Fortress Europe – a brief history of the European migration and asylum policy

A historical institutionalist analysis of the migration and asylum policy, and the impacts of the current migration crisis

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Hallinnon ja organisaatioiden tutkimuksen linja

Pro gradu-tutkielma

Lokakuu 2016

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HELSINGFORS UNIVERSITET
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Tiedekunta/Osasto – Fakultet/Sektion – Faculty	Laitos – Institution – Department
Valtiotieteellinen tiedekunta	Politiikan ja talouden tutkimuksen laitos

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Työn nimi – Arbetets titel – Title
Fortress Europe – a brief history of the European migration and asylum policy
A historical institutionalist analysis of the migration and asylum policy, and the impacts of the current migration crisis

Oppiaine – Läroämne – Subject
Yleinen valtio-oppi: hallinnon ja organisaatioiden tutkimuksen linja

Työn laji – Arbetets art – Level	Aika – Datum – Month and year	Sivumäärä – Sidoantal – Number of pages
Pro gradu	Lokakuu 2016	101+10

Tiivistelmä – Referat – Abstract

1900-luvun Euroopan historialle tunnusomaista ovat suuret sosiaaliset, poliittiset ja taloudelliset muutokset sekä yhtenäisen eurooppalaisen yhteiskunnan luominen. Enemmistön Euroopan maista ollessa nyt EU:n jäseniä, poliittinen fokus on kuitenkin 2000-luvulla siirtynyt suurelta osin Euroopan ulkopuolelta peräisin olevaan maahanmuuttoon. Vaikka EU sen aikaisemmissa muodoissa loi useita mekanismeja maahanmuuton koordinoimiseksi, virallinen alku yhteistyölle sijoittuu vuoteen 1999. Viime vuosina maahanmuuttokeskustelu on keskittynyt turvapaikanhakijoihin, ja tilannetta kutsutaan yleisesti pakolaiskriisiksi. Eurooppalainen maahanmuutto- ja pakolaispolitiikka eivät ole vain äärimmäisen ajankohtaisia aiheita, mutta suurin osa kattavasta tutkimuksesta on peräisin ajalta ennen Lissabonin sopimusta, ja tuoreemmat tutkimukset käsittelevät politiikkakehitystä vain lyhyesti. Toisaalta syvällisemmät katsaukset keskittyvät vain tiettyihin ajanjaksoihin EU:n historiassa.

Tämän tutkimuksen tavoitteena on lisätä ymmärrystä EU:n maahanmuuttopolitiikan kehittymisestä, ja tätä kautta tarjota selityksiä EU:n vaikeuksille selvitä nykyisestä pakolaiskriisistä ja luoda toimivaa turvapaikkajärjestelmää. Tässä onnistuttiin hyödyntämällä historiallis-institutionalistista näkökulmaa. Historiallinen institutionalismi tarjoaa työkaluja selittää EU:n kyvyttömyyttä saavuttaa yhteisymmärrystä etenkin turvapaikkakysymyksissä. Apuvälineinä toimivat etenkin polkuriippuvuuksien ja epäjatkuvuuskohtien analyysi sekä tuoreempana vähittäisen muutoksen käsite. Lisäksi kerronnallista prosessin seurantaa käyttäen muutoksen keskeisiä tekijöitä voitiin tunnistaa. Tutkimuksen toinen, kunnianhimoinen tavoite oli historiallisen institutionalismin tärkeimpiin tutkijoihin tukeutuen vastata teorian havaittuihin heikkouksiin, ja mm. syytöksiin sen kykenemättömyydestä selittää muutosta lainkaan. Tutkimuskysymykset olivat seuraavat:

Miten eurooppalainen maahanmuutto- ja turvapaikkapolitiikka ovat muuttuneet ajan saatossa?

Miksi EU on epäonnistunut yhtenäisen maahanmuuttopolitiikan luomisessa?

Kerronnallista prosessin seurantaa soveltaen kehityksen analyysi liitettiin onnistuneesti kausaalisen prosessin askelten kuvailuun, alkaen kahdenkeskisistä sopimuksista ja *laissez-faire* -politiikasta johtaen vähitellen sopimusten luomiseen, joiden tarkoituksena oli luoda yhteinen maahanmuutto- ja turvapaikkapolitiikka. Sekä sisäisiä prosesseja että ulkoisia yllykeitä muutokselle havaittiin, ja päätösten ajallista aspektia sekä keskinäisriippuvuutta painottaen muodostettiin historiallisen institutionalismin mukainen narratiivi. Jatkuvalle kehitykselle löydettiin useita tekijöitä, joista monet olivat haasteita kuten laiton maahanmuutto, turvapaikanhakijoiden suuri määrä, ja turvallisuushuolet. Muita keskeisiä tekijöitä ovat EU:n sisäiseen vapaaseen liikkuvuuteen johtanut jatkuva integraatio, Euroopan yhtenäisasiakirja, laajentuneet ulkorajat ja ammattitaitoisen työvoiman tarve. Toiseen tutkimuskysymykseen liittyen huomattiin, että EU:n maahanmuutto- ja turvapaikkapolitiikka eivät ole kovin organisoituja eivätkä johdonmukaisia. EU-instituutiot ovat itse tunnistaneet ristiriidan odotettujen lopputulosten ja todellisten seurausten välillä. Taustalla oleva institutionaalinen syy tälle vaikuttaa pitkälti olevan EU-lainsäädännön joustamattomuus. Lopuksi Hoffmannin tutkimusta hyödyntäen esitettiin osan ongelmista olevan seurausta joidenkin maiden näkemyksestä siitä, että kansalliset toimenpiteet ovat hyödyllisempiä yksittäisille maille kuin yhteistyö.

Historiallis-institutionalistisia metodeita sovellettiin menestyksekkäästi todennettavien ja kiinnostuvien tuloksien saamiseksi EU:n maahanmuutto- ja turvapaikkapolitiikkaan liittyen. Polkuriippuvuuden, epäjatkuvuuskohtien ja vähittäisen muutoksen yhdistäminen osoittautui erittäin toimivaksi institutionalistisen muutoksen selittämiseksi ja teorian kohtaan osoitettuun kritiikkiin vastaamiseksi. Vähittäisen muutoksen käsite osoittautui keskeiseksi analyysille. Tämä tutkimus on onnistunut lisäämään ymmärrystä EU:n maahanmuutto- ja turvapaikkapolitiikasta, ja teorian testaamisen kautta parantamaan historiallisen institutionalismin käytettävyyttä tutkimusmenetelmänä. Teorian perinteistä viitekehystä lähestyttiin kriittisesti, ja osaan kritiikistä vastattiin. Lopputuloksena osoitettiin, että historiallinen institutionalismi tarjoaa huomattavaa potentiaalia politiikan muutoksen selittämisessä.

Avainsanat – Nyckelord – Keywords

EU, politiikka, maahanmuutto, pakolaiset, pakolaiskriisi, turvapaikanhakijat, historiallinen institutionalismi, uusinstitutionalismi, kerronnallinen analyysi, polkuriippuvuus, epäjatkuvuuskohdat, vähittäinen muutos

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Administration and Organizations

Työn laji – Arbetets art – Level	Aika – Datum – Month and year	Sivumäärä – Sidoantal – Number of pages
Master's thesis	November 2016	101+10

Tiivistelmä – Referat – Abstract

The history of the 20th century Europe is characterized by great social, political and economic changes, and the construction of a common European society. However, with the majority of European countries now being members of the European Union, the political focus has in the 21st century largely shifted towards the non-European immigration. Despite establishing various mechanisms to co-ordinate the migration in the European Union during the past decades, it was only in 1999 that the EU officially started to work towards a common immigration policy for Europe. In the past few years, the migration discourse has focused on asylum applications, and the situation in Europe is now considered to be a migration crisis. Not only is the European migration and asylum policy a highly topical subject, but the majority of the comprehensive research has been done before the Lisbon Treaty, and the more recent studies address the historical development of the migration policy only in brief. On the other hand, the more thorough presentations tend to account for only a short time period in the EU's history.

The aim of this study is to contribute to the understanding of the development of the European Union migration policy in order to better comprehend the shortcomings in tackling the current migration crisis and the inability to create a working asylum system. This was achieved by applying a historical institutionalist view on the development of a European migration policy. The historical institutionalism offers tools to explain the EU's inability to reach Europe-wide agreements especially in the asylum matters, e.g. through the concepts of *critical junctures* and *path dependence*, and the more recent addition of gradual change. Furthermore, using narrative process tracing, the constituting elements of change could be identified. Related to this understanding of HI is the ambitious secondary objective of this study. The fiercest critics claim HI to be "incapable of coping with change". Drawing from the foremost HI theorists an attempt was made to address the perceived shortcomings of the theory. The research questions were the following:

How has the European migration and asylum policy evolved over time?

Why has the EU failed to create a coherent migration policy?

Using narrative process tracing the analysis of development was successfully incorporated in the description of the steps in a causal process beginning with bilateral agreements and a *laissez-faire* policy on migration, gradually leading to the creation of treaties and agreements with an aim to consolidate a common European migration and asylum policy. Both endogenous processes and exogenous catalysts were identified, and emphasizing the temporal aspects of decisions as well as their interconnectedness, a narrative consistent with the historical institutionalist framework generated. Several reasons for continuous development were identified in the study, many of them challenges such as illegal immigration, high number of asylum seekers, and security concerns. Other important factors include the continuous integration that brought about free movement, the SEA, widened external borders, and the need for skilled labor force. Relating to the second research question, it was noted that the migration and asylum policy has hardly been well-organized nor coherent. The EU institutions have themselves recognized the shortcomings of the policies in relation to intended outcomes and the materialized consequences. The underlying institutional reason for this seems largely to be the inflexibility of the EU legal framework. Finally, making use of the research by Hoffmann it was postulated that some of the difficulties are due to perceived advantages of preferring domestic action. Concluding, the historical institutionalist methods were successfully used to produce verifiable and interesting results regarding the development of the EU's migration and asylum policy. The complementary approach of combining critical junctures, path-dependence and gradual change proved very useful in explaining institutional development and addressing criticism against HI. The inclusion of gradual change proved crucial for the analysis. This study has managed to add to the understanding of the EU's migration and asylum policy, and through theory testing even improve the usage of historical institutionalism as a research method. The traditional theoretical framework was approached critically and some of the criticism towards HI addressed. As a result, it has been shown that HI offers considerable promise for explaining policy change over time.

Avainsanat – Nyckelord – Keywords

EU, policy, migration, crisis, immigration, refugees, asylum seekers, historical institutionalism, new institutionalism, narrative process tracing, path-dependence, critical junctures, gradual change

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List of Abbreviations

AFSJ Area of Freedom, Security and Justice

AMIF Asylum, Migration and Integration fund

CEAS Common European Asylum System

CFSP Community and Common Foreign and Security Policy

DG Directorate General

EASO European Asylum Support Office

EC European Commission

ECJ European Court of Justice

ECRE European Council on Refugees and Exiles

EEC European Economic Community

EP European Parliament

ERF European Refugee Fund

ESF European Social Fund

EU European Union

EURODAC European Dactyloscopy

Europol European Police Office

ERF European Refugee Fund

Eurostat The Statistical Office of the European Communities

FRONTEX The European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union

GDP Gross Domestic Product

Global Approach to Migration and Mobility (GAMM)

HI Historical Institutionalism

HLWG The High Level Group on Asylum and Migration

JHA Justice and Home Affairs

NGO Non-governmental organization

OECD Organization for Economic Cooperation and Development

SEA Single European Act

TREVI Terrorisme, Radicalisme, Extrémisme et Violence Internationale

UK United Kingdom

UNHCR United Nations High Commissioner for Refugees

WWII Second World War

1. Introduction

> "We don't always choose the best solution but we carry on regardless, trying to remain upright and decent in order to do honor not to the walls or the doors or the windows but to the empty space inside, the space where we worship and venerate what is dearest and most important to us."
> **— Paulo Coelho, The Zahir**

The history of the 20th century Europe is characterized by great social, political and economic changes, and the construction of a common European society. However, with the majority of European countries now being members of the European Union, the political focus has in the 21st century largely shifted towards the non-European immigration. Immigration is related to several political issues such as unemployment, crime, terrorism, as well as ageing populations and the integration of non-Europeans into European culture, customs and institutions (Parsons & Smeeding 2006, 1).

Despite establishing various mechanisms to co-ordinate the migration in the European Union during the past decades, it was only in 1999 that the EU officially started to work towards a common immigration policy for Europe (COM(2008) 359 final, 2008). In 2006, when the immigration was not yet striking in a historical comparison, Parsons and Smeeding (2006, 6–9) highlighted four aspects that make the 21st century migration different from the previous century. First of all, in the previous decades, the immigrants have more than ever consisted of "non-European, non-Christian and non-white people", as contrary to for example the earlier migration waves from Southern and Eastern Europe. Second, the significant postwar migration into Europe consisted largely of labor migration, today of refugees and asylum seekers. Third, in the wake of the "war on terror" and the rise of Islamic fundamentalism, the migration from Muslim countries has given rise to anti-immigration populist movements. Lastly, in times of economic hardships, migrants have historically been targeted and blamed. Just like the rising unemployment in 1980's

manifested itself in anti-immigration extremism (e.g. Le Pen in France), and immigrants were accused of criminality and draining welfare benefits, the same rhetoric is used today.

What is different this time is the sheer number of refugees trying to enter the European Union. In the past few years, the migration discourse has focused on asylum applications, and the situation in Europe is now considered to be a migration crisis (Berhidsky 2016). The asylum applications have previously peaked in 1992 (672,000 applications in the EU–15), mostly originating from the former Yugoslavia, and in 2001 (424,000 applications in the EU–27), after which the number of applications fell to around 200,000 (Eurostat 2016). While between 2010 and 2012 around 1.4 million non-EU nationals immigrated into the EU every year, and around 700,000 emigrated yearly (DG Home 2015b), from 2012 onwards the attention has been focused on asylum seekers who have been making their way into the EU in unprecedented numbers: the number of asylum seeker in 2013 was 431,000, and rose to 627,000 in 2014, only to more than double to 1,3 million in 2015 (Eurostat 2016). However, the asylum claims do not show the whole picture, as many irregular immigrants do not register themselves. Germany, with the highest number of new asylum claims in 2015 – over 476,000 – announced that more than a million people had been counted in their "EASY" -system for counting and distributing people before they make asylum claims; on the other hand, FRONTEX recorded 1,800,000 migrants crossing the EU borders (BBC 2016).

2. Background and objectives

The first steps of the European migration policy cooperation were taken somewhat *pari passu* with the European integration development, but gradually, and in an accelerating pace since the 1980's, it has become part of the Justice and Home Affairs (JHA) cooperation. The JHA is involved in cross-border issues such as free movement of citizens, guaranteeing fundamental rights, the fight against terrorism and organized crime, and asylum and immigration matters (Consilium 2015). Due to the prevalence of asylum issues, and their close relation to migration policy, this paper will start by tracing the development of migration policies, but the closer the present day we approach, the more will the focus be on asylum policy. Also, because of their interconnectedness, it has become common practice in the literature to refer to the 'EU asylum and migration policy' (Kaunert and

Léonard 2012). The overarching theme will thus be migration policy, but a lot of space will be given to asylum policy – the fourth pillar of the European Agenda on Migration (2015).

Not only is the European migration and asylum policy a highly topical subject, but the majority of the comprehensive research has been done before the Lisbon Treaty (see e.g. Geddes 2003; Garson and Loizillon 2003; Hatton 2004; Martiniello 2006), and the more recent studies address the historical development of the migration policy only in brief (see e.g. Guild and Minderhoud 2012; Faure et al. 2015). On the other hand, the more thorough presentations tend to account for only a short time period in the EU's history (See e.g. Zetter et al. for 1990–2000; Parkes 2010 for Amsterdam to Lisbon; Chetail and Bauloz 2011). Overall, the field of research focusing on EU immigration policies seems to be small, even if growing (Roos 2013, 5). The aim of this study is to contribute to the understanding of the development of the European Union migration policy in order to better comprehend the shortcomings in tackling the current migration crisis and the inability to create a working asylum system.

Some researchers consider new institutionalism to be the leading perspective on European integration and Politics (Peterson and Shackleton 2006, 5), and dominant in the study of organizations in general (Suddaby et al. 2014, 100). Historical institutionalist perspective has been successfully and increasingly used in EU-studies (Meunier and McNamara 2007; Pollack 2009; Fioretos et al. 2016), but in the research of European migration policy mostly other theories have prevailed (eg. Multi-level governance, Europeanization, Securitization, Intergovernmentalism, Neofunctionalism), despite the fact that migration issues have been and continue being a central part of the European integration process. An exceptionally popular explanation for the early development has been the 'venue-shopping' (see Guiraudon 2000; 2003) All in all, only a handful of new institutionalist analyses of organizations and change have used a historical or historical case study perspective, while a majority has adopted a rational-deductive (or rational choice) perspective (Suddaby et al. 2014, 103).

While much of the new institutionalist research on EU has been done using explanations derived from rational choice theory, notably concentrating on the executive, judicial and legislative politics (Pollack 2009, 129), the historical institutionalism (HI) offers an

important view of the temporal aspects of the processes. As will be shown, despite the criticism the historical institutionalist understanding of change (Mahoney and Thelen 2010) offers great explanatory power in regards to the development of the EU's migration and asylum policies.

The EU countries have agreed that there should be common immigration and visa rules that are valid in every EU member states. These rules address questions relating to (Ec.europa.eu Immigration, 2011):

- Entry and residence conditions for migrants
- Procedures for issuing long-term visas and residence permits
- The rights of migrants living legally in an EU country
- Tackling irregular immigration and unauthorised residence
- The fight against human trafficking
- Agreements on the readmission of citizens returning to their own countries
- Incentives and support for EU countries to promote the integration of migrants

So far, the EU has agreed on common measures on:

- EU-wide rules that allow citizens of countries outside the EU to work or study in an EU country
- EU-wide rules that allow citizens of countries outside the EU who are staying legally in an EU country to bring their families to live with them and/or to become long-term residents
- Shared visa policies that enable non-EU citizens to travel freely for up to 3 months within Europe's single travel zone, the Schengen area

There are however exceptions to the EU-wide rules (Ec.europa.eu Immigration, 2011). Denmark does not apply rules related to immigration, visa and asylum policies. Ireland and the UK are allowed to choose on a case-by-case basis whether or not to adopt EU rules on immigration, visa and asylum policies.

The EU Asylum policy is based on the 1951 Geneva Convention Relating to the Status of Refugees. Additionally, all the Member States have signed the 1967 Protocol that removed the temporal and geographical restrictions that were include in the 1951 Convention. The Convention contains two important clauses (UNHCR 2010): Article 1 gives a definition for a refugee; Article 33 presents the principle on *non-refoulement*, banning the forced returning of asylum seekers to a territory where they might be harmed. EU has also set up common minimum standards and procedures for asylum seekers in order to guarantee a high level of protection for those who need it, but at the same time trying to ensure that the asylum systems are not abused. The challenge the EU is facing with the current immigration crisis, is the lack of a coherent EU immigration policy that would capitalize on the benefits of legal immigration and solve the issues related to irregular immigration. (Europa.eu JHA 2016). Currently, each member state alone decides: the total number of migrants that can be admitted to the country to look for work; all final decisions on migrant applications; rules on long-term visas – stays for periods longer than three months; and conditions to obtain residence and work permits when no EU-wide rules have been adopted (Ec.europa.eu Immigration, 2011).

The goal of this study is to apply a historical institutionalist view of the development of a European migration policy, and to analyze the current migration crisis in this context. The historical institutionalism offers tools to explain the EU's inability to reach Europe-wide agreements especially in the asylum matters, e.g. through the concepts of *critical junctures* and *path dependence* (see e.g. Pierson 1996). My aim is to answer the following research questions:

How has the European migration and asylum policy evolved over time?

Why has the EU failed to create a coherent migration policy?

