adoption of the **Asylum Procedures Directive** (which happened in 2005, see above), at the time the last piece of legislation missing from the Tampere Programme; and for a uniform status for refugees in the EU, as the long-term goals of the CEAS had laid out in the Tampere Programme. Furthermore, the new program not only underlined the EU's focus on the CEAS, but also called for the evaluation of the first phase and the outline of the concrete next steps until 2010. The evaluation by the Commission resulted in a **Green Paper**<sup>75</sup> on **Asylum** in 2007 and a policy plan in 2008. The Green Paper is worth mentioning because it calls the member states out for not implementing the CEAS directives to a point where one could speak of true harmonization. Also, it states the need for wider protection even beyond refugees and people benefiting from subsidiary protection. The **Policy Plan** is a series of concrete proposals, among them the recasting of the existing asylum directives as well as Dublin. Due to the imminent entry into force of a new treaty, the Commission decided to postpone these steps.<sup>76</sup> The Hague Programme was also followed by the launch of Europe's **Global Approach to Migration** (GAM) that set the stage for the CEAS' external dimension.

#### iv. 2008 to 2014: Advancements (2<sup>nd</sup> Phase)

In the previous phase, asylum (as part of JHA and then AFSJ) had been somewhere between intergovernmentalism and communitarization. This ended with the **Treaty of Lisbon** in 2007. The Treaty of Lisbon is of vital importance for asylum for three reasons. First, it made the Charter of Fundamental Rights of the EU compulsory, and it also bound the EU to comply with the ECHR, the Council of Europe's Human Rights charter of the 1950s.<sup>77</sup> Second, the new treaty put the AFSJ in the hierarchy of goals only second to peace and prosperity. This came with the abolition of the three-pillar-system, through which asylum, alongside all areas of JHA,

<sup>75</sup> Green Papers are published by the Commission on future plans for the EU. They are usually the basis for the later, more concrete White Papers. See here for a detailed explanation: [https://eur-lex.europa.eu/summary/glossary/green\\_paper.html](https://eur-lex.europa.eu/summary/glossary/green_paper.html)

<sup>76</sup> Cherubini 2016, 163ff.

<sup>77</sup> Cherubini 2016, 161f.

was brought under the ‘normal’ mode of policy-making. This includes the right to initiative by the Commission, co-decision of the Parliament and the Council and finally normal competences for the CJEU. Thus, asylum had become a normal policy field of the EU.<sup>78</sup> And three, the treaty explicitly called for the CEAS regarding asylum, subsidiary as well as temporary protection; and within that, for common standards, not just minimum standards. This includes:

- a uniform status for beneficiaries of asylum and subsidiary protection that is valid in the whole EU,
- common systems for asylum and subsidiary protection as well as temporary protection,
- a mechanism to determine responsibility of member states,
- reception standards for applicants and
- agreements with third countries to manage the influx.

The treaty also allows for emergency measures in case one or several member states are confronted with a crisis. Finally, the treaty also calls for solidarity between the member states as a basis for the CEAS.<sup>79</sup>

After Lisbon, the EU continued the work laid out by the Hague Programme and the Green Paper and Policy Plan that had followed it. This means that it began to revise the existing CEAS legislature under the regulatory mode.<sup>80</sup> In 2008, the French Presidency of the Council agreed on the European Pact on Immigration and Asylum that, while acknowledging progress, also pointed out the need for more harmonization. This pact was curious not for its (less than new) content though, but for its timing and symbolism. Timing, because the French Presidency published the pact while the Commission was working on the next AFSJ-program. And symbolism, because since Lisbon, asylum was firmly under community law, and not intergovernmental agreements such as this pact. This marks the beginning of a series of conflicts between the European institutions and the member states over migration, borders and asylum.<sup>81</sup> Still, the Commission eventually published the **Stockholm Programme** that laid out the priorities for the period between 2010 and 2014. In accordance with the Lisbon Treaty, the Stockholm Programme changed the focus for the CEAS away from minimum standards towards a common asylum procedure based on a uniform status for refugees in the EU.<sup>82</sup> Again, the Commission was called upon to draft an action plan outlaying the steps necessary to implement

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<sup>78</sup> Lavenex 2015, 372

<sup>79</sup> Treaty of Lisbon, Art. 63

<sup>80</sup> Cherubini 2016, 165

<sup>81</sup> Hampshire 2016, 543

<sup>82</sup> European Parliament 2018e, 5



the Stockholm Programme. In this Communication, the Commission picked up a proposal from the Hague Programme: the creation of an office entirely dedicated to the coordination and information of asylum in the EU.<sup>83</sup> One year later, the co-legislators agreed to create the **European Asylum Support Office** (EASO) in Malta.<sup>84</sup> Similarly, the EU set up the European Network on Migration to provide the European institutions and the public with reliable information on all matters migration in the EU.<sup>85</sup> Furthermore, 2011 saw the launching of the **Global Approach to Migration and Mobility** (GAMM), which built on its predecessor GAM but focused more on the external dimension of the CEAS specifically. This means that the EU decided to help the European neighborhood and countries near conflicts in building their asylum systems, and to develop a resettlement program.<sup>86</sup> Then, between 2011 and 2013, the re-casting of the CEAS legislation passed into law. Dublin and Eurodac, the directives regarding qualifications, reception conditions and asylum procedure all were updated and recast in the new **Asylum Package**.<sup>87</sup> 2014 marked the end of the Stockholm Programme. The deadline for CEAS had passed, and indeed much had been achieved. However, the implementation of the directives and other standards remained uneven among the member states, meaning that the CEAS was still far away from reaching its goals. Burdens remained shared unevenly, and a common asylum procedure had not been achieved.<sup>88</sup>

This is due to the Parliament not taking on a more liberal role and push for harmonization<sup>89</sup> and the aforementioned renewed reluctance of the member states to give up further control of migration. Still, as it was time for a **new five-year program**, the Commission presented its proposal for it. Unlike the Commission's previous proposals, this one lacked the ambition of its predecessors and instead of new goals, it focused on strengthening what was already there. Unsurprisingly, the Council did not favor a more ambitious approach either, therefore the new program was vastly different from the previous three and lacked direction. Maybe symptomatic of this is the fact that the program was not given the name (or any name) of the city in which it was signed. Of course, the Council and Commission made a good point in saying that the vast body of legislation on asylum needed time to be implemented. However, the real reason for the stagnation in asylum are most likely tensions between the member states because of the financial crisis and the immigration caused by the Arab Spring.<sup>90</sup> One new measure was the

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<sup>83</sup> European Commission 2010, 7

<sup>84</sup> European Parliament and Council Regulation (EU) No 439/2010

<sup>85</sup> Council Decision 2008/381/EC

<sup>86</sup> European Commission 2011, 18

<sup>87</sup> Cherubini 2016, 166

<sup>88</sup> Hatton 2015, 615

<sup>89</sup> Ripoll Servent and Trauner 2014, 1152

<sup>90</sup> Hampshire 2016, 543

replacement of the ERF and two related funds (the Return and the Integration Fund) with the new **Asylum, Migration and Integration Fund** (AMIF) that provides funding over several years for the EU's whole migration agenda.<sup>91</sup>

#### v. 2015 to 2017: Responding to the Crisis

In light of the mounting pressure on asylum systems in Europe, the final phase of the CEAS began. It did so with **Europe's Agenda on Migration** in the spring of 2015, which should provide emergency measures for the current situation, and give new direction to migration policy in Europe, asylum among it. The latter include better implementation of the directives and a better evaluation of this, new measures to fight the abuse of the CEAS, a European list of safe countries of origin (to send people back there faster), a better implementation of Dublin and Eurodac as well as an evaluation of whether Dublin needs revision or replacement.<sup>92</sup> The emergency measures of the agenda are relocation and resettlement schemes, cooperations with third countries to keep migrants away from the EU in the first place, and assistance to the countries of first entry by additional funding and the so-called hotspot approach.<sup>93</sup>

Following this agenda, the Commission and the Council (according to Art. 63 (3) of the Lisbon Treaty, these emergency measures did not go through co-decision<sup>94</sup>) worked on drafting legislation for all four of these emergency measures. In the fall of 2015, decisions were made and emergency schemes set up. The basis for all other measures were the **hotspots**. Hotspots are reception centers near the points of entry, where refugees are to be taken care of, registered in the Eurodac-database and their application for asylum is recorded. These hotspots are operated by local authorities with the help of EASO, the European Border and Coast Guard (better known as Frontex) and Eurojust. The hotspots were founded as a basis for the other emergency schemes: relocation and resettlement of refugees out of the hotspots.<sup>95</sup> **Relocation** was set up to relocate refugees from the borders and hotspots according to a quota based on burden-sharing and solidarity between the member states. Just days apart, the EU decided on two relocation measures for a total of 160.000 people in September 2015. Implementation of this did not go smoothly though, and it did also need reaffirmation of the CJEU in 2017.<sup>96</sup> **Resettlement** aims to open safe, legal ways into the EU by having the EU pick up its refugees from centers near a crisis. In 2015, the EU as well as Iceland, Liechtenstein, Norway and

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<sup>91</sup> European Parliament and Council Regulation (EU) No 516/2014

<sup>92</sup> European Commission 2015, 14

<sup>93</sup> European Commission 2015, 6

<sup>94</sup> Treaty of Lisbon, Art. 63 (3)

<sup>95</sup> European Parliament 2018e, 2ff

<sup>96</sup> European Parliament 2018e, 5

Switzerland agreed to resettle over 20.000 migrants and began working on this soon after.<sup>97</sup> However, as resettlement is part of the external dimension of asylum and the EU focuses on agreements with third countries in this, it soon began and concluded talks with Turkey and drafted the **EU-Turkey Statement & Action Plan** in early 2016. The idea is simple: for each denied asylum applicant from Syria that Turkey takes back, the EU resettles a Syrian refugee from Turkey in the EU. This agreement not only changed resettlement, but also the hotspots in Greece. They became closed facilities, where refugees are detained until either they received asylum and could leave the respective island, or if they are denied asylum, they are brought back to Turkey.<sup>98</sup> To finance all of this, the EU also agreed to raise the budget of the AMIF as well as the part-taking organizations such as Frontex.<sup>99</sup> Furthermore, the Council agreed to use an additional part of the EU budget available to help the countries most affected by the refugee crisis in 2016. The Parliament criticized this for the lack of its involvement and for it being another ad-hoc measure lacking an overall strategy for the crisis.<sup>100</sup>

#### **d. Common European Asylum**

The acquis results in a European asylum system that has achieved quite a lot since the Tampere Programme, but that still has a long way to go to become an effective solution, or even what the EU initially had envisioned the CEAS to be. This section sketches out the current workings of the CEAS (not considering the emergency measures as they are temporary), the short-comings of the system and what it might look like in the future based on current reform plans.

##### **i. What the CEAS is (Achievements)**

The process begins once a person *crosses the external border* of the EU illegally (seeing as there is no legal way to do that for someone seeking asylum<sup>101</sup>) and cannot be sent to a country considered safe, is picked up by the authorities and makes their *asylum application*.<sup>102</sup> The first step is to determine if the member state where the application has been made is even *responsible*. This is decided via the Dublin III convention, which states that the member state of first entry is responsible. If it is determined that the asylum seeker is not in this member state, they are brought back there. The *Eurodac-database* for fingerprints is a helpful tool to

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<sup>97</sup> European Parliament 2018i, n.p.

<sup>98</sup> European Parliament 2018e, 7

<sup>99</sup> European Parliament 2018c, n.p.

<sup>100</sup> European Parliament 2018d, n.p.

<sup>101</sup> Council Directive 2001/51/EC

<sup>102</sup> European Commission 2016, n.p.

determine responsibility.<sup>103</sup> During the asylum procedure, the *Reception Conditions* Directive is to be followed. It requires the member states to provide asylum seekers with housing, food, clothing, health care, education (for minors) and the right to seek employment (after nine months at the latest). Furthermore, the Receptions conditions has special provisions for people who need special attention (i.e. psychological assistance) and it gives asylum seekers freedom of movement in the member state (this does not apply in some circumstances though).<sup>104</sup> To determine whether an applicant qualifies for asylum (or subsidiary protection), their case is assessed according to the *Asylum Procedures* Directive, which guarantees (in theory) common standards across the EU.<sup>105</sup> Whether a person meets the requirements should be in accordance with the Qualifications Directive, which clearly states *who qualifies* for asylum and for subsidiary protection. This, if it is practiced across the EU, would give a lot of legitimacy to the Dublin Convention because it would not matter then in which member state a person seeks asylum. The chances would be the same everywhere.<sup>106</sup>

Once asylum is granted, the Qualifications Directive's second function comes into play. It guarantees refugees *rights*, such as obtaining a residence permit, healthcare, freedom of movement in the EU and access to the labor market.<sup>107</sup> If asylum is not granted, a person can *appeal in court* to be given asylum. If this is not granted either, they must leave the EU or are deported ('returned').<sup>108</sup>

In theory, this is a comprehensive system for asylum. In practice, the application is severely lacking though. There has been some harmonization when it comes to the common standards, but in reality, there is little convergence: member states interpret the standards by which refugees must be treated differently or simply have not properly implemented the directives.<sup>109</sup> The acceptance rates too differ vastly despite the Qualifications Directive, even when it comes to Syrian refugees.<sup>110</sup> See figure 1 below for a graphic illustration of this whole process.

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<sup>103</sup> European Commission 2016, n.p.

<sup>104</sup> European Parliament and Council Directive 2013/33/EU

<sup>105</sup> European Parliament and Council Directive 2013/32/EU

<sup>106</sup> European Parliament and Council Directive 2011/95/EU

<sup>107</sup> European Parliament and Council Directive 2011/95/EU

<sup>108</sup> European Commission 2016, n.p.

<sup>109</sup> Hatton 2015, 615

<sup>110</sup> Toshkov 2014

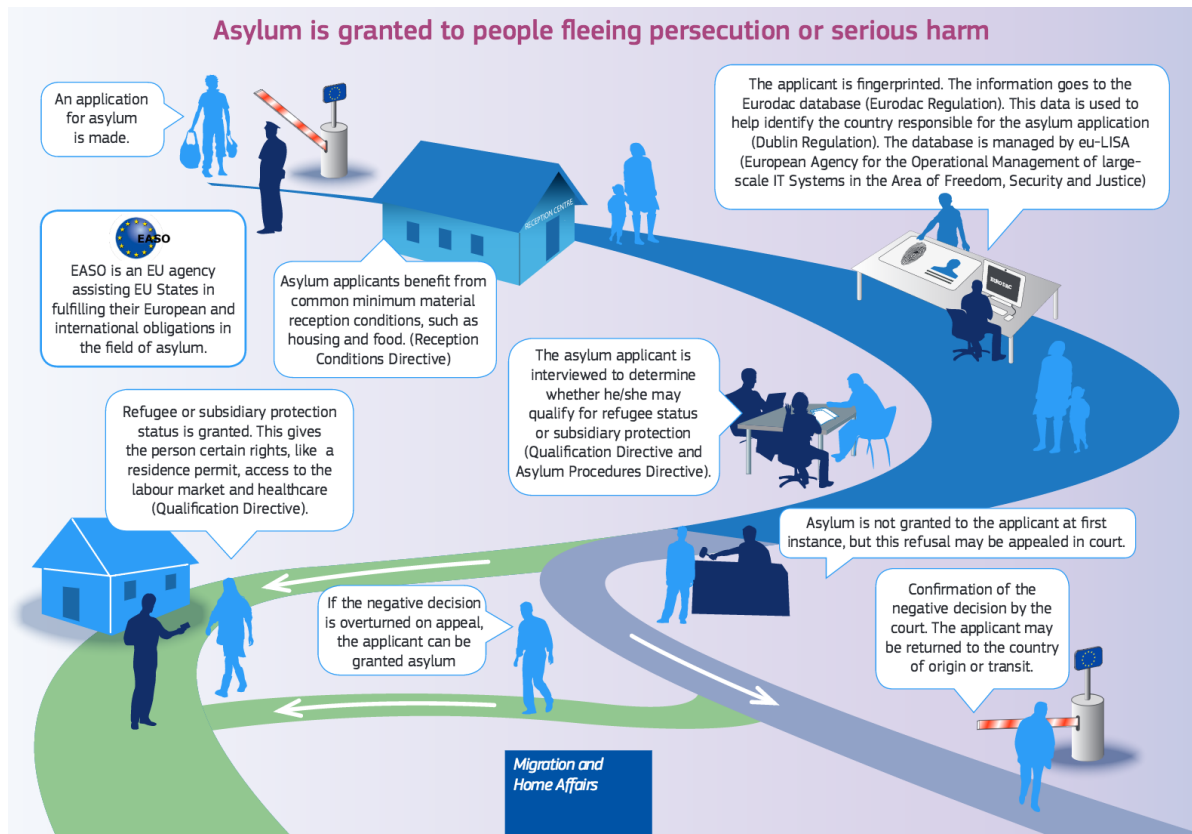


Figure 1: The Common European Asylum System<sup>111</sup>

## ii. What the CEAS is not (Failures)

The previous sections of this chapters often hinted on some of the short-comings of the CEAS. This section goes into more detail on that while being aware that the list might not be complete. Problems are organized in four sections: the reception of asylum seekers, the asylum process, the external dimension of the CEAS and policy-making in the field. Many of the issues have already been touched upon in this thesis in one place or another because one cannot describe the CEAS without encountering them.

