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Publication metadata

Title: ‘It takes three to tango’: new inter-institutional dynamics in managing major crisis reform
Author(s): Sandrino Smeets, Derek Beach
Journal: Journal of European Public Policy, 29(9), 1414-1432
DOI/Link: https://doi.org/10.1080/13501763.2021.1958904
Document version: Publisher’s PDF (Version of Record)
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‘It takes three to tango’: new inter-institutional dynamics in managing major crisis reform

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To cite this article: Sandrino Smeets & Derek Beach (2022) ‘It takes three to tango’: new inter-institutional dynamics in managing major crisis reform, Journal of European Public Policy, 29:9, 1414-1432, DOI: 10.1080/13501763.2021.1958904

To link to this article: https://doi.org/10.1080/13501763.2021.1958904

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Published online: 30 Jul 2021.

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‘It takes three to tango’: new inter-institutional dynamics in managing major crisis reform

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ABSTRACT
This paper provides an in-depth reconstruction of the (failed) reform of the EU’s Common European Asylum System. Even though this was essentially a legislative process, it was characterized by extensive European Council involvement. In fact, the European Council is commonly blamed for the lack of progress in EU reform. Divisions at the level of the Heads and an insistence on consensus made it impossible for the machine room to proceed with the dossier. We challenge this view, by looking at the interplay between the European Council, Council (of Ministers) and Commission. We argue that the effectiveness of European Council involvement crucially depends on the actions of these two institutions. Involvement of the Heads can propel, paralyze or derail EU decision-making, depending on when and how they are brought into play. The Council and Commission play a crucial role by anticipating, setting the scene for and providing the follow-up to European Council involvement.

KEYWORDS Asylum and migration; EU institutions; intergovernmentalism; leadership; negotiations

Introduction
One of the most significant developments in the European Union (EU) of the last decade has been the rise of the European Council, – which refers to the meetings of the EU Heads of State or Government. As a combined result of the coming into force of the Lisbon Treaty and four successive existential crises – Eurozone crisis, migration crisis, Brexit and currently the Covid-19 pandemic – the European Council has come to play a more prominent role in shaping and steering EU decision making (Bickerton et al., 2015; Puetter, 2014; Van Middelaar, 2019). Moreover, the ‘Heads’ are transcending their traditional roles of setting the general course in EU integration and acting as
dealmakers in end-game negotiations (Tallberg, 2008; Wessels, 2015). The European Council is increasingly involved in operational and legislative matters that are more typically handled at the more technical or administrative levels (Bocquillon & Dobbels, 2014; Bressanelli & Chelotti, 2016). An increasing number of issues or dossiers have become ‘Chefsache’ (‘matters for the bosses’).

Of course, the fact that the Heads deal with the most pressing, politically contentious issues is not surprising. The very definition of a ‘Chefsache’ is that the issue cannot be resolved at the lower levels, but requires the attention of the political leaders. The relevant question is when and in what sense the Heads are involved in regular, rule-based EU decision making (Van Middelaar, 2019, p. 178). As we know from previous crises, the European Council is not the place where such major crisis reforms are actually developed and agreed (Smeets & Beach, 2020b). This is one of the reasons why European Summits typically end with disappointing ‘too little, too late’ analyses describing how the Heads again ‘fudged’ a deal (Börzel, 2016; Jones et al., 2016).1 Agreements reached by the Heads need to be transformed into feasible and meaningful solutions within the legal and institutional framework of the EU.

It is unclear how – by which means and through which mechanisms – the European Council is supposed to steer the rest of the EU’s institutional machinery. The European Council does not have its own ‘machine room’ where policy proposals are developed, nor is it sufficiently anchored to the existing machinery except through the office of the European Council President, who has too small a cabinet and too little administrative support to maintain overall guidance of machine room processes.2 The Sherpa-network of personal advisors to the Heads was very influential during the early stages of the Eurozone crisis, but it lacks the institutional infrastructure to become a permanent rival to the Coreper.3

Instead of focusing on the Heads and their summits, this paper explores the broader implications of European Council involvement. To what extent does it ‘trickle down’ to the rest of the institutional machinery? How does the European Council affect – contribute to or interfere with – the actions of and interactions between the (European) Commission, the Council (of Ministers) and to a lesser extent the European Parliament (EP)?4 We maintain that the effectiveness of European Council involvement crucially depends on the role played by the Commission and the Council. In effect, it takes ‘three to tango’ in this new system of European Council centered governance.