Historical institutionalism is well suited to answer these questions by recognizing different phases of institutional origins, development and change, as well as their relationship to each other. Related to this understanding of HI is the ambitious secondary objective of this study. The fiercest critics claim HI to be "incapable of coping with change" (Peters et al. 2005). Drawing from the foremost HI theorists I will try to address the perceived shortcomings of the theory, most importantly by incorporating gradual change to the

analysis as presented by Thelen (2002), Thelen and Streeck (2005), and Mahoney and Thelen (2010). Furthermore, using narrative process tracing, the constituting elements of change can indeed be identified, whereas critical junctures and path-dependence provide an already established framework for explaining development. The aim is thus even to contribute to the HI theory through theory testing some of the proposed solutions to the determined problem.

3. Theoretical framework

3.1 Historical institutionalism

According to Pollack (2009, 125), the European Union is the world's most densely institutionalized international organization, and looking at the number of intergovernmental and supranational institutions associated with it, it is hard, if not impossible, to dismiss the claim. It is logical then, says Pollack (2009, 126), that in the past years, new institutionalism has been used increasingly often and with ever better results to study of the European Union.

The new institutionalism – the three main approaches being historical, sociological and rational choice institutionalism (Schmidt 2006, 99) – was developed in order to bring back the institutions into the study of politics in America in the 1980's (Pollack 2009, 126). Already in 1977, Meyer and Rowan argued that the prevailing theories at the time were too concentrated on the coordination and control of activities as the central explanatory factor in how formal organizations succeed (1977, 342). Instead, they saw that the postindustrial society is an amalgam of a complex social organizational network and ideological matter, dominated by rational organizations. Meyer and Rowan (1977, 345–346) regarded the organizations' structure as a reflection of their environment.

All three institutionalisms agree on that institutions are rules that structure behavior (Steinmo 2008, 126). Where rational choice institutionalists view institutions as strategic utility-maximizers, sociological institutionalists assume that people act according to a "logic of appropriateness" modifying their behavior according to a given institutional environment (Pollack 2009, 127). Historical institutionalism in turn presents a middle way between the two camps by focusing on the effects of institutions over time and emphasizing

historical process (Thelen 1999, 384). Historical institutionalism is firmly established inter alia in the research of European Politics, being a "empirically rich and analytically sophisticated" research tradition in Political Science (Fioretos et al. 2016, 21).

Steinmo has identified three ways that make history important for research (2008, 127). Firstly, Steinmo cites Alexander Gershenkron's seminal essay 'Economic Backwardness in Historical Perspective' from 1952, which showed that the process of industrialization depends on *when* a country industrializes. Secondly, specific events can be explained more adequately when taking in consideration the historical moment, the context, and the actors within them, rather than treating all political action the same. Thirdly, researchers have also shown that policy affect subsequent choices in the future; historical institutionalists aim at studying the interdependence of these multiple causal factors (Steinmo 2008, 127–128).

3.2 Historical epistemology

Suddaby et al (2014, 106) argue that as new institutionalism has become more popular, it has lost its sensitivity to the historical methods, assumptions and epistemology that the old institutionalism at least implicit adduced. The traditional historical epistemology emphasized four points. Firstly, the historical studies of institutions do not aim at providing generalized *truth claims*, but rather posit that institutions are products of distinct elements of time and space, and the explanations are therefore particularist and localized. Secondly, Suddaby et al. (2014, 104) claim that historical studies of institutions focus on complex, instead of unitary *causality*. Thirdly, where new institutionalism has been criticized of its extensive focus on theory building, the historical studies are more interested in observing empirical phenomena (Suddaby et al. 2014, 105). Lastly, historical analyses of institutions tend to focus on endogenous explanations for institutions, whereas new institutionalism places focus on exogenous explanations (Suddaby et al. 2014, 105–106).

For the purpose of this study, I will combine the new institutionalist framework with a historically informed view on institutions – using narrative process tracing – to embed theoretical findings in the description of institutional change over time. This will be done in order to counter some of the problems new institutionalism has been diagnosed to encounter by neglecting history. Suddaby et al. (2014, 107) write that new institutionalism

has treated historical processes as series of events that are analyzed individually, and disregarded the importance of understanding the origins of an institution and the development until the point of analysis. The authors note that new institutionalism treats history as relatively constant, but misses the critical role of narrative and interpretation in history. The second problem of new institutionalism, according to Suddaby et al. (2014, 107–108), is the tendency towards functionalism, i.e. seeing the positive results of development as proof of higher standards of legitimacy, adoptability, or superior logics. Skocpol and Pierson (2002, 706), however, suggest that "[h]istorical institutionalists are typically suspicious of functional explanations, in which institutional outcomes are explained by their outcome". What is more, path-dependence in social sciences has treated the institutional development as one of many possibilities that has resulted from series of choices, that can have been intentional or implicit (Suddaby et al. 2014, 108). Skocpol and Pierson (2002, 700) have further noted that "[p]ath dependence arguments also a provide useful and powerful corrective against tendencies to assume functionalist explanations".

This study draws both from a historically sensitive analysis of development taking in consideration endogenous processes, such as conventions and co-ordination measures, and a view on path-dependence where history generates "a series of specific moments of choice" (Suddaby et al. 2014, 108). This is because I believe that historical analysis is important for understanding the development of the European migration policy and interpreting measures that have been taken, in their context, and path-dependence offers a valid theoretical framework for explaining the developments and subsequent short-comings in creating a common European migration policy. Contrary to functionalism, a historical analysis allows avoiding the evaluation of historical decisions in a present day context. Instead, an attempt can be made to explain decisions in the light they were seen at the time. Lastly, the exogenous processes are needed to account for the effect of the immigration crises on the policy developments.

3.3 Institutional change and ideas

According to Steinmo (2008, 129), institutionalist research has in recent years tackled two issues: how to better understand institutional change, and what is the role of ideas in

politics and history. Steinmo argues that change is difficult due to several reasons. Since institutions form part of other institutions and changing rules often affect even others, some actors resist change for their own benefit. People might also prefer the current setting because they are accustomed to it, or because learning new rules would be expensive. Changing rules can also have unpredictable effects, causing change to appear intimidating.

Even Mahoney and Thelen (2010, 2) lament how limited the theorizing of the process of change is in institutional analysis. While there exist many tools for explaining how institutions come into being at certain points of time, means to explain the more gradual evolution have been scarce. The traditional institutionalist explanation for change is that when stable organizations experience exogenous shocks, they are forced to react and change. Steinmo (2008, 130), however, supports ideas an explanatory factor for change, ideas being "*creative solutions to collective action"*. He explains that ideas represent measures that a group or collective agree would solve a specific problem (2008, 131). By incorporating European ideas of freedom, security and justice, the institutional evolution can be better understood. In this view, institutions, ideas and the environment are engaged in a co-evolutionary process, where outcomes are contingent and non-predictable (Steinmo 2008, 133). This is coherent with the understanding of some other researchers, such as Suddaby and Greenwood, who posit that if change is viewed as the result of complex processes caused by political and economic pressure, change is best studied using historical methods (2011, 178). For example, the idea of European citizenship offers an interesting starting point for the discussion regarding the EU migration and asylum policy. Unfortunately, a more thorough discussion about ideas and HI is out of the scope of this study. An extensive review of ideas and HI can be found in Blyth et al. (2016).

Keeping in mind that historical institutionalists have traditionally focused on continuity – resorting to critical junctures as an explanation of change – in order to explain gradual change, this study will additionally draw from the theoretical elaboration of the four ideal types (Thelen 2002; Thelen and Streeck 2005; Mahoney and Thelen 2010, 6–7): Displacement, Layering, Drift, and Conversion. Displacement means the removal of existing rules and the introduction of new ones. Layering includes the introduction of new rules on top of or alongside existing ones. Drift is characterized by the changed impact of

existing rules due to shifts in the environment. Lastly, conversion addresses the changed enactment of existing rules due to their strategic redeployment. This study also employs Capoccia's (2015, 147) understanding of institutional change: historical development consists of longer periods of stability and adaptation that alternate with shorter phases of change; thus, critical junctures and gradual change form a dual-system for the analysis of change.

3.4 Critical junctures and path-dependence

In historical institutionalism, in order to understand *why* something happened, it is necessary to know *when* it happened. Steinmo (2008, 126) argues that a historical institutionalist relies on historical records to understand why a certain political choice was made, and that political outcomes can with a great likelihood be interpreted as a result of both rule following and interest maximizing. The concept of critical junctures is one of the most fundamental ones in HI (Capoccia and Kelemen 2007). According to Capoccia and Kelemen (2007), a typical way of theorizing institutional change in this tradition is to contrast periods of path-dependence with sudden changes in the form of critical junctures. Critical junctures represent events that allow or demand a change in the existing strategies or institutional structures, and they can be either endogenous or exogenous. Crises, on the other hand, are endogenous events or actions that threaten the functions of an institution by disrupting the decision making. The authors also note that a critical juncture is usually seen as short phases that can even last for a few years. Decisions made at a critical juncture could subsequently be seen to result in path-dependence as these institutional choices are difficult to alter later (Capoccia and Kelemen 2007, 342).

On the other hand, historical institutionalism has been said to have often relied on the concept of path dependence (Lowndes & Roberts 2013, 38). The concept of path dependence is often interpreted as that since changing the course is expensive, once a direction of actions has been chosen the decision makers are unwilling to change it. Lowndes and Roberts, however, challenge this position by saying that path dependence would be more characteristic to stabile times (2013, 40). Critical junctures are a better explanatory tool for institutional change, since they can be used to identify external shocks

that have reduced the cost of change. For the purposes of this study, critical junctures are well suited as they place the focus on "formative periods" in institutional development (2013, 114). These are the periods when new institutions – or in the context of migration, treaties and legislation – are born, and eventually path dependence started.

Lately, scholarship has questioned the theoretical virtues of path-dependence pointing to its limitations, and thus indirectly disputed the importance of critical junctures in analyses of institutional development (Capoccia 2016). Capoccia notes that for example gradual institutional change has shown much empirical promise, but that in this kind of institutional development, "critical junctures have no place in analysis" (2016, 100–101). Nevertheless, Capoccia (2016, 100) admits that proponents of endogenous institutional change, such as Streck and Thelen (2005), do accept incorporating in the analysis critical junctures that are followed by stability. This study tries to find a middle way by acknowledging the criticism against path-dependence and critical junctures, as well embracing the newest theoretical elaborations that have been shown to produce valuable theoretical findings. Therefore, first, realizing the necessity of a framework for determining what is a critical juncture and what not, this study draws on the early work of Hogan (2006) and his four criteria for critical junctures: the existence of a generative cleavages, and the need for change to be *significant, swift, and encompassing*. This allows evaluating the strengths of the arguments for perceived critical junctures. Second, path-dependence will be used to explain the direction of change. Third, gradual change is used to highlight the mechanisms of this change. By incorporating these elements, the goal is to enable an analysis that takes into account exogenous causes of change as catalyst, and then to describe the unfolding of subsequent long-term effects and resulting events. This in turn permits the identification of two types of development: unexpected and reactional, as well as slow and usually more politically guided. A similar, complementary approach has previously been taken successfully (see e.g. van der Hejden 2014).

3.5 Defining migration and asylum

Migration is a multidimensional phenome that spans from intraregional movement to irregular asylum seeking. Researchers such as Boswell and Geddes (2011) include in their

study of migration and mobility in the EU elements such as migration and refugees, migration and asylum policy, labor migration, family migration and irregular migration. For the purposes of this study, the focus has been put on EU regulation affecting third-country nationals, although the nature of the regulation makes it necessary to also explore developments that are aimed at regulating, or facilitating, the movement of EU-nationals. The heavy focus on asylum policies is justifiable by the EU's own policy foci and central role of asylum seekers in shaping the EU migration policies. Boswell and Geddes (2011, 2) provide a functional definition for migrants: an international migrant is someone who has been living outside their country of origin for twelve months or more. This is coherent with the EU (EU Glossary 2014) definition for immigrant: a third-country national who moves to EU for the purpose of staying for at least 12 months. However, the EU definition also includes persons that have previously been residents of another Member State. Thus, Boswell and Geddes' definition is more useful for studying non-EU nationals. Furthermore, the EU defines asylum as a protection given by a state on its territory, based on the principle of non-refoulement and refugee rights. An asylum seeker, then, is someone who has made an application for protection under the Geneva Convention. Lastly, an irregular migrant is a person staying in a Schengen country, and who does not fulfil, or no longer fulfills the conditions of entry, stay or residence.

4. Methodology

Historical institutionalism studies objects that change because of, adapt to, and are affected by a complex interaction of interdependent variables over time, and is therefore interested in explaining, not making predictions (Steinmo 2008, 134). As Rueschemeyer (2003, 318) has argued, case studies need not solely generate theories, but can also be used to test them, and to find causal explanations for observations. For Rueschemeyer, historical case analysis does not mean a single observation, but a continuous comparing of empirical data and theoretical ideas in many data points. This results in two advantages compared to most quantitative studies: the interplay between theoretical development and data is much more direct and frequent, and a closer matching of conceptual intent and empirical evidence is allowed (2003, 318).

This study relies on singular case study, namely the European Union, using narrative process tracing as a method, and path-dependence and critical junctures combined with the ideas of gradual change as theoretical, explanatory concepts, based on the analysis of primary and secondary sources. Different phases of the development will be analyzed in their contemporary and historical context. The analysis will pay attention to specific points in time when a measure has been taken, how long it has taken to complete the measure, and in what order the measures have been taken. This allows us to draw conclusions on what has caused change, what difficulties there have been and how they have affected the implementation of measures, and how the different measures are connected to each other.

Drawing from the research of Van de Ven and Poole (2007), Abbott (1984, 2001), and Rowlinson (2005), Suddaby and Greenwood (2011, 184) explain that dividing processes into phases is characteristic of historical methods. These phases are supposed to be "relatively distinct and coherent", and logically assorted; however, identifying starting and ending points can prove to be difficult. In order to identify temporal variance, the development of the EU's migration policy has to be divided in time periods that take account for the main changes (della Porta 2008, 220). In previous studies, the development has been divided in several ways, naturally depending also on when the studies have been conducted.

Researchers have taken considerably distinct approaches to dating the development of the European migration policy. Faure et al. (2015, 10) see the signing of the Schengen Convention in 1985 as the starting point of European cooperation in the matter, whereas for example the view of the European Commission is that it was only in 1999 that the EU started to work towards a common immigration policy for Europe (COM(2008) 359 final). Hatton (2005, 108), on the other hand, concentrates on the development of asylum policy, dividing it into three phases: the period up to 1999, including a wide range of regulations and a toughened policy towards asylum seekers in the 1990's; the period of policy harmonization, 1999–2004; and the planned integration of asylum policy, 2004–2010. In 2003, as Geddes' comprehensive and seminal book on European migration politics was published, he divided the development into four periods (2003, 131–138): Minimal immigration policy involvement (from 1957 to 1986); informal intergovernmentalism

(1986–93); formal intergovernmental cooperation (1993-99); and the period of communitarization from the end of the 1990's onwards. Others, like Kostakopoulou, (2006) use a similar periodization dividing the development in *Ad hoc* intergovernmental cooperation (1960's–1985), Advanced intergovernmental cooperation (1985–92), diluted intergovernmentalism (1993–98) and contained intergovernmentalism (1999–).

Migrant numbers offer a possibility to identify key dates, and possibly critical junctures, for changes in the European cooperation, since increases in migration have forced the member states to address emerging issues. Regarding the earliest years of the EU, Martiniello (2006, 301–302) divides the period between 1945 and 1973–74 into five migratory scenarios, of which most European Community countries of that time experienced at least one:

- Manual workers from southern Europe, Balkans North Africa and Turkey coming to Northern European countries
- Colonial powers the likes of UK and France promote immigration from their colonies and ex-colonies
- Decolonization leads first to ex-colonials returning to the mother country, then for example residents form ex-British East Africa fleeing the dictatorships back to UK
- Political asylum seekers from the communist bloc and Latin America
- The movement of highly qualified elites due to the development of international organizations

On the other hand, Garson and Loizillon (2003) divide the period between 1950 and 2003 in four migratory periods:

- Employment-related migration and the reconstruction of Europe (1945–1975)
- Economic crisis and new migration adjustments: increasing flows of family reunification and the permanent nature of migration (around 1975–end of 1980)
- Diversification of host and sending countries and the increase in the flows of asylum seekers, refugees and ethnic minorities (late 1980–end of 1990's)
- The return of employment-related migration with a "preference" for skilled workers and temporary migration (end of 1990's onwards)

The periodization of this study is partly based on previous research, partly on my own insights based on an accumulated understanding of the topic. The following periodization will be used as a frame against which the policy decisions and other critical events will be mirrored:

1957–1972: Focus on national policies and a *laissez-faire* policy
1973–1989: Increased intergovernmental cooperation
1990–1999: Dublin Convention through the Tampere Programme
2000–: Communitarization of migration and asylum in the Treaty of Amsterdam, CEAS

Then again, development is often seen in HI as a result of the initial conditions. This makes using process tracing particularly suitable: as Vennesson (2008, 224) explains, it is "a research procedure intended to explore the processes by which initial conditions are translated into outcomes". Process tracing will thus be used to identify steps in a causal process leading to the creation of treaties and agreements with an aim to consolidate a common European migration policy. As Vennesson (2008, 231) puts it, "[the] goal is to uncover the relations between possible causes and observed outcomes". My narrative use of process tracing differs from pure historical narrative in three ways, laid out by Vennesson (2008, 235): the process tracing is focused, meaning that some information regarding the phenomena is lost; an analytical explanation is developed based on the theoretical framework of this study; and the goal is to provide a narrative explanation of a causal path leading to the creation of common European migration rules and practices. With regards to critical junctures, this means focusing on the "main actors, their goals, preferences, decisions, and the events that directly influenced them" (Capoccia and Kelemen 2007, 357).

Finally, an inductive approach will be applied. Following the definition given by Héritier (2008), this means empirically investigating the phenomenon in order to understand the perspective of the actors involved in each decision that will be explored, describing eventual regularities, and concluding with conceptual interpretation.

4.1 Data

Apart from answering the earlier specified research questions, this study aims at presenting a reference list of the main researchers in the field of European migration and asylum policy. For the qualitative part, the data collection has focused on primary sources, such as official EU documents in the form of treaties, communications and meeting minutes. This has not been possible in all cases, e.g. when the original documents are not available online, or very hard to find, for which reason also data collected by others has been used. Secondary data is useful because it provides high quality and processed data from other researchers, also reducing time required for conducting this specific study. It also enables the evaluation of previously conducted research and the theoretical and empirical approaches used. The secondary data has been collected by reviewing existing relevant literature, books, journals and articles. In addition, newspaper articles and editorials have been reviewed to provide background for the topic, especially regarding the current state of the European migration policy. Lastly, for quantitative purposes, additional material, such as statistics, have been retrieved from appropriate sources, including the UNHCR and Eurostat -registers.

5. The European Union and decision making

The European Union can't be placed in any accepted category of political organizations (Peterson & Shackleton 2006, 1), and it has widely been called an institution *sui generis* (Phelan 2012). What makes EU so special is that it is neither a state nor an international organization in the traditional sense. Instead, it comprises of unique institutions that do not fully match any other bodies at national or international level (Peterson & Shackleton 2006). EU is an economic and political cooperation project that was created after the end of the Second World War. The driving force was to foster trade between countries making them economically interdependent and thus likelier to avoid conflicts. As a result, six countries – Belgium, Germany, France, Italy, Luxembourg and the Netherlands – joined together to form the European Economic Community (EEC). The economic union then developed into a political union spanning 36 specified topics (Europa.eu Policy 2015), changing its name to the European Union in 1993. Today, the member states work together

in the Council of the European Union in ten policy areas, where every Member State is represented at ministerial level. (Europa.eu 2015).

