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European Immigration and Asylum Policy

Scope and Limits of Intergovernmental Europeanization

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Introduction

The European Union's migration policy has evolved rapidly over the past two decades. This should actually have come as a surprise to many observers. Migration policy — understood here to encompass asylum, refugee and immigration policy — is generally seen as an essential matter of national sovereignty. This is reflected by the intergovernmental policy-making procedures of European migration policy. But whereas intergovernmentalism is usually associated with stagnating European integration, migration policy — as a common European policy — has evolved nonetheless.

It shall be claimed that the unlikely development of the European policy domain results from a process I shall call "intergovernmental Europeanization". At its root is dense intergovernmental cooperation between various levels of government. Creating shared identities and problem definitions among administrators and members of executive agencies, dense intergovernmental cooperation facilitates the issuance of harmonized policies and European solutions, even if supranational governance is absent.

This argument shall be embedded in an analysis of the policy mode of European migration policy. The notion of a "policy mode" (Wallace & Wallace 2000) — or of "modes of Europeanization" (Scharpf 2000) — has been provided as a conceptual alternative to the grand theories of European integration, such as "intergovernmentalism" and "neofunctionalism", that have traditionally given orientation (i.e. a theoretical framework) to research on European integration. Distinguishing policy modes means differentiating idealized patterns of policy-making with specific features that determine the development of a policy domain. This approach of mid-range theorizing does not claim to offer a general theory for European integration.

In order to outline the policy mode of European migration policy and to develop the argument of intergovernmental Europeanization, the following account will deal consecutively with (a) the big intergovernmental bargains setting the

"constitutional" framework of migration policy-making, (b) the regular policy-making within this frame, and (c) the intergovernmental cooperation that takes place below the ministerial level. The latter level of interaction prepares (d) the argument of intergovernmental Europeanization that shall finally (e) be tested by looking at recent cases of decision-making. However, to present the frame of migration policy, the analysis shall begin with an account of the international bargains.

The Constitutional Framework of Migration Policy

European migration policy is essentially a by-product of the elimination of border controls between EU member states. Eliminating border controls was a vision deeply rooted in the project of European integration: The tearing down of border gates was a symbolic act of the European movement in the immediate aftermath of World War II, and is a common starting point of narratives on European unification. But although various measures were taken to facilitate migration within the European Community, free movement policies did not include lifting border controls until the 1980s.

The issue re-emerged on the European policy agenda in the mid-1980s. To revive stagnating European integration, plans for lifting border controls between the member states of the European Community were considered. The project had as its proponents two powerful heads of state: German chancellor Helmut Kohl and French president François Mitterrand pushed for it from 1984 onwards. Both were concerned that citizens in Europe increasingly lacked emotional attachment to the idea of a united Europe. A symbolic and tangible step such as doing away with bothering waiting times and controls at borders was seen as a way to convince Europeans that "Brussels" had immediate benefits for them.

Due to staunch opposition from Great Britain and Ireland, the plan was only vaguely mentioned in the Single European Act of 1986, and without an outline of a European Community policy. But Germany and France stuck to their plans, and as an alternative to a Community policy, an international treaty, the Schengen

Agreement of 1985, was concluded outside the framework of the European Community. Envisaging the "gradual abolition of controls at the common frontiers", it was signed by Belgium, the Netherlands, Luxembourg, France and Germany.

The signatories of the agreement agreed to eliminate border controls and to allow citizens to travel freely within their common territory. At the same time, so-called flanking measures were foreseen to coordinate and strengthen control of the common external borders. The signatory states considered this a necessary correlate to the loss of control (i.e. reduced security) the elimination of their borders would entail. These flanking measures turned out to be the nucleus for the European migration policy (understood to be a policy dealing with migration across external borders) that has emerged since.

Although this may appear as a spill-over according to neo-functionalist logic, the first step of European migration policy quite clearly followed an intergovernmental pattern. It was a Franco-German initiative and the political will behind it that was the starting point of a European migration policy. The vetoes of Britain and Ireland correspond to the intergovernmental notion that no state can be bound to a common policy without its consent.

The 1985 Schengen Agreement did not yet spell out concrete measures for enforcing the common boundary and was indeed rather a declaration of will. To implement the Schengen project, the path of international negotiations was pursued further, leading to the so-called Schengen Convention on Implementation in 1990. It entailed (a) intensified controls of the external borders, in accordance with uniform standards (Art. 3-8); (b) a harmonization of visa and entry regulations (Art. 9-27); (c) the creation of a "Schengen Information System", containing data on persons; and (d) a co-ordination of asylum policies by laying down rules for the responsibility for asylum claims (Art. 28-38). As many technical points still had to be clarified among the governments of the signatory states, it took until 1995 before border controls between the initial signatories of the Schengen Agreement

and of the Convention and the states that had acceded in the meantime — Spain and Portugal — were abolished (Hailbronner/Thiery 1998).¹

There was yet another process pointing towards a European migration policy that followed the road of concluding international agreements external to the Community framework. As indicated, the Single European Act mentioned migration affairs only in the most general language. Nevertheless, an intergovernmental ad hoc committee associated with the Council of the European Union was established. In the so-called "High-Level Working Group on Asylum and Migration", there was agreement on the need to reduce the political and social burdens that asylum seekers were said to incur. Negotiations on an international agreement with rules for reaching this aim were taken up.

The result was the so-called "Agreement on the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities" — the "Dublin Agreement", in short — which was signed in June 1990. Its central provision was that any asylum claim should be dealt with only by the European state first entered by an asylum-seeker. When the Dublin Agreement came into effect in September 1997, its rules supplanted the provisions of the Schengen Convention concerning the state responsible for dealing with asylum claims.