One major issue for the reception of refugees concerns the **design of Dublin**. The Dublin Convention simply was not designed for mass-influxes of refugees into the EU, because it would then by default put a large (possibly too large to cope) strain on member states with external borders.<sup>112</sup> Furthermore, the key principle of the Dublin Convention (the first member state of entry processing the asylum application) only makes sense in combination with the remaining aspects of the CEAS, such as common standards of asylum across the union. In absence of this, it still matters where a person seeks asylum, therefore asylum seekers have an incentive to work around Dublin.<sup>113</sup> These issues of the Dublin convention also tie into many

<sup>111</sup> European Commission 2016, n.p.

<sup>112</sup> McNally 2017, 52

<sup>113</sup> McNally 2017, 50

other issues of the CEAS, such as the matter of burden. The Dublin regulation places the ‘burden’ of asylum on the member states with external borders, may that be on land or at sea. Of course, Dublin is meant to function together with several other regulations to create a system for **burden-sharing**<sup>114</sup>. Burden-sharing means mechanisms through which countries share the costs of common policies or public goods.<sup>115</sup> This is not so much an issue in a time without a major crisis, although in the EU it has been in debate pre-2015 too, but during a crisis it can become a huge matter, as the refugee crisis of 2015 showed. Many member states have been unwilling to share the strain with the southern member states, which put especially Greece in a precarious situation.<sup>116</sup> The issues with Dublin and burden-sharing lead to another major problem of the EU’s asylum situation: the standards and **human rights issues at the hotspots**. With large numbers of refugees entering Greece and Italy, the Dublin regulation forcing them to stay there and the rest of the member states not willing to take in relocated refugees, the hotspot-approach has been adopted to help Greece and Italy. But these large reception centers have long been criticized for appalling standards and human rights violations.<sup>117</sup>

The CEAS aims to harmonize the asylum procedure and the standards for the treatment of applicants and refugees across the EU. There has been progress with this, however for the most part, there is a **lack of convergence** in all of these matters. Refugees from the same countries face vastly different recognition rates in the EU, what they receive during the procedure and afterwards when their application has been accepted. These different standards, as already discussed, leaves the Dublin Convention with massive problems.<sup>118</sup> However, research has also found that while harmonization is lacking, the once-predicted race to the bottom because of the common minimum standards of the CEAS has not taken place.<sup>119</sup>

The external dimension of the CEAS faces a multitude of problems as well. For once, the EU is criticized for putting the focus too strongly on **keeping people out**: the so-called fortress Europe in force.<sup>120</sup> The border fences in Spain and the proposals to set up reception centers of the EU outside of the EU are evidence of this, as well as the fact that there is **no legal way** for refugees into the EU. Applications cannot be submitted at an embassy abroad, airlines are not allowed to carry them and crossing the border without a visa is illegal.<sup>121</sup> This creates demand for the services of **human smugglers** and makes entering the EU in general a dangerous

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<sup>114</sup> Treaty of Lisbon, Art. 63b

<sup>115</sup> Thielemann 2003, 253

<sup>116</sup> McNally 2017, 52

<sup>117</sup> Amnesty International 2016

<sup>118</sup> McNally 2017, 50

<sup>119</sup> Zaun 2016

<sup>120</sup> McNally 2017, 55

<sup>121</sup> Den Heijer, Rijpma and Spijkerboer 2016, 618

endeavor.<sup>122</sup> Another problem is the EU's cooperation with its neighbors. The already-mentioned agreement with Turkey ties into the issues with the hotspots as many refugees can either leave these with asylum status bound for the EU, or without it and to Turkey. It is questionable whether refugees are treated in **Turkey by a standard** that is acceptable to the EU. Also, this agreement leaves the EU very **dependent on Turkey**, because the EU relies on Turkey to solve its refugee crisis, whereas Turkey is going through questionable democratic changes and can demand things from the EU in return for this agreement.<sup>123</sup> Finally, the numerous **re-admission agreements** that the EU has with many nearby countries (for deportations into countries deemed safe) work well as long as the EU's neighbors have an interest in pleasing the EU (i.e. to be granted membership or even only membership applicant status), but this approach is more than questionable; one reason being that this leverage vanishes once membership or applicant status is granted, and a country cannot be strung along forever.<sup>124</sup>

Considering the strong ties of asylum to the state, it seems reasonable to call the Tampere Programme's visions for asylum on the European level fairly ambitious. The legislative goals that had been set out back in 1999 the EU completed by 2005 (see 2.C.iii), and the Hague and Stockholm Programmes envisioned a completed CEAS by deadlines that have passed. However, may it be because of the economic and financial crisis, the need for consolidation time to adopt the new laws or other reasons, the progress as well as the ambition have slowed down since then. Stockholm's unnamed follow-up program illustrates this with its focus on what is already there instead of going further, and by the simple irony of it lacking a name. By 2014, it appeared that the EU's asylum plans had somehow lost its direction and drive to push ahead. A **lack of direction** certainly is a severe problem for a project like this.<sup>125</sup> However, the refugee crisis has made it obvious that the CEAS at the time was not enough, and now with the crisis passed (for the time being), there are signs that the EU could have re-gained its ambition for the CEAS. A variety of reforms are being discussed and in his last State of the Union address, Commission President Jean-Claude Juncker himself called for sustainable solutions and lasting solidarity, stronger external borders and faster returns.<sup>126</sup> Whether this means advances for the CEAS remains to be seen. The **political climate** and different interests and opinions on how to handle the problem have also shown to be a stumbling block for EU policy-making in asylum. The Visegrád-group (Hungary, Poland, Slovakia, Czech Republic) has proven to be vocally anti-immigration and uncooperative when it comes to deepening integration in this

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<sup>122</sup> Den Heijer, Rijpma and Spijkerboer 2016, 622

<sup>123</sup> Batalla Adam 2017

<sup>124</sup> Wunderlich 2012

<sup>125</sup> Hampshire 2016, 543f.

<sup>126</sup> Juncker 2018, 7

field, like when they blocked the relocation-measures<sup>127</sup>. Even Germany's slogan *wir schaffen das*<sup>128</sup> of 2015 is no longer the prevalent mood. Immigration too was a big influence on the Brexit-referendum<sup>129</sup>, parties that are outspokenly anti-immigration have achieved success in elections across the continent<sup>130</sup> and in the summer of 2018 the Southern member states often argued for days over who would allow boats with refugees to dock in their harbors.<sup>131</sup> In sum, the climate appears to have grown from skeptical and always having an eye on security, to openly toxic. This is reflected in the law-making in the Council, where several directives on migration are currently being blocked.<sup>132</sup> But even the Commission always underlines the security-matter alongside the CEAS.<sup>133</sup> Added to those specific issues of course are other factors that make decision-making in the EU a long process: many veto-players and the high cost of failure to name but a few.

To sum up, it seems that the CEAS is simply not future-proof at the moment. It has a difficult time handling current refugees, and the CEAS is certainly not ready to handle the next refugee crisis any better.

### iii. What the CEAS could be (reform plans)

The CEAS, though the first-phase legislation all technically there, was incomplete before 2015 and that became painstakingly obvious in the crisis. It facilitated emergency measures, and it gave new direction and possibly dedication to pushing the CEAS further. Current reform plans include:

- end the temporary checks at the internal borders and get back to Schengen,
- improve the existing CEAS (Dublin III, the Reception Conditions, Qualifications, Asylum Procedures Directives and Eurodac)
- implement the potential fourth phase of the CEAS by providing safe and legal ways into the EU (through permanent relocation programs<sup>134</sup> and humanitarian visa),
- strengthen the external dimension through stronger external borders, a new partnership approach, a European list of safe third countries and a permanent resettlement program.<sup>135</sup>

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<sup>127</sup> European Parliament 2018b, n.p.

<sup>128</sup> SWR 2015, n.p.

<sup>129</sup> Wadsworth et al. 2016, 51

<sup>130</sup> For example in Austria

<sup>131</sup> For example reported here: the Malta Independent 2018, n.p.

<sup>132</sup> For example here: European Parliament 2018f, n.p.

<sup>133</sup> Juncker 2018, 7

<sup>134</sup> European Parliament 2018h, n.p.

<sup>135</sup> European Parliament 2018g, n.p.



Of course, that is not all that the CEAS could be. The academic discourse has also drawn up **proposals** on how to make the CEAS better. A common thread is the burden-sharing aspect (Suhrke 1998, Thielemann, 2003) and how to make relocation and resettlement more efficient and fair. The EU's relocation scheme was based on GDP, population, unemployment and the asylum application the countries have processed in the last five years; however there were problems with undesired effects of the distribution key<sup>136</sup> and besides, it was merely a temporary scheme. For the possible future relocation and resettlement scheme, for example Hatton (2016) has proposed a modified model. His model has three steps: first of all, controls of the external borders need to become even more draconian, to control immigration and to discourage refugees from attempting to survive the dangerous journey into the EU, also to end death of refugees in the Mediterranean Sea. Secondly, the EU should provide more help in refugee camps near to the source of the conflict, and there, assess the need of people, and bring those who are most in need safely into the European Union as refugees. Finally, the EU should also focus on burden-sharing and create a proper relocation program for those refugees.<sup>137</sup> A different approach is proposed by Fernández-Huertas Moraga and Rapoport (2015). It also builds on a distribution key of refugees in Europe, however, this one includes two more steps and is based strongly in microeconomics: the member states are assigned quotas of refugees, but they have two options in how to deal with these quotas. Either they take in refugees with all that this entails, or they pay for other countries to do it. This way, supply and demand will meet at the optimum and provide the most efficient solution. That is not all, however, because refugees are of course not commodities to be traded. They rightfully have preferences of where to go, and these should be taken into account through a form of a matching mechanism. Refugees would need to create a list of their desired destinations (or places they do not want to go), and the member states would do the same in terms of demographic criteria of the refugees that they would like. The preferences of both sides would be matched as well as possible to create an optimum again.<sup>138</sup>

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<sup>136</sup> Grech 2017, 227

<sup>137</sup> Hatton 2016, 444f.

<sup>138</sup> Fernández-Huertas et al. (2015), 649ff.

### 3. European Integration Theory

European Integration is an enormous body of research that, in the most basic sense, aims to explain policy-making in the EU. Several angles have been proposed over the years, but the longest-standing and most important one is still that which considers the EU as *sui generis* and therefore studies it away from classic comparative political theory. These integration theories aim to explain why and how the EU as a whole as well as its separate policy areas developed over time. Important to note in advance is that the different European integration theories arose in different points of time and against vastly different backdrops of political climate, and often in response to each other. However, that does not mean that only the most recent theories still hold validity. On the contrary, even the oldest integration theory is still useful in the study of EU policy-making. This is partly due to the complexity of the EU: different issue areas and different points in time often require different integration theories. Therefore, it is important to keep in mind that there is not ‘the one’ integration theory, but several that co-exist and that all have their uses.<sup>139</sup>

This chapter summarizes the core argument and criticisms of the most important integration theories, as described by some of the best and most comprehensive reviews, and introduces the most important texts of each theory. Furthermore, it provides an overview over how integration theory has been used in the past to explain the integration of asylum policy.

#### a. Neofunctionalism

The founding of the first predecessor of the EU not only marked the beginning of European integration, but also the study of it: in 1958 (Haas), neofunctionalism emerged to explain regional integration. Subsequent accounts by Haas 1961, Lindberg 1963, Lindberg and Scheingold 1970 and more recently George 1991 as well as Sandholtz and Stone Sweet 2012 laid out the core mechanism of neofunctionalism: spill-over effects. Placing one policy area on the supranational level (such as coal and steel in the 1950s) leads to unintentional and unanticipated pressure for integration in neighboring policy fields (in this case, i.e. taxation or employment). Another example is the common currency forcing fiscal cooperation in a budgetary crisis such as the latest one. These spill-over effects can either be functional like in the examples above, or concern actors in political spill-overs, i.e. the European Commission promoting more cooperation, or national actors being forced to work together with supranational actors and shifting their loyalties away from the national level because of

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<sup>139</sup> Pollack 2015, 12f.

unanticipated advantages of cooperation. Neofunctionalism therefore argues with dynamics where integration in one field leads or at least promotes integration in other fields.<sup>140</sup> If these dynamics are ignored, negative externalities appear due to the unequal integration<sup>141</sup>.

Naturally, every theory must be applied to a particular policy field or period for an evaluation of it to be meaningful, but there are recurring aspects. The irregularities in the integration process such as in the period of Eurosclerosis are often used to argue against spill-over effects, but neo-functionalists explain different phases by arguing that political actors can indeed slow the spill-over effects down, but eventually the pressure will be too large, and they must give in.<sup>142</sup> Furthermore, neofunctionalism is criticized for widely ignoring or at least underestimating the role and interests of actors in policy-making, as well as the technicalities of the complex process of EU policy-making. This is why neofunctionalism can be used well for mid- and long-term trends, but not small instances of policy-making.<sup>143</sup>

Also in the field of migration, neofunctionalism has been applied. Butt Philipp (1994) as well as Sandholtz and Stone Sweet (1998) argue that migration policy has been the result of integration pressure following the creation of the single market. The integration of the economy led to the need for free movement of people, and thus the EU's migration policy was born.<sup>144</sup> Another piece of literature in this context is proposed by Scipioni (2017b). He argues that (deliberate) incomplete integration in a policy field can also have a spill-over effect and lead to more integration, because the flaws of incomplete agreements create or worsen a crisis, and to solve this, more integration is needed. Scipioni uses the refugee crisis of 2015 to test this argument and though he confirms the theory to a point (i.e. the creation of the European Asylum Support Office), while the failing of relocation policies tests it.<sup>145</sup>

Overall, neofunctionalism is a debatable theory in the field of migration, because the earliest steps towards integration did not come from the EU institutions themselves, but from intergovernmental cooperation between the member states (i.e. the Schengen agreement):<sup>146</sup> see the following section for this argument.

## **b. Intergovernmentalism**

The classic opposing theory to neofunctionalism is intergovernmentalism of the 1960s, as well as its revival as liberal intergovernmentalism after the Eurosclerosis in the mid-1980s.

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<sup>140</sup> Pollack 2015, 14f.

<sup>141</sup> Schäfer 2002, 24

<sup>142</sup> Schäfer 2002, 17

<sup>143</sup> Schäfer 2002, 25

<sup>144</sup> Butt Philipp 1994; Sandholtz and Stone Sweet 1998

<sup>145</sup> Scipioni 2017b

<sup>146</sup> Guiraudon 2000

Advocates of this school of thought such as Hoffmann 1966, Moravcsik 1998, Moravcsik and Schimmelfennig 2009 and Pierson 1996 dismiss the previous theory of automatic spill-over effects for its ignoring of actors, and instead put the national governments into the focus of the analysis. European integration is shaped through the more powerful EU member states using their bargaining power, package deals and ‘side payments’ to less powerful member states in order to pursue their own interests in negotiations. These interests are shaped domestically. Furthermore, supranational organizations are only agreed upon if member states expect these organizations to ensure compliance of other member states with mutual commitments. This theory unsurprisingly emerged at a time when national governments (such as the then-newly joined members Denmark and the United Kingdom (UK)) resisted further transfer of power to the supranational level.<sup>147</sup> The Open Method of Coordination (OMC) is often seen as an example of this theory. It allows the member states to not only decide which goals to pursue and how, but also to keep as much sovereignty as possible while blaming the EU domestically. Intergovernmentalism is praised for considering national interests in policy-making, because this arguably explains a lot of the details of legislation. However, it is criticized for overestimating national governments’ strategical thinking, as many consequences of EU policy-making are considered unexpected or unintended or facilitated by the European institutions. The OMC is again a good example of these critics: indeed, the national governments draw advantages from it, but they surely did not anticipate the power of benchmarking and the Commission’s trademark ‘naming, blaming and shaming’ to all but force more compliance.<sup>148</sup>

In the migration debate, intergovernmentalist perspectives have been the most influential ones, especially in the beginning. The ‘venue-shopping’ argument proposed by Guiraudon (2000), but also Lavenex (2001), is the most common and influential. According to Guiraudon, the timing and the direction of integration in this field can best be explained by the member states’ tendency to venue-shop. They brought the process of integration underway by aiming to circumvent national constraints (parliaments, courts, NGOs, etc.) through supranational cooperation, where the member states would have the advantage. This explains why especially at first, the member states and the Council had the most influence over the direction that the EU’s migration policy took, not the Commission or other European institutions.<sup>149</sup> Another intergovernmentalist argument by Givens and Luedke (2004) similarly claims that European migration policy advanced because of the member states negotiating with each other based on domestically shaped preferences. The resulting harmonization is often restrictive towards

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<sup>147</sup> Pollack 2015, 16f.

