

JAKOV BOJOVIC

Investigating the Ambition of
the European Commission in
Justice and Home Affairs:
The Cases of Hotspots
and the EBCG

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ABOUT THE AUTHOR

Jakov Bojovic is a PhD candidate at the Department of Political Science at Central European University in Budapest, Hungary and was a Research Associate at the CEU Center for Policy Studies in 2019. The topic of his PhD is the post-Lisbon ambition of the European Commission in areas of Justice and Home Affairs and Economic and Monetary Union.

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CENTER FOR POLICY STUDIES
CENTRAL EUROPEAN UNIVERSITY
Nádor utca 9, 1051 Budapest, Hungary
<http://cps.ceu.edu>, cps@ceu.edu

1. Introduction

This Working Paper presents an analysis of the Commission's reform ambition in the field of Justice and Home Affairs, based on two policy episodes during the time period of President Juncker's Commission (2014 - 2019). The new intergovernmentalism (Puetter 2014, Bickerton, Hodson et al. 2015, Fabbrini and Puetter 2016, Schmidt 2016) is chosen as the theoretical background for the Working Paper, as it problematizes the notion of the Commission's ambition towards supranationalism, widely accepted by the previous theories. New intergovernmentalism is a theory explaining European integration in new areas of activity that occurred in the period after the Maastricht Treaty came into force in 1993. In this period, according to the authors, the power of traditional supranational actors has not increased in the way it has before. Methods of policy coordination, delegation to executive agencies, centrality of intergovernmental bodies and processes of deliberation and consensus seeking have replaced the classic community method as the main modes of integration. How does the new intergovernmentalism, with its expectations of the Commission's behavior, fare with seemingly ambitious attempts by the Juncker Commission to reform the governance of Justice and Home Affairs?

The theory's foundations were laid out in the Bickerton et al.'s (2015) Special Issue on new intergovernmentalism published in the *Journal of Common Market Studies* in 2015. The article explains the integration paradox of integration without supranationalization and how existing theories of EU integration fail to fully explain it. The classic EU integration approaches - neofunctionalism and liberal intergovernmentalism - assumed that the interdependence of the

Member States would lead to supranationalization. The article provides six hypotheses¹ of the new intergovernmentalism to fill this gap and invites new contributions to test them (Bickerton et al. 2015: 711). Out of the six hypotheses of the new intergovernmentalism, the second and the third hypothesis are about the Commission (Table 3). Still, the two hypotheses, although convincing as statements about the empirical reality, are not fully operationalized in the article, especially given that the concepts used are undefined which makes their meaningful testing unattainable (see Schimmelfennig 2015 for a more detailed criticism). The thesis that this Working Paper is going to become a Chapter of will further operationalize the hypotheses relating to the Commission, before testing them.

<p>Hypothesis 1: Deliberation and consensus have become the guiding norms of day-to-day decision making at all levels.</p> <p>Hypothesis 2: Supranational institutions are not hard-wired to seek ever closer union.</p> <p>Hypothesis 3: Where delegation occurs, governments and traditional supranational actors support the creation and empowerment of de novo institutions.</p> <p>Hypothesis 4: Problems in domestic preference formation have become stand-alone inputs into the European integration process.</p> <p>Hypothesis 5: The differences between high and low politics have become blurred.</p> <p>Hypothesis 6: The EU is in a state of disequilibrium.</p>

Table 1. The six testable hypotheses of the new intergovernmentalism (Bickerton et al. 2015)

The second hypothesis of the new intergovernmentalism states that supranational institutions are not hard wired to seek ever-closer union. Bickerton et al. further elaborate that the “argument here is not that supranational institutions have been devoid of ambition since Maastricht but that their ambition has been directed elsewhere at projects that did not entail a transfer of significant new powers to the supranational level” (Bickerton et al. 2015: 710). While the new

¹ Here the authors borrow Brady and Collier’s (2010) definition of a hypothesis as a “tentative answer to a research question”.

intergovernmentalism can obviously be perceived as a restricting environment for the Commission, especially in terms of its ability to autonomously drive the process of integration and obtain autonomous decision-making powers, this hypothesis still leaves a lot of room for investigation. Precisely, the Commission's actual ambition regarding integration in the new areas of EU activity generally remains a black box. While the PhD will investigate and further operationalize various ambitions that the Commission may have, this Working Paper takes two types of "new intergovernmentalist" outcomes and tests the Commission's ambition in the process of arriving to them. The first outcome type, or a type of integration, is the creation and empowerment of "de novo" bodies. It is already identified as a potential ambition of the Commission the third hypothesis of the new intergovernmentalism (Table 2), and other research focusing on the process of agency creation (e.g. Leonard 2009). One of the key outcomes of EU integration since Maastricht has indeed been the delegation of various tasks to EU agencies and other similar bodies, which the new intergovernmentalism calls *de novo* bodies. Since competence expansion is the underlying structural interest of the Commission, delegation to these actors is, according to the Principal-agent model (Pollack 1996), a strategy that the principal, in this case the Member States, employs to counter the Commission's ambition and diffuse the central bureaucratic powers. It is often assumed that it is easier for the Member States to control the potential bureaucratic drift if an EU agency, for example Frontex, is performing tasks on their behalf, than if the Commission was given these tasks. In contrast, it is hypothesized here that EU agency empowerment can be an ambition that the Commission has, even when Member States are against or divided on this issue.

H1: The Commission's ambition is the creation and empowerment of *de novo* bodies.

The second type of integration is one in which the Commission takes coordinative, soft governance roles. It is important to note here that the Commission increasingly faces the pressure to prove to the EU citizens that it does something useful and tangible (Haverland, de Ruyter et al.

2018), and more than often it is put under pressure to prove it is able to do this without expanding its powers. Thus, the Commission, especially in the new areas of EU activity, may have to think of creative solutions to solve complex governance problems without further supranationalization, especially in times of crises. The Commission's underlying reasoning in proposing pragmatic solutions may be, according to the literature on policy entrepreneurship (Princen 2007), to build its credibility with the Member States. This potential ambition is conceptualized here as a pragmatic and credibility building ambition. The Hypothesis 2 thus tests the ambition of the Commission to offer concrete and pragmatic solutions to problems facing the EU without expanding its domain of powers. As a technocratic powerhouse, the Commission is at the unique position to offer such solutions, but the question is whether the ambition for these new roles for the Commission comes from the Member States or the Commission itself. An earlier example would be the coordinative role that the Commission played in the Troika. The question here would be whether this was indeed the idea of the Commission all along, to take on these additional tasks that are outside of the community method competences, or it was the European Council that shaped the agenda and delegated to the Commission. The establishment of the European Semester in 2010 and similar modes of experimental governance (Zeitlin 2016) could also be considered such cases as they give the Commission soft coordinative roles and develop novel ways of governing and integrating. The case in the refugee crisis that is especially of interest is the Hotspot approach developed to manage the immense migratory influx in 2015. It gave the Commission a coordinative role through non-legislative and non-binding acts, but it offered a concrete solution for cooperation between the Member State and various EU agencies that deal with migration.