The paper makes two contributions. On an analytical level, it offers a theoretical model of the interplay between the European Council, Council and Commission in managing major EU reform negotiations. The model explains how the Heads can propel, paralyze or derail EU decision making, depending on whether the Council and Commission are able to anticipate, set the scene for and provide the follow up to European Council involvement. On an
empirical level, the paper provides an in-depth process tracing analysis of the interplay between the three institutions in managing the reform of the Common European Asylum System (CEAS), which stemmed directly from the migration crisis. For this reconstruction, we use the method of *embedded process tracing*, in which we reconstruct decision and policy making processes by working together with close insiders from all three institutions and from the member states, building on series of in-depth conversations and internal documentation.5

CEAS reform can be considered a ‘negative’ or ‘failed’ case of reform. The empirical analyses will zoom in on six episodes in the management of migration reforms, in which the institutional activities or strategies appeared to be out of sync. The analyses thus serves to demonstrate the validity of the model ‘ex negativo’: by highlighting the main pitfalls that can stall or derail the process. The analyses reveal that the slow and erratic progress in migration reform cannot be solely attributed to (‘blamed on’) the Heads. It was primarily due to a mismatch between European Council and Council approaches, along with some, with hindsight, unfortunate strategic choices of the Commission.

**Theory: new inter-institutional dynamics below the European Council**

The rise of an intergovernmental body, the European Council, has provided impetus to intergovernmentalist theorizing, both ‘new’ and ‘old’ (Fabbbrini & Puetter, 2016; Moravcsik, 2018; Schimmelfennig, 2018). Major crisis-induced reforms – like the ESM, Fiscal Compact or EU Turkey deal – were considered intergovernmental, in the sense that they were established as intergovernmental agreements outside EU law, thus by-passing Community actors and action channels, and instead of reflecting the dominance of specific member states (Germany in particular). Major crisis reforms are different from ordinary legislative processes and politics, due to recurrent European Council involvement, however limited this may be in practice, which in turn affects the dynamics between Commission and Council.

The new dynamics at the level of the European Council have been analyzed, specifically through the prism of ‘new intergovernmentalism’ (Bickerton et al., 2015: Puetter, 2014). New intergovernmentalism offers a valuable framework for analyzing the role of the European Council as such, how it dealt with successive EU crises through summitry, in a process of intergovernmental coordination and deliberation at the level of the Heads and their Sherpas. The theory tells us less about the role of the European Council in the post-crisis, legislative reform processes, and about the interplay with the Community institutions (Maricut, 2016, p. 545).

‘Old’ or ‘liberal’ intergovernmentalist analyses of migration (CEAS) reform also focus on member states interactions at the highest political level, while
black-boxing much of what goes on at the technical, process level (Moravcsik, 2018; Schimmelfennig, 2018; Zaun, 2018). Intergovernmentalists identified three camps: the Southern or ‘frontline’ member states, the North-Western or ‘destination’ member states, and the Eastern or ‘less-affected’ member states. The North-Western camp wanted more ‘responsibility’ (to properly manage borders and apply asylum procedures). The Southern camp wanted more solidarity (to deal with the large inflow). The Eastern camp wanted neither, and rendered impossible a concession-based deal. Member states were trapped in a ‘suscation game’ in which the most affected member states would continue to bear the brunt (Zaun, 2018, pp. 48–49).

However, as our empirical reconstruction of the CEAS reform will show, the technical process did matter. The failure to deliver on the CEAS package was, to a significant degree, due to process management errors, not only at the level of the political leaders, but also at lower levels. At least partial agreement could have been reached if different choices had been made, not only by the European Council, but also by the Commission and the Council.

In this section, we present a general model – of European Council – Council – Commission interactions in dealing with major crisis reforms. For this, we engage with two studies that have elaborated on these inter-institutional dynamic (Bocquillon & Dobbels, 2014; Van Middelaar, 2019). While both studies give pre-eminence to the role of the European Council and its President, our focus is broader, incorporating what the Council and Commission can do to ensure a smooth functioning of the system.

In his book Alarums and Excursions, former member of the cabinet of European Council President Van Rompuy, Luuk van Middelaar provides a theoretical analysis and historical reconstruction of how the European Council carved out its role and position in the broader EU system. He starts from a similar distinction between the European Council as control room (or ‘bridge’) and the machine (or ‘engine’) room. However, Van Middelaar is generally more convinced that the European Council is able to provide guidance (through tasking and mandating) and maintain control (by intervening and breaking the deadlock) over machine room processes. Second, he maintains that the European Council President can act as ‘the connection man’ between the two levels (Van Middelaar, 2019, pp. 197–199).

