EU Asylulm Policies: The power of strong regulating states.

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ACI	Actor-Centred Institutionalism
AIDS	Aquired Immune Deficiency Syndrome
APD	Asylum Procedures Directive
AT	Austria
AV	Accountability View
BAFL	Bundesamt für die Anerkennung Ausländischer Flüchtlinge
BAMF	Bundesamt für Migration und Flüchtlinge
BE	Belgium
Benelux	The Benelux Union (that is Belgium, the Netherlands and Luxembourg)
CAT	Convention against Torture
CDU	Christlich Demokratische Union Deutschlands
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
CRC	Convention on the Rights of the Child
CRSR	Convention relating to the Status of Refugees
CSU	Christlich-Soziale Union in Bayern
DE	Germany
DL	Decreto Legislativo
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECSMA	European Convention on Social and Medical Assistance
ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law

EJN	European Judicial Network
EL	Hellenic Republic of Greece
ELENA	European Legal Network on Asylum
EMN	European Migration Network
EP	European Parliament
EPP	European People's Party
ERF	European Refugee Fund
ES	Spain
ETA	Euskadi Ta Askatasuna
EU	European Union
FGM	Female genital mutilation
FI	Finland
FPÖ	Freiheitliche Partei Österreichs
FR	France
FRA	European Union Agency for Fundamental Rights
FRONTEX	European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union
GDP	Gross domestic product
GDR	German Democratic Republic
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE	Ireland
IPA	International Protection Alternative
IT	Italy
JHA	Justice and Home Affairs
LIBE	Civil Liberties, Justice and Home Affairs Committee in the European Parliament
LU	Luxembourg

MEP	Member of European Parliament
MPI	Migration Policy Institute
NGO	Non-Governmental Organisation
NL	Netherlands
OFPRA	Office Française de Protection des Réfugiés et Apatrides
ÖVP	Österreichische Volkspartei
PD	Presidential Decree
PES	Party of European Socialists
PT	Portugal
PV	Protection View
QD	Qualification Directive
RCD	Reception Conditions Directive
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SE	Sweden
SPD	Sozialdemokratische Partei Deutschlands
SPRAR	Sistema di Protezione per Richiedenti Asilo e Rifugiati
STAR	Ständige Arbeitsgruppe Rauschgift
TEC	Treaty Establishing the European Community
UK	United Kingdom of Great Britain and Northern Ireland
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations

Chapter 1

European Asylum Policies in Crisis

Since summer 2015 more than one million people have entered Europe in search of refuge and protection against persecution. The persistence of repressive regimes, conflict, and failed statehood in the Middle East and Africa, most prominently in Syria, Iraq and Afghanistan (cf. UNHCR 2016), has forced these people to leave their homes and search for new livelihoods elsewhere. As legal migration to Europe is nearly impossible, most of them have paid smugglers who helped them cross the European Union's (EU) external borders. Many have lost their lives in the attempt to cross the Turkish-Greek border or have drowned when their boats sank in the Mediterranean Sea. But even those that arrived in Europe were often not provided adequate protection and treated with hostility.

With the rising numbers of refugees arriving in European border countries in late summer 2015, the deficiencies of their asylum systems became evident. Media reported maltreatment of asylum-seekers in Hungary, where they were brought to camps characterised through degrading general conditions and denied access to a fair procedure (Al Jazeera 2015). The other Member States' responses to these events differed widely. While some traditional recipient countries such as Germany and Sweden agreed to temporarily open their borders and to admit new asylum-seekers (Graham-Harrison et al. 2015), especially the new Member States in Central and Eastern Europe refused to do so (Lyman 2015). But also other traditional refugee receiving countries like the United Kingdom (UK) and France kept a low profile and received a relatively small share of the applicants.

Given the persistently critical humanitarian conditions for asylum-seekers in the border countries Italy and Greece, which were overburdened by the inflow, the European Council of 22 September 2015 agreed to relocate 66,000 asylum-seekers from these countries (Council 2015). The agreement was one of the relatively few instances in European decision-making where Member States made use of qualified majority voting to outvote a small minority of Member States, including the Czech Republic, Hungary, Romania, and Slovakia. These countries were not ready to receive additional asylum-seekers and Slovakia and Hungary eventually challenged the agreement before the Court of Justice of the European Union (CJEU) as they felt it had been illegally imposed on them (CJEU 2015a; CJEU 2015b). The other Member States were sluggish to implement the agreement and by January 2016 only 272 people have been relocated (Kingsley 2016a).

