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The Impact of European Union Asylum Policy on Domestic Asylum Policy in Germany and Britain: 1990-2007

by

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Abstract

Over the past two decades, the European Union has taken important steps towards the establishment of a common European asylum policy. The question of the impact of this cooperation on domestic asylum policy has so far received surprisingly little attention. Most explanations have focused on how an agreement on restrictive policies was achieved at EU level, and assumed a relatively unproblematic implementation of these measures domestically. More recently, some scholars have contested these explanations by emphasizing the rights-enhancing effects of recent EU asylum policy legislation.

This thesis argues that rather than focusing on the question of whether EU cooperation increases or decreases domestic asylum policy standards, we should focus on explaining how EU asylum policy affects domestic asylum policy. The question can only be addressed satisfactorily if the inter-related processes of arriving at these policies at EU level and implementing them domestically are taken into account.

The theoretical account proposed here conceives of preferences as the crucial variable connecting the processes of uploading and downloading. The main argument of this thesis is that governments try to project their policy *preferences* which reflect their desire to change or retain domestic status quo and to download policies in accordance with these preferences. At the EU level, governments seek to upload or support policies in line with their domestically-shaped preferences and oppose those which contradict them or at least seek flexibility allowing them to maintain existing policies. At the national level, states download EU policy selectively, in line with their domestically-shaped preferences, leading to over-implementing, under-implementing or not implementing certain provisions.

In addition, the thesis locates the sources of these preferences on asylum policy in public opinion, party ideology, and the number of asylum seekers. The dissertation shows that issue salience in the media and among the general public affects the relationship between these variables.

Depending on the political-institutional context, the factors identify above interact with each other, resulting in differential impact of EU asylum policy on domestic policy. The thesis distinguishes between *simple* and *compound* polities, and shows how they differ in their responsiveness to the variables identified above, in the frequency and stability of reforms, and in the way they use the EU to facilitate domestic change. It also demonstrates that in compound polities preferences are mostly influenced by party ideology while in simple ones they are more likely to reflect public opinion.

In order to trace the impact of EU cooperation in asylum policy on domestic policy, this dissertation employs process tracing and a three-step analytical framework which encompasses preference formation, EU-level negotiations and implementation. Such framework allows us to answer the question of the impact of EU asylum policy on national ones without under- or overstating the role of the EU. The dissertation applies this framework to study all major EU asylum policy agreements adopted between 1990 and the completion of the first phase of the Common European Asylum System in 2007, and their impact in Germany and Britain.

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1. Introduction

1.1. Asylum policy: between national dilemmas and European solutions?

The increase in the number of asylum seekers since the mid-1980s and especially after the end of the Cold War has made the issue of asylum a highly salient one although the granting of asylum to those fleeing from persecution has been part of European state practice for decades. Despite the fact that the number of asylum applicants nowadays is much lower than that with which Western European states were confronted at the height of the "asylum crisis" in early 1990s (Boswell, 2000; Alink et al., 2001), the significance of asylum policy and the controversies surrounding it have not subsided. This is hardly surprising given that the question of asylum touches the heart of national sovereignty as states determine who can be granted or refused protection on their territory and what rights the refugee status entails.

Refugees are the only group of non-citizens to which states accept that they have certain responsibility as a result of both their self-identification as liberal states respecting individual human rights and by virtue of their international obligations under the 1951 Geneva Convention Relating to the Status of Refugees[1]. Meeting these responsibilities poses a number of challenges to the nation-states (Joppke, 1998). These can be broadly divided into two categories: challenges to the welfare state and challenges to ethno-national identity of the state (Boswell, 2000; Schuster, 2003). Despite the fact that the character of the welfare state clearly reflects conceptions of national identity (Bommes and Geddes, 2000), the 'threats' posed by influx of asylum-seekers to each component are distinct.

With regard to the welfare state, a high number of asylum-seekers and refugees[2] is

[1] The 1951 Convention relating to the Status of Refugees (Geneva Convention) is the key international legal document defining who is a refugee, their rights and the legal obligations of states.

[2] The term 'asylum seeker', although not part of international law terminology, is commonly accepted to

problematic because of the costs associated with their accommodation and subsistence, the handling of their claims through the judicial system, their respective removal following a negative decision or, in case of being granted a refugee status, integration into the host society and access to welfare benefits equivalent to those granted to citizens. Bearing these costs becomes very difficult especially when the increase in the number of applications to the point of a "crisis" coincides with the problems of the sustainability of the welfare state, manifested, among others, in increased expenditure and dwindling income due to demographic and economic structural factors.