The EU law, or *acquis*, is divided into *primary* and *secondary* legislation. The primary legislation consists of treaties, that are basis for all EU action. Secondary legislation includes regulations, directives and decision. Not all of these are binding, and they do not always apply to all EU countries. After the signing of the Treaty of Lisbon, the majority of European laws are now adopted jointly by the European Parliament and the Council of the European Union in a procedure called *Ordinary Legislative Procedure*. The Commission drafts the EU legislation, and if approved by the EP and the Council, also implements it. (Europa.eu Law 2015).

Everything the EU does is based on voluntarily and democratically agreed upon treaties, i.e. binding agreements. EU consists of 13 institutions, a number of interinstitutional bodies and over 40 agencies. The EU legislation involves three main institutions: The European Parliament (EP), the European Commission (EC), and the Council of the European Union. The European Parliament represents the citizens of the European Union through 751 directly elected represents: Members of the European Parliament. EP has three main roles: legislative, supervisory and budgetary. The central duties include: passing EU laws together with the Council of the EU, based on EC proposals; democratic scrutiny of all EU institutions; questioning Commission and the council; and establishing the EU budget together with the Council. The EP has not much influence over migration and asylum policy.

The European Commission represents the interest of the whole Union as a politically independent executive arm. It draws up proposals for new European legislation, and implements the decisions of the EP and the Council of the EU. It also manages EU policies, allocates EU funding, enforces EU law together with the Court of Justice, and represents the EU internationally. 28 Commissioners, led by the Commission President, are selected from each member country to take responsibility over one of the policy areas. The Directorate-General Migration and Home Affairs prepares EU-level rules in the policy areas of cross-border issues, such as asylum, migration, border control, organized crime and terrorism (DG Home 2015a)

The Council of the European Union brings together government ministers from each EU country, depending on the policy area to be discussed. It acts as the voice of EU member governments, adopts EU laws, coordinates EU policies, and, based on European Council guidelines, develops the EU's Foreign & Security Policy. (Europa.eu Institutions 2016). The Council of the EU has many preparatory bodies, such as The High Level Group on Asylum and Migration, the central forum for strategic discussions and initiatives within the Global Approach to Migration and Mobility (GAMM) framework (a policy guideline set by the Commission) (Consilium HLWG). The group deals with areas like the external dimension of the EU's asylum and migration policies, dialogue, cooperation and partnership with countries of origin and transit countries, as well as legal migration, illegal migration, asylum applicants and development.

The European Council is composed of heads of state or government of EU countries, the European Commission President, and the High Representative for Foreign Affairs & Security Policy, who meet at least twice every six months. Representing the highest level of political cooperation between EU countries, its role is to set EU's overall political direction. However, it cannot pass laws. (Europa.eu European Council 2015).

In addition, two particular EU agencies work with implementing EU migration and asylum policy: The European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union (FRONTEX) and the European Asylum Support Office (EASO). FRONTEX is responsible for controlling the EU borders and conducting joint operations using member states' staff. It also conducts research and risk analysis on the situation at the external borders; provides a rapid response capability in case of a crisis situation at the external borders; assists member states in returning illegal foreign nationals; and even works closely with the border control authorities of non-EU/Schengen countries (FRONTEX 2016). EASO was set up by Regulation (EU) 439/2010 of the European Parliament and of the Council (EASO 2016). Among other things, the agency

> *acts as a center of expertise on asylum, contributes to the development of the Common European Asylum System by facilitating, coordinating and strengthening practical cooperation among Member States on the many aspects of asylum;*

provides operational support to Member States with specific needs and to Member States whose asylum and reception systems are under particular pressure; and provides evidence-based input for EU policymaking and legislation in all areas having a direct or indirect impact on asylum. (EASO 2016).

6. Analysis: the development of the European migration and asylum policy

The development of the European migration policy has followed quite closely the increasing European integration, becoming an integral part of the Justice and Home Affairs (JHA) cooperation that was introduces by the Treaty of Maastricht, and replaced by the Area of Freedom, Security and Justice (AFSJ) through the Treaty of Amsterdam. The AFSJ is involved in cross-border issues such as free movement of citizens, guaranteeing fundamental rights, fight against terrorism and organized crime, and asylum and immigration matters (Consilium 2015). In order for a Europe without internal borders to work, and for EU to have a common external border, it is necessary that the member states agree on a common policy on who are allowed into the EU, and what rights and freedoms the non-member state nationals have (Luedtke 2006, 421). According to Kostakopoulou (2006, 232), immigration policy is a matter of *high politics*, i.e. closely linked with national sovereignty and nationhood. This view is visible in that the EU has established Justice and Home Affairs Council as one of the configurations of the Council of the European union, comprising of the justice and home affairs ministers of EU member states.

Due to the delicacy of the AFSJ matters, the developments in integrative institutional solutions have been slow. The AFSJ cooperation can be traced back to the 1960's, when after the creation of common agricultural policy various initiative were taken to address matters such as fraud in the European Community finances, advancement of civil judicial cooperation and the promotion of mutual assistance among customs authorities (Kostakopoulou 2006, 233).

6.1 The Early Years

The starting point for the development of a European migration policy was the signing of the Treaty of Rome in 1957, establishing European Economic Community (EEC), and providing the legal basis for a European intra-community migration policy (Martiniello 2006, 314). However, as Meyerstein notes (2005, 1519) the article 3 only mentioned migration once – affirming that the Community "must take measures concerning the entry and movement of persons". The early migration policies consisted largely of bilateral agreements between countries, mirroring the labor demands (Martiniello 2006, 311). During the 'Trente Glorieuses', 30 years of unforeseen growth in Europe after the WWII, production was modernized, trade increased and all sectors grew (Garson and Loizillon 2003). The bilateral agreements consisted of e.g. arrangements for the transportation of workers, exchange of manpower for industrial resources and rules for the length of stay. Martiniello (2006, 311) writes that the agreements also specified which industrial sectors were open to labor market access, and that the workers initially had to be healthy, young males, not allowed to bring with their families. According to Martiniello (2006, 311–312), the labor demand in 1960's lead to governments adopting a *laissez-faire* policy, meaning that immigrants could enter on a tourist visa, and having found a job, be granted residence and working rights. Garson and Loizillon (2003, 3) detail how more than 30 million foreign workers (including temporary workers and multiple entries) entered the EEC between the early 1960's and early 1970's. Consequently, by the early 1980's the foreign population had tripled since 1950 up to 15 million residents. Martieniello (2006) views the European immigration policies between 1945 and 1974 as reactive. All the European Community countries had their own immigration policies, that were basically only an element in employment policy, and adjusted according to the labor market situation. Nevertheless, in 1974, the need for common legislation in immigration matters was becoming apparent. In the meeting of the Heads of Government in Paris, it was deemed necessary to create new common policies (Paris Communication 1974, 8). One of the goals was to investigate the possibility of establishing a passport union, and a harmonization of immigrant legislation.

In the mid 1980's, the European Commission considered there to be two key dates regarding the Community's policy on migration before 1985: the years 1968 and 1976 (Bulletin Community 1985, 5). In 1968, the free movement of workers within the

Community came fully into effect through the adoption of EEC regulation 1612/68. The free movement of people, and especially of workers, was named as one of foundations of the Community, and the principle of free labor movement was aimed at dissolving all labor-related discrimination based on member state workers' nationality (EEC regulation 1612/68). According to Martiniello (2006, 314), this regulation established a legal distinction between European and non-European workers, and separated the issues of intra-European migration and immigration from outside of the Community.

During the high economic growth in 1950's and 1960's, a large number of workers from non-member countries was recruited. The oil crisis in 1973–74 transformed the global economy and labor markets (Martiniello 2006, 302), and it was at that point when the number of migrants reached record heights in Europe (Castles and Kosack 1985). Many researchers, including Martiniello (2006, 303) as well as Garson and Loizillon (2003, 3), see this as the turning point when many European governments decided to end further labor migration, as the supposedly temporary immigrants did not return home as expected, despite the recession and rising unemployment.

With the rising unemployment, the recruitment of workers from non-member countries was strictly limited or even banned (Bulletin Community 1985, 6). The problems between the third country nationals and the European Community members were strikingly similar to those the EU faces today: inadequate social and educational structures; housing shortages as an increasing number of migrant families were reunited; uneasy relationships between the national and foreign communities; and the fear of competition on the labor market (Bulletin Community 1985, 6). The stopping of migration also had unintended consequences. Hansen (2003, 26) notes that for example in Germany, many guest workers chose not to leave the country due to the low likelihood of being allowed to return. Activists, churches and NGOs helped the guest workers eventually resulting in legal guarantees allowing them to stay. In many countries the immigrants had social rights benefits similar to native workers, and the situation in their home countries was much worse (Garson and Loizillon 2003, 3).

As a response to the multitude of issues, the European Council presented an action program for migrant workers and their family members, leading to an adopted resolution in 1976

(Bulletin Community 1985, 5–6). At this point, no common migration policy existed, and the Commission settled for underlining the importance of consultations between member and non-member countries to facilitate the adoption of common positions by the member states (1985, 6). As Hansen (2003, 26) points out, the result was, however, a new wave of immigrants through the right to family reunification. Also in 1975, the 12 Community states founded the Trevi group in order to counter terrorism (Uçarer 2013, 283). After 1984 the group grew up to a forum for the coordination of policies in areas such as international organized crime and border control (Bunyan 1993; Boccardi 2002; Peterson & Shackleton 2006). In the beginning of the 1990's Trevi was succeeded by Europol.

The period leading to the Oil Crisis can be characterized as *drifting* change. As Streeck and Thelen (2005, 24) explain, this kind of change may be perceived as stability but lead to fundamental change. Streeck and Thelen (2005, 19) suggest that change is often endogenous and "could be produced by the very behavior an institution itself generates". This description can be used to explain the development from considering free movement of especially workers as one the foundations of the Community, through a *laissez-faire* policy (cf. *nondecisions* in Streeck and Thelen 2005, 25) to eventually leading to the limiting or even banning the recruitment of workers from non-member countries in 1973 as a result of a combination of an exogenous effect (the oil crisis) and the over time intensified effects of increasing amount of foreign labor and institutional neglect.

6.2 Schengen

The beginning of 1980's marked the beginning of the third migration period (Garson and Loizillon 2003, 4). The traditional European emigration countries, the South European countries and Ireland, were becoming countries of destination, and the countries of origin diversified notably from old colonies to Asian and sub-Saharan countries. Also the reasons for migration had begun to change and an increasing number of immigrants came as asylum seekers and refugees (Garson and Loizillon 2003, 4). By 1985, the European Commission had begun to advocate a European immigration policy. As the immigration issues became increasingly important, the Commission presented a communication called *Guidelines for a Community policy on migration* (Bulletin Community 1985). The European Commission

had started to consider that a common European migration policy might be gradually evolving to become an integral part of the creation of the European citizenship (Bulletin Community 1985, 6). The European citizenship pertained to the rights that Community member country nationals enjoyed in their home countries, and the discussion about what rights should be extended to member country nationals living in some other member country than their home country; essentially political rights to vote, stand for election, and to become a public official in the member states (Bulletin Community 1975). The Commission report from 1975 (Bulletin Community 1975, 30) recognized that the equal treating of foreigners in the economic and social fields was already accepted by public opinion due to long-lasting and frequent negotiations between member states, but the equal treatment in the political field was a new idea, "*and the public will have to be given an opportunity to get used to it*".

In 1985, the Commission noted it to be fundamental that the free movement of person become gradually accepted "*in its widest sense"* – not just in regards to the Community employment market – and to further the concept of European citizenship (Bulletin 1985, 6–7). For the same purpose, the Commission deemed it necessary that the legal status of non-member country immigrants should be adapted in order to reinforce foreign communities, and to promote the equal treatment of immigrants. According to Martiniello (2006, 314), a few months after introducing the *Guidelines*, the Commission also presented the idea of European coordination of entry, residence and work-permit regulations for non-European citizens, and the creation of a common visa policy. With Schengen, a new system was created with the objective to assign responsibility to review asylum claims to one state in order to reduce the administrative costs and to prevent multiple claims (Uçarer 2013, 283).

Later in 1985, in an attempt to facilitate the coordination of migration policy actions between the Commission and the member states, the Commission attempted to set up a procedure for previous notification and concerted action on migratory policies regarding third countries (Martiniello 2006, 315). Unsurprisingly, some member states opposed this decision claiming that it restricted their national sovereignty, leading to the Council adopting a resolution stating that non-European migration policy remains a national responsibility.

Geddes notes (2003, 131) that the many of the Commission proposals were rebuffed by member countries, but significant developments were nevertheless made within Trevi, and after 1984, Schengen. Belgium, Luxembourg and the Netherlands had agreed to abolish border controls already in 1970. According to Geddes (2003, 131), the protests caused by the delays that lorry drivers had to suffer at the Franco-German border led to an agreement between the two countries in 1984. The Schengen Agreement was signed in 1985 in an attempt to abolish border controls between the Benelux countries, France and Germany. An implementing convention was however agreed only in 1990, coming to effect six years later (Geddes 2003, 131; Kostakopoulou 2006, 233). Martiniello (2006, 316) writes that the planning proceeded in secrecy and outside the European institutions, which raised many questions among parliamentarians and NGOs working with immigrant issues. One reason for this was that despite furthering visa and entry policy harmonization, the agreement heavily emphasized police and judicial cooperation – which in Martiniello's view was a clear statement of associating immigration with criminality and terrorism (2006, 316). According to Kostakopoulou (2006, 233), also police and customs officers within Trevi had established a 'chain of equivalence' between the single market and security deficits, meaning that the anticipated abolition of internal borders was seen to require tightened external borders and internal surveillance.

Kostakopoulou (2006, 234) even sees Schengen contradicting the intergovernmentalist theory's claim that the formation of national preferences always precedes interstate cooperation. In many cases national objectives have been formulated only after long top level European discussions in specific matters. On the other hand, the European Council recognizes that even though only a few countries were originally involved in the Schengen process, the development was closely tied to the community level advancement where some countries moved faster than others (ECRE 2006, 8).

6.3 The Single European Act

According to Boccardi (2002, 31), the Trevi group was the driving force of formulating the emerging policies and laying the groundwork for new structures to integrate the work of police, customs, immigration and security service agencies. Another important

development was the creation of the Ad Hoc Immigration Group in 1986, that comprised of five working parties: border control, visa policy, asylum policy, illegal immigrants and information technology. The group composed of senior civil servants from the twelve member states. One of the goals of the Ad Hoc Group was to stop false asylum claims in Europe (Martiniello 2006, 317). For example, in 1987, the Ad Hoc Group drafted an agreement imposing sanctions on carriers that brought improperly documented third country nationals into the Community (Boccardi 2002, 32). As a consequence, airlines had to extensively train their personnel to for example detect document forgeries, and, in many countries, to start cooperating with border officials (Boccardi 2002, 52–53).

The European countries continued being deeply divided between their aspirations towards the creation of an internal market and maintaining their sovereignty in migration issues. The Single European Act (SEA), ratified in 1987, was the first major revision of the Treaty of Rome, and most notably expressed the intention of the European Community Member States to complete the creation of the internal market. The SEA contained a political declaration by the governments of the Member States on the matter of the free movement of persons, stating that

> *In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.* (SEA 1987, 30).

It was clear, however, that the signatories did want to retain their national control. The General Declaration on Articles 13 to 19 of the Single European Act, which addresses the internal market, stated the following:

> *Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.* (SEA 1987, 28).

In 1988, the growing number of intergovernmental groups (such as the Trevi group) dealing with issues related to the free movement of persons led to the European Council meeting in Rhodes to institute a Group of Coordinators, consisting of senior national civil servants and the European Commission as an observer (Boccardi 2002, 32). According to Bunyan (1993, 8), the Group of Coordinators was also a measure to compensate for the removal of internal border controls through discussing issues "related to strengthening external borders controls, immigration and asylum policies, measures against terrorism, international crime, drug trafficking, police and judicial cooperation, and the exchange of information and intelligence in the above fields". The Group of Coordinators crafted the *Palma Document*, adopted by the Madrid European Summit in 1989, that laid the foundation for subsequent initiatives regarding the free movement of persons (European Council 1989, 10). According to Boccardi (2002, 32), the document listed several propositions relating to asylum matter, the essential ones being:

- a common visa list for the Community, to be updated every six months
- a common list of inadmissible persons
- appropriate measures to deal with the 'asylum shopping' phenomenon
- abbreviated procedures for 'manifestly unfounded' asylum claims
- harmonized interpretation of international commitments
- common measures for external border control
- the establishment of a common information system
- combating illegal immigration and common expulsion policies.

As the number of asylum applications had been increasing rapidly and the carrier sanctions had not had the expected effect, the coordination of the asylum policy had taken overall priority. At the same time, the idea of border-free Europe and the need to control the internal movement of aliens led to applying the same restrictions on refugees trying to enter the Community as were applied on prospective migrants. Due to this, the asylum seekers' fundamental right for protection was increasingly neglected. (Boccardi 2002, 33.) Also, Martiniello (2006, 316) notes that even though the coordination of immigration policy was promoted, there were no extensive discussions about the content and development of a future common immigration policy.

With the Oil Crisis as a turning point away from drifting change, the following period up to the end of 1980's displays characteristics of *layering*. Layering is defined by Streeck and Thelen (2005, 31) as new elements being attached to existing institutions gradually changing their status and structure. 1974, the focus had started to shift from new arrivals to the problems the existing migrants faced (Bulletin Community 1985, 6). Earlier the same year, the Paris Communication (1974) had expressed the need for creating new common policies on migration matters. A more far-reaching goal was the establishing of a passport union, building on the agreements and ideals of free movement. During this period, the ideal of free movement was elaborated and institutionalized in the form of Schengen, and the legal status of non-member country immigrants revisited and coordination of associated policies developed. Particularly revealing is the expansion of the anti-terrorist group Trevi, founded in 1975, to include structures for cooperation in immigration matters. Additionally, with the SEA the free movement of people was decisively tied to combatting different illegal activities, and compensated by the establishment of the Group of Coordinators.

6.4 Dublin Convention

The result of the influxes of migrants and one of the first key asylum measures was the 1990 Dublin Convention. The objective of the convention was to put an end to the *asylum shopping*, i.e. asylum seekers making applications in more than one member states, and to maintain a Eurodac database of rejected asylum claims and fingerprints (Geddes 2003, 133; Uçarer 2013, 287). The Dublin Convention mapped the rules for common processing asylum applications, whereof the main parts of the Dublin framework were set up at a meeting of immigration ministers in the end of 1992. A central point was that the country where an asylum seeker first enters the EU, is responsible for processing the asylum application. Geddes (2003, 133) suggests that the measures affected especially aspiring EU-member states in Central and Eastern Europe making them a buffer zone to dissipate the migration pressures on EU-states. The framework also included the following elements (Geddes 2003, 133): adoption of a non-binding resolution on 'manifestly unfounded applications for asylum', meaning that an application could be rejected if it was not covered by either the Geneva Convention or New York Protocol since the applicant did not have to

fear persecution in her home country or the claim was done on dishonest grounds; and agreeing on a resolution on harmonized approach to third countries, meaning turning away asylum seekers from 'safe third countries', such as central and eastern European countries. The cooperation was functioning from a security centered point-of-view aimed at restricting unwanted forms of migration (Geddes 2003, 134). In Martiniello's (2006, 304) view, the European populations and governments started treating asylum seekers colder and colder in the 1990's, considering many of them "false refugees" or "disguised economic migrants".

The Dublin Convention was signed only in 1997, due to diplomatic issues (Geddes 2003, 133). The Community Member States had agreed on a Convention of External Frontiers in 1991, but could not be signed because of a dispute between the UK and Spain over the status of Gibraltar (SEMDOC 1993, 3). The Convention of External Frontiers laid out general principles concerning the crossing, surveillance, control and nature of controls at external frontiers, and surveillance at airports, as well as the creation of an electronic, joint list of persons with refused access to member countries (SEMDOC 1993).

The Commission noted in 1991 that the harmonization through the Dublin Convention was not enough, and that the Member States have realized that completion of the internal market already necessitates – and the establishment of political union certainly will necessitate – harmonization of the formal (organization, length of procedures and means of redress) and substantive aspects of the right of asylum (SEC (91) 1857 final 1991, 4).

