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Research Article

# European Integration and the Governance of Migration

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# Abstract

This article traces the development of EU governance of migration, with an emphasis upon key moments of institutional reform such as the creation of the pillar of Justice and Home Affairs within 1992's Treaty on European Union. The article identifies three periods with different governance patterns since the Maastricht Treaty, with increasing involvement of institutions such as the Court of Justice and the European Parliament. Together with the increased relevance of EU agencies such as Frontex, this has produced a style of governance that is neither predominantly intergovernmental nor supranational, though multilevel and experimental governance are not prominent either. The article also examines what modes of governance are present within the primary migration policy domains. Member states still enjoy considerable discretion in labour migration and family reunion, and the EU institutions have respected this. However, there has been greater supranational involvement in the areas of irregular migration and specifically asylum, whether through the involvement of EU agencies, or through legislation and court rulings that genuinely oblige countries to change their domestic rules. Institutional changes have continued to empower the Commission, with the potential for substantially greater participation and authority for the EU institutions.



# Keywords

Migration; Asylum; Governance; Justice and Home Affairs; European Commission


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International migration has been a European concern since the establishment of the European Coal and Steel Community in 1951. At that time, 'migration' consisted of the movement of nationals from the six member states within an international labour market. What is now generally referred to as the European Union's (EU) migration policy regards the movement from outside of non-EU citizens, or third-country nationals (TCNs) (Boswell and Geddes 2011: 3). This article traces the development of EU governance of migration, with an emphasis upon key moments of institutional reform such as the creation of the pillar of Justice and Home Affairs within 1992's Treaty on European Union. It also breaks down migration to illustrate how the balance of governance modes varies by policy domain.

In line with the special issue's motivation, two primary concerns guide this survey of governance. The first involves identifying discernable historical phases in the development of migration, with an eye to whether governance has altered incrementally as the result of the assertiveness of the supranational institutions, as historical institutionalism argues, or through punctuated moments of transformation by which the member states have stewarded such changes through intergovernmental treaty reforms. Second, migration is analysed in terms of what modes of governance are present within the primary policy domains of legal migration, irregular migration, and asylum.

The first section reviews the analytical framework advanced by Tömmel in this issue, before surveying further literature on modes of governance, in particular the governance of migration. As in the cases of Foreign Policy (Dominguez, this issue) or Monetary Union (Chang, this issue), the migration of TCNs was not an original European competence. Thus, rather than expecting the governance of migration to have developed in step chronologically with the four phases delineated

by Tömmel, the second section delves into whether the characteristics of each distinct phase are nonetheless identifiable within the governance of migration, and if so, whether these developments can be readily periodised. This is answered through an examination of the development of institutional competences over migration policy that evolved principally after the 1993 founding of the EU. The third section provides analyses of different government modes within five separate sub-areas of migration: labour migration, family reunion, irregular migration, asylum, and long-term TCNs. Here, we see diverse balances of governance modes where the positioning of the line between hierarchical versus decentralised policymaking shifts by issue area.

## THE HISTORICAL PROGRESSION OF EUROPEAN GOVERNANCE

Sandra Lavenex (2015: 368) has labelled the mode of governance in Justice and Home Affairs matters, including migration, as transgovernmentalism. This indicates the combination of elements of traditional 'communitarisation' - where the European Commission takes the lead role in proposing legislation to be approved by the Council and European Parliament - with more intergovernmental practices resting upon loose cooperation rather than concrete hierarchically prescribed standards. Instead of focusing on an ultimate goal of legal harmonisation, governance rests primarily upon defining the more operational aspects of intrastate cooperation, which frequently occurs through independent regulatory agencies. This general characterisation is merited, but to trace better the development of governance over time and to explore the balance of different modes of governance, I first provide a general theoretical framework to conceptualise governance.

Tömmel's (2016) examination of EU governance and the analyses of several of the articles in this special issue are guided by Kooiman's typology of three orders of governance (2003). Within the first order, governing actors engage in managing matters on a 'day-to-day' basis. Second order governance foresees greater delegation to establish and maintain the institutional settings within which first order governance takes place. This requires the transfer of governance authority to other organisations, or at least setting up a framework of behaviour through procedures and regulations. Finally, third order governance, or meta-governance, anticipates that governance requires putting in place a normative framework that political actors (namely the states) will follow.

Tömmel posits four distinctive phases in the development of governance within the EU. Phase one emphasised intervention by the supranational institutions performing state functions, most prominently production controls. The second phase in the 1960s was characterised by attempts to harmonise policy. Member state resistance resulted in the setting of concrete standards being delegated to private transnational bodies, with EU legislation being limited to passing framework legislation setting goals whose implementation was left largely in the hands of the member states. The third phase, beginning in the mid-1980s, imposed the principle of mutual recognition in a hierarchical fashion. If market liberalisation proved unattainable through common standards, states were obligated to recognise the standards of each of their neighbours, even if those imposed less stringent obligations. Phase four, beginning in the 1990s, was characterised by the introduction of more sophisticated procedures and institutions of EU governance to refrain from directly intervening in the member states. As in the second phase, this implies second order governance, where regulatory frameworks and transnational networks are designed to guide states operating within a decentralised system of multilevel governance in which subnational and non-state actors provide input on policy formulation and implementation.

