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## **Why EU asylum standards exceed the lowest common denominator:**

### **The role of regulatory expertise in EU decision-making**

**Natascha Zaun**

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**ABSTRACT** While scholars traditionally expected EU policy-making in the area of asylum to produce lowest common denominator standards, recent studies on the first phase of the Common European Asylum System have observed higher asylum standards in some instances. This paper aims at explaining this divergence. Drawing on concepts of regulatory expertise and ‘misfit’, it argues that the observed variation in policy output can be explained by the dominance of a few (Northern) Member States which were highly successful in inserting their positions in the core EU directives. Government effectiveness and exposure to the phenomenon entailing regulatory expertise provide a powerful explanation for Member States being effective policy-shapers. Characterized by low levels of government effectiveness and exposure in the asylum area, Southern European countries were, on the contrary, rather passive during the negotiations and barely left any mark on the EU directives.

**KEY WORDS** Asylum, Decision-Making, European Union, Expertise, Regulatory Competition

## **INTRODUCTION**

Since the Treaty of Amsterdam, European Union (EU) asylum policies have traditionally been assumed to be lowest common denominator (LCD) policies (Lavenex 2001: 865; Maurer and Parkes 2007: 191). As Member States are expected to favor deterrence of asylum-seekers and refugees through negative regulatory competition and downgrading of standards (Barbou des Places 2003), LCD policies should eventually entail a race to the bottom (RTB) (Peers 2000: 1) in

which every Member State with previously higher standards introduces the lowest standard allowed by the EU.

Yet, there is growing evidence suggesting that cooperation in the area of EU asylum policies has not entailed a RTB, but rather maintenance of the status quo or even a rise in standards, strengthening refugee protection in Europe (Odysseus 2006; ECRE 2008; UNHCR 2010; Thielemann and El-Enany 2011; Kaunert and Léonard 2012). Moreover, recent case law of the European Court of Human Rights (ECtHR) has shown that particularly Southern European Member States, such as Greece (*M.S.S. vs. Belgium and Greece*) and Italy (*Tarakhel vs. Switzerland*), fall short of fulfilling the minimum standards required by EU asylum law, particularly due to their weak reception facilities. Thus, EU asylum standards clearly exceed the standards of certain Member States.

Explaining why EU asylum policies are not LCD policies and why they have not entailed a RTB, I shed light on the issue why some Member States agreed on standards that exceeded the domestic status quo. Others have highlighted the role of rights-enhancing EU institutions as a ground for raised standards in the second phase of the Common European Asylum System (CEAS) (Kaunert and Léonard 2012; Thielemann and Zaun 2013). This article, however, focuses on its first phase when supranational institutions were weak and intergovernmental bargaining characterized decision-making. In this phase, LCD-exceeding standards are particularly puzzling, since under unanimity vote every Member State had a veto.

I argue that higher standards are not exclusively based on increased competencies for community institutions, but also on different degrees of Member States' bargaining success. My core empirical finding is that strong regulators<sup>1</sup> have actively shaped EU policy-making, whereas weak regulators have barely left a mark. In other words, under unanimity vote in the Council, asylum legislation represents the LCD of the strong regulators. Theoretically, I find that bargaining success is heavily shaped by regulatory expertise and having clearly defined preferences and positions.

The article begins by presenting the ‘misfit model’ in EU policy studies (Börzel 2002; Eichener 1997; Héritier 1996; Héritier et al. 1994) and its application to EU asylum-policy-making as an explanation for the legislative output on the EU level and the outcome on the domestic level. By adding a systematic typology to determine strong and weak regulators, this article extends it to high politics and core state powers in addition to the areas of weak politics (namely safety at work and environmental policies) in which it has been initially developed. In the next section I show that regulatory competition and the dominance of strong regulators have been present ever since the beginnings of intergovernmental asylum policy-making. The main empirical section then traces the negotiation processes on the 2003 Reception Conditions Directive (RCD).

The following section contextualizes the findings with further cases. I show that the dynamics of asylum policy-making are valid beyond the RCD case. In the concluding section I position my findings in the debate on EU asylum policy-making.

## **THE ‘MISFIT MODEL’ AND REGULATORY EXPERTISE**

The institutional setting of the first phase of the CEAS suggests that policy output on the LCD is highly likely. Under unanimity vote, every Member State could block a decision by veto. Moreover, the European Parliament, which acted as a comparatively liberal actor at the time (Ripoll Servent and Trauner 2014), was only to be consulted and had little to no influence. The Council was hence the strongest actor on the EU level and could act independently from other EU institutions.