Geddes (2003, 134) points out that despite difficulties in ratifying the convention, the informal cooperation did, however, lead to routinized interaction between interior ministers and officials. The development was towards more formalized cooperation and a more central role for supranational institutions, despite the opposition from Denmark and the UK. The problem was, nevertheless, that in order to reform the Treaties and expand immigration competencies, all member states had to agree. Especially the Germans were anxious to press for solidarity and burden sharing in the form of redistributing asylum seekers between member states (Geddes 2003, 134). Hatton (2005, 109) notes that in 1994, Germany proposed to the European Council that the receivers of temporary protection in Europe would be redistributed according to the Member States' population, size of territory and

GDP per Capita. Nevertheless, the other Member states rejected the proposal, with UK, that was receiving relatively few asylum applications, at the forefront. Germany was at the time receiving over half of all EU applications, year 1992 being the most challenging as almost two-thirds of the asylum application in Europe were lodged in Germany, totaling 438,00. Notwithstanding, the situation was about to change: while UK reveived 32,000 applications in 1992, at the beginning of the new millennium, UK bypassed Germany as a destination country (Eurostat Database 2016).

As a compromise between the preference for intergovernmentalism and the status quo advocated by Denmark, the UK, Greece and Ireland, the immigration and asylum issues were incorporated more closely in the legal framework of the Treaty (Geddes 2003, 134). This meant the creation of the future European Union's third 'pillar': Justice and Home Affairs, in addition to the existing intergovernmental pillars of Community and Common Foreign and Security Policy (CFSP).

The ground work for one of the main problems in today's immigration crisis was laid already in 1990 with the article 6 of the convention:

> *When it can be proved that an applicant for asylum has irregularly crossed the border into a Member State by land, sea or air, having come from a non-member State of the European Communities, the Member State this entered shall be responsible for examining the application for asylum (Dublin Convention 1990).*

As thousands of refugees are entering Europe through southern and eastern Mediterranean routes, the burden rests heavily on south European countries, and has led to countries like Greece to push migrants towards north without processing asylum claims.

Hailbronner and Thym (2016, 1024) note that the convention did not work even in the very beginning: 95 % of all asylum claims were processed outside the Dublin system during 1998–1999, and transfers accounted for only 1.7 % of the cases. Also, especially NGOs criticized the Convention early on claiming it to be "inequitable, unworkable and expensive" (ECRE 2006, 8). One crucial characteristic of the Convention was that the criteria of first point of entry laid excess burden on certain Member States. The lack of burden sharing mechanisms would regularly prove to be a major issue. The Commission's

review after two years showed that "few if any Member States appear to regard the Dublin Convention as an unqualified success, and many have expressed concerns about the efficiency of the Dublin system" (SEC (2000) 522 final 2000, 5). The review also admitted the shortcomings the Convention had been accused of – including not having a noticeable effect on the asylum applications in the EU – and, before presenting proposals for improving the situation, established that "[i]t is not clear whether, at the present, the Convention is producing sufficient benefits to justify the resources which are devoted to its implementation" (SEC (2000) 522 final 2000, 17).

The fall of the Berlin wall started a chain reaction eventually culminating in the collapse of communist regimes, that resulted in a migration flow from the Eastern Europe. At the same time, illegal migrants and refugees were entering Europe from the south. Between 1989 and 1992 the number of asylum applications in Europe more than doubled from 320,000 to 695,000 (Hansen 2003, 35). As a consequence of the geopolitical cataclysm, external border control became a priority for EU, and migration a major issue in the European political context (Martiniello 2006, 317; Boswell and Geddes 2011, 7). Garson and Loizillon (2004, 4) include to the equation the East-West movement of ethnic minorities that was directed to a few Member States, especially Germany. Other important, if not lesser destinations were e.g. Finland and Greece.

Tracing back the development of the Dublin system, the European Council lifts the turmoil in central and eastern Europe in 1989 as a decisive factor in the development of the safe third country concept that soon was codified in the Dublin Convention (ECRE 2006, 6). The safe third country concept postulated that asylum applicants could be returned to these countries, instead of the Member State where they first had applied for asylum. The democratization of old east-bloc countries meant that they could be considered safe and the asylum applicants sent there – especially as many of the countries also acceded the 1951 Geneva Convention. As the European countries started receiving increasing numbers of asylum seekers in the 1990's, they started implementing non-arrival and non-admission policies. The European Council report (ECRE 2006, 6) notes that the non-arrival policies where aimed at restricting access to EU, e.g. through aircraft sanctions; the non-admission policies resorted to the fact that an asylum seeker had travelled through a non-Member

State that was considered safe and could thus be sent back. Most researchers agree on the importance of the increase in asylum seekers at the turn of the decade with respect to the increased efforts to harmonize EU asylum policies (See e.g. Düvell and Jordan 2002, 504; Hatton 2012, 8). A central factor in this development was the fact that the situation affected all of the Member States. As Hoffmann has shown (1966, 882), national states are less likely to cooperate in areas where they have particular national interest: "[n]ations prefer the certainty, or the self-controlled uncertainty". The problem was that the number of asylum seekers had left the Member States vulnerable. On the other hand, Putnam (1988) explains the politics of many international negotiations as a two-level game. At the second, international level: "national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign development" (1988, 434). Therefore, Member States want to cooperate only in cases when preferences overlap. The migration flows presented a perfect example of a situation where the Member States had more to gain by cooperating than by going solo.

While there was no critical juncture identified before this stage, there are even other approaches to path-dependence that could be invoked. An especially suitable – and widely cited – explanation is provided by Pierson (2004). Pierson (2004, 20) writes that path-dependence can be seen as institutional self-reinforcement where positive results render decision makers more prone to stick to such choices. This view is partly collaborated by Kostakopoulou (2006, 236), who views the institutionalization of JHA cooperation by the Maastricht Treaty as a clear demonstration of path-dependence. Between 1986 and 1991, over 20 intergovernmental bodies were created, and because of the lack of coordination, and the difficulty of agreeing binding measure and then monitoring them, resulted in a need to reform the institutional structure (Kostakopoulou 2006, 235). A JHA configuration of the Council was created and the decision-making process evolved to a five-tiered structure consisting of the JHA Council, Committee of Permanent Representatives, K4 Committee (named after article K4 of the Treaty on European Union, and which absorbed the Coordinator's Group), Steering Groups and Working Groups. Nevertheless, this five-tier structure, instead of the normal three-tiered Council working structure, still led to coordination problems and ineffectiveness (Kostakopoulou 2006, 236). Despite the faults, the cost for changing direction can be seen to have become great. This is due to them being

"attempts to minimize the political uncertainty concerning power distribution between the member states" (Chou 2009, 546). Chou (2009, 542) also explains that the cooperation in the European asylum and migration matters developed through political actor's decisions that were taken as response to internal and external pressures. In my view, however, this alleged path-dependence characterized by gradual change of drift and layering can better be interpreted to have been disrupted by a critical juncture already around the end of 1980's, and the developments Kostakopoulou describes as a result of this. The path-dependence can thus be further argued through the continued development towards increased attempts to establish more coherent European policies in migration and asylum. This was manifested by the perceived need to tighten external borders because of the abolition of internal borders, and by the view of the European Commission that a common European migration policy was an integral part of the of the European citizenship. Additionally, the Member States were still in charge of the development, and the European cooperation in fact strengthened nation states (Moravcsik 1994, 3), making collaboration preferable even in migration and asylum matters.

In order to substantiate my claim, using Hogan's (2006) criteria, it can be postulated that this period constitutes a critical juncture. Firstly, it can be identified as a *generative cleavage*, in this case because of the shock that the unanticipated flow of asylum seekers caused. Secondly, the change was *significant*. Immigration and asylum had become more and more salient, new institutions for cooperation created, and old ones updated. Thirdly, the change was also *encompassing*: between the period from 1985 and 1990 the EU had started working towards harmonization of asylum procedures, and more formalized cooperation in matters related to asylum and third country nationals' entry, stay and movement in the EU. Lastly, the change was *swift*. In a period of five years, the process had begun or was already finalized to create *inter alia* the Schengen area, SEA – leading to a gradual shift of JHA competences to the European level –, Dublin Convention, and various cooperative settings. The collapse of the Soviet Union was the ultimate catalyst: an exogenous shock par excellence for the EU (Vachudova 2007, 106).

6.5 The Maastricht Treaty

The Maastricht treaty, also known as the treaty of the European Union, was signed in 1992 and entered into force in 1993. It had three important consequences: The European Union and the single European currency, euro, were created, and the three pillars of the EU established. The first pillar consisted of the European Communities, constituting the framework for in which areas the member states conceded their powers to the Community institutions. The second pillar was the common foreign and security policy, and the third pillar cooperation in the fields of justice and home affairs.

Regarding the third pillar, the Union expressed its objective to cooperate by intergovernmental methods in the following areas (Europarl Fact sheet 2016):

- rules and the exercise of controls on crossing the Community's external borders;
- combating terrorism, serious crime, drug trafficking and international fraud;
- judicial cooperation in criminal and civil matters;
- creation of a European Police Office (Europol) with a system for exchanging information between national police forces;
- controlling illegal immigration;
- common asylum policy.

Nevertheless, the creation of the pillars did not result in a clear common migration policy. Only visa policy was included in the supranational first pillar, whereas the other features of immigration policy were relegated to the third pillar, created in order to limit centralized, supranational policy harmonization (Martiniello 2006, 317).

In 1994, Germany made a proposal to the European Council to give the European Community more responsibility for migration and asylum policies (Faure et al. 2015, 10; Hatton 2005, 109). Germany was at the time receiving over half of all EU asylum applications. The rejected proposal was that people receiving temporary protection in the EU would be redistributed based on population, size of territory and GDP per capita (Hatton 2005, 109). In 1995, the Council presented two resolutions that proposed that in the event of massive asylum seeker flows, member state should offer temporary protection, in

accordance to ‘a spirit of solidarity’ and the idea of burden sharing. However, Hatton further notes that not even the Kosovo crisis resulted in invoking the resolutions.

6.6 Treaty of Amsterdam

The Treaty of Amsterdam was signed in 1997 and entered into force in 1999 – giving increased power to the Union and a stronger position for the Parliament, increasing cooperation, simplifying the European Treaties, and applying institutional reforms with a view to enlargement (Europarl Fact sheet 2016). One of the crucial changes after the adoption of the Treaty of Amsterdam was that the EU institutions were now allowed to adopt regular Community instruments, i.e. Directives and Regulations, that have primacy over domestic law in cases of conflict (Hailbronner & Thym 2016, 2). The new measures included allowing closer cooperation between member states in the area of the third pillar. Interestingly enough, at the same time the following areas were moved away from the third pillar to the Community method: asylum, immigration, crossing external borders, combating fraud, customs cooperation and judicial cooperation in civil matters, in addition to some of the cooperation under the Schengen Agreement. This change was due to the establishment of the Area of Freedom, Security and Justice (AFSJ) which is also referred to as *communitarization* (Phinnemore 2013, 32). This meant that the cooperation was moving from an intergovernmental approach to a common approach. In other words, the European Commission was given the exclusive right to propose legislation in this area beginning in 2002 (Hatton 2005, 109). At the same time, Denmark, Ireland and the UK were given exclusive right to choose whether they want to participate in specific proposals (Faure et al. 2015, 10).

According to Martiniello (2006, 318), from the opening of the Intergovernmental Conference in 1996, that led to the Treaty of Amsterdam, the European migration policy regime went through four major developments: the political agenda widened substantially, joint international action began to be emphasized, the protection of the external borders went on to become a priority, and the responsibilities of different actors in regard to immigration policy became progressively unclear. The Treaty was a big step forward in creating common rules, binding the Council to adopt within five years after the entry of the

treaty measures on asylum, refugees and immigration policy (Treaty of Amsterdam 1997, Article 73k). The measures included:

- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States
- minimum standards on the reception of asylum seekers in Member States
- minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection
- measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States
- Measures on immigration policy within the area of illegal immigration
- promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons

The Treaty of Amsterdam also addressed situation when one or more member states are confronted with an emergency situation characterized by a sudden inflow of nationals of third countries. In such scenario, the Council was granted the authority to, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned. In addition, the Treaty established that the question of abuse of asylum procedures and appropriate rapid procedures to dispense with manifestly unfounded applications for asylum should be further examined to accelerate these procedures (Treaty of Amsterdam 1997, Declaration 49).

The EU migration policy development emphasized the restriction on immigration until the Amsterdam Treaty (Geddes 2003, 143) but the unbalance between how many immigrants different member states had received was already troubling. Researchers such as Lang (2013) have pointed out that solidarity as one of the core values of the EU has been a guiding principle of the EU asylum policy especially since the time that the Treaty of Amsterdam came into force. The uneven distribution of the immigration burden has for

long caused more problems to certain member states than for others. Still, a way to find an equilibrium has not been found.

6.7 Tampere Programme

The Tampere Summit was convened in 1999 in order to evaluate the impacts of the Treaty of Amsterdam and to discuss future development. The goal was to create an area of freedom, security and justice utilizing the new possibilities created by the Treaty of Amsterdam (Council Tampere 1999), placing it at the top of the EU's political agenda (EC Communication 2004, 3). EU was never intended solely as an economic entity but to encompass all aspects of the Europeans daily lives (DG Home 2002). The Presidency conclusions underlined the significance of free movement and extended the right to this freedom for non-EU-citizens as well as the respect of the right to seek asylum (Council Tampere 1999). This, however, required that common policies on asylum and immigration, i.e. Common European Asylum System, be created.

The subsequent period can be seen crucial in understanding the current EU asylum policy. In Hailbronner and Thym's (2016) view many of the decisions made at the time have shaped the EU asylum policy. According to Juss (2005, 754), the Tampere Summit marked the rejection of the ideology 'Fortress Europe'. As Hatton recounts (2005, 110), the Tampere agreement included the reaffirmation of EU ministers that the Refugee Convention would apply fully on common EU asylum policies and that the principle of non-refoulement would be followed. The European Commission itself recognizes the importance of the Amsterdam Treaty and Tampere Programme describing them as turning points in the EU's commitment to work together in immigration and asylum matters (COM/2003/0336 final).

The failure of traditional migration control policies to control migration flows had led the west European countries to find new measures, most notably by partnering with countries of origin and transit (Boswell 2003). Boswell identifies two approaches: firstly, outsourcing the traditional control policies to countries of origin and transit; secondly, applying preventive measures such as addressing the causes of migration in order to remove incentives to migrate. At the Summit it was agreed that the EU needs a comprehensive

approach to migration addressing political, human rights and development issues in countries of origin and transition with the underlying goal of managing migration flows.

The program was fourfold. The main approach was to partner with countries of origin and combatting poverty, improving living conditions and job opportunities, preventing conflicts, and consolidating democratic states (Council Tampere 1999). The second objective was to create a common European asylum system. At Tampere, the European Council decided that common system was to be implemented in two phases (EP Asylum 2016). This was a huge development in the EU migration politics. The first part of the budding Common European Asylum System (CEAS) consisted of harmonizing existing national policies, and the second of introducing a EU-wide system (Hatton 2005, 210). The problem was, however, that the legislative acts laid out remained limited to minimum standards due to the restrictive EU competencies (Hailbronner & Thym 2016, 1025). The focus was thus on spreading legislature at national level. The third and fourth objectives were to guarantee a fair treatment of third country nationals, and to effectively manage migration flows.

In 2000, the Commission issued a Communication on a Community immigration policy noting that although laying out the framework for common immigration and asylum policies, the Council had not elaborated on how this was to be developed and implemented (COM/2000/0757 final). In only fifteen years, between 1985 and 2000, the number of foreign-born residents had more than doubled from 23 million to 56 million, or 7.7 per cent of the population (Penninx 2013, 109). The Communication presented two options for tackling the migration pressures, and at the same time, labor shortages. The other option being resisting migratory pressures, the Commission held that labor migration should be promoted, and wished to stimulate discussion in the hope that consensus was to be achieved. The Communication also presented the Commission's view on how to take concrete action, and elaborated its views in matters such as the definition of conditions of admission and of residence.

In 2003, the Commission issued a new Communication, this time on immigration, integration and employment (COM/2003/0336 final). With the launch of the Lisbon strategy in 2000, the EU had begun working on an ambitious goal: becoming the most

competitive and dynamic knowledge-based economy in the world. The Commission's objective to promote legal immigration was in 2003 seen even more pivotal, and the communication was issued to highlight the integration practices. All in all, the Communication consisted of three topics: responding to the Tampere conclusions by reviewing current practice and experience with integration policy at national and EU level; examining the role of immigration in relation to the Lisbon objectives in the context of demographic ageing and; outlining, on this basis, policy orientations and priorities – including actions at EU level – to promote the integration of immigrants.

In 2004, the Commission published its final six-monthly report on the advances of Tampere Programme (COM(2004) 4002 final). The Communication described that compared to 1999, substantial progress had been made in most areas of JHA, and that the EU citizens are clearly in favor of a common policy on asylum and migration (2004, 3). Nevertheless, the contemporary Treaties posed legal and instrumental constraints on decision making – mostly due to the need of unanimity in Council decisions (2004, 4). In addition, the Communication noted that "[t]he Member States are sometimes reluctant to cooperate within this new European framework when their interests are at stake. Moreover, the right of initiative shared with the Member States sometimes had the effect that national concerns were given priority over Tampere priorities." This can be explained by Hoffmann (1966, 822), who writes that in matters of 'high politics' – such as migration (Kostakopoulou 2006, 232) – "[a] gamble could be won only if the method had sufficient potency to promise a permanent excess of gains over losses, and of hopes over frustration". Whereas the earlier deduction of migrant flows as a stimulant for cooperation during the critical juncture around the end of 1980's could be interpreted as the Member States calculating the price for cooperation being lower and less effective than cooperation, now domestic solutions appeared prefarable.

Without challenging the views that the Treaty of Amsterdam and especially the Tampere Programme have had a profound effect on the development of the EU asylum policy, the period might more accurately not be seen as a critical juncture, but rather as a result of path-dependence. Whereas e.g. Menz (2003, 34) argued that

> *"a critical juncture has been reached in the construction process of an European CAIP [common asylum and immigration policy] because of the 'securitization' of the issue, growing real number of migrants, Europe's demographic deficit, labor market shortages, business demands for skilled labor and the electoral rise of the far right",*

I take a different stance based not on intentions but concrete actions. In line with Capoccia's and Kelemen's (2007, 367) view on critical junctures, it does not suffice that the Tampere Programme has become one of the cornerstones of the EU asylum policy. In 2005, Juss noted that practically there is no such thing as European immigration and refugee policy; Instead each country in the EU determined for itself which persons it will grant leave to enter or remain as refugees or migrants and which persons not (2005, 750). Lindstrøm (2005, 598) gave the same verdict: "although the 1999 Tampere European Council called for a Common European Policy on Asylum and Migration to be formulated by 1 May 2004, no such policy has come into existence as yet." Instead of allowing closer cooperation between Member States in migration and asylum matters, the Treaty of Amsterdam empowered the Commission, and the Union decision making in the issue was locked in the old model were Member States took decisions on national level.

The first reason for my interpretation is that the program provided the goals but not the tools. Secondly, its development cannot easily be explained by for example the number of asylum seekers either, as was the case in the beginning of the 1990's: the new peak in asylum seekers took place only after the agreement on the Tampere Programme, and around 1997–1999 the numbers had dropped considerably from earlier the peak years. Thirdly, the development of a Common European Asylum System has been slow, and especially in the first half of the 2000's, little progress was made. This is because European migration policy has always been fraught with internal contradictions which have yet to be resolved (Juss 2005, 751). As Capoccia (2015) presents it, "the social and political bases for reform may exist but political entrepreneurs may fail to mobilize the necessary coalition to achieve reform". For instance, according to Lindstrøm (2005), the common European asylum policy had by 2005 so far only focused on restricting migration flows – that were perceived as a security threat – and to combat populist pressures. Even this followed the

policy stances formulated in the 1980's. As a new development she identifies only the "relatively new paradigm", i.e. eliminating the root causes of migration flows.