This not only questions the authority of EU decisions, but also demonstrates that the EU is facing substantial problems to manage the unprecedented inflow of asylum-seekers. The EU's so-called 'refugee crisis' is therefore essentially a management and confidence crisis in which Member States are careful not to commit to receiving any asylum-seekers that have not yet entered their territory. Instead, they try to pass the responsibility onto their neighbours. These dynamics have provoked the humanitarian crisis among refugees which we witness today in many Southern and Eastern European Member States. Even those Member States that were initially more open to receiving asylum-seekers, namely Germany and Sweden, later on introduced temporary border controls (Taynor 2016) and restricted their national asylum policies in order to deter potential asylum-seekers and encourage them to search for protection elsewhere (Crouch 2015; Zeit Online 2015). The continued responsibility-shifting has led to a confidence crisis between Member States in which they have unilaterally closed their national borders, because they do not believe that their neighbour countries will take their responsibility to provide effective protection to refugees. It has thus the potential to challenge the European integration project more generally. Additionally, it may have detrimental impact on the state of refugee protection on this continent.

Why has the EU suddenly failed to co-operate during this period of high refugee influx? After all, EU asylum policy was one of the most dynamic areas of European integration in the 2000s, with a constant production of new regulatory instruments. Just two years earlier, in 2013, the EU had established a Common European Asylum System (CEAS) that was supposed to grant protection standards on a comparable level across Member States and to regulate the distribution of asylum-seekers among them. This CEAS was supposed to be fully implemented in Member States by 2015. This study shows that the EU has harmonised asylum systems in its Member States and regulated the distribution of asylum-seekers only on paper. In practice, EU integration on a high level of protection has not succeeded. I argue that many of the dynamics we see today during the EU's 'refugee crisis' have been present since the early days of EU asylum co-operation and that the effectiveness of EU asylum policies suffers from the same problems that lie at the heart of the crisis. All attempts to reform EU asylum policies and ensure a working co-operation in the field will have to take these dynamics into account.

Underlying these dynamics is one of the last decade's key research puzzles about EU asylum policy-making, namely why EU asylum policies routinely exceed the lowest common denominator of EU Member States, and, conversely, why the often-feared race to the bottom

in asylum standards across Europe did not take place. I argue that since the 1990s, the core motivation for Member States to engage in EU asylum co-operation was to ensure responsibility-sharing. The top recipients of asylum-seekers, Germany and Sweden today and then among them, saw co-operation as a means to ensure that Member States that did not yet provide effective protection or that had restrictive policies in place, introduced functioning and liberal asylum systems, so that they would become more attractive asylum destinations. To this end, top recipients in North-Western Europe tried to impose their own refugee protection standards on presumably more restrictive Member States and particularly on Member States in Southern and Eastern Europe. Subsequent to the Amsterdam Treaty in 1999, when the EU was supposed to establish legislation in the field, North-Western European Member States were very successful in introducing their standards into EU legislation. This implied that Member States in Southern and Eastern Europe would have to establish effective asylum systems which they did not previously possess. However, these countries neither had an interest in becoming top recipients themselves nor were their administrations capable of building robust asylum systems that could deal with the increased influx of asylum-seekers and refugees. In the end, policy harmonisation – at least in some instances – was a success on paper. In practice, it failed widely.

Background and Research Question

The main aim of EU co-operation in the area of asylum policies has been to create a more even distribution of asylum-seekers across Member States. Member States tried to reach this aim by introducing a distribution mechanism, laid down in the Dublin Regulation. In the same breath, the EU adopted three directives to harmonise procedures for assessing asylum claims and ensuring that refugees and asylum-seekers had access to certain rights across Europe. The Dublin Regulation has been regularly criticised by scholars and non-governmental organisations (NGOs) for overburdening Southern European border countries and exposing asylum-seekers to an asylum lottery. With rising numbers of asylum-seekers arriving in these border countries today, these dynamics are particularly obvious. The same actors that criticised the Dublin Regulation have also critically observed EU policy harmonisation. The asylum directives were expected to reflect Member States' interest to deter asylum-seekers through the adoption of restrictive EU policies on the lowest common denominator or even lower (see Lavenex 2001a: 865; Maurer/Parkes 2007: 191). It was assumed that the EU's lowest common denominator would eventually lead to a race to the bottom in asylum standards across Europe (Peers 2000: 1). In this race to the bottom, every Member State that previously provided higher protection standards would introduce the

