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BACES Working Papers
No. 11-2023

# The Emperor without Clothes?

## Explaining the Choice for a Flexible Solidarity Mechanism proposed in the Asylum and Migration Management Regulation

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# Barcelona Center for European Studies

## Jean Monnet Center of Excellence

# Working Paper Series


**ISBN: 978-84-09-37140-2**
**ISSN: 2696-4554**

BACES Web: https://www.upf.edu/web/baces
BACES E-mail: baces@upf.edu

Publications in the Series should be cited as: **AUTHOR, TITLE, BACES Working Papers No. X/YEAR. [ISBN][ISSN] [URL]**

The Barcelona Centre for European Studies (BACES) of Pompeu Fabra University (Spain) is a Jean Monnet Centre of Excellence co-funded by the Erasmus+ Programme of the European Union. This Working Paper Series is peer reviewed by an Editorial Board led by Prof. Javier Arregui and Prof. Fernando Guirao.

# *The Emperor without Clothes?*

## *Explaining the Choice for a Flexible Solidarity Mechanism proposed in the Asylum and Migration Management Regulation*

Damian Krämer

**Abstract**[1]

During the so-called "refugee crisis," when the Dublin system of refugee allocation failed, the Commission unsuccessfully attempted to establish a legislative framework for solidarity-based relocation. By proposing legal flexibility in its initiative for a Regulation on Asylum and Migration Management, the new von der Leyen Commission has resurrected the issue and brought it back on the legislative agenda. However, it appears to be counterintuitive that the Commission has proposed this regulation as it would constitute a dis-integrative step departing from policymaking through robust and uniform legal arrangements. But why did the Commission nevertheless decide to initiate such a proposal? This puzzle will be addressed in this research by applying a novel perspective that attempts to explain the Commission's motivations in light of dis-integration and compliance research applied to the Commission's peculiarities. Its considerations will be examined through a qualitative content analysis. The findings suggest that the Commission sees controlled dis-integration as the lesser evil and that it is heavily constraint by the interests of other actors giving much importance to a vocal minority against uniform relocation legislations.

***Keywords:*** European Commission; Dis-integration; Non-compliance; EU Migration and Asylum Law and Policy; Common European Asylum System; Solidarity.

[1] This working paper is a slightly modified version of a Master's thesis that was successfully defended at the Universitat Pompeu Fabra and has now been published in this context.

**List of Abbreviations**

| | |
|---|---|
| Art. | Article |
| CEAS | Common European Asylum System |
| COM | European Commission |
| ECJ | European Court of Justice |
| EP | European Parliament |
| EPRS | European Parliamentary Research Service |
| EU | European Union |
| iPEX | EU Interparliamentary Exchange Data Base |
| LIBE | Civil Liberties, Justice, and Home Affairs Committee |
| lit. | *littera* |
| MEP | Member of European Parliament |
| OJEU | Official Journal of the European Union |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UNHCR | United Nations High Commissioner for Refugees |

## Introduction

Since Brexit at the latest, there has been intense discussion about the phenomenon of European dis-integration. The research debate evolving around theoretical explanations of dis-integration focuses mainly on the role of member states, which try to regain power and competences either by leaving the EU or by shifting certain decision-making powers back to the national level. Valuable contributions such as those of Schimmelfennig (2018) or Vollaard (2014; 2018) were able to convincingly explain the reasons for member states' behaviour in this respect. However, previous research has largely disregarded supranational actors such as the Parliament or the Commission in this context (cf. Vollaard, 2014, p. 3). This national bias seemed well justified since it can be assumed that EU organs pursue policies that are as harmonised as possible. Otherwise, they would curtail their own power. Nevertheless, the Commission has recently counterintuitively proposed legal flexibility for the first time, which is tantamount to a dis-integrative step. This phenomenon occurred in the policy field of violence-induced migration.

After the so-called "refugee crisis" in 2015, the regulatory distribution mechanism for those who entered the EU irregularly through its exterior borders, the so-called Dublin system, collapsed (cf. von Braun, 2017). The reason for this policy failure appeared to be a heightened pressure of violence-induced migration on peripheral EU member states, inter alia, precipitated by an intensification of the Syrian civil war. It is uncontested in the research literature that this policy failure exposed a "solidarity crisis" (Radjenovic, 2020) within the EU. A comprehensive legislative package intended to modify and strengthen the CEAS' legal structure during the 2014-2019 legislative term eventually failed to owe to an internal deadlock within the Council (cf. EP, 2021a). Meanwhile, the incumbent von der Leyen Commission seeks to replace the Dublin system in its proposal for an "Asylum and Migration Management Regulation" establishing a new solidarity mechanism (cf. ibid.; Carrera, 2021, pp. 9f.; EPRS, 2020, p. 1). However, this proposal permits member states to choose their contribution form, ostensibly enabling "flexible solidarity" (Dimitriadi, 2020, p. 7; cf. COM, 2020c, p. 18). Both the legal and political science literature express strong reservations about this approach. It is highly doubtful whether the proposed legislation complies with the principle of solidarity as enshrined in EU primary law. There is a prospect that adequate burden-sharing may not be realizable, leading to "legal fragmentation" (Scicluna, 2021, p. 655; cf. Art. 80 TFEU; Carrera, 2021, p. 9; Dimitradi, 2020, p. 7; ECJ 2019; another view: Maiani, 2017).

Considering this, one may reasonably ask why the Commission pursued such an ambiguous and legally questionable solution. A retrospective softening of a legally binding framework through optionality may not only result in a loss of political control by the Commission, but also in an erosion of integration through (robust) law as it has been pursued hitherto. Does the Commission strategise with possible costs of this flexible scheme in order to eventually reach a new regime arrangement? Is it to improve member states' compliance with their obligations to take over refugees, which has been lacking in recent years? To address this puzzle and these sub-questions about the Commission's counterintuitive behaviour, the overarching research question "***Why did the Commission propose a flexible solidarity mechanism in the Asylum and Migration Management Regulation?***" will be addressed from an interdisciplinary (political science and law) perspective employing an abductive methodology that allows for inductive supplementation of deductively developed assumptions. This contribution strives to enhance understanding of a supranational actor's behavioural dispositions, such as the Commission. It will be shown whether it proves itself to be an emperor without clothes, as a former Interior Minister of the Czech Republic had accused it of being by trying to achieve a robust legal framework (cf. Chovanec, 2015).

First, a concise literature review will be conducted to elucidate the research's academic and social relevance. Second, a theoretical framework of analysis will be developed by combining different streams of literature. Third, after elaborating on the research design and chosen methodology, the analysis of the Commission's rationale for the proposed regulation is to be examined. Finally, the study results will be critically reflected, and open questions and problems regarding further scientific engagement with the topic will be addressed.

## Literature Review and Contribution

The following chapter reviews selected pertinent literature addressing issues of incomplete harmonisation, unsuccessful reform initiatives, and why actors resist further vertical and horizontal integration at the EU level. These findings illustrate the academic and societal value of exploring the rationale behind the Commission's counterintuitive behavioural patterns.

### *State of the field*

In the scientific examination of why integration attempts have failed and why there has been a deadlock in negotiations on robust regulatory frameworks, the focus is mainly on the member states, respectively the Council as the representation of nation-state governments within the EU's legislative system. As such, the focus of the debate follows the widespread view in the literature that although far-reaching competences have been transferred to the supranational level and therefore the EU is often referred to as a political system *sui generis*, it is nevertheless primarily and foremost an "association[...] of states" (Zervaki, 2014, p. 11), in which member states play the crucial role in integration theory. While certain sovereign powers have been ceded to the supranational level, competence-competence remains at the national level. *Id est*, the EU cannot create its competences without the unanimous assent of all member states. This principle is known as limited, enumerative individual conferral of competences (cf. Art. 5 (1) TFEU; Blanke/Mangiameli, 2013, pp. 255ff.; Cloots, 2016, p. 92; Müller-Graff, 2009, pp. 114f.).

Consequently, representatives of liberal intergovernmentalism describe the reasons for opposition to further integration and thus transfer of competences in domestic conditions mirrored in behaviour at the EU level (cf. Andersson, 2016; Puetter, 2012, pp. 161f.; 2014, pp. 1ff.; Zaun, 2020, pp. 2f.). For instance, Zaun (2020, 6) convincingly argues in the context of a case study in the deadlocked CEAS reform under the 2014-2019 Juncker Commission that when national governments:

> […] see rising support for right-wing populist parties are likely to consider asylum policies more salient and adopt a stronger position on this issue.

Thus, if a policy is unpopular domestically in some fields, such as migration from predominantly Islamic nation-states (cf. Godziak/Márton, 2018), governments are less likely to agree to it – especially exacerbated if an action has re-distributive ramifications – since politicians strive to be re-elected.

Scholars of new-intergovernmentalism, on the other hand, presuppose that the former distinctions between high and low politics as known from the classical integration theory of intergovernmentalism have dissolved (Bickerton et al., 2015, p. 715) due to nation-states' awareness of diminishing power, policy domains are being re-evaluated and subject to a "rapid politicisation" (ibid.). High politics refers to extremely contested policy issues that attract nations to "articulate national sovereignty reservations" (Bieling, Lerch, 2012, p. 22; translation from German, DK). As a result, member states tend to oppose supranationalisation because of a feared zero-sum game i.e., benefits can at most cover but not surpass undesired sovereignty costs (Holler, Illing, 2009, pp. 55f.). As a result, no further integration is expected. Low politics is less troublesome in terms of mandatory and enforceable supranational norms (Bieling, 2012, p. 86). Consequently, "the incidence of [robust regulatory frameworks] is correspondingly high" (Abbott, Snidal, 2000, p. 441).