We make two observations in this regard. First, we note that the amount of actual ‘tasking’ by the European Council tends to be overestimated. The European Council is more influential when it can endorse existing proposals or ongoing processes in the machine room. The effective interplay between the European Council and Council during (specific episodes) of the Eurozone crisis was due, in no small part, to an effective division of labor between the generalists at the top and the specialists in the machine room. The tasking and mandating done by the European Council was typically very general,
and primarily served to show that there was a political commitment, which provided ministers and civil servants with enough leeway to proceed, for instance on the size and scope of the ESM or specific elements of the banking union (like bail-in conditions or the supervisory and resolution mechanisms).

The second point is related to the European Council’s ability to intervene and break the deadlock, for instance on the Single Supervisory Mechanism (SSM) in December 2012 or the Single Resolution Mechanism (SRM) in December 2013 (Nielsen & Smeets, 2018). We note that the effectiveness of the European Council’s interventions very much depend on the ability of the Council to set the scene for European Council endorsements and interventions. This means that the ministers need to bring the dossier or matter up to a point at which the Heads ‘only’ need to provide the final push. As we shall see, this was missing at key episodes in the management of migration reform. The Council was unable to lay out the groundwork, thereby putting the Heads in a situation in which they could either decide to fly over or else get dragged into the nitty-gritty details of the dossier.

The second study, by Bocquillon and Dobbels (2014) focuses specifically on European Council – Commission interactions. The authors characterize this relationship along a hierarchical (vertical) dimension and a cooperative (horizontal) dimension, thereby distinguishing between an ‘obedient Commission’, a ‘runaway Commission’, ‘agenda-setting competition’, and a ‘mutually reinforcing partnership’ (2014, p. 27). In Bocquillon and Dobbels’ typology, it is again the European Council that primarily determines the kind of relationship it has with the Commission. When dealing with high-level crisis-induced reforms, the European Council will take the lead, and ask the Commission to come up with well-circumscribed proposals (Bocquillon & Dobbels, 2014, p. 28). The second defining factor is the permanent European Council President, which enhances the European Council’s ability to task and monitor the Commission, and therefore makes relations more hierarchical (Bocquillon & Dobbels, 2014, pp. 24–25).

We contend that there is evidence that the Commission has an equally important, strategic role to play in determining what this relationship will look like (Smeets & Beach, 2020b; see also Becker et al., 2016; Nugent & Rhinard, 2016). Specifically, the Commission needs to anticipate (beforehand) and make effective use of European Council guidance on a dossier. The Commission, together with the Council, also needs to provide the follow-up to European Council involvement. The political and technical levels of the Commission need to ensure that the general sentiments and directions presented at the level of the Heads are properly reflected in their proposals at the level of the Council. Here, again, we will again see important variations during the management of migration reform. The (political level of the) Commission either sought to challenge the views held at the level of the Heads, or else
they decided largely to *ignore* European Council level proceedings and focus on propelling the legislative process. Neither of these approaches was very effective because, as we know from Eurozone reforms (ESM, banking union), the Commission is most effective in shaping and steering machine room processes, if it can use control room coverage (Smeets et al., 2019).

The same reasoning applies to the role of the European Council President, whose ability to steer depends on the willingness of the political level inside the Commission to accept the guidance of the European Council President. There was a rather effective interplay between the political level of the Commission and President Tusk and his team in the run-op to the EU Turkey Joint Action Plan and Statement, which allowed the Commission to play a large role in actually shaping the deal (Smeets & Beach, 2020a). The nominal guidance of Van Rompuy was crucial for launching and ensuring continued political commitment to the banking union (Nielsen & Smeets, 2018). In migration reform, on the other hand, Commission President Juncker repeatedly chose to champion alternative visions, instead of showing that the Commission’s ideas fit within the broad orientations set by the Heads.

The insights from the literature and our own observations are reflected in Figure 1. The model identifies three major stages in a major crisis reform process:

1. Initial stage (tasking or agenda setting stage): The reform process is started on the basis of a task/mandate from the European Council. Before this initial tasking the Commission can try to anticipate/influence beforehand the kind of task/mandate it will receive from the European Council.
2. Intermediate stage(s) (negotiating stage): The shape and substance of the reforms are being negotiated at the machine room level, but with nominal supervision and occasional interventions by the European Council. The

![Figure 1](image-url)
Council and Commission need to set the scene for effective European Council endorsements during the process.

3. Concluding stage (decision making stage): In the final stage, the Council and Commission need to provide the follow up to European Council involvement. This means they are able to deliver a deal in which they leave only a few of the most political/contentious issues to the European Council. The European Council then breaks the deadlock on these issues, after which the reform can be completed and agreed at the machine room level.

Note that there is not necessarily a linear path through these stages. For instance, stage one (tasking) can be returned to if the European Council significantly changes what the machine room is tasked to negotiate. Additionally, stage two can have multiple rounds, in which the Council (and Commission) work on the technical negotiations and are able to deliver partial results, while repeatedly going back to the European Council to get endorsements/re-mandated (reflected in the horizontal arrow).

