Fence-sitters no more: Southern and Central Eastern European Member States' role in the deadlock of the CEAS reform

This article explains recent changes in the negotiation dynamics concerning EU asylum policies, the policy failure in the Common European Asylum System and the deadlock in its post-2016 reform. Combining the Core State Power framework with the literature on punctuated equilibria and bounded rationality, it argues that EU asylum policies have important redistributive implications. In earlier phases, these were concealed by a regulatory policy-making approach which depoliticised EU legislation in that area. The 2015 asylum crisis demonstrated that this approach failed to produce the expected integration and entailed an even unfairer distribution of asylum-seekers, hence leading to information updating among Member States. Together with the ascent of right-wing populism in many Member States, this has fundamentally changed the negotiation dynamics from a situation with a few dominant Member States to a highly politicised environment in which previously passive Member States acted either as promoters or as blockers, thus producing deadlock.

Key words: asylum, Central Eastern Europe, Core State Powers, punctuated equilibrium, Regulatory State, Southern Europe

Introduction

Southern Member States have historically adopted a rather passive role in European Union (EU) asylum policies (Zaun, 2016). Moreover, the accession of ten new Member States in 2004 had no major effect on EU policymaking, since Central Eastern European (CEE) Member States do not usually act *en bloc*, but joined existing coalitions (Kelemen et al., 2014; Toskhov, 2017; Hokovský, 2016) and have rarely had a strong impact on policy output (Copland, 2014). While Southern Member States and the Visegrad States (V4) played a marginal role in EU asylum policymaking prior to the 2015/16 asylum crisis, since then they have developed into clearly distinguishable coalitions. Albeit for different reasons, both groups are at the heart of the reform deadlock of the Common European Asylum System (CEAS) that has existed since the summer of 2018. This reform began in mid-2016 as a response to the pervasive flaws which the CEAS exposed in 2015, and constitutes the third round of policymaking in this area, preceded by the first and second phases of the CEAS, from 2000 to 2005 and from 2008 to 2013.

While the reform largely aims at amending extant legislative instruments, the negotiation dynamics have changed significantly; the earlier phases featured a high level of contestation among EU institutions, with the European Parliament (EP) and the European Commission systematically holding more liberal positions than that of the Council (Kaunert, 2009; Ripoll Servent and Trauner, 2014). Yet, within the Council there was a broad consensus on the *status quo* (Ripoll Servent and Trauner, 2014; Zaun, 2016). The deadlock in these negotiations was usually due to Member States considering Commission proposals 'too liberal' - that they did not adequately reflect their preferences (Peers and Rogers, 2006; Interview_PermRep 1/2012; Interview_Council_1/2012).

This situation changed dramatically post-2016. The reform process has been deadlocked in the Council since the summer of 2018. Southern and CEE Member States, which were traditionally passive ('fence-sitters', see Börzel, 2002), have become either active promoters ('pace-setters') or blockers ('foot-draggers') (Rasche, 2018), and the reform package did not pass through the trilogues by the end of the 8th EP legislature. This radical shift in the negotiation dynamics is puzzling, as none of the legislative proposals under debate is completely novel. Except for the uncontroversial Resettlement Regulation, all of them are recasts of legislation in place. This paper therefore asks: *Why are dynamics of the negotiations on EU asylum policies in the third phase of the CEAS fundamentally different from those in its first and second phases?*

To address this question, I combine Genschel's and Jachtenfuchs' (2014; 2016; 2018) Core State Power (CSP) framework, with accounts on punctuated equilibria and bounded rationality (Jones & Baumgartner, 2005a; 2005b). The CSP framework can account for the conflict lines that persist in the CEAS since its inception. However, punctuated equilibria and bounded rationality are better placed to explain positional changes, and hence policy change, where the CSP framework would otherwise be rather static. In line with the CSP framework, I argue that the shift towards more politicised and controversial negotiations can be explained by EU asylum cooperation, like any CSP cooperation, having significant redistributive implications. These had been concealed under the EU's traditional regulatory policymaking (Majone, 1994), but resurfaced in 2015. In line with the concept of bounded rationality, the asylum crisis entailed information updating among Member States, making them experience first-hand the uneven redistributive implications of the current regulatory framework. Previously passive Member States therefore now consider asylum policies salient. In some Member

States these position changes were amplified by changes in government and the increasing role of (right-wing) populist parties.

This study makes two important contributions: Empirically, it provides a broader explanatory framework for Member States' behaviour in EU asylum policymaking over the past two decades. Particularly, it explains the deadlock in the CEAS reform, which has not been studied previously. Theoretically, it contributes to the CSP literature, suggesting a combination with punctuated equilibria to explain changes in Member States' positions and behaviour in the area of CSP.

The paper is organised as follows: The first section presents the theoretical framework. It engages with key arguments of the CSP framework and demonstrates how they apply to EU asylum policymaking; it also presents the gaps in the framework and demonstrates how the theory of punctuated equilibria can help to address these by focusing on the micro-foundations of policy change. The second section of the paper compares the negotiation dynamics in the CEAS over all three phases, and explains the differences in Member States' behaviour across these. The paper ends with conclusions.

Methodologically, this is a 'within-case analysis' (George and Bennett, 2004, pp. 147-148) of CEAS secondary legislation, which makes it possible to hold important factors constant and focus on those that produce different dynamics. The analysis is based on a qualitative content analysis of official EU documents, secondary data from the literature on past CEAS reforms, media reports, and a total of 57 original interviews conducted with Justice and Home Affairs (JHA) Counsellors in Member States' Permanent Representations, experts from national Ministries, and representatives from the Commission, the Council, the EP and relevant Non-Governmental Organisations (NGOs) in 2012 and 2019.

