

# The Emergency Relocation Scheme: A Burden Sharing Failure

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Editor: Sarah Wolff, Director of the Centre for European Research, Queen Mary University of London

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**About the author:** Griffin Shiel has an MSc in International Public Policy from Queen Mary, University of London. He also has a BA in American History & Politics from the University of East Anglia. Griffin worked as an intern for the Centre for European Research (CER) assisting with the NEXTEUK project examining the future of EU-UK relations with a particular focus on the impact of the coronavirus pandemic on EU policy. He currently works in a policy role at the Food & Drink Federation (FDF) where he works on employment and workplace policy.

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## Abstract

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A common criticism of the European Union's response to the European Refugee Crisis beginning in 2015 is that Member States failed to share the burden of responsibility for processing and protecting refugees arriving in Italy and Greece. This caused those nations' asylum systems to be overwhelmed. Blame has been levied at both the EU for its weak leadership and Member States for not engaging with burden sharing. However, not enough work has been concerned with linking the absence of burden sharing with European integration. This dissertation will aim to address this gap by examining the failure of the EU's Emergency Relocation Scheme (ERS). It will do so by linking the shortcomings of the scheme to the persistence of tropes associated with 'new intergovernmentalism', a model for explaining the implications of European integration since the signing of the Treaty of the European Union in 1992. It will be argued that the inability of the EU and its Member States to meet the burden sharing objectives of ERS should be understood as a by-product of new intergovernmentalism, specifically the prioritisation of domestic policies over supranational ones, the emphasis on deliberation and consensus as policy-making methods and the use of de novo bodies.

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## Abbreviations

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AFSJ – Area of Freedom Security and Justice

CEAS – Common European Asylum System

CJEU – Court of Justice of the European Union

EC – European Community

EP – European Parliament

EPRS – European Parliamentary Research Service

ERS – Emergency Relocation Scheme

ERF – European Refugee Fund

EU – European Union

FRONTEX - European Border and Coast Guard Agency

HRW – Human Rights Watch

JHA – Justice and Home Affairs

OHCHR – Office of the High Commissioner for Human Rights

OJEC – Official Journal of the European Community

QMV – Qualified Majority Voting

UNHCR – United Nations High Commissioner for Refugees

V4 – Visegrad 4

## Introduction

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The European Union (EU) regularly uses ‘burden sharing’, or equivalent terms such as ‘solidarity between Member States’ in the context of immigration policy. For instance, the Treaty of Lisbon stated that immigration policies “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” (Thielemann, 2012, 810). The European Parliament’s (EP) definition, which will be used in this essay, is the “mechanisms for the distribution of pressures across the Member States based on a number of different solidarity mechanisms” (European Parliament, 2010, 29).<sup>1</sup> Burden sharing usually takes one of four forms: (1) physical relocation of refugees; (2) assistance in managing refugee flows; (3) financial assistance and (4) harmonisation of asylum and refugee policies (Newland, 2011, 2).

The concept dates back to the United Nations’ Convention relating to the Status of Refugees (1951) which recognised that “the grant of asylum may place unduly heavy burdens on certain countries” which should be mitigated through “international co-operation” (UNHCR, 1951, 13). Europe’s burden sharing capacity was most significantly tested during the European Refugee Crisis beginning in 2015, a period often analysed with references to burden sharing. This dissertation will contribute to the existing analyses by examining why the EU’s Emergency Relocation Scheme (ERS) fell so short of its intention to facilitate burden sharing among Member States between 2015 and 2017.

### ***The European Refugee Crisis: Causes, Challenges and Responses***

In 2015 and 2016, over two and a half million refugees applied for asylum in the EU, half a million more than in the previous five years combined (Eurostat, 2020). This period is referred to as the ‘European Migrant Crisis’ or the ‘European Refugee Crisis’. Using both terms interchangeably ignores key differences between refugees and migrants. A refugee is any individual “who, owing to a well-founded fear of persecution [...] is outside the country of nationality” (European Commission, N.D.a). Contrastingly, a migrant chooses to move for reasons such as employment, education or family reunion (UNHCR, 2016). Henceforth ‘refugee crisis’ will be used because this dissertation’s focus is the ERS which was specifically created to relocate refugees.

The refugee crisis was caused by a combination of push and pull factors. Refugees were pushed out of their countries of origin by conflicts such as the war in Syria, and then out of transit nations such as Turkey due to poor living conditions. Simultaneously, the actions of

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<sup>1</sup> Kathleen Newland (co-founder of the Migration Policy Institute) defines burden sharing as “a subset of international co-operation in which States take on responsibility for refugees who, in terms of international refugee law, would fall under the protection of other States or assist other States in fulfilling their responsibilities.” (Newland, 2011, 1) Many groups, such as the United Nations High Commissioner for Refugees (UNHCR) use ‘responsibility sharing’ (European Parliament, 2010, 26). As most of the literature use in this essay uses ‘burden sharing’, and the essay is concerned with EU actors, the EP’s definition will be used.

some European countries pulled refugees to the continent. In 2015 Macedonia abolished measures preventing refugee entry, making the migratory route from Greece through the Balkans easier and cheaper, and German Chancellor Angela Merkel announced that all refugees arriving in Germany would be offered temporary residency. These, and other factors, made Europe an appealing destination for refugees (Sly, 2015).

This influx created many challenges. National governments had to come up with ways to process asylum claims whilst managing political and public opposition to immigration, and the financial costs of integrating refugees. At the same time EU institutions were trying to formulate a Union-wide response by implementing various legal and policy instruments. This was part of its mission to create a Common European Asylum System (CEAS) which balanced EU solidarity with national sovereignty (Metcalf-Hough, 2015, 4-5). Efforts included increasing military patrols of the Mediterranean to combat migrant smuggling and trafficking; creating safe, legal migratory routes into the EU; co-operating with third countries (non-EU states) such as Turkey; establishing a common list of 'safe' countries; and adopting resettlement and relocation schemes (Apap, Dobrova and Radjenovic, 2019, 2; Barbulescu, 2017, 301).