In the model, we identify six institutional activities – anticipating, tasking, setting the scene, (re)mandating, providing the follow up, breaking the deadlock – which together propel decision making on major crisis reforms. In the empirical analyses, we focus specifically on what went wrong at these different stages of the process. By tracing these pitfalls in the process, we arrive at a better understanding of what effective European Council involvement can look like, and what the roles of Commission and Council are in this system.

Empirical analysis: six episodes of inter-institutional friction

In this section, we reconstruct the management of the EU’s migration reform. In Appendix I, we provide a condensed overview of the entire CEAS reform process from April 2015 until December 2018. In the analyses below, we zoom in on six episodes of inter-institutional friction between the European Council, the Council and the Commission. We explain these pitfalls within the context of our model of effective European Council involvement.

September 2015: a clever coupe that soured the atmosphere

Although it was technically not part of the CEAS reform process, which started only with the Commission proposals of May and July 2016, a brief recap of the inter-institutional dynamics in September 2015 is required to understand the legislative process of 2016–2018. This was still at the height of the migration crisis, with thousands of refugees already being stranded
in Hungary, and many more arriving at the EU’s external borders every day. In response to this situation, the Commission put forward a proposal for the mandatory relocation of 120,000 refugees from the frontline states to other EU member states (Commission, 2015b). Mandatory relocation had been a politically contentious issue (i.e., Chefsache) from the start. The European Council of 25–26 June explicitly stated that relocation was a measure to which ‘all Member States will agree by consensus’ (European Council, 2015a, p. 4b, Italics added). The rotating Council Presidency and Commission felt that, because of this statement, they were denied access to an instrument – the prospect of a potential QMV vote – that could be used to put pressure on individual member states (Author’s interviews, Council Secretariat and Commission services, 25-5-2018; 8-4-2019).

The Luxembourg Presidency, supported by the Commission, thus decided to opt for another route by forcing a Qualified Majority Vote (QMV) decision on mandatory relocation at Council level (Council, 2015; Ludlow, 2015). This was at the Justice and Home Affairs (JHA) meeting of 22 September, a day before the European Council was to discuss migration. The decision to go for QMV on such a contentious issue has been hotly debated ever since. Some of the more Community-minded considered it a clever coupe. Seeing that a breakthrough could not be expected at the level of the Heads, getting a decision via the normal institutional route was seen as the most effective strategy, at least in the short run.

The general point we make here is that what the European Council can do very much depends on when it is brought in a position to intervene. The extraordinary European Council of 23 September was clearly a bad moment to bring in the Heads. Seeing that a more comprehensive debate on migration was planned for October, and the QMV decision on relocation had already been taken, it was unclear what the European Council could say or do at their meeting of 23 September (European Council, 2015b). In his invitation letter, European Council President Tusk did not even mention relocation (Ludlow, 2015: 2). It was the German Chancellor, Merkel, who insisted that the European Council discuss the matter.

Second, we note that the nominal ‘followers’ i.e., the Council and Commission, had significant autonomy in following or disregarding their ‘leaders’. The decision to go for a QMV vote was, in fact, not as contested (at least not at the level of the Council) as it would become in the years that followed. Although the Luxembourg Presidency acted quite forcefully, the meetings of the JHA Council of 14 and 22 September were not particularly hostile. The objecting member states had indicated that it would actually be better to outvote them on the matter, in order to avoid endless reruns of the same debate, where they had no mandate to agree on anything regarding relocation (Author’s interviews, Council Secretariat and Member states representatives, 18-12-2017; 7-11-2019).
The September 2015 QMV ‘triumph’ was a poisoned chalice though, in that it would eventually turn relocation, the Dublin regulation and CEAS reform in general, into Chefchache. As a result, negotiations that should have been kept on a technical level would be taking place at the political level.

**May–July 2016: reshaping the EU’s asylum policy along community lines**

The legislative proposals for reforming the CEAS were presented in two packages on 4 May and 13 July 2016 (Commission, 2016a–g: for an overview see Appendix 2). The mandate for launching CEAS reform was rather thin, essentially boiling down to a very general reference in the European Council Conclusions of February 2016 which stated that: ‘progress must be made towards reforming the EU’s existing framework so as to ensure a humane and efficient asylum policy’ (European Council, 2016a, p. 9).