Core State Powers: Implications for institutional setup and policy content in the CEAS

EU asylum policies share important features of CSPs that have direct implications for policymaking in this area. According to the CSP framework, the Maastricht Treaty constitutes a turning point in EU policymaking, as it allowed the EU to adopt policies in areas 'of key functions of sovereign government' (Genschel and Jachtenfuchs, 2016, p. 42), including JHA. As Member States were cautious about making substantial sovereignty transfers in these areas, policymaking remained largely intergovernmental,

which led some to diagnose the rise of a 'new intergovernmentalism' (Bickerton et al., 2014), i.e. more cooperation without a deepening of the federation. This had consequences for both the institutional setup of the EU polity and policy content.

Institutionally, the polity in these areas is more likely to be intergovernmental. Postfunctionalists argue that this is due to a lack of consensus among voters, the so-called 'constraining dissensus' (Hooghe and Marks, 2009). Some Member States whose electorate is especially hesitant towards EU integration therefore opt out of these policies (Genschel and Jachtenfuchs, 2014, p. 255). Indeed, EU asylum policies were both institutionally and territorially fragmented, and only became fully communitarised in their second phase (Bendel and Ripoll Servent, 2017, p. 60). Territorially, Denmark, Ireland and, until recently, the United Kingdom, were given the right to opt in.

Regarding policy content, the incomplete sovereignty transfer means there is a limited material capacity for the EU to exercise power centrally. It fills this gap by harnessing national CSPs through the adoption of common regulation (Genschel and Jachtenfuchs 2016, p. 45; Genschel and Jachtenfuchs 2014, p. 253), a tool otherwise used to exercise power over private actors. Thus, the EU tries to address the regulatory competition resulting from national policies in the area of CSP. The advantage of regulatory integration rather than EU level capacity-building is that it depoliticises EU involvement (Genschel and Jachtenfuchs, 2016, p. 49) and "tends to conceal" the – albeit limited – sovereignty transfer, as well as the "distributive implications of integration" in CSP (Genschel and Jachtenfuchs, 2014, p. 262). These exist because some actors benefit from regulatory competition. Hence, even incomplete EU integration likely leads to an asymmetric redistributive impact of EU regulation. While the CSP framework does not derive expectations regarding Member States' positions from this asymmetric redistributive impact, I expect that countries benefitting from redistribution support EU integration in this area, while those that incur additional costs oppose it. The intensity of the opposition is likely to increase along with a higher degree of enforceability. Under regulatory policymaking, opposition from disadvantaged Member States is less intense than in negotiations around EU level capacity-building.

EU asylum policies were indeed designed as regulatory policies (Genschel and Jachtenfuchs, 2018, p. 182), but were mainly aimed at addressing imbalances in asylum applications across Europe. This was first considered necessary with the opening of the internal borders in 1992. Interior Ministers in main asylum-seeker destinations, including

Germany, France, Austria, the Netherlands and Sweden, expected uncontrolled immigration to their countries (Vink, 2005, p. 103). Only the adoption of 1) shared asylum standards and 2) rules determining the Member State in charge of processing an asylum application were expected to avoid these dynamics. Without common rules, border countries would incentivise asylum-seekers to seek protection in these traditional recipient countries, either through engaging in downward regulatory competition of protection standards or by simply ignoring any asylum claims (Barbou des Places, 2003).

The CEAS encompasses two types of regulatory instruments for redistributing asylum-seekers: first, three directives (the Asylum Procedures Directive, the Reception Conditions Directive, and the Qualification Directive). These aim at policy harmonisation 'to stop secondary movements' of asylum-seekers (Vink, 2005) resulting from either the mere existence of diverse asylum standards across the EU or active regulatory competition among Member States. Second, the Dublin Regulation that develops criteria determining which Member State oversees the processing of an asylum application. The redistributive implications of the Dublin Regulation are more imminent than those of the directives, but it is nevertheless designed as a regulatory instrument. It assigns the responsibility to process an asylum claim based on the existence of a relationship between the Member State and the applicant rather than proposing a generalised redistributive quota system. The rationale behind the Dublin Regulation is that a state responsible for an applicant being in the EU is also responsible for assessing their claim. If none of the other criteria listed applies, the asylum-seeker's first country of entry is responsible. The first country of entry principle has immediate redistributive implications, and has caused border countries to shoulder a large proportion of asylum applications in recent years (Trauner, 2016, p. 311).

Regulatory CSP policies, however, are often ineffective, because Member States' capacities diverge, and compliance varies. In the area of asylum, scholars have highlighted repeatedly that the regulatory approach has not achieved harmonisation and assignment of responsibility in practice (Genschel and Jachtenfuchs, 2018, p. 185; Trauner, 2016). Member States in Southern and Central Eastern Europe have neither the incentives nor the capacity to comply with EU legislation that clearly aims at redistributing asylum-seekers towards them. The lack of incentives weighs particularly heavy for the Dublin Regulation, as the systematic 'waving through' of asylum-seekers during the 2015 crisis showed (Costello and Mouzourakis, 2016).