Furthermore, I find helpful Hogan's (2006, 663–664) theorizing of critical junctures:

> "*Not all events, even seemingly significant events, can reasonably be called critical junctures. A critical juncture must be an event, prior to which a range of possibilities must exist, but after which these possibilities will have mostly vanished*."

The Tampere Programme is rather a path-dependent result of the first critical juncture in the end of 1980's, with elements dating even further back – a model example of graduate change. The period from the Maastricht Treaty to Amsterdam is characterized by layering change, meaning that new elements were added to existing institutions, or in this case, policies. As noted earlier, regarding the European migration policy the political agenda widened substantially, joint international action began to be emphasized, and the protection of the external borders went on as a priority. With the Treaty of Amsterdam and the Tampere Programme, the change became converting – the institutions and policies were given new purposes: the EU institutions were now allowed to adopt regular Community instruments; asylum and immigration were moved away from the third pillar to the Community method; the significance of free movement was emphasized and extended the right to this freedom for non-EU-citizens. Finally, the failure of traditional migration control policies to control migration flows resulted in attempts to find new measures, most notably the partnering with countries of origin and transit – which the Commission had promoted already in the beginning of 1990's (COM/2002/0703 final 2002, 7). It is also worth noting, that this interconnectedness of conversion and layering is a commonly agreed view among scholars of the topic (van der Hejden 2014, 8).

Nevertheless, as a negative case or near miss (Capoccia and Kelemen 2007, 352; Capoccia 2015) – a dramatic institutional change could happen but did not – the Tampere Programme remains a scholarly important point of comparison.

The examination of the Treaty of Amsterdam and Tampere Programme provide further evidence for path-dependence. Chetail (2015, 7) has showed that the Dublin Convention

functioned as an incentive for creating a common asylum system, and was followed by several endorsements from the Commission. Hatton (2004), on the other hand, found in his analysis that the asylum policies in the EU Member States resulted in an annual reduction of 172,600 applications between 1981 and 1999 (2004, 36). During 1990–1999 all EU-countries adopted some restrictive policies, but changes in policy relative to the rest of the EU had comparatively small effects on the total number of asylum applications in any given country (Hatton 2004, 41). My argument here is two-fold: firstly, the increased number of asylum seekers had left the EU Member States seeking for solutions to the problem; Secondly, although at some extent effective, the measures were considered reactive, incomprehensive, and unintegrated (UNHCR 2001, 4). These facts had led the Commission (COM/2000/0757 final, 3) to conclude that the "'zero' immigration policies of the past 30 years are no longer appropriate", and thus a choice had to be made between continuing the restrictive measures and trying to reap the benefits of immigration. The results of the earlier discussions on this topic can be seen in the Tampere Programme.

6.8 9/11

According to Penninx (2013, 112), already in the beginning of the 1990's, due to the international political terrorism migration had become primarily associated with problems and threats. However, the terror attacks in the United States on September 9, 2001 were a turning point in the Western security politics. As D'Appollonia and Reich (2008, 323) point out, this was the starting point of a new debate on the grounds on which asylum seekers could be admitted to the EU. In the authors view, security became to be seen more important than human right obligations. As an example of this, they cite the EU Council Directive 2004/83/EC that maintains the right of Member States to revoke, end or refuse to renew refugee status if "there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present" (Council Directive 2004/83/EC). Similar concerns were raised by the UNHCR after the adoption of Asylum Procedures Directive in 2005 (Baylis 2008, 175) and by refugee rights activists as early as in the 1990's with the conclusion of the Dublin Convention (Uçarer 2013, 287).

Nevertheless, Baylis argues that there is a crucial difference between the US and the EU in the wake of 9/11: In the States, the asylum seekers were increasingly seen as potential terrorists, whereas in the EU security and asylum was seen in a broader context, i.e., that of migration (2008, 173). According to Baylis, asylum seekers are just a part of large scale migration that could deteriorate social, cultural and economic security and increase crime (see also Chou 2009). This is a strong argument against the explanations derived from the theories of securitization, and shared by other researchers such as Boswell (2007, 606), who concludes that "[m]igration control policies in Europe do not appear to have become securitized as a result of 9/11 or the subsequent terrorist attacks in Madrid and London". The situation might have changed, however, as more recent analyses such as the one provided by Kate (2012, 463) suggest, especially after the recent terrorist attacks.

6.9 Dublin Regulation II

In 2003, the Dublin Regulation II was adopted to replace the 1990 Dublin Convention (ECRE 2006). As its predecessor, Dublin II Regulation established the criteria and mechanism for allocating responsibility to a single Member State for processing an asylum claim, and a hierarchy for identifying this Member State. To assist this process, the EURODAC system – a EU-wide database of asylum seekers' and irregular migrants' fingerprints to identify those applicants who already had applied for asylum in another Member State – came finally into use in 2003. Although proposed as early as in 1990 in connection to the adaptation of the Dublin Convention, the EURODAC Regulation was given only in 2000. The sextuple hierarchy for determining the responsible Member State for examining an asylum application was the following (EC Dublin II):

- principle of family unity (in which country the applicant has a family member who has refugee status or whose application is being examined)
- issuance of residence permits or visas (which country has provided the documents)
- illegal entry or stay in a Member State
- legal entry in a Member State
- application in an international transit area of an airport

If, however, no Member State could be designated on the basis of these criteria, the responsibility is shifted on the first Member State with which the asylum application was lodged.

In 2006, the European Council on Refugees and Exiles' Report on the Application of the Dublin II Regulation in Europe noted that the Regulation was intrinsically flawed and that Member States had failed to implement it (ECRE 2006, 4). The conclusion was that that the Dublin II was "based on an erroneous presumption that an asylum seeker will receive equivalent access to protection in whichever Member State a claim is lodged" (2006, 169). Also, being a binding document, the differences in EU and national asylum rules became particularly clear. Nevertheless, the following year the Commission's own report concluded that the objectives of the Dublin system would, "to a large extent", be achieved, although some concerns remain (Commission Memo/07/227 2007). Next year, the European parliament made it clear it did not share the Commission's view by stating that it "[s]trongly believes that unless a satisfactory and consistent level of protection is achieved across the European Union, the Dublin System will always produce unsatisfactory results from both the technical and the human viewpoints" and that "in the absence of a genuine common European asylum system and a single procedure the Dublin system will continue to be unfair both to asylum seekers and to certain Member States" (EP P6_TA(2008)0385).

6.10 The Enlargement of the EU in 2004

In 2004, ten new Member States acceded the Union, making it the largest enlargement of the EU in its history in terms of territory, number of states and population. The EU population grew with almost 75 million overnight. Before the accession, a review of studies in the matter concluded that an in average between 300,000 and 600,000 would move annually from Eastern Europe to Western Europe eventually reaching a total of 3–5 million before becoming quantitatively irrelevant (Fassmann and Münz 2003, 26). Between 2004 and 2009, 1,1 million citizens of the new Member States had moved to the old EU15 countries, more than doubling the number from the 900,000 residents at the end of 2003 (Ecofin 2009, 128–129). Still, this event is not comparable with the influx of asylum seekers for two reasons. Firstly, the European countries had begun planning the accession

of Central and Eastern European countries as early as 1989 with the Council Regulation (EEC) No 3906/89 (Phare 2007). The Phare Programme was a financial instrument that started with the Council Regulation granting economic aid to Hungary and Poland to support reforms as well as economic and political transition. The Programme then transformed in 1994 to an instrument of the pre-accession strategy for the ten future Member States. Secondly, the accession was far from uncontrolled. The Community acquis (effectively the European Union Law) that were the basis of the membership negotiations consisted of 31 chapters, 3,000 directives and around 100,000 pages (EU Enlargement 2015). However, the integration of the new Member States was not painless; still today the free movement causes tensions – as was seen during the Brexit Campaign that played with the Brits fears/perceptions of Eastern Europeans taking the locals' jobs. The analysis of Delbeqc and Waldorf (2010, 2) shows that the varying, temporary restrictions of free movement of the citizens of the new member states only had a very weak effect on the number of migrants.

Anticipating the enlargement, the EU launched in 2003 the European Neighbourhood Policy. As the external borders of the EU were drastically changed, new challenges arose. Some of the priorities listed in the new Action Plan were cooperation on migration, asylum and visa policies (COM/2004/0373 final). The Neighbourhood Policy was a continuation in the external dimension of EU's migration policy aimed at capacitating the neighbors in order to control migration.

6.11 CEAS – Common European Asylum System: the first stage

The process towards creating CEAS was commenced in 1999 at Tampere in order to consolidate the differences in the Member States' asylum systems and to establish minimum standards for asylum. The first stage of the CEAS consisted of four parts (EC CEAS 2015). The Reception Conditions Directive concentrates on the conditions in which the applicants have to wait for decisions; Dublin II Regulation established the procedures enhancing the protection of asylum seekers during the process, and gives guidelines to the division of responsibilities between countries, also including the EURODAC Regulation

allowing law enforcement access to a EU-wide database of fingerprints; Lastly, the Asylum Procedures Directive addresses the quality of asylum decisions.

With CEAS, the EU was changing its approach of extreme restriction of migration in order to secure external borders and limit asylum applications, to one aimed at maximizing the benefits of the inevitable immigration (Düvell and Jordan 2002, 498). Düvell and Jordan (2002, 499) note that at the same time as the EU was embracing immigration due to the need for workers, around 15 million EU citizens were unemployed. The fact that asylum seekers were hard to fit into this model, is one of the factors that led to the intensive focus on harmonizing asylum policies.

Hatton (2005, 110) points out that the first stage even included setting up the European Refugee Fund (ERF) in 2000 in order to financially promote the burden-sharing. The idea was to provide financial aid for member states that receive disproportionate numbers of refugees, as well as to help integrate immigrants and to finance temporary protection measures in case of a mass influx of refugees would occur. The ERF had a budget of 216 million over 2000–2004, which increased to 628 million euro for the period 2008–2013 (Interim 2016). The financial measures involved even other funds. The European Fund for the Integration of Third-Country Nationals had a budget of 825 million euro during 2007–2013 and aimed to support integration efforts not covered by the European Social Fund. The External Borders Fund operated with 1,820 million euro during 2007–2013 in order to ensure the efficient control of the external borders and management of immigration flows. Lastly, the Return Fund had a budget of 676 million euro during 2008–2013 for addressing irregular migration.

In 2014, these funds were replaced with the Asylum, Migration and Integration fund (AMIF) that was set up for the period 2014–2020 with 3,137 million euro of financing (AMIF 2016; COM(2011) 751 final). The AMIF also provides funding for the European Migration Network that provides information on migration and asylum. In addition, the Internal Security Fund with a budget of 3,764 million euro was created to finance border management, visa procedures, fight against crime, as well as risk and crisis management (EC Funds 2015).

Another important event in the development of the EU migration policy at the time was the creation of a fast-track procedure and common criteria for issuing a special residence and work permit for highly-skilled workers – the EU Blue Card (EC Agenda 2015, 10) – in 2009 through the Council Directive 2009/50/EC. The Blue Card is available in 25 EU countries, not applying to Denmark, Ireland and the UK, for applicants with higher professional qualifications, such as a university degree, and an employment contract with high enough salary in comparison to the national average.

6.12 Hague Programme

In 2004, the threat of terrorism had once again become palpable, and the attacks on 9/11 and 3/11 in Madrid were noted in the introduction of the Programme (Hague 2004, 3). The Hague Programme was the start of the second phase in the creation of a common European asylum system (EP Asylum 2016), and the second multiannual program within the AFSJ. Reviewing the results of the Tampere Programme in 2004, the Commission characterized the results as successful but adding that much also remains to be done (EC Communication 2004). According to the Commission, considerable progress had been achieved in regards to a common policy on asylum and migration, even though the Commission had had even more ambitious plans. In respect to the future development, the Commission reminded that a uniform refugee and subsidiary protection status must be determined together with a common procedure for recognizing and withdrawing the asylum status (EC Communication 2004, 10). The Commission also highlighted the need for the adoption of a strategy for migration that would be in balance regarding admission for employment purposes and the promotion of integration as well as countering illegal immigration and human trafficking, including an effective policy on return and readmission (EC Communication 2004). Here, too, the importance of strong solidarity was emphasized. Consequently, The Hague Programme revolved around five elements (Balch and Geddes 2012, 14): a common European asylum system; legal migration and the fight against illegal employment; integration of third country nationals; the external dimension of asylum and migration policy; and the management of migration flows.

According to Luedtke (2006, 424), national governments saw the modest cooperation already achieved as a success, and together with the external borders becoming common borders and the perception of the third pillar as relatively inefficient, most EU countries had started to reconsider their position on EU control in migration issues. The European Court of Justice was given jurisdiction over immigration, although only national high courts could refer case to ECJ. However, after the five-year transit period, the member states agree to expand EU control: for example, ECJ was given full jurisdiction, meaning that any national court could request national ruling (Luedtke 2006, 424). Noteworthy was that Germany succeeded in inserting a clause into the Constitution, allowing the member states to determine the number of immigrants accepted into their countries (Hague 2004, 10). This further underlines the limits of the concrete actions that followed the Treaty of Amsterdam – in this case common European immigration regulation.

Interviewing political actors in Brussels, Luedtke (2006, 425) found out that The Hague Program was considered by many to be a setback for supranationalism. The Hague Program restricted the ECJ jurisdiction back to the point where only national high courts could refer cases to ECJ. Also, all areas of immigration policy making was moved to co-decision and majority voting, except for legal migration. Luedtke interpret this as other areas of immigration policy (such as illegal immigration and political asylum) becomes policy areas where EU has full control, but legal migration issues involve certain aspects of intergovernmentalism (unanimity voting in the Council, no co-decision power for the EP). With The Hague Program, national governments now had control over the most sensitive area of immigration, legal migration, that relates to questions about who to let in. According to Luedtke (2006, 425) issues such as illegal immigration and political asylum were less controversial, because they were concerned about restricting and controlling the number of immigrants.

Part if this goal was the establishing of the European Agency for the Management of External Borders (FRONTEX) in 2004 through the Council Regulation (EC) No 2007/2004. FRONTEX is not only an agency but also a network for European border guards. It was created mainly in order to “coordinate operational cooperation between Member States in the management of external borders of the EU, assist them in

circumstances requiring increased technical and operational assistance at external borders, and to provide them the necessary support in organizing joint return operations" (Council Regulation (EC) No 2007/2004). In 2011, the Regulation was amended "to improve the integrated management of the EU's external borders and to enhance cooperation between national border guard authorities" and in 2014 laying down rules "for the surveillance of the EU's external sea borders in the context of operational cooperation managed by FRONTEX" (Eur-Lex FRONTEX 2016). It is important to note, however, that the Member States continue being responsible for the external borders; FRONTEX' role is only to facilitate the cooperation.

The first phase of CEAS was followed by a review of the results resulting in the 2007 Commission Green Paper on the Future CEAS (Green Paper 2007). The Green Papers are documents that the EC publishes in order to raise a discussion on a specific topic after having consulted the relevant parties. The Green Papers can lead to White Papers, i.e. concrete proposals for action. Apart from presenting 35 specified questions for developing the CEAS, the Green Paper tentatively admitted that although the Dublin System was not meant to be a burden sharing instrument, and had largely met its primary objective of establishing the Member State responsible for examining an asylum application, it "may de facto result in additional burdens on Member states" that lack the appropriate resources and face particular migratory pressures (2007, 10). Thus, the Commission deemed it necessary to develop a system that clearly allocates responsibility in order to avoid asylum shopping and 'refugees in orbit', possibly including complementary measure to the Dublin system (2007, 11).

The evaluation and the public consultation, including 89 contributions, led to the EC Policy Plan on Asylum in 2008 (COM(2008) 360 final). The development of the CEAS was to be based on three pillars: "better and more harmonised standards of protection through further alignment of Member States' asylum laws; effective and well-supported practical cooperation; a higher degree of solidarity and responsibility among the Member States, as well as between the EU and third countries" (2008, 4). Also, the Commission reiterated the fundamental role of the Geneva Convention in the EU asylum policy (2008, 2).

The Policy Plan identified three trends (2008, 3): firstly, the asylum levels were at a historically low levels, making it timely to improve the national asylum systems; secondly, as a critical flaw of CEAS was seen the differences in asylum decisions that legislative harmonization at EU level had not managed to solve. As a consequence, there has been secondary movements in the EU area; thirdly, an increasing number of positive decisions resulted in granting subsidiary or other kind of protection based on national law, and not on the Geneva Convention.

Finally, the Policy Plan defined four principles that were to guide the EU action in asylum (2008, 11): upholding the EU's humanitarian and protection tradition and ensuring fundamental rights when implementing CEAS; creating a system where all asylum seekers are treated equally; enhancing the efficiency of the asylum system through providing uniform legal norms and standards, common devices and cooperation mechanisms; increasing solidarity within and outside the EU.

6.13 GAMM – Global Approach to Migration and Mobility

As presented earlier, the path for cooperation with third countries was opened as early as in the 1970's when the European Council presented an action program for migrant workers and their family members. While no common migration policy existed, the Commission opted for underlining the importance of consultations between member and non-member countries to facilitate the adoption of common positions by the member states. Even here the Pierson's (2004) view on institutional self-reinforcement show great explanatory potential for the creation of path-dependence. In the Communication on Immigration and Asylum Policies in 1994 (COM(94) 23 final), the Commission stated that "action on migration pressure, particularly through co-operation with the main countries of would-be emigration to Europe" was a key component of an effective immigration policy (1994, 2). In 1998, the European Council set up a High Level Working Group on Asylum and Migration (HLWG) (Council 5264/99). The HLWG was to create a common approach "targeted at the situation in the most important countries of origin of asylum-seekers and migrants". Boswell (2003, 630), however, was early to note that the preventive approach of the HLWG did not seem to meet its expectations, and the focus of keeping asylum seekers

or immigrants in their regions of origin was met with criticism from NGOs, EP and the UNCHR. Despite the early disappointments, the group is still relevant with its objective to strengthen the external dimension of the EU's asylum and migration policies based on dialogue, cooperation and partnership with countries of origin and transit; the Group also prepares conclusions and recommendations on asylum and migration to be adopted by the Council (EU Glossary 2014).

In 2002, migration had become a central issue in the political life of industrialized countries, and "a major strategic priority for the European Union" (COM/2002/0703 final). At the European Council in Seville, the Heads of States and Governments had asked that immigration policy would be integrated in the EU's relations with third countries. Interestingly enough, the Commission leant on its own joint communication with the EP from 1994 while making the case for countering migration pressure through cooperation with third countries (COM/2002/0703 final 2002, 7). This underlining of an eight years old policy stance can be interpreted as evidence for underlying institutional path-dependence – the Commission wanted to make the case for having pursued a potentially successful route already for years.

After a few additional Communications, the external approach soon took a more concrete form. What Lavenex and Stucky (2011) interpret as a reaction to external shocks – the incidents at Ceuta and Melilla leading to the death of some migrants – lead to the informal summit at Hampton Court in 2005, where the EU Heads of State and Government called for a comprehensive approach to migration issues (COM(2005) 621 final). The Commission responded a month later by producing an action plan, and promising to develop a list of concrete actions for improving global migration, focusing on Africa. A Commission follow-up in 2006 reported on the progress made, suggested including legal migration and integration in the Global Approach, and reminded of the importance of other regions than Africa, especially to the east and south-east of Europe (COM(2006) 735 final). Of great significance was the creation of the Rabat Process in the summer of 2006. Ministers in charge of migration and development issues of 55 African and European countries decided in the gathering in Morocco to cooperate in a number of issues that affected the countries of origin, transit and destination of migration (MEMO/15/4832).

