

**Delegation to the
European Commission
in EU Migration Policy:
Expertise, Credibility, and
Efficiency**

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Abstract

In 1999, with the entry into force of the Amsterdam Treaty, European Union (EU) migration went from being an area of intergovernmental cooperation to one governed by ever closer version of the Community Method. This shift resulted in a significant production of secondary legislation being agreed at the EU level, regarding all areas upon which the EU had some degrees of competence, namely asylum and refugee, irregular migration, legal migration, administrative cooperation, and border and visa policy. The academic literature is divided in how to interpret policy developments in this area. Some academic contributions have emphasised the divergence from traditional EU policy methods, others have analysed migration policy in the perspective of traditional questions about EU integration, and the majority had some normative assessments of the policies being formulated.

This thesis tackles EU migration policy from the point of view of delegation. It proposes to assess the extent of EU integration in this area by measuring the amount of powers the Council of the European Union has granted to the European Commission. The dissertation finds that delegation has occurred in this policy area, and to an extent that is comparable to other, older policy areas, but is uneven across migration categories. Past delegation studies highlighted a number of possible determinants of delegation, such as reducing uncertainty, strengthening the credibility of commitments, achieving efficiency, as well as institutional contexts. This dissertation finds evidence for the credibility and efficiency rationales, as well as conflict between the Council and the Commission. This study is relevant to current debates about how much power EU institutions are and should be granted, whether these institutions are biased towards the nature of the policies, and current trends in EU integration.

I, Marco Scipioni, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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List of acronyms

AFSJ: Area of Freedom, Security and Justice.

BEPA: bureau of European policy advisors.

CIREA: Centre for Information, Discussion and Exchange on Asylum.

CIREFI: Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration.

CJEU: Court of Justice of the European Union.

EASO: European Asylum Support Office.

EMN: European Migration Network.

EP: European Parliament.

EU: European Union.

eu-LISA: European Union Agency for Large-Scale IT Systems.

EURODAC: European Dactyloscopy.

EUROPOL: European Police Office.

FRA: European Union Agency for Fundamental Rights.

Frontex: *Frontières extérieures*, European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

ICMPD: International Centre for Migration Policy Development.

IOM: International Organization for Migration.

JHA: Justice and Home affairs.

MFF: Multiannual Financial Framework

OECD: Organisation for Economic Co-operation and Development.

OMC: Open Method of Coordination.

RABIT: Rapid Border Intervention Teams.

SCIFA: Strategic Committee on Immigration, Frontiers, and Asylum.

SIS: Schengen Information System.

TCN: third-country national.

TEC: Treaty establishing the European Community.

TEU: Treaty on European Union.

UNHCR: United Nations High Commissioner for Refugees.

VIS : Visa Information System.

1. Setting the scene: Introducing EU migration policy

Migration is an all-pervasive phenomenon in the European Union (EU). It is part of member state societies, laws and economies, and is hotly debated in national and European political arenas. Net migration¹ in the EU has totalled over one million per year in nine of the twelve years between 1999 and 2009 (table 1.1), however the story is far from uniform. Net migration in Spain accounted for approximately one fifth of the EU-27 total in 1999, but that share increased to more than half by 2007. There was a ten-fold increase in Italy's net migration figures between 1999 and 2007, a doubling in the UK, and a trebling in Ireland during the same period. Yet net migration in Germany decreased consistently from 2001 to 2009, at this point the state was experiencing negative levels of net migration for the second consecutive year². Eurostat, the statistical body of the EU, has revealed that since 1992 the contribution net migration has made to population growth has been more significant than that of natural growth, which reached a historic low point in 2002 (Eurostat 2011b).

Table 1.1. Net migration in selected EU countries, in thousands (1999-2009)

Country	1999	2001	2003	2005	2007	2009
EU-27	1013.6	666.4	1785.4	1542.3	1539.5	681.7
Belgium	16.1	34.4	33.6	49.2	58.9	64.1
France	157.3	181.9	196.9	187.2	73.8	31.8
Germany	202.1	274.8	142.2	81.6	45.2	-10.7
Ireland	24.2	39.3	32.2	63.4	74.4	-19.1
Italy	34.9	39.8	407.8	202.7	436.0	212.4
Spain	237.9	510.8	661.5	633.9	776.4	136.8
UK	137.6	172.9	208.0	298.4	300.8	237.3

Source: Eurostat; Demographic balance and crude rates (code: demo_gind).

Note: Net migration is the difference between the number of immigrants and the number of emigrants. In the context of the annual demographic balance however, Eurostat produces net migration figures by taking the difference between total population change and natural change; this concept is referred to as net migration plus statistical adjustment.

Migrant populations have become an established component of European societies. Table 1.2 illustrates changes in stocks of foreign-born populations, with

¹ Net migration is the difference between immigration to and emigration from a given area during the year (net migration is positive when there are more immigrants than emigrants and negative when there are more emigrants than immigrants) Eurostat, 'Glossary:Migration', *Statistics Explained* (updated 30 July) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Net_migration>.

² But it increased sharply in 2010 to more than 130,000.

numbers in member states such as the UK almost doubling over the featured period and numbers more than trebling in Italy and Spain. A focus on absolute numbers however indicates significant changes in the population structures of all European countries. Finally, it is important to note that uneven levels of refugee stocks exist across member states, a migration category that has grabbed headlines in a number of EU countries in the last twenty years.

Table 1.2. International migrant stocks, shares of migrant stocks compared to population, and refugee populations in selected European countries (1990-2010)

Country		1990	2000	2010
France	International migrant stock	5 897 267	6 278 718	7 196 481
	As percentage of total population*	10.4	10.6	11.4
	Estimated refugee stocks	186 629	131 115	200 687
Germany	International migrant stock	5 936 181	8 992 631	9 734 034
	As percentage of total population*	7.4	10.8	11.7
	Estimated refugee stocks	722 250	940 750	594 269
Italy	International migrant stock	1 428 219	2 121 688	4 798 701
	As percentage of total population*	2.5	3.7	7.9
	Estimated refugee stocks	12 379	6 437	56 397
Spain	International migrant stock	829 705	1 657 285	6 234 283
	As percentage of total population*	2.1	4.1	13.5
	Estimated refugee stocks	8 490	6 851	3 820
UK**	International migrant stock	3 647 126	4 705 567	7 005 100
	As percentage of total population*	6.4	8.0	11.3
	Estimated refugee stocks	43 395	121 275	238 150

Source: UNPD.

Note: *International migrant stock as a percentage of total population. For these countries, international migration stocks do not include estimated refugee population. ** Including Northern Ireland.

In terms of EU migration legislation, an Italian case concerning a residence permit application is illustrative of the impact this body of law has had on member state positions on migration. In February 2012 an Italian man, who had lived in Spain and while there had married a Uruguayan man, successfully sought an Italian residence permit for his husband (La Repubblica 2012a). The permit was at first denied by Italian authorities, but the couple successfully appealed citing the right of free movement for EU citizens and their partners as enumerated in the 2004 Free Movement Directive and transposed into Italian law in 2006. While the Court abstained from ruling on the validity of the couple's marriage, it upheld the right of the "spouse" of an EU citizen to be granted a residence permit. This ruling was based on the fact that the definition of the term "spouse" is set through national

legislation and, as the Italian Court recognised the marriage was legal under Spanish law, Italian authorities were required to issue the permit. This case marks a significant infiltration of EU migration law into domestic affairs (La Repubblica 2012b). It also illustrates the level of freedom left to member states in this policy area, with certain migration categories dominated by EU legislation binding only to its objectives and not in the form of its application (i.e. Directives).

At the time of writing migration is at the centre of intra and inter-state debates and, at times, tensions (Jones 2012: 54). Attention to this issue has been high since the 1990s, with European efforts being heralded as an example of the positive effects of regional cooperation in the absence of a more global approach (Financial Times 2002h). That said tensions remain high. France clashed with Italy over what the German Interior Minister labelled as a “small influx” of migrants in the wake of the Arab Spring in North Africa (Le Figaro 2011). Political tensions have also been heightened at times between member states and EU institutions. The row between France and Italy came only weeks after the Court of Justice of the European Union (CJEU) had struck down an Italian law that prescribed between one and four years imprisonment for undocumented migrants as it conflicted with Community legislation (The Economist 2011). However criticisms have also been known to come from the opposite direction at times. For example, the former Italian Interior Minister Roberto Maroni has often attributed major responsibility for Italy’s current immigration and border control issues to the EU (Ministero dell'Interno 2010; Rijpma 2010).

1.1. Research objectives

Although brief, the above overview of the topical nature of migration in Europe gives some ideas of why the academic literature on this topic has grown significantly since the end of the 1990s. The literature has analysed and assessed policy developments in this area in different ways. Some contributions have emphasised divergence from traditional EU policy methods, either to underscore policy makers’ efforts at finding viable *alternatives* to a Community Method that is becoming ever-less relevant (Monar 2001), or conversely to track the changes that have brought this policy area *closer* to traditional EU policy-making methods

(Niemann 2008). The majority of the academic contributions have involved some normative assessments of the policies being formulated, either as a factor amplified by EU institutional architecture (Guiraudon 2000a) or as part of a broader global trend in migration policy (Huysmans 2000).

This thesis seeks to explain the rationales for and the extent of integration at the European Union (EU) level between member states in the area of migration policy. For the purposes of this research, integration is captured by measuring levels of delegation. The primary research question is therefore a simple one: why and to what extent have member states delegated powers to EU institutions in the field of migration? The first objective of this work is to chart and measure EU integration in this policy area. The empirical realm of this research is EU secondary legislation³ on migration adopted between 1999 and 2009, i.e. between the Amsterdam and Lisbon Treaties. The EU produced a high volume of secondary legislation in all areas of its competence during this period: asylum and refuge; irregular migration; legal migration; administrative cooperation; and, border and visa policy. The second objective of this dissertation is to assess whether and to what degree the factors most commonly assumed to be conducive to delegation – i.e. institutional contexts, reducing uncertainty, strengthening credibility of commitments, and achieving efficiency – are validated in the case of migration policy. These aims are achieved in two ways. First, delegation in secondary legislation is measured quantitatively using models employed in previous delegation studies. And secondly, this quantitative analysis is followed by a series of qualitative analyses focusing on different migration categories, the aim of which is to understand the actual effect of each of the delegation determinants identified above.

The main findings of this analysis are that delegation does exist in EU migration policy; the extent of this delegation is comparable with other older policy areas, but it is unevenly spread across migration categories. Of the three grounds and two institutional contexts tested, findings confirm that delegation results only from motivations of credibility and efficiency, but is limited by the conflict between the Council of the European Union (the Council) and the Commission on this

³ In legal terms, while the Treaties and other fundamental principles of EU law (e.g. the requirement of protecting fundamental rights) are termed ‘primary law’, all legislation flowing from Treaty articles is generally termed ‘secondary legislation’ Kieran St C Bradley, ‘Legislating in the European Union’, in Catherine Barnard and Steve Peers (eds.), *European Union Law* (Oxford: Oxford University Press, 2013) at 103..

matter.

This chapter is intended to demonstrate how this dissertation approaches EU migration policy from a new angle. It is arranged as follows: Section 2 provides an overview of the history of policy cooperation in this area; Section 3 reviews the relevant literature on EU migration; Section 4 briefly introduces the main hypotheses of this dissertation; Section 5 clarifies the methodology adopted; and finally, section 6 outlines the structure of the chapters to follow.

1.2. History of policy coordination on migration in the EU

This section seeks to shed light on the reasons for choosing delegation as an interpretative lens for this research. Before Maastricht (February 1992 to November 1993)⁴, the then European Communities had enacted a limited number of measures concerning the movement of EU member state citizens from one member state to another. Free movement provisions were initially limited to “workers, self-employed persons and providers of services”, but were then expanded to include “families of intra-Community migrants” (Stetter 2000). Political attention to migration ranged from low to non-existent at the EU level for much of the period running up to the Single European Act (February 1986 to June 1987), and policies concerning third-country nationals (TCNs, i.e. not citizens of EU member states) were excluded from this set of measures altogether. The Single Market initiative, with its emphasis on the abolition of all internal border controls, has however been regarded by many commentators to have been one of the triggers for increased cooperation on this policy front (Niemann 2008). Around the time of its emergence, much of the limited cooperation between member states was intergovernmental in nature and existed largely outside the EC institutional framework. The Schengen Agreement and its implementing Convention (signed in 1985 and 1990 respectively), which mainly dealt with the removal of internal borders among contacting parties and some corollary measures, are good examples of such intergovernmental cooperation. Similarly, the Dublin Convention that aimed to facilitate coordination of asylum processing and distribution across participating member states (signed in 1990) is another such example. Many authors have viewed

⁴ The two dates refer to Treaties signing and entry into force.

these developments as crucial to subsequent developments in EU cooperation (Monar 2001, 2011), with a key role being played by networks of national officials operating outside the EU (e.g. Pompidou Group, 1972; Trevi Group, 1975). Indeed such networks have framed as a new form of governance that substitutes more traditional and formal methods of EU integration, mainly through what has been labelled the Community Method (see below).

Migration policy entered into the Union's institutional structure through the Treaty of Maastricht (Title VI of TEU, Art. K1 to K.9). Strictly speaking, it was not designated as a Community competence because migration issues were confined to the "third pillar" of Justice and Home Affairs (JHA). In a nutshell this meant that JHA decision-making was largely intergovernmental within the Council, without the traditional involvement of the Commission, the CJEU or the European Parliament (EP) (Majone 2005: 53). Among the nine areas of "common interest" in JHA, three were directly related to migration: "asylum policy"; "rules governing the crossing of the Community's external borders"; "immigration policy and policy regarding third country nationals" (den Boer and Wallace 2000: 500; E. Uçarer 1999: 250).

That said much of the cooperation under that framework was labelled as "soft" as the policy output had no binding value. According to both Council and Commission, therein lay the problems and the solutions to finally bringing about an effective EU migration policy. The Council and the Commission issued an Action Plan "on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice", where they held that,

the instruments adopted so far often suffer from two weaknesses: they are frequently based on 'soft law', such as resolutions or recommendations that have no legally binding effect. And they do not have adequate monitoring arrangements. The commitment in the Amsterdam Treaty to use European Community instruments in the future provides the opportunity to correct where necessary these weaknesses (Council 1998: 5).

These words reflect the awareness of the political elites of many member states that, as stated by the then Deputy Minister for European Affairs Michel

Barnier, arrangements in the third pillar “did not work well” and change was necessary either through empowerment of the Commission or importing Qualified Majority Voting (QMV) from other areas (Beuter 2002; Corrado 2002; Deloche-Gaudez 2002). Problems in monitoring and verification of actual implementation persisted years later, with Nordic countries reportedly critical of the arrangements set out in EU legislation (Agence Europe 2001c).

Amsterdam marked a shift in gear for migration policy (October 1997 to May 1999). Indeed the text of the various Treaties displays that shift. The Maastricht Treaty referred to migration policies as “matters of common interest” (TEU, Title VI, Art. K.1) whereas the Amsterdam Treaty categorised them as one of its “objective[s]” (Art. 2 TEU, fourth indent), which placed them on an equal footing with priorities such as the completion of the internal market. In practice the Amsterdam Treaty gave the green light for the transfer of some migration issues into the Treaty Establishing the European Community (TEC)⁵, i.e. the “first pillar”. Commentators have characterised this move as beginning a process of ‘communitarisation’ (Niemann 2008; Stetter 2000). Although a set of issues was brought within the scope of the Community (Title IV, Art. 61-69 TEC), these were ruled by comparatively different arrangements in terms of institutional competences and policy-making. In brief, the Commission had an unusual shared right of initiative⁶, the EP was loosely involved overall, the form of voting in the Council differed according to migration categories, and the CJEU’s jurisdiction was severely limited due to restrictions on preliminary ruling procedures. The enduring nature of some of these elements until adoption of the Lisbon Treaty makes clear that member states’ reticence did not disappear.

Political momentum on migration issues remained high until the end of the decade, as marked by the Vienna and Tampere European Councils (December 1998; October 1999). These Councils, while standing clear of ambitious calls for harmonisation, aimed at defining more detailed political objectives for EU cooperation and achieving more overall convergence (The Times 1999). They became part of EU migration policy-making as they were held every five years to

⁵ Unless otherwise specified, in this work all the subsequent Treaty acronyms refer to “Treaty establishing the European Community” (TEC), and the “Treaty on European Union” (TEU).

⁶ The Commission already asked for the monopoly of the right of initiative in the weeks ahead of the Tampere European Council European Report, ‘Setting the Stage for Tampere Law and Order Summit’, *European Report*, 25 September 1999a..

provide long to medium-term guidelines and objectives to otherwise short-term EU activities. This division of work echoes Hix's framing of the EU as a dual executive, where the Council and the European Council deal with medium to long-term issues, while the Commission manages short-term affairs (Hix 2005: 27).

In parallel to these treaty developments a number of policy initiatives have also mushroomed in this area. This has particularly been the case with the “external dimension of migration policy” (Cristina Boswell 2003c). Although the connections between migration and foreign policy were recognised early on, actions did not follow suit and the effectiveness of the external dimension of EU migration policy remained contested at the time of writing (Menz 2014). Ten years after a “global approach to migration” was proposed (Commission 2005c), synergies in foreign affairs and migration policy are still awkward in relation to issues such as readmission agreements (Cristina Boswell 2003c), asylum and refugee policy (Haddad 2008) and the connection between development and migration policy (Lavenex and Kunz 2008). Migration policy has also been influenced by the broader revision of EU policy making, as evidenced by the introduction of the Open Method of Coordination (OMC) in 2001. This represented a form of loose coordination between member states that avoided the binding arrangements typical of the traditional Community Method. In addition, individual member states circumvented the Council by undertaking direct political initiatives, this was the case with the 2008 French-led 'European Pact on Immigration and Asylum' (Carrera and Guild 2008). Again, in line with broader developments in EU politics, the EP's role and input in migration policy-making has increased in recent years. This has been analysed both in terms of the power this institution is capable of wielding and the net result for the policies themselves, mainly in terms of a liberal / restrictive divide (Lopatin 2013; Ripoll Servent 2010). Finally, the increase in the number agencies working in this area is worth noting given that, by the end of 2014, there were at least five working either directly or indirectly on migration-related issues.

1.3. Explaining EU migration policy

The growing importance of EU migration policy has been matched by a corresponding increase in attention within the academic literature. The aim of this

section is to provide an overview of how authors have explained these developments and the current level of integration in EU migration policy. Overall there are some commonalities in most of these accounts. First, the majority of these contributions cover only short timeframes (Cerna 2009; Menz 2011). Secondly, authors tend either to focus on treaties (Niemann 2008; Stetter 2000) or on a few select policies such as the external dimension of migration (Cristina Boswell 2003c; Pollak and Slominski 2009; Wolff 2008). Others again focus on broader policy areas such as irregular migration (de Haas 2009; Giuseppe Sciortino 2004) or border policy (Hobbing 2005; Mitsilegas 2007). Thirdly, a number of these works have a normative element in that they try to assess whether EU policies have become restrictive or liberal towards migrants (Carrera and Guild 2008; Mitsilegas 2004). This research therefore makes a valuable contribution to this area of scholarship as it involves analysis of a longer time period than previous studies (ten years to be precise), its remit is broad as it includes all legislation produced during that ten year period, and it avoids normative assessment of policy content. The following analysis of academic literature groups contributions under three distinct headings:

- How EU migration policy relates to the Community Method;
- How migration policy has been framed within and contributed to EU studies; and finally,
- Debate concerning the liberal or restrictive nature of EU migration policy.

1.3.1) Delegation and the Community Method

Policy-making in the EU has been practiced and understood exclusively in terms of the Community Method (the Method) for quite some time. Wallace characterises it as “a centralized and hierarchical institutional process, with clear delegation of powers, and aimed at 'positive integration'” (2005: 79-80). In particular, a

strong role [is] delegated to the European Commission in policy design, policy-brokering, policy execution, and managing the interface with 'abroad' (Wallace 2005: 79-80).

In the last two decades however, the meaning and the practice of the Method has come to vary a great deal in the academic literature. The idea of a Community Method was first applied to traditional EU competences such as the Common Agricultural Policy. However as the EU remit of action has expanded alterations to the Method have begun to appear. Consequently the Community Method has not only changed historically, but has meant different things according to the policy area in which it has been applied. For instance, Puetter defines the key feature of the Community Method as its process of integration by law, this is distinct from policy coordination with non-binding consequences seen in areas such as Economic and Monetary Union (2012: 162). For some authors on the other hand, the Community Method stands for the necessary involvement of EU actors. Consequently Bickerton *et al.* argue that “major new areas of EU activity” diverged from traditional Community Method inasmuch as they have “studiously avoided” supranational involvement, i.e. the Commission and CJEU (2014). For Niemann it seems that voting procedures within the Council and the EP’s involvement are relevant in terms of Community Method (2008).

An important strand of the literature understands EU migration policy-making mechanisms as differing significantly from the Community Method. First, it is argued that EU migration policy emerged outside the EU (Monar 2011). Secondly, some of the early traits of informal and intergovernmental cooperation continue to persist to date (Geddes 2014; Monar 2010). In particular, soft forms of cooperation typical under Maastricht were not regarded as failures from which future EU action departed, but have remained a central feature of the EU approach to migration policy (Monar 2010: 237-38). Thirdly, EU action in this area has included a number of outputs other than hard law, such as recommendations, best practices, operational measures, and programmatic documents. It is then argued that limiting analysis to the products of the Community Method would fail to capture the novelty of this policy area. The basic point is that, similar to Puetter’s distinction between integration by law and other means of cooperation (2012), EU integration should not be equated exclusively with the adoption of binding agreements. The importance of European Council meetings dedicated to migration supports assertions within the experimentalist literature that such activities are evidence of a political choice to diverge from the traditionally exclusive reliance on the Commission for policy initiatives (Monar 2010). However this assessment of European Council’s role echoes Hix’s framing of the EU as featuring dual

executive, where the Council and the European Council deal with medium to long-term issues and the Commission manages short-term affairs (Hix 2005: 27). In other words, this division is not something entirely new in EU affairs or peculiar to migration policy. Finally the AFSJ⁷ is common only to a sub-set of states, as three member states⁸ have elected not to accede to portions of this Treaty Chapter while reserving the right to opt in at a later stage, either in part or in full.

Having emerged in the 1990s, studies concerning governance have favoured a less state centric approach and instead focused on the ways policies are made at the EU level (Jachtenfuchs 2001). This perspective suggests that a combination of factors determined the evolution of the JHA area, included among them are “laboratories” and “driving forces” (Monar 2001, 2010). The willingness of policy-makers to push ahead in this area, both in terms of experimenting with new policy-making solutions and branding this area a policy priority, coalesced with increased internal and external pressure to act. Laboratories constituted the template for the subsequent network-style, *ad hoc* arrangements in the third pillar. Schengen, by far the most important laboratory, was crucial to a number of areas that found their place within the EU framework almost a decade later (e.g. asylum, borders and visas policies). Schengen became an institutionalised forum for high-level meetings ranging from those solely involving officials to those held at the ministerial level. This in turn helped to develop mechanisms, cultures and experiences for the cooperation that would follow.

The transnational activism that triggered the early phases of European cooperation on migration was chiefly led by networks of officials from the Justice and Home Affairs Ministries, who emerged as the groups most dominant in shaping the form and content of the EU (Guiraudon 2003: 264-65). Guiraudon⁹ argues rather influentially that, when dealing with migration in their domestic arenas national executives and officials wished to escape pressure from a variety of sources such as competing ministries within their own governments, parliamentary oversight, and the judicial branch. Consequently they sought more suitable policy venues within

⁷ The “area of freedom, security and justice” stated in art. 61 (TEC).

⁸ Ireland and the UK are covered by Protocols 3 and 4 attached to the Treaty of Amsterdam, while Protocol 5 covers Denmark.

⁹ Her argument has become one of the most convincing on the emergence of EU cooperation. Lavenex has adapted that argument to also explain the burgeoning external dimension of EU migration policy Sandra Lavenex, 'Shifting up and Out: The Foreign Policy of European Immigration Control', *West European Politics*, 29/2 (2006), 329-50 at 331..

which they could design competences and implement measures. From the mid-1980s, governments increasingly created transnational cooperation mechanisms dominated by law and order officials where EU institutions played only minor roles. Joppke implicitly confirms that there were definite incentives to fleeing domestic settings where national courts presented the prospect of imposing serious constraints on executive action. In sum, the determining factor for EU cooperation was the *locus* and not the powers, i.e. the *locus* was chosen precisely because it had no powers on its own.

From the perspective of governance, authors have consistently focused on the introduction of the OMC as a further example of the relevance of these policy methods in understanding the development of EU migration policy (Caviedes 2004). Tholoniati has argued that “the OMC has helped to overcome initial resistance to EU action”, identifying “a common European interest” and creating “a role for the EU in previously untouched areas, such as migration policy (2010: 113). However a note of caution is in order. It may be true that there was resistance due to divergent interests, but political pressure was high, particularly in the first years after Tampere. For example, the European Council frequently called upon both the Council and the Commission to speed up policy delivery. An alternative reading is that cooperation on these matters was difficult for EU states due to the presence of distinct administrative practices, different legal systems and unique historical backgrounds regarding migration (Düvell 2011a: 293).

Following Amsterdam, some contributions to the academic literature began referring to migration policy as communitarised (Menz 2014; Stetter 2000), while others “gradually” filtered this term in after Lisbon (Acosta Arcarazo and Geddes 2013: 180). However the reader is at times left in the dark as what this entails in practice and what it means for EU integration. For example, it is unclear whether the term communitarisation refers to the Community Method or the fact that migration issues were brought within the Community pillar (“the first pillar”). If the former is the case, describing developments under Amsterdam as a “communitarisation” of EU migration policy could be misleading. That is, up to 2005 the Commission was not the sole initiator of migration policy as it shared this function with the Council, and until Lisbon the CJEU had only limited jurisdiction, which seems at odds with Wallace’s account of the Community Method. In the latter

scenario, it is certainly correct to state that some migration issues were transferred to the first Pillar. However, an unintended consequence of this statement is that policy-making was homogeneous both in relation to migration and all other EU policy areas included in the first pillar. This is simply not the case. A possible third interpretation of this phrase refers to the gradual expansion of migration-related issues touched on or covered by EU initiatives, an even broader use of the term Community (Stetter 2000).

To solve these ambiguities and differing interpretations, this dissertation offers an explanation based on the notion of delegation. The definition of this notion varies according to the school of thought or discipline from which it is approached. Delegation may be defined in an operational sense as coming about where powers such as policy proposal and implementation are formally ceded to “semi-autonomous central institutions” (Moravcsik 1993: 509)(Moravcsik 1993, 509). Instead of directly determining and executing aspects of policy formulation or implementation, a group of actors may decide to include an agent in the process. This involvement can vary in terms of degree and scope, ranging from compulsory consultative roles (e.g. principals are under obligation to take the agent's opinion into account when making a decision), to operational management of some kind (e.g. the agent is in charge of running the day-to-day working of a Fund), to external representation (e.g. the agent represents the principal in international fora).

While a thorough discussion of this concept is undertaken in Chapter 2, this thesis posits that delegation is an example of integration because member state governments collectively agree to advance towards a set of policy goals by involving a third party to whom powers are accordingly conferred. At that moment, member state governments abandon individual approaches to solving external and cooperative problems and allow themselves to be governed by shared positions. This is in spite of the fact that these common positions may subsequently operate against an administration's wishes or against the wishes of their political successors.

The matter of delegation is however relevant to broader questions of EU integration. For example, if the Community Method is identified as *the* process of integration then divergences from this Method cannot represent instances of integration. However, such a simplistic statement masks a more nuanced reality of

both EU affairs and the academic study thereof. Many of the works investigating new forms of cooperation in the EU have not been normative in their assumptions, indeed they have attempted to show how these new methods expand understanding of current trends in EU integration (Bickerton et al. 2014). That said the selection of the dependent variable for this research – the delegation of powers – involved commonality with research focused on the Community Method. First as highlighted in Wallace’s contribution, delegation is a key aspect of the Community Method. Secondly, the definition of delegation is based on a contractual agreement formalised in law, which matches the legal focus highlighted by Puetter.

Focusing on delegation is a simple and more traditional way of addressing questions concerning EU integration. It is simple because past scholarship offers models to detect it. Traditionally, delegation is regarded as the hallmark of EU cooperation. From an International Relations perspective, the supranational nature of the EU project is what makes it distinctive (Moravcsik 1993; Rosamond 2000). No other international institution has the same degree of authority or autonomy in exercising its powers. The negative side of selecting delegation as the focus of this dissertation however is that it seems to suggest that cooperation and integration are only significant when brought about through legally binding institutionalised mechanisms. This is an underlying assumption of liberal intergovernmentalism (Moravcsik 1999) as well as other theoretical framings of EU integration such as the 'comparativist' approach (Hix 2005: 37-38), which sees the Community Method as the only effective means of EU policy-making. This literature further assumes that member states either cooperate and delegate, or they do not “really” aim at coordinating their actions but instead opt for EU level window-dressing by promoting some form of loose coordination. Consequently, a focus on delegation seems to exclude other informal ways of cooperating.

While it is true that these forms of cooperation should not be ignored, choosing to focus on delegation makes sense in a number of ways. The AFSJ is one of the few EU policy areas where legislative output has been on the rise (Smismans 2011: 511), hence this indicates a preference for binding agreements in this area among the actors involved. Methodologically speaking the fact that delegation is codified in law offers a clear and less arbitrary way of measuring and evaluating integration than other forms based on discursive analysis or network relationships. Unlike delegation, networks operate through more informal contacts, which can

make the detection and analysis of their contributions more difficult. Furthermore delegation clearly maps the powers that EU institutions enjoy in a given policy area, thus capturing and offering a simple but structured response to questions that often appear in the media concerning the powers wielded by the EU. Unfortunately, the media often portrays powers as having been ceded to, grabbed or even stolen by the EU. In the haze of uncertainty on the true nature of EU / member state power dynamics, all manner of political games and tactics can play out. By re-phrasing questions about the EU around delegation, it is possible to re-establish some clarity about “who does what and why” (Franchino 2006a: 2). In sum, delegation offers a way of entering into the important academic debate on integration that has shaped EU studies from the beginning, while at the same time offering answers to more contemporary questions regarding what the Union actually does.

This research seeks to demonstrate that delegation has occurred and is significant, however it also shows that migration policy has been included in traditional methods of EU policy-making (Bonjour and Vink 2013). This is even more the case if EU policy-making methods are regarded as constantly evolving (Buonanno and Nugent 2013: 1). Thus EU migration policy has also been brought into the fold because EU policy-making has, on the whole, conspicuously diversified over the last two decades. This dissertation shows that the amount of legislation adopted in this area, the level of powers conferred on the Commission through secondary legislation, and the inter-institutional dynamics commonly associated with the Community Method are interlinked in the case of migration policy. The links between delegation and EU integration are further analysed in the contributions surveyed in the next section.

1.3.2) EU migration policy and European integration

Since the 1990s, and particularly after the success of the Single Market initiative, some commentators considered that EU integration was beginning to push into areas so essential to nation states that they argued the process was likely to stop or slow down considerably (Jones 2012; Messina 2007, 2009; Moravcsik and Nicolaïdis 1999; Ross 2011). Mounting concerns over subsidiarity and the pillar structure agreed in Maastricht were, and still are, regarded as confirmation of the

predominance of intergovernmentalism in the EU at the time. Migration was additionally regarded as an explicit threat to national capacity to control external boundaries and internal identitarian bonds (Geddes 2005b). In their two contributions analysing the Treaty of Amsterdam, Moravcsik and Nicolaïdis held that despite significant pushes for supranationalisation of the entire Third Pillar before and during negotiations, a mixed outcome emerged concerning decision-making, institutional powers, and competence granted to the Community. In their view “institutional sovereignty[,] geographical specificity [and] widely disparate interests” made any further integration impossible (Moravcsik and Nicolaïdis 1998: 29). A similar line is followed by Messina who argues that the peculiar form that EU migration policy has taken after Amsterdam,

can best be understood against the backdrop of the national interests and political pressures that [were] propelling each EU Member State along the path of cooperation and collective action (Messina 2007: 139-40).

The net outcome of both arguments was that member states were unlikely to grant significant powers to EU institutions, signalling resistance among national executives to any rhetoric of policy improvements under the EU aegis and the pursuit of an intergovernmental style of policy-making at the EU level.

Givens and Luedtke assert that the formation of a European migration policy is conditional upon the interests of and pressures faced by national governments. Following an intergovernmental logic, this contribution links domestic politics with EU outcomes. In brief, these authors contend that harmonisation, or lack thereof, in a given policy area and the nature of that harmonisation (either restrictive or liberal), is the product of the salience of that issue in a given member state (as revealed through press coverage) and of the domestic liberal structure (which either constrains the national executive or leaves it free to follow its preferred course of action in restricting immigration) (Terry Givens and Luedtke 2003; Terri Givens and Luedtke 2004, 2005). However, links between the two levels are not clear and the choice of dependent variables, i.e. harmonisation and liberal / restrictive, is problematic and normative. Authors diverge in their assessment of harmonisation attained by EU law mainly because they focus on individual aspects in isolation (for example comparing the policy areas of borders and asylum), or they pay attention

to legal texts or implementation mechanisms (Hollifield et al. 2014; Jordan et al. 2003; Mitsilegas 2002). Authors also diverge greatly on whether the content of policy is liberal or restrictive, as the next subsection will show.

Maintaining a focus on domestic forces, but taking a public policy rather than a purely intergovernmental approach, Freeman contends there is no one size fits for all for migration policy in Europe. Different migration policy areas rest at different points of the supranational / intergovernmental spectrum. For Freeman, for example, the fact that visa policy had been surpranationalised meant that “a domestic politics framework may be of declining relevance to that policy in Europe” (Freeman 2006). Although there had been several attempts to introduce asylum policy at the EU level, “it is still sensible to inquire into the national sources of asylum policies” (Freeman 2006: 241). Still recently, commentators have indicated that “major policy decisions [are evenly] shared between the EU and national levels”, indicating that the process of integration is only halfway through (Buonanno and Nugent 2013: 7).

In line with rational-choice approaches¹⁰, Stetter proposes a new framing of EU migration developments based on “regulation and principal agent theories” (2000: 80). Stetter notes that while neofunctional arguments “do account for the causes” that have put migration on the EU agenda, “they fail to provide an explanation for the ways and means that the EU espoused in order to deal with migration issues” (2000: 81). In the era of globalisation the regulation of migration

¹⁰ Studies of delegation are marked by a rational bias Mark A. Pollack, 'Rational Choice and Eu Politics', in Knud E. Jorgensen, Mark A. Pollack, and Ben Rosamong (eds.), *Handbook of European Union Politics* (London: SAGE, 2007b) at 32.. However rationality is “thin”, meaning that it does not necessarily have to be loaded with utilitarian assumptions about actors' motivations, but can contemplate a plurality of objectives Pollack, 'Rational Choice and Eu Politics', at 33.. Rational-choice assumptions have to match the various contexts in which they are applied Pollack, 'Rational Choice and Eu Politics'.. Taking into account the context in which policy-making takes place, EU architecture and environment elicit rational behaviour. Any Commission proposal undergoes extensive exploratory research before being tabled, a process that involves civil society, lobby groups, organised interests, and also experts and research institutes Laurie Buonanno and Neill Nugent, *Policies and Policy Processes of the European Union* (Basingstoke: Palgrave Macmillan, 2013) at 40-45, 102-05, Neill Nugent, *The Government and Politics of the European Union* (seventh edn.; Basingstoke: Palgrave Macmillan, 2010) at 121-25.. National figures such as ministers, prime ministers and heads of state and more Brussels-based actors such as the Permanent Representations represent the interests and positions of member states at EU level. The latter are the bodies that actually take care of most day-to-day issues in EU affairs, attending Council meetings and liaising with the capitals Jeffrey Lewis, 'Is the 'Hard Bargaining' Image of the Council Misleading? The Committee of Permanent Representatives and the Local Elections Directive', *Journal of Common Market Studies*, 36/4 (1998), 479-504..

has become regarded as a public good which has to be collectively managed to prevent negative effects on individual countries (Caviedes 2004: 291; Lavenex and Uçarer 2002). Intergovernmental agreements could solve negative externalities, as was the case for those created in the abolition of internal frontiers. However implementation of the Maastricht arrangements accentuated the fact that intergovernmental arrangements were not working, hence a step had to be taken towards supranationalisation in order to solve problems associated with cooperation. Stetter argues that these “regulatory failures” left no option other than to “communitarise” more. These regulatory failures are confirmed in the previous quotation from the Council and Commission Action Plan, where emphasis is given at overcoming the soft law output (Council 1998). The focus on previous regulatory failure is also present in Niemann’s work, which sets out that a second source of functional pressures was the “dissatisfaction of collective goal attainment” (2008: 570-72). In other words due to the investment EU politicians had made in the EU level approach to migration, pressures resulted from the shortcomings in previous Maastricht arrangements, i.e. overlapping competences, cumbersome legal instruments, unanimity requirements, absence of judicial review, and the diminished role of the Commission. This disappointment apparently diminished with the achievements reached through Amsterdam, but returned after Tampere due to delayed and uneven attainment of fixed targets (Niemann 2008: 571). Unfortunately Stetter does not unpack the notion of delegation and only superficially touches upon its determinants. While he refers to factors such as credibility and uncertainty¹¹, these are left unexplained (Stetter 2000: 81, 83). A principal-agent approach of this sort has however been employed recently to explain policy development in the external dimension of EU migration policy (Menz 2014).

Niemann offers a neofunctionalist argument to explain the progressive communitarisation of migration policy through treaty changes. His framework is not state-centric and combines four factors: a) “functional pressures”; b) “the role of supranational institutions”; c) “socialisation, deliberation and learning processes”; and, d) “countervailing forces” (Niemann 2008: 561). Niemann holds that the first three factors are “dynamics” which contribute to and strengthen integration, whereas the final element “goes against these integrational logics”

¹¹ See next Chapter.

(2008: 561).

Guiraudon has however criticised rationalist accounts of the development of EU migration policy for not appearing credible (2003: 264). “Rationality” is typical of two different approaches. The first, common before Maastricht, saw the emergence and development of EU migration policy as “compensatory measures” that needed to be established because of parallel projects elsewhere in the EU. Monar presents an example of this line of reasoning in highlighting the compensatory nature of Schengen as regards the Single Market initiative (2001: 750-54). After Maastricht the Fortress Europe rhetoric found its way into migration policy. Again, this perspective availed itself of coordination based on a rational response to the perceived threat from forms of migration such as irregular migration and asylum seeking. Guiraudon criticises how these rationalist approaches mask the “complexity and incompleteness” of EU migration policy and portray these policies as “an inevitable solution to a commonly defined problem” (2003: 264). Guiraudon’s description of the process of EU integration in this field in terms of a “garbage-can” model portrays the idea of an EU project historically emerging as an unintended consequence of other processes (2003).

This dissertation responds to these criticisms by noting that delegation results from logics of “complexity”, which it helps to solve. More precisely, delegation is a device frequently used in international contexts to solve complex cooperation problems by involving a third party. Indeed delegation is not the only potential solution to such problems, but rather it is one of many and is therefore not inevitable. Past empirical studies have shown that delegation is neither extremely conspicuous when present nor constant across legislative measures and policy areas, similar findings should be expected from this dissertation (Franchino 2004; Pollack 2003b). In short, delegation is only one of the tools available to and used by principals. Finally, delegation does not imply that all actors involved share or perceive problems similarly. Rather it implies that they share common beliefs and approaches on how to solve international issues. For instance, delegating agenda setting to a third party does not imply the same viewpoint or interest, but rather it demonstrates agreement over whether to go about solving a given issue.

1.3.3) Delegation and the liberal/restrictive nature of EU migration

policy

A number of commentators have analysed EU migration policy along a liberal / restrictive divide (Terri Givens and Luedtke 2005; Kaunert and Léonard 2012; Ruffer 2011). Rather than asking questions about policy-making or about EU integration, this strand in the literature addresses more normative dimensions. Unfortunately, however, this literature does not clarify to what this normative / restrictive divide is compared to. Is it compared to the *ex ante* situation at the European level? Is the comparison concerning the situation in a given set of countries? Is the comparison casted against some ideal type of policy (e.g. more effective, or more accountable, or fairer to migrants' rights)? Joppke questions what might explain the “gap between restrictionist policy goals and expansionist outcomes” in migration policy (Joppke 1998). In line with negative public perceptions, governments wished to reduce unwanted flows of immigrants. Joppke considers two forms of unwanted immigration: asylum-seekers and family reunification, forms accepted by liberal states on humanitarian grounds; and, “illegal immigration”, which happens because of “states' sheer incapacity to keep migrants out” (Joppke 1998). This failure does not stem from international obligations or states' reduced capabilities within a new global scenario (Koslowski 1998; Sassen 1998). Instead Joppke emphasises the role of domestic “legal process” as a means of explaining that gap (Joppke 1998: 271). That is, she cites the accumulated jurisprudence of some member states as making it impossible for executives to achieve their stated, restrictive goals, which severely limits their policy options. Joppke's work originally arose as a response to a past contribution on this debate, which held that western member states were proceeding towards expansionist policies in liberal states (Freeman 1995). Although still separated into two different sets, i.e. old and new immigration destinations, EU member states were nonetheless bound to integrate their “approach to immigration [and ...] take the liberal democratic form”, which is “broadly expansionist and inclusive” (Freeman 1995: 881). According to Freeman, the fact that “governments grapple with common problems” explained this convergence (Freeman 2006: 227).

The idea of an overall trend in EU migration policy is present also in Guiraudon's work, which sets out that,

migration management in the EU context is focused on preventing unwanted migration, through visa policy and carrier sanctions, the establishment of buffer zones[,], the constitution of a database of inadmissible aliens (the Schengen Information System) and of asylum-seekers' fingerprints (EURODAC) (see also Finotelli and Sciortino 2013; 2003: 267)¹².

Recent academic contributions point in the direction of a qualification of Guiraudon's "venue shopping" argument. Kaunert and Leonard suggest that contrary to what is expected in light of the a venue shopping argument, "the main EU asylum legal instruments have overall rendered asylum standards more liberal, rather than more restrictive in the EU" (2012: 1409). There has, in particular, been a recent wave of literature that associates liberal policy trends with the Commission and restrictive ones with the Council (Kaunert 2010; Luedtke 2011; Menz 2014; Ripoll Servent and Trauner 2014).

While highlighting an important area of debate, these contributions seem to tackle the issue of EU integration in this area by referring, either implicitly or explicitly, to policy convergence. This convergence can be in the direction of liberal or restrictive policy goals, however it has been difficult to find agreement between these positions thus far as the two notions are contested. Some authors compare EU policies to existing member state policies, while others make comparisons with the policies of entering member states (Luedtke 2011; Mitsilegas 2002). Another group uses international norms as a benchmarks and tends to emphasise the lowering of standards (Bell 2010; Juss 2005). And yet another group points to possible future developments once supranational actors get involved, hinting at an increased monitoring and more even implementation emerging as a result (Acosta Arcarazo and Geddes 2013; Menz 2014; Ripoll Servent and Trauner 2014).

Huysmans asserts that the Single Market represented a political opportunity for a new framing of migration in terms of threat to societies (2000: 759-60). Echoing developments at domestic levels, and particularly in the context of

¹² The SIS database contains information on some categories of wanted or missing persons and objects. The EURODAC is an EU asylum fingerprint database which gather data from asylum seekers and irregular migrants.

important shifts in “Western European welfare states”, “migration has been increasingly presented as a danger to public order, cultural identity, and domestic and labour market stability” (Huysmans 2000: 752). This laid down the groundwork for Europe-wide views on migration that were instrumental in integrating policies at the EU level. That said the point for Huysmans is more about understanding how and to what extent the process of EU integration has influenced the securitisation of migration, rather than how the securitisation of migration explains the emergence and the present institutional standing of EU migration policies.

Recently some authors have begun to take issue with these explanations. Contrary to the common view that migration has been increasingly securitised after 9/11 and the Madrid and London bombings, with Frontex acting as undeniable evidence of that trend (Wolff 2008: 255), Neal holds that Frontex is better understood as “a logical continuation of the integration process and the principle of free internal movement in the EU”, even if “this does not completely discount the security dimension (2009: 334). Indeed, Frontex exemplifies instances of integration which are not, as the securitisation arguments would suggest, fruits of emergence and exception but are rather the continuation of risks management logics which had already been part of the EU vocabulary for years when the agency was established.

In terms of the substance of research, this dissertation strives to steer clear of evaluating the restrictive or liberal nature of EU policies. While such an analysis would address important and central questions on this topic, it could distract from the analysis of EU integration in this area. While it is difficult to remain neutral on a sensitive political issue such as migration, it is essential that a normative-free view of what has occurred in this policy area be provided here (Christina Boswell 2010: 2278). The whirlwind of media headlines certainly stirs up questions of how EU cooperation on migration might affect the state of democracy, the EU political project and migrants' rights. The answers to these questions are indeed important, particularly in the context of ever-increasing politicisation of migration, mounting concerns over the democratic legitimacy of an EU level approach to such issues, not to mention the EU project as a whole. Yet it is puzzling that as the “democratic deficit” critique of EU institutions was mounting and gaining support, so too was delegation of powers to the EU in this area. Commentators such as Geddes (1995)

were quick to highlight the social and political risk of such contradictory behaviour, which saw the gradual transfer of powers, that had up to that point been the preserve of national administrations, to what the public saw as 'unaccountable' institutions (Financial Times 2002d). This dissertation seeks to address these remarks in two ways. First it maps the EU's powers in this area to illustrate exactly what lies within its remit, and particular attention is paid to the legal mandate of the Commission. Secondly, it identifies the most likely reasons behind the Commission's empowerment in this area, thereby making sense of what could at first appear to be a puzzling cession of powers and competences. In terms of the latter, this dissertation provides a further response to frequent questions concerning 'centralisation' trends in the EU (Parsons and Smeeding 2006: 19).¹³ By unpacking and explaining delegation, this dissertation addresses gaps in knowledge on the extent to which powers have been centralised through EU institutions and the degree of freedom EU bodies have in exercising those powers.

1.4. Hypotheses and theories of this research

Borrowing insights from past academic studies, this thesis uses delegation to explain the evolution of EU migration policy and its present role. Supported by principal-agent models¹⁴, this approach sheds some light on the dynamics underlying delegation by describing how principals and agents can interact under different policy and institutional settings. These models facilitate understanding of the varying degrees of delegation and discretion identified by referring to a number of factors. In particular, the review of academic literature on delegation in Chapter 2 highlights the role of some likely determinants, namely: uncertainty; credibility of commitments; and, efficiency; plus institutional dynamics. That said this review shows the extent to which independent variables used by scholars are entangled and overlap, which makes attributions of relative importance extremely difficult. The ultimate purpose of Chapter 2 is therefore to bring some conceptual clarity and, importantly, to operationalise these notions so they are suitable for analytic use in

¹³ This theme is much in vogue also in other policy areas at present (November 2013), as for instance in economic and fiscal policies Financial Times, 'Eu Calls for Centralisation of Powers', *Financial Times*, 2 October 2012, Otmar Issing, 'The Risk of European Centralisation', *EuropeanVoice* (2013)..

¹⁴ See next chapter.

the empirical chapters.

Lavenex and Uçarer hold that migration policy is, by definition, likely to engender collective action problems (2002: 209). This is echoed in official EU documents. In the words of the Commission, “**immigration is by nature a cross-border phenomenon**. A coordinated approach is essential to help Member States to manage it more successfully”¹⁵ (Commission 2007d). The idea underlying this and other statements made in official EU documents is that migration, being a social phenomenon that is by definition international¹⁶, is likely to feature negative externalities and therefore should trigger cooperation between states. Consequently member states can delegate powers to a third party (or parties) to regulate that cooperation. If migration policy is essentially about controlling borders, deciding who has the right to enter a country or not, what he or she is entitled to, and what he or she is entitled to do in that country, has clear effects on the receiving state and also other states. In the EU this is true in two respects. The first concerns member states, which must coordinate in order to avoid unilateral action within their ranks. In the second respect, collective action by EU member states causes adjustments of some form or other in other non-EU states.¹⁷

Theories of delegation hold that institutional contexts are relevant to the emergence of delegation. Authors converge on the fact that conflict between Council and Commission is likely to hinder the possibility of delegation, but are divided as to the effects of divisions within the Council (Franchino 2006a; Pollack 2003b). Turning to rationales, it has been argued that member states would confer powers to the Commission in relation to agenda setting, monitoring and sanctioning in order to solve problems of “credibility of commitments” in this policy area (Moravcsik 1999; Pollack 2003b). Past delegation studies predict that higher levels of uncertainty connected to a policy area make it likely that more delegation would be witnessed therein. This is either because the agent to whom powers are conferred is an ‘expert’ in that area, or because the policy area is riddled with information gaps (Franchino 2006a; Pollack 2003b). Finally according to some authors, the more principals are likely to gain from streamlined decision-making and “a

¹⁵ Emphasis in the original.

¹⁶ This does not intend to diminish the significant dimension of internal migration.

¹⁷ For reasons of space and resources, this work is not going to look at this “external dimension” of EU migration policy.

reduction in workload [through] reliance on bureaucratic expertise”, the more delegation should be expected (Franchino 2002: 685; Pollack 2003b). However as highlighted in section two of this chapter and as will be highlighted in the next chapter, authors at times refer to efficiency as related to the achievement of policy goals, something which is more accurately described as effectiveness (Stetter 2000). If these two notions are disentangled the resulting picture is more complex. In terms of effectiveness, previous failures are likely to trigger more institutionalised cooperation.

1.5. Methodology

Quantitative and qualitative research is employed with the aim of understanding the extent of and rationales for delegation in migration policy at the EU level. To achieve this existing academic literature is first examined to single out the rationales commonly identified as conducive to delegation, they are then applied to the case of EU migration policy. In addition to this “confirmational strategy” (Bordens and Abbott 2011: 48), Chapter 2 is focused on making order of a theory of delegation that relies on vague and ill-defined independent variables. Chapter 3 then applies a promising quantitative method that has seldom been tested to date. This is carried out in the context of a policy area where quantitative research is largely absent, normative viewpoints tend to dominate, and comprehensive studies are scarce.

The first method employed in analysing delegation involves two rather similar quantitative models previously employed by Franchino (2004) and Pollack (2003b). The objective of which is to quantify how much delegation is present both in single legislative measures and in clusters of legislative measures grouped mainly according to their legal bases. This approach has produced a systematic account of delegation within an EU policy area (migration policy in this case), and has facilitated an in-depth examination of the constituent parts of this policy area. Owing to the limits of the quantitative models on offer in the literature¹⁸, the second method involves qualitatively analysing the determinants of delegation identified in the literature review carried out in Chapter 2. This is achieved over the course of four chapters, and the examination of each determinant concludes with a further

¹⁸ See Chapters 2 and 3.

look at delegation arising from individual measures and policy sub-areas (i.e. migration categories).

Migration can be framed within the context of a wide variety of disciplines such as anthropology, sociology, legal studies, political science, and comparative literature, to name but a few (Christina Boswell 2010: 278). Much of this work is interdisciplinary in nature, involving literature on delegation, the EU, and migration studies. Insights derived from legal studies are included here as some legal background is essential to understanding developments in the remit and competence of EU law in this area. Relevant legal commentaries and interpretations of EU migration law are also used throughout (Chalmers et al. 2014; Craig and de Búrca 2011; Hailbronner 2010; Peers and Rogers 2006; Peers 2011). Yet despite calling on interdisciplinary sources to enrich its content and findings, this thesis remains rooted within the realm of political science.

Indeed, in relation to political science, decisions on migration matters are traditionally considered as states' competences. Within the EU, substantial differences exist between member states over who is considered a migrant and who is not. Although the UN has put forward a recommendation as to who should be classed as an international migrant (mainly based on the intended duration of stay), the application of that definition by member states has been inconsistent (Fassmann 2009: 29-36). In practice and for statistical purposes, a migrant can be defined as a person not holding the nationality of the country he or she moves to or they could also be defined as a foreign-born resident. Geis, Uebelmesser and Werding nicely capture the effect of these two different definitions by displaying different calculations for immigrant populations in Germany, France and the UK (2011: 770-72). The difference between these two definitions results in a variation of more than two million among for immigrants aged 18-65 in France, while for Germany the variation is more than 3.5 million, and for the UK it amounts to a variation of 1.8 million. There were nearly 22.875 million foreign citizens in the EU-25 in 2005, but 40.560 million people were born in a different country from the one they resided in (Fassmann 2009: 30-33).

This dissertation does not focus on an analysis of the migration phenomenon *per se* as might be captured by pursuing questions such as 'why do people

migrate?’, or ‘what could explain the occupational level of group X as compared with group Y in country Z?’. Rather this study focuses on the policies the EU has developed regarding migration. In the EU a first differentiation is between rules concerning EU nationals and TCNs. At an abstract level this distinction is solely administrative in nature, and is superimposed on the same phenomenon of movement of people. Although in the majority of cases it is possible to differentiate between EU legislation addressing the former or the latter group, there are exceptions where both groups are covered within a single measure¹⁹. And while a comparison of these two sets of legislation is worth investigating, it is not the object of this dissertation. This study instead focuses on legislation regarding TCNs, and this choice presents several benefits. First it involves a smaller time span, as competences regarding TCNs only emerged after Maastricht. Secondly, and partly arising as a consequence of the latter, the legislative sample is also reduced when compared with the body of legislation adopted over more than 50 years of cooperation on freedom of movement for EC workers.

EU legislation on migration is divided into five categories: asylum and refuge; irregular migration; legal migration; administrative cooperation; and, borders and visas. First, such categorisation facilitates consideration and challenging of the existing literature, as these are the most common groupings found therein. Secondly, these categories reflect administrative divisions at the EU level. The Commission usually divides migration issues along these lines, for instance through its Communications. For the Council, the story is more complicated. While there is only one Council formation dealing directly with migration at ministerial level, fourteen others have been identified as having dealt with migration issues at the lower levels, the majority of which concerned borders and visas. Finally, and most importantly, these categories match treaty articles, which form the basis of secondary legislation²⁰. Decision-making across these areas has not been uniform, as the Treaty laid down varying rules for these articles. Thus Chapter 3 examines the extent to which different decision-making regimes entailed varying degrees of delegation. The ultimate aim is to gain an understanding of what accounts for variations in delegation across migration categories.

¹⁹ For instance, this is the case of 2004 Free Movement Directive. The Directive covers both EU nationals and their TCNs family members.

²⁰ However, not all EU legislation can be easily referred to a single article. On this, see Chapter 3 for a broader discussion.

The analysis focuses on secondary EU legislation enacted between May 1999 and November 2009. This is the empirical material that sets out the dependent variable, i.e. delegation. Yet this alone does not clarify why secondary legislation, and not primary legislation, is the subject of analysis. First, measuring delegation present in secondary legislation maps what has happened after the guiding principles and objectives of a policy area have been crystallised through the Treaties. In other words, it provides evidence of the relative distribution of powers among EU actors in an evolving policy domain and provides guidance as to how the governance of that policy can be understood. Secondly, previous studies have argued that there are fundamental differences between delegation in primary and secondary legislation. This dissertation tests the extent to which this is actually the case. More precisely, Majone argues that there is a fundamental difference between delegation through the Treaties, which is fundamentally motivated by the need to strengthen credibility and thus displays high discretion for the Commission, and delegation through secondary legislation, which is aimed at achieving efficiency and hence shows lower levels of discretion for the Commission (2001). Yet Pollack holds that Majone's position is debatable on both theoretical and empirical grounds (Pollack 2007a). Theoretically speaking the distinction between the two rationales is not as neat as Majone suggests, but is more of a continuum. Empirically, past studies have shown that discretion varies gradually rather than dichotomously.

The Commission and the Council are the two main actors considered in this dissertation. A study of delegation is biased towards those institutional actors with the power to grant authority and the positioning to receive it. The Council²¹ and the Commission fit this profile within the context of the EU. In addition, arrangements in EU migration policy emphasise the importance of looking at member state governments. Until 2004 the power of legislative initiative was shared between the Council and the Commission in relation to the majority of migration sub-sectors, while the power of adopting legislation rested mainly with the Council. The EP was only loosely involved through consultation until 2004 when it joined all but a few areas, such as labour migration. The impact of other actors was also considered

²¹ Particularly after the broad change in policy-making occurred in 2005, a case can be made for including the EP as a further principal within the principal-agent relation. However, due to the complexity of Council/EP and Commission/EP relationships, the focus has been kept on the Council as the main actor. Documents from the EP have been consulted regularly, but a fuller coverage of the EP was beyond the scope of this dissertation.

during the documentary analysis concerned with investigating the independent variables. These actors included international organisations, the media, national politicians, EU officials, think tanks and academic contributors to this field. Particular attention is paid to a limited set of countries, which are either considered representative of broader trends or are central to the issue under discussion. The criteria on which such selections were made are: size of foreign population; size of native population; different migratory experiences; and, voting weight in the Council²². This has resulted in a focus on France, Germany, Italy, and the UK. Italy has only experienced substantial migration inflows since the mid-1980s and can be considered representative of the so-called new countries of immigration in Europe, a set that also includes Spain and Greece (Arango 2012; Geddes 2003; Okólski 2012b, 2012a; Zincone 2011). For Zincone, Italy and these countries share “rapid inflow, substantial volume and a high proportion of undocumented immigrants” (2011: 247). Germany experienced mass immigration from at least the 1950s (Borkert and Bosswick 2011; Fassmann and Reeger 2012; Martin 2014; Okólski 2012a). In terms of volumes²³, it has been the top destination country for asylum seekers for several years and has featured the largest migrant population in Europe. Importantly, together with France, Germany was one of the countries willing to seek a European solution to migration issues since the 1980s. France and the UK, former colonial powers, have much older and diversified experiences concerning migration (Cerna and Wietholtz 2011; Geddes 2003; Hansen 2014; Hollifield 2014; Wihtol de Wenden 2011). There are a number of elements that distinguish these two countries, but the most noteworthy for this research is the different stances taken with regard to border control. The consequent decision of the UK to negotiate a different relationship with the EU on the entire JHA area is also notable (Adler-Nissen 2009).

Chapter 2 and 3 look at the criteria for coding. The benefit of employing such a technique is that coding can clearly provide confirmation of whether delegation is present in a single piece of secondary legislation or across a group of measures and policy sectors. In order to ensure that this approach was feasible and would yield significant results, a pilot study was carried out on a subset of legislative

²² Indeed, they alone account for 116 votes (29 each) of the total 345 (33.6 percent) (as of 2009). Under Nice, a triple majority was needed to get measures through the Council. That said empirical research warns against rushed judgements on the importance of Council voting, as this rarely takes place and a consensus practice prevails *The Economist*, 'Why Voting Weights Don't Matter', *The Economist*, 15 June 2007, sec. Charlemagne..

²³ For more details on stocks and flows in these countries, see Chapter 1, 4 and 6.

measures (the EU migration funds). Consistency in the coding results was ensured by carrying out the procedure twice, once at the very beginning of the project, and then again in parallel with the qualitative analyses set out in the following empirical chapters. That said, as set out in some detail in Chapters 2 and 3, there are several limitations to an exclusively quantitative research based on the models developed so far in the literature, such as coding criteria and vagueness of notions to be tested. To address these problems, qualitative analyses were carried out for the five policy areas identified above.

A number of sources were consulted to find and assess the relative importance of the determinants of delegation. First, official sources such as Commission, EP and Council documents were examined. While obtaining documents by the former two was not problematic, a small proportion of Council documents were restricted from public access due to security concerns (i.e. relating to residence permits and visas) or foreign policy implications (e.g. visa lists). It was essential to focus on the Council because this is the institutional gathering for the member states; i.e. the principals in the principal-agent model employed here (see Chapter 2). It is also seen as an important driver of policy-making and legislation in this policy area, due to the relative weakness of the EP during much of the period considered (Aus 2008; Terry Givens and Luedtke 2003; Ripoll Servent and Trauner 2014). And finally, the Council is the most direct expression of member state involvement in the EU architecture. Hence, it is sensible to look at Council documents as confirmatory evidence for the analysis.

Information from major migration information providers was used to contextualise and critically evaluate these documents, and to identify and explain other factors at play. These sources included the Organisation for Economic Co-operation and Development (OECD), the International Organisation for Migration (IOM), Eurostat, the European Migration Network (EMN), as well as established think tanks and organisations focused in whole or in part on migration issues (e.g. MPI, CEPS). To complement this analysis, media coverage of migration has been examined extensively using both the *Nexis* and *Agence Europe* databases. Other studies have already identified this method as an effective strategy for grasping the relevance of a given issue at both national and European levels (Caviedes 2015; Terri Givens and Luedtke 2005; Pollack 2003b: 71; Giuseppe Sciortino and Colombo 2004). In addition, a small number of elite interviews were conducted

with EP officials, the Permanent Representations, and the Commission²⁴.

Use of these materials is intended to shed light on the factors accounting for member states' repeated choices to delegate competencies to the EU institutions. In other words from a rational-choice perspective, the “validity” question²⁵ is addressed by referring to sources that explicitly make links between issues of uncertainty, credibility of commitments and efficiency, and their effects on policy areas or issues where delegation occurs. Content analyses were run within the two above-mentioned databases. However, the objective was not to measure the topics by counting the number of occurrences, as is the case in most content analyses (Matthews and Ross 2010: 395). The objective was more to identify the presence of trends and phenomena in member states' public, political and in expert / practitioner discourses. The main motivation behind this choice was to check for the existence of the phenomena that are purportedly conducive to delegation and, where present, to look at their effects. Consequently, this was a more thematic analysis (Matthews and Ross 2010: 372-85).

To ensure reliability of findings and replicability, the coding method for the dependent variable is set out clearly. The advantage of employing a textual analysis of independent variables is discussed in Chapter 2. Appropriate references are provided for all documents, data sources and literature discussed in the text.

1.6. Plan of the thesis

This thesis consists of a total of eight chapters, including the present introductory chapter. Chapter 2 focuses on theory and provides a comprehensive and in-depth analysis of some of the more notable theoretical proposals concerning delegation in the EU. This review does not limit itself to a presentation of the main arguments,

²⁴ A number of potential candidates were intentionally sampled in three EU institutions, the Commission, the Council and the EP (“purposive sampling”) Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2004) at 333-34. Unfortunately only a few were available for interviews. In addition, the majority of respondents came from the Commission, which skewed any possible balanced account. As the main goal of the interviews was to ascertain interviewees' opinions on the reasons for cooperation and delegation in migration policy, semi-structured interviews were selected as the most appropriate approach Bryman, *Social Research Methods*..

²⁵ Put simply, a validity question asks ‘am I researching what I think I am?’ Bob Hancké, *Intelligent Research Design, a Guide for Beginning Researchers in the Social Sciences* (Oxford: Oxford University Press, 2009) at 86-90..

but also extracts suitable hypotheses about the delegation in EU migration policy from the works presented. The empirical portion of the text runs from Chapter 3 to Chapter 7 inclusively.

Chapter 3 focuses on coding secondary EU legislation on migration. This is an important exercise in mapping current EU powers on migration and also entails testing the hypotheses identified in Chapter 2. While most literature on EU policy focuses narrowly on individual areas such as asylum or labour migration, Chapter 3 presents a quantitative analysis of the entire legislative *acquis* that relates to migration policy. Chapters 4 to 7 in turn deal with the migration categories, i.e. asylum and refuge, irregular migration, legal migration, and borders and visas. The objective of which is to assess each of the three independent variables to relation to the level of delegation in both individual measures and across policy subsectors. Finally, Chapter 8 brings together the theoretical perspectives on delegation, insights from EU migration literature, the main accounts of EU integration, and the findings of the empirical chapters, and draws conclusions in relation thereto.

2. Varieties of delegation

Delegation is far from being an uncontested notion. Indeed, delegation studies often involve different views on what delegation is and why it occurs. Yet this variety is under appreciated in the literature. This is no more the case than in relation to the likely determinants of delegation, which has seen a number of different hypotheses put forwards in the literature. Therefore this chapter offers a comparison of different theories of delegation rather than presenting delegation theory as a unified body of thought. Section 2.1 opens with an extensive treatment of the dependent variable, i.e. the notion of delegation. Section 2.2 assesses the determinants of delegation already identified in the literature, with the aim of identifying relevant hypotheses to guide analysis in the following empirical chapters. Finally, Section 2.3 concludes by briefly summing up the main findings of the chapter.