H2: The Commission's ambition is to offer pragmatic and non-supranational new governance solutions.

In both types of integration, there is also a possibility that the Commission was a passive actor, and that the European Council or other institution was in the driving seat. Thus, regardless the

outcome, the Commission's ambition may also be restricted to brokering or securing - if it has already been agreed elsewhere without its input - a consensus solution between the Member States. According to Moravcsik (1999: 299), this is the only way in which the Commission can be a meaningful link in the causal link of EU integration: "Rare entrepreneurial success stemmed not from the qualities of supranational entrepreneurs stressed in most existing analyses, but from rare structural circumstances under which international officials could help overcome domestic and transnational collective action problems." Furthermore, Moravcsik also claims that if the Commission cannot be considered a crucial causal link for integration, because if it did not act in such a way, a Member State or some interest group would have stepped in and filled the gap with the same proposal (Moravcsik 1995). Still, for Moravcsik, the Commission could act as an agent that tries to expand its competences, albeit only successfully to the point that the Member States would have suggested anyway, due to control factors that they put in place (as described in H1a). This is also a hypothesis seemingly close to the new intergovernmentalism camp as the theory's authors claim that in the EU consensus has become an end for itself (Puetter 2016). The European Council for example, increasingly important for day-to-day policy making in the view of the new intergovernmentalism, is a body that adopts its conclusions by consensus. Fabbrini and Puetter (2016) claim that "there is little room for the Commission to play a political role in policy-making that openly challenges the consensus position within the European Council and the Council". Instead, the Commission is a part of this consensus oriented institutional infrastructure, and not an outsider to the process. Notable example is the Commission's role in the Eurogroup as lead presenter and facilitator (Puetter 2006). The mechanism of this approach would, especially in highly salient cases, start in the European Council which would, after reaching a consensus, instruct the Commission to prepare legislation in line with the position shared by the Member States. However, the question remains what happens in cases when there is a lasting disagreement in the European Council, as opposed to the general agreement that was brokered by EU leaders in EMU reform during the financial crisis (Puetter 2012). In any case, the Commission's ambition is in this

scenario restricted to contributing to or merely following the consensus making practices in the European Council and other intergovernmental bodies active in respective policy areas, and then locking-in the consensus achieved there. The Commission takes a passive role and may act as either an honest broker, or an implementor of decisions of the European Council or another intergovernmental venue.

H3: The Commission's ambition is to lock-in the consensus achieved in intergovernmental venues.

The ambition of the Commission within the two chosen policy episodes is assessed through document analysis, process tracing of policy episodes, and semi-structured elite interviews. Document analysis of key Commission's Communications, white and green papers, memos, press releases and official proposals will show what the Commission's ambition was, at least on paper. High political saliency is flagged at the beginning of the policy episodes where relevant. Interviews are designed to investigate the Commission's ambition behind the proposal on paper, and the process through which the Commission arrived to it along with key factors influencing it. They were conducted with Commission officials, both in DGs and in Cabinets, as well as with Council Secretariat, COREPER II permanent representations, European Parliament Secretariat, and interest group representatives. A total of 29 interviews were conducted for the PhD as a whole – first set in November 2017 (13 in JHA area) and second set in November 2018 (16 in EMU area). The different actors were asked about the Commission's ambition, to avoid an overestimation of the Commission's role that could be a false finding if only Commission representatives were asked about their ambition.

Process tracing (Collier 2011) is used to track the Commission's ambition over time. Generally, the policy episodes are presented in a chronological, not thematical, manner. Hence, documents are analyzed having a temporal dimension in mind and the interviewees are asked about crucial events that affect the Commission's ambition through different periods. Furthermore, process

tracing is especially important with regards to the consensus seeking ambition and the significance of the intergovernmental venues. It is the main method used to establish whether the Commission's ambition was only to act as an implementer of decisions of intergovernmental venues.

The process tracing and the identified shifts in ambition present an explorative element of the research that goes beyond the hypotheses tested. Another explorative and additional element is finding in which specific cases did the Commission have different ambitions, which will allow putting forward new claims regarding the Commission's role in the new intergovernmentalism. Primarily, the aim is to establish the different types of ambitions of the Commission in new areas of activity dominated by the new intergovernmentalism, yet the amount of data gathered by this thesis project and the analytical framework of ambition that is suggested will allow presenting initial findings with regards to the key contextual and internal variables that guide the Commission to different types of ambition.

2. Justice and Home Affairs as an EU Area of Policy Making

Justice and Home Affairs (JHA) is an area of policy-making in the European Union that spans issues of police cooperation, judicial cooperation in civil and criminal matters, immigration and asylum policy, and external border management. The EU entered this field not as a substitute to the Member States who remain the primary policy makers in this field, but as an important additional provider of policies and minimum standards. Its significance lies in the fact that it touches upon some of the most fundamental state functions. As Monar (2013: 2) explains, “the rather technically sounding term ‘justice and home affairs’ should not make one forget that in this domain the EU is dealing with issues relating to the most invasive forms of state action such as deprivation of liberty, refusal of entry at borders, expulsion, and uncovering of personal data”.

This Working Paper takes the policy developments and reform attempts of the period 2014-2019 as a case to investigate the ambition of the Commission in the area of JHA. Specifically, the cases

chosen are within the scope of the migration, asylum, and border control aspects of the JHA domain. This is especially important as 2015 was marked by the start of the “refugee crisis”. In 2014, Commission President Juncker made Migration one his ten political priorities for the period 2014-2019 and entrusted a Commissioner with a special responsibility for Migration, Home Affairs and Citizenship, Mr. Dimitris Avramopoulos, from the Greek party of New Democracy (European People’s Party). At the height of the refugee crisis, through the year 2015, more than 1 million people entered Europe from the Middle East and North Africa (MENA) region, and most of them through Italy or Greece (BBC 2016). This created a disproportionately large pressure on the two frontline Member States and displayed the fallacies of the Justice and Home Affairs policies. Most importantly, the Dublin system in which the Member State of entry is responsible for administrating the asylum claim has failed and effectively stopped being implemented from 2015. Also, as of November 2015, a number of Member States including Austria, Denmark, Sweden and France used the right to reinstitute internal border controls, thus also effectively suspending the Schengen acquis. Hungary went so far in its anti-migrant approach to build a wall on its southern border with Serbia. In contrast, led by Chancellor Merkel Germany adopted an open border policy in 2015, deciding to let in one million asylum seekers.