<sup>148</sup> Schäfer 2002, 29ff.

<sup>149</sup> Guiraudon 2000

immigrants' rights. The most recent papers on intergovernmentalism in asylum focus on the EU's attempt at a quota-system to distribute asylum seekers among EU member states.<sup>150</sup> Zaun (2018) argues that it was the member states (those with fewer refugees) that blocked the initiative, which was endorsed by member states with a larger number of refugees. Intergovernmentalism is contested by some agreements (i.e. Schengen) developing away from national politics. Furthermore, especially institutionalist accounts of European integration point out that intergovernmentalism ignores the later influence of the other European institutions, especially the Commission, the Parliament and the European courts.<sup>151</sup> Intergovernmentalist answers to that are for example Ripoll Servent and Trauner (2014; 2016), Trauner (2016) and Maurer and Parkes (2007) arguing that while the Commission, the Parliament and the CJEU later gained more influence to decide over migration policy, the member states' preferences prevailed because they had already locked in the hard policy core before giving away power to the EU institutions. The later changes done have not changed the policy core, but merely tweaked its implementation.<sup>152</sup> This also goes along the lines of institutionalism.

### c. Institutionalism

Furthermore, there is institutionalism (or rather, the new institutionalisms) as another major theory of European integration. This theory was first used in the United States in another context, but then also found its way into the study of European integration, like in Scharpf 1988, Pierson (2000) and Pollack (2009). In general, institutionalism focuses its attention on the formal rules of the European institutions in policy-making, such as the community method and its many rules and veto players. These affect processes as well as outcomes in policy-making in the EU. Wider understandings of the concept also include informal rules (i.e. norms and conventions) that influence the actors of a process. Institutions only influence the actor through incentives though, as their overall characteristics (such as motives) remain the same. Another interest of intuitionism are institutions and their effects over time. The core argument is that existing institutions (i.e. a certain law) constrain later decision-makers because of so-called increasing returns that would make a switching to a new path much more expensive than adapting what is already there. In a nutshell, it is institutions that matter for institutionalism.<sup>153</sup>

The great strength of this approach is that it shows policy in its institutional context. It can help explaining the genesis and overall direction of a policy. However, it is less suitable to

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<sup>150</sup> Givens and Luedke 2004

<sup>151</sup> Zaun 2018

<sup>152</sup> Ripoll Servent and Trauner 2014, 2016; Trauner 2016; Maurer and Parkes 2007

<sup>153</sup> Pollack 2015, 18ff

clarify the finer details, because European integration does not always aim at a big, explicit goal, but is developed along the way.<sup>154</sup>

In the migration discourse, the argument that the member states venue-shop is widely accepted, but only when it comes to the earlier stages of integration in the field of migration. Later, the ‘venue-shopping’ argument loses its plausibility, because placing migration in the sphere of supranational policy-making has not decreased the number of veto-players at all, like Thielemann and Zaun (2017) argue.<sup>155</sup> The main institutionalist argument concerning the CEAS puts the European Commission, the European Parliament and the European courts into focus. Kaunert (2009) for example examines the influence of the European Commission on the formative legislation of the CEAS (the directives and the Dublin regulation) and finds that what ended up in the EU’s programs (the first being Tampere) was surprisingly similar to an early White Paper by the Commission on migration. Therefore, he argues that the European Commission has played a vital role in the field, and has managed to keep it far less restrictive than the member states would have wanted. The Commission has achieved this by using the first mover advantage, by linking migration to the single market instead of the security threat after the 9/11 terrorist attacks, and by forging alliances with NGOs to increase the legitimacy of the Commission’s proposals.<sup>156</sup> Kaunert and Léonard (2012) similarly argue that, while the ‘venue-shopping’ argument is very plausible, claiming it has shaped migration policy according to the member states’ interests does not reflect later changes to the venues. The Amsterdam Treaty put asylum into the first pillar of the EU and therefore, the Parliament eventually had the right to co-decide with the Council instead of being merely consulted.<sup>157</sup> Furthermore, the CJEU and the ECHR gained power as well and ruled in some decisive cases, as accounts such as Arcarazo and Geddes (2013) demonstrate: since the Lisbon-treaty, the CJEU has competence to rule on asylum and migration, and it has constrained what the member states can do.<sup>158</sup> As Servent and Trauner (2014; 2016), Trauner (2016) and Maurer and Parkes (2007) show, institutionalism in the form of path-dependency can also apply to the member states though (as mentioned in the previous section already): through the Council alone deciding on the early legislation of the CEAS, it could lock in the hard policy core, which later proved very difficult to change.<sup>159</sup> Finally, the increasing importance and power of new offices and agencies such as

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<sup>154</sup> Schäfer 2002, 16

<sup>155</sup> Thielemann and Zaun 2017

<sup>156</sup> Kaunert 2009

<sup>157</sup> Kaunert and Léonard 2012

<sup>158</sup> Arcarazo and Geddes 2013

<sup>159</sup> Ripoll Servent and Trauner 2014, 2016; Trauner 2016; Maurer and Parkes 2007

the EASO have been highlighted by Scipioni (2017a) to further advance institutionalist arguments.<sup>160</sup>

#### **d. Constructivism**

Constructivism goes in line with institutionalism when also considering informal rules. However, in this approach, these norms are said to influence actors, not institutions, because they shape their characteristics and interests. Therefore, as opposed to previous theories, the preferences of actors in the political process are not determined exogenously, but influenced endogenously. In terms of the EU, this school of thought proposes that the institutions of the EU shape the behavior, interests and characteristics of national governments and individuals. However, studies conducted for this theory have produced mixed results, not painting a clear picture of how to evaluate this approach.<sup>161</sup> Readings on constructivism are Jupille et al. (2003), Risse (2009) and Schimmelfennig (2012).

#### **e. Realism**

Opposing constructivism is realism. Realism considers foreign policy of states to be in competition with each other, which is why all governments are mainly concerned with their own interests. Consequently, realism is pessimistic towards supranational projects such as the EU. Early European integration went against this, but realism scholars argued that the threat posed by the Soviet Union was the common enemy that held the European Communities together. However, European integration progressed after the fall of the Iron Curtain, therefore, realism is not by far a major theory of European integration beyond the field of foreign policy.<sup>162</sup>

#### **f. Governance**

Summarizing the last theory mentioned in this chapter, the governance approach, is not an easy task because it is not a compact theory but a cluster of theories. There is a large number of introductory literature already, such as Scharpf 1999, Hooge and Marks 2001 or Jachtenfuchs 2007. Governance is also not indigenous to the study of the European Union, and while some sources add it to the cluster of theories on European integration, others consider it a third approach (the second being to study the EU with of-the-shelf theories of comparative politics under the premise that the EU resembles a federal system and is not *sui generis*). Governance as a third approach would consider the EU neither as a supranational system nor a national one,

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<sup>160</sup> Scipioni 2017a

<sup>161</sup> Pollack 2015, 21f.

<sup>162</sup> Pollack 2015, 23f.

but a new constellation.<sup>163</sup> The governance approach examines interdependencies between policy fields, overlapping competences, and the networking of actors. It assumes that through more integration, member states depend on each other more and more, which results in neither actor having all the required knowledge to solve problems. Therefore, successful problem-solving requires actors from various levels to work together to find solutions.<sup>164</sup> Furthermore, the governance approach proclaims a new political climate, where persuasion or a better argument can be stronger than actors' own interests<sup>165</sup>. Typical of this governing without government are policy fields where the EU has National Action Plans (NAP): it is a circle that is repeated year after year. The Commission and the Council prepare a report on the policy field in question. Based on this, the Council makes recommendations, which are reviewed by various committees and then made into guidelines that the member states have to consider. The latter formulate NAPs annually, which are then reviewed by the Council. The Council can give recommendations to the member states again if the Commission suggests it. These recommendations are included in the next report. This approach is a novelty, because it combines the supranational, European goals with national strategies to achieve them, because it explicitly considers national diversities, and because it focusses on benchmarking between the member states. Of course, any measures following the National Action Plans are voluntary. However, the European Commission especially influences the process; also because in this type of governing, it controls the funding.<sup>166</sup> CEAS is a policy field where this method is applicable. The member states formulate NAPs, and the Commission distributes money from the European Refugee Fund (ERF).<sup>167</sup> Furthermore, governance approaches also look at how the EU can influence national policies. Some of the studies in this found that EU membership is strong leverage over countries eager to join, but this leverage is easily lost once membership is granted, or if a state is no longer interested.<sup>168</sup>

The governance approach is among other things criticized for assuming that all actors are always cooperative and eager to arrive at a solution. This downplays the interests of each actor, and it ignores other factors, such as spill-over effects, unintended consequences or simple things like a Commission that is crafty at negotiating.<sup>169</sup> Governance approaches are used for example when it comes to soft measures, such as the National Action Plans (NAPs)<sup>170</sup>, but in the field

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<sup>163</sup> Pollack 2015, 35

<sup>164</sup> Schäfer 2002, 32f.

<sup>165</sup> Pollack 2015, 41

<sup>166</sup> Schäfer 2002, 33

<sup>167</sup> Eur-Lex 2018, n.p.

<sup>168</sup> Pollack 2015, 38

<sup>169</sup> Schäfer 2002, 39

<sup>170</sup> Schäfer 2002, 33



of migration, the use of the governance approach is quite limited. Accounts such as Thielemann (2005) deal with the European Refugee Fund, and Menz (2011) looks closer at the role of NGOs and other actors outside of the European institutions and national governments.

### **g. What to take away**

This overview makes it clear that to examine any policy-field of the EU, it is not necessary to invent the wheel anew: Policy-making in the EU and European integration have been studied and theorized thoroughly from a variety of angles in the decades that the EU and its predecessors have existed. The main viewpoints all were introduced to the field in a certain phase of European integration, from the initial broad optimism of future possibilities, over the period of Eurosclerosis to today's additions to the field. However, none of the main theories are nowadays considered outdated, and neither has there been a consensus reached. The situation seems more complex now than ever: Some theories see much potential for future integration (in general, neofunctionalism and constructivism, through spill-overs and Europeanization of people and institutions, respectively), others argue that the potential for EU integration is spent (in general, intergovernmentalism and realism) and yet another camp thinks that the EU is doomed to fail; a process marked by e.g. the exit of EU members such as the United Kingdom. What at least the introductory literature (as Pollack 2015, Schäfer 2002, Rosamond 2000, Saurugger 2013, Jørgensen, Pollack and Rosamond (2007), Wiener and Diez (2009) and Jones et al. (2012)) has in common is that it has accepted the diversity of EU policy-making and European integration. This master thesis is based on this assumption as well because it provides good analytical tools from a broad literature to explain variation in EU policy-making not just across policy-fields, but within the sphere of the Common European Asylum System (CEAS) and over time as well.

The next chapter continues European integration theory because it describes the methodology of this thesis, and as such, it also specifies which integration theories are of particular importance and why. It also puts them in relation to one another with the use of two dimensions, creating a matrix. Therefore, this chapter leaves it at describing them and pointing to further reading.

## 4. Methodology

This chapter provides detailed information on the methodology of the thesis. First, it discusses which parts of the *acquis* have been used in what way to answer the research question. Secondly, it summarizes the key assumptions of the integration theories used, explains why they were chosen and how the empirical process has drawn from them. Thirdly, it provides some perspective through characteristics and challenges of the field and the topic, and finally this chapter maps out how the results are presented in the subsequent chapter on the results.

### a. Use of the *Acquis*

Chapter 2.C. lays out the *acquis* on asylum in the EU in detail. Of course, not everything that is mentioned is in fact technically part of it. Rather, things like Green and White Papers of the Commission, the Return Handbook or even the programs on the CEAS are documents that map out what the legislation should look like. Broadly speaking, the list contains three different aspects:

- **General set-up:** This category contains important non-EU documents (like the Geneva Convention) as well as the EU treaties, which define the conditions of policy-making.
- **Agenda-setting:** Documents like the Tampere Programme or the Commission's White Paper on Asylum define concrete goals for the field.
- **Legislation:** The *acquis* in the narrowest sense contains the actual legislation on the CEAS. These are mainly the directives and the Dublin convention.

Not all that has been described in the *acquis* is part of the analysis. The non-EU documents, as important as they are as a guide and reference, have naturally not been decided by the EU under EU law, so they are left out of the analysis as an issue. The EU treaties are treated as *acquis* if they specifically mention asylum, but otherwise they are treated for what they are: the framework of policy-making. It would simply go too far to analyze how they came to pass.

The papers on the CEAS and the legislation meanwhile are the main part of the analysis. However, even here there are some exclusions: for matters of scope, as well as with regard to content. Things that have no major direct influence on the CEAS (like the creation of the EMS) or legislature that has merely reaffirmed what is already there (e.g. the second, third and fourth version of the ERF) are neglected.

## b. Application of Theory

This thesis has a strong focus on theory because the drawing on theory allows to not only see why a policy was created, but also policy-making: the conflicts, the actors, their interests, the veto players, the negotiations. It puts a stronger emphasis on institutions than an analysis that focusses less on theory and more on the problem-solving, practical aspect of a field.

This focus of course stems from the question guiding this thesis: what integration theory can contribute to understanding the integration of asylum in the EU, its causes, contents and output. To answer it, I looked at the field in question through the lens of European Integration theory and tried to find out how different theoretical concepts would portray the development of the CEAS, which pieces of the *acquis* and which circumstances they would highlight as the driving force.

In short, the empirical work of this thesis drew onto the theory by finding evidence that supports the importance of one theory or another. This concept is taken from Schäfer (2002) who did something very similar in employment policy.<sup>171</sup> Like him, I also focused on four integration theories: institutionalism, neofunctionalism, intergovernmentalism and governance. This selection was done because of three main reasons:

- These four models are the main theories of European Integration, with the largest body of literature and discourse.
- These are also the theories that have been used in the field of migration.
- Finally, they do represent four substantially different ways of policy-making, which is best for comparison.

These different understandings of policy-making vary in terms of who each theory underlines as the driving force behind the integration of any given policy field of the EU. They focus on different actors, content and dynamics, and they all have their flaws: aspects they leave out or are not able to explain convincingly. Schäfer's model puts the four theories in question into a matrix that reflects these different understandings of policy-making. It asks two basic questions: who is the focus of the theory (is it formal institutions, such as the regulatory mode of governance, or is it the actors) and what is the motivation of policy making (the actor's own interests, or the active solving of problems).<sup>172</sup> The theories fit into the matrix as following:

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<sup>171</sup> Schäfer 2002, 6f.

<sup>172</sup> Schäfer 2002, 6

<i>Subject of Analysis</i>	<i>Motivation of Actors</i>	
		Own interests
Institutions	<i>Institutionalism</i>	<i>Neofunctionalism</i>
Actors	<i>Intergovernmentalism</i>	<i>Governance</i>

Table 2: Matrix of Integration Theories

Institutionalism therefore understands institutions and their inner workings as the main driving force behind EU-integration. This includes institutional constraints by unanimous voting or the regulatory mode, court rulings and path-dependency of policy. Neofunctionalism also focusses on institutions, but it is more concerned with problem-solving and unintended further integration that for example Schengen brought (the spill-over effects). Governance is equally concerned with problem-solving, but it shifts the attention to a variety of actors, also outside of the formal actors in the EU, like how the OMC includes the member states strongly or how the Turkey statement is an example of cooperation with non-EU countries. Finally, intergovernmentalism highlights the importance of actors as well, but how their own interests influence policy-making. The classic venue-shopping argument is an example of this.