This dissertation is concerned with the final aspect, specifically the Emergency Relocation Scheme (ERS). ERS committed to temporarily relocating 160,000 refugees from Greece and Italy to other EU Member States over two years through the use of mandatory relocation quotas calculated using four criteria: (1) national GDP (2) population size (3) unemployment level (4) number of asylum-seekers already in the country (European Parliament, 2020). The scheme was an attempt at physical burden sharing but ultimately failed to meet the challenges created by the refugee crisis. This dissertation will argue that the failure should be understood as a result of the European integration along 'new intergovernmentalism' lines since the signing of Treaty on the European Union (Maastricht Treaty) in 1992. Analysing ERS provides us with an insight into the importance of burden sharing as a solution to refugee crises and the extent to which the EU and its Member States failed to act on the principle during the crisis.

## Literature Review

To situate this dissertation within the existing work on the EU's response to the refugee crisis it is important to review the academic work most pertinent to what will be covered. The argument that burden sharing was absent from the EU's response to the refugee crisis has been made by other scholars. Murray and Longo argue that the Dublin System – which will be assessed in chapter one – imposed “uneven burdens” on Member States with external borders by allocating responsibility for examining asylum claims to states of first entry (Murray and Longo, 2018, 417). Additionally, the authors assert that weak EU leadership damaged its reputation as “a policy innovator and problem solver” (ibid. 418). This undermined its legitimacy as a leader in this policy area and pushed domestic governments to assume unilateral management of the crisis instead of burden sharing. McEwen criticises the EU-Turkey Deal, labelling it an act of 'burden-shifting' which caused Greece's asylum system to be overwhelmed and migrant protection to deteriorate (McEwen, 2017, 20). She identifies three factors which caused acts of burden shifting: (1) a

weak international legal framework for co-operation on migration policy (especially the Dublin System), (2) self-interested EU Member States prioritising national interests and concerned with the “economic, social and political costs” of accepting refugees, and (3) a “short-sighted conceptualisation” by the policymakers responsible for the deal as a temporary phenomenon (ibid. 26).

A related criticism of the EU’s response is that it was undermined by a lack of co-operation among states and the absence of a shared objective among policymakers. Ariadna Ripoll-Servent asserts that “the failure of relocation quotas can be explained by the absence of a shared understanding of what was at stake in the crisis” (Ripoll-Servent, 2020, 180). She argues that the existence of dichotomous frames led to gridlock over the issue of refugee relocation. The refugee crisis was framed as ‘a threat’ - a disruption to political and social life caused by uncontrollable, exogenous (external) events - and contrastingly as an ‘opportunity’ - being endogenous in nature (caused by flaws in EU’s policies and institutions in need of correction). Southern and Northern Member States attempted to frame the crisis endogenously and push for reform to the asylum system. However, this was ineffective, as Eastern states who framed the crisis exogenously were unwilling to move away from the existing migration regime from which they had benefitted (ibid. 194).

Fontana and Panebianco argue that the EU’s response lacked coherence and consistency, describing the variety of policies in place in different states as a “patchwork of practices, protection systems and responses” (Panebianco & Fonatana, 2015, 9). The authors argue that the existence of a “border control vs duty of protection” debate, which split Member States into different camps, caused the EU to fail in its duty to protect Syrian refugees (ibid. 13). Guiraudon similarly argues that the lack of co-operation and coordination at the EU level, rather than the lack of co-operation between Member States, was most damaging. She also argues that the EU suffered from “policy inertia” in the area of migration policy caused by interior ministers and other bureaucrats becoming too powerful at the expense of other migration policy makers. Ultimately, she argues that the policy solutions were a continuation of the ineffective EU migration policies of the previous decades that had no impact on the border security-oriented goals and instruments of the EU (Guiraudon, 2018, 154-157).

The relocation and resettlement aspect of the EU’s response has also been the subject of substantial academic analysis. Niemann and Zaun contend that ERS “suffers from an implementation deficit” evidenced by only 25% of persons being relocated by July 2017. Additionally, the scheme failed to take into account the preferences of asylum-seekers in deciding where to relocate them. Similar to Guiraudon, Niemann and Zaun assert that ERS repeated some of the problems with the Dublin System in expecting the different, disconnected asylum systems across the continent to provide comparable levels of protection and welfare for refugees, despite evidence to the contrary (Niemann & Zaun, 2018, 6-7).

Bauböck links the shortcomings of relocation and resettlement with European integration and burden sharing. He argues that European integration should have provided an ideal platform for effective burden sharing to protect refugees. However the attachment of

Member States to the principles of the Dublin System, the lack of shared norms relating to refugee protection, and the open borders in the Schengen area meant that translating the principle of burden sharing into practice was never achieved as Member States either did not want to or were not incentivised to engage with it (Bauböck, 2017, 150-2). Bauböck's is a strong essay however there is no consideration of the importance of the implications of the new intergovernmentalism in accounting for the absence of burden sharing.