The Schengen and the Dublin Agreement, being the result of international negotiations and having been reached without the involvement of supranational actors, were clearly concluded in an intergovernmental fashion. The ad hoc cooperation of a group of European states on the control of external borders and asylum was instituted. Very soon, this cooperation was to be integrated into the framework of the European Union, as this issue was included, at the request of Germany, in the agenda of the Intergovernmental Conference (IGC) negotiating the Treaty of Maastricht.

European states agreed that the ad hoc cooperation they had begun should be done on a more continuous basis in order to avoid inefficiency. In addition, Germany hoped that an integration of asylum affairs into the European Union framework

might lead to a shared responsibility for asylum-seekers, i.e. to a more equal distribution among states. Pushing for a full supranationalization of migration affairs, it gained the support of Belgium, Italy, Greece, the Netherlands, Spain and Ireland. However, Great Britain strongly insisted on migration remaining an intergovernmental matter.

Due to the need for consensus, only the lowest common denominator was achieved, which was the Justice and Home Affairs pillar of the European Union with its intergovernmental decision procedures. The competences included into the Treaty on the European Union were an inclusion of what had already been dealt with external to the European Union framework before: asylum policy; the control of the external borders; and policy regarding third-country nationals. The only new issue inserted was that of combating unauthorized immigration (Art. 62, ex Art. 73j). The result of Maastricht thus reflects the member states' desire to create a greater continuity of cooperation. It follows, however, an intergovernmental pattern.

During negotiations at the IGC when preparing the 1997 Treaty of Amsterdam, two issues were at the core of negotiations. Pro-European federalists — Belgium, the Netherlands and Luxembourg, in particular — wanted to overcome intergovernmentalism and to fully integrate asylum and immigration matters into the supranational first pillar of the European Union, i.e. to communitarize it and to introduce qualified majority voting (QMV). Second, there was a need to prepare the European Union for eastern enlargement. Thus the proposal was made to incorporate the Schengen legislation into European Union law, so that accession candidates would have to adopt and implement that body of law upon accession.

Great Britain, Ireland and Denmark rejected these proposals, insisting on their sovereign control over borders. Due to the need for unanimity, an agreement had to be reached with these persistent objectors. As a result, "flexible integration" was necessary to make treaty reform possible at all. Britain, Ireland and Denmark reserved for themselves the privilege of withholding themselves from the communitarization of EU migration policy and of opting in when they wanted to.

This opened the way for the inclusion of the Schengen *acquis* into EU law, requiring accession candidates to accept this body of law.

When negotiations went beyond this point and dealt with the communitarization of migration policy and QMV, it became clear that other states were not the outright federalists they had appeared to be when more reluctant states were still involved. Most importantly, Germany resisted QMV in immigration and asylum policies, fearing that European decisions taken without its consent might increase the number of asylum-seekers arriving in Germany.

Nevertheless, the 1997 Treaty of Amsterdam achieved the transfer of asylum, visa and immigration affairs from the third and intergovernmental pillar of the European Union to the first pillar with its community method. The formula of creating "an area of freedom, security and justice" was introduced as a keyword, indicating that security and restriction were at the heart of the EU's migration policies. The EC Treaty now anticipated far-reaching measures in the field of asylum and migration policy, including minimum standards for the acceptance of asylum-seekers and refugees, as well as for issuing permanent visas and maintaining family integrity. As was acknowledged by the Working Group on Freedom, Security and Justice at the European Convention, in immigration policy, "the current legal bases (...) in principle cover the full breadth of the immigration domain" (European Convention 2002).

At first glance, there seems to have been a bold transfer of powers. But when looking at provisions in more detail, the changes appear more modest. The EC Treaty includes several safeguards that allow European governments to resist unwanted developments. Generally, there is a time limit of five years, during which policies in the various fields detailed in the treaty need to be adopted. But issues of particular concern to national sovereignty, or ones that might incur burdens — distribution of refugees, permanent immigration, non-EU nationals' rights — are excluded from the five-year period (Art. 64). In addition, a clause was inserted stating that "the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security" (Article 64, 1) shall be untouched. Most importantly, there are fairly

complex provisions concerning voting requirements, which shall be discussed in the next section.

To sum up the development of the framework of European migration policy, it quite clearly corresponds to an intergovernmental pattern. As a matter of fact, there are no visible signs of a self-sustaining dynamism, or of spill-over. On the contrary, every step of integration has quite deliberately been made by the states involved. This interpretation is underscored in particular by the abstention of those states that did not consider the integration of this policy field as being in their interest.

Such an interpretation, in line with the findings of Andrew Moravcsik (1998), is of course not too surprising. It is almost tautological to state that intergovernmental bargaining follows an intergovernmental pattern. This does not, however, preclude the possibility that regular decision-making in the big intergovernmental bargaining sessions created a dynamic towards an ever-increasing Europeanization of this policy domain.

Regular Decision-Making

Outlining his idea of four basic "modes of Europeanization", Fritz Scharpf notes that the mode of "intergovernmental negotiations" is fundamental for Treaty revisions, but that it is also "approximated in those policy areas in the first pillar where the Council of Ministers must still decide by unanimity" (Scharpf 2000: 13). Tracing how regular decision-making on European migration policy has developed will demonstrate that in the area of migration policy, decision-making has — until now — generally remained intergovernmental.

During the negotiations concerning the 1990 Schengen Implementation Convention, there was an awareness that decisions would have to be taken on a continuous basis. At the same time, the states involved shared a concern that the issue at stake — the control of the external borders — was crucial to their sovereignty. To maintain leverage, it was not a supranational decision-making body

that was instituted, but a strictly intergovernmental one operating under a rule of unanimity, the "Schengen Executive Committee", made up of the representatives of member states (Art. 131 and 132 of the Convention). The Schengen Executive Committee continued to operate independently of the European Union after the introduction of competences on migration affairs in the Treaty of Maastricht, but was integrated into the Community structure with the Treaty of Amsterdam.