It is fair to say that this was a case of self-mandating (what we call ‘championship’) by the Commission, taking its own May 2015 migration Agenda as starting point (Commission, 2015a). The idea was to embed mandatory relocation in a broader recast of the Dublin Regulation. The political level of the Commission anticipated (wrongly as it would turn out) that there was momentum for broader reform. This is why the proposals were launched with great speed and without the usual process of consultations and impact assessments. Moreover, there was no need for such assessments, seeing that Commission, Council and EP had just finished the previous round of CEAS reform and some of the directives had entered into force only recently (e.g., the Asylum Procedures Directive only in July 2015). The previous asylum package was generally considered to be quite liberal, which explains why some groups in the EP were quite happy with it, and now feared backtracking (Author’s interviews, Commission and EP 19-12-2017, 22-5-2019, 10-4-2019, 8-4-2020).

Within the Council, there was support for a reform of Dublin, not just from the Southern member states who had always been critical about the country of first entry principle, but also from the North. However, the majority of the member states were surprised about the second package of July on asylum procedures, qualifications and reception conditions, two of which the Commission intended to turn from directives into (more binding) regulations. The decision to go for ‘maximum harmonization’ had been taken already in January 2016 at the level of the President. At the technical level, Commission officials were unsure about the high level of ambition (Author’s interviews, Commission, 7/8-11-2019).

The Commission thus made a clear and conscious choice to push forward on the ‘ordinary’ legislative track, irrespective of the European Council (Author’s interview, Commission, 7-4-2020). As a result, the Commission’s
ambitious plans did not receive European Council endorsement. The June 2016 European Council does not welcome, or even take note, of the legislative package, but instead refers back to its own ‘comprehensive approach to the migration challenge’ of October 2015 (European Council, 2016b, p. 8). The general point is that the Commission again had significant autonomy to propose a reform package, independent from and beyond what was acceptable at the European Council level. The problem with this approach, however, was that at some point the European Council would have to be brought back in.

June 2017: legislative business as usual, but without a political push

The second half of 2016 and the first half of 2017 can be considered legislative business as usual. The Slovak and Maltese Presidency made progress on the arguably easier files, the Eurodac and Agency (EASO) Regulation, getting to a partial general approach in the Council and trilogues with the EP. However, on the second package (procedures, qualifications and reception conditions) member states were still in the process of finding out just how different national asylum regimes actually were, and were hesitant about changing their legal systems (Author’s interview Commission and member states representatives, 7-11-2019; 10-1-2020, 7-4-2020).

Negotiations on the Dublin regulation specifically were certainly not proceeding according to plan. The last time that the Council had in fact discussed Dublin – meaning the legal text – had been during the Dutch Presidency in the first half of 2016. The Slovak and Maltese Presidency went for a different approach of working with thematic non-papers, discussed at the Coreper level, instead of in the Asylum Working Party. These non-papers were about the broader balance between responsibility and solidarity. Many other things were brought into the debate, like border controls and secondary movements, that had little to do with Dublin. A second problem was that the solidarity/relocation element was gradually watered down (e.g., by adding steps, to be used in highly exceptional circumstances, only for designated groups of refugees), up to a point where for the Southern member states it was not good enough anymore.

The rotating Council Presidency thus felt it made sense to bring in the European Council, in order to seek a broader reorientation of the debate and to provide a political push. The problem with this approach was that there was little that the European Council could do to propel such nitty-gritty, technical level discussions. The Council effectively failed to set the scene for effective European Council endorsement and re-mandating. Linking back to our model, June 2017 was a moment when the European Council was brought in too early, to do the wrong thing. In Dublin, political
discussions were becoming more and more toxic, while on most of the other files the technical work was not advanced enough.

As a result, the June 2017 European Council could do little more than refer back to its December 2016 Conclusions, which state that: ‘the Council is invited to continue the process with the aim of achieving consensus on the EU’s asylum policy during the incoming Presidency.’ (European Council, 2016d, p. 6, italics added) and provide some guidance on the concept of safe third countries that was blocking negotiations on the asylum procedures regulation. In Dublin, a general understanding was growing at the machine room level that they should strive to keep the file away from the European Council as much as possible, to avoid further politicization.

**December 2017: a failed attempt at decoupling**

There was more momentum in the CEAS reform negotiations during the Estonian Presidency in the second half of 2017, with files going up to Coreper in November, but still no progress on Dublin. Like their predecessors, the Estonians had watered down the idea of mandatory relocation, seemingly replacing it with an alternative (a la carte) form of solidarity that would still become mandatory in a second (crisis) stage. However, it was clear to both the rotating Presidency and European Council President that any decision on how to proceed vis-à-vis Dublin would have to be dealt with by the Heads. Their strategy was to aim for a decoupling of Dublin.