Punctuated equilibria and information updating in times of crisis

The above operationalisation has shown that the CSP framework allows us to understand some of the major implications of EU policymaking in areas close to state sovereignty, such as asylum. However, the framework is rather static and cannot account for changes in policymaking. Although the CSP framework suggests that a move from regulatory to openly redistributive policymaking and EU-level capacity-building may occur under pressure, i.e. in times of crisis (Genschel and Jachtenfuchs, 2014, p. 257), it is not clear whether *any* crisis will lead to change, or whether specific (micro-level) conditions are necessary for this. Jones' and Baumgartner's (2005a; 2005b) research on punctuated equilibria can fill this gap. It suggests that change occurs not merely based on the presence of an external shock (e.g. the increased inflow of asylum-seekers in 2015 or new actor constellations, e.g. through the electoral success of right-wing populist parties in some Member States), but also due to ensuing endogenous processes of information updating and bounded rationality among policymakers. Given the complexity of most policy problems and the abundance of potentially relevant information, policymakers never have the full picture and continually over- or underestimate the implications of a policy choice. They do so because they must rely on indexes that risk overrating the influence of one factor at the expense of others. Thus, they "underadjust and overcorrect" previously taken policy paths (Jones and Baumgartner, 2005a, p. 334). External shocks can lead to the recognition of "previously ignored facets of the environment" and the realisation of their potential impact.

Hence, policymakers that previously considered an issue to be low on their political agenda might later make it a priority, based on newly prioritised information. This is referred to as 'information updating on ignored facts' in my analysis. It may explain why some Member States take a passive role in EU policymaking at one moment but later become active promoters or blockers. Policymakers also update their information regarding the preferences of the electorate and the salience of an issue among voters, based on opinion polls, media and, of course, vote shares in elections (Arnold, 1990, p. 10; Jones and Baumgartner, 2005a, p. 330), referred to as 'information updating on electoral preferences' in my analysis. Governments that see rising support for right-wing populist parties are likely to consider asylum policies more salient and adopt a stronger positions on this issue. Thus, they act as either pace-setters or foot-draggers. This highlights that voter preferences do not necessarily function as 'constraining dissensus' (Hooghe and Marks, 2009) on governments favouring more integration, but are

constitutive of their pro- or anti-integrative positions. Changes in governments are both external shocks and radical moments of information updating that lead to punctuated equilibria. If right-wing populists come to power, very different substantive positions are brought to the EU negotiating table, including on asylum, one of the main issues around which they mobilise their voters (Boomgaarden and Vliegenthart, 2007). At the same time, their election reinforces these positions by signalling that their positions are in line with voter preferences and that representing them at the EU level will pay off in electoral terms.

The positions of Member States in the CEAS over time

Table 1 presents an overview of the role different Member States have played over time: the group of 'fence-sitters' (Börzel, 2002), i.e. countries taking a passive approach to EU asylum policymaking, has shrunk since 2016. Southern European states have generally joined the group of 'pace-setters'. The V4 and Austria have become 'foot-draggers'. Italy has acted both as pace-setter and foot-dragger at different times.

Table 1: Evolution of CEAS positions over time (Source: interviews, see annex)

[Table 1 about here]

Pace-setters are usually countries that consider themselves beneficiaries of EU asylum policies in redistributive terms but also electorally. Fence-sitters do not *perceive* EU asylum policies as implying important changes for them. Foot-draggers oppose EU asylum policies, because they consider that they will suffer as a result of the redistributive implications of those policies, including in electoral terms. Northwestern Member States have been pace-setters since the beginnings of CEAS integration, as they have continuously faced large asylum-seeker numbers and high levels of politization (Zaun, 2017). I demonstrate that the change of behaviour among border countries has mainly been due to their growing perception of a problem. Initially, they did not consider themselves affected by asylum-seekers and did not adopt strong positions on policy harmonisation and Dublin, but the increased inflow and politicisation of the issue in border countries since 2015 led them to update their information. They now had a vested interest and became more active. Moreover, the situation in the Southern border countries

also caused information updating among CEE Member States. Not immediately affected by the redistributive effects of EU asylum policies, they still understood that any concessions towards countries favouring more redistribution could bring them into a position similar to that of the border countries. Yet most of them remained fence-sitters, because how governments perceive losses and gains is also affected by national voter preferences. (Right-wing) populist governments that mobilise their voters around anti-immigrant policies (Poland, Hungary, the Czech Republic) or countries with a strong populist minority party (Slovakia) can be expected to consider a potential rise in asylum-seekers through EU policies an even bigger loss. Indeed, 74% of Poles do not want migrants from Africa or the Middle East, and among supporters of PiS that figure is 90% (Ciobanu, 2017). Moreover, since many of these governments are Eurosceptics (including in Italy), they do not benefit from any successful cooperation at the EU level: governments that would receive more asylum-seekers (V4) benefit by taking a tough stance against an EU that seeks to redistribute asylum-seekers towards them; governments that might receive fewer asylum-seekers (e.g. Italy) do not benefit from the problem being solved by the enemy - the EU. These countries become foot-draggers.

Regulatory policymaking: depoliticisation and the dominance of a few with a vested interest

The first and second phase negotiations on asylum harmonisation were dominated by a group of Northwestern Member States with a long-standing tradition of policymaking in this area. They not only sought to redistribute asylum-seekers through the adoption of shared policies, but also tried to shape those policies by modelling them around their own national legislation to avoid misfit with EU legislation. States in Southern Europe with no such tradition remained largely passive during negotiations, not considering themselves affected by EU legislation, and therefore left no mark on EU asylum policies. This is well-documented in the literature, which rules out alternative explanations such as package deals or side payments (Zaun, 2016, 2017). Indeed, an observer from a pace-setting state was surprised by their passiveness on articles that clearly forced them to massively expand welfare benefits for asylum-seekers. Her explanation was that "the issue was not equally sensitive for them", given their lack of asylum legislation (Interview_MS_1/2012). The CEE and Mediterranean island states that joined the EU since 2004 did not change this dynamic, and initially adopted a similarly passive approach (Interview_PermRep_1/2012; Interview_PermRep_2/2012). While they had

implemented the CEAS *acquis* successfully in preparation for EU accession (Interview_PermRep_3/2012), none of them had a history of receiving asylum-seekers. The V4 modelled their asylum systems around those of Germany and Austria, and did not advance positions on EU asylum directives that deviated much from those of these two countries (Interview_PermRep_3/2012; Byrne et al., 2004).

