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To cite this article: Florian Trauner (2016) Asylum policy: the EU's 'crises' and the looming policy regime failure, Journal of European Integration, 38:3, 311-325, DOI: [10.1080/07036337.2016.1140756](https://doi.org/10.1080/07036337.2016.1140756)

To link to this article: <http://dx.doi.org/10.1080/07036337.2016.1140756>



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Published online: 24 Mar 2016.



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Asylum policy: the EU's 'crises' and the looming policy regime failure

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ABSTRACT

What has been the impact of the European Union (EU)'s multifaceted crisis on asylum law and policy development? The article argues that the EU has sought to safeguard the core of its asylum policy by adding new layers of policy instruments in response to both the financial and economic crisis post-2008 and the refugee crisis starting in 2015. These instruments have had the overarching aim of providing EU member states facing high migratory pressures and/or financial constraints with additional support. Their efficiency, however, has remained questionable, reflected by a widening gap between the EU's asylum laws and actual asylum practices of member states. By avoiding a paradigm shift in asylum policy, the EU has come to face a difficult situation: the implementation of the existing EU asylum rules may overburden southern member states while the perpetuated ignorance of these rules risks overburdening northern member states.

KEYWORDS

European Union; asylum; economic and financial crisis; refugee crisis; decision-making processes

Introduction

The point of departure for this research – and for the Special Issue at large – has been the impact of the economic and financial crisis on policy-making processes in the European Union (EU). More specifically, this article has been interested in how the multifaceted crisis triggered by the collapse of the investment bank Lehman Brothers in 2008 has altered the patterns of policy-making in a field such as EU asylum policy. With the extraordinary events at the external borders of the EU when hundreds of thousands of migrants strived to enter the EU's territory and/or to reach specific member states such as Germany and Sweden in 2015, the economic and financial crisis intertwined with yet another crisis, publically referred to as Europe's 'refugee crisis'. The reluctance of Eastern European countries to participate in a EU-wide resettlement scheme and other issues, including the re-erection of border fences within Europe, paved the way to a widespread perception that the EU acts disunited and is incapable of finding a solution that is up to the challenge it faces (e.g. FT 2015a).

This research seeks to embed the EU's policy responses to the refugee crisis into a more longitudinal picture of EU law and policy development under difficult external circumstances. Put differently, the article is interested in how EU actors involved in asylum policy-making

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have reacted to the challenges triggered by both the financial and economic crisis post-2008 and the refugee crisis starting in 2015. The investigation of the impact of the multifaceted crisis the EU has been facing since 2008 is still a research desideratum (but see Nacheva 2015; Triandafyllidou 2014). Thus far research has primarily focused on aspects such as the Europeanisation of national asylum systems (e.g. Guild 2006; Lavenex 2001; Toshkov and de Haan 2013), the dynamics of decision-making and content of EU asylum law (e.g. Kaunert and Léonard 2012; Ripoll Servent and Trauner 2014; Zaun 2015), the role of EU in externalising asylum policy and the responsibility for refugee protection (e.g. Andrijasevic 2010; Gammeltoft-Hansen 2007; Klepp 2010) and the issue of burden-sharing and solidarity in Europe (e.g. Bendel 2015; Thielemann and Armstrong 2013; Uçarer 2006).

The article argues that uncommonly high numbers of refugees, triggered by the wars in nearby regions, in combination with tight budgetary constraints of some member states have exposed the deficiencies of the EU asylum policy, such as a lack of comparability of the asylum standards of certain member states. In reaction, the EU has sought to safeguard the constitutional pillars of its asylum policy, notably the Dublin regime, by introducing and adding new policy instruments that should provide member states facing difficulties with additional support. However, several member states have not yet managed to fix their ill-functioning asylum system, nor have the numbers of how many asylum seekers member states receive been equalised within Europe. The pressure on the EU to reform its asylum policy at a higher order of change has reached a critical stage.

Analytically, the research adheres to the research framework developed for the purposes of the Special Issue. This framework elaborates on how different actors may use or incorporate a particular 'crisis' into the policy-making process (see Falkner, 2016). Peter Hall's (1993) concept of different 'orders of change' is used to understand what kind of change may be achieved in such a situation. The highest order of change concerns 'paradigmatic change', or change at the level of ideas (see Falkner, 2016, for a detailed discussion). Put differently, one might ask, is a crisis potent enough to motivate actors to embark on far-reaching policy change they would otherwise be unable to agree upon under other circumstances? Or, to the contrary, does a crisis enhance the inability of actors to exit from a situation described as 'joint decision trap' (Scharpf 1988)? Methodologically, the research builds not only on an analysis of primary and secondary resources but also on the conduct of a range of semi-structured expert interviews.