lowest standard allowed by the EU directives. Decision-making at the EU level is susceptible to low standards of protection, according to scholars working in the field, as restrictively-minded Interior Ministers and bureaucrats decide on common policies behind 'closed doors' in the Council with their fellow ministers (Lavenex 2001a: 853-854). This excludes the liberal, rights-enhancing, veto players present at the domestic level, such as national courts or liberal parliamentarians. Using the concept of Venue-Shopping as introduced by Baumgartner and Jones (1993), Guiraudon (2000) argues that Interior Ministers have deliberately chosen the European level to pass restrictive policies in co-operation with their likeminded counterparts in other Member States and circumvent domestic liberal veto players.

While these Venue-Shopping based explanations were developed during the time of intergovernmental co-operation (Guiraudon 2000), they have usually also been drawn upon to explain the later phases of asylum policy communitarisation (Guiraudon/Lahav 2006: 180-181; Maurer/Parkes 2007). After the 1999 Amsterdam Treaty, supranational institutions continued to play only a minor role in the decision-making process: The European Parliament (EP) was not a co-legislator, the Council decided under unanimity, the European Commission shared its right to initiate legislative proposals with the Member States, and the CJEU had very limited jurisdiction over these asylum directives (see EU 1997). In sum, the supranational institutions remained weak during the entire first phase of the CEAS, from 2000 to 2005.

Yet, studies looking at the implementation of asylum directives during the first phase of the CEAS show that far from racing to the bottom, EU asylum policies preserved the *status quo* or even raised protection standards (Odysseus 2006; Thielemann/El-Enany 2011). Additionally, recent case law of the European Court of Human Rights (ECtHR) and the CJEU has shown that some Member States, specifically Greece[1] and Italy[2], did not comply with the EU directives and provided less protection than required. In other words, these Member States had agreed to EU protection standards that exceeded their domestic *status quo ante*. The expectations that EU asylum directives represent the lowest common denominator were unjustified.

This study addresses these contradictory findings and aims to explain EU legislative output and domestic legislative outcome in the first phase of the CEAS. Others have highlighted the role of pro-immigrant supranational EU institutions functioning as additional veto players at the EU level (Kaunert/Léonard 2012; Ripoll Servent/Trauner 2014; Thielemann/Zaun 2013)

[1] See ECtHR (2011) *M.S.S. v. Belgium and Greece* and CJEU (2011) *Joined cases of N.S. v. United Kingdom and M.E. v. Ireland.*
[2] See ECtHR (2014) on *Tarakhel v. Switzerland.*

in the second phase of the CEAS. In that phase, the competences of the supranational institutions were substantially enhanced in the asylum area. These new competences were introduced with the Lisbon Treaty and included co-decision of the EP, the exclusive right to initiate legislation for the Commission, qualified majority voting in the Council and full jurisdiction of the CJEU. Protection standards above the lowest common denominator are therefore more puzzling in the first phase of the CEAS, when community institutions were still weak and when intensive transgovernmentalism among supposedly restrictive Interior Ministers characterised asylum policy-making. Since moreover, unanimous voting was the rule and every Member State thus had a veto it is puzzling why some Member States, especially Italy and Greece, agreed to a protection standard that exceeded their *status quo ante*.

The core questions guiding the research are:

1) *Why do EU asylum policies exceed the lowest common denominator?*

2) *Why was there not been a race to the bottom in refugee protection standards across Europe subsequent to EU legislation?*

I am, in other words, both interested in EU level policy output and domestic policy outcome of its transposition.[3] In order to provide an alternative explanatory model to Venue-Shopping, this study draws lessons from standard setting in other areas of EU legislation, such as social policy and environmental policy (Eichener 1992, 1997; Héritier et al. 1994; Héritier 1996, 1997) and argues that to some extent asylum legislation follows a similar logic. These scholars have suggested that EU policy-making (and domestic transposition) is driven by two dynamics: First, Member States generally want to maintain their domestic policies and try to avoid misfit pressures resulting from EU policies being different from national policies. Second, (some) Member States compete over the influence on EU legislation to avoid misfit before it occurs. This is subsumed under the notion of regulatory competition. I will build on and extend the theoretical approach of Misfit and Regulatory Competition and make it applicable for EU asylum policy, while further developing the approach and specifying some as yet neglected aspects.