The refugee crisis sparked a series of reform proposals from the Commission in the area of Justice and Home Affairs. Some of the adopted proposals include the establishment of the Hotspots for migration management, the EU Migration Partnerships, the transformation of Frontex into the European Border and Coast Guard (EBCG), the Asylum, Migration and Integration Fund, and the EU Emergency Trust Fund for Africa. Furthermore, the EU-Turkey deal was signed on March 18, 2016 in an attempt to solve the issue of influx, promising Turkey €6 billion in financial aid, for accepting the Syrians who reached Greek islands illegally, whilst taking into the EU the legal Syrian refugees from Turkey. The proposal to reform the Common European Asylum System (CEAS) is, at the time of writing, still in a deadlock as the Member States were strongly divided on the adoption of solidarity relocation mechanisms. By 2018 the refugee situation stopped being a crisis.

The level of irregular arrivals in 2018 dropped over 90% below the level of 2015, with around 150,000 arrivals (European Commission 2019). However, the talks of reforming the CEAS and other areas within JHA are continuing.

The research presented in this Working Paper looks specifically into two policy episodes in the fields of migration management (Hotspots) and border control (EBCG). The thesis itself adds the policy episodes in the area of asylum (CEAS). The three cases are chosen to investigate the ambition of the Commission, to test the hypotheses outlined in the previous chapter.

2.3. Policy episode 1: Migration flows management

2.3.1. Description

One of the first issues of the crisis was to deal with the emergency situations that the arrival of such enormous number of people caused in the frontline states. The exact number of people who arrived in 2015 is unknown but estimated to be over one million, with over 4,000 feared drowned (UNHCR 2015). For example, from 1st of January to 12th of October 2015, the number of arrivals in Italy was 593,432 according to an IOM estimate (European Stability Initiative 2017: 10). The island of Lesbos in Greece had 113,411 arrivals between January and August 2015. From January to August 2014, “only” 6,336 migrants have arrived to Lesbos, less than 6 percent of the number that arrived in the same period the following year. Further 34,000 have crossed by foot from Turkey into Bulgaria and Greece (UNHCR 2015). This number of arrivals, clustered at only a few entry points, was a new governance experience for both the EU and the frontline Member States for which they were unprepared. In the early months of the crisis, the local authorities could not cope with the pressure, and screening of newly arrived migrants and refugees was mismanaged. It was especially difficult to keep respecting the Dublin Regulation, which stipulates that the first country of entry should be the one responsible for processing the asylum claim. A new and coordinated way to deal with the emergencies caused by the migration influx was badly needed,

both for reasons of public security and solidarity. Figure 1 shows the dramatic rise of arrivals in 2015 compared with years before and after.

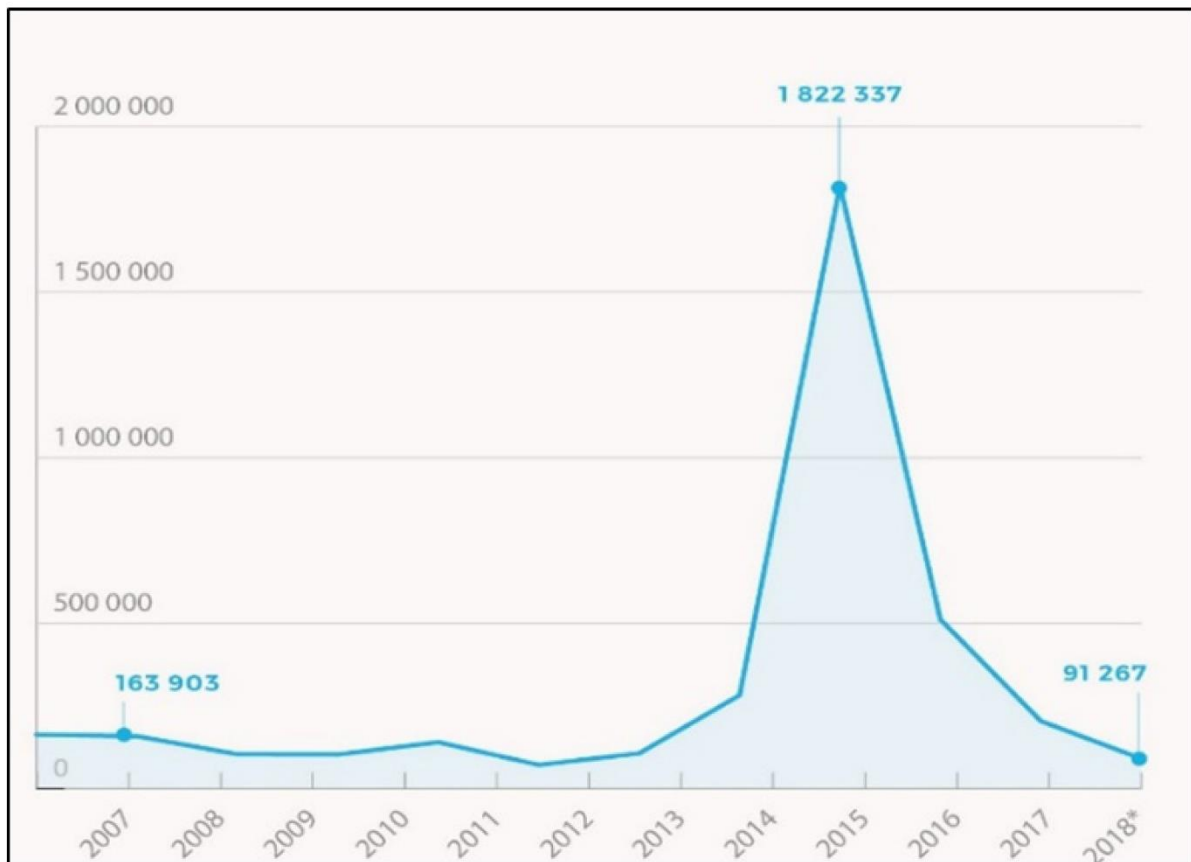


Figure 1. Irregular arrivals through the Mediterranean by year. Source: Council of the EU (2018)

