

Migration and Integration: Focal Points of European Migration Law and Policy¹

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I. Introductory Remarks and grid of analysis

This essay and the arguments contained therein shall try to address focal points of EU (this sense, the wording “European migration law and policy” contained in this essay’s title refer to the European Union) migration law and policy and are, almost necessarily, reflective on the past. By definition, this essay can only paint with a broad brush and try to highlight the main decisions taken as they were at the time. Also, this essay shall mainly address and focus on third-state migration; intra EU-migration shall be addressed – as affected – in the conclusion only.

The main aim, however, is to highlight the necessary interaction of decisions taken on the policy-level, on the political level and finally, their transformation into law.

Furthermore, I base my arguments on the assumption that the EU does not have competence to legislate on matters of integration and inclusion *per se* – these policy

¹This essay is based on a presentation at the 1st Austro-Slovenian Faculty Meeting Ljubljana – Vienna in October 2019, hosted by the Law Faculty of the University of Vienna.

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fields are determined by the Member States and the ECJ, the latter applying secondary legislation dealing with migration and asylum – and that the EU only has very limited competence to legislate on matters “territorial” to Member States.

Since the massive influx of refugees and migrants in the years 2015 and 2016, matters of third-state migration have rarely stayed out of headlines and have often dominated these. While there may have been persistent and substantial policy divisions among Member States as to how to react in case of a (renewed) emergency, one can safely state that pressure is rising on the EU to take a firm stance in case of such an emergency, which may flare up again at any given moment.²

As early as August 2019, Greece repeated its calls for the EU to share the burden of new arrivals amid a sharp increase in refugees and migrants landing on Greek islands in recent weeks.³ In December 2019, the situation had apparently not improved, on the contrary: in September 2019 alone, over 10,000 newcomers had arrived in Greece, prompting Prime Minister Kyriakos Mitsotakis to appeal to the EU to exhibit more solidarity towards Greece and other States at the EU’s external borders.⁴

While the Eastern route of migration has caused Member States located along the EU’s external borders to struggle politically and financially, the Western Mediterranean route became – according to the FRONTEX risk analysis 2019 – the most frequently used route into Europe.⁵ Member States on the EU’s external borders have issued numerous and increasingly louder appeals for help, and the EU has had to deal with increasingly polarized political positions and individual opinions on third-state migration, some even calling the project of European unification into question.

This essay’s second focus lies with integration: Here again, we face the already mentioned differing approaches between Member States and, perhaps, within these. The Sustainable Government Indicators (SGI) study on migration policy, asking the

² Jess Smeets, ‘EU Split on migration widens’, EU Observer, 29 August 2019, available at <https://euobserver.com/opinion/145773> (last accessed 11 March 2020).

³ Smeets, EU Split on migration widens.

⁴ Helena Smits (Global Development, supported by the Bill & Melinda Gates Foundation), ‘Greece says it’s ‘reached limit’ as arrivals of refugees show no sign of slowing’, The Guardian, 16 December 2019, available at <https://www.theguardian.com/global-development/2019/dec/16/greece-says-its-reached-limit-as-arrivals-of-refugees-show-no-sign-of-slowing> (last accessed 11 March 2020); Chase Winter, ‘Migrants arrivals in Europe from Turkey rise sharply in 2019’, Deutsche Welle, 17 December 2019, available at <https://www.dw.com/en/migrants-arrivals-in-europe-from-turkey-rise-sharply-in-2019/a-51702064> (last accessed 11 March 2020).

⁵ FRONTEX, *News Release – Frontex publishes Risk Analysis for 2019*, available at <https://frontex.europa.eu/media-centre/news-release/frontex-publishes-risk-analysis-for-2019-Dh6Wkf> (last accessed 11 March 2020).

question “How effectively do [Member States’] policies support the integration of migrants into society?”⁶, tends to demonstrate widely differing approaches between Member States.

The political guidelines for the new European Commission promise reforms; a new Pact on Migration and the relaunch of the reform of the Dublin rules on asylum are – together with a reinforced European Border and Coast Guard Agency – at the very top of the policy and political agenda.⁷ The stakes are high, for if the EU and its Member States were to fail in dealing with migration in a humane and efficient manner, this may cause voters to turn towards far-right parties, and cause massive difficulties to the European project itself.

II. The Matrix

When reflecting on this essay’s topic and the differing, sometimes even conflicting decisions in law and policy taken by Member States and the EU alike, it became obvious that I had to first search for a matrix, make a suitable and useful choice, with the goal of translating (or retranslating) such a matrix into law and possibly, legal policy of the future.