The Justice and Home Affairs pillar of the European Union worked in an intergovernmental fashion as well. The decision-making body for migration policy was the Council of Ministers, representing member states' interests. The European Commission was assigned only a very limited role in the policy-making process. As one European Commission official put it: "Some of [the member states] are almost pathological in their determination to keep the Community institutions out of the process ..." (Tomei 2001: 56). The European Parliament's role was limited to information rights, and the European Court of Justice did not obtain jurisdiction.

Qualified majority voting was planned for only very limited areas of a more technical nature. As the unanimity requirement generally remained, states retained a dominant position in decision-making, so that decision-making in fact remained intergovernmental. This was celebrated by Britain's (then) prime minister, John Major: "At Maastricht we developed a new way, and one much more amenable to the institutions of this country — co-operation by agreement between governments, but not under the Treaty of Rome." (cit. Geddes 2000: 93)

Maastricht retained intergovernmental decision-making in general, though with one qualification: Article 100c was inserted into the European Community Treaty, which established the regular community procedure for "issuing a list of countries whose nationals must be in possession of a visa when crossing the external borders": The list was to be prepared by the European Commission, to be discussed in the European Parliament and to be decided upon by the Council of Ministers, thus giving supranational actors a say in this field of the policy-making process. Beyond that, Article 100c (6) would have contained the possibility to

transfer further issues to Community decision-making by a unanimous Council vote, but this chance was not exploited (Boer/Wallace 2000: 499f).

It was the Treaty of Amsterdam that brought about major changes by integrating issues of migration policy into the European Community Treaty. With the transfer of areas of jurisdiction into the first pillar of the European Union, supranational actors entered the field. The European Commission was assigned its usual role to initiate policies, the European Parliament gained the right to be heard in the policy-making process and the European Court of Justice obtained jurisdiction, albeit limited in certain respects. As mentioned earlier, voting provisions were fairly complex and required, on a case-to-case basis, unanimity, QMV, or the cooperation procedure of Article 251 ECT (table 1). In most cases, a move to the cooperation procedure is foreseen in 2004, but this depends on an unanimous decision in several contested policy areas, so that it is fairly uncertain whether it will occur. For the time being, unanimity continues to be the general rule for decision-making.

This leaves the European Commission in a weak position vis-à-vis the Council and affects the shape of Community policy. The Commission is an adherent of a liberal and inclusive immigration policy. Its open standpoint is founded on the assumption that immigration is an economic and demographic necessity. In its Communication on immigration policy presented in 2000, the Commission expressed the conviction that migration will generally have positive effects, if properly regulated, and that it "believes that channels for legal immigration to the Union should now be made available for labor migrants" (Commission 2000a).

Apart from economic considerations, the Commission's positive approach to immigration is based on an acceptance of multiculturalism. As António Vitorino, the EU's Justice and Home Affairs Commissioner put it: "It is essential to create a welcoming society and to recognize that integration is a two-way process involving adaptation on the part of both the immigrant and of the host society. The European Union is by its very nature a pluralist society enriched by a variety of cultural and societal traditions [...]. There must, therefore, be respect for cultural and social differences" (Vitorino 2001: 34). The Commission pursues, generally

speaking, an open immigration policy aiming at making the European Union attractive to highly-skilled immigrants.

The member states in the Council of the European Union, at least most of them, usually do not share the Commission's liberal standpoint. Due to unanimity requirements, a frequent pattern of migration policy-making has been that the standards of a fairly liberal proposal by the Commission are lowered during negotiations in the Council of Ministers. The member states' preferences, by simplifying matters, often appear to converge towards using European Union policy-making to maximize security and minimize social and economic burdens.

Dense Intergovernmental Cooperation

Along with and extending beyond meetings of heads of states at European Council summits, and of ministers in the Justice and Home Affairs-Council, a dense web of intergovernmental cooperation on migration policy has evolved. High-ranking officials from national ministries meet regularly within the substructure of the Council, there is a constant exchange of information between national administrations, and practitioners from executive agencies meet on various occasions.

Comparable to other policy domains, the decision-making of the Council of Ministers on migration affairs is prepared by meetings of the Committee of Permanent Representatives (COREPER). Operating under COREPER, the "Strategic Committee on Immigration, Frontiers, and Asylum" prepares Council decisions. Most of its substantial work is done by seven working parties (on Migration, Expulsion, Visa, Asylum, the "Centre for Information, Reflection and Exchange on Asylum" — Cirea, the "Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration" — Cirefi, and Frontiers). Except from COREPER, where staff from the member states' foreign ministries is present, it is members of the national ministries of the interior who are present at meetings dealing with migration policy.

Apart from these intergovernmental dealings within the substructure of the Council, national administrations and executive agencies have institutionalized contacts in several additional ways. From 1992 onwards, several instruments for information exchange and personal contacts between national administrations have been created. As their existence may have repercussions for policy formulation, they shall be described briefly.

To gather, exchange and disseminate information and to compile documentation on all matters relating to asylum, the "Centre for Information, Reflection and Exchange on Asylum" (Cirea) was founded by a Council decision in June 1992. More than just providing information services, it issues joint reports on countries of origin of asylum-seekers, and is a forum for the exchange of information on asylum-seekers' travel routes and national asylum law. The overall aim is a harmonization of asylum practice through an exchange of information: for example, as was said in the Council's directive on guidelines on joint reports on third countries: "The ministers responsible for immigration have on several occasions spoken of the desirability of drawing up joint situation reports on certain third countries of origin of asylum-seekers. They believe this to be essential if a convergent and eventually harmonized analysis of asylum applications is to be obtained" (Commission 1996). CIREA assembles members from national ministries and executive agencies eight to ten times a year in Brussels.