The negotiation dynamics around the Dublin Convention and the Dublin II Regulation were different from those on the asylum directives, as no Member State could draw on national legal precedents and regulatory expertise. Border countries which clearly were disadvantaged by the Dublin Convention nevertheless agreed to it, because otherwise they could not join the Schengen area (Baldwin-Edwards, 2002; Armstrong and Thielemann, 2013). Nor was the Dublin II Regulation controversial: the Dublin Convention had only been in place since 1997 and the number of asylum-seekers was rather low, so its redistributive implications were not yet obvious and could be easily underestimated. A former Deputy Head of the Commission's Asylum Unit argues that border countries agreed to Dublin II because it "was a very different situation" and they had "not thought about [the implications]" at the time (Interview_COM_1/2012). Moreover, as the first country of entry principle was only to be applied after a set of other criteria had been ruled out, there was some uncertainty around which Member States would be hit most by Dublin's redistributive effects. When the number of asylum-seekers increased in the border countries in the aftermath of the Arab Spring in 2011, Italy and Greece tried to alleviate that pressure by promoting the adoption of a suspension of Dublin transfers to border countries in times of high inflows as part of Dublin III (Interview_PermRep_4/2012; Interview_PermRep_5/2012), which had also been suggested by the Commission (Commission, 2008, p. 52), but faced fierce objections from Sweden, France, Germany, the Netherlands, and Austria (Council, 2010, p. 66), who argued that many of the problems border countries faced were home-made: had they implemented the asylum directives properly, they would be better able to manage the asylum inflows. While there was some understanding for Greece's incapacity to do so, Northwestern Member States complained that Italy's asylum-seeker intake was much lower than theirs and that, as one of the richest countries in Europe, Italy could do more (Interview_NGO_1/2012). But countries like Cyprus or Malta did not support Italy and Greece either, because they would not benefit from a suspension of transfers (Council, 2009, p. 55). Few asylum-seekers landing on those islands ever engaged in secondary movements, and so those countries never received many Dublin transfers. Their main

problem was the first country of entry principle and the lack of relocation policies to support border countries (Interview_PermRep_6/2012). The CEE aligned with the Northwestern Member States, because they also benefitted from the *status quo* in redistributive terms (Interview_PermRep_1/2012; Interview_PermRep_3/2012). Eventually, in 2013, the Polish Presidency proposed an 'early warning mechanism' for crisis situations as a compromise (Interview_Council_7/2012; Council, 2012, p. 16), which did not imply significant sovereignty transfers: When it was triggered, the Council should convene and discuss joint solidarity measures alongside support provided by the Commission and the European Asylum Support Office (EASO) (Council, 2013a, p. 70-72). Overall, the negotiations around Dublin III were more controversial than previous negotiations on Dublin or the directives (Interview_PermRep_1/2012), due to the imminence of its redistributive implications during the Arab Spring. Yet this did not significantly change the position and behaviour of border countries, which remained relatively passive and were more talked about (as problem cases) than they actively shaped the discussions (Interview_PermRep_8; Interview_NGO_2/2012). Italy and Greece were isolated on the suspension of transfers, and did not yet dare to question the first country of entry principle. Ultimately, only Greece voted against the Dublin III Regulation (Council, 2013b, p. 2).

The above supports the notion of bounded rationality. Southern and CEE Member States (which joined before the second phase) were largely passive in the first and second phases of the CEAS. Their governments did not consider asylum policy a priority, because they had little asylum legislation that would have to be changed (South), their positions were already advanced by Northwestern states (CEE), or because they were taking in few asylum-seekers and there was little voter mobilisation over the issue. Moreover, these states could still avoid the redistributive effects of EU policy by strategically not complying with EU legislation, as the 'waving through' during the asylum crisis demonstrated.

Redistributive policymaking and EU capacity-building: High levels of politicisation and hard bargaining among (almost) all involved

The asylum crisis led to further information updating among Southern Member States, as it underlined the asymmetric redistributive implications of the Dublin Regulation. With other Member States unilaterally suspending Schengen, a 'waving through' was no longer possible. Hence, systematic, quota-based solidarity through a 'corrective allocation

mechanism' emerged as a solution attractive for border countries that had blocked the idea in the mid-1990s when it would have required them to take in asylum-seekers from Northwestern states (Council, 1994). While the latter had long been aware that CEAS compliance was low (Interview_PermRep_1/2012; Interview_PermRep_9/2012), the crisis had initially (i.e. before the border closures) increased secondary movements towards them. With populism on the rise in many Northwestern states (Zaun, 2018), asylum became even more salient to them, and they wanted better enforcement of EU policies. The CEE states also saw how swiftly the borders were closed. Lest they soon find themselves in a position similar to that of the border countries, they were sceptical about more solidarity and better enforcement (Interview_PermRep_3/2019). The V4 and Italy, moreover, had new, largely populist governments in place. This deeply politicised the post-crisis CEAS reform.