The Global Approach to Migration and Mobility can be seen as the external dimension of the EU's migration policy (COM(2008) 611 final). In 2007, the Commission elaborated on the enhancements of the Global Approach it had suggested in 2006, focusing on the concept of migratory routes (COM(2007) 247 final). The Commission noted the importance to widen the perspective of the Approach to better include even Middle Eastern, Asian and Latin American countries, in addition to eastern and south-eastern border areas of the EU and Africa. It had for long been evident that controlling migration required cooperation with third countries, but it was only trough GAMM that the EU brought all the actions under one umbrella (COM(2008) 611 final).

The process continued with the adoption of Paris Cooperation Programme in 2008, Prague Process in 2009, integration to the Stockholm Programme in 2010, Dakar Strategy in 2011, and finally the Rome Declaration and Programme in 2014. The Roma Programme for 2014–2017 added a fourth pillar to the process – promoting international protection (ICMPD Rabat 2016). The other pillars are: organizing mobility and legal migration; improving border management and combating irregular migration; and strengthening the synergies between migration and development. Up to date, the EU has developed a wide array of instruments in order to enable a comprehensive cooperation with third countries of origin and transit of migratory flows. These include (DG IPOL 2015b, 9):

- Migration dialogues (both regional and bilateral),
- Mobility Partnerships
- Common Agendas on Migration and Mobility
- EU Readmission Agreements
- Visa Facilitation Agreements
- Migration clauses in association and cooperation agreements
- Regional Protection Programmes
- Regional Development and Protection Programmes
- Frontex and EASO's external tools

To give context, EU has spent more than EUR 1 billion on more than 400 projects worldwide between 2004 and 2014, and additional four billion for migration and asylum related programs between 2007 and 2013.

6.14 The Lisbon Treaty

In 2007, the Treaty on the Functioning of the European Union, or the Lisbon Treaty, was signed – after an unsuccessful attempt to establish a Constitution for Europe in 2005 (Lisbon Treaty, 2007). The Lisbon Treaty was to reform the EU institutions and improve the EU decision-making process, strengthen the democratic dimension of the EU, reform the internal policies of the EU, and strengthen the external policies of the EU. The Lisbon Treaty did not bring any dramatic changes in the EU migration policy, but the measures on asylum were transformed into a common policy (EP Asylum 2016). This marked the end of the third pillar. The Lisbon Treaty is especially significant as these objectives are for the first time now legally binding for the Member States. The new system was to consist of the following:

- a uniform status of asylum
- a uniform status of subsidiary protection
- a common system of temporary protection
- common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status
- criteria and mechanisms for determining which Member State is responsible for considering an application
- standards concerning reception conditions
- partnership and cooperation with third countries

The third paragraph of the Article 63, also gives the Council the right to adopt provisional measures to combat the effects of a sudden influx of third-country nationals to one or more Member States (Lisbon Treaty 2007. The proposal has to come from the Commission, and the Council has to consult the EP before acting. With respect to decision making, the Lisbon Treaty marked the move to qualified majority voting, instead of unanimity. This is something that e.g. Juss (2005, 754) has called one of the requirements for a common system.

6.15 Stockholm Programme

In 2009, The Hague Programme was followed by the Stockholm Programme that was intended to guide the ASFJ-cooperation during 2010–2014. One of the goals was to complete CEAS by 2012. In 2008, the EU had agreed on the European Pact on Migration and Asylum that reiterated the respect for the Geneva Convention, and called for proposals aimed at establishing a single asylum procedure between 2010 and 2012 (EP Asylum 2016). The Stockholm Programme reaffirmed the objective of establishing an area of common asylum procedures emphasizing the need for solidarity with member states that face particular pressures, as well as underlining the central role the EASO was to have. Regarding regular migration, the Stockholm Programme recognized the opportunities and challenges that increased mobility pose but highlighted that when well-managed, migration can benefit all stakeholders (Council 17024/09 2009, 59). For this was needed a comprehensive and sustainable European migration and asylum policy that takes into account the long-term consequences of migration and the need for integration and creates common rules for asylum (CEAS). The Action Plan Implementing the Stockholm Programme specified seven areas of focus (COM(2010) 171 final):

- Delivering an area of freedom, security and justice for Europe's citizens
- Ensuring the protection of fundamental rights
- Empowering European citizens
- Strengthening confidence in the European judicial area
- Ensuring the security of Europe
- Putting solidarity and responsibility at the heart of response in migration and migration matters
- contributing to a global Europe

Nevertheless, despite the over 350 concrete actions taken or to be taken listed in the Action Plan – including reports, directives, communications, legislation and meetings with stakeholders – authors such as Parkes were already as early as in 2010 able to claim that the Programme was a failure (Parkes 2010, 157). In his analysis, Parkes lists as reasons for this the limited programming repertoire and inter-institutional mud-wrestling. On the other

hand, Balch and Geddes (2012, 14) interpret the concrete results between the Treaty of Amsterdam and the Stockholm Programme as a shift from policy harmonization towards "more practical or pragmatic attempts to find alternative methods to achieve common goals".

6.16 European Asylum Support Office

The implementation of the EU asylum policies not been easy, and whole national systems have failed e.g. in Greece. At the same time, the EU has developed its practical cooperation capacities in the form of the establishment of the European Asylum Support Office (EASO) in Malta. In order to support the three main objectives for the development of CEAS presented in the European Commission's policy plan on asylum, a proposal to establish EASO was made in 2009 and accepted in 2010 (EASO 2016). EASO became fully operational in 2011. The aim of the EASO is to support Member States in unifying the asylum policies and making the processes fairer, as well as to provide technical and operational support for those countries receiving significant numbers of asylum seekers. Hailbronner and Thym (2016, 1027) add that the objective of EASO is also to make the interpretation and application of EU legislation on asylum more coherent similar to Eurodac's function as a booster of the Dublin Regulation.

6.17 CEAS: more revisions

Lisbon Treaty provided the EU with a fortified basis for harmonizing legislation. Consequently, the Commission proposed that the existing minimum standards would be replaced by a common set of rules (Hailbronner & Thym 2016, 1025). Hailbronner and Thym note that the disputes among the EU institutions and problems with practical implementation led to detailed prescriptions in some issues giving the member states little room for adjustments and making it difficult to gain an overview of the asylum policy. Also, the CEAS concentrates on harmonizing legislation within the EU, but can only indirectly, if at all, influence events outside the EU borders. This shortcoming has become evident with the current migration crisis, spawning a variety of responses from the EU institutions including FRONTEX operations, adoption of relation and resettlement

schemes, enhanced cooperation with countries of origin or transit, creating regulations and reforming them (Hailbronner & Thym 2016, 1026).

In its Green Paper on the Future CEAS in 2007, the European Commission had outlined two goals for the second stage: achieving "a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States" (Green Paper 2007). Furthermore, the EC expressed its aim to "adopt an integrated, comprehensive approach to asylum" that includes all aspects of the asylum process. The deadline for beginning the second stage of the CEAS was initially set to 2010, only to be postponed to the end of 2012. Finally, in March 2013, the European Parliament and the Council reached an agreement.

The two main updates were the Dublin III (Regulation (EU) No. 604/2013) "establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national (national of a non-member country) or stateless person", and EURODAC (Regulation (EU) No. 603/2013) "for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection".

Also, four directives were revised:

- Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection
- Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, repealing the Council Directive 2004/83/EC
- Directive 2013/32/EU on common procedures for granting and withdrawing international protection, repealing Council Directive 2005/85/EC
- Directive 2013/33/EU laying down standards for the reception of applicants for international protection, repealing the Council Directive 2003/9/EC

Hailbronner and Thym (2016, 1026) note that the EU asylum policy has often been criticized for focusing on preventing migrants from entering the EU, thus leading to the use of the term 'Fortress Europe'. In their view, however, the truth is more complex. Despite its shortcomings, the EU asylum policy includes a rather broad definition of the criteria for refugee status and subsidiary protection, and high standards for internal protection, as well as grants extensive guarantees for vulnerable groups. On the other hand, there have been reports of restrictive entry and border control policies. Although there remain some issues, such as that the asylum applications are distributed unequally, Hailbronner and Thym argue that the CEAS has been instrumental in establishing refugee protection systems in all EU member states (2016, 1026).

The importance of migration matters for the EU was highlighted in 2010 as the Directorate-General justice, freedom and security was split into DG Justice and DG Home (EurActiv 2010). As Collett (2015, 2) notes, this was further emphasized in 2014 through the renaming and restructuring of the DG Home to Directorate-General for Migration and Home Affairs.

6.18 Dublin III

The Dublin III Regulation was adopted in 2013 and came into effect in 2014. Apart from updating the existing rules and objectives, the Dublin III Regulation included among other things the following improvements (Regulation (EU) No 604/2013):

- A mechanism for early warning, preparedness and crisis management
- a variety of measures aimed at improving the rights of the asylum applicants

The Dublin system has not been able to solve many of the problems it has faced since the very beginning. Fratzke (2015, 7) analyzes that one of the main issues is the shifting of much of the responsibility for examining asylum claims on the Member States at the EU's external borders. Other issues include delays in the processing of the claims, costs and low-efficiency, and high secondary movement. Although the Commission has noted (COM(2008) 360 final) these deficiencies, the problems persist. In 2015, the Policy Department C of the Directorate-General for Internal Policies published a report called "Enhancing the Common European Asylum System and Alternatives to Dublin" (DG IPOL 2015a). The results were a grim read. While the Dublin System has been seen as the corner

stone of the CEAS, it is "neither fit for its intended purposes nor designed as a solidarity measure" (DG IPOL 2015a, 8). On the contrary, the Dublin System violates asylum seekers fundamental rights (CoE Doc. 13866 2015, 3); still, the EU has even accelerated the efforts to apply it, no matter the costs.

In the Amsterdam Treaty, the Article J.1 states that

> *The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations*. (Amsterdam Treaty 1997, 10).

With no functioning solidarity measure, it is no wonder the EU has failed to create a functioning, common asylum system. As an EP study puts it: "It is widely accepted that the system does not work as expected and never has" (DG IPOL 2016, 12). The Dublin system is a stillbirth.

Also, in 2014, the Commission issued a Communication called "An open and secure Europe: making it happen" (COM(2014) 154 final). Here it was recounted how significant progress had been made since the agreement on the Stockholm Programme, including the agreement on CEAS. Furthermore, the communication presented political priorities: guaranteeing the flow of skilled and talented work force to the EU in a highly competitive world and thus maximizing the benefits of migration and integration; presenting a credible approach to irregular migration and return; consolidation of the CEAS in practice; strengthening the GAMM; preventing crime and terrorism; strengthening security through border management; and enhancing the common visa policy and the functioning of Schengen

After the conversion followed by the Tampere Programme, the change of the EU migration and asylum policy beginning with the Dublin Regulation II and Hague Programme can best be describe with layering, i.e. new elements are added to the old policies gradually changing their status and structure. Layering is supported among other things by the

frequent revisions of central policies and the CEAS, creating new tools, mechanisms and instruments (e.g. EASO, FRONTEX, ERF), and programs (GAMM and Dublin II and III). These included the Dublin II and III revisions, integration of different funds to the AMIF, as well creating the Blue Card in order to clarify and update the policies aimed at promoting high-skilled workers' immigration. This is in line with Streck and Thelen's definition (2005, 24): "[l]ayering involves active sponsorship of amendments, additions, or revisions to an existing set of institutions". The process was facilitated by the Lisbon Treaty which provided the EU with institutional leverage for harmonizing legislation, and consequently for example measures on asylum were transformed into a common policy. Also, path-dependence can be identified dating back to the Dublin Convention. Despite commentators characterizing the Dublin System as unfit, the Commission has made repeated attempts to fix it and considers it a central tool of the CEAS. The second example of path-dependence is the development of the cooperation with third countries into the GAMM.

6.19 The Migrant Crisis

In 2013, 20.4 million third-country nationals were living in the EU, amounting to 4% of the total population (MEMO/15/4544). The number of asylum seekers was already in sharp rise: there were 430,000 submitted asylum applications in 2013, a steep increase from the 335,000 in 2012, before rising to 627,000 in 2014 (Eurostat Database 2016). 90% of the asylum applications were lodged in just 10 Member States (MEMO/15/4544): Germany (34%), Sweden (14%), Italy (10%), France (10%), UK (5%), Hungary (5%), Netherlands (4.2%), Belgium (3.9%), Austria (3.9%), Denmark (2.4%).

The newly elected European Commission President Jean-Claude Juncker presented in July 2014 his "Political Guidelines for the next European Commission" (Juncker 2014). The ten-point plan included a chapter titled "Towards a New Policy on Migration". Here, Juncker reviewed six actions for managing migration better:

- Implementing the common asylum system, removing divergences in national implementation, and exploring the possibility of using the assistance of the EASO in emergency situations

- Promoting a new European policy on legal migration, addressing labor and skill shortages, and making EU "at least as attractive as the favorite migration destinations such as Australia, Canada and the USA"
- Stronger actions related to irregular migration
- Entrusting a Commissioner with special responsibility for Migration
- Securing Europe's borders by increasing FRONTEX' operational capacities

The work that Juncker had started, took aback in 2015 as the number of persons seeking a new life in Europe exploded. In May 2015 the severity of the situation was yet to become clear, as the Commission published a communication titled "A European Agenda on Migration" laying out a road map for creating a "coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration" (COM(2015) 240 final). In April 2015, High Representative/Vice-President Federica Mogherini and Commissioner Dimitris Avramopoulos had presented a ten-point emergency plan for the migration crisis, and announced that the publishing of the Agenda would take place in a month with more lasting measures (EC Press 2015). The Communication on a European Agenda on Migration contained a solemn message: the collective European immigration policy had failed, and a new, more European approach combining external and internal policies was needed (COM(2015) 240 final, 2). The Commission also presented seven immediate Key Actions:

- A funding package to triple the allocation for Triton and Poseidon in 2015–16 and to finance an EU-wide resettlement scheme.
- Immediate support to a possible Common Security and Defence Policy mission on smuggling migrants.
- A legislative proposal to activate the emergency scheme under Article 78(3) TFEU by the end of May, on the basis of the distribution key included in the Annex.
- A proposal for a permanent common EU system for relocation for emergency situations by the end of 2015.
- A Recommendation for an EU resettlement scheme by the end of May followed if required by a proposal for more permanent approach beyond 2016.
- EUR 30 million for Regional Development and Protection Programmes.

- Pilot multi-purpose centre established in Niger by the end of 2015.

The Migration Crisis was a truly eye-opening event for the EU. The Commission concluded that there were structural limitations of EU migration policy and the tools available. Subsequently, the Agenda laid out a four-pillar structure for a "fair, robust and realistic" EU migration policy (Table 1).

Reducing the incentives for irregular migration	**Border management – saving lives and securing external borders**	**Europe's duty to protect: a strong common asylum policy**	**A new policy on legal migration**
Addressing the root causes through development cooperation and humanitarian assistance. Making migration a core issue for EU delegations. An action plan on smuggling in May 2015. Stronger action so that third countries fulfil their obligations to readmit their nationals. Adoption of a Return Handbook and monitoring of the implementation of the Return Directive. Reinforcement and amendment of the FRONTEX legal basis to strengthen its role on return.	Strengthening FRONTEX's role and capacity. Union Standard for border management. Strengthening EU coordination of coast guard functions. A revised proposal on Smart Borders Strengthening the capacity of third countries to manage their borders.	Establishing a new monitoring and evaluation system for the Common European Asylum System and guidance to improve standards on reception conditions and asylum procedures. Guidelines to fight against abuses of the asylum system. Strengthening Safe Country of Origin provisions of the Asylum Procedure Directive to support the swift processing of asylum applicants from countries designated as safe Measures to promote systematic identification and fingerprinting. More biometric identifiers passed through Eurodac. Evaluation and possible revision of the Dublin Regulation in 2016.	Modernisation and overhaul of the Blue Card scheme. A platform for dialogue with social partners on economic migration. Stronger action to link migration and development policy. Re-prioritising funding for integration policies Cheaper, faster and safer remittance transfers

Table 1: Four pillars to manage migration better. *Source:* COM(2015) 240 final

In addition to the aforementioned, the Commission had three goals: completing the CEAS, sharing the management of the external borders, and creating a new model of legal migration, including the creation of a pool of work seeking applicants where employers could seek potential employees.

The first major action in relation to the management of the external borders was the proposal in December 2015 to create a European Border and Coast Guard (EC Press 2015). The aim is to establish an agency that would be built from FRONTEX and the Member States' border management authorities. What is more dramatic is the Commission proposal of "targeted modification of the Schengen Borders Code to introduce mandatory systematic checks of EU citizens at external land, sea, and air borders, meaning obligatory checks on EU citizens when entering or exiting the EU. This will be done "in order to verify that persons arriving do not represent a threat to public order and internal security".

In April 2016, the Commission released a communication on the reform of the EU asylum and migration systems (COM(2016) 197 final). Having identified structural weaknesses in the CEAS, the Commission presented its five priorities:

- Establishing a sustainable and fair system for determining the Member State responsible for asylum seekers
- Reinforcing the Eurodac system
- Achieving greater convergence in the EU asylum system
- Preventing secondary movements within the EU
- A new mandate for the EU's asylum Agency

Between May and July 2016, the Commission addressed the first goal of the European Agenda on Migration by presenting concrete proposals to complete the reform of the CEAS in accordance with the five priorities (EC Press 2016). Claiming to have learned from experience, the Commission called for a common and harmonized set of rules at EU level aimed at addressing the all so familiar collection of challenges: creating "a common

procedure for international protection, uniform standards for protection and rights granted to beneficiaries of international protection" and "the further harmonisation of reception conditions in the EU". Importantly, a proposition to strengthen the role of EASO was also put forward, meaning that it would have a new policy-implementing role in addition to an operational role, becoming the EU's Asylum Agency. These measures are hoped to "simplify and shorten the asylum procedure and the decision-making, discourage secondary movements of asylum seekers and increase integration prospects of those that are entitled to international protection." (COM(2016) 467 final).

In May 2016, the Commission presented the Dublin IV proposal, part of a package including proposals of the Agency for Asylum and the recast of the EURODAC Regulation (COM(2016) 270 final). The reception was skeptical, however. A study by the EP's Policy Department for Citizens' Rights and Constitutional Affairs (DG IPOL 2016) suggested that "[t]he Dublin system is ineffective and inefficient, inflicts hardship on protection seekers and damages the efficiency of the CEAS" and that the Dublin IV proposal will likely not solve the problems but instead "probably aggravate current imbalances in responsibilities among Member States" (2016, 6).

Relating to legal migration, the current main legislation consists of (DG Home 2016b):

- Blue Card Directive
- Students and Researchers Directive
- Intra-corporate Transferees Directive
- Seasonal Workers Directive
- Long-term Residents Directive
- Family Unification Directive
- Single Permit Directive
- GAMM
- EU Resettlement Scheme

Several commentators have raised the question whether the migration crisis will mark the end of Schengen (Klip 2015, 313; DG IPOL 2016, 9). The foundations of Schengen have truly been shaken in the past year. In the fall of 2015 several Schengen Member States –

including Sweden, Germany, Denmark and Belgium– introduced temporary internal border controls. In November, the Dutch Finance Minister played with the idea of creating a mini-Schengen to protect the countries most affected by the influx: Sweden, Germany, Austria, Belgium and Netherlands (Telegraaf 2015). In March, the Germans upset the Swedes by announcing that Germany will no longer receive asylum seekers that have been sent back to the country in accordance with the Dublin regulation (DN 2016). Simultaneously, Sweden had continued the border checks due to the fact that there were still 600,000 persons in Germany that had not formally sought asylum. In May 2016, the Commission authorized Germany, Austria, Denmark, Sweden and Norway to maintain for six months "proportionate" temporary border controls at specific intra-Schengen borders triggering the Article 29 of the Schengen Borders Code concerning "cases where exceptional circumstances put the overall functioning of the Schengen area at risk" – for the first time ever (DG Home 2016a; COM(2016) 635 final). The article gives the Schengen Member States the right to introduce internal border controls temporarily for a duration of six months – with the possibility to prolong them three times to a total length of two years (MEMO/16/3205). Moreover, in December 2015 the Danes had rejected in a referendum a proposal of convergence with the EU in the criminal justice and home affairs system, that it has been exempt from since 1993 (BBC 2015). With regards to a re-vote the Danish People's Party declared in September 2016 that it would back that proposal only if it included a vote on the future of Danish participation in the Schengen cooperation (Kildegaard Sørensen and Munkholm 2016).