### c. Characteristics of the Field

The field is a very interesting one within the arguably unique setting of the EU. Asylum began to europeanize in the Eurosclerosis-phase of European Integration, when the overall process had slowed down considerably. That might be why the cooperation moved from relatively soft cooperation to harder methods over time. Furthermore, asylum as a matter of national sovereignty is of particular interest if on a supranational level. This is why one always encounters the member states' stances on the matter when studying the CEAS, whether it is their ideas of what cooperation should look like, or resistance to further integration. Finally, the field is also of particular interest because it is not an economic topic, like the classic fields of EU integration. Rather, it has to do with human rights, security and social policy.

### d. Challenges of the Analysis

The four theories in question are not equally well-developed or have equally strongly the goal to explain integration. Institutionalism for example is a fully-developed model to explain European integration, whereas Governance is merely a cluster of theories.<sup>173</sup> They are not fully comparable, but as it was not the goal of Schäfer's analysis, it is not the goal of this thesis either. Furthermore, by only focusing on four integration theories and the method described above, a

<sup>173</sup> Schäfer 2002, 8

certain selectivity in what is presented cannot be avoided. Also, one has to keep in mind that the integration of asylum in the EU has been and is a complex process with the final outcome more dependent on trial and error as well as necessity instead of the one goal that the EU works towards. With the added reality that competences and policy-making, interests and circumstances changed, all theories hold merit in some situations. It would be unrealistic to expect to find the one explanation for the integration of the CEAS. Also, all of the theories have been applied in the field in one way or another, so part of the analysis is to test the arguments through the method applied by Schäfer and with a sharper focus on the CEAS, yet with a more detailed collection of the *acquis*. Furthermore, as the member states still decide considerably in the field, their vastly different interests and influence is never far in such an analysis. One has to be careful to keep them out of it unless their role was incremental for the causes, direction and form of the integration. Finally, as the CEAS is not completed, the final outcome has not yet been defined, and can therefore not be used to judge the success or failure of what has happened. It can also not be used as a reference of which steps of the process were most important for the CEAS, because we do not yet know where it will end up.

#### **e. Layout of the next chapter**

On a more technical level, the results of the analysis will be presented as follows: the three plus one phases (the one being the so-called pre-phase of how asylum made the agenda) constitute the sections so that it follows a chronological structure. Within these sections, the four integration theories are the subsections. In each of these subsections, I consider what each phase would look like according to the theory in question, and then what reality is like: which parts of the *acquis* each theory can explain well, and with which part it struggles. The matters of interests are:

- Causes of Europeanization: Why was it even up for discussion? Was it external events, previous integration, the interests of actors, etc.?
- Policy-making: who set the agenda and how was the discussion framed? Who were the veto players and actors, what were their powers and interests? Whose interests prevailed eventually?
- Output: is the focus on security or human rights, on deeper and wider integration or on the member states' national interests? What type of legislation developed?

## 5. Results

This chapter presents the results. It constitutes of four sections divided into four parts each. The sections represent the phases of the CEAS and are divided into the four integration theories in question. After a brief reminder of the key points of each theory, the phases of the CEAS are reviewed from the perspective of each theory in terms of the causes, the process of policy-making and the output and outcome. To find out which theory fits best, I looked at what the theories can explain well, and what does not fit. Finally, a brief evaluation sums up the results: first of each phase in particular, and then overall.

To find detailed explanations, descriptions and literature, refer to chapter 3 for Integration theory and to chapter 2.C. for the *acquis* as well as the list of legislative acts and documents in the appendix of this thesis. With these chapters and list included, this chapter does not reference to them anymore unless quoted directly. Also, because parts of this analysis have been studied before, I occasionally refer to previous results or highlight them with examples. If so, it is stated in the text and the literature in question can be found in chapter 3 as well as in the bibliography. None of these conclusions are mine of course, but they cannot be left out of this analysis if one wants to paint a comprehensive picture.

Unlike the chapter on the *acquis* (2.C.), this part leaves out the important documents that asylum in the EU is based on, because they were not EU-legislation. But for completeness' sake and as a reminder, find them in the table below.

<b>12/1948</b>	Human Rights Declaration
<b>11/1950</b>	European Convention for Human Rights + Protocols
<b>07/1951</b>	Geneva Refugee Convention
<b>01/1967</b>	Geneva Protocol

*Table 3: Guiding Documents of Asylum in the EU*

### a. The Pre-Phase

The integration of asylum (or rather, the unravelling of asylum being an entirely national matter) began in the 1980s with the end of the so-called Eurosklerosis. This phase received its name because European Integration had slowed down for various reasons, and was frequently hindered by the unanimous voting system in the Council. Eurosklerosis ended in 1985, when Jacques Delors was president of the European Commission. The most notable and immediate progress in integration following Eurosklerosis was the completion of the European Single Market, something that had been a goal since the 50s and the Treaty of Rome.<sup>174</sup>

<sup>174</sup> Young 2015, 116ff.

This was also the starting point of migration and asylum on the European level, because the attempts to complete the single market had established a link between the open internal borders and a different immigration policy, as the influential White Paper of the Commission states: “[...] *most of our citizens would regard the frontier posts as the most visible example of the continued division of the Community and their removal as the clearest sign of the integration of the Community into a single market. [...] Once we have removed those barriers, and found alternative ways of dealing with other relevant problems such as [...] immigration [...], the reason for the existence of the physical barriers will have been eliminated.*”<sup>175</sup> With the legislation that followed this White Paper, asylum made it onto the EU’s agenda. See below the steps in this phase of the CEAS:

06/1985	<b>Schengen I</b>	42000A0922(01)
06/1985	<b>White Paper on the Completion of the Single Market</b>	COMCB5) 310 final
02/1986	<b>Single European Act</b>	11986U
06/1989	<b>Palma Document</b>	
06/1990	<b>Schengen II</b>	
06/1990	<b>Dublin Convention I</b>	97/C 254/01
02/1992	<b>Maastricht Treaty</b>	11992M
12/1992	<b>London Resolutions</b>	

Table 4: *Acquis of the Pre-Phase of the CEAS*

### i. Neofunctionalism

Neofunctionalism considers further integration a consequence of the integration of neighboring policy fields through spill-over effects: integration in one field leads to integration pressure in another field. Within Schäfer’s matrix, this means that neofunctionalism focusses on institutions and politics as problem-solving. In migration, this is a classic theory that considers the single market as the integration that led to the pressure to integrate migration.<sup>176</sup>

How does this theory fit with the pre-phase of the CEAS? After a long period of Eurosclerosis, the new Commission of the EG was eager to end stagnation and integrate further. The single market was the way to do it. Like Butt Philipp 1994 and Sandholtz and Stone Sweet (1998) have argued, neofunctionalism fits with this development very well, because as the White Paper stated (see above), removing the internal borders and establishing the free movement of people made a different immigration control necessary to ensure security. Control of migration needs border security, and if that does not happen at the internal borders, it needs to be on the external borders. The open area this creates needs common rules, otherwise the member states would have no control over their territory anymore. This indeed describes a spill-over effect: the integration of the single market leading to integration in another policy field.

<sup>175</sup> European Commission 1985, 6

<sup>176</sup> For a detailed description and sources, see chapter 3.A.

The first legislature of this pre-phase appears to emphasize this as well: the preparation and signing of the Single European Act (which created the single market) led to Schengen I (which opened the internal borders), which in turn made cooperation in migration necessary to ensure security. The participating five countries decided “*to abolish checks at common borders and transfer them to their external borders. To that end they shall endeavor first to harmonise, where necessary, the laws, regulations and administrative provisions [...] [to] safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities*”<sup>177</sup>. The connection of the Single Market and migration policy is clear here as well. Therefore, the member states formed an ad-hoc group to find a solution for the issue of migration in this context. And this group of the Council concluded its work on the subject with the Palma document; a document that introduces the idea of what became Dublin I soon after, the first piece of legislation of what would be the CEAS. Schengen II (the implementation agreement) enshrines similar policies to compensate for the lack of checks at the internal borders.

This is a compelling argument, but neofunctionalism has one key problem with this logic, like Guiraudon (2000) also argued: with its focus on the formal rules of the EU instead of actors, it fails to explain why the early integration of migration happened entirely (i.e. Schengen I) or for the most part (Dublin I) between the member states. This speaks against neofunctionalism, because this theory is focused on institutions, not actors. The member states’ large involvement requires a look at the actors though. Therefore, if neofunctionalism alone could explain this phase of the CEAS, then it could not have been intergovernmental agreements alone that brought about integration of the field.

The phase of intergovernmental agreements ended with the Treaty of Maastricht however, which put migration into the third pillar of EU competences. There was even the option to communitarize it fully (by moving it to the first pillar), but the Council decided against that. Instead, it agreed on some minimal standards as well as the London Resolutions, but none of those measures were binding or had much of an effect. Neofunctionalism struggles to explain this as well. The pressure to integrate should have been there undoubtedly because of the Single Market and Schengen, and the Balkan war and the influx of refugees it brought with it were additional pressure. But it needed another Treaty for more integration to happen.

Neofunctionalism is a compelling and well-established argument<sup>178</sup> about the integration of asylum as part of Justice and Home Affairs. It can very well explain why cooperation in

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<sup>177</sup> Schengen I, Art. 17

<sup>178</sup> see for example Lavenex 2015



migration made it onto the agenda. But as this theory leaves out the interest of actors (instead focusing on problem-solving), it is less suitable to explain details (i.e. why in particular the member states decided on the principle by which Dublin operates, instead of another method to control asylum) or why, despite the pressure from inside, the member states and the Council let chances for further integration pass by. Also, neofunctionalism does not take into account pressure from outside, such as the heightened number of asylum applications in the 90s due to the disintegration of Yugoslavia. Dublin I and the plan for the CEAS happened during that time, and it seems entirely unrealistic that there is no connection between a refugee crisis and the development of something as fundamental as a European asylum system.

## ii. Intergovernmentalism

Intergovernmentalism dismisses spill-over effects and instead claims that the member states' governments (this is a focus on actors instead of institutions) alone are responsible for integration, or the lack thereof. If it is in their interest to integrate, then this interest stems from wanting to circumvent national constraints (and is therefore shaped domestically). In negotiations, more powerful member states use their power as well as side-payments to get their will.<sup>179</sup> In migration, this inevitably leads to Guiraudon's (2000) venue-shopping theory.

What would this mean for asylum? It would mean that it was not integration pressure from the single market, but the member states and their interests that caused the integration of asylum. There is ample evidence for this. For starters, it was not the European institutions (not the Commission, especially not the Parliament, and not even the Council) that brought about Schengen I and Dublin I, it was the member states (in the case of Schengen, only a handful of them) that decided between each other. They did do this officially because of the Single Market; however, as the venue-shopping theory suggests, the real reason could have been national pressure from courts, Parliaments, NGOs and other actors to create liberal asylum regimes in Europe, which was something that the member states' governments did not want. Therefore, they looked to the European level to circumvent these national actors by creating a restrictive European solution.<sup>180</sup> This argument is plausible, especially given the heightened influx of refugees from Yugoslavia. It would make sense that governments therefore attempted to find ways to make their national asylum systems more restrictive, or at least not more liberal and when it suited them, they sought a European solution. The strong emphasis on security in all documents of this CEAS pre-phase supports this: the reason for European regulations were explicitly security concerns and asylum abuse due to the Single Market (i.e. in the Schengen

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<sup>179</sup> For a detailed description and sources, see chapter 3.B.

<sup>180</sup> Guiraudon 2000, 261ff.

agreements, the ad-hoc group for immigration and its Palma document, as well as the London resolutions). Furthermore, the second suggestion of the Palma document regarding the uniform status of refugees (a more liberalizing suggestion than anything else at the time) failed; and when they had the chance, the member states did not transfer JHA from the third into the first pillar (which would have taken away power from them). Also, the details of the legislation could be evidence for intergovernmentalism: the Dublin Convention clearly favors member states without external borders, because the strain is on those with external borders. In complex negotiations, it seems entirely plausible that some side-payments or other issues between the member states, as well as power disparities between different member states played a role in who got their will.

On the other hand, the Commission did have a hand in the Dublin Convention, and it was the European Commission that first established the link between the Single Market and asylum in its famous White Paper on the Single Market, and who defined the very first goals of the CEAS in 1991 in its Communication. The member states followed, so the Commission (and therefore, formal rules of the EU) seem to have had a quite considerable influence that only unfolded later on, despite the compelling venue-shopping point of view. Also, while the intergovernmental phase was entirely concerned with security, the Maastricht Treaty brought formal rules for migration by putting Justice and Home Affairs as a new field into the third pillar, and Justice and Home Affairs also included freedom and justice, not merely security.<sup>181</sup> Of course, the Council did not agree to put JHA into the first pillar where it would not have had as much power to decide, and the early attempts at a common asylum policy were non-binding. But the progress cannot be denied, especially knowing how it went on in the following phase.

Intergovernmentalism is also a compelling and well-established argument in the early phase of the CEAS. It explains well why it was the member states and not the European institutions that did the first steps towards integration, and why the focus was on security, while stopping at doing anything to harmonize asylum, even after the Maastricht Treaty had been signed. But the influence of the Commission also cannot be denied due to the White Paper and the effect it had on the Dublin regulation and the CEAS as a whole. And, like the common critique of intergovernmentalism states, it is highly doubtful that the member states had any inkling of how quickly and how much asylum would be integrated very soon, due to the new treaties. Therefore, it is questionable whether intergovernmentalism was the only mechanism at work, whether the member states and their interests really were the only factors influencing the pre-phase of the CEAS.

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<sup>181</sup> Lavenex 2015, 368ff.

### iii. Institutionalism

For institutionalism, it is the formal rules of policy-making as well as interests that matter the most. This theory includes arguments of path-dependency and lock-ins of policy-cores: changing of paths later on is difficult, due to formal rules and increasing returns.<sup>182</sup>

How does this theory work in this phase of the CEAS? From an institutionalist perspective, the formal rules of the EU (i.e. the mode of governance, the veto-players, etc.) would strongly influence the policy-making process and the legislature. However, the EG had no competences in the field at the time. Therefore, the focus of the theory limits its usefulness in the pre-phase of the CEAS: Schengen and Dublin happened outside of the institutional framework of the then-EG, the White Paper, albeit influential, was not legislation, the Single European Act itself was not truly concerned with migration and the work of the ad-hoc group on migration was informal as well, their Palma document merely Council Conclusions, not binding legislation.

However, institutionalism still offers interesting perspectives. First, despite having no competences in the field at the time, the European Commission published a communication on the later CEAS in 1991 and the plans sketched out in this paper are quite faithfully reflected in the Tampere Programme and the legislation of the first real phase of the CEAS (see 2.C.iii). This may not constitute of formal rules, but institutionalism can also include informal rules and it ties into path-dependency (due to shaping how the EU progresses on the path that it is on). Furthermore, the Maastricht Maastricht Treaty had an impact, because it ended the intergovernmental, informal cooperation and instead communitarized JHA by bringing it into the third pillar. However, this did not lead to any important development at first, which could indeed be evidence for an institutional mechanism: the Council at the time had to decide unanimously, and that was a large institutional constraint for difficult decisions. Migration being a matter very close to the nation state could be a field where this voting system would restrain the output. The non-binding nature of the Council's earliest decisions on asylum are evidence of this.

Classic path-dependency is not easily applicable either, because migration was only beginning to be integrated, the path only being decided. That is interesting from another perspective though: not the changing (or not changing) of paths, but the deciding of a path that would be hard to change in subsequent phases of the CEAS. Dublin I might be such a case. It was decided on very early in the development of the CEAS (during a refugee crisis no less) between the member states, and following the institutionalist narrative, this put the CEAS on a path. It seems likely that this happened, given how the directives of the CEAS build on the

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<sup>182</sup> For a detailed description and sources, see chapter 3.C.

Dublin Convention and how later policy-making in the field already happened in a much more complex institutional setting due to the following treaties that communitarized it further. Therefore, policy-makers would have a more difficult task switching paths away from Dublin I. Whether this lock-in happened deliberately or not is another matter entirely, of course.