In terms of structure, the article develops its argument in three steps. It starts by looking at how EU member states have altered their patterns of dealing with refugees post-2008. It then shifts the attention to an analysis of the EU decision-making processes under the influence of the economic and financial crisis. The final part investigates the EU's response to the 2015 events, during which the EU's containment strategy, as applied in the economic and financial crisis, has reached its limits.

Stage 1: The impact of the financial and economic crisis on refugees and member states

The financial and economic crisis had not only an impact on the EU asylum-related policy-making processes but also on the actual situation of refugees in Europe. Refugees have struggled to access the rights outlined in international and European law. Some member states facing tight budgetary constraints found it difficult to sustain the functioning of their asylum systems and procedures.

The deteriorating human rights situation of refugees

In the wake of the financial and economic crisis, an increasing level of unemployment and a decrease in the standard of living in certain member states have led to a rise in xenophobia, racism and violence against third-country nationals. The Secretary General of the Council of Europe, Thorbjørn Jagland, considers that 'human rights, democracy and the rule of law in Europe now face a crisis unprecedented since the end of the Cold War' (Council of Europe 2014, 5). Migrants could face the risk of 'unjustified, excessive or inadequate detention' and, if not detained, a 'lack of basic protection' (such as minimum health care) (Council of Europe 2014, 18).

The development that migrants – particularly asylum seekers – are perceived as a (financial and societal) 'burden' started long before the financial and economic crisis. At the beginning of the Cold War, refugees were welcomed in Western Europe. They were interpreted as a sign that the democratic systems of the West were more attractive than the Communist regimes in the East. Since the 1980s and 1990s, however, Western European states have focused more on the perceived and real costs raised by refugee protection (Lavenex 2001). Individuals coming in search of protection were often suspected of being 'bogus' asylum seekers who sought to profit from national welfare systems. Migration and asylum have increasingly been converted into a law-and-order question and have become 'securitized' (Guild 2006; Huysmans 2000).

The financial and economic crisis worsened the situation – some member states with tight budgetary constraints found it more difficult to sustain the functioning of their asylum systems and procedures. According to the 2014 report on Europe published by the United Nations High Commissioner for Refugees (UNHCR), the asylum systems have become highly fragile in some parts of Europe. 'Difficulties in accessing territories and asylum procedures, violations of the principle of *non-refoulement*, low recognition rates and the destitution of those who have been recognised as refugees continue to encourage onward movements' (UNHCR 2014a). In other words, refugees have struggled to receive the protection they need.

Member states with financial problems fall behind

The cornerstone of the EU's asylum policy is the Dublin regime that allocates responsibility for dealing with asylum seekers in the EU. The Dublin Convention (1990) was initially signed as an intergovernmental treaty outside the EU's legal framework and was later incorporated into EU law (2003/343/EC, the 'Dublin II Regulation'). The central principle of the Dublin regime is that only one member state is responsible for the examination of an asylum seeker's application, usually the country of first entry. The EU has therefore worked towards establishing comparable treatment and conditions for asylum seekers everywhere in the Union. Between 1999 and 2005, the EU adopted a series of laws defining minimum standards in areas such as the reception and qualification of asylum seekers in order to reduce differences between member states' asylum systems.

While the EU has hence worked towards harmonising asylum standards and procedures, it has not yet managed to establish a comparable and uniform system. In other words, it *does* matter where an asylum seeker submits the application. The European Council on Refugees and Exiles (2011) spoke of a 'lottery' for refugees within the Common European Asylum System, given that asylum seekers had a very different prospect of being granted asylum in the EU member state. This concern of civil society actors is echoed in scholarly

work. According to a quantitative analysis by Toshkov and de Haan (2013, 662), a certain convergence in recognition rates (both full status and complementary protection) cannot mask that asylum procedures and outcomes continue to vary in the EU – ‘asylum seekers from most countries of origin face substantially different chances of recognition depending on the destination country to which they apply.’ A similar conclusion is drawn by Parusel (2015, 133), who suggests there is a ‘strong need for further harmonisation’, even if he already detects a ‘fragile trend towards an approximation of national decision-making practices’.