What the rotating Presidency and European Council President wanted to get from the European Council was a mandate to move on with the rest of legislative package, without Dublin. In his invitation letter and in the draft European Council Conclusions, President Tusk referred to mandatory relocation quotas as ‘highly divisive and ultimately ineffective’. Tusk had never been a supporter of mandatory relocation (see e.g., European Council, 2015d; Maricut, 2016, p. 546). However, this time, his statement was not meant as a contribution to the debate, but rather an attempt to end it. Tusk felt that mandatory relocation had developed from a fringe phenomenon into the central obstacle of the entire dossier. The amount of political attention was completely disproportionate to its effects on the ground.

Within the Council and also at the technical levels of the Commission, many agreed to Tusk’s remark (Author’s interviews, Commission and Council Secretariat, 22-1-2020, 7-4-2020). However, at the level of the Heads, Chancellor Merkel and Dutch Prime Minister Rutte were unwilling to give up on quotas just yet (Author’s interviews, European Council President Cabinet and Member states, 25-5-2018, 7-11-2019). Strangely enough, at the JHA Council one month later, Germany suddenly announced that it would be willing to drop the quotas in order to ensure progress on CEAS reform (Ludlow, 2017, p. 18). By then, it was too late.
Based on counterfactual reasoning, the December 2017 Summit can be considered a critical juncture. Had the European Council allowed the Council to proceed with CEAS reform without mandatory relocation, (i.e., engage in ‘re-mandating’), the incoming Bulgarian Presidency would have been able to make real progress, perhaps even reaching a deal in June 2018. Had the Commission come on board and showed itself willing to develop alternative, flexible forms of solidarity (e.g., through non-papers or communications), President Tusk might have been able to present the Heads with a feasible alternative. However, what actually happened was that both the political Commission and some member states claimed that they were taken by surprise by Tusk’s bold attempt to ‘unmake’ relocation as a Chefsache. For the incoming Bulgarian Presidency, it was clear that CEAS reform would have to start, instead of end, with Dublin.

**June 2018: a ‘not so good’ basis for European Council discussions**

The Bulgarian Presidency in the first half of 2018 was undoubtedly the most vibrant period on migration reform. All sides agree that the Bulgarians came closest to agreeing on the CEAS package. It is also the most interesting period for understanding what can go wrong in the interplay between the European Council and the Council. The view from the European Council was that the Bulgarians held on to the file for too long, and when it finally arrived at the desk of the President, there was very little to work with. The view from the Council Presidency was that the European Council (President) failed to provide guidance on how it would proceed with the file, thereby making it impossible for the Council (Presidency) to set the scene for European Council involvement. Instead of attributing blame, we trace the origins and causes of this disconnect between the levels.

Until June 2017, this was a *machine room process only*, and it was up to the Council Presidency to decide how to proceed with the files. The Bulgarian approach was simple in terms of the substance but creative in terms of procedures. The Presidency decided to go back to the legal text of the Dublin regulation and not get lost in broader (solidarity versus responsibility) debates (Author’s interviews, member states representatives, 10-1-2020, 8-4-2020). The Presidency decided to set up a higher-level Friends of the Presidency (FOP) SCIFA group. The FOP format is more flexible, as there is no full translation regime and there is flexibility in planning meetings. The Presidency also decided to go to Coreper every couple of weeks to lock in the progress.

By the beginning of May, a lot of the technical work on most of the files was done. However, the fact that Dublin was part of the package, meant that the European Council would have to be brought in at some point. Due to electoral changes in Italy, Austria (the upcoming Presidency) and
internal divisions in Germany (between Merkel and Seehofer), divisions at the level of the Heads had only become deeper. Instead of lowering their ambition, the Bulgarian Presidency decided to push ahead full throttle and get as many proposals on the table as possible. The Bulgarian approach hit a wall in a Coreper meeting at the end of May, which was preparing for the JHA Council of 5 June. The bone of contention was one sentence in the Presidency’s overview of all the progress made on the CEAS dossiers, including Dublin:

"delegations are invited to agree that … the compromise proposal prepared by the Presidency represents a good basis for the preparations in which the presidency of the European Council, in consultation with the rotating Presidency, … will engage after the meeting of the Council, in view of the meeting of the Heads of State or Government at the end of June. (Council, 2018a, p. 25, italics added)"

The Council Secretariat had strongly advised against this sentence, anticipating (rightly) that it would lead to divisive debates already at Coreper level, which meant that the text would never reach the JHA ministers, let alone the Heads. For the Presidency, on the other hand, it was clear that no breakthrough could be reached at the level of the ministers anyway, so it would be better to bring divisions out into the open at the level of the Heads.

It was only after the June JHA Council that the file was handed over to the European Council President. For the remaining three weeks, it was a control room process only. This is also when ‘the political Commission’ came back in. In an almost exact rerun of the 2015 dynamics, Commission President Juncker and, by then Secretary General, Selmayr organized another mini-summit at the Berlaymont where they again championed their own approach. However, divisions ran too deep, and the Commission’s text was considered far too ambitious, which meant that a breakthrough could not be achieved (Ludlow, 2018, p. 13).