Despite their fears about losing influence and sovereignty, countries appear, however, to recognise that greater cooperation is required to handle current issues. In this perspective, new-intergovernmental governance would be a compromise between loose intergovernmental coordination and supranational competence relinquishing. Empirical findings on energy policy suggest that politicisation and growing awareness of the security implications of energy supply encouraged member states to seek deeper intergovernmental cooperation rather than abandon discretionary powers through harmonisation. Further integration in this way would carry the danger, from a national perspective, of the Commission and European Parliament being engaged in decision-making, which might result in an outcome that jeopardises the interests of individual nation-states (cf. Balzacq, 2005.; Buzan et al., 1998; Bieling, Lerch, 2012, p. 68; Bickerton et al., 2015; Krämer, 2021*b*; Panić, 2009, p. 31;). Terms such as "embedded intergovernmentalism" (Bocquillon, Maltby, 2020) or "procedural supranationalism" (Thaler, 2020) have been introduced in this process, though they lack theoretical underpinning and analytical distinctiveness.

Recently, literature on differentiated integration has developed rapidly. In this context, it has been mainly investigated how member states react to exogenous shocks and negotiate opt-outs in vertical and horizontal terms in domains deemed as core state powers. Differentiated *dis*-integration, on the other hand, basically describes "the selective reduction of a state's level and scope of integration" (Schimmelfennig, 2018, p. 1154), while differentiated integration refers to progressive cooperation at the EU level, which, however, is not undertaken in a confirmatory manner, but instead takes account of national preferences and might be observed already since earliest stages of the European integration process (cf. Stubb, 1996, pp. 283f.; Leuffen et al., 2013). So-called "core state

powers" are a key concept in the most recent research literature and describe policy fields that may be defined as:

> […] action resources deriving from the state's monopoly of legitimate coercion and taxation: military force, police power, border control, public revenue and administrat[ion] (Genschel, Jachtenfuchs, 2018, p. 181).

Core state powers as an analytical category appear to have great similarities with high politics known from intergovernmentalism. Practically all contributions to this academic discussion, which has gained new momentum with the United Kingdom's withdrawal from the EU, argue similarly and can now – after many rather descriptive contributions – persuasively account for member state rationales for dis-integration. However, because of these *realpolitik* circumstances, the focus has been chiefly on dis-integration at the polity level and on explaining how it was possible that Brexiteers won the leave campaign, with little attention paid to differentiation and dis-integration in specific policy areas (scf. Genschel, Jachtenfuchs, 2018; Leruth, 2015; Leruth et al., 2019; Morsut, Kruke, 2018; Schimmelfennig et al., 2015; 2018; Vollaard, 2014; 2018). In this respect it is – comparable to new-intergovernmentalism research – mainly argued with the structure of the policy field concerned from a nation-state perspective (high politicisation combined with continued interdependence) rather than with the political process and the power-play between legislative actors.

If one, however, extends the definition of differentiated dis-integration to the policy sphere, dis-integration occurs when "EU policies are transferred back to member states" (Scicluna, 2021, p. 660). In other words, policies and decision-making powers that previously laid at the EU level and gave the individual nation-states no or only limited scope for discretion are re-structured and given back *ad libidum* to national governments. This cannot only be achieved by formally returning competences but also seems to happen by making the formal legal commitment to the sanction-bearing law more flexible. If member states have the freedom to choose whether and how they react and comply with supranational law, this can be seen as a dis-integrating step if the previous policy approach formulated robust and uniform normative commands (cf. ibid.; EP, 2007; Krämer, 2020, pp. 46f.; Přibáň, 2010; Repasi, 2018). The employment of legal flexibility or soft law techniques, i.e. norms that lack unambiguous legal binding force, must therefore be seen as an integrative step backwards from robust law.

### *Shortcomings of Existing Literature and Academic Relevance*

Few contributions have examined how other actors, particularly supranational institutions such as the Commission, strive to address these issues and how national aversion to more integration influences future reform initiatives. While individual scholars have acknowledged a state-centric perspective

and admitted a certain bias (Vollaard, 2014, p. 3), the Commission's relationship *vis-à-vis* the co-legislators in this respect is largely unexplored and poorly theorised. This ignores the Commission's critical position as the EU's sole actor with the right of initiative (Art. 17 (2) TEU). It is true that significant contributions, such as Hartlapp's and others' (2010; 2013; 2014), have been ascribed to the Commission's preferences and dispositions for action. However, the emphasis has been on internal processes, with little investigation of the Commission's relationship to other actors in the legislative process or the interests that inspire the Commission to propose policies, particularly in soft governance or even dis-integration. The research endeavour attempts to add knowledge to this and, if considered necessary, to supplement existing theoretical assumptions. As a result, a shift in perspective is proposed that departs from the primary analytical emphasis of the academic discussion, namely the reasons for member states' behaviour. Additionally, it should be noted that unsuccessful reform processes, such as the selected case, are negotiated in the form of a legislative package that permits logrolling (cf. Council, 2019, p. 2). Traditionally, this strategy is expected to avoid deadlocks and ensure quick adoption (cf. Aksoy, 2012; Kardasheva, 2013, pp. 858ff.; Persson, 1994, pp. 222f.;). Given the duration of the previous legislative term, the reverse seems more plausible. Insofar, this well-established premise does not correlate to observed phenomena in the real world, and this widely held opinion in the literature is contested.

| | **Main Assumption** | **Blind Spots** |
|---|---|---|
| **Liberal Intergovernmentalism** | Domestic conditions determine member states' integration-avoiding behaviour at EU level. | Pure focus on nation-state actors and disregard of structural conditions outside the nation-state system. |
| **New-Intergovernmentalism** | The structure of the policy field concerned explains an "integration fatigue" (Puetter 2014: 1), that leads member states to seek European cooperation without further integration. | Underestimating role of other EU actors. Inability to explain steps backwards. |
| **Differentiated (Dis)Integration** | Fields belonging to core state powers lead to opt-outs and, where the occasion arises, to an attempt at dis-integrating a member state's scope of integration. | Cannot (yet) explain how supranational actors behave and what motivates them to allow or actively propel dis-integration. Mainly focus on polity and horizontal integration instead of policies. |

*Figure 1: Overview of relevant research literature and gaps (own representation).*

### *Social Relevance*

However, the suggested study has not solely academic relevance. Likewise, social significance is derived from the requirement of comprehending how such grave policy issues are to be resolved at the EU level and the efforts taken by the Commission to accomplish it. This is evident because individual member states have increasingly taken unilateral action on such problems in recent years, resulting in open confrontations that threaten the EU's core foundations. Additionally, since 2015, there has been a de facto lack of an effective legislative framework capable of adequately addressing violence-induced migration into the CEAS. This highlights the need to study this political and legal evergreen within the EU's governance system to ascertain the motivations for actors' behaviour and the ramifications for asylum law and policy within the CEAS' geographical scope. Given the current developments in Russia's invasion of Ukraine, which created the largest refugee movements originating from the European continent since the end of the Second World War (UNHCR, 2022); because millions of minors, women, and men over 60 are trying to leave the country, it is critical to actively monitor and investigate asylum policy and legal arrangements. Due to a lack of a reliable legislative framework, the EU and its member states are forced to rely on ad hoc measures (cf. Krämer, 2020). Additionally, "flexible" or soft law approaches have been increasingly popular in recent years, casting doubt on the EU's prior effective integration via law (ibid., pp. 46f.), and hence legal certainty as well as "the normative legitimacy of the EU's legal order" (Scicluna, 2021, p. 659) itself.

## Theoretical Framework

The theoretical framework to be developed hereinafter combines different streams of literature and concentrates on the theory of differentiated dis-integration and non-compliance research applied to the Commission as an actor in the inter-institutional space, which has been mostly "neglected in the empirical [research]" (Burns, 2004, p. 1). A new viewpoint is proposed that complements, narrows, or alters previously held assumptions. This chapter aims to generate empirically testable hypotheses. However, before it is possible to work out the potential costs and benefits of the Commission's behavioural options, which are assumed to shape this supranational actor's behaviour and could provide an explanation for why it formally proposes active steps towards dis-integration, it is first necessary to situate the Commission within the institutional structure and define its role in order to understand related spheres of influences and constraints that determine complex cost-benefit trade-offs.

### *The European Commission and its Role in the EU's Legislative System*

The Commission's composition and competences are codified in EU primary law under Article 17 TEU and define its role in the EU's political system. Apart from enforcing EU law, representing the Union externally, executing budgets, and implementing secondary and tertiary legislation (Article 17 (1) TEU), the Commission's primary function is to formally introduce proposals for secondary legislation, such as regulations and directives:

> Union legislative acts may *only* be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide (Art. 17 (2) TEU; emphasis added).