The 'Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration' (Cirefi), founded in 1992 as well, serves a similar purpose. It collects and analyses information on legal and illegal immigration, on unlawful residency, the entry of aliens through facilitator networks, the use of false or falsified documents and the executives' decisions. Since May 1999, Cirefi offers an early warning system for the transmission of information on illegal immigration and facilitator networks. The Centre assembles experts from the member states and meets every month.

In March 1998, the EU Council of Ministers adopted "Odysseus", a program of training, exchange and cooperation in the field of asylum, immigration and the

crossing of external borders. The program's general objective was to extend and strengthen cooperation. Public or private institutions, non-governmental organizations, research institutes, universities and training bodies could take part in the program. The Odysseus program was continued in 2002 under the name ARGO ("Action Programme for Administrative Cooperation in the Fields of External Borders, Visas, Asylum and Immigration"). Major objectives are to promote cooperation among national administrations responsible for implementing Community rules, and to ensure that proper account is taken of the Community dimension in their actions. The program includes training measures such as the elaboration of harmonized curricula, staff exchanges, the exchange of best practice, and the organization of conferences and seminars.

In addition, two Community-wide information systems have been established. To facilitate effective control over the external borders of the signatory states of the Schengen Convention, the "Schengen Information System" (SIS) was created. It is a database used by the police and by consular agents to obtain information on individuals who are checked at borders or who apply for a visa, as well as on goods thought to be lost or stolen. Another information system, called Eurodac, is related to the Dublin Convention. The Dublin Convention contains rules for determining the state responsible for examining an asylum application. Thus a mechanism for the comparison of the fingerprints of asylum applicants needed to be established to identify aliens who have already applied for asylum in another member state. Eurodac's central unit is a computerized central database that became operational on 15 January 2003.

The instruments described lead to contact and discussion among administrators and practitioners in the field of asylum, visa and border-control affairs. Officials concerned with regular immigration are as yet seldom involved in networks of dense intergovernmental cooperation. However, the Commission has presented respective proposals in its statement on an open method of co-ordination.

To promote "co-operation, exchange of best practice, evaluation and monitoring", the Commission intended to make "arrangements including the setting up of

committees and working groups — with senior officials, experts in immigration matters from the member states, representatives of the social partners and of local and regional authorities, experts on particular topics under review and with other representatives of civil society." This was considered conducive to achieving convergence of practice and procedure, and "to achieve a gradual approach to the development of an EU policy, based, in a first stage at least, on the identification and development of common objectives to which it is agreed that a European response is necessary" (Commission 2001a).

The open method of coordination is a part of a two-tiered approach towards a European immigration policy (Commission 2001d) and was meant to supplement the legislative development of a European immigration policy. However, only very limited steps have yet been taken to implement the open method and to create contacts among officials in the field of regular immigration.

European migration policy in general follows a policy mode of intergovernmental cooperation. But while there is "dense intergovernmental cooperation" on visa, asylum and border-control affairs, cooperation among national officials on regular immigration remains sporadic to date. It shall be suggested in the next section that the differences in the degree of cooperation among national governments in these subfields of European migration policy may account for variations in progress.

Intergovernmental Europeanization?

The idea that continuous personal interaction creates shared identities and problem definitions that facilitate coordinated problem solutions refers to the concept of "epistemic communities" (Haas 1992). With respect to European integration, more elaborate lines of reasoning have been developed by recent institutionalist approaches to European integration (Stone Sweet and Sandholtz 2001).

Formulated for the case at hand, the argument can be stated as follows: Once initiated, continuous cooperation of national administrators in the field of

migration policy or its subfields leads to shared knowledge, problem definitions, and shared identities. The sharing of knowledge, problem definitions and identities facilitates the finding of European solutions. As administrators are a major source of input for the policy-makers responsible, their cooperation will facilitate European decision-making. Due to a dense cooperation of governments at various levels, the issuing of further policies proceeds smoothly. The expectation is a steady Europeanization of migration policy — at least in those fields with dense cooperation.

Verónica Tomei has in fact argued — in her analysis of European migration policy — that due to an "intrusion of the European discourse in the national formulation of policies" (Tomei 2001: 135) there is a "creeping communitarization" (Tomei 2001: 137). Among those concerned with migration policy, there are cross-national networks of officials where professional interests dominate national interests (Tomei 2001: 127). As a result, migration policies that have traditionally been formulated independently have increasingly converged.

One important aspect of this mechanism I shall call "intergovernmental Europeanization" is its implication that progress in a policy domain is not dependent on the supranational actors' entrepreneurship and on relaxed voting requirements in the Council like QMV. Quite the contrary — given there is dense intergovernmental cooperation — one predicts a convergence of national policies towards a Europeanized policy, when the mode of governance is intergovernmental and voting operates under unanimity.

It is not intended here to delve into the more sophisticated details of this theory, but to gather evidence on whether the concept of intergovernmental Europeanization is empirically valid. For that purpose, two recent cases of migration policy making shall be examined. Intergovernmental Europeanization would predict that policy progress will be steady in areas with dense intergovernmental cooperation, while it is expected to stagnate in the absence of it. The two cases looked at here — not claiming to offer a systematic test of the theory, but rather to explore it — concern a directive on temporary protection, and

a directive on family reunification. Both directives were the first to be decided in their respective fields. More systematic tests of the theory will be possible when the whole set of the proposed Community legislation is decided upon.