This article applies Tömmel's chronological framework on the emphasis of governance strategies over time to review the overall development of EU migration policy. However, there are further common explanations as to what motivates greater supranational assertiveness and the willingness of member states to relinquish control, in contrast to pronounced preferences for retaining national

competences with limited supranational intervention. The historical institutional approach, exemplified by Stone Sweet and Sandholtz's work (1997), places subnational policy entrepreneurs at the centre of its examination of how supranational institutions incrementally accrue authority. Conversely, the archetypal explanation for why some policies are resistant to hierarchical supranational governance traces back to Hoffman's concept of intergovernmentalism (1966), where policy areas closely aligned to traditional conceptions of sovereignty are less likely to be subjected to the EU's hierarchical governance than more technical 'low politics' areas where efficiency concerns predominate. The supposed dichotomy between supranationalism and intergovernmentalism has also been critiqued through the concept of multilevel governance, which elevates a focus on subnational and non-state actors in describing and explaining less hierarchical EU governance (Marks and Hooghe 1996). A final relevant theoretical explanation as to where EU governance resides and why is that of venue shopping, which developed explicitly within the study of immigration. As originally laid out by Guiraudon (2000), venue shopping contemplated the idea that restriction-minded governments willingly transfer authority over certain policies to the European level to evade the demands of domestic interests seeking to circumscribe government autonomy in the name of safeguarding individual rights. However, recent research indicating that states sometimes embrace EU rulemaking to escape the constraints of domestic populists clamouring for greater restriction (Kaunert and Léonard 2012) suggests that venue shopping may serve both liberalising and restrictive intentions.

Synthesising this literature, the following concepts and hypotheses guide the analysis. It seems unlikely that EU governance in migration would progress along Tömmel's timeline, for hers is not solely an evolutionary model, but rather sees that the different phases occurred in response to a larger context of changing attitudes toward integration. With EU migration policy essentially developing at the time of Tömmel's fourth phase, we would expect governance that eschews intervention, settling instead for second order governance where institutions and guidelines operate within dynamic, non-hierarchical, and perhaps experimental modes of governance. As for differentiation by policy area, the different theories offer competing outcomes. Viewing legal migration, particularly labour migration, as low politics, we might expect multilevel governance, paralleling the strong role that non-state actors such as the social partners frequently play in this area domestically (Caviedes 2010; Freeman 1995). Conversely, irregular migration and asylum are highly visible and politicised issues that awaken sovereignty concerns, so the expectation is for a limited surrender over policy authority. If there were venue shopping in these areas of high politics, states would only transfer policy authority to the European level if the resulting standards were as restrictive, or more so, than those already in place.

The analysis of governance modes in the third section therefore seeks to establish whether supranational, intergovernmental, or multilevel governance is common in each of the policy sub-areas. While this does involve the straightforward identification of the level at which competence is accorded through the institutional framework of the EU treaties, it extends beyond this to consider: 1) the degree to which new standards impinge on the sovereignty of the member states in terms of being able to keep existing rules in place; and 2) the pattern of involvement of the EU's supranational institutions. The empirical examination of governance across the five different policy sub-areas endorses no clear single explanation but rather demonstrates a mix of governance modes, thereby challenging the predictive power of the high/low politics distinction.

## THE DEVELOPMENT OF MIGRATION GOVERNANCE

Though this piece distinguishes freedom of movement from TCN migration, the discussion of EU migration policy briefly surveys freedom of movement, as integration in this area created some of the conditions and momentum advancing the inclusion of immigration and asylum in the Treaty of

European Union. (For a deeper discussion of freedom of movement and its relationship to the concept of EU citizenship, see Maas elsewhere in this issue.)

### *Freedom of Movement*

The Coal and Steel Treaty of 1951 itself reflected a concern with freedom of movement, forbidding discrimination versus coal and steel workers who were nationals of the other member states, providing the general model on free movement adopted in the 1957 Treaty of Rome. These provisions established the freedom of movement for workers (read employees) by giving them the right to accept employment offers and move freely and stay within the territory of another member state for employment purposes. Directives passed in the 1960s guaranteed workers additional procedural rights (Maas 2005), yet workers were still required to apply for work and residence permits in the same manner as TCNs. This 'common area of occupational mobility' (Quintin 2000: 10) reached a turning point in terms of governance in 1968, through a directive giving workers the right to enter, leave, and live in member states, and a regulation abolished nationality-based discrimination between EC workers with regard to work conditions, salary, and unemployment, social, and tax benefits, rendering freedom of movement no 'mere network of intergovernmental relations' (Favell and Recchi 2009: 8).

The Single European Act of 1986 set the stage for a flurry of directives in 1990 on the rights of students, residence for persons of sufficient means, and employees and the self-employed who had ceased their occupational activity. Coupled with the 2004 directive consolidating older directives and regulations, freedom of movement has been transformed from being limited to economic activity to simply preventing welfare tourism by EU citizens (Barnard 2010), even if member state implementation has been described as 'disappointing' by the Commission (European Commission 2009).