This comprehensive reform began in 2016. Discussions on a permanent quota system for the redistribution of asylum-seekers failed shortly after being proposed, with many Member States preferring to discuss the issue as part of a wider CEAS reform (Council, 2015). Early in the negotiations, EU institutions agreed on a 'package approach', under which all legislation discussed under the CEAS could only be adopted comprehensively, not piecemeal (Interview_PermRep_1/2019, Council, 2016a, p. 3). The package consisted of two components, a *solidarity component* mainly to support border countries (as part of Dublin IV) and a *responsibility component* to support countries experiencing the adverse effects of secondary movements. The responsibility component consists of the three directives of which two have been turned into regulations, the Eurodac Regulation and, most prominently, the EU Asylum Agency (EUAA), designed to ensure that border countries comply with CEAS standards (Interview_PermRep_1/2019; Interview_PermRep_2/2019). The adoption of the EUAA equals EU level capacity-building under the CSP framework. The EUAA could potentially intervene in national asylum systems and run substantial parts of them, as already happens *de facto* through the EASO in Greece (Tsourdi, 2016).

The CEAS negotiations became deadlocked during the Bulgarian Council Presidency in the first half of 2018, given the lack of consensus on Dublin IV (Interview_PermRep_3/2019; Interview_PermRep_2/2019; ANSA, 2018), which spilled over to the remaining dossiers due to the package approach (Council, 2019, p. 7-9). The deadlock continued because the Austrian Presidency that followed did not pursue a

compromise on Dublin IV any further, as the right-wing populist FPÖ had no interest in adopting stronger solidarity measures (Interview_PermRep_2/2019; Interview_PermRep_4/2019; Peel, 2018). Given the lack of time to complete the reform before the EP elections in May 2019, the Romanian Presidency did not take up the issue, either, in early 2019. The negotiations were postponed to a later stage when the new Commission and EP would be sitting (Interview_PermRep_1/2019; Interview_MEP_1/2019; Council, 2019).

The *responsibility package* is especially important to the Northwestern Member States, spearheaded by Germany. These have acted as pace-setters on the package because they are the ones mainly affected by secondary movements from border countries, and consider better enforcement of EU policy the single most important issue in the CEAS (Interview_PermRep_1/2019; Interview_PermRep_5/2019). As policy harmonisation and traditional regulatory policymaking have proved unsuccessful in addressing the uneven distribution of asylum-seekers, the Northwestern states aim for capacity-building through the EUAA, which is at the core of the responsibility package. By enforcing EU policies in previously non-compliant states (Council, 2016b), they hope to receive fewer asylum-seekers once the EUAA is active. In principle, border countries are not opposed to the responsibility package. Depending on the outcome of Dublin IV, the EUAA could also oversee the physical redistribution of asylum-seekers in line with the corrective allocation mechanism. However, they criticise the diagnosis that a lack of capacity-building in the South and the secondary movements resulting from it were the main drivers of the asylum crisis (Interview_PermRep_6/2019). Moreover, following a position paper published by the border countries, they consider the retention of fingerprints in Eurodac for 10 years in the current Regulation excessive (Interview_PermRep_6/2019; Cyprus et al., 2018), as it assigns them responsibility for asylum-seekers long after their first entry. The Bulgarian Presidency proposed a compromise of five years (Barigazzi, 2018a). Finally, border countries will not agree to the responsibility package without a decision on the solidarity package, especially Dublin IV (Council, 2019, p. 3), because they are afraid to lose all leverage over the Northwestern Member States and fear that the solidarity component will be abandoned. Therefore, they opposed the adoption of a mini (responsibility) package consisting of the harmonisation of policies, the Resettlement Regulation, the EUAA and the Eurodac Regulation, which Germany and France together with the Commission pushed for in late 2018 (Eder, 2019) because there was already a consensus content-wise on these proposals after the

trialogues, and because they wanted to show voters that the EU could react to the crisis by adopting at least some of the proposed pieces of legislation (Interview_PermRep_2/2019). This was especially important for the German Chancellor, who was facing domestic conflict with Interior Minister Seehofer. Seehofer, who had repeatedly adopted positions close to those of the AfD, wanted to take unilateral measures to stop migration to Germany, thus undermining Merkel both domestically and at the EU level (Handelsblatt, 2018; Herszenhorn, 2018). This highlights that populist pressures and 'information updating on electoral preferences' also caused an intensification of Germany's position. Germany had previously been hesitant towards any EU-level capacity-building in this area (Interview_PermRep_1/2012), but now supported it vigorously. The border countries and the V4 also opposed the adoption of the mini-package. The V4 clearly prefer the *status quo* (Interview_PermRep_3/2019; Interview_PermRep_7/2019) and are generally critical of reform. They want to prevent secondary movements from border countries (Robinson, 2018a) and have no problem with continuing regulatory policy harmonisation that gives them leeway, but they strongly oppose EU level capacity-building through the EUAA. Although at present it is the border countries that are most likely to face interference with their sovereign decisions on asylum claims (Interview_PermRep_3/2019; PermRep_7/2019), the V4 are afraid to be in a similar situation in the future, because they, too, have weaker asylum systems than the Northwestern Member States (Interview_PermRep_3/2019).