While no definitive answer regarding to the future of Schengen cannot be given, it is evident that for its survival the system has to be reformed, and most importantly be better included in the EU's foreign policy and the measures related to addressing the root causes of migration in third countries (Klip 2015). The unilateral decisions of certain Member States to reinstall border controls are, however, an important explanatory sign on the dysfunction of the EU migration and asylum system. As was the case with the Treaty of Amsterdam and the Tampere Programme regarding increased cooperation in migration and asylum matters, in the event of a migration crisis, the Schengen system proved to be a losing bet in a gamble between EU-level cooperation and domestic actions. This can likely

be seen as a result of the continuing discontent with the effectiveness and slow development of common policies.

Lastly, it can be postulated that the current migration crisis is very similar to the one starting at the end of the 1980's, allowing for making the case for a critical juncture. Once again, a *generative cleavage*, as presented by Hogan (2006), can be identified in the form of the external shock that the influx of asylum seekers caused. The changes have been *encompassing*, *swift* and *significant*. In the span of 18 months, the EU has presented an emergency plan, followed by an admission of the failure of the migration policy, and a call for a *new* approach – only two years after the CEAS had finally been agreed upon, although still uncompleted. The pursued reforms include a new model of legal migration, creating a new European Border and Coast Guard as well as an Asylum Agency, a Dublin IV proposal, as well as a dramatic modification of the Schengen system with external border checks for EU-citizens.

7. Discussion

> *Yet, numbers to Europe remain, in most EU countries, at intolerably high levels. At the same time, only the most resourceful – generally young and male – can make it to Europe's shores, and they are by definition not always the most deserving. The vast majority of the world's refugees are in the South, rotting in refugee camps or suffering internal displacement.*
>
> *In a shrill and caricature-ridden debate, asylum seekers are seen as either genuine or 'bogus'. Yet there is no clear distinction between desiring freedom and desiring material security. Asylum seekers coming to Europe want a better life, to use an American phrase, but they come in the main, – –, from lands afflicted by political. instability and violence. They are fleeing death and destruction and seeking a land of stability and prosperity.*

This passage sounds very familiar to contemporary ears, and describes uncannily well what we are seeing happening every day. Nevertheless, these words were written in 2003 by Hansen. Migration is anything but a new phenomenon, and rulers and nations have

struggled with its consequences since ages. At the same time, new generations are born to endure the same hardships as their predecessors, and to dream of a better future. This study has been an attempt to outline a part of the history of European migration, and to explain why the EU migration and asylum policy looks like it does today.

The well-known appellation that forms part of the title of this study, 'Fortress Europe', was born during the World War II, and was later applied to the negative, liberalist criticism against the perceived European protectionism through the Common Market project at the turn of the 1980's (Mavrodi 2010, 3). However, today the term has been adopted chiefly in the use to criticize the EU immigration policies for being too exclusionist against third country nationals. Proponents of the term see the 'fortress' consisting of concrete measures taken in order to prevent irregular economic migration (Amnesty 2014, 6). Especially the Leftists have extended the criticism to accuse the EU of disregarding people "who are trying to escape miserable living conditions, political persecution or forms of state and non-state violence" (COM(2003) 687 – C5-0613/2003 – 2003/0273(CNS), Minority Opinion, 32). Others, such as van Houtum and Pijpers (2007), more optimistically, agree on the economic aspect of the policy creation, but prefer merely seeing the EU as a 'gated community' with selectively protectionist immigration policies. Without delving deeper in the discussion about the term 'Fortress Europe', the appellation seems fit to be used in the context of this study's title.

The first research question of this study was '*How has the European migration and asylum policy evolved over time?'* Using narrative process tracing the analysis of development was successfully incorporated in the description of the steps in a causal process beginning with bilateral agreements and a *laissez-faire* policy on migration, gradually leading to the creation of treaties and agreements with an aim to consolidate a common European tamigration and asylum policy. Both endogenous processes and exogenous catalysts were identified, and emphasizing the temporal aspects of decisions as well as their interconnectedness, a narrative consistent with the historical institutionalist framework generated.

As it has been noted, identifying starting and ending points is often difficult but in an attempt to formulate relatively distinct, coherent, and logically assorted divisions, a wide range of historical institutionalist tools were used to identify change. Firstly, it was theorized that critical junctures place focus on formative periods, or generative cleavages as it was postulated here. Critical junctures are a powerful but sensitive tool. In order to use it, the researcher has to have a clear understanding of the phenomena at hand, so that possible interdependencies can be identified. A demonstrative example of this is the earlier mentioned characterization by Lavenex and Stucky (2011) of the incidents at Ceuta and Melilla in 2005 as 'external shocks' to the EU's securitarian approach to migration control. While this event might in another context, such as the development of the external dimension of the EU's migration and asylum policy, be considered a critical juncture, there are no grounds for such an interpretation in this present analysis which takes a broader view on the topic. Meunier and McNamara (2007, 8) present an even more comprehensive list of "junctures" and "challenges" that the project EU has faced since 1957: "the 'empty chair' policy, the entry of Great Britain, the end of the Cold War, the referenda on the Maastricht Treaty, the introduction of the euro, and the enlargement of ten new countries at once". To this list could be added many more items, notably the crisis in 2005 regarding the heated discussions and subsequent failure to adopt an EU Constitution, and more recently the economic crisis. As a consequence, in order to identify critical junctures and other key dates in this specific policy area, the analysis of migrant numbers (see table 2) and especially the number of asylum seekers proved extremely useful – and proof of an exogenous catalyst for change. This is, however, in no manner counterintuitive – quite the contrary. While in other EU policy areas different critical junctures might have been identified – possibly related to the integration process or enlargement – it is only logical that the EU migration and asylum policy have been greatly shaped by extreme increases in migration. For increased theoretical validity, Hogan's (2006) four criteria for determining what is a critical juncture was used.

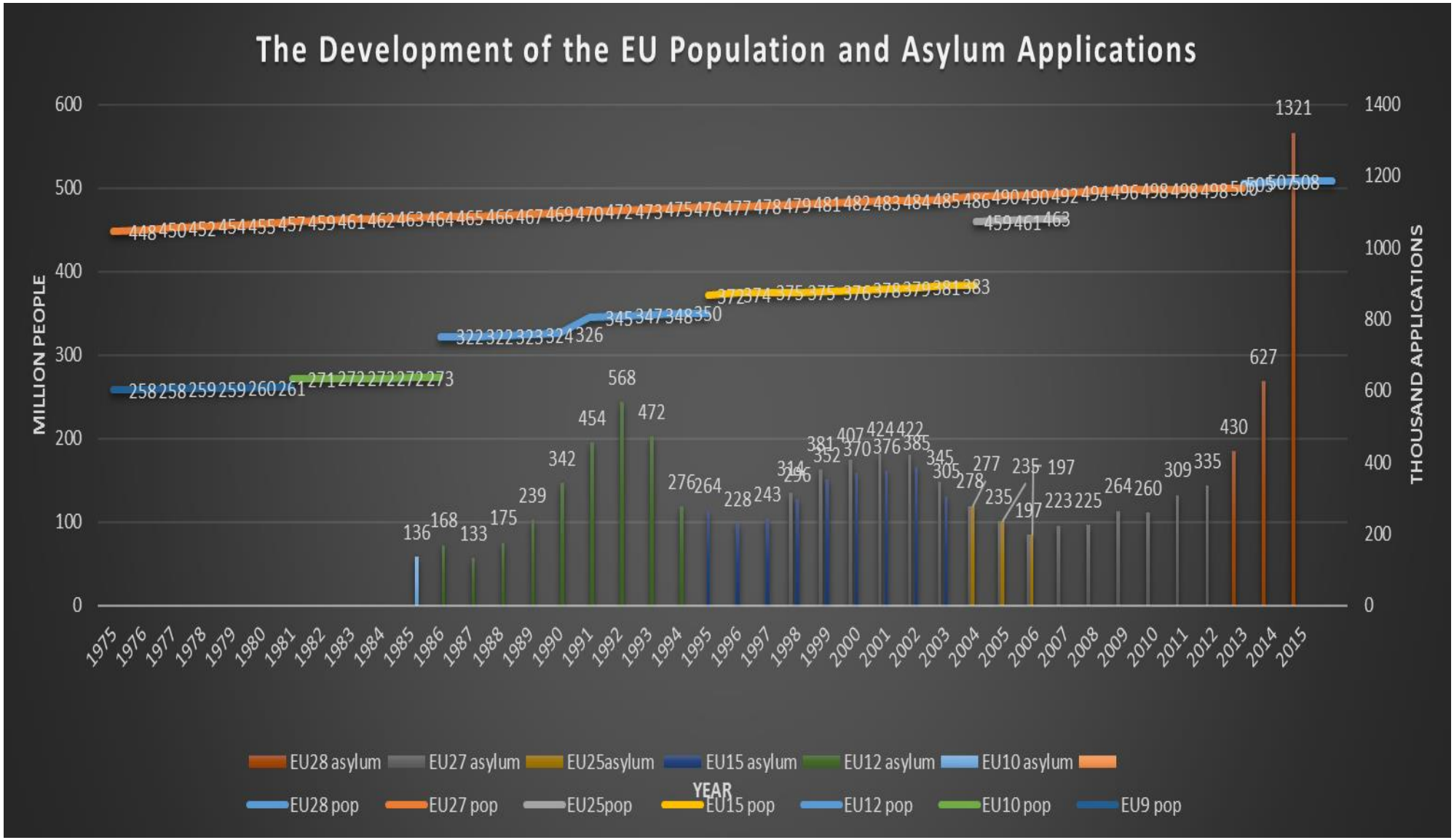

Table 2. Source: Eurostat Database (2016). Note: numbers are rounded to the nearest thousand (asylum) or million (population). For Germany the numbers are until 1990 from FRG, for France including oversees since 1991. The chart include numbers from the all the current EU27 countries, as well as only from the Member States at a specific time.

Secondly, path-dependence showed its appropriateness in explaining why the EU has persisted in holding on to certain policies that have been widely criticized and turned out not to work. Thus, path-dependence also partially explains the direction of change, i.e. why the policies have not regressed but rather continuously evolved building on previous structures and decisions. Against this background, at least one decision could decisively be attributed to the appearance of a critical juncture, and resulting in path-dependence – the creation of the Dublin Convention. Thirdly, although path-dependence could be identified, the analysis would have remained incomplete without additional tools. Keeping in mind that the traditional approach of HI of applying critical junctures as an explanation of change followed by path-dependence has deservedly been criticized, the shortcomings of the theory were tried to be compensated by using the concept of gradual change to describe slow policy change. This was underpinned by Capoccia's (2015) understanding of institutional change consisting of longer periods of stability and adaptation that alternate with shorter phases of change. Therefore, the critical junctures combined with gradual change constituted the theoretical framework for the analysis of change. Consequently, it was shown that the development of the EU migration and asylum policy consists of two types of change: unexpected - caused by critical junctures, and resulting in rapid EU-level decisions; gradual - politically guided and advocated, and with appropriate conditions, following path-dependence. In accordance with the tradition of HI to divide processes into phases in order to identify temporal change, the following periodization resulted:

1957–1972: Focus on national policies and a laissez-faire policy

1973–1989: Increased intergovernmental cooperation

1990–1999: Dublin Convention through the Tampere Programme

2000–: Communitarization of migration and asylum in the Treaty of Amsterdam, CEAS

In the early years of the European Community, migration was hardly a common issue. Cooperation was bilateral and work-based immigration widely encouraged. However, as the Oil Crisis hit in 1973, the situation changed. European policy makers didn't expect migrant workers to stay. Suddenly, millions of foreign workers wanted to stay, and at the same time unemployment was rising sharply. The first policies developed to manage immigration were reactive, and the integration of the existing migrant population wasn't

completely successful (Hansen 2003, 36). In the 1980's, the third migration period begun (Garson and Loizillon 2003), and the Commission started to advocate a common migration policy. Immigration had become more and more intrinsically connected to the idea of European Citizenship, and the related free movement of persons. The Schengen Agreement was signed in 1985, and the Single European Act ratified in 1987. A number of intergovernmental groups were also created, including the Trevi and the Group of Coordinators. Then came the collapse of the Soviet Union and largest influx of migrants and refugees in Europe since the WWII.

By 1990, the intensified cooperation in migration and asylum, as well as the escalating immigration to Europe had led to the creation of the Dublin Convention. With the signing of the Treaty of Maastricht many expected advancements in a common migration and asylum policy, but in vain. Boswell and Geddes (2011, 3) aptly summarize the reasons for the late inclusion of migration and asylum in the EU's main legal and political framework. There were several important developments after the end of the Cold War:

- the migration flows to and within Europe grew considerably
- more countries were affected
- EU gained importance and more legislative powers
- new immigration-related problems surfaced; namely growing concern about irregular immigrants, people-smuggling, and human trafficking.

Despite the inability to reach concrete results regarding a common policy, this first critical junctures dug the trail for a path-dependent development in the future. In the end of the 1990's, the Treaty of Amsterdam and the Tampere Programme built on the earlier results through layering change. Two significant changes were the *communitarization* and the decision to officially start working towards a common European asylum system. Also, an ideological change to deeper cooperation with third countries and closer attention paid to the human rights of the asylum seekers, could be identified. Beginning the new millennium, the change became converting, and the institutions and policies given new meanings. Also, path-dependence continued being clearly visible especially with the Dublin Regulation – fraught with problems but still fundamental in the EU asylum toolbox. After adopting

number of new legislation and revising old ones, the EU officials, with the Commission having the lead, were feeling deservedly optimistic about creating common, functioning policies for the EU in migration and asylum. Unfortunately, come year 2015, and everything changed. The period up to the migration crisis is characterized by layering: several revisions of policies, the creation of new instruments to aid in the execution of existing policies, and the establishment of new programs in accordance with earlier decisions.

Several reasons for continuous development were identified in the study, many of them challenges such as illegal immigration, high number of asylum seekers, and security concerns. Other important factors include the continuous integration that brought about free movement, the SEA, widened external borders, and the need for skilled labor force. Path-dependence is visible not only in the notable layering of policy decisions, but also in the list of historical key themes of the EU migration and asylum policy that augments through time but themes are seldom omitted (see table 2). Further proof can be found in institutional statements that point out earlier decisions and their importance for the contemporary state-of-affairs, or policy stances that have stood the test of time. Apart from the notorious Dublin Convention, another interesting example is the cooperation with third countries. The 'stickiness' of the Dublin Convention can be explained by difficulty of changing direction (Skocpol and Pierson 2002, 699), and the developing of the third countries -approach by Pierson's self-reinforcement (2004).

Finally, Suddaby et al. (2014) have noted, new institutionalism has a tendency towards functionalism and explaining institutional outcomes by themselves – as proof of superior design. Path-dependence showed that this explanation is not always valid, and that institutions can hold on to decisions that have been shown to be inadequate. Also, an attempt was made to explain decisions in their context, instead of how they are seen today. The complementary approach of combining critical junctures, path-dependence and gradual change proved very useful in explaining institutional development and addressing criticism against HI. A crucial indication of this are the logical and coherent results that the analysis produced. As a result, several objections to the HI could be addressed, thus contributing to

the testing of the theory. The criticisms include inter alia claims of HI's inability to explain change, and the shortcomings of the concepts of critical junctures and path-dependence.

Historical key themes of the EU migration and asylum policy

1957–1972 Focus on the free movement of EEC Citizens in the Treaty of Rome	1973–1989 Increasing intergovernmental cooperation	1990–1999 Dublin Convention through the Tampere Programme	2000–2016 Communitarization of migration and asylum in the Treaty of Amsterdam, CEAS
- National policies - Bilateral agreements mirroring labor demands - *Laissez-faire* policy - Intra-European migration	- Non-European migration as national competence - Strengthening external border controls - Harmonizing migration legislation - Common visa policy - Removal of internal borders, free movement of people - Ending of labor migration - Family reunification - Equal treatment of foreign nationals - Coordination of entry, residence and work-permit regulations - Common information system - Coordinated reviewal of asylum claims - Stopping the asylum shopping - Common policies regarding third countries - Illegal immigration - Crime and terrorism	- Communitarization - External border control became a priority - Common asylum policy - Rules for common processing of asylum applications and determining the country responsible for the processing - Safe third countries - General principles for controlling the external borders - Harmonization of the right of asylum - Flows of asylum seekers - Combating terrorism and crime, Europol - Controlling illegal immigration - Stopping the asylum shopping -Eurodac database	- Communitarization - Protection of the external borders as a priority - creating a CEAS - Commitment to cooperate in migration and asylum matters - Rules for common processing of asylum applications and determining the country responsible for the processing - Uniform status of asylum - Minimum and common standards relating to asylum seekers and refugees - Controlling migration flows - Joint international actions - cooperation with third countries - Fair treatment of third country nationals - Integration of immigrants - Measures defining rights and conditions of third country nationals' residence in different Member States - Measures on illegal immigration - Finding a balance of effort between Member States regarding the receiving of refugees and asylum seekers - Solidarity - Security concerns related to immigration - Principle of family unity - The creation of institutional instruments to promote EU-level cooperation - Promoting high-skills labor immigration - Protection of fundamental rights

Table 2.

The second research question was '*Why has the EU failed to create a coherent migration policy*?' In order to answer the question, it has to be defined what a coherent policy consists of. Lesińska (2012, 242–243) has presented a convenient checklist for what is traditionally seen as an ideal policy:

- Predictive and well-planned (based on a widely accepted long-term strategy that defines the state's interests and aims to achieve them via migration policy)
- Well-organised and coherent (supported by a legal framework that serves as a normative basis and an appropriate bureaucratic structure that ensures successful implementation).
- Rational (based on a thorough analysis of all available data and information sources, as well as the experiences of other countries).
- Efficient (there should be a consistency between the intended objectives and final outcomes of a given migration policy)

Against this criteria, the EU migration and asylum policy can be evaluated to have been at least partially unsuccessful. Despite experiences from previous migration flows, the EU had not been able agree on policy that would have functioned during the latest migration crisis, thus failing on the criteria of predictability and being well-planned. Second, the migration and asylum policy has hardly been well-organized nor coherent, demonstrated by the problems with agreeing on and implementing policy proposals, as well as the frequent restructurings. The European Commission has had a central role in developing the EU's migration and asylum policies thanks to its policy-initiating right (see table 4). Each Treaty widened the scope of the EU's influence on Member States policies. Nevertheless, until 2009, the decisions were made unanimously restricting the possibilities to create common policies. Making use of the research by Hoffmann (1966), it was postulated that despite attempts to create policy instruments and legislation consolidating a common European approach, the Member States have perceived domestic measures more effective and/or beneficial, and therefore initially resorting to unilateral decisions in times of crises. It was, however, showed that external shocks can tilt the scales so that cooperation is perceived as the preferable approach. The distrust of common solutions has also resulted in an evil circle

of further slow development and ineffectiveness of EU policies in the area. Here can be applied Geddes' (2000) understanding of policy constraints. Of the factors Geddes identifies at least the following can be attributed to the partial failure of EU migration and asylum policies: large borders and the scale of immigration; the lengthy procedures needed to agree on policies; differences in national interests.