### *Immigration and Asylum*

Compared to freedom of movement where EU rules essentially prescribe mobility rights, with migration, states still wield primary control over the conditions of entry and stay, partly because this area became subject to EU governance more recently. Freedom of movement was initially intended as a substitute for the need to open labour markets to TCNs, yet the extensive realisation of freedom of movement actually increased the pressures on states to relax border controls, highlighting the complexities of drawing an invisible line between EU and non-EU nationals in terms of internal mobility (Maas 2007: 34). The Commission's success in advancing freedom of movement arguably had an intentional third order governance impact in normalising the mobility of foreigners.

Migration of TCNs was not addressed within the foundational treaties of the 1950s, and this remained the case until the 1992 creation of the EU. Until then, the Commission contented itself with steering member states toward a common approach, but this falls short of third order governance, since the Commission was largely agnostic as to policy content to avoid member state backlash (Papademetriou 1996). Nevertheless, the issue of mobility of TCNs was addressed through the 1985 Schengen Agreement, under which the initial signatories Belgium, France, Luxemburg, the Netherlands, and West Germany dismantled their border controls toward the other treaty members, effectively opening themselves to EU and non-EU nationals alike. Though legally outside of the EEC, this freedom of circulation within several member states introduced a further dynamic normalising TCN migration within part of the Community.

The Treaty of European Union finally placed immigration and asylum issues within the competence of the newly established EU, and though changes in modes of governance have advanced incrementally and subtly since then, it is possible to delineate three periods of governance, the first extending from 1994-1999. The Maastricht Treaty's architecture reflects the ambivalence of several member states, foremost Denmark, France, Greece, Ireland and the UK, toward the communitarisation of migration. Thus, together with other nominally high politics areas such as police and justice affairs, migration issues were placed into the third pillar of Justice and Home Affairs, where member states alone had the right of legislative initiative and veto, the EP was limited to consultation and the ECJ lacked jurisdiction. In terms of the subject matters that were now under the EU's purview – immigration (family reunion and employment-related), irregular migration, asylum, and external borders – this was a considerable advancement, but during this initial period, they were governed in an intergovernmental fashion, manifested by the 'closed and restrictive manner' that JHA Councils operated in before the signing of the Amsterdam Treaty (Boswell and Geddes 2011: 64), when the input and cooperation from the remaining EU institutions became more commonplace. This governance configuration was a far cry from the first phase delineated by Tömmel (2016), for supranational institutions lacked authority to intervene directly.

In identifying periods within the development of migration governance, the key transition point is the 1997 Treaty of Amsterdam, when structural and procedural changes created an immigration regime that has incrementally approximated ever greater elements of supranational governance, beginning with the second period in 1999. The Treaty oversaw the transfer of immigration and asylum matters from the third pillar into the first pillar's 'Area of Freedom, Security, and Justice', but this transition was less dramatic than it might appear, since during the first five years (1999-2004), the Commission was only to share the right of initiative with the member states, while the co-decision process empowering the EP was not applied. With consensus still being required, this lacked most of the elements of communitarisation, particularly since the ECJ could only issue preliminary decisions upon the request of national high courts, rather than all courts (Luedtke 2006: 424). Thus, the subnational actors who were crucial in expanding freedom of movement rights lacked the critical institutional partners to bring about substantial change. Of more immediate impact was the incorporation of Schengen into Title IV of the EC Treaty. This did not automatically include all EU countries, since countries had the choice to join if they could demonstrate effective external border control systems, but it meant that the Commission and Court would now be involved in implementing Schengen obligations.

Upon evaluation, during this second period, governance still only resembled Tömmel's second phase, if anything. Supranational institutions had little authority to intervene directly, but framework legislation was introduced in 2003 with regard to long-term residents, family reunion, and asylum, with additional directives on asylum in the following couple of years. Unlike in Tömmel's second phase, harmonisation here was limited to that accomplished through EU legislation; international bodies were not enlisted to self-regulate as they had been beginning in the 1960s with regard to product standards. Non-hierarchical, experimental governance that is characteristic of Tömmel's fourth phase was attempted through the Commission's proposal of a non-binding soft-law system of governance employing the Open Method of Coordination in 2001, but the Council did not advance past giving the proposal a first reading, in large part due to its design, which ceded initiative to the Commission and intended to introduce non-state and subnational actors into the policymaking process (Caviedes 2004). Thus, this second period also does not strongly resemble Tömmel's fourth phase either, though Denmark's opt-out and Ireland and the UK's opt-in represent the multispeed governance that is a characteristic of the fourth phase in areas such as Economic and Monetary Union and the Common Foreign and Security Policy.

The post-Amsterdam transition period actually lasted a full six years, thus 2005 marks the beginning of the third and current identifiable period of governance. There have been subsequent changes, as

the Lisbon Treaty brought about the end of the three pillar structure in 2009, but with migration already relocated to the first pillar in 1999, it was subject to supranational governance since the mid 2000s. As of 2005, the co-decision procedure, rather than unanimity with mere EP consultation, covered asylum, illegal migration, and some facets of visa and residence permits, while Lisbon added the remaining immigration issue areas other than those regarding passports, residence permits, and emergency decisions regarding asylum (De Zwaan 2012: 16).