Overall, there has been an increase in polarisation concerning parts of the CEAS that were previously uncontested. Both the border countries and the V4 are aware of the redistributive implications of the *responsibility package*. At the same time, the Northwestern Member States now strongly support the adoption of EU level-capacity building through the EUAA. Two factors explain this change. The first is the 2015/16 asylum crisis, which highlighted the potential redistributive implications of EU asylum policies to both the V4 and the border countries and led to 'information updating on ignored facts' among them; the V4 became 'footdraggers' and the border countries (except Italy) 'conditional footdraggers' that will only waive their veto in exchange for more solidarity. The fact that EASO could turn into a fully-fledged Agency further intensifies their opposition. Both groups are aware that once the EUAA is active it will be much harder for them to use discretion in the implementation to alleviate pressures resulting from redistributive EU asylum policies. The second factor contributing to the polarisation of the responsibility package is 'the information updating on electoral

preferences' and the rise of right-wing populism. Many observers suggest that, as Eurosceptics, the V4 and Italy blocked the adoption of the mini-package to show to voters that the EU was incapable of addressing the asylum crisis. 'Mainstream' governments, such as those of Germany and France, on the other hand, wanted to adopt it to prove the opposite (Interview_PermRep_2/2019; Barigazzi, 2018b). Northwestern pace-setters, and Germany in particular, which had not previously supported the adoption of EU level capacity-building, are under increased electoral pressure from right-wing populists (Zaun, 2018) and now have stronger incentives to push for better compliance among border countries. While the Southern and V4 Member States are strongly aware of the significant sovereignty transfers they make by agreeing to the EUAA, these traditional asylum-seeker recipients 'ignore' the potential effects it could have on their asylum systems, because they have significantly shaped the CEAS and consider themselves automatically compliant with it (Interview_PermRep_6/2019; see also Ripoll Servent, 2018).

Border countries, including Greece, Italy, Malta, Cyprus, and more recently Spain, which have received increasing asylum-seeker numbers in the past few years, have acted as pace-setters on the *solidarity package*. Compared to earlier CEAS phases, when they did not feel affected by EU legislative output, they are now acting strategically and using their agreement to the responsibility component as a bargaining chip (Interview_PermRep_6/2019; Interview_Council_1/2019; see Council, 2019, p. 8). Italy has used its opposition to the disembarkation of asylum-seekers rescued at sea strategically in order to highlight the urgency of an agreement on solidarity (Council, 2019, p. 3; Stone, 2018). In the solidarity package, the controversy revolves mainly around the idea of a 'corrective allocation' mechanism in Dublin IV. The Bulgarian compromise for Dublin IV (Council, 2018) suggested that, when a Member State receives 140% of its share under the reference key, which takes into consideration GDP and population size, asylum-seekers will be relocated to other EU Member States to fill up no less than 50% of their share. Additionally, the Member State in question will receive financial support from others (art. 34eI). This was a watered-down version of the Commission proposal. It aimed to maintain the solidarity core, which was important to border countries and those such as Germany or Sweden that wanted to make sure the secondary movements of 2015/16 would not be repeated. Additionally, it aimed to address the concerns of the V4, which opposed 'automatic quotas' (Paravicini and Herszenshorn, 2018). Still, the adoption of Dublin IV was blocked by an 'unholy alliance' of the V4 and Italy in June 2018, each of which had very different reasons for acting as

foot-draggers (Interview_Council_2/2019; Agence France Press, 2018). While the V4 were against receiving additional asylum-seekers from other EU Member States, Italy declared that Dublin IV was not going far enough, because it did not abandon the first country of entry principle. Abandoning this principle and replacing it by a 'free choice' or comprehensive relocation programme had been discussed in the EP in 2017 (Interview_EP_1/2019; European Parliament 2017: 9).

To a certain extent, the redistributive implications of the corrective allocation mechanism can explain Member States' behaviour. As Figure 1 in the Annex highlights, Italy, as a wealthy country with a comparatively large population, would not benefit much from the reference key. Dropping the first country of entry principle would arguably help Italy more, because it would stop any Dublin transfers. For the V4, opposition was perfectly rational, because the adoption of the reference key would have meant an increase in asylum-seekers for them in the future. But many of the Northwestern European countries would benefit from the redistribution under Dublin IV. For years, Germany, Sweden, Belgium and Luxembourg have received larger shares of asylum-seekers than they would have to under the reference key. The Netherlands and France have received roughly their reference key share and even the CEE states of Slovenia and Bulgaria have experienced asylum application spikes in recent years. Indeed, these countries have been not strictly opposed to the solidarity component. The Northwestern states in particular have understood that a lack of solidarity with the border countries took away the latter's incentives to contribute to the responsibility part in 2015/16 (Interview_PermRep_15/2019; Delcker, 2016). Still, they consider the adoption of the responsibility package, and especially EU level capacity-building through the EUAA, to be a prerequisite for solidarity (Interview_PermRep_5/2019; Interview_Council_1/2019).

The 2015/16 asylum crisis further sensitised all Member States towards the redistributive implications of the Dublin Regulation, which had either been ignored or not considered a priority. The border countries, and to some extent Germany and Sweden, therefore now act as 'pace-setters' on Dublin IV, as they have either suffered from unfair distribution (the border countries) or the poor implementation of the Dublin Regulation (Germany and Sweden). Yet, while the redistributive implications of the reference key as compared to the *status quo* can generally explain Member States' positions, it cannot account for the intensity of their positions. Moreover, Italy's zig-zag course, and Austria's

and Hungary's opposition, considering their temporarily high asylum-seeker numbers, remain puzzling. Certainly, the Baltic States would not benefit from either the reference key or the Agency, and so were not enthused about either. However, they were much more open to compromise (Interview_PermRep_8/2019) than the V4, and remained fence-sitters. While Poland acted as an honest broker between the North and the South in the Dublin III negotiations, the V4 has now become extremely vocal as foot-draggers, especially opposing the adoption of the reference key under Dublin IV.