Therefore, institutionalism definitely provides interesting perspectives in this phase: the difficult voting-situation in the Council that has been a problem all through Eurosklerosis, the member states deciding on a key piece of CEAS legislation entirely between themselves and therefore putting the later CEAS on a path. But the Commission laid the groundwork for influence that defied its formal competences. Nevertheless, as far as explaining the causes, processes and outcome of the pre-phase, institutionalism is not applicable because the formal rules did not yet apply for a large part of the agreements of this phase.

#### **iv. Governance**

Governance is a cluster of theories that considers policy-making so complex that it requires a network of actors, many of them on the local level, to come up with solutions for problems. It is therefore actor-centric as well as considering politics as a tool to solve issues.<sup>183</sup>

Much like institutionalism, this theory struggles to contribute much at this early point of the CEAS. Certainly, it could be that migration was put on the agenda to solve a problem: the problem created by open borders. But the actors deciding on solutions were undoubtedly the member states (Schengen and Dublin), the Council (the Palma document) and the EU as a whole (Maastricht Treaty). Therefore, there is no real evidence that a network of actors as envisioned by Governance was at work. And given the sheer number of actors (i.e. in the negotiations of the Dublin convention, which included twelve member states), it seems even more unlikely that these actors all were not concerned with their own interests, and instead only focused on rationally finding a solution for a problem. The nature of the Dublin convention especially makes this seem unlikely: Dublin does after all put a considerably larger burden onto the member states at the external borders to process asylum requests, especially given the lack of any other CEAS directives at the time. This burden is especially large during an immediate conflict near the external borders. Therefore, it appears naïve to think that Italy, Greece or Spain would ignore their own interests like this.

#### **v. Conclusion**

This pre-phase of the CEAS is hardest to grasp, because few things were directly concerned with asylum, there is not much legislation to go on, and there is not as much evidence to find

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<sup>183</sup> For a detailed description and sources, see chapter 3.F.

in terms of communications and press releases. In terms of the theories, it is rather a competition between the two classic EU integration theories neofunctionalism and intergovernmentalism, because EU policy-making was not advanced enough for the remaining two. As such, the classic approaches both have been thoroughly studied in this context and provide compelling, though not uncontested arguments: neofunctionalism establishing a link between the single market and migration that caused integration pressure; and intergovernmentalism instead pointing out that the early steps in this area were still decided entirely by the member states.

There is probably no absolute answer to be found. Most likely, both approaches contribute to what really happened, but cannot explain the pre-phase on their own.

## b. First Phase

The pre-phase ended with asylum being a shared interest of the EU where harmonization was planned for the future, and Dublin I being the only legislation on the subject. As chapter 2.C.ii showed, the starting point for the first ‘real’ phase of the CEAS is the Treaty of Amsterdam that followed only five years after Maastricht in 1997. Amsterdam was a game changer because it set out explicit goals for the CEAS that all were translated into legislature later; and because it put asylum into the first pillar and therefore under the Regulatory mode, albeit with a delay of five years (from 1999, the year when Amsterdam came into force). Still, this is the birth of the CEAS (although it only received the name with the Tampere Programme), and the majority of what is the CEAS legislation now was developed following the Amsterdam Treaty. In the table below is an overview:

10/1997	<b>Amsterdam Treaty</b>	11997D
12/1998	<b>Vienna Action Plan</b>	-
10/1999	<b>Tampere Programme</b>	-
12/2000	<b>Charter of Fundamental Rights of the EU</b>	2000/C 364/01
12/2000	<b>Eurodac Database</b>	2725/2000
09/2000	<b>European Refugee Fund I</b>	2000/596/EC
02/2001	<b>Treaty of Nice</b>	2001/C 80/01
07/2001	<b>Temporary Protection Directive</b>	2001/55/EC
01/2003	<b>Reception Conditions Directive</b>	2003/9/EC
02/2003	<b>Dublin II</b>	343/2003
04/2004	<b>Qualification Directive</b>	2004/83/EC
11/2004	<b>The Hague Programme</b>	2005/C 53/01
12/2004	<b>European Refugee Fund II</b>	2004/904/EC
12/2005	<b>Asylums Procedures Directive</b>	2005/85/EC
12/2005	<b>Global Approach to Migration</b>	

Table 5: *Acquis of the First Phase of the CEAS*

### **i. Neofunctionalism**

Neofunctionalism considers integration of one policy field a consequence of integration pressure created by the communitarization of a neighboring policy field through spill-over effects. As such, it is focused on institutions and problem-solving.<sup>184</sup>

What would this mean for the first phase of the CEAS? It would mean that previous integration had created pressure, which led to the communitarization of asylum. Unfortunately, aside from the pre-phase, spill-over effects from neighboring policy-fields do not apply for the CEAS, because communitarization had already started. But there could be integration pressure from within the field to integrate further, or due to the incomplete nature of the previous integration. Where can one find such spill-over effects in this phase of the CEAS then? It could be that the reluctance of the Council and the member states to commit to communitarizing asylum more in the previous phase led to more integration pressure in this phase, because of Dublin I standing alone during the Yugoslavia refugee crisis: the EU had decided on a rule governing who had to process asylum applications (the countries of first entry, meaning usually the member states with external borders), but there were no common standards or funding for these member states. They were only left with more responsibility. This incomplete integration naturally was a problem during the disintegration of Yugoslavia, or at least it did nothing to help the countries of first entry. This integration pressure could have led to the Amsterdam Treaty and subsequently the Tampere Programme founding the CEAS. Nothing of the sort is mentioned in these documents, but a refugee crisis of this size at that time cannot be coincidence.

On the other hand, communitarization at that time has to be taken with a grain of salt: Tampere set out broad goals for the CEAS, but the mode of governance under which those would be adopted excluded the Parliament, the CJEU, had the Commission share agenda-setting with the Council and put the decision-making entirely under the Council's responsibility. So the member states had far more power, not the European institutions. Furthermore, the first two steps towards the CEAS (the ERF and the Eurodac-database) did nothing to harmonize, they only supported Dublin I. And the first directive of the CEAS was concerned with Temporary Protection instead of a European Asylum system. This shows that, if this pressure has been at work, then its impact was still limited.

One more argument for spill-over effects can be made, notably with the external dimension of the CEAS. Previously, all the measures had been internal, but GAM added an external dimension to it. This happened at a time when border security around the Mediterranean was

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<sup>184</sup> For a detailed description and sources, see chapter 3.A.

not working well, and when the EU started its ENP to avoid hard borders along the new external borders of the enlarged Union. GAM fits into this well, because it adds a layer of measures to solve the issues at the external borders and because it represents a closer cooperation with the EU's neighborhood.

Neofunctionalism is naturally not the best theory to explain the ongoing integration of the CEAS. Only when it is considered within a field does it make sense. As such, it can contribute something to explaining the overall trends of the time, but not any of the details: that the incomplete CEAS combined with a refugee crisis creates integration pressure is a plausible spill-over effect. But that this communitarization was limited due to the special mode of governance applied cannot be explained with neofunctionalism.

## **ii. Intergovernmentalism**

Other than neofunctionalism, intergovernmentalism makes actors (in particular, the member states) and their interests the sole focus of the analysis. Integration happens if it is in the interest of the member states, and through trade-offs and power disparities in negotiations member states assert themselves.<sup>185</sup>

What evidence is there in the first phase of the CEAS? At first glance, not much: integration moved ahead quickly and was about to give the European institutions (in particular the Commission and the Parliament) broad influence. However, when looking closer, one discovers a convenient situation for the member states. Eurodac, the ERF, the three CEAS directives as well as the Temporary Protection Directives all build on Dublin I (and II, once communitarized) to make sure that it can be enforced. That was in the interest of powerful member states like Germany, so further integration makes sense. And while that came with the regulatory mode and therefore less power for the member states, the Amsterdam Treaty made sure that the Council and therefore the member states decided on all of this legislation by introducing full co-decision only once the CEAS legislation had been decided on, as Ripoll Servent and Trauner (2016) point out. This situation clearly speaks for the member states. On the other hand, the Commission also had a hand in the legislation (see the next section on that too) by setting the agenda: the goals defined in White Paper of the previous phase were reflected quite accurately in the Tampere Programme, which was the roadmap for the legislation that the Council passed. Also, the power for individual member states in the Council did diminish before most of the directives were passed, because the Treaty of Nice changed the unanimous voting system in the

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<sup>185</sup> For a detailed description and sources, see chapter 3.B.

Council to that of qualified majorities. That way, one member state no longer could block the entire Council.

Another argument for intergovernmentalism ties into the discourse of whether the CEAS has become more restrictive or more liberal over time (see for example Levy 2005 for an argument for liberalization versus Karyotis 2007 for a more pessimistic perspective). The general agreement of this debate is that the member states want a more restrictive CEAS (with asylum concerns being tied to security, especially after 9/11). With that as a premise, the first phase of the CEAS ties into intergovernmentalism, because the Dublin system (Dublin and Eurodac) combat asylum abuse, and the Temporary Protection Directive (though in practice never used) makes asylum a temporary situation. The counter argument already mentioned applies here as well though: the Commission strongly shaped the Tampere Programme and as such the CEAS legislation, and it is the Commission that decides on the distribution of funds from the European Refugee Fund that was established.

Furthermore, there is the (recurring) matter of the member states not adopting legislation to the EU's satisfaction and of not harmonizing their minimum (later common) standards enough. However, that varies a lot between member states and piece of legislation, and it might just be that these things take time. Still, it is a common point of critique by the Commission, for example in the Green Paper of 2007 that began evaluating the first phase of the CEAS<sup>186</sup>.

The intergovernmentalist argument makes a lot of sense in this phase of the CEAS as well, but less so than before, because as asylum gets communitarized, the member states' ability to venue-shop decreases. Still, in this phase, it is likely that they at least tried to use the EU to their advantage while still making sure that their influence is preserved.

### iii. Institutionalism

Institutionalism looks at the formal rules of the EU as the factor shaping policy. This includes veto-player, path-dependency and lock-ins of policy-cores that constrain later policy-makers. The integration of the CEAS would therefore be shaped by the mode of governance and by the boundaries of the path it is on.<sup>187</sup>

How could this phase of the CEAS with institutionalism? First of all, the timing of the changes of the Amsterdam Treaty, the Vienna Action Plan and the subsequent Tampere Programme fits with the timing of the disintegration of Yugoslavia and the refugee crisis accompanying that. It could have been one of those big breaks that, if not leading to a changing of paths, altered it enough to lead to these substantial advancements (Dublin existed, but

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<sup>186</sup> European Commission 2007, 3

<sup>187</sup> For a detailed description and sources, see chapter 3.C.



harmonization of asylum in the member states was not on the agenda before Amsterdam). The terrorist attacks in New York in 2001 could have been a similar big break, by putting the EU on a path of dealing with refugees outside of its borders.

There is also ample evidence that the CEAS in this phase was path-dependent. The Dublin principle had been established in the previous phase, and the new legislation built on it: the Eurodac database is a necessary tool to enforce the Dublin system (by enabling the member states to determine the first country of entry) and the Qualifications, Reception Conditions and Asylum Procedures directives aim to level the playing field to lower incentives for asylum seekers to apply for asylum in a particular state or ‘asylum-shop’. Therefore, it is no surprise that Dublin II enshrined this principle in the EU acquis. Path-dependency after all means that once something is on a path, it becomes harder and harder to change paths because that would cost far more money and effort than to simply tweak the existing law. The path was decided due to Dublin, and changing it would probably have been more complex than building on it. The Commission would have had to justify it, convince the member states and the Council, find a new, better path. All in time for the Amsterdam Treaty, no less.

Looking at the actual legislation more closely offers an interesting perspective on institutionalism as well, from the Council’s point of view. It stems from the fact that, while the institutional rules had been decided to change in favor of the Parliament and the Commission, this would only happen with a delay. Therefore, the old mode of governance that had the Council decide (albeit with qualified majority instead of unanimous votes after the Treaty of Nice) still applied when Eurodac, Dublin, the ERF, GAM and all the directives came to pass. This argument, for example by Ripoll Servent and Trauner (2016), fits well with the institutionalist argument that policy-makers can constrain later policy-making by locking in hard policy-cores. And given how the legislation in the subsequent phases (see sections 2.C.iii. and 2.C.iv.) only changed the acquis but did not touch that core, that is a very convincing argument. On the other hand, when considering this phase a bit more entwined with the previous one, it becomes a bit more doubtful how influential the Council and the member states really were. Two things point to the Commission having more influence than it would be obvious at first sight. First of all, the Commission tried to gain competence and have an influence right from the start, when it linked migration to the Single Market in the White Paper of the previous phase. And in 1991, it released a Communication that included the following goals: the strict enforcement of the Geneva Convention, common standards for the asylum procedure, the reception conditions and how the refugee status is interpreted; also measures for subsidiary and temporary protection as well as a system to share information with regards to, for example, first

country of entry<sup>188</sup>. The Dublin regulation already existed at the time, of course. These goals are suspiciously similar to what the Tampere Programme set out for the CEAS (and subsequently, what the *acquis* became), only the long-term goals of Tampere are new to the program. This is especially remarkable, given how limited the Commission's competence were. Secondly, the Commission not only made sure that the Geneva Convention was sufficiently enforced, but it also pointed out the “*urgent need to complement the Geneva Convention with instruments capable of handling today's asylum challenges*”<sup>189</sup>. This included measures for temporary and subsidiary protection, two things that were later on also translated into legislation. This supports the notions that the Commission managed to keep the CEAS liberal<sup>190</sup>, and that it influenced it more than one might have expected. This supports institutionalism from the perspective that it looks at the European institutions' formal rules and competences, but it also puts institutionalism into doubt because the Commission achieved more than its institutional rules allowed.

Institutionalism is a very interesting and not new theory in this phase of the CEAS: it can potentially explain why asylum was further communitarized (although it is not the only pattern that would fit), why the CEAS built on Dublin and how the Council made its influence stick.

#### **iv. Governance**

Governance is institutionalism's opposite because it focusses on actors instead of institutional rules, and on problem-solving instead of interests. It argues that a network of actors is required to make policy because knowledge is not concentrated, and that a good argument can triumph.<sup>191</sup>

Governance is hardest to apply, not only because it is a rather vague cluster of theories, but also because its impact is often not so obvious. But there are some aspects of this phase of the CEAS that point to governance. First, the Tampere Programme explicitly called for the EU to work closely with the UNHCR when developing the CEAS legislation. That would mean the involvement of at least a small network of actors who have expert knowledge in the field. The same goes for GAM: the EU began to work closely with its neighbors to enforce the CEAS. Finally, the newly established ERF distributes money to the member states, but how it is spent does not depend on the EU, but instead on more local actors.

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<sup>188</sup> European Commission 1991, 1ff.

<sup>189</sup> European Commission 1998, 6

<sup>190</sup> Kaunert 2009, 157

<sup>191</sup> For a detailed description and sources, see chapter 3.F.

Other than that involvement of more actors in policy-making, enforcing it as well as funding it, governance aspects are hard to find, especially given how early on in the process this phase was.

## v. Conclusion

This phase of the CEAS was undoubtedly the most influential, simply because the acquis that was passed in it remains to this day the core CEAS legislation.

Neofunctionalism can best explain some overall trends although its usefulness is rather limited here. Intergovernmentalism on the other hand is very relevant, because the member states still had a lot of power in this phase, although if considered in context (which it absolutely should be), it becomes obvious that, if the Council locked in a policy-core, the Commission pretty much defined what this core should be. Therefore, the formal rules (and institutionalism) can also contribute a lot to the analysis of the first phase of the CEAS. Governance on the other hand is also limited, but it is interesting to note that the EU did indeed try to include a wider network of actors so early on.