2.1. The Dependent Variable: Delegation

Studies on the EU have long debated whether and to what extent member states were integrating (Rosamond 2000). This dissertation captures integration in the form of a specific policy-making outcome, which is the conferral of power over a policy matter to a given institution, i.e. ‘delegation’. Considered from the standpoint of EU law, delegation is rather narrowly defined in terms of “quasi-legislative acts”. The Commission is also identified as having “significant powers in the field of delegated legislation”, and indeed the Council can confer “quasi-legislative powers upon the Commission” (Chalmers and Tomkins 2007: 94; Nugent 2006: 171-72). The Lisbon Treaty further specified the nature of these “delegated acts” (Chalmers et al. 2014: 67-72). Across the legislative set consulted in this study, these powers were generally allocated to the Commission, save for a handful of exceptions (Peers 2011: 21). In this dissertation however, the term delegation is taken in a much wider sense, as set out below.

The dependent variable of this research project has been variously framed in the academic research. Moravcsik has analysed delegation in the context of a wider study of the reasons for and conditions of cooperation at the EU level, in a complex

interplay between domestic and international dynamics (1999). For Moravcsik, the EU differs from all other international organisations because of its high level of “institutionalisation” (1993: 509). Sovereignty is delegated when powers such as the power of policy proposal or implementation are conceded to “semi-autonomous central institutions” (Moravcsik 1993: 509). It is important to highlight that delegation for Moravcsik only arises upon a substrate of previously established cooperation, which materialises through a liberal preference formation at the domestic level and an intergovernmental bargain at the EU level. Indeed the true goal of his thesis is to understand the conditions for cooperation itself, and only after this is institutionalisation dealt with (Moravcsik 1999). Finally Moravcsik is exclusively interested in institutional changes occurring in the Treaties, and disregards secondary legislation. The different *loci* of delegation are however tackled by Pollack.

Pollack identifies the first form of delegation as deriving from primary legislation (i.e. EU Treaties) and institutional design (2003b: 56, 65). He then adds a cross-spectrum policy comparison to this institutional analysis, recording the level of delegation and discretion in secondary legislation (2003b: 775-154). In contrast to Moravcsik (1999) but in common with Franchino (2004), Pollack’s analysis takes cooperation as a given. Indeed the latter two authors do not question how cooperation comes about, but instead start from there to identify the criteria for delegation in the EU. Pollack notes that functionalist theories of delegation explain

institutional choices [...] in terms of the functions that a given institution is expected to perform, and the effects on policy outcomes it is expected to produce, subject to the uncertainty inherent in any institutional design (2003b: 20).

In other words, functionalist theory explains delegation starting from its expected “effects”. This definition immediately exposes the “instrumental” rationality assumptions of this framework, which ultimately relies on the ability of actors to estimate the likely consequences of different institutional options and shape their conduct accordingly. This conception of rationality is apparent in how Pollack describes principal-agent models. In his words these models draw,

from rational-choice theories of domestic and international politics, arguing that rational actors [...] instrumentally delegate powers to executive and judicial agents systematically in order to lower the transaction costs of policy-making, and that in doing so they tailor the discretion of their agents, again systematically, as a function of several factors including the demand for credible commitments, the demand for policy-relevant information, and the expected gap between the preferences of the principals and the agents (2007, 4).

Principal-agent analyses are validated insofar as “executive and judicial agents” are found to correspond to these functional roles (Pollack 2003, 6). He foresees “four key functions” which principals are likely to delegate in the EU: a) “monitoring compliance”; b) “solving problems of incomplete contracting’ among principals”; c) “adopting credible, expert regulations of economic activities in areas where the principals would be either ill-informed or biased”; and, d) “setting the legislative agenda so as to avoid the endless ‘cycling’ that might otherwise result if the principals retained that power for themselves” (Pollack 2003, 6). In practical terms, provisions in secondary legislation that grant such powers are considered delegation.

Rationalist approaches to delegation agree on the importance of transaction costs as a reason for delegation. Drawing on regime theory, Moravcsik argues that functionalist theory predicts the “creation of common rules and procedures” to reduce transaction costs, which in turn affects “the information and expectations of national governments” (1993: 514). Dahlman holds that there are three main categories of transaction costs, “search and information costs, bargaining and decision costs, policing and enforcement costs” (1979: 148). Similarly, Moravcsik identifies transaction costs as “the costs of identifying issues, negotiating bargains, codifying agreements, and monitoring and enforcing compliance” (1993: 508). Transaction costs are thus connected to problems of efficiency and effectiveness of collective actions.

While Moravcsik’s aforementioned definition focuses on institutional autonomy and is captured in debates on EU integration, Franchino’s provides a more hands-on policy-oriented formulation wherein “any major provision that gives the [...] Commission the authority to move the policy away from the status quo” is

considered delegation (2006a: 109-10). Franchino asserts that strategic game calculations within different sets of decision rules among EU level players are essential to grasping delegation dynamics in the EU (2004). Pollack adopts a functionalist interpretation of delegation as the essential notion to understand principal-agent dynamics in the EU (2003b). And all three appear to share common views on the relevance of “principal-agent conflict” in explaining the dynamics of delegation within the EU (2006b: 218-19). In particular, principal-agent models give a reliable description of the mechanisms that constrain agents and their likely attempts to escape excessive control.

In a study covering a period of over 40 years, Franchino gathers 158 “major pieces of [EU] legislation” and finds that delegation to member states accounts for 87 percent of the sample (138 measures out of 158) (2004: 280). He observes that the delegation in EU secondary legislation tend to favour member states’ administrations rather than EU institutions. This finding confirms the theoretical premise that member states delegate to third parties only on the basis of lacking credibility surrounding national implementation (Franchino 2006a: 299). Franchino therefore argues that delegation to EU bodies is a sort of second option of member states (2004: 276-80). This finding can at first appear paradoxical. Indeed at first glance it could be seen as member states delegating to themselves (Franchino 2001: 191). However delegation from the Council to member state administrations is still understood as delegation because these are distinct entities. Franchino observes that if the Council is considered an EU institution (as it should) then the act of delegation is not void of substance but, on the contrary, constitutes an act of integration. In fact when the Council delegates to member state authorities it is always done through an EU act, which is legally binding upon member states and imposes a competence on the EU in that particular policy area. This indicates that member states have decided to cooperate and integrate in that particular area.

Besides these commonalities, there are also differences in how authors understand and explain delegation. Moravcsik contends that in addition to being functional, delegation can be politically motivated. While he does not present a definition of the latter, it seems it serves legitimising and blame-shifting purposes for member state governments (Moravcsik 1993). This is echoed by Thatcher and Stone Sweet who suggest that one reason for delegation is avoiding “taking blame for unpopular policies” (2003: 3-4). Hawkins et al. define delegation as,

a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former. This grant of authority is limited in time or scope and must be revocable by the principal (Hawkins et al. 2006: 7).

It is important to remember that this authority is made explicit in a legal text, which differentiates it from other aspects of the Commission's involvement in EU affairs such as its informal agenda setting function (Pollack 2003b). The Commission may or may not exercise such powers, but the essential point is that it has a statutory authority to do so if it wishes.

McNamara takes another approach in defining delegation as shaped by both rational and cultural factors (2003). She holds that the,

basic premise of principal agent theory is that in certain instances, one actor (the principal) may gain from delegating power to another actor (the agent) if there is an expectation, first, that the agent's subsequent actions will be aligned with the principals' preferences and, second, that moreover there is some advantage to moving policy capacity to the agent (2003: 43).

While this characterisation of principal agent approaches in many respects includes some of the features already mentioned above, a more controversial aspect of McNamara's definition emphasises the synchronisation of principal-agent preferences. However this undermines what Pollack described as the need for mechanisms of control, and, at a deeper level, the principal-agent model itself. In fact this model is based on the possibility that the principal and the agent might diverge in their opinions and preferences at some point in time. In such instances, the fact that the agent may sanction the principal for non-compliance with policy objectives can be the consequence of a deliberate institutional architecture that aims to insulate the agent. On the other hand, there is obviously the risk that the agent's initiatives might fail to please the principals, and the model provides insights on how to address the potential for slippage on the part of the agent in favour of the principal. Theoretically the agent can be obliged by a statutory constraint to stick to a determined objective, as for instance is the case for the European Central Bank.

In line with this reasoning delegation to an agent, particularly in the case of multiple principals, allows the agent to monitor and, if needs be, sanction the principals for deviating from any pre-defined policy path. A divergence of preferences is implicit in such a scenario.

Majone clarifies this latter point about insulation with reference to 'trustees'. Trustees should be established in those policy areas where political contestation is high and can adversely affect the policies carried out. Some authors emphasise that it is specific aspects of policy and not contestation that is behind higher delegation in those areas where stability favours economic investment and broader involvement of actors. However Wonka and Rittberger doubt a differentiation between economic and social areas is justified from the point of view of discretion being granted to an agent (Wonka and Rittberger 2010). Delegation to trustees should incorporate a shield from future political interventions precisely because the purpose of a trustee is to limit political interference and achieve Pareto efficient outcomes. Using this logic of delegation, the best option for principals is to choose agents “whose policy preferences differ systematically” from their own (Majone 2001: 104). The greater the degree of discretion member states concede to an institution the greater the degree of commitment they show, which in turn implies cooperation (Thatcher and Stone Sweet 2003: 12). This logic of delegation contrasts with efficiency-based arguments, which has the purpose of reducing decision-making costs given that one of the “key problems political principals face is bureaucratic drift” (Majone 2001: 103-04). In sum, principals should design agents and control mechanisms in different ways according to their needs. While Majone’s insights have the benefit of highlighting the difference between different forms of delegation, his idea that the two are empirically separated in normal EU affairs is less convincing. Indeed it is not entirely clear why EU primary legislation answers to a logic of credibility, while secondary legislation to one of efficiency.

Principal-agent theories however tell a cautionary tale. It is possible to view this as a contemporary Machiavellian approach, in that the model suggests the *Principe* (*mutatis mutandis*, the principal) should assume that the agents is likely to act on the basis of their own preferences. Thatcher and Stone Sweet argue that “agents are likely to develop their own interests” (2003: 4) for a number of reasons: they want to “produce the best policies”; they are the subject of pressures from a

variety of actors such as lobby interests, NGOs and think tanks (Hix 2005: 27-31); or, they want to expand the remit of their competences (Franchino 2006a). When agents behave differently to how principals had anticipated, the latter incur “agency loss”. Principals have a number of control mechanisms they can adopt *ex ante* or *ex post* to re-direct policy towards their preferred goals (Pollack 2003b).

However, principals face a dilemma relating to the effectiveness of their policy, as they are dependent on the agent’s capacity to carry out the mandated tasks. The more principals constrain agents in their actions, the more the achievement of these goals might be jeopardised. Minimal “discretion” must therefore be guaranteed, indeed this is the reason these actors are called 'agents' and not 'tools' (Dimitrakopoulos 2001: 112). Principals must get this measure of discretion right to avoid jeopardising their primary goal while also preventing loss of control. As this framework goes to great lengths to explain the design portion of policy and institutions, it is naturally inclined towards the kind of rationality assumptions the Frankfurt school termed “instrumental rationality” (Williams 1993: 82-98).

It is therefore fair to say that delegation is not solely about the conferral of power. It is also about the discretion with which that power is wielded. Discretion refers to the potential for agent participation in shaping a policy’s content, timing, duration, scope of action, or indeed any other aspect thereof. Discretion entails responsibilities, which in turn calls for accountability (Majone 2000: 290-98). In other words, the more discretion is granted to an agent the more questions about legitimacy are likely to arise. The academic literature has long focused on issues of accountability, legitimacy and transparency in EU migration policy (Christina Boswell 2010; Pollak and Slominski 2009).

This rational-choice approach has nevertheless been the subject of criticisms on a number of fronts. Rosamond (2000: 115, 116) holds that these approaches tend “to define institutions as formal legalistic entities and sets of decision rules that impose obligations upon self-interested political actors” (Rosamond 2000: 115,16). In such a framework, “preference formation” is “exogenous to the institutional

venue”²⁶ and preferences are created and ordered through “self-interest”. Institutions are thus portrayed as constraints. Indeed, the principal function rational choice institutionalism attributes to institutions is a reduction of “transaction costs” – those risks and penalties that arise when actors engage in negotiation with one another”. In other words institutions impinge on actors’ actions to reduce those costs, functioning hence as constraints. An obvious criticism of this evaluation is that institutions are presented as completely devoid of agency and appear only to serve as passive limitations on actors’ actions. The assumptions of rationality present in principal-agent models have direct consequences for their use in predicting empirical outcomes. Thatcher and Stone Sweet highlight that,

stipulating the existence of sufficient functional demand to support and sustain a new non-majoritarian institution tells us nothing about how actors came to define problems in ways that pointed to delegation (2003: 6).

In other words, the fact it might seem obvious that *ex post* functional rationales are behind the creation of or delegation to an institution does not in itself explain how actors decided this was the path to take. According to Kassim and Menon, the “ex post attribution of motives without empirical investigation” plagued principal-agent literature (2003: 127).

2.2. The independent variables

Moravcsik holds that institutional choices like delegation are the “result of a cost-benefit analysis” that weighs the “increased political risk of being outvoted or overruled on any individual issue” against the benefit of “more efficient collective decision-making” (1993: 509-10). While efficiency features prominently here, Moravcsik later goes on to emphasise an “explanation based on the need for credible commitments” (1999: 73). Three elements can “encourage national governments to support a movement from unanimity to delegated or pooled

²⁶ There are obviously exceptions to this succinct presentation. A rational-choice institutionalist such as Franchino holds that actors' preferences are importantly shaped in a strategic game, which is played within these institutions and takes into account institutional decision rules.

decision-making”: (a) “The potential gains from cooperation”; (b) “The level of uncertainty regarding the details of specific delegated or pooled decisions” (not only present details, but also future consequences ensuing from these present decisions); and, (c) “The level of political risk for individual governments or interest groups with intense preferences” (Gilligan 2009; Moravcsik 1993: 510, 11; Moravcsik and Nicolaïdis 1999: 76). Pollack’s principal-agent analysis suggests that three determinants are likely to lead to delegation: “uncertainty”, “efficiency”, and “credibility” (Pollack 2003b: 6, 7, 10). These three factors should bring about delegation in the form of the four aforementioned functions: “monitoring compliance”; “solving problems of incomplete contracting among principals”; “adopting credible, expert regulations of economic activities in areas where the principals would be either ill-informed or biased”; and, “setting the legislative agenda” (Pollack 2003b: 6). Pollack finds support for the credible commitments rationale in delegation to the Commission, as it enjoys agenda setting, “monitoring, incomplete contracting, and regulatory functions” (Pollack 1997: 107). Whereas this is not so much the case for the expertise function, “EU supranational agents are thinly staffed”, and have “little scientific or technical expertise” (Pollack 2003b: 10). Moravcsik also reaches this conclusion.

As discussed later, an unfortunate feature of the academic literature on the determinants of delegation is that the use of these notions is extremely vague. It is indeed difficult to understand what “intangible” independent variables such as uncertainty or credibility of commitment actually mean (Pollack 2006: 172). Operational definitions are either absent or unsatisfactory. Thus the main goal of the following subsections is to bring some clarity to these concepts and identify testable definitions and hypotheses.

To test the hypotheses identified below against related to the three rationales of uncertainty, credibility of commitments and efficiency, official documents from the Council, Commission, and EP are examined. Reports and policy papers by international organisations such as the OECD, IOM and UNHCR are analysed, as is secondary literature and press coverage. A similar approach is also taken to testing these hypotheses in relation to the institutional context, this time mainly examining official documents from the three main EU institutions. Elements such as the length of Council negotiations or the number and persistence of national delegations’ “reservations” (i.e. objections or vetoes) are likely indicators of

conflict within the Council (Aus 2008: 108). The same Council documents usually report the Commission's representative opinions. These opinions, together with Commission and EP documents and media reports such as *Agence Europe* (Pollack 2003b: 71), are examined to detect conflicts between Council and Commission.

2.2.1) The relevance of EU politics. Institutional conflicts and delegation

While Moravcsik, Pollack, and Franchino agree that conflict between the Council and the Commission should lead to less delegation and discretion (Franchino 2006b: 219), the last two authors diverge regarding the role of internal Council divisions. Conflict within the Council is interpreted variously throughout the literature, with some regarding it as a standalone factor while others consider it within the broader remit of EU studies, and others again see it as a necessary condition for delegation.

Buonanno and Nugent argue that internal conflict is linked to credibility, as the more internal conflict the more likely it is that transposition and implementation problems will arise. Consequently member states interested in correctly managing and implementing a policy are likely to grant powers to the Commission. Nugent and Buonanno also spell out where delegation is likely in relation to transposition and implementation:

transposition problems commonly occur in member states which: opposed or expressed strong reservation in the Council about a Directive; have existing legislation that is different from the content of a Directive; and have a weak legislative and/or administrative capacity (2013: 109).

For Franchino conflict within the Council is necessary for delegation to the Commission to materialise. That is because conflict within the Council makes explicit the "lack of credibility of national implementation" (Franchino 2006a: 299). In the absence of such conflict, the Council would prefer to delegate their national administrations (2006a: 292). Interestingly, Franchino holds that past delegation decisions towards national administrations that failed to attain their

objectives constitute an incentive for the Council to delegate to the Commission (Franchino 2006a: 293). While Franchino holds that in such events past delegation decisions simply “lack [...] credibility”, it is not clear how Franchino views the relationship between this institutional factor and the credibility of commitment rationale.

This argument is criticised by Pollack. At first he argues that credibility and conflict pertain to two different rationales (2003b: 34) and then, contrary to the previous discussion, he asserts that the higher the level of conflict within the Council the less likely it is that delegation will occur. This is because, in a principal-agent analysis, high conflict between principals increases the costs of sanctioning a runaway agent (Pollack 2003b: 32). Pollack follows this by considering conflict between principals and agent. From this perspective, the more the Council and the Commission’s stances diverge the less delegation should occur. Again according to the principal-agent model, this divergence makes agency costs ever more likely (Pollack 2003b: 32-33). This view is also shared by both Franchino (2004) and Moravcsik (1999). However it is important to note that this runs contrary to Majone’s idea of a fiduciary principle wherein the more the credibility of a policy is at stake, the more delegation should occur. This is because it is the only guarantee that the policy will be managed under a less short-term political approach.

Following these observations, two hypotheses emerge to be tested in relation to the institutions:

- H₁ The more conflict within the Council, the more delegation to the Commission should be expected.
- H₂ The more conflict between the Council and the Commission, the less delegation to the Commission should be expected.

2.2.2) Expert and reliable source of information and knowledge? Uncertainty contextualised

Uncertainty broadly relates to the existing knowledge about something or the changing nature of an object²⁷. The relationship between uncertainty and policy-

²⁷ These two features emerge from Oxford’s and Cambridge’s definitions of “uncertain” and

making is complex and multi-layered, and has long been the subject of debate in political science (Weber 2004). Most accounts deemed knowledge as valuable in an instrumental sense, i.e. it is required for a policy actor to have the necessary competence to produce effective and justified policy decisions (Hix 2005: 49, 57, 66; Page 2010). Expert knowledge is also relevant to “legitimising” an actor and “substantiating” their policy decisions (Christina Boswell 2008). This latter point suggests an element of tension compared with more neutral accounts of knowledge and information, emphasising their potential uses rather than the technical or scientific nature of the expertise.

There are various understandings of uncertainty in delegation studies. For Moravcsik broad political agreements among member states can have uncertain future consequences (1999: 74). Because of that instability, delegation could represent an answer for those politicians eager to secure the future of a given policy area (1999: 74). Moravcsik considers the hypothesis of delegation because of the “the need for centralised expertise and information” (1999: 69). In his terms, an informational explanation for delegation is based on a “technocratic governance” viewpoint of EU affairs (1999: 71, 73). He discards the idea of delegation occurring because of the Commission’s expertise, citing that a thinly staffed body such as the Commission cannot match the knowledge and expertise of national administrations (1999: 72). A second explanation connecting delegation with uncertainty is that the Commission is at the centre of networks of experts (1999: 72).

According to Franchino, where the “link between policy and outcome” is uncertain²⁸, “legislators face greater complexity and will have to gather more information to produce detailed legislation” (2004: 274). This need for information is therefore an incentive for delegating. However, Pollack cautions against such a deceptively simple hypothesis, holding that,

[m]easuring the inherent uncertainty, or informational intensity, of an issue area is a difficult and contentious process since the actual complexity of an issue area is impossible to measure directly

“uncertainty” Anonymous, 'Oxford Advanced Learner's Encyclopedic Dictionary', in Jonathan Crowther (ed.), (Oxford: Oxford University Press, 1993) at 985, Anonymous, 'Cambridge Advanced Learner's Dictionary', in Elizabeth Walter (ed.), (Cambridge: Cambridge University Press, 2008) at 1579-80.

²⁸ Franchino calls them “informationally intense” issue areas Fabio Franchino, 'Delegating Powers in the European Community', *British Journal of Political Science*, 34 (2004), 269–93..

(2003b: 62-63).

Pollack asserts that there is a relationship between uncertainty and delegation, and maintains that an operational definition of the latter is more difficult than commonly assumed. Indeed, he renounces this strategy because he sees all proxies created to capture 'complexity' or 'informational intensity' as dubious at best (Pollack 2003b: 62-63). This is why he favours what the literature has traditionally defined as an arbitrary definition of complexity.²⁹ Member states could have an incentive to delegate in cases where there is high uncertainty when “executive and judicial agents may solve problems of incomplete information (by providing policy-relevant information to legislators)” (Pollack 2003b: 6). According to Pollack, these are the cases where member states delegate because they want to rely on the expertise of agents. Indeed he identifies “the demand for policy-relevant expertise” as one of “the most important motivations for delegation and the most important determinants of agent discretion” (Pollack 2003, 28).

Expertise is heavily connected with the supposed complexity of an issue or policy area (Wonka and Rittberger 2010). The more difficult it is to understand or analyse an issue (e.g. macroeconomic policy) or the more operationally complex policy-making is (e.g. how to deal with TCNs' integration), the more principals are likely to delegate to agents to ensure the policy is managed effectively. Expertise is not only part of the literature on delegation, but it also refers back to older schools of thought on EU integration. Neofunctionalists argues that one of the reasons for creating a supranational arena is because of the expertise found at the level (Rosamond 2000). Indeed this supranational level had to be constructed in such a way as to assure expertise and technical knowledge. The common practice of equating the supranational level with expertise has become so entrenched that it has been defined as “the common currency of politics in the European Union” (Geddes 2014: 5; Kraler and Rogoz 2011: 24). In the context of trade policy, Zimmermann observes that information is a key “factor in establishing the autonomy of the Commission”, and it enables “it to pursue a strategy with relatively little interference from the Member States” (H. Zimmermann 2007: 821).

²⁹ One of Franchino's criteria for measuring complexity is word count. However, and as also noted by Pollack, the degree to which a policy is detailed and long can be the expression of a number of things: the difficulty of reaching an agreement, the novelty of a policy issue, or the deliberate intention of keeping the wordings vague in order to satisfy some reluctant participants.

Accounts of the Commission's expertise are not always positive though. Hix states that the Commission “does not have a monopoly on information and expertise” (Hix 2005: 68) while Franchino highlights that the selection procedure for the Commission staff favours officials with “generalist” knowledge. EU agencies present a more problematic case. Past research shows that the Commission can initiate loose cooperation on an issue, and then propose institutionalisation of that cooperation through an agency (Christina Boswell 2008). And the simple fact of its existing working relationships with these bodies strengthens the Commission’s image of expertise (Egeberg and Trondal 2011). On the other hand, the creation of such agencies could suggest that the Commission did not have sufficient expertise in a given policy area. Another element to be considered is the presence of ever rising numbers of Seconded National Experts within the Commission. Their presence is intended to provide the Commission with insider views of national administrations and to provide much needed expertise in given areas (Trondal 2008). That being said, there is little common agreement in political science on what constitutes 'expertise' (Page 2010: 258-59).

Another view of uncertainty highlights the limited use of knowledge and information. It is maintained that agents work as providers of reliable information and little else. In a complex multi-layered structure such as the EU, the question of who provides information to whom is essential for to the working of the entire system. This is a key factor in any account based on transaction costs, wherein an agent (here the Commission) is charged with providing reliable and regular information to all actors involved (Hix 2005: 66).³⁰ The need for information is further strengthened in the EU context by the different and constantly evolving legislative frameworks of member states. Indeed, it is important to bear in mind that the legislative competences now held by the EU do not deprive member states of policy action at national level. In other words member states have not stopped legislating since the EU became competent in this area. This does however complicate the interplay between EU and national legislation, making timely communications and information essential (Wonka and Rittberger 2010). A minimalist perspective of this element would frame the Commission as little more

³⁰ Overall negotiating costs for political actors are lowered in terms of search for information and production of knowledge (and possibly legislative proposals) on that basis.

than a Secretariat, in line with other International Organisations where information is gathered and passed on to key players (i.e. member state governments) (Hawkins et al. 2006). Moravcsik and Schimmelfenning move in this direction in claiming that,

institutions help states reach a collectively superior outcome by [...] by providing the necessary information to reduce the states' uncertainty about each other's preferences and behaviour (2009: 72).

At the other end of the spectrum, other scholars have argued that the Commission has gained an unparalleled view of individual governments' positions and the state of affairs regarding the policies covered by the EU³¹ precisely because of this position (H. Zimmermann 2007). Nugent has, for instance, argued that due to the Commission's ubiquitous presence at all stages of EU policy-making and its cumulated expertise, "the Council and the EP may have to bow on technical/information grounds" (2001: 11, 13). Broadly speaking the academic literature is replete with images of the Commission "at the centre of a network of knowledge", which "gives the individuals working in it an advantage to be weighed against the advantages of other players" (Rosamond 2000: 146).

Arising from these minimalist and maximalist approaches, it is possible to discern two additional hypotheses:

- H₃ The more policy-makers look for expertise in given policy domains, the more delegation to the Commission is likely.
- H₄ The more cooperation in a policy area is dependent on communication or information sharing (or hampered by a lack thereof), the more delegation to the Commission is likely.

H₄ is connected with the fact that the Commission has historically been regarded as the place where information is sought, stored, shared among EU institutions and with the broader public. Pollack argues that, due to the fact that "the empirical world

³¹ In the context of Comitology, Hix believes that the "Commission must have very good information about the opinions of every national expert on every committee" Simon Hix, *The Political System of the European Union* (Basingstoke; New York: Palgrave, 2005) at 57..

is inherently uncertain”, in order to enact effective policies “legislators face constant demands for policy-relevant information about the state of the world (2003b: 29). It is therefore necessary to ask whether the need for centralised information management is the reason for delegation in the EU. Moravcsik highlights how commentators have argued that policy-making (e.g. “modern economic planning”) is “a highly complex activity requiring considerable technical and legal information”, and that such information is “most efficiently provided by a single centralised authority” (1999). In other words, “the collective-action problem facing governments is one of coordinating the production of information” (Moravcsik 1999).

If reliance on an expert actor is one way to ensure the reduction of uncertainty, a second is to ensure that reliable information is regularly provided and accessible to all. If this task seems to downgrade the Commission's role in the EU architecture to a simple Secretariat, it is nonetheless an essential component of the EU machinery. This is a key recommendation of principal-agent analysis in cases of multiple principals, as is the case with the EU. By constraining the agent through requirements to report constantly to principals, informational asymmetries can be reduced not only between agents and principals, but also between principals themselves. Indeed information circulation is the basis of monitoring and sanctioning, two functions usually associated with credibility of commitments (see the next subsection). EU law usually requires member states to communicate relevant policy information to the Commission. This is the basis of the Commission's role in monitoring member states' actions, and enables it to carry out what Pollack terms “decentralised sanctioning” (2003b: 22). Monar admits that the constant reporting activity can “serve as an instrument of ‘collective discipline’” but, in a constructivist-informed remark, he adds that reporting also contributes “to a common perception of problems and needs for action through common situation assessments” (2011: 128). However, the reporting requirement present in secondary legislation fails to create this sort of constant and regular channel of information as reporting happens at discrete intervals, generally over four to five years. In addition, reporting fails to provide the form of proactivity that is the hallmark of discretion for the agent-Commission (at least for this dissertation). Reporting can of course be political in content. Nevertheless, the reporting requirement fails to register even a modicum of discretion, a feature identified in the literature as an essential ingredient

for delegation because of uncertainty.

Past principal-agent studies also highlight the degree to which uncertainty and efficiency overlap. The accepted wisdom of this body of research is that principals are more likely to delegate on informationally intense policy areas for two reasons: first, as agents are deemed to be expert in the field, principals can be sure that policy choices will be effective and efficient; secondly, by delegating in informationally intense issue areas, principals can save resources which can be redeployed to other uses (Franchino 2004: 279). These reasons are tested separately here under two independent variables, the former under 'uncertainty' and the latter under 'efficiency and effectiveness'. Regarding uncertainty, the objective of the qualitative analysis is to assess whether and to what extent informational needs were expressed by policy actors, and whether and to what extent knowledge gaps are identified.

2.2.3) The essence of EU's exceptionalism or pragmatic necessity? The credibility of commitments

Scholars have connected delegation to the risk of policy deadlock or defection by present day or future governments (both political successors and other member state governments) (Coen and Thatcher 2008: 52; Hawkins et al. 2006: 16-21; Moravcsik 1999: 3-4; Pollack 2007a: 14). The academic literature generally refers to these as "time-consistency" problems (Franchino 2006a; Majone 2001). Franchino lists them as "a mismatch between long- and short-term incentives, turnover in political personnel (i.e. the lack of political property rights) and *ex-post* incentives for unilateral noncompliance [defection]", which as a consequence "may substantially undermine policy objectives and the value of legislation" (Franchino 2006a: 187). The idea is that member states acknowledge policy problems at a given time ('T'), agree on how to solve them or at least some common guiding principles, and subsequently create common policies for that purpose. However member states realise that in order to make those policies work another policy actor should be empowered to fulfil certain necessary functions - e.g. proposing, monitoring and implementation -, and consequently they delegate to that body. It is widely recognised that Art. 211 TEC³² grants such powers to the Commission through

³² Now Art. 17 in the Treaty of Lisbon (Treaty on European Union).

primary EU legislation (Majone 2001; Pollack 2003b: 83-84). Thus at $T+1$, member states receive policy recommendations, are subject to monitoring and are sanctioned should they diverge from the policy path chosen at time T . In a broad sense, this is nothing new. For example, it was common practice among Italian *Comuni* to invite a third 'neutral' party to manage and administer a city during the middle ages (Artifoni 2008: 375-80).

EU member states undertake broad, general commitments attached to the EU as a collective undertaking, which are usually stated in the Treaties, But can be also the result of CJEU jurisprudence (Majone 2001). However they also undertake specific commitments of various forms. European Council statements can help to identify a political agreement for a given policy. Among the general commitments made by member states in the context of the EU, solidarity is a key principle. The Treaty of Amsterdam (Art. 1, third indent, TEU) states that the task of the Union “shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples”. A commitment to solidarity has also been crystallised as a general principle of EU law through CJEU jurisprudence (Barbou Des Place 2002: 13). Burden-sharing is a form of solidarity wherein “costs of common initiatives or the provision of public goods³³ should be shared between states” (Thielemann 2003: 253, 56-57). Solidarity can be seen as a “motivation for burden sharing” when it is a “commitment to other members of a group to abide by the outcome of their collective decision-making” (Thielemann 2003: 257). The Council committed to solidarity as early as 1998 in implementing the Amsterdam provisions. On that occasion, it stated that the,

principle of solidarity among Member States and between them and the European institutions, should apply in facing the transnational challenges presented by organised crime and migration movements (Council 1998: 11).

As with uncertainty, credibility of commitments is an extremely vague notion.

³³ “Public goods constitute a major class of collaboration dilemmas. When states can benefit from a good (such as clean environment) whether or not they contribute to its provision, the classic free rider problem arise and, in the absence of centralised provision, the outcome is likely to be sub-optimal” (Hawkins et al. 2006: 16; see also Caviedes 2004: 291).

Looking at the literature, Moravcsik holds that the “credible commitments” rationale is the only one capable of explaining the gradual empowerment of EU institutions when compared with ideological and technocratic reasons for delegation (1999: 73-77). Pollack however sees no explicit link between the rationales for delegation and the four functions he expects will be delegated to the Commission. He suggests that monitoring and satisfying incomplete contracts should qualify under the credibility of commitments rationale, but links are not as pronounced for agenda setting and regulatory powers (2003b: 65). That said Pollack also acknowledges that “such delegation [of those functions] obviously includes an informational component” (2003b: 65). Finally, he leaves the reader in the uncertain position “of recognizing a demand for credible commitment when we see it” (Pollack 2003b: 64). In sum, past studies do not help in generalising about the connection between individual instances of delegation and the rationales Pollack singles out. This is one of the reasons the quantitative analysis of delegation in Chapter 3 is accompanied by qualitative investigations in Chapters 4 to 7.

In principal-agent dynamics it is reasonable to expect that, in areas where confidence crises have emerged among governments in the past, principals would delegate to a third party to pre-empt the potential re-emergence of this dynamic. While the importance of previous crises is recognised in the literature, and “a demand for delegating substantial discretion to independent agents” is somehow suggested, past scholarly efforts have “not specified clear criteria for identifying what sorts of issues are likely to create a ‘credibility crisis’ for legislators” (Pollack 2003b: 64). That being said it is reasonable to expect that if governments have not previously lived up to their commitments in a given policy area (T-1), they should engineer suitable institutional mechanisms to prevent possible defections when that policy domain is re-negotiated (T).

Difficulties are likely to arise in maintaining the credibility of commitments when the cost of agreements disproportionately impacts some principals (Hawkins et al. 2006: 21; Pollack 2003b: 30). Moravcsik held that “high conflict” related to “distributional” issues are not likely to result in delegation (1999). However, it must be noted that he was mainly referring to delegation in primary legislation. The peculiarity of delegation in secondary legislation is that it emerges on a substrate of political agreement, at least in principle. While zero delegation is surely an option,

complete withdrawal from already established patterns of cooperation is less likely. For instance, once a policy area is included in the Treaties member states can be encouraged by a Commission proposal to take action. However the more member state practices diverge before an agreement is reached on a given issue, the more likely defection is (Buonanno and Nugent 2013: 109; Thatcher 2002: 132). The simple idea behind this is, the higher the costs associated with implementation of a policy the higher the likelihood of renegeing on a promise. To prevent this, member states have the option to lock themselves into a stated set of policy goals under the monitoring of a third party (e.g. Thatcher 2002: 132; Hawkins et al. 2006: 21-22).

The following hypotheses therefore emerge regarding credibility of commitments:

- H₅ In a context of previously established commitments, the more imbalances are present in the distribution of the relative costs and benefits, the more powers are likely to be conferred on the Commission to either propose solutions or monitor the policy implementation so that imbalances are dealt with.
- H₆ The more crises of confidence have affected cooperation in the past, the more likely it is that powers are allocated to the Commission.

In addition to generally being identified as the executive branch in the EU, agenda setting is the reason the Commission has legislative powers (Majone 2008: 228, 31-32). The academic literature understands agenda setting in a variety of ways. Agenda is the “set of issues that receive serious attention in a polity”, and the “political agenda” consists of the issues “that receive attention from decision-makers” (Princen and Rhinard 2006: 1120). In the EU context, authors have highlighted that because of a lack of political leadership (Nugent 2001) and because of the numerous policy actors involved in policy-making at different levels and to varying degrees (from interest groups, to social actors, to various experts in the institutionally organised committee), “agenda-setting [is] substantially easier than in most other settings” (Peters 2001: 79). Others are more concerned with how policy items are framed as a means of understanding the likelihood of their making it through the decision-making phases, or gauging the extent to which they are able to shape final policy outcomes (Peters 2001: 80). Focusing as it does on delegation,

this thesis neither frames the agenda setting function of the Commission as consisting of informally wielded powers nor managing to drive the content of a policy (Princen and Rhinard 2006). Instead for the purposes of this dissertation, agenda setting is the statutory obligation for any legislative proposal to stem from the Commission. This is the distinction that Pollack draws between formal and informal agenda setting (2003b: 47-49).

Agenda setting strengthens the credibility of commitments by granting exclusive powers to propose or modify a policy to a third party. That body is empowered to determine whether existing legislation: is effective in tackling a policy issue; impinges disproportionately on some member states; requires updating; or indeed that new legislation is necessary to deal with a previous political mandate provided by the principals. The ability to amend legislation is obviously not entirely lost to principals but, at least in the EU context, doing so incurs the significant cost of re-contracting the entire agent mandate with the Commission. In a context where any legislator (or principal) has the right to express his or her view, an “endless series of proposals” can arise for any reason ranging from slowing down the process to disagreement to retaliation (Pollack 1997: 102-06). In such cases, it is sensible to delegate agenda setting powers to the Commission. While this supports the efficiency rationale behind agenda setting, i.e. there are clear time and resource-saving benefits to delegating this function to the Commission, this also reinforces the credibility of commitments in a deeper sense. Indeed once the power of proposal becomes the agent’s prerogative and no longer rests with principals, the latter group depends on the agent to initiate and deal with the content of the proposal. Principals can then negotiate and amend the proposal, even substantially so, but it is the agent that sets the terms of the debate. Remarkably the EU Treaties further strengthen the Commission’s position by making it difficult for the Council to alter a Commission proposal in the context of QMV, the Council may only do so under unanimity rules. Principals can however make their voices heard informally before the agent presents a proposal, thus shaping its substance. Yet the point is that the agent has the statutory right to ignore or welcome suggestions coming from principals, and this the essence of discretion.

In practice, agenda setting takes many forms in the legal text of secondary legislation. In the majority of cases a provision is present at the end of the legal text that grants the Commission the power of proposing amendments, which is defined

by the Commission as “a standard provision of Community law” (Commission 2004d: 21). These provisions are always nested in clauses that tie them to evaluation reports of entire measures. Therefore, the Commission is empowered to propose modifications to existing legislation to the extent that the evidence suggests such changes are needed. The kind of expertise and knowledge that this reporting involves is limited as it deals exclusively with implementation of a given policy, and *ex post*, meaning it is intended that the Commission develop it over a number of years (usually specified in the legal clause). As a result it seems more appropriate to understand these provisions as instances of agenda setting, rather than uncertainty. This is not to say that the Commission will not become “expert” in a given number of years. Rather it highlights that at the time when the measure is adopted, member states are not interested in the expertise of the Commission.

These observations on agenda setting lead to the contentious issue of Comitology.³⁴ This dissertation includes Comitology provisions both as delegation to, as well as constraints upon the Commission. In all its forms, Comitology appoints the Commission as the agenda setter: a representative of the Commission always chairs the meetings and the Commission is a key player in proposing, withdrawing and adopting the measures at stake (Blom-Hansen 2008; Dehousse 2003; Hix 2005: 52-58; Moury and Héritier 2012; Nugent 2006: 176-80). Scholars have also argued that Comitology could be seen as a problem-solving device (Pollack 2003a). Even in its most restrictive form, the regulatory procedure³⁵, the initiative starts with the Commission. The Committee must use weighted votes, i.e. the same rules governing Council votes, and the Commission can adopt the measure only if it is in accordance with the determination of the Committee. Although the role of member states is more decisive in this procedure than in others³⁶, the Commission still preserves its formal agenda setting powers.

³⁴ The majority of legislation adopted in this area is covered by the Comitology rules adopted in 1999 European Union, '1999/468/Ec: Council Decision of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission', (Brussels, 1999).. In July 2006 new Comitology rules entered into force European Union, '2006/512/Ec: Council Decision of 17 July 2006 Amending Decision 1999/468/Ec Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission', (Brussels, 2006b)..

³⁵ A regulatory procedure with scrutiny was added in 2006 to involve the EP in decision-making European Union, '2006/512/Ec: Council Decision of 17 July 2006 Amending Decision 1999/468/Ec Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission', at Art. 5a..

³⁶ The Commission's power dwindles as the procedure becomes restrictive (i.e. from Advisory to Regulatory Procedure).

Comitology has traditionally been regarded as a key control mechanism through which member states can oversee and, if needs be, rein in the Commission's implementation of a policy. Principal-agent studies have long discussed control mechanisms (Pollack 2003: 19), either in the form of fire alarm or patrolling. While the majority of studies focus on the control mechanisms that member states impose on the Commission, the monitoring functions imply that the latter could also avail itself of fire alarm or patrolling mechanisms (Hix 2005).

In a Directive that sets only minimum standards, patrolling by the Commission can wind up being overtly onerous. Member states can be afforded varying degrees of freedom in the adoption of legislative measures, legal text can be full of exceptions or can be non-specific, or measures can entail the adoption of rules by a number of actors (e.g. reception facilities for asylum seekers). Patrolling then becomes impossible. This is a clear limitation for a sparsely staffed body such as the Commission, where resources have to be administered parsimoniously (Nugent 2006)³⁷. The only option in such cases is to oblige member state administrations to notify the Commission of their decisions (in the context of implementation of an EU measure), so that the latter is made aware of events and can, if needs be, investigate further. Patrolling is easier in relation to Decisions and Regulations. These measures frequently entail some form of mechanism that directly involves the Commission or where member state discretion is low to non-existent. In other words, the study of delegation must also take account of the type of legislative measures involved.

There is more than a degree of confusion caused by the conceptual overlapping between what some authors term "uncertainty" and credibility of commitments. As previously discussed, uncertainty is at times understood as a lack of clear knowledge about what the future developments of a given policy area might be. This is the definition employed by Moravcsik (Moravcsik 1999: 73-77), while Wonka and Rittberger are more specific on this calling it political uncertainty (Elgie and McMenamin 2005; Wonka and Rittberger 2010). In such situations, policy

³⁷ The Commission has the power to carry out infringement procedures in cases of member state non-compliance. However a high-ranking Commission official (Director) stated that the Commission is not keen on carrying out infringement procedures because, *inter alia*: they are resource consuming; long and therefore ineffective; and politically costly for the Commission (ODYSSEUS, Brussels conference, Friday 15 July 2011).

actors may choose to lock both themselves and their political successor into a particular set of policy goals under the authority of an institution. This is nothing new in EU politics, nor is it exclusive to migration policy. For instance, one of the motivations behind the German-backed proposal to establish a European IMF in 2010 was to put in place an instrument that could reduce future uncertainty by establishing common rules (Atkins 2010). From a delegation standpoint, it could be said that what happens between policy actors after this uncertainty is acknowledged is what is important here. This highlights that the credibility of commitments is really what is at stake. In other words, member states delegate because they want to secure a given policy area, either because they fear what their political successors will do when in government or because they fear the consequences of an unregulated and unpredictable policy area. Thus even if the objective of delegation can be regarded as a reduction of uncertainty, the underpinning idea is again one of credibility of commitments faced with potential responses to political and or social changes. The idea is therefore to establish institutions that can cope with unforeseen consequences of an agreement or unpredictable future events (Moravcsik and Schimmelfennig 2009: 72).

2.2.4) More than a semantic quarrel: effectiveness and efficiency

There is more than a degree of confusion concerning the relationship between efficiency and delegation in the academic literature. This seems to be due in no small part to a confusing use of the term efficiency, which is not a semantic trifle (Czaika and de Haas 2011: 6; Majone 2011: 19). Pasquino usefully distinguishes between efficacy and efficiency (Pasquino 2004: 267), seeing efficacy (or effectiveness) as “the ability of a given policy to achieve the stated goals”, and efficiency as the ability to achieve that goal at the lowest possible cost³⁸.

In this study, effectiveness, as a rationale for delegation, is connected to previous policy failures at either national or EU level. Consequently, if

³⁸ Cambridge Advanced Learner's Dictionary definition of “efficiency” is “when someone or something uses time and energy well, without wasting any” Anonymous, 'Cambridge Advanced Learner's Dictionary'.. Oxford for “efficiency” is “the state of quality of being efficient”, which in turn means “achieving maximum productivity with minimum wasted effort or expense” Anonymous, 'Oxford Advanced Learner's Encyclopedic Dictionary'.. “Efficacy”, on the other hand, is defined by Oxford as “the ability to produce a desired or intended result”, and by Cambridge as “an ability, especially of [...] a method of achieving something, to produce the intended result; effectiveness”.

effectiveness is indeed a trigger for delegation, the Commission should be empowered to adjust a policy in response to its evident failures. The main determinants of delegation for Stetter are not the improvements of policy output but the need to address “previous regulatory failures” (Stetter 2000). In other words delegation is not about efficiency, but rather is about achieving the stated goals. Monar holds that the entire area of AFSJ has been progressively ‘communitarised’ because of the “undeniable lack of effectiveness of the alternatives” (Monar 2011: 130). Majone points to the internal reconfiguration of the Commission as a consequence of regulatory failures in the BSE crisis (2000: 282, 99). Hix reinforces this point by making a direct comparison between the Single Market initiative and migration policy. He asserts that,

the issue facing governments in the area of migration policies in the mid 1990s was similar to the issue they had faced market regulation policies in the mid-1980s: there was a growing public and elite perception of regulatory failure, and the easiest way of tackling this crisis was to delegate agenda-setting to an independent agent (Hix 2005: 365).

Freeman questions whether some policy areas are more prone to failures. In a dismissive tone, he suggests that “gaps between intentions and outcomes are common in all areas of public policies and are not necessarily signs of failures” (Freeman 2006: 639). On the other hand, Castles offers an account of the reasons failures have been such a prominent feature of much migration policy so far. He proposes that there is a mismatch between short-term policies and the nature of the migration process as “a long-term social process with its own dynamics” (Castles 2004). Thus the reason migration policy is frequently assumed to be failing is that the root causes of migration are related to “factors on which migration policies have little or no influence” (Czaika and De Haas 2013: 487). Some authors have emphasized the importance of avoiding assessments of policy failures based on “discursive gaps”, that is to say the gap between the level of discourse among politicians and the actual policies (Czaika and De Haas 2013: 496). Castles has also described a “bureaucratic belief” that well-designed policies can actually regulate migrant “admission and residence effectively shap[ing] aggregate behaviour”, managing migration to such an extent that its flows can “be turned on and off like

a tap by appropriate policy settings (Castles 2004: 208). The focus on previous failures also speaks to an older debate regarding migration and globalisation (Koslowski 1998; Sassen 1998). The idea being that states are unable to deal with new aspects of globalisation, from global financial markets to international migration, and are increasingly losing control as the main actors on the world stage. In this latter perspective, policy failures hence represent the epiphenomena of a deeper trend.

Efficiency entails a perceived gain in terms of increased productivity, or relief of administrative or management burdens (Franchino 2002: 685). As argued by Franchino, that is why delegation so often takes the form of operational management by the Commission (2002). Pollack cites efficiency as an “unexpected” outcome of his analysis, which he connects to “a desire to reduce the workload of the Council and to increase the speed and efficiency of implementation” (2006: 189). This makes sense if account is taken of the “painfully slow” nature of the EU legislative process, where reaching agreement in the Council and the EP can take a considerable amount of time (Pollack 2006: 189). Pollack refers to efficiency in relation to agricultural and fisheries policy, where “speed and efficiency of decision-making” was the main concern of policy-makers (Pollack 2003b: 10). Moravcsik considers that the prospect of “potential gains from cooperation” should be a determinant of delegation, where governments take a forward glance at how they want a particular policy area to look like (1993: 510). Gains can be as varied as: electoral gains (due to Moravcsik’s constant focus on domestic politics); enhanced legitimacy (offered by the “international venue”); quicker and more timely decisions; overcoming “previous failures to reach agreements”; the desire or need for implementation of what has already been agreed; and, shifts in national preferences (Moravcsik 1993: 510). It is clear that Moravcsik makes no distinction between effectiveness and efficiency. Interestingly, Franchino notes that delegation motivated by efficiency is a sort of default condition. He argues that when all other possible reasons for delegation have been ruled out, the only one still standing is grounded in “a reduction in workload” (Franchino 2002: 685). Franchino argues that principals should ponder on the “specific policy objectives” and ask themselves: “had this power not been conferred upon the Commission, would the objectives of this act be compromised?” (2002: 681).

Two further hypotheses arise from this literature:

- H₇ The more failure encountered in a policy area, at the national and or European level, the more likely member states are to delegate to the Commission.
- H₈ The more principals are likely to gain from a reduction in workload and the saving of time and resources, the more delegation should be expected.

Effectiveness and efficiency partially overlap with credibility of commitments and uncertainty. Regarding credibility of commitments, secondary legislation usually provides ways of addressing evident policy failures after adoption. This is usually provided for by means of a reporting requirement, often coupled with the possibility of tabling a proposal to amend the existing policy. This is a prudent method of handling unforeseen problems and addressing them through evidence-based policy responses. Reporting is also a safe way for principals to control and anticipate what their agent can propose later. In Majone's words, "principals cannot be presented with a *fait accompli*" (2000: 294). Interviews with Commission officials indicated that member states usually interpret indications of incorrect transposition, as furnished by the Commission, as a signal for possible infringement procedures (Interview 2). Having said that, Franchino does not consider a reporting function as sufficient to qualify as delegation, as it does not afford the Commission the power to change policy. More than that, he considers reporting requirements as a constraint imposed on the Commission. For the purposes of this dissertation, it is the potential for setting the direction of policy that is really at stake in these reporting-an-amending clauses, thus it was decided to interpret them³⁹ as constituting agenda setting rather than effectiveness. It is therefore included under the credibility of commitments.

Turning to uncertainty, issues of efficiency are at times connected with informational needs. In this sense delegation occurs because principals wish to acquire more information about a given issue, as well as about other member states

³⁹ When coupled with the possibility of proposing amendments or modifications. In the absence of that, simple reporting is considered a constraint on the Commission.

participating in the negotiation. In principal-agent analyses, the role of the agent is to facilitate this flow of information towards and between principals and to provide up-to-date and reliable information about the issue at hand. It must however be noted that this does not imply any legislative or executive powers for agents in carrying out these tasks. This informational function affects the objective of reducing uncertainty in a collateral sense, as the information provided should illuminate both the decisional environment and the policy issue. As such the interpretation of efficiency blurs considerably with that of uncertainty. To address this, it has been decided that informational factors will be separated in this study by keeping them under the heading of uncertainty.

Delegation based on efficiency assumes that the Commission differs little from a Secretariat in an International Organisation, albeit with perhaps more tasks and responsibilities. Such a perspective dismisses the notion of the Commission as a supranational agent capable of shaping, or at least contributing to, the overall direction of the EU political project (Pollack 2003b: 22). This reading of delegation is shared with reasons for delegation based on asymmetric information, as discussed in the uncertainty section. On the other hand, the regulatory failure explanation points to delegation as a higher order solution for unresolved problems, emphasising how the EU has become an essential policy arena for member states. Nevertheless the efficiency dimension should not go underestimated. While this chapter has striven to steer clear of any reference to migration, one example is particularly illustrative here. Migration entered the public policy and opinion domains of individual member states at different times. For southern European countries in the 1990s and eastern ones in the 2000s, relying on the EU for policy inputs and platforms and a number of managerial and operational tasks, meant unloading of great administrative costs. At the turn of the millennium, migration policy begun to rely extremely on new technologies, large IT systems, and expensive control mechanisms and policy choices (Broeders and Hampshire 2013; Freeman 2006: 639). Collective Community undertakings, where a number of actors foot the financial and administrative costs of such measures, are surely the source of major relief for many actors.

2.3. Concluding remarks

This review of delegation theory provides an indication of the main factors driving delegation in EU institutional contexts, i.e. the need for reduced uncertainty, the willingness to strengthen credibility, and the quest for efficiency. These initial factors are termed ‘rationales’ because they are related to the policy area in question. The other two factors identified here concern the dynamics both within the Council, which is the key legislative actor during much of the period analysed here, and between the Council and the Commission. While the first four of these factors encourage further delegation, the last is inversely related thereto. That is the more conflict present between the Commission and the Council, the less delegation should be expected. The following table summarises the hypotheses identified in the foregoing discussion.

Table 2.1. Independent variables and hypotheses

Independent variables	Hypotheses	Key elements
Institutional contexts	<p>H₁ The more conflict within the Council, the more delegation to the Commission should be expected.</p> <p>H₂ The more conflict between the Council and the Commission, the less delegation to the Commission should be expected.</p>	<p>Divergent preferences within the Council. Divergent preferences between the Council and the Commission.</p>
Uncertainty	<p>H₃ The more policy-makers look for expertise in given policy domains, the more delegation to the Commission is likely.</p> <p>H₄ The more cooperation in a policy area is dependent on communication or information sharing (or hampered by a lack thereof), the more delegation to the Commission is likely.</p>	<p>Problems of knowledge → expertise.</p> <p>Problems of information sharing, collection and processing → Commission as secretariat (IR).</p>
Credibility of commitments	<p>H₅ In a context of previously established commitments, the more imbalances are present in the distribution of the relative costs and benefits, the more powers are likely to be conferred on the Commission to either propose solutions or monitor the policy implementation so that imbalances are dealt with.</p> <p>H₆ The more crises of confidence have affected cooperation in the past, the more likely it is that powers are allocated to the Commission.</p>	<p>Allocation of costs (burdens). Were there any imbalances among member states in the way a given phenomenon affected them?</p> <p>Past crises: Have there been any crises of confidence in this policy area?</p>
Efficiency and effectiveness	<p>H₇ The more failure encountered in a policy area, at the national and or European level, the more likely member states are to delegate to the Commission.</p> <p>H₈ The more principals are likely to gain from a reduction in workload and the saving of time and resources, the more delegation should be expected.</p>	<p>Policy failures at the national and/or EU level.</p> <p>Saving time and resources → Commission as secretariat (IR).</p>

Problems concerning knowledge and information are considered when investigating reasons connected with uncertainty, this is both in terms of provision of expertise and the availability of a source of reliable and regular information within the EU framework. When investigating credibility, past crises and disproportionate costs are indicators of possible defection or implementation problems. Finally, efficiency and effectiveness are respectively likely to result from member state wishes to unburden themselves of administrative and operational duties, and past national or European policy failures.

The study of delegation aims at grasping the singularity of the EU project by explaining its unique level of institutionalisation, and also offers a fine-grained analysis of where integration occurs and why. By considering a number of possible determinants for delegation, it may also be useful in explaining the unevenness of integration in EU affairs, a phenomenon that has been increasing in prominence since Amsterdam at the very least, when “flexibility” became a buzzword within the EU. On the other hand, the study of delegation as developed so far suffers as the result of a number of assumptions. It pays little attention to the burgeoning soft policy methods emerging in EU affairs. Due to its exclusive reliance on legal texts, it is ill suited for more informal governance approaches. Finally, principal-agent analyses in particular feature deeply embedded assumptions about actors and rationality. Actors are understood as unitary, mainly for parsimonious reasons, hence internal divisions, such as those seen within governments, are unaccounted for. Logics of consequences prevail, as the model is about calculations that principals and agents are presumed to have made in order to explain a given institutional setting. As a consequence, sociological and constructivist insights that have emerged in recent years to explain EU integration and policy outcomes are left unanswered.

3. Quantitative analysis of delegation in EU secondary legislation

This chapter analyses secondary legislation on migration enacted between May 1999 and November 2009. A preliminary point to note is that, as a result of the methodological limitations of quantitative analysis highlighted in this chapter, adding qualitative analyses serves an important control function in addition to being essential for a more in-depth investigation of the reasons behind delegation. In other words while this chapter mainly concentrates on the dependent variable, i.e. delegation, the ensuing chapters setting out the qualitative analysis primarily concentrate on the independent variables put forward in Chapter 2, i.e. conflict within the Council and between the Council and the Commission, reducing uncertainty, strengthening credibility of commitments, and achieving efficiency.

Secondary legislation is analysed using existing templates drawn from academic literature. The objective is to chart delegation along the lines of several migration categories, measure its magnitude, and provide a first tentative account of the reasons behind findings. This chapter first specifies the selection criteria for the set of legislative measures present in the sample. Secondly, it clarifies the methodology for the coding criteria. Thirdly, it displays the relevant empirical findings of this investigation. Fourthly, a brief section discusses the results. The fifth section concludes.

3.1. The selection criteria and the set of legislative acts

The first selection criterion for secondary legislation is its legal basis. In the Treaty of Amsterdam, the articles on migration are included in Title IV on “[v]isas, asylum, immigration and other policies related to free movement of persons” (Articles 61 to 69 (TEC)). Although the Treaty of Nice “made some modest changes” to certain aspects of decision-making, it did not modify the separation of migration categories into Treaty articles (Peers 2006: 222-25). This dissertation looks at three forms of legislative instruments within this *aquis*, Regulations, Directives and Decisions.

According to EU law, these are the only forms of secondary legislation with a binding legal force⁴⁰ (Chalmers et al. 2010: 98-100).

In addition to secondary legislation stemming directly from the Treaty articles that define migration, it became increasingly clear during the research that it was also necessary to include secondary legislation originating with other TEC articles, as in the case the Migration Statistics Regulation. Migration is explicitly cited as a primary objective of these measures, for example the Regulation establishing a financial instrument for development that directly repeals and addresses past migration-related legislation. Because of this complex selection the assignment of migration 'categories' (see below) has turned out to be more difficult than expected. This is discussed below.

A further issue emerged during the selection process concerning secondary legislation with a limited geographical validity. An example of legislation with an explicitly limited geographical scope would be visa agreements with China or Moldova. These are Decisions or Regulations concerning narrow areas of policy such as local border traffic. The coding methodology is ill equipped to deal with the structure of the legal texts of these measures.

A number of different sources have been consulted in selecting and collecting relevant legislation. First the Commission publishes the legislative measures adopted in each field (borders, asylum, etc.), which has aided the selection process (Commission). Secondly, there is now a vast body of academic literature on EU migration law and policy, which has been used to confirm the selection of measures (Hailbronner 2010; Papagianni 2006; Peers 2011).

As a consequence of this selection process, secondary legislation has been grouped into five broad migration categories in this dissertation: legal migration; administrative cooperation; irregular migration; asylum and refuge; and borders and visas. In the main these categories match Treaty articles or their subparagraphs. Having categories that closely match Treaty articles forms part of the coding models developed in previous delegation studies (Franchino 2004; Pollack 2003b). In addition, such a choice allows this dissertation to speak to migration studies that frequently group policies under similar labels (Christina Boswell and Geddes 2011).

⁴⁰ The two other typologies, i.e. Recommendations and Opinions, have no binding force.

Difficulties arose in assigning certain pieces of legislation to migration categories. This was, in the main, either because the legislation in question came from outside Title IV or because the measure was too general or originated from several articles. In these cases legislative measures were assigned to the closest relevant categories, which to a certain extent highlights the arbitrary nature of the categories chosen. The explicit objective of the legislative measure was the first criterion used to categorise such legislation. For instance, the Migration Statistics Regulation was assigned in this way. This Regulation does not originate from Title IV articles but was categorised under 'administrative cooperation' together with several other legislative acts from the same Article. The fact that this measure does not refer to any specific type of migration is what motivated this decision. Rather it is a measure that, due to the encompassing nature of its objectives and its technical focus, is best categorised as concerning administrative cooperation in EU migration policy. In some cases however the objective was broader than or only partially related to migration, an example of which is the Development Cooperation Regulation dealing with migration within the broader context of development policy.

At this point it is important to highlight that the 'categories' denote different administrative practices within member states and the EU⁴¹. In other words, any decision on the selection criteria is arbitrary in the sense that it does not correspond to any ontological differences within migration as a social phenomenon (Geddes 2008: 20-21). Indeed one can rightly argue that a number of EU level migration policy initiatives have aimed at establishing a basic consensus on what those categories mean (e.g. Asylum Qualification Directive).

Further complicating this choice, Treaty articles can be governed by different decision-making procedures. This creates problems when trying to understand how, if at all, decision-making affects delegation and discretion. The sections below each deal with different migration categories and discuss the likely effect on decision making on delegation and discretion. Turning now to the legislation in question, the most relevant features of the set are examined.

⁴¹ On this issue, see also the remarks in Chapter 1.4.

Table 3.1. Legislative acts adopted by policy sector (1999-2009)

	<i>With implementing measures</i>				<i>Without implementing measures</i>			
	<i>Reg</i>	<i>Dir</i>	<i>Dec</i>	<i>Tot</i>	<i>Reg</i>	<i>Dir</i>	<i>Dec</i>	<i>Tot</i>
Asylum	4	4	5	13	2	4	3	9
Visas and Borders	22	0	19	41	21	0	2	23
Irregular migration	1	8	6	15	1	8	3	12
Administrative	2	0	5	7	2	0	5	7
Legal	3	8	2	13	3	8	1	12
<i>Total</i>	<i>32</i>	<i>20</i>	<i>37</i>	<i>89</i>	<i>29</i>	<i>20</i>	<i>14</i>	<i>63</i>

Source: author's own compilation from EurLex, Peers (2011).

Note: Reg = Regulations; Dir = Directives; Dec = Decisions; Tot = Total.

The left-hand section of Table 3.1 includes implementing measures and shows the extent to which member states and EU institutions have concentrated their legislative efforts on borders and visas. This sub-set is the most conspicuous one, totalling 41 legislative measures. It is also interesting to note that this is the only policy sub-set where Directives are absent. A first potential inference that could be drawn from this, which requires confirmation through the qualitative chapters to come, is that this is due to the different legal nature of Directives and Regulations. According to EU law, Directives are binding only with regard to their objectives and individual member states are free to determine how those objectives are achieved, whereas Regulations are binding in their entirety (Chalmers et al. 2010: 98-99). The predominance of Regulations in this policy area can therefore be taken as an indication of member states' intentions to eliminate or limit member states' discretion in how policy is implemented. Another interesting feature is the frequency of Decisions in the borders and visas area. This is due to the number of implementing measures stemming from the Regulations adopted. In other words the Regulations left a number of details to be determined by the Commission under Comitology procedures, which in turn generated an abundance of Decisions. Indeed if all implementing Decisions are eliminated from this area (right-side section), this would result in an area with 23 legislative measures adopted, the majority of which being Regulations.

Legislators' efforts seem to have been distributed much more evenly across the other three sectors of EU migration policy. The academic literature suggests that legal migration is the most underdeveloped policy area of EU migration policy (Christina Boswell and Geddes 2011). However that interpretation is only partially corroborated by the actual figures of legislative output broken down by sectors,

which in fact shows similar figures to those on asylum and refugee policy.

While all three forms of binding legislative acts have been adopted, Decisions are the most prominent if implementing measures are counted. As noted earlier this is mainly because EU border and visa law required many implementing acts, particularly to apply the complex Schengen *acquis* which only entered the EU legal framework with Amsterdam. Decisions on borders and visas account for more than half of all Decisions listed in the left frame. Whereas in the right-hand frame the distribution of legal acts is more even with Regulations in this case accounting for more than a third of the total.

3.2. Coding criteria

Franchino elaborates a list of provisions⁴² could be counted as delegation that is present in secondary legislation. It has to be remembered that Franchino's research design only considers "powers and constraints on executive action that are above and beyond those specified in the treaty" (2004: 293). Examples of delegation are,

[...] the right to issue implementing regulations or directives or to take decisions with some discretion; imposition of fines and penalties; carrying out negotiations with third countries; extension of discretionary authority to new issues or economic sectors; carrying out inspections or conducting investigations or inquiries (only if they complement other powers such as those to take decisions or to impose penalties); request of information (only if it complements powers to take decisions, to carry out investigations, to tax or to impose penalties); the authorization of or the right to take measures that may alter the policy; the right to grant derogations and exemptions; transposition of provisions of directives with some discretion; extension of policy authority that member states would have otherwise relinquished as a result of adopting the measure at hand; designation of authorities and institutions (Franchino 2004: 293).

⁴² Pollack and Franchino define as "provisions" articles and numbered paragraphs. However, there are exceptions regarding subparagraphs and indents Mark A. Pollack, *The Engines of Integration* (Oxford: Oxford University Press, 2003b) at 430-32..