These behavioural changes can be explained by the changes in the governments of those since the time of earlier CEAS reforms, and by the fact that they all now have populist parties in power. On the one hand, these changes in government served as an external shock that brought new positions to the EU negotiating table. On the other hand, they led to an information updating on the salience of asylum policies ('information updating on voter preferences'). The populist governments in the V4, particularly, would not benefit electorally from agreeing to EU policies that would have negative redistributive implications for them by forcing them to take in additional asylum-seekers. This to some extent even applies to Austria and Hungary, which received large asylum-seekers numbers in the past and might be considered potential beneficiaries of a reference key, but have managed to decrease their asylum-seeker intake through unilateral measures (Zaun, 2018).

Moreover, finding a solution to the asylum crisis would not benefit the V4 or Italian governments, either, for two reasons. First, they thrived on the perception of a persistence of a 'refugee crisis', as several interviewees suggest, particularly with regard to the former Italian Interior Minister Salvini. Salvini, who subsequently became Interior Minister, mobilised voters in the March 2018 Italian elections by pointing to the EU's incapacity to achieve a fairer distribution of asylum-seekers in Europe and blaming the EU for turning Italy into "Europe's refugee camp' (Robinson, 2018b). A solution to the asylum crisis would therefore not be beneficial for Salvini in electoral terms. Second, again, as Eurosceptics, populist governments like those of the V4 and Italy generally benefit from any inactivity of the EU, which proves their point (Interview_EP_1/2019; Interview_PermRep_2).

In the third phase of the CEAS, the negotiation dynamics have changed fundamentally, as the EU moves from EU regulation of national capacities in a redistributive policy area to discussing redistributive policies through quota-based

relocation (Dublin IV) and EU-level capacity building through the EUAA. Following the redistributive logic of the negotiations, even policy instruments that were previously uncontroversial, such as the three core asylum directives, are now being used as bargaining chips. This is due to significant information updating on both the facts and on voter preferences among all the Member States involved. In contrast to the earlier phases, the EP and especially the Commission have been less human rights-oriented (Interview_NGO_1/2019) and more focused on getting at least some policies adopted (Gotev and Bulckaert, 2018), because the controversy in the Council has diminished the likelihood of any reform being passed.

Besides policy content, the decision-making mode has become increasingly controversial. While the EU adopted the ordinary legislative procedure in 2005, the use qualified majority voting on the relocation of asylum-seekers sparked significant criticism among the V4 in 2015 (CJEU, 2017). Likewise, after the negotiations on the Dublin IV Regulation stalled, the V4's heads of state and the governments pushed for the introduction of a clause in the European Council Conclusions of June 2018 suggesting that decisions on Dublin IV should be taken by 'consensus' (European Council, 2018). Observers interpret this as a requirement for unanimity (Interview_COM_1/2019; Interview_COM_2/2019; Interview_COM_3/2019; Interview_PermRep_9/2019; Interview_PermRep_3/2019, see also: Tasr, 2018). Arguably, the V4 venue-shopped at the level of the European Council, where decisions are taken unanimously in order to avoid being outvoted again at the level of the Council. Due to the package approach, this means that all other pieces of legislation might have to be adopted under unanimity as well (Interview_PermRep_9/2019; Interview_PermRep_3/2019; Interview_PermRep_10/2019; Interview_EP_1/2019). While it is unclear how binding this is, as it contradicts the Treaties, it could again lead to disintegration and increased institutional fragmentation. This highlights that even successful instances of integration are more easily questioned in areas of CSP, and potential integration retrenchment is likely when Member States update their perception about the redistributive and/or electoral implications of CSP integration.

Conclusion

Empirically, this paper has explained why both the content and the decision-making mode in EU asylum policies have become significantly more controversial in the third phase of the CEAS than in its first and second phases. The 2015 asylum crisis brought the

distributional consequences of the current, ill-functioning CEAS to the forefront, and led to a demand for more integration in the CEAS among both the Northwestern and Southern Member States, both of which expected to benefit from more integration in redistributive (and electoral) terms and therefore acted as pace-setters. While this would have allowed for a package deal, the opposition of the V4, acting as foot-draggers, and of Italy, playing a double role, undermined this deal. These countries would lose in redistributive terms with further integration; moreover, their governments thrive on the persistence of an asylum crisis and the EU's inability to solve it.

The paper also contributes to our understanding of CSP policymaking more generally. It demonstrates that different states (or one state at different times) take different, usually opportunistic, positions on CSP integration. They act as 'pace-setters' if they will gain from it, but become 'foot-draggers' if they will lose from it in redistributive and electoral terms. This is true for policy content, including EU level capacity-building, which involves different levels of sovereignty transfers for different states, but also for the decision-making mode, as the V4's push for unanimous voting in the Council suggests. This instrumental approach to solidarity and CSP integration can be observed in the Eurozone reform and the EU's response to Covid-19 and constitutes an important feature of CSP policymaking that deserves further empirical investigation.