The ‘misfit school’ focuses particularly on the role of Member States in the Council and is hence well posed to formulate actor-related expectations. The model expects that Member States usually try to maintain the status quo of their legislation since changes induced by EU legislation would incur material and ideational costs (Héritier 1996: 164). Hence, their positions in negotiations generally reflect their domestic status quo. Yet, not all Member States are equally

effective in uploading their policies, but their bargaining success is based on their respective capacity. Drawing on Héritier (1996) and Börzel (2002), I argue that regulatory expertise is a capacity variable which accounts for Member States' success in EU negotiations. Strong regulators, i.e. Member States with a regulatory tradition in a certain field, have regulatory expertise, which weak regulators with a much younger tradition lack. However, unlike in the areas of occupational safety or environmental policies, strong regulation in asylum does not equal high standards of protection. In fact, strong regulators can tilt towards protection or restriction. Theoretically, all four combinations of regulatory density and protection standards (strong or weak regulation with high or low standards)<sup>2</sup> are thus conceivable. However, in practice the combination of weak regulation and high standards does not exist, as weak regulators face difficulties in enforcing refugee protection.

While the 'misfit school' does not systematically establish which states qualify as strong and weak regulators, I argue that government effectiveness plus exposure can account for a state becoming a strong regulator.<sup>3</sup> According to the World Bank Government Effectiveness Indicator (GEI) some Member States have administrations which are significantly more effective than others thus being able to create stronger regulation in general (Kaufmann et al. 2010). However, government effectiveness is only a necessary condition for being a strong regulator: If a state is not faced with asylum-seekers, there is no need to introduce regulation on this issue. States with effective institutions and which are strongly exposed to the issue are more likely to build a regulatory framework and become regulatory experts than those which have weak institutions and no exposure.

I measure government effectiveness during and before EU level negotiations through the GEI from the year 2000, when negotiations started. Exposure is operationalized through the total number of asylum applications a Member State has received ten years prior to measurement (Eurostat 2009). The more asylum-seekers a country receives in total, the more it will build

precedence and specific regulations applicable to a variety of cases, i.e. if it has an effectively working administration in the first place.

According to this model, strong regulators in the area of asylum policies are Germany, the United Kingdom, the Netherlands, France, and Sweden. Medium regulators are Austria, Belgium, Spain, Finland, and Luxembourg, and weak regulators are Greece, Italy, and Portugal (see Figure 1). Medium regulators have effective governments and can be expected to easily adopt a dense regulatory framework once they are exposed to an issue. Weak regulators, on the other hand, will not do so, due to low levels of government effectiveness. As regards their strategies and behavior, I expect medium regulators to take a middle path, sometimes acting more like strong regulators, while acting more like weak regulators on other occasions.

**Figure 1: Strong and weak regulators on asylum in the EU in 2000**

[Figure 1 about here]

Strong and weak regulators differ with regards to their preferences, their bargaining success, and their policy implementation capacity. Strong regulators have higher incentives to initiate co-operation on the EU level than weak regulators. In the perspective of strong regulators, common EU standards and regulations can help overcome the negative externalities of regulatory competition. In the area of asylum policies, strong regulators consider themselves to be more attractive to asylum-seekers due to their strongly developed asylum systems. Weak regulators, by contrast, prefer the absence of EU regulation in the field. They benefit from regulatory competition, as any EU regulation would entail costly change and make them potentially more attractive to asylum-seekers (Barbou des Places 2003).

Given the higher exposure, the issue is also more salient for strong regulators that are thus more likely to adopt strong bargaining positions. Due to their high levels of government

effectiveness, they can easily build positions for the negotiations (cf. Panke 2011: 50) and due to their exposure these are rooted in first-hand experience. With their need and capacity to learn from experience, strong regulators have more ideational input to bring to the debates (Héritier 1996: 155). Weak regulators are less certain about the potential costs of introducing regulation. As their administrations are less effective, they have less clear-cut positions. Based on their low levels of exposure, weak regulators' positions are considered less legitimate by other Member States. Under unanimity vote, EU legislative output can hence be expected to represent the LCD of the strong regulators.

However, in the asylum area, weak regulators are not entirely opposed to EU directives, as both strong and weak regulators benefit from EU legislation in another way. Given the likelihood of populist exploitation of the issue of asylum (cf. Howard 2010: 737), moderate parties can be expected to restrict themselves to minimal legislation on this issue as to not give any room to populist parties. Still, there are pressures to implement change, e.g. if this is required by case law or if their systems prove ineffective. Thus, legislating on the EU level is a way of drawing an issue away from the restrictively-minded electorate's attention (cf. European Commission 2001). Therefore, strong regulators who govern the issue more actively on the domestic level can use EU negotiations to anticipate domestic legislative changes. Weakly regulating governments can 'learn' from strong regulators during the negotiations (cf. Eising 2002) and use EU directives to reform their domestic asylum systems without endangering re-election.

Even though they are not entirely averse to change, weak regulators are not able to reform their entire system at once, again due to low levels of government effectiveness. Thus, they respond with 'calculated non-implementation' (Héritier 1996: 154) or non-compliance where 'misfit' requires them to change substantial parts of their asylum system. As all strong regulators upload the core concepts of their domestic approach under unanimity vote, they should all be compliant.