The economic and financial crisis furthered these divergences. Some member states badly hit by the crisis – first and foremost Greece – have had a particular standing in the EU asylum regime. They are countries at the external EU border and therefore, in principle, are responsible for the handling of new asylum seekers arriving in the EU through their territory. However, this rule has become problematic. With the economic situation worsening, Greece has started to face another crisis – the ‘Greek asylum crisis’ (McDonough and Tsourdi 2012).

On 22 December 2011, the Court of Justice of the EU delivered a judgement on the case of an Afghan asylum seeker, who entered the EU through Greece, where he was arrested in 2008. He then continued his journey to the UK, where he applied for asylum. In line with the Dublin Regulation, the person was informed that the responsibility for this case lay with Greece. The Court of Justice of the EU, however, maintained that member states may not transfer an asylum seeker to this member state because

they cannot be unaware that systemic deficiencies in the asylum procedures and in the reception conditions of asylum seekers [...] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment. (joined cases C-410/10 and C-493/10)

This ruling confirmed a similar ruling of the Strasbourg-based European Court of Human Rights in January 2011 (*M.S.S vs. Belgium and Greece*).

The court rulings resulted in a (temporary) suspension of ‘Dublin regime transfers’ of asylum seekers to Greece. Greece has been a case *in extremis*, yet the challenge of an ill-functioning asylum system has also been noted for other EU member states, including Bulgaria, Hungary and Italy. In November 2014, the European Court of Human Rights maintained that Dublin transfers of vulnerable categories of refugees (notably families) back to Italy would require individualised prior guarantees to fulfil the commitments of the European Convention of Human Rights (*Tarakhel vs. Switzerland*). The UNHCR recommended that all member states refrain from sending asylum seekers back to Hungary in 2012 (UNHCR 2012). A similar warning was issued in early 2014 for Bulgaria (UNHCR 2014b). In both cases, the UNHCR questioned whether asylum seekers had a chance for a fair asylum procedure and highlighted the bad conditions of the reception facilities. After the respective governments addressed some of these concerns, the call for a temporary suspension of Dublin transfers was lifted by the UNHCR. Civil society organisations, however, still have reservations about the breadth of these reforms and continue to suggest a ban on transfers of asylum seekers to Bulgaria and Hungary (e.g. Amnesty International 2014; Hungarian Helsinki Committee 2014).

It needs mentioning that not all problems detected in the asylum systems of member states have related to the economic and financial crisis. Politicians have some room for manoeuvre even under budgetary constraints. To put it bluntly, if a government decides to spend more on issues such as pensions and social welfare than on receiving asylum seekers, the administrative weakness of reception centres and asylum systems is a political choice that may aim at making the country less attractive for this group of migrants.

The issue of solidarity and refugee burden-sharing

The question of solidarity and refugee burden-sharing is an old-standing issue in the EU's asylum policy (Thielemann and Dewan 2006), thereby predating the economic and financial crisis. Yet, the combination of increasing numbers of refugees triggered by the wars and revolutions in the Middle East and the tight budgetary constraints by southern 'frontier countries' contributed to a higher salience of the burden-sharing issue. Italy was particularly outspoken in its call for more solidarity and burden sharing in the field of migration and asylum (e.g. EurActiv 2014). The northern states, in particular Germany, have used statistical data to reject the southerners' claims for more solidarity and burden sharing.

Figure 1 shows that the number of asylum applications started to diverge well before 2015 when a majority of the newly arrived refugees headed to Germany. 72% of all asylum applications in the EU were made in only five member states in 2014 (European Commission 2015a, 13). Roughly one out of three asylum seekers in the EU-28 applied in Germany of that year. The five countries that received the most asylum applications in 2014 were Germany, Sweden, Italy, France and Hungary, respectively. Relative to the absolute number of inhabitants, however, it was Sweden that had the most asylum applications (8.4 applicants per thousand inhabitants) in 2014, followed by Hungary (4.3) and Austria (3.3) (Eurostat 2015).

The high number of asylum applications in EU member states that are *not* at the EU external borders have led to accusations that frontier countries such as Italy refrain from systematically fingerprinting newly arrived asylum seekers so that their point of entry into the EU is not traceable. These states reportedly enter the fingerprints into the Eurodac database with a substantial delay, implying that the asylum seeker finds enough time to leave the country and apply elsewhere (expert interview 5). The Italian interior minister has openly threatened to release the migrants that Italy intercepts at high sea to other member states in non-compliance with EU rules if the country does not get more support and solidarity from its EU partners (EUobserver 2014a).