Franchino spells out what constitutes delegation on the basis of *efficiency* in another contribution to delegation literature,: “Computation and fixing of refunds”; “Specification of legal terms and Terminology”; “Adoption of rules, particulars, criteria, conditions and provisions of implementation”; and “Operative management of some measures” (2002: 682). The only modification made to Franchino's list in this dissertation is to include “agenda setting” measures as delegation, as per Pollack's argument. Franchino's account focuses on capturing the executive side of the Commission. Pollack's approach on the contrary, is to identify all the powers that characterise the Commission. An important example of how this “agenda setting” power is expressed in secondary legislation is the power to revise and propose amendments to existing legislation (generally within a given period). This is one of the most common clauses present in secondary legislation but is not universal, it is not for example present in the Carrier Sanctions Directive. Although, at the theoretical level, the Commission could have proposed a modification of the Directive⁴³, it has not done so to date.

Both Pollack and Franchino codify control mechanisms as “constraints” in secondary legislation. It is important to properly account for these elements because it allows understanding of the “discretion” left to agents within a principal-agent model. The primary aim of control mechanisms is to “mitigate [...] the informational asymmetries [through monitoring]” and to “constrain or shape the incentives of the agents [through positive or negative sanctioning]” (Pollack 2003b: 27). Pollack lists twelve procedural constraints on the Commission’s action,

time limits; spending limits; reporting requirements; consultation requirements⁴⁴; public hearings; rule-making requirements; appeals procedures; exemptions for individuals or classes of individuals; requirement for explicit legislative approval; the possibility of legislative overrule; a requirement for approval by an executive body; the possibility of overrule by an executive body (Pollack 2003b: 99, 430).

⁴³ It is within its treaty powers.

⁴⁴ Including the 'advisory committee' procedure in Comitology Franchino, 'Delegating Powers in the European Community', (at 293b..

There are some problematic aspects to this operationalisation though. It was shown in the previous chapter that Comitology provisions, while constraining the Commission's activities to varying degrees, nevertheless offer the Commission a potential to shape debate by granting it the power of proposal. Another problem regards the notifications requirements. These are assumed to act exclusively as a constraint on the Commission's action. However this picture fails to represent adequately the essential function notifications have in keeping the EU project afloat. Notifications requirements flow in both directions from member states to the Commission and *vice versa*. Continuous reporting and compulsory exchange of information forms the basis of the Commission's monitoring function. For instance, a failure to notify of the transposition of a Directive into national law constitutes the first alarm bell for the Commission. Notifications are also important in assessing the impact on the ground of EU policies as member states are required to submit statistics and figures to the Commission on the application of certain measures. That said these notifications do not provide the Commission with explicit powers to shape the direction of a given policy, thus they fail to meet Franchino's stringent criteria for delegation (Franchino 2004). The Commission can however use this sort of information in its reports and use those reports to suggest changes to existing policies. In many cases, information obtained through notifications provides the essential building blocks of the Commission's knowledge, as it does not have the resources to carry out large surveys and inspections. Yet it was decided to stick to a parsimonious account of delegation so that the findings of this thesis could be compared with those of previous studies.

Notifications in this sense provide the opportunity to clarify some aspect of the choice of dependent variable. The Commission can create common readings and frameworks for given phenomena using information gathered through these notification requirements and other instruments such as commissioned studies, reports, and conferences,, but these can always be discarded by the Council and EP who are the ultimate decision-makers on such matters. For instance, the Commission released two studies, six Communications and one report between 2000 and 2004 dealing, to varying degrees, with labour migration. However, the actual impact of all those efforts in terms of legislation remained limited at best. While these initiatives could have contribute to create a consensus and start a debate at the EU level on these issues, this dissertation on the other hand proposes to look

at delegation as an instance of integration. It further examines whether and to what extent cooperation among member states indicates a willingness to integrate by recording the instances where powers to act on and shape policy were conceded to the Commission.

On the mechanics of the coding, the 'delegation ratio' (dr) captures the power that a piece of secondary legislation confers on the Commission. It consists of the ratio between the number of provisions delegating some forms of power to the Commission and the total number of provisions present in the legal text. On the other hand, the 'constraint ratio' (cr) indicates the extent to which the Commission's action is limited. This is worked out by assigning the constraints present in the legal text to one of the 12 possible constraints listed above. Finally, the 'discretion index' (di) captures the Commission's room for manoeuvre once its powers and constraints are taken into account. This is calculated as the delegation ratio minus the delegation ratio multiplied by the constraint ratio ($di = dr - (dr * cr)$). The closer the constraint ratio is to the number 1 the lower the discretion index is as all types of constraint are present in a legislation. In this dissertation, quantitative analyses of delegation limits itself to descriptive statistics of delegation. Moreover, the independent variables are not suitable to be treated quantitatively, which rules out the possibility of employing inferential statistical methods. In effect, Pollack's study was also limited to descriptive statistics of the distribution of delegation with respect to its independent variables (2003b).

This explanation of how the delegation ratio and discretion index are calculated leads us to a discussion of the methodological difficulties that emerged during the coding. Coding long legislative measures tends to result in an underestimation of the delegation ratio and consequently the discretion index. For simple mathematical reasons these two indicators are susceptible to be skewed in cases in which there are high numbers of provisions in legislative text. This calls for a supplementary qualitative analysis to further investigate the nature of delegation in those texts. In Pollack's words, although the,

delegation measure is highly sensitive to the total number of provisions in each chapter (that is, the denominator) it provides a good first-cut measure of delegation" (2003b: 92).

A further element deserving consideration relates to aggregation issues. Calculated as it is on the basis of single legislative measures, previous studies have extended this coding method to policy areas identified according to treaty headings (Pollack 2003b). This was conducted on the basis of a varying number of measures pertaining to those areas, from one for regional policy to thirty-six for free movement of persons (Franchino 2006a: 82). This dissertation employs a more systematic approach. As the entire policy area of migration is covered, it not only provides aggregate findings but also allows for a more in-depth investigation of differing values between measures. In other words, this work takes a policy perspective, analysing the main findings and rationales in sub-policy areas such as borders and visas and asylum, and also takes a results-oriented perspective. The main aim of which is to match the predominant drivers (Council division, Council/Commission conflict, uncertainty, credibility, efficiency/effectiveness) to each degree of delegation (high, medium, and low⁴⁵).

3.3. Analysis of the results: policy-area analysis

This section analyses the results of coding within each of the migration categories set out in the previous section. As previously discussed, the objective of these subsections is not to provide a full account of delegation and discretion in these policy sub-sectors but rather to map and describe where delegation occurs. On a methodological note, all tables below present aggregate results in two versions, one with and one without implementing measures. Implementing measures tend to skew the aggregate results, as most do not feature any delegating provisions. In other words, they tend only to add to the denominator of the averages but not to the numerator. Therefore, the final discussion on aggregates excludes implementing measures.

⁴⁵ See below for this categorisation.

3.3.1) Policy-area analysis: asylum and refugee

Table 3.2. Delegation in asylum and refugee law

<i>Legislation</i>	<i>A</i> ⁴⁶	<i>B</i> ⁴⁷	<i>C</i> ⁴⁸	<i>D</i> ⁴⁹	<i>E</i> ⁵⁰	<i>F</i> ⁵¹
Commission Decision 2008/22/EC implementation of Decision 573/2007/EC establishing the European Refugee Fund	136	5	4	0.037	0.333	0.025
Commission Decision 2007/815/EC adoption of strategic guidelines	2	0	0	0.000	0.000	0.000
Council and EP Decision 2007/573/EC establishing a European Refugee Fund	193	38	5	0.197	0.417	0.115
Council Directive 2005/85/EC on procedures for granting and withdrawing refugee status	169	7	4	0.041	0.333	0.028
Council Decision 2004/904/EC establishing a European Refugee Fund	86	20	6	0.233	0.500	0.116
Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals as refugees	99	2	3	0.020	0.250	0.015
Commission Regulation (EC) 1560/2003 for the application of Council Regulation (EC) 343/2003 DUBLIN II	62	2	1	0.032	0.083	0.003
Council Regulation (EC) 343/2003 establishing criteria for determining the Member State responsible (DUBLIN II)	95	11	3	0.116	0.250	0.087
Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers	87	1	1	0.011	0.083	0.011
Council Regulation (EC) 407/2002 laying down rules to implement 'Eurodac' Regulation 2725/2000 for fingerprints (DUBLIN II)	15	9	3	0.600	0.250	0.450
Council Directive 2001/55 on temporary protection in case of mass influx of migrants	76	4	2	0.053	0.167	0.044
Council Regulation (EC) 2725/2000 establishment of 'Eurodac' for comparison of fingerprints for Dublin	115	9	4	0.078	0.333	0.052
Council Decision 2000/596/EC establishing a European Refugee Fund	63	19	6	0.302	0.500	0.151
<i>Aggregate results</i>	<i>*1198</i>	<i>*127</i>	<i>**3.23</i>	<i>**0.132</i>	<i>**0.269</i>	<i>**0.084</i>
<i>Aggregate results (no implementing)</i>	<i>*983</i>	<i>*111</i>	<i>**3.78</i>	<i>**0.117</i>	<i>**0.315</i>	<i>**0.069</i>

Notes: *Total and **averages

Past delegation studies have generally employed two measurements, the delegation

⁴⁶ Number of provisions

⁴⁷ Number of delegating provisions

⁴⁸ Constraints

⁴⁹ Delegation ratio

⁵⁰ Constraint ratio

⁵¹ Discretion index

ratio and discretion index (Franchino 2004; Pollack 2003b). The table above shows a medium value for the aggregate delegation ratio (13.2 percent), but low discretion (8.4 percent). If the outlier of the Eurodac implementing Regulation is taken out of this category, the aggregate delegation ratio is 11.7 percent and the aggregate discretion index is 6.9 percent. Looking to the academic literature, one of the most common observations on this migration category is that it has, at least until well into the 2000s, been an intergovernmental and lowest-common denominator policy sector (Christina Boswell and Geddes 2011: 152)⁵². These quantitative findings confirm that reading, as only five out of the thirteen legislative measures feature delegation and discretion in double digits.

The average constraint ratio in the asylum and refugees field (13 legislative measures) is 26.9 percent (31.5 percent without implementing measures), almost twice that of borders and visas. This would suggest that member states kept the Commission under close surveillance and accompanied delegation with a number of control mechanisms. As mentioned in the previous chapter, some authors believe that principals can delegate to an agent in order to secure the principals' credibility of commitments from future political interventions in a given policy area, this is known as the locking-in thesis. This is even more likely in politically sensitive areas (Majone 2001). It is not however what happened in the highly sensitive area of asylum policy. The relatively high average constraint ratio, as compared against the other policy areas analysed here, indicates that member states did not write any blank cheques. In other words, Majone's prediction of an insulated agent in cases where credibility is at stake is qualified by the high constraint ratio. One can say that principals have nonetheless found a way to shape future policy without having to concede powers to a third party. Nevertheless the idea of strengthening the credibility of commitments by delegating to a third party does not find any confirmation here. Efficiency may however explain this finding, as a central management authority was needed for the workability of these measures. Having said that it is difficult to assess the relative importance of the three determinants in any meaningful way without a supporting qualitative analysis. This is undertaken in the following chapters.

⁵² For a different opinion, see Dauvergne Catherine Dauvergne, *Making People Illegal: What Globalisation Means for Migration and Law* (New York: Cambridge University Press, 2008) at 146..

Turning to the legislative measures in question, burden-sharing efforts in the form of the three European Refugee Funds and the presence of reallocation mechanisms (Eurodac and Dublin) have contributed significantly to the delegation ratio and discretion index. In terms of the independent variables, the willingness to credibly commit to a policy seems to be the most powerful determinant. The Eurodac Regulation displays a delegation ratio of 60 percent and a discretion index of 45 per cent. This Regulation illustrates the methodological problem mentioned in the previous section. This short legislative measure made up of only a few provisions, many of them conferring delegation, results in a high delegation ratio. Finally, the Dublin Regulation displays a medium delegation ratio. These results contrast with the low delegation in other headline-grabbing legislative measures belonging to this set (see next paragraph). Discretion in the Dublin Regulation is indeed slightly above average for this policy area. However, closer inspection reveals that Comitology procedures for this Directive were the strictest available at the time, i.e. regulatory procedure.

Having said that, the measures that were fundamental to creating a “common European asylum policy”⁵³ and that most captured commentators’ attention – namely, the Temporary Protection, the Asylum Reception, the Asylum Qualification, and the Asylum Procedure Directive - featured almost no delegation and discretion. The Commission is granted few if any powers in these measures and the discretion in exercising those powers is negligible. This finding may be relevant for the previous literature on delegation (Franchino 2006a). Such literature may accidentally skewed its coding results by selecting only the most important legislative measures in given policy areas. The case of asylum policy reveals that those dubbed as the most important legislative pieces not always are also those displaying significant delegation and discretion.

Asylum and refugee policy has been among the policy sectors where decision-making was most fragmented where time taken to develop delegation and discretion is concerned. In Art. 63(1) and 63(2)(a) of the Treaty of Amsterdam, asylum and refugee policy was covered by a five-year “transitional period” during

⁵³ Indeed, the treaty of Nice introduced a new article that stated that once the measures establishing minimum standards were achieved, the voting rule in the Council in this policy area could change from unanimity to QMV.

which the Council was supposed to adopt “[c]ommunity legislation defining the common rules and basic principles governing these issues” in accordance with a special procedure. Once that condition was fulfilled the subsequent legislative measures were to be adopted under what was then termed the co-decision procedure. Art. 63(2)(b), promoting a balanced effort among member states in receiving and bearing the consequences of receiving refugees and displaced persons, was not covered under the five-year “transitional period” but was eventually grouped measures which, as of 1 January 2005, were covered by Art. 251 TEC. According to Franchino (2006a) delegation and discretion should increase following the introduction of QMV. However, unlike the policy area of irregular migration, the majority of measures featuring significant delegation and discretion took place before this change in decision-making (3 out of 4 before 2005). On the other hand, it is also true that the majority of legislative measures were produced in the first period before 2005 (9 out of 13). *Autrement dit*, the shift from consensus to QMV does not seem to be connected to the level of delegation and discretion in the given legislative acts.

3.3.2) Policy-area analysis: Irregular migration

Table 3.3. Delegation in irregular migration law

<i>Legislation</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>
Council and EP Directive 2009/52/EC on minimum standards against employers of illegally staying third-country nationals	48	1	2	0.021	0.167	0.017
Council and EP Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals	84	1	1	0.012	0.083	0.011
Commission Decision 2008/458/EC implementing Decision 575/2007/EC on the European Return Fund	118	5	4	0.042	0.333	0.028
Commission Decision 2007/837/EC implementing Decision 575/2007/EC adoption of the strategic guidelines	2	0	0	0.000	0.000	0.000
Decision 575/2007/EC of the EP and Council establishing the European Return Fund for the period 2008 to 2013	195	48	6	0.246	0.500	0.123
Commission Decision 2005/687/EC on the format for the report on the activities of immigration liaison officers networks	2	0	0	0.000	0.000	0.000
Council Decision 2004/573/EC on the organisation of joint flights for removals of third country nationals	10	0	0	0.000	0.000	0.000
Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data	19	0	0	0.000	0.000	0.000
Council Directive 2004/81/EC residence permit for victims of trafficking	49	1	2	0.020	0.167	0.017
Council Decision 2004/191/EC setting out the criteria and practical arrangements for the compensation of the financial imbalances on expulsions	18	0	0	0.000	0.000	0.000
Council Regulation (EC) 377/2004 on the creation of an immigration liaison officers network	21	2	3	0.095	0.250	0.071
Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air	37	1	2	0.027	0.167	0.023
Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence	10	0	1	0.000	0.083	0.000
Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen	12	0	0	0.000	0.000	0.000
Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals	20	1	1	0.050	0.083	0.05
<i>Aggregate results</i>	<i>*645</i>	<i>*60</i>	<i>**1.47</i>	<i>**0.034</i>	<i>**0.122</i>	<i>**0.022</i>
<i>Aggregate results (no implementing)</i>	<i>*523</i>	<i>*55</i>	<i>**1.5</i>	<i>**0.039</i>	<i>**0.125</i>	<i>**0.026</i>

Note: *Total and **averages

Irregular migration contains 18 legislative measures with an aggregate delegation ratio of 4.3 percent (low) and a discretion index of 3 percent (low). Excluding implementation measures does not cause the average delegation ratio and discretion index to change much, 4.9 and 3.4 percent respectively. In aggregate terms, this set of legislation shows the lowest levels of delegation and discretion of all those examined here. The only exception to these low levels of delegation and discretion is the European Return Fund Decision that covers the period 2008 to 2013, which displays 24.6 and 12.3 percent in the delegation ratio and discretion index respectively. The most likely grounds for such results are efficiency, i.e. operational management of the Fund, and credibility, to address imbalances related to presence and inflows of irregular migrants.

The irregular migration policy area appears to be particularly suitable for controlling the veracity of the blame-shifting rationale for delegation (Thatcher and Stone Sweet 2003: 3). Past academic studies have used this type of explanation in the case of EU agencies such as Frontex (Rijpma 2010), or for Directives concerning labour migration and family reunification and asylum-policy (Christina Boswell and Geddes 2011; Menz 2011). The basic idea behind this example is that member states engineered these agencies or policies, at least in part, so that citizens would direct their complaints and opposition against them rather than national politicians. Member states could have been encouraged to do this because of the combined effect of two factors. First, irregular migration has been portrayed as a threat to social cohesion or the European model of the welfare state (Bigo 2004: 74-78; de Haas 2009; Mitsilegas 2004: 29). And secondly, this is a policy area with a history of past policy failures (Castles 2004).

The Directive on the obligation of carriers to communicate passenger data and the Employer Sanction Directive are two likely examples of delegation being useful from the point of view member state governments. Providing the Commission with more powers to control, monitor and sanction in these areas was useful for governments wishing to shift responsibility towards the Commission. Hypothetically, were the Commission to receive more delegated authority in these areas, carriers, businesses and enterprises would have had to direct complaints on administrative burdens, expenses and possibly sanctions to the Commission and not their respective national governments. Additionally, such measures could have led the broader public to think that problems in managing irregular migration was partly

related to shortcomings in the Commission's management. None of the above has happened, indeed little if any powers have been granted to the Commission in any of these measures. This both relates to monitoring member state governments and administrations (on top of Treaty powers), and also concerns the issues at stake in the broadest sense possible (e.g. employers, or carriers). In other words, the Commission has virtually no powers *vis-à-vis* member states in the text of the two Directives. Consequently the blame-shifting hypothesis finds little confirmation in this policy area.

If decision-making affected delegation the most noteworthy shift in this policy area should have been expected right after the January 2005 switch to QMV in the Council⁵⁴. This hypothesis finds support in the data, where the only measure with high delegation and medium discretion occurs after 2005. However, this supporting evidence is too light a basis on which to either confirm or reject this interpretation.

⁵⁴ European Union, '2004/927/Ec: Council Decision of 22 December 2004 Providing for Certain Areas Covered by Title Iv of Part Three of the Treaty Establishing the European Community to Be Governed by the Procedure Laid Down in Article 251 of That Treaty', (Brussels, 2004a) at art. 1(2).

3.3.3) Policy-area analysis: Legal migration

Table 3.4. Delegation in legal migration law

<i>Legislation</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>
Council Directive 2009/50/EC on conditions of entry and residence for highly qualified employment	96	1	3	0.010	0.250	0.008
Council Regulation (EC) No 380/2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits	17	2	1	0.117	0.083	0.107
Commission Decision 2008/457/EC implementing Decision 575/2007/EC on the European Integration Fund	129	5	4	0.039	0.333	0.026
Council Decision 2007/435/EC establishing a European Integration Fund	172	49	6	0.285	0.500	0.142
Council Directive 2005/71 procedure for admitting third-country national for the purpose of scientific research	51	1	1	0.020	0.083	0.018
Council Directive 2004/114/EC on the conditions of admission for studies, pupil exchange, training	44	1	1	0.023	0.083	0.021
Council and EP Directive 2004/38 right of EU citizens and their family to move and reside	137	1	3	0.007	0.250	0.005
Council Directive 2003/109/EC third country nationals long term resident	104	1	2	0.010	0.167	0.008
Council Directive 2003/86 on the right to family reunification	78	1	2	0.013	0.167	0.011
Council Regulation (EC) 859/2003 nationals of third countries who are not already covered by those provisions	9	0	0	0.000	0.000	0.000
Council Regulation (EC) 1030.2002 laying down a uniform format for residence permits for third-country nationals	20	3	1	0.150	0.083	0.138
Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation	45	1	2	0.022	0.167	0.019
Council Directive 2000/43/EC implementing the principle of equal treatment racial or ethnic origin	33	1	2	0.030	0.167	0.025
<i>Aggregate results</i>	<i>*935</i>	<i>*67</i>	<i>**2.154</i>	<i>**0.056</i>	<i>**0.179</i>	<i>**0.041</i>
<i>Aggregate results (no implementing)</i>	<i>*806</i>	<i>*62</i>	<i>**2</i>	<i>**0.057</i>	<i>**0.167</i>	<i>**0.042</i>

Note: *Total and **averages

Measures pertaining to a variety of areas have been included in this category. Legal migration is made up of all measure related to labour migration, family reunification, study or training, researchers, integration and long-term residents. The two 2000 Directives on equal treatment are based on Art. 13 TEC. Aggregate results for delegation and discretion are slightly higher than for irregular migration, but are still low. On the contrary, average constraint is higher than irregular

migration, signalling tighter control by the Council than in the case of irregular migration.

Similar to the results recorded for irregular migration, there are two particular measures worth focusing on in the area of legal migration, the Integration Fund Decision and Residence Permit Regulation. The former measure displays 28.5 and 14.2 percent in delegation and discretion respectively, while the latter 15 and 23.8 percent in the parameters. Delegation and discretion are however almost undetectable in the rest of the legislative acts of this set. Again, similar to findings in relation to asylum policy, the legislative acts that have received the greatest levels of attention in the academic literature display little if any powers granted to the Commission (Cerna 2013; Menz 2011; Ruffer 2011). This has led some commentators to argue that this area is the most underdeveloped in EU migration policy (Geddes 2008: 134). While most commentators have pointed to the lack of common interests in developing this policy area, this thesis tests in Chapter 6 the absence of grounds for delegation as a means of explaining low results in this area.

Unanimity was employed for all measures adopted under Art. 63(3)(a) until Lisbon. Therefore, contrary to all other sub-sectors, it is not possible to compare different periods marked by shifts in decision-making. Unanimity has not affected the legislative output though, as the number of measures adopted is in line with asylum policy.

3.3.4) Policy-area analysis: Administrative measures

Table 3.5. Delegation in administrative law

<i>Legislation</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>
Council Decision 2008/381/EC establishing a European Migration Network	47	10	4	0.213	0.333	0.142
Regulation (EC) 862/2007 of the EP and the Council on Community statistics	43	4	4	0.093	0.333	0.062
Regulation (EC) 1905/2006 establishing a financing instrument for development cooperation	155	27	6	0.174	0.500	0.087
Council Decision 2006/688 mutual information mechanism on asylum and immigration measures	24	6	5	0.250	0.417	0.146
Council Decision 2005/267 establishing a secure web-based information and coordination network of migration management services	19	5	3	0.263	0.25	0.197
Council Decision 2004.867.EC amending Decision 2002.463.EC ARGO programme	5	2	1	0.400	0.083	0.367
Council Decision 2002/463/EC adopting an action programme for administrative cooperation ARGO	32	7	4	0.219	0.333	0.146
<i>Aggregate results</i>	<i>*325</i>	<i>*61</i>	<i>**3.86</i>	<i>**0.23</i>	<i>**0.32</i>	<i>**0.16</i>
<i>Aggregate results (no implementing)</i>	<i>*325</i>	<i>*61</i>	<i>**3.86</i>	<i>**0.23</i>	<i>**0.32</i>	<i>**0.16</i>

Note: *Total and **averages

Five measures in this sub-set originate from Art. 66 on administrative cooperation in the area of migration. Two of these measures are about the funding cooperation on migration issues without sectorial differentiation (ARGO Decisions⁵⁵), and four are about knowledge and information in the three dimensions of production, sharing and dissemination (e.g. the EMN Decision, the Decision on mutual information mechanism). That is why they were considered in this category. The other measures in this set such as the Migration Statistics Regulation and Development Cooperation Fund stem from a number of other Treaty articles. Aggregate levels for both the delegation ratio and discretion index are the highest in the data set.

The Secure Web-Based Information and Co-ordination Network Decision features 26.3 percent delegation ratio and 19.7 percent discretion index. This is an executive measure that confers a variety of administrative and management tasks on the Commission in addition to a good deal of discretion in managing them. The Mutual Information Mechanism Decision displays a delegation ratio of 37.5 percent and discretion index 21.9 percent. Almost exclusively related to irregular migration,

⁵⁵ The "ARGO programme" is a "Community action programme [...] to support and complement the actions undertaken by the Community and the Member States in the implementation of Community legislation founded on Articles 62, 63 and 66 of the Treaty" (ARGO Decision, Art. 1).

the legal basis of this Decision is nonetheless Art. 66. Always related to a possible uncertainty rationale, the EMN Decision shows high delegation and discretion, respectively at 21.3 and 14.2 percent. This Decision provides for coordination between national and European authorities, and experts in the field of migration. The ARGO Decision features 21.9 percent and 14.6 percent in delegation and discretion respectively, while its amending Decision features 40 percent and 36.7 percent respectively. ARGO was an all-embracing programme, funding projects from borders to asylum and from visas to immigration. The Development Cooperation Regulation has been included in the data set because, on top of repealing past legislative acts in the field of migration, it features a number of articles exclusively dedicated to migration-related measures. It is also generally guided by the viewpoint that migration and development are inextricably linked. The latter feature was the result of a long-term re-framing of development and migration issues, which is also supported by the Global Approach to Migration that emerged in 2005 (Commission 2005c).

Art. 66 was governed under unanimity until 1 May 2004, after which it fell under QMV. The switch corresponds to a change in legislative output, with 2 measures adopted before that date and 3 after), but there is no significant difference in terms of delegation and discretion as both the ratio and the index remain high throughout the period. Hence there does not seem to be a direct relationship between decision-making structures and delegation.

3.3.5) Policy-area analysis: Borders and visas

Table 3.6. Delegation in borders and visas law

<i>Legislation</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>
Commission Decision 2010/49/EC determining the first regions for the start of operations of the Visa Information System (VIS)	3	0	0	0.000	0.000	0.000
Commission Decision 2009.876.EC adopting technical measures for entering the data and linking applications	2	0	0	0.000	0.000	0.000
Commission Decision 2009/756/EC laying down specifications for the resolution and use of fingerprints for biometric identification and	2	0	0	0.000	0.000	0.000
Regulation 810/2009 of the EP and the Council on a Community code on visas (Visa Code)	278	5	4	0.018	0.333	0.012
Commission Decision 2009/720/EC laying down the date for the completion of migration from the Schengen Information System (SIS)	2	0	0	0.000	0.000	0.000
Commission Decision C(2009) 3770 modifying the technical specifications for the uniform format for residence permits for TCNs	7	0	0	0.000	0.000	0.000
2009/377/EC Commission Decision adopting implementing measures for the consultation mechanism and the other procedures referred to in Regulation (EC) 767.2008 concerning the VIS	2	0	0	0.000	0.000	0.000
Regulation 81/2009/EC amending Regulation (EC) No 562/2006 as regards the use of the Visa Information System (VIS)	5	1	2	0.200	0.167	0.167
Commission Decision C(2008) 8657 laying down a certificate policy as required in the technical specifications on the standards for security features and biometrics in passports and travel documents issued by Member States and updating the normative reference documents (contact details for certification authorities)	3	0	0	0.000	0.000	0.000
Council Regulation 1104/2008/EC on migration from the SIS 1+ to the second generation SIS II	73	24	4	0.329	0.333	0.219
Council Regulation (EC) 856/2008 amending Regulation (EC) 1683/95 uniform format for visas numbering of visas	5	1	1	0.200	0.083	0.183
Regulation 767/2008 concerning the Visa Information System (VIS)	154	17	7	0.110	0.583	0.046
Regulation 296/2008 of the European Parliament and of the Council amending Regulation 562/2006	5	2	1	0.400	0.083	0.367

<i>Legislation</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>
establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)						
Commission Decision 2008/602/EC laying down the physical architecture and requirements of the national interfaces and of the	2	0	0	0.000	0.000	0.000
2008/456/EC Commission Decision laying down rules for the implementation of Decision 574/2007/EC establishing the External Borders Fund	134	5	4	0.037	0.333	0.025
2008/333/EC Commission Decision of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II)	2	0	0	0.000	0.000	0.000
Council Regulation (EC) 189/2008 on the tests of the second generation Schengen Information System (SIS II)	2	0	0	0.000	0.000	0.000
2008/173/EC Council Decision on the tests of the second generation Schengen Information System (SIS II)	2	0	0	0.000	0.000	0.000
2007/599/EC: Commission Decision implementing Decision 574/2007/EC of the EP and of the Council as regards the adoption of strategic guidelines for 2007 to 2013	2	0	0	0.000	0.000	0.000
Council and EP Regulation 863/2007 on rapid intervention teams (RABIT)	82	13	4	0.159	0.333	0.106
Council and EP Decision 574/2007/EC External Borders Fund for the period 2007 to 2013	198	55	6	0.278	0.500	0.139
2007/171/EC Commission Decision laying down the network requirements for the Schengen Information System II	1	0	0	0.000	0.000	0.000
2007/170/EC Commission Decision of 16 March 2007 laying down the network requirements for the Schengen Information System II	2	0	0	0.000	0.000	0.000
Regulation 1987/2006 on the establishment, operation and use of SIS II	170	16	5	0.094	0.417	0.055
Regulation (EC) 1931/2006 of the EP and the Council on local border traffic	41	2	2	0.049	0.167	0.041
2006/752/EC Commission Decision establishing the sites for the Visa Information System during the development phase	3	0	0	0.000	0.000	0.000
2006/648/EC Commission Decision laying down the technical specifications on the standards for biometric features related to the development of the Visa Information System	2	0	0	0.000	0.000	0.000
Council and EP Regulation (EC) 562/2006 establishing a Community code on the rules governing the	164	7	3	0.043	0.250	0.032

<i>Legislation</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>
movement of persons across borders (Schengen Borders Code)						
2005/358/EC Council Decision designating the seat of the FRONTEX	2	0	0	0.000	0.000	0.000
Council Regulation 851/2005 amending the visa list regulation	11	5	3	0.455	0.250	0.341
Council Regulation 2252/2004 on standards for security features and biometrics in passports	15	2	1	0.133	0.083	0.122
Council Decision 2004/512/EC establishing the Visa Information System (VIS)	13	3	4	0.231	0.333	0.154
Council Regulation 2007/2004 Frontex	124	17	5	0.137	0.417	0.080
Council Regulation (EC) 694/2003 on uniform formats for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD) provided for in Regulation (EC) 693.2003	14	3	1	0.214	0.083	0.196
Council Regulation (EC) 693/2003 establishing a specific Facilitated Transit Document (FTD), Facilitated Rail Transit Document (FRTD)	30	0	1	0.000	0.083	0.000
Council Regulation (EC) No 334/2002 amending Regulation 1683/95 laying down a uniform format for visas	8	2	2	0.250	0.167	0.208
Council Regulation (EC) No 333/2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding	15	2	1	0.133	0.083	0.122
Council Regulation (EC) 2424/2001 on the development of the second generation Schengen Information System (SIS II)	14	3	4	0.214	0.333	0.143
Council Regulation 1091/2001 on freedom of movement with a long-stay visa	3	0	0	0.000	0.000	0.000
Council Regulation 789/2001 reserving to the Council implementing powers examining visa applications	8	2	1	0.250	0.083	0.229
Council Regulation 539/2001 listing the third countries whose nationals must be in possession of visas	19	2	2	0.105	0.167	0.088
<i>Aggregate results</i>	<i>*1624</i>	<i>*189</i>	<i>**1.66</i>	<i>**0.10</i>	<i>**0.14</i>	<i>**0.07</i>
<i>Aggregate results (no implementing)</i>	<i>*1449</i>	<i>*184</i>	<i>**2.78</i>	<i>**0.17</i>	<i>**0.23</i>	<i>**0.13</i>

Note: *Total and **averages

Turning now to the most densely populated policy area of the data set, borders and visas, the most obvious point to note is that 18 of the 41 measures are implementing acts. These have been counted because of their binding legal nature. Among the 41 measures, a sizeable number show high and medium delegation and discretion. The average delegation ratio is 10 per cent and the discretion index is at 7 percent. If implementing measures are excluded, delegation jumps seven percentage points to

17 percent, with discretion up 6 points to 13 percent. There are simply too many legislative measures with high delegation and discretion to introduce them all in detail. High and medium delegation ratios are both present in border and visa related legislation, these measures are concentrated on technical measures such as IT programmes as well as on cooperative and management initiatives such as Frontex.

These points confirm the widespread belief that border and visa policy is one of the most advanced area of cooperation in the EU (Niemann 2008: 570). The volume of legislative output and the aggregate results in terms of delegation and discretion⁵⁶ corroborate this. On the other hand however, these observations highlight the problematic nature of frequent references to politicisation in EU migration policy (Stetter 2000). Briefly, many failures or deadlocks in cooperation in EU migration policy appear to arise for political reasons. It therefore follows that if such sensitivities were not present integration would be more streamlined. While *prima facie* a reasonable assumption, the findings here reveal unexpected difficulties with it. First, it is difficult to provide a precise definition of what is meant by politicisation. Nevertheless, applying its plainest meaning, it seems logical to conclude that administrative measures present the lowest political visibility in the legislative set. It therefore makes sense that higher average delegation and discretion levels exist here than in other migration categories (see previous subsections). However, many regard border and visa policy a politically salient issue (Luedtke et al. 2010: 147, 58; Meloni 2005: 1358), yet it features average levels of delegation and discretion that are substantially above those of legal and irregular migration. Even more ambiguous is the case of asylum policy, which stands halfway between all these migration categories but whose position in terms of being more or less politicised than legal migration or border and visa policy is not clear.

If the contention were true that changes in the decision-making prompt more delegation and discretion, this policy area should have been the most advanced over time. With the entry into force of the Treaty of Amsterdam, all legislative acts stemming from Art. 62(2)(b)(i) and (iii) immediately required QMV in the Council and consultation with the EP. This was consistent with the Treaty of Maastricht

⁵⁶ Not counting for implementing measures.

(Peers 2005). Also, Art. 62(2)(b)(ii) and (iv) were brought under the remit of Art. 251 (co-decision) after five years, with no Council vote required for that change to take effect. On the other hand, art 62(1) was under the five years “transitional period” and was transferred to art. 251 as of 1 January 2005. Thus a sort of three-tiered regime existed in border and visa policy, making this area one of the most complicated in terms of intricacies of the legislative process. That being said, legislative measures featuring high and medium delegation are equally distributed across the two time periods before and after 2005. Hence this sub-set does not lead to a clear confirmation of the relevance of decision-making to the degree of delegation.

3.4. Discussion

This analysis has found instances of almost all of Franchino's delegating provisions. The average delegation ratio and discretion index for the migration policy area⁵⁷ is 12.4 percent and 8.9 percent respectively. Based on Franchino's findings a cross-policy comparative stance is taken here, albeit with a number of caveats. The first is to remember that the coding criteria have been slightly modified, including agenda setting provisions in this case. At the very least this should have inflated the results of this study as compared with Franchino's. However, in keeping with Pollack (Pollack 2003b), if the purpose is to chart and measure the powers being granted to the Commission the inclusion of agenda setting provisions is justified. Secondly, one has to take account of the fact that these figures refer to *overall* discretion in policy sectors, each composed by the entire set of measures traceable to that category. Franchino and Pollack account for a variable number of measures deemed significant in each policy area. It is not clear what effect that selection criteria has for delegation and discretion. As mentioned several times in this chapter, the measures that attracted most attention in academic literature do not necessarily display the highest delegation and discretion.

Bearing that in mind, it is possible to identify that the Commission's discretion in this data set ranks below the level of a number of policy areas such as “Monetary compensation amounts” (15 percent), “Agriculture-organization of markets” (14.74

⁵⁷ Excluding implementing measures.

percent), “Fishing-organization of markets” (10.61 percent), and “Competition-merger control” (9.71 percent). Surprisingly, the Commission's average discretion is above those of “Commercial policy (7.37 percent) and Agriculture-financial provisions (6.90 per cent)”, two long-established Community competences, “Transport-market conditions (6.51 percent); (9) Agriculture-structural policy (6.33 percent); and (10) Regional policy (6.21 percent)” (Pollack 2003b: 102). A closer look indicates that the Commission enjoys uneven delegation and discretion depending on the policy sub-sector. Discretion in administrative cooperation, borders and visas, and asylum and refugee law is above many of the policy areas mentioned above.

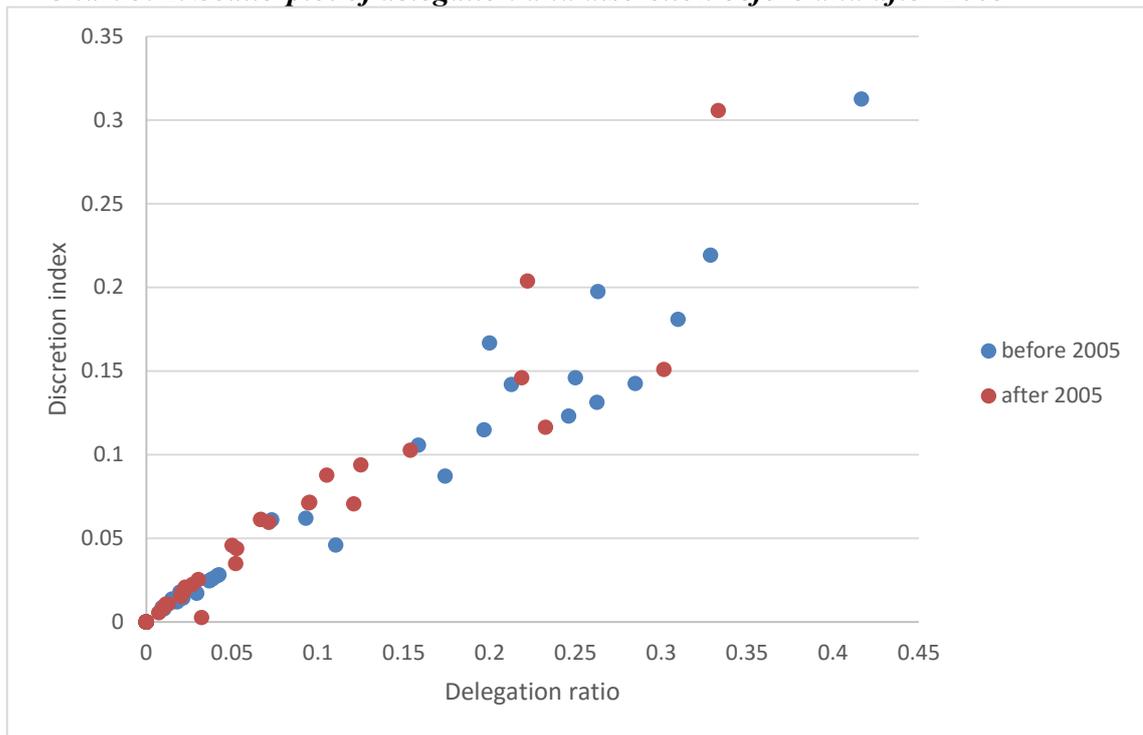
A trend seems to exist whereby the Commission is granted powers only where the measure deals with rather technical or administrative matters, it becomes less relevant as an actor when the legislation in question is about setting European minimum standards or harmonising a given policy issue. As migration policy is chock-full of minimum standards and harmonising measures, it is evident why average delegation ratio and discretion index are medium and low respectively. Turning to the grounds for delegation? First, the technical nature of much of the measures hints at expertise and general management capabilities as likely rationales for delegation. In other words it indicates efficiency and uncertainty. The prominence of the Funds across this sub-set also points to the importance of credibility of commitments and efficiency. The Frontex Regulation is no exception to this as it concerns operational management and delegation seems again to be made on the basis of efficiency.

Turning to the typology of legislative measures used, it is striking that of the 35 measures displaying high and medium delegation not one is a Directive. The Council tends not to delegate in this kind of measures. If it is true that member states enjoy more discretion in this type of secondary legislation, one would assume that consistent implementation would require that mechanisms be inserted within the legislation to allow the Commission to properly monitor member states. This would be on top of the functions the Commission has by virtue of the Treaty. The findings of this dissertation reject this assumption.

The findings of this chapter do not neatly confirm Franchino’s hypothesis that

changes in decision-making affect delegation and discretion and that a switch to QMV in particular should lead to more discretion. The scatterplot below does not deliver a clear confirmation of that hypothesis. The main distribution patterns of the two periods marked by the change in voting procedure does not indicate any clear-cut divergence between the two series, and this is what one would expect if Franchino's theory were correct.

Chart 3. 1. Scatterplot of delegation and discretion before and after 2005



The focus thus far has exclusively concerned policy areas and sectors. The figures presented were aggregates of results extracted using a methodology employing single legislative measures as units of analysis. This analysis is combined with another, which is centred on the individual legislative measures. Two cut-off points, set at 10 percent and 20 percent respectively, are introduced to signify medium and high delegation ratio and discretion index rates. Franchino found that the highest discretion for a policy category stood at 20.67 per cent (competition – rules for undertaking) (2006a: 176). Bearing that in mind, it makes sense to argue that results ranking above 20 percent achieve the highest possible scores in EU legislation. A limited number of policy areas populate the space between 10 per cent and 19.99 percent, while the majority of Franchino's results fall below 9.99 percent. The results for this analysis are displayed using this

classification in table 3.7 below.

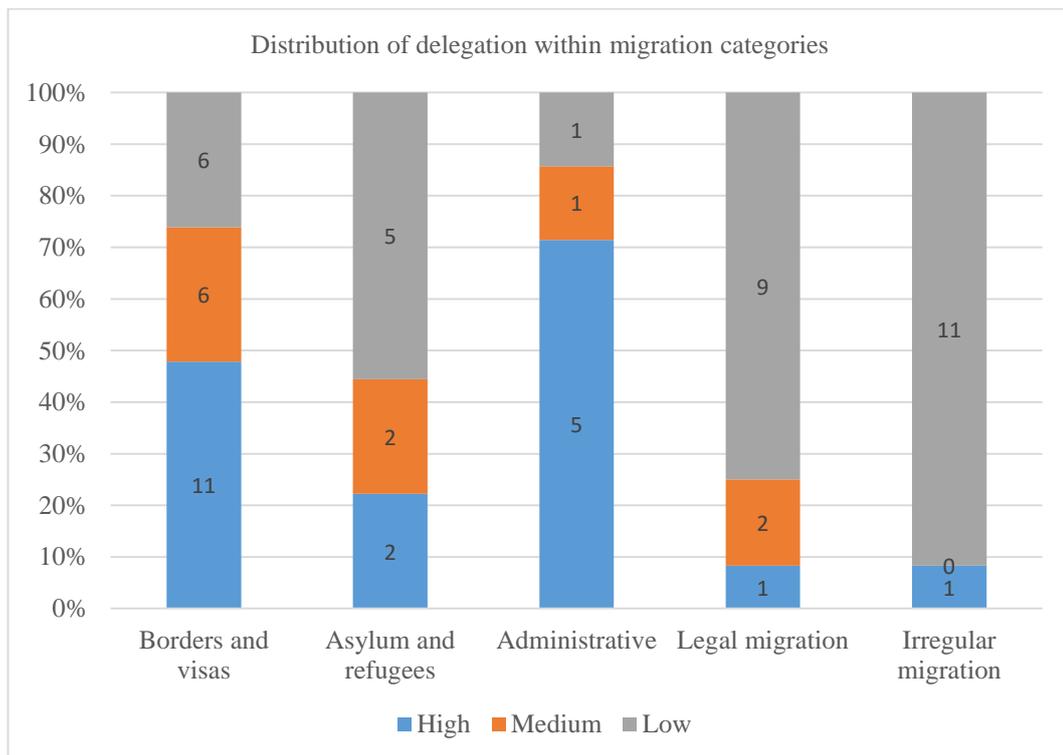
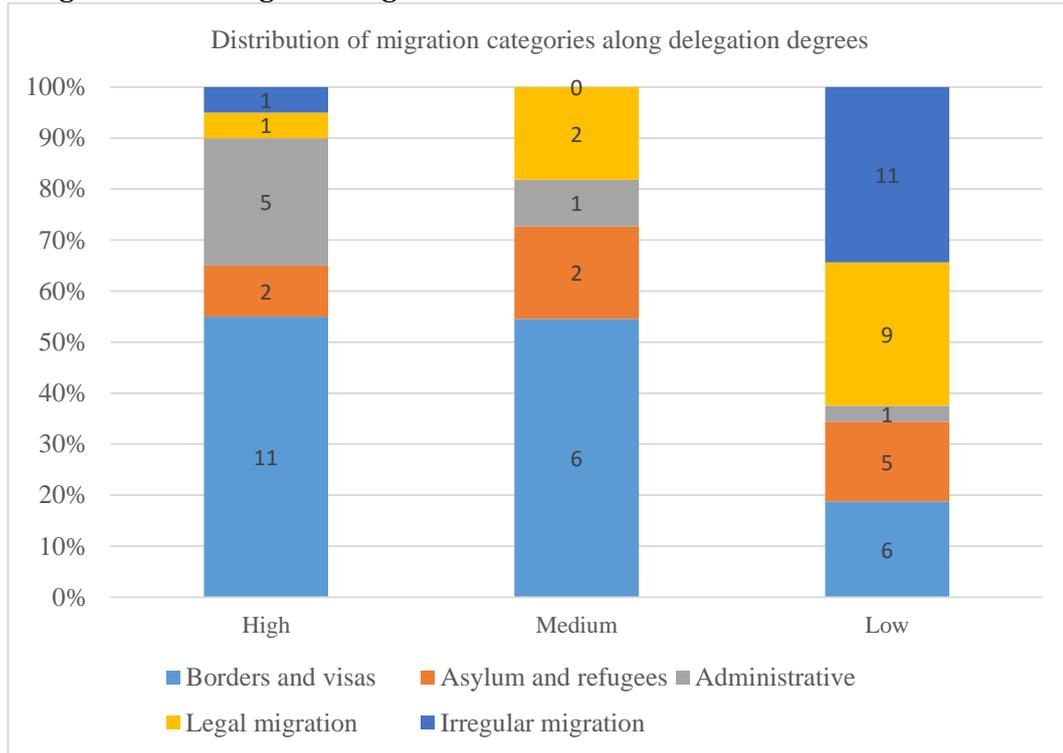
Table 3.7. Number of legislative measures with medium to high delegation ratios per policy area (first with implementing measures, then without implementing measures)

	<i>Borders and visas</i>	<i>Asylum and refugees</i>	<i>Administrative</i>	<i>Legal migration</i>	<i>Irregular migration</i>	<i>Total</i>
High (0.2 - x)	11	3	5	1	1	21
Medium (0.1 – 0.19)	6	2	1	2	0	10
Low (0 to 0.1)	24	8	1	10	14	58
Total	41	13	7	13	15	89
High (0.2 - x)	11	2	5	1	1	20
Medium (0.1 – 0.19)	6	2	1	2	0	10
Low (0 to 0.1)	6	5	1	9	11	33
Total	23	9	7	12	12	63

Note: in the bottom half, implementing measures are not counted.

The two-stacked bar charts below first display all categories and then the degrees of delegation dealt with here. Looking at the migration categories, measures with high and medium delegation are more common in the administrative and borders and visas categories (in decreasing order). This takes account of the effect of the widely differing number of legislative measures present in each category, which instead affects the second chart. That latter chart shows that borders and visas and administrative measures (in decreasing order) make up the overwhelming majority of measures featuring both high and medium degrees of delegation. Therefore, the aggregate results are confirmed when a different view is taken and attention is paid to the distribution of measures across policies areas.

Chart 3.2 and 3.3. Distribution of legislative measures along migration categories and delegation degrees



Note: Excluding implementing measures.

There are 20 pieces of legislation⁵⁸ featuring a delegation ratio equal to or above 20 percent, they consist of the migration funds and technical or IT

⁵⁸ Not counting implementing measures.

instruments such as VIS and SIS. This would indicate that the Commission is most empowered where the objective is to strengthen credibility (securing member states' commitments is an explicit objective of the Funds), and to rely on operational management (efficiency reasons). There are eleven legislative measures that qualified as medium, ranging from 10 to 19.9 percent. This sub-set is made up of some of the remaining legislative measures related to Funds, other technical measure related to IT systems (SIS), and Frontex and related measures. This only reinforces the previous finding about credibility of commitments and efficiency. The other 33 pieces of legislation feature low delegation, with values from zero to 9.9 percent. Among them nine feature no delegation whatsoever. The conspicuous number of measures with low delegation confirms Franchino's finding that the majority of measures feature low delegation and discretion. For him, this is because the Council favours national administrations over EU implementation paths when creating legislation (Franchino 2006a: 163-79).

3.5. Conclusions

The quantitative content of this chapter serves as a guide for the ensuing qualitative research by identifying clusters of delegation. The first finding is that delegation and discretion are present in this policy area to an extent that is comparable to other EU policy areas. It has also been shown that variation in delegation and discretion does happen both across and within policy areas. Nevertheless the quantitative models present in the literature help little in understanding the determinants for such delegation. Thus, as identified in Chapter 2, the following chapters look at the various determinants of delegation and investigate the extent to which they can explain the various levels of delegation recorded in this chapter.

4. Delegation in asylum and refugee law

While the foregoing chapter provided a clear picture of the amount and distribution of delegation in EU migration policy, this chapter marks the first of four dealing with the migration categories identified in Chapters 2 and 3 from a qualitative standpoint. As mentioned in Chapter 2, the migration categories used in this dissertation have largely been organised around Treaty articles. They are: asylum and refugee policy; irregular migration; legal migration and administrative cooperation; and finally, border and visa policy. With particular reference to asylum, the last chapter revealed that on aggregate this policy area shows medium delegation and low discretion, with four measures featuring a high and medium delegation ratio. Asylum and refugee policy is also marked by the second highest constraint ratio in the entire data set, signalling a high level of member states' control over the Commission.

Legislation on asylum and refugee policy between 1999 and 2009 stemmed from Art. 63(1) and (2) TEC. These Treaty provisions granted Community competence on “[m]easures on asylum” such as the “criteria and mechanisms for determining which Member State is responsible for considering an application” (i.e. the Dublin Convention), and minimum standards concerning reception, qualification, and procedures for granting or withdrawing refugee status. The Treaty also allowed for “[m]easures on refugees and displaced persons” regarding minimum standards for temporary protection and burden sharing. Of these measures, only burden sharing was omitted from the five-year arrangement that should have triggered a vote in the Council (Peers 2011: 301).

Before proceeding further, it is important to distinguish between a refugee and an asylum seeker given the frequency with which the terms are conflated. The 1951 UN Convention Relating to the Status of Refugees defines a refugee as an individual,

“... who owing to a ‘well founded fear of persecution’ for reasons of political opinion, race, religion, nationality or membership in a

particular social group are outside their country of nationality and are unable or, as a result of such fear, unwilling to return to it” (M. Gibney, J. 2004: 5-6).

An asylum seeker on the other hand may acquire refugee status should their application for asylum be accepted by a hosting state, they are not however endowed with this status until such time as this occurs (M. Gibney, J. 2004: 10). Thus it is the responsibility of the receiving state to decide whether an asylum seeker is granted refugee status, whether they are granted another form of international protection such as subsidiary protection or protection for humanitarian reasons, or indeed whether their application is denied.

This chapter deals with each of the determinants of delegation highlighted in the second chapter. The first section briefly summarises the relationship between Commission and Council, with analysis of this dynamic continuing throughout the rest of the chapter. Three subsequent sections deal with the independent variables: need to reduce uncertainty; desire for strengthening the credibility of commitments; and, quest for efficiency and effectiveness. And, as similar migration funds have emerged in other migration areas, the forerunning European Refugee Funds are discussed at length to develop an understanding thereof.

4.1. Analysis of the determinants of delegation

4.1.1) Institutional factors: Council internal division, and conflict between Council and Commission

Delegation scholars are divided over whether conflict within the Council brings about increased or reduced levels of delegation. Following principal-agent models, Pollack holds that conflict within the Council leads to reduced levels of delegation as the possibility of sanctioning the agent decreases in the context of divided preferences among principals (2003b). With an eye to implementation, Franchino posits that conflict within the Council can lead to no implementation or poor implementation, thus, in his view, delegation to the Commission is essential for the purpose of policy effectiveness (2004). A more widely accepted hypothesis in principal-agent models is that delegation and discretion should decrease as conflict

between the Council and the Commission increases⁵⁹. The purpose of this section is therefore to briefly summarise the institutional contexts surrounding asylum policy.

It is rather telling that the first subheading used to sum up the results of the first multi-annual programme in JHA ('the Tampere Programme') is "Important achievements in a difficult environment" (Commission 2004f: 3-5). This report refers to member states' resistance to the Commission's initiatives in this area and this title effectively captures the tone of the relationship between the two EU institutions regarding asylum policy. While guided by consensus on certain overarching principles, member states were divided on a number of aspects of the legislation. It was agreed that there was a need to preserve the principle of asylum, yet on the other hand, member states also agreed that reducing asylum seeker inflows was desirable. Divergence also arose on a number of practical issues, the best demonstration of which is perhaps the number of years it took for the Council to reach agreement on first asylum package: five years for the Asylum Procedure Directive; three years for the Reception Condition Directive; and, four years for the Asylum Qualification Directive. A number of substantive points that emerged during the debates concerning these measures contributed to these delays. They ranged from access to labour markets for asylum seekers to the lists of countries regarded as "safe" for the purposes of asylum assessment procedures. For instance, Council negotiations over the Asylum Qualification Directive were reportedly put on hold for several months pending adoption of a new migration law in Germany (European Report 2003b, 2004c). Similarly, Council proceedings concerning the Reception Conditions Directive were stalled due to German misgivings as to the authority of the EU to rule on matters concerning access to its labour market (European Report 2003d). The issues most intensely debated in this Directive were related to access to labour market, freedom of movement, the scope of the Directive (the inclusion of subsidiary protection), and education and training (Agence Europe 2002a; Council 2000x). The subsequent sections highlight the most controversial of these issues.

Proposals, Communications, and press releases issued by the Commission

⁵⁹ See Chapter 2 for a thorough presentation of these hypotheses.

between 1999 and 2009 provide evidence of liberality regarding TCNs, member states' obligations and the remit of legislation concerning asylum seekers and refugees. Member states, on the other hand, have tended to oppose such proposals to the extent that the Commission has been required to issue several redrafts of its proposals⁶⁰. In an unusually harsh press release for example, the Commission outlined how its original proposal on the Reception Conditions Directive was watered down by the Council on provisions concerning family members, freedom of movement, employment and vocational training, and, quality and availability of reception conditions (Agence Europe 2002c, 2002d; Commission 2002a). Moreover, the Commission was compelled to table a second proposal on minimum standards – the 'Asylum Procedure Directive' – after the Council spent over a year in internal wrangling over its first proposal (Commission 2002c). This second proposal came about only after the Belgian Council Presidency and the Commission President recognised the presence of a complete deadlock during the Laeken European Council. Tensions were again evident when, much to the dissatisfaction of the Commission (European Report 2000g) and the EP (EP 2000b: 15-16), the Council retained Comitology implementation powers in the Eurodac Regulation. Indeed, as stated by the EP, the Temporary Protection Directive 2001/55/EC was the result of the Council's previous failure to reach an agreement on two similar proposals made by the Commission in 1997 and 1998, which was "lamentable in view of the seriousness of this matter" (EP 2000a: 22).

Commissioner António Vitorino indicated a belief that, contrary to the desires of the Commission, the low level of harmonisation was explicitly provided for through a high number of legal exceptions in the texts adopted. This was one of the main reasons behind the Commission's emphasis on developing a second phase of the European asylum system. Vitorino is reported to have stated that "The level of harmonisation for the first phase is very limited, therefore the added value will be limited, we need other legislative instruments", and while he understood that there is "a certain legislation fatigue on asylum within the Council", there were "too many exceptions" in the legal texts adopted to that date, and therefore no "fair sharing of the burden" (Agence Europe 2004b).

Although made before the first package of major asylum measures was

⁶⁰ E.g. the first European Refugee Fund, Eurodac Regulation, the Asylum Procedure Directive.

completed, this statement reveals the Commission's dissatisfaction with how this policy area was taking shape, while also demonstrating how it continued to push its agenda irrespective of the realities on the ground. Indeed, one month after the Tampere assessment was completed, the Commission proposed a radical overhaul of the measures both under discussion (the Asylum Procedure Directive) and recently agreed upon (Commission 2004e). While at the time this was justified as a response to the need to improve the legislation, the timing was puzzling. And despite the fact that member states were under treaty obligations to conclude the first package of measures on asylum by May 2004, they were unable to achieve this and the Asylum Procedure Directive was only adopted in December 2005.

In conclusion, it seems safe to say that Commission and Council were at odds on asylum and refugee policy during this period. This is supported by the quantitative analysis discussed in Chapter 3 in that this relationship featured the second highest constraint ratio among migration categories.

4.1.2) Uncertainty

It is one of the central tenets of this dissertation that the more a policy field is plagued by information and knowledge gaps, both in content and sharing, the greater the incentive for principals to delegate powers to a third party. Such delegation may be for the purpose of gathering information, or may be intended to produce expert knowledge on behalf of the principals. This section first focuses on the issues that characterise cooperation on information and knowledge concerning asylum at the European level, and then analyses the extent to which these issues correspond with delegation in secondary legislation. A similar approach is taken in the forthcoming qualitative chapters.

Boswell and Geddes hold that data on asylum “tend to be fairly reliable” (2011: 156, 70). Thus the overall picture concerning asylum-related data for the period covered by this dissertation is not particularly problematic. Asylum may be contrasted with irregular migration⁶¹ and likened to labour migration in this regard

⁶¹ See next chapter.

(Poulain and Singleton 2006: 376). As with labour migration⁶², cooperation on asylum statistics has been built upon existing frameworks institutionalised by the United Nations High Commissioner for Refugees⁶³ (Kraler and Reichel 2010b: 22; Loescher and Milner 2011: 189). That said, the majority of migration measurements result from the collection and aggregation of cross-national information. It therefore follows that pan-European migration statistics are, in the main, only as good as the national components given that the “completeness of the tables depends largely on the availability of data from the relevant national statistical institutes” (Fassmann 2009: 31).

Towards the end of the 1990s, most member states had already established their own means of collecting and interpreting data on asylum and refugees. That said some exceptions did exist where such data was completely absent prior to EU accession, in such cases data collection was reportedly only introduced during the 1990s (Kraler and Reichel 2010a: 6). Malta, for instance, created an asylum database as a direct consequence of requests from the EU (Kraler and Reichel 2010a: 6). Another issue was the variation in criteria employed in asylum-data collection. For example, while some member states counted total resident asylum seeker and refugee populations (15 out of 25 member states), others counted only refugees who had received Geneva Convention status (Fassmann 2009: 37). These were not trivial matters. Indeed, while negotiating the European Refugee Fund in early 2000, the Spanish delegation objected to the use of statistics for the allocation of money as these data had not been harmonised in any way at EU level (Council 2000w).

The Commission began developing a statistical toolkit in 1999 as a direct consequence of the growing importance of asylum as a political issue (European Report 1999d, 2001b). In its 2000 Communication on asylum, the Commission named “[i]nformation, exchanges and common evaluations” and “statistics” as the first two priorities for this policy area (Commission 2000b: 14, 15). In addition to which, it became its stated intention to identify,

⁶² See Chapter 6.

⁶³ As from its webpage, the “The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide” Unhcr, 'Office of the United Nations High Commissioner for Refugees. About Us.', <<http://www.unhcr.org/pages/49c3646c2.html>>, accessed 10 August 2014..

“new mechanisms for cooperation between national authorities to compile and exchange information, analyse statistics, provide ‘early warning’ and rapid information on national and Community administrative and judicial decisions, the exchange of good practice, training, processing requests and Country of Origin Information” (Commission 2006e: 2).

Both the Swedish and Belgian Presidencies proposed information exchange mechanisms on asylum (as well as other areas of migration) in 2001 (Agence Europe 2001g; Commission 2003d; Council 2001r; EUObserver.com 2001a). In 2002, CIREA⁶⁴ ceased to exist after approximately four years of activity (Commission 2003d: 4), and all its tasks were transferred to the Commission, which in turn set up EURASIL (the EU Network for Asylum Practitioners). Cooperation on asylum statistics at the EU level received a major boost with the introduction of the Migration Statistics Regulation. In addition to which, a “system of mutual information” was created where “those in charge of migration and asylum policy in the Member States” could share “information and views” (European Union 2006a: Recital 3, 4)⁶⁵. The availability of better and more reliable information from member states, and enhanced communications between them helped administrations address misconceptions and improve cooperation toward the long-standing objective of achieving a Common European Asylum System. An important aspect of which was the harmonisation of statistical apparatuses as, in addition to being an objective *per se*, this provided the Commission with a firmer and more central role in migration policy (Christina Boswell and Geddes 2011: 168).

Despite this progress, policy-makers were aware that substantial long-term problems remained regarding a number of statistical issues. For one thing, achieving consistency and comparability of data required the presence of common working definitions. The absence of which made it “clear that the available European statistics on migration and asylum [were] not adequate for the preparation and monitoring of legislation and policy” (Commission 2005d: 4). Nevertheless, although common definitions were deemed essential by member states to combat

⁶⁴ A Council Working Party on asylum.

⁶⁵ For more on these two measures, see Chapter 6.

‘asylum shopping’⁶⁶ and despite the definition of an asylum seeker being grounded in common minimum standards set out in the Asylum Qualification Directive, broad variation persisted among member states even years after this Directive’s adoption (Commission 2010a). Every now and then, these problems would pop up in the media (D. Casciani 2002b). Council documents also reveal that member states were interested in obtaining more information on what their counterparts were doing on a number of asylum issues. The Council circulated questionnaires on, *inter alia*, accelerated procedure (Council 2001z), renewed applications (Council 2001y), transfers of protection (Council 2000k), alternative forms of protection (Council 2000i), complementary forms of protection (Council 2001q). Practices as regards international protection varied conspicuously, and this was a cause for concern among member states. For example, in the late 1990s France and Germany strictly adhered to the letter of Geneva Convention and thus refused to recognise persecution by non-state actors as a ground for granting refugee status⁶⁷ (Delouvin 2000: 71; Green 2001: 93; 2005: 339; Koslowski 1998: 171). On the other hand, the UK did grant international protection also in those cases, which created implementation problems with regard to the Dublin Convention (Agence Europe 2002b; The Guardian 2001b). A decade later, difficulties persisted, which led the Commission to voice many criticisms in its report on the application of the Asylum Qualification Directive (Commission 2010d).

Statistics on recognition rates are a good example of how definitions directly impact on asylum policy. These statistics are highly important and are often quoted in asylum policy; they refer to the share of applications upheld as a function of the total number of decisions made, and can be broken down into first and final decisions. In 2011, recognition rates varied hugely among member states. Even more telling is the fact that recognition rates varied within specific nationalities of asylum seekers (Iraqis, Afghans and Somalis) across Europe (Commission 2009a: 23; ECRE 2012). The likelihood of an Afghan national seeing his or her asylum request granted in 2011 was 73% in Sweden but only 37% in Germany. Similarly, an Iraqi national stood a better chance of having his or her application approved in

⁶⁶ See next section.

⁶⁷ It should be said that some of these member states had other forms that granted some sort of protection to those falling out of the strict interpretation of the Geneva Convention. See Barbou Des Places Ségolène Barbou Des Place, 'Evolution of Asylum Legislation in the Eu: Insights from Regulatory Theory', (16; Firenze: European University Institute, 2003) at 10.

Belgium (81%) than in Denmark (13%). And a Somali national had a 95% chance of approval in Italy as compared with 39% in France. This was happening seven years after the first legislative package on asylum was adopted.