Methodologically, I will combine process-tracing (Beach/Brun Pederson 2013; Rohlfing 2012: 150-167) with a 'before-after' analysis (George/Bennett 2004: 166-167) of *status quo ante* policies and policies after transposition of EU asylum directives and triangulate various data

[3] Public policy research distinguishes between policy output and policy outcome. Policy output is understood as the results of political decision-making at the EU level, for instance EU asylum directives. Policy outcomes are the results of policy transposition at the domestic level (Blum/Schubert 2011: 130; Easton 1965: 351).

sources, including EU documents, reports on the *status quo ante* and the transposition of EU law in Member States, and expert interviews, to answer the research questions.

The aim of this study is fourfold: First, I address the puzzle described above. In doing so, I argue that higher protection standards are not exclusively based on increased competencies for community institutions, but also on Member States' preferences and different degrees of bargaining success. Second, I want to contribute to the theoretical debate on EU decision-making and the question of what explains effective influence in EU negotiations, arguing that informed positions and hard bargaining constitute important power resources in negotiations. Third, I conduct a systematic and thorough study of both EU level and domestic processes and triangulate various methods and data sources for the investigation of EU decision-making processes. I propose such a systematic approach for policy studies in general, as it enhances the quality of the (qualitative) empirical analysis. Finally, I provide insights into the field that help to understand the behaviour of EU Member States during the EU 'refugee crisis' and that explain the absence of effective EU co-operation today.

State of the Art

Since the early days of intergovernmental European co-operation in the area of immigration and asylum policies, scholars have tried to answer the question whether the European policy output was more liberal or restrictive than what European states had previously done domestically. Scholars have also wondered what impact these policies had on domestic immigration and asylum politics. I will first summarise the main findings of past research in the field and after that identify the gap I address with my study and describe to what extend my research will be able to fill this gap.

In the mid-1980s and early 1990s European states co-operated intergovernmentally on issues related to immigration and asylum. At the same time some of these states introduced restrictive policies domestically. These restrictive policies comprised the introduction of carrier sanctions on airlines, the notions of 'safe third countries' and 'safe countries of origin', as well as 'manifestly unfounded asylum applications' (Lavenex 2001b: 203). Scholars found different explanations for the motivations underlying European co-operation and its restrictive results. One group of scholars following the Venue-Shopping Theory suggested that newly created European fora could account for the increased restrictiveness. Another group of scholars studied Europeanisation of immigration policies and highlighted the role of

national politics and an anti-immigrant political climate as the main factors explaining restrictive policy-change.

The idea underlying the notion of Venue-Shopping is that domestic actors deliberately choose to cooperate through intergovernmental framework and pass international agreements which (in contrast to treaties, for instance) do not require parliamentary ratification. Thus, they are able to circumvent potential veto players at the domestic level and foster their policy preferences through the backdoor. The argument has been put forward most prominently by Didier Bigo (1996) and Virginie Guiraudon (2000). According to them, restrictively-minded Interior Ministers try to implement harsher immigration policies. On the domestic level, however, they encounter veto players, such as courts, other ministries with more liberal traditions such as the Ministries of Health, Labour or Foreign Affairs (Bigo 1996: 99), parliamentarians or migrant aid groups with more liberal preferences (Guiraudon 2000: 252). In order to circumvent these veto players, Interior Ministers used intergovernmental European networks since the mid-1980s to pass restrictive immigration measures, thereby excluding liberal veto players. In a framework of intergovernmental co-operation in a number of fora, such as the Trevi group, the Club of Bern, the STAR (acronym for *Ständige Arbeitsgruppe Rauschgift*/Permanent Working Group on Narcotics) group and the *ad hoc* immigration group, European states were able to pass treaties such as the Schengen Agreement or the Dublin Convention. These again led to the adoption of very restrictive policies at the domestic level of the signing Member States as liberal veto players had no say in this vertical policy-making (Ibid.: 268).