## **METHODOLOGY**

The paper studies the case of the Reception Conditions Directive (RCD). The RCD was highly contested and reception conditions are a most likely case (George and Bennett 2004) for attempts to downgrade standards, since generous reception conditions are perceived as potential pull factors for asylum-seekers (Thielemann 2004: 56).

Answering my questions requires an investigation of both the EU level and the domestic levels. I combine a 'before-after' comparison of status quo ante policies in Member States and policies after implementation with process-tracing (George and Bennett 2004: 147-148, 166-167) of the negotiations on the directive's three core aspects, namely access to work, freedom of movement, and material reception conditions, which were highly contested and thus *à priori* prone to LCD output. Process-tracing enables me to carve out the causal mechanism(s) of effective influence and to show how these produced both the legislative output and outcomes on the national levels. The data used for the 'before-after' analysis are status quo ante and implementation reports conducted on behalf of the Commission (COM 2000; Odysseus 2006). Information on the negotiations was retrieved from Council documents and 40 semi-structured expert interviews with relevant individuals from EU institutions, Member States, and NGOs conducted between March 2012 and August 2013.

## **STRONG AND WEAK REGULATORS IN THE CEAS**

The CEAS is shaped by the dominance of the strong regulators. In the 1990s, both endogenous and exogenous factors highlighted the need to cooperate on asylum policies for strong regulators. On the one hand, the abolition of internal borders with the Schengen Agreements made the enforcement of the external EU borders a core priority for these states (Niemann 2006: 196-198). Since weak regulators had porous borders, strong regulators tried to set incentives for their border enforcement (cf. Baldwin-Edwards 1997). On the other hand, the growing numbers of



refugees fleeing conflicts fuelled by the end of the Cold War posed a major challenge to strong regulators which were the main recipients of refugees. As asylum-seekers did not distribute naturally across Europe, strong regulators looked for cooperation on the EU level to ensure 'burden-sharing'. By harmonizing their policies, strong regulators hoped to become less attractive to asylum-seekers. In their thinking, asylum-seekers were 'asylum shoppers' choosing the most generous destination countries (Barbou des Places 2003). Hence, the main idea underlying the CEAS is to avoid secondary movements resulting from disparities of asylum systems (COM (2001) 181 final: 6).

The strong regulators perceived minimum harmonization as a means to raise standards in other Member States and tried to impose their regulatory model on them. While the Southern Member States did not yet have working asylum systems (Baldwin-Edwards 1997; Finotelli 2009), restrictive practices among strong regulators were also suspected to entail secondary movements (Interview PermRep\_Anon). Only the Northern Member States had developed dense regulatory frameworks focusing on border control, not admitting other immigrants than asylum-seekers and refugees. Southern Member States had weak regulatory frameworks, including lax border control and barely accessible asylum systems with norms existing only on paper. Yet, they would offer the same individuals falling into the North's asylum-seeker category the possibility to work in the informal sector and stay in the country 'irregularly' (Finotelli 2009). With the Schengen Agreements, strong regulators tried to transfer their regulatory model to the South, imposing an introduction of secondary asylum law (Baldwin-Edwards 1997). This transfer continued with EU asylum legislation, as I will show in the following section.

## **REGULATORY COMPETITION AMONG THE STRONG REGULATORS, LEARNING PROCESSES WITH THE WEAK REGULATORS**

In this section I will analyze the negotiations and the implementation of the RCD. I expect strong regulators to be active, and effective in negotiations, while weak regulators are rather

indifferent and ineffective. While both strong and weak regulators are assumed to adopt little change subsequent to EU legislation, only strong regulators should be compliant.

Negotiations on the RCD started in June 2000 and the directive was officially adopted by the Council in January 2003.

Three issues were particularly contested, namely: access to work, freedom of movement and material reception conditions. As Table 1 shows, the only LCD standard is the one adopted on freedom of movement, which follows the restrictive practice of Germany. On access to work, the directive exceeds the status quo ante of France, the UK, Italy, Austria, and Luxembourg. Yet, as I will show later, France planned to introduce labor market access anyways and the UK only had banned it to respond to the pressures arising from being a liberal outlier. As concerns material reception conditions, the directive exceeds the status quo ante of Italy and Greece, which do not have strong welfare systems and did not previously provide material conditions. Thus, the standard adopted represents the LCD of the strong regulators, which represents the LCD of all Member States when weak regulators provide a higher standard of protection, e.g. in the case of freedom of movement. Looking at the transposition, the directive evidently did not entail a RTB. Mostly, Member States maintained their status quo ante, even if it was more liberal than suggested by the RCD. In some cases, however, transposition led to a downgrade of standards or even an upgrade beyond the directive. These instances will be investigated more closely in the sections to come.