There were a number of reasons for this variation, among them issues such as “lack of objective and reliable country of origin information” which are directly linked to the role of information and knowledge (Council of Europe 2009). Obtaining information on countries of origin had long been an issue for EU member states, which regarded the harmonisation of such information as an important factors towards more homogeneous asylum procedures across Europe. In other words, having common knowledge of the situation on the ground in many of these third countries could therefore help to standardise recognition rates across Europe (Commission 2000b: 14; EP 2001b: 22). Indeed, Monar states that resolving this was one of the objectives behind establishing the “high level working group on asylum and migration” in 1998, a body charged with “provid[ing] the Council with a list and assessment of countries of origin and transit[,] and to develop[ing] integrated action plans in respect of these countries” (1999: 156). This issue achieved political recognition during the November 2004 European Council when The Hague Programme was debated (Agence Europe 2004d; Council 2004c) and was eventually institutionally recognised through the EASO (Financial Times 2009). However, as late as 2009 the Commission, Council, and a number of stake holders consulted on the Impact Assessment of EASO recognised the lack of harmonised country of origin information as one of the key issues preventing the achievement of a “fair and more harmonised treatment of applications for international protection throughout the Union” (Commission 2009b: 5).

Information and knowledge in the area of asylum policy tends to receive media and political attention (Mouzourakis 2014). For example, member states with high per capita rates of asylum applications⁶⁸ are sensitive to the perceived excess burden placed on their systems. However, member states rely on statistics and information on one another’s asylum trends and administrative practices to justify such claims. Information on asylum and refugee flows and stocks has therefore increased in importance and particularly where EU funding allocations have become tied to these data (Kraler 2005). Indeed according to the EU Court of

⁶⁸ See next section.

Auditors, France and the UK were still losing out on funding in 2005 when compared with other member states because of how data collection on asylum policy was carried out (European Report 2007b). The importance acquired by these EU funding schemes should not be underestimated. At the time the first European Refugee Fund was established, Germany criticised the idea of financing individual member states it labelled as transit countries that did not host asylum seekers (direct reference was made to Italy). In 1999, Chancellor Schroeder reportedly declared that as approximately 80 percent of refugees reaching Italy then moved on to other countries, Italy should not receive money from EU funds (La Stampa 1999).

As set out in the section on effectiveness⁶⁹, the outcome of the asylum procedure is fundamental to distinguishing between irregular migration and asylum and refugee protection. If the procedure ends with a rejection of the application, and no other forms of protection or stay are offered by the hosting state, the applicant must leave. To provide a snapshot of the phenomenon, there were approximately 13,695 successful applications (25.2% of the total)⁷⁰ and 40,735 rejected applications (74.8%) during the second quarter of 2010 in the EU27 (Eurostat 2010). There is evidence to suggest that a conspicuous number of rejected applicants fall out of trace (D. Casciani 2002b). This is where the boundaries between asylum and irregular migration begin to blur.

Data on this phenomenon is critically lacking and this gap is consistently recorded in the academic literature. By 2001, the Commission was highlighting evidence of gaps in the data of several member states in relation to the return of rejected asylum seekers, while for other countries data was classified under the general return category, including irregular migrants (Commission 2001e). Apparently, member states were not immediately forthcoming on this and the Commission undertook a more focused initiative involving a sub-set of member states (Commission 2003d: 9-10; European Report 2003f). Part of the problem with this data arose due to inherent difficulties in data gathering, however political pressures were also at play given that these figures are usually taken as an indicator of the effectiveness of asylum policy (Blinder 2013: 8; Christina Boswell and Geddes 2011: 172). If numbers of missing applicants turned out to be significant, it would seriously discredit the policies of those member state governments who are

⁶⁹ Section 4.1.4.

⁷⁰ Figures include Geneva Convention refugees, subsidiary protection and humanitarian reasons.

generally tough on rhetoric. A clear example of this reticence is seen in former UK Prime Minister Tony Blair's refusal to put forward even rough figures of the number of failed asylum seekers present in the UK during a BBC interview given in the lead up to the 2005 UK general election (BBC 2005). After revealing that the asylum backlog was nearly double the estimate, UK Home Secretary David Blunkett stated that he was “absolutely committed to the transparency, clarity and reliability of official statistics”, as he believed that it was “essential that people have confidence in the statistics produced, especially on such an important issue as asylum” (The Guardian 2003; The Independent 2001a; The Times 2001b). At the EU level, the political salience of such information was implicitly recognised both in the May 2001 Council Conclusions mentioned above (Council 2001r), and in the EP report evaluating the 2003 Commission Action Plan on migration and asylum statistics (EP 2003b: 10).

Another sensitive aspect of asylum policy relates to secondary movement, meaning the movement of an asylum seeker from one country to another. This had been covered by the Dublin Convention since 1997, however, despite member states’ obligations to exchange information under this agreement the Commission concluded this mechanism did not work properly (Commission 2000d: 12). For instance, statistics collected under the Dublin scheme recorded approximately 3,000 transfers out of and approximately 4,500 transfers into in member states’ territories in 1998. The Commission’s response was to highlight that if effective collection and communication were present these numbers should have correlated with one another. In other words, member states simply lost track of around 1,500 transfers. This illustrates difficulties not only with knowledge on asylum itself, but also with information sharing. Member states recognised that more cooperation was needed in this respect, and provided an effective response through Eurodac.

In sum, this review of uncertainty-related issues in asylum policy demonstrates that problems existed and persisted during the ten years under investigation. In particular, these problems related to: lack of statistical harmonisation; differences in the underlying concepts and practices applied by member states; politicisation of asylum-related information; and, weak structures of cooperation. And yet, prior to this time-period many member states had already established their own forms of information gathering in regards to asylum, and

international bodies had a long established tradition of this. Therefore, uncertainty in this policy area was not quite as critical as was the case for irregular migration⁷¹. The discussion to follow considers how these issues of uncertainty gave rise to delegation.

Qualitative analysis of delegation in selected measures.

The development of European Refugee Funds highlight EU efforts to improve the quality of data coming from national administrations⁷². In the 2000 Decision the Commission was only the recipient of data gathered by the member states, it had little room to question or interpret this data save under advisory procedure (Art. 10(3) and 23). These provisions did not change much in the 2004 Decision except for the insertion of a reference to member states' duties to collaborate with the Commission in collecting statistics relevant to the Fund. The obligation of member states to provide data to the Commission went further unaltered in 2007, however the Commission was granted the discretion to "evaluate the quality, comparability and completeness of the statistical information in accordance with normal operational procedures". In order to do so, at "the request of the Commission (Eurostat), Member States shall provide it with all the necessary information" (Art. 13(5)). In other words, the Commission has an explicit power to question the figures coming from member states and to request clarifications if needs be. Contrary to the previous developments, the arrangement introduced in 2007 implies that the Commission is an expert capable of assessing member states' data.

This expertise is also evident in Temporary Protection Directive. Here, the Commission is the body responsible for determining whether an emergency situation exists under art. 5(1), how it ought to be dealt with, and whether it is appropriate to extend emergency arrangements under Art. 4(2), Although the final decision on such matters can only be taken by the Council, the Commission's information must both be the basis for such a decision and must be included therein, *inter alia* (art. 5(3)(d)). Further administrative cooperation and the exchange of

⁷¹ See next chapter.

⁷² The European Refugee Fund has a long and complicated history in itself. The first Council Decision was adopted in 2000 and the second in 2004. A third Decision was taken jointly by the European Parliament and the Council on 23 May 2007, repealing the 2004 Decision and inserting the Fund into the General programme "Solidarity and Management of Migration Flows" (SOLID). SOLID included three other Funds: EU Borders Fund, EU Return Fund, and EU Integration Fund for Third-country nationals.

information is channelled through the Commission and a web of national contacts in a similar fashion to other legislative measures presented in this chapter (art. 27(1)).

In the Asylum Procedure Directive, the Commission must receive notice of changes to member states' national "safe third country" lists (Art. 27(5)). A member state must also notify the Commission of any decision to add a country to its national list (to be distinguished from the "minimum common list") (Art. 30(6)). In terms of the "minimum common list", the Commission formulates modification proposals based on a range of information. It is afforded broad discretion in this regard (Art. 29(3)), which highlights the expert role member states confer upon the Commission. This is very important, particularly in light of the fact that the Commission was initially opposed to the concept *tout-court* (European Report 2006b). Indeed, when the Commission initially decided on the list internal divisions emerged within the College of Commissioners (European Report 2006a). However, as member states were so divided, no option could be agreed upon other than to leave the matter at the discretion of the Commission (European Report 2004a).

The 'Eurodac' Regulation covers both asylum seekers and irregular immigrants⁷³, but its principal purpose is to compare "fingerprints for the effective application of the Dublin Convention". It may therefore be said to tackle problems concerning expertise and information sharing. A Central Unit located within the Commission has been granted responsibility for aspects of the system's operational management. Importantly, Eurodac must both provide annual figures and "draw up statistics on its work every quarter" on a number of its functions (Art. 3(3)). In addition to which the Commission may also, under Comitology procedure, propose to add some statistical tasks additional to those already undertaken (Art. 3(4)). The Commission is also charged with a number of informational, evaluating, and reporting tasks in Art. 24⁷⁴, but none of these functions involves the provision of an explicit pro-active power, hence they are not counted as delegation.

⁷³ The inclusion of irregular migration in the database was highly controversial at the beginning. Reportedly, Germany and Austria fought hard in the Council, during the Maastricht period, to include that category in the database European Report, 'Justice and Home Affairs: Full Session in Prospect for May 28 and 29', *European Report* (1998b), European Report, 'Justice/Home Affairs Council: Little Tangible Headway but Willingness to Boost Cooperation', *European Report* (1998a)..

⁷⁴ These are mainly related to the functioning of the Central Unit.

On the other hand, it is important to note that the Council retained the power to compile statistics on asylum shopping (Art. 12(2) and (5)). This is one of the very few cases where the Council retained implementing powers for itself, and it is significant that it decided to avail itself of that opportunity in the case of statistics. Reportedly, a majority of member states in the Council wanted to retain implementation on this very sensitive issue (Agence Europe 1999f). Debates on this issue were intense, with the Council on one side and the EP and Commission on the other, with Commissioner Vitorino unsuccessfully opposing a Franco-German deal on the Comitology arrangements (European Report 2000g, 2000j, 2000e).

The Reception Conditions Directive is also relevant to the issue of information sharing. First, the Commission plays an important role in facilitating cooperation among member states by gathering information. According to Art. 22, member states must inform the Commission on “data concerning the number of persons, broken down by sex and age, covered by reception conditions”, as well as “provide full information on the type, name and format of the documents provided for by Article 6”. Commission efforts at gaining a larger role in these matters was rejected by a number of member states (Council 2001v: 45).

The Dublin Regulation features a notification requirement with respect to the Commission in order to avoid or solve asymmetries in information provided by member states, however nothing more is required (Art. 21(6)). A similar situation exists in respect to the Asylum Qualification Directive. This Directive established an institutionalised mechanism for cooperation that placed the Commission at the centre of a web of national contacts. The aim of which was to strengthen cooperation and communication among member states (Art. 35). It should be noted that the Council rejected proposals for the creation of similar networks in respect of the Reception Conditions Directive and the Asylum Procedure Directive.⁷⁵ Nevertheless, as these provisions fail to assign a proactive role to the Commission, they are not counted as delegation.

⁷⁵ Compare the original Commission proposal Commission, 'Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status. Com(2000) 578 Final. Cns 2000/0238.', (Brussels, 2000a) at 7. with the ultimate text of the Directive.

4.1.3) Credibility of commitments

This section investigates the extent to which the wish to strengthen the credibility of commitments is a determinant of delegation in the area of asylum policy. Chapter 2 described how problems surrounding the credibility of commitments are connected to potential member states' defections from previously agreed policies.⁷⁶ This section is intended to provide an overview of the problems nested in this policy area and to identify how those issues have affected cooperation. In short, it can be said that member states experienced problems with imbalances due to the inflow and distribution of asylum seekers in addition to the crises that marred this policy area. As was the case with the previous section on uncertainty, this section is divided in two parts. The first looks at the asylum situation in Europe and issues connected to credibility of commitments. The second turns to the extent to which these issues have been matched by delegation in secondary legislation.

The first question regards the commitments member states have undertaken in this policy area. While it appears that all categories of migration are of equal importance in the Treaties, the Tampere European Council Presidency Conclusions directly refer to a "Common European Asylum System" (European Council 1999: A. II.). While in the same document the need for "common policies on asylum and immigration" is also acknowledged (European Council 1999: 3), asylum policy is dealt with in a level of detail that includes identifying complete harmonisation as the ultimate aim in policy areas such as asylum procedures. The same is not the case for other migration categories such as legal migration (Lavenex and Wallace 2005: 473).⁷⁷ Member states subsequently altered their commitments in the subsequent multi-annual programme known as the Hague Programme (Council 2004a).

Eurostat data on asylum applications show a very complicated picture. Member states have experienced different levels of asylum inflows and feature distinct administrative practices regarding asylum seekers and refugees. There is a clear trend of decrease in asylum inflows across the EU following the spike of the late 1990s-early 2000s (chart 4.1 below⁷⁸). However, individual countries have

⁷⁶ See Chapter 2, section 2.2.2.

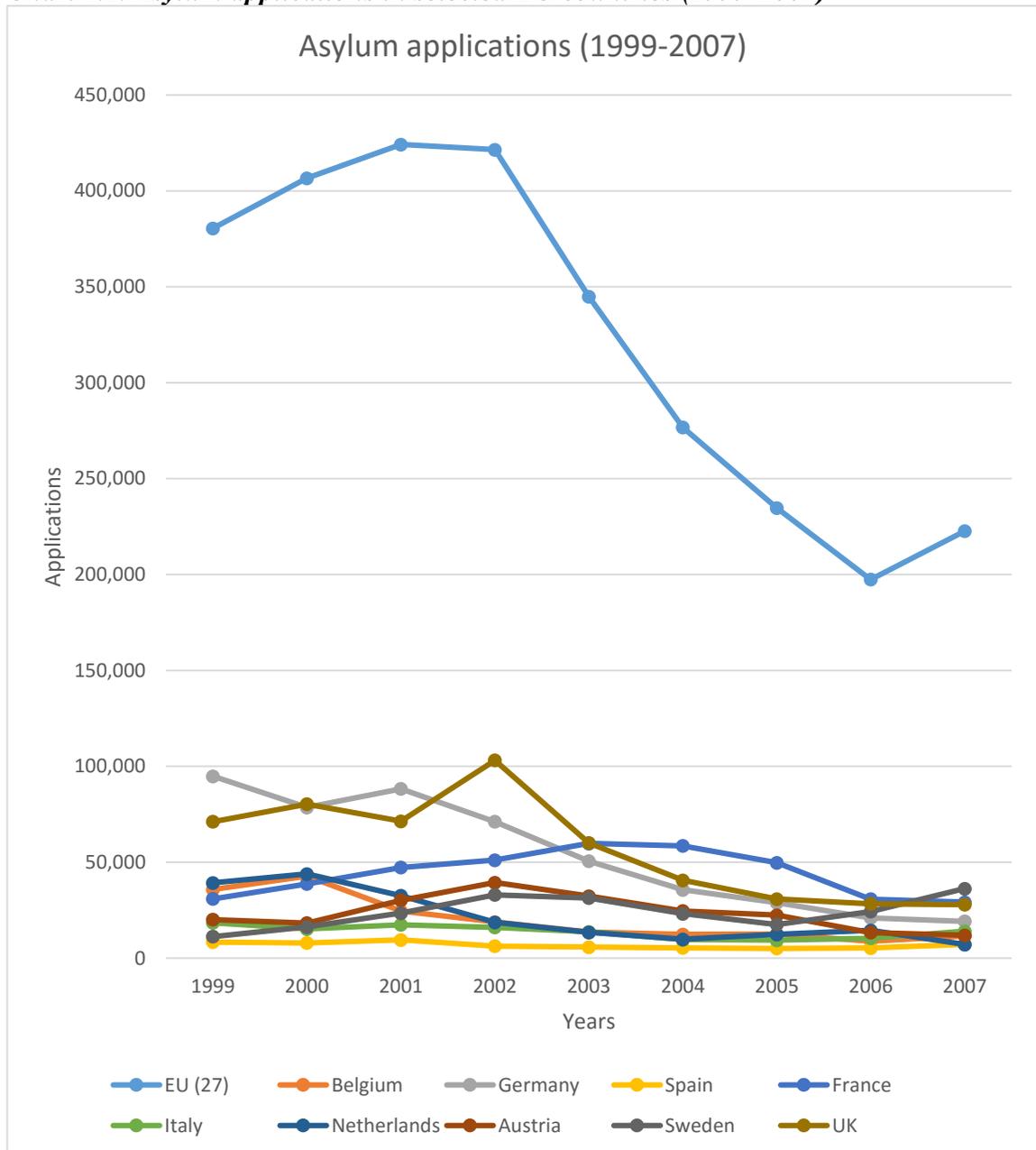
⁷⁷ See Chapter 6, section 6.1.2.

⁷⁸ The chart refers to the period 1999 to 2007 because Eurostat recognises the entry into force of the Migration Statistics Regulation (in July 2007). Briefly, Eurostat believes that data for the period

experienced very different trends where asylum applications are concerned. Germany has seen its number of applications reduce in the years considered. The UK experienced a spike in 2002, but has since seen numbers decrease to less than a half of 1999 figures. In fact, under political and media pressure, Prime Minister Tony Blair stated that he would have like to see the total number of asylum-seekers entering the country reduced “by 30 per cent to 40 per cent in the next few months, and I think by September of this year we should have it halved” (Geddes 2005a: 727). France had a steadily increasing trend until 2004, but applications have since started to decrease. That rise was largely due to inflows from former African colonies (Wihtol de Wenden 2011: 63). Italy has seen its asylum figures increase at the end of 1990s, fall to almost half by 2005, and then rise again by 2007. The Netherlands experienced its peak in 2000 after which significant reductions brought numbers to less than a sixth of peak levels (Engbersen 2012: 93). Whereas Sweden is perhaps the most volatile in this set of countries in that its volumes rose until 2003, nearly halved in the following two years, and then more than doubled by 2007. In sum, asylum flows and their geography change over time. Indeed, as the Swedish and Italian cases demonstrate, flows can change over time within countries. From a rational choice perspective, it therefore makes sense to engineer solidarity mechanisms that guarantee some form of support for member states based on their inflows.

before and after that data are not comparable.

Chart 4.1. Asylum applications in selected EU countries (1999-2007)



Source: Eurostat.

Note: Asylum applications by citizenship, 1999 to 2007. Annual data (rounded); code: migr_asycz.

Figures for refugee populations highlight similarly uneven numbers and fast changing trends. Table 4.2 shows that the countries with the highest total refugee populations for 2010 were Germany, the UK, France, and Sweden, in decreasing order. However, ten years earlier the ranking was very different (Germany, Sweden, the Netherlands, France and the UK, again in decreasing order). Looking at the pace of change, the Netherlands saw an annual rate of change of more than 20 per cent during the 1990s, while Italy experienced a similar rate in the 2000s. Finally, while for the majority of countries featured in Table 4.1 refugees represented a minimal portion of the foreign population, refugees represented a sizable minority in both

Sweden and Germany.

Table 4.1. Refugee stocks in selected member states (1990-2010)

	<i>Estimated refugee stock at mid-year</i>			<i>Refugees as a percentage of the international migrant stock</i>			<i>Annual rate of change of the refugee stock</i>	
	<i>1990</i>	<i>2000</i>	<i>2010</i>	<i>1990</i>	<i>2000</i>	<i>2010</i>	<i>1990-2000</i>	<i>2000-2010</i>
Austria	37 172	48 787	42 630	4.7	4.9	3.3	2.7	-1.3
Belgium	25 721	17 796	17 892	2.9	2.0	1.6	-3.7	0.1
France	186 629	131 115	200 687	3.2	2.1	2.8	-3.5	4.3
Germany	722 250	940 750	594 269	12.2	10.5	6.1	2.6	-4.6
Italy	12 379	6 437	56 397	0.9	0.3	1.2	-6.5	21.7
Netherlands	17 154	146 180	74 961	1.4	9.2	4.1	21.4	-6.7
Spain	8 490	6 851	3 820	1.0	0.4	0.1	-2.1	-5.8
Sweden	124 723	158 367	82 629	15.8	15.8	6.0	2.4	-6.5
UK	43 395	121 275	238 150	1.2	2.6	3.4	10.3	6.7

Source: (UNPD 2013).

The picture is even more striking when asylum application numbers are considered relative to host population size. Here, the concept of burden takes on a domestic focus in the sense that the sustainability of asylum inflows is measured against the relative size of the resident population. Scholars are divided as to the most effective means of calculating asylum flows and impact. Thielemann, for example, criticises the double criteria of fixed and variable components upon which the European Refugee Fund is based, instead preferring a proportional criteria calculated relative to the native population. The latter calculation helps to factor in the reception capacity of a given state (Thielemann 2006: 446), an issue that has gained in importance as the perceived social impact of asylum seekers has increased. Member states such as the UK and Austria, for example, favoured an approach to burden sharing that would see funding allocations being based on the relationship between asylum inflows and population (Agence Europe 2000b; Council 2000f; The Guardian 2000a). Nevertheless the Fund's finalised format instead sees money allocated on the basis of sheer volume of flows, irrespective of native population size.

Differing rates of asylum inflows and refugee numbers are, however, just one piece of the complicated puzzle that is asylum policy in the EU. Crises of confidence among member states represent another important component, particularly in the context of commitments to collective action. This is the case, for instance, where so-called transit countries are concerned. These states received

frequent accusations from fellow member states at both domestic and European levels for indolence in stepping up controls and hosting equal shares of asylum seekers (Agence Europe 1998a). This criticism was repeatedly addressed to Mediterranean member states, including France. Criticisms were voiced against France's blind-eye policy following allegations that asylum seekers were exploiting loose controls in France and entering the UK through the Channel Tunnel (Financial Times 2002g). The German asylum crisis of the early 1990s is frequently recalled in the literature, here Germany bore much of the brunt of asylum seekers fleeing to Europe from the Balkans (Green 2001: 92-95). Again, in the late 1990s German Interior Minister Kanther complained of high asylum inflows and the absence of assistance from other member states (Agence Europe 1998a; Agence France Presse 1998a). Germany was repeatedly recalled that event when calls for more support came from other member states in the following years (BBC 2006). Green holds that, following its disappointment at lacking cooperation on asylum in the 1990s (and particularly the Kohl government's failure to find a European solution to the German asylum problem), the German governments' priority with respect to EU migration policy has been to preserve its own domestic achievements (Green 2001: 90; Monar 2003: 310-13). In fact, the restrictions implemented in Germany were perceived as under threat from a potentially more generous EU asylum policy. These concerns are present also in other fields, as for instance family reunification (Menz 2011). Hence, Germany has become meticulous in the policies it supports, and is sceptical of any talk concerning common or comprehensive EU migration policy (Christina Boswell and Hough 2008: 333-34; Green 2001: 99-100; Hellmann et al. 2005).

Other asylum-related tensions and crises were present in the 1990s and well into the 2000s. Boswell offered an even longer perspective, demonstrating how pervasive asylum-related crises were in the past century (Christina Boswell 2000). Another example concerns negative competition among member states regarding asylum procedures and rights; this is compounded by a fall in recognition rates⁷⁹ across Europe. Hatton estimates that the latter dropped from over 50 percent in 1982

⁷⁹ The recognition rate is defined by Eurostat as "the share of positive decisions in the total number of decisions for each stage of the procedure (i.e. first instance and final on appeal)" Eurostat, 'Glossary: Asylum Recognition Rate', (updated 12 August) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Asylum_recognition_rate>.

to 28 percent in 2001 (2005: 107; Messina 2007: 44). The legal convergence following the introduction of concepts such as “safe third country” or “safe country of origin” into the asylum policies of some member states constituted a form of “race to the bottom” (Hatton 2005: 109). In a nutshell, the argument was that “by increasing the restrictiveness of their asylum policy [...] states will be able to redress the inequitable distribution of burdens” (Thielemann 2006: 442). Although the Union adopted legislation that should have brought these rates into line with one another, they continued to diverge into 2008 (Europolitics 2008). This was cause for friction at the EU level. Indeed, in 2009 the Swedish Minister with responsibility for immigration rejected accusations of lacking solidarity levied by southern member states by highlighting how disproportionate burdens had been caused by very low recognition rates in Greece with respect to the same group of TCNs (Agence Europe 2009a; Wolff 2008).

The perception of asylum seekers as burdens began to emerge after the end of the Cold War. At this time flows increased significantly, as did the associated costs, and occasional debates on the issue began to appear in the popular press (Hatton 2005). These elements served as the basis for a “policy backlash” that swept across Western Europe (Hatton 2005: 107). The 1973 closure of labour migration channels also nourished suspicion that asylum seekers were not exclusively seeking refuge from persecution, but were also seeking better economic conditions – i.e. in reality, they were economic migrants. Again, concerns regarding “bogus asylum seekers” spread throughout Europe, with European governments rushing to restrict this entry channel. Member states with more generous welfare state provisions felt their welfare systems were abused by flows of asylum seekers (Financial Times 2001a). In particular, such governments believed their systems were compromised by less favourable ones in other member states. The emergence of a public discourse on bogus asylum seekers is therefore central to the evolution of asylum policy in Europe (Christina Boswell 2003b: 317; Cerna and Wietholtz 2011: 199; Green 2002: 11). The idea of bogus asylum seekers has been variously framed across European countries. For instance, the former Austrian Interior Minister talked about “economic refugee”, blurring the line distinguishing an asylum seeker genuinely seeking shelter from persecution and a migrant who is looking for better economic conditions (Agence France Presse 1998b).

The policy response to the concept of asylum seekers as burdens was the restrictive trend in asylum policy discussed earlier. Nevertheless, member states realised that ever tightening national policies would not attain the desired goal of reducing asylum inflows, rather it would place further strain on international relations (Koslowski 1998: 169). Thus, as the Belgian Minister Antoine Duquesne stated in 1999, it was time to "put an end to negative competition between Member States" (Agence Europe 1999e). Burden sharing emerged as a way of levelling out imbalances among member states. Germany was the first country to table an explicit proposal advocating this approach in the early 1990s (Thielemann 2006: 446-47). The reasons for this initiative are clear. Germany received approximately half of all EU asylum applications between 1988 and 1997 due to the collapse of the Soviet bloc and the emergence of conflicts in the former Yugoslavia (Bloch et al. 2000: 2). Its proposal for burden sharing was rejected due to opposition from a number of member states, and "temporary protection 'in a spirit of solidarity'" was offered instead (Christina Boswell 2003b: 324; Hatton 2005: 109). These issues re-emerged in the context of the first negotiations on the European Refugee Fund (Council 2000r).

A succession of refugee crises awakened member states and created an environment where perceptions of risk and the domestic importance of achieving political results with regard to asylum became aligned (Financial Times 1999b). Indeed, one of the reasons behind the creation of the European Refugee Fund and the Temporary Protection Directive was to lower the uncertainties concerning emergency situations (member states had recently experienced the Kosovo crisis, this is explicitly referred to in the Temporary Protection Directive). Burden sharing as a lesson derived from the Kosovo crisis is something that also Commissioner Vitorino highlighted (Agence Europe 2000c; Financial Times 1999a). While it is true that the timing of the perceived crises varied across member states, these developments had become an engrained element of debate surrounding migration and asylum in Germany, France, the UK, the Netherlands, and Sweden by the late 1990s (Alink et al. 2001: 291-92). In addition, while one could be critical of the small sums initially allocated to the Fund, such amounts could have bought into the scheme also initially reluctant member states. Indeed, it may well have strengthened the "symbolic" image of the Fund as a form of exercise in solidarity between member states (Hatton 2005; Thielemann 2003, 2005). That said, the growth of this

fund from €216 million in 2000 to almost €700 million in 2007 is further evidence of increased cooperation and the recognised importance of this policy area over the years following its establishment.

Aside from the European Refugee Fund, burden-sharing in EU asylum policy mainly materialised through norm-sharing (Barbou Des Place 2002). The assumption behind which is that differences in norms and practices are believed to influence the choice of destination state among asylum seekers. As long as reception conditions differed, it was believed that asylum seekers would have incentives to move again within Europe (Bloch et al. 2000: 4; Council 2000n: 4). French Minister of Interior Daniel Vaillant voiced this concern, amongst others, and in the run up to the adoption of the Asylum Qualification Directive told to his British counterpart “they [the British] must also make an effort to harmonise legislation in order to make Britain less attractive”. This was a direct reference to Britain’s practice of recognising refugees on the basis of persecution by non-state actors, a policy opposed by France and Italy (The Guardian 2001b). Ironically, given its position that common norms would have led to a more even distribution of asylum-seekers across Europe, this criticism was actually well received by the British government (Financial Times 2001e; The Guardian 1999). Similarly, Germany came to see harmonisation as a means of ensuring burden sharing given its stance that Europe-wide rules would diminish incentives to exploit more generous provisions in certain member states (Hellmann et al. 2005: 150; Schuster 2000: 129). However, Spain criticised the harmonisation of social benefit payments and sought to have it ruled out due to fears that this factor influenced the choice of the destination country among asylum seekers (European Report 1999e).

Measures introduced to restrict secondary movement between member states were largely based on the welfare magnet thesis and are connected to concerns of abusive exploitation of welfare systems. It follows that they too relate, to the issue of disproportionate costs being shouldered by some member states. Secondary movements “are more likely to be seen as voluntary and motivated by economic or quality of life concerns than by safety” (S. E. Zimmermann 2009: 75). According to the Commission, in 2001 the net beneficiaries of the Dublin Scheme were the UK, the Netherlands, Sweden and Denmark, while the net losers were Germany, Austria, Italy and France (Commission 2001a: 3). It was revealed that, of the

655,204 asylum applications lodged in the EU between 1998-1999, member states: exchanged 39,521 requests for take charge / take back applicants (6% of total applications); accepted 27,588 of those (4.2%); but actually transferred only 10,998 applicants (representing 1.7% of the total applications, or 27.8% of total requests) (Commission 2001a: 2). The net result is that “in more than 95% of cases it is the Member State in which the asylum application is lodged which assumes responsibility for examining it” (Commission 2001a: 2). In purely numerical terms, the Dublin Convention did not seem to address an important component of asylum in member states. On the other hand, this phenomenon seemed to continue into the 2000s. In 2009 the Commission reported that the “asylum 'lottery’”, due to “deficiencies in procedural and substantive standards”, constituted “a driver behind continuous secondary movements. Multiple applications remained high – at 17% in 2006 and 16% in 2007” (Commission 2009a: 11).

These remarks confirm that the first asylum package adopted by the EU did not substantially change the underlying imbalances in asylum trends. Reportedly, all actors involved in the Dublin Regulation recognised that deficiencies were present in the framework, and these were connected to the “lack of trust among member states” (Agence Europe 2008d; European Report 2004d). Putting aside the quantitative aspects of the phenomenon, the key issue concerning secondary movements among asylum seekers has always been the perception of an abusive exploitation of national welfare systems (Mitsilegas 2014: 185).

This section has clarified the frequency and extent to which asylum flows changed in magnitude and destination during the period under review. It has also shown that, while national migration experiences have differed, a gradual consensus has emerged on the need for a reduction in flows. Crises were also frequent and at times undermined mutual trust among member states.

Qualitative analysis of delegation in selected measures.

The 2000 European Refugee Fund was the first step taken by member states towards “receiving and bearing the consequences of receiving refugees and displaced persons” (TEC, Art. 63(2)(b)). The essence of the Decisions, for Barbou

Des Places, is to “set [an] institutionalised fiscal-sharing system” where “low receivers [compensate] major receivers” (2002: 24). The Fund recognises that flows change both geographically and over time and, by employing a proportional element it leaves it open for any member state to benefit. In addition, as the Funds are time-limited revisions are carried out periodically. This provides a means of stabilising a rapidly evolving political situation. It also empowers principals to reign in their agent, should they so wish, by refusing to renew the programme when it expires (Pollack 1997: 119). This is not a distant possibility. In one interview, a senior official from one of the founding member states expressed dissatisfaction about the Commission’s management of the Migration Funds and indicated the negotiations concerning the 2014-2020 Multiannual Financial Framework would be an occasion through which to bring about some changes (Interview 1). In addition, a fixed element was incorporated into the scheme to draw in member states unaffected by pressing asylum concerns (Christina Boswell 2003b). Reportedly, this was brought to the negotiating table by member states who, while at the time were not experiencing significant flows of asylum seekers, thought the Fund should have helped them in building capacity to respond to potential future flows (European Report 2000c). Although it was originally thought that this element would have gradually disappeared, it has remained firmly in place within all revisions made to date. That said, the fixed component of the first Fund (2000) amounted to approximately one third of the total budget, whereas in 2004 revision saw this reduced to 16 per cent (Hatton 2005: 111).

The coding results set out in Chapter 3 indicate that the Commission enjoys high levels of delegation and medium discretion in the three Decisions. That said each also displays a steady decline over time in relation to both the delegation ratio and discretion index. The delegation ratio is inversely proportional to the total number of provisions and is positively related to the number of provisions delegating some powers. If a conspicuous increase in the number of provisions in the legal text (which more than doubled between 2004 and 2007) is not matched by a similar trend in delegating provisions, then the ratio will decrease mathematically, which in turn affects the discretion index. In a principal-agent reading exclusively focused on quantitative results, the constant decrease in both delegation and discretion would suggest that principals have revised the initial empowerment and increased constraints on the Commission (a form of 'negative feedback') (Tallberg

2003: 21). However, a closer look at the legal text qualifies such remarks.

The Commission adopts guidelines that identify priorities for the multiannual programmes (European Union 2004e: art. 12(1)). It therefore has significant power to guide how allocated funds are used also at the national implementation level. This decision-making authority is constrained by the Comitology committee (management procedure), however the power of setting guidelines has proven an important instrument not only with respect to the ERF, but also for the very idea of a common EU asylum policy. In its evaluating report (Commission 2011e: 11), the Commission highlighted that the Fund had provided grants to 1,403 projects between 2005 and 2007, disbursing approximately €151 million of the €297 million spent in those years. In this sense, the EU contributed to shaping asylum-related projects across Europe by setting methods and objectives for (at least part of) national policies on asylum. In addition, the three priorities identified for 2005-2007 aimed at strengthening the incorporation and application of the EU legislative *acquis*, thus further contributing to harmonising on the ground practices (Commission 2011e: 10).

The Commission's role in assessing national actions was however contested at first. Council documents reveal that the French delegation saw the Commission's role as fundamental to ensuring member states "evaluation[s]" were subjected to scrutiny. This was a reaction to the Austrian delegation's suggestion that no prior evaluation should be carried out by member states, citing this would absolve member states of their responsibilities. The Austrian delegation also wished to limit the Commission's role to one of communications recipient, however the French insisted that it have authority to issue a 'request' for information and hold a monopoly over assessment⁸⁰. It was proposed that assessments would require every member state to provide "sufficiently detailed information to enable the Commission to verify" that member states comply "with the provisions of this Decision and the financial rules in force" (2000, art. 8(3)). The fact that the Austrian delegation subsequently dropped its request would suggest that France was able to win unanimous consensus on this point. This granted to the Commission a decisive role in ensuring individual responsibility in the context of member states' allocation

⁸⁰ Compare the text of the proposal with Council Council, 'Proposal for a Council Decision Creating a European Refugee Fund. 8678/00', (Brussels, 2000w) at 18., and the final text of the Decision.

of Fund money. These developments are highly important for this dissertation.

It was noted in the earlier discussion on credibility of commitments that divergences in adoption of the widening EU *acquis* were much discussed by member states. Indeed, it is an important testament to the strengthening role of the Commission on credibility of commitments that it was empowered to set the agenda (albeit in the context of Comitology). This has also been identified by other scholars (Thielemann 2005: 818). Delegation to the Commission strengthens credibility of commitments in at least three conspicuous ways: it focuses European action on asylum; it provides ex-ante scrutiny on financed actions; and, it allows for the monitoring and sanction of member states' conduct in administering the Fund's finances.

The Temporary Protection Directive also tackles imbalances by promoting assistance in emergencies (European Report 2000i). In the past, member states showed little solidarity towards those bearing the most onerous consequences of inflows (e.g. Germany, Austria for the Kosovo crisis) (Alink *et al.* 2001). With this Directive (alongside the European Refugee Funds), member states committed to preventing excessive burdens falling on individual member states. From the perspective of the development of a Common Asylum Policy, this Directive was the first effort in standardisation that envisaged establishment of minimum standards in reception conditions, qualification for international protection status, and procedures to be followed in granting such status. This legislative mosaic was intended to convince future asylum seekers that they would receive the equal treatment anywhere in Europe and that an application filed in any member state stood the same chance of success.

The Directive also allocates a small number of critical responsibilities to the Commission to help prevent against derogation from commitments to solidarity. If, for example, the Commission recognises the existence of an emergency it may propose that the Council take a qualified majority decision thereon (art. 5(1)). It may also propose the extension⁸¹ or termination of emergency arrangements if

⁸¹ Germany proposed that, under the solidarity article, any continuation of the emergency mechanisms happened after the proposal of the Commission, contrary to a simple Council decision Council, 'Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures

deemed appropriate (Art. 4(2), Art. 6(1)(b)). However, this power is somewhat curtailed by the fact that member states can also prompt the Commission to propose such a measure. While a formal reading of the legal text does not decisively answer the agenda setting question, the Directive does signal a cautious political approach by member states. The Commission has no power to enforce any agreement. As Barbou Des Places highlights, even after the entire mechanism had been activated, i.e. member states have taken a QMV vote in the Council, they “are not bound by any concrete obligations”, but simply have “to indicate, in figures or in general terms, their capacity to receive such persons” (2002: 22).

As discussed in the opening section of this chapter, the presence of a marked difference between the Commission's original proposals and the texts eventually adopted is a common feature of all the Directives constituting the first phase of EU asylum policy. This has been noted by both media and academic commentators (European Report 2004g; Hellmann et al. 2005: 153-54). This trend tends to surround some of the most contentious points of each Directive. That said the Council was also divided on such matters. For example, when agreement was reached at Council level on the Reception Condition Directive, some member states were very critical of the result. In particular, the Swedish Minister of Immigration criticised the standards set by the Directive as “way below our standards” (EUObserver.com 2002d). This was a particularly salient point given that one of the main objectives of this measure was to remove asylum-shopping incentives by standardising reception conditions across Europe. Access to labour markets was another a contentious issue during Council negotiations (Council 2002b). And a number of issues⁸² “of a politically sensitive nature” (Council 2003d: 3) were debated at length during Council negotiations (Council 2002a: 39) on the Asylum Qualification Directive.

The Reception Condition Directive implementation assessment report highlighted that, although the flexibility of the Directive’s provisions made infringements a virtual impossibility, member states' practices varied hugely. The

Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof. St 6914 2001 Init.', (Brussels, 2001g)..

⁸² The definition of “serious harm” which constituted the basis for the recognition of subsidiary protection; access to integration facilities (which is left to Member States' discretion); and again access to labour market.

Commission concluded that this “undermines the objective of creating a level playing field in the area of reception conditions” (Commission 2007a: 10). To improve monitoring, the Commission proposed the idea of national contact points to, *inter alia*, streamline communication and facilitate the sharing of experiences among member states (Commission 2001c). This was coupled with the provision of statistics (as previously discussed in the section on uncertainty above). While eventually rejected by member states, this proposal was re-introduced by the Commission in the recast Directive. The Commission signalled from the beginning that this initiative could have been financed through the European Refugee Fund, which would have rendered it virtually cost-free for member states. In addition, the EP proposed the establishment of an “independent European supervisory system, under the authority of the UNHCR” to supervise “matters relating to employment, training and education, and to material reception conditions generally in Member States”. This element was also rejected in subsequent negotiations (EP 2002b: 91-92). More intrusive arrangements, such as inspections by the Commission, were not considered despite similar arrangements being undertaken for all migration funds. Indeed, the EP was already conducting inspections of reception facilities at this time (Commission 2008a: 6; UNHCR 2012: 18). The prospect of empowering the Commission to take on such duties was actually voiced after the EP’s inspection of the Lampedusa reception facility harshly criticised the poor conditions of that structure. Commissioner Frattini’s reportedly responded by saying there were “only five officials at the Commission [who] were involved with asylum”, and that the “European Commission [to his knowledge] has never carried out such inspections” (Agence Europe 2005d).

Member states chose an agenda setting rather than a monitoring and sanctioning role for the Commission in the Dublin Regulation. As a result, it is empowered to set the implementing rules for:

- “settling differences between Member States concerning the need to unite the persons in question [humanitarian clause], or the place where this should be done” (Art. 15(5));
- “taking charge and taking back” (Chapter V of the Regulation);
- preparations and procedures for transmitting requests (art. 17(3) second indent), acceptable evidentiary requirements (Art. 18(3)) and the interpretation thereof (Art. 20(3));

- the carrying out transfers and related matters (Art. 19(5) and 20(4)); and,
- the establishment of “secure electronic transmission channels” (Art. 22(2)).

The use of Comitology in Art. 15(5) is noteworthy in that it assumes the form of a compensation chamber. It is significant that member states did not agree an arrangement on either this matter or on Art. 19(5) and 20(4), which directly address problems with the implementation and effectiveness of the Dublin Convention with regard to the carrying out of transfers. Having said that, it has to be underlined that this agenda setting happened under the strictest of Comitology procedures, i.e. the regulatory procedure. The Commission’s involvement in such matters was significant, albeit it took place under the close eye of member states. Finally, in addition to its traditional role of monitoring through reporting and amending, the Commission has authority to approve bilateral arrangements between member states where modifications to normal procedures do not infringe upon the main tenets of the Regulation (Art. 23(2)).

The Commission has further agenda setting responsibilities under the Asylum Procedure Directive. In this instance it drafts the list of countries eligible for classification as safe country of origin or safe third country, and this prompts a qualified majority vote by the Council (Art. 29(1) and 36(4)). Formally, changes to this list can only be made by the Commission, however it must consider any requests for change submitted by the Council (Art. 29(3)) or member states (Art. 29(4)).

4.1.4) Efficiency and effectiveness

This section has two objectives. First, it sheds light on the extent to which failures were present in asylum policy at both national and European levels. It further considers whether these failures gave rise to delegation to the Commission. Secondly, it examines whether member states unburdened themselves and consequently freed up vital resources by making use of the Commission's coordinating and managerial role.

In order to investigate failures, one should understand what a successful

asylum policy is. For member states, a successful asylum policy boils down to reducing numbers⁸³ (Terry Givens and Luedtke 2003: 291-30; Guiraudon 2000a; Hatton 2005; Thielemann 2006). Apparently, some countries have been very effective in doing this. Past studies have argued that Germany, for instance, spent much of the 1980s and 1990s trying to restrict asylum. This culminated in 1993 with mainstream political parties amending the constitutional right to asylum (known as ‘the asylum compromise’) (Bosswick 2000: 47-50; Green 2013: 339). A reduction of inflows seems to validate this policy response. After experiencing high volumes of applications in the early 1990s, German asylum figures reduced steadily for the rest of that decade and throughout the 2000s. Both before and after the peak of the early 2000s, the UK’s Labour government adopted legislation aimed at restricting asylum (Cerna and Wietholtz 2011: 199-201). Again applications steadily decreased from over 100,000 in 2002 to approximately 25,000 towards the end of that decade (see Eurostat figures in table 4.1). Costs associated with hosting asylum seekers, e.g. legal aid (The Times 2003), were also mounting. This was a thorny issue in the Asylum Procedure Directive adopted at the EU level, which is captured by the difference in transposition deadlines. While the Directive had to be transposed within two years, the provision on legal aid in three (European Report 2004g). According to media and academic commentators, previous internal relocation programmes did not meet burden-sharing objectives within the UK (Christina Boswell 2003b; The Independent 2000). The increase towards the end of the 1990s and beginning of the 2000s was one of the factors that motivated the UK to work with its EU counterparts on asylum matters. Home Secretary Jack Straw declared in late 1998 that “[asylum policy] is an area where work with our European partners is essential” (Associated Press International 1998). This position remained stable in the following years, although signs of dissatisfaction were mounting. Home Secretary Blunkett declared,

“Progress has still been too slow[.] We need to give confidence to people living in all EU countries that we are giving priority to these issues. Without such trust public concern will rise” (The Guardian 2002a).

⁸³ On the other hand, it is important to appreciate that for other actors, such as advocacy groups, a successful asylum policy is measured by the, for instance, fair procedures and the degree of protection granted to individuals Matthew Gibney, 'Policy Primer. Asylum Policy', *The Migration Observatory* (University of Oxford, 2012)..

More controversially, Italy is regarded by some to have achieved a momentary success in reducing asylum inflows after adoption of its ‘push-back policy’ (Deutsche Presse-Agentur 2010; Giuseppe Sciortino 2014). This was, however, later challenged and struck down in the courts (European Court of Human Rights 2012; Vogt 2012). As a consequence of that European Court of Human Rights judgement, Italy pledged not to undertake such policy in the future (MPG 2012). Therefore, to what extent this policy could be qualified as successful is open to question.

The effects of restrictive asylum policies on asylum flows have nevertheless been called into question. First, a number of these policies were adopted in the context of a significant decrease in overall numbers of applications lodged in the EU. When Maastricht entered into force in 1993, 516,705 asylum applications were filed in the EU15. When Amsterdam entered into force in 1999, 352,705 applications were lodged in the EU15, a reduction of 31.8% when compared to 1993. And, when the Lisbon treaty entered into force in 2009, Eurostat counted 266,390 asylum applications. Secondly, the impact of state policies on volumes of application has been called into doubt in recent years (Hatton 2011). Thielemann’s analysis of the Swiss and UK cases is cause for scepticism over the real effects of state policies on asylum flows. Qualitative studies of the UK case have revealed that asylum seekers were not influenced by general asylum policy in selecting their destination states; it follows that changes in such policies are likely to have proven even less influential (Thielemann 2006: 448). Thielemann also employs quantitative methods to test the hypothesis that asylum policy affects asylum flows. He examines push and pull factors traditionally used by migration scholars to understand the patterns of asylum applications in a set of OECD countries between 1986 and 1999. Thielemann finds that “the effect of policy related factors [...] is not as significant as that of historic and economic factors” (2006: 463). More precisely, prohibitions on work and low recognition rates display an effect, whereas movement restrictions, benefit systems (either cash or in-kind), and the presence of stringent provisions (e.g. safe third country) do not emerge as important predictors. Bosswick contests the effectiveness of Germany’s ‘asylum compromise’⁸⁴ in

⁸⁴ See previous section.

cutting the number of asylum applications on the basis of timing and broader policy and administrative changes carried out in the same period⁸⁵ (2000: 50-51). In sum, caution is to be advised when seeking to connect a reduction in volumes of asylum applications and the success of a state policy, as other plausible explanations may well be present.

Another thorny issue in asylum policy is the extent to which governments have been able to remove asylum seekers from their territories where their applications have been rejected⁸⁶, this has been termed the “deportation gap” (M. Gibney 2012: 4). An IOM study in 1999 highlighted a number of problems arising from past policy efforts concerning both voluntary and forced repatriation of asylum seekers (Koser 2001: 11-12). A later UNHCR study found that,

while large numbers of asylum seekers arrive, and few are given refugee status, fewer still are forced to leave the country. Deportation remains a singularly rare occurrence. Indeed, the striking feature of the data is that it shows that deportations have in no way increased in a manner commensurate with overall asylum applications (M. Gibney and Hansen 2003: 4).

A further UNHCR study found that asylum seekers whose applications had been rejected made up a significant portion of all expulsion decisions in Germany (Noll 1999: 50). For Green, Germany’s “inability to remove failed asylum seekers is arguably the Achilles heel of the entire system, as it undermines the credibility of a state’s attempts to secure its borders” (Green 2002: 11). Governments have undertaken a number of initiatives to empower and improve their “deportation machine[s]” (Fekete 2005: 69-70). These mainly include budgetary increases (Spain, Sweden), increased numbers of staff dedicated to deportations (Spain), and setting targets for annual deportations (UK⁸⁷). These problems were not solely

⁸⁵ These regarded the access to the labour market for asylum seekers and the practice of fingerprinting them.

⁸⁶ It is interesting to see that issues regarding rejected asylum seekers touched not only country at the south or eastern periphery of Europe. See the pressures on the Irish governments in the early 2000 *Financial Times*, 'Asylum Seekers Find Little Welcome in Ireland', *Financial Times* (2000a)..

⁸⁷ For an interesting perspective on the UK, and some comparative remarks with Germany and The Netherlands National Audit Office, 'Returning Failed Asylum Applicants', (HC 76; London, 2005)..

apparent to academics and practitioners but were also acknowledged in political circles. In a speech given at the opening of Britain's 2005 EU Presidency, Prime Minister Blair focused, in part, on the effective return of rejected asylum seekers. It is noteworthy that Blair's attention was exclusively limited to the 'repressive' front of migration. No mention was made to any forms of legal migration, or integration. As priorities, he listed only enhanced security for borders, and return for failed asylum seekers and irregular migrants (Agence Europe 2005b). Moreover, it has been reported that the German Interior Minister informed his British counterpart that there were some "400,000 rejected asylum seekers which Germany cannot remove and are eligible for state support" (M. Gibney and Hansen 2003: 6). The media was also well aware of this phenomenon and the difficulties associated with quantifying it (Financial Times 2000c; The Guardian 2000a).

Turning to internal relocation mechanisms in the EU, towards the end of the 1990's it was becoming clear to policy actors and commentators that the Dublin Convention was not working. In particular, great dissatisfaction was mounting regarding the loose solidarity commitments undertaken by some member states. In short, reforms were necessary⁸⁸. First, it appeared there was more than a degree of confusion over the purpose of the Convention. Some were of the opinion that Dublin mechanism failures were synonymous with burden-sharing failures. However, this seems somewhat inaccurate. Theoretically, the Dublin mechanism could work perfectly well without achieving an equitable redistribution of asylum seekers. Its objective was not equitable redistribution, but allocating responsibility for processing applications. The Dutch assessment of the Dublin revision highlights this exact area of confusion in stating "it is questionable whether the Dublin Convention is the appropriate instrument for achieving such an equitable distribution" (Council 2000u).

One of the many troubling aspects of the Dublin Convention was the low take-up among member states (European Social Policy 2008). The Commission, for

⁸⁸ Any survey of the press of these years will provide countless of declarations in that sense Agence Europe, 'During Informal Meeting in Birmingham, Germany Reopens Question of Sharing Burden of Refugees - Other Results of the Session', *Agence Europe* (7150, 1998a), Agence Europe, 'Dublin System Must Be Improved', *Agence Europe* (9674, 2008d), European Report, 'Commission Floats Dublin Convention Review Plan', *European Report* (20001), The Guardian, 'Uk Plan for Asylum Crackdown: Proposal for Rapid Reaction Border Guards', *The Guardian* (2002a)..

example, cast doubt on the effectiveness of the Convention in noting “the considerable problems faced in attempting to monitor the impact of the Convention in the absence of adequate statistical information” (Commission 2003d: 6). According to the few figures collected by member states during its early days, and with only one notable exception, no member state transferred more than 1 per cent of asylum applicants under the Dublin scheme (Commission 2000b, 12). Denmark bucked this trend by transferring approximately 18 per cent of its asylum applications. Nevertheless, the Commission has suggested this success can be explained with reference to Denmark’s bilateral agreement with Germany (one of biggest receivers under the scheme). The Commission began canvassing member states to identify attitudes towards a revision of the Dublin mechanism as early as 2000, at which point it was immediately clear that major changes were not feasible (European Report 2000l; Financial Times 2001c). In 1999, the French Interior Minister reportedly declared that “the Dublin Convention was being applied 'badly' but that it was probably better to work with this agreement than to try to formulate a new one” (Agence France Presse 1999).

Efficiency in asylum policy was a long-standing goal of policy-makers. There were frequent calls from all levels to speed up procedures. The EP, while noting that intergovernmental procedures for solidarity among member states were not working, called for such action (Agence Europe 1999d, 2001f, 2009e). Similarly, while unable to agree on a means of achieving it, member states were also keen to see a speeding up of procedures. Member states’ emphasis on quick procedure was criticised by advocacy coalitions as detrimental for the asylum seekers’ rights (Agence Europe 2005a; Financial Times 2005b). Fast-track procedures emerged early on in Europe-wide debates about how a European asylum policy ought to look (Agence Europe 2002g, 2003g). These procedures are used by a number of member states for applications that are assessed as manifestly unfounded (Reneman 2014). UK Prime Minister Blair indicated his belief that cooperation at the EU level offered the prospect of establishing common fast-track procedures (The Guardian 2002b). And, although the Council revealed through a survey of national positions that practices varied hugely, all member states agreed in principle to the adoption of fast-track procedures and to the strengthening of harmonisation (European Report 2000d).

At the EU level, two initiatives are particularly noteworthy. The failed

imitative of common asylum application-processing centres, and EURODAC. While EURODAC has already been analysed, the former idea envisaged the creation of centres outside Europe to process asylum requests, jointly managed by the member states. It was not enacted, at least externally, because of the complex legal implications and difficult feasibility (on the other hand, UNHCR informed member states that internally it could have been done) (Financial Times 2004).

In sum, the area of asylum witnessed several policy failures. To name but a few, these included constant policy efforts to reduce numbers of asylum seekers, the continued presence of sizable numbers of rejected asylum seekers whose removal was difficult to achieve, the continuous variation in recognition rates across EU member states, and efforts at blocking secondary movement. Efficiency was clearly also manifest in the desire to speed up asylum procedures and reduce their costs.

Qualitative analysis of delegation in selected measures.

In the interests of efficiency, the Commission has been conferred with authority to set out guidelines and priorities for the actions to be funded under the European Refugee Fund. According to Czaika (2009), it is authorised to manage and administer financial transfers to member states, determine the criteria used to select actions for funding and select which actions are funded. This set-up applies to all migration funds, as will be discussed in the chapters to follow, and is intended to prevent management dispersion and financial waste. The fact that member states agreed to converge on key issues and grant the Commission a substantial say in formulating these priorities underpins the credibility of commitments made. It also has important consequences for the efficiency of the entire operation. In other words, the Commission is, to a great extent, the operational manager of the Funds.

The Commission could use up to 5 percent of the 2000 Fund's available resources for 'Community action' to "finance innovatory action or action of interest to the Community as a whole" (Art. 5(1)). Although this is an important example of delegation, it must be noted that the Commission originally requested that up to 10 percent of the Fund to be dedicated to these measures (Commission 1999b: 8). In 2004 a two-percentage point increase was applied to the share of the Fund

allocated to the Commission's exclusive discretion (Art. 8). This had been preceded by a push by the Commission for a significant increase in the Fund budget, which it deemed essential to overcoming its "symbolic" nature. However, following a 2004 redefinition of the actions that were to be promoted through the Fund, the Commission's remit became much more constrained (Art. 8(2)). In a subsequent 2007 revision, the 'Community actions' share of the Fund was increased to 10 per cent. This is even more significant when it is considered that the Commission did not request such a rise on this occasion (Commission 2005h: 25). Member states instigated this change in agreement with the EP (indeed, the latter had proposed an increase of up to 15%) (EP 2005: 19, 71, 76-77).

While the Commission had more money to spend on Community actions, it was also charged with meeting more specific criteria. It may be argued that the higher the number of criteria to be met, the more constrained the supranational actor is. However this is not effectively measured through Franchino's coding criteria as it assigns values on the basis of typology, not the number of occurrences (2004). Nonetheless, on careful review of the criteria for actions to be funded, it appears that the Commission is not more constrained but rather has gained competences. Looking at the Fund from an historical perspective, one notes a low degree of specification in the 2000 Decision, with a Commission relatively free to promote actions within the context of a non-exhaustive list (Art. 5 (1)). The 2004 Decision however introduced a more comprehensive list of actions featuring four specific points additional to the typology of actions funded by member states (Art. 8 (2)). While this can be read as a restrictive turn concerning Commission's discretion, the 2007 revision increased this list again, this time to eight-points. The new list included all the previous points and introduced new ones concerning common statistical tools, structural support for networks present in at least ten member states, and the provision of support in emergency situations. The Commission also gained powers under another section of the Fund, that of 'technical assistance'. This involved some overlap with the previously held duties along with the introduction of new areas of responsibility (e.g. IT systems, and information and training measures for national authorities). In sum, although the Commission's remit has become more controlled, it is also broader.

This line of reasoning should however be considered in the context of Comitology. The implementation of funded actions took place in 2000 using the 'advisory procedure', traditionally classified in EU textbooks as the most permissive

for the Commission (Hix 2005: 54-55; Nugent 2001: 268-71; Pollack 2003b: 118). In 2004, in addition to the advisory procedure, the Decision introduced the 'management procedure'. In the 2007 revision, the 'advisory procedure' was superseded by the 'regulatory procedure with scrutiny'. In a principal-agent approach, this dynamic can be read as a tightening of the grip on the Commission. This interpretation is further supported by the fact that, in its proposed revision, the Commission foresaw neither the addition of the regulatory procedure with scrutiny, nor its application in the case of adoption of the strategic guidelines⁸⁹. In short, if extensive powers have been delegated to the Commission, member states have also found a number of ways to limit its action. A possible reading of the situation is that member states saw the benefit of channelling the Funds through the Commission, but were unsure how the latter would operate. Therefore, they kept tight control on the Commission's remit. From this perspective, this was a win-win scenario that saw member states achieve the common interest of more decisive action in this area while simultaneously retaining tight control of their agent⁹⁰.

Operational management is also present in the case of Eurodac Regulation. Eurodac was a technical addition to the failing Dublin Convention that was considered necessary to facilitate its successful operation. In other words, it provided the essential component necessary to stop the practice of asylum shopping (Agence Europe 1999c). The EP apparently supported endowing the Commission with an important role, "including responsibility for the co-ordination of data exchange and for operating a central database of fingerprints" (The Irish Times 1998). However this was "categorically" resisted by France and Denmark (European Report 1998b, 1998d). The Commission was nevertheless tasked with supervising the Central Unit on matters such as security and data protection (Art. 13(4) and 14(2)). In addition, the Central Unit has a number of duties concerning the workings of system. As the Central Unit is located within the Commission and the Commission is responsible for it, evaluations and improvements relating to the Unit's operation fall within the Commission's purview. The power of simple evaluation would not normally constitute a delegating provision, but the fact that

⁸⁹ Compare the Commission's proposal Commission, 'Proposal for a Decision of the European Parliament and the Council Establishing the European Refugee Fund for the Period 2008-2013 as Part of the General Programme 'Solidarity and Management of Migration Flows' {Sec(2005) 435}. Com(2005) 123 Final. Cod 2005/0046', (Brussels, 2005h) at 52. with final text of the 2007 Decision (art. 17(3)).

⁹⁰ I owe this latter observation to Dionyssi G. Dimitrakopoulos.

the Commission can modify the Central Unit's working procedures means this does constitute delegation (Art. 24).

In terms of effectiveness, the picture for the minimum standards Directives adopted by the EU is complicated. No provisions were identified in the legal texts that could be explicitly linked to the policy failures identified above. Having said that, the extent to which further delegation could have improved the situation is not clear, and it is even less clear whether such a move would have proven politically feasible. The only case where failure was widely recognised was the Dublin Convention, and member states introduced the Eurodac to address this. While the Commission is granted powers through the Eurodac Regulation, they seem to relate more to the kind of operational management that the Commission is usually granted in large IT undertakings such as the SIS or the VIS⁹¹. In other words, these powers seem more related to efficiency than effectiveness.

With regard to the Asylum Procedure Directive, few efforts were made to coordinate policies on reception at the European level before this measure was introduced, and it is problematic to begin classifying national policies as failures in this area. In fact, as member states' policies varied so widely it is difficult to identify whether previous problems led to delegation. For instance, asylum seekers in Denmark had an obligation to remain in reception centres in order to qualify for assistance, whereas in Sweden additional financial assistance was made available to asylum seekers residing outside reception centres (UNHCR 2000: 22)⁹². Member states committed different amounts of resources to asylum reception (Commission 2001h: 25). However, this stemmed from unique combinations of factors such as welfare systems, constitutional arrangements concerning the provision of asylum, and historical legacies of hosting asylum seekers and refugees. Arguably, EU cooperation did not emerge because of previous failures, but because lacking coordination of national policies caused regional problems (negative externalities). Finally, as the Directive is not an operational one, i.e. it does not feature any executive tasks and there is no need to delegate operational management. This rationale is replicable with regard to almost all legislative measures dealing with common standards in this area.

⁹¹ See Chapter 7.

⁹² UNHCR (2000) Reception Standards for Asylum Seekers in the European Union: 22.

4.2. Conclusions

An analysis of institutional contexts reveals that there were a number of divisions between member states, but also various points of convergence. In theory, divisions within the Council should lead to more delegation to the Commission. However as Franchino suggests (Franchino 2004), this is true so long as there is no conflict between the Council and the Commission. In the case of asylum policy, this dynamic was turbulent to say the least.

The picture presented in this chapter in relation to uncertainty is mixed. It rarely induced member states to confer powers on the Commission. Indeed, the Commission was often cast as the recipient of notices or the agent responsible for disseminating information concerning member states, but this action could seldom be the result of its own initiative. Neither could it contribute to the processing of that information nor could it oblige member states to take account of its contributions. This finding seems to be in line with other studies of delegation (Franchino 2004: 269, 72-74, 91, 93). The elements promoting delegation were not present in the final legal text. And, until the Migration Statistics Regulation was introduced in 2007, the Commission had limited involvement in creating knowledge on or informing member states of asylum shopping practices. This was despite the fact that little empirical study had been conducted on this hotly debated phenomenon. No mention was being made of issues surrounding information on countries of origin either. And, even more importantly, little responsibility was conferred upon the Commission to investigate, assess or request accurate and reliable information from member states on what happened after asylum applications were lodged both in terms of the various procedural stages and in the event of a rejection⁹³.

Having said that, there are a few notable exceptions. While in the first two Refugee Fund Decisions the Commission was loosely associated with the statistical submissions that formed the basis of member states' funding allocations, the third revision empowered it to directly intervene in their evaluation. It is noteworthy that the Commission is not explicitly mentioned in the legal text until the Decision's

⁹³ On this, see also the next chapter on irregular migration.

third revision. Finally, the Commission's input is fundamental to any decisions concerning the list of “safe countries of origin” under the Asylum Procedures Directive.

Turning to the credibility of commitments, only a limited role was recorded for the Commission on the agenda setting side of minimum standards, while no sanctioning powers were recorded at all (except for the European Refugee Funds). Member states, albeit realising that EU action could provide a remedy to negative externalities, were not however keen on granting powers to the Commission in this area. They identified a number of problems in this area, such as secondary movement, disproportionate and hard-to-predict inflows, and alleged abuse of welfare systems (Mitsilegas 2014: 186). They also experienced a number of crises of confidence. That said member states nonetheless opted for a strategy of minimum coordination in this area. To that end, a set of minimum standard measures was devised that was supposedly capable of limiting disproportionate inflows and secondary movement. Member states linked this package to a solidarity mechanism (the European Refugee Funds) and this drew buy-in from all actors. Although symbolic in its infancy, this system engaged all member states in a broad operation that, at least initially, mattered to only a small number of them. This is critical to a discussion on delegation as member states placed the Commission at the centre of this rebalancing mechanism thereby conferring it with broad and significant powers.

The importance of efficiency as a key determinant of delegation is immediately apparent from operational arrangements such as the Refugee Funds or Eurodac. More precisely, operational management accounts for a number of delegating provisions in these measures. There was however no evidence that effectiveness was a driving force behind delegation. Member states paid close attention to previous failures in the cases of uneven recognition rates across Europe, secondary movement, and the status of rejected asylum seekers. They opted not to involve the Commission in the first and last of these, and decided to rely on its agenda setting function with respect to secondary movement (albeit under strict Comitology procedures).