This literature review has identified several lines of argument relating to the shortcomings of the EU's response to the refugee crisis. Whilst the body of work is extensive, there is nothing linking the absence of burden sharing to new intergovernmentalism. This dissertation will fill this gap, beginning by summarising the development of European integration theory and the key tenets of new intergovernmentalism, followed by a detail of the methodology. The main body will be divided into three parts. Chapter one will analyse the unsuccessful attempts made by the EU in the 1990s and early 2000s to create a burden sharing regime with a specific focus on the pitfalls of the Dublin System and the Amsterdam Treaty. Chapter two will analyse the problems with how the ERS was formulated. Chapter three will examine the issues with how the ERS was implemented. Ultimately, this dissertation will show that the burden sharing objective of ERS was undermined by the absence of existing burden sharing mechanisms, a flawed policy-formulation procedure and weak implementation, all of which can be tied to the persistence of tropes associated with the new intergovernmentalism.

## Theoretical Framework

The failure of the ERS to facilitate burden sharing will be tied to the theory of new intergovernmentalism. It is therefore necessary to summarise the development of European integration theories which led to the establishment of new intergovernmentalism.

### ***Development of European Integration Theory***

From the 1950s to the 1980s, 'neo-functionalism' was the dominant theory of European integration. Neo-functionalists held that integration was driven by a variety of state and non-state actors at both European and domestic levels, and that co-operation between states in one policy area created pressures to cooperate in other related areas, leading to further integration (Jensen, 2016, 54). By the early 1980s, neo-functionalism had become discredited as the European Community (EC) was failing to honour its commitments to remove trade barriers and provide economic prosperity to all members. As a result, the competing 'intergovernmentalism' was embraced by Member States frustrated by the speed and progress of the EC. Intergovernmentalists such as Stanley Hoffman argued that European integration was driven by Member States, and was the result of national governments cooperating to achieve "mutually advantageous bargains." Under intergovernmental terms, any increase in the power of supranational bodies was the result of decisions made by national governments (Hooghe & Marks, 2019, 1115; Moga, 2009, 800; Vaduva, 2016, 32). Intergovernmentalism has since been reconfigured. Seeing its limitations, Andrew Moravcsik developed liberal intergovernmentalism by combining the

neo-functionalist emphasis on the importance of domestic politics with the classic intergovernmentalist contention that Member States are the key drivers of integration (McCormick, 2011, 25). He held that integration was driven by national economic interests and was shaped by “patterns of commercial advantage, the relative bargaining power of important governments, and the incentives to enhance the credibility of inter-state commitment” (Moravcsik, 1998, 3).

### ***New Intergovernmentalism***

Moravcsik theory was criticised by Bickerton, Hodson and Puetter. They argued that “liberal intergovernmentalism’s ability to make sense of the post-Maastricht period is problematic and tensions exist in its analysis of the 1990s and 2000s” and that Moravcsik’s conclusion that the EU has been in a state of ‘stable institutional equilibrium’ since Maastricht is misleading. From this critique, they developed ‘new intergovernmentalism’ theory to explain European integration, contending that the post-Maastricht era is characterised by integration in the absence of supranationalism as opposed to liberal intergovernmentalism which the authors labelled “a theory of supranationalism” (Bickerton, Hodson, Puetter, 2015a, 17). The new intergovernmentalism is characterised by a paradox whereby Member States seek closer integration and co-operation but without delegating more power to the EU’s supranational institutions (Bickerton, Hodson, Puetter, 2015b, 717).

At the core of this theory are the six hypotheses “to elucidate, explain and tease out the normative implications of the new intergovernmentalism” (ibid, 2015b, 711).

- 1) Deliberation and consensus have become the guiding norms of day-to-day decision making at all levels.
- 2) Supranational institutions are not hard wired to seek ever-closer union.
- 3) Where delegation occurs, governments and traditional supranational actors support the creation and empowerment of de novo bodies.
- 4) Problems in domestic preference formation have become standalone inputs into the European integration process.
- 5) The differences between high and low politics have become blurred.
- 6) The EU is in a state of disequilibrium (ibid. 711-717).

These implications have been tested by scholars in a variety of policy contexts, particularly Justice and Home Affairs (JHA). For instance, Wolff argues that “some of new intergovernmentalism’s core hypotheses present some novel explanations for JHA developments”, particularly hypotheses one and four (Wolff, 2015, 131). Additionally, Maricut contends that in the years since the Lisbon Treaty (2007), JHA’s institutional framework has retained a “strong new intergovernmentalist character” (Maricut, 2016, 532). This is evidenced by presence of the European Council in agenda-setting, the informal working methods used by the Council, the large number of working parties (WPs) and the use of senior expert committees. The use of new intergovernmentalism to analyse developments in JHA shows that it is a useful and appropriate theory for analysing burden sharing within the context of EU refugee and asylum policies during the refugee crisis.

***Methodology***

This dissertation aims to address the overarching question: to what extent was the failure of the ERS to bring about effective burden sharing caused by new intergovernmentalism? Answering this question entailed a synthesis of theoretical work on new intergovernmentalism with primary and secondary literature on the EU's response to the refugee crisis. I used a variety of primary and secondary sources, including EU legislative documents, news reports, peer-reviewed journal articles and books.

I encountered two significant challenges. First, the COVID-19 pandemic and subsequent closure of libraries meant that I was limited to using sources available online, which is the reason why my bibliography is primarily made up of journal articles as these are the most easily accessible online academic sources. Second, the word count did not permit me to test the validity of each of the six hypotheses concerning the implications of the new intergovernmentalism. As will become apparent, I focused on testing hypotheses one, three and four as these are most applicable.