Two notable contributions of Europeanisation scholars on intergovernmental co-operation in the 1990s are the study of Vink (2005) on the Netherlands and the study of Lavenex (2001b) on France and Germany. Both find that domestic opportunity structures were mainly responsible for restrictive changes. Hence, European policy-making did not cause restrictive policies, but Europe served as a scapegoat to cover the implementation of more restrictive moves by national policy-makers. Studying the Netherlands, Vink (2005) investigates co-operation in the areas of asylum policy, residential status and nationality. While his core argument is that European citizenship has not substituted for national citizenship (Ibid: 4), he is hesitant to argue that Dutch immigration and asylum policies have been changed as a result of European rather than domestic developments. He thus poses the counterfactual question of whether "similar changes in domestic policies would have happened without being accompanied by an ongoing process of European integration" (Ibid.). Asylum is considered a

particularly interesting case in this regard due the number of related instruments passed on it during the 1990s (Ibid.: 7). Drawing on parliamentary debates concerning the Safe Countries of Origin Act (1994) and the Safe Third Countries Act (1995) – both based on concepts mentioned in the London Resolutions – Vink demonstrates that Dutch parliamentarians actually referred to the usage of these terms in Germany. This is supported by the fact that the parliamentarians almost exclusively referred to the German terms *sichere Drittstaaten* und *sichere Herkunftsstaaten* (Ibid.: 106). The Netherlands hence implemented these restrictive concepts to not be considered a 'soft touch' in comparison to its neighbour Germany. Vink concludes that governments would have pursued these restrictive policies also in the absence of European co-operation, but could get away with it more easily by strategically profiting from the EU level playing field.

Lavenex (2001a: 853; 2001b: 200) investigates both the decision-making at the European level and domestic implementation of immigration policies in Germany and France. Concerning the European level she finds that due to the sensitivity of the issue, co-operation in this field was characterised by intensive transgovernmentalism, that is the close co-operation of Justice and Home Affairs (JHA) officials[4]. In the absence of an overarching normative framework on the issue, 'intensive transgovernmental' co-operation led to rather restrictive policies (Lavenex 2001b: 201). In Germany and France, Lavenex argues, the reference to Europe changed the cleavage structure and legitimated the introduction of restrictive policies: In Germany, the restrictive asylum frame of EU intergovernmental co-operation resonated well with the rather critical discourse on asylum-seekers. At the same time the reference to Europe provided the normative legitimation for a more restrictive approach to the constitutional asylum which had been introduced as a response to the crimes committed by the Nazis during World War II. On the contrary, in France the implementation of the European asylum frame was incompatible with France's self-understanding as a *terre d'asile* and was hence accompanied by a discourse linking the issue to questions of French identity. Under *cohabitation* (divided government) the socialists had to follow this restrictive approach, legitimising this move, again, by referencing Europe and the Schengen Agreement (Ibid.: 203). Both countries adopted convergent reforms implementing the European *acquis*. The outcomes in these countries were thus very similar, while the processes of restriction diverged significantly in both countries (Ibid: 203-204). In a nutshell, Lavenex too finds that restrictive policy-change relied on the domestic opportunity structure and a climate for restrictive changes, while the

[4] This should not be confounded with intergovernmentalism which focuses on the co-operation between heads of state.

European level mainly served as a tier to which blame was shifted for these developments (Lavenex 2001a: 863).

After the communitarisation of immigration and asylum policies with the Treaty of Amsterdam in 1999 both Political Scientists and Legal Scholars agreed that the restrictive trend of transgovernmental co-operation subsequent to the Maastricht Treaty was likely to be maintained. Most legal scholars consider the asylum directives that have been passed after the Amsterdam Treaty to be at least partly incompatible with international human rights law and thus adopt a very critical stance towards these instruments (Costello 2007; Garlick 2006; Gil-Bazo 2007; Handoll 2007; Peers/Rogers 2006). More specifically, scholars suggest that EU asylum policies are lowest common denominator policies (Lavenex 2001a: 865) which eventually entail a race to the bottom, given that every Member State can be expected to downgrade their protection standard to meet the low standard allowed by the directive (Peers 2000: 1).