The current institutional framework appears supranational in form, particularly considering the expanded role of the Commission, EP, and Court. The Commission's sole possession of the right of initiative sets the stage for it to assume leadership, and indeed, internal reconfigurations have mirrored its burgeoning competence. With the JHA Council ceding its sole prerogative to introduce legislation in 1999, and then losing the ability to propose legislation entirely in 2006, the Commission adapted by creating a separate Directorate General in 1999 to deal with Justice and Home Affairs, which was renamed DG Justice, Liberty and Security, and which, in 2010, was split into a further DG of Migration and Home Affairs, separate from the newly formed DG Justice and Consumers (Boswell and Geddes 2011: 62).

In the third period, the European Parliament won in relevance due to its partnership role in co-decision, even if its pro-migrant rights stance in opposition to the Council's imputed restrictiveness has lapsed into one of collusion (Lopatin 2013). Further, the Court of Justice of the European Union's role after Lisbon expanded since it can now hear cases referred from all national courts. This had already been the case with asylum, where the court has ruled on issues such as limiting member state discretion on the Dublin Regulation, and that homosexuality is a justifiable grounds for asylum, and this trend promises to continue to an accelerated degree if a common system can be put into place (Boswell and Geddes 2011: 63). In 2014, five years after the Lisbon Treaty went into effect, the Commission also assumed oversight capacity, and thus can threaten member states with court action in the case of infringement, as has already been the case with asylum (Nielsen 2015), opening a further avenue for Court intervention.

Another emerging aspect of governance in the third period has been the heightened role of EU agencies such as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), created in 2004, and the European Asylum Support Office, established in 2010. The direct cooperation of these agencies with member states harks back to the decentralisation of multilevel governance, but the involvement of non-state and sub-state actors that Tömmel identifies within the fourth phase is still lacking. As a whole, governance in the third period is characterised by greater participation of the supranational institutions in the drafting and implementation of framework legislation, together with non-hierarchical voluntary coordination between EU agencies and member states. This is understandable for a newer policy competence that initially followed intergovernmental governance patterns, but this less developed supranational aspect has not resulted in the resort to new governance instruments or divestment of governance authority to non-state actors that Tömmel posits as characteristic for European governance since Maastricht. Migration policy has developed essentially during what Tömmel considers the fourth phase in EU governance, but it followed its own path during this period of time, only exhibiting certain representative traits of that phase.

## VARYING GOVERNANCE TRANSFER BY MIGRATION ISSUE AREA

Unlike freedom of movement, where certain provisions were codified in the founding Treaties, substantive migration and asylum rules developed through secondary legislation. If EU governance is viewed as simply the competence to draft and pass legislation, the different areas can be said to share a similar governance structure, although legal migration only became subject to co-decision

after 2009. This section's analysis of governance looks beyond merely the competence accorded and instead compares both: 1) the extent to which new rules genuinely challenge member states' existing rules; and 2) the involvement of the EU's supranational institutions. Here, we can identify several different modes of governance operating within the separate policy sub-areas of legal migration, irregular migration, and asylum over the past quarter century.

### *Labour Migration*

Eager to demonstrate its business-enhancing credentials, the Commission sought to advance labour migration in its proposal for an Open Method of Coordination in Immigration (European Commission 2001) and a 2005 Green Paper (European Commission 2005), but the only legislation establishing a discrete worker visa is the 2009 'Blue Card' Directive. Modelled after the sectoral labour migration policies of the member states in the early 2000s (Caviedes 2010), the Blue Card offers highly skilled TCNs who are already working in one member state the possibility to move to other member states after 18 months, together with a long-term perspective for permanent residence. High earning prerequisites, together with provisions allowing countries to declare that their labour market is unprepared to absorb further high-skilled migration or simply opt out of the Blue Card entirely, provide member states with great flexibility in transposition such that few successful applicants are likely (Cerna 2013). Migration of the highly skilled is the type of circumscribed low politics area where a transfer of competences is supposedly less problematic, but even France, Germany and the UK – where client politics historically assured businesses access to foreign specialists – shied away from relinquishing greater control over the entry of third-country nationals, claiming that their existing programmes already attracted sufficient talent (Caviedes 2008).

Initial drafts of the Blue Card Directive also featured an unskilled labour dimension, but this is only partially reflected through the 2014 Seasonal Workers Directive imposing common minimum standards for workers' entry and stay, without creating a distinct visa. Similarly, a 2004 directive established common conditions of admission for students, trainees and volunteers, a 2005 directive promoted the intra-EU mobility of scientific researchers, and a 2014 directive created common streamlined procedures for intra-corporate transfers of the highly skilled, but they are limited to articulating a common set of expectations and guarantees for countries that *already* have such policies on the books. Further harmonisation was achieved through the 2011 directive mandating that member states establish one single application process and permit granting both residence and employment authorisation. In terms of governance, together these 'economic' policies produce some procedural harmonisation and constitute a measure of third order governance through which the Commission can parade business-friendly measures enhancing the mobility of the highly skilled, but they impose few obligations, instead leaving discretion and ultimate control in the countries' hands, with the EP and ECJ staking out few prerogatives or initiatives.