**Table 1: Reception Conditions Directive: Status quo ante and transposition**

[Table 1 about here]

Discussions on reception conditions were initiated by a discussion paper submitted by the French Council Presidency to the Asylum Working Party in June 2000. Strong regulator France actively used the agenda-setting phase to propose its own regulatory approach. The proposal later delivered by the Commission was heavily influenced by previous debates on the discussion paper (COM (2001) 181 final). According to the French proposal, early labor market integration would attract asylum-seekers and should be authorized only in exceptional cases after one year (Council Doc. 9703/00: 7). By suggesting one year, France tried to upload the (expected) result of an ongoing domestic reform. In France, there were discussions to introduce labor market access after one year, as this was the period after which asylum-seekers no longer received welfare benefits and started working illegally (European Commission 2000/France: 23). The proposal providing access to material reception conditions as a general rule targeted Italy and Greece, which did not provide material reception conditions. Moreover, the Working Paper proposed freedom of movement without exceptions, which again is in line with French practice.

Subsequent negotiations were characterized by activism and hard bargaining positions among the strong regulators and a low profile of the weak regulators. According to the vast majority of my interviewees, strong regulators are particularly active, as minor changes can incur high costs (Interviews PermRep\_FR; PermRep\_Anon; PermRep\_DE), especially since costs multiply with the number of applications affected by a legislative change (Interview PermRep\_Anon). Moreover, states which are particularly affected by a high inflow of applicants usually find an attentive ear among others (Interview PermRep\_AU), because they will eventually have to apply legislation on a daily basis (Interview Council). At the same time, strong regulators are considered particularly credible as they have ‘working’ asylum systems (Interview PermRep\_UK). Most of the strong regulators mention reluctance to substantial changes of established practices (Interviews PermRep\_UK; PermRep\_DE; PermRep\_FR; PermRep\_SE; Interview\_Ministry of Interior\_DE).

Yet, due to divergent approaches concerning levels of protection, discussions among strong regulators were not harmonious either. For instance, the Netherlands and Sweden, being much more generous on most issues, wanted harmonization to go further and to provide more extensive and uniform protection for asylum-seekers. For them, having a LCD standard on the EU level was suboptimal, as they would still stand out as being more generous than other Member States. Moreover, both states with liberal and restrictive traditions did not want to change their standards through EU law, as the national law is underpinned by values shared in the community (Interview PermRep\_SE), or has been scrutinized by all three branches of government providing its legitimacy (Interview Ministry of Interior\_DE).

### ***Freedom of movement***

Freedom of movement was particularly contested among strong regulators. Germany found the French proposal too liberal and asked for higher flexibility to restrict it, thus trying to upload its domestic approach (Council Doc. 1024/00: 4). Belgium, being more liberal in this regard, wanted a higher degree of uniformity and binding force for freedom of movement (Council Doc. 10242/00: 2-4). After an article accommodating the German position was introduced with the Commission proposal (COM (2001) 181 final: 32-33), other more liberal Member States such as Sweden and Finland introduced a scrutiny reservation, describing “the restriction on freedom of movement [as] contrary to human rights” (Council Doc. 11320/01: 15) and suggesting “other ways to assist rapid processing of asylum applicants, without it being necessary to restrict their freedom of movement” (Council Doc. 12839/01: 7). Other Member States having reservations on the article were France and the Netherlands, which also did not restrict freedom of movement. Yet, in the Committee of Permanent Representatives (COREPER), Germany, later joined by Austria (Council Doc. 6467/02: 10) and Greece (Council Doc. 5444/02), was accommodated and the others eventually lifted their scrutiny reservations (Council Doc. 7802/02: 9) on this article. This can be explained by the strong positions restrictive strong

regulators tend to have in areas they consider crucial for their asylum system, since the adoption of higher standards leads to liberalization. States providing a higher standard on the other hand do not need to change their policy to comply with the directive, as the directive only lays down minimum standards (Interview PermRep\_SE). This makes the adoption of the LCD of strong regulators highly likely.

While the ‘misfit model’ can explain the role of Germany, the eventual support of Austria and Greece remains puzzling. Moreover, while all other Member States maintained their status quo ante, Greece and Austria subsequently restricted freedom of movement: Austria was revising its asylum law under a right-wing populist government and planned to restrict freedom of movement in Dublin II cases. While legislative change in Austria occurred after the adoption of the directive, these processes took place in parallel and Austria tried to negotiate anticipated legislative changes into the directive. Moreover domestic resistance against restriction by veto players was not overwhelming. Even the Green party at the time suggested a restriction of immigration law (Langthaler 2010: 201), arguably due to the electoral strength of the right-wing populist *Freiheitliche Partei Österreichs* (cf. Howard 2010). Arguing counterfactually, restriction would have occurred even without the directive. Greece is a more interesting case in this regard, given the absence of a domestic debate on asylum policies (Triandafyllidou and Ambrosini 2011: 262) and no legislative changes being underway. Greece, hence, seems to have learned during the negotiations about this practice as a means of swiftly processing applications.