Looking back at Chapter 1, three main trends were identified in EU migration

policy literature. The case of asylum policy allows us to discuss one of the best-known explanations for EU cooperation on migration, the venue-shopping argument⁹⁴. Guiraudon's insights are only partially vindicated in this dissertation. Indeed, contrary to one's expectations based on her analysis, member states were found to have conferred powers on EU institutions. The important question is what sorts of powers. A conspicuous gap was identified with regard to powers of sanctions under EU level agreements, limitations were also found with respect to monitoring. Member states started out with loose coordination in this area in the early 1990s, this bore little fruit though. The incorporation of Dublin, together with the construction of a level playing field by means of norm-sharing again left many member states dissatisfied⁹⁵ (Mitsilegas 2014). That said the political compromise establishing weak sanctioning measures won much support, this was seen as a win-win for many member states. Member states with longer histories of migration (e.g. UK, Germany) did not want to replicate constraints at the EU level that had been painstakingly by-passed at home (Guiraudon 2000a; Joppke 1998). In practice, this translated into a preference for little if any sanctioning powers over member states'. At the opposite end of the spectrum, countries new to the issue of immigration signed up to EU arrangements having had little experience with asylum policy, let alone its implementation. These countries also featured poor records in implementation (Jordan et al. 2003). In the case of Italy, for example, EU asylum policy took the form of principled agreements consistent with a broader pro-European stance (Agence Europe 2001c; Corrado 2002). Having experienced exclusion from the first Schengen agreement, Italy preferred to accept an asylum legislation package despite its lack of clear benefits (Magnani 2012: 652; Vincenzi 2000: 101-03). Weak sanctioning mechanisms meant more discretion in on the ground application of EU rules. And reports on the Dublin Convention signalled that member states in the external ring of the EU were classified as net recipients under the Dublin rules, but actual transfers were so "modest" that no talk of excessive burden made sense (Commission 2000d). In other words, the gap between the letter of EU rules and their implementation already resembled a gulf. In the end, while politicians and policy-makers argued against concessions at the EU level that would replicate or create domestic constraints, they drifted incrementally towards

⁹⁴ See Chapter 1 for a thorough presentation of the argument.

⁹⁵ This prompted a revision of the asylum package between 2011 and 2013. While interesting indeed, a deeper comparison between the first and the second asylum packages is not feasible in the limited space of this research, and exceeds the period considered in this dissertation (1999-2009).

tighter cooperation over time. This demanded credibility and management to work.

Past scholarship has highlighted the role of the external dimension of migration policy as an alternative to asylum policy deadlocks (Cristina Boswell 2003c) or as a solution to institutional problems (Lavenex 2006). Where problems are understood as institutional constraints that member states wish to avoid, this chapter has shown that member states restricted monitoring capabilities and granted limited powers to the Commission through legislation setting minimum standards. In other words, it seems redundant for member states to have established an external dimension of EU cooperation on asylum only as a means of limiting the control of supranational bodies given that they had already engineered asylum legislation to minimise the role of the Commission.

Normative assessment of EU asylum policy abound (Fekete 2005; M. Gibney, J. 2004; Juss 2005; Kaunert and Léonard 2012). Mitsilegas looks at the extent to which notions such as solidarity and trust are exclusively interpreted through member states' interests, and the damaging consequences this trend has for migrants' rights (Mitsilegas 2014). This neglect of migrants' perspectives has given rise to a peculiar situation wherein solidarity is based on delegation, that is to say member states express mutual commitments to solidarity by sharing key policy principles and pooling resources through agencies such as EASO and Frontex (Mitsilegas 2014: 189-90). This chapter has confirmed this insight by showing the degree of commitments that EU member states to solidarity among themselves. While this thesis focus might be ill suited to answer to an assessments of the impact of EU asylum law on migrants' rights, the first section of this chapter has shown that, overall, the Commission and the Council had two different stances when it came to that issue between 1999 and 2009. Broadly, the Commission took a more liberal stance towards migrants' rights than the Council.

In terms of Community Method, while it is certainly true that member states introduced a number of soft policy initiatives in this area, this dissertation highlights that member states were also eager to create hard, binding solutions to a number of problems. Binding measures were seen as key to solving many of the problems member states experienced in relation to fair distribution of asylum seekers and responsibility for applications. In addition to which, formal action was taken towards supporting policy implementation through establishment of the Funds.

These measures prioritise strengthening of the legislative *acquis* and provide further evidence of the commitment to common policies (or at least nominally converging ones). In other words, it would be a mistake to interpret policy experimentation as a sign of discontent with the Community Method and its formal output.

5. Delegation in EU secondary legislation on irregular migration

The objective of this chapter is to provide a qualitative account of the level of delegation and discretion in irregular migration policy. Findings set out in chapter 3 indicate that irregular migration includes only one measure displaying high delegation and medium discretion. In addition, this policy area displays the lowest average levels of delegation and discretion of all migration categories analysed in this dissertation, at 3.9 percent and 2.6 percent respectively. The average constraint ratio is also however the lowest among migration categories, at 1.25 percent⁹⁶

The EU legislative *acquis* on irregular migration is based on Art. 73(3)(b) and includes measures on “illegal immigration and illegal residence, including repatriation of illegal residents”. However, much of the legislation adopted by the EU concerning asylum and borders and visa policy in the years considered had a bearing on irregular migration to a greater or lesser extent (Andreas 2003). After the Treaty of Amsterdam entered into force, the Commission shared the right of initiative with member states, there was unanimous voting in the Council, consultation with the EP, and the CJEU had only limited powers. It was only after the five-year transitional period that the Commission gained the exclusive right of initiative (May 2004).

Irregular migration⁹⁷ is a broad expression that can be used to encompass different forms of irregular entry, stay, and employment within the context of national and international discourse. Member states' past efforts at dealing with irregular migration had to overcome a huge initial problem relating to the lack of a

⁹⁶ All these figures refer to results not including implementing measures.

⁹⁷ In this research, the expression 'irregular migration' is preferred over other forms also present in EU documents, such as 'illegal migrants'. For an early debate on the issue, see the UNHCR recommendations to the EU European Report, 'Justice and Home Affairs: Unhcr Says Eu's Immigration Policy Is Undermining Right of Asylum', *European Report*, 29 July 2000a.. “The terms irregular (with no regular/legal status), undocumented (without the appropriate papers) and unauthorised (without legal permission for entry, stay and work) migration denote different facets of the wider phenomenon of irregular migration” Bastian Vollmer, 'Comparative Policy Brief - Political Discourses', *Clandestino. Undocumented Migration: Counting the Uncountable Data and Trends Across Europe* (ELIAMEP, ICMPD, 2009) at 1.. While such distinctions can be important from a legal standpoint, for the purpose of this research these terms are used interchangeably.

common definition or understanding of what “irregular migration” constituted (Espeth Guild 2004: 3-29; Mitsilegas 2004: 36-37). Legal definitions differed among countries, and in at least one case no definition existed at all (Spain) (Morehouse and Blomfield 2011: 5). Recently EU law has come to define an irregular migrant as a,

third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State (European Union 2009a: Art. 2(b)).

As with the previous chapter on asylum policy, institutional dynamics within the Council and between the Council and the Commission are first investigated. Irregular migration in Europe is then analysed with regard to problems of uncertainty, credibility of commitments, and efficiency and effectiveness. A brief conclusion sums up the relevant findings.

5.1. Analysis of the determinants of delegation

5.1.1) Institutional factors: Council internal division and conflict between Council and Commission

Cooperation in the Council regarding irregular migration is difficult to characterise. The leading view of the Council was that,

illegal entry and illegal migration has come to represent a major problem in the Member States of the European Union as well as elsewhere in Europe (Council 1999i).

On one hand, this is the area in which the Council demonstrated most clearly their ability to create and shape a policy without recourse to the agenda setting role of the Commission. The majority of the measures in this area do not stem from Commission proposals but from individual or joint member state proposals. In this regard political consensus was not nominal but very much applied. On the other hand there were doubts over the effectiveness of the measures adopted in the initial years. The following discussion demonstrates that actual implementation of these

measures was found wanting by the member states. When the Commission began proposing legislation divisions emerged more clearly. The Return Directive and the Employer Sanctions Directives demonstrate, mainly through the length of the negotiations but also the number of reservations entered by national delegations, how thorny and divisive the matters at stake were. This is reflected in the average length of negotiations in the Council; for Council-led legislation this was 14 months, whereas for Commission-led legislation it was 25 months.

The fact that this policy area was mainly left to member states in the first five years also makes it difficult to assess Council-Commission relations. It is difficult then to assess the extent to which preferences diverged as the Commission did not table many proposals. Of the eleven measures adopted up to December 2004, only two were based on the Commission's initiative. One Commission proposal was the consequence of a request presented in another Council Directive, and the other was the Directive on residence permits for victims of trafficking (European Union 2004d).⁹⁸ At the supranational entrepreneurship level, the Commission pushed for more cooperation in this area from the 1980s and began publishing policy papers from the time it obtained the power to propose legislation in JHA (first within the context of a new approach to migration) (Commission 2000c). The Commission submitted comments on specific forms of irregular migration also covered under other policy areas, such as the case of "undeclared work" (Commission 1998). In 2001 the Commission issued a Communication exclusively dedicated to irregular migration (Commission 2001d), which was reportedly well received by the Council (Agence Europe 2002k), and then it followed this with several others in the period considered.

One of the few areas of contention between the two actors was the Commission's advocacy for matching the tightening of irregular migration with increasing channels of legal migration. However debates on this issue were limited and light. The fact that the Council had relatively little to be concerned about in terms of agency loss is recorded by the constraint ratio set out in Chapter 3, which

⁹⁸ There were signs at the time that the Council was split during negotiation Agence Europe, 'Conference on Trafficking in Human Beings Does Not Agree to Grant Residence Permits to Victim', *Agence Europe*, 21 September 2002h.. In addition, by the transposition date, 12 member states had not incorporate the text into their national legislation Agence Europe, 'Parliament Wants Action Plan to Tackle Human Trafficking', *Agence Europe*, 18 November 2006b.

is the lowest of all migration categories. Authors have argued that the Commission seemed to consider that increased labour migration could be achieved only if coupled with a resolute stance on irregular migration and employment, or that more family reunification could be obtained only by stemming irregular inflows (Bell 2010: 165). For instance, as argued by Commissioner Frattini,

[w]e need a reinforced and more efficient fight against illegal immigration, fundamental for the credibility and coherence of our immigration and asylum policies” (Agence Europe 2006c).

This line of reasoning makes it clear that action on irregular migration was deemed essential to seeing advances in other migration policy areas materialise. Such claims also found echoes in debates within the EP (Agence Europe 2007a), and was supported also by individual member states (Agence Europe 2001d; Hansen 2014). Member states also demonstrated that they could and wanted to cultivate some of their agendas on irregular migration, as well as other areas such as family reunification, outside the EU framework. This in turn upset the Commission due to fears of being sidelined. This was the case with the G5 meetings of interior ministers⁹⁹ that involved regular gatherings to discuss pressing issues or to step up cooperation (Agence Europe 2005e).

5.1.2) Uncertainty

Knowledge gaps existed in all aspects of irregular migration including entry, stocks, flows, demographics, and dynamics. Two things can therefore be expected of delegation based on uncertainty in this area; first, a pronounced role for the Commission in providing expertise on irregular migration; and secondly, a prominent role for the Commission in receiving and disseminating information. By definition there is no direct administrative record of the multi-faceted social phenomenon that is variously labelled irregular migration. Figures and estimations are generally derived from other data sets. However as discussed in the previous chapter, past research has found that the synergies between different sources and data were not fully combined,

⁹⁹ France, the UK, Italy, Spain, and Germany.

in order to create specific indicators that would not only better monitor state practices in the field of irregular migration but also shed light on migrants' strategies (Kraler and Reichel 2010b: 53).

In 1991 the Commission stressed the need for harmonised statistics “providing reliable information over a satisfactory timescale” in order to overcome the gap in knowledge on irregular migration (Mitsilegas 2004: 30). One year later this request materialised into the creation of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI) within the Council. CIREFI was dissolved in July 2010, its tasks now covered by Frontex (Peers 2011: 584). This agency has acquired relevance since 2004 for data collection and analysis in irregular migration (Morehouse and Blomfield 2011: 1). The first Eurostat studies on irregular migration date back to the late 1990s (Eurostat 1998b, 1998a). This is perhaps a consequence of the Commission and CIREFI's advocacy for EUROSTAT involvement in the collection of migration statistics (European Report 1998d), something that one interviewee from the Commission confirmed (Interview 3).

The Commission observed that there were a number of problems related to collecting and analysing data and that these related to “statistical confidentiality” and “data sensitivity” issues. While “statistical confidentiality” refers to privacy issues of an individual, “data sensitivity” is connected with political, policy or operational reasons. This latter element has been put forward as one of the main cause of the poor state of data gathering in irregular migration, as commentators have argued that “numbers of illegal immigrants are underestimated due to the reluctance of Governments to admit that they have failed to seal their borders properly” (Mitsilegas 2004: 39). One issue of importance to the Commission was that of increased transparency in collection, use and diffusion of data on irregular migration. The Commission's Action Plan on irregular migration set its first step as “boosting co-operation between national authorities through more information-sharing and joint operations” (European Report 1998d). This was welcomed by the Council, with France being the only exception, in the spirit of Tampere as it related to the publication of data (Mitsilegas 2004: 31). France contended that research results should not be made public and argued that these should have been limited to

government officials and EU bodies dealing with the matter. This element of reticence in sharing and releasing information on irregular migration has affected much of EU policy on irregular migration (Agence Europe 2002b). Ultimately the sensitivity of information relating to irregular migration was clear to all policy-actors (EP 2003b: 5). In the context of a revision of Community statistics on migration the Commission indicated that, due to the sensitivity of the matter, irregular migration statistics deserved a separate treatment and their disclosure should have been more limited (Commission 2003d: 8, 9; European Report 2003e). The Commission seemed to believe that the introduction of the OMC, with its emphasis on exchange of information and best practice, could represent a response to continuous gaps in information and knowledge (Agence Europe 2001e).

An example of the difficulties related to obtaining and assessing information on irregular migration emerged during the Council-led analysis of member states' removals of the irregularly present TCNs. The Council stated that

the statistical data contained in this document may not be completely accurate, either because statistics are not updated or because national administrations do not collect the relevant information (Council 2000).

Again on information-sharing, in the late 1990s the EP presented a report on a rapid alert system for transmitting information on irregular migration involving the Commission (Agence Europe 1999a). The idea of an early-warning system was also echoed in a series of initiatives of the 2000 French Presidency which did not, in contrast, foresee any involvement of either the Commission or the EP (Council 2000}). The non-involvement of the Commission is noteworthy as France had sought a more centralised system than the fragmented and often bilateral exchange of information that existed at the time within CIREFI (European Report 2000h). The quality of the information provided should also have improved according to the French Presidency, providing more and reliable information in a standardised manner by means of a revised version of the 'form' in use at the time (Council 2000~, 2000e). Past efforts however met with a number of differing views from member states (Council 2000d). Some preferred bilateral exchanges (Council 1999d: 2), others were sceptical of the new 'form', while others noted that the

information gathered was too dissimilar to be systematically summarised and compared (Council 2000c: 3). While the UK and the Netherlands proposed to abandon the system altogether as it was deemed ineffective, Germany pushed in the opposite direction and insisted that it should be made compulsory (Council 2000b). In other words, the proposed solution to a clear policy failure did not involve the Commission in any way.

Another example that illustrates the difficulty of collecting and comparing data coming from different member states becomes apparent if attention is paid to CIREFI data collection practices. In 1997 member states agreed on the data to be collected within CIREFI. This was mainly based on a number of categories such as refused aliens, illegal presence, facilitators, removed aliens, regularisations, etc. First of all however, these categories were questionable in terms of both accuracy, e.g. “refused aliens” did not distinguish between efforts at multiple and single entries. Secondly comparability was an issue, i.e. it was not certain that member states meant the same thing when it came to illegal entry, stay and employment. Due to these difficulties and “with a view to enhancing the collection of statistical data on illegal migratory flows and assessing the situation in a uniform manner”, in March 1998 it was decided “to make the Commission's statistical service, EUROSTAT, responsible for collecting and processing data on behalf of CIREFI” (Council 2000): 2). Serious problems also arose with the collection of evidence in this policy area. That is cooperation in sharing information and knowledge was not always forthcoming, for example the monitoring system adopted by the Council for irregular migration initiatives under Maastricht received information only from some member states (Council 1999f). The Greek delegation also issued a questionnaire to other delegations to obtain further information on regularisation programmes, again obtaining responses from only some delegations (Council 1999h, 1999g). To help in better tackling the problems related to knowledge and information in irregular migration, CIREFI proposed a “[c]onceptual framework to be used in the exchange of data on illegal entry in international cooperation” (Council 1999i). With reference to the possibility of forging a common returns policy, Commission officials explained how difficult it would be in the absence of “harmonised methods for calculating statistics”. In doing so they first highlighted examples of member states who did not provide any data, they then raised the issue of non-uniformity of data on phenomena falling under categories of irregular

migration. For example, some member states were reportedly including “people who were denied entry to the EU at a land border” in return figures (European Report 2002c). During the French Presidency in 2000 a, seminar on illegal immigration networks reached wide-ranging conclusions on irregular migration, stating that

“it was clear that existing practices were found wanting and the participants expected practices to be improved. This was the case for communication and the exchange of information: The participants unanimously called for smoother and swifter communication procedures (Council 2000h: 15)

Despite a context characterised by uncertainty, politicians have not hesitated to jump on this issue (Agence France Presse 2002; EUObserver.com 2002c; European Report 2002d). Many commentators have suggested that the release of figures and facts on irregular migration has caused public concern within Europe and has caught the attention of politicians and policy-makers (BEPA 2006: 6, 9, 16)¹⁰⁰. Indeed this claim is made in the opening statement of the CLANDESTINO an EU-funded project that has become the most respected source of information on irregular migration data. Sizes, stocks and flows are obviously difficult to control and verify in this area, which is by definition outside the remit of state control. Whether spontaneous or nurtured by politicians, public opinion in member states demonstrated concern over numbers and purported increases in irregular migration. There was also support for the notion that the EU was the appropriate place to tackle this phenomenon (Agence Europe 2002n). The latest confirmation of this trend was identified in the 2012 Eurobarometer survey on awareness of Home Affairs policy among citizens. This found that a majority of respondents were in favour of increased EU assistance to member states in handling irregular migration and felt that the costs of such assistance should be shared among member states (Eurobarometer 2012: 14-16). This concern over irregular migration has been tackled in political discourses by displaying what some authors term “effective

¹⁰⁰ See also Blair's declaration on trafficking (followed by Jack Straw), which also served the purpose of blocking irregular migration through the Balkan route *Financial Times*, 'Cook Seeks 'People Trafficking' Curb Illegal Immigration Britain to Ask Eu Partners to Help Close Balkans Route to West', *Financial Times*, 19 January 2001b, *The Guardian*, 'Penalising the Poor: The West Wants the Free Movement of Capital, but Not of Labour. It Is Illogical and Immoral', *The Guardian*, 19 March 2001a..

governance”, that is to say the tendency to focus “on numbers (of arrests, deportations, sums spent, border guards hired)”, with the ultimate goal being political attention and recognition (Vollmer 2009: 2). This is only strengthened by the fact that the general public is increasingly concerned with the extent and dynamics of irregular migration, indeed more so than any other aspect of migration (Morehouse and Blomfield 2011: 2).

A number of examples can clarify this trend. Sarkozy's political career is regarded as emblematic of the benefits of being seen as resolute and effective in dealing with migration in general, and irregular migration in particular (Marthaler 2008: 387). His resolve in dealing with migration, and irregular migration in particular, as the French Interior Minister was also a major factor in his candidature to the Elysée. While operating in this capacity, Sarkozy gathered Interior Ministers from a select number of member states to adopt a European strategy on the issue, thus gaining domestic and international recognition (Financial Times 2005b). UK Home Secretary Blunkett saw cracking down on irregular migration as the only way of re-establishing “trust” in the migration system and opposing right-wing parties (Financial Times 2002e). The combination of “number games”¹⁰¹ and perceived threats has enabled politicians to benefit from irregular migration issues (Financial Times 2002f). The Italian Interior Minister for example asserted that there were two million people waiting in Libya to sail to Europe, even though the source(s) of those figures were not made clear (The Times 2004). This reference to Libya exemplifies one of the most frequent images of irregular migration (The Observer 2003), which is connected to the “myth of invasion” of African immigrants onto European Mediterranean shores (de Haas 2009). This perspective also permeated through to the highest political levels as demonstrated, for instance, through the Council statement concerning ‘[c]onclusions on illegal immigration and trafficking of human beings by sea’ (Council 2002d). Early estimates of irregular immigration into Europe followed a similar pattern, with widespread adoption and use of figures by EU institutions which received little scrutiny (Giuseppe Sciortino 2004: 18).

¹⁰¹ “The term 'Number Games' is coined to note the significance and role of the numbers in media and policy discourses. State authorities, governments (and occasionally other stakeholders such as NGOs, think tanks, etc.) use and interpret figures depending on their own strategic interests” Vollmer, 'Comparative Policy Brief - Political Discourses'. As an example of these number games and of political will to exploit concerns on irregular migration at all levels of the political food chain, see The Observer, 'Bosnia Cashes in on Migrants', *The Observer*, 28 January 2001, The Times, 'Study Says 100,000 a Year Enter Illegally', *The Times*, 6 October 2005a..

Again, this emerged during Council debates on the Asylum Procedures Directive where Italian Interior Minister Giuseppe Pisanu reportedly held that “the two questions of illegal immigration and asylum are linked” as “only 6 or 8% of requests for asylum made by illegal immigrants are founded” (Agence Europe 2002g).

A host of other actors also became increasingly aware of the magnitude of irregular migration. The Commission and other international actors such as the UN, ILO, OECD and the Council of Europe became involved in irregular migration issues from the 1970s onward (Cholewinski 2004: 160). In 1997 the United Nations Population Division asserted that “undocumented migration is ‘one of the fastest growing forms of migration in the world today’” (BEPA 2006: 11; Düvell 2011b: 78). The OECD began regularly releasing reports on irregular migration from the mid-1980s (Düvell 2011b: 78, 81), and in 1999 stated that in Europe the “wide range of statistical observation systems employed but is above all testament to the exploratory nature of these first attempts” (European Report 1999b; Tapinos 1999a: 233). The OECD also focused on the weakness of the statistical apparatus in dealing with irregular migration, the level of difference between national systems, and the difficulty of ensuring reliability even within national systems (Tapinos 1999b). This conclusion was perfectly in line with the result of one of the first Eurostat studies on the topic, stating that,

même s’il n’est pas complet, cet inventaire des estimations donne une idée de leurs lacunes, montre même dans la plupart des cas leur absence de fondement statistique (Eurostat 1998b: 72)¹⁰².

Numbers games have also affected the Commission. Although the Commission recognised that by definition it is “impossible to have a clear picture of the scale of the phenomenon” of irregular migration (European Report 2001d), it was nonetheless eager to put forward its proposals, possibly due to “its social, economic and political implications” (Mitsilegas 2004: 30). This is clearly visible in the Communications and Green Papers issued on irregular migration issues in the early 2000s. It is puzzling then that the Commission concluded more recently

¹⁰² My translation would be: “even if not complete, this inventory of estimates gives an idea of their gaps, showing also that, in the main, they lack any statistical grounding”.

that “the data presented in this note do not support the idea that illegal immigration to the EU is increasing” for the period 2004-2007 (but with some categories of data going back to 2002) (Commission 2009c: 35). Similarly in its recent report on the Employers Sanction Directive, the Commission stated, “the majority of irregular migrants remain undetected”. While this may well be the case, no evidence is provided to support this statement (Commission 2014c: 2).

Doubts surrounding data and information on irregular migration aside, it is evident that after such statements by some of the key actors in the field it was not possible to ignore the phenomenon. These statements, however, portrayed neither a reliable nor a common knowledge of the scale and dynamics of the phenomenon in Europe. For many member states this was also lacking at the national level. To conclude, it is easy to see the high degree of uncertainty – understood in this dissertation as impacting on the role of information and knowledge – surrounding any talk about the intensity and form of irregular migration at both national and European level.

Since uncertainty is defined as the lack of knowledge and limited flow of information, this overview of the national and European situations shows the extent to which the policy area of irregular migration suffered as a consequence of uncertainty. Indeed, uncertainty permeated both the national and European levels, and ranged from information collection and sharing to the provision of expertise.

Qualitative analysis of delegation in selected measures.

In 2001 and 2004 the Union equipped itself with two measures dealing with “the mutual recognition of decisions on the expulsion of third country nationals” (European Union 2001a, 2004c). A crucial element for the viability of these two legislative measures was the presence of a reliable information mechanism that could provide member states with and allow them to share information on expulsion decisions. While the original French proposal did not include clauses related to the circulation of information among member states, the final text included it (Art. 6). This function was not delegated to the Commission but was left to member states to manage. This turned out to be a determinant factor in the difficult implementation these measures had. In 2004 the Commission stated that “it must be noted that no progress has been made on a common mechanism for exchanging information on

return decisions” (Commission 2004b: 10). The Council was of the same opinion when it encouraged national administrations to cooperate more on that matter (Council 2004f: 1-2). In light of this acknowledged informational weakness, it is even more puzzling that the 2004 Decision granted no power to the Commission in this area. Moreover, although the 2003 proposal called on all member states to present an annual report to the Commission providing detailed information on the application of the Decision (Council 2003b), this was judged too cumbersome and was scrapped in the final version in favour of a more general provision of information “on the number of enforcement measures [...] which were reimbursed in accordance with this Decision” (Art. 4). The EMN Report on 'Return Migration', which captured attitudes of a number of member states' national administrations, found that the Directive did not have any significant take up by member states¹⁰³, *inter alia*, because of lack of information about other member states' decisions (EMN 2007: 19-20). In sum, while there was a recognised need for information sharing the Commission was not involved.

A similar element is present in the Italian initiative on the organisation of joint flights for removal of third country nationals (European Union 2004b). A “systematic exchange of information”, albeit envisaged by the Italian Presidency as a flanking measure for the 2004 Decision, did not materialise in the legal text (Council 2003c). The Irish Presidency seemed to agree when it held that “this issue needs to be addressed in order to give full effect to the Decision” (Council 2004e). The solution to these recognised problems came a full two years after the proposal had been tabled with the entry into force of Mutual Information Mechanism Decision (Commission 2006c; European Union 2005). A couple of months following the adoption of the Decision, the Council called on the member states to,

report regularly to the Council and to the Commission on joint flights carried out by them and to share the information and experience for the benefit of all Member States (Council 2004d).

The 2003 Directive on assistance in removals recognises the need to communicate relevant information for the purposes of carrying out removals of

¹⁰³ “Despite the widespread transposition, there has been little or no experience in its implementation” Emn, 'Return Migration', *EMN Synthesis Report: Research Study III* (2007) at 19..

TCNs transiting through other member states. This simple recognition, which is not present in other contemporary legislative measures, derives from Art. 4(3) but is managed by member states. Any modifications to the “form” used in such information exchanges are made under a Comitology procedure, thereby granting the Commission a say on how information is managed and used (Art. 4(3), second subparagraph).

The 2004 Regulation on the creation of an immigration liaison officers’ [ILO] network was the outcome of a Greek initiative (Council 2003a). Immigration liaison officers are mandated to aim for “the prevention and combating of illegal immigration, the return of illegal immigrations and the management of legal migration” (Art 1(1)). This Regulation feeds into the plan to manage the external borders of member states by “setting up [...] networks of immigration liaison officers posted in third countries”. Member states’ consular officials are thus invited to share knowledge and information on irregular migration flows coming into the EU. In order to facilitate that, the Commission has been empowered to design and adopt a “model and a format” for the six-monthly report that each Council Presidency must complete concerning the activities of ILO network (Art. 6(2)); draft the annual evaluation report on the activities of the network; and, compile an annual “factual summary” on the situation and progresses in the management of irregular migration, together with “such proposals or recommendations as it deems appropriate” (Art. 6(4)). While these provisions are clearly aimed at reducing uncertainty, they also deal with efficiency issues. This is particularly the case with the final two provisions given that they concern saving resources through the centralised management of certain aspects of policy aspects through the Commission.

The EP’s proposal favoured an even stronger role for the Commission, suggesting that it should have responsibility for informing and updating liaison officers on the conditions of “entry, exit and residence in the various Member States” (EP 2003a). The EP’s position was that this arrangement would be “*in the interests of improving information policy in the fight against illegal immigration*” (EP 2003a)¹⁰⁴. This would have amounted to a further confirmation of the Commission’s role in reducing uncertainty by managing information. It should also

¹⁰⁴ Emphasis in the original.

be noted that not all member states have the means to assign migration liaison officers to a number of countries (the Commission's 2009 proposal to amend this Regulation stated that member states had ILOs in more than 130 countries) (Peers 2011: 545). In such cases, it was proposed that the Commission should play a central role in providing an equal amount of information to all players in the Council. This element was however dismissed in the final version.

The Commission has similar powers concerning the management of information within the European Return Fund as it does in relation to the other migration Funds. It can request information (Art. 14(4)), has the power to “check[ing] the existence and proper functioning of management and control systems in the Member States” (Art. 11(2)), and can withhold or suspend “payments in part or in full” if those systems fail. The “reference figures” mentioned in Art. 14(4) are the basis on which annual disbursement allocations are made and are a direct product of the management system. It is therefore safe to say that in instances of verified mistakes in data the Commission is authorised to take appropriate measures. In addition to uncertainty, a credibility of commitments logic is evident here where proper functioning of the policy is assured by the Commission's power to monitor and, if needs be, sanction specific operational failures.

Under the Employer Sanctions Directive member states must communicate data and figures concerning inspections to the Commission, it is then responsible for reporting on the issue (Art. 16(1) and (2)). This tackles a source of uncertainty concerning internal labour market controls operated by member states and also gently pressures member states to do more in terms of controls. Germany, for example, is one of the few member states where, according to commentators, opposition to irregular immigration has translated into more efforts in labour market inspections (Castles 2006: 16; Düvell 2011b: 61; Martin 2014).

5.1.3) Credibility of commitments

In 1998 the Council invited the Commission to put forward “practical proposals for combating illegal immigration more effectively [that] need to be brought forward swiftly” (Council 1998). Despite this recommendation the

Commission abstained from presenting such proposals, instead leaving the way clear for member states (Barbagli et al. 2004: 38-39). This proactive role of the member states is testament to their interests. The Tampere European Council committed the Council to adopt legislation tackling human trafficking and the networks involved in such practices (European Council 1999: IV, 23). The Hague Programme emphasised the need to tackle irregular employment, nevertheless member states were left to set the targets for the reduction of the informal economy within the European employment strategy (Council 2004a: 10). The fight against “illegal immigration” also appears to be the ultimate objective behind a number of policies on borders and visas, asylum, and cooperation with third countries (Council 2004a).

Estimates of irregular migration in the EU have considerably improved since the EU-funded CLANDESTINO Project. Numbers of irregular migrants in the EU ranged from:

- 3.1 to 5.3 million in 2002, i.e. 0.8 percent to 1.4 percent of the total EU population or 14 per cent to 25 percent of the foreign population;
- 2.2 to 4.8 million in 2005, i.e. 0.58 percent to 1.23 percent of the total for the EU-15 population or 8 percent to 18 percent of the foreign population; and,
- 1.8 to 3.3 million in 2008, i.e. 0.46 percent to 0.83 percent of the total EU-15¹⁰⁵ population or 7 percent to 12 percent of the foreign population (Vogel 2009: 4).

These figures are particularly significant when compared with numbers of foreign residents, and that is especially the case for 2002 when the maximum estimate represented a quarter of the total foreign population. A trend of decline is also evident from these figures, estimates for the numbers of irregular migrants as percentage of foreign population approximately halved between 2002 and 2008 (Morehouse and Blomfield 2011: 1, 2). This trend also seems to be carried through to some member states such as Germany, although not to all. There is also wide disparity between member states in terms of numbers of irregular migrants. It is

¹⁰⁵ This declining trend is not entirely due to the Enlargement process, as the aggregate calculation is made for the same set of Member States (i.e. 15).

clear from these figures that a number of countries were particularly subject to irregular migration, they are (in declining order for 2008): the UK; Italy; Germany; France; Spain; Poland; and, Greece. In addition to which the ratio of numbers of irregular migrants to the resident populations appear high for countries such as Greece, the UK, Belgium, the Netherlands, and Poland. Such disparity arguably prompted individual member states to put financial solidarity mechanisms in place, as was the case with Belgium (Agence Europe 2002b) and Spain (Agence Europe 20021).

A final element relevant to the issue of uncertainty in irregular migration concerns actual flows (Düvell and Vollmer 2011: 6-7). Flow patterns seem to have significantly changed since Frontex has begun to track them. This factor encourages a long-term approach as member states realise that flows are likely to change in magnitude and composition through time. Such a long-term approach must, in turn, be underpinned by credible commitments in order to be effective. That aside, from the perspective of uncertainty the rapid change in points of entry reveals the importance of the circulation of information among member states, something the early warning system discussed in the previous section was intended to tackle. At times these shifts in the geography and typology of “illegal border crossing” were very rapid. For instance, Frontex reported that the ratio between land to sea illegal border crossing in the Eastern Mediterranean Route¹⁰⁶ jumped from 65 percent to 35 percent respectively, to 90 percent to 10 percent between the first and the second quarters of 2010 (Morehouse and Blomfield 2011: 10). This route alone made up 54 per cent of all illegal crossings into the EU (Morehouse and Blomfield 2011: 10). From a geographic viewpoint, Italy went from more than 35,000 detections of unauthorised entries in 2008 to less than 10,000 the year after, whereas in the Turkish-Greek land borders they went from less than 10,000 in 2009 to more than 46,000 in 2010 (Morehouse and Blomfield 2011: 10).

Crises also affected the credibility of member state commitments in this policy area. Some member states saw irregular migration as a consequence of the length of their borders and their geographical positions, and believed that help should have come from other member states in that respect. Other member states

¹⁰⁶ Mainly from Turkey to Greece by land or sea.

viewed the conspicuous presence of irregular migration as due to ineffective migration management, they therefore deemed that improving the situation required a national policy response (Agence Europe 2003a). The effective removal of irregularly present TCNs was one issue that arose. Another was the need to address the scenario whereby irregular migration was not only present in Europe but was tolerated in some countries. Irregular migration was also constantly produced in member states, because possible sources of irregular migration were not closed either. Migrants could still overstay their visas, cross borders without travel documents or with forged ones, or take up employment in member states without having the necessary permissions to do so. Although commentators have highlighted that estimates of absolute numbers of irregular migrants suggest a decrease since the mid-2000s for a variety of reasons (Düvell and Vollmer 2011), its political relevance has not (Kraler and Rogoz 2011). Irregular migrants found hiding in trucks, vans, and other modes of transport have made headlines in a number of member states.

Member states recognised that pressing imbalances emerged from the different levels of and exposure to irregular migration present among them (Commission 2006b: 3). A thorny issue surrounded the suspicion that authorities in some member states were turning a blind eye to flows they knew were only transiting through their territories without the intention of staying. In the early 2000s for example, France and the UK held several high-level meetings to try to sort out problems related to asylum seekers and irregular migrants reportedly flowing from France to the UK via the Channel Tunnel (Financial Times 2002b; The Times 2001a). French authorities supposedly behaved ambiguously towards a number of would-be asylum-seekers initially camped close to the town of Sangatte, thus allowing them to later make an onward journey to the UK (Wihtol de Wenden 2011: 74). Such speculation and concerns undermined the credibility of commitment to the policy of reducing the numbers of irregular migrants. More recently southern member states have complained of lacking solidarity from other member states and have threatened to reconsider other migration policy commitments in response. In 2006 eight heads of state and prime ministers jointly wrote to the Finnish Council Presidency seeking renewed EU action to relieve the southern member states most exposed to irregular migration inflows (Agence Europe 2006f). A Spanish request for more assistance from fellow member states was opposed by Germany and France. Germany stated that its financial solidarity

had limits, and reminded how little help it had received in the early 1990s to cope with its own asylum crises, and France connected the current Spanish problems to the pull-factors of the regularisation that country carried in 2005 (Agence Europe 2006a; European Report 2006c). Specific issues also divided member states, such as whether and how to redistribute the presumed irregular migrants¹⁰⁷ landing on some member states' shores. In the 2000s this has been a frequent request of smaller member states such as Malta (Agence Europe 2007c), and which have been often supported by the EP (Agence Europe 2007b).

A further question regarded what to do with the irregular migrants already present in the territory. Regularisations (amnesties or normalisations) can be broadly defined as,

any state procedure by which non-nationals who are illegally residing, or who are otherwise in breach of national immigration rules, in their current country of residence are granted a legal status¹⁰⁸ (Baldwin-Edwards and Kraler 2009: 9).

The REGINE study – a large-scale EU-funded research project on regularisations in Europe – found that all member states featured “production” of irregular migration in one way or another. Large-scale regularisations, while routinely practised in the past by a number of member states, are now often met with widespread criticism (Finotelli and Arango 2011: 496-97). The REGINE project calculated that between 5 and 6 million irregular migrants were regularised from 1996 to 2008 using different methods and based on different legal statuses (Kraler 2009b). However regularisations do not entirely solve the problem of irregular migrants already present in member state territories. Of the 4.7 million applications lodged in the period 1996 to 2007 only 3.2 million were accepted. On top of these residual failed applications, about which little is known, one must add the constant inflow of irregular migrants. The Commission places numbers of the latter group at “between 893000 and 923300” annually by aggregating estimates for 21 Member States, though net inflows are believed to be “much less” (Commission

¹⁰⁷ While member states tended to regard these migrants as irregular, it could be noticed that their legal status was unclear, as some of them could lodge an asylum request when offered the possibility.

¹⁰⁸ Emphasis in the original.

2007f: 3).

Turning to specific cases, Italy ran six regularisations between 1982 and 2002 involving approximately 1.5 million irregular migrants (Baldwin-Edwards and Kraler 2009: 71-73). Between 1985 and 2005 Spain regularised approximately 1.176 million irregular migrants. France regularised in the region of 268 thousand individuals between 1973 and 2006. Guiraudon and Jileva have found that France, through a “case-by-case regularization system [has processed] as many as 20,000 persons a year” (2006: 283; Kraler 2009a: 37-38). Germany has a category of irregular migrants who have come to be 'tolerated' by virtue of satisfying a number of possible criteria (Council 1999g). In practice the obligation to leave is suspended, but their presence has an ambiguous legal status (Council 2000z: 2). Between 1996 and 2006 Germany regularised approximately 75 thousand “hardship cases, 'Rejected asylum seekers', and 'Long-term tolerated persons' (*Bleiberechtsregelung*)” (EUobserver.com 2007).¹⁰⁹ That said approximately 84% of all “known applications” for regularisation programmes are made up by Italy, Spain and Greece (in decreasing order) (Kraler 2009b: 3). It is clear then that,

recent experience in Europe shows that it is not an option to decide whether to have an amnesty or not; rather, the choice is between repeated amnesties and discreet amnesties carried out on a case-by-case basis (Tapinos 1999a: 243).

These differences in practices have amounted to crises of confidence between countries that practice large-scale regularisation programmes, mainly southern EU states such as Italy and Spain, and states harshly opposing this policy option, such as Germany, the Netherlands and, more recently, France (Brick 2011: 6). One of the most recent battles on this issue occurred during the negotiations for the 2008 'European Pact on Immigration and Asylum', when the Spanish and French Interior Ministers were unable to settle the dispute on whether or not to insert a clause banning mass regularisation (EurActiv 2008). In the end the proposed ban was diluted as the pact was “only political and not binding”, as former Italian Prime Minister Berlusconi put it (Agence Europe 2008c). In terms of mutual trust, there

¹⁰⁹ For the sake of comprehensiveness, it has to be noted that some member states would argue against an understanding of “tolerated persons” as irregular migrants Christal Morehouse and Michael Blomfield, *Irregular Migration in Europe*, (Washington, DC: Migration Policy Institute (MPI). 2011) at 4..

is a widespread image of the southern states as constituting the “soft underbelly” of Europe (Finotelli 2009: 866). Those countries feature a deeply rooted shadow economy that makes any reduction in the stock and inflow of irregular migrants difficult (Geddes 2003), thereby triggering the widely criticised practice of regularising migrants. This image nurtures scepticism among some member states regarding the capacity and willingness of others to adopt and implement irregular migration-control measures.

To conclude, member states have been subject to differing flows of irregular migrants and have hosted uneven numbers of irregular migrants. Despite being present in almost all member states, regularisations were uneven in terms of numbers of irregular migrants regularised, the legal status of migrants both before and after the regularisation, and the methods used.

Qualitative analysis of delegation in selected measures.

The Directive on mutual recognition of expulsion decisions targeted the problem arising from TCNs subject to expulsion orders moving to another member state and therefore avoiding EU expulsion (European Union 2001a, 2004c). In an internally border-less Schengen area the possibility of TCNs fleeing prosecution by moving from one country to another was plausible. Evidence of this phenomenon however remained anecdotal at best, indeed no figures were retrievable from any of the documents consulted in this dissertation. The first element crucial for the viability of the legislative measure was a reliable information mechanism; this has already been discussed in the previous section. The second was a financial element that could resolve imbalances arising from expulsion decisions. Member states were concerned about the consequences of executing expulsion decisions issued by other member states once TCNs were in their territories. Article 7 sets out that the Commission is granted powers to formulate a proposal “to adopt appropriate criteria and practical arrangements” to establish how “[m]ember [s]tates shall compensate each other for any financial imbalances” originating from the application of the Directive. In other words authority was delegated to the Commission to formulate the proposal for the creation of the compensation mechanism. Clarifying the financial consequences of the Directive makes the agreement viable (Council

2000v). Council negotiations demonstrate that the issue of costs was a concern for many national delegations (Council 2000t). (Council 2000t)(Council 2000t)(Council 2000t)(Council 2000t)By reassuring actors that the rules for future development of the Directive would be laid down by a third party and would not result in periodic *ad hoc* agreements, the neutrality necessary to convince all actors to take part was present.

The idea behind the 2001 Carrier Sanction Directive was to make private transport industry actors liable for the immigration consequences of their services. Some member states, such as the UK and Germany, had indeed introduced similar measures as far back as the mid-1980s (Hatton 2005: 108). The Council, and particularly France who had proposed this measure, considered that “making carriers face up to their responsibilities constitutes one of the essential lines of force of this [irregular migration] policy” (Council 2000s; European Report 2000b). With this legislation in place member states could also avoid a race to the bottom arising from efforts to offer advantageous deals to private carriers to the detriment of EU counterparts. At the time this measure was designed there were particular concerns regarding unfair competition in the air transport sector. Consequently there were reasons for delegation of strictly monitoring functions. In practice however this Directive features no delegating provisions whatsoever, not even the otherwise ubiquitous right to propose amendments after a revision of the policy.

Another Decision where credibility has played an important role in delegation is the European Return Fund. The Fund is part of a broader package of Decisions making up SOLID (“Solidarity and Management of Migration Flows”), and was the first legislative measure adopted in this policy area using the co-decision procedure. The structures, provisions, and delegation within the Fund are similar to the European Refugee Fund analysed in the previous chapter. And in addition to the reasons set out in the previous chapter for adopting a burden-sharing mechanism, variability over time must be taken into account. In the case of irregular migration, flows and destination countries change so swiftly that the best arrangements member states can adopt are ones that facilitate a flexible component of the Fund to be allocated on the basis of the sheer numbers of irregular migrants coming in. The Commission serves the function of concentrating member states’ efforts on a limited number of priorities. The power of adopting the strategic guidelines that

guide the activities of the multiannual programmes promotes overall cohesion in the projects supported by the Fund (Art. 18). In this way, the actors involved in the Fund must design their initiatives according to a limited number of priorities following principles already set out under the EU Cohesion policy. These guidelines are adopted under the most stringent Comitology procedure, known as the regulatory procedure with scrutiny, to restrain the Commission's scope. The Commission is also entitled to examine the “multiannual programmes” (Art. 19(3)) before approving them. In the event that the Commission finds the programmes inconsistent with the guidelines it can invite the member state in question to provide more information and to revise the programme (Art. 19(4)). The attention paid to its structure and the respect shown for its guidelines reinforce the credibility of the Fund, in that member states’ plans are controlled for conformity under the Commission’s supervision. The revision of the multiannual programme can be made either upon the request of a member state or the Commission (Art. 20(1)). Finally, approval of the multiannual programmes takes place under the management procedure (Art. 19(5)), with a mid-term review of the strategic guidelines being carried out by the Commission (Art. 22(1)).

As discussed in the previous section, the Commission must check the existence and adequate functioning of management and control systems in member states (Art. 11(2)(a)). And to further strengthen credibility of commitments to the guidelines, the Commission can withhold and suspend payments where necessary (Art. 11(2)(b)). The Commission is tasked with monitoring the administration of the Fund in the member states to control its proper functioning, this can be done through on-the-spot checks if needs be (Art. 33). Indeed, the Commission also has significant freedom in exercising its controlling powers. Article 34(2) exemplifies this in stating that the Commission can decide to rely exclusively on the auditing authority of a given member state but it can resort to more intrusive controls if “there is evidence to suggest shortcomings in the system”. All these elements signal the importance of the credibility rationale to delegation in relation to the Fund where a great deal of power has been delegated and a significant amount of freedom has been afforded to the Commission in exercising them. Again, this is exemplified by the fact that the Commission can ask member state administrations to carry out inspections on its behalf if it suspects the presence of irregularities (Art. 45(1), second indent). Overall, by controlling the administration and functioning of the Fund the Commission has a key role in ensuring the credibility of the policy.

There was an interesting development during the negotiations for the Return Directive in that, in order to reach consensus on the key issue of detaining irregularly resident TCNs, some member states voiced the possibility of providing a specific stream of funding to a sub-set of countries (reportedly Italy, Spain, Greece and Malta) under the European Return Fund as a form of side-payment (Associated Press International 2008; European Report 2008b). This is because the Directive states that TCNs can be detained for up to 18 months and that appropriate care, and free legal aid, must be provided. In countries with large suspected numbers of irregular migrants this is likely to result in significant costs.

Finally, the Employer Sanctions Directive was the first EU measure to explicitly connect irregular migration to labour markets. The regulation of internal controls (Art. 14) was a controversial issue during EU-level negotiations. Indeed the measure of opposition to it can be gauged by the fact that the Commission initiated the infringement procedure against 20 member states. Taking into account that the UK, Ireland and Denmark did not opt in, this means that 83 percent of member states failed to transpose the Directive in time (Elsbeth Guild 2014). This element would have made important progress in reducing employment among irregular migrants and was strongly recommended by a number of commentators and institutions (Christina Boswell and Geddes 2011: 144; Geddes 2003, 2008; Giuseppe Sciortino 2009)¹¹⁰. States considered new to the issue of immigration (e.g. Italy) displayed a preference towards external controls (e.g. land border controls), over internal ones. This has been directly linked to EU pressures in shaping migration policy (Finotelli and Sciortino 2009: 121). Towards the end of the 1990s the Commission estimated that “undeclared work” made up 16 percent of EU GDP, representing between 7 and 19 percent of regular employees (ILO 2010). This Directive could have made the difference for a number of member states affected by an allegedly strong shadow economy and the draw it created for irregular migrants. This link was made clear in a number of EU documents, *inter alia*, in The Hague Programme (Agence Europe 2004d). Provocatively, in 2000 a spokesperson for Commissioner Vitorino reportedly asserted,

‘I do not know’ if, despite their great declarations against illegal

¹¹⁰ Justice and Home Affairs Commissioner Frattini made several declarations to that effect during his tenure.

immigration, Member States knowingly keep a ‘stock of illegal immigrants’ as cheap labour but ‘at any rate we must put an end to this situation’ (Agence Europe 2002i).

The Directive fostered the credibility of commitment to the reduction of irregular migration in Europe in a number of ways. Common financial and criminal penalties were set out together with provisions for labour market inspections. None of the rules regarding those points featured delegation to the Commission. However in its first report on the application of the Directive the Commission pointed out that the sanctions devised by member states varied hugely, to the point that it “raises concerns [over] whether sanctions can always be effective, proportionate or dissuasive and will therefore have to be further assessed” (Commission 2014c: 10). In addition, numbers of labour market inspections and the percentage of both employees and employers covered by such inspections was so minimal in some member states that “it [was] unlikely to dissuade an employer from hiring irregular migrants” (Commission 2014c: 9).

The number of inspections was a controversial issue from the beginning among member states and between the Council and the Commission (Vogel and Cyrus 2008: 5-6). On one hand, a common benchmark for the number of inspections executed in a year was believed to be the only safeguard against unfair competition among member states. Yet on the other, as member states had varying degrees of irregular migration in their territories, some member states in the Council observed that for countries with a lower presence of irregular migration having high volumes of inspections would impose an unreasonable burden. One solution could have been to let the Commission and member states change the thresholds member states had to comply with annually on the basis of the continuous reporting already provided for in the Directive and subject to the Comitology procedure. This is not a far-fetched idea as similar provisions exist in migration Funds wherein the Commission is free to decide if the national management systems need closer scrutiny through inspections (see above on European Return Fund). It is interesting to note that the Commission considered it “necessary” for the credibility of the Directive to have a quantitative benchmark for inspections and to ensure the quality of such inspections. It is clear that member states were not of the same opinion, among

those who rejected this provision were Germany, the Netherlands and Poland¹¹¹ (Council 2007c: 8, 13; 2007a: 16).

5.1.4) Effectiveness and efficiency

As in the previous chapter this section focuses on the rationales for delegation based either on previous policy failures at the national or European level, or because of purported time and resource savings. Problems in national policies dealing with irregular migration were already evident in the 1990s and 2000s. The issue of how to reduce irregular migration has been a constant presence in Presidency Conclusions and Commission Communications. The problem for all policy actors was how to make it work.

Visa policy was considered essential in reducing irregular migration, as it is widely recognised that visa over-stay, and not sea landings, is the main source of irregular migration (Hollifield 2014: 181; Morehouse and Blomfield 2011: 12), although one could be forgiven for imagining the reverse to be the case judging by media coverage of the issue. Internal apprehensions confirmed that in the UK the majority of those irregularly present were visa over-stayers (for the years 2008-2011) (EMN 2012: 120). While visa policy is analysed in Chapter 7, a few considerations are pertinent here. Analysing data on regularisation in Southern member states and other sources of data regarding irregular migration (internal apprehensions and estimates), commentators have argued that a sizeable proportion of irregular migrants in some of the countries traditionally considered lax in migration controls (e.g. southern Member States) had actually entered via visas released by more generous diplomatic systems. For instance, it has been estimated that sizeable numbers of irregular migrants present in Italy, Spain and Portugal actually entered through German-issued visas (Finotelli and Sciortino 2009: 130-31; Finotelli 2009: 896). In addition, as discussed in the previous sections of this chapter the connection between irregular migration and the shadow economy had long been established. However because the EU had limited if any power over labour market policies, action on this front was difficult to undertake. Other initiatives aimed at stemming irregular migration are extremely expensive and of

¹¹¹ Even more opposition received the Commission's proposal that the TCN in question should not be removed until "any back payment from" his/her remuneration has been provided. Twelve Member States objected to such element.

uncertain results (EMN 2012: 8). EU efforts at sealing its borders through a number of high-tech projects have yielded mixed results at best and have been among the biggest expenditures in EU cooperation on migration so far.

From the historical records of member states and EU initiatives in this field, it is safe to conclude that there have been serious problems with returning TCNs either to transit or to their countries of origin (Collier 2013: 134). This was the case, for example, for the removals target adopted by the Labour government in the UK. Admitting failure in 2005, Home Secretary Charles Clarke refused to set down another target stating only that the,

number of failed [asylum] applicants and dependents removed each month [had to increase] more than the number of unfounded asylum applications (The Times 2005b).

Italy, after managing to increase enforced expulsions up to the early 2000s, saw figures scaling down again due, *inter alia*, to “budgetary problems” (Finotelli and Sciortino 2009: 130; Giuseppe Sciortino 2014). This emphasis on return is again present in a number of documents. Just weeks after the adoption of the 2004 Decision on joint flights for instance, the Council urged member states to increase “the rate of returns from the EU” (Council 2004d). The French presidency of the second half of 2000 set itself the objective of shifting European policy in that direction (European Report 2000a). France has also had many problems in returning irregular migrants (Hollifield 2014: 181). These calls to the Council in fact originated from deep-seated domestic problems. Ellermann argues that “Germany has been at the helm of diplomatic and administrative efforts to increase the efficacy of repatriation policy” (2008). The majority share of the increase in deportations between the mid-1980s and the 2000s seems to be ascribable to failed asylum-seekers rather than “illegal migrants” or “migrants offenders” (Ellermann 2008).¹¹² This was an expensive strategy as asylum-seekers come from a host of countries, multiplying hence the costs of returns by the number of ‘destination’ countries. In 2001 alone return flights to 145 destination countries were carried out (Ellermann 2008).

¹¹² While about 8,000 deportations carried out in 1985, after a peak of 47,000 in 1993, deportations stabilized around 35,000 in 2000.

It is however the need to be seen by electorates as active that pushes politicians of all persuasions to devise and propose all manner of policies concerning irregular migration (Christina Boswell and Geddes 2011). In February 2001 the centre-left prime ministers of Italy and the UK, respectively Amato and Blair, wrote a joint letter to a prominent UK newspaper arguing for better tools at the EU level for identifying and returning irregularly present TCNs (Guardian Weekly 2001). Whereas in 2002 Blair proposed to tackle irregular migration with extreme solutions, and this was in line with the position of the centre-right Spanish Presidency (Financial Times 2002a). Finally, member states do not release much information on the actual costs of returning irregularly present TCNs, so it is quite difficult to assess the efficiency of this policy option (EMN 2012: 12). A Commission staff document does however give some insight into the amounts spent by member states in executing the returns policy, albeit stating that figures and data are hard to come by and are not comparable. In 2004 Spain spent €38 million returning 27,600 irregular migrants; French efforts to return the top 5 nationalities cost €34 million (for 16,500 people); Ireland removed 599 persons for €1.7 million; and in Germany, while the federal budget allocated €18 million for transportation of 30,000 people, the Länder are estimated to have spent other €20 million (Commission 2005a).

In its 2001 Communication on a “common policy on illegal immigration”, it is striking to note the absence of any reference to figures on the returns policy or on irregular migration in general for that matter. This is rather problematic as irregular migration is argued to be one of the most pressing concerns for the EU, yet there are no substantial facts to support this claim. To be fair though, in this Communication the Commission recognised that facts and figures were deemed uncertain and subject to revision and in fact dedicated the first analytical section to the need for better “understanding [of] the phenomena” (Commission 2001d: 7). In 2002 the Commission released some figures on returns,

According to the available figures 367,552 persons have been removed in total in the year 2000, for 1999 the number of removed aliens amounts to 324,206 persons. In the framework of assisted voluntary return programmes conducted by IOM 87,628 persons

emigrated in the year 2000 out of the EU voluntarily, for 1999 the number is 78,273 persons (Commission 2002b)¹¹³.

While these figures are interesting as they provide at least some context on this little understood phenomenon, they fail to provide a complete picture of the returns situation by neglecting to indicate the percentage these returns represent compared with the number of expulsion decisions. This is key to identifying the number of irregular migrants that remain in the EU. Again, when the Commission published the first “Annual report on the development of a common policy on illegal immigration”¹¹⁴ in 2004 it included no figures to provide context on actions either already adopted or to be undertaken. In a 2005 Memo referring to returns in the EU-25 during 2004, the Commission reported that it had gathered information showing that of 650,000 “return decisions” issued by member states only 160,000 “forced returns” were actually carried out. It would be logical to conclude that, adding the 48,000 “voluntary returns” to that figure, this points to a 27.2 per cent rate of compliance with expulsions decision (Commission 2005g: 1). However it is impossible to make such a simplistic determination, as forced expulsions do not necessarily refer to expulsion decisions taken in the same year. Gathering data from sources other than CIREFI, the Commission holds that approximately one third of all return decisions are implemented (Commission 2005g: 5). It is also interesting to note that the Commission sought data other than that provided by CIREFI's, a choice not indicated in the Annual report. This seems to suggest that the reliability of the CIREFI's figures was dubious at best, and, at worst, the Commission considered them as in need of some form of support and thereby of diminished value. The final figures released by the Commission were quite different from those issued by CIREFI, an outcome the Commission justified as being the result of differing methods of collecting and compiling data. Comparing the return decisions to removals effected between 2005 and 2007, the Commission showed uneven ratios among member states ranging from 260 percent for Greece, 138 percent for

¹¹³ For some more figures covering the same period, see also Commission, 'Commission Staff Working Document - Annex to the General Programme Solidarity and Management of Migration Flows - Extended Impact Assessment {Com(2005) 123 Final}. Sec(2005) 435', (Brussels, 2005a)..

¹¹⁴ There have been a report every about three years Commission, 'Annual Report on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders, and the Return of Illegal Resident. Sec(2004) 1349', (Brussels, 2004b)..

Estonia and 132 percent for Bulgaria¹¹⁵, to 21 percent for Lithuania, 18 percent for Ireland, and 14 percent for Romania (Commission 2009c: 28). If a member state's success or failure in retaining control over migration in its territory is measured by its ability to reject those who are within its borders irregularly, it is safe to say that member states had plenty of room for improvement.

Problems in returning irregularly present TCNs either to countries of origin or transit arise due to a number of reasons including: bureaucratic politics, i.e. differences in effectiveness and incentives for different branches of the administrative machineries of member state; difficulties in member state and EU foreign policy, i.e. striking international agreements so that TCNs can be returned¹¹⁶; judicial politics, i.e. the capacity and or willingness of judiciaries to take the decisions resulting in the expulsion of TCNs. Arguably one of the most convincing reasons is that the prospect of carrying out removals is contingent upon identifying TCNs and securing the agreement of destination states to receive them (Barbagli et al. 2004; Ellermann 2008; Triandafyllidou 2010).

The European Council stressed the “urgency of strengthening efforts to prevent and combat illegal immigration in an efficient manner”, particularly at the southern borders (Agence Europe 2009d). Individual countries also intermittently emphasised their efforts through coordinated appeals “to speed up the process of combating illegal immigration” (Agence Europe 2005e, 2006d). In some cases the appeal for faster action on irregular migration seemed to imply a criticism of how the Commission was handling the dossier (Agence Europe 2003i). The EP appeared divided on the issue. While some MEPs staunchly asserted the need for an “efficient fight against irregular migration” and criticised the practice of mass regularisations

¹¹⁵ Those high number can be explained by taking into account that statistics use the as nominator in the ratio the actual number of returns, which can be larger than the denominator – the number of return decisions – because of administrative backlogs dragged from one year to the next.

¹¹⁶ It is difficult to underestimate the importance of readmission agreements in this sense. Readmission agreements are famously difficult to sign and implement according to the academic literature. The simple reason for this is that sending countries have little interest in agreeing to a policy that offers little in return. Brady reports that a senior JHA official working in the Council explained that “a country with 2,000 nationals illegally resident in the EU, sending money back home, is infinitely better off than a country with 2,000 extra unemployed people” Hugo Brady, 'Saving Schengen: How to Protect Passport-Free Travel in Europe', (London: CER, 2012) at 14, *The Times*, 'Leaders Expected to Unite on Tough Approach to Migrants', *The Times*, 20 June 2002.. In 1999 action at the national level was in the early stages, not to mention EU level cooperation or simple coordination Council, 'Summary Report of Member States' Contributions on Readmission Questions (See 6933/99 Migr 15 + Add 1 and Add 2). St 7609 1999 Rev 1', (Brussels, 1999b)..

(Agence Europe 2005h), others seemed more opened to a more rights-based approach to irregular migration and, while considering mass regularisations ineffective, were not opposed to it in principle (Agence Europe 2007a). The Commission expressed the need for a “more efficient fight against illegal immigration” and argued that achieving this aim depended on a combination of different tools: from the Rapid Reaction Border Teams connected with Frontex, to the e-borders initiative encompassing an automatic entry/exit system (Agence Europe 2006c). Indeed operational cooperation, such as pooling resources and joint operations, was reportedly more interesting to member states, than efforts at harmonising legislation (Agence Europe 2002e, 2002b, 2003i).

In sum, return policies were largely unsuccessful and imbalanced at the national level as evident from rates of compliance with return decisions. A number of factors caused these failures, not all of them within the remit of EU action. In other words solving these issues required coordinated action exceeding EU capabilities. While there were a number of calls to make irregular migration policies more efficient, the extent to which they were achieving their goals in the first place and the benchmark against which success was to be measured was unclear. This was largely because calls frequently lacked specifics on how existing policies were performing and how they could be improved.

Qualitative analysis of delegation in selected measures.

Turning to efficiency, the Immigration Liaison Officers Regulation requires the Commission to inform all member states of agreements made by individual states. This also applies to member states’ “intentions” to send an official to a third country so that other member states can join in and benefit from the individual initiatives of others. Although efficiency rationales are evident here, the Commission only has powers of notification, thus it is not counted as delegation.

The Commission is granted up to 7 percent of the European Return Fund’s €676 million budget, i.e. approximately €47 million over seven years, to “finance transnational actions of interest to the Community as a whole” (Art. 6(1)). Alongside the technical assistance available at the discretion of member states, the Commission can also propose technical assistance worth up to €500,000 of the

annual budget (Art. 16). The list of actions eligible for financing seems to be exhaustive, albeit the wording is rather vague which arguably allows for quite a degree of freedom in interpreting and applying these constraints. All of these provisions point to an efficiency rationale, whereby the Commission is empowered to carry out many of the managerial tasks connected with the Fund.

Concerning effectiveness, the Union equipped itself with a number of measures aimed at expelling irregular migrants and sending them back to a third country of origin or transit. This is the case with the Directive on the mutual recognition of expulsion decisions, the Carrier Sanction Directive, the Directive on assistance in cases of transit for the purposes of removal by air, the Decision on joint flight for removals of TCNs, and finally, the Return Directive. In many of these cases no powers were delegated to the Commission, and in the few cases where this did happen it had no obvious connection to previous failures. That said apprehensions decreased between 2008 and 2012, and removals oscillated between 167,000 and 199,000 from 2010 to 2012. Therefore one could also conclude that delegation on the basis of addressing previous policy failures, if ever present, has faded. However as acknowledged by the Commission, it is only possible to speculate whether these changes are due to EU or national policies, the economic crisis, political and social changes in some of the sending countries, or changes in the direction of international flows (Commission 2014b; Düvell and Vollmer 2011).

With the Employer Sanctions Directive member states acknowledged that past efforts at sanctioning employer malpractices were far from satisfactory (Preamble, Recital 21). The Impact Assessment accompanying this legislative proposal identified a number of areas where previous policies had failed. It is interesting to note that the EU could do very little in light of,

“Insufficient human resources allocated to the bodies or units that are expected to deter, detect and penalise undeclared work”;
“Inadequate financial resources at the disposal of the competent bodies or units to undertake monitoring and act upon violations observed”;
“Obstacles to field operations (e.g. legislation that allows employers to deny access to inspectors if they regard conditions on the site as unsafe)”;
“Lack of information to

undertake effective controls (e.g. few risk analyses, limited access to information from tax authorities and banks on companies under suspicion, employees reluctant to testify against those who exploit them)”; “Lack of data to assess the outcome of inspections” (Commission 2007e: 10).

Allocation of resources within member states, collection and processing of data for effective labour inspections, and decisions regarding the priority of national laws were beyond EU action. For a more radical perspective one could refer to Castles' analysis of failure in migration policy. He observed that “the growth of undocumented migration throughout Europe can be seen as a response to neo-liberal labour market deregulation [...]. Thus, undocumented migration is an indirect effect of state policies which have quite different motivations” (Castles 2004: 215).

A number of national delegations questioned the appropriateness of these measures both on grounds of subsidiarity for some articles, e.g. rules on inspections and labour markets-related definitions, and their legal basis (Council 2007d). Therefore, although it was clear from the beginning that effectiveness was among the reasons for delegation, the scope of EU action was limited and closely guarded. One of the most problematic and important elements of this Directive was the section on sanctioning. Controversial during the Council negotiations, particularly where criminal sanctions were concerned (Council 2009), it involved no delegation of authority to the Commission. As previously discussed, internal controls are believed to yield important effects in reducing employment among irregular migrants. However the Commission's proposal requiring “Member States to ensure that the employee records of at least 10% of the companies established on their territory are inspected” was watered down by the EP, which opted for a much more modest 5% (EP 2009: 24). The same EP report states that the “current average national requirement is 2 %” (EP 2009: 24). This issue was also divisive in the Council both with regard to the content of sanctions and the principle of involving the Commission in the design of criminal sanctions (European Report 2007a, 2008a). Member states were thus required to communicate data and figures on inspections to the Commission, which was then in charge of reporting on the issue (Art. 16(1) and (2)). This set-up was regarded as likely to place pressure on member

states to do more in terms of controls. However, even if it fails to become a sanctioning mechanism for member states and thereby stopping short of acting as a credibility-enhancing mechanism, it is sufficient to consider it as touching on effectiveness. The quest for effectiveness would have seen further progress if, as suggested in a SCIFA revision of the legal text, member states were required to communicate the previous years' inspection figures as well as making commitments on present year targets (Council 2008b, 2008a). That would have meant a step forward, namely from information to actual commitment with the Commission positioned as repository for both information and commitments, although again not sanctioning powers. In other words it would have meant a further step from effectiveness to credibility.