### *Long Term Residents*

Under the 2003 Long Term Residents Directive countries must accord freedom of movement to TCNs and their family members who have resided elsewhere in the EU for five years and grant treatment equal to that of their own nationals with regard to welfare benefits, social assistance, and social benefits. This approximates the benefits accorded through freedom of movement to EU citizens themselves, but it should only be viewed as selective supranationalisation (Luedtke 2006: 437), for countries may still privilege EU nationals with regard to employment and education, and they are free to require TCNs to fulfil integration requirements such as language or civics classes.

With Germany, Greece, Italy, Luxembourg, Portugal and Spain critical of the Commission's initial drafts (Luedtke 2011: 8), the language was amended such that many of the provisions are voluntary rather than mandatory. Despite this relaxation of obligation, most member states were tardy in transposing the directive, resulting in 20 infringement actions and three ECJ judgments. A 2011 Commission report on the implementation of the directive registered dissatisfaction with its impact and the transposition of provisions in spirit with its intentions (European Commission 2011). Nevertheless, as predicted by Luedtke (2006), the Court has begun to limit member states' discretion, as exemplified by a 2015 opinion from the Advocate General that Dutch requirements for long term residents (LTRs) to take integration tests exceeded the necessary and proportional integration measures envisioned by the directive. Thus, while the uneven level of obligation and inadequate operation of the directive still suggest intergovernmentalism, enhanced Court powers have begun to curtail member states' prerogatives, and this has the capacity to shift governance in a more supranational direction. Furthermore, if one compares the LTR Directive to the free movement rights accorded to EU citizens, member state compliance with those rights, as highlighted by France's expulsion of the Roma, is also deficient (Gehring 2013), so this is an area where advances are attained incrementally and imperfectly.

### *Family Reunion*

Roughly one third of legal migration to the EU occurs via family reunion (Huddleston 2012), and already in 2003, the Council passed a Directive on the Right to Family Reunion. Though establishing some minimum standards in allowing TCNs to bring family, it actually permitted many states to become more restrictive in terms of age limits for children and maximum processing times (Schibel 2005). Throughout a three-year process passing through three drafts, the Commission received support from key member states such as Belgium and France whose standards were already higher (Luedtke 2011), whereas Austria, Germany and the Netherlands were granted discretion to preserve mandatory integration measures and lower age limits. The initial intentions of the Commission to provide integrative support through guarantees of access to training or education gave way to an emphasis on integration requiring applicants to demonstrate certain levels of cultural proximity or linguistic proficiency. Opposition from Greece, Portugal and Spain toward granting reunion rights to unmarried couples resulted in the directive only mandating rights for spouses and children, giving member states the discretion to include further qualifying family members (Menz 2010: 448). The EP's attempt to challenge certain provisions, such as allowing for up to a two-year waiting period, for violating the European Convention on Human Rights was dismissed by the ECJ in 2006, signalling that this agreement is to be read with great deference to member state discretion (Boswell and Geddes 2011: 115-16). As Article 1 explains, the directive simply determines the conditions under which the right to family reunion may be exercised, but it creates no right of family reunion.

Countries were slow in transposing the directive, leading the Commission to open 19 infringement cases, and by 2008, only Luxembourg had not transposed the Directive. The Commission's Report on the directive's implementation pointed out that despite its 'low level binding character', member state implementation was incomplete or incorrect in various areas (European Commission 2008: 14). However, rather than proceeding with non-compliance proceedings, the Commission's approach has been cautious, providing guidance toward better compliance through a 2011 Green Paper and a 2014 Communication to the EP and Council. Instead, the Court has become more assertive through a series of decisions since 2010, striking down national provisions that are too demanding in terms of demonstrating adequate or stable resources and considering whether spouses under 21 may enter provided there is no hint of forced marriage.

To the extent that a few countries (and future accession candidates) with lower standards changed their national statutes, the Directive can be viewed as a supranational imposition, but the low – as

evidenced by the large number of countries that already offered higher protection (European Commission 2008) – and often non-compulsory standards suggest that member states' prerogatives were also being shielded. In generating the aforementioned documents providing guidance, the Commission has adopted an inclusive approach that solicits the opinions of member states and non-governmental organisations alike, but until such input generates a revised directive with binding requirements forcing countries to revise their domestic rules, the current family reunion regime reflects intergovernmental, rather than multilevel, governance.

### *Asylum*

The EU has been relatively successful in generating common standards and effectively reducing member state discretion in the realm of asylum (Kaunert and Léonard 2012). The EU was already active in this area prior to Maastricht, with the 1990 Dublin Convention establishing a system through which countries could send asylum seekers back to their first EU country of arrival. Regulation in this issue area reflects countries' desires to limit their exposure to potential applicants, while the Commission aspires to a streamlined single process, but currently, EU rules only provide minimum guarantees and obligations on certain issues. The 2003 directive established minimum standards for the reception of asylum seekers, while in 2004, separate directives set minimum standards for qualifying as a refugee and standards on asylum procedures.