This gives the Commission *de jure* a monopoly on the initial formulation of legislative proposals, which places it in a unique position within the inter-institutional structure of the Parliament, the Council, and the Commission as the EU's main legislative bodies (Ponzano et al., 2012, pp. 6f.). Therefore, the Commission plays a major role in agenda-setting and theoretically can set the tone for the legislative agenda at the EU level, at least in ordinary day-to-day politics (see long-term political guidelines setting of the European Council according to Art. 15 (1) TEU). Nonetheless, this power of initiative does not exist in a vacuum that can be studied analytically apart from other factors that are likely to limit and complicate its agenda-setting and political guidance capacities significantly. Hence, two critical aspects come into play: inter-institutional bargaining and policy context.

### *Inter-institutional Bargaining*

Since the introduction of the ordinary legislative procedure, also known as the co-decision process, with the Maastricht Treaty in 1993 and its further development with the Amsterdam Treaty in 1997 (cf. Burns, 2004, pp. 2ff.; Ponzano et al., 2012, p. 37), the institutional structure has shifted and appears to have affected the Commission's power position remarkably. Whereas it was previously sufficient for the Council and the Commission to reach an agreement as the Parliament had a merely consultative function, the establishment of the co-decision procedure has placed Parliament and Council on an equal legal footing, and a majority vote in favour of a legal initiative on both sides is required for secondary legislation to be successfully adopted (Art. 294 TFEU; Burns, 2004, pp. 2ff.). The ordinary legislative procedure, in which the Parliament plays an equal role, has become the standard (cf. Arndt et al., 2015, p. 62) and is likewise provided for in the CEAS policy sector under study.

With the Treaty of Amsterdam, the legislative competence in such a sovereignty-sensitive policy field was transferred for the first time in legal history to a supranational organisation by transferring the field of migration and asylum from the Third intergovernmental Pillar to the First Pillar of the EU's political system (cf. Breitenmoser, 2017, p. 32). Based on this "communitarisation of asylum policy" (Filzwieser, Sprung, 2010, p. 24; translation from German; DK), the European Council in Tampere in 1999 (EP, 1999) and the Hague Programme in 2004 were adopted (cf. Hatton, 2005, pp. 109ff.; Höllmann, 2014, pp. 72ff.). With the ratification of the Treaty of Lisbon in 2007 and the foundation of the EU's present treaty framework, the Hague Programme's objectives were ultimately implemented in formal law, and the CEAS was established. It was conceivable to agree on a co-legislative procedure for this field (cf. Perrin, McNamara, 2013, p. 11).

The result of this decision is a substantial restriction of the right of initiative. Although the Commission has still a *de jure* monopoly on legislative initiatives, it is *de facto* significantly constrained by increased complexity as a result of the growth in the number of actors with voting rights and thus veto power:

> Over the years, the power to co-legislate, shared by the European Parliament and the Council, and the related practice involving talks between the representatives of the co-legislators, has *de facto* impacted upon the monopoly of the legislative initiative of the Commission (Ponzano et al., 2012, p. 37; emphasis added).

The reason for this is that the Commission, by exercising its policy formulation function, must take care to consider the diverging and, depending on the policy field, changing interests of both actors when formulating proposals for regulations or directives in order to be able to achieve adoption. As will be explained in more detail below, the interests of both actors diverge considerably, especially in sovereignty-sensitive issues. While member states are keen to maintain their competences, the Parliament, as a supranational actor, naturally pursues an approach that tends towards more harmonisation and supranationalisation (cf. Arregui, 2016; Bieling, Lerch, 2012). This "heterogeneity of actor's interest [is] a major constraint" (Hartlapp et al., 2014, p. 9) for the Commission. Consequently, the Commission's understanding has also evolved away from a mere initiator to an honest broker between the two co-legislators, as a joint statement by the presidents of all three pertinent institutions clarifies:

> The Commission […] shall exercise its right of initiative in a constructive manner with a view to reconciling the positions of the European Parliament and the Council (OJEU, 2007, p. 6).

This situation "adversely impacts the autonomous exercise of the power of initiative" (Ponzano et al., 2012, p. 37) and forces the Commission to anticipate the positions of the co-legislators

to make proposals that are actually feasible for a (timely) adoption (Hartlapp et al., 2014, pp. 22ff., 264ff.) and ultimately proper implementation. It is, therefore, necessary to reconcile the interests and respond to the demands of the Parliament and the Council, and at the same time, ensure that the potential outcome still complies with own preferences (cf. Burns, 2004, p. 15):

> To sum up, the introduction of the codecision procedure in the EU decision-making and the functioning in practice of the inter-institutional system have transformed the role of the Commission from that of an autonomous initiator to that of a reactive initiator (Ponzano et al., 2012: Executive Summary).

It is assumed that the Commission is by no means an ideology-free, apolitical actor consisting of technocrats. It rather acts politically, has its own structurally determined interests to increase competence and pursues its own agenda, which may be fed by self-interest and/or normative attitudes (Hartlapp et al., 2012), as empirical findings have suggested that contradict with the still widespread underestimation of the Commission's political role (cf. Krämer, 2020). From a rational-choice premise, it is reasonable to expect that the Commission accepts costs because it believes that the proposed policy is preferable to the alternatives. Rationalists presume that risk-averse actors accord with pre-determined interests. The advantages and disadvantages of a course of action are weighed against one another, and the most beneficial course of action is chosen (cf. Hopf, 1998, pp. 174ff.; Keck, 1997, p. 140; Lipson, 1999, p. 501; Trubek et al., 2005, p. 8f.). Therefore, it is expected that the Commission would carefully weighs costs and advantages when using its right to initiative.

***Context Matters: The Commission and the Policy Cycle***

The Commission's behavioural dispositions are not only limited and determined by the fact that it needs to anticipate the positions of the other actors involved but are also dependent on the political context, which has been largely neglected in previous research. However, this context plays a major role in the case of the Commission and could be a main explanatory factor, as the Commission is situated at the beginning of the policy cycle through its right of initiative (Figure 2).

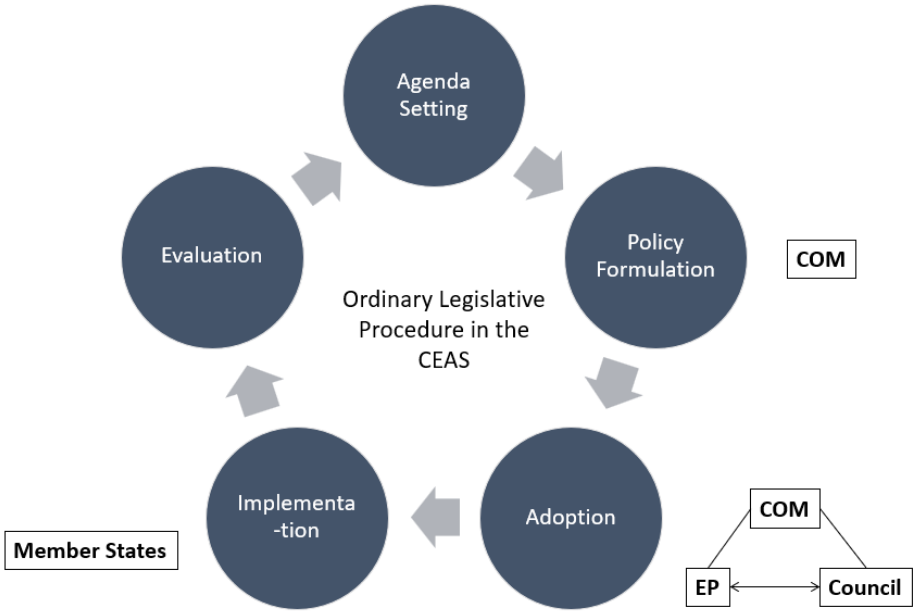


*Figure 2: The policy cycle and relevant actors for each legislative step within the CEAS' co-decision procedure, in which the Commission is embedded (own, highly simplified overview based on Knill/Tolsun, 2008, pp. 13ff.).*

Accordingly, the formulation of policies is not simply an unbound process but is somewhat related to experiences from previous cycles that a policy usually goes through. In other words, an actor who is entitled to make policy proposals must consider and incorporate the previous historical process in this policy field. For instance, if problems have arisen in policy implementation previously, this should be reflected in the revision of a policy. This may also be referred to as path dependence, as known from integration theory, which describes the idea that future decisions are contingent on prior events. It is often referred to as "institutional stickiness" (Correljé et al., 2013, p. 5; Pierson, 2000; Schubert, Klein, 2018, p. 170). Without "exogenous shocks" (ibid., p. 4), it is unlikely to push through large-scale reform projects in a deliberative process since too many interests influence political decisions. This is compounded by the politicisation of policy domains, which includes high costs, and actors will thus be careful about the future design of policies in a too rapid fashion without ensuring the impacts of particular policies through a feedback loop (Easton. 1965, pp. 32ff.; Pierson, 2000). In this respect, the process-oriented notion of the policy cycle suggests:

> "[…] that the content of policy, particularly in the case of contentious decisions, is derived from the policy cycle itself" (Everett, 2003, p. 65).