In response to this situation, one of the key measures was the Hotspot approach. This approach gives EU agencies the mandate to assist frontline Member States with identifying, registering and fingerprinting arrivals, in order to ascertain those who need international protection (European Court of Auditors 2019). They are designed as physical centers in which efforts of all the relevant authorities are coordinated by the Commission. Specifically, it is the representatives of the EBCG, EASO, European Union Agency for the Operational Management of Large-Scale IT Systems (eu-LISA), the EUROPOL, Eurojust, the Member States and the Commission that are present in the Hotspots. EASO seconded experts from other Member States to work alongside and under full control of the local staff, in order to help identify those that need international protection in line with the EU Asylum Procedures Directive. The EASO support teams are assisting in processing

legitimate asylum claims as quickly as possible (ibid.: 8). The EBCG coordinates the return of those not eligible for international protection. It also deploys Joint Screening Teams to support the Member States with registration and identification. Investigations regarding smuggling and trafficking networks are done by Europol and Eurojust with the responsible Member State. Finally, eu-LISA provides ICT expertise based on its management of the Eurodac system for fingerprinting of asylum seekers (European Parliamentary Research Service 2018: 2). There are currently five Hotspots in both Italy (Lampedusa, Messina, Pozzallo, Taranto and Trapani) and Greece (Chios, Kos, Leros, Lesbos and Samos) as Figure 2 shows. To illustrate their size and overpopulation, the total capacity of Hotspots in Greece in May 2018 was 6.458 with occupancy of 15.201. The lack of shelters for unaccompanied minors together with issues of needs of vulnerable groups remain serious issues in Greek Hotspots, that led to protests of refugees in Chios and Lesbos (ibid.: 3). The Greek government adopted a law in 2016 that regulates the Hotspots (4357/2016). The reception capacity of all the Hotspots in Italy in the same period is 1.850 without data on occupancy. The Hotspots in Italy are governed by Standard Operating Procedures adopted together with the European Commission. The Italian hotspots have had several incidents including arson, procurement irregularities, overcrowding, and use of force (ibid. 4).



Figure 2. Location of Hotspots in Italy and Greece. Source: European Court of Auditors (2019)

The EU-Turkey deal which came into force in March 2016 to a certain degree changed how the hotspots operate in Greece. The deal foresees that migrants arriving from Turkey to Greek islands are kept on the islands, where they undergo a quick admissibility check in the Hotspot. If they are not to be given protection, they are sent back to Turkey. The Hotspot approach was enhanced, giving the EU agencies more executive rights and the Commission more coordinative duties. The Greek Hotspots were transformed into “closed centers” after 20 March 2016, meaning that migrants arriving to the Aegean islands were detailed on the Hotspot premises until their application was processed. The Hotspots were also designed to contribute to the emergency relocation mechanism adopted by the Council of the EU on 14 and 22 September 2015 after consulting the Parliament, which outlines the transfer of 160,000 asylum-seekers from Greece and Italy to other Member States. Finally, in June 2018, a proposal for creating “controlled centers” on the model of the Hotspots was put forward in a concept paper of the European Commission on the basis of the conclusions of the European Council. The controlled centers are created in

order to provide incentives to EU ports for taking in refugee rescue ships. According to this approach, the passengers on a refugee boat that disembarked in an EU port can be given an initial registration and asylum screening on the spot within 72 hours, after which they are either returned to countries of origin, transferred to the first Member State of entry in line with the Dublin procedure, or to the local asylum procedure and reception centre (European Commission 2018). The EU would also financially support the Member State taking part in the processing of the disembarked with €6,000 per person relocated. The involvement of the Hotspots in the EU-Turkey deal, relocation, and the modeling of controlled centres after them, show that it is an approach that has the support of the Member States, and that can be linked to other policy areas as well. According to the European Commission (2017b: 12), the Hotspot “has shown itself to be a flexible and useful EU instrument that can be adapted to any Member State in the same situation”. Although it was intended as a temporary emergency measure, it evolved into a long-term instrument and the “key element in the EU’s support for Member States on the external borders of the EU” (European Parliamentary Research Service 2018: 2). In 2017, the European Court of Auditors (2017) published a Special Report named “EU response to the refugee crisis: the ‘hotspot’ approach” stating that “the hotspot approach has ensured that most of the arriving migrants in 2016 were properly identified, registered and fingerprinted and their data checked against relevant security databases” (ibid.: 1). In November 2017 the Commission published detailed guidelines on how the Hotspot approach can be most effectively used in potential crisis situations in the future (European Commission 2017c).

The Hotspots are a technical case that has not yet been politicized by the domestic publics in the Member States. The governments of the Member States were not divided on the issue and have accepted the need for Hotspots in managing the influx of migrants and refugees. The criticisms came from the humanitarian non-governmental organizations that emphasized the need to secure better conditions in the Hotspots (e.g. Amnesty International 2017). The European Parliament’s LIBE Committee finds that the focus of the Hotspots has shifted from identification of refugees

to migration control leading to human rights violations (European Parliament 2017: 44). Overall, the issue of introduction of Hotspots was not present as a political issue in the media. A search for the term “Hotspots” in the leading EU policy publication “POLITICO” refined by publication dates between January 1st 2015 and December 31st 2015 gives 64 results. The number of articles goes down to 39 after taking out the irrelevant results. Most of the articles focus on the condition in the hotspots and do not present opposing views of any particular Member States. When further refined to results between June 2015 and September 2015, when the approach was presented and adopted, it gives zero results (POLITICO 2019). Albeit with limitations, this review indicates that the approach was adopted without a large public debate and political arguments. The hotspot approach also did not give new decision-making rights to the Commission or expand the community method. Instead, it gave the Commission a soft coordinative role with clearly defined tasks for the executive actors and most of the new competences, budget, and staff was given to the agencies taking part in the Hotspots. However, the legal mandates of the agencies were not enlarged on the basis of the Hotspots. Still, the hotspot approach was used as an argument in the efforts to expand the legal competences of the agencies.

Thus, the hotspot approach itself did not give new legal competences to the Commission, nor agencies. It can clearly be considered a technical issue of managing the registration, fingerprinting and returns, rather than a political issue. While the policy episode is not suitable for testing the hypothesis H1, as the context and outcomes do not match the ones present in them, the policy episode allows for testing the Commission’s ambition to build its credibility by providing quick and viable solutions to burning issues (H2). This case thus explores the Commission’s ability to act as a policy entrepreneur in technical (un-politicized) cases that do not lead to a competence maximization. This would imply that the Commission’s ambition is not “hard-wired to the idea of ever closer Union”, but that it can be an active player in other types of projects as well. The next sub-chapter will closely investigate the process of adoption of the Hotspot approach in order to find if their establishment was the Commission’s original idea, or the Commission was a passive

actor in their creation. Given the European Council's close involvement in agenda shaping in crisis situations, Hypothesis H3 is the logical alternative that is tested against H2. The 16 interviews conducted along with careful process tracing based on policy documents and official proposals will give an answer to the question whether the Hotspots, one of the most influential responses to the refugee crisis, came from the Commission or the European Council.