In the realm of migration and asylum there are – very obviously – coinciding, overlapping and also conflicting identities, policies and resulting in corresponding legal choices between institutions of the European Union, Member States, political parties and, finally, legal scholars; due to the format chosen, I shall only be able to offer focal points or glimpses, and will unfortunately not be able to go into ramifications.

The matrix I would like to suggest consists of three threads of identity and runs as follows: The EU can be regarded as a “common market”, additionally, to various degrees, as an influential “normative power” and finally, as a “superstate”. I am hugely

⁶ Bertelsmann Stiftung, *Sustainable Government Indicators*, available at https://www.sgi-network.org/2018/Policy_Performance/Social_Policies/Integration/Integration_Policy (last accessed 11 March 2020).

⁷ Ursula von der Leyen, *A Union that strives for more – My agenda for Europe*, available at https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (last accessed 11 March 2020).

indebted to the work and ideas of Sandra Lavenex,⁸ herself drawing inspiration from the ground-breaking work of Fritz Scharpf.⁹

As shall be suggested, these three aspects of the EU's identity have been there since the beginning of European integration, as the forerunner treaties to the European Economic Community Treaty amply demonstrate. In recent times, these three facets of identity – and the word “facet” shall be preferred over the one of “part” or “aspect” or “thread”, since it indicates a closer association – have shown a tendency to overlap and blend into each other. A compromise between them is and remains unsettled, though one or the other tends to dominate policy decisions and be translated into law. I would like to address the common-market identity of the EU very briefly, since this facet of identity does not immediately pertain to the topic of this essay, although its legal fabric, especially in the shape of the Schengen Agreement, underscores the “rest”.

1. The Common Market-Identity

The “common-market identity” or “market-power identity” is supposed to take a functionalist, apolitical stance and be modelled according to Member States' needs;¹⁰ fundamentally, the market-power approach has found its translation into law in the free movement of workers and, therefore, the free exchange of workers, and the removal of obstacles – the obstacle-based approach with regard to the four market freedoms – in order to sustain economic growth and competitiveness. However, it shall be suggested that the “market-power” approach has not ever been “apolitical”: by granting migrant workers the very same rights to access to work under the principle of non-discrimination or the principle of equality, and later, by conferring the right to vote to Union citizens, by establishing Union citizenship itself and placing it on equal footing with the free movement of workers, there is very little that may be termed apolitical about the “market-power” identity.

The policy choices mentioned above and the conflicting choices made by the EU and its Member States in the aftermath of the year 2015 only highlight that Member States have refused to hand over competence on “territorial” matters, a choice which would, most probably, not have been approved by voters and constitutional documents alike.

⁸ Sandra Lavenex, ‘Common Market, normative power or super-state? Conflicting political identities in EU asylum and immigration policy’ (2019) *Comparative European Politics* 567–584, <https://doi.org/10.1057/s41295-019-00175-4> (no pagination available).

⁹ Fritz Scharpf, *Governing in Europe: Effective and Democratic?*, 1st ed. (New York: Oxford University Press, 1999).

¹⁰ Lavenex, ‘Common Market, normative power or super-state?’ (no pagination available).

Consistently with this line of argument, Member States have also been hitherto opposed to addressing third-state migration by third country nationals, in the sense and meaning of economic immigration into the EU on a policy level.¹¹

The common-market approach may have been the dominant one for a very long time, as amply illustrated by the Single European Act 1986, and numerous pieces of secondary legislation on competition and state aid matters. Though it may be somewhat tempting to suggest a timeline for the “market-power identity”, the three facets of European identity have always been overlapping, and, in turn, the normative power approach took over the dominant role in shaping EU-policy.

2. The Normative-Power Identity

The “normative-power identity”, however, could very easily be termed as the dominant one until recent times, when it became intertwined with the “superstate identity”. The materialization of the “normative-power identity” may be due to the collapse of the Eastern bloc and the ensuing need to discuss and define first enlargement and subsequently, European aims and values; even though the European Constitution did not materialize, its rules on values and enforcement thereof made it successfully into the Treaty of Lisbon 2008.

The “normative-power identity” is epitomized by the *Tampere* conclusions of the European Council 1999, projecting the EU as a normative power protecting universal human rights:¹² “From its very beginning European integration has been firmly rooted in a *shared commitment to freedom based on human rights, democratic institutions and the rule of law*. These common values have proved necessary for securing peace and developing prosperity in the EU. They will also serve as a cornerstone for the enlarging EU. The EU has already put in place for its citizens the major ingredients of a shared area of prosperity and peace [...] This freedom *should not, however, be regarded as the exclusive preserve of the Union’s own citizens*. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. *It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory*. This in turn requires the Union to develop common policies on asylum and immigration, *while taking into account the need for a consistent control of external borders*” (emphasis added).¹³

¹¹ Lavenex, ‘Common Market, normative power or super-state?’ (no pagination available).