Asylum and refugee policy: The Directive on Temporary Protection

"Temporary protection" is a new instrument for dealing with mass flows of refugees as they appeared in the 1990s, most importantly during the Kosovo crisis. Traditional mechanisms of refugee protection proved incapable of coping fast enough with these situations of mass influx, as they deal with refugees' claims on an individual basis. In order to be better equipped for dealing with huge migratory flows in crisis situations, there were negotiations for creating a European instrument for a coordinated response of European states.

In May 2000 the Commission presented a proposal regarding temporary protection which was decided upon by the Council in July 2001. It is not possible to reconstruct in detail how changes to the proposal were effectuated, as transcripts of negotiations in the Council of Ministers are not publicly available. However, by way of a comparison of the Commission proposal and the directive finally adopted, one may recognize the thrust of politics in the Council.

First of all, the Council broadened the scope of applicability of temporary protection. The proposal limited temporary protection to two years, and it was meant to apply to situations when there was indeed a mass influx and the asylum system was unable to process the number of applications. The final directive extended temporary protection to three years, to situations with an *imminent* influx, and it was modified in order to apply to situations *without* an overburdening of asylum systems. This broadening of scope reduces states' burdens to engage in the more demanding refugee protection procedures under the Geneva Convention.

Major changes were made concerning family reunion. The Commission proposal foresaw family reunification (a) with the extended family, and (b) with family members who were dependent, (c) had undergone traumatic experiences or (d) who needed special medical treatment. If scattered across member states, families

would have had the choice to reunify in any member state. The final directive narrowed this down to a reunification of the nuclear family, and left the choice of the place of reunification to member states' discretion.

With respect to a return to the country of origin at the end of temporary protection, the Commission proposal referred to the European Convention on Human Rights and to Art. 33 of the Geneva Convention. A "long-term, safe and dignified return" was mentioned as condition. The Council deleted the reference to those international instruments and used the down-scaled formulation "safe and durable return". A clause mentioning enforced return *expressis verbis* was inserted and discretion granted, whether children would be allowed to complete their school year before a family's return.

Other provisions inserted into the directive by the Council, all of which had not been contained in the proposal, allowed (a) charging for issuing visas, (b) for discrimination of persons under temporary protection vis-à-vis refugees concerning access to employment, and entailed (c) the provision that access to asylum procedures should be granted only after the expiration of temporary protection.

Highlighting these modifications of the Council shows that the Council's negotiations made the directive much more restrictive. It left more discretion to the member states, but potentially lowered standards of protection. Human-rights organizations' suspicions that "temporary protection" may undermine standards of refugee protection were fed, and as one commentator remarked, the final directive "does not show a commitment to high standards among the Member States" (Peers 2002: 90).

On the one hand, the case shows that the Commission is a relatively weak actor vis-à-vis the Council, as far-reaching changes have been made to its proposal. On the other hand, among member states, there has been a convergence towards certain — albeit limited — standards. They were able to reach a substantial result, even if the issue had its controversial side with respect to burden sharing.

Immigration Policy: The Directive on Family Reunification

The Treaty of Amsterdam envisaged legislative work relating to long-term visa and residence permits, family reunion and rights of third-country nationals. After protracted negotiations including the rejection of a first version of a Commission proposal by the Council, there has been political agreement on a directive on family reunification. It deals with the question of who are eligible members for family reunion of a citizen of a non-EU state who is living in the EU, and under what conditions his relatives may enter. The final version of the regulation has not yet been formally decided, but comparing the original Commission proposal of December 1999, the amended proposal of May 2002 (that integrated the Council's modifications) and what is known about the final result of Council negotiations, points to a very diluted result.

In the explanatory memorandum to the first proposal for the regulation on family reunion, the Commission put the proposed legislation in the wider context of the emerging immigration policy of the European Union. The Commission expressed the conviction that harmonizing immigration policies must entail the restriction of "the possibility that the choice of the Member State in which a third-country national decides to reside will be based on the more generous terms offered there" (Commission 2000c: 9). Due to some member states' resistance in the Council, most staunchly advocated by Germany, the directive had to be modified substantially. Acknowledging that "negotiations in the Council particularly in May 2000 and May and September 2001, were tricky and success did not ensue" (Commission 2002b: 2), the amended proposal the Commission presented was watered down in many respects.

The regulation concerns third-country nationals, i.e. immigrants who are not nationals of a member state of the European Union, who want to reunify with relatives at their place of residence in the EU.

A crucial point in need of regulation is the question of who are the family members of a third-country national eligible for family reunification. The Commission's original proposal obliged member states to permit the entry and residence of an

applicant's spouse, the family's minor children, and the materially dependent relatives in the ascending line of the applicant (Art. 5). In the amended proposal, the obligatory authorization of entry and residence was restricted to an applicant's spouse and children; the admission of a materially dependent applicant's parents and of dependent adult unmarried children was left to the discretion of the member states (Art. 4). But due to a provision leaving it to the member states "to adopt or retain more favorable provisions for persons to whom it applies" (Art. 3, 5), it is basically up to the member states to decide whom to admit.

The question whether an applicant's minor children may be *denied* family reunification if a certain age is exceeded, was particularly contested. Under pressure from Germany, the derogation was inserted that "where a child is aged over 12 years, the Member State may [...] verify whether he or she meets a condition for integration", thus giving room for the German migration law debated at that time to restrict possibilities for children older than 12 years to reunify with their family. Before political agreement was reached during the meeting of Justice and Home Affairs Council of Ministers on 28 March 2003, another derogation was inserted. Now, member states may request that "the applications concerning family reunification of minor children have to be submitted the age of 15, as provided for by its existent legislation on the date of implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorize the entry and residence of such children on grounds other than family reunification."