Stage 2: Maintaining the asylum policy 'core' and providing extra support

The previous section demonstrated that the flaws of the EU asylum system, such as a lack of comparability of the asylum standards of member states, have already become more exposed in the context of the financial and economic crisis. How has the EU reacted to this

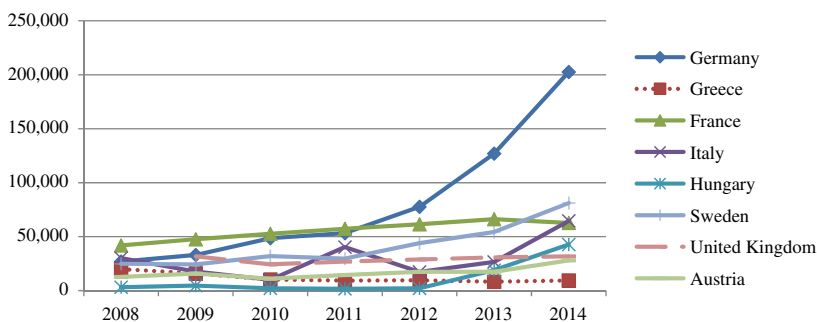


Figure 1. Asylum applications in selected EU member states.
Source: Own elaboration based on Eurostat data.

development? It sought to apply a double-strategy: maintaining the core of the existing EU asylum laws while providing more support for countries under migratory and/or financial stress. The overall objective at this stage was to ensure policy stability.

The recast negotiations of the EU's asylum laws (2005–2013)

The timing of financial and economic crisis coincided with the recast of the EU asylum legislation. With few exceptions, the legislative texts developed prior to 2005 became subject to a recast exercise. The EU's objective has been to go beyond the common minimum standards of the first generation and to develop fully harmonised asylum standards and procedures.

These negotiations were contested. To understand these difficulties, one has to look back to the negotiations on the first generation of EU asylum laws. Prior to 2005, the Council and the European Parliament (EP) developed a different approach to asylum. The EP tended to propose liberal, refugee-friendly measures and acted as an advocate for more harmonisation (Hix and Noury 2007, 202). The Council insisted on not expanding the rights and benefits for asylum seekers and to maintain flexibility for member states. Since the EP had no more than the right to be consulted, the Council translated most of its positions into EU law (Ripoll Servent and Trauner 2014, 1146–1148). The second generation of asylum laws were negotiated under co-decision, implying an empowerment of the EP, compared to the previous negotiations. The Parliament, in alliance with the Commission, was keen to develop more harmonised and liberal rules, yet the Council refrained from being put under pressure. The member states had just implemented the first generation of asylum laws and perceived less urgency to agree on second-generation asylum laws. The Council insisted on compromises that were close to its position – even at the risk of failed negotiations (Lopatin 2013; Ripoll Servent and Trauner 2014).

In this negotiation constellation, the economic crisis became an important discursive tool for proponents of a solution close to the status quo. In their interactions with the Parliament and the Commission, the member states appealed to the difficult economic climate as an argument to keep flexibility and prevent a rise, for instance, in the level of reception conditions (expert interviews 1, 2 and 4; see also Peers 2012, 1). A case in point has been the EP's proposal for a new procedure aiming at identifying persons with special needs. According to the argument of the Council, even if the procedure would only cost € 100 per individual, it would end up applying to all asylum seekers, which would raise the final cost to millions of Euros (expert interviews 2 and 3). This reasoning was convincing in view of the austerity programmes all over Europe. In 2011, the Commission issued two new proposals on key asylum laws, the Receptions and Procedures Directive, which accommodated key concerns of the member states.

The difficult and lengthy negotiations translated into policy outcomes close to the status quo. The asylum laws adopted by June 2013¹ did not change the policy rationale defined by the Council in the first-generation asylum laws (under consultation) largely unaffected (Ripoll Servent and Trauner 2014). In highly controversial issues, the (northern) member states' position in the Council favoured adjustments only, but no transformation of the current regime prevailed. For the Dublin III Regulation in particular, both the Commission and the EP were in favour of a suspension of the transfers of asylum seekers if a member state's asylum system was overburdened. This clause was not inserted, only an additional 'early warning

mechanism' and ad hoc support for countries under 'particular pressures' (Regulation No. 604/2013, Arts. 22 and 23).

Showing solidarity through other means?