¹² Lavenex, ‘Common Market, normative power or super-state?’ (no pagination available).

¹³ European Council, *Tampere European Council 15 and 16 October 1999 – Presidency Conclusions*, available at https://www.europarl.europa.eu/summits/tam_en.htm#c (last accessed 11 March 2020).

Translated to the realm of immigration and asylum law, the “normative-power identity” rendered possible the adoption of the European Charter of Fundamental Rights¹⁴, or – on the level of secondary legislation and more specifically – the Directive on the right to family reunification,¹⁵ or the long-term resident Directive concerning the status of third country nationals,¹⁶ and, most important for the argument presented here, the Dublin III-regulation¹⁷ and the accompanying qualification directive.¹⁸

The focus of the qualification directive lies on the express intent to no longer abide by the “classic” concept of individual persecution, which lies at the heart of Art. 1 of the Geneva Convention on the Protection of Refugees 1951¹⁹ and which gave rise to the distinction between “the status of refugee”, “the status of subsidiary protection” and “the status of a displaced person”.²⁰ The directive replaces the three-fold concept mentioned above with the concept of “international protection”²¹; “international protection” is to be granted to persons qualifying as “refugees” and to such qualifying for subsidiary protection, whereas the substantial number of persons falling under the category of “displaced persons” remains largely outside the scope of regulation and protection.

The qualification directive requires Member States to grant persons qualifying for “international protection” equal treatment on a par with a Member State’s own

¹⁴ Charter of Fundamental Rights of the European Union, OJ c 326/2012, p. 391.

¹⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/2003, p. 12.

¹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/2004, p. 44; cf. Louise Halleskov, ‘The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality’ (2005) 7 European Journal of Migration and Law 181-202, p. 181.

¹⁷ Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/2013, p. 31 (henceforth referred to as “Dublin III-regulation”).

¹⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees and for persons eligible for subsidiary protection, and for the content of protection granted, OJ L 337/2011, p. 9 (henceforth referred to as “qualification directive”).

¹⁹ Convention relating to the Status of refugees, adopted in Geneva on 28 July 1951, UNTS vol. 189, p. 137; Cf. for a consolidated version: Convention and Protocol relating to the Status of Refugees, available at <https://cms.emergency.unhcr.org>.

²⁰ James Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd edn. (Cambridge University Press, 2014), p. 2.

²¹ Cf. Art. 1 qualification directive.



citizens and Union citizens²² in a number of fields such as access to employment,²³ access to education,²⁴ access to social welfare and healthcare.²⁵

On procedural questions, the focus of the Dublin III-regulation lies on establishing a robust system of individual remedies against a material decision by Member States' authorities:²⁶ the leading judgement in the case *Ghezelbash*²⁷ addresses the question as to whether the Dublin III regulation is essentially a system for Member State-cooperation based on mutual trust, or whether the asylum seeker has a legal interest in the correct application of the Dublin III regulation; the preliminary question itself concerns Art. 27 of the Dublin III regulation.

In its judgment, the Court concludes that the revision of the Dublin III regulation gives an asylum seeker a more prominent position and that appeal should be possible against a decision based on any of the regulation's criteria for determining the responsible Member State; and thus a failure to apply Art. 19 (2) Dublin III regulation must be challengeable before a court of law.²⁸

One might suggest that the approaches chosen in the two legislative acts of the Union are inconsistent from a systemic point of view: while the qualifications directive opts for a group-based approach and does away with the distinction "refugee", requiring individual persecution, and "person qualifying for subsidiary protection", the Dublin III regulation chooses an approach based on individual rights and remedies.

A massive inflow of migration would test the EU's asylum regime to its limits; before and in the aftermath of the crisis of 2015, which had substantial consequences with regard to the build-up of the EU's migration and asylum system. Thus, Member States, perhaps due to the sheer number of migrating persons, began offering and sometimes even enforcing measures of integration.

The following judgment shall highlight the problems caused by the points raised above, i.e. the merging of categories of third-country migrants and ensuing the diverging approaches between the qualification directive and the Dublin III

²² Jean Yves Carlier and Luc Leboeuf, 'Choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso, (2017) 54 CMLR 631-44, p. 639.

²³ Art. 26 qualification directive.

²⁴ Art. 27 qualification directive.

²⁵ Arts. 29 and 30 qualification directive.