Other points not contained in the Commission's original proposal were that a member state "may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members" (Art. 8, 2), and permission to charge a fee for issuing visas for family reunion (Art. 13). Certain parts of the directive have maintained their binding character, in particular as far as family reunification of refugees and access to employment and education are concerned. But the flexibility and derogations introduced into the proposal imply that the Commission's original

intention to harmonize family reunification and to establish a first building block of genuine European immigration legislation has not been reached.

Acknowledging this implicitly, the Commission adopted a strategy to prevent member states from moving still further away from common standards. First, there is a standstill clause that ensures that member states do not use the derogations if their legislation at the time of adoption of the Directive did not already provide for them (Art. 3, 6). The objective is to ensure that the Directive does not operate paradoxically as a source of fresh divergences between the member states. Second, to keep the harmonization process going, a review of the regulation was envisaged (Art. 19). The Commission may be hoping for times when voting procedures in the field of family reunification move to QMV — whether this will occur is uncertain, given the fact that this presupposes a unanimous decision by the Council.

The case of the directive on family reunification demonstrates that European Union member states have retained a dominant position over migration policy-making, but unlike the directive on temporary protection, member states' preferences did not converge towards shared, albeit low, standards. In the case of family reunification, divergences among member states' positions made so many derogations and exemptions necessary that the aim to create the first part of a harmonized immigration policy was missed.

Evaluation of Intergovernmental Europeanization

Intergovernmental Europeanization would have predicted the attainment of substantial results in fields with dense intergovernmental cooperation and stagnation in a field where dense intergovernmental cooperation is absent. Of course, intervening variables or alternative explanatory variables might be introduced to modify the simple formulation of intergovernmental Europeanization presented. For instance, the presence of an issue on the public agenda suggests itself. During negotiations on the directive on family reunification, a far-reaching reform of immigration law was under discussion in Germany and family reunification was at the center of Germany's national debate. This strongly

narrowed the options of the German Minister of the Interior, Otto Schily, at European-level discussions. It might be hypothesized that an understanding reached among bureaucrats concerned with migration policy can only lead to smooth decision-making if there are no relevant public debates that make politicians inclined to have their own national agendas.

But that would only be plausible if there had been dense intergovernmental cooperation in both cases. In fact, there is clearly variation concerning the density of intergovernmental cooperation. As has been noted earlier, there is dense intergovernmental cooperation on asylum affairs, but hardly any on immigration policy. Thus the expectation that policy would proceed towards substantial results in asylum and refugee affairs, but not in immigration policy, where the result was a highly diluted one, was met in these cases.

Priorities of Migration Policy and Path-dependency

A third observation on migration policy concerns — at a more general level — the ways priorities have been set and shifted in migration policy. Intergovernmental Europeanization suggests, like institutionalist theories in general, path dependency. Areas of action with far-reaching institutionalized cooperation are likely to prosper, while in the absence of institutionalization decline cannot be prevented. Comparing the outlook of European migration policy today with the profile of the Treaty of Amsterdam and the conclusions of the Tampere European Council, points to two significant shifts in European migration policy.

First of all, the perspective of a development of a genuine European immigration policy has been dropped almost entirely. This is reflected, for instance, by the report of the Working Group on "Freedom, Security and Justice" at the European Convention. It states that despite the far-reaching competences included in the European Community Treaty, "Member States will in practice, according to a generally shared understanding, remain responsible for the volumes of admission of third-country nationals and of their integration into the host country." Considering this, the report acknowledges that the Union will play but a supportive

role, i.e.: "the Union could provide added value to national integration efforts mainly through incentive and support measures, rather than through harmonizing legislation" (European Convention 2002: 5). Outright rejections of a determination of admission levels by European institutions have been uttered before by German minister Otto Schily: "The admission of labor migrants has to be geared to the genuine needs of the national, regional, and local labor markets. Decisions on this need to remain within the jurisdiction of the member states".

Second, fighting illegal immigration has emerged as a new top priority of European migration policy. Included in the Amsterdam Treaty as a matter of secondary concern, it was at the heart of the European Council of Seville in June 2002, adding also the joint management of external borders as a new issue on Europe's migration policy agenda. The European Convention Working Group acknowledged that "there is a stronger call in practice for common Union action regarding the fight against illegal immigration, including criminal sanctions, given the evident ineffectiveness of purely national policies."

The shifting focus from regulating legal economic immigration to combating illegal immigration of course also reflects the events of September 11th and a new concern for security matters. But the securitization of migration policy can also be accounted for by drawing on intergovernmental Europeanization. Progress in the management of external borders could be achieved quickly by building on the cooperation of the interior and justice ministries and, more particularly, of the police forces, customs and immigration services that had existed before. Quite the opposite is true for cooperation on legal immigration. A take-off of this field of policy has never taken place, as national policy-makers were not integrated into trans-European networks that would have had the potential of shared perspectives and an appreciation that European solutions may be appropriate for immigration.

Conclusion

The discussion of the mode of migration policy-making has suggested that its core feature has remained intergovernmentalism. Intergovernmentalism does not, however, necessarily imply — as is usually said to be the case — stagnating European integration. On the contrary, migration policy has evolved in a steadfast way, and the explanation that was offered was "intergovernmental Europeanization". A dense intergovernmental cooperation that includes institutionalized contacts of administrators and members of executive agencies at different levels has facilitated the Europeanization of migration policy. The presence of such networks of dense intergovernmental cooperation was also used to explain why certain areas of migration policy — asylum, combating illegal immigration, and managing external borders — thrive and others stagnate.

The discussion allows two points to be made concerning the future of European migration policy. First of all, one question is whether intergovernmental Europeanization will remain dynamic in the years ahead. In this respect, enlargement needs to be taken into account, which will introduce new groups of officials and practitioners concerned with migration policy. As the continuity of actors is a precondition of intergovernmental Europeanization, migration policy may sputter due to the accession of new countries to the European Union.