The ensuing European Council summit could do little to break the stalemate. All sides agree that the June 2018 European Council summit was the worst summit ever on migration, derailing Dublin and CEAS reform in general. This was the meeting at which the Heads themselves tried to (re)shape EU migration policy, drafting texts and forging compromises, resulting in a plethora of measures, ranging from controlled centers to disembarkation platforms (European Council, 2018a, pp. 5–6). The problem was a lack of overall guidance, not least by President Tusk, who had become weary of these migration re-runs, and at some point even decided to leave the meeting. Even more problematic was the lack of a parallel machine room process that could turn the political impetus of the Heads into feasible proposals for reform. This time, it was the Heads that were flying solo.

In our model of effective inter-institutional dynamics, what the experimental approach of the Bulgarian Presidency had done was to bring the
consensus trap out into the open. The legislative process at Council level had become paralyzed due to (the need for) European Council involvement. Yet, the European Council level was also unable to take over the process. As a result, the Council failed to bring the technical work (on Dublin specifically) up to a point at which the Heads could provide a political push. The European Council, for its part, failed to provide a sense of direction on what is needed from the machine room, and ended up setting tasks on which Council and Commission would never be able to deliver.

**Aftermath: October 2018: asylum reforms along Austrian lines**

There was never much hope for a breakthrough during the Austrian Presidency, certainly not on Dublin, which was not even put back on the table. However, from an inter-institutional perspective, the Austrian Presidency is relevant for understanding the role of the Commission.

First, the Commission decided to opt for a more ‘pragmatic’ approach, in substance moving towards the lines of the Austrian Presidency by focusing more on the strengthening of the external borders, preventing secondary movement and prioritizing returns. Second, the Commission now showed itself willing, in fact, was actively looking for, ways to break up the CEAS package so as to allow as much progress as possible on everything but Dublin. This change of tactic, however, came too late. It would have taken at least a couple of months to decouple the legal texts. Furthermore, the Commission was still aiming for a rather large package (five or six of the files), instead of going for a few.

The Austrian Presidency appeared to be on the same track of agreeing to a more limited package of less ambitious reforms, and thereby keeping the European Council out. This is also why, in October, the Presidency asked the EP to reopen inter-institutional negotiations on three files (qualifications regulation, reception conditions regulation, and resettlement framework) on which some member states had shown reservations, even though provisional agreement with the EP had already been reached. The EP, for its part, refused to play ball. In Dublin, the Council routinely explored the concept of ‘mandatory solidarity’ (instead of mandatory relocation), but they ran into a dead end when the October 2018 JHA Council did not embrace it (Council, 2018b, p. 14). European Council debates about breaking up the package followed only in December, too late to have an effect (European Council, 2018b, p. 6)

The general point here is that breaking up the package can be considered as another attempt to ‘unmake’ migration as a Chefsache. Based on counterfactual reasoning, we contend that if decoupling had been proposed earlier, there would have been a chance to have a normal legislative process, with limited involvement of the European Council, in which some results could have been reached.
Conclusion and discussion: blaming the scapegoats?

This article makes two contributions to our understanding of inter-institutional dynamics in the EU. First, we developed a process model of effective (and ineffective) European Council involvement in major crisis-induced reform. Second, we applied this model to the case of the failed CEAS reform to explain how this process can get stalled or derailed. In Appendix 3, we added these pitfalls to our model. Obviously, the model is not intended as an exact replica of each crisis reform process, but rather as a heuristic tool to understand such processes and where they can break down. The occurrence of one or more process management errors does not necessarily mean that the reform is doomed from the start, but it does increase the likelihood of failure. More research should be undertaken to explore whether other non-reforms exhibited similar errors, and on successful reforms, to see how these pitfalls were avoided or overcome.

In this conclusion, we focus on the broader implications of our findings, both within and beyond the case of migration reform. Both in Brussels circles and in the academic debates it has become common to blame the EU’s slow and erratic responses to major challenges on an unwillingness/inability of the intergovernmental bodies to tackle problems (Jones et al., 2016). The European Council, and to a lesser extent the JHA Council, have become the obvious scapegoats for all those who expected the EU to be/do more on migration (Lavenex, 2018, p. 1195; Scipioni, 2018, p. 1362). This view is well characterized by one close insider:

The problem was that the Chefs had said that it was Chefsache, but never dealt with it. This made it impossible for the Council’s regular machinery to deal with it… The paradox was that there was very intensive European Council involvement, but they hardly ever dealt with, or even talked about, the CEAS package as such. The same sentence about the need for consensus kept popping up, but the Heads never gave it back to the Council. (Author’s interview, Council Secretariat, 22-1-2020)

Our reconstruction of the key episodes of inter-institutional friction qualify this view. It revealed some of the limitations that the European Council faces in taking the lead and charting out the course in major crisis-induced reforms. We shifted the focus to what the Council – in particular the rotating Presidency and Council Secretariat – and the Commission can do within this new system of European Council centered governance to steer such reforms towards successful adoption.