While maintaining the pillars of the existing system, the EU has sought to enhance its support for southern EU member states in their dealing with migration flows. These measures have not challenged the key elements of the EU's asylum rules as defined in the legal integration process, yet they added a new policy layer aimed at ensuring the sustainability and credibility of the EU asylum regime. They can be categorised into (1) financial solidarity, (2) operational support through the EU's border agency, Frontex, and the European Asylum Support Office (EASO) and (3) voluntary relocation measures (FRA 2011, 36–37).

More financial support

Regarding financial solidarity, for instance, Greece received € 82.7 million from the European Refugee Fund, the External Borders Fund and the Return Fund in 2013 (European Commission 2014, 6). These three funds are part of the EU's framework programme 'Solidarity and management of migratory flows' financed with a total of € 5.8 billion for the period 2007–2013. The funds also allow for the funding of emergency measures. In 2013, an amount of € 36.34 million was made available for nine member states in order to better deal with consequences of the Syrian refugee crisis (European Commission 2014b, 20). The different funds have been replaced by a new 'Asylum, Migration and Integration Fund' with a budget of € 3.1 billion for the period 2014–2020. In this new multi-annual framework programme, member states are obliged to use at least 20% of this money for measures supporting legal migration and another 20% for asylum measures (Regulation 516/2014, Art. 15).

These have been considerable amounts of money, yet the financial crisis has made it more difficult for countries such as Greece to take full advantage of these funds due to the co-financing requirements (European Parliament 2013, 6). Also, the administrative procedure required to access these funds has proven to be an obstacle. An NGO (non-governmental organisation) has to advance all costs of a project before it actually receives money from the European Refugee Fund. In practice, this requirement has often overstretched the capacity of applying NGOs (FRA 2011, 38).

More operational support

The second way to help overburdened EU member states has been operational support through the EU agencies, particularly the EU's border management agency, Frontex, and the EASO. These agencies are sometimes promoted as a panacea for dealing with the migration flows into Europe (or, probably more accurate, for curbing them). Frontex's budget has increased substantially in the agency's comparatively short existence and is still far higher than that of the EASO (see Figure 2).

Frontex deployed its first Rapid Border Intervention Teams in Evros from November 2010 to March 2011. A total of 175 border-control specialists sent by member states and Schengen associates supported the Greek authorities with technical equipment and know-how in order to control the Greek-Turkish land border. Greece was also the test case for the 'emergency support' offered by the EASO. So-called Asylum Support Teams have worked to improve

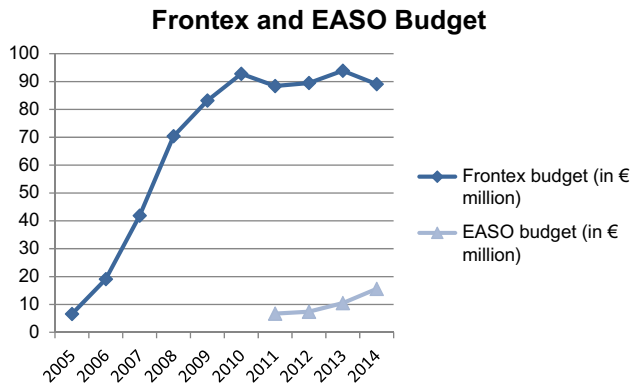


Figure 2. Frontex and EASO Budget.

Source: ‘Governance documents’ of Frontex; ‘Budget’ sheets of EASO.

the functioning of the concerned asylum system. By mid-2014, EASO offered ‘operational support’ to four member states: Bulgaria, Italy, Greece and Cyprus (EASO 2014).

The most important operation for Frontex has been ‘Triton’, which replaced the Italian ‘Mare Nostrum’ operation in November 2014. Mare Nostrum was launched in reaction to the Lampedusa tragedy of October 2013, when more than 360 migrants drowned on their way to Europe. The costs of Mare Nostrum, which were borne by Italy, amounted to € 9 million per month. The country struggled to convince its EU partners to assume these costs. In June 2014, EU Home Affairs Commissioner Cecilia Malmström maintained, ‘I am full of admiration for Mare Nostrum [but] to just replace it with a Frontex operation isn’t possible. We don’t have the money’ (EUobserver 2014b). In the compromise reached in August 2014, two already existing EU operations in the Mediterranean (Hermes and Aeneas) were merged in order to replace Mare Nostrum. Operation Triton, however, initially had a substantially smaller budget (€ 2.9 million per month) and focused its activities closer to the northern borders of the Mediterranean (Agence Europe 2014). This changed in early 2015 when EU heads of state or government tripled the operation’s budget in reaction to an increasing number of migrants drowning on their way to Europe (European Council 2015).