Insecurity over whether the Europeanization of the policy domain will continue if unanimity requirements are maintained was recognized during the negotiations on the Amsterdam Treaty revision. On visa affairs, automatic moves to QMV were foreseen, though with a delay of five years on certain policy matters (Art. 67, 3 & 4). For the remaining fields of migration policy, a move to QMV was envisaged pending a unanimous decision of the Council (Art. 67, 2). Expanding on this approach to extend QMV, the Treaty of Nice introduces QMV in further areas. The European Convention's Working Group on "Freedom, Security and Justice" even proposed to extend QMV to asylum policy and combating illegal immigration without any preconditions. While there are efforts to integrate the personnel of

accession candidates into the existing networks at an early stage, QMV will be an appropriate response to the limits of intergovernmental Europeanization ahead.

The second point concerns the profile of European migration policy. Its "Fortress Europe" image would be changed fundamentally, if the restrictive measures that dominate at present were counterbalanced by opening opportunities for legal immigration. Progress towards a European immigration policy might be more probable, if there was a move towards QMV — a decision rather unlikely for the time being. On the other hand, if the intergovernmental Europeanization argument is correct, the creation of dense intergovernmental cooperation in integration and immigration affairs would prepare the ground for further Europeanization. The Community's proposed open method for the coordination of national migration policies might therefore be, in the long term and if properly implemented, an appropriate strategy to give Europe's migration policy another face.

References

Primary Sources

- Council of the EU (1996): *Guidelines for joint reports on third countries adopted by the Council on 20 June 1994*. OJ C 274/52 of 19 September 1996.
- Council of the EU (2000a): *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*. OJ L 316 of 15 December 2000, pp. 1-10.
- Council of the EU (2001a): *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*. OJ L 212 of 7 August 2001, pp. 12 – 23.
- Council of the EU (2001b): *Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement*. OJ L 327 of 12 December 2001, p. 1.
- Council of the EU (2002a): *Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme)*. OJ L 161 of 19 June 2002, pp. 11-15.
- Council of the EU (2002b): *Council Regulation (EC) No 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas*. OJ L 53 of 23 February 2002.
- Council of the EU (2002c): *Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by MS to persons holding travel doc. not recognised by the Member State drawing upon the form*. OJ L 53 of 23 February 2002, pp. 4-6.
- Council of the EU (2002e): *Council Framework Decision 629 of 19 July 2002 on combating trafficking in human beings*. OJ L 203 of 1 August 2002, pp. 1-4.
- Council of the EU (2003): *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*. OJ L 050, 25 February 2003, pp. 1-10.
- European Commission (2000a): *Communication from the Commission to the Council and the European Parliament on a Community immigration policy*. COM(2000)757 final of 22 November 2000.
- European Commission (2000b): *Proposal for a Council Directive 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*. COM(2000)303 final of 24 May 2000.
- European Commission (2000c): *Proposal for a Council Directive on the right to family reunification*. COM(2000)624 final of 10 October 2000.
- European Commission (2000d): *Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM(2000)578 of 20 September(2000e):

Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum.

COM(2000)755 final of 22.November 2000.

European Commission (2001a): *Communication from the Commission to the Council and the European Parliament on an open method of coordination for the community immigration policy.* COM(2001)387 of 9 July 2001.

European Commission (2001b): *Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States.* COM(2001)181 final of 3 April 2001.

European Commission(2001c): *Proposal 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(2001)257 of 23 May 2001.

European Commission (2001d): *Proposal for a council directive concerning the status of third country .. nationals who are long term residents,* COM(2001)127 of 13 March 2001.

European Commission (2001e): *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities,* COM(2001)386 final of 11 July 2001.

European Commission (2001f): *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection,* COM(2001)510 final of 12. September 2001.

European Commission (2001g): *Proposal: relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months,* COM(2001)388 of 10 July 2001.

European Commission (2001h): *Communication from the commission to the council and the european parliament on a common policy on illegal immigration,* COM(2001)672 final of 15. November 2001.

European Commission (2002a): *Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.* COM(2002)326 final/2 of 3 July 2002.

European Commission (2002b): *Amended proposal for a Council Directive on the right to family reunification,* COM(2002)225 final of 2 May 2002.

European Commission (2002c): *Proposal: Towards integrated Management of the external borders of the MS of the EU,* COM(2002)233 of 7 May 2002.

European Commission (2002d): *Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities.* COM(2002)071 final of 11. February 2002.

European Convention (2002): *Final report of Working Group X "Freedom, Security and Justice".* CONV 426/02. Brussels, 2 December 2002.

European Council (1999): Tampere European Council — Presidency Conclusions, 15 and 16 October 1999.