### ***Access to work***

Regarding access to work, the Netherlands and Sweden, which grant access after six and four months respectively, considered the proposed text by France as too restrictive (Council Doc. 10242/00: 5). When the Commission suggested access to work after six months (COM (2001) 181 final: 34), others felt this was too liberal. Greece, Spain, Italy, Luxembourg, Portugal, and the UK had a scrutiny reservation on the entire article. Italy, Luxembourg, and the UK had a labor

market ban for asylum-seekers in place or were about to introduce one. Greece and Italy explained their restrictive position with a fear of creating a pull factor (Council Doc. 11320/01: 21). While Greece provided for immediate labor market access in theory, it rejected a provision making this obligatory at an early stage, as in practice many asylum-seekers received late access due to bureaucratic inefficiency (Odysseus 2006: 35).

Positions on the time frame varied substantively: Belgium, Germany, Greece and France wanted more and Sweden even less than six months (Council Doc. 11320/01: 21). The issue remained controversial in COREPER and the draft now said that “Member States shall determine a period of time, starting from the date on which an application for asylum has been lodged, during which an applicant shall not have access to the labour market” (Council Doc. 7307/02: 15). France insisted on a concrete period of time, in order to ensure deeper harmonization.

The final directive contains a time limit of one year, introduced by Germany in light of the 2001 negotiations in response to a national court judgment declaring the domestic labor market ban unlawful (Özcan 2000; European Commission 2000/Germany: 36-37). France had envisaged introducing labor market access after one year and hence could accept this standard. Thus, while change seems to be induced by EU legislation, it is rather based on domestic legislation similar to restriction on freedom of movement in Austria. The UK had traditionally been liberal on labor market access and had only introduced a ban for asylum-seekers in 2002, due to both domestic and international pressures. Both the suffocation of 58 Chinese irregular immigrants in a lorry (Flynn 2003) and pressures from France only dissolving the irregular refugee camp in Sangatte if the UK restricted its generous labor market policy towards immigrants, provoked a restriction of labor market access in the UK (Reuters News 26 June 2002). The rise in standards was hence no problem for the UK, as this was not against its regulatory tradition and most applications were in any case processed within six months (Interview PermRep\_UK). Like all other Member States providing higher standards than the

directive, Sweden maintained its more liberal policy. In sum, Member States' preference for maintaining their domestic standard can explain the absence of an RTB. Why, however, did Luxembourg, Austria and Italy lift their reservations and introduce standards beyond the directive requirements? This was closely linked to the question of material reception conditions, as they 'learned' that introducing access to work alleviated pressures on the welfare system (Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 5, 27), as will be shown in the next section.

### ***Material reception conditions***

Indeed, Italy had a scrutiny reservation on the entire chapter III dealing with all forms of material reception conditions. While the strong regulators provided material reception conditions, although of a diverging quality, Italy and Greece did not provide for material reception conditions at all, as (e.g. unemployed) nationals also did not have access to welfare (European Commission 2000/Greece; Italy). As Italy did not provide material reception conditions, it suggested that Member States may reduce or withdraw those once an applicant started to work and only provide food allowances and access to basic social care if needed (Council Doc. 11320/01: 26).

Other Member States providing material reception conditions were critical of this linkage between labor market access and withdrawal of reception conditions. Germany, Luxembourg, the Netherlands, Finland, Sweden, and the UK specified, "that the possibility of labor market access is not a sufficient condition to reduce the level of benefits. It is the fact of having found a job and the level of remuneration that would make it possible to reduce or withdraw material benefits" (Council Doc. 11320/01: 26). Clearly, Member States wanted to simplify access to welfare with the weak regulators. The issue remained contested and was later discussed in COREPER. Greece wanted to minimize costs and provide for the possibility to reduce and withdraw material reception conditions after a reasonable period of time after labor market access had been granted. "In such cases, if they are not financially independent, Member States shall grant them, at least

food allowance and access to health care” (Council Doc. 7307/02: 22). Moreover, Greece also had a reservation about defining “a daily expense allowance” as part of material reception conditions in the definitions section (Council Doc. 7307/02: 5). However, the daily expense allowance figured into the text adopted by COREPER (Council Doc. 7802/02: 5) and Greece’s move to reduce or withdraw material reception conditions was not accommodated. Instead, the fact of having worked for a reasonable period of time was considered a basis for reducing or withdrawing material reception conditions, which most strong regulators could subscribe to (Council Doc. 7802/02: 14). Again, the standard provided by the directive represents the lowest standard among the strong regulators, as it accommodates a number of exceptions (e.g. to the restriction of health care in Germany) (cf. European Commission 2000/Germany).