5.2. Conclusions

The necessity of reducing uncertainty in this policy area was very high during the period analysed here, as indicated by the review of the academic, institutional and political discourses in the second section of this chapter. However this did not translate into major concessions to the Commission. Although plaguing this policy area, uncertainty constantly fails to materialise through concrete provisions in the legal texts dealing with the gathering and spreading of information. There is also almost no delegation that could be related to the provision of expertise. Even if much of the overall purpose of much of this legislation is to reduce uncertainty, this seldom translated into delegation. Better information and knowledge coupled with increased dissemination thereof were policy needs clearly expressed by both EU actors and a wider constellation of actors concerned with migration policy, e.g. the OECD. What is more, the viability of the Directive on mutual recognition of expulsion decisions and the Decision on organisation of joint flights for removals of TCNs demanded information sharing. However the Council did not empower the Commission to make these agreements work, which lead to a situation where measures became ineffective. An exception to this is the Immigration Liaison Officers Regulation, which requires the Commission to take part in its information mechanisms. As with all other funds in migration policy, the European Return Fund contained provisions that implied an expert role for the Commission. In sum, similar to the findings of the previous chapter on asylum, uncertainty does not seem

to be an important determinant for delegation.

Credibility of commitments to the “fight against illegal immigration”¹¹⁷ was severely corroded by member state practices such as large-scale regularisation programmes and high levels of attraction to shadow economies among irregular migrants seeking work. Delegation to the Commission emerged through agenda setting provisions, the authority to prioritise and concentrate member states’ efforts (in the European Return Fund), and occasionally the power to supervise them. Although often essential for the efficient cooperation of member states, these provisions fail to amount to a critical mass that could be detected by the criteria of the quantitative analysis. In addition, the Commission at times exercises a determining role in matters of burden sharing such as the financial mechanisms in the Directive on the mutual recognition of decisions on the expulsion of TCNs. Moreover, it proposes amendments and recommendations on the Immigration Liaison Officers Regulation on the basis of its annual report, and under the Comitology procedure in relation to the Directive on assistance in cases of transit for the purposes of removal by air.

Although the credibility of commitments appears to be a reliable predictor, there are cases where it does not result in delegation. A noteworthy example of this is the Employer Sanctions Directive. Member states, the Commission and the EP all recognised that illegal employment was one of the main drivers behind irregular immigration into Europe, i.e. it was a pull factor (Commission 2007e: 4). However member states avoided any direct involvement of the Commission in the workings of national enforcement. The most contentious aspect of this area relates to regularisations (Düvell and Vollmer 2011: 9). While the EU was at least able to agree the Return Directive on the problematic area of returns, nothing of the like materialised for regularisation. However a different approach is acquired if regularisations are framed as an admissions policy as distinct from a patch for ineffective irregular migration policy. In the end, these practices amount to the movement of people from an administrative category of exclusion into a ‘clean’ administrative inclusion zone. Seen from this perspective, by definition regularisation resides outside of EU competence, as is the case with all admission policies (Giuseppe Sciortino 2004: 36).

¹¹⁷ To use a common expression in EU documents.

The only measure with a high operational dimension is coincidentally the one identified as displaying the highest levels of delegation and discretion, the European Refugee Fund. No broad delegation has however been conferred to the Commission in other cases where regulatory failures were manifest. In this sense, and recalling its rejection in the previous chapter, the hypothesis that previous regulatory failures determine delegation does not seem to be supported by the analysis of secondary legislation (Stetter 2000). Broeders and Engbersen have highlighted that the capacity of member states to make early estimates of and detect irregular migrants have greatly increased through enhanced use of databases and biometric identifiers such as Eurodac and or VIS (Broeders and Engbersen 2007). However there is a mounting degree of scepticism towards them. While member states and EU institutions seem to see these tools as essential to achieving the desired reduction in irregular migration, the Commission has recently expressed doubts as to the merits of these policies compared with other exogenous factors. The Council is also increasingly dissatisfied with the length and costs associated with these undertakings (see Chapter 7).

Chapter 2 highlighted that an intergovernmental perspective would suggest cooperation was more likely to advance in asylum, border and irregular migration policies than on labour or secondary migration due to only partially overlapping national interests (Messina 2007: 17). On the contrary, this chapter has shown that cooperation on irregular migration, as measured through delegation and discretion, is the lowest among all migration categories. In addition, if legislative output is considered labour migration is as significant as asylum policy.

Huysmans believed that the existence of irregular migration justified the restrictive nature of other migration policies (2000: 753). This would suggest that member states integrated more in this area as this represented their paramount concern. This study demonstrates that on the contrary, integration as measured by delegation is almost non-existent. However this also highlights the limits of a focus on delegation. In the first five years member states tried to shape this policy area in the most intergovernmental way possible under the Amsterdam arrangements. And this prompts the question of whether this means there was no integration in this area. Member states attempted to duplicate national models at the European level, achieving mixed results. Some of the legislation regarding returns was re-framed

by Commission-proposed legislation in the second half of the 2000s. This signals that while the EU is flexible enough to allow member states to express their priorities and policy preferences almost without restriction, save for those imposed by their peers, it also accommodates reform from within, and radically so. The idea of duplicating national systems and policies is far from peculiar to irregular migration (Menz 2011). While this approach can in some ways be seen as an opportunistic exploitation of the EU venue, it also shows a pragmatic take on EU integration in the context of a “great variety of legal cultural characteristics” present across member states (Düvell 2011a: 294). It also highlights how different forms of policy-making can co-exist for long periods within the Community pillar. This confirms experimentalist readings of migration policy making. And it is interesting that, as a result of a study on delegation, it is possible to appreciate the extent to which member states have put different policy making methods into practice.

In terms of the liberal/restrictive divide, the situation is more complex than it is in relation to other migration categories. Due to member state dominance in the early years it is difficult to single out the relative contribution of individual institutions at the EU level, i.e. the Commission and the Council. On the other hand, the Return Directive, which was the one Directive that civil society organisations, NGOs and academics expected would make a positive change in migrants’ rights, disappointed many (Ripoll Servent 2011). This assumption rested on the likelihood that the Commission and the EP would come together to enmesh migrants’ rights into EU legislation, something that has received mixed assessments so far (Lopatin 2013; Ripoll Servent 2011; Ripoll Servent and Trauner 2014). The loose nature of this purported alliance is illustrated also in the case of the Employer Sanctions Directive. The EP significantly watered down the initially high commitment to labour market inspections that, according to the Commission, was a key element of this Directive. Furthermore, while perhaps guided by pragmatic assumptions concerning EU institutional politics, the fact that the Commission chose to leave this entire policy field to member states speaks volumes of its purported championing of migrants’ rights.

6. Delegation in Legal Migration and Administrative Cooperation

Chapter 3 showed that the delegation ratio and discretion index of legal migration and administrative cooperation are diametrically opposed. In aggregate terms, legal migration is the second lowest migration category for delegation and discretion, while administrative cooperation is the highest. Moreover, the relatively small set of legislative measures concerning legal migration features few instances of high and medium delegation, while the even smaller administrative cooperation set features six legislative measures with high and medium delegation. This chapter is dedicated to understanding why that is the case.

The Amsterdam Treaty commits the Union to adopt,

measures on immigration policy within the following areas: [...] conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion (art. 63(3)(a) (TEC).

Article 63(4) (TEC) deals with,

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.

Finally, administrative cooperation entails,

measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission (Art. 66 (TEC)).

Legal migration is identified in the literature as the area where EU policy has

advanced the least. Cooperation on legal migration at EU level has been slow and difficult in many respects. One of the reasons it has been so is that legal migration policy was determined under the unanimity rule until the Lisbon Treaty entered into force in 2009 (TEC, Art. 63, third indent). This was the only policy area that remained under these rules for this length of time, demonstrating that member states drew lines in the sand marking out the elements where cooperation and negotiations had to proceed more carefully.

For purely presentational reasons, this chapter deals with both administrative cooperation and legal migration together. Following the structure set out in previous chapters, a brief initial section contextualises the relationships within the Council and between the Commission and the Council with relation to these policy areas. The following three sections clarify delegation in legal migration and administrative cooperation along the lines of the three independent variables: uncertainty; credibility of commitments; and, efficiency and effectiveness. A brief conclusion sums up the relevant findings.

6.1. Analysis of the determinants of delegation

6.1.1) Institutional factors: Council internal division, and conflict between Council and Commission

The Council was more divided on legal migration than on administrative cooperation. As in previous chapters, the length of Council negotiations was used to identify conflict. For administrative legislation the average length was 14 months, whereas for legal migration it was 21. The latter figure however masks significant exceptions such as the nearly four years it took to negotiate the Family Reunification Directive, and the almost three years spent on the Long-Term Resident Directive. In legal migration, member states were divided on a long list of substantive issues such as student mobility, dependent families, and access to labour market for researchers. One possible explanation for such deadlocks is that many issues included in legal migration relate directly to regulatory competition, which is at the heart of the dominant economic policy paradigm¹¹⁸. The Commission seemed to acquiesce to that reality after five years of efforts (Commission 2004a:

¹¹⁸ I owe this point to Dionyssi Dimitrakopoulos.

9). It is noteworthy that, in the Commission's evaluation of Tampere, legal migration was the only area where solidarity was not invoked. Thus a "realistic approach" was deemed the most suitable for legal migration, while solidarity was made central to all other areas, including asylum, borders and visas, and irregular migration (Commission 2004a: 9-10). Looking at the substantive points, member states did not seem to differ on administrative cooperation to the extent seen in legal migration. There were few if any divergences in the case of ARGO, or the 2005 Decision on the web-based information system. In the case of the EMN, member states agreed on the non-suitability of the EP's presence during Steering Board Meeting, had common views on strengthening the role of the Board but conflicting ones on its composition (Council 2007b). The only significant exception was the Mutual Information Mechanism Decision. In that case, lines of divisions were many, as for instance on the typology of information to be shared and at what level that discussion should be held (Council 2006c).

Commission and Council were highly divergent in the realm of legal migration. The Commission actively produced proposals on legal migration from early on, repeatedly restating its views on, *inter alia*, the desirability of labour migration channels, the benefit of family reunification (also in terms of integrating) (Commission 1999a: 3, 9) and attracting highly skilled migrants to Europe (Commission 1999a: 2, 3, 9; 2004a: 9-10). The Commission was at times critical of the agreements reached, for example it judged the Family Reunification Directive as being "more restrictive" than its own proposal (Commission 2008f: 2). The Council did not however, in the main, share the same positive viewpoints. Germany, backed by a varying combination of member states, consistently opposed any talk of opening up labour migration or losing its veto over this delicate issue (Agence Europe 2004a). While QMV was taboo for virtually the entire period under examination here, the Commission highlighted that the deadlock on some JHA dossiers could only be overcome by streamlining decision-making (Commission 2004a; Prodi 2000: 9). The quantitative results of Chapter 3 also identify that member states exercised rather intensive control over the Commission in the area of legal migration. In a comparison of legal migration and irregular migration, two categories with relatively low levels of delegation and discretion, the constraint ratio calculated for the former was higher than the latter. Finally, in the case of administrative cooperation, while the Commission pushed hard for harmonised and

reliable statistics, the Council delayed in taking a decision in this area (Agence Europe 2005f). The Commission repeatedly highlighted that more knowledge was needed to improve policy, and although the Council agreed in principle, policy action arrived late (Agence Europe 2003j). The length of the negotiations over this Regulation seems to be partly due to the EP's determination in securing a deeper involvement in the Regulation, benefiting from the negotiations on the new Comitology rules ongoing at the time. Again, lines of division were evident in the case of Mutual Information Mechanism Decision, with some Countries rebuffing some of the Commission initiatives (Council 2006c). That being said, for the rest of the legislative measures in administrative cooperation there was no conflict comparable to the area of legal migration.

6.1.2) Uncertainty

Compared to irregular migration, legal migration faced relatively minor problems in terms of knowledge and the circulation of information. Member states had a good deal of data on national labour markets, residence permits, and other legal migration related issues. It is worth noting that definitions of employment-related statistics in the EU are based on International Labour Organization (ILO) standards. At the national level, statistics are comparable by virtue of the "European system of national and regional accounts" (ESA95, or 1995 ESA), which provides "information on the structure and developments of the economy of the Member States of the European Union and their respective regions" (Eurostat 2015a). In general, labour market statistics have improved considerably since adoption of the "Employment" Chapter (Title VIII) of the Amsterdam Treaty.

It is frequently noted in the literature that labour and skills shortages potentially influence member state decisions to accept and organise labour migration channels (Devitt 2011; Menz 2002: 726; Ruhs and Anderson 2012). In broad terms,

labour and skills shortages occur where there is a demand for labour in a particular occupation, but a lack of workers who are available and qualified to do the job (Christina Boswell and Geddes

2011: 84).

The IOM has highlighted that the definition of what constitutes a “gap” in the labour market or in skills among workers varies hugely from state to state. Indeed definitions are hard to come by (IOM 2012: 11; Ruhs and Anderson 2012: 2). For instance, quoting from a 2002 OECD study, the IOM notes that “employers tend to report on recruitment difficulties, but not on labour shortages *per se*” (IOM 2012). Ruhs and Anderson note that there are fundamental differences in the way shortages and skills are thought of between employers and economists (Ruhs and Anderson 2010).

Early studies on the quality and comparability of data concerning labour migration highlighted “the inadequacies and incompleteness of data” (Dobson and Salt 2002: 5). Regarding labour migration statistics, Dobson and Salt have argued that, in the six countries included in their study¹¹⁹, it “is difficult to make valid comparisons in respect of stocks and flows of foreign workers”, and this “because of wide differences in data availability, in sources and methods of data collection and in definitions and coverage” (2002: 4).

These academic and practitioner debates are echoed in the EU context. One of the Commission's first attempts at making the case for a common EU labour migration policy called for “each member state [to] compile annual reports on their labour needs”, which would form the basis of an “overarching EU approach to recruitment” (Christina Boswell and Geddes 2011: 94). These categories were however explicitly excluded from cooperation in the 1998 Action Plan on migration statistics (Commission 2003d: 5). As a consequence the Commission was reportedly unaware of how many migrant workers were already working across and within member states, and what the estimated labour market demand was for migrant workers (EUObserver.com 2001b).

In parallel to its first proposal on labour migration (Commission 2001f), the Commission put forward the Open Method of Coordination in migration policy (Commission 2001g). The idea behind this method was that by sharing objectives, information and best practice, member states could eventually adopt a common, albeit loose, approach to migration. This soft policy move was deemed essential as

¹¹⁹ Germany, Italy, UK, Portugal, the Netherlands, Switzerland.

the open resistance of certain member states offered no hope for any binding agreement. The five-year Hague Programme presents a rare example of member states expressing interest in receiving input from the Commission on legal migration. Here, the Council asked the Commission, to put forward a “policy plan on legal migration”. Notably, this should have included “admission procedures capable of responding promptly to fluctuating demands for migrants labour in the labour market” (Carrera and Formisano 2005: 4).

However, such a policy plan might prove unattainable. In a realistic view, there are limits to the potential for EU action in this area. The IOM observed the high potential cost of a technical operation capable of both ascertaining whether labour or skills gaps exist in a given member state(s), and releasing that information in a sufficiently timely fashion to facilitate its exploitation for job-creation purposes. It is exactly for that reason that “some countries, such the United States, do not perform systematic analysis of occupational skill needs for migration policy purposes” (IOM 2012: 13).

Governments have also encountered difficulties in forecasting exact figures for actual demand of workers in a given sector of the economy (Münz 2004, 2008). In other words, labour shortage forecasts have been far from perfect. Even conceding that governments could hazard estimates at the number of workers needed, the number of migrants attempting to access a given sector could be far higher or lower than anticipated. The political risks related to using such estimates are illustrated by the UK experience in the last decade (Christina Boswell and Geddes 2011: 88-91, 100-01). Estimates of the potential influx of labour migration in the UK turned out to be much lower than the actual flows (Financial Times 2005a; Vargas-Silva 2014). It must be noted that there was a strong determination among government political elites backing the choice of allowing into the country labour migrants inflows. Home Secretary Blunkett confirmed that consensus by saying he “saw no upper limit to labour migration” (Geddes 2005a: 727; Smith 2008: 423). It is likely that this under-estimation has contributed to the increased salience of immigration in UK (Blinder 2014; x. D. Casciani 2002a). In sum, although policy actors had better information on labour migration than on irregular migration, they clearly found it difficult to operationalise in the furtherance of national or EU level policy-making.

Issues to do with collecting and producing reliable data on family reunification were identified in the early 2000s. The Commission requested access to such information in its family reunification proposal (Commission 2000f: 6; 2002d: 13), which was rejected by the Council. Following requests from the EP, it emerged that some member states had no knowledge of the magnitude of the phenomenon. These states were solely gathering “general data on persons granted admission for non-asylum related reasons”, i.e. they did not have any break-down of categories within legal migration (Commission 2001e: 10). Again due to the “widely differing definitions used”, information on family reunification was deemed “of little use for developing and implementing policy” by both the Commission and the EP (Commission 2003d: 13).

Overall, cooperation on statistics across migration categories presented a number of problems. An early EP report stated that,

in some instances, Eurostat receives inadequate or insufficiently appropriate and unequivocal information from the various actors because those actors constantly use differing definitions, which leads to the international comparison of data and, hence, to the efficacy of policy forms being impaired (EP 2003b: 5).

To solve this, the Commission proposed a debate be held “to verify whether Community legislation and harmonisation in the field of statistics would be useful”. This would serve the purpose of preventing “duplication of effort and, secondly, to bring definitions and practices into line with each other so that all the actors are ready and able to publish accurate figures (EP 2003b: 5). Acknowledging that Eurostat’s role was crucial in this area, the EP fully endorsed the Commission’s bid, “to propose further measures to improve statistics and information exchange” aiming at the “communitisation of asylum and immigration policy” (EP 2003b: 7).

A stronger role for the Commission also appeared warranted by the fact that “to date, not all the Member States are supplying comprehensive information to Eurostat” (EP 2003b: 7). The EP repeatedly warned of the potential and actual politicisation of statistics and the bodies producing them. In the EP’s view, such politicisation might affect the quality of statistics and the policies based thereon. Highlighting that the Council recognised the pervasiveness of this issue, the EP

therefore recommended that the Commission propose suitable solutions (EP 2003b: 10).

After the 2003 Action Plan on Community statistics, the Commission proposed a Regulation in 2005 that was eventually adopted in 2008. Besides what mentioned in the first section of this chapter, the considerable time lapse between proposal and adoption is telling of the political sensitivity of this issue. Indeed, the Council highlighted that “[r]estrictions should be allowed for reasons relating to national security” and the sensitivity concerns “of data on illegal migration and the granting of Geneva Convention status” (Council 2001x, 2001u). Political sensitivities were again signalled by the Council Presidency Conclusion of May 2001, which stated that “[d]ue consideration should be given to demonstrable sensitivity concerns” (Council 2001t: 5). And concerns over these sensitivities lasted throughout the Council-EP negotiations under co-decision (Council 2006f). Problems were not only connected to the sensitive nature of certain information, but also to its collection. In 2003 the Commission identified areas where collection still needed to either commence or improve, this included “data on legal [...] entry and stay; second instance asylum decisions and data on the implementation of procedures” and data related to the Dublin Convention (Commission 2003d: 6).

Specific issues remain unanswered when it comes to the role of information within legal migration. For instance when assessing the Family Reunification Directive in 2012, member states and NGOs criticized the fact that little knowledge or research was available on the “abuses” of family reunification (Commission 2012c). However, this did not stop public or political opposition to family reunification channels. More broadly, the Commission argued for more information concerning national policies on migration and asylum. It referred to the potentially negative externalities that national policies might have on other member states in the context of an internal borderless zone, and proposed an information mechanism to facilitate the sharing of knowledge (Commission 2005i). Indeed the need for information was even evident from the actions of member states. For example, the German delegation conducted a survey of fellow delegations to obtain information on admission channels, with specific reference to quotas. This clearly implied a need for better and more reliable information in relation to legal migration (Council 1999e).

This latter initiative is also relevant to the broader phenomenon of internal

consultation within the Council. Analysis of Council documents revealed that the practice of circulating questionnaires and questions was quite common in relation to migration and, in a comparative stance, to a lesser extent foreign policy. That investigation also revealed that irregular migration featured prominently, with over ten consultations in five years (1999-2004). These latter consultations related to a wide range of issues including, but not limited to: member state legislation on preventing and combating illegal immigration networks(Council 2000a); detention pending expulsion (Council 1999c); expulsion by air (Council 2000g); illegal migration from the Balkans (Council 2001s); alert mechanisms in airports (Council 2002c); exchange of information on irregular migration (Council 2000~)(Council 2000e); legalisation of irregular migrants (Council 1999h, 1999g); and, early warning systems (Council 2000m). Matters related to asylum¹²⁰, borders and visas¹²¹, and to a lesser extent legal migration¹²² were also among the topics of discussion. The sheer volume of these consultations is testament to member states' willingness to obtain and share information. A possible explanation for this approach points to the sensitivity of the information at stake. This theory is supported by the clear preference for keeping information on irregular migration within the Council and the fact that some of these documents are yet to be disclosed to the public¹²³. On the other hand, it is not necessarily clear what level of sensitivity is attached to other dossiers, such as the accelerated asylum procedure and "transfer of protection", i.e. migrants already covered by some form international protection who move to another member state. In addition, the adoption of the Mutual Information Mechanism Decision in 2006 does not seem to have stopped this practice, as information on employer sanctions was circulating among member states in this way as late as 2009. Admittedly the volume of these exchanges has dropped sharply, but its resilience shows that the Council still favours internal management of information on some matters. It must however be noted that this procedure was not problem-free, as many of questionnaires witnessed late replies or received no reply whatever from some member states.

¹²⁰ See Chapter four, section 4.1.2.

¹²¹ For example, uniform format for short-term visa, risk assessment, visa database, visa refusals.

¹²² For instance, marriage of convenience and family reunification Council, 'Compilation of Replies to Questionnaire Concerning Council Resolution of 4 December 1997 on Measures to Be Adopted on the Combating of Marriages of Convenience. 10998/99', (Brussels, 1999a)., quota system for labour migration.

¹²³ Not only those pertaining to irregular migration.

To sum up, there was widespread recognition across the policy community and individual governments that a number of problems existed with the quality and comparability of statistics, and the operationalisation of knowledge for policy purposes. This was the case for labour migration and the elaboration of estimates for migration inflows. Member states resisted early calls for increased harmonisation at the EU level on this matter. That said many member states had consolidated practices and knowledge on the terms of residence or employment of migrants within their own territories. Overall though, information circulation was still problematic, as recognised, *inter alia*, by the practice of questionnaires and the proposal for a mutual information mechanism.

Qualitative analysis of delegation in selected measures.

Problems concerning knowledge and information sharing were present in legislative measures on legal migration, as demonstrated through the Blue Card Directive (European Union 2009c). Similar to many other cases analysed in Chapters 4 to 7, the Commission's proposal on the Blue Card Directive observed problems with the comparability of data available from the few schemes in Europe targeting high-skilled immigrants. For many member states, data was simply not available (Commission 2007c: 3). In the Commission's words, the "scale of the problem is difficult to quantify" and "only very rough estimations can be provided" (Commission 2007c: 3). Faced with opposition from some member states, the Commission needed better mapping of and insights into the scale of the issue to progress its long-standing campaign for the establishment of labour immigration channels.

To ensure that member states are aware of the effects of the Directive in national labour markets, the legal text stipulates that member states must communicate information to the Commission on: fixed levels of admission of TCNs; the outcomes of labour tests that member states might enact before issuing any Blue Card permit; real volumes of admissions; renewals and withdrawals; nationality and occupation of Blue Card holders; family members; and, member state of previous residence (if any). Having said that, these provisions are not considered delegating powers, as they do not directly empower the Commission to alter the course of the policy. In other words, the Commission acts as a mere recipient of information but does not have explicit power to shape policy in this

area. Admittedly the Commission might employ this information to compile reports and propose amendments on the basis of their content. However, this possibility is not enumerated in the legal text.

Under Art. 66 on administrative cooperation, the Union equipped itself with a comprehensive means of funding European action on migration issues, albeit minimal. This was the ARGO Decision, which features high delegation and discretion. At a time when formal cooperation was still emerging, the ARGO programme aimed at facilitating administrative cooperation across member states by improving knowledge among national administrations about their respective practices. As the presence of different administrative practices was considered a possible source of excessive burdens for some member states, better knowledge was considered a first step towards closer cooperation. In the Commission's proposal, reference was made to “developing a common working methodology and culture between the Member States”, a “better understanding of the administrative processes in each Member State”, and the “computerisation process and electronic exchange of data” (Commission 2001b: 3). In this respect, Art. 10(3) empowers the Commission to “promote and facilitate” all kinds of actions falling within the remit of the Decision, including to “promote cooperation between national agencies in implementing Community rules” (Art. 3(a)). In sum, the Decision confirms the second hypothesis regarding uncertainty: delegation tends to occur when information-sharing and communication problems arise, rather than because of needs for expertise.

Another important piece of legislation dealing with uncertainty is the Decision establishing a mutual information mechanism on asylum and immigration measures. An internal Commission document refers to national measures such as regularisations or quotas as examples of information to be shared. It may then be argued that this Decision has an important credibility of commitments value, as it was believed that national measures could alter or undermine collective efforts at establishing a common European migration and asylum policy (see next section).

This was a long awaited measure dealing with communications among member states, particularly in relation to national measures with the potential to affect other member states (Commission 2005i: 2). Highlighting the enduring political sensitivity of the information concerned, France recommended that the

mechanism be limited solely to information gathering, leaving any further discussion and action at the discretion of the ministerial level. In the view of the French delegation, a “permanent and binding mechanism” could have been inappropriate (Council 2006c: 2). This interpretation was contrasted by other member states who backed the Commission, such as Germany (Council 2006c: 2, 3). This backing was crucial in light of the numerous internal divisions between national delegations, as illustrated through the objections raised during negotiations (Council 2006c, 2006e), and the distance between the Commission’s proposal and the stance of some national delegations. The Commission asserted that the proposal would have been strengthened by including a provision requiring an “exchange of views” between fellow member states or member states and the Commission (Commission 2005i: 3). This turned out to be controversial, with a number of member states judging this provision too political and involving a flavour of pre-screening of national policies. Thus member states argued that the Commission should have been either only partially (Germany) or not at all involved (UK) (Council 2006e: 11).

In its proposal the Commission lists about ten measures already adopted, which feature notification requirements similar to what this Decision was meant to achieve. With regards to uncertainty, the Commission is empowered to request additional information from a member state on topics covered by the Decision (art. 2(3)) where it deems it appropriate. However in others (art. 2(4)), member states have conspicuous discretion over answering to such request. The Commission is also included in the web of national contact points designated by member states to exchange information. In addition, the proposal explicitly refers to court decisions as relevant information to be shared however, at the insistence of Germany, no additional information could be demanded in relation thereto (Council 2006c: 8). Finally, the Commission has to draw up a “general report” which forms the basis for the exchange of views “at ministerial level”. In all these cases, the Commission is at the centre of mechanisms aimed at sharing and providing information among member states. Again, this confirms the second hypothesis connected to uncertainty, but not the first on expertise.

The same issue concerning the circulation of information is tackled by the Secure Web-Based Information and Co-ordination Network Decision. The Council empowered the Commission to undertake the operational management of this

service, which speaks to the efficiency and effectiveness rationales¹²⁴. Moreover, it provided it with a say in “the structure and content thereof [i.e. the network] and the elements for information exchange” (Art. 2(1)). The same article also provides a non-exhaustive list of “elements” that leaves the Commission with scope to intervene in this matter (Art. 2(2)). Importantly, the Decision does not open any door for the Commission to elaborate on this data; therefore its expertise function seems less relevant here.

The Migration Statistics Regulation (European Union 2007b) encompasses all migration categories, from refugee protection to irregular migration, and from borders to labour migration. Its legal basis however lies outside Chapter IV on migration (Art. 285(1) TEC). This Regulation represents a test case for the uncertainty rationale, as it is the result of a widely recognised need for better statistics on all migration areas and exchange thereof (Commission 2003d: 2; Council 2001r). Even though the Regulation does not oblige member states to harmonise their statistical toolboxes, it requires them to specify the approaches taken to facilitate more precise comparisons and an assessment of sources (Commission 2005d: 3). This is no trivial point, as one interviewee in the Commission revealed that in the early years following Amsterdam, the Council provided information with no additional remarks on sources or methods used. To improve the situation the Commission tried to involve Eurostat in the process and in Council meetings, however this was opposed by the Council (Interview 3).

The Commission's report on the implementation of the Regulation highlighted that pre-existing cooperation on statistics and exchange of information relied on voluntary contributions by member states. The Commission stated,

European migration statistics were characterised by poor data availability and a low degree of harmonisation. In many cases, basic EU level aggregates could not meaningfully be produced as the component national data were either not available for some Member States or were prepared using widely differing statistical definitions. The lack of harmonisation meant that analyses and comparisons of data relating to different Member States were

¹²⁴ See section 6.1.4.

unreliable and potentially misleading. This implied that an important area of European public policy lacked appropriate statistics to inform evidence-based decision making (Commission 2012b: 5).

Problems still persisted following implementation in terms of definitional issues that reduce comparability, timeliness of the data provision, and accuracy. (incomplete and absent data still persisted) (Commission 2012b).

Having said that the Regulation itself does not feature many delegating provisions from a quantitative perspective, and a number of constraints are present, which are perhaps the result of the political sensitivities mentioned above. That said the delegating provisions included in the Decision are important. As the Preamble states, the Commission is “empowered to update the definitions, to decide on the groupings of data and additional disaggregations and to lay down the rules on accuracy and quality standards” (Recital 16). This empowerment is articulated in three provisions: Art. 8(1) grants the Commission the right to make “additional disaggregations” in a number of areas; and, Art. 9(3) states, if the Commission so requires, member states must provide all information “necessary to evaluate the quality, comparability, and completeness of the statistical information”. However, these measures are adopted under the Regulatory Procedure with Scrutiny, the strictest of the Comitology procedures. These elements confirm both hypotheses related to uncertainty. The Commission is recognised as an expert in statistical affairs (collection, assessment and processing), and is also the institution charged with ensuring that information is supplied and shared.

Always under administrative cooperation, the Union decided to equip itself with a permanent provider of knowledge and information. Previous chapters have frequently highlighted how EU policies relied on patchy knowledge bases, such as in the case of irregular migration, or voiced concerns on the lack of information on a particular issue (see above). The Council finally approved the establishment of a European Migration Network (EMN) in 2008, which directly answered the data and knowledge needs of “the Community and its Member States” (European Union 2008d). Before this Decision was adopted there had been a forerunner to the EMN, which was followed by a Green Paper on its future (Commission 2006f; Geddes 2014: 11).

The Commission is entrusted with a number of powers through this Decision. Regarding uncertainty, the Commission must “adopt the EMN's annual programme of activities”. Read together with Art. 6(1), and taking account of the fact that the Commission also sits on the Steering Board, the Commission has some powers in setting the direction of the research-related activities of the network. This demonstrates trust in the expertise of the Commission as the network was intended to become the key source of reliable knowledge for all member states involved¹²⁵. In addition, the Commission compiles a synthesis report based on the national ones, “bringing together the main findings and placing them within an EU policy perspective (e.g. by relating them to recent policy initiatives)” (Commission 2008d). This is not to be underestimated as it also serves as the basis for the Commission’s Annual Report on Immigration and Asylum (Commission 2012a: 2). In sum, delegation to the Commission seems to take place under an uncertainty rationale related to its expertise and for reasons of efficiency (see third section).

6.1.3) Credibility of commitments

As in previous chapters this section aims at understanding member state commitments on legal migration and administrative cooperation, and the extent to which those commitments were tarnished by imbalances or past crises. In terms of commitments, member states were required by the Treaties to set rules for entry and residence, long-term residence permits, and intra-EU movement. Notably, explicit mention of labour migration was absent from the Treaty. At Tampere the European Council added a commitment to fair treatment and the right of long-term migrants to work as employees or to become self-employed. For legal migration and TCNs policy, reference is only made to policy “approximation” among member states (European Council 1999: A. III. 20, 21). There is no mention of common policies for legal migration, as in the case of “common visa policy”, there is only an aspiration for “more efficient management” (European Council 1999: A. IV. 22). The 2004 Hague European Council stated that,

¹²⁵ Denmark does not participate in this Decision, and Ireland opted-in in 2009 European Union, '2009/350/Ec: Commission Decision of 28 april 2009 on the Request by Ireland to Accept Council Decision 2008/381/Ec Establishing a European Migration Network (Notified under Document Number C(2009) 2708)', (Brussels, 2009b)..

[l]egal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy (Agence Europe 2004d).

This connects labour migration policy to other flagship projects of the EU, but fails to specify any further or more precise commitments. The Commission pointed out that member states already had obligations under several international agreements regarding family reunification and many of them had family rights in their Constitutions (Commission 1999a: 3-5). Over two years later the Commission noted that, while the European Council restated its commitments to the Tampere “guidelines” without entering into details as to what this entailed, the Council was deadlocked on finding workable solutions (Commission 2002d: 2). This speaks to the absence of strong commitments as well as to the deep divisions among member states. Therefore, it seems that member state commitments on legal migration were weak, which in turns diminished the need to strengthen the credibility of those commitments.

There was however no reference to enhanced administrative cooperation in the Tampere programme. What is more, few references were made to increased cooperation among member states at all, except for border controls. On the other hand, the following five-year Hague Programme set out that, “strengthening practical and operational cooperation between relevant national agencies [was] of vital importance” (Council 2004c).

The idea of an EU labour migration policy attracted both supporters and opponents. Early Commission attempts to establish common rules for TCN workers floundered among diverging preferences in the mid-1990s and again in early 2000s (Financial Times 1994). In 2000 the Commission argued the case for labour migration channels, and stated that “overall, migrants generally have a positive effect on economic growth, and do not place a burden on the welfare state” (Commission 2000c: 27; The Independent 2001b). Capitalising on the momentum that the Tampere European Council had apparently initiated, the Commission proposed a Directive in 2001 “on the conditions of entry and residence for the purpose of paid employment and self-employment activities” (Agence Europe 2001a; Commission 2001f). One could interpret the Commission's early attempts

to establish a common EU labour migration policy as a further instance of a competence-eager bureaucracy rushing to put its foot inside the door of a new policy area (Hix 2005: 67-69). Having said that the Commission's stance has at times been ambiguous over what a Community policy would entail, which has not helped in countering resistance among member states. The European Employers' Association (UNICE) endorsed the idea of a single procedure (and a single legislative measure) on admission and residence rights for TCNs for employment purposes, as suggested in the first Commission Communication on the matter. Having said that, UNICE was not clear on how such a method would work in practice. It questioned in particular how labour shortages would be formulated and made flexible enough to comply with subsidiarity requirements (Council 2001b). The EP also questioned the competence of the Commission in such affairs (EP 2001c).

The Commission's approach changed completely because this initially bold strategy failed (Commission 2005j; Euro-East 2005; Financial Times 2005c). Overall the Commission brought labour migration into the broader context of legal migration, and tackled it in a sectorial fashion. The idea was to harmonise an ever-increasing number of legal migration sectors in a piecemeal way. Thus far the Commission has managed to propose and adopt measures related to students and trainees, researchers, high-skilled migrants¹²⁶. Another of the Commission's strategies to make headways into labour migration was to highlight the potentially negative externalities arising from a non-harmonised labour migration environment. This was framed in terms of increased flows into irregular migration. To that end, the Commission issued a Communication on "the links between legal and illegal migration" (Commission 2004c). Portrayed in terms of effectiveness, the Commission's strategy was to highlight past failures of existing national labour migration policy in terms of their irregular migration consequences, and to argue from there for a European legal migration policy. The underlying argument was that the more legal migration channels are opened the less irregular migration is created (Carrera and Formisano 2005: 6; European Report 2005b).

Finally, the Commission has highlighted the demographic benefits European

¹²⁶ Outside the period of this research, it is important to add that the EU adopted in 2014 a Directive on intra-corporate transferees and another on seasonal workers.

societies could reap from increased immigration (Fargues 2011). At the beginning of the new millennium, the often-quoted UN study on *Replacement Migration* raised major concerns on this issue (2000). The Commission immediately tuned into this analysis and proposed its demographic and economic perspectives on the future of the Union in 2000. In this study the Commission stated that, “across the EU as a whole, it is net migration that has become the principal component of population growth” (Commission 2000c: 24). International migration plays a significant role in the size and structure of the population in most EU member states. According to Eurostat, member state population increases in recent years have mainly been due to net migration (Eurostat 2011a). As European states face huge problems related to ageing populations, immigration is seen as one of the potential solutions to the potentially disruptive consequences of a falling birth rate (Brücker et al. 2006: 136).

In contrast with the Commission’s preferences as revealed above, commentators have suggested that difficulties in reaching agreements and designing policies at EU level are mainly due to the different interests at play among member states (Christina Boswell and Geddes 2011: 76, 81; Cerna 2013). Domestically, opinion polls usually tend to favour tough stances on migration. In 2006 polls revealed that “40% of respondents in France and more than 60%” in other countries (UK, Italy, Spain and Germany) believed that “there were too many immigrants in their country and that their country's immigration policy was making it too easy for migrants to enter legally” (von Weizsäcker 2007: 121). The situation had escalated somewhat with the emergence of a financial crisis, when, a Financial Times survey conducted in 2009 “showed that over three-quarters of adults in Italy and the UK”, and about two-thirds in Spain and Germany, “supported the idea of sending migrants who cannot find a job home” (Ruhs and Anderson 2010).

Countervailing this pressure, business associations have frequently taken a positive stance on labour migration, which can in turn find a positive reception within governments (Caviedes 2004: 306; European Report 2004f; Messina 2009: 3). However these are not necessary conditions. In the early 2000s, the UK made a clear distinction between irregular migration and the huge flows of asylum seekers (which had to be halted and reduced, respectively), and labour migration (which had to be promoted) (Cerna and Wietholtz 2011; Financial Times 2003, 2005d).

Empirical studies converge on the fact that employer and business associations were not active in supporting a UK labour policy (Statham and Geddes 2006; Wright 2012). Another powerful source of influence, particularly for centre-right governments, is their link to catholic electorates. In Italy for instance, this factor has frequently put a brake on the most extreme policy proposals coming from allied parties in the context of government coalitions (Zincone 2006). This makes for an unstable situation at EU level, where member states must respond to a number of pressures while also preserving their political stance, at least rhetorically.

A further line of division is that sets of member states have different historical experiences of labour migration. A number of examples can illustrate this. Temporary labour migration schemes were a common feature of most Western European states from the end of WWII to the 1973 oil crisis. Germany, the UK, France, the Netherlands, and Belgium were among those countries that actively sought increasing numbers of migrants to meet labour market needs (Castles 2006: 2; Castles et al. 2014: 104-11). On the other hand, countries like Italy, Portugal and Greece were among those countries sending their citizens to work abroad. These programmes ended after the oil crisis, and policy-makers assumed labour migrants would return to their home countries when no longer able to secure employment. The opposite turned out to be the case, with migrants even trying to bring their families in too (Castles et al. 2014: 111-18). This profoundly impacted policy makers and public opinion in destination countries, to the point that labour migration and family reunification became objects of contentious political debates (Simon and Lynch 1999: 457, 64). Former sending countries became destination countries for other migratory flows between the end of the 1980s and the 1990s, and adopted labour migration schemes to try to regulate these inflows (Castles et al. 2014: 113-15; Perlmutter 2014). These differences in timings and experiences made for an uneasy mix at EU level, where compromise has been difficult to achieve thus far.

One example of the effects of these different traditions is the Italian initiative for labour migration quotas in the EU. Quotas for entry were a relatively common practice among certain member states (Commission 2006d: 14-15; Smith 2008: 423) and Italy has been fairly consistent in supporting the idea of an EU labour migration policy (Finotelli and Sciortino 2009: 121, 24). Domestic pressures were relevant to this stance, as Italy's employers association saw the idea of a zero immigration policy as disastrous (BNP Paribas Economic Newsletter 2005;

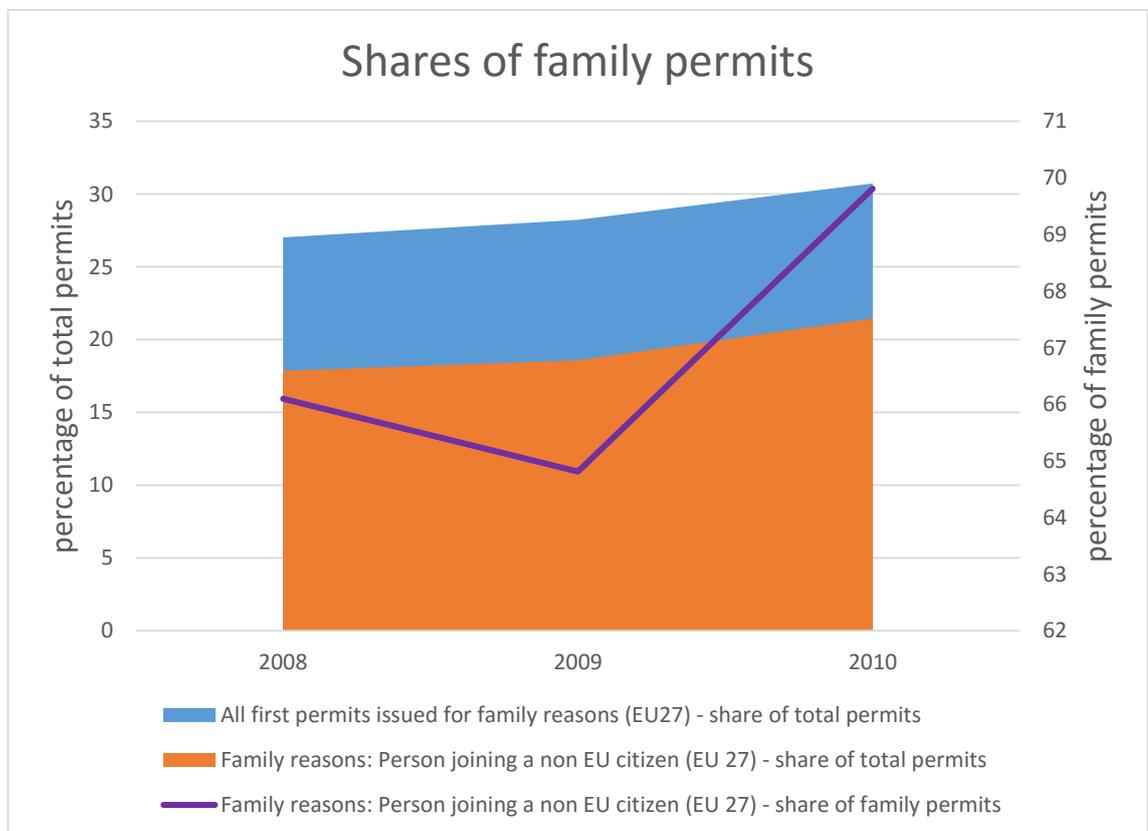
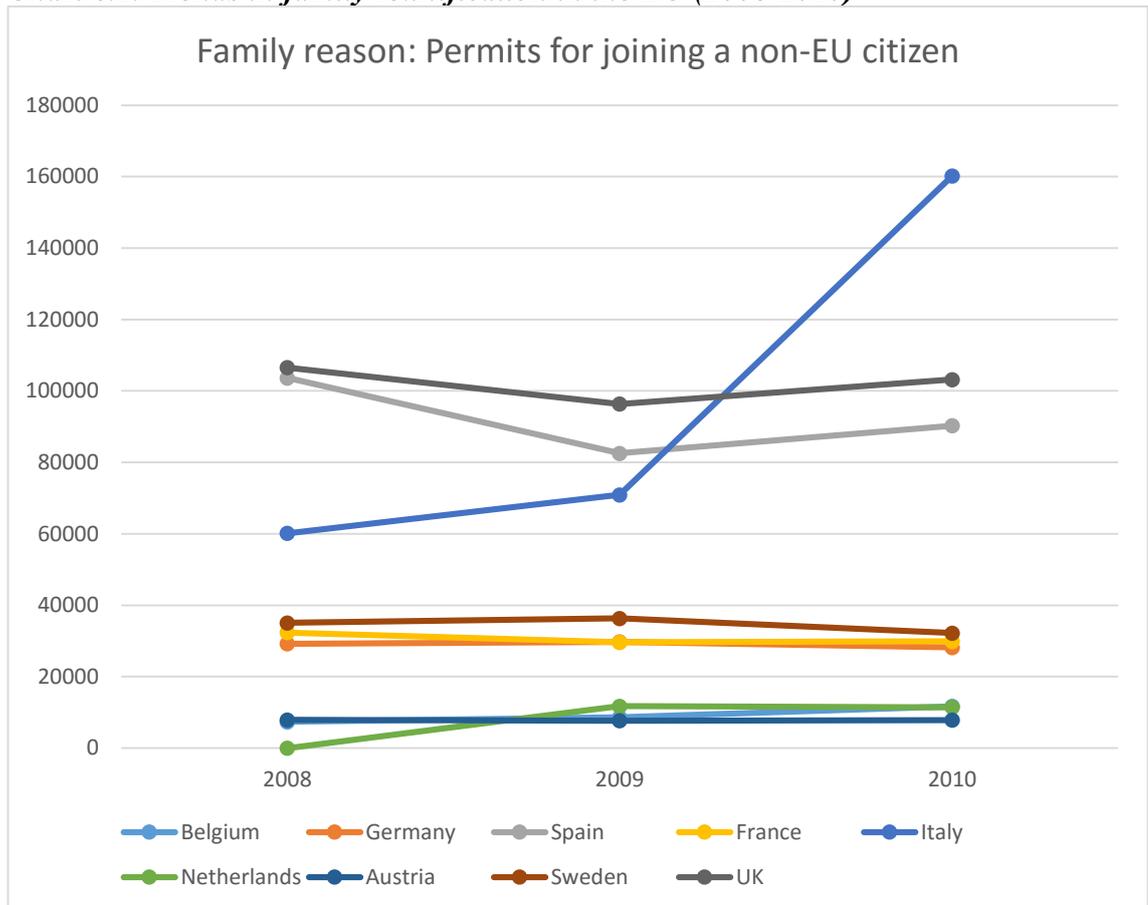
Financial Times 2002c). In this context, Italy unsuccessfully sought to upload its quota system for use at EU level (Agence Europe 2003g). In 2003 Interior Minister Pisanu supported the idea of, “having a European system of quotas” (The Independent 2003). To him, this would have helped to satisfy labour market needs and reduce irregular migration by granting entry to fixed numbers of TCNs. The failure to upload this model was due to opposition from countries that had used similar policies in the past, for instance France and Germany (Agence Europe 2003b; Agence France Presse 1999; BBC 2006; Le Figaro 2003; Martin 2014: 237). The persistence of this stance was confirmed several years later, when Interior Minister Schäuble stated this approach was not even on the agenda in Berlin. This statement was in response to a question on Italian and Spanish labour migration quotas and a suggestion that a mechanism such as this be adopted at EU level (BBC 2006). While the Commission’s in a 2000 Communication was that quotas were not a feasible strategy, the JHA Commissioner argued in their favour only a few years later (Agence Europe 2003d). During talks about a possible shift to QMV in 2004 for legal migration matters, a group of member states including, *inter alia*, Germany, Austria, and Denmark, jointly pushed to retain “access to the labour market [...] under national scope” (as centre-right Austrian Chancellor Wolfgang Schüssel put it (Agence Europe 2004a).

Particularly after the mid-2000s, a minimum level of convergence began to emerge on the desirability of adopting a scheme for highly skilled migrants. Many EU countries developed programmes to encourage high skilled migration during the early 2000s (e.g. Belgium, Germany, France, UK) (Apap 2001: 2-3; Carrera 2007a: 10; Financial Times 2001d; Hansen 2007). Competition over attracting highly skilled migrants brought the potential for member states to begin undercutting one another (Cerna 2013). This trend does not relate solely to high-skilled workers, but also encompasses researchers and students (Agence Europe 2002f). Member states joined other countries in what has been called the “global race for talent” (De Somer 2012: 4; von Weizsäcker 2006). Indeed, the Commission constantly reminded them of the connection between the Lisbon Agenda pledge of a knowledge-based economy and the need to attract students and researchers into Europe (Agence Europe 2005c). In other words, it connected the desirability of labour migration policies to other flagship EU projects. However many commentators have highlighted that the net result of differences in experiences and

interests has led to a situation where member states were not cooperating with each other, but “competing against *each other*” over the same pot of skilled migrants. This intra-EU competition is exemplified by the decision of member states to add a European framework to their existing national models for attracting skilled migrants rather than surrender the latter and adopt a common overall approach (Cerna 2013; Collett 2008). Apparently, competition over labour migration was not recognised as burdening other member states. While some authors have argued that the “use of third-country nationals in the labour market of one Member State may create imbalances in competition between the Member States” (Szyszczyk 2006: 497), this sort of argument is not cohesive and is frequently questioned. Member states seem to remain unconvinced of the benefits of tightly coordinating their labour migration policy.

As previously discussed, there is an accepted wisdom in some quarters of the academic literature and the media that migrants exploit family reunification and free movement rights, which ultimately damages some member state welfare systems. This is known as a welfare magnet thesis (Finotelli 2009), whereby more generous provisions in a given member state encourage migrants to go “shopping” for the best offers. This is a clear case of the potential for a given member state’s policies to damage others in the context of an internally borderless area. The Commission’s proposal on family reunification explicitly refers to this problem. Similar to the discussion on norms-sharing in the area of asylum policy, the underlying idea is that harmonisation “serves the purpose of preventing forum shopping by third country nationals seeking the Member State with the most lenient rules on family reunification” (Oosterom-Staples 2006: 454, 87).

Chart 6.1. Trends in family reunification in the EU (2008-2010)



Source: Commission (2014a).
 Notes: data missing for the Netherlands for 2008.

The two charts above (Chart 6.1) show that in 2010 family reunification still represented slightly less than one third of all EU residence permits (the blue area in the graph below, measured on the left hand axis), this is within the context of a decreasing trend overall since the start of the new millennium (Commission 2011d). More than two thirds of family reunification permits was due to permits issued to family members of a TCN in 2010 (purple line, measures on the right-hand axis). If member states wanted to cut overall levels of immigration, families joining a TCN constituted an important piece in the puzzle. That said these overall trends for the EU-27 masked different trends at the national levels (chart above). Many EU countries witnessed flat or slightly decreasing trends in absolute numbers (Germany, France, Sweden, Austria, the Netherlands), while a small set of member states recorded uneven or increasing trends (Italy, Spain, Belgium, the UK).

Finally turning to administrative cooperation, the Commission and the member states realised that, in order to strengthen the adoption of common frameworks in all areas of JHA cooperation (border controls, asylum etc.) they needed some degree of support during implementation as well as some common projects on top of legislative action. The ARGO Fund emerged to meet this need. While the overall amounts were minimal, it is worth noting that ARGO represented an endorsement of a previous effort emerged during Maastricht and the continuance of a project aimed at fostering common policies (Commission 2001b: 17-18). The majority of the initiatives financed were seminars, conferences, exchanges, and a few projects.

Summing up, there were no clear commitments by the member states in the area of legal migration above and beyond what stated in the Treaties, and a variety of opinions existed on the usefulness and feasibility of an EU labour migration policy. Efforts at promoting cooperation, either by the Commission or individual member states, could not create enough interest, let alone commitment, among all member states. The fact that member states were divided in the Council is irrelevant as commitments to an EU level action were lacking. The only possible exception is family reunification, where both commitments and likelihood of tensions originating from magnet welfare thesis were present. For what concerns administrative cooperation, while on the sidelines at the Tampere European Council, it reemerged as a vital area of cooperation in the mid-2000s.

Qualitative analysis of delegation in selected measures.

Some legislative measures pertaining to legal migration have been considered by commentators as crucial for the evolution of EU migration policy. These are the Family Reunification Directive, the Long-Term Resident Directive, the Free Movement Directive, Students Directive, and Researchers Directive. Chapter 3 revealed that these measures do not include much if any delegation. It is therefore pertinent to ask why that is the case. A first explanation could relate to time. As these decisions were taken relatively early in the history of EU cooperation on migration, it is possible that principals (member states) were reticent to concede major powers to the Commission. This contrasts with contemporary measures that generate strong delegation (European Union 2000b, 2000a, 2001c). In addition, this line of reasoning may appropriately describe the context surrounding the adoption of the first three of these measures, but it is less convincing in relation to the latter two. Another potential explanation is simply that these measures did not need any delegation. In other words, delegation served no policy need. Finally, and similarly to the minimum standards Directives in asylum policy, the distance between the positions of Commission and Council could account for the absence of delegation. Due to the significant amount of legislation, only some of the measures adopted are discussed in detail.

The proposal for a Council Directive on the 'right to family reunification' for TCNs received a cold reception from member states. Member states had different national legislative regimes governing the matters at stake, and found it difficult to agree on the key definitions of the Directive (what constitutes a family, a dependant, a minor, etc.) (European Report 2000f). The Council tried to regroup several times by identifying the “sensitive political issues on which delegations’ positions diverge considerably” and restarting the debate focusing on these, but achieved varied results (Council 2000l, 2001f). Germany, for instance, was concerned about the consequences such legislation would have on its “national labour market” and “national budget”, while Austria had a general reservation on the whole proposal (Council 2000j). Difficult negotiations lasted for more than three years, with lines of division existing between member states on all portions of the proposal (European Report 2000k, 2001a). This prompted the Commission to the release of

two revised proposals that substantially watered down its initial proposal (European Report 2002a).

The Directive displays a number of exceptions and is ambiguous in different provisions (e.g. concerning labour access¹²⁷), which makes effective monitoring of compliance difficult (Pascouau and Labayle 2011: 100; Peers 2006: 214, 15). The Commission had a negative view of the potential variations and safeguards retained by member states (Commission 2008f, 2011c). Negotiations proved politically costly for all actors involved, with debates reportedly taking place both between member states and also between the Commission and the member states. Agreement was also hard-won on procedural aspects, for example in relation to the deadlines for replying to applications for family reunification and renewal of residence permits. Again, the Commission was of the opinion¹²⁸ that the,

alternative solutions put forward by the delegations had weakened the text to such an extent the objective of harmonising Member States legislations in this field was becoming increasingly distant (Council 2001h: 2)

Some national delegations such as the Netherlands objected to the “*rendez-vous*” clause, a common provision in EU legislation (Council 2002e: 22). Nine years after the Directive’s adoption, member states showed little appetite to modify to their levels of discretion granted during its revision (Commission 2012c: 2).

The Commission's proposals for the Family Reunification, Long-Term Resident, and Free Movement of EU Citizens Directives each contained a provision on sanctions (“Penalties”). This was scrapped in the final text of the first two, but not for the latter. This provision was inserted in many proposals in the early 2000s, but was dropped in response to strong opposition by the Council. While a conspicuous number of member states questioned the appropriateness and legitimacy of such a provision, the Commission argued that this was a traditional element of legislation (Council 2001i). In the context of the Temporary Protection Directive, the French delegation remarked that a solution should be found for this

¹²⁷ For both employed and self-employed Steve Peers, *Eu Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011) at 468..

¹²⁸ Before putting forward the third proposal.

matter as it had already emerged in the context of the Family Reunification Directive (Commission 1999a: 30; Council 2001j: 32). It further considered that this issue was related to the entire Title IV of the Treaty (i.e. horizontal issue).¹²⁹ In other words, the French move was a clear signal that if a decision was made not to include this provision in the final legal text, it should have been applied consistently throughout the legislative acquis (which was developing at the time). This early debate should not be overlooked, as it is revealing of member state appetites for monitoring and sanctioning in this policy area. While negotiating the Family Reunification Directive, Belgium and Germany opposed this provision on the ground that it was vague and appeared only to duplicate EC treaty rules (Council 2001i). In some cases penalties did not seem to refer to member states but rather to individuals who contravened the Directive, the example of marriages of convenience is mentioned in relation to the Family Reunification Directive. However it was suggested later that this could also affect civil servants within national administrations, a point raised by Germany and Austria, who opposed such interpretation (Council 2001l: 25). In response, the Commission argued that this was a vital tool for identifying the extent to which the Directive was being implemented correctly and therefore was essential to its monitoring role.

By September 2001, an agreement seemed to be reached on a sort of horizontal provision to be applied to all legislation. This provision did not envision a requirement that member states notify the Commission of what penalties had been agreed. In other words, penalties were something to be entirely managed within the Council. However, few months later the Commission revisited the issue in a paper aimed at harmonising wordings and definitions across all asylum legislation (Council 2001m: 18-19). This implicitly created a political endorsement of weak monitoring in this body of legislation. The emergence of such protracted debate over a provision that, in the Commission's estimation, was a traditional element in EC policy-making did not constitute a promising start for monitoring and sanctioning elements in the emerging JHA legislation. After the provision was deleted in the Dublin Regulation (Council 2002f: 29), it did not re-emerge in other Council discussions. The justification for its insertion in the case of the Free

¹²⁹ The negotiations on the Asylum Qualification Directive made explicit reference to the Temporary Protection Directive as the template upon which modelling all further provisions. The provision in the Qualification Directive which foresaw the notification to the Commission was deleted in the negotiations Council, 'Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status. St 11844 2001 Init', (Brussels, 2001k) at 42..

Movement Directive seems to have been the broad and varied ties to several Treaty Chapters.

The Researchers Directive 'on a specific procedure for admitting third-country nationals for the purposes of scientific research' set itself the ambitious goal of attracting 700,000 researchers by 2010 (increased to one million by 2020 in 2013) (Commission 2011b: 9). The Directive applies to researchers seeking entry into the EU for more than three months having established a “hosting agreement” with a “research organisation”, be it public or private (Art 2(c)). The procedure leading to admission is noteworthy. In practice once member states have selected the “research institutions”, and if all the conditions are met by the “research organisation” hosting the “researcher”, “Member States are obliged” to release the residence permit and grant admission to the TCN (EP 2013: 3; Peers 2011: 452). Having said that, delegation here is not towards EU bodies - the Commission has little if any powers in this Directive -, but to public and private actors within EU member states.

Turning to measures dealing with administrative cooperation, the EP report on ARGO empathetically described the connection between implementation and credibility of commitments. First, the EP saw one of ARGO's core objectives as the preparation of a more extensive “responsibility-sharing” mechanism, albeit limited to the field of border control (EP 2002a). This confirms the reading of migration funds as devices established to strengthen credibility of commitments aimed at facilitating solidarity among member states. In other words member states voluntarily bound themselves to a solidarity framework, with money being allocated according to collectively chosen criteria. The EP was also keen to stress the importance of the Commission’s involvement,

[u]niformity between the practices of the Member States when applying Community law cannot be obtained by strengthening cooperation and collaboration simply among their national administrations, it also requires the backing of the Commission in its capacity as guardian of the Community's interests (EP 2002a: 8).

There were many more EP amendments which went in the same direction, i.e. emphasising the Commission's role in monitoring, proposing and strengthening Community and national actions (e.g. Amendment 11 to art. 1; Amendment 12 to art. 3; Amendment 33 to art. 10, Amendment 34 to art. 11) (EP 2002a: 11,12, 20). The Council eventually dismissed all of these amendments.

The Commission is granted “financial control” over measures deemed eligible for funding (Art. 11(5)). In concrete terms, this means that each action to be financed is the subject of “grant agreements” between the Commission and the national agencies proposing the actions. The financing decision and contracts arising therefrom are subject to financial control by the Commission and to audits by the Court of Auditors. Although there are no provisions that force suspension or withdrawal of allocated funds as is the case in other migration funds (e.g. European Refugee Funds), the binding contractual form is important as it better facilitates the Commission in performing its controlling tasks. Finally, the Commission may decide to invite “representatives from the candidate countries to information meetings after the ARGO Committee's meetings” (art. 13(5)). This external reach granted to the Commission is not unusual. In the Secure Web-Based Information and Co-ordination Network Decision, the Commission can, under Art. 7, enter into “agreements with bodies governed by public law established under the [EC treaties] or established within the framework of the [EU]”. This also enables the Commission to strike agreements with other EU bodies if deemed appropriate.

6.1.4) Efficiency and effectiveness

It is essential to remember that any talk of labour migration became a sort of political taboo at both national and EU level for a sub-set of member states following the 1973 Oil Crisis. One prominent consequence of the end of labour migration policies at that time¹³⁰ was that the issue of family reunification emerged. Efforts at limiting this channel have fallen short, as family reunification remains one of the main sources of immigration for many European countries. Opposing

¹³⁰ Not all closures of labour migration schemes actually achieved their objectives. According to Hollifield, “the first real attempts by the French government to assert control over immigration (permanent workers, family members, seasonal workers [...]) ended in failure” James F. Hollifield, 'France', in James F. Hollifield, Philip L. Martin, and Pia M. Orrenius (eds.), *Controlling Immigration. A Global Perspective*. (Stanford: Stanford University Press, 2014) at 164.

this policy preference, the Commission pushed for cooperation based on a multi-faceted strategy discussed in the previous section. More broadly, authors have argued that restrictive policies can fail in their intent for a number of reasons. *Inter alia*, in a regional context such as the EU “spatial” or “inter-temporal substitution”¹³¹ occurs when migration is simply diverted to other member states (Czaika and De Haas 2013: 497). Nationally and regionally speaking, different legal orders and policies can induce migrants to access some countries over others (Czaika and De Haas 2013: 497).

As discussed in the previous section, past experience has severely limited policy options when it comes to labour migration. Looking at the latest wave of labour migration, i.e. the fascination with highly skilled migrants, member states employing inducement programmes have enjoyed mixed success (e.g. Germany, UK) (Apap 2001: 9-16; Cerna and Chou 2013; Martin 2014: 238). Germany developed a “Green Card” initiative in the early 2000s that aimed to attract approximately 20,000 IT specialists into the country in response to evidence of labour shortages in that sector. However, this provoked political clashes with the Christian-Democrat opposition of the time (Christina Boswell and Geddes 2011: 88-89). This illustrates that even a category as seemingly non-controversial as highly skilled migrants (Cerna 2013) can become a source of tension in a country where an anti-immigration policy has become a dogma. Aside from Germany’s peculiarities this example clarifies that unlike all other migration categories analysed in this dissertation, no agreement could be reached on legal migration, not even in relation to overarching principles. In irregular migration or asylum and refugee policy, member states did at least agree that illegal immigration had to be stemmed and asylum flows reduced. This is not to say that differences and conflicts were not present. On the contrary conflicts emerged because of divergent policies, such as in the case of large-scale regularisations, or administrative practices leading to different recognition rates. Nonetheless, there was at least an overarching agreement on the direction of policies. That was not the case for legal migration wherein member states were not able to agree, even in principle, on the desirability of labour migration channels.

In a comparative stance, some authors have argued that “France and Germany

¹³¹ Emphasis in the original.

appear to be relatively unattractive for highly educated migrants” mainly because the “unemployment rate of immigrants with a tertiary educational degree” is “enormous in these countries and wages are significantly lower than in the UK and the US” (Geis et al. 2011: 788). It is therefore unsurprising to find that “shares of high-skilled migrants are much higher in the UK and the US than in continental Europe” (Geis et al. 2011: 788). In the case of the Blue Card Directive, the failure of European policies to attract highly skilled migrants was evident for all policy actors. Member states had compelling reasons for changing the direction of policy on this issue as, according to the OECD “foreign-born workers with university or equivalent qualifications make up just 2 per cent of the EU labour market” (Collett 2009). This is less than half the percentage for the United States (4.5 percent), while that figure is about 8 percent for Australia and 10 percent for Canada (Commission 2007b). The Commission demonstrated the extent of European problems in attracting skilled migrants in its proposal, stressing that while the “EU is the main destination for unskilled to medium-skilled workers from the Maghreb (87% of such immigrants)” the majority (54 percent) “of the highly qualified immigrants from these same countries reside in the USA and Canada” (Commission 2007c: 3). According to the Commission, the determinants of this situation are: the 27 different national administrations; difficulties for moving internally within the Union; and, the length and complex administrative procedures (Collier 2013: 149). However, the fact that an argument could be made for an EU scheme aimed at attracting highly skilled migrants fell short of convincing member states to impose a single, common procedure on admission (Zaletel 2006).