3.3.2 Analysis of the Commission's ambition

The Hotspots were first officially proposed in the European Agenda on Migration (European Commission 2015) as a cooperation of relevant actors in specific areas to help national authorities manage their internal borders, mass arrivals and mixed flows. The European Agenda on Migration was published by the Commission on 13th of May 2015 and it mentions the hotspot approach twice. Before that, on 20 April 2015, the Joint Foreign and Home Affairs Council published the "Ten point action plan on migration". High Representative/Vice-President Federica Mogherini and Commissioner Dimitris Avramopoulos jointly stated on that occasion: "The dire situation in the Mediterranean is not a new nor a passing reality. That is why the Commission will come forward with a comprehensive European Agenda on Migration in May to address the structural problems" (European Commission 2015). The ten-points action plan does not mention the hotspot approach and instead calls on the Member States "to ensure fingerprinting of all migrants" (ibid.). The minutes of the Special Meeting of the European Council of 23rd of April 2015 also do not mention the hotspots (European Council 2015). On 15th of July 2015, Commissioner Avramopoulos sent a roadmap about the implementation of the Hotspots to Member States, "drafted jointly with the Member States and with Frontex, EASO, Europol and Eurojust", according to the Commission's brochure on the Hotspots published later in 2015 (European Commission 2015: 1). This suggests that the Commission worked closely with the relevant stakeholders in the preparation of the approach.

Thus, looking at official documents, the Commission was the first one to officially propose the Hotspots, and not the European Council, nor the Council. A Head of Unit in the Commission confirmed how the Commission was the one to originally put forward the proposal to establish Hotspots.

“Both Frontex and EASO were in Greece but they were not talking so much, surely not looking for synergies or really cooperating. And then the Commission has invented the concept of the Hotspots - that was the Commission again who took the lead on promoting new ideas. From now on its not only these two but it is also EUROPOL that is there for the security dimension of those flows, and the Commission also has people on the spot to contribute to the coordination of the activities, because they have different mandates. In the Hotspots they are condemned to work together.”²

As soon as the Hotspots were suggested, they were immediately welcomed by the Member States, one interviewee explains, because “the number of refugee arrivals went up and it was clear Greece would come under enormous pressure”.³ The interviewee explains that the idea was approved already in June in the European Council and by September 2015 the Commission started preparing the Hotspots approach. The preparatory stage took the Commission three months and consisted of drafting the Roadmap and Standard Operating Procedures. This was important, according to the interviewee, because clarity was needed among the many different stakeholders: “one needs to have the necessary mechanisms, tools and procedures agreed upon in advance to make sure all of these actors play things in a synchronized way and not like a cacophonous orchestra”.⁴ The Commission coordinated this process and finished in December 2015. The rollout of implementation then began before Christmas 2015.

² Interview with a Head of Unit in the European Commission (5)

³ Interview with a Head of Unit in the European Commission (1)

⁴ Interview with a Head of Unit in the European Commission (1)

Hence, the Hotspot approach as a new policy instrument was pioneered by the Commission as an immediate response to the crisis. This case shows a strong ambition of the Commission to portray itself as a problem-solver and build credibility. At the same time, it does not expand the prerogatives of the Commission as an autonomous decision-maker. It restricts the Commission's role to overseeing and soft coordinating the roles of the relevant actors, without giving it legally binding powers in the policy area of migration control. Another interviewee from the Commission confirms the Commission's role in advocating the idea of Hotspots, and how the main goal was to bring the relevant actors together.

“Hotspots were the Commission's idea. It is really true – we take here a certain pride because we always said that in case of disproportionate pressure of mass arrivals we need to bundle, create synergies, bring everyone that can help to focus on the primary task on the border – identification, registration, fingerprinting and screening.”⁵

This interviewee's response shows that the officials in the Commission are quite proud of their leadership in this particular case. The ambition for the Commission, as found in the interviews, was to build credibility as an actor that can solve problems on the ground. It represents a novel instance in which the Commission acts locally and not only sets standards from Brussels. As an interviewee from the Commission explains: “It is true that due to the crisis, it is the first time that the Commission has sent people both to Italy and Greece on long term mission. It's a bit of a shift in responsibility, not just from Brussels deciding what should be the rules and control the implementation, it's also helping on the spot in extreme circumstances.”⁶

It is clear from the above that the Commission acted entrepreneurially and provided a solution in the approach of hotspots. The implementation of the hotspots was also closely monitored by the Commission. In its Communication of 27th of September 2017, the Commission stated that, on

⁵ Interview with a Head of Unit in the European Commission (1)

⁶ Interview with a Head of Unit in the European Commission (3)

the basis of lessons learned, it will publish technical guidance, including a template for the Hotspot Standard Operating Procedures (H-SOPs) on the implementation of the hotspot approach. On 15th of November 2017, the Commission published the “Best practices on the implementation of the hotspot approach” accompanying the document “Progress report on the European Agenda on Migration” (European Commission 2017). The document calls the approach a cornerstone of the broad range of measures set out by the Commission in the European Agenda on Migration. The hotspot approach is also a “tangible operational achievement” according to the Commission, which emphasizes the technical nature of this proposal (ibid.: 2). The whole focus of the document was to ensure that hotspots are “functioning effectively” (ibid.: 3). For this reason, the H-SOP were presented in this approach, which are a detailed description of what processing of migrants should ideally look like in the Hotspots, step-by-step. The Commission also presented seven best practices, or recommendations, for the further development of the Hotspots. The most important of them is the recommendation to initiate return procedures directly from the Hotspot, which would then be enforced by the European Border and Coast Guard. This recommendation was accepted and implemented on the ground in 2018 (European Commission, 2018).. With regards to the EU-Turkey statement of March 2016, this intergovernmental deal affected the way that the hotspots operate in Greece without protests from the Commission. The change fundamentally affected the hotspot approach and turned it into detention centers for refugees. While the European Parliament, the Greens (2017), the NGOs such as Amnesty International (2016) and international organizations such as the UNHCR (2016) protested this changed nature of the Hotspots, the Commission saw this as proof that Hotspots are a “flexible and useful EU instrument” (European Commission 2017: 6). The Commission thus defended the technical interpretation of the Hotspot approach and once again shown its strong ambition to prove its usefulness to the Member States. The European Council also had a strong agenda-shaping role in the development of the “controlled centers”. In an aftermath of a rescue crisis whereby Italy and Malta refused to take in a refugee boat stranded in the sea, which eventually ended in the port of

Valencia in Spain, the European Council (2018) directly instructed the Commission to prepare the controlled centers on the basis of the Hotspot approach. The Commission followed suit and prepared a Communications presenting the idea. Thus, while the Commission's ambition was to create the original instrument, the European Council also had a great role in shaping the instrument in the future, as the examples of the EU-Turkey deal and the controlled centers show. The Commission was complicit with these changes and was able to find a reasonable technical justification for both.