## c. Second phase

Even though the CEAS was between programs at the time, 2007 is the year that marks the beginning of the second phase of the CEAS (at least for the purposes of this thesis). The initial legislature had been completed in 2005 (as envisioned in the Tampere Programme and strengthened by the Hague Programme), therefore the plans proposed for the CEAS in a Green Paper in 2007 aimed to advance the CEAS, not create it. Combined with the signing of the Lisbon Treaty and the substantial changes it brought to how policy was made in the field (now via the regulatory mode, which is the ‘normal’ mode of governance of the EU), it is safe to assume that the CEAS had completed its initial stage and was now to be advanced. Unsurprisingly, the phase kicked off with substantial evaluation of what had been achieved, and with evolving plans for a new program under the new treaty, as the mentioned Green Paper shows. The goal was to “*establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection*”<sup>192</sup>. To achieve that, the Commission proposed several measures aimed to close gaps in the CEAS acquis, make sure that standards were harmonized at all, and harmonized on a higher level; and to increase solidarity between the member states. Find in the table below an overview over the legislation of this phase:

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<sup>192</sup> European Commission 2007, 2

05/2007	<b>European Refugee Fund III</b>	573/2007/EC
06/2007	<b>Green Paper on Asylum</b>	COM(2007) 301
12/2007	<b>Treaty of Lisbon</b>	2007/C 306/01
06/2008	<b>Policy Plan</b>	COM(2008) 360
05/2008	<b>Establishment of EMN</b>	2008/381/EC
09/2008	<b>European Pact on Immigration and Asylum</b>	
12/2008	<b>Return Directive</b>	2008/115/EC
12/2009	<b>Stockholm Programme</b>	2010/C 115/01
05/2010	<b>European Asylum Support Office</b>	(EU) No 439/2010
11/2011	<b>Global Approach to Migration and Mobility</b>	COM(2011) 743
12/2011	<b>Recast Qualifications Directive (including a Uniform Status)</b>	2011/95/EU
06/2013	<b>Recast Reception Conditions Directive</b>	2013/33/EU
06/2013	<b>Recast Asylum Procedures Directive</b>	2013/32/EU
06/2013	<b>Recast Eurodac Regulation</b>	(EU) No 603/2013
06/2013	<b>Dublin III</b>	(EU) No 604/2013
03/2014	<b>Commission Communication “An Open and Secure Europe: Making it happen”</b>	COM(2014) 154
04/2014	<b>Asylum, Migration and Integration Fund</b>	(EU) No 516/2014
06/2014	<b>Follow-up to Stockholm</b>	CEC 2014a

Table 6: *Acquis of the Second Phase of the CEAS*

### i. Neofunctionalism

Neofunctionalism explains integration with spill-over effects of the communitarization of neighboring policy-fields. Integration in one field creates pressure to integrate another field. If this pressure is ignored, there will be negative consequences. And while actors can slow this process down or halt it in the short term, they cannot stop it in the long-term. As such, neofunctionalism combines institutional and structural arguments with policy-making as problem-solving.<sup>193</sup>

How would this phase of the CEAS looked like then, according to neofunctionalism? The new legislation would have been decided on due to institutional pressure to integrate asylum further. What evidence is there for this? First off, spill-over effects from other fields must be dismissed, because this logic concerns the beginning of integration in a field, and the CEAS had already gone beyond that. But integration pressure can also come from within a field, through previous (complete or incomplete) integration. Undoubtedly, there was the ambition to integrate, as exhibited for example by the Commission in its Green Paper on asylum. In it, the Commission went as far as proposing a resettlement scheme for more burden-sharing, a uniform status for refugees in the EU and a harmonized asylum procedure (which would take the directives that set common standards to another level)<sup>194</sup>. But ambition is not the same as pressure, and the reality of what legislation was passed casts doubt on whether integration pressure existed. The directives passed were recast directives and as such, merely tweaked the

<sup>193</sup> For a detailed description and sources, see chapter 3.A.

<sup>194</sup> European Commission 2007

existing legislature. The same goes for the Global Approach to Migration and Mobility, which was a follow-up to the GAM of the previous phase, and for the fund. The Stockholm Programme was ambitious, but while it was being developed, the Council released its own paper (European Pact on Immigration and Asylum) where it laid the focus on strengthening what was already there instead of integrating further. Stockholm's implementation and its follow-up program already reflects this basic thinking. Finally, the list of goals that the programs did not achieve is a rather long one. Therefore, while the mode of governance had changed (the Lisbon Treaty gave competences to the Parliament, the CJEU and expanded the Commission's role), this phase of the CEAS did not bring fundamental changes or advances. The harmonization in the member states too was found lacking. And one has to keep in mind that the economic and financial crisis hit the EU in this phase as well, which naturally put the focus on other matters.

Therefore, it does not appear that neofunctionalism can explain what happened in this phase of the CEAS. Too little real progress was made, and too little pressure to integrate existed. However, that does not mean that the pattern does not fit neofunctionalism. Quite the contrary: in the absence of integration pressure (or the focus of it being elsewhere), integration had slowed down and remained more or less on the same level as before, until the refugee crisis of 2015 made asylum the most pressing issue of the EU. Therefore, neofunctionalism does fit with the overall trends, but details are out of its reach as per usual because it leaves out actors and their interests.

However, as it is continued in section 5.D., it could be that the scope of this phase simply is not big enough to capture a larger trend: the slowing down of integration before and in 2014 could be a temporary hold-up of integration done by the member states and the Council, but because pressure kept building, integration moved forward later on.

## **ii. Intergovernmentalism**

Intergovernmentalism is neofunctionalism's opposite, as it focuses its attention entirely on the member states and their interests (instead of institutions and problem-solving). Integration therefore stems from the member states, if it is somehow in their interest. In negotiations, trade-offs can lead to integration as well.<sup>195</sup>

What would this perspective mean for the CEAS at this point? It would mean that any advances, or lack thereof, were due to the member states pursuing their own interests on the EU level. The big argument against intergovernmentalism in this phase is the changed mode of governance. With the Lisbon Treaty, Communitarization of asylum was complete from the

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<sup>195</sup> For a detailed description and sources, see chapter 3.B.

stand-point of policy-making: it was now fully under the normal mode of governance, instead of being outside of the EU's sphere (like in the pre-phase) or under a special mode of governance that left the power with the member states for a time (like in the first phase of the CEAS). The Commission had the right to set the agenda and propose legislation, the Council and the Parliament were co-legislators and the CJEU could be called upon by the Commission if the member states did not comply with legislation. As such, the new mode of governance only gave the member states power through the Council, but even the Council could no longer decide alone. Undoubtedly, this limited the member states' ability to venue-shop and influence EU legislation.

However, the fact remains that this phase of the CEAS, while starting ambitiously, did not deliver on its goals. Factors such as the economic and financial crisis had nothing to do with intergovernmental explanations, but other reasons did: the lacking harmonization of national laws despite the directives is the direct result of the member states' actions. Indirectly, through the Council, the member states' influence shows as well. While the Commission was drafting the ambitious Stockholm Programme, the Green Paper on Asylum, the following policy-plan and the Treaty of Lisbon, the Council decided on its Pact on Immigration and Asylum, which aimed to strengthen what was already there instead of pushing forward. The reality is highlighted for example by the European Parliament in its report on the Stockholm Programme. The Parliament "*deeply deplores the failure to make the principles of solidarity and fair sharing of responsibility [...] a reality [...] [and] calls for the introduction of a coherent, voluntary permanent intra-EU relocation scheme*"<sup>196</sup>. Also, it "*regrets the so far limited involvement of Member States in resettlement*"<sup>197</sup>. Burden-sharing and resettlement had been explicit goals of all the Commission's documents on this phase of the CEAS (such as the Green Paper and the Stockholm Programme). And given the report of the Parliament, the only actors left to receive such criticism is the Council as co-legislator, and directly and indirectly, the member states. Stockholm's follow-up then completely lacked the ambitious factor that the previous ones had had. Furthermore, the Lisbon Treaty still ensured the Council sole power to decide in case of an emergency situation.

Zooming in closer leads past the overall goals as defined by the programs and to the actual legislation. Lack of ambition aside, a considerable amount of legislation was passed during the second phase of the CEAS. GAM was renewed in GAMM, the ERF was renewed once and reformed once, the EASO and ENM were founded and almost the entire CEAS legislation was

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<sup>196</sup> European Parliament 2014, 93

<sup>197</sup> European Parliament 2014, 94

recast under the new mode of governance. That especially is a strong argument against intergovernmentalism. In reality, the new legislation brought few changes though. Certainly, the recast Qualifications directive finally brought the uniform status for refugees, and especially founding EASO was a big deal. But aside from that, overall, the EU only tweaked the existing legislation. That is true for the fund, for GAM and for the directives. The member states' reluctance for further integration could be a good explanation for this, albeit in combination with path-dependency (see next section). And Dublin III is a curious case in this context. In its Green Paper, the Commission stated that “[t]he Dublin system (Dublin and EURODAC Regulations) were not devised as a burden sharing instrument [...] [and] may de facto result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location<sup>198</sup>”. Why did the Council agree to keep and recast it then, if even the Commission admitted that the Dublin system is against the interests of certain member states? The timing of Dublin III (along with path-dependency, see the next section on that) could add to answering this question. Dublin and Eurodac were recast in 2013, and the member states mostly affected by the negative aspects of Dublin were the Southern member states that also were most affected by the financial crisis. It is an entirely intergovernmental way of thinking to consider that those member states bailing-out the Southern states used this power in negotiations to make sure that Dublin continued.

Despite losing a lot of its explanatory power through the newly-introduced regulatory mode in asylum, intergovernmentalism is still worth considering in this phase of the CEAS, because the member states and their interests are too influential still to be left out. They can pursue their interests through the Council, and they can hinder integration through non-compliance. The lack of ambition of the CEAS in this phase and the mere tweaking with the existing legislation points towards intergovernmentalism as well. However, much like neofunctionalism is best at explaining overall trends and fails at details, intergovernmentalism can add much to explaining details, but much less to explaining the overall trends. The economic and fiscal crisis is such a case: the overall situation has nothing to do with intergovernmentalism, but how it affects the member states' behavior to pursue their interests is an intergovernmental point of view.

### iii. Institutionalism

Institutionalism shares with intergovernmentalism the focus on interests, but it concentrates on the formal rules of policy-making in the EU instead of the member states. Common

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<sup>198</sup> European Commission 2007, 10

arguments highlight the importance of the actors of the regulatory mode (especially the Commission), point out the path-dependent nature of policy due to increasing returns and highlight policy-makers' ability to constrain later policy-making.<sup>199</sup>

How would this play out in the second phase of the CEAS? The institutional rules of the EU would be the factors to shape policy-making through the complex nature of the regulatory mode and path-dependency. One great strength of institutionalism, especially compared to intergovernmentalism, is that it highlights the importance of the Commission, the Parliament and the CJEU. In this phase of the CEAS, their influence is definitely worth considering, because the Lisbon Treaty gave them far-reaching competences. The Commission can define the goals, which it definitely did as seen in the Green Paper and the JHA (later AFSJ) programs, as well as with agenda-setting in the regulatory mode. Also, the Commission distributed the money from the fund, and it was the Commission that evaluates the member states' compliance with the directives. The Parliament on the other hand became co-legislator through the Lisbon Treaty and therefore had an equal say in passing the directives as the Council. The founding of the EASO is a good example of this: it was suggested in the first two JHA programs, was picked up in 2009 by the Commission and decided in 2010 by the co-legislators. However, the EASO directive remains almost the only truly new legislation of this phase. The other directives were only tweaked for the most part: Asylum Procedures and Reception conditions directives were changed from minimum to common standards and the Qualifications directive added a uniform status for refugees. Other than that, there were no substantial changes. Certainly nothing that changed the nature of these directives. Furthermore, this phase of the CEAS failed to deliver true harmonization as well as the other proposals of the programs, such as resettlement.

Institutionalism has an explanation for this limited success of the Commission and the Parliament though, and it lies with the member states. Back when the Maastricht Treaty was signed, they made sure that before asylum was fully communitarized by Lisbon, it would be up to the Council to decide on the initial legislature of the CEAS. In doing so, they put the CEAS on a path and constrained later policy-makers' abilities to change that path, like it has been often argued by Ripoll Servent and Trauner (2014, 2016); Trauner (2016) and Maurer and Parkes (2007). This is a core institutionalist argument: the member states through the Council locked in their wishes for the CEAS by making sure that the Council decided on the path-defining legislation of it. After Lisbon, the Commission would have a difficult task switching paths, because that would be a lot more difficult and expensive than adjusting the existing measures, for example due to the complex nature of the regulatory mode or the fact that a

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<sup>199</sup> For a detailed description and sources, see chapter 3.C.



complete overhaul of a sizable amount of legislation and institutions would be costly. This is a very compelling argument, especially given how consistent the CEAS legislation has always been. Dublin had been the first step, and the CEAS has never strayed from the path set out by it. Eurodac helps to maintain Dublin, and so do the directives (at least in theory): by levelling the playing field, they provide Dublin with legitimacy. If conditions of asylum are the same across the EU and refugees receive a uniform status, then there would be fewer incentives for asylum seekers to arrive in one particular country, and then it would matter little if the countries with the external borders process most of the requests. Especially given the funding and help received from the AMIF and EASO. And in a crisis, there are emergency provisions in the Lisbon Treaty. Even the proposed measures, such as resettlement, and the emergency measures of 2015 fit into this pattern (see section 5.D.). The European Commission confirms as much in its Green Paper on Asylum, albeit without saying why the EU should not stray from Dublin: *“In the past, possible alternative systems for the allocation of responsibility were considered. [...] However, thought should mainly be given to establishing ‘corrective’ burden-sharing mechanisms that are complementary to the Dublin system”*<sup>200</sup>. And because this was a Green Paper calling to stakeholders to come up with ideas for more concrete plans, the Commission ruled out a changing of paths very early on in the process. So even without the Commission saying so, it is obvious that the CEAS is path-dependent and deliberately or not, it was the member states who defined the path and constrained the other actors, even after losing much of their power.

Path-dependency is a very good framework for this phase of the CEAS, because the Commission and the Parliament did not manage to integrate the CEAS a lot more, and path-dependency especially provides a compelling argument for why that could be (alongside intergovernmentalism and its focus on the member states’ interests). There is not much evidence speaking against this line of thinking, although of course institutionalism is best suited to explain overall trends and not details.

#### **iv. Governance**

Governance is a cluster of theories that acknowledges the complexity of policy-making. Policy-fields and competences overlap, and a lot of actors are required to gather all the knowledge necessary to solve problems. Furthermore, it is actor-centric by saying that good arguments can make a difference in negotiations, but unlike intergovernmentalism, the focus lies on problem-solving, not interests.<sup>201</sup>

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<sup>200</sup> European Commission 2007, 11

<sup>201</sup> For a detailed description and sources, see chapter 3.F.

As such, the governance aspect is hardest to grasp in any phase of the CEAS, but when thinking in terms of the wider network of actors, it becomes more tangible. And there is some evidence that at least some aspects of governance were at work in this phase. This begins with the Green Paper on Asylum that was the first step towards the new program and therefore new legislation. In it, the Commission not only asks for stakeholders to launch a discussion on the proposals and ideas shared in the paper, but it also calls on more involvement of stakeholders in the CEAS.<sup>202</sup> The Commission therefore involved a wider network of actors at least in the process of coming up with its proposals for legislation. Furthermore, by creating the EASO and the EMN, the EU put a focus on information gathering, and began to rely more on experts in the field to coordinate asylum in the EU. GAMM does the same only with external stakeholders such as the EU's neighborhood and the UNHCR, and finally, while the Commission distributes the money from the ERF (later the AMIF), it falls to the member states to decide on how to spend it. This points to a reliance on local experts who have more knowledge on what the member states need. Whether that is successful is for someone else to discuss, but that model is definitely an example of governance.

Other than that, it is hard to say how influential governance has been. It could very well be that superior arguments influenced the negotiations for the acquis, but the other theories provide good perspectives on that, and there is simply no easy way to tell, not even from the results. Because while there might be a better solution for the CEAS, there is certainly a logic to the current one. Especially from a path-dependent perspective, the solution to asylum has been decided a long time ago, at a time when the path towards an inclusive shared asylum system was not yet on the agenda. This is a limitation of governance: it overestimates the rational thinking of the actors and underestimates the way in which EU integration unfolded along the way.

## **v. Conclusion**

The second 'real' phase of the CEAS started ambitiously and accomplished some advances, but overall only adjusted what was already there and ended on a quite unaspiring note.

Neofunctionalism and institutionalism are best suited to explain the overall trends of this phase, the only mild changes and eventual stagnation, whereas intergovernmentalism and governance make it easier to look closer at the legislature, whether that is the already existing one as it is the case with intergovernmentalism, or the new aspects that allow more explanatory power for governance.

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<sup>202</sup> European Commission 2007, 15

In the end, it seems that all four theories are suited to explain aspects best suited to the nature of their approach, but no theory can alone deliver all the answers.

#### d. Crisis

In 2015, asylum applications in the EU reached a record-high due to the humanitarian crisis in Syria that added to the usual number of asylum seekers.<sup>203</sup> This sudden change marks the beginning of the final phase of the CEAS (at least in this paper) because it inspired new and different advances in the field. Whether it will still be considered a phase of its own in a few years when we can look back at it remains to be seen.