²⁶ Art. 3 Dublin III-regulation.

²⁷ Judgement of the ECJ of 7 June 2016 (Grand Chamber), *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C-63/15.

²⁸ Maarten den Heijer, 'Remedies in the Dublin Regulation: Ghezelbash and Karim' (2017) 54 CMLR 859-71, p. 859.

regulation, leaving systemic loose ends and even rendering measures of integration more difficult to pass.

In the joined cases *Alo and Osso*²⁹ the questions for preliminary ruling refer to the lawfulness of the system of distributing subsidiary protection beneficiaries within Germany. According to national law, German authorities assign a place of residence within a specific city to persons qualifying for subsidiary protection when and if such persons are deemed to be dependent on social welfare; the ECJ would have to assess whether the assignment of residence to “a group within a group” infringes the right to free movement and, as a consequence, the right to social welfare as enshrined in the qualification directive.

In its judgment, the Court draws attention to the recitals of the qualifications directive. Such a measure may be justified by the objective to facilitate the integration of subsidiary protection beneficiaries by preventing the concentration of third-country nationals receiving social welfare and the emergence of points of social tension and by linking third-country nationals, which may be in particular need of integration to a specific place of residence so that they can make use of the integration facilities available.³⁰

Apparently, as suggested by *Carlier and Leboeuf*, the ECJ, led by the “equalization” between refugee status and subsidiary protection, chose to interpret rights of subsidiary protection with reference to the Geneva Convention, thereby giving rise to systemic loose ends, since the Geneva Convention clearly grants refugees the right to freely choose their place of residence.³¹

In the aftermath of the years 2015 and 2016, however, a remarkable shift towards measures of integration and their assessment in courts of law seems to have taken place; the proportionality test is applied in the mildest possible version, meaning that integration measures must merely not make it excessively difficult or impossible to exercise the right in question. This is, for example, true for measures requiring language tests or certain kinds of civic examinations, as illustrated by the case *Minister van Buitenlandse Zaken v K. and A.*³²; such requirements are, according to the ECJ,

²⁹ Judgment of the ECJ of 1 March 2016 (Grand Chamber), *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, joined Cases C-443/14 and 444/14.

³⁰ *Carlier and Leboeuf*, ‘Choice of residence for refugees and subsidiary protection beneficiaries’, p. 635.

³¹ *Carlier and Leboeuf*, ‘Choice of residence for refugees and subsidiary protection beneficiaries’, p. 639.

³² Judgment of the ECJ of 9 July 2015, *Minister van Buitenlandse Zaken v K, A*, Case C-153/14.

compatible with Art. 7 (2) of the family reunification directive, provided that they do not make it impossible or excessively difficult to exercise the right in question.

Recently, another aspect of the EU's identity takes the main stage, first based on measures of integration within the territory of the EU, such as the afore-mentioned Union citizenship, and then on measures of entry-control outside the territory.

This facet of identity, the statist or superstate identity, remains, so it shall be suggested, dominant until these days.

3. The Statist Identity

The statist facet of identity of the EU seems to follow the established path of the formation of statehood; following the regulation of monetary affairs and of military affairs, it is migration policy which comes into focus. The development of migration policies can thus be regarded as a corollary of state formation.³³

The Stockholm programme 2009 already draws attention to the management of third-state migration to be attached to managing the Union's external sea and land borders, by declaring: "Access to Europe for businessmen, tourists, students, scientists, workers, persons in need of international protection and others having a legitimate interest to access EU territory has to be made more effective and efficient. At the same time, the Union and its Member States have to guarantee security for its citizens. *Integrated border management and visa policies should be construed to serve these goals.*" (emphasis added).³⁴

Barely a decade later, Art. 3 TEU of the Lisbon Treaty³⁵ includes among the aims of the Union: "The Union shall offer its citizens an area of freedom, security and justice [...], in which *the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.*"

Thus, within the third facet of the matrix suggested, third-state migration is to be addressed from the territorial perspective of border management, together with the prevention and combating of crime, as an issue of internal security; this approach shall be reflected in the framing of the FRONTEX regulation, to be shortly mentioned below.

³³ Lavenex, 'Common Market, normative power or super-state?' (no pagination available).

³⁴ European Council, The Stockholm Programme 2009 – An open and secure Europe serving and protecting the citizens, available at https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/stockholm-programme_en (last accessed 11 March 2020), p. 5.

³⁵ Consolidated version of the Treaty on European Union, OJ C 326/2012, p. 13.