Even if the policy cycle is too simplistic as an explanatory model, it offers the possibility of structuring theoretical assumptions analytically and the inclusion of a contextual, holistic perspective of the power plays between the institutions, to which the Commission must subjugate itself at least

partially through reaction (ibid., pp. 66, 70). Thus, this perspective offers to develop a more sophisticated analytical framework in fields where

> […] the policy content and the process of decision-making [is] the outcome of 'a play of power' which proceeds by interaction and a series of negotiating steps between groups using a variety of resources and techniques in order to reach a solution (ibid., p. 66).

It can therefore be assumed that due to its positioning in the policy cycle (Figure 3), the Commission must not only consider the feasibility of policies in a forward-looking manner but must also take into account the accumulated lessons learned from previous experiences, which in turn are reflected in the Commission's behavioural dispositions in proposing pending reforms.


*Figure 3: Visualisation of the Commission's required contextual considerations (own representation).*

From these observations, various costs and benefits arise concerning a "flexible" and thus dis-integrative policy approach, as proposed in the CEAS reform, and are influenced by the specific role of the Commission in the EU's legal system. It is therefore assumed:

*[$H_1$] The Commission makes its proposed CEAS reform ex-ante and ex-post dependent on the co-legislators, Parliament and Council.*

***The Commission's Considerations***

This chapter explains – structured according to the pertinent steps of the policy cycle – the costs and benefits that may play a role for the Commission's considerations for actively proposing dis-integrating steps through the introduction of legal flexibility. The following factors seem pertinent to this work; they are inextricably linked and are only separated for analytical purposes.

***Policy Adoption***

Rationalistically, the proposal for a regulation that is accepted by the co-legislators and has the possibility of a proper and timely adoption by a majority within the respective collective actors is to be chosen from the Commission's perspective.

*Member State's Sovereignty Concerns*

Although the Commission does not have sovereignty concerns due to its supranational competence-seeking identity, it must address possible sovereignty costs incurred by member states, as their assent is required through the Council in the ordinary legislative procedure. It may be theorised that the aforementioned conception of core state powers plays an essential role in the Commission's considerations. Robust uniform regulatory frameworks that do not allow for any differentiation or flexibility at the vertical level and impose legal obligations on every member state, in the same manner, deprive national actors of their own discretionary leeway and thus lead to costs for the exercise of national sovereignty. However, these expenses are not only determined by the kind of the selected instrument of uniform cooperation (for example, a regulation). Above all, it is the policy domain that, by its very nature, poses the risk of excessive or unforeseen sovereignty costs (cf. Abbott, Snidal, 2000, p. 440). Sovereignty has two central elements that must be considered. On the one hand, internal sovereignty refers to a state authority's complete exercise of sovereign powers within the state's frontiers (cf. Schubert, Klein, 2018, p. 305). On the other hand, external sovereignty refers to states' total autonomy and equality as a primary principle under international law (ibid.). Thus, the control over who is entering and residing on national territory and needs to be integrated into a national society triggers potentially high costs:

> Sovereignty costs are at their highest when international arrangements impinge on the relations between a state and its citizens or territory, the traditional hallmarks of (Westphalian) sovereignty (Abbott, Snidal, 2000, p. 440).

This connection between a state and its population (internal sovereignty) or territorial integrity (external sovereignty) is most impacted in areas of core state powers, to which any type of migration belongs, and leads to a high degree of politicisation (cf. Bieling, 2012, p. 86). Therefore, member states are less likely to agree to robust legal frameworks and strong integration if it touches the core of national identity that domestic actors strive to preserve (cf. Leruth et al., 2019; Schimmelfennig et al., 2015). A legal softening of integration in vertical terms could therefore become necessary in order to be able to achieve revisions.

*Bargaining Costs*

Since the Commission has to anticipate member states' sovereignty interests and related concerns for integration to be successful, the sovereignty costs mentioned above are closely interlinked with bargaining costs. In general, costs are incurred when complex and stagnating negotiations lead to a deadlock, the political reputation of the actors involved suffers as a consequence of dissents, or the

necessary reform is delayed or even fails to be passed before the end of the legislative period and thus the advent of parliamentary discontinuity due to the complexity and length of protracted negotiations (cf. Abbott, Snidal, 2000, pp. 435f.; Trubek et al., 2005, pp. 11f.). These expenses can be aggravated, particularly in the event of package deals, when logrolling and other concessions are negotiated across legislative acts (cf. dissenting: Kardasheva, 2013). For this reason, it could *prima facie* be assumed that negotiation costs could be avoided by anticipating sovereignty concerns.

This assumption, however, does not do credit to the complexity of the institutional framework wherein the Commission and the ordinary legislative procedure operate. As the sole actor with the right of initiative in the EU legislative system, the Commission is expected to consider not only member states' and, therefore, Council's interests but also those *vis-à-vis* the Parliament, which must provide its consent by a majority vote in the plenary. Comparable to the Commission appears the Parliament to be likewise a supranational actor with a competence-seeking identity that naturally sought rather robust legal frameworks and (ambitious) progressive harmonisation (cf. Arregui, 2016). Dis-integration, in this regard, stays in stark contrast to the Parliament's goal as it is likely to reduce its scope of influence. As a result, the apparent advantage of rapid adoption motivated by national interest considerations is virtually diminished. Nonetheless, empirical studies on bargaining satisfaction and analysis of prior deadlocks (ibid.; Repasi, 2018; 2019) indicate that the Parliament is willing to make much more concessions and accept lesser increments if they do not result in full dis-integration or absent harmonisation. Hence, it is more important to the Parliament that issues are solved within the EU's institutional setting in order for it to have any influence. Thus, the Commission might give greater weight to national interests when reconciling co-legislators' preferences.

*Swiftness and Strategic Forecasting*

Furthermore, a more flexible approach that is likely to prevent a severe deadlock in the informal trilogue negotiations between Commission, Parliament, and Council that has the potential to paralyse the whole legislative process of a big package of secondary acts would prevent the situation of a *de facto* absence of any functioning legal framework. Although it would constitute a certain degree of dis-integration by deviating from the established practice of robust uniform legality, it would reduce costs for the Commission because it could reach swiftly an agreement that makes it obsolete to rely further on malfunctioning *ad hoc* measures or soft law that are dependent of the member state's goodwill. In this regard, a more flexible and transitionally dis-integrative approach would be preferable, as it would reinstate control to the Commission, which can at the very least monitor and forecast how each member state responds. Second, it is likely more expedient to build progressively

on an imperfect harmonisation or strategically take a step back through dis-integration to assuage member states' contentious divisions. Thus, the legislative act may be preparatory, educating political actors about the objectives being pursued and fostering trust to re-reach a robust framework in the future (cf. Krämer, 2020).

Considering these costs and benefits for a policy adoption, it can be hypothesised:

*[$H_2$] Based on the costs and benefits for the policy adoption, the Commission considers the proposed regulation a more favourable alternative.*

***Policy Implementation***

A flexible policy approach that deliberately reduces previous integration steps could be a strategy to counter continued or feared non-compliance in the (national) implementation of legal obligations.

*Costs of Non-Compliance*

Non-compliance research generally assumes that when politicisation and interdependence are high, and especially when cost-increasing re-distributive implications are included, as is the case with refugee acquisition, there is a high likelihood of member states' engaging in conscious non-compliance to avoid these very costs (cf. Dawson, 2020; Falkner, Treib, 2008, pp. 294f.):

> a combination of high interdependence and high politicisation may lead to either [differentiated integration] or wilful non-compliance (Scicluna, 2021, p. 661).

As a result, if differentiated but progressive integration cannot be achieved, the only remaining option to address this issue is to engage in controlled differentiated dis-integration by softening a legal framework favouring fewer restraints and increased choice. Otherwise, it risks conscious non-compliance and an open legal and political crisis. Moreover, research on Latin American countries' compliance with international public law on human rights indicated that, contrary to popular belief, a greater degree of legal obligation, does not necessarily imply a greater likelihood of compliance (cf. Lutz, Sikkink, 2000, pp. 654ff.). Thus, from the perspective of the Commission, controlled dis-integration could be a viable middle way. The reason for this lies in a characteristic inherent to most international organisations, namely that neither the Commission nor the EU as such have effective capacities to truly sanction, hence preventing non-compliance by making it costly (cf. Scicluna, 2021, p. 657). Even rulings of the ECJ lack practical enforceability, as the recent disputes between the Commission and Poland about the rule of law, have shown (cf. COM, 2016; 2017; 2020*a*).

Consequently, dis-integrative flexibility appears to be a credible alternative to the uncoordinated loss of control produced by national non-compliance, in the Commission's viewpoint. A constraining framework allowing several alternatives for the addressees of a policy may mitigate full deviation from the actual objectives. Thus, flexibility may constitute a coping mechanism for non-compliance.

*Free-Rider Problem*

Nevertheless, flexibility has not only advantages as it reduces the likelihood of wilful non-compliance that might damage people's trust in the EU. There is also a flip side to the coin, namely in terms of possible expenses associated with the selected approach: Belated softening of previously robust legislation may result in legal fragmentation, which is feared by a substantial portion of the literature, as already mentioned. There is a possibility that the re-distribution of violence-induced migration will fail since all member states – who are likewise cost-averse actors – will have no valid reason or incentive to accept the more expensive admission of refugees over the alternative options supplied by the Commission (cf. Grossmann,Hart, 1980). In other words, the flexible approach increases the likelihood of free-riders and thus might jeopardise the Commission's policy objectives.