The starting point for the analysis of this phase of the CEAS is the new five-year program that was presented in 2014, because it lays out what the EU was planning for the time in which the Syrian crisis later happened. The new program put a strong focus on strengthening what was already there to give the member states time to catch up with the standing legislation: *“The [...] effective implementation of the [...] CEAS is an absolute priority. [...] It should go hand in hand with a reinforced role for the European Asylum Support Office [...] in promoting the uniform application of the acquis. Converging practices will enhance mutual trust and allow to move to future next steps.”*<sup>204</sup> The EU does refer to future next steps here, but unlike in the previous programs, it does not map these out or specify them in any way. This can mean two things: either the EU really intended for the member states to further consolidate their legislation before the next steps would be taken, or the drive for integration in the field had somehow slowed down. Whatever it was, it is safe to assume that deepening the integration was put on hold. This changed in 2015 when a sudden rise in asylum applications occurred and the EU called for action in its European Agenda on Migration and the latest phase of the CEAS began. As a reminder, in the table below the measures adopted in 2015 and subsequent years:

05/2015	<b>European Agenda on Migration</b>	COM(2015) 240
07/2015	<b>Emergency Resettlement</b>	11130/15
09/2015	<b>Hotspots</b>	COM(2015) 490
09/2015	<b>1<sup>st</sup> Emergency Relocation Measure</b>	(EU) 2015/1523
09/2015	<b>2<sup>nd</sup> Emergency Relocation Measure</b>	(EU) 2015/1601
09/2015	<b>Action Plan on Return</b>	COM(2015) 453
2015	<b>Return Handbook</b>	-
12/2015	<b>Additional Funding</b>	2015/2252(BUD)
03/2016	<b>Turkey Statement</b>	COM(2016)166
09/2016	<b>Amendment to Relocation</b>	(EU) 2016/1754
03/2017	<b>Renewed Action Plan on Return</b>	COM(2017) 200
09/2017	<b>Court Decision to uphold Relocation</b>	C-643/15 and C-647/15
	<b>Readmission Agreements</b>	(numerous)
	<b>Asylum and Migration Fund</b>	

<sup>203</sup> Eurostat 2018, n.p.

<sup>204</sup> European Council 2014, 3

<b>European List of Safe Countries</b> <b>Ongoing case on Relocation in CJEU</b>
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Table 7: *Acquis of the Crisis Phase of the CEAS***i. Neofunctionalism**

What evidence is there that neofunctionalism with its focus on dynamic integration pressure through spill-over effects can best explain the causes, process and output of this phase of the CEAS?<sup>205</sup>

At first sight, spill-over effects make little sense, because clearly it was an outside event (the war in Syria) that led to more asylum applications in the EU, which in turn led to integration pressure; not integration in another field of EU policy like neofunctionalism claims. However, if one thinks of integration pressure not only from other fields but also within one and takes into account later advocates, neofunctionalism could provide further possibilities. According to newer takes on the theory, actors can temporarily hold up the integration dynamic; but they cannot stop it, which is why a phase of strong integration pressure follows a phase of stagnation. From this perspective, the mounting integration pressure in 2015 could fit this pattern: stagnation as demonstrated in the post-Stockholm Programme was followed by a phase of intense integration due to the previously growing pressure during stagnation. Nevertheless, the *acquis* decided in 2015 and beyond (at least until the time this thesis was submitted) is different from the previously existing *acquis*, because it consists of emergency and ad-hoc measures meant to deal with the immediate effects of the situation (securing the border, saving asylum seekers on the way to the EU, preventing human smuggling, easing the burden on the Southern member states), while permanent measures could not be decided on. The Commission, after consulting with the Parliament, gave the Council power to decide on temporary emergency measures to deal with the situation. These measures did not follow the EU's previous plan for the CEAS (which would for example include a permanent resettlement scheme), the normal policy-making process, or represented a long-term plan for the future. Jean-Claude Juncker, President of the Commission, said so himself in his State of the Union Address 2018: “*We cannot continue to squabble to find ad-hoc solutions each time a new ship arrives. Temporary solidarity is not good enough. We need lasting solidarity [...].*<sup>206</sup>” This break in continuity speaks against spill-over effects, because it was not spill-over effects or integration pressure that led to further integration of the CEAS. Instead, external factors pressured the EU to solve the immediate situation, not develop the CEAS itself further with a long-term perspective in mind. This makes it questionable how influential integration dynamics really are.

<sup>205</sup> For a detailed description and sources, see chapter 3.A.

<sup>206</sup> Juncker 2018, 7

One more neofunctionalist argument offers a possible solution for this though. Scipioni (2017b) put forward the theory that it can also be incomplete integration leading to spill-over effects, because incomplete agreements can lead to crises, which can lead to further integration pressure. There is no doubt about the CEAS being incomplete at the beginning of 2015, with several steps of the previous programs not tackled yet and the EU itself mentioning the need future integration in the post-Stockholm Programme. And there is no doubt about the incomplete CEAS making, or at least worsening, the crisis of how to deal with asylum seekers in the EU in 2015, because the CEAS simply was not designed for such a large influx and was unable to handle it. The author found that in previous crises, incomplete integration did lead to some changes, but not to solving the core-issues (which he describes as the lack of solidarity and centralized institutions), therefore neofunctionalist arguments are only useful to a point.<sup>207</sup> A year later, it is still too early to judge whether the incompleteness of the CEAS will lead to more integration beyond ad-hoc measures. The plans for it are still on the table (i.e. permanent resettlement and relocation schemes, improving the existing CEAS) but it remains to be seen what becomes of them. If this crisis of the CEAS facilitates the motivation to improve and complete it, then neofunctionalists might have a strong argument with this incomplete integration. So far, it does not look like the CEAS is about to start a new phase of integration: in 2015, the Council of the European Union managed to decide on the emergency relocation measures, but two years later, the CJEU had to rule on these measures because several member states had taken action against them. The hotspot approach is widely criticized, harmonization is lacking, several member states have elected anti-immigration governments in the wake of the crisis and before the crisis already, integration of the CEAS had slowed. Naturally, those might just be bumps on the road to be expected in a particularly difficult topic so close to the member states' core competences. But without the commitment of the member states, we cannot be sure if the CEAS will be completed anytime soon.

Neofunctionalism's usefulness in this phase of the CEAS is questionable. Certainly, the crisis provided ample pressure for further integration, but it is not the kind of pressure that neofunctionalists have in mind. Broader neofunctionalist interpretations are limited in their usefulness here as well, because the previous integration of the CEAS has little to do with the ad-hoc measures of this phase. The break in continuity speaks against integration pressure because of the previous phase of stagnation. Only considering incomplete integration in the field as pressure for further integration is a convincing argument in this phase of the CEAS: undoubtedly the CEAS was incomplete before, and undoubtedly that led to a crisis. However,

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<sup>207</sup> Scipioni 2017b

ad-hoc and temporary measures cannot be considered true further integration, therefore it is too soon to judge this matter. Besides, such incomplete integration might have the opposite effect: if the CEAS loses its legitimacy in the member states' eyes, then further integration will be even more difficult. Neofunctionalism's usefulness is also very limited when it comes to the details of the policy-making process as well as the outcome, but this lies in the nature of the theory. It can best be applied to the beginning of a field and its overall looks, but more detailed accounts are not possible, because neofunctionalism does not take actors and their interests into account. There is simply no way to explain why the EU chose with the instruments that it did.

## ii. Intergovernmentalism

For Intergovernmentalism, actors and their interests are the focus of the analysis. In the study of EU politics, this means that the member states' governments are seen as the factor that shapes integration intentionally through the promotion of their interests. In the field of migration, the most prominent account of this is the venue-shopping argument, that says migration was communitarized because the member states wanted to circumvent national Parliaments.<sup>208</sup>

How would this theory play out in this phase of the CEAS? The lack of ambition of the post-Stockholm Programme as well as the European Pact on Immigration of the Council that was introduced with the Stockholm Programme in the making shows a certain reluctance of the member states to integrate asylum further, at least for the time being. But the Syrian refugee crisis changed the circumstances. Whether they wanted to or not, and whether they were prepared for it or not, the member states were affected (although some a lot more than others). From an intergovernmentalist perspective, the member states' responses to this situation on the European level (in the Council) would depend on their interests (i.e. regarding political orientation of the government, upcoming national elections because of fear of electoral punishment, the political and societal climate in the member states with regards to refugees, etc.). Understandably, the venue-shopping argument held the most merit when the member states still had the sole right to decide on asylum in the EU. This changed with the Lisbon Treaty. However, the Commission decided to call on Article 63 (3) of said treaty to enable the Council to decide on provisional measures in the crisis. This put the ball back into the Council's court, and therefore makes the venue-shopping argument very interesting to look at in this context.

Following the Commission's proposal for a relocation scheme, the Council decided on the first relocation of 40.000 people from the hotspots in Italy and Greece by qualified majority

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<sup>208</sup> For a detailed description and sources, see chapter 3.B.

(unfortunately, the actual outcome of the vote is not public) in September 2015. Unlike what the Commission had had in mind though, the Council's relocation scheme was voluntary. Furthermore, the Parliament called for more solidarity, a permanent relocation mechanism and a way to consider the refugees' preferences of destination. But as the Parliament was only to be consulted in these emergency measures, it could not influence the outcome.<sup>209</sup> The second relocation scheme followed almost immediately due to the situation worsening, and the president of the Commission Jean-Claude Juncker calling for the relocation of another 120.000 people. This time, the Council agreed to the mandatory scheme with only one key change made to the initial proposal: Hungary, after having received a lot of refugees coming in from Serbia, chose not to be a beneficiary of relocation alongside Italy and Greece.<sup>210</sup> The reason for this seems to be a matter of principle, notably that if Greece was fulfilling the Dublin Convention, Hungary would not be in this situation in the first place; and the matter of the hotspots. Hotspots were the basis for the relocation schemes, and Hungary did not want to host any of these.<sup>211</sup> The second relocation scheme was also agreed on by qualified majority. But the success of both of these schemes is limited. Only about 33.000 of the 160.000 people were relocated, and the second scheme was very contested despite it passing the Council: Slovakia, Hungary, the Czech Republic as well as Romania voted against it, with the first two trying unsuccessfully to have the decision overturned by the CJEU. With the scheme falling short, the Commission eventually suggested making part of it voluntary, to which the Council agreed. Still, Poland, Hungary and the Czech Republic failed to meet their obligations, which eventually brought the relocation scheme to the CJEU again.<sup>212</sup> This is strong evidence for intergovernmentalism: the Parliament had little to do with the decision-making process, which put the responsibility with the Council, the representation of the member states. And though the Council's decisions already were much less focused on solidarity between the member states than what the Commission and Parliament would have wanted, the national governments made the relocation schemes come short of their goals by a lot. They did this *despite* a binding CJEU ruling confirming their obligations. Also telling is the fact that a permanent relocation scheme automatically triggered by a crisis like this could not be decided on by the Council. From an intergovernmentalist perspective, this does make sense: those countries that are least affected by a crisis such as this one would need to take in more refugees (which costs money, and in a populist political environment, is not a

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<sup>209</sup> European Parliament 2018a, n.p.

<sup>210</sup> European Parliament 2018b, n.p.

<sup>211</sup> Financial Times (2018), n.p.

<sup>212</sup> European Parliament 2018b, n.p.

very popular decision), so the status-quo of no permanent relocation (and resettlement; see below) is preferable to them. Therefore, they block such proposals.<sup>213</sup>

Resettlement was more successful in terms of reaching its goals (the roughly 22.000 people were indeed resettled), but this scheme was considerably more limited in scope than relocation, and within a year of deciding on it, it was combined with the Turkey statement that aimed at ending illegal migration from Turkey to the EU. This means that for each resettled refugee from Turkey, one refugee was taken back by Turkey from the hotspots. Also, the permanent relocation mechanism that the Parliament again called for has not been decided on.<sup>214</sup> The Turkey-statement itself was heavily influenced by the Commission, and has been criticized by the Parliament, which again was not included in the decision-making process. In a statement regarding this matter, the Parliament expressed concern over Turkey's general situation (i.e. regarding press freedom and security) and states that the Commission's handling of the cooperation with Turkey "*gave the impression that the EU is willing to go silent on violations of fundamental rights in return for the Turkish Government's cooperation on refugees*"<sup>215</sup>.<sup>216</sup>

A final aspect of intergovernmentalism in this context is not just the member states pursuing their interests on the European level, but them circumventing national constraints and them playing the EU against national interests. This is an extremely complex situation, especially given that the EU has 28 member states. But without digging into this matter deeply, there is one example: Hungary's current government is vocally anti-immigration and during 2015, blamed the EU domestically for the refugees passing through Hungary. But at the same time, Hungary declined being a beneficiary of the relocation scheme (which would have meant, at least in theory, that refugees would have been relocated from Hungary) and then voted against the scheme when Hungary was on the other side of relocation again.<sup>217</sup>

Intergovernmentalism can contribute a lot to explaining this phase of the CEAS. It was caused by external circumstances, but for the way the emergency measures were decided, the Treaty of Lisbon has given the Council the sole power to decide. So while the Commission set the agenda and drafted the proposals, the Council amended them critically (i.e. making the first relocation scheme voluntary instead of mandatory) and the Parliament's wishes had little to no influence. Therefore, the member states strongly influenced the output (the legislation), but they influenced the outcome even more by either complying too little or not at all with the Council's decisions. Even the venue-shopping argument is plausible in this context. Member states with

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<sup>213</sup> Zaun 2018

<sup>214</sup> European Parliament 2018h, n.p.

<sup>215</sup> European Parliament 2016, n.p.

<sup>216</sup> European Parliament 2016, n.p.

<sup>217</sup> European Parliament 2018b, n.p.



a lot of refugees looked to the EU to solve the issue, whereas member states with fewer refugees and/or in need of someone to blame also looked to the EU. However, the latter would require looking at the member states in particular, therefore the main arguments for intergovernmentalism are those above in this context. In general, intergovernmentalism often overestimates the governments' strategic thinking though, because the member states are not always aware to judge the consequences of their actions<sup>218</sup>.

### iii. Institutionalism

Institutionalism focusses on the formal rules of policy-making and sees politics as interest-based. Important examples of the theory include path-dependency because of increasing returns, changes of different magnitudes<sup>219</sup> and actors restraining later policy-making by locking in policy cores. Usually, only exogenous shocks can facilitate a switching of paths.<sup>220</sup>

What would this mean for the third phase of the CEAS? It would mean that under normal circumstances, the CEAS would stay on the path that it was already on and develop further by building on what is already there. However, this phase of the CEAS did not happen under normal circumstances (if normal are the circumstances of previous phases with regards to the number of asylum seekers). These unusual circumstances are the very thing that define this phase of the CEAS and that brought along the new policy. The most obvious question, albeit not usually the first in this theory, is to ask is whether the Syrian refugee crisis is an exogenous shock that brought along 3<sup>rd</sup> order policy changes, a switching of paths and goals. The simple answer to that is that it did not bring along such changes. The EU went beyond tweaking its existing policy (which would be 1<sup>st</sup> order changes), but there was no overhaul of the goals of the EU on asylum (3<sup>rd</sup> order changes). Instead, it was 2<sup>nd</sup> order changes and therefore no changing of paths: the EU changed instruments, but left the overall goals the same. The new instruments, the hotspot approach combined with relocation and return to safe countries of origin, were explicitly designed to ensure that the current CEAS is enforced: “[...] *the ‘Dublin system’ is not working as it should. [...] The EU can provide further assistance, but the rules [of the CEAS] need to be applied in full.*”<sup>221</sup> This holds especially true given that all of these instruments were temporary emergency measures, and not permanent additions to the *acquis*. We can therefore look at the third phase of the CEAS as following the path it was already on. That is not overly surprising, especially through the lens of institutionalism, because a changing of paths would be extremely costly and difficult: the goals of the CEAS are written down in the

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<sup>218</sup> Schäfer 2002, 31

<sup>219</sup> Hall 1993, 277ff.

<sup>220</sup> For a detailed description and sources, see chapter 3.C.

<sup>221</sup> European Commission 2015, 13

Treaty of Lisbon<sup>222</sup>, meaning that a new treaty would be required to change them. Even introducing new directives or regulations would require a broad consensus of Parliament and Council, and also time: the mode of governance for the CEAS requires the regulatory mode, which is a time-intensive process and high costs of failure, and the crisis required immediate action. The EU's choices of action were definitely limited by these institutional constraints. The only reasons why new instruments could be introduced quickly was firstly Article 63 (3) of the Lisbon Treaty, which allowed for provisional measures in a case of emergency, decided on by the Council alone<sup>223</sup>. And secondly, it was the unusual nature of the Turkey Joint Action Plan (it's official title being 'statement' hinting at how unusual this decision was) that allowed the Commission to surpass the Parliament and the CJEU so completely in this matter. These are strong argument for the path-dependent nature of the CEAS and the importance of institutional rules.