Although Italy and Greece opposed introducing welfare benefits or labour market access after a certain period, they did not adopt hard bargaining strategies. Facing rising numbers of asylum claims after the introduction of the Dublin Convention Italy was ready to change its system and ‘learn’ from the strong regulators. It so far lacked trained staff, institutional capacities, “a particular and detailed legal base on asylum, including implementation regulation”, and central co-ordination or government policy and programs which could deal with the issue coherently (European Commission 2000/Italy: 22). With elections coming up in 2001, and with critical public attitudes towards asylum, politicians did not want to bring such a delicate issue onto the domestic agenda. Therefore, policymakers in Italy were interested in common policies and perceived minimum harmonization as a way to improve domestic policies without paying the political costs for unpopular measures (European Commission 2000/Italy: 23). Having been pressured into taking more asylum-seekers and developing a working reception system, weak regulators also perceived minimum harmonization as a chance to reform their reception systems based on the strong regulators’ expertise. Yet, due to immense misfit between EU and domestic legislations Italy and Greece had massive problems in transposing the directive.



While Italy introduced a national reception system in 2002, reception centers still do not provide sufficient space for applicants. Asylum-seekers that receive a place must leave the center after six months, when they receive a work permit and are considered able to sustain themselves. Yet, they have no realistic chance to access work due to the difficult labor market situation and prioritization of Italians and other third-country nationals (Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 5-7, 25). Recent ECtHR case law (*Tarakhel vs. Switzerland*) showed that reception conditions are even today widely unavailable in Italy. Greece provided particularly poor reception conditions and received harsh criticism, including several court judgments on the European level. The judgment of *M.S.S. vs. Belgium and Greece* clearly stated that the Greek reception system violated art. 3 of the European Convention on Human Rights. Again, institutional deficiencies and lack of practical implementation impeded an effective transposition. While strong regulators had successfully shaped EU asylum directives and were hence compliant, weak regulators did not comply with EU law.

## **CONEXTUALISING THE FINDINGS: THE OTHER DIRECTIVES AND THE RECAST RCD**

This section shows that the theoretical model does not only apply to the RCD, but has also explanatory power for the other directives of the first phase, i.e. the Qualification Directive (QD) and the Asylum Procedures Directive (APD), as well as the recast RCD.

The APD takes a special position, as asylum procedures are strongly anchored in national administrative law and much less specific to asylum law (Ackers 2005: 5). This accounts for Member States with high government effectiveness and low intake of asylum-seekers such as Spain being accommodated on their restrictive outlier position on suspensive effects of appeals (cf. Ackers 2005: 6). At the same time, strong regulators such as Germany have been again highly effective in negotiating issues in that have nothing to do with the statuses addressed by EU law. For instance, Germany has uploaded its safe third country concept which it only applies to its

discretionary refugee status as introduced by the German Basic Law (Ackers 2005: 22). Weak regulators Greece and Italy did not provide free legal aid which was to be provided as a rule according to the APD and had to introduce it from scratch (Ackers 2005: 5, 10; UNHCR 2010: 449-451).

The most important issue in the QD at the time was the recognition of victims of non-state persecution. Restrictive outliers Germany and France that had fought against the recognition of victims of non-state persecution since the 1990s were undergoing legislative changes. Particularly in Germany the Green Party which was now in government took a strong part in recognizing particularly victims of non-state persecution (Brabandt 2011: 146-150). Germany later agreed on recognizing non-state persecution because of domestic processes and not because of EU legislation in the first place. Regarding access to social benefits, housing and health care as well as the duration of residence permits, the directive takes up the standards provided by the most restrictive strong regulators: It exceeds the standards of weak regulators that do not have encompassing welfare systems and it grants residence for a minimum period of three years which is the lowest standard among the strong regulators, namely in the Netherlands (Bouteillet-Paquet 2002: 255; Council Doc. 9038/02: 27, footnote 2).

The core issues of the recast directive were detention and, again, access to work (Thielemann and Zaun 2013). While freedom of movement in a broader sense was not even touched by the Commission, some adjustments were made on material reception conditions aiming at providing care for people with special needs (COM 2008 (815) final: 19, 26-28; art. 17-22 of 2013/33/EU). Germany had clearly shown in the negotiations on the original RCD that it would never accept any legislation going against its national distribution key, which included a restriction of freedom of movement. Yet, weak regulators accepted adjustments on material reception conditions, although ECtHR case law had clearly shown that these states did not comply with provisions on material reception conditions in the first phase of the CEAS. While indeed weak regulators have been more active in second phase negotiations, they have not

followed their positions through till the end, even on issues that were crucial to them such as the suspension of transfers in the Dublin III regulation (Interview Jesuit Refugee Service Europe). The reason was that while they had received more applicants lately, they were not able to build credible expertise due to their poorly working systems (Interview PermRep\_Anon). The directive has not been transposed yet, but it can be expected to lead to minor upgrades, while the overall goal of complete policy harmonization will not be attained.