## Chapter I: The Development of Burden Sharing in Europe

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The Maastricht Treaty was signed at a time of political upheaval in Europe. The Soviet Union collapsed, Germany reunified, ethnic conflicts broke out in the Balkans, and ex-European territories struggled to establish stable economic and political systems (Schuck, 1997, 245). Additionally, between 1981 and 1995, six Member States joined the EC (later the EU), bringing the membership to 15. These changes contributed to a surge in Europe's refugee population; between 1990 and 1994, there were 2.4 million asylum applications, almost double the number of applications over the previous 20 years (Van Mol and de Valk, 2016, 36). This chapter examines the main attempts at physical and financial burden sharing and policy harmonisation adopted in Europe in response to the growing refugee population on the continent, beginning with an analysis of the Dublin System. This will be followed by an examination of other major policies introduced in the post-Maastricht period including the Amsterdam Treaty and the European Refugee Fund (ERF).

### ***The Dublin System***

In 1985, five members of the EC signed the Schengen Agreement, pledging to gradually remove common border controls and introduce free movement for nationals of signatory states. In 1990, the Schengen Convention was signed, setting out the arrangement for implementing the freedom of movement (European Commission, N.D.b). The formulation of the Schengen Area and the adoption of 1986 Single European Act permitting free movement within the EC created a more open Europe. This increased openness combined with the continent's growing refugee population meant it was necessary to clarify which European state was responsible for handling asylum claims (Schuster, 2003, 112). Thus in 1990, the EC's Member States<sup>2</sup> negotiated The Dublin Convention. The Convention, which came into effect in 1997, was a monumental attempt at asylum policy harmonisation. Whilst it did not mention burden sharing, it had significant implications for the physical burden sharing of refugees (Garcés-Mascreñas, 2015, 1).

The Dublin Convention stipulated that, in most circumstances, the responsibility for processing asylum claims lay with "...the Member State responsible for controlling the entry of the alien into the territory of the Member States", which usually meant the State of first entry (European Union, 1990, 0007). For the first time Member States no longer had to rely on ad-hoc negotiations to determine responsibility for asylum claims as there was now a workable, legal framework for this task (Fratzke, 2015, 6). The Dublin Convention was replaced by the 2003 Dublin Regulation (Dublin II), which in turn was replaced by the 2013 Dublin III Regulation. These latter iterations built on the provisions of the convention, namely by clarifying the criteria for determining the responsible Member State. For

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<sup>2</sup> In 1990 the EC had twelve Member States: Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Republic of Ireland, Spain, United Kingdom. Denmark did not sign the convention at the same time as the other states.

instance, both Dublin II and Dublin III established family unity as being first in a hierarchy of criterion (Garcés-Mascreñas, 2015, 2).

The Dublin System remains a crucial part of the EU's asylum system. However, its longevity must not distract from its flaws. First, the system wrongly assumes that Member States' asylum laws and practices were based on common standards, and that refugees and asylum seekers would enjoy the same protections regardless of which country they are in. In reality, new intergovernmentalism has meant that even as migration policy becomes more integrated, Member States have resisted supranationalism and harmonisation (UNHCR, nd). This became apparent during the refugee crisis as the variety of asylum policies was exposed. For instance, refugee rejection rates varied considerably; in Sweden, the rate was 28%, whereas France and Italy rejected 68% and 58% respectively (Panebianco and Fontana, 2018, 9). This made burden sharing difficult as states were unable to send refugees to states with weak protection of refugees as it would contravene the principle of *non-refoulement* which prohibits the transferring of refugees to a country where they are likely to be persecuted (OHCHR, nd).

Second, the core principle of the system - the state which assists refugees entering the EU is responsible for them - has resulted in Member States with external borders dealing with more asylum claims because they are more accessible to refugees. This problem was exacerbated as many frontline states are economically unstable and lack the infrastructure for dealing with large refugee influxes, thus the "spirit of solidarity" expressed in Dublin II's preamble and the principle of burden sharing are both contravened (Robert Schumann Foundation, 2017). Greece, arguably the country worst affected by the Eurozone crisis, was a major recipient of refugees prior to the refugee crisis, but proved unable to deal with the 2015 refugee influx. Eva Cossé (Human Rights Watch (HRW)) asserted that "Greek authorities are simply unable to cope with the large numbers given the country's ever-deepening economic crisis", evident in the overcrowding, poor sanitation and limited access to food and healthcare in Greece's refugee reception and detention centre (HRW, 2015). Ultimately, the Dublin System was a flawed attempt at policy harmonisation which severely damaged the burden sharing capabilities of the EU during the refugee crisis.

### ***Beyond Dublin***

The Dublin Convention was part of a sustained period of flawed burden sharing attempts in Europe in the late 1990s and early 2000s. In 1994, in response to the Balkan refugee crisis, Germany tried to initiate physical burden sharing among EU states by proposing a Council Resolution on Burden Sharing which included a compulsory resettlement mechanism. The proposal stated that "Where the numbers admitted by a Member State exceed its indicative figure . . . other Member States which have not yet reached their indicative figure . . . will accept persons from the first State." (European Council, 1994) Council Document 7773/94 ASIM 124) However, Member States with fewer asylum seekers than Germany, notably the UK, objected to compulsory resettlement. Eventually, a watered-down version which opted for non-binding principles to address refugee crises such as 'the spirit of solidarity', 'equity of distribution' and 'harmonisation of response' without any mention of compulsory resettlement, was agreed in 1995. The ineffectiveness of the resolution was exposed during

the Kosovo refugee crisis, when Member States opted against using it to resolve the crisis (Thielemann & Dewan, 2006, 363).

In 1997, the Treaty of Amsterdam was signed in another attempt at policy harmonisation. Entering into force in 1999, the treaty was the first step in creating the Area of Freedom, Security and Justice (AFSJ), and had many provisions significant to EU refugee policy. First, the Treaty altered the EU's third pillar (co-operation in Justice and Home Affairs), by limiting it to the area of police and judicial co-operation in criminal matters. Freedom of movement, visa, asylum and immigration issues were transferred from the third to the first pillar (the European Communities<sup>3</sup>) (CVCE, 2016). Additionally, the EU expanded the number of decisions covered by Qualified Majority Voting (QMV)<sup>4</sup> to include foreign policy issues, giving the Commission a say over most JHA policies.