3.3.3. Summary of the policy episode

The interviews and the official documents confirm that the Commission was the one to come up with the Hotspot approach. Furthermore, they show that the Commission gives great importance to this new instrument, considering it one of the cornerstones of the EU's reaction to the refugee crisis. What allowed the Commission to quickly propose the Hotspot approach was its unique position as the only technocratic body with the ability to coordinate the many JHA agencies that had a role to play in managing the migratory influx. The fact that the Commission acted in a technical manner and used technical language as shown above, is largely the reason for success of the Commission's proposal. The Hotspot approach also did not create new competences for the Commission, which was another reason for its swift approval by the Member States. The Commission still managed to keep some hold of the development of Hotspots through publishing technical recommendations in the form of soft law, as Communications. However, the European Council also showed quite some impact on their development through the EU-Turkey deal and the establishment of the controlled centers. These are further arguments for the conceptualization of JHA as an area of joint agenda setting of the European Council and the Commission. Ultimately, this case shows how the ability of the Commission to exert leadership is not tied to the project of ever-closer Union. The Commission's ambition can be placed elsewhere, in this case, into problem-solving that enhances its credibility with the Member States.

3.4. Policy episode 2: Border control

3.4.1 Description

Unlike the Hotspot approach, being a new policy instrument that the Commission successfully presented and implemented in 2015, the EBCG's predecessor Frontex was established back in 2004. Illegal immigration through the Mediterranean was on the agenda of the EU in the early 2000s as, for example, the number of migrants intercepted along the Spanish coast reached 17,000 in the year 2000. In 2006, Canary island arrivals reached a peak of 31,000 (Carling 2007 according to Wolff 2008). A common approach to managing the border was necessary given that there were no internal borders in the Schengen area and illegal crossings were affecting all of its members, especially destination countries such as Germany.

The need for better management of external border control was first presented in the Conclusion No. 42 of the Laeken European Council of 14 and 15 December 2001: 'The European Council there asked the Council and the Commission to work out arrangements for cooperation between external border control services and to examine the conditions in which a mechanism or common services to control external borders could be created (European Council 2001: 3). Before that, according to Leonard (2009: 376) it was Italy and Germany that presented a joint initiative to establish a "European Border Police" to the Council. As a response to the call of the European Council, which acted as an agenda setter without providing the two institutions with detailed guidance of how the objective should be achieved, the Commission published a Communication on 7th of May 2002. The Commission calls for an establishment of the European Corps of Border Guards in the medium term and most likely after amendment of the Treaties. Their first function would be the common surveillance of the most sensitive places, especially at maritime borders, and later checking functions at border crossing points. The Commission avoided specifying what type of an EU body this new organization would be, whether it would be an EU agency, or a unit within the Commission: "At the appropriate juncture, the Commission will evaluate the

institutional and legal nature of this structure” (European Commission 2002: 24). On 14th of June 2002 a plan for the management of the external border was adopted by the Council (Council of the EU, 2002). This plan only mentions a European border guard once, in the last paragraph of the 27-pages long document:

“Based on the experiences of this gradual development, further institutional steps could be considered, if appropriate, following an in-depth legal study addressing the question of the legal basis and identifying the instruments which would be necessary. Such steps could include a possible decision on the setting up of a European Corps of Border Guards, composed of joint teams, which would have the function of supporting the national services of the Member States, but not replacing them.” (ibid.: 27)

The cold reception of the Commission’s proposal was a sign that border control was sensitive subject for most of the Member States and that transferring competences to the EU level in this area will not be so easy. “In particular, the British government favoured increased cooperation on external border controls but was reluctant to see any centralisation in that policy area.” (Leonard 2009: 376). The Member States shortly made advances on an intergovernmental basis. In 2002, the Member States adopted an action programme that enabled them to initiate joint missions, first being the Ulysses mission in the Strait of Gibraltar and the Canary Islands (Lutterbeck 2006: 68). In the same year, the Member States also agreed on External Borders Practitioners Common Unit, to facilitate the exchange of information and data between the border control units of the Member States. The appropriateness of this unit was challenged by the Commission which, in its Communication on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents of 3rd of June 2003, called for creating a more systematic and permanent basis for joint border management activities (European Commission 2003). The Council reiterated the Commission’s position in its conclusions published on the same day as the Commission’s Communication. Thessaloniki

European Council of 19-20 June 2003 endorsed both EU institutions and asked the Commission to “examine the necessity of creating new institutional mechanisms, including the possible creation of a Community operational structure” (European Council 2003: 4). The European Commission in November 2003 proposed the establishment of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) and argued that “...the Agency will be in a better position than even the Commission itself to accumulate the highly technical know-how on control and surveillance of the external borders that will be necessary” (European Commission 2003: 7). Frontex was created by the Council Regulation EC 2007/2004, with the main tasks of:

- (1) coordinating operational cooperation between Member States regarding the management of external borders;
- (2) assisting Member States in the training of national border guards, including establishing common training standards;
- (3) conducting risk analyses;
- (4) following up on developments in research relevant for the control and surveillance of external borders;
- (5) assisting Member States when increased technical and operational assistance at external borders is required; and
- (6) assisting Member States in organising joint return operations. (Council of the EU 2004)

The Frontex proposal was not as ambitious as the proposal from the original Communication of the Commission in 2002, which made it acceptable for the Member States. The agency did not have its own equipment nor border guards. It had only 220 employees in total and a budget of €80 million from the EU annual budget (European Commission 2010). While the Council quickly approved the Commission’s proposal of the tasks for the new agency, the main point of dispute was the composition of the Management Board (Leonard 2009: 380). The Commission originally

proposed the Management Board to have twelve members from the Member States and two from the Commission, but the Council amended it with a one Member State, one board member rule, and the Commission was complicit with this change. The European Parliament proposed six members for the Commission and six for the Council, which was disregarded by the Council, that only had to consult the European Parliament on this regulation.

Very quickly after it came into force, due to need for a more operational approach, the way that Frontex operated was changed with subsequent regulations. For example, after a direct request from the European Council in December 2006, the European Patrols Network (EPN) started in May 2007. Also, the Rapid Border Intervention Teams (RABITs) Regulation of 20 August 2007, has changed in a substantial manner the provisions of the founding Regulation of Frontex and provided a "rapid reaction capacity" for a reinforcement of human resources to a Member State in need. 500-600 border guards made up the "RABIT pool", however, these were still employees of the national border guards and not Frontex permanent staff. In 2008 the Commission presented a Roadmap for establishment of the European Border Surveillance System (EUROSUR), which was given political priority by the Stockholm Programme. In February 2010, the Commission proposed enhancing the operational capacity of Frontex, after a request put forward at the European Council meeting of 10-11 December (European Commission 2011). The Commission stated that the aim of its proposal is "to ensure that Frontex can provide appropriate technical and human resources in the framework of joint border patrols. EU countries would have to ensure that a pool of equipment such as boats and planes are at the disposal of the Agency, which would also be able to acquire its own equipment." (ibid.: 1). However, the Commission's long-standing ambition to ensure Frontex has adequate staff and equipment to be able to independently pursue its mission objectives was not yet welcomed by the Member States.