When it comes to the details of causes, contents and output of the third phase of the CEAS, institutionalism unsurprisingly begins to struggle. The policy-making process and its outcome, the instruments specifically, would have to be a direct result of institutional rules and their interests (with interests being understood in a more passive way here than in the actor-centric theories, i.e. through previous constraining of later policy-making), and therefore would have to be a predictable outcome in a given situation. That may be true for the overall nature of the changes, but not for details. Why was the distribution key of the Relocation measures based on GDP, population size, unemployment and previous number of asylum seekers<sup>224</sup> and not on the countries' and refugees' preferences (i.e. preferences in terms of demographic aspects and family in the EU, respectively)? Why did the Commission decide to engage in the much-criticized Turkey statement despite the concerns and difficulties regarding Turkey? Why could the permanent schemes not be decided on? Why was relocation so contested and eventually not successful? The Lisbon Treaty did define goals and the CEAS directives lay out specific tools, but especially Article 63 (3) gives plenty of room for the Council to decide on what it deems necessary and for the member states to influence that. The answer lies in a weakness of institutionalism: it looks back and paints the process' course as logical and its outcome as predictable, but leaves out that EU integration does usually not follow a clear plan and that it is very much shaped by actors and their interests<sup>225</sup>. Policy-making is amazingly complex,

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<sup>222</sup> Treaty of Lisbon, Art. 63 (2)

<sup>223</sup> Treaty of Lisbon, Art. 63 (3)

<sup>224</sup> European Parliament 2018a, n.p

<sup>225</sup> Schäfer 2002, 16

especially in the regulatory mode, and without looking at the actors' interests, the details of the emergency measures cannot be explained.

Therefore, institutionalism can well explain why the Syrian refugee crisis did not lead to 3<sup>rd</sup> order changes and why the emergency measures overall followed the path that the existing CEAS is on. But because it leaves out actors and their interests, it is unable explain the details of policy as these would require a closer look on the decision-making process.

#### iv. Governance

Governance is the hardest theory to apply because it is more of a cluster of ideas, not a theory. But in the broadest sense governance means that policy fields depend on each other, competences overlap and actors form networks. This means that knowledge on how to solve problems rests with many different actors, so a network of actors is needed to solve issues. Governance is therefore focused on actors and on politics to solve problems.<sup>226</sup>

What does this mean for the third phase of the CEAS? The starting point is clear: the unprecedented influx of refugees mainly due to the war in Syria. However, through the governance-lens, it would have to be earlier than that, right when the integration of the CEAS threatened to slow down. An incomplete CEAS was an obvious problem after all, so from the governance perspective, the actors involved would have wanted to solve that. But integration had slowed down considerably before 2015 and only regained momentum when the problem could no longer be ignored. This is also why asylum was put onto the agenda again: to solve the situation at hand, not to complete the CEAS. The fact that only emergency measures could be decided on, while any permanent solution and as such more integration of the CEAS failed is proof of that.

From the governance perspective, the measures would be decided on by a network of actors with the necessary information to solve the issue at hand. It is certainly true that no actor can solve such a crisis on their own, most certainly not the individual member states. The integration of the CEAS and of the EU as a whole have gone too far for this to be realistic. Schengen has opened the internal borders which refugees can also cross, and Dublin III has regulated where asylum applications have to be processed. But in the decision-making process of the latest phase of the CEAS, it is still questionable whether this broad network of actors is realistic. In the European Agenda of Migration, the EU does state that all actors, "*Member States, EU institutions, International Organisations, civil society, local authorities and third countries need to work together to make a common European migration policy a reality.*"<sup>227</sup> However,

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<sup>226</sup> For a detailed description and sources, see chapter 3.F.

<sup>227</sup> European Commission 2015, n.p.

the emergency measures were decided over a short period of time (resettlement as early as July 2015, with the Agenda on Migration being published in May that year) and the decision-making process was rather exclusive: the Commission set the agenda by submitting its proposal, gave the Council the right to decide and the Council did just that, with the Parliament only to be consulted. It is doubtful whether members of the civil society or local authorities were consulted given the short time frame. Even the monetary aspect, usually in the instrument closest to governance (the National Action Plans) responsibility of the Commission, here had to be approved by co-decision because it was an amendment of the budget.

When looking at the output though, governance becomes more relevant. One feature of the approach is that policy-makers also call upon local actors and decentralized procedures due to the complexity of the issues. The EU definitely did this with its resettlement scheme, as the Council clearly states: “[we] *recognise the importance of the supporting role to be played by EASO in the implementation of this scheme [...] [and] recognise the key role of UNHCR and the substantial contributions by IOM [International Organization for Migration] in the resettlement process*”<sup>228</sup>. A third country, in this case Turkey, was also closely involved in the resettlement scheme. The hotspots (and as a consequence, relocation as well as resettlement) are a similar example because various EU agencies and bodies were significantly involved. EASO was directly involved in the running of the hotspots by providing assistance with the asylum applications to the local authorities. Frontex helps the member states to control the external borders, saves lives at sea and helps local authorities with identification. Europol is involved in combating human smuggling and other crime-related aspects of asylum.<sup>229</sup> Furthermore, the many re-admission agreements that the EU has with third-countries hint at a close cooperation with third countries.

Governance is therefore applicable, but its importance for understanding this phase of the CEAS is still limited. Leaving out the actors’ interests and assume they only mean to solve problems is simply not realistic. Hungary is a good example of this again: if the country was simply concerned with solving the issue of a large number of refugees in Hungary, why did it choose not to be a beneficiary of the relocation scheme? Clearly, something else than problem-solving was on the government’s mind. Also, the CEAS should have been a priority before the crisis already, and now actors should be concerned with completing and future-proving it to prevent another refugee crisis. But this phase of the CEAS only constitutes of emergency measures.

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<sup>228</sup> Council of the European Union 2015, 3f.

<sup>229</sup> European Parliament 2018e, 5

**v. Conclusion**

The final phase of the CEAS is the easiest to grasp, because the point of departure is clear and the measures all tie into the same scheme. In terms of integration, it is as difficult to pinpoint than any other phase though. In general, neofunctionalism and institutionalism, with their focus on institutions instead of actors, can best explain the direction of what happened; like why the emergency measures did not depart from the path. The actor-centric approaches, intergovernmentalism and governance, have a much easier time explaining content and output, for example why relocation mostly failed. But these theories leave out the influence of the EU institutions too much and are less suitable to explain the overall trends, because actors do not always pursue their interests in a strategic manner, and sometimes things simply develop their own dynamics.

As such, what has been the fact in all other phases is the obvious answer again: all approaches can contribute something to this matter, but we do need more than one to paint a clear picture.

## 6. Summary and Conclusion

*Neofunctionalism* is a great (although not unrivalled) theory to explain why asylum began to be communitarized: through integration pressure from the creation of the Single Market. In the subsequent phases of the CEAS, neofunctionalism is most useful when applying it within the field and via incomplete integration that piles up pressure to integrate further, which eventually has to be addressed. From 2015 onwards is a good example of where this is very plausible. But neofunctionalism naturally cannot explain details so well, for example why it was the principle of first entry in particular on which the CEAS got built, or why the EU failed to agree on a permanent resettlement scheme. *Intergovernmentalism* is an equally established approach, albeit entirely different. Because it includes the member states and their interests, it is also a compelling argument for all phases of the CEAS, like how intergovernmental agreements started the whole process, how the Council decided on the core legislature, how the member states were reluctant to harmonize and why so far, no true integration came from the recent refugee crisis. At the same time, the member states quickly lost much of their power as integration progressed, and the influence of the European institutions, especially the Commission, cannot be denied, for example due to the earliest drafts of the CEAS by the Commission being remarkably similar to what it became later on. *Institutionalism* is not so useful over the entire span of the CEAS, because institutionalism did not apply at first and because path-dependency requires a path. But later on, institutionalism provides convincing insights. It can well explain why most of the CEAS legislation builds on the Dublin principle, and why the EU never strayed from it. It can do this up until the most recent developments in the field. Other aspects of the theory, such as the constraining of later policy-makers, is equally convincing, but loses some of its validity when the Commission's impact comes to the surface. *Governance* cannot contribute as much as the three other theories because it is more vague, newer and less obvious. But its core ideas are very worth-exploring, and evidence for governance can still be found: the EU has almost from the start tried to involve a network of actors to allocate knowledge and come up with good ideas. Also, some parts of the CEAS that are bit outside of the core legislature, such as the EASO, the fund and the hotspot-approach do display aspects of governance by involving a network of actors, local knowledge and local responsibility to set priorities.

What is called the *pre-phase of the CEAS* in this thesis is an inconspicuous but very influential period of time. The member states decided intergovernmentally on the Dublin regulation, possibly in response to the single market, possibly to pursue their own interests. In

doing so, the member states, knowingly or not, put the future CEAS on a path that it has yet to stray from; although the Commission was obviously influential beyond what one might have expected in shaping the path of the CEAS. At the end of this phase, the CEAS was a common interest of the EU, and the union faced a refugee crisis due to the disintegration of Yugoslavia. The *first phase* kicked off with the Treaty of Amsterdam, a document that laid out the ambitious path for the CEAS. In its wake, the Council decided on the core legislation for the CEAS, and while it did that almost on its own and enshrined the path that the CEAS was on, that legislation is suspiciously similar to the Commission's first draft of the CEAS. This phase also saw the introduction of new layers, such as the ERF and the external dimension via GAM. Given the subsequent development of the CEAS, the importance of this phase cannot be overstated. The *second phase* of the CEAS completed communitarization due to the Lisbon Treaty finally bringing co-decision (and therefore the normal mode of governance) to the field. This gave formal competences to both the Commission and the Parliament, but integration still slowed down. Harmonization was lacking, and the Council's ideas for the CEAS were different quite a bit from the Commission's. The recast directives did pass, but they merely tweaked with what was already there, something that strongly points to path-dependency and to the Council having locked in the policy-core in the previous phase. The only true advancements, the uniform status and EASO, were important though, and especially the latter is the basis to include a wider network of actors. The *crisis-phase* of the CEAS forced the EU into action, because the Dublin-regulation was impossible to uphold at that time. Due to a clause in the Lisbon Treaty, it was soon up to the Council to decide on emergency measures, which it did: in a perfectly path-dependent manner, hotspots were set up, and based on those, resettlement and relocation started. Especially the latter was contested and often not complied with in the member states though, and the CJEU was called upon to uphold it. So far, nothing permanent has resulted from this phase however.

With regard to the research question asking *what the major theories of European integration contribute to explaining the many instances of policy-making cumulating in the current state of the Common European Asylum System*, it is safe to say that the general consensus in the study of European Integration holds up in asylum as well: all theories can explain parts of what happened, none can explain it all, and they all are worth considering. It is even valid to say that by considering several of them, a much more nuanced and exact picture can be painted. I tried to do this, by looking at overall trends, outside circumstances and details in each phase of the CEAS, and consider what happened in light of four important integration theories. Some things

underlined previous research in the field, other lines of thought, especially in the most recent phase, are new.

Still, the CEAS as a whole is a new field so there is plenty of room for more research. This thesis spans a large period of time and a lot of integration theories, so any phase of the CEAS, really any instance of policy-making, deserves to be looked at much closer through the lens of European integration. In the end, it is to say that the CEAS is an amazingly interesting thing to study, because it combines a lot of integration of a contested field in a short period of time, is incremental to the EU these days, and because it is still unfolding: the CEAS is not complete, but it will have to be in the future. Understanding the CEAS and its complex integration in a complex EU is vital in this. Studying the integration of the CEAS can even tell us something about European integration as a whole, because it is such a complex puzzle of integration theories and includes so many actors and interests.

Finally, I want to end this thesis by referring back to my reasoning when I chose this topic: the current situation, especially the death toll at the EU's border and beyond, is horrifying, unacceptable and entirely unworthy of the EU's ideals. As such, it threatens the EU and we have to change it. Luckily, the European Union is work in progress, and we need to work on improving the parts that need improving to achieve the sort of community that meets our ideals, because this Europe is still the best that we have ever had.



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## 9. Abbreviations and Acronyms

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
Coreper	Committee of Permanent Representatives
DG	Directorate General
EASO	European Asylum Support Office
EC	European Communities
ECHR	European Court of Human Rights
EEC	European Economic Community
EMN	European Migration Network
ERF	European Refugee Fund
EU	European Union
FRA	Fundamental Rights Agency
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
IOM	International Organization for Migration
JHA	Justice and Home Affairs
NAP	National Action Plan
NGO	Non-governmental Organization
O.J.	Official Journal
OMC	Open Method of Coordination
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees

## 10. Annex: Legislative Acts and Documents

This annex contains a reference list of all the legislative acts as well as official documents of the *acquis* on asylum used for this thesis. This is chronological and reflects tables 4-7. If possible, the acts are taken from the official journal of the European Union (O.J.), if not a link is provided where the document can be found. If the act is usually known or most commonly referred to by a different name than the official one, it is stated in parenthesis at the end for clarity.

*The Schengen acquis* - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000, O.J. L 239. (*Schengen I*)

*European Commission (1985)*: Completing the Internal Market. [http://aei.pitt.edu/1113/1/internal\\_market\\_wp\\_COM\\_85\\_310.pdf](http://aei.pitt.edu/1113/1/internal_market_wp_COM_85_310.pdf) [01.12.2018].

*Single European Act*, 29 June 1987, O.J. L 169/1.

*Tony Bunyan (1997)*: Key Texts on Justice and Home Affairs in the European Union 1976-1993. Statewatch: London. (*Chapter 1 contains the text of the Palma document*)

*Convention Implementing the Schengen Agreement* of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990. <https://www.refworld.org/docid/3ae6b38a20.html> [01.12.2018]. (*Schengen II*)

*Convention determining the State responsible for examining applications* for asylum lodged in one of the Member States of the European Communities - Dublin Convention, 19 August 1997, O.J. C 254. (*Dublin I*)

*Treaty on European Union*, OJ C 191. (*Treaty of Maastricht*)

*Council of the European Union (1992)*: Criteria for rejecting unfounded applications for asylum. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133102> [01.12.2018]. (*London Resolutions*)

*Treaty of Amsterdam* amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 10 November 1997, O.J. C 340.

*European Commission (1998)*: Towards an Area of Freedom, Justice and Security. [http://europa.eu/rapid/press-release\\_MEMO-98-55\\_en.htm](http://europa.eu/rapid/press-release_MEMO-98-55_en.htm) [01.12.2018]. (*Vienna Action Plan*)

*Council of the European Union (1999)*: Tampere European Council 15 and 16 October 1999 – Presidency Conclusions. [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm). [01.12.2018].

*Charter of Fundamental Rights* of the European Union, 18 December 2000, O.J. C 364.

*Council Regulation (EC) No 2725/2000* of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, O.J. L 316.

*Council Decision 2000/596/EC* of 28 September 2000 establishing a European Refugee Fund, O.J. L 252.

*Treaty of Nice* amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 10 March 2003, O.J. C 80.

*Council Directive 2001/55/EC* of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, O.J. L 212. (*Temporary Protection*)



- Council Directive 2003/9/EC* of 27 January 2003 laying down minimum standards for the reception of asylum seekers, O.J. L 31. (*Reception Conditions*)
- Council Regulation (EC) No 343/2003* of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, O.J. L 50. (*Dublin II*)
- Council Directive 2004/83/EC* of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. L 304. (*Qualifications Directive*)
- Council of the European Union (2004)*: The Hague Programme. Strengthening Freedom, Security and Justice in the European Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005XG0303%2801%29> [01.12.2018].
- Council Decision 2004/904/EC* of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010, O.J. L 381.
- Council Directive 2005/85/EC* of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. L 326. (*Asylum Procedures*)
- Council of the European Union (2005)*: Global Approach to Migration. Priority Actions focusing on Africa and the Mediterranean. <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015744%202005%20INIT> [01.12.2018].
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# 11. Acknowledgements

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“[...] I will say to you that our efforts will continue unabated. We will keep working to render this imperfect Union that little bit more perfect with each passing day<sup>230</sup>”

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<sup>230</sup> From Jean-Claude Juncker’s State of the Union Address of 2018