Our process level analyses suggest that, contrary to intergovernmentalist theorizing, migration reform was not doomed from the start because of non-overlapping preferences. The failure to deliver on the CEAS package was, to a significant degree, due to process management errors – and not only by the political leaders. If the European Council had been willing to
decouple, or at least to ‘de-symbolize’, the issue of mandatory relocation; if the Commission had been less ambitious on the political level and willing to break open the CEAS package at an earlier point in the negotiations; and if the Council (Presidency) had made sure that all (the other) legal texts were ready for endorsement, anticipating political momentum, the outcome could have been different.

Our process theory of effective European Council involvement can be used to understand the management of other major crisis-induced reform negotiations, not in the least dealing with the financial implications of Covid-19 crisis. What is already clear is that in the run-up to the ‘historic deal’ of 21 of July 2020 on the Covid recovery fund (formally Recovery and Resilience Facility) and Multiannual Financial Framework (MFF), the Commission played a notably different, more instrumental, role. In contrast to the political Commission of the Juncker/Selmayr days (Peterson, 2017), the Von der Leyen Commission was able to anticipate what the Heads needed in terms of a big financial gesture, and to convince them that this was something that could be feasibly delivered within the framework of the next MFF.

The European Council, for its part, was willing to provide both the Council (in this case Eurogroup) in March, and the Commission in April with a sufficiently broad yet clear mandate, which allowed the two institutions to go slightly beyond their job descriptions by suggesting the Leaders to look for ‘innovative financial instruments’ and a ‘reorientation of the MFF’ (Eurogroup, 2020 pp. 19–20). Intergovernmentalists will probably highlight the importance of the Franco-German proposal for a Covid Recovery Fund of 18 May 2020. However, by mid-May, the groundwork for the July deal had already been firmly laid out within the inter-institutional circles (Politico, 2020). It would perhaps be more appropriate to call the Franco-German proposal a German endorsement that stole the limelight a bit from the contribution of the Commission.

These claims, of course, require a more comprehensive process-level reconstruction of the coming about of Covid Recovery fund. Our first suggestion would again be to shift the focus away from the intergovernmental deal-making between the Heads. Overall, our analyses have shown that, even after more than a decade of major crisis reforms, this new system of European Council centered governance is still characterized by codependence without control. This is why there are no easy lessons to be learned in terms of either being prudent or daring to be bold. While we attribute more actorness to institutional actors, they are not puppet-masters behind the scenes. European Council involvement is too erratic to be orchestrated. The system, instead, depends on continuous signaling, often informal and across institutional divides, typically between a small group of key institutional actors who are able to assess what the other side might need. For the Commission to be able to anticipate and for the Council to be able to set the scene, the European Council needs to provide a sense of direction. Vice versa, the
European Council tends to get this sense of direction from Commission proposals or non-papers floated at the level of the Council.

This paper has tried to show how the involvement of the European Council affects the interplay between institutional actors when dealing with non-routine legislative decision-making. Even though their actual involvement might be limited and erratic, the Heads still act as nominal overseers and owners of such processes. When dealing with the most pressing challenges of the moment (i.e., ‘Chefsache’), European Council involvement is a constant. What differs is the ability of the other institutional actors to cope with this involvement; specifically whether the Commission and Council are able to bring in, work with and take their cues from the European Council, so that it can propel their work.

Notes

1. Moreover, when the Heads do decide to go at it alone, for instance with the March 2011 Euro Plus Pact or the June 2018 Asylum reforms (more below) their impact on EU policy tends to be limited.
2. The European Council President can also draw upon the support of the unit for General and Institutional Affairs in the Council Secretariat.
3. The Sherpa network primarily operates through informal, bilateral or trilateral e-mail and telephone contacts between key sherpas. Plenary meetings have become less important and less frequent.
4. The European Parliament is seen as one of the ‘losers’ of the increased ‘intergovernmentalisation’ of EU decision making and has played a less prominent role in major crisis reforms.
5. More information on the research design and a complete list of the interviews can be found in the online methodological appendix.
6. The proposal for a reception conditions directive was the exception in this regard.
7. Contrary for instance to the banking union package that was launched in September 2012.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This work was supported by Det Frie Forskningsråd [grant number: DFF-4003-00199].

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