Significantly, Article 63 of the Treaty committed the Council to adopting measures “promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons” (European Union, 1997, 0029). However, this commitment in theory did not translate in practice as European asylum policy is still far from uniform. This became clear during the refugee crisis. For example, whilst Sweden provided permanent permits to asylum seekers with temporary residency, Bulgaria built fences on its border with Turkey. Meanwhile eastern European transit states employed restrictive policies against migrants, such as the Czech Republic regularly subjecting refugees to up to 90 days of detention (Carrera, Blockmans, Gros and Guild, 2015, 15). Amsterdam's Temporary Protection Directive, which committed Member States to ascertaining their refugee intake capacity, is at best a modest attempt at burden sharing. The Directive did not commit the Member State to admit a specific number of refugees, nor did it set any financial burden sharing mechanisms. (Kaunert and Leonard, 2012, 10-13). The financial burden sharing issue was somewhat addressed with the creation of the European Refugee Fund (ERF) in 2000, which aimed ‘to promote a balance of efforts’ in receiving refugees by allocating common European funds to projects geared towards receiving and integrating refugees. However, ERF's allocation rules benefitted the most powerful Member States, and amounted to little more than a symbolic attempt at burden sharing with minimal substance (Thielemann, 2005, 808; 822). The gap between the principles and the implementation of Amsterdam's burden sharing provisions shows the

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<sup>3</sup> The three pillars of the EU established by the Maastricht Treaty are:

- 1) European Communities. Primarily tasked with making the single market work and promoting the development of economic activities among
- 2) Common Foreign and Security Policy. Tasked with defining and implementing through intergovernmental methods a common foreign and security policy.
- 3) Co-operation in the fields of Justice and Home Affairs. Concerned with the Union developing a common area of freedom, security and justice. Included asylum policy and combatting illegal immigration (European Parliament, 2020).

<sup>4</sup> QMV is used by the Council of the European Union when voting on a proposal by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy. Under QMV, a qualified majority is required to adopt a decision and is achieved when two conditions are met: (1) 55% of Member States vote in favour; (2) proposal is supported by Member States representing at least 65% of the total EU population (Council of the European Union, ND).

difficulty in translating the concept of burden sharing into effective policy when countries are concerned with retaining control of policy.

In summary, the period from the signing of the Dublin Convention to the implementation of the Treaty of Amsterdam demonstrates the challenges the EU faced in facilitating a comprehensive burden sharing system to effectively address the growing refugee population on the continent. The Dublin System placed too much responsibility on frontline states that did not have the financial capability of dealing with large refugee influxes. The Amsterdam Treaty's commitment to burden sharing was of minimal substance, and ERF reinforced long-standing biases which favoured the most powerful Member States. This period was a missed opportunity. Europe had the chance to create an effective framework for burden sharing, but failed to do so. This failing re-emerged during the refugee crisis, as the new intergovernmental tendencies of Member States and EU institutions obstructed the formulation and implementation of the ERS.

## Chapter II: Issues in the Formulation of the Emergency Relocation Scheme

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Niemann and Zaun contend that the ERS suffered from an “implementation deficit” (Niemann and Zaun, 2018, 6). This is a valid criticism, however it overlooks the problems with how ERS was formulated. This chapter will examine three issues which undermined the ERS’s formulation. First, the JHA policy environment in which ERS was created was characterised by new intergovernmental tropes. Second, the imposition of mandatory relocation quotas was not in line with the preferences of some Member States. Third, the Commission and Council’s decision to break from new intergovernmental policy-making conventions was ill-advised. Ultimately, even without an implementation deficit, the ERS would not have effectively facilitated burden sharing because of the issues with its formulation.

### ***Justice and Home Affairs: A New Intergovernmental Environment***

Prior to the refugee crisis, JHA policy-making was characterised by new intergovernmental characteristics. Wolff points to the use of ‘European Pacts’ by the European Council as evidence of new intergovernmental behaviour. European Pacts entail the European council agreeing on guidelines for the rest of the EU and its Member States in specific areas of JHA. Pacts have been made in several areas including immigration, and whilst there is no legal basis to them, Wolff argues that they are proof of the “eagerness to deliberate at the highest political level on JHA issues” and the “trend towards high-level intergovernmental policy coordination.” This supports hypothesis one regarding the normative implications of new intergovernmentalism: “Deliberation and consensus have become the guiding norms of day-to-day decision making at all levels (Wolff, 2015, 135-6).

Wolff also argues that the use of early informal agreements - whereby the Council and the EP decide informally between them before the first reading - “confirms that deliberation and consensus between the two co-legislators, sometimes at the highest level, have become ends in themselves and that even the EP is not necessarily hard-wired to seek ever closer union.” This supports both hypotheses one and two (“Supranational institutions are not hard wired to seek ever-closer union”) (Ibid, 136). Between 2009 and 2012, 78% of co-decided acts used early informal agreements, despite the process being controversial for hindering attempts to make the EU’s legislative process more inclusive, transparent and accountable (Reh, 2014, 823).

Maricut asserts that JHA in the post-Lisbon period is “a hybrid area of European integration [both] with and without supranationalisation”. JHA contains elements of the classic “community” method, namely a focus on legislation and an increasing role of supranational institution and new intergovernmentalism. This is combined with new intergovernmentalism tropes such as the permanent presence of the European Council in the agenda-setting process during crises, the concentration of problem-solving decisions in informal JHA Counsellor meetings and the “continuous search for consensus in the

Council on crucial decisions – despite the introduction of QMV” (Maricut, 2016, 552). The political environment in which the ERS was formulated was characterised to a significant extent by new intergovernmentalism which was detrimental to its formulation.