Reasons for this state of affairs were usually found in the institutional setup. The Amsterdam Treaty only partly communitarised asylum and immigration policies and hence the Member States were still in the driving-seat (Guiraudon 2000: 262-264). Decisions in the Council were taken under unanimity, the CJEU only had limited jurisdiction, the Commission shared its right to initiate legislation with the Member States, and the EP was only to be consulted and even then its positions were not in any way binding for the Council. The close co-operation between officials from Interior Ministries in different European countries was assumed to further weaken other ministries at the domestic level and to entail venue-shopping (Lavenex 2001a: 868-68). Moreover,

> "in the event of unanimous voting in the Council, the Commission will anticipate the position of the most reluctant government [...], thus perpetuating harmonisation with the lowest common denominator" (Lavenex 2001a: 865).

Parkes (2010: 33, 41-43) builds on Venue-Shopping and suggests that restrictive policy output can indeed be explained by the continued influence of the Interior Ministries whom he describes as 'arch-rationalists'. These use, he continues, 'old arguments' and path-dependencies favouring restrictive solutions (Ibid: 47-60). In a similar vein, Parkes and Maurer suspect the root of restrictive policies to lie in the ideational realm: While the newly involved institutions such as the EP and the Commission have more recently been very apt at showing that their involvement adds legitimacy to the outcome (EP) or expedites the process of making policy proposals (Commission), they have not been able to change the restrictive policy image of asylum policies (Maurer/Parkes 2007: 174).

While all of these scholars expect restrictive policies, they have not assessed whether EU asylum policies are indeed more restrictive than Member States' previous policies. The description of EU asylum policies after Amsterdam as restrictive is instead a normative one: EU asylum policies after Amsterdam have not left their restrictive policy core in the sense that European asylum policies still aim at distinguishing 'deserving' from 'non-deserving' immigrants. Who such a deserving immigrant is, has clearly varied over time and space. From an open borders perspective, Bigo was hence right to note that any similar kind of distinction is part of a restrictive practice, as immigrants labelled as 'non-deserving' are 'illegalised' and 'criminalised' (2001: 141).

Yet, the suggestion that EU asylum policies *post*-Amsterdam have become ever more restrictive was later qualified with the first implementation studies by legal networks such as Odysseus (2006), the European Council for Refugees and Exiles (ECRE) (2008) and the United Nations High Commissioner for Refugees (UNHCR) (2010a). Scholars thus suggested that EU asylum policies did not necessarily lead to more restrictive policies, but sometimes even enhanced the rights of asylum-seekers in the EU (Thielemann/El-Enany 2009; Thielemann/El-Enany 2011).[5] While these studies give exemplary evidence for raised protection standards, they do not systematically assess whether the core directives in the EU asylum area have resulted in more liberal or more restrictive policies domestically. Moreover, they do not address the question whether Member States have agreed on the most restrictive standards available or on the lowest common denominator respectively. In addition, an explanation revealing what can account for both the absence of lowest common denominator policies and a race to the bottom is clearly missing. This study fills both gaps. It first of all engages in a systematic analysis of EU asylum standards and the impact they have on domestic asylum policies. Second, it provides explanations for both EU policy output and domestic policy outcomes.

The reason for focusing on the first phase of the CEAS is mainly based on theoretical considerations. As scholars have already pointed out, protection standards beyond the lowest common denominator after the Lisbon Treaty are likely, given the strengthened role of the supranational institutions (Kaunert/Léonard 2012; Ripoll Servent/Trauner 2014; Thielemann/Zaun 2013). Protection standards beyond the lowest common denominator in this first phase are, however, a much bigger puzzle, as the Community institutions were rather weak at the time and could not account for this legislative output at the EU level. Thus, even

[5] Interestingly, for the area of EU (labour) immigration policies, Christof Roos finds a similar trend and states that "EU immigration policies more and more define the cracks in the walls of Fortress Europe" (2013: 1989).

in a setting of intensive transgovernmentalism there seem to be dynamics at work which impede lowest common denominator policies and a race to the bottom.

While my focus is on the first phase of the CEAS, my findings still have a lot to say about the second phase of the CEAS and the policy-making processes during the 'refugee crisis'. In fact, in the second phase the first phase instruments were recast, which meant a revision of selected provisions of the original directives. As Ripoll Servent and Trauner (2014: 12) highlight, Member States are still the main actors also in the second phase of the CEAS. They are also the key actors during the 'refugee crisis' when most key legislative instruments (such as the relocation agreement; see Council 2015) had been passed in the Council alone.