In contrast to the Directive on Family Reunion, the practical effect of this harmonisation is viewed as having loosened restrictions in several countries that could scapegoat the EU directives when passing more liberal standards (Boswell and Geddes 2011: 155). All three directives have been revised as of 2013, with some scholars pointing to expanded EP involvement in these recast versions as producing higher protection levels (Ripoll Servent and Trauner 2014) such as the right to an in-person interview, greater protections for unaccompanied minors, and limiting the recourse to detention, while others argue that the EP abandoned Commission efforts to expand the circle of qualifying family members or to raise the minimum age for such individuals (Lopatin 2013: 747). Still, one can argue that EU Asylum Policy imposes genuine obligations upon states that previously had more stringent acceptance standards, slow procedures, or offered limited financial support. Governance has been impacted in terms of the number and level of obligations that have been introduced in the area of asylum, however, the impact has not been uniform. Insistent countries like Germany have effectively uploaded their preferences on expanding the list of perceived 'safe' third countries to which one can return applicants, allowing for a broader definition of refugee that circumscribes the ability to exclude particular applicants (Post and Niemann 2007), while Germany, Italy and Poland successfully lobbied for countries to decide the extent to which successful applicants can access public assistance (Menz 2010: 450).

In addition, since 2011, the European Asylum Support Office exercises first order governance, providing information and aid in preparing national reception facilities. However, claims that genuinely higher standards, effective advocacy from the EP, and an increasing caseload for the ECJ (Groenendijk 2014) amount to a supranational Common European Asylum System have surely been tempered by the migrant crisis of 2015, which reminds us of the lack of consensus concerning burden sharing. While the Commission managed to secure a one-off agreement to distribute 120,000 refugees, in the end it was pleas and threats from overwhelmed individual countries such as Greece, Hungary, Italy or Malta, together with exhortations for a comprehensive system of solidarity under the leadership of the French and Germans, which ensured even these results, with under 1000 refugees actually having been relocated by mid-December of 2015.

### *Irregular Migration*

Countries have shown great concern regarding irregular migration, where the EU's operative piece of legislation is the 2008 'Returns' Directive dealing with deportation. Passed via the co-decision procedure, the directive is commonly referenced as an example of active and concrete EP influence (Baldaccini 2009; Ripoll Servent 2011). Establishing minimum deportation standards regarding the setting of age requirements, and limiting temporary custody and processing times, the directive came under heavy criticism from the EP, which sought to decrease member state discretion and expand rights to voluntary departure and legal remedies. The EP eventually settled for fewer revisions than it initially demanded (Acosta 2009), so while governance was impacted - evidenced by escalated inter-institutional wrangling - the final result only modestly infringed upon member state discretion, since many already offered protections rights at the minimum level, or subsequently reduced their protection. Indeed, Italy promptly demonstrated the benefits of venue shopping, increasing maximum detention times from two to eighteen months in 2008, as permitted by the directive (Baldaccini 2009). However, the ECJ also sanctioned Italy three years later for imposing harsher detention conditions than permitted, signalling that the directive may provide member states with the ability to act more restrictively, but it can also be wielded to hold them in check.

Governance has expanded in a new direction as borders are pushed outward and sending countries are included within this process. Cooperation with third countries, by assisting them in monitoring borders, coordinating the return of irregular migrants, and caring for refugees otherwise bound for the EU, was allocated over EUR 3 billion in funding for the 2008-13 period (Geddes 2008: 182). The 2004 establishment of the EU's external border agency, Frontex, further attests to the prioritisation of border control. Though countries have not ceded decision-making authority to an EU institution through the creation of Frontex, this represents a change in policy implementation in individual and communal border control (Neal 2009). The establishment of rapid border intervention teams, and a number of missions in the Mediterranean where FRONTEX's role was less passive, demonstrate an independent and occasionally lead role (Carrera, den Hertog and Parkin 2013), exemplifying first order governance, even if not hierarchically imposed. However, a 2012 ECJ decision striking down a sea borders operation rule that passed without EP approval indicates the intention of these two EU institutions to remain relevant within the governance structure. The decision to increase Frontex's budget by 50 per cent from one year to the next (Mathiason, Parsons and Jeory 2015) justifies critiques concerning the privileging of security within EU migration policy (Huysmans 2000), but it also makes a point about when high politics areas may still be amenable to integration. Here, the member states have granted the EU authority even in an immensely salient high politics area, but in terms of setting the agenda, governance remains in the hands of the member states in the area of irregular migration.

## CONCLUSION

Gauging the impact of EU migration policy is complicated. Unlike regional funds or monetary union, migration is not an entirely new programme existing only at the European level. Each member state already had a national regime in place before it was agreed that EU competence should be introduced in this area. Furthermore, immigration and asylum were not initially situated in the first pillar where supranational institutions wielded the authority to drive policy and its implementation. As a result, governance over these issues is subject to constant negotiation and renegotiation, leading to a fairly incremental process of integration where the member states still enjoy substantial discretion in determining the specifics of policy and how to implement it locally.