Based on these considerations, the third hypothesis regarding the policy implementation step states:

*[$H_3$] The proposed mechanism's flexibility is an attempt by the Commission to increase compliance by member states through choice.*

**Research Design and Methodology**

To address the posed question(s), the research project will conduct a qualitative single-case study, a key design of small-N research in the social sciences (cf. Blatter et al., 2018, p. 174; Flick, 2009, p. 184). Case studies can be defined as:

> "[…] an empirical inquiry that investigates a contemporary phenomenon (the 'case') within its real-life context, especially when the boundaries between phenomenon and context may not be clearly evident" (Yin, 2014, p. 16).

The chosen research design may be utilised to pursue manifold objectives, most notably the theoretical explanation of empirical phenomena, which is the research's purpose. This design has shown to be particularly useful for examining political processes or developments (politics; in this case: bargaining and implementation issues) and outcomes (policy; in this case: regulation proposal) in a particular policy field (cf. Anastas, 1999, p. 94; Blatter et al., 2018, p. 268; Yin, 2014, pp. 9ff.).

Small-N designs are well-suited for this approach because they enable the development of a thorough knowledge while concentrating on a small number of subjects (cf. Gerring, 2007, pp. 38f.). The findings of this case study may thus serve as a baseline for future research to see if the trends identified can be generalised to other scenarios, policy fields, and supranational institutions' behaviour in general. According to the study purpose, the specific policy proposal may be classified as a so-called "critical case" (Yin, 2014, pp 51):

> [Such a case is] in no way statistically representative or 'ordinary'. In contrast, [it is] selected […] because of the opportunity [it] afford[s] for the examination of theory. (Anastas, 1999, p. 101).

Therefore, this design appears to be well-suited to the research objective, as it will be analysed how the choice of dis-integrative legal flexibility may be explained utilising the combined theoretical approach chosen. To undertake such deductive research, it is first necessary to develop tangible expectations in the form of hypotheses from abstract theoretical considerations. Thus, the research question must be translated into testable statements (cf. Rowley, 2002, p. 19). This has already been completed as initial work employing the state of the field on differentiated dis-integration and non-compliance literature while considering the Commission's distinctive features (Chapter III). Single-case studies necessitate a conscious and purposeful case selection since they are the sole unit researched (cf. Ritchie et al., 2013, pp. 51f.).

***Case Selection***

The Asylum and Migration Management Regulation initiative was chosen for three reasons: First, the CEAS is a policy area undoubtedly belonging to core state powers where dis-integration is most likely to occur. For years it seems to have been the most controversial and volatile EU field, in the context of which there have been numerous failed reforms and open confrontations between EU institutions and member states. Second, it appears to be the first time that the Commission has actively proposed dis-integrating steps through legal flexibility. While there has been increased *ad hoc* use of soft law in the past, the Commission has never attempted to transpose this into a regulation. Third, the geopolitical circumstances and the millions of refugees associated with them make it necessary to analyse the pertinent policy designs critically.

***Methodological Approach: Qualitative Content Analysis***

A qualitative content analysis (cf. Mayring, 2000; 2014; Schreier, 2012) will be conducted, examining the Commission's considerations in-depth. The objective is to apply the selected approach to interpretively illuminate the Commission's reasonings by coding and assigning them interpretatively

to pre-determined categories. While the research design is deductive in nature, as stated, the coding process will employ an abductive logic. Qualitative content analyses enable relatively flexible data analyses, making them applicable for abduction. While the analysis is primarily concerned with hypotheses derived from theory, the addition of abductive elements as a "third way" (Rinehart, 2021, p. 5) between the classical inductive, that is, theory-developing, and the described deductive logic

> suggest[s] [...] analysis as a back and forth process between the research evidence and considerations of theory (ibid.).

This innovative third way is chosen because existing theoretical assumptions are to be adapted and examined in a new focus on the Commission. Abduction helps to inductively complement existing categories where necessary and thus allows an adequate understanding and explanation of the behavioural patterns of an actor whose structural features have been so far insufficiently addressed.

***Data***

The selected empirical material to be coded consists of three types of primary sources:

1. The main material analysed will be sources authored by the European Commission which explain the reform proposal that can provide information on the underlying intentions. These include the proposed regulation itself, official communications and working documents.
2. Documents related to the reform and produced by the co-legislators or member states are supplementarily analysed. As theoretically expected, their interests play a significant role in the Commission's policy formulation.
3. Other primary sources that contain the Commission's considerations or from which these can be extracted are coded.

The main empirical material is retrieved *inter alia* from the EUR-Lex and iPEX databases, which provide official EU legal and policy documentation. A complete list of all coded documents and the coded categories may be consulted in the appendix. Additionally, sources are considered that may contradict own theoretical assumptions and result in an unanticipated outcome that cannot or only partially be explained by the chosen theoretical framework. This avoidance of a confirmation bias is a critical quality criterion of empirical research (cf. Anastas, 1999, p. 96; Rowley, 2002, pp. 20ff.). Not only does the chosen design have advantages for the specified research goal, but it also has limitations that must be acknowledged. No generalisation based on statistical quality standards may

be drawn from the case study results, as they are not a statistical test of a theory (ibid.), in which, for instance, additional intervening variables are calculated. According to the stated objective, it can only contribute to an interpretative understanding of the underlying theory and determine its suitability for explaining the Commission's new and counterintuitive behaviour.

## Analysis

Before the content analysis' results can be presented and critically discussed, it is necessary to provide a brief overview of the Commission's regulation proposal and its flexible solidarity mechanism. Providing such contextual information is imperative to allow for a holistic and in-depth understanding of the subject being studied within case studies (cf. Anastas, 1999, p. 96).

### *Contextualisation: The Asylum and Migration Management Regulation Proposal*

The Asylum and Migration Management Regulation is intended to replace the Dublin system, which failed following the so-called "refugee crisis". This system is based on the so-called Dublin-III-Regulation, enacted to achieve a better-coordinated response to asylum issues (cf. Filzwieser, Sprung, 2010, p. 23). The Dublin system determines which member state is responsible for a particular asylum claimant. With the introduction of this system, it was established that an individual seeking international protection must always have his or her asylum application processed by a single clearly designated member state (Art. 1 Dublin-III-Regulation). In general, the member state responsible is the one via whose borders the refugee entered the EU irregularly, unless other factors, such as the location of the nuclear family, take precedence (cf. Dolk, 2011, p. 4). The Dublin-III-Regulation was a completely harmonising legislation that bound all member states uniformly. However, this policy has resulted in member states along the EU's southern and southeast external borders bearing a disproportionately high cost because of the large migratory influx from Africa and the Middle East (cf. Bojadijev, Mezzadra, 2015). There is no system for burden-sharing – even in times of crisis, as foreseen in Art. 78 (3) and 222 TFEU. When the number of refugees ultimately leaped in 2015, owing mainly to the devastation caused by the Syrian Civil War, the entire system imploded. The member states involved were unable to care for all migrants and were forced to allow them to continue their journey unregistered to other EU countries (cf. Maiani, 2017, pp. 625ff.; Weber, 2016, pp. 17f.).

To address this policy failure and to stop relying on subsequent malfunctioning *ad hoc* relocation measures, which have only provided short-term solutions, the Juncker Commission had envisaged a regulation for binding redistribution keys for migrants as foreseen in EU primary law as

an expression of re-distributive solidarity (cf. Art. 80 TFEU; Hiplod, 2016, p. 391; Klamert, 2014, pp. 28f.). However, the associated legislative package, like the malfunctioning *ad hoc* measures, failed savagely and has:

> show[n] the limits of [the Commission] in taking supranational decisions without the unanimous binding support of the Member States. The 2015 events illustrated the gap that still exists between the need for supranational initiatives to solve complex, transboundary challenges and the Member State's sovereignty (Morsut, Kruke, 2018, p. 156)

The von der Leyen Commission, therefore, appears to be pursuing a completely different approach: The new initiative gives the "possibility for Member States to choose" (COM, 2020*c*, p. 18) their kind of contribution from three options (Figure 4) and hence implements "flexible solidarity" (Dimitriadi, 2020, p. 7). Although, according to Art. 80 TFEU in conjunction with Art. 77-79 TFEU, it is conceivable to develop a robust relocation mechanism, as intended in the Juncker plan, in which individuals are allocated across member states using a fixed key (cf. EPRS, 2020, p. 4); the current Commission opts for a flexible approach (Krämer, 2021*a*). This not only deprives the Commission itself of considerable influence and results in a loss of predictability over the member states' behaviour but also represents dis-integration, as previous although malfunctioning integration through uniform law is to be replaced by soft governance and legal flexibility.