The financial costs associated with receiving refugees are only one part of the problem. The other part comprises the political costs of legitimizing the 'generous' treatment of asylum seekers and refugees in the face of reforms of the welfare state which often consist of reducing the services and welfare benefits available to citizens. Why should a recognized refugee have equal access to benefits which are normally reserved for citizens who have been contributing to the system? Why should an asylum-seeker be immediately entitled to accommodation while some citizens face housing shortages for years? Most probably, politicians would not have found it difficult to answer these questions if there had not been the assumption that most asylum-seekers were in fact, disguised economic migrants and thus "undeserving". This distinction between the "genuine" and the "bogus" asylum-seekers has been forged over the past decades (Sales, 2002) after states introduced restrictions on legal migration following the crisis of mid-1970s and the increased unemployment rate and thus asylum became the only major legal route of entry into Western Europe (Joppke, 1998; Geddes, 2000). The recognition rates of asylum-seekers declined which led to the conclusion that most asylum-seekers try to abuse the system and

refer to those individuals who have lodged an asylum claim. 'Refugee' is used here to refer to those individuals who have been granted protection by the state.

are not actually in need of protection. This has also led to the conflation of the categories of "economic migrant" and "refugee" and to treating matters of asylum and immigration together despite the important conceptual and legal differences among them.

These developments further exacerbated the second challenge to the nation-state that asylum-seekers arguably pose: the perceived threat to national identity. The importance of national identity for the formation of *nation*-states is well-documented in the literature. In countries which mobilized their populations on ethnic grounds and granted citizenship on the basis of ethnicity (*jus sanguinis*), such as Germany, non-nationals were excluded on the basis of not sharing the same ethnic descent. By definition, then, foreigners, including asylum-seekers, did not share the cultural and political homogeneity which characterizes ethnic Germans and had the potential to undermine it. Even countries which embraced more liberal conceptions of citizenship, based on place of birth (*jus soli*), such as Britain, regarded asylum-seekers as a challenge to the balance of race relations and a threat to Anglo-Saxon identity. Furthermore, the heightened threat perception among the population, coupled with economic insecurity, leads to an increased support for far-right parties and backlash against foreigners and thus undermines social stability.

Faced with such challenges, governments have been forced to react. The most obvious solution has been the introduction of various restrictions to stem the flow of asylum-seekers. A number of scholars (Cornelius et al., 1994; Joppke, 1998; Guiraudon, 2000) have argued that due to human rights being constitutive of liberal democratic states and due to the power of courts to protect and expand them, the options of the states to react are in fact quite limited even if they were to be in full control of their borders: an assumption which is in itself problematic. While states could introduce some measures such as visa restrictions relatively easily, they could not easily address what were considered to be the "pull-factors" attracting asylum-seekers to their countries such as generous welfare

benefits and the right to work[3]. Neither could they remove refused asylum seekers quickly due to the many possibilities of appeal against such decision as well as the associated financial costs of tracing such asylum seekers and their subsequent detention and deportation. In addition, forced removal of failed asylum seekers, some of whom have been living in the country for years is often met with resistance by NGOs (Gibney, 2008) and carries a clear political risk of alienating moderate voters[4]. Failing to address the problem, on the other hand, also carries possibly an even bigger risk for the government since their prospects of re-election are significantly diminished in the face of increasingly narrow-minded public and opposition parties eager to point to the governments' inability to deal with the matter.

Another possibility of addressing the issue of refugee flows is the so-called "root causes" approach: tackling the reasons which force people to flee from their countries and seek protection elsewhere such as armed conflict, generalised violence, persecution or natural disasters. The approach combines targeted use of development assistance to address these "push factors" with establishing protection in the region of origin so refugees do not have to seek asylum elsewhere (Boswell, 2003a). The problems associated with ensuring the effectiveness of such approaches, their political and financial cost and the danger that they would be seen as an attempt by Member States to evade their responsibilities towards refugees, often made them less appealing to governments.

Given these constraints, how could the governments deal with the problem if increased flows of asylum seekers? One way would be to turn to the international level and

[3] The fact that many countries have applied the "pull" and "push" factor terminology – developed in the context of migration – to refugee flows reflects the conflation of the phenomena of "forced" and "economic" migration.