***The Formulation Process: a catastrophic break from consensus***

On 22 September 2015, Interior Ministers convened an Extraordinary Home Affairs Council meeting in which they agreed on the relocation of 120,000 refugees “in clear need of international protection from Greece, Hungary and Italy”. The relocation would be facilitated through the use of mandatory quotas whereby each Member State involved in the scheme was given a set number of refugees to take in (European Commission, 2015). This agreement was in addition to the existing decision made just eight days earlier by the Extraordinary JHA Council to relocate 40,000 asylum seekers from Italy and Greece. However, the process of formulating ERS was deeply flawed. It exposed the extent to which deliberation and consensus had become ingrained norms in JHA policy-making and in turn the negative effect that a break from such norms could have.

ERS was formulated in two parts. The first was the creation and adoption of the first European Commission proposal on relocation. This followed the policy-making pattern to be expected in the new intergovernmentalism era; an emphasis on deliberation and consensus with the European Council playing a considerable role. The process began in May 2015 when the European Commission put forward a proposal as part of its European Agenda on Migration, calling for the relocation of 40,000 refugees from Greece and Italy which the European Council agreed to in June 2015. Crucially, the agreement specified that “all Member States will agree by consensus by the end of July on the distribution of such persons, reflecting the specific situations of Member States.” In July 2015, an agreement was reached in the form of a resolution of “representatives of the Governments of the Member States meeting within the Council”, and this agreement became a formal decision adopted by the Council in September 2015 (De Witte and Tsourdi, 2018, 1462).

The adoption of the Commission’s first proposal was evidence that deliberation and consensus were the *modus operandi* of the EU institutions when the refugee crisis broke out. Importantly, it also showed that this mode of policy-making worked; the scheme had progressed from proposal to formal decision with minimal contestation. However, the work done by the EU institutions was undone in September 2015, as the deep-seated commitment to consensus and deliberation and the self-interest of Member States meant that the final relocation scheme lacked legitimacy and support, undermining any chance of it facilitating burden sharing before it had been implemented.

The adoption of the first Commission proposal was already underway in the summer of 2015 when the number of refugees entering the EU rose considerably. In April 2015 there were just over 50,000 new asylum applications and fewer than 500,000 pending applications. In September there were over 150,000 new and more than 800,000 pending applications (Eurostat, 2016). The commitment to 40,000 relocations was deemed insufficient and the Commission proposed an additional 120,00 relocations from Greece

and Italy<sup>5</sup>, with mandatory quotas in place to determine how many refugees each Member State would admit. The issue with the second proposal, and a major reason why the burden sharing effort was undermined from the beginning, was that it was taken by QMV by the Council, breaking from the new intergovernmentalism norm of using consensus.

The response to the Council's decision showed the existence of two tenets of the new intergovernmentalism. First, that deliberation and consensus were seen as the correct way to formulate JHA policy. Jean Asselborn, chair of the JHA Council, stated that it would have been preferable had the decision "been adopted by consensus", and European Council President Donald Tusk argued that the use of QMV in such sensitive issues would undermine EU policy coordination (Peutter, 2016, 611-12). Second, as per the fourth hypothesis concerning the implications of new intergovernmentalism<sup>6</sup>, Member States in the post-Maastricht era opposed infringements by supranational EU institutions on their sovereignty. This was evident in the opposition by politicians from the Visegrad 4 (V4) (Czech Republic, Hungary, Poland, Slovakia). For instance, Slovakian Prime Minister Robert Fico said "as long as I am Prime Minister, mandatory quotas will not be implemented on Slovak territory" and Poland's interior minister, Teresa Piatkowski stated "We are prepared to accept migrants but not quotas" (Brigazzi and De La Baume, 2015).

The fallout from the use of QMV and backlash against mandatory quotas is evidence of JHA's strong new intergovernmentalists character during the refugee crisis. The objections demonstrate that deliberation and consensus had become ingrained norms for creating and adopting policy at the EU level. Additionally, the preference for integration without supranationalisation among many Member States is evident in the objection to enforcing mandatory quotas. Finally, the failure of the Commission's mandatory relocation system to gain support demonstrates how Member States were unwilling to cede authority to the Commission (Faure, Gavas and Knoll, 15). Even before implementation, the ERS's effectiveness as a burden sharing mechanism and alternative to the Dublin System was undermined by new intergovernmentalism.

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<sup>5</sup> Hungary was originally included in the second proposal originally proposed by Jean Claude Juncker but was not in the agreement that was eventually adopted (Brigazzi and De La Baume, 2015).

<sup>6</sup> The fourth hypothesis is: "Problems in domestic preference formation have become standalone inputs into the European integration process" (Bickerton et al, 2015b, 714)

## Chapter III: The Failed Implementation of the Emergency Relocation Scheme

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The European Commission's 15th report on the progress of its relocation and resettlement schemes, published in September 2017, made for disappointing reading. Member States had failed to meet the target of 160,000 relocations. Only 27,382 refugees had lodged applications through ERS, just 19,244 people had been relocated, 2,741 still needed to be relocated, and a further 2,765 applicants for relocation had been rejected by Member States (European Commission, 2017a). The failure of the scheme, and the divisions it exacerbated within the Union, led the European Commission to decide to end mandatory relocation in 2017 and propose a voluntary relocation scheme instead (Duszczyk, Podgórska & Pszczółkowska, 2020, 483). This chapter will examine two different institutional dynamics which explain the weak implementation of the ERS and the persistence of the normative implications of new intergovernmentalism. First, the conflict of interest between the anti-immigration policy preferences of V4 leaders and the ERS's burden sharing objective. Second, the comparative founding and resources for two de novo bodies – the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (FRONTEX) – demonstrates how Member States prioritised border protection over burden sharing.