Key developments during the past five years within the statist identity have been, among others: In the aftermath of the year 2015, a concerted European effort was made to manage third-state migration via third-state agreements, most prominently, the EU-Turkey statement of 18th March 2016.³⁶ This statement, contained in a press release, communicated to the public the results of a meeting between the members of the European Council and their Turkish counterpart. It announced the agreement on a number of additional action points; “additional” refers to measures already in place or soon to be introduced, such as stepping up security efforts by the Turkish coast guard and the opening of the Turkish labour market for Syrians under temporary protection.

The additional points of action encompass, among others, the return of all migrants arriving on Greek islands from Turkey as of 20 March 2016, admission to the EU of a number of Syrian refugees from Turkey equivalent to the number of Syrians returned from Greece to Turkey, as well as a number of accompanying measures, most notably financial support for refugees in Turkey.³⁷

On the judicial level, the case *X and X v. Etat Belge*,³⁸ fits seamlessly into argument and context: the case at hand deals with Art. 25 of the Visa Code,³⁹ referring to visa with limited territorial validity on humanitarian grounds. The ECJ held that the issue of visas for a stay longer than three months had not been harmonized and was thus not governed by EU law – it remains governed by national law. Thus, Member States are not under an obligation to issue humanitarian visas under Art. 25 Visa Code – they may do so if they so decide. The judgment in *X and X v. Etat Belge* leads back and reconnects with the argument put forward above that – if only for constitutional reasons – Member States need to retain and have hitherto succeeded in retaining regulatory competences on matters “territorial”.

Put very succinctly though, as a consequence, we may observe a bifurcation of applicable law, followed by a bifurcation of people; therefore, people excluded from the European territory are very probably also excluded from the application of EU

³⁶ European Council, EU-Turkey Statement, 18th March 2016, press release 144/16, available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (last accessed 11 March 2020).

³⁷ For an overview of facts cf. European Stability Initiative, The EU-Turkey Statement three years on, available at <https://www.esiweb.org/pdf/ESI%20core%20facts%20-%20EU-Turkey%20Statement%20three%20years%20on%20-%202015%20April%202019.pdf> (last accessed 11 March 2020).

³⁸ Judgement of the ECJ of 7 March 2017 (Grand Chamber), PPU, *X and X v. Etat Belge*, Case C-638/16.

³⁹ Regulation No 810/2009 of the European Parliament and the Council of 13 July 2009 establishing a Community Code on Visas, OJ L 243/2009, p. 1 (henceforth referred to as “Visa Code”).

law.⁴⁰ The dichotomy of “inclusion – exclusion”, applied to third-state migration, can safely be termed one of the defining features of modern statehood. In EU law though, the dichotomy mentioned has been there since the very beginnings, in the preservation of certain rights to free movement to first citizens of Member States, and then to Union citizens – citizenship being itself another defining feature of modern statehood.

And finally, the FRONTEX regulation entrusts to the European Border and Coast Guard Agency, named FRONTEX, the integrated border management of the EU’s external borders, the monitoring of migratory flows and risk analysis as well as external border management.⁴¹ This task shall, according to Art. 34 of the FRONTEX regulation, be fulfilled in full respect of human rights, especially of the right to non-refoulement. We thus may conclude that, at least for the time to come, the EU’s statist identity can be regarded as dominating policy and law-making activities.

III. Conclusion

With almost breath-taking speed, the EU has – within a comparatively very short time span – developed its statist identity; on “territorial” matters though, Member States tend to join forces, rather than to transfer competencies to the level above, the level of the EU.

At the time of writing, the need for a multi-voice, democratic dialogue, for well-informed and balanced views has not changed, on the contrary: the EU-Turkey statement seems, at least for the time being, to have run into troubled waters, with the Syrian civil war and outside interventions endangering future collaboration. The intra-European discussion on how to manage migration has not yet surrendered to extreme views, though it is in extreme danger of doing so. Humane and efficient border-management is needed if the Schengen system is to survive intact; a fully functional European third-state migration policy should urgently be implemented, perhaps more so than ever in recent years.

In its conclusions of 28 June 2018, the European Council confirmed that a functioning EU (migration) policy, relying on a comprehensive approach, requires both effective controls of the Union’s external borders, and internal and external

⁴⁰ Thomas Spijkerboer, ‘Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice’ (2017) 31 *Journal of Refugee Studies* 216-39, pp. 217, 220.

⁴¹ Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L 251/2016, p. 1 (henceforth referred to as “FRONTEX-regulation”).



aspects.⁴² Such a policy, still to be developed, should, according to the European Council, be in line with the Union's principles and values.

⁴² European Council, European Council conclusions, 28 June 2018, press release 421/18, available at <https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/> (last accessed 11 March 2020).



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