| **Relocation** (Option 1) | **"Return Sponsorship"** (Option 2) | **Capacity building and operational support** (Option 3) |
|---|---|---|
| Provision in the draft:<br>Art. 45 (1) lit. a, c Regulation Proposal<br><br>Explanation:<br>Participation in relocation of refugees based on a distribution key (Art. 45 (1) lit. a, c Regulation Proposal; Carrera 2021: 10). | Provision in the draft:<br>Art. 45 (1) lit. b; Art. 55 Regulation Proposal<br><br>Explanation:<br>Supporting another member state affected by migratory pressure by carrying out expulsions of illegally staying third-country nationals (cf. Art. 55 (1) Regulation Proposal). | Provision in the draft:<br>Art. 45 (1) lit. d; Art. 49 Regulation Proposal<br><br>Explanation:<br>Support for affected member states in close consultation with the Commission's situational assessment. No precise information (cf. Art. 49 Regulation Proposal; Carrera 2021: 10f.). |

*Figure 4: Overview of the flexible solidarity mechanism as proposed by the Commission (own, slightly adapted representation from Krämer, 2021a, p. 9).*

Critics fear that solidarity cannot be achieved with this proposal and that fragmentation and softening of EU law could ensue. After all, solidarity "is a legal obligation" (Dimitradi, 2020, p. 7) and is inextricably linked to burden-sharing (ibid.; ECJ, 2019). Additionally exacerbated by crisis situations, which were not ruled out at that time given the escalating conflict in Syria and tense relations with Turkey (cf. EPRS, 2020, p. 7; de la Baume/Eder, 2021), but nowadays becoming abundantly clear following the large-scale invasion of Ukraine and the suffering associated with it triggering large refugee movements. However, a legal evaluation or impact assessment is omitted. This contribution aims to explain why the Commission submitted this counterintuitively self-cutting and dis-integrating proposal and not a normative or legal evaluation.

### *Discussion of Findings*

The results of the conducted qualitative content analysis to reveal the Commission's considerations through interpreting pertinent primary sources are presented hereinafter. For better comprehensibility, the discussion of findings follows the pre-defined order resulting from the theoretical framework and the policy cycle. The findings suggest that the Commission's considerations largely align with theoretical expectations. However, regarding the first hypothesis, a more extended and revised theoretical approach is required.

#### *Addressing Co-Legislators' Interests*

According to the first hypothesis, the Commission's reflections should contain indications of the consideration of the interests of the member states or the Council as the EU body representing them, as well as those of the Parliament in a retrospective and future-oriented manner. Examining the Asylum and Migration Management Regulation proposal in which the Commission justifies its approach, it is noticeable that it considers both the adoption and implementation (A1, A2) of the regulation and provides corresponding arguments for the formulation of this policy. From a purely numerical perspective (Figure 5), it is relatively apparent that the Commission addresses the interests of the member states, respectively, the Council most frequently (A1.1, A2.5). This concerns both the adoption and implementation steps as the two sub-categories with the most coded segments deal with nation-states' positions and interests for each step of the policy cycle.

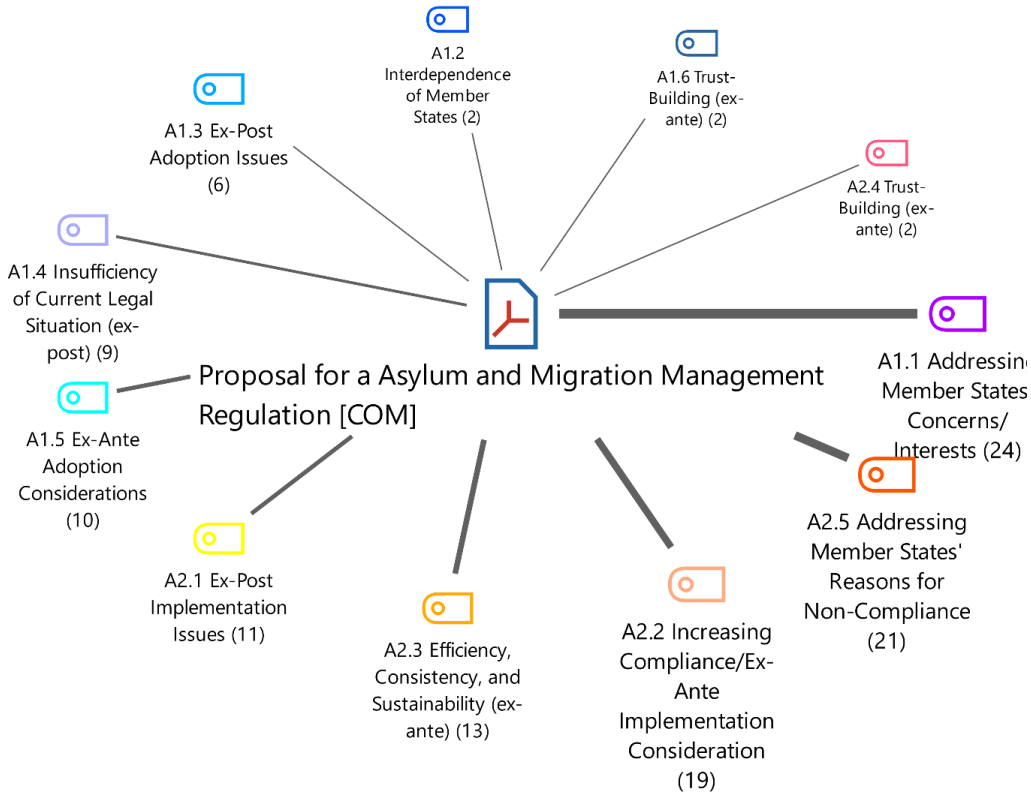


*Figure 5: Frequency of Coded Segments within the Proposal with their respective Categories (own representation).*

For the Parliament, no such indications could be found in the actual proposal, even though the Parliament is a co-legislator with equal formal powers in this instance. Suppose one, however, compares all three main documents in which the Commission justifies its policy formulation. In that case, there are isolated acknowledgements of the interests of the Parliament, but only reference is made to the fact that there is an exchange and close coordination with the directly elected representation of all EU citizens (A1.7; Figure 6). Nevertheless, the explanatory memorandum to the regulation does not go into detail about the Parliament's substantive expectations, even though it had already formulated precise positions for a reform of relocation and burden-sharing in the area of violence-induced migration at an early stage (C1, C2, D3). Although the theory supports less attention to the Parliament, since this actor is willing to make significantly more concessions and does not have to participate in the implementation of the regulation, it seems surprising how little awareness is devoted to the Parliament's positions at this point. Nonetheless, a possible explanation can be found in the in-depth interpretation of the Commission's arguments hereafter and the consultation of the supplementary analysis' findings of documents from the member states and the Council (Coding Table B). Generally, it can be stated that the Commission is basing its proposal to a large extent on positions taken by the co-legislators, and thus their dispositions constitute a valuable explanatory

variable for the regulation's flexible solidarity mechanism. However, the first hypothesis cannot adequately explain the large disregard of the Parliament's position.

| | Commission Staff Working Document [COM] | Proposal for a Asylum and Migration Management Regulation [COM] | New Pact on Migration and Asylum [COM] | ∑ |
|---|---|---|---|---|
| **A1 Policy Adoption** | | | | |
| A1.1 Addressing Member States' Concerns/Interests | 16 | 24 | 7 | 47 |
| A1.2 Interdependence of Member States | 0 | 2 | 5 | 7 |
| A1.3 Ex-Post Adoption Issues | 7 | 6 | 2 | 15 |
| A1.4 Insufficiency of Current Legal Situation (ex-post) | 12 | 9 | 4 | 25 |
| A1.5 Ex-Ante Adoption Considerations | 11 | 10 | 6 | 27 |
| A1.6 Trust-Building (ex-ante) | 1 | 2 | 4 | 7 |
| A1.7 Addressing Parliament's Interests | 4 | 0 | 2 | 6 |
| **A2 Policy Implementation** | | | | |
| A2.1 Ex-Post Implementation Issues | 20 | 11 | 10 | 41 |
| A2.2 Increasing Compliance/Ex-Ante Implementation Consideration | 9 | 19 | 12 | 40 |
| A2.3 Efficiency, Consistency, and Sustainability (ex-ante) | 6 | 13 | 11 | 30 |
| A2.4 Trust-Building (ex-ante) | 1 | 2 | 3 | 6 |
| A2.5 Addressing Member States' Reasons for Non-Compliance | 25 | 21 | 7 | 53 |

*Figure 6: Cross-tabulation with Number of Coded Segments per Sub-category of Coding Table A (own representation).*

*Designing an Adoptable Regulatory Framework*

With the adoption of such a major reform, complex cost-benefit trade-offs are expected. The second hypothesis states for this policy step that the Commission, despite all the costs associated with the proposal, considers the costs of non-adoption to be higher and therefore, the policy design presented could be a more favourable alternative. The Commission makes elaborate remarks about the inadequacy of the past and present legal situation and points to problems in the legislative process before arguing, based on this assessment, how lessons can be learned for this legislature:

> Another structural weakness of the Common European Asylum System (CEAS) is the absence of a functioning system for the fair sharing of responsibility among Member States. The current Dublin system is not aimed at ensuring the fair sharing of responsibility, but rather at objectively allocating the responsibility to examine an application for international protection to a specific Member State (COM, 2020*d*, p. 22)

As described above, the previous legal framework has failed owing to strong migratory inflows and has proven unable to deal with pressure caused by external events. As a result, the Commission contends that the current legal situation is insufficient and that existing practices must be revised (A1.4, D1), as they are barely harmonised and frequently "abused" (ibid.). Particularly,

> relocation efforts [in the wake of the failure of the Dublin system] have revealed several difficulties with [...] ad hoc and temporary formats of cooperation, with sometimes prolonged periods […] to find agreements to allow for disembarkation, and with only relatively few Member States contributing to relocation. (ibid., p. 7).