Testing voluntary relocation schemes

A third and final way to show solidarity is a relocation of asylum seekers from EU countries with high arrival numbers to EU countries with lower numbers. Already in the year 2010, the Commission established a feasibility study on such an intra-EU-relocation mechanism (European Commission 2010). The European Parliament (2012) was an ally in the Commission’s efforts by demanding early on a permanent relocation mechanism in the EU. Yet, the member states largely opposed legally binding relocations schemes before the 2015 refugee crisis. The Commission’s study (2010, 10) reflects a highly contested view on the reasons for the ‘uneven distribution of [the] asylum burden’. As a matter of fact, the EU has only been able to agree on a pilot project of voluntary intra-EU-relocation from Malta (EUREMA). The project’s scope was limited. In the first phase in 2011, 227 asylum seekers were relocated from Malta to 10 other member states. In 2012, in the project’s second phase, this number slightly increased to 356 individuals relocated to 16 member and associated states, such as Norway (EASO 2012, 4).

Stage 3: Struggling for paradigmatic change post-2015

Early 2015 has been marked by a series of migrant boat tragedies in the Mediterranean Sea and unusually high numbers of new refugees arriving on European soil, further stressing the EU to the point of 'crisis'. In April of the same year, a single boat tragedy in the Mediterranean Sea caused the death of more than 800 people. 3692 migrants reportedly drowned in 2015 (IOM 2015). Simultaneously, the numbers of refugees and migrants reaching the EU's territory skyrocketed in an unprecedented manner. A total of one million refugees are expected to arrive in Germany during 2015 (Der Spiegel 2015). This amounts to a fivefold increase compared to the preceding year. 200,000 refugees crossed Austria in the month of September 2015 alone, with 10,000 staying to apply for asylum (Springer 2015). Most irregular migration movements have been registered at the central and eastern Mediterranean route. According to the International Organisation for Migration (2015), 810,000 migrants and refugees have crossed into Greece by sea, and 5000 more by land in 2015.

It is important, however, to place these numbers in a wider context. There are currently 60 million refugees in the world – a number unseen since Second World War (UNHCR 2015). In other words, Europe is not alone in facing migratory challenges.

Surrendering the EU policy?

Given the sheer number of the newly arrived migrants, the EU 'frontline' member states began overtly ignoring Dublin's 'first-country-of-entry' principle and allowed the migrants to move on to their preferred countries of destination, first and foremost to Germany and Sweden. Facing the facts of a de facto surrender of a key pillar of the EU asylum policy, Germany announced itself to suspend the Dublin rules for refugees coming from Syria (EurActiv.com 2015). The conservative Christian Social Union in Bavaria criticised this decision, declaring it an invitation for an 'open door' policy. Contrastingly, political commentators noted that this announcement only acknowledged that such returns were no longer practical within Europe (Rachmann 2015).

With the gap between the legal EU asylum regime and the actual practices of member states becoming wider, the EU has been compelled to engage in a process of policy reform. In May and September 2015, the European Commission proposed a series of measures under the title 'European Agenda on Migration'. The agenda includes a common list of 'safe countries of origin', plans to install a more efficient EU return policy, and strategies to tackle the root causes for migration in Africa and to solve the conflicts causing people to flee (European Commission 2015a). The flagship proposal was the installation of an 'emergency relocation scheme' for a total of 160,000 migrants from three frontline member states, namely Hungary, Greece and Italy. It should become the first step towards a more permanent resettlement policy within Europe. The resettlement should concern refugees from countries with an average recognition rate of above 75%. Member states participating in the scheme may benefit from € 780 million of EU budget support (European Commission 2015c). In effect, this amounts to a lump sum of around € 6000 per relocated migrant (Council of the European Union 2015, 16).

Northern EU member states, including Germany, backed the Commission's plans and promoted the relocation scheme. They were particularly interested in the measures accompanying the relocation mechanism, notably an enhanced commitment for national authorities

to register and host new migrants. According to the Commission's plan, support for the 'frontline' member states depends on whether they cooperate with the registration and fingerprinting of newly arrived migrants. In the so-called 'hotspot' approach, the EU's agencies, namely Frontex, Europol, Eurojust and EASO, should help the authorities of the frontline member states 'to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants' (European Commission 2015b). To put it more bluntly, the frontline member states may no longer have the liberty to ignore the EU rules on fingerprinting and registration as outlined in the Eurodac Regulation Nr. 604/2013, if they want to benefit from the relocation scheme.