The Argument in a Nutshell

This study argues that EU asylum policies are not lowest common denominator policies, for the following reason: All Member States try to impose their domestic protection standards (or anticipated results of domestic reforms) to the EU level to avoid adaptation costs, but some Member States are consistently more effective in influencing EU legislative output than others. Strong regulating[6] Member States in North-Western Europe, that is states with effective governments and significant numbers of asylum applications, have used EU asylum policies as a tool for responsibility-sharing since the early days of asylum co-operation. They have aimed to impose their own protection standards onto the weak regulators in mainly Southern Europe. Additionally, strong regulators have aimed to converge with other strong regulators, where they perceived them as having less generous policies than their own. Their motivation for doing so is based on the perception that asylum-seekers are law consumers who choose which asylum-system they want to apply to, based on its generosity.

While weak regulators generally provide weak refugee protection due to a lack of capable institutions, strong regulators also vary significantly in the protection standards they provide. Member States that have effectively working governments and whose administrations experienced a broad range of cases and situations when processing asylum claims, are more active and hence effective during the negotiations. Given their significant exposure to the issue and their administrative capacity to react to high numbers of applications, delegations representing strong regulating Member States such as Germany, Sweden, France, the UK and

[6] When talking about strong regulating states, I adopt a wide definition of regulation, which encompasses a state's capacity to make rules and enforce them in broad sense. I do not wish to contrast the regulatory state with the welfare state, for instance, as is done most prominently by Majone (1997). In fact, many of the rules I investigate have a direct impact on the welfare of refugees in Europe.

the Netherlands considered the issue to be much more salient and therefore adopted harder bargaining strategies. Under unanimous voting rules, all Member States with firm positions and that are ready to defend these positions at the political level are accommodated. For weak regulators such as Greece, Italy and Portugal the issue of asylum was less salient, as they were first, not confronted with refugees and asylum-seekers and second, even if they were, they tended to respond less to such pressures as their administration worked less effectively.

At the same time, strong regulators have credible expertise through the large number of applications they receive and their reliable administrations. They can draw upon their expertise in negotiations from an early stage and thus shape EU policy-making. Their reliable administrations and substantial manpower allows them to not only build domestic expertise, but also enables them to introduce wording and to suggest concepts to address policy problems during negotiations at the EU level. Most weak regulators have never had a working asylum system. Asylum-seekers reaching these countries are hence not discovered by the authorities. Most do not usually apply for asylum but instead try to find work in the informal economy and live in the country without holding any kind of legal status. Therefore, the asylum systems of weak regulators lack credibility and their delegations cannot draw upon a large body of expertise on how to regulate asylum. Thus, these states are highly ineffective in influencing EU asylum policies.

Under the system of unanimous voting, the restrictive Member States among the strong regulators are most effective in influencing EU legislative output. For them their *status quo* is at stake, whereas liberal strong regulators can maintain their system since only minimum standards are adopted. This can explain why EU asylum policies in the first phase of the CEAS represent the lowest common denominator of the strong regulating Member States.

The absence of a race to the bottom can be explained by the fact that Member States do not want to change their domestic asylum policies in the first place. This is also true for liberal strong regulators which could downgrade their protection standards to be in line with EU legislation, but refrain from doing so at a national policy level. Costs of change in this regard include both material and ideational/norms-related costs in the sense that policies represent values and norms shared by the governments' constituencies. Thus, liberal Member States understand it as being within their self-interest to be liberal in the first place and therefore do not want any alien norms to invade their policy system. Where change occurs subsequent to EU legislation, this is mainly due to domestic legislative processes running in parallel to EU decision-making. This supports findings by Lavenex and Vink and is in line with an

understanding of Europeanisation as a circular process in which uploading and downloading concur (Börzel/Risse 2000). These processes can account for legislative changes made by strong regulating Member States. These Member States used EU asylum legislation as a window of opportunity to reflect their own asylum policies and introduce desired changes. This approach was politically convenient, as it helped strong regulators to bolster their own reforms through EU policies, thus making these reforms in an unpopular area with little benefits for constituencies less noticeable at the domestic level. Yet, change occurring with weak regulators cannot be explained through domestic policy-making. In fact, these Member States transposed a large number of provisions on paper by inscribing them in their laws. Yet, they did not implement all of these reforms because of the huge misfit between EU and domestic legislation in these countries, as well as their limited administrative capacities. At the same time, negotiations at the EU level were a means for Member States to learn about the practices of their neighbour countries. As occurred in the 1990s, some strong regulators as well as weak and medium regulators, copied effective practices (both liberal and restrictive) to manage asylum and reduce costs. This resembles the idea of the 'copycat' approach observed by Vink (2005), according to which Member States copy the regulatory approaches of their neighbour countries.