Therefore, the Commission – like most of the literature – concludes that "[t]he current migration system is insufficient in addressing these realities" (COM, 2020*c*, p. 1). In this respect, a revision attempt is based on an *ex-post* evaluation of previous difficulties (see also $H_1$). Nevertheless, this *ex-post* review goes beyond a purely legal contemplation and addresses adoption issues of the past and is reflected in *ex-ante* design considerations that are supposed to allow for a swift and cost-efficient adoption (A1.5, A1.6).

Theoretically, it has been expected in the second hypothesis that the Commission will have to address sovereignty interests of the member states, because associated political volatility combined with a high degree of interdependence has been shown to be an obstacle to robust regulatory frameworks, according to valuable research results from differentiated (dis-)integration and new-intergovernmentalism scholars. Additionally, this combination appears to increase the likelihood of non-compliance. Thus, in order to find a political solution and lower the threshold for adoption in the legislative process, the Commission would need to address these issues (see $H_2$). Acknowledging this, the Commission, in the explanatory memorandum of the new flexible solidarity mechanism, points

out that the new approach leaves open the possibility for member states to choose, at their own discretion, the form of contribution they prefer. In this way, concerns with re-distributive implications in the area of core state powers are addressed (A1.1, A1.5, A2.2, A2.5, B1.1, B1.2, B2.1). At the same time, however, it also points to the high degree of interdependence that goes hand in hand with the transnational phenomenon of violence-induced migration and therefore necessitates cooperation at the European level (A1.2). The old approach to reforming the Dublin-III-Regulation, similar to the failed system, was a robust, uniform legal framework. In retrospect, this approach failed because the concerns of the member states described above were inadequately addressed, resulting in a complete deadlock:

> On the legislative side, negotiations on the 2016 CEAS proposals did not lead to an agreement among Member States, in particular *due to divisions on the issue of compulsory relocation* of applicants for international protection, which continues to be a bone of contention in the context of consultations with Member States on the New Pact on Asylum and Migration. *Finding an agreement among Member States is therefore key for a more effective management of migration* (COM, 2020*d*, p. 51, emphases added)

This also explains the stronger focus on the needs of the member states. They are not only responsible for the implementation but were also the reason that the previous negotiations failed within the Council (see $H_1$). The bargaining costs and policy problems associated with this deadlock, which remain unresolved, have led the Commission to withdraw the old reform proposal and replace it with a new one designed to provide a "fresh start" (COM, 2020*b*, p. 1):

> With a view to overcome the current deadlock and provide a wider and solid framework for the migration and asylum policies, the Commission intends to withdraw the 2016 proposal (COM, 2020*c*, p. 4).

Based on this experience, several consultations would be made for this new start, which did take into account the concerns of the member states in particular. Therefore the robust approach is sacrificed in favour of legal flexibility, as the Commission considers this approach better than having to rely on the *ad hoc* measures that have been declared insufficient as it would allow to actually overcome the sustainable standstill and reach an adoption because the Council continues to refuse to see legal obligations depriving of the solidarity principle in Art. 80 TFEU (cf. Council, 2014; A1.3, A1.5):

> The overall contribution of each Member State to the solidarity pool should be determined through indications by Member States of the measures by which they *wish* to contribute (COM, 2020*c*, Recital 22; emphasis added).

Nevertheless, the supplementary analysis of reasoned opinions of various national parliaments on the draft regulation has revealed the member states' very asymmetrical interest situation (B1, B2, D2). Hungary, for example, which, together with other member states from the *Visegrád* Group, appears to be one of the most vocal opponents of refugee relocation, even sees this flexible approach as a violation of the principle of subsidiarity and thus of national sovereignty. However, geographically peripheral states that have been particularly affected by migratory pressure from the Middle East and Africa would like to see a more robust enforcement of burden-sharing. In this respect, the Commission seems to be following the lead of those who would rather dis-integrate. Therefore, the conflict of interests within the Council is resolved in favour of the opponents of continued uniform and robust legal integration (D1).

Furthermore, the package deal approach of the past policy cycle seems to have made reforms more difficult and prevented other legislative projects:

> Whereas significant progress was made on a number of these proposals, and provisional political agreements were reached between the co-legislators [on five proposals] less progress was achieved on the proposals for the Dublin Regulation and the Asylum Procedure Regulation, mainly due to diverging views in the Council. There was also not sufficient support for agreeing on only some of the asylum reform proposals ahead of an agreement on the full reform (COM, 2020*c*, p. 3)

In this respect, this observation and assessment contradict the literature, which expects package deals to have the exact opposite effect. The reasons for this may be that actually uncontroversial aspects of a legislative package are misused to exert political pressure and increase both political and negotiating costs for other actors in order to be able to push through one's own position in a controversial case (see also: logrolling).

*Increasing Compliance*

It is reasonable to assume – as in hypothesis three – that the Commission's proposed policy is intended to address persistent non-compliance with relocation measures. Considering the experiences of the last term, it is undeniable that the Commission's attempt to achieve a comprehensive and legally obligatory relocation of asylum seekers through *ad hoc* measures failed. As a result of member states' insistence on voluntary initiatives, the total number of refugees re-distributed fell well short of the Commission's expectations. Because of the obstructionist stance of some national governments inside the Council, the legislative process has virtually stalled. This exacerbates the previously indicated policy concerns and paralyses the entire legislative process around the package deal. Given the

likelihood that non-compliance with *ad hoc* measures will erode the Commission's authority over time, it is plausible to assume that the current "flexible" approach, which allows member states to choose the type of contribution they will make, is an effort to prevent this deliberate non-compliance (see $H_3$).

Based on the overlap and interconnectivity of the policy steps, since both are prerequisites for a successful policy change and are thus an inseparable part of the Commission's considerations, it is also evident from the overlays of coded segments assigned to the respective categories of Coding Table A (Figure 7) that the arguments mentioned are closely interconnected and that only the Commission's implementation-specific considerations are addressed here for analytical simplicity and to avoid redundancy.

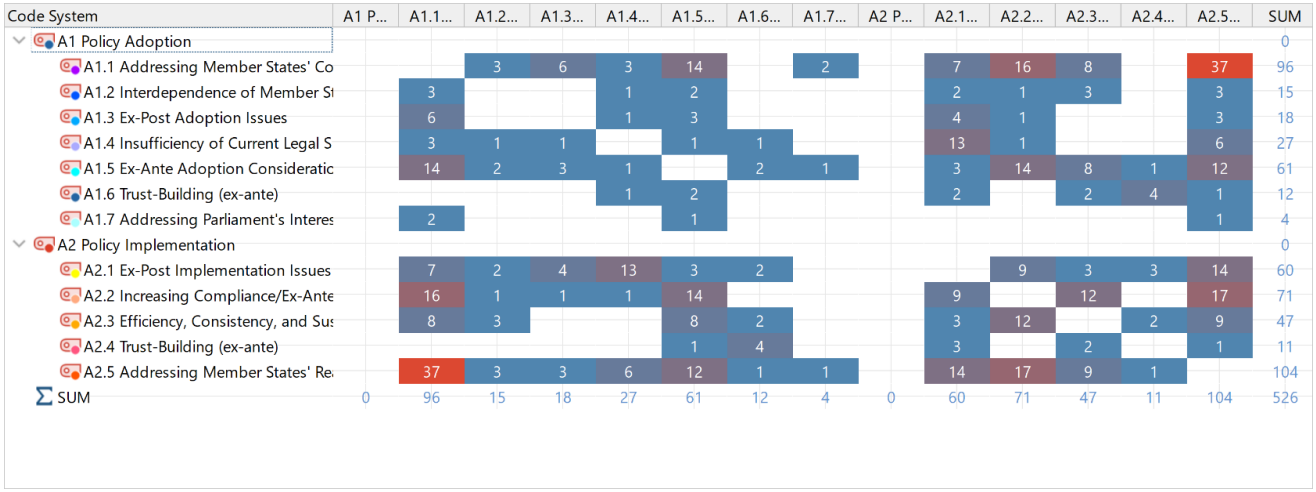


*Figure 7: Relations and Overlays of Coded Segments in the Three Main Documents (own representation.)*

Based on evaluations of past reasons for member states not to adhere to relocation measures and solidarity, as well as past trust and efficiency deficiencies, the Commission proposes a flexible approach that expands the notion of solidarity:

> An approach with the built-in flexibility to choose from the measures that they would be obliged to take ensure [sic!] support to Member States under migratory pressure, respecting the type of solidarity contribution indicated by individual Member States (COM, 2020*d*, p. 75)

and

> […] by setting solidarity measures from among which Member States can *choose to contribute*. (COM, 2020*c*, p. 2; emphasis added)

It is noticeable that the Commission, unlike before, opts for a cooperative instead of a top-down approach to implementation matters, which the Parliament would have preferred in order to improve the monitoring of compliance (C1, C2.1, C2.2, D3):

> The Commission and the Council will then consider any appropriate further actions to be implemented in that respect, within the limits of their respective competencies (ibid.).