### ***Reluctant Member States: anti-Immigration as anti-burden sharing***

Most EU states failed to meet their mandatory refugee relocation commitments under the ERS. Of the 27 states involved in the scheme only two – Ireland and Malta – met their targets, and only a handful of others including Finland, Latvia and Sweden came close to meeting theirs (European Commission, 2017b). For the most part, Member States fell short because of inherent flaws in the ERS and the EU's asylum system at large. However, the V4 not only failed to meet their quotas but refused to even attempt to meet them, therefore undermining the scheme by prioritising their own anti-immigration agendas ahead of burden sharing. This prioritisation was evident in the rhetoric and policies of the V4, which lends further support to hypothesis four of new intergovernmentalism that “problems in domestic preference formation have become standalone inputs into the European integration process” (Bickerton et al., 2015b, 714).

In December 2017, the European Commission referred the Czech Republic, Hungary and Poland to the Court of Justice of the European Union (CJEU) for non-compliance with the ERS. Hungary and Poland had refused to relocate any refugees and the Czech Republic only relocated 12 (European Commission 2017c). The disobedience of the V4 went beyond their low number of relocations, as high-ranking politicians in each of the four countries criticised the scheme and voiced anti-immigration views. Viktor Orban - Hungarian Prime Minister and leader of right-wing national conservative party Fidesz – in an attempt to shift responsibility, labelled the crisis a “German problem” (Euronews, 2015). He also called it an “invasion” and predicted that it would “destabilize governments, countries and the whole European Continent” (Mendelski, 2019, 11-13). After the Paris and Brussels terrorist attacks

in 2015 and 2016 respectively, V4 politicians increasingly conflated the refugee influx with the threat of terrorism. Poland's Prime Minister Beata Szydlo of the right-wing populist Law and Justice Party (PiS) asserted that "in the face of the present terrorist threat related to people of Muslim denomination, I cannot see any possibility for Poland to receive any migrants presently" (Duszczek et al, 2020, 476). Similarly, Fico, leader of Slovakia's left-wing populist party Direction – Social Democracy party, claimed that "thousands of terrorists and Islamic State fighters are entering Europe with migrants" and promised supporters "we will never – under a quota system – bring one single Muslim to Slovakia" (BBC, 2016).

Anti-immigration, Islamophobic sentiments were not unique to the V4. Almost identical opinions were voiced elsewhere. For example, Marine Le Pen, leader of the French nationalist conservative party The Front National, regularly used anti-immigrant, Islamophobic language in her speeches (Nossiter, 2015). Similarly, Geert Wilders – leader of the far-right Party for Freedom in the Netherlands – saw his popularity increase whilst calling for tighter immigration controls and for the Netherlands to leave the EU in order to adopt their own asylum policies (Wilders, 2015). However, what distinguishes the V4 from other Member States is that the politicians espousing such views were in positions of power, and therefore were able to support their opinions with policies. The Czech Republic, in response to growing public opposition to taking in refugees, introduced controls at the Austrian border and tightened its asylum regulations; for example, they adopted legislation requiring asylum applications to provide a certificate proving the absence of infectious diseases (Duszczek et al, 2020, 476). The Slovakian government ignored their quota assignments, and rather than taking in the refugees from Greece and Italy, handpicked 149 Christians in internal displacement camps in Iraq to give refuge to (Lerner, 2016). As countries of transit, the opposition to and undermining of mandatory quotas from the V4 severely undermined the burden sharing objective of ERS by causing the burden of responsibility to be shifted on to other Member States, notably Germany. This left Member States who had previously supported the scheme feeling abandoned in their efforts to help refugees and more receptive to the V4's position (Duszczek et al, 2020, 483).

The V4 alone cannot be blamed for the failure of ERS, however their prioritisation of anti-immigration policies which shifted rather than shared the burden of responsibility for refugees undermined the intentions of the relocation scheme. Furthermore, the V4's disobedience is evidence of how in the post-Maastricht, new intergovernmental era the preferences of domestic governments dictate how Member States implement EU directives. The importance of domestic preference not only affected the policy choices of individual Member States but, as will be demonstrated in the next section, also influenced the power afforded to different *de novo* bodies.

### ***The European Asylum Support Office: a de novo body of limited Influence***

*De novo* bodies are agencies created by the EU with a specific, narrow remit and considerable autonomy and control over their assigned resources. *De novo* bodies existed before Maastricht; the European Investment Bank was established in 1958 and an additional four *de novo* bodies were established before 1992. However, according to new intergovernmentalism theory two of the key characteristics of the post-Maastricht era are:

(1) the proliferation of de novo bodies and (2) the increased delegation of power from governments and supranational bodies to de novo bodies. Plenty of evidence supports these claims. For example, in 2012 there were 32 different de novo bodies, and in 2013 the combined staff of all de novo bodies stood at around 15,000, more than the number of staff at the EP, CJEU and Council combined (Bickerton et al. 2015b, 705; 713 Hodson and Peterson, 2017, 11-12). However, when it came to the implementation of the ERS's mandatory relocation quotas, the empowerment of one de novo body, the EASO, was not forthcoming as it did not align with the preference of Member States for border control over burden sharing.