While the CSP framework can explain the key incentives that drive Member States' behaviour in areas closely related to national sovereignty, it is largely static and unable to explain changes in positions or the zeal with which these are pursued. Concepts of bounded rationality and punctuated equilibria can help make the framework more dynamic, allowing it to explain policy change. This study has highlighted that Member States indeed update their positions based on newly-perceived information regarding the potential redistributive effects of EU policies ('information updating on facts') and changed voter preferences ('information updating on electoral preferences'). While the CSP framework draws on Postfunctionalist explanations to explain opposition to EU level capacity-building and redistributive policy-making, it would be worthwhile investigating how mass publics influence EU level negotiations. This paper has demonstrated that voter preferences are not only a constraining factor for governments, but are often constitutive of their positions in EU negotiations, as recent studies on EU politicisation management have demonstrated (Hobolt and Wratil, 2020; Schimmelfennig 2020). The newly emerged populist governments bring new positions to these negotiations and have different

incentives than moderate governments, which explains their different behaviour. The positions populists represent were largely ignored in the past, but are at the heart of the EU's multi-crisis. At the same time, governments do not only passively respond or 'react' to voter preferences, but pro-actively manipulate them by creating situations that perpetuate electoral support, as shows the case of Salvini's double game on Dublin IV.
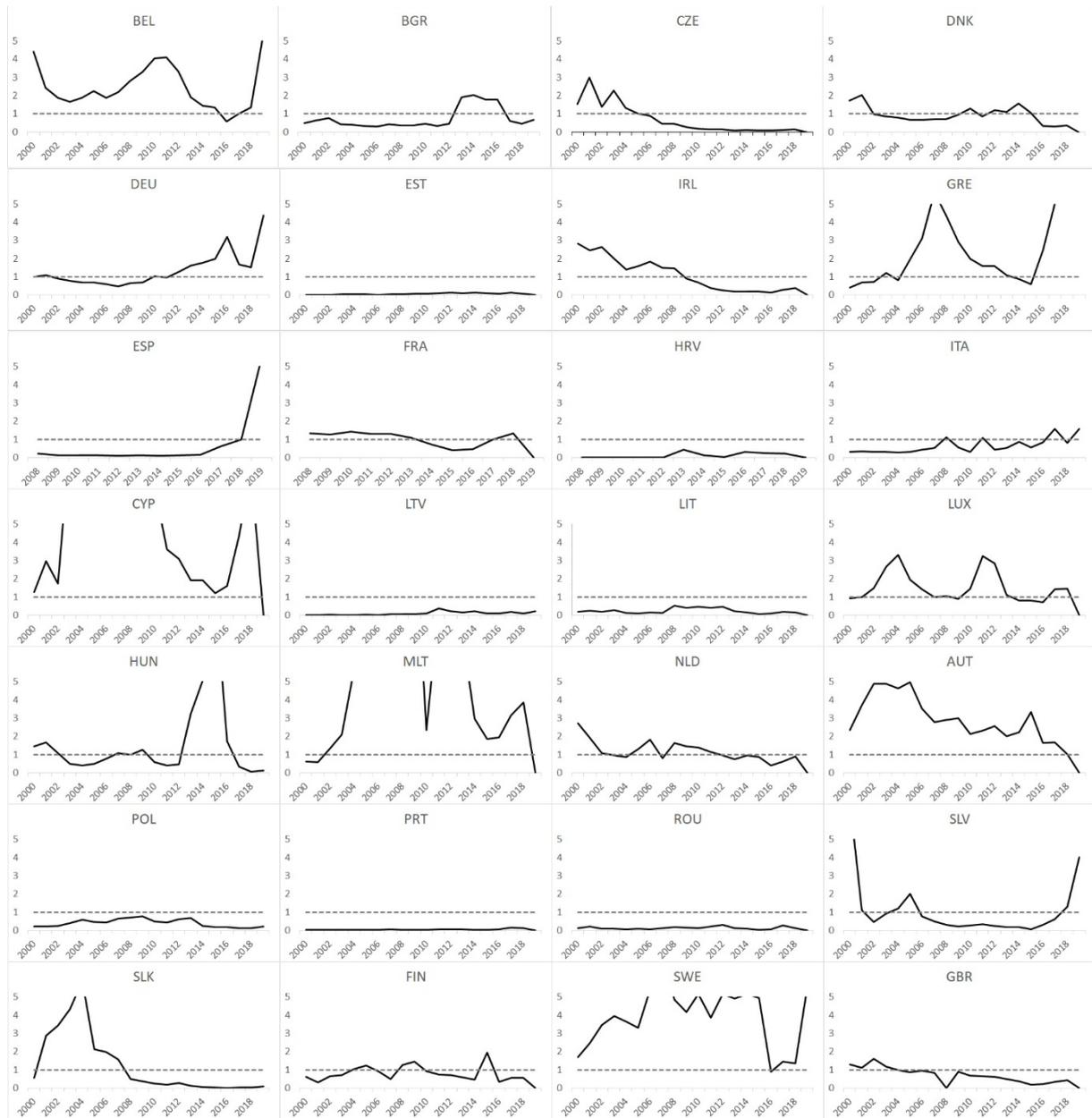
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Appendix I

Figure 1: Dublin IV Provision Ratio (% of applicants in a given year / % of responsibility according to key. The dotted line represents 100% of their share under the reference key Source: Eurostat 2019a,b,c)

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Appendix II on data and methods

The data in this paper results from fieldwork from two research projects. The first is from the project "Regulatory policy-making in EU asylum policies" which was conducted at the *Bremen International Graduate School of Social Science*s from 2012-2014 and focused on EU asylum policymaking in the first (2000-2005) and second (2008-2013) phases of the Common European Asylum System. It was funded by the *German Research Foundation*. The fieldwork included 39 interviews with experts from the EU institutions, Member States' Permanent Representations in Brussels, selected officials of national ministries as well as NGOs. The second project focused on the "Comprehensive post-crisis reform of the Common European Asylum System" and was conducted at the *London School of Economics*. Fieldwork for this project was conducted in the spring 2019 and includes 18 interviews with experts from EU institutions, Member States' Permanent Representations in Brussels and NGO representatives.

I have provided a combined list of interviewees and documents that were used for this paper.

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