As discussed on a number of occasions in this chapter, family reunification has become one of the largest flows of legal migration among European states since labour immigration schemes were blocked in the early 1970s (Christina Boswell and Geddes 2011: 109). Taking this element into account, member states can be divided into two main groups: those states that experienced significant inflows of family reunification throughout their history of migration; and those that have only recently experienced this phenomenon. Looking at individual member states, countries such as Austria, France and the Netherlands, family reunification “currently account for 40 to 60% of all permanent immigration (Kraler and Kofman 2009: 2). Whereas, in countries such as Italy, Spain, and the UK where labour migration is still a strong immigration channel, family reunification accounts for a

lower share of total admissions (albeit still significant, ranging from 31 to 39 percent). A Commission note stated that, in the early 2000s this migration channel constituted “more than 50% of the total legal immigration to the EU” (Commission 2011c). Therefore, if member states are to be taken seriously in their frequent declarations about reducing immigration to Europe, this should be the first area where action is taken (Christina Boswell and Geddes 2011: 104-05). These levels of inflows also reveal the failure of successive reforms of family reunification undertaken with the intent of reducing numbers (Christina Boswell and Geddes 2011: 112; Terry Givens and Luedtke 2003: 291-30). This failure is the result of both national and international law, and jurisprudence on this issue (Guiraudon 2000b; Joppke 1998; Pascouau and Labayle 2011; Ruffer 2011: 941). As a consequence of these legal constraints member states could not block this channel entirely. They therefore seem to have opted to make it more difficult and unpalatable for applicants by introducing stringent criteria for, *inter alia*, integration measures, for example imposing age limits and inspections regarding fraud and abuses (Kraler and Kofman 2009: 4; Kraler 2010: 34-36; Ruffer 2011: 944-48). These restrictive objectives can be seen most clearly in relation to family reunification for TCNs as compared with EU nationals (who are protected by more generous free movement provisions) (Pascouau and Labayle 2011: 5; Ruffer 2011).

During the negotiations on the Family Reunification Directive, the Council was divided on a number of issues. Although made explicit by the Commission, the Council seemed unconvinced of the need for more efficiency and clearer procedures. An example of this can be seen in the various deadlines accompanying the procedures set out in the text. The Council was divided on this, and concern was raised over the prospect of adopting common deadlines in light of different administrative structures present in member states (Council 2000o: 6; 2001n: 10; 2001o; 2001p: 2). On the other hand, relinquishing all deadlines would have meant giving up to any serious effort at harmonisation.

While efficiency gains for legal migration were not clear to all, they were apparent to policy actors in relation to administrative cooperation. A case in point is the Enlargement process, wherein great emphasis was placed on the need for accession countries to establish adequate administrative capacities in border control and irregular migration (Agence Europe 2002m, 2002p). Increased efficiency in administrative cooperation on asylum was already an objective of Commission’s

Communications in the early 2000s (Commission 2000b: 15, 17). The EP linked the adoption of the ARGO programme to efficiency gains in terms of time and administrative resources, suggesting potential improvements in visa procedures as a specific example (Agence Europe 2002j). The Commission judged the adoption of ARGO as “extremely important” (Agence Europe 2002c). Member states were eager to access funding facilitating such administrative cooperation, judging by the fact that the Odysseus programme, the forerunner to ARGO, terminated its financial envelop one year in advance (Commission 2001b: 2). The objective of the Decision on the web-based information and cooperation network was to establish a rapid early warning mechanism concerning irregular migration between member states. The fact that member states have tried to achieve that since the end of the 1990s, but with questionable results, is testament to their quest for more efficient cooperation (Commission 2003a).

To sum up, while member states had mixed success in restricting secondary flows into Europe at the national level, it is not clear how to assess their efforts in labour migration. The only clear policy initiative concerned highly skilled migrants, and these EU policies (particularly the continental ones) failed to attract the category of migrants sought. Turning to administrative cooperation, efficiency gains were actively sought through concrete initiatives and were supported by all EU actors.

Qualitative analysis of delegation in selected measures.

The purpose of ARGO was to strengthen and harmonise administrative practices across the EU. Official documents placed particular emphasis on harmonisation and homogeneous implementation of Community legislation put in place by national administrations (Commission 2001b). Such requests reflected problems of effectiveness in national administrative practices, which the measures promoted through ARGO were intended to address. The fact that administrative cooperation under ARGO-funded projects took on a legally binding status was a step from a soft cooperation policy, based on voluntary participation and good will, to compulsory cooperation inscribed in a legal framework.

As is usual for migration funds, the Commission is tasked with the operational management of ARGO. This is clear from Art. 12(3) point (a) and (b), where the

Commission is required to prepare the “annual work programme” and “evaluate and select the actions proposed by national agencies”. These routine operations took place under the Comitology procedure (respectively, management and advisory). It is possible to interpret the decision to empower the Commission to “evaluate and select” the actions to be financed as a way of overcoming shortcomings of previous EU level action in the light of what has been said above, and given that these elements would normally be classified under operational management. In this light, this was an effectiveness decision. Having said that the limited nature of this decision must not be forgotten, in terms of the actual capabilities it created. ARGO’s funding amounted to €25 million for a 4 year period, surely not a sum that could reshape national administrative practices.

As previously discussed, the Blue Card Directive is the only legislative measure explicitly concerning labour migration to have been adopted in the period analysed. Provisions dealing with labour market access in other legislative measures do not feature any Commission involvement. More profoundly, these provisions are frequently coupled with labour market tests, whereby access for TCNs is conditional upon a number of criteria. Again, delegation fails to materialise in this legislative measure. This casts more than a doubt on the reliability of effectiveness as a determinant for delegation, if due account is taken of the policy failures in attracting highly skilled migrants. The Family Reunification Directive is another example. This Directive represented an opportunity for member states to limit this significant immigration channel, an area where previous national attempts had largely failed. However it does not show any instances of delegation that can be read in terms of effectiveness.

Delegation in the measures stemming from administrative cooperation frequently satisfies the efficiency rationale. One legislative measure that is possible to connect to an effectiveness rationale as well is the Secure Web-Based Information and Co-ordination Network Decision, which quantitatively features high delegation and medium discretion. This result is in line with other legislative measures that establish IT system (e.g. SIS, Eurodac). While rather comprehensive in its reference to migration, the Decision is actually only about irregular migration, as specified in the Preamble (point 1). Both the development and management of the network are under the supervision of the Commission (Preamble, point 2). Art.

2(1) grants the Commission “responsibility for the development and management of the network”. This is easily definable as “operative management”, as Franchino would put it, which positions it as delegation based on efficiency. However, this Decision results from a revision of a previously existing informal network, whose results have been received with mixed responses (Commission 2003b; 2003a: 2). In the words of the EP, the Commission’s proposal was responding,

to the criticism of the existing early-warning system repeatedly voiced by the Member States and the desire for increased and at the same time simplified coordination in the field of irregular immigration (EP 2004a: 9),

In other words, an explicit connection was drawn between previous policy failures and delegation to the Commission, hence it seems appropriate to see this provision as aiming at effectiveness. It was not only a question of saving time and resources, it was also a matter of achieving the stated objectives. Art. 3 empowers the Commission to both establish the terms and procedures surrounding access to the network, and the rules and guidelines for its use. Art. 5(4) provides the Commission with scope to propose the establishment of further security measures regarding access to the network, under the advisory procedure in Comitology. Most of the delegating provisions are about conferring operational tasks to the Commission, or adopting rules and conditions for implementing and using the network. As previously noted, this result is in line with a broader tradition that sees the Commission at the centre of large IT endeavours in this policy area.

The Mutual Information Mechanism Decision confers similar powers on the Commission, where it is responsible for the “development and management of the network”. While this surely represents an instance of operational management, explicit reference is made to previous informal obligations of member states that were considered ineffective. Therefore this delegation can also be considered as based on effectiveness (Commission 2005f: 3). In its impact assessment, the Commission considered the feasibility of adopting a loose informal cooperation mechanism between member states, but rejected it in the light of past experiences of ineffectiveness (Commission 2005i: 4). That said, this viewpoint was contested as a number of member states insisted on keeping the cooperation more informal (including Italy, France, Belgium and the UK) (Council 2006c).

The Commission, the EP and the Council, i.e. all actors involved in the Migration Statistics Regulation, agreed that previous “attempts to harmonise definitions through gentleman agreements with the Member States have repeatedly failed, indicating the need [...] for greater action at Community level” (EP 2007). In its proposal the Commission was unusually explicit on where problems lay, stating that “acting individually, and despite extensive non-legislative attempts by the Commission to improve coordination in this domain”, member states did not “supply to the Commission the harmonised data necessary for comparable Community statistics on migration and asylum” (Commission 2005d: 4). Consequently, this can be understood as a delegation on the basis effectiveness, justified by past failures of soft EU policy regulatory efforts.

The Commission is tasked through the EMN Decision with a number of managerial and efficiency tasks. The EMN is composed of National Contact Points and the Commission. Its activities are guided by a Steering Board, which “should provide political guidance [...] including contributing to the preparation of and approving the EMN's annual programme of activities” (Preamble 11). The Steering Board is composed of one representative from each member state, one from the Commission and two scientific experts. The Commission convenes and chairs its meetings (art. 7(3)). After adopting the EMN's annual programme of activities, the Commission is tasked with monitoring the activities of annual programmes, and must also report to the Steering Board. Based on the projects presented, the Commission must fix the indicative amounts to be made available for individual grants and contracts, and the National Contact Points. It can also enter into agreements with “other entities” in order to collaborate towards the achievement of the objectives of this Decision, subject to the approval of the Steering Board.¹³²

Although this Decision aims at solving problems of uncertainty, delegation seems more closely related to efficiency. In other words, disregarding the general aim of this Decision to tackle problems of information and knowledge, delegation to the Commission is mostly related to managing the network's operation and monitoring its output. In this regard, the EP seemed more favourably disposed to giving to the Commission more authority over harmonising statistics, assessing the

¹³² Until 2012, two of these agreements have entered into force, with Norway and Croatia Commission, 'Report from the Commission to the Council and the European Parliament on the Development of the European Migration Network, Com(2012) 427 Final', (Brussels, 2012a) at 2..

impact of EU legislation, and studying patterns of national implementation (EP 2008a). The majority of these amendments were discarded in the final version (EP 2008a: 11-13) along with the EP's bid for a seat in the Steering Board, which had been supported by the Commission but not the Council (EP 2008a: 25).

6.2. Conclusions

This chapter compounds findings related to two separate migration categories, legal migration and administrative cooperation. Regarding legal migration measures, qualitative analysis confirms the limited amount of delegation and discretion highlighted in Chapter 3. Administrative cooperation on the other hand offers interesting insights into the relationships between dependent and independent variables.

The picture regarding uncertainty is mixed. The analysis of legal migration offered almost no confirmation for the uncertainty rationale, a result consistent with the findings of other empirical chapters (e.g. irregular migration). If exclusive attention is paid to the measures most commented in the academic literature, results are negative. These are all the measures stemming from Art. 63(3)(a) and (4) TEC. While much attention was devoted to abuse of legal migration channels by TCNs, no legislative measures analysed here featured clauses dealing with these issues (not even notification requirements). On the other hand it should be remembered that, the situation concerning statistics and knowledge surrounding legal migration was in far better shape than that of irregular migration policy for example, resulting in a reduced rationale to delegate. Administrative cooperation is however characterised by delegation, which frequently serves informational and communication needs¹³³ but rarely the need for expertise.

Turning to administrative cooperation measures, a qualitative analysis of the Migration Statistics Regulation somewhat confirmed the findings of the quantitative analysis in Chapter 3. This Regulation features delegation in key aspects of information gathering, processing and circulation. The Mutual Information Mechanism Decision also addressed long-standing problems with communication and information sharing among member states (as discussed in

¹³³ H2, section 2.3.

other chapters). Among the five cases analysed in the qualitative chapters of this study, this is no doubt the most definitive correlation between uncertainty and delegation. These examples involved far-reaching provisions dealing with the root causes of uncertainty across migration policy, and represent key test cases because of their primary focus on reducing uncertainty (as distinct from the many other measures that sought to achieve these ends only as secondary objectives). The ARGO Decision also features interesting, if embryonic, attempts to establish channels of communication and to advance knowledge of member states administrative practices.

On the other hand, other important measures offer only limited confirmation of the uncertainty rationale. The stated goal of the EMN Decision was to provide expertise and advance migration knowledge. However it provides only partial confirmation of the uncertainty rationale as much of the delegation here relates to efficiency rather than expertise. In Boswell's estimation the EMN's establishment demonstrates the Commission's entrepreneurship, as it originated through loose cooperation, which was later followed by a proposal to establish an *ad hoc* institution. The Commission's strategy in that case was to involve "national governments in producing studies could help to normalize debate on controversial policy issues, and make them more likely to endorse the findings" (Christina Boswell 2008: 485). However this says little about the purported reliance of member state on the Commission as an expertise provider, something that delegation studies would expect, and much more about the political use of knowledge. Geddes offers an explanation of the EMN as an example of "soft, non-binding governance" (2014: 10), i.e. an alternative to the Community Method. He stresses the networking potential of this body, and highlights the intergovernmental lenses through which policy actors involved view it. This intergovernmental perspective derives from the fact that experts are pooled within these networks by member states. That said, the decision to create a formalised body responded to long-term informational and knowledge needs in this area. The fact that a legislative measure was adopted after other policy efforts had been attempted is testament to the fact that the demand for something more institutionalised was present among these policy-actors. The network analysis Geddes carries out is certainly insightful and helps to interpret policy actors' perspectives, but seems to downplay the fact that these webs emerge upon an institutionalised layer which is formalised through this Decision.

Finally, these instances of delegation tend to confirm only the second hypothesis regarding uncertainty. That is to say delegation mainly relates to information sharing and channels of communication between actors, rather than the provision of expertise. The survey of the literature on delegation in Chapter 2 revealed that authors differed a great deal in their understanding of the Commission's role in reducing uncertainty. Authors such as Hix and Nugent believe that the Commission is an expert actor. Pollack and Franchino hold that while principal-agent approaches would stipulate that delegation occurs because the agent is an expert in a given policy area, empirical studies reveal that the Commission has managerial expertise at best. Moravcsik holds that member state expertise is no match for the thinly staffed Commission, which tends to comply with what a secretariat of an International Organisation would do. This chapter tends to confirm the latter viewpoint, wherein the Commission's overall role is not one of expertise-provider but rather one of facilitator and streamliner of communication and information.

The need to secure member state commitments in the area of legal migration has not led to as much delegation as it did in other migration categories. Many legislative measures show undeniably low levels of delegation and discretion. Nevertheless this observation should be prefaced with an acknowledgement that member states did not commit themselves to tight agreements. This is highlighted in the cautious tone of high-level political communiques and programmatic documents. Other studies have highlighted the limited effects that international organisations such as the OECD and EU have on labour market policies (Armingeon 2007). In the case of the EU, these studies have highlighted that EU initiatives have had some effect at national level but only when the highest national political level was directly involved in policy-making, and policies consequently reflected their preferences. This chapter adds to that body of literature by demonstrating the limited potential of EU policies to make inroads into core elements of state sovereignty where member states do not support such involvement. The most notable exceptions to this story are the various funds that have been included in this area, namely: ARGO; the Development Cooperation Regulation; and, the Integration Fund Decision. As in previous chapters, all three feature a number of provisions aimed at securing member state commitments by delegating powers to the Commission.

Finally turning to efficiency and effectiveness, it is possible to identify a number of provisions delegating operational management to the Commission in the case of administrative cooperation. For instance, this happened for the EMN Regulation, the Development Cooperation Regulation, and ARGO. Always in the area of administrative cooperation, the picture for effectiveness is also more positive than in previous chapter, where explicit links could be traced between previous failures and delegation in, *inter alia*, the Secure Web-Based Information and Co-ordination Network Decision, the Migration Statistics Regulation. However, for what concerns legal migration, the picture is again negative for effectiveness. In an area where failures have been numerous and explicitly acknowledged by policy actors (e.g. labour migration, family reunification), more instances of the Commission's empowerment were expected.

The comparison between these two migration categories further highlights the importance of distance between the policy stance of member states in the Council and that of the Commission. The literature would predict that in cases where multiple principals are split, as with the Family Reunification Directive, agents would be able to exploit the situation and gain the upper hand in terms of delegation or agenda setting (Pollack 1997: 112-13). However delegation literature suggests that, the more divergent the Council and Commission's preferences are, the less delegation to the Commission should be expected (see Chapter 2). The cases of legal migration and asylum policy confirm the difference between the Commission and Council's stances along the liberal / restrictive divide. This is clearly the case for the Family Reunification Directive, where the Commission had to table three different proposals to satisfy the Council's fragmented position. The Commission frequently remarked that the Council's objections had diluted and compromised the integrationist objectives of the original text, thereby favouring a repressive framing (Agence Europe 2000c). The thorny issues for the Students Directive, which saw Commission and member states in opposition, were the possibility of movement within the EU and access to work. These features were deemed essential to attract students into Europe and therefore to reverse the negative trends in the global competition for talent. The Council opposed such moves for a variety of reasons ranging from outright dismissal of any talk on labour migration to fear of abuse of this migration channel.

Regarding shifts away from the Community Method, Caviedes suggests that the OMC in migration policy has been used by the Commission as a tool to enter the new policy field of legal migration (Caviedes 2004). Caviedes argues that the Council's refusal to adopt the Commission's proposal on an OMC in migration policy is not a sign of the unsuitability of the method, but is "a testament to the perceived discursive power of the OMC process" (2004: 306). This is because,

being forced to compare and evaluate immigration policy in an open forum together with civil societal and international actors, whose views on immigration are often quite liberal, involves a risk of losing control over the agenda-setting process (Caviedes 2004: 306).

However, this is doubtful. Member states were highly successful in resisting and avoiding such intrusions from well-organised interests groups in other policy areas, such as occupational health and safety policy (Smismans 2008). A study of delegation proves that member states can limit or virtually exclude the Commission if they so wish, if the ultimate objective of new policy-making methods is to exclude supranational actors (Bickerton et al. 2014). The near complete absence of delegation in legal migration shows this. If the case of integration measures is considered, it is plain that there are simply no secondary legislation measures with that explicit objective, except for the Integration Fund and the two 2000 Directives on discrimination (European Union 2000c, 2000d). Moreover, this occurred despite explicit commitments to TCN integration in the Treaties and in other programmatic documents.

7. Delegation in border and visa legislation

Chapter 3 indicated that the area of border and visa policy features a number of legislative measures with high levels of delegation and discretion. Aggregate levels of delegation and discretion are also the second highest among migration categories.¹³⁴ This chapter seeks to establish why delegation features so prominently in this policy area. In light of the fact, however, that this migration category has such a large amount of legislation attaching to it, it was not possible to examine all the pieces of legislation qualitatively. Instead, it was decided to examine only the most important pieces of legislation and those relevant to delegation.

Competences on borders and visas are defined in the Amsterdam Treaty in Art. 62 TEC. The following issues are dealt with in this rather long and expansive text: (1) absence of internal controls; (2) measures concerning external borders; (2(b)) visas for external borders valid for no more than three months; and (3) freedom to travel within the territory of the member states for no more than three months. Considerations regarding external borders have featured in EC/EU affairs at the very least since the Single Market initiative of the late 1980s (Cassarino 2006; Geddes 2005b; Hobbing 2005; Monar 2001). Migration is not the sole policy concern relating to the notion of borders, a variety of different policy issues ranging from trade to tourism and from criminal activity to transport are also linked thereto. In short, policies centred on borders are not exclusively related to migration, but are enmeshed with a number of other policy considerations.

The importance of borders has also been present in the public consciousness in a historical sense. First, traditional notions of sovereignty rely on borders as the most visible sign of the territoriality of state power. Borders however also have deeper ontological meaning. In the words of Boswell and Geddes, “it is the borders of states that make international migration visible as a distinct social process” (2011: 13). Historically, the concept of sovereignty became entangled with notions of territory, borders and citizenship. Secondly, public opinion is susceptible to

¹³⁴ When implementing measures are excluded from the set.

media portrayals of boats crowded with migrants arriving on European shores (Christina Boswell 2003a: 99; de Haas 2009). Eurobarometer surveys issued in 2004 revealed that 80 percent of all respondents favoured reinforced controls at the gateways to the EU. These figures went as high as 89 percent among Italian respondents, and 81% among German respondents (Jorry 2007: 4).

In line with the structure of the previous chapters, delegation in border and visa affairs is analysed according to the two institutional components of the conflict both within the Council, and between Council and Commission. The impact of three independent variables (uncertainty, credibility of commitments, effectiveness and efficiency) is investigated in three subsequent sections. This is then followed by a brief conclusion summing up the results of this analysis.

7.1. Analysis of the determinants of delegation

7.1.1) Institutional factors: Council internal division, and conflict between Council and Commission

Overall, it seems that the internal divisions within the Council were relatively superficial and that general agreement prevailed. The average length of debate within the Council varied greatly. Debates concerning the 2001 Visa List Regulation, the 2001 SIS II Regulation, the 2004 VIS Regulation, and the 2008 SIS+ to SIS II Regulation took between six and eighteen months to be agreed. Whereas the Schengen Border Code Regulation and the 2006 SIS II Regulation took nearly two years, and the 2008 VIS Regulation took more than three. It must be said though, the duration of negotiations appears more justified when the complexity and length of the latter two legal texts is taken into account. Debates concerning these legal texts also varied in intensity. No significant division emerged for the 2004 VIS Regulation, whereas a number of technical issues were raised during negotiations surrounding the Visa List Regulation. These included visa requirements for stateless persons and refugees, which proved a contentious point between the Council and the Commission (Council 2000p, 2000q). Intense debates surrounded a number of political and technical issues on the 2008 VIS Regulation; the need to reconciliation in the Council's fragmented relationship with the EP also arose here (Council 2006a, 2006b).

Overall, the analysis of official documents and press coverage reveals that the Commission's preferences were broadly in line with that of the Council. The emphasis was on more control and wider use of IT in the performance of tasks related to borders and visas. That said there were some points of contention. These were mainly related to the border guard initiative, which began to emerge in the early 2000s and was opposed by some member states. The EP report also revealed the contentious nature of Frontex (EP 2004b: 12). Ultimately though, the establishment of this agency and the fact that the final legal text bore striking resemblance to the original proposal highlights that convergence was possible. In addition, only about two weeks separated the Commission's proposal from the Council Conclusions approving the agency, signalling that substantial agreement had already been achieved by the time the proposal was published (EP 2004b: 29). That said the Commission saw reinstatement of border controls as an important measure (in continuity with the long-standing protection of the Single Market), while member states tended to favour a more flexible use of this option (Financial Times 2011a). Where visas were concerned, much of the debate surrounded technical features of documents and consular cooperation. In this respect, Commission and Council were not far apart. There was nevertheless some specific areas of contention. These included, *inter alia*, Comitology rules for the VIS (Council 2004b), and proposals for visa requirements for refugees from countries not subject to visa requirements. The latter was resisted by the Commission but endorsed by the Council (Council 2000y). The Council and the Commission did however display similar views on many aspects of the broader topic concerning the massive use of IT in border controls (SIS II) and visas (VIS) (Commission 2004a: 9). However, there has been growing dissatisfaction in the Council concerning the Commission's handling of these undertakings.

7.1.2) Uncertainty

Following the format set out in previous chapters, two questions guide this section: Were there any acknowledged needs for information and expertise among policy actors? And, if yes, what was the Commission's role in answering to these needs? When Amsterdam entered into force, member states had long established their need

for better and more reliable information. At the EU level, lack of information and knowledge in border and visa issues was addressed through the establishment of extensive IT systems. The SIS, the first and best known, had been up and running since 1995. The Union IT toolbox was expanded to incorporate visa information (VIS), as well as information on cognate areas such as asylum and irregular migration (EURODAC). In relation to the second research question, member states assigned responsibility for the operational management of these costly, long-term and complex undertakings to the Commission. Moreover, they considered the Commission (and other EU agencies also) as a hub for information and knowledge sharing. Ironically, this trend is corroborated through the body of academic articles that highlight lack of accountability in these initiatives and the potential threat to civil liberties. Simply put, these warnings imply that something substantial happened in this policy area (Balzacq 2008; Bigo et al. 2012; Wolff 2008: 263-66).

When the new agency with responsibility for IT systems in migration, eu-LISA, started its work in December 2012, it was responsible for managing three databases: SIS II; VIS; and, EURODAC. The vast presence of IT systems points to the importance that collecting data and having better and more reliable information on border issues has acquired since cooperation on those matters began in the EU. Papagianni reports that measures were put in place for the exchange of statistical data on visa applications as early as 1994, or on “possible malfunctions at the external borders” since the Schengen initiative (2006: 116, 17). These measures were amplified in the wake of the September 11 attacks in the US, after which member states reportedly requested that the Commission “set up an information exchange network on visas issued” (European Report 2001c). A strong concentration on visa policy persisted several months after this as is evident in a Commission Communication on irregular migration (Commission 2001d). The Commission considered improved knowledge and communication on visas instrumental to increased understanding of irregular migration and improved prospects of its reduction. Its plan was to establish an information exchange system on visas issued by member states, common visa centres, and the network of liaison officers in national representations abroad (EUObserver.com 2003c; European Report 2003a).¹³⁵ Member states welcomed these IT measures. One of the evidence

¹³⁵ See also Chapter 5.

is that while the UK has decided not to engage in much of the collaboration on borders and visas, it did opt into SIS alongside non-EU countries such as Iceland, Norway and Switzerland. New functionalities proposed to be included in the revised SIS II, such as biometric information, were debated at length by the Council (Council 2000{, 2006d). At the insistence of some member states (e.g. Germany), the new system was required to collect such data (EUObserver.com 2003b, 2003a; Mitsilegas 2007: 388; Parkin 2011: 11). That said the early phases of Schengen cooperation on information sharing were not always straightforward. Information from member states was apparently not always forthcoming, which created problems in assessing the effectiveness of the Convention (European Report 1999c). A Commission staff working paper from the early 2000s noted that, on top of the lack of relevant debate concerning statistics on legal migration within CIREFI (see previous chapters), in order to “complete the picture of third country nationals’ flows to the EU” data on “short term visas [and] multiple Schengen visas etc.” would be needed (Commission 2001e).

The quest for more in the way of automated, smart, computerised borders has been relentlessly pursued in the EU, this is in line with international trends (Papademetriou 2011: 3, 4). The goal of the wide-spread adoption of IT systems in managing borders is to “preclear’ legitimate travellers and instead target likely threats and passengers about whom nothing or very little is known”, “all done as far away from the physical border as possible” (Papademetriou 2011). The link between border control and irregular migration is therefore strong. The underlying idea is that “active surveillance and exclusion of irregular migrants by the state depends heavily on information and knowledge production” (Broeders 2007: 72). Moving controls away from physical borders to more abstract locations and, crucially, as far away from the states’ territories as possible, echoes some of the key concepts developed in migration policy in the 1990s and early 2000s – particularly the idea of ‘remote control’ policies (Guiraudon 2000a). However, commentators have rightly pointed out that a visa is already a form of “remote control”, which somewhat dilutes claims that this is a novel policy development (Mau et al. 2015: 3).

Problems experienced in this policy area related to: the accuracy of information gathered; compatibility of the various national systems with one

another; the interoperability of various databases and software; the gap between national and European systems; and, the sheer size of the database. In terms of the latter, it was calculated that, once completed and operational, VIS was to be among “the largest biometric databases in the world” (Brady 2012: 29-30). There is also an important sociological dimension to the extensive creation and use of IT systems. If these developments in the “digitisation” of borders signify the need for better and more effective control, these measures confirm to all actors – from would-be migrants to business travellers, from citizens to those of other statuses – that something is being done to control the movement of people (Broeders and Hampshire 2013). In the context of a deep politicisation of migration across Europe,

significant pressure [has been put] on governments to act and, crucially, to be seen to be acting to 'better manage' their borders. The adoption of high-tech border controls can be understood in terms of their instrumental and symbolic value for governments eager to persuade electorates that they have immigration 'under control' (Broeders and Hampshire 2013: 2, 3, 6).

That being said, the symbolic value should not downplay the efficiency aspects of these IT systems in providing for the policy needs of member states. A similar interpretation has been applied to the practice of reinstating internal border controls (Groenendijk 2004).¹³⁶

With regards to migration, the SIS stores information about “persons to be refused entry to the Schengen area as unwanted aliens”, and also “identity papers” (Broeders 2007: 79). SIS facilitates the detection and refusal at borders of “unwanted aliens”, and it enables law enforcement authorities to check the identity of persons already present in the territory (Broeders 2007: 80). The EP report on the switch from SIS1+ to SIS II states that in December 2007 this was the “largest common European data base, with a total data volume [...] of 22,450,781, from which 1,142,988 is related to persons” (EP 2008b: 7)(EP 2008a, 7)(EP 2008a, 7)(EP 2008a, 7). Of those individuals, the largest category concerns irregular migration. In cases where national law enforcement agencies need more information than is

¹³⁶ See next section on credibility.

available on SIS, they may refer to the “SIRENE network of national contact points” (Parkin 2011: 4).

Risk analyses conducted by Frontex are a further initiative aimed at gathering information and expertise on this policy area. They are intended to provide uniform and standardised information and knowledge to all EU actors.¹³⁷ However, an ICMPD study on the status of information exchange in this area found that, in relation to the two main activities of information gathering and exchange “FRONTEX access to intelligence information is narrow since the Agency possesses limited admittance to gather and analyse personal data” (ICMPD 2010: 61). In addition, “personal data is communicated via existing channels (mainly via EUROPOL) during joint operations” (ICMPD 2010: 61). The same study stated that “only a few [member states] are main sources of data input to EUROPOL’s and INTERPOL’s databases” (ICMPD 2010: 9). Another study reached similar conclusions in 2004, stating “the poor quality of information sent to Europol is testimony to the lack of trust” among law enforcement authorities (Agence Europe 2004c)(2004a). In other words, although these bodies were established to provide enhanced services to member states, member states were reluctant to share information between one another and through these bodies. This was a self-defeating move as was observed in the aforementioned ICMPD study, which stated that the “apparent lack of pro-active provision of information” by member states was “worrying” and it put into questions the quality of these databases “as, naturally, [these] are only as good as their input” (ICMPD 2010: 110).

This drive towards better and more reliable data however did not end there. The borders package proposed by the Commission in 2008 recommended the establishment of an “entry/exit system” that would, *inter alia*, determine the number of visa over-stayers present in the EU at any given time (Commission 2008c, 2013a; Geyer et al. 2008; Peers 2011: 197-99). According to a number of estimates, visa over-stayers represent the largest category of irregular migrants in the EU, and the entry-exit system is the last undertaking aimed at better knowledge and understanding of migration issues. It demonstrates the need for more and reliable statistics, a long-standing issue in EU affairs (Geyer et al. 2008: 3). And its

¹³⁷ More on this below.

positioning as an information-focused initiative is reinforced by the fact that it would have little effect in terms of real reduction of irregular migration. That is, counting and registering over-stayers does not equate to locating, finding, and expelling them.

The Commission has also been supportive of the interoperability of databases in the Area of Freedom, Security and Justice, and issued a Communication to that effect in 2005 (Commission 2005e). According to Mitsilegas, this was an important step towards the further centralisation of powers in the Commission in the area of JHA (Mitsilegas 2007). The potential for such interoperability has been called into question by a number of actors ranging from commentators to policy actors (Hobolth 2013: 425-26; Mitsilegas 2007: 391-94; Parkin 2011). These criticisms centred mainly on issues of privacy of personal data, access to data, and the principle of purpose limitation (Financial Times 2000b; The Guardian 2000b). The fact that Commission and member states have been successful in seeking such changes in relation to such a delicate matter seems to be the result of their having portrayed interoperability as a merely technical matter (Commission 2005e; European Report 2005a). A recent example of the awareness that surrounds this sort of information and data sharing is the Commission' Communication entitled *Overview of information management in the area of freedom, security and justice* (Commission 2010c). This Communication dealt, *inter alia*, with thorny issues such as access to personal data, purpose limitation and fundamental rights. And its main purpose was to dispel doubts and concerns expressed by civil society and academia concerning the extent of data collection and storage in this undertaking (Besters and Brom 2010; Geyer et al. 2008). This is not the only negative consequence of the move towards the digitisation of borders. Significant delays and repeated failures in effecting the shift towards IT systems has created difficulties at the institutional level. The Commission's reputation has suffered in the eyes of several member states, particularly following its management of the SIS II (see below) (Europolitics 2009).

To sum up, the number, size and continued presence of these databases provides evidence of the quest for more and better information in this policy area. The Commission has been its centre and the timeline of SIS proves that these efforts at reducing uncertainty predate the period considered in this dissertation. Similar to

findings in relation to legal and asylum policies, European cooperation on these issues rested on a foundation of national expertise.

Qualitative analysis of delegation in selected measures.

The Visa List Regulation requires the Commission's involvement in all inter-member state communications relating to changes in the two lists annexed to the legal text. It was, for example, incumbent upon the Commission to prepare a report on the action the Romanian government was willing to take with regard to irregular migration. On the basis of these policy pledges, the Regulation requires the Commission to report back to the Council and make "any useful recommendations" (Art. 8). This therefore implies that the Commission is intended to make use of the expertise it accumulated as negotiator of the Enlargement process (Sedelmeier 2010).

Although the Commission stated that its proposal for the Visa Information System (VIS) Decision did not seek to specify the content of the VIS and solely sought to secure funds, its actual legislative proposal went into much more detail. It referred to European Council documents where the importance of collecting, disseminating and efficiently utilising information was emphasised. In this respect, the VIS was, *inter alia*, likely to: "contribute to the improvement of consular cooperation and to the exchange of information between central consular authorities"; "contribute to the prevention of "visa shopping"; and, "facilitate application of the Dublin Convention determining the State responsible for examining applications for asylum". These elements highlight how information – and its circulation among member states – was deemed important in the context of creating the VIS (Commission 2004h: 3). That said the Decision features no delegation that can be linked to this issue of uncertainty. It does not empower the Commission to specify the type of data gathered, how it is accessed nor how it is disseminated. And the Commission recognised it could not add further details on these matters to its proposal as, at the time, there was no "political orientation by the Council on basic elements of the VIS" (Commission 2004h: 4). A similar situation arose with the VIS and Short Term Visa Regulation (European Council 2008). These Regulations set out the rules for gathering statistics on short-term

visas but the Commission is excluded from this initiative (art. 17).

Both expertise and information asymmetry are tackled in the Frontex Regulation. Frontex is tasked with risk analysis (Art. 4) and, to that end, designs the templates for analysis and carries out “general” and “tailored” assessments. It must also incorporate a risk analysis model into the common core curriculum for border guards. A number of scholars have observed that this is perhaps one of the most important tasks assigned to Frontex (Neal 2009; Pollak and Slominski 2009). For Neal in particular, risk is the “predominant conceptual language in the rationale, documentation and practices of Frontex” (2009: 334). And the model of risk analysis is described as,

bifurcated in that it is directed at both the (potential) movement of people and capacities and weaknesses of Member State border systems (Neal 2009: 348).

For instance, when this body reports its findings to the Council it is likely to trigger naming and shaming practices due to the assessment of member states' borders practices. Moreover, this information is also taken account by the Commission when determining the allocation of financial support under the European Borders Fund.

Frontex is empowered to “take all necessary measures to facilitate the exchange of information relevant for its tasks with the Commission and the Member States” (Art. 11). The Regulation also stipulates that the Agency “should follow up on the developments in scientific research”, as well as “disseminate this information to the Commission and to the Member States” (Recital 8). Article 7 also states that Frontex should “set up and keep centralised records of technical equipment for control and surveillance of external borders” present in the member states. As Jorry points out, this could be the basis for a first-ever database on member states' capabilities with regards to border control (Jorry 2007: 24). Frontex exchanges information and cooperates with other bodies dealing peripherally with borders and migration (e.g. Europol). Data exchange with these bodies on operational matters have reportedly been established and functioning properly (Jorry 2007: 17).

In sum, Frontex's risk analyses have become a source of information and forecasting for member states, highlighting the expert role of the Agency. Expertise

is also present in the research and design function carried out by the Agency, as well as its contributions towards the common curriculum. Finally, Frontex also engages in information sharing such as through the centralised record of equipment, data exchanges with other EU bodies, and between EU bodies and member states.

In the first complete consolidation of the rules on crossing borders since Schengen ('the Schengen Borders Code Regulation'), the only provisions concerning information on border crossing are Art. 13(5) (refusals of entry) and Art. 8(4)) (relaxation of border checks). These clauses directly affect the reduction of uncertainty regarding irregular migration flows (as people refused at borders are used to produce estimates of irregular migration flows), and the credibility of commitments to securing external borders (as any relaxation of border controls must be justified by "exceptional and unforeseen circumstances"). The Commission is solely a recipient of information on these matters, as the articles in question spell out what detailed information member states must submit. Although the Commission is at the centre of all member states notifications and reports (as Art. 34 attests), such clauses nonetheless fall short of the criteria for delegation. While it is true that the Commission can act on a member state's failure to notify, unlike the Migration Statistics Regulation¹³⁸, the Commission is not empowered to modify the sort of information member states submit (unless it is proposed through further legislation).

Similar to the Schengen Borders Code Regulation, the Commission is at the centre of the member states' notification requirements in the Visa Code. The Commission works as a central information hub (Art. 3(2), Art. 8(7)(8), Art. 22(3)(4), Art. 31(2)(3), Art. 33(5), Art. 40(5))¹³⁹ and is required to draw up regular reports concerning local Schengen cooperation (art. 48(4)). Interestingly, it may in turn delegate compilation of these reports to the member states concerned (art. 48(5)). According to the Commission, the EU lacked a channel for exchanging "useful and comparative data on the number of visas issued and refused" (Commission 2006a: 7). And to resolve this issue it proposed that member states submit regular updates to it on these statistics. It is also important to note that, under the regulatory procedure with scrutiny, the Commission was entrusted with

¹³⁸ See Chapter 6.

¹³⁹ Article 53 summarises these notification requirements.

amending “non-essential elements” of the Annexes (art. 50), including Annex III dealing with statistics. The fact that member states chose the strictest form of Comitology to constrain amendments to non-essential aspects of what were considered technical matters should come as no surprise. As the Commission pointed out, member states had not previously collaborated on this issue despite the prior adoption of legislative measures under Maastricht. Within the Regulation, rules on the “exchange of supplementary information” among member states have to be adopted under Comitology.

A number of “new technical features and functionalities” have been introduced with SIS II, “including new categories for alerts, the storage of biometric data (photos and fingerprints) and the interlinking of alerts” (Parkin 2011: 7). On the other hand, these innovations were not without their problems. As a number of commentators argued, the massive injection of biometrical data into IT systems that allowed for interconnectivity within and between systems and allowed for a number of possible uses and users, ran the risk of contravening the principle of purpose limitation of personal data (Parkin 2011: 28). In addition, the intertwining of data within databases serving different purposes could facilitate discriminatory practices on the part of law enforcement agents and agencies, thereby breaching the non-discriminatory principle of EU law. In the wake of 9/11, EU member states decided that greater access should be conceded to a number of additional actors, *in primis* to Europol and Eurojust. This further illustrates a move towards greater inclusion of EU actors to use the same information for a variety of purposes ranging from immigration to legal prosecution (Parkin 2011: 10).

Similar to what has already been noted with respect to the other Funds, the Border Fund Decision establishes an important role for the Commission in vetting the “quality, comparability, and completeness of the statistical information” (art. 14(10), third indent and fifth). If the Commission finds such information is not up to standard, it can request that a member state supply it with further information. Frontex can also make a similar request (Art. 15(2)). This happens in the context of the risk analyses carried out by the Agency, which form the basis of the “annual distribution of resources”. In other words, the Commission's monitoring and scrutiny applies to a rather sensitive area as these figures form the basis on which money from the Fund is allocated. This indicates that this delegation provision,

while also solving issues surrounding uncertainty, answers to credibility rationales inasmuch the Commission ensures the reliability of information upon which disbursements are made. In other words, while it is true that statistical and informational issues are resolved by delegation to the Commission, this is a by-product of action taken towards the ultimate goal of alleviating costs and burdens placed on individual member states due to a number of factors (see next section for a full list).

7.1.3) Credibility of commitments

In line with the corresponding sections of previous chapters, this focuses on previous crises of confidence among member states and on the disproportionate burdens imposed on individual member states (or sub-sets thereof). At the Tampere European Council, border policy was linked first and foremost to irregular migration (European Council 1999: 3). This enhanced cooperation between authorities, brought about “exchange programmes and technology transfers”, and introduced a geographical focus by emphasising “maritime borders” (European Council 1999: 24). When compared with legal migration for example, member states specified where they wanted policies to go in more detail, thereby signalling a higher degree of interest. Member states also committed to a “common active policy” on visas, albeit that the meaning of ‘active’ was not entirely clear. This policy incorporated “false documents” and had an immediate effect on efficiency by introducing “closer co-operation between EU consulates in third countries” and “common EU visa issuing offices” (European Council 1999: 22). Overall, this provides a sense of clear commitments by member states and a concrete idea of where policies were to go. The idea of “Integrated Border Management” was also reasserted at the highest political level through the draft Constitutional Treaty. That idea was a *fil rouge* that can be traced through the ten years of cooperation in this area (Commission 2004a: 9). In its revision of the multiannual programmes of the AFSJ area, the European Council praised the creation of Frontex and emphasised the importance of the “Plan for the Management of the Maritime Borders” in addition to SIS and VIS, albeit that the latter two were listed under the “fight against terrorism” (European Council 2004: 2, 3). Member state commitments to building up external frontiers are also highlighted by the repeatedly high budgetary

allocations agreed in order to acquire tools necessary for managing those borders (see sections below on SIS developments).

As the spotlight switched to border controls and their effectiveness in the late 1980s, discourses concerning shared responsibilities and solidarity among member states emerged (Hobbing 2005: 1). Abolishing internal borders meant member states occupying internal geographical locations became reliant on the border control implementation practices of other member states. This clarifies the extent to which mutual commitments and trust were necessary in this area from a very early point (Jorry 2007: 4). For instance, Italian Prime Minister Massimo D'Alema justified his requests for European support in establishing readmission agreements with other countries (considered easier to obtain in a collective fashion) by stressing that Italy was one of the countries "most exposed, to both East and South" (Agence Europe 1998b).¹⁴⁰

Member states have however long held doubts over the effectiveness of other countries' border controls. In the late 1990s, German Interior Minister Manfred Kanther criticised the quality of Greece and Italy's border controls in the aftermath of the Kurdish asylum crisis noting that "[t]he situation in southern Europe is not what we might expect" (Agence France Presse 1998a, 1998e; Financial Times 1998a). That said, German law enforcement agencies were reportedly aware that inflows of Kurds clearly did not originate directly with Italy, but also involved other EU countries (mainly France) (The Guardian 1998a). In the context of an election looming the following year, Germany's highest ranking politicians called for "much tougher Italian action to stop the flow of illegal immigrants from Turkey" (Agence France Presse 1998a; The Guardian 1998b). And while Italian Prime Minister Romano Prodi maintained that Italy welcomed refugees, a position endorsed by the President of the Republic Scalfaro, the Austrian Interior Minister reportedly accused Italy of getting rid of refugees by sending them to other EU countries (Agence France Presse 1998d). The same Minister, together with the Austrian Foreign Minister, went on to assert that all participants of the Schengen Agreement should have ensured that the rules were respected (European Report 1998c). In other words, in the space of a few weeks the credibility of commitments to common external border control was called into question (Agence France Presse 1998c).¹⁴¹

¹⁴⁰ In such requests, the Spanish Prime Minister Aznar supported him.

¹⁴¹ For a more recent episode, see the debates surrounding Greece conduct as a Schengen member

These examples are intended to illustrate how intensely politicised the issue of borders is (Financial Times 1998b), which makes unrealistic any hope of resolving it through purely economic or material means. Referring to the 2004 Enlargement, Pastore reports that Italian border control authorities were at high alert when, following a number of years spent at the forefront of Europe's gatekeeping efforts, they had to cede a portion of their Eastern front responsibilities to the Slovenian (Pastore 2002: 2-3).¹⁴² Similar concerns were voiced by German authorities prior to the 2004 Enlargement to the east (Green 2001: 100). Indeed, growing fears concerning the acceding states gripped the general public and authorities during this time (Bade 2004: 359-60). A fear of "exposure" first arose after the fall of the Iron Curtain, with the German Federal Border Guard emphasising its fear of "the exposure of German eastern and southern borders to illegal immigration" (Monar 2003: 310-13). Interestingly, Monar notes that "successive German governments" have considered a European solution to these concerns logical (2003: 310-13).

The symbolic value of borders is also indicated in the reinstatement of EU border controls. According to this 'emergency brake present in the Schengen Convention, any member state may reintroduce controls at its borders "where public policy or national security so require[s]" (Hobbing 2005: 11). This option strengthens credibility of commitments inasmuch as it offers member states some temporary leeway when facing emergency situations, thus avoiding any legal straightjacket whose respect might be regarded as unrealistic in such events. In other words, the commitment to a policy does not equal the absence of some flexibility in the rules. Perhaps even more importantly, this clause allows governments to reassure citizens (Groenendijk 2004). Its not so infrequent use suggests that member states tolerate a moderate use of this tool as it is primarily considered a response to domestic factors, thus no member state is willing to contest the rationale for any given reinstatement. This idea of a silent consensus is reinforced by Groenendijk's finding that, of all 33 cases of reinstatement only once did one member state (Germany) request clarification from another as to why it was re-introducing the internal borders.

Financial Times, 'Eu Plans to Exclude Wayward Schengen Nations', *Financial Times* (2011b).

¹⁴² The image of alliances between Mediterranean countries in these matters – at times suggested by commentators – can be misleading. Italy apparently rushed to criticise Greece for failing to control its border when boats of irregular migrants started to land on the Calabrian coast Agence Europe, 'Greece and Turkey React Strongly to Italy's Accusations', *Agence Europe* (7770, 2000a)..

Integrated border management (IBM) is an all-pervasive notion in EU affairs that emerged at the Laeken European Council in 2001 as a policy response to EU border control problems. As a practical example of what a “European management concept on border control” might entail, the Belgian Council Presidency suggested a “European Border Police” (Council 2001e). The Commission insisted and expanded the idea in its 2002 Communication on integrated border management (Commission 2002e). However, implementation of such a mechanism has proven difficult in the EU context owing to the “particular territorial situation with a fragmented borderline and patchwork structure of legal systems” (Hobbing 2005: 2).

Another element worth considering is that EU borders have continually shifted due to the Enlargement process. Following the 2007 Enlargement only 11 member states were left with land borders to patrol amounting to 7,958 km¹⁴³ (House of Lords 2008: 14). This has meant that, while some member states had to rely on other member states for border control, other member states felt an increased pressure to patrol *de facto* common borders (Hobbing 2005: 5). There are also wide disparities in the length of borders to be patrolled. While Slovakia and Hungary are, for example, responsible for patrolling less than 150 km, Finland, Romania, and Poland have more than 1,000 km to cover. It must also be noted that land borders represent only a fraction of the EU’s 80,000 km coastline (House of Lords 2008: 17-18; Jorry 2007: 5). Moreover, there are “over 280 international airports” in the EU (Brady 2012: 6). Their importance as international borders was stressed by Spanish Interior Minister Rajoy in highlighting that airports are the main points of entry for irregular migration (The Independent 2002). In 2008, 1,792 Border Crossing Points were regulated under Schengen rules, 43 percent of which belonged to only four countries: 250 in Germany, 158 in Italy, 171 in Denmark, 193 in France (in a Schengen-27) (Commission 2008b: 96-97). The Commission observed that some of the countries under stress because of control duties had per capita GDPs that were lower than average (Commission 2005b: 6). This point was also taken up by individual member states. For instance, French President Sarkozy declared that,

¹⁴³ This does not include Spain with its enclaves.

A number of partners, which are not the richest countries, constitute the borders of Europe and do not have the resources to protect the borders of Europe. We must help them, there are no two ways about it (Agence Europe 2009c).

Following the 2007 enlargement, all but two¹⁴⁴ states with external land borders featured GDP per capita rates ranging between 37 percent and 62 percent of the EU27 average (Eurostat 2015b). Furthermore, borders are not solely used by migrants but are subject to a number of other dynamics. For instance, according to the World Tourism Organisation the “total number of international arrivals worldwide [rose] from 687 million in 2000 to 940 million in 2010” (Brady 2012: 7). London Heathrow processed an “average of 190,000 persons per day in 2011” (Broeders and Hampshire 2013: 5). Thus it is clear that the physical distribution of borders makes for an uneven picture in Europe.

Turning to visas, statistics on Schengen visas¹⁴⁵ issued by member states indicate that the numbers are high but localised. While in 2009 approximately 10.261 million visas were sought, 2010 saw this number increase to approximately 11.812 (a more than 15 per cent year on year increase) (Commission). In 2012 five states received more than 60 percent of all applications, they were France, Germany, Spain, Italy and Finland (Commission 2013b). According to the Commission, 10 out of the 23 Schengen member states (Ireland and UK are excluded as non-Schengen members) had over 100 consulates around the world (Commission 2005b: 56).¹⁴⁶ The practice of granting visas varied among member states too, but numbers remained high in all cases. Germany issued visas in respect of 87 percent of applications, Spain 90.6 percent, France 81.6 percent, Italy 100 percent, and Sweden 83.7 percent. Visa processing, while little analysed, should be more carefully scrutinised for its effect on irregular migration given that the overwhelming majority of irregularly present TCNs appear to be visa over-stayers (Finotelli 2009; Finotelli and Sciortino 2013; Giuseppe Sciortino 2014).

¹⁴⁴ If Switzerland, Spain and Cyprus are excluded, only Greece and Finland had per capita GDP of more than 63 percent of EU 27 average.

¹⁴⁵ Type C, valid for less than 3 months.

¹⁴⁶ Inexplicably, there was no reference date for these figures. The only clarification added was that “The figures for visa applications are based on administrative data for a given year. They have been rounded” Commission, 'Commission Staff Working Document. General Programme Solidarity and Management of Migration Flows. Annex. Extended Impact Assessment.', (Brussels: European Commission, 2005b) at 56..

As an indication of the cost of border controls in Europe, the Commission revealed in its pre-enlargement preparation document for the Thessaloniki European Council that the amount spent at the time by individual member states was approximately €3 billion per annum (Aus 2008: 112; Commission 2003c: 18). Brady reports that the UK's annual budget for its Border Agency is also around €3 billion (Brady 2012: 27). That said a French-commissioned study on borders which was presented at the 2003 Justice and Home Affairs meeting in Rome stated a "big hole in terms of knowledge" was cost, and that there was "no comprehensive accounting system for sea border controls" (European Report 2003c). Referring to uneven costs affecting member states because of border controls, Commission President Prodi is reported to have stated that,

some EU countries are responsible for the internal security of the Union and it is necessary, in the future, that the financial and operational burden be shared by all EU states (EUObserver.com 2002a).

To remedy to this issue, the Commission President proposed the introduction of "common border guards". From a win-win perspective, while simultaneously achieving buy-in among reluctant member states, this would perhaps also have allowed sceptical member states to scrutinise the quality of border controls across the Union.¹⁴⁷ Indeed an Italian-led feasibility study on the possibility of joint operations at the borders garnered positive attention when presented to the Council. This signalled an early interest in the possibility of both pooling personnel and other resources, and of agreement on common objectives and practices (Agence Europe 2001b). Mitsilegas seems to concur with this argument as he suggests that Frontex has been the policy response to lingering scepticism among the 'old' member states concerning the capacity of accession states to cope with tight border rules such as those demanded in the Schengen *acquis* (entered into EU legislation with

¹⁴⁷ Commissioner Vitorino was of a similar opinion Agence Europe, 'Eu/Immigration: Commission Recommends Setting up European Border Guard Corps, in Framework of Common Internal Border Management Policy', *Agence Europe* (8206, 2002o), Agence Europe, 'Eu/Borders/Immigration', *Agence Europe* (8390, 2003c), Euobserver.Com, 'Eu Ministers Meet in Rome to Discuss Border Police Eu', *EUObserver.com* (2002b).. The issue re-emerged years later, in similar terms Financial Times, 'All Eu Countries 'Should Bear Border Control Costs'', *Financial Times* (2004)..

Amsterdam) (Mitsilegas 2007: 361). For Hobbing, solidarity is interpreted differently by certain sets of EU states. In his estimation, “old” member states consider that financial solidarity should be attached to operational involvement by all participating member states. Obviously this serves the purpose of reassuring all member states that controls and management procedures are appropriate and up to standard. On the other hand, “new” member states view such requests as overtly intrusive and oppose the operational presence of foreign staff in their territories (Hobbing 2005: 8).

A note of caution is however warranted at this point. A simple quantitative approach showing how much is spent on border controls, or what percentage of external borders are now covered by a handful of states, could mask the qualitative leap that happened with Schengen and the process of shifting borders. The result of the Enlargement process and of expanding participation in Schengen has been that some states have seen their external borders disappear while others have seen their borders switch from being national borders to Schengen borders. Thus when confronted with issues on their borders, this latter group of member states cannot think of them as internal affairs but must immediately see them as EU and Schengen related issues (Carrera et al. 2011: 3).

This section has demonstrated the extent to which member states were subject to different risks in relation to physical borders, and how these borders have been in constant flux. It has also highlighted the different levels of visas applications across European states. Crises were far from unheard of in this area, with member states frequently criticising one another for weak or wanting controls. Indeed this highlights the conceptual shift in European thinking on borders, which, at least to some degree, has lost its exclusively national focus and has come to symbolise something of a common issue. The limits of this shift are however illustrated by the persistence of the practice of reinstating internal border controls.

Qualitative analysis of delegation in selected measures.

Most of the delegation identified in these policy areas is connected with agenda setting. The 2001 Schengen Information System Regulation (SIS II) required that the Commission develop the system (Art. 2). This Regulation conferred

implementing powers on the Commission (Art. 5) as expressed under Art. 3 and 4 (respectively, under management and regulatory procedure). And through it the Commission acquired important agenda setting powers in a realm that had to that point been intergovernmental in nature. The context within which this occurred was information-rich in that, the Commission had the first SIS model from which work, the Council indicated a number of new functionalities that were required to be inserted, and it also suggested how the new infrastructure should work (Council 2001a). In sum, the Commission's action was guided by past and present Council initiatives. These two bodies added a joint declaration to the Council minutes specifying what the object of Comitology decisions would be and what new legislative measures were to be adopted (Council 2001c: Annex III). The Commission however argued that the regulatory procedure did “not comply with the criteria regarding choice of procedural methods established [, reserved] all its rights under the Treaty”, basically threatening to take legal action (Council 2001d). Yet it was not only left with the task of developing and managing the new system (see section below on efficiency), but also undertook an important role in designing these features (at least nominally). This example of delegation shows how member states may have seen the Commission as the proposer of politically risky (security and personal data protections arrangements; Art. 4(b) and (d)) or potentially costly policy solutions (which may have caused some member states to drag their feet, even where the entire project was financed by Community money) (Art. 4(c)).

The Visa¹⁴⁸ List Regulation was an important step towards the completion of harmonisation in visa policy. The EP's stance on the subject was that the “text proposed by the Commission sets out to achieve total harmonisation” in this area (EP 2000c). An important provision that delegated powers to the Commission is Art. 8(2). This authorises the Commission to enter into talks with a third country (Romania) on topics such as illegal immigration and residence, and then report to the Council. If the Commission deems it appropriate, it can add recommendations. The Council, on the basis of the Commission's report, determines the date from which that country will fall under the scope of Art. 1(2) (i.e. its nationals are exempted from visa requirements) (Preamble, Recital 12). This is an example of agenda setting where member states secure commitments by involving a third party

¹⁴⁸ Article 62(2)(b) of the EC Treaty clarifies that these are “visas for intended stays of no more than three months”.

in the policy making process.

Even more intriguing is the case of Art. 1(4)(d). According to this article the

Commission shall examine any request made by the Council or by a Member State that it submit a proposal to the Council amending the Annexes to this Regulation to include the third country concerned in Annex I and remove it from Annex II.

The term “examine” implies a degree of discretion for the Commission where it must assess a member state's request concerning a matter of foreign policy. On one hand this is an awkward provision as it does not allow the Commission to propose that a third country be moved from Annex II to I (which could be seen as a re-statement of its power of proposing)¹⁴⁹. Whereas, on the other hand, the issue of “reciprocity and solidarity” arose immediately as a key concern for a notable number of member states such as France, Germany, Belgium and Spain. All the while the Commission was sceptical as to the legal basis of any such initiative (Council 2000q: 3). Its role as a filter for member state requests, whereby not all requests are immediately implemented but must first undergo a third party evaluation, favours a credibility of commitments rationale.. The Commission’s position seemed to benefit from a recommendation of the Council Legal Service to introduce a procedure which, instead of providing for automatic reinstatement of a visa requirement for a third country, would involve a Council decision following a Commission proposal (Council 2000y: 1). These provisions were strengthened in the 2005 amended version of the Visa List Regulation. Thus as this is considered a case of effectiveness, it will be analysed in the next section.

The Schengen Borders Code confers important powers on the Commission in terms of reinstatement of internal border controls, a sensitive topic over which tough political battles have taken place in the past. The Commission has the power to “issue an opinion” within the “procedure for foreseeable events” in the case of “temporary reintroduction of border control at internal borders” (Art. 24(2)). This “opinion”, which by itself does not constitute an instance of delegation, must be viewed as a “consultation between the Member State planning to reintroduce border

¹⁴⁹ Something which indeed the Commission proposed few years later

control, the other Member States and the Commission”. Furthermore, the Commission is not bound to issue that opinion, but “may” opt to do so (although it must be noted that the Commission, in its proposal, stipulated “shall” and not “may”) (Commission 2004g: 56). The process is politicised as a result given that the Commission is likely to have to justify its reasons for intervening. This is also an important issue in cases where member states decide to prolong internal border control; in such cases the Commission’s opinion has to be considered account again (Art. 26(2)). As the Commission’s involvement was completely absent from the previous Schengen rules (Peers 2011: 180) this represents a concession to the Commission in this area. This attention to internal border control is reinforced in Art. 38 (second indent), where the Commission is required to report on and present proposals in relation to problems with the application of provisions relating to internal borders. It has been calculated that member states reinstated border controls 17 times between the Border Code application date and June 2010 (Peers 2011: 182).

The Frontex Regulation is one of the most prominent elements of the idea of an “integrated border management”. Commentators have stressed the burden-sharing nature of this Regulation (Hobbing 2005: 14; Jorry 2007: 2), which was surely the objective of some member states and explains the resistance of others to such policy initiative. It also departs from the almost exclusive agenda setting delegation in this area, providing this 'Agency' and the Commission with a number of powers. Indeed, there is a sort of double delegation by the member states to Frontex and the Commission. This has created a peculiar situation where the Commission not only acquired delegated powers of its own, but was also given responsibility for overseeing another delegated body in certain respects of its duties.

The Agency is required to “evaluate, approve and coordinate” proposals for operational cooperation between member states in the field of managing external borders (Art. 3). This element is essential to avoiding suspicions that the Agency is exploited for national interests. Such suspicions are not unlikely to arise, thus it is important for the long-term credibility of the Agency that it is seen as a neutral actor. Indeed, Carrera believed that the Agency’s focus is often hijacked by political pressures from Member States (Carrera 2007b: 12-13). In terms of its functions, the Agency is empowered to propose initiatives albeit that such proposals must gain the support of the member states (Art. 3, second indent). The Agency has also been

conferred with limited discretion to allocate Community finances in relation to return cooperation (Art. 9). This is a substantial step-down from the Commission's proposal that the Agency co-ordinate and organise return operation in member states, indeed the text approved by the Council actually limits this function to a generic "necessary assistance" (Jorry 2007: 18; Mitsilegas 2007: 370). The EP was also dubious of these duties being conferred on the Agency, both in relation to cost-efficiency and the focus of the Agency (EP 2004b: 13-14). Finally, the Agency may facilitate cooperation with a third country (or countries) on issues that fall within the scope of the Regulation (Art. 14). For that purpose, the Agency may conclude "working arrangements" with "authorities of third countries" (Art. 14, second indent).

On the issue of solidarity, the Commission saw both Frontex and Rapid Border Intervention Teams (RABITs) (European Union 2007a), as tools to foster solidarity and cooperation among member states. By bringing member states together through its Management Board (made up of seconded officials, two from the Commission and one per member state), Frontex provided the beginnings of a peer reviewed monitoring system. It also provided monitoring and evaluation of the "result of joint operations and pilot projects". The RABIT Regulation stipulates that while the deployment of a "Team" can only happen at the request of a member state, the decision to deploy lies with the Agency ("the Agency may deploy", Art. 12(5)). As a consequence, no one member state can expect to disproportionately exploit Frontex's resources as decision-making responsibilities are split between different actors. Additionally, the Executive Director of Frontex is not severely constrained on this issue as the sole factors guiding his or her decision are: his or her assessment of the situation (he or she may deploy experts on the ground to assess the situation); the Frontex risk analysis; and, relevant information provided by either the requesting member state or other member states. Finally, it must be noted that, unlike usual Frontex operations, RABIT operations are funded exclusively through Community finance, thereby strengthening solidarity.

To complete this suite of solidarity strengthening efforts and measures aimed at lessening burdens related to borders and visas, the European Borders Fund was created with a budget of €1,820 million for 2007-2013, which is by far the biggest migration related fund. Legislators have acknowledged that burdens are different because of,

differing situations prevailing in Member States as regards the geography of their external borders, the number of authorised and operative border crossing points, the level of migratory pressure, both legal and illegal, the risks and threats encountered and finally the workload of the national services regarding the examination of visas applications and the issuing of visas (Preamble, Recital 2).

These factors create an unbalanced situation, which this Decision is intended to redress at least partially. Delegation and discretion are respectively high and medium in this Decision, and the powers granted to the Commission are similar to those described in the previous chapters for the other funds.

7.1.4) Efficiency and effectiveness

Following the structure of preceding chapters, this section first looks at previous policy failures both at the national and European level as a likely trigger for delegation. Secondly, it examines the extent to which efficiency has been a determinant for delegation, focusing on the goal of saving time and resources. Common rules on border checks and visas were already set out in the Schengen Convention (respectively, Art. 6 and 10). A number of doubts emerged as to the efficacy of border control measures in the fight against crime and efforts to reduce irregular movements across frontiers both before and after the Schengen agreements came into force. The analysis of border policy suggests that policy failures should not be understood as leading to immediate policy change. The evaluation mechanisms of the Schengen system were, for example, long regarded as problematic. A French-commissioned report presented in a 2003 conference of Interior Ministers in Rome highlighted the loopholes in seaports and sea controls. This study reportedly lamented the “lack of a genuine audit on how the 1990 Schengen Convention's rules on sea border controls are being implemented”. Although the Schengen evaluation mechanisms were considered a “step forward”, its “recommendations are not binding” (European Report 2003c). According to the Commission, discussions on how to reform them were ongoing since 1999 (Commission 2010b: 5). However by 2009 the Commission continued to highlight

that no progress had been made towards involving more Community bodies in this area. In other words,

given its intergovernmental basis, Schengen evaluation has been and still is entirely in the hands of the Member States, with the Commission participating as an observer (Commission 2009d: 4).

Notwithstanding this, the ‘Schengen inspections’ that member states routinely conduct on one other’s borders have been proven both to have failed and been difficult to reform. An interviewee from a Permanent Representation was clearly aware of that failure and acknowledged that member states were simultaneously the culprits and the victims in this weak monitoring system. The former Director General for Home Affairs Stefano Manservigi reportedly called the Schengen Evaluation Mechanisms “little more than a faceless peer review” and referred to the need to introduce a ‘Community Method’ also in the Schengen Governance (2012). The Commission proposed to grant some competences for Schengen evaluations to Frontex (Commission 2008e: 8), but nothing came of that initiative either.