That said, this piece has argued that since the EU assumed authority over this issue with the signing of the Maastricht Treaty, one can identify three periods with different governance patterns. The first

period, from 1994 to 1999, exhibited intergovernmental governance, with the Commission limited to floating ideas and plans, the ECJ and EP essentially outside the process, and the JHA Council fostering coordination and setting long term goals. The second period began following an institutional change that transferred several migration-related policy areas into the first pillar where the Commission shared agenda-setting powers with the member states. This second period from 1999-2005 witnessed a cautious Commission pushing forward legislation in a hit or miss fashion, with the EP limited to consultation at best and the ECJ still effectively marginalised. During the third period, since 2005, the Commission has increased its assertiveness, buttressed at times by an assertive EP. Since 2009, essentially all areas of migration have been subject to EU regulation, with the EP co-deciding on legislation, while the Court develops a body of cases generally limiting member state discretion. Together with the increased relevance of EU agencies, this has produced a style of governance that is neither predominantly intergovernmental nor supranational, yet where multilevel and experimental governance are not prominent either.

In areas such as labour migration and family reunion, the legislation issued has left considerable discretion to the member states, and the EU institutions have respected this. However, in the areas of irregular migration and specifically asylum, there has been greater supranational involvement, whether through the insertion of EU agencies, or through legislation and court rulings that genuinely oblige countries to change their domestic rules. In any case, traditional distinctions between high and low politics prove of limited analytical value unless one moves beyond the mere question of whether integration occurred to examine whether governance affords the member states continued policy discretion or not, and even in such cases, there has been greater surrender of sovereignty in supposedly high politics areas such as asylum than in areas such as high skilled migration with reputedly low salience.

Moving forward, with the Commission now empowered not only to monitor compliance but also to enforce it in tandem with the Court, the question is how quickly it becomes more assertive. Part of that answer may rest upon the impact of the 2015 refugee crisis, in which the Commission achieved an agreement on burden sharing that was reached over the objections of several countries. Some member states, such as Hungary and Slovakia, have vowed to ignore the obligations that have been imposed on them. It remains to be seen whether this moment engenders greater communitarisation, such that it becomes customary to make decisions via qualified majority voting, or whether countries respond by refraining from extending the governance opportunities of the supranational actors or passing legislation that is arrived at without consensus.

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## REFERENCES

Acosta, D. (2009) 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law*, 11(1): 19-39.

Baldaccini, A. (2009) 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', *European Journal of Migration and Law*, 11(1): 1-17.

Barnard, C. (2010) *The Substantive Law of the EU: The Four Freedoms* (3rd ed.). New York: Oxford University Press.

Boswell, C., and Geddes, A. (2011) *Migration and Mobility in the European Union*. New York: Palgrave Macmillan.

Carrera, S., den Hertog, L., and Parkin, J. (2013) 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability *versus* Autonomy?', *European Journal of Migration and Law*, 15(4): 337-358.

Caviedes, A. (2004) 'The Open Method of Coordination in Immigration Policy: A tool for prying open Fortress Europe?', *Journal of European Public Policy*, 11(2): 289-310.

Caviedes, A. (2008) 'Troubled Transnational Interest Representation: Diverging National and EU-level Social Partner Preferences in Immigration Policy'. International Studies Association Annual Conference, San Francisco, CA, March 26-29.

Caviedes, A. (2010) *Prying Open Fortress Europe: The Turn to Sectoral Labor Migration*. Lanham, MD: Lexington Books.

Cerna, L. (2013) 'Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card initiative', *Policy Studies*, 34(2): 180-200.

Chang, M. (2016) 'The (Ever) Incomplete Story of Economic and Monetary Union', *Journal of Contemporary European Research*, 12(1): 486-501.

De Zwaan, J. (2012) 'The New Governance of Justice and Home Affairs: Towards Further Supranationalism', in S. Wolff, F. Goudappel, and J. de Zwaan (eds) *Freedom, Security and Justice after Lisbon and Stockholm*. The Hague: Asser Press: 7-26.

Dominguez, R. (2016) 'The EU Governance System of External Relations', *Journal of Contemporary European Research*, 12(1): 518-531.

European Commission (2001) 'Communication on an open method of co-ordination for the community immigration policy', COM (2001) 387 final, July 11.

European Commission (2005) 'Green paper on an EU approach to managing economic migration', COM (2004) 811 final, January 11.

European Commission (2008) 'Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to Family Reunification', COM (2008) 610 final, October 8.

European Commission (2009) 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM (2009) 313 final, July 2.

European Commission (2011) 'Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents', COM (2011) 585 final, September 28.

Favell, A. and Recchi, E. (2009) 'Pioneers of European integration: an introduction', in A. Favell and E. Recchi (eds) *Pioneers of European Integration: Citizenship and Mobility in the EU*. Northampton, MA: Edward Elgar: 1-25.

Freeman, G. P. (1995) 'Modes of Immigration Politics in Liberal Democratic States', *International Migration Review*, 29(4): 881-902.