Thirdly, the EU institutions have themselves recognized the shortcomings of the policies in relation to intended outcomes and the materialized consequences. The underlying institutional reason for this seems largely to be the inflexibility of the EU legal framework (Ackermann et al. 2015, 1449). It is also clear that the decision making system is rigid and sluggish as can be seen with Schengen (Agreement in 1985, Implementation Convention in 1990, and entering in force in 1995), Dublin convention (signed in 1990, came into force in 1997), or the development of the CEAS (since 1999). Lastly, the EU countries have had many different approaches to the restrictiveness of European migration policy. Drawing from the data of Determinants of International Migration project at Oxford University, Hagen-Zanker and Mallett (2015) have shown that between 1995 and 2015 for example German migration policies have become increasingly less restrictive, the British more restrictive, and the Spanish taken turns in restrictiveness and laxness.

Concluding, the historical institutionalist methods were successfully used to produce verifiable and interesting results regarding the development of the EU's migration and asylum policy. The inclusion of gradual change proved crucial for the analysis. This study has managed to add to the understanding of the EU's migration and asylum policy, and through theory testing even improve the usage of historical institutionalism as a research method. The traditional theoretical framework was approached critically and some of the criticism towards HI addressed. As a result, it has been shown that HI offers considerable promise in explaining policy change over time.

JHA/AFSJ cooperation from Trevi to Lisbon – The role of EU-institutions and the decision making mechanisms

	Pre-Maastricht JHA	**Post-Maastricht third pillar**	**Post-Amsterdam first pillar Immigration; asylum; Police and Judicial Cooperation in Civil Matters**		**Lisbon Treaty**
		Title VI TEU, Article K	**Title IV TEC, Article 61-69**		**Title IV TEC, Article 61-69 Consolidated pillars**
			1999-2004	Post-2004	
European Parliament	No role	Limited role, consultation	Consultation	Codecision	Ordinary legislative procedure
European Council	No direct role	Dominant actor	Dominant but Commission and EP descendant	Shared power position in decision making	Shared power position Enhanced cooperation possible
European Commission	Consultative Occasional observer at intergovernmental meetings	Shared right of initiative with member states except judicial and police cooperation (no right of initiative)	Shared right of initiative (member states asked the EC to assume an exclusive right for asylum issues	Exclusive right of initiative	Exclusive right of initiative except in police and judicial cooperation (EC shares right of initiative with a coalition of at least 25 % member states)
No jurisdiction	No jurisdiction	Referral for an obligatory first ruling for national last instance courts	Referral for an obligatory first ruling for national last instance courts	Jurisdiction to enforce all AFSJ decisions	
Intergovernmental negotiations Non-binding decisions in the form of resolutions Binding decisions in the form of treaties	Unanimity rule on all issues	Council acts unanimously on proposals from EC and member states for the first five years Opt-in (UK, Ireland), opt-out (Denmark)	Council acts unanimously on proposals from EC Move to Qualified Majority Voting Opt-in (UK, Ireland), opt-out (Denmark)	Qualified Majority Voting for most decisions Opt-out (Denmark on judicial cooperation) Opt-in (UK, Ireland)	

Table 3. Source: adapted from Uçarer (2013)

8. Conclusions

The results of this study showed that the EU has come to a new critical juncture in regards to the development of the common migration and asylum policy. Collett (2015, 3) notes insightfully that the JHA framework does not anymore suffice for the development of a common immigration policy. Whilst border controls and other regulative elements continue playing a central role in the management of immigration, the matter is a lot more complex. According to Collett, the EU has to take into account both the international and local effects of immigration including employment, education, trade and all economic policies. One of the leading causes of the failure to create a satisfying CEAS is that migration issues relate to so many domestic priorities: security, employment, justice and home affairs, and relations with third countries. This time around the asylum seeker statistics are quite literally off the chart (See table 1). During the previous peaks in asylum seekers, the EU received an average of 165 (EU12 in 1992) and around 100 (EU15 in 2002) asylum applications per 100,000 local population (Eurostat Database 2016). In 2015 the number was 260. In addition, the applications were extremely unevenly distributed. The EU28 median being 130, the five countries receiving proportionately most applications – Hungary, Sweden, Austria, Finland and Germany – had ratios of 1,799; 1,667; 1,027; 591; and 587. In comparison, during the previous crisis when Germany in 1992 received 77% of the EU12 asylum applications, the ratio was 545 applications per 100,000 Germans. The statistics oblige one to ask, whether any asylum system could have handled such a trauma.

One of the most pressing issues might be how to integrate the newcomers. These are also reflected in the four-pillar European Agenda on Migration that consists of (2015):

- reducing the number of irregular migrants
- border management
- common asylum policy
- legal migration, including integration and development in the countries of origin

The aim of this study has not been to present an exhaustive account of every single communication, Green Paper, memo etc. that the European Union institutions have released relating to migration and asylum policy (for a comprehensive list see Statewatch 2016a,

2016b, and 2016c). Still, for reference, annex 1 presents the scope of the current main regulations and directives adopted in the field of asylum and migration, and annex 2 an overview of the law applicable to asylum, border management and immigration in relation to EU. Instead, the goal has been to provide an encompassing description of the steps that the EU has taken in order to respond to the problems that intra-European free movement combined with an increased number of immigrants and asylum seekers, and the lack of common policies, has raised. With the help of a historical institutionalist framework, it has been possible to identify critical junctures that have forced the EU to modify its approach and to develop new tools. Process tracing, on the other hand, has proved a useful concept for explaining the development as well as the inability of the EU to make such policy changes that would solve the issues earlier approaches have faced, and to tackle new issues. Nevertheless, no one theory can fully explain complex phenomena such as the EU policy making process, and thus this account should be viewed as a chapter of a larger narrative, including but not limited to domestic politics, a plethora of stakeholders – private and public –, and the peculiar nature of the EU as a multinational project of peace. The development of the EU migration and asylum policy goes hand in hand with the process of EU integration, and the historical view highlights many of the problems that have been present also in other policy areas. Thus, the results might provide guidelines or directions for researchers hoping to explain developments in other EU topics.

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Annexes

Annex 1. The scope of the current main regulations and directives adopted in the field of asylum and migration

Asylum	Subject	Immigration	Subject
Reception conditions of asylum seekers	Council Directive 2003/9/EC reception conditions of asylum seekers Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection	**Borders management**	Schengen Borders Code Schengen Evaluation Local Border traffic at the external land borders Simplified regime for the control at the external borders FRONTEX Agency EUROSUR system
Determination of the state responsible for examining an asylum application (Dublin)	Dublin Regulation Implementing Regulation Dublin and third countries Temporary derogation from Dublin rules: relocation of asylum seekers	**Short term visas**	List of third countries whose nationals must be in possession of short term visas Visa Code Visa Information System Agreements on the facilitation/exemption of issuance of visas
Comparison of fingerprints (Eurodac)	Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement	**Admission and stay**	Students and pupils Researchers Research, studies, training, voluntary service, pupil exchange

	Regulation (EC) no 2725/2000 Council Decision 2006/188/EC extending to Denmark the Eurodac system Regulation (EU) No 603/2013 establishment of Eurodac for the effective application of regulation (EU) No 604/2013 (Dublin III)		Highly skilled workers/EU Blue Card Single Permit Seasonal Workers Intra Corporate Transfers Family reunification Long term residents
Refugee and subsidiary protection definition	Council Directive 2004/83/EC on minimum standards for the qualification and status as refugees or as persons who otherwise need international protection Directive 2011/95/EU standards for the qualification of persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary person	**Irregular migration**	Carrier sanctions Unauthorized entry, transit and residence Victims of trafficking in human beings Sanctions against employers of illegally staying third-country nationals
Procedures for granting and withdrawing refugee status	Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status Directive 2013/32/EU on common procedures for granting and withdrawing international protection	**Return of third country nationals in an irregular situation**	Return Directive Mutual recognition of expulsion decisions Assistance in cases of transit Joint flights of removal Readmission agreements with third countries
Temporary protection	Council Directive 2001/55/EC on minimum standards		

	for giving temporary protection
European Asylum Protection Office (EASO)	Regulation (EU) No 439/2010 establishing a European Asylum Support Office

Source: adapted from EuropeanMigrationLaw.eu (2016)

Annex 2. Overview of the law applicable to asylum, border management and immigration in relation to EU

Access to the territory and to procedures	Issues covered
Convention implementing the 1985 Schengen Agreement, 19 June 1990 Visa List Regulation, Regulation (EC) 539/2001 Visa Code, Regulation (EC) 810/2009	Schengen visa regime
Carriers Sanctions Directive, 2001/51/EC Facilitation Directive, 2002/90/EC	Preventing unauthorised entry
Schengen Information System (SIS), set up by Title IV of the 1985 Convention implementing the Schengen Agreement SIS II Regulation, Regulation (EC) 1987/2006 and SIS II Decision, Council Decision 2007/533/JHA Return Directive, 2008/115/EC, Article 11	Entry ban/ Schengen alert
Schengen Borders Code, Regulation (EC) 562/2006	Border checks
Return Directive, 2008/115/EC, Article 4 (4)	Transit zone
EU Charter of Fundamental Rights, Article 18 (right to asylum) Charter, Article 19 (protection in the event of removal, expulsion or extradition) Asylum Procedures Directive, 2013/32/EU	Asylum seekers
Schengen Borders Code, Regulation (EC) 562/2006, Articles 3 and 12	Push backs at sea
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial) Asylum Procedures Directive, 2013/32/EU Schengen Borders Code, Regulation (EC) 562/2006, Article 13 Visa Code, Regulation (EC) 810/2009, Article 32 (3) and Article 34 (7)	Remedies

Status and associated documentation	Issues covered

Asylum Procedures Directive (2013/32/EU), Article 9, (right to remain) Reception Conditions Directive (2013/33/EU), Article 6, (documentation)	Asylum seekers
Qualification Directive (2011/95/EU)	Recognised refugees and persons granted subsidiary protection
Residence Permits for Victims of Anti-Trafficking Directive (2004/81/EC) Employer Sanctions Directive (2009/52/EC) Return Directive (2008/115/EC) ECJ, C-357/09, *Kadzoev*, 2009 CJEU, C-34/09, *Ruiz Zambrano*, 2011	Victims of trafficking and particularly exploitative working conditions Migrants in an irregular situation
Long-Term Residents Directive (2003/109/EC)	Long-term residents
1970 Additional Protocol to the Ankara Agreement, Article 41 (standstill clause) Decision 1/80 of the EEC-Turkey Association Council (privileges for family members)	Turkish nationals
Free Movement Directive (2004/38/EC)	Third-country national family members of EEA nationals
CJEU, C-135/08, *Rottmann*, 2010 (loss of citizenship of the Union)	Stateless persons

Asylum determination and barriers to removal: substantive issues	**Issues covered**
TFEU, Article 78 and EU Charter of Fundamental Rights, Article 18 (right to asylum), both referring to UN Convention relating to the Status of Refugees, which enshrines this principle in its Article 33 EU Charter of Fundamental Rights, Article 19 (protection in the event of removal, expulsion or extradition)	Principle of non-refoulement
Qualification Directive (2011/95/EU), Article 4	Assessment of the risk

Dublin Regulation, Regulation (EU) 604/2013 CJEU, Joined Cases C-411/10 and C493/10, 2011 *N.S. and M.E.*, (Dublin transfers)	Dublin transfers
Return Directive (2008/115/EC), Articles 5 and 9	Expulsion of seriously ill persons
EU Charter of Fundamental Rights, Article 18 (right to asylum) Qualification Directive (2011/95/EU) ECJ, C-465/07, Elgafaji, 2009 (subsidiary protection) **Exclusion from protection:** CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 2010 **Cessation of protection:** CJEU, C-175/08, *Abdulla*, 2010 EU Charter of Fundamental Rights, Article 19 (protection in the event of removal, expulsion or extradition)	Asylum determination (refugee status and subsidiary protection)
Qualification Directive (2011/95/EU), Article 8	Internal relocation
EU Charter of Fundamental Rights, Article 19 (protection in the event of removal, expulsion or extradition)	Prohibition of collective expulsion
Long-term Residents: Long-Term Residents Directive (2003/109/EC), Article 12 **Third-country national family members of EEA nationals:** Free Movement Directive (2004/38/EC), Article 28 CJEU, C-348/09, *P. I.*, 2012 CJEU, C-300/11, *ZZ*, 2013 (notification duties) **Turkish nationals:** Association Council Decision 1/80, Article 14 (1) ECJ, C-349/06, Polat, 2007	Third-country nationals with a higher degree of protection from removal

Procedural safeguards and legal support in asylum and return cases	**Issues covered**
Asylum Procedures Directive (2013/32/EU)	Asylum procedures
EU Charter of Fundamental Rights, Article 47 (right to an effective	Right to an effective remedy

remedy and to a fair trial)	
Asylum Procedures Directive (2013/32/EU), Article 46 (5) – (9)	Suspensive effect
Asylum Procedures Directive (2013/32/EU), Article 31 (8)	Accelerated asylum procedures
Dublin Regulation, Regulation (EU) 604/2013 CJEU, C-411/10, N.S., 2011 CJEU, C-245/11, K., 2012	Dublin procedures
Return Directive (2008/115/EC)	Return procedure
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial)	Legal assistance
Asylum Procedures Directive (2013/32/EU), Articles 20 – 22 Return Directive (2008/115/EC), Article 13 (remedies)	Legal assistance in asylum procedures Legal assistance in return decisions

Private and family life and the right to marry covered	**Issues**
EU Charter of Fundamental Rights, Article 9 (right to marry and right to found a family) Council Resolution (1997) on measures to be adopted on the combating of marriages of convenience	The right to marry and to found a family
EU Charter of Fundamental Rights, Article 7 (respect for private and family life) **Family members of EEA nationals exercising free movement rights:** Free Movement Directive (2004/38/EC) ECJ, C-127/08, Metock, 2008 (previous lawful stay of third-country national family member in EU Member States is not required) ECJ, C-60/00, Mary Carpenter, 2002 (third-country national spouse can remain with the children in spouse's home country when husband moves to another EU Member State) ECJ, C-59/85, State of the Netherlands, 1986 (registered partners)	Family regularisation

CJEU, C-34/09, Ruiz Zambrano, 2011 (children at risk of losing the benefits of EU citizenship) CJEU, C-256/11, Murat Dereci, 2011 (spouse and children) **Family members of third-country national sponsors**: Family Reunification Directive (2003/86/EC) (the family member has normally to apply from outside the country)	
Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC) CJEU, Chakroun, 2010 (it does not matter whether the family was created before or after the third country national arrived) **Family members of third-country national sponsors:** Family Reunification Directive (2003/86/EC)	Family reunification
EU Charter of Fundamental Rights, Article 7 (respect for private and family life)	Protection from expulsion
Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC), Article 13 **Family members of third-country national sponsors:** Family Reunification Directive (2003/86/EC), Article 15	Relationship breakdown cases
Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC), Articles 27-33 **Family members of third-country national sponsors**: Family Reunification Directive (2003/86/EC), Article 6 (2)	Criminal conviction cases

Detention and restrictions to freedom of movement	**Issues covered**
Reception Conditions Directive (2013/33/EU), Article 2 (h)	Definitions: detention or restriction on free movement
Return Directive (2008/115/EC), Article 15 (1) Reception Conditions Directive (2013/33/EU), Article 8 (2)	Alternatives to detention
Return Directive (2008/115/EC), Article 15 (1)	Exhaustive list of exceptions to the right to

Reception Conditions Directive (2013/33/EU), Article 8	liberty
Schengen Borders Code, Article 13 (refusal of entry)	Detention to prevent an unauthorised entry into the country
Return Directive (2008/115/EC), Article 15 CJEU, C-61/11, El Dridi, 2011 and C329/11, Achughbabian, 2011 (relationship between pre-removal and criminal detention)	Detention pending deportation or extradition
Return Directive (2008/115/EC), Article 20 Reception Conditions Directive (2013/33/EU), Article 8 (3)	Prescribed by law
Return Directive (2008/115/EC), Articles 15 and 3 (7) Reception Conditions Directive (2013/33/EU), Article 8 (2)	Necessity and proportionality
Return Directive (2008/115/EC), Article 15 (1) Reception Conditions Directive (2013/33/EU), Article 9 (1)	Due diligence
Return Directive (2008/115/EC), Article 15 ECJ, C-357/09, Kadzoev, 2009	Realistic prospect of removal
Return Directive (2008/115/EC), Article 15 (5) (6) ECJ, C-357/09, Kadzoev, 2009	Maximum length of detention
Return Directive (2008/115/EC), Articles 3 (9), 16 (3) and 17 Reception Conditions Directive (2013/33/EU), Article 11 Anti-Trafficking Directive (2011/36/EU), Article 11	Detention of individuals with specific needs
Return Directive (2008/115/EC), Article 15 (2) Reception Conditions Directive (2013/33/EU), Article 9 (2)	Right to be given reasons
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial) Return Directive (2008/115/EC), Articles 13 (4) and 15 (3) Reception Conditions Directive (2013/33/EU), Article 9 (3)	Right to review of detention
Return Directive (2008/115/EC), Articles 16 and 17 Reception Conditions Directive (2013/33/EU), Article 10	Detention conditions or regimes

Forced returns and manner of removal	**Issues covered**
Return Directive (2008/115/EC)	Carrying out removal: safe, dignified and

FRONTEX Regulation (amendments), Regulation (EU) 1168/2011 Council Decision on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (2004/573/EC)	humane
Asylum Procedures Directive (2013/32/EU), Article 48	Confidentiality
EU Charter of Fundamental Rights, Article 2 (right to life) Return Directive (2008/115/EC), Article 8 (4)	Serious harm caused by restraint measures

Economic and social rights	**Issues covered**
EU Charter of Fundamental Rights, Articles 12 (freedom of assembly and association), 15 (1) (freedom to choose an occupation and right to engage in work), 16 (freedom to conduct a business), 28 (right of collective bargaining and action), 29 (right of access to placement services), 30 (protection in the event of unjustified dismissal), 31 (fair and just working conditions) and 32 (prohibition of child labour and protection of young people at work) Access to the labour market is regulated by secondary EU law for each specific category	Economic rights
EU Charter of Fundamental Rights, Article 14 (right to education for everyone) Return Directive (2008/115/EC), Article 14 (1) (migrants in an irregular situation) Reception Conditions Directive (2013/33/EU), Article 14 (asylum seekers	Education
EU Charter of Fundamental Rights, Article 34 (3) (social security and social assistance) For third-country national family members of EEA nationals, long-term residents, asylum seekers, refugees, subsidiary protection status holders and victims of trafficking, rules on housing are contained in secondary EU law	Housing
EU Charter of Fundamental Rights, Article 35 (healthcare) Healthcare is regulated by secondary EU law for each specific category	Healthcare
For third-country national family members of EEA nationals: Free Movement Directive (2004/38/EC), Articles 24 and 14	Social security and assistance

Coordination of Social Security Regulation (EC) 883/2004, amended by Regulation (EU) 465/2012 **For third-country national moving within the EU:** Regulations (EC) 859/2003 and (EU) 1231/2010 **Other categories:** Secondary EU law has specific entitlements for asylum seekers, refugees, persons granted subsidiary protection, victims of trafficking and long-term residents	

Persons with special needs	**Issues covered**
EU Charter of Fundamental Rights, Article 24 (the rights of the child)	Unaccompanied minors
Dublin Regulation, Regulation (EU) 604/2013, Article 8 CJEU, C-648/11, 2013, MA, BT and DA (Dublin transfers) Reception Conditions Directive (2013/33/EU), Article 24 Asylum Procedures Directive (2013/32/EU), Article 25 Qualification Directive (2011/95/EU), Article 31 Return Directive (2008/115/EC), Article 10	Reception and treatment
Asylum Procedures Directive (2013/32/EU), Article 25	Age assessment
Anti-Trafficking Directive (2011/36/EU)	Victims of trafficking
Convention on the Rights of Persons with Disabilities (ratified by the EU) Reception Conditions Directive (2013/9/EC), Articles 19, 21 and 22 Asylum Procedures Directive (2013/32/EU), Article 14	Persons with disabilities
Reception Conditions Directive (2013/33/EU), Article 25 Asylum Procedures Directive (2013/32/EU), Article 24	Victims of torture and other serious forms of violence

Source: adapted from ECHR and FRA (2014).