While the model bears strong explanatory value also for the second phase of the CEAS including the recast RCD, the strengthened role of supranational institutions in this phase has weakened the position of restrictive outliers (cf. Thielemann and Zaun 2013): Germany and France could no longer block an earlier access to the labour market and thus Member States agreed on a compromise with the EP. Accordingly, access is granted after 9 months, which is much closer to what the majority of Member States already had in place. Moreover, safeguards on detention were introduced, which were of high importance to the EP and the Commission. This, however, again was only problematic for the weak regulators (cf. M.S.S. vs. Belgium and Greece).

## **CONCLUSION**

This study set out to answer the questions why EU asylum legislation exceeds the LCD and why it did not entail a RTB. I have shown that Member States generally prefer maintaining their status quo policies over changing them. However, not all Member States are equally effective in influencing EU directives. While different degrees of effectiveness in influencing intergovernmental policy-making have already been observed in negotiations on the Dublin Convention in the 1990s (Baldwin-Edwards 1997) and thus seem to be part of a wider dynamic, these have never been systematically explained. This article aimed at closing this gap. It demonstrated that strong regulators are very active due to the issue's salience and strong exposure; weak regulators are more passive and have little to bring to the negotiations. They have less expertise on how to regulate the issue. At least during the first phase of the CEAS, there was

not much at stake for them, given the low numbers of applications they received. Therefore, even under unanimity vote, EU directives do not represent the LCD of all Member States, but the LCD of the strong regulators. But during the second phase of the CEAS, when particularly many Southern European border countries had already received large numbers of claims due to the Dublin II system, they were not able to extract concessions on the issue most crucial for them either, namely the suspension of transfers in the Dublin III Regulation (Interviews PermRep\_EL; PermRep\_IT). This was because of their less effective asylum systems (Interviews PermRep\_DE; PermRep\_SE, PermRep\_UK), which are a result of low levels of government effectiveness and thus the lack of credible expertise which they could bring to the negotiation-table.

While the policy output of the second phase is also influenced by a variety of institutional variables (i.e., qualified majority vote, enhanced agenda-setting powers of the Commission, and the input of the European Parliament), regulatory density is still crucial for policy output in this phase. Moreover, the tendency among strong regulators to try to maintain the status quo ante explains the Ripoll Servent's and Trauner's (2014: 1142) observation on the "continuity of the policy core" between the two phases of the CEAS.

Member States' aversion to change as a rule explains the absence of a RTB. Member States even prefer to maintain their status quo if it is more liberal than the directive, because domestic policies represent domestic values and compromises between political and societal actors involved in policy-making.

Yet, sometimes change does occur. Particularly weak regulators learned about practices other Member States apply to manage asylum. In fact, for them, introducing an asylum system via the EU level is a handy way to avoid the political costs of doing so domestically. In this sense decisions are taken away from politicized domestic debates and blame is shifted on the EU. Strong regulators, on the other hand, negotiated anticipated domestic changes into the directives in order to have subsequent discretion for the domestic practice keeping it out of domestic debates.

From a counterfactual perspective, one could argue that strong regulators would have introduced liberalizing and restricting changes even without the EU, whereas weak regulators lacked policy ideas to do so.

As I have observed a North-South transfer in regulatory policies in yet another policy area at the core of sovereignty, this raises substantial questions about the changing statehood in Southern Member States, which are heavily influenced by policy ideas created elsewhere. Whereas Northern Member States tried to impose their regulatory models in the asylum area on Southern Europe, they might have achieved this only on paper. This is so, as weak regulators would have to massively reform not only their asylum systems but also their entire welfare systems to comply with EU law. However, asylum directives have created a minimum threshold of standards below which Member States may not fall. This definitely minimizes the discretion of states in responding to rises in applications with a lowering of standards.

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## NOTES

- 1 The theoretical model I draw on has used the terms ‘high’ and ‘low’ regulators. I have opted for the terms ‘strong’ and ‘weak regulators’ to account for the fact that high regulators in asylum policies should not be confounded with high standard countries.
- 2 I use the terms ‘high standards’ and ‘low standards’ as relational measures, comparing Member States longitudinally and cross-sectionally. I use the terms high standard/liberal and low standard/restrictive interchangeably.
- 3 Government effectiveness is considered an important factor for negotiation success (Panke 2011:50) and for effective implementation (Börzel et al. 2010: 7-8). This misses the dimension of the specific policy area, referred to by Börzel when suggesting that early industrialization is a determinant for being a strong regulator in environmental policies (2002: 196-197).

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### **List of Interviewees**

Council, Secretariat of the Council of the EU, 20 March 2012.

Jesuit Refugee Service Europe, 20 November 2012.

Ministry of Interior\_DE, German Federal Ministry of the Interior, 16 October 2012

PermRep\_Anon, Permanent Representation of an EU Member State (prefers to be cited anonymously), 8 August 2013.