Geddes, A. (2008) *Immigration and European Integration: Beyond Fortress Europe?* Manchester: Manchester University Press.

Gehring, J. (2013) 'Roma and the Limits of Free Movement in the European Union', in W. Maas (ed) *Democratic Citizenship and the Free Movement of People*. Boston, MA: Martinus Nijhoff Publishers:143-174.

Groenendijk, K. (2014) 'Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach', *European Journal of Migration and Law*, 16(3): 313-335.

Guiraudon, V. (2000) 'European Integration and Migration Policy: Vertical Policy-making as Venue-Shopping', *Journal of Common Market Studies*, 38(2): 251-71.

Hoffmann, S. (1966) 'Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe', *Daedalus*, 95(3): 862-915.

Huddleston, T. (2012) *Family reunion: Confronting Stereotypes, confronting policies. MPG EU Family reunion briefing, updated.* Migration Policy Group. Available online: http://www.migpolgroup.com/public/docs/family reunion briefing 2012 final edited.pdf [accessed June 13 2015].

Huysmans, J. (2000) 'The EU and the Securitization of Migration', *Journal of Common Market Studies*, 38(5): 751-78.

Kaunert, C., and Léonard, S. (2012) 'The development of the EU asylum policy: venue-shopping in perspective', *Journal of European Public Policy*, 19(9): 1396-1413.

Kooiman, J. (2003) *Governing as Governance*. London, UK: Sage.

Lavenex, S. (2015) 'Justice and Home Affairs: Communitarization with Hesitation', in H. Wallace, M. A. Pollack, and A. R. Young (eds) *Policy-Making in the European Union* (7th ed). New York, NY: Oxford University Press: 367-387.

Lopatin, E. (2013) 'The Changing Position of the European Parliament on Irregular Migration and Asylum under Co-decision', *Journal of Common Market Studies*, 51(4): 740-755.

Luedtke, A. (2006) 'The European Union dimension: Supranational integration, free movement of persons, and immigration politics', in C. A. Parson and T. M. Smeeding (eds) *Immigration and the Transformation of Europe*. New York: Cambridge University Press: 419-41.

Luedtke, A. (2011) 'Uncovering European Union Immigration Legislation: Policy Dynamics and Outcomes', *International Migration*, 49(2): 1-27.

Maas, W. (2005) 'The Genesis of European Rights', *Journal of Common Market Studies*, 43(5): 1009-25.

Maas, W. (2007) *Creating European Citizens*. Lanham, MD: Rowman and Littlefield Press.

Maas, W. (2016) 'European Governance of Citizenship and Nationality', *Journal of Contemporary European Research*, 12 (1): 532-551.

Marks, G., and Hooghe, L. (1996) 'European Integration from the 1980s: State-Centric v. Multi-level Governance', *Journal of Common Market Studies*, 34(3): 341-378.

Mathiason, N., Parsons, V., and Jeory, T. (2015) 'Frontex to get budget hike after refugee failures', *euobserver.com*, September 2. Available online: https://euobserver.com/justice/130334 [accessed September 3 2015].

Menz, G. (2011) 'Stopping, Shaping and Moulding Europe: Two-Level Games, Non-state Actors and the Europeanization of Migration Policies', *Journal of Common Market Studies*, 49(2): 437-462.

Nielsen, N. (2015) 'EU court actions on asylum to multiply', *euobserver.com*, September 1. Available online: https://euobserver.com/justice/130072 [accessed September 2 2015]

Neal, A. (2009) 'Securitization and Risk at the EU Border: The Origins of FRONTEX', *Journal of Common Market Studies*, 47(2): 333-56.

Papademetriou, D. (1996) *Coming Together or Pulling Apart? The European Union's Struggle with Immigration and Asylum*. Washington DC: Carnegie Endowment for International Peace.

Post, D., and Niemann, A. (2007) 'The Europeanisation of German asylum policy and the "Germanisation" of European asylum policy" the case of the "safe third country" concept'. European Union Studies Association, Tenth Biennial Conference, Montreal, Canada, May 17-19.

Quintin, O. (2000) 'Introduction', in J. Carlier and M. Verwilghen (eds) *Thirty years of free movement of workers in Europe: proceedings of the conference, Brussels, 17 to 19 December 1998*. Luxembourg: Office for Official Publications of the European Communities: 9-13.

Ripoll Servent, A. (2011) 'Co-decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the 'Returns' Directive', *Journal of Contemporary European Research*, 7(1): 3-22.

Ripoll Servent, A., and Trauner, F. (2014) 'Do supranational EU institutions make a difference? EU asylum law before and after 'communitarization'', *Journal of European Public Policy*, 21(8): 1142-62.

Schibel, Y. (2005) 'Transposing EU Law on Legal Migration', *European Journal of Migration and Law*, 6(4): 395-404.

Stone Sweet, A., and Sandholtz, W. (1997) 'European integration and supranational governance', *Journal of European Public Policy*, 4(3): 297-317.

Tömmel, I. (2016) 'EU Governance of Governance: Political Steering in a Non-Hierarchical Multilevel System', *Journal of Contemporary European Research*, 12(1): 406-423.