The strongest opposition to the Commission's reform agenda derived from Eastern Europeans. The Hungarian government of Viktor Orbán rejected the Commission's perception of it being a 'frontline state' and opposed the idea of effectively hosting an EU refugee camp that registers and distributes newly arrived migrants (Robinson 2015). In reaction to the rising numbers of asylum seekers, Hungary perceived the necessity of a 'national emergency measure' and erected a new fence on its borders to Croatia and Serbia. This contributed to diverting the refugee flow away from Hungary to neighbouring states, in particular Slovenia. Senior politicians from Hungary, the Czech Republic, Romania and Slovakia also disapproved of the Commission's plans on the grounds that they did not want to open their countries' doors for Muslim refugees from the Middle East and north Africa (Barber 2015). By outvoting the four opposing Eastern European member states, the Council agreed on the relocation of a total of 160,000 people from Italy and Greece in September 2015.

From an analytical angle, it can be stated that the time and the functional pressure in the context of the 2015 refugee crisis were extremely high. Yet, the member states have had a different level of exposure to these pressures. Some member states including most Eastern European states, the UK, Spain and Portugal have been less affected by the large number of refugees coming into or transiting their countries compared to countries such as Germany, Austria, Sweden, Italy and Greece. Furthermore, a (informal) norm of consensus seeking in the Justice and Home Affairs Council has made it difficult for the EU to react in a quick and comprehensive way. The use of qualified majority voting in a sovereignty-sensitive issue such as compulsory quotas for refugees has been 'remarkable' (Roos and Orsini, 2015) and highlights the extent to which EU decision-making processes on asylum issues have become contested. The contestation is not yet over. In the first month after the adoption of the scheme, a total of 158 out of a planned 160,000 people have been relocated (Agence Europe 2015). This low number in combination with the reiterated statements of Eastern European governments to judicially and politically challenge the Council's decision indicates that the main playing field for the contestation is now the implementation level.

Keeping the 'Baseline' Dublin regime

Is this relocation scheme, in combination with the 'hotspot' approach, a paradigmatic change in EU asylum policy? The new approach provides an additional layer to the Dublin system but does not replace it. As the Commission (2015d) puts it,

[T]he Dublin system [...] remains the baseline system. For relocated persons, the proposed decision entails a limited and temporary derogation from certain provisions of the Dublin system [...]. For the remainder, the Dublin Regulation remains applicable and valid as a general rule for all asylum applications lodged in the European Union.

In effect, the EU's policy reform amounts to a 'Dublin-plus' strategy in which the core of the existing EU asylum policy is maintained. This strategy, however, risks failure in case one of the following two scenarios materialises.

Acceptance of EU rules overburdens southern member states

The new relocation scheme has caused much political controversy. However, it actually deals only with a number of the new refugees coming to Europe. In the Council's own words, 'this number [of 120,000 relocations] corresponds to approximately 43% of the total number of third-country nationals in clear need of international protection who have entered Italy and Greece irregularly in July and August 2015' (Council of the European Union 2015, 12). The relocation scheme may therefore not be a game changer in terms of how refugees are distributed in Europe. Those refugees who do not qualify for the relocation scheme are supposed to stay in 'frontline' member states, given that a return to the premises of the Dublin system is part of the EU plan. The EU's 'hotspot' approach, if fully accepted and implemented, may therefore increase the responsibility of states such as Greece and Italy to provide refugee protection, while the new relocation scheme risks providing them with only a limited amount of relief.

Ignorance of EU rules overburdens northern member states

In 2015, Germany's acceptance of the southern member states' disregard for the Dublin rules has been central for avoiding a humanitarian tragedy within Europe. Chancellor Angela Merkel's well-known phrase 'We can do this' became a symbol for the country's willingness to take in a considerable share of the newly arrived refugees. The German position, however, has already changed to some extent (Wagstyl 2015). If Germany and other northern member states with high migrant numbers do not see a value added provided by the EU's new policy measures, there is a risk of a further proliferation of 'national emergency measures', such as border controls and border fences. The discussions on whether or not the Schengen zone providing passport-free travel in Europe can be maintained have already intensified by the end of 2015. A case in point has been the warning of senior EU officials that Greece risks a suspension from the Schengen zone, should the Greek government under Alexis Tsipras not overhaul its response to the refugee crisis (FT 2015b).