It took the refugee crisis for the next major reform and expansion of mandate of Frontex to be introduced. The European Agenda on Migration suggests that Frontex should be able to initiate

its own return missions (European Commission 2015: 10) and calls for strengthening Frontex's role and capacity, without details on what that should include. A few months after the European Agenda on Migration (May 2015) was published, the European Commission proposed enhancing the mandate of Frontex (December 2015) and it was adopted in record time during 2016 (Council of the EU 2019). On 14th of September 2016, the "European Border and Coast Guard Agency", or EBCG, was founded by the Regulation 2016/1625, replacing the Frontex based on the Juncker Commission's proposal. While Frontex was entirely dependent on Member States' voluntary and ad hoc contributions to its operations, the new regulation created a standing pool of 1500 border guards and technical equipment to which the Member States have committed explicit contributions that may not be withheld (Niemann et al. 2018: 28). Furthermore, the Council is given the right to decide by a qualified majority to dispatch border guards to a Member State, even against their will (ibid.). Among other novelties, the EBCG was also given a role in the return procedures, although without giving it the right to act upon them independently. What remained the same between Frontex and EBCG, according to several authors (e.g. Moreno-Lax 2017, Ripoll-Servent 2017) was the principal aim of keeping migrants out of the EU and the technical approach to border management as an issue of operational capacity and effectiveness.

The next proposal for reform came already two years later. After the calls for EBCG reform featured in the European Council's Conclusions of 28 June 2018, the Commission soon proposed a new standing corps of 10.000 border guards, more efficient return procedures and a strengthened cooperation with non-EU countries (European Commission 2018). Both the European Parliament's LIBE Committee and the JHA Council adopted a negotiating position on the EBCG reform in February 2019 (European Parliament 2019, Council of the EU, 2019). The two are currently in the negotiating process with regards to the reform of the EBCG.

3.4.2 Analysis of the Commission's ambition

The process tracing presented above shows that the Commission has had a long-standing ambition of empowering the EU's border control agency, which goes back to the early 2000s. The many instances in which the European Council communicated its positions on the reform of the agency shows that the agenda setting in JHA is one of shared agenda setting between the Commission and the European Council. Thus, the choice of the theory of the new intergovernmentalism as a starting point for analyzing the Commission's role proves fruitful. This sub-section takes a more detailed look into the Commission's ambition in this institutional architecture, whether or not it supports agency empowerment or is pushed into it by the Member States. The policy episode serves to test the Hypothesis 1a: 'The Commission's ambition is the creation and empowerment of de novo bodies. The analysis specifically focuses on the period after 2015 and the establishment of the EBCG, although certain conclusions will also be drawn from the earlier reforms.

Thanks to the creation of the EBCG, the management of the EU's external borders is now truly a shared responsibility between the agency and the Member States. In the Commission's Communication of September 2017, the decision to enlarge the mandate of the EBCG was labelled "ground-breaking" (European Commission 2017). Or, as one interviewee from a Permanent Representation put it:

"The time we are living in now is one of a very quiet revolution in Home affairs. We see many things changing on many fronts to an extent that would have been unimaginable 5 years ago. The EBCG was science fiction project. It was floated by certain stakeholders from time to time, but it wasn't anywhere close to the political reality we have now."⁷

As mentioned above, the European Agenda on Migration of May 2015 portrays the reform of Frontex as a priority for the Commission and announces a proposal for strengthening its mandate. The EBCG proposal was approved on the basis of the Commission's December 2015 proposal in a short amount of time, especially given that it touches upon the highly sensitive issue of border

⁷ Interview with a Permanent Representation – JHA Counsellor (2)

control. An interviewee from a permanent representation pointed out that “it took us half a year to agree, which is very speedy and not Brussels-like.”⁸ Another PermRep employee gave an interesting response that regards the Commission’s ambition:

“Many of us were surprised with how far EBCG proposal went. In reality, the final regulation is not that far apart from what the Commission proposed. There was a bit of a reaction at first, but Member States came around. The European Council came in and... when the European Council comes into it, the procedure changes a bit. You have a European Council conclusion saying to conclude the negotiations on this proposal by June next year and then it suddenly becomes about doing it in time. Then Member States are under more pressure to give in on certain points that they might have otherwise continued to insist on.”⁹

The crucial moment in the EBCG legislation was the European Council meeting of 16 October 2015. The conclusions of the meeting, a six-page document, mention Frontex seven times. The leaders of Member States reiterate the Commission’s proposal and call upon the Council and the Parliament to “enlarge the Frontex mandate on return to include the right to organise joint return operations on its own initiative and enhance its role regarding the acquisition of travel documents for returnees” (European Council 2015). Importantly, the European Council set a deadline to the Council and Parliament to come to an agreement by June 2016. Still, not all that the Commission proposed ended up in the legislation. Specifically, and regardless of the European Council recommendation, the mandate to act independently on returns was deleted after the Council negotiations of March 2016 (Den Heijer et al. 2016: 631).

The Commission’s 2018 proposal for expanding the mandate of the Agency came as a surprise to some Member States. For example, an JHA counsellor in an interview conducted for this thesis in

⁸ Interview with a Permanent Representation – JHA Counsellor (3)

⁹ Interview with a Permanent Representation – JHA Counsellor (1)

November 2017 stated: “I hope we don’t have another proposal on EBCGA in the near future. To go even further than what was agreed upon it is very difficult. We have reached what is very near the maximum. [...] I find it really very difficult to think of where else we could go with further integration. But, the Commission has very good imagination (laughter). They still manage to come up with more every time I think ‘this is it’”¹⁰

It repeats the Commission’s calls for giving proactive return management to the EBCG, instead of acting only by request of Member States (European Commission 2017, p. 20). Furthermore, President Juncker used his called for 2018 State of the Union speech to advocate for the EBCG and increasing its number of border guards from 1,500 to 10,000 (European Commission 2018). This proposal turns the border control an issue of a message of unity as much as it is a technical issue and takes the policy entrepreneurship of the Commission to the highest level. However, the open involvement of the President in the advocacy for the EBCG might prove to be not the best way forward for a case that has been built as a technical one for almost two decades. Potentially as a consequence of this, in late 2018, Hungarian Government started a billboard campaign with the face of Juncker (and George Soros) saying that Brussels “wants to weaken member states’ right to border protection”. The differences between high and low politics are thus becoming blurred (Bickerton et al. 2015). While it is too early to judge the success of this proposal and strategy, it shows that the Commission is ready to go “all in” for expanding the mandate of a de novo body with a strong intergovernmental structure that the EBCG is.