The most recent diplomatic dispute¹⁵⁰ in this dynamic was the Franco-Italian spat over the consequences of the Arab Spring (Carrera et al. 2011). This incident should have led to “*un renforcement profond de Schengen*”, to use the former French President Sarkozy's words (2011). However, it resulted in little change in policy terms as member states were not prepared to agree on ceding more powers to the Commission (Brady 2012: 33-36). It also contributed to this failure the fact that the two main proponents of this revision had rather different ideas when it came to the substance of the reform (Dominelli 2011; Heuzé 2011; La Repubblica 2011). In other words, according to Brady all available Schengen revision options entailed allocating more powers to the Commission. The resulting compromise (the ‘Schengen Governance Package’) was tabled in 2011 and expressed through a Communication and two legislative proposals (Commission 2011a). It was intended to introduce new rules on monitoring, sanctions for flawed implementation, and provide for reinstatement of internal border controls. The Commission's proposals

¹⁵⁰ Indeed, this is only the last episode of a long list. For instance, towards the end of the 1990s the same concerns were voiced after a purported Kurds crisis The Independent, 'Without the Poor of the World, Where Would the Rich World Be?', *The Independent* (1998). Because of this presumed invasion, France and Austria restored border controls with Italy.

for monitoring and sanctioning also envisaged on-the-spot controls in member states and the possibility of isolating a member state by re-imposing border controls in the member states surrounding it. The fact that the Commission tabled such daring proposals reflects the magnitude of the problems faced. On the other hand, some of most radical proposals, such as “unannounced inspections” and a “supervisory mechanism”, were far from new as they featured among the priorities of The Hague programme (Council 2004a: 15).

EU institutions frequently called for better management of border policy (Agence Europe 2003f, 2003e, 2009b). The European Council also called for improved efficiency in border controls related in particular to “combat[ing] illegal immigration” (Agence Europe 1999b, 2009d). The Commission presented Frontex as a way of “achieving large-scale saving[s] in EC financing for the management of external borders” (Agence Europe 2002o). Member states, both individually and within the Council, stressed the importance of quickly adopting biometric identifiers in visa databases (Agence Europe 2005e) to speed up visa procedures (Agence Europe 2008b) and improve the “operational capacity” of Frontex (Agence Europe 2009e).

Obviously the need for better information and knowledge, as highlighted in the first section of this chapter, does not end at the abstract level but relates also to a functional need. A comparative study by the ICMPD signalled that of all law enforcement agencies border guards “have a greater need to near instantaneous access of data from their own countries’ agencies, or from other MS” (ICMPD 2010: 21). Indeed these agents are at the forefront of preventing and confronting irregular migration, tackling human trafficking, ensuring smooth entry of tourists, and so forth. If they are to provide an effective and efficient service in the context of a common external border, they must be equipped with the necessary information and tools. That is why major efforts have been undertaken in this area in terms of databases and IT systems. Broeders and Hampshire argue that a key to the successful incorporation of IT into this area has been the perception of its efficiency (2013). Time and again the Commission has emphasised the time saving benefits of large scale databases (Agence Europe 2006e, 2008a). While politicians may have been more concerned by their symbolic function, a number of interests have clustered around the time and cost-savings that the massive introduction of digital

technology promised. For instance, public administration has benefited through reduced personnel and resource demands, thereby allowing for redeployment to other areas. Moreover business and carrier interests have benefited from a customer satisfaction standpoint due to increased time spent in shopping malls in “airport departure zones” (Broeders and Hampshire 2013: 1215). More broadly, the economic benefits of streamlined border and visa protocols have been far from negligible for the travel and tourism sector (Mau et al. 2015: 4).

As illustrated by the SIS II reform, managing large IT systems is not risk-free (see previous section). Following this undertaking, it is possible that the Commission will be more sceptical of taking full responsibility of such programmes in the future. The Commission has instead suggested shifting direct responsibility for such projects to an agency dedicated to managing IT systems. Speaking of the 2008 Regulation on the migration from SIS+ to SIS II (European Union 2008c), the EP’s report describes the “enormous disappointment” of the accession member states to whom swift access to the system was promised (EP 2008b: 7). That said scholars have questioned the extent to which border controls can be effective at all, and have openly questioned whether they ever had been (Andreas 2003: 110). A further criticism, as discussed earlier in this chapter, is the risk of achieving efficiency at the expense of rights. This concern is not exclusively expressed by NGOs and civil society organisations. The European Data Protection Supervisor emphasised the importance of supervising access to data (particularly biometric data), data security and clarity over who had responsibility for managing the VIS (Agence Europe 2005g).

Qualitative analysis of delegation in selected measures.

Despite the failures in border and visa policy discussed above, effectiveness rarely brings about delegation. Previous regulatory failures are explicitly mentioned as a reason for the adoption of the revised Visa List Regulation in 2005. In particular, it was the non-reciprocity clause that was deemed ineffective in that Regulation (European Report 2002b). The consequence of this clause was that a third country whose nationals were cleared of visa requirements but subsequently reinstated visa requirements for individual member states, could have been subject to an EU

response. The potential EU responses were however considered “unsuitable”, and the Council agreed to grant more decisive powers to the Commission (Preamble, Recital 1). Art. 1 empowered the Commission to: take “steps with the authorities of the third country in order to restore visa-free travel”; report back to the Council after 90 days and, if necessary, accompany that report with a proposal to restore visa requirements for the third-country; or, forego the aforementioned report and simply propose to restore visa requirements. By empowering the Commission to evaluate and take action against a third country, member states show solidarity towards the member states that have been the object of such reinstatement of visa requirements.

The Regulation also falls under the category of effectiveness in a broader sense. First, the Regulation acts as a point of convergence for both national and European foreign policy and migration. This convergence is enumerated in the Regulation through two of the three criteria member states are required to consider when determining whether a third country should be included in either of the two lists. They are illegal immigration, public policy and international relations (Commission 2000e: 9). The Regulation lists all countries whose nationals require a visa when crossing a member state's borders (Annex I), and all countries exempted from that requirement (Annex II). Member states acted under the assumption that, in addition to having better performing migration policies with third countries, working together would afford them more international influence and would better position them to negotiate international deals. Previously, member states had a common list of countries whose nationals were obliged to have a visa but each member state could add countries to this list (Commission 2000e: 2). From an external point of view, the existence of such a list was not a very compelling foreign policy tool. However having to negotiate visa policy with a number of European countries *en bloc* made reinstatement of visa controls with a single member state more risky for a third country.

Before the establishment of Frontex a network of national agencies dealing with specific aspects of border controls existed, but this was soon judged inefficient. Consequently the idea of structuring this network hierarchically around a single agency gained ground (Commission 2004b: 4-5; Hobbing 2005: 13, 18). Jorry reports that the Greek Presidency (January-June 2003) argued that there were “deficiencies of [that] framework for cooperation and the subsequent necessity to

establish a new institutional structure” (Jorry 2007: 8). In particular, the Presidency is reported to have highlighted problems relating to,

lack of preparation, co-ordination problems, lack of legal basis, the insufficient co-operation of certain participating States[,] a certain lack of discipline on the part of the Member States in their involvement in these programmes (Agence Europe 2003h).

This opinion was also shared by the EP which stressed the shortcomings of existing Council structures dealing with borders and highlighted the problems concerning the network structure established across several member states (EP 2004b: 30). To address this Frontex was given responsibility for training staff with the aim of achieving more homogeneity in the quality of borders controls across Europe, something that had been lacking up to that point. This was in line with previous requirements under Argo¹⁵¹, something that should have been taken into account to “ensure consistency with the objectives and priorities identified by the Commission in this context”, at least according to the EP (EP 2004b: 7). In this regard, Frontex replaced previous policies that had achieved mixed results at best.

The area of borders and visa policy offers a number of examples of delegation on grounds of efficiency. The Regulation concerning implementation powers for visa applications is one of the few in the entire legislative *acquis* that assigns implementation powers to the Council. Due to the “sensitivity” of the visa policy area and as a way to limit intrusion by other bodies in the field, Finland proposed to reserve,

to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (European Union 2001b).

The Regulation updated several instruments related to the Schengen Convention such as Common Consular Instructions (CCI). The EP recommended that the Finnish proposal be rejected “outright” on a number of grounds ranging from

¹⁵¹ See Chapter 6.

institutional flaws to democratic deficit (EP 2001a: 10). Foreign policy considerations notwithstanding (Preamble, Recital 8), the Regulation allows the Commission to formulate proposals as to possible changes in the CCI and the Schengen Consultation Network (Art. 1(1) and (2)) (EP 2001a). This power is shared with member states. Yet, it is significant that such powers were granted to the Commission at all, particularly in an area where all cooperation up to that point had been intergovernmental and in the context of foreign policy concerns. That said, it seems that legislators sought to achieve efficiency gains as the issues under Comitology arrangements “are to be adopted and regularly amended and updated in order to meet the operational requirements” of the consular authorities. In other words, the paramount concern was timely and efficient decision-making.

Indeed, a number of legislative measures aimed to speed up the decision-making process. Some amended past legislative measures, such as Council Regulation laying down a uniform format for visas (European Union 2002b), Council Regulation dealing with the numbering of visas (European Union 2008b), and EP and Council Regulation amending the Schengen Borders Code (European Union 2008a). All these measures displayed high levels of delegation and can be explained by legislators’ wishes to update aging administrative or technical arrangements, or as a response to technological advances that demanded an update of security or IT features. Many of these measures modify the Comitology provisions under which technical and security arrangements are decided. Part of the explanation for the abundance of measures displaying high and medium levels of delegation in border and visa policy is the extensive reliance of legislators on IT measures and the process of incorporating and updating the Schengen *acquis* into EU legislation. In the case of the Schengen Borders Code Regulation a number of technical matters could have benefited from the assignment of an agent in charge of resolving non-essential matters. This is indicated by the abundance of Comitology provisions. The Commission can propose new rules for border surveillance (Art. 12(5)) and amendments to the Annexes III, IV, and VIII dealing with several technical matters. All these Comitology provisions were reformed because of the new Comitology rules adopted in 2006, which resulted in a new Regulation.

Delegation in the Regulation on a uniform format for visas is related to two efficiency grounds (European Union 2002a). The first is for the Commission to continue providing speedy decisions on the technical specifications of visas in the

context of mounting security concerns and constant technological developments. Secondly, as the Comitology rules had changed since the EU had approved the first set of rules on visas under Maastricht in 1995, these also required updating in line with the most recent revision in 1999.

It is important to remember the “difficult road” that has led to SIS II. Referring to the Comitology arrangements of the 2001 Schengen Information System Regulation (SIS II), the Council dismissed the EP's invitation to lessen the oversight burden in the Comitology procedure due to the technical nature of the project. The EP believed that as the SIS II would have already been a difficult and lengthy undertaking, adding complicated Comitology procedures to it would have proven detrimental to the primary objective of installing the system quickly. The Enlargement was looming at the time and it was believed that the old SIS could not have shouldered the additional impact of the accession countries. The EP was also alarmed by the financial and staffing implications of this Regulation. Indeed, even though it was clarified that staff would have been drawn from EU institutions the effect on the Commission was not clear. In other words, the EP highlighted the risk of granting powers to the Commission absent corresponding resources (EP 2001d: 16). In light of these considerations the EP suggested establishing a separate agency under the supervision of the Commission, a move that materialised ten years later.

That said participants did not see the SIS project as a failure. A number of states did agree on the need to improve the system and add new “functionalities”, but this was within the context of a system that achieved results and simply required updates. Therefore effectiveness does not seem relevant here, although efficiency was on the other hand was to the fore. Member states assigned its development and management to the Commission. On top of which, a key objective of the Council was to secure financing from the Community to avoid cumbersome intergovernmental efforts at shouldering a project with expenditure implications that were far from certain (Council 2001w: 3).

While the supposed deadline for SIS II entry into force was 2006, the system only began operating in 2013 and saw “a 500% increase in its budget” (Brady 2012: 30; Commission 2013c; Parkin 2011: 1). A profound dissatisfaction with the Commission's handling of the project and a growing mistrust of its capacity to manage large IT programmes is evident from official documents and commentary concerning the project (Collett and Papademetriou 2011; Council 2010). One of the

more non-negligible consequences of which is the emerging idea of creating an independent agency to manage EU IT systems relating to the area of freedom, security and justice (Parkin 2011: 24). Indeed, although thus far traditionally the remit of the Commission, such an Agency is likely to be charged with the “development” of the IT of a new entry and exit system, something that thus far was traditionally conferred to the Commission (Commission 2013a: 3).

Frontex is provided with a number of powers under the RABITs Regulation, which broadly address the grounds of efficiency and credibility. The fact that member states have agreed to delegate decisions on these issues to another body speaks to the credibility of their commitments and the content of these measures aims at efficiency. While member states remained in charge of decisions relating to the “selection of staff” and the “duration of their deployment” (Art. 4(3)), the Agency determines the composition of teams based on art. 8(b) of the Frontex Regulation. This article also specified that a member state could request Agency support on technical or personnel matters. The Agency could then directly assist in the coordination of operations or deploy its experts (Art. 4(1)). The Executive Director of the Agency has the right to propose the profile and number of border guards participating in teams, with the Management Board making the final decision, and any subsequent amendments thereto, by a three quarters majority (Art. 4(2)). Member states are furthermore obliged to make their personnel available to the Agency except in the presence of an “exceptional situation substantially affecting the discharge of national tasks”. The Agency may also acquire technical equipment for RABIT operations (Art. 12(4)). In return the Agency is required to conduct regular exercises and provide members of the “Rapid Pool” with suitable training (Art. 12(5), second indent). Agency decisions on these points must be based on information provided by member states, and states must respond to data requests within five days (Art. 12(5)).

7.2. Conclusions

The Commission and Frontex have both been granted with powers as to the gathering, processing, circulation and dissemination of information on borders and visas on grounds of uncertainty. And a number of legislative measures contain

provisions dealing with uncertainty, such as the SIS II Regulation, the EU Borders Fund, and the Visa Code Regulation. In some of these cases the Commission is only a recipient of information and therefore these provisions fall short of representing actual delegation. The need for information and knowledge to achieve a number of policy objectives in this area found expression in the Commission's prominent role regarding the IT systems developed in this area. In addition to the previous points noted regarding administrative cooperation, this represents evidence of the Commission's empowerment due to a need for information and its circulation. Nevertheless the Commission's expertise does not appear to have been a determinant of delegation in this case, with the exception of Frontex.

As in previous chapters, delegation within the European Borders Fund has been found to foster credibility of commitments. In addition to which, credibility of commitments has been found to motivate delegation instances of border and visas policy such as the Visa List Regulation. The Commission is also granted important powers, *inter alia*, through the Frontex Regulation, the 2005 amendment to the Visa List Regulation regarding reinstating visa requirement for third countries, and the Borders Code Regulation in the decision-making regarding reinstatement of internal border control. In short, credibility of commitments appears to have influenced decisions to involve the Commission in this policy area.

The 2005 amendment to the Visa list Regulation grants explicit powers to the Commission to address a previous regulatory failure and to enhance its standing on foreign policy, thereby indicating delegation on grounds of effectiveness. The centralisation of functions through Frontex also speaks to effectiveness as a ground for delegation given that the Agency's establishment was a response to coordinating difficulties that emerged during a previous *ad hoc* and network-based cooperation effort. On the other hand a sort of retrenchment has occurred in relation to delegation in borders and visas policy where large IT systems are concerned. This is due to waning confidence among some member states regarding the Commission's capacity to manage such vast undertakings.

In terms of efficiency however, member states did demonstrate a preference for delegating operational management to the Commission in cases where large IT systems were involved. Although to follow Franchino's line of reasoning there is a tendency to dismiss the nature of this delegation as technical or managerial, the

issues at stake in some cases are indeed more substantial than that. The matters decided upon by the Commission, albeit mainly under some form of Comitology procedure, deal with data protection, practical forms of collaboration (such as forms the filling out of forms by law enforcement agencies), or rules and procedures on access to databases. These are matters that have at times evoked strong opposition from NGOs, civil liberties groups, national governments and also the law enforcement agencies on the ground. Indeed, at times this debate also involved the Commission and the member states. For instance, this was the case with regard to fingerprinting under the 2008 VIS Regulation. The Commission at first argued that questions surrounding fingerprinting could be solved in a separate technical legislative instrument. However France “strongly emphasised” that the issue was not technical in nature but was in fact a political decision, therefore it was required to be dealt with in the main legal text (Council 2005). On the issue of what committee should deal with the implementation of VIS, the Commission argued that the existing SIS committee could serve this purpose in order to save on resources and reduce complexity. Nevertheless Finland, followed by France, demanded that two separate committees be created (Council 2004b)¹⁵².

As with previous chapters, the present chapter concludes with a discussion of findings in the context of the existing academic literature. The reason for Pollak and Slominski to characterise Frontex as an instance of experimentalist governance is that one of the most important purposes of the agency is to “experiment with new solutions to certain problems, some of them not even known yet” (2009: 907). However, the fact that the agency has some discretion and aims at innovative answers to border controls problems does not fall outside the theoretical remit of principal-agent approaches, as the two authors seem to argue (2009: 905). Principal-agent approaches regard agencies as able to guarantee principals’ commitments and face not only day-to-day working, but also resolving not-foreseen issues arising if they fall within the institutions’ remit¹⁵³ (Pollack 2007a). All the debates about agents’ slippage would not take place if such a possibility were not foreseen. For the two authors, Frontex aims “to accomplish a rapprochement in terms of interests,

¹⁵² *Inter alia*, because two different types of personnel were likely to be involved, because the issues at stake were likely to be different as well as the types of information transmitted.

¹⁵³ From a legal standpoint, the issue of discretion is more limited than in the case of the Commission due to the so-called Meroni doctrine. D. Kelemen and Giandomenico Majone, 'Managing Europeanization: The European Agencies', in John Peterson and Micheal Shackleton (eds.), *The Institutions of the European Union* (Oxford: Oxford University Press, 2012)..

legal traditions and ideas through information sharing and collective learning process” (2009: 913). While this may well be the case, one should not discount the stated objective of that body. As showed in this chapter, Frontex answers to precise expertise and information requests by the member states, something that far from being a novelty peculiar to new EU agencies, is part of what the Commission does since its inception. Frontex coordinated the Community support to much needed joint operation, at the request of the member states. This implies that when solidarity is requested, this is channelled through a third party so to increase its credibility. Finally, Frontex follows a logic of economy of scale by encouraging pooling of member states’ equipment, personnel and expertise.

A popular approach to EU migration policy emphasises the importance of security for the developments in this area. This approach sometimes blurs with widespread discourses surrounding an emerging, or indeed existing, 'Fortress Europe' (Czaika and de Haas 2011: 8-9). From this perspective, emphasis is placed on the powers EU institutions and member state officials have accumulated for the purposes of creating a sealed European continent, sheltered from irregular migrants and other perceived threats. If this contention were to hold true, legislative and executive powers with a high degree decision-making autonomy ought surely to have been conferred upon EU bodies such as the Commission to shape the form, timing, and magnitude of border controls. Frontex has been regarded as confirmation of this perspective (EP 2004b: 32; Jorry 2007). And even though this Agency does demonstrate significant delegation and discretion, these powers fall short of such a reading with regard to a number elements such as autonomous patrolling and independent mission set-up. As Jorry acknowledges, “it does not bear any policy-making or direct operational powers” (Jorry 2007: 9, 20). This chapter has therefore shown that, rather than security reasons, the long lasting quest for efficiency has driven developments in border and visa policy as is clearly visible in the case of IT-related measures. While in a broader sense these are updated versions of remote control policies, the significant delegation in these policy areas has been determined by a determination to credibility commit to cooperation in these areas. This is in addition to the efficiency gains these developments are meant to achieve (Broeders and Hampshire 2013).

The Commission and the Council have shared a common perspective

concerning the benefits of IT measures and the use of new technologies in this area. This partly explains why delegation and discretion were found at to be at their second highest levels in Chapter 3 and confirmed in this chapter. However, it is not clear how this reflects the liberal / restrictive divide frequently mentioned in the literature (Ripoll Servent and Trauner 2014). The criticisms that have been levied with regard to these innovations in terms of citizens' rights make it difficult to classify the Commission's stance in this area as liberal.

For Mitsilegas the creation of Frontex represents a sign of mistrust among member states (Mitsilegas 2007) that specifically aims to constrain the accession states. As existing member states feared the consequences of leaving European external borders guarded by new states, they opted to create an agency that would instruct them in the implementation of the Schengen rules. However while it is true that member states opted for a centralisation of coordinating functions, it is doubtful that they conceded more than that. The Agency has almost no decision-making power when it comes to legislation or monitoring member state implementation of EU legislation. Its autonomy is also limited at the operational level as it relies heavily on member state consensus to initiate operations and on their material support (e.g. equipment) to carry them out. Indeed the EP seems to suggest that both the Commission's proposal for its establishment and the Council's consensus underscore the intergovernmental nature of the Agency (EP 2004b: 30), which is at odds with hypotheses of centralisation.

8. Conclusions

This dissertation set out to explain the extent and reasons for delegation in EU migration policy. Past studies have focused on policy-making features of this area such as networks, EU institutions and member states (Geddes 2014; Menz 2009; Monar 2001), the convergence of migration policy across member states (Ette and Faist 2007; Hollifield 2014), and the substance of policies (e.g. experimentalist, securitisation) (Huysmans 2000). In contrast with the former approaches, this study has focused on a traditional feature of EU policy-making, delegation. This is the process of member states conferring powers to an EU body through Council action, traditionally the Commission. Taking delegation as a measure of integration is not novel in EU studies (Moravcsik 1999). It is assumed that if member states were willing to confer powers to a third party, this constitutes *de facto* integration. Chapter 2 defines delegation and, most importantly, sets out the most likely reasons for delegation on the basis of a thorough review of previous theoretical work on the matter. They are reducing uncertainty, strengthening the credibility of commitments, and enhancing efficiency and achieving effectiveness. In addition, conflict between the Commission and the Council is identified as a potential constraint on delegation, whereas different views exist as to how conflict within the Council is likely to affect delegation.

Delegation was selected as the dependent variable for reasons of simplicity and opportunity. Coding templates already present in the academic literature offered clear and simple tools to measure delegation in secondary legislation adopted between 1999 and 2009 (Franchino 2004; Pollack 2003b). This quantitative exercise laid the groundwork for the discussion of some of the assumptions and conclusions present in the academic literature. At the same time, it also highlighted the need to couple this quantitative investigation with a qualitative analysis assessing the various rationales proposed in the literature to explain delegation. Delegation was analysed in respect of five policy areas: asylum and refuge; irregular migration; legal migration; administrative cooperation; and, border and visa policy. A simple question underpinned this analysis; to what extent are the commonly assumed determinants of delegations helpful in explaining delegation in EU migration policy? The following section summarises the main findings. This

involves an initial overview of the main results, with the focus then moving on to the individual determinants of delegation. A section on further avenues for research follows before the final section connects the results of this dissertation to broader debates in the academic literature.

8.1. Main findings

The first conclusion, established in Chapter 3, is that delegation is present in this policy area. This may seem trivial, but previous studies of delegation through secondary legislation have neglected this area, thus it is a new finding (Franchino 2004; Pollack 2003b). To be fair, it must be noted that this lacuna is mainly the result of the timing of previous projects, in that they concluded before the end of the 1990s. Chapter 3 finds that average levels of delegation and discretion¹⁵⁴ in migration policy stood, respectively, at 12.2 percent and 8.7 percent for the period in question. From a cross-policy perspective, discretion in migration policy ranks among much older areas of cooperation such as “merger control” and “market conditions” for transports (Franchino 2006a: 176). It was also established that delegation levels vary across migration categories. For purely analytical reasons, the coding results of Chapter 3 were ranked under three values that refer to levels of delegation identified in each legislative measure (high, medium, low).¹⁵⁵ Asylum policy features two measures each for high and medium delegation, with the majority displaying low delegation. Irregular migration has one measure with high delegation, the rest displaying low levels. Legal migration features one measure each for high and medium delegation, with the rest registering as low. Administrative cooperation has five measures with high delegation and one with medium levels. And finally, borders and visas features eleven measures with high delegation, six with medium levels, and six with low delegation.

Having demonstrated that delegation is present, analysis moved on to the assessment of why that is the case. Accordingly, a new question was used to lead this analysis: why do delegation levels differ between migration categories? Attention was turned to the determinants of delegation to answer this. Chapter 2

¹⁵⁴ Without implementing measures.

¹⁵⁵ See Chapter 2 for an explanation of these values.

critically surveyed existing academic literature looking for drivers of delegation, and extrapolated eight hypotheses concerning the links between the independent and dependent variables. The process of selecting and specifying the independent variables turned out to be a crucial step in this research, because of the ambiguous definitions and applications of the determinants of delegation in the literature

The results of the combined quantitative and qualitative analyses have produced unexpected conclusions in light of the theoretical findings identified in the existing academic literature. While authors engaged in the study of delegation tend to concentrate on individual determinants, the findings of this project indicate that this approach is insufficient in the case of migration policy. Delegation results from the *rationales* that underpin the choices of key actors, these are identified here as the need for reducing uncertainty, the willingness to strengthen credibility, and the quest for efficiency. *Institutional contexts*, or dynamics between EU actors, are also identified as playing a key role in bringing about EU level delegation. However it is crucial to note that delegation does not emerge on foot of individual factors, but it results from the interplay of various elements. The best analogy for which comes from the force field of physics, i.e. the force and strength of individual vectors matter, but only inasmuch as they contribute to the resultant vector. The first set of factors is labelled 'rationales' as, while being related to the policy area in question, they have to be accepted by agents to be converted into policies. The other two factors describe the dynamics within the Council, the key legislative actor during much of the period analysed here, and between the Council and the Commission. In terms of the effect of these factors, the first four are thought to promote further delegation, while the fifth is inversely related thereto, i.e. the more conflict between the Commission and the Council, the less delegation should be expected. That being said, it was also found that only certain determinants set out in the literature affect delegation. Specifically, while credibility, efficiency, and conflict between the Council and the Commission explain levels of delegation, uncertainty, effectiveness, and internal conflict within the Council have not been found to do so. Table 8.1 below summarises the principal findings.

Table 8.1. Rationales and intuitional contexts for delegation in migration policy, and their outcomes

	<i>Rationales driving delegation</i>			<i>Institutional contexts</i>		<i>Delegation</i>
	<i>Uncertainty</i>	<i>Credibility</i>	<i>Efficiency/Effectiveness</i>	<i>Council internal division</i>	<i>Divergence Commission/Council</i>	
Asylum	Medium	High	Medium	High	High	Medium
Irregular	High	High	Medium	Medium	Medium	Low
Legal	Low	Low	Medium	High	High	Low
Administrative	Medium	Medium	High	Medium	Low	High
Border and visas	Medium	High	High	Medium	Low	High

The basic message of Table 8.1 is that, in order to have medium to high levels of delegation a policy area must have had pressing reasons (i.e. 'high') related either to the *rationales* of credibility or efficiency, and low to medium levels of opposition through conflict between the Council and the Commission.

Another thing to note from Table 8.1 is that ordinal values are relational, that is they do not express intrinsic values but are expression of rankings between categories. Ontologically it makes little sense to argue that credibility of commitments was high in asylum policy and low for legal migration. However, what the Table 8.1 is intended to clarify is simply that, in light of the empirical research carried out in the previous chapters, credibility reasons were found more pressing in asylum policy when compared with legal migration. It is, however, more difficult to attribute values when the difference is not as conspicuous as in the previous example. For instance, the difference between irregular migration and asylum policy in the case of uncertainty is interesting. Knowledge of the former phenomenon was poor in many member states, little academic or policy-related research existed on it until well into the 2000s, there were no previous knowledge bases at the international level upon which European solutions could have been built, and the eagerness for more communication and information-sharing was high, as signalled by numerous internal Council consultations on the matter. In the case of asylum policy however, this was a social phenomenon that national administrations had long been dealing with, international organisations had well-established methods of collecting, processing and releasing data thereon, and while the Council did consult internally on it this did not happen to same extent as with irregular migration.

Looking close at table 8.1, the interpretation of the borders and visa row is straightforward. Rationales were high, and crucially conflict with the Commission was low. Again, reading the table is simple in the case of legal migration and administrative cooperation. There were simply no reasons for delegating in the case of legal migration, and this was reinforced by intense conflict between the Council and the Commission on this matter. Administrative cooperation however saw high levels of efficiency rationales coupled with an absence of conflict between EU institutions, which resulted in high delegation. For asylum, while rationales for delegation ranged from medium to high, conflict with the Commission was at its highest (together with legal migration). The contrast between these two opposing

trends produces a result that is intermediate in relation to the two sets represented by irregular and legal migration on the one hand, and borders and visas and administrative cooperation on the other.

The real puzzle in these results is irregular migration policy. Rationales to delegate were present, particularly in relation to credibility of commitments and, to a lesser extent, efficiency. While broad consensus existed in the Council on the need to combat irregular migration, significant contention also existed on issues such as regularisation practices. Conflict between the Council and the Commission was also moderate. The only even partially satisfactory explanation for the low delegation might be that any form of further action in this area would have strayed into policy areas where the EU had no competence. Developments in returns policy encroached significantly on foreign policy, and aside from conceding the authority to the Commission to negotiate readmission agreements with third countries (which member states did through Amsterdam), there was little that member states could achieve without granting more powers to the Commission and involving critical areas of legal migration or admission (e.g. labour migration schemes to offset the incentives of entering EU countries irregularly). However the latter was off limits. Another frequently mentioned strategy for reducing irregular migration would have involved introducing more internal controls, such as in the labour markets, but negotiations on the Employer Sanctions Directive revealed just how sensitive this was for member states.

8.1.1) Institutional factors: Division within the Council, and the conflict between the Council and the Commission

Two common hypotheses in the literature connect divisions within the Council and conflict between the Council and the Commission to the likelihood of delegation. This project reveals that the first element does not seem to influence delegation.¹⁵⁶ Nonetheless, the second element is one of the most powerful predictors of delegation.¹⁵⁷ It must however be noted that this acts as a constraint on delegation, not a driver. Thus the two elements are inversely proportional, the more conflict between the Council and the Commission increases the less delegation is to be

¹⁵⁶ H1 in Chapter 2.

¹⁵⁷ H2 in Chapter 2.

expected. Indeed absence of conflict between the two institutions turns out to be a necessary, although not sufficient, element for having delegation. In all cases where the conflict between the two institutions was high, delegation was driven down. Asylum and refugee policy confirms a holistic perspective on delegation. There were powerful reasons to delegate on asylum in the first place where credibility and efficiency were concerned. Therefore, the combination of these rationales and the institutional contexts at EU level yielded a result that lies somewhere between irregular and legal migration policies at the lowest end, and borders and visa policy at the highest end.

Two hypotheses were identified in relation to conflict within the Council from the literature review conducted in Chapter 2. The first states: on the basis of principal agent analysis, the more conflict within the Council, the less delegation should exist as divided principals are less capable of controlling a runaway agent. The second hypothesis states: on the basis of implementation studies, the more divided the Council the more delegation should exist, as member states were less likely to fully implement measures if they were not on board during Council negotiations. Neither hypothesis could however be confirmed as no discernible pattern of influence was identified between conflict within the Council and delegation.

Acosta Arcarazo and Geddes seem to believe that the Commission has played a limited role in shaping migration policy up until the Lisbon Treaty was approved. This is due to the fact that the Commission's policy objectives could not be supported by the CJEU, which in turn was due to the limitations imposed on references through preliminary rulings (2013). This work has confirmed that the Commission has rarely been given sanctioning powers in secondary legislation. This is coupled with the fact that the overwhelming majority of infringement procedures initiated by the Commission were later withdrawn (Peers 2011). A possible interpretation of this is that the Commission simply opted for a long-term strategy. Indeed although the Commission had a number of different policy preferences to the Council, it rarely pushed for a more substantial role for itself through its proposals. This is key to understanding what most commentators have characterised as a low-profile approach by the Commission in this area. The Council repeatedly signalled to the Commission that the JHA policy area was a sensitive one, and that any instance of cooperation should proceed carefully and

cautiously (Majone 2005; E. M. Uçarer 2001). A closer reading of the first years of cooperation under the Amsterdam rules is crucial to understanding the relationship between the Council and the Commission. Between the end of 1999 and 2001, the Commission put forward three measures that were thought to capitalise on the political momentum generated at Tampere. These were the Directive on Employment (Commission 2001f), Family Reunification (Commission 1999a), and the Asylum Procedures (Commission 2000a). These measures represented clear defeats for the Commission, obliging it to reconsider the scope and content of its policy proposals. While the first measure was simply ignored by the Council with little debate traceable in the archives, the others faced intense opposition and debate. The Commission had to redraft these measures several times in order to get them through the Council. All in the context of a Commission that, for the first time in the history of EC affairs, had no formal monopoly over initiative (Majone 2005: 62). The Council's attitude towards many of these early efforts by the Commission is perhaps best summarised by German Chancellor Schroeder who reportedly said that, "[t]he Commission's fantasies have been rationalised" (European Report 2002e).

The Council's opposition to the Commission's viewpoints could help to explain why, even in cases where the Council was divided and the likelihood of defection was high, no significant delegation occurred. A telling example comes from asylum policy. The Council had not yet finished adopting the first legislative package on minimum standards on asylum, when the Commission proposed a radical overhaul of the entire system. In other words, the distance between the two institutions was not only a question of initial positions, but persisted through time (European Report 2004e). Thus while German Interior Minister Schily was proposing the establishment of asylum application centres in non-EU countries, JHA Commissioner Vitorino was replying that a common European asylum system, and not a system of minimum standards, was a necessary pre-condition for such a measure thereby highlighting the incomplete nature of EU policy in this area (European Report 2004b).

8.1.2) Uncertainty

The notion of uncertainty has been unpacked along two dimensions in this study:

the first related to expertise¹⁵⁸; and, the second related to information-asymmetry¹⁵⁹. The hypotheses set out in Chapter 2 state that the more a policy area is plagued with uncertainty, the more delegation should be recorded. These hypotheses have not been confirmed. Seldom has the Commission been delegated powers to facilitate the flows of information towards all participants, this is even less so in the case of its purported expertise. Perhaps the best example of this trend is irregular migration, where uncertainty was found to be ubiquitous. International organisations such as the OECD, the Commission, and other actors began highlighting the need for a better understanding of and more data concerning the complex phenomena encompassed by the term “irregular migration”. This was also recognised at the highest political level, through Council and European Council statements. Nevertheless, it was rarely possible to match these concerns to concrete instances of delegation in secondary legislation.

Comparing the two hypotheses on uncertainty, there is stronger confirmation for powers being delegated to the Commission on foot of a need for information sharing rather than expertise. This is confirmed in the case of administrative cooperation, where the majority of legislative measures answer information-sharing concerns, but only the Migration Statistics Regulation is related to a rationale of expertise. Past studies indicate “EU officials with the capacity to control information, [and] generate ideas” have expanded their remit in migration policy, and that “informational asymmetry and leadership capacity” is a key explanatory factor for that expansion (Margheritis and Maldonado 2003: 163). However this study has shown that the informational claims of this statement are seldom upheld. Although member states often include the Commission in their official communications and information flows through notification requirements or involvement in networks, secondary legislation rarely grants the Commission explicit powers to change a policy on that basis. Most often the Commission is only the recipient of information, it rarely has the power to control that information, and is frequently obliged to release it. Informational asymmetry is difficult to detect. The Commission struggled to obtain information and data from a number of member states in a number of areas, most critically perhaps in irregular migration and some asylum matters.

¹⁵⁸ H3 in Chapter 2.

¹⁵⁹ H4 in Chapter 2.

Finally, the idea of the Commission's having an edge over member states with regard to information as the driver for its ever-expanding competence and powers is doubtful. Legislators clearly recommend the use of knowledge acquired by virtue of the Commission's reporting duties as a basis to propose amendments to current legislation. While this could grant some informational fuel for a runaway bureaucracy, it is equally plausible to regard it as an instance of careful evidence-based policy-making. In other words, changes to legislation must be warranted by evidence of policy deficiencies or possible improvements. Moreover, this provides a channel for inclusive policy-making whereby actors are made aware of issues that might have arisen during the implementation of a policy (via constant reporting), and are then presented with proposals to address them. Hence this analysis of uncertainty does not confirm that member states are losing ground to a runaway bureaucracy. On the contrary, it seems they have engineered mechanisms to facilitate cooperation towards collective solutions.

Application of Franchino's stringent criteria for delegation where a proactive policy role is set out for the Commission resulted in the exclusion of countless instances of notification requirements imposed on member states (Franchino 2006a: 109-10). This confirms the notion of the Commission as repository of Community knowledge. Coming back to Chapter 2, these notification requirements underlie the idea of the Commission as a tool for lowering transaction costs. In fact, these are the means through which the Commission can "meet demands for policy-relevant information about the state of the world" (Pollack 2003b: 180). Excluding these items from the category of delegating provisions is only tenable when it is acknowledged that this dissertation is testing delegation in secondary legislation. Nevertheless, it is important to be aware that the Commission can use such information and knowledge to elaborate its proposals and Communications, commence infringement procedures, and report to the EP.

While it is generally believed "the level of expert information required in a particular area" is what explains delegation (Hawkins et al. 2006: 13-15; Hix 2005: 66), this study qualifies those remarks. In many of the cases where high delegation occurred, expert information was not the cause. For instance in the case of large IT systems such as the SIS II, although expertise was needed member states seemed more interested in utilising the Commission's managerial skills rather than its

expertise on migration or IT services (usually something the Commission sub-contracted). The Commission rarely had the power of shaping, requesting, or processing information, and it was not empowered by virtue of its superior and authoritative knowledge on migration. There are exceptions to this. For example the risk analyses carried out by Frontex are a powerful use of information and knowledge. Moreover, the Commission was empowered by member states to conduct a series of tasks in relation to the Migration Statistics Regulation that implied a significant degree of expertise in the field. However, these were relatively rare occurrences, which tallies with other analyses of delegation in the EU. For instance Pollack states that,

in international politics member-state principals are likely to have strong domestic sources of expertise, and have weaker informational incentives to delegate such powers to international organizations (2007a: 14).

8.1.3) Credibility of commitments

The survey of the main theoretical approaches in Chapter 2 found that authors tend to agree that strengthening the credibility of commitments is one of the main rationales behind delegation of powers in a given policy area (Hawkins et al. 2006: 18; Pollack 2007a: 14; Thatcher and Stone Sweet 2003: 4). Unfortunately though, the same chapter showed how controversial and vague this notion is. By connecting its meaning to the likelihood of defection¹⁶⁰, it has been possible to demonstrate that determination to strengthen the credibility of commitments is positively correlated with delegation. More precisely, the idea of credibility has been linked to uneven cross-country trends in migration phenomena and past crises of confidence among member states.

Asylum and refugee policy provides a good example of the importance of credibility of commitments for delegation. A significant portion of delegation present in this area is due to the European Refugee Funds, as well as the Dublin Regulation and, to a minor extent, Eurodac. While some of this delegation is due to

¹⁶⁰ H5 and H6 in Chapter 2.

concerns for efficiency¹⁶¹, credibility of commitments plays an important role. Delegation is however not as high as it could have been because of the intense conflict between the Council and the Commission, which resulted in levels of delegation and discretion ranking halfway between the higher results of administrative cooperation and borders and visa policy, and the lower results of irregular migration and legal migration policies.

Most frequently though, the Commission strengthens the credibility of member state commitments through its “agenda setting” powers (Hawkins et al. 2006; Pollack 2003b: 16). Member states already granted this power to the Commission through primary legislation, nonetheless examples of delegation through secondary legislation are abundant. These include, *inter alia*: powers to propose amendments; Comitology procedures where the Commission is tasked, subject to varying degrees of constraint, with proposing solutions to incomplete contracts (legislative measures) between member states; complementing legislation by engineering financial compensation mechanisms; or, proposing the triggering of an emergency mechanism, as with the Temporary Protection Directive.

The first hypothesis¹⁶² under this heading was linked to Pollack’s suggestion that credibility problems are likely to be most acute “when issues impose concentrated costs” (Hawkins et al. 2006: 19). Some of the cases analysed here exposed evidence of this: as was the case with asylum-seeker flows and stocks; external border control for peripheral countries; and, uneven levels of irregular migrant stocks. From a rational choice perspective, this should have triggered concerns that those member states likely to incur burdens may defect in the future. Indeed member states should have designed mechanisms to monitor and, where necessary, sanction non-compliance. Yet while monitoring is ubiquitous throughout the legislation, for example through obligations to notify the Commission, sanctions are rare. It is pertinent to question why that is.

First, Pollack seems to suggest that the absence of explicit sanctioning powers in EU legislation should come as no surprise. Indeed he holds that institutions such as the Commission,

¹⁶¹ See next section.

¹⁶² H5

need not be given the power to enforce agreements through sanctions, but need provide only enough information about compliance to facilitate decentralized sanctioning by the principals themselves (2003b: 22).

With a specific reference to migration, a further potential reason is that member states were caught between two goals. One aimed at creating agreements that would be palatable for domestic audiences, and the other focused on striking agreements capable of achieving their stated policy objectives. A way out of this quandary was to endow the Commission with its usual monitoring powers, but to carefully avoid any sanctioning powers being granted thereto. Monitoring would allow member states to be thoroughly informed about sensitive migration issues likely to affect them in the context of an internally borderless area. While the lack of formal sanctioning powers would allow for an answer that was more politically rewarding than institutionally focused. A political agreement of this nature is delicate, as indicated by looking at the OMC experiment. In the only study dedicated to the introduction of OMC in migration policy, Caviedes holds that member states resorted to this method because of member state predispositions “to withhold delegating authority from the Commission” (2004: 306). However, after an initial surge of interest, references to OMC virtually disappeared from official documents. Member states seemed little interested in this loose form of cooperation, and the method was abandoned (Caviedes 2004: 305-06). More broadly the introduction of OMC is related to the fact that, in Caviedes' opinion, “only in issue areas where the presence of an external legislator and adjudicator is deemed necessary to prevent shirking will policy be communitarised” (2004: 292). In light of the results of this study however, it seems that this statement should be qualified. It has been shown here that member states have not shied away from delegating in administrative cooperation, borders and visas, and, to a lesser extent, asylum and refugee policy.

8.1.4) Efficiency and effectiveness

It was noted in Chapter 2 that the literature on delegation refers interchangeably to two different notions, effectiveness and efficiency, as likely triggers for delegation.

Effectiveness has been linked to previous policy failures¹⁶³ in this study, and efficiency has been linked to the potential for saving time and resources¹⁶⁴. And despite their frequent confusion with one another, separate results have been recorded for efficiency and effectiveness.

The picture regarding efficiency is straightforward, with the results here confirming that member states tend to delegate operational management tasks to the Commission. This should not however be dismissed as a merely technical issue. As discussed on numerous occasions, the powers delegated to the Commission are numerous and heterogeneous and range from managing large IT systems to providing technical assistance to member states in need, and from managing several migration funds to supporting networks of state officials. Member states need an actor with managerial expertise, as distinct from technical expertise, upon whom powers can be conferred (Franchino 2006a). The Commission fulfils this need. Stretching this line of reasoning a little, this seems to echo early debates in International Relations literature where the role of the Commission was compared with Secretariats in other International Organisations (Jupille et al. 2003).

Hawkins asserts that, “gains from specialisation are likely to be greater when the task to be performed is frequent, repetitive, and requires specific expertise or knowledge” (Hawkins et al. 2006: 14). This is what happens in the case of delegation based on efficiency. That is, member states recognise that initiatives such as the migration funds and introduction of large IT systems require constant support from EU institutions. In other words, frequent and repetitive tasks can be fruitfully delegated to the Commission in order that gains from a “division of labour” are maximised, i.e. member states make decisions and EU bodies execute them. That being said the “managerial” tasks the Commission is charged with, while no doubt technical in nature, are far from unimportant or non-contentious. Indeed authors have argued that the distinction between technical and political is a blurred one, and “the imprecision of this very distinction is, in fact, a powerful facilitator for reaching intersectoral and intergovernmental compromise at the EU level” (Fouilleux et al. 2005: 610; Rosamond 2000: 40-41). In many cases, these efforts at delegation have turned out to be controversial and have provoked reactions from policy actors, such as civil society organisations in the case of IT databases. This

¹⁶³ H7 in Chapter 2.

¹⁶⁴ H8 in Chapter 2.

study has shown that member states have also used the full range of Comitology procedures available to them, demonstrating that they differentiate between more and less troubling issues in terms of potential “agency slippage”¹⁶⁵. In a way, this is a long-standing debate in EU affairs. In his classic work on the Commission, Nugent highlights that even though it,

is best known for launching proposals in respect of what may be thought of as grand and overarching policies, [...] in volume terms most of its initiatives are focused on detailed policies in particular sectors (Nugent 2001: 10).

The picture in relation to effectiveness, understood as the effort to redress previous national or European failures, is however negative. In some cases previous failures are indeed quoted in official documents as triggers for delegation. However, this happens in only a few cases within the overall set of legislative measures analysed. The overwhelming majority of policies issues labelled as failing by official documents, practitioners, academics or media outlets, could not be connected with specific instances of delegation in this dissertation. The results of the analysis carried out in this study demonstrate that previous failures are neither sufficient nor necessary to justify delegation in a given policy area. This runs counter to a number of accounts in the literature (Majone 2000; Monar 2011: 130; Stetter 2000). However findings here confirm Gilligan’s theory that previous failures, by themselves, do not really explain advances towards institutionalised international cooperation (2009: 50).

8.1. *Future avenues of research*

This study has involved in-depth research on delegation within a single policy area, which is an approach that has not been taken before. An obvious initial step towards building on the advances made in this study is to carry out a range of similar studies across other policy areas. This would facilitate comparison of results, and would

¹⁶⁵ Kassim and Menon hold that slippage may occur when “the very structure of delegation provides incentives for the agent to behave in ways inimical to the preferences of the principals” Hussein Kassim and Anand Menon, 'The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?', *Journal of European Public Policy*, 10/1 (2003), 121-39 at 122..

allow an assessment of whether the present findings are peculiar to this policy area or are generalisable beyond migration policy. It would be possible to include areas subject to significant political pressures, such as environment or social policy, or indeed less prominent areas such as development and cooperation policy. In addition, there is a widespread perception that the role of the Commission is diminishing in EU affairs (Nugent 2010: 135-36). It would be possible to test this by checking for various levels of delegation and discretion through time and across policy areas, using the methods employed here. More profoundly, if this study's central premise that delegation is an expression of integration is accepted, this could provide a way of illustrating levels of integration across EU policy. The result of which would be to bring much-needed clarity to EU studies focused on integration.

For reasons of space and resources, it was necessary to limit this study to the policy-design phase, which tends to portray delegation as a one-off event. However once powers are delegated, agents use them, which in turn is likely to impact on principals who may revise, withdrawn or indeed reaffirm those powers. This shows how delegation is more of a process than a one off-event. A further, and eminently relevant, research project could therefore concentrate on the implementation of migration policy, so that light might be shed on how delegated powers are exercised. This is an important facet of what is usually termed as discretion, though it is little studied.¹⁶⁶ The implementation of migration funds could make for an interesting study of this sort. This study has demonstrated that the powers granted to the Commission in those funds are so extensive in remit and depth that, from a principal-agent perspective, it is likely their use has had consequences for the principals - i.e. the member states in the Council and, recently, the EP. An interviewee from a Permanent Representation hinted at some frustration in the Council concerning the Commission's conduct in this regard (Interview 1). A similar issue is observable in an area of competence that seems to have been secured by the Commission, i.e. the management of IT systems. Events occurred during the creation of SIS II that have cast long shadows on the Commission's capacity to effectively supervise such projects.

¹⁶⁶ For an exception, see Dimitrakopoulos Dionyssi G. Dimitrakopoulos, 'Unintended Consequences: Institutional Autonomy and Executive Discretion in the European Union', *Journal of Public Policy*, 21/2 (2001), 107-31..

The results of this study could also act as the starting point for a new angle on the debate about the restrictive or liberal nature of EU migration policy. An interesting approach would be to investigate the effect that significant Commission involvement has on the substance of policies. This could be achieved by comparing policies featuring high delegation with those where the Commission has had few or no powers. This would enable a light to be shone on the effect of EU institutions on policy. In particular, it could be interesting to check for such an effect now that a number of legislative measures have been re-framed at the EU level, for example in asylum policy or in the new package for migration funding established under the 2014-2020 Multiannual Financial Framework.

8.2. *Links with broader debates on the EU and migration policy*

The point of departure of this dissertation was diametrically opposed to experimentalist-informed readings of cooperation in migration policy (Monar 2001, 2010; Pollak and Slominski 2009). While these approaches focus on efforts by policy-makers to avoid the Community Method, this study set off to measure integration by investigating one of the most classic features of the Community Method, delegation. The resulting analysis found that this policy area has seen a significant volume of regular legislative output. Moreover delegation is present and significant, and is comparable to other long-established EU policy areas in terms of volume. The conclusion is that, as seen through the lens of delegation, migration policy has been fully incorporated into traditional EU policy-making mechanisms. A recent contribution to the literature holds that “[w]here delegation occurs, governments and traditional supranational actors support the creation and empowerment of de novo bodies” (Bickerton et al. 2014: 11). This study however qualifies this statement by observing that delegation to new EU bodies does not happen to the detriment of traditional addressees of delegation such as the Commission. In the most pertinent case, delegation to Frontex took place in a policy area that already involved high delegation and discretion to the Commission. The Commission does not appear to have lost out, in a sort of zero-sum game, but has rather been one of the staunchest supporters of the idea of an agency over the years. Finally a close relationship appears to exist between the two bodies, as for instance

the Commission sits on the Frontex's Management Board.

The policy-venue explanation for the emergence of migration policy in the EU maintains that governments wish to circumvent national constraints on migration control and hence have created trans-national cooperation mechanisms dominated by law and order officials, with EU institutions playing a minor role (Guiraudon 2000a; Lavenex 2006). This dissertation qualifies this argument. As mentioned above, Chapter 3 highlights that EU migration policy features as much delegation as other more traditional policy areas. Therefore EU institutions are not minor players in this area. The qualitative analysis of this study involves an assessment of the extent to which cooperation can be explained in rationalist terms, namely: uncertainty; credibility; and, effectiveness and efficiency. While policy failures *per se* have rarely induced member states to grant powers to the Commission, potential gains from increased efficiency have produced such a result. In terms of operational management, working through EU institutions has surely meant more opportunities for member states to control and act at the European and international level. Frontex, the numerous IT systems¹⁶⁷, and the networks established by the EU have amplified member states' reach over a phenomenon that is international by definition. Member states have also benefited greatly from working within EU institutions in terms of gaining knowledge and information, while leaving little room for the Commission to make use of that knowledge to either expand its policy remit or to shape policy. And here there is a further line of criticism. While the policy venue argument captures member states' determination to avoid close monitoring and sanctioning, which recent contributions have also underlined (Acosta Arcarazo and Geddes 2013), it has led to a general feeling among academic commentators that what EU cooperation is actually about is masking and shielding national executives' true intentions and actions on migration policy. This dissertation has confirmed the gap in sanctioning devices in secondary legislation, but not of monitoring tools, which are actually abundant. More profoundly, EU cooperation on migration policy is also about achieving increased efficiency in pan-European regulatory and operational policy undertakings. Strengthening credibility through common action is also present, particularly in areas such as visas and borders. Again, member states granted important, albeit

¹⁶⁷ Although recent, disappointing experiences with large-scale IT systems might have made member states more wary of the Commission involvement in this area.

variously controlled, agenda setting roles to the Commission to solve credibility concerns. A non-negligible dimension of that is EU funding, which tackles imbalances (in some cases admittedly only at a symbolic level) and strengthens common actions. These dimensions are however frequently dismissed in the current academic debate.

A question about centralisation was posed at the beginning of this document. This is a frequent theme when it comes to EU studies. Indeed, it arises often in the media through questions that ask things like ‘why do (or did) we give so much power to Brussels?’ If the question of centralisation is measured solely on the grounds of the number of occurrences of delegation, delegation is present in this policy area. Consequently, one could conclude that a process of centralisation has been ongoing in this area since 1999. However the qualitative analysis discussed in Chapters 4 to 7 provides a more nuanced picture.

Moravcsik has highlighted that the EU “constitutional order [...] preserves national democratic politics for the issues most salient to citizens” and tends to delegate “to more indirect democratic forms those issues that are of less concern, or on which there is an administrative, technical or legal consensus” (Chalmers and Tomkins 2007: 85). According to this statement, EU migration policy should not go in the direction of more centralisation. However, the analysis of secondary legislation conducted here has shown that delegation: does occur in areas of great political salience, such as asylum relocation and border control coordination; and, also occurs when consensus is not entirely apparent, or when divergence is so stark that negotiations stall, such as with the Dublin Regulation. As an addendum, it worth noting that secondary EU legislation has largely been neglected or analysed only fragmentally in most literature, thus these findings perhaps support a revisiting of this approach.

Centralisation seems to be a by-product of the European migration funds, it only happens as a consequence of the Commission’s coordinating role therein (e.g. multiannual programming). This also happens in the context of administering and managing funds in cooperation with national administrations, which are under obligations of constant reporting to the Commission. In the case of IT systems, the Commission was at first empowered to establish and manage a number of different projects, but many of these were planned to be transferred to other bodies since their initial proposals (e.g. VIS, SIS). In addition, the Commission has accepted the

support of individual member states, as envisaged in its original mandate. It has therefore delegated some of its competences in turn.

Since 1999 the EU has established a number of agencies focused on migration (Frontex, EASO, EU-LISA) and a number that deal directly with migration issues (EUROPOL and FRA). Chapter 5 in fact set out how some authors have linked agency creation to the centralisation of powers in the field of EU migration policy (Mitsilegas 2007). In the broader field of delegation studies, authors have linked agency creation with a competence-eager Commission that, conscious of member state opposition to its entrepreneurship, sees agency creation as a way of advancing its role (Keleman 2002; Wonka and Rittberger 2011). EU migration policy offers only partial support for these assertions. For example, while the Commission did push hard for the establishment of Frontex and its creation represented an enlargement of the Community action's remit, it is also true a sizeable number of member states actively supported this initiative.

Chapter 2 demonstrated that Moravcsik sees credibility of commitments as the only factor capable of explaining the level of delegation in the EU (1999: 73-77). While confirming his findings on the limited explanatory power of uncertainty, this study has also bolstered efficiency as another trigger of delegation. Majone's argument for two logics posits that when principals want to achieve credibility, agents have to be as insulated as possible (2001). When the objective is efficiency, more controls over agent conduct are admissible. The findings here partially confirm these insights. The quest by principals for efficiency is identified as one of the most powerful determinants of delegation. However, Majone seems to assume that supranational agents act either without prior bias or with a pro-integration preference in relation to EU politics. This only partially matches the portrait of the Commission identified here, i.e. an agent with consolidated policy experience and prerogatives based on decades of EU policy-making. Not only was the Commission prodding member states with migration-related proposals since the 1980s (Stetter 2000; E. M. Uçarer 2001), but it appeared to have established viewpoints on a number of migration issues. Finally, the quantitative results of Chapter 3 qualify Franchino's remarks about the impact of decision-making rules on Commission's discretion. While Council voting rules varied a great deal in migration policy in the period considered, this seems not to be related to either increases or decreases in discretion.

Consideration of the substance of policies was deliberately avoided. There has been huge debate, both within academia and civil society, concerning the restrictive or liberal character of EU and EU-led national policies (Ette and Faist 2007). However such evaluations have been avoided here as this policy area is heavily politicised and it was felt that normative remarks would have changed the nature of this research. That said a small number of comments might be useful. There is a growing stream in the literature arguing that tension exists between liberal EU institutions and restrictive member states (Kaunert and Léonard 2012; Lavenex 2006). This dissertation has shown that EU institutions have a more issue-oriented approach. More to the point, it has demonstrated that in certain cases the policy positions of Commission and Council were not that distinct, thus undermining characterisations of these bodies as embodying opposite biases towards migration policy. It is doubtful that the Commission showed a liberal bias in areas such as irregular migration or border and visa policy. With their frequent criticisms, commentators, NGOs, and civil society organisations illustrated that the Commission shares many of the assumptions and preferences of member states regarding the wide use of, what some have termed, intrusive technologies and control devices in the areas of border control, alongside a general tendency towards restriction of and the need to “fight” against irregular migration (Bigo et al. 2012; Broeders and Hampshire 2013; Geyer et al. 2008; Parkin 2011). It might be true that the Commission opted for such strategies in order to facilitate increased legal migration channels, however the point still stands. It is also clear that the latter strategy failed, at least in the period considered here.

At present the EU is drawn into a number of different debates within member states (Financial Times 2015b). One that is typical of contemporary discourse in the UK is that the Union has gained too much power, some of which should be dispersed back to the domestic level (Financial Times 2013, 2014; Townsend 2015). These arguments are certainly true to the extent that the Commission has defined policy preferences and these have a bearing on individual policies adopted. However, this study demonstrates that, overall, the Council does not delegate when it is engaged in conflict with the Commission. In practice, this means that the Council has been able to create agreements which do not extend the Commission’s powers beyond those already granted by the Treaties. Thus unless member states

are ready to enter into a radical overhaul of the Union's architecture with difficult-to-predict consequences, the *status quo* is likely to remain in place. Debates in other member states such as Italy seem to go in the exact opposite direction, with complaints of a feeble Union (BBC 2013; Financial Times 2015a; Riegert 2014). However the findings here show that Community bodies tend to be empowered either to strengthen commitments or to increase efficiency. In the case of migration, member states are already committed to principles of solidarity and have established mechanisms to underpin them (e.g. migration funds, the Visa List Regulation). The fact that the practical manifestation of this solidarity was amended through the last Multiannual Financial Framework (MFF) confirms that these mechanisms are now engrained in EU affairs (Commission 2014d). It is therefore essential to determine the intensity of these commitments, for example by measuring budgetary adjustments in the migration funds, and not their firmness. However, that has little to do with delegation. For that, a political agreement is needed. But it is hard to envision such developments materialising in the near future in light of the climate of domestic retrenchment in Europe.

In these final concluding remarks, it is important to provide a recap of the overall importance of this work to EU studies. This work has ventured down a well-worn path of EU studies in looking at delegation as the hallmark of integration. Questions surrounding EU integration have long characterised EU studies, and they continue being debated today (Bickerton et al. 2014). Migration policy in particular is an area where opt-outs and differential policy-making powerfully illustrates the idea of a Europe *à la carte*. Having said that, the findings presented here demonstrate that those member states that have entered into this chapter of cooperation have shown a high demand for traditional policy-making. Traditional here means the adoption of EU Directives, Regulations, and Decisions, in just the same fashion as in other policy areas. Chapter 1 outlined how for some authors the use of such legally binding measures is part of the traditional Community Method (Puetter 2012). Traditional also means that the level of delegation, and by extension the level of integration, is comparable to other policy areas, therefore reducing if not eliminating the feeling that cooperation on migration is something of a 'strange beast' in EU affairs. These elements combined mean that, if supranationalisation is interpreted as the empowerment of Community actors, this area is not an example of "integration without supranationalism" (Bickerton et al. 2014). While efforts at

experimenting with migration policy have not been absent, it is remarkable that member states have accompanied these initiatives with traditional ways of doing business in EU policy-making; meaning an abundant outflow of secondary legislation and significant powers conceded to EU institutions. That said, an assessment of the content of this policy output or its actual impact in terms of implementation, is beyond the means of this dissertation. However, and more profoundly perhaps, this study does show that research in the area of EU migration policy would benefit from the pursuit of traditional EU integration questions, such as: 'is there any delegation in this policy area?' and 'what motivates it?'. While the operationalisation of delegation employed here has its limitations, it underlines the need for systematic empirical research to show how much power has truly been delegated to the EU in specific policy areas. This point may sound obvious since the degree of delegation has long been treated as the default dependent variable in studies of integration, but it remains a dependent variable that is all too often underspecified in a literature where the search for plausible independent variables takes precedence.

List of interviews

- Interview 1 (03/07/2013). Permanent Representation of a founding member state - Counsellor: Home Affairs
- Interview 2 (03/07/2013). Commission - International Relations Officer.
- Interview 3 (04/07/2013). Commission - Head of Unit.
- Interview 4 (27/02/2013). EP coordinator for Socialist and Democrats delegation of a founding member state.
- Interview 5 (20/06/2011). Commission - Member of Commissioner Cabinet.

Annex. List of abbreviations.

<i>Abbreviation</i>	<i>Legislation</i>
Visa Code Regulation	Regulation 810/2009 of the EP and the Council on a Community code on visas (Visa Code)
Employer Sanction Directive	Council and EP Directive 2009/52/EC on minimum standards against employers of illegally staying third-country nationals
Blue Card Directive	Council Directive 2009/50/EC conditions of entry and residence highly qualified employment
Return Directive	Council and EP Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals
EMN Decision	Council Decision 2008/381/EC establishing a European Migration Network
VIS Regulation	Regulation 767/2008 concerning the Visa Information System (VIS)
RABITs Regulation	Council and EP Regulation 863/2007 on rapid intervention teams (RABIT)
European Return Fund Decision	Decision 575/2007/EC of the EP and Council establishing the European Return Fund for the period 2008 to 2013
European Borders Fund Decision	Council and EP Decision 574/2007/EC External Borders Fund for the period 2007 to 2013
European Refugee Fund Decision	Council and EP Decision 2007/573/EC establishing a European Refugee Fund
European Integration Fund Decision	Council Decision 2007/435/EC establishing a European Integration Fund
Migration Statistics Regulation	Regulation (EC) 862/2007 of the EP and the Council on Community statistics
Establishment, Operation and Use of SIS II Regulation	Regulation 1987/2006 on the establishment, operation and use of SIS II
Development Cooperation Regulation	Regulation (EC) 1905/2006 establishing a financing instrument for development cooperation
Mutual Information Mechanism Decision	Decision 2006/688 mutual information mechanism on asylum and immigration measures
Schengen Borders Code	Council and EP Regulation (EC) 562/2006 establishing a Community code on the rules governing the movement of persons across borders
Asylum Procedure Directive	Council Directive 2005/85/EC on procedures for granting and withdrawing refugee status
Researchers Directive	Directive 2005/71 procedure for admitting third-country national for the purpose of scientific research

Amended Visa List Regulation	Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism
Immigration Liaison Officers Decision	Commission Decision 2005/687/EC on the format for the report on the activities of immigration liaison officers networks
Secure Web-Based Information and Co-ordination Network Decision	Council Decision 2005/267 establishing a secure web-based information and coordination network of migration management services
Students Directive	Council Directive 2004/114/EC on the conditions of admission for studies, pupil exchange, training
European Refugee Fund Decision	Council Decision 2004/904/EC establishing a European Refugee Fund
ARGO amending Decision	Council Decision 2004.867.EC amending Decision 2002.463.EC ARGO programme
Frontex Regulation	Council Regulation 2007/2004 Frontex
VIS Decision	Council Decision (2004/512/EC) establishing the Visa Information System (VIS)
Asylum Qualification Directive	Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals as refugees
Immigration Liaison Officers Regulation	Council Regulation (EC) 377/2004 on the creation of an immigration liaison officers network
Free Movement Directive	European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
	Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air
Long-Term Resident Directive	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
Family Reunification Directive	Council Directive 2003/86 on the right to family reunification
	Council Regulation (EC) 693/2003 establishing a specific Facilitated Transit Document (FTD), Facilitated Rail Transit Document (FRTD)
Dublin Regulation	Council Regulation (EC) 343/2003 establishing criteria for determining the Member State responsible (DUBLIN II)

Asylum Reception Conditions Directive	Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers
	Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence
ARGO Decision	Council decision 2002/463/EC adopting an action programme for administrative cooperation ARGO
Resident Permit Regulation	Council Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals
Eurodac implementing Regulation	Council Regulation (EC) 407/2002 laying down rules to implement 'Eurodac' Regulation 2725/2000 for fingerprints (DUBLIN II)
Schengen Information System Regulation (SIS II)	Council Regulation (EC) 2424/2001 on the development of the second generation Schengen Information System (SIS II)
Visa Implementing Powers Regulation	Council Regulation 789.2001 reserving to the Council implementing powers examining visa applications
	Council Directive 2001/40/EC on the mutual recognition of decision on the expulsion of third country nationals
Temporary Protection Directive	Council Directive 2001/55/EC on temporary protection in case of mass influx of migrants
Carrier Sanction Directive	Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen
Visa List Regulation	Council Regulation 539.2001 listing the third countries whose nationals must be in possession of visas
European Refugee Fund	Council Decision 2000/569/EC establishing a European Refugee Fund
Eurodac Regulation	Council Regulation (EC) 2725/2000 establishment of 'Eurodac' for comparison of fingerprints for Dublin

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