EASO began operating in 2011 tasked with developing the CEAS, specifically “enhancing practical co-operation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need” (EASO, 2016, 3). Whilst burden sharing is not explicitly part of its remit, “helping Member States fulfil their[...]obligations” shows that EASO was expected to facilitate burden sharing. There was a strong intergovernmental nature to the set-up of EASO. First, the management board was comprised of one representative from each Member State plus two Commission appointees, evidence of the Member States' desire for control. Second, EASO had no direct or indirect power over the decision-making of Member States (Scipioni, 2018, 770; Schneider and Nieswandt, 2018, 16). EASO played a significant role in the EU's attempt to relocate refugees from Italy and Greece through an array of activities, including: deploying teams of ‘asylum experts’ from different Member States to Italy and Greece; facilitating co-operation and information exchange between Member States; monitoring the relocation process; and developing tools to support specific steps in the relocation process (EASO, nd).

The substantial remit given to EASO is evidence of Bickerton et al.'s third hypothesis – “Where delegation occurs, governments and traditional supranational actors support the creation and empowerment of de novo bodies” (Bickerton et al, 2015b, 713) – in action. However, the applicability of the hypothesis is limited as, when compared with FRONTEX, the resources and responsibilities afforded to EASO were minimal and of minor importance. First, EASO's budget in 2016 was 69 million euros and they employed 175 staff. FRONTEX had a 238-million-euro budget and 417 members of staff. Second, EASO's competencies were mostly within the realm of operation support and coordination. They provided information, expertise and training, and carried out administrative tasks such as interviewing asylum claimants and evidence-assessment. These were all important tasks but national authorities retained formal decision-making power (Schneider and Nieswaltdt, 2018, 17). In contrast, FRONTEX was given authority in overseeing large naval operations covering huge expanses of the Mediterranean Sea. FRONTEX deployed ships, aircrafts and helicopters as part of Operations Poseidon and Triton to support Greece and Italy respectively with border control, surveillance, search and rescue and intercepting smugglers and traffickers. (European Factsheet 2016).

FRONTEX's operations were considerably more successful than EASO's relocation efforts. As the mandatory quotas were ended in 2017, FRONTEX's Operations Triton (renamed Themis in 2018) and Poseidon along with Operations Indalo (based in the Eastern Mediterranean) and Sophia (in the Southern Central Mediterranean) continued apace,

rescuing 531,178 people as of June 2020 (Council of the European Union, 2020). The differences in the resources and responsibilities assigned to EASO and FRONTEX shows that de novo bodies are an important part of policy-making in the new intergovernmental era, as per hypothesis three. However, the extent to which a de novo body is empowered by Member States depends on how closely the responsibilities of the de novo body align with their policy preferences. FRONTEX was assigned more responsibility and far greater resources to carry out its tasks than EASO because Member States were more concerned with border control than they were with refugee relocation through burden sharing.

The ERS's 'implementation deficit' was multifaceted. First, because the V4 Member States in key transit locations were so opposed to the mandatory quotas ERS's burden sharing objective was severely undermined. Second, the EASO was not provided with the resources or responsibilities which would have allowed the agency to effectively implement ERS and facilitate burden sharing. Collectively, these implementation deficits support two hypotheses of the new intergovernmentalism; (1) that domestic policy preferences influence how EU directives are implemented by Member States, and (2) de novo bodies are becoming increasingly important actors in EU policy. However, there is also evidence of a hierarchy of hypotheses as the empowerment of de novo bodies is contingent on how salient their area of authority is to Member States.

## Conclusion

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In the post-Maastricht, new intergovernmental era Europe has integrated in a paradoxical manner, as EU Member States integrate without supranationalisation. Deliberation and consensus have become entrenched norms of policy-making, de novo bodies have become more common and influential, and the domestic preferences of Member States more important in determining the success of EU policies (Bickerton et al., 2015b, 717). This dissertation has demonstrated that the implications of new intergovernmentalism had a detrimental impact on the policy-making in JHA which in turn severely hindered the success of the EU's Emergency Relocation Scheme in facilitating effective burden sharing among states during the refugee crisis.

The ERS was an admirable attempt by the EU to create a viable alternative to Dublin and ease the pressure placed on Greece and Italy by the mass influx of refugees. However, it was undermined on several fronts. First, in the years after the signing of Maastricht the EU failed to create an effective system for facilitating the fair distribution of refugees among its Member States. The Dublin System placed too much pressure on frontline states to be responsible for asylum seekers and attempts to move away from Dublin were undermined by the desire for Member States to retain authority. Thus, at the onset of the crisis, there was not an effective burden sharing mechanism in place.

Second, ERS was created in the JHA policy environment which was characterised by the persistence of new intergovernmental tropes, in particular the emphasis on deliberation and consensus. Third, the decision by the council to use QMV instead of consensus to impose mandatory quotas provoked severe backlash among the already Eurosceptic, anti-immigrant governments of the V4. Before the ERS could even be implemented it had already been undermined by objections to how it was formulated.

Fourth, the implementation was undermined by the actions of the V4 governments. High ranking politicians criticised the mandatory quotas, and governments adopted policies which contradicted the burden sharing objective, making it clear that domestic policy preferences outweighed any legal obligations imposed by the EU. Finally, the implementation of the ERS was undermined by the limited resources and responsibilities afforded to the EASO leaving it unable to carry out its task of "helping Member States fulfil their European and international obligations to give protection to people in need." Whilst EASO was left with insufficient resources to meet the challenges of the refugee influx, FRONTEX was given an increased budget and oversight of naval operations in the name of border protection, making it clear that the EU prioritised border protection over refugee relocation.

It cannot be definitively asserted that if the EASO had been given more resources, or if the mandatory quotas had been decided upon through consensus that the ERS would have been successful. What is clear is that when the EU needed to act on the principle of burden

sharing it failed to do so, and that this failing can and should be understood as a by-product of new intergovernmental integration.

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