If this proposal was to become reality, the EBCG would have more employees than the Commission’s DG Migration and Home Affairs, which would make it the most staffed EU institution that deals with issues of migration. Due to this empowerment, a question of potential clashes on policy between the EBCG and the Commission is possible to imagine. “Agencies are quite keen to establish themselves as more and more relevant and more and more valuable and to

¹⁰ Interview with a Permanent Representation – JHA Counsellor (1)

grow in size and importance. They dedicate a lot of time and resources to making themselves useful and visible”, stated a JHA Counsellor.¹¹ On the question of potential clashes, a Head of Unit in the Commission made a comment that “the Commission has always respected the expertise of executive agencies, because they can add something to what we don’t have, this is the EU’s operational striking power. The agencies have also respected the division of powers, except in few occasions until they have been banged on their head, that they should focus on implementation.” This shows that even though the Commission is ready to advocate strongly for giving implementation tasks to agencies, problems may arise if agencies enter the Commission’s area, which is policy making. Both the Member States and the Commission share an ambition to make sure the agencies do not enter this domain and are thus able to jointly keep them in check.

To conclude, this analysis clearly shows that the Commission acted as a policy entrepreneur for enlarging the mandate of Frontex and turning it into the EBCH. It is confirmed both in the Commission’s proposals that were always a few steps ahead of the Member States, and in the interviews conducted. Instead of the Member States using the agency to stop the Commission from expanding, it was the Commission itself that was the key policy entrepreneur in the case of the EBCG. This confirms the Hypothesis H1a: The Commission was not only complicit with the European Council’s ideas, but it had an ambition further empower a *de novo* body that exceeded the expectations of the Member States time after time.

3.4.3. Summary of the policy episode

Several factors can be emphasized as crucial in explaining the Commission’s ambition and its success in the case of the EBCG. These are: the intergovernmental nature of management of the agency, the technical de-politicizing discourse, the interaction with the European Council, and the continuity of ambition of the Commission that precedes the crisis.

¹¹ Interview with a Permanent Representation – JHA Counsellor (1)

The fact that each Member State is represented in the management board of the EBCG makes it more acceptable for the Member States to delegate to this body. The Commission shows interest in having common, coordinated policies at the EU level, regardless of their intergovernmental nature. A Head of Unit in the European Commission explains why agency empowerment is a good approach for the Commission:

“This (agency empowerment) has proven to be a good approach because it also makes it easier to buy in the Member States. They see the agencies as one of them, while the Commission is seen as a political animal, with a potentially different agenda and opposite interests.”¹²

Furthermore, what made the Commission a successful policy entrepreneur in the case of the EBCG is its continued insistence on making the issue seem technical. Integration in a policy area that is so crucial to sovereignty thus moved forward in a case of high politicization, that the refugee crisis was bringing domestically. While the EU was seen in some Eastern European Member States as being too liberal towards migrants and refugees (BBC 2015), the international human rights organizations were critical of the Frontex and its role in building a “fortress Europe” (Human Rights Watch 2015). Furthermore, the issue of Brussels having too much power over the Member States was looming since the Brexit referendum was announced. The Commission managed to walk on this thin layer of ice and push through an ambitious EBCG reform, partially thanks to the de-politicization of border control.

The European Council was also an important actor as it ensured quick adoption by putting additional pressure on the Council and the Parliament through its deadlines. A JHA counsellor explains that “at some point in 2016 there was a need for a success story and the EBCG was the only candidate for this.”¹³ This need to show that something is being done was the crucial driving

¹² Interview with a Head of Unit, European Commission (1)

¹³ Interview with a Permanent Representation – JHA counsellor (2)

force behind the European Council's urgent recommendations. The Commission had ready made proposals, as it already proposed an expansion of Frontex back in 2010. Every time the European Council called, the Commission answered with an ambitious proposal that took a step forward. Instead of coming up with consensus solutions in its proposals, the Commission put forward the most ambitious ones, both in 2016 and in 2018. The call for giving the EBCG the rights to act on returns, and 10,000 border guards is a clear example of this.

This analysis has also shown a strong sense of continuity between the Commissions of different Presidents. It is the Commission's services and their technical expertise once again, like in the case of the Hotspots, that have played a crucial role in expanding Frontex not only in 2015 and potentially after 2018, but in continuity since Frontex was first established¹⁴. Another continuity that should be emphasized is one of the active role that the European Council has played ever since 2002. It called on the Commission to develop proposals and gave deadlines before the crisis, and with the crisis its role intensified. This shows the relevance of the theory of the new intergovernmentalism and the role that the European Council plays in moving integration forward without supranationalization. Still, this role that the European Council plays in agenda setting has not hampered the Commission's ambition, but moved it into other directions, and one of them is the empowerment of de novo bodies, as Hypothesis H1 predicted.

3.6. Conclusion

The findings of this chapter suggest that the Commission is far from being hard-wired to "ever closer union" with respect to migration policy. These findings are in line with the theory of New Intergovernmentalism's expectations of the Commission's behavior. They also develop the Hypothesis 2 of the New Intergovernmentalism, by giving more detail on what the alternative desired outcomes might actually be for the Commission. Table 5 below summarizes the findings

¹⁴ Interview with a Head of Unit, European Commission (1)

of the Chapter. The Commission has shown ambition and leadership in promoting new governance models in the case of the Hotspots. In the case of the EBCG reform, it was ambitiously pushing for the expansion of the mandates of de novo bodies.

Case	Hypotheses confirmed
Hotspots	H2: The Commission's ambition is to offer pragmatic and non-supranational new governance solutions.
EBCG	H1: The Commission's ambition is the creation and empowerment of de novo bodies.

Table 5. Hypotheses confirmed in case studies

The third JHA case that the thesis investigates, the CEAS reform, brings forward the issue of the Commission having a, self-proclaimed, political ambition. The findings suggest that with issues that are highly controversial, such as the permanent relocation mechanism, the European Council takes the lead role and the Commission shows willingness to support consensus building even when it is not in line with its original political ideas. Given the importance of deadline setting and in-depth guidance of the European Council, more research could be done on the dynamics of cooperation between the Commission and the European Council.

Interview data

1. Interview with a Head of Directorate in the European Commission (1)
2. Interview with a Head of Unit in the European Commission (1)
3. Interview with a Head of Unit in the European Commission (2)
4. Interview with a Head of Unit in the European Commission (3)
5. Interview with a Head of Unit in the European Commission (4)
6. Interview with a Head of Unit in the European Commission (5)
7. Interview with a Head of Unit in the European Commission (6)
8. Interview with a Permanent Representation – JHA Counsellor (1)
9. Interview with a Permanent Representation – JHA Counsellor (2)

10. Interview with a Permanent Representation – JHA Counsellor (3)
11. Interview with a Permanent Representation – JHA Counsellor (4)
12. Interview with a Permanent Representation – JHA Counsellor (5)
13. Interview with a Permanent Representation – JHA Counsellor (6)
14. Interview with a Permanent Representation – JHA Counsellor (7)
15. Interview with a Head of Unit in the General Secretariat of the Council (1)
16. Interview with a LIBE Committee Administrator, European Parliament (1)