Thus, the Commission is – in line with the theoretical expectation as formulated in hypothesis three – trying to increase compliance through less legal coercion and more national discretion by allowing a flexible choice between three options. This appears to be trust-building and, in the Commission's view, could be a basis on which to build-up (A1, A1.6, A2, A2.3, A2.4, D1).

***Outlook***

As of today (June 6th, 2022), no significant progress has been made since the reform proposal was published nearly 20 months ago. Neither Parliament nor Council have yet been able to present a final position for the informal trilogue negotiations between Council, Parliament, and Commission. In the Parliament's case, no official agreement has been found since the presentation of a first draft by the rapporteur MEP Tobé in the LIBE Committee for a Parliamentary position. Here, the committee still has to prepare a recommendation for a decision in the plenary (cf. EP, 2022). In the Council, this process seems to take even longer. On the one hand, due to the experiences of the past years in this policy field and the fact that everything should only be negotiated as a package according to multiple requests of the actors involved. On the other hand, because some national parliaments have expressed major reservations regarding the proposal, substantial concerns and disagreements continue within the Council (Coding Table B).

It is generally assumed that external shocks such as the invasion of Ukraine by the Russian Federation and the associated large migration movements could be a strong incentive for swift adoption and implementation. However, there are no hints that any attempts have been made to speed up the process. Instead, existing EU and numerous national asylum and refugee provisions and regimes are being suspended and transitionally replaced by *ad hoc* measures to deal with the situation, which have so far shown a surprisingly high degree of solidarity, unity, and compliance among member states (cf. AlJaZeera, 2022; The Guardian, 2022; critical view: New Statesman, 2022). However, scepticism may be expressed that this situation will remain so if the war and the resulting intensified refugee situation drag on for years to come.

## Conclusion

This research has addressed the puzzling phenomenon of a supranational actor proposing a dis-integrative policy to govern violence-induced migration by replacing robust, uniform law with a flexible approach and the freedom to choose by initiating the Asylum and Migration Management Regulation. So far, the focus of the academic debate has consistently been on nation-states, which, due to their structural characteristics, have been more sceptical about integration in sovereignty-sensitive policy areas. Theoretical approaches have been successful in explaining nation-state behaviour but have so far neglected supranational actors, as dis-integration appears counterintuitive at first glance. By combining different streams of literature, it was endeavoured to develop a theoretical framework that assumes as the main explanatory variables constraints through the inter-institutional system in which the Commission is embedded and *ex-ante* and *ex-post* considerations. Furthermore, it was assumed that supranational actors might pursue legal flexibility and choose dis-integration when sophisticated cost-benefit trade-offs suggest that it is more favourable for a proper policy adoption. Additionally, it might constitute a coping mechanism for malfunctioning implementation and uncontrolled dis-integration through wilful non-compliance by member states.

The findings of the qualitative content analysis seem to support the assumption that the Commission is proposing a flexible solidarity mechanism because it is trying to overcome the long-term deadlock in the negotiations on CEAS reform and that a flexible policy design is the lesser evil in this circumstance. It is significantly constrained in its choice of policy designs and appears as an emperor without clothes especially considering the already occurring contested views on even this proposal within the Council before the informal trilogue negotiations. Furthermore, it becomes apparent that by addressing the member states' reasons for not adhering to previous relocation legislation, an attempt is being made to cope with it by providing the member states with a choice and hopefully – from the Commission's perspective – not leading to an unpredictable loss of control. From the Commission's vantage point, it is more favourable to relinquish some influence in a controlled manner than to expose oneself to the danger of losing it in an uncontrolled fashion.

Nevertheless, an ambiguity has emerged that cannot be adequately explained by the theoretical framework and therefore requires further research and revision: While constraints and opinions of the co-legislators significantly influenced the proposed Asylum and Migration Management Regulation, i.e. the inter-institutional system in which the Commission is embedded, and there were both *ex-ante* and *ex-post* considerations given by its position as a policy formulating actor by the sole right to initiative, two unexpected problems have emerged upon critical reflection of the results. First, the Parliament has been neglected beyond the expected degree. Second, the interests of the member states

show a high asymmetry and diversity. However, the Commission has been strongly oriented towards a vocal minority for substantial national decision-making latitude. One possible explanatory variable to be investigated for this could be political capital of contention or network effects, which enables certain actors to assert their positions. This asymmetry has not been addressed sufficiently because the member states have been treated as having a homogeneous identity. Further differentiation is therefore necessary.

Although – as already explained in the methodology chapter – the case study has a limited generalizability due to its design, it could nevertheless provide valuable insights for a further scientific discussion of the phenomena of dis-integration and legal flexibility: It could be shown that the national bias, which still prevails in a large part of the research literature, does not adequately reflect reality and insights could be found into which considerations the Commission takes into account in its policy formulation in such a volatile field. Upon further examination, a research agenda should explore the extent to which the findings of this case study can be applied to other cases and how to further differentiate the theoretical framework in order to unleash the greatest possible explanatory power.

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Treaty on European Union.

Treaty on the Functioning of the European Union.

## Appendices

*Coding Table A – European Commission*

| # | Author | Title | Publication Date | Full Text Version |
|---|---|---|---|---|
| **1** | European Commission | Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum | September 23, 2020 | LINK |
| **2** | European Commission | Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] | September 23, 2020 | LINK |
| **3** | European Commission | Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] | September 23, 2020 | LINK |

*Coding Table B – Council and Member States*

| # | Author | Title | Publication Date | Full Text Version |
|---|---|---|---|---|
| **1** | Council of the European Union | Statement by the Council on Article 80 TFEU | April 7, 2014 | LINK |
| **2** | Cyprus, Greece, Italy, Malta, and Spain | Dublin Regulation. Position paper of Cyprus, Greece, Italy, Malta and Spain on the Proposal recasting the Dublin Regulation | unknown | LINK |

| | | | | |
|---|---|---|---|---|
| **3** | National Assembly of Hungary | National Parliament Reasoned Opinion on Subsidiarity | January 25, 2021 | LINK |
| **4** | Italian Senate | National Parliament Reasoned Opinion on Subsidiarity | February 5, 2021 | LINK |
| **5** | Senate of Romania | Opinion of the Senate of Romania | March 24, 2021 | LINK |
| **6** | Greek Parliament | Opinion on The new Pact on Migration and Asylum | March 5, 2021 | LINK |
| **7** | Federal Council of Germany | Beschluss des Bundesrates | February 12, 2021 | LINK |

*Coding Table C – European Parliament*

| # | **Author** | **Title** | **Publication Date** | **Full Text Version** |
|---|---|---|---|---|
| **1** | European Parliament | European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration | April 12, 2016 | LINK |
| **2** | European Parliament | Draft Report | October 11, 2021 | LINK |

*Coding Table D – Miscellaneous*

| # | **Author** | **Title** | **Publication Date** | **Full Text Version** |
|---|---|---|---|---|
| **1** | European Parliamentary Research Service | Reforming asylum and migration management | October, 2020 | LINK |

*Utilised Categories and Sub-categories*

| | |
|---|---|
| **Code System** | **386** |
| A1 Policy Adoption | 0 |
| A1.1 Addressing Member States' Concerns/Interests | 47 |
| A1.2 Interdependence of Member States | 7 |
| A1.3 Ex-Post Adoption Issues | 15 |
| A1.4 Insufficiency of Current Legal Situation (ex-post) | 25 |
| A1.5 Ex-Ante Adoption Considerations | 27 |
| A1.6 Trust-Building (ex-ante) | 7 |
| A1.7 Addressing Parliament's Interests | 6 |
| A2 Policy Implementation | 0 |
| A2.1 Ex-Post Implementation Issues | 41 |
| A2.2 Increasing Compliance/Ex-Ante Implementation Consideration | 40 |
| A2.3 Efficiency, Consistency, and Sustainability (ex-ante) | 30 |
| A2.4 Trust-Building (ex-ante) | 6 |
| A2.5 Addressing Member States' Reasons for Non-Compliance | 53 |
| B1 Policy Adoption | 0 |
| B1.1 Voluntariness of Measures | 10 |
| B1.2 Touching Core State Powers | 6 |
| B1.3 National Adoption Capacity | 10 |
| B2 Policy Implementation | 0 |
| B2.1 National Discretion Necessary | 7 |
| B2.2 Support Demanded | 8 |
| B2.3 Ex-Ante Implementation Issues | 5 |
| C1 Policy Adoption | 0 |
| C1.1 Solidarity as Legal Principle | 6 |
| C2.1 Supranational Approach | 5 |
| C2 Policy Implementation | 0 |
| C2.1 Robust Implementation of Solidarity | 5 |
| C2.2 Implementation with Supranational Institutions | 4 |
| D Miscellaneous | 0 |
| D1 European Commission's Considerations | 5 |
| D2 Council and Member States' Position | 5 |
| D3 European Parliament's Position | 6 |

For the coding, the analysis software MAXQDA was used because of better visualisation possibilities. However, due to the qualitative and interpretative character of the analysis procedure, the allocation of individual empirical segments was done manually and not automated by the software. The complete coding tables indicating the assigned text passages with the software-based reference can be found below.


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Co-funded by the
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of the European Union