Conclusions

This article has investigated how the multifaceted crisis that the EU has faced post-2008 has affected decision-making processes and outcomes in the field of asylum policy.

With its principle that the responsibility for dealing with asylum seekers lies with the first EU country of entry, the Dublin system builds upon the assumption that comparable rules and procedures exist throughout the EU. Regardless of the EU's efforts to harmonise these rules in the Common European Asylum System, national asylum systems and procedures have continued to exhibit substantial differences. With regard to the countries left badly bruised by the economic crisis, these differences have become more pronounced. The inner-European 'Dublin-transfers' of asylum seekers back to Greece have been interrupted in the wake of court rulings and have become greatly contested for countries such as Bulgaria, Hungary and Italy.

In this situation, the EU has displaced most of its first-generation asylum laws with new rules aimed at moving from common minimum standards to common EU asylum standards. The economic crisis became an important discursive argument for not expanding the rights of asylum seekers in view of the financial implications of such a step. The asylum package agreed upon in June 2013 nuanced the existing legislation without reversing the core of the existing regime (e.g. Ripoll Servent and Trauner, 2014). The EU, however, sought to enhance its support for the member states facing difficulties in coping with the migratory pressure. The EU border management agency, Frontex and the EASO have become more involved in the management of migrants and asylum seekers in these EU member states. In other words, the economic and financial crisis has brought about a *de facto* (not a *de jure*) differentiation between those member states where the national infrastructure could stand the pressures of enhanced migration flows even under budgetary constraints and others that could no longer do so in a self-sustaining way.

While the economic and financial crisis – and its implications in the asylum field – was primarily seen as a ‘southern’ problem, the consequences of the 2015 refugee crisis were felt equally – if not more – by northern EU member states. Most newly arrived migrants headed to only a few countries in the north, notably Germany. In view of high migratory pressures, member states began overtly disrespecting the Dublin rules. This was the case in Italy, Greece and other transit countries by allowing migrants move on to northern destination countries. This too was the case in Germany with the suspension of the Dublin rules for Syrian refugees.

To regain control, the EU proposed a series of new instruments, in particular a relocation scheme for 160,000 migrants from Greece and Italy. The decision was taken by outvoting opposing Eastern European states. This breach of an informal consensus norm in the Council reflects how polarised EU decision-making processes have become in the context of the refugee crisis. The EU, however, has still refrained from touching the key pillars of its asylum policy, notably the Dublin regime. The relocation scheme, in combination with the ‘hotspot’ approach, is meant to provide an additional layer of instruments to the Dublin regime but not to replace it. According to the project’s conceptual framework (Falkner, 2016), this amounts to a second-order change implying a change in instruments or techniques yet no change at the level of overarching ideals or hierarchy of priorities.

The question, certainly, is: to what extent can this attempt to ensure, or, more precisely, to come back to policy stability be sustainable? Adding new layers of policy instruments to maintain a policy core that procedures sub-optimal outcomes may eventually no longer suffice. By avoiding a policy change of higher order, the EU has come to face a difficult situation: the implementation of the existing EU asylum rules may overburden southern member states while the perpetuated ignorance of these rules risks overburdening northern member states.

Interviews

- (1) Political advisor to the Confederal Group of the European United Left/Nordic Green Left (GUE/NGL), November 2012
- (2) Council official, Secretariat of the Council of the EU, November 2012
- (3) Diplomatic source A, November 2012.
- (4) Diplomatic source B, November 2012.
- (5) NGO activist participating in the European Council of Refugees and Exile, October 2014.

- (6) Commission official, DG Home Affairs, March 2015
- (7) Official of the Fundamental Rights Agency, October 2014.
- (8) Hubert Pirker, Member of European Parliament (1996–2014) in the LIBE committee, March 2015

Acknowledgement

I would like to thank Gerda Falkner, Christof Roos, Ilke Adam, the two anonymous reviewers and other participants of this Special Issue for useful comments on earlier versions of the article. The editorial help of Whitney Isaacs, Brigitte Pircher and Meghan Casey is gratefully acknowledged.

Disclosure statement

No potential conflict of interest was reported by the author.

Note

1. The asylum package encompasses the Receptions (2003/9/EC; 2013/33/EU), the Qualifications (2004/83/EC; 2011/95/EU) and the Procedures Directives (2005/85/EC; 2013/32/EU) as well as the Eurodac (2725/2000/EC; 603/2013/EU) and the Dublin Regulations (343/2003/EC; 604/2013/EU).

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