PermRep\_AU, Permanent Representation of Austria, 28 March 2012

PermRep\_DE, Permanent Representation of Germany, March 30 2012

PermRep\_EL, Permanent Representation of Greece, 3 April 2012.

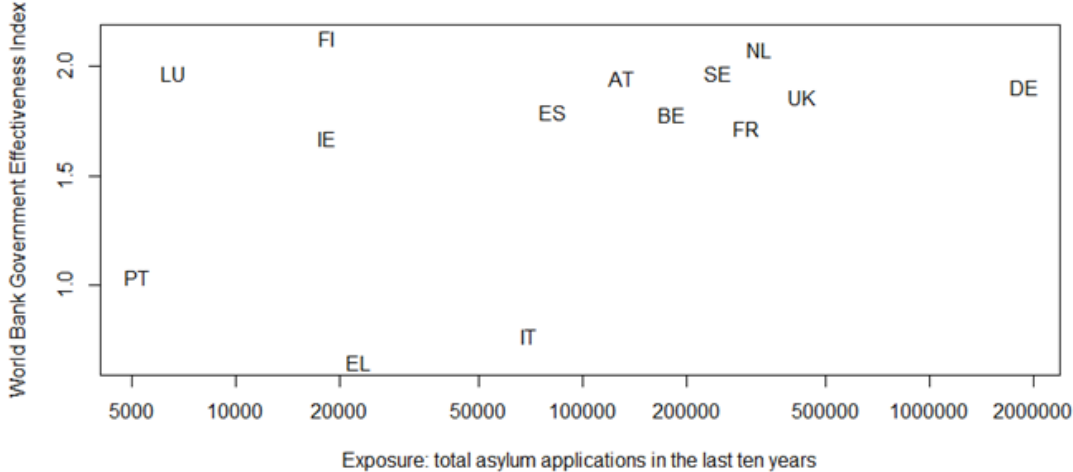
PermRep\_FR, Permanent Representation of France, 23 November 2012.

PermRep\_IT, Permanent Representation of Italy, 13 April 2012.

PermRep\_SE, Permanent Representation of Sweden, 29 March 2012.

PermRep\_UK, Permanent Representation of the United Kingdom, 11 April 2012.

Figure 1:



Note: X axis in log scale.

Sources: Eurostat 2013; Kaufmann/Kraay/Matruzzi 2010.

- Legend:
- |             |             |             |                 |                    |
|-------------|-------------|-------------|-----------------|--------------------|
| AT: Austria | ES: Spain   | FR: France  | LU: Luxembourg  | SE: Sweden         |
| BE: Belgium | EL: Greece  | IE: Ireland | NL: Netherlands | UK: United Kingdom |
| DE: Germany | FI: Finland | IT: Italy   | PT: Portugal    |                    |

Table 1:

|                       | Access to work: <i>provided after 1 year</i> |                                  | Access to material reception conditions: <i>provided</i> |                     | Freedom of movement: <i>may be restricted</i> |                     |
|-----------------------|--|----------------------------------|--|---------------------|---|---------------------|
|                       | Before transposition                         | After transposition              | Before transposition                                     | After transposition | Before transposition                          | After transposition |
| <b>Austria</b>        | no access                                    | after 3 months                   | yes  | yes                 | yes   | restricted          |
| <b>Belgium</b>        | after AP <sup>1</sup> exhaustion             | after AP <sup>1</sup> exhaustion | yes  | yes                 | yes   | yes                 |
| <b>Finland</b>        | after 3 months                               | after 3 months                   | yes  | yes                 | yes   | yes                 |
| <b>France</b>         | under exceptional circumstances              | after 1 year                     | yes  | yes                 | yes   | yes                 |
| <b>Germany</b>        | after 1 year                                 | after 1 year                     | yes  | yes                 | no  | no                  |
| <b>Greece</b>         | immediate access                             | immediate access                 | no   | no                  | yes   | restricted          |
| <b>Italy</b>          | no access                                    | after 6 months                   | no   | no                  | yes   | yes                 |
| <b>Luxembourg</b>     | no access                                    | after 9 months                   | yes  | yes                 | yes   | yes                 |
| <b>Netherlands</b>    | after 6 months                               | after 6 months                   | yes  | yes                 | yes   | yes                 |
| <b>Portugal</b>       | after AP <sup>1</sup> exhaustion             | after AP <sup>1</sup> exhaustion | yes  | yes                 | yes   | yes                 |
| <b>Spain</b>          | after 6 months                               | after 6 months                   | yes  | yes                 | yes   | yes                 |
| <b>Sweden</b>         | after 4 months                               | after 4 months                   | yes  | yes                 | yes   | yes                 |
| <b>United Kingdom</b> | no access                                    | after 1 year                     | yes  | yes                 | yes   | yes                 |

Notes: <sup>1</sup> Admissibility Procedure.

Sources: COM 2000; Council Doc. 5430/02; Odysseus 2006.