Structure of the Study

The study is structured as follows: Following the approach of Actor Centred Institutionalism (ACI), I will carve out causal factors and develop a mechanism based on both institutional and actor-related factors in chapter 2. While institutional factors function as intervening (that is moderating) variables, actor-related factors are key in building the central mechanisms that explain EU policy output and domestic legislative outcome. Drawing on the Misfit and Regulatory Competition Model, I suggest that strong regulators are more effective in influencing EU legislation than weak regulators are. Yet, I also will modify the approach: First of all, I suggest that strong regulation and high standards does not necessarily mean the same thing. Rather strong regulation can encompass both liberal and restrictive policies. Second, I develop criteria to determine which Member States are strong and which are weak regulators. Third, I develop an explanation for the enhanced effectiveness of strong regulators in comparison to weak regulators. Last, I elaborate on the design, methods and data used in this study. I chose a case study design. While studying only policy-making in the area of asylum, my design is implicitly comparative, as I compare my findings to those made in environmental and safety at work policies. These are 'most different' policy areas (see Gerring

2007: 139-142; Seawright/Gerring 2008: 304-306), because they belong to the realm of low politics, whereas asylum policies is closely related to national sovereignty and high politics. The methods I apply are the following: To systematically establish whether Member States agreed on the lowest standards available I compare the status of the directive to the *status quo ante* of the Member States. To see whether these standards led to a race to the bottom, I engage in a within-case comparison (Before-After-Analysis), comparing national asylum policies before and after EU legislation (see George/Bennett 2004: 147-148). This is based on studies of asylum systems in Member States before and after EU asylum legislation. To explain policy output at the EU level I trace the processes of negotiations in the Council (Ibid: 166-167; Beach/Brun Pedersen 2013; Rohlfing 2012: 150-167). This is done with the help of Council documents, original interview data from 39 semi-structured expert interviews, press sources and secondary data from Political Science studies on EU asylum policies. To account for the domestic legislative outcome I give exemplary evidence from the transposition processes of some Member States.

Chapter 3 presents an overview of the evolution of the CEAS, embedding it in international human rights law. In this chapter I show how strong regulators have framed debates since the 1990s and tried to foster responsibility-sharing through policy harmonisation. Moreover, I will introduce the legislative instruments which define EU asylum policies, namely the 2003 Reception Conditions Directive (RCD), the 2004 Qualification Directive (QD) and the 2005 Asylum Procedures Directive (APD).

In chapter 4 I examine my dependent variables more thoroughly. Comparing the different *status quo antes*, I systematically investigate where EU asylum policies represent the lowest standards available among EU Member States and where they do not. Comparing the *status quo ante* of Member States with the situation after transposition, I address the question of whether EU asylum policies have led to a race to the bottom in asylum standards across Europe.

In Chapter 5 I provide an explanation for the standards laid down at the EU level. Tracing the negotiation processes, I will investigate whether all Member States wanted to upload their *status quo ante*. Besides studying Member States' preferences, I also address their strategies and power resources and explain what can account for the effective influence of a Member State on EU legislation. Specifically, I will assess whether those Member States I have defined as strong and weak regulators have adopted different strategies and had different degrees of effectiveness in influencing EU asylum legislation.

Chapter 6 answers the question of why EU asylum policies did not entail a race to the bottom. As I find in chapter 4 that EU asylum legislation did not entail a change in policies in most instances, I need to explain this trend towards policy stasis. Moreover, I will explain change in the few instances in which it occurred and address the question of whether Venue-Shopping can explain change subsequent to EU legislation.

Chapter 7 draws a conclusion and situates the findings in the debate on EU asylum policy-making and the 'refugee crisis' more specifically and EU decision-making more generally. It elaborates on the generalisability and implications of the findings and the limitations of this study. Moreover, it provides some directions for further research.