Secondary Sources

- Angenendt, Steffen (2002): "Einwanderungspolitik und Einwanderungsgesetzgebung in Deutschland 2000-2001", in: Klaus Bade / Rainer Münz (eds.): *Migrationsreport 2002*, Frankfurt: Campus, pp. 31-59.
- Boer, Monica den / Wallace, William (2000): "Justice and Home Affairs", in: Helen Wallace / William Wallace (eds.): *Policy-Making in the European Union*. Oxford: Oxford University Press, pp. 493-518.
- Caporaso, James A. / Stone Sweet, Alex (2001): "Conclusion: Institutional Logics of European Integration", in Alec Stone Sweet, Wayne Sandholtz and Neil Fligstein (eds.), *The Institutionalization of Europe*. Oxford: Oxford University Press, 221-236.
- Geddes, Andrew (2000): *Immigration and European Integration. Towards Fortress Europe?* Manchester: Manchester UP.
- Gusy, Christoph / Arnold, Hans (2002): "Die Rechts- und Asylpolitik der Europäischen Union", in Werner Weidenfeld (Hrsg.): *Europa*, Bonn: Bundeszentrale für politische Bildung, 531-542.
- Haas, Peter (1992): "Introduction: Epistemic Communities and International Policy Coordination", in: *International Organization*, 46(1), pp. 1-35
- Hägel, Peter / Deubner, Christian (2001): "Migrationspolitik der Gemeinschaft", *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 4, pp. 154-159.
- Hailbronner, Kay (2002): "Migrationspolitik und Rechte der Drittstaatsangehörigen in der Europäischen Union", *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 3, pp. 83-89.
- Hailbronner, Kay / Thierry, Claus (1998): "Amsterdam — Vergemeinschaftung der Sachbereiche Freier Personenverkehr, Asylrecht und Einwanderung sowie Überführung des Schengen-Besitzstandes auf EU-Ebene", *Europarecht*, 5, pp. 583-615.
- Märker, Alfredo (2001): "Zuwanderungspolitik in der Europäischen Union: Europäisierte Lösungen oder Politik des kleinsten Nenners?", *Aus Politik und Zeitgeschichte*, B 8, pp. 3-10.
- Moravcsik, Andrew (1998): *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*. Ithaca, NY: Cornell UP.
- Nanz, Klaus-Peter (1994): "Das Schengener Übereinkommen : Personenfreizügigkeit in integrationspolitischer Perspektive", *Integration*, 17, pp. 92-108.
- Niessen, Jan (2001): "Overlapping Interests and Conflicting Agendas: The Knocking into Shape of EU Immigration Policies", *European Journal of Migration and Law*, 3, pp. 419-434.
- Peers, Steve (2002): "Key Legislative Developments on Migration in the European Union", *European Journal of Migration and Law*, 4, pp. 85-126.
- Scharpf, Fritz W. (2000): "Notes Toward a Theory of Multilevel Governing in Europe", *MPIfG Discussion Paper 00/5*.
- Schmahl, Stefanie (2001): "Die Vergemeinschaftung der Asyl- und Flüchtlingspolitik", *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 1, pp. 3-11.

Stone Sweet, Alex / Fligstein, Neil / Sandholtz, Wayne (2001): "The Institutionalization of European Space", in: Alec Stone Sweet / Wayne Sandholtz / Neil Fligstein (eds.): *The Institutionalization of Europe*. Oxford: Oxford UP, pp. 1-28.

Tomei, Verónica (2001): *Europäisierung nationaler Migrationspolitik. Eine Studie zur Veränderung von Regieren in Europa*. Stuttgart: Lucius & Lucius.

Turnbull, Penelope / Sandholtz, Wayne (2001): "Policing and Immigration: The Creation of New Policy Spaces", in: Alec Stone Sweet, Wayne Sandholtz and Neil Fligstein (eds.): *The Institutionalization of Europe*. Oxford: Oxford University Press, pp. 194-220.

Vink, Maarten (2002): "European Immigration Politics", *West European Politics*, 25(3), pp. 203-210.

Vitorino, António (2001): "Interview with António Vitorino", in: *Schweizerische Monatshefte*, 81(11): 33-35.

Wallace, Helen / Wallace, William (eds.) (2000): *Policy-Making in the European Union*. Oxford: Oxford UP.

Table 1: Voting requirements

Treaty provision	Field of action	Voting until 2004	Voting after 2004	major Proposals legislative measures
Visa Policy				
Art. 62(2)(b)(i)	list specifying visa requirements	QMV	QMV	Council of the EU 2001b
Art. 62(2)(b)(ii)	procedures and conditions for issuing visas	unanimity	QMV (Art. 251)	none to date
Art. 62(2)(b)(iii)	uniform format for visas	QMV	QMV	Council of the EU 2002b Council of the EU 2002c
Art. 62(2)(b)(iv)	rules on a uniform visa	unanimity	QMV (Art. 251)	none to date
Art. 62(3)	conditions for TNC's freedom to travel within the territory of the Member States during a period of no more than three months	unanimity	after unanimous vote: QMV (Art. 251)	Commission 2001g
Asylum and Refugee Policy				
Art. 63(1)(a)	responsibility for asylum claims	unanimity	Art. 67(5)*	Dublin Convention of 15 June 1990 Council of the EU 2000a Council of the EU 2003
Art. 63(1)(b)	minimum standards for asylum seekers	unanimity	Art. 67(5)*	Commission 2000e Commission 2001b
Art. 63(1)(c)	minimum standards for qualification as refugee	unanimity	Art. 67(5)*	Commission 2001f
Art. 63(1)(d)	minimum standards - granting or withdrawing refugee status	unanimity	Art. 67 (5)*	Commission 2000d
Art. 63(2)(a)	temporary protection to displaced persons	unanimity	Art. 67 (5)*	Council of the EU 2001a
Immigration Policy				
Art. 63(3)(a)	long term visas and residence permits	unanimity	after unanimous vote: QMV (Art. 251)	Commission 2000a Commission 2001e
Art. 63(3)(a)	family reunification	unanimity	after unanimous vote: QMV (Art. 251)	Council of the EU 2003
Art. 63(4)	third national rights	unanimity	after unanimous vote: QMV (Art. 251)	Commission 2001d
Art. 63(3)(b)	illegal immigration	unanimity	after unanimous vote: QMV (Art. 251)	Commission 2001h Commission 2002d Council of the EU 2002e

* Article 67 (5) ECT has been introduced by the Treaty of Nice. It provides that after the adoption of legislation defining the common rules and basic principles governing of the respective issues, the legislative procedure of Article 251 shall apply.