[4] This risk is greater for left parties whose electorate has traditionally been seen as more liberal towards asylum-seekers, but some centre-right parties such as Christian Democrats also seem to be affected by it since their Christian ideology presupposes certain obligations towards those in need of protection (cf. also Boswell and Hough, 2008).

attempt to resolve the issue through multilateral cooperation. Scholars (Joppke, 1998, Guiraudon, 2000, 2003, Geddes, 2003) have argued that EU Member States have "escaped to Europe" in an attempt to realize their preferences for more restrictive asylum policies which they would have been unable to pursue at home due to the above-mentioned constraints from courts and NGOs protecting asylum-seekers' rights. The European level provided the right venue for the realization of these preferences as the intergovernmental nature of cooperation shielded officials from the influence of domestic actors opposed to restrictive asylum policy measures as well as from the involvement of the Community institutions such as the European Commission, the European Parliament, and the European Court of Justice which are also assumed to take a more liberal stance towards asylum-seekers. Officials from the Ministries of Interior used the opening provided by the realization of the principle of free movement of people in the EU and the removal of internal borders agreed in the Schengen Agreement of 1985[5] to emphasize the need of "compensatory measures" to address the possible negative consequences of freedom of movement such as the unregulated flows of asylum-seekers and illegal immigrants who could move unimpeded throughout the territory of the Schengen states. In particular, the assumption was that the removal of borders would increase the possibility of asylum-shopping, that is, lodging multiple asylum claims in different countries, exploiting the different criteria for granting asylum. In order to prevent this, in 1990 ministers adopted the

[5] The Schengen Agreement was signed by Germany, France and the Benelux countries in 1985 and provided for the systematic removal or internal border controls among these countries (*Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985*. OJ *L 239 , 22/09/2000 P. 0013 - 0018)*. It was followed by the Schengen Implementation Convention in 1990 (*Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990*. Official *Journal L 239 , 22/09/2000 p. 0019 - 0062)*. See Chapter 4.

so-called Dublin Convention[6] which assigned responsibility of examining asylum application to a single country as well as a number of soft-law instruments, commonly referred to as the London Resolutions (1992)[7] aimed at harmonizing their approach towards third countries of origin or transit of asylum seekers. These restrictive measures agreed at the EU level were subsequently presented at the national level as *fait accompli* and thus allowed governments to overcome domestic opposition and introduce a restrictive asylum policy.

This "escape to Europe" thesis, according to which governments agree on restrictive asylum policies at the EU level and then implement them domestically in a relatively unproblematic way has so far constituted the main explanation of the relationship between EU and national asylum policies. However, since the focus of previous studies has been mainly the first part of their thesis, namely, explaining why and how governments shifted to the new European venue, the second part – the actual influence of the EU on domestic asylum policies – has remained largely unexplored apart from few exceptions (Lavenex (2001), Vink (2002), Faist and Ette (2007), Thielemann and El-Nany (2008), Kaunert and Leonard (2011)).

In addition, the institutional set-up of cooperation in EU asylum policy has changed substantially since the early 1990s when the policies discussed in these studies were agreed. Since the adoption of the treaty of Amsterdam in 1997 and the movement of asylum and immigration policies to the first pillar of the EU, subjecting them to a different, more

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6 Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 15 June 1990, Official Journal C 254 , 19/08/1997 p. 0001 - 0012

7 London Resolutions is the commonly used term for three interrelated soft law measures: Resolution on a harmonised approach to questions concerning host third countries adopted 30 November 1992 (Document WG I 1283); Resolution on manifestly unfounded applications for asylum adopted 30 November 1992 (Document WG I 1282 REV 1); Conclusions concerning countries in which there is generally no serious risk of persecutions adopted 30 November 1992 (Document WG I 1281).

supranational decision-making procedure and increasing the involvement of Community institutions such as the Commission, the European Parliament (EP) and the European Court of Justice, the reality of asylum policy-making has changed. Moreover, following the initial steps of cooperation in asylum, the problem structures in the various countries have changed also as a result of this cooperation whose goal has been to equitably share the burden among all member states. In particular, it is possible that the number of newly-arrived asylum seekers has increased in some countries and decreased in others. As a result, it is probable that the position towards further EU cooperation on this matter of each member state may have changed. However, studies have failed to take such interaction effects of previous cooperation efforts into account. In addition, the impact which the changed institutional set-up of cooperation at the supranational level as well as possible changes of domestic power relations as a result of the process of European integration could have on asylum policy have so far been insufficiently addressed in the literature. As Lavenex (2007: 318) notes: "this interplay between domestic pressure, Communitarization, Europeanization, domestic change, and new Communitarization is very salient in asylum policy" but, also due to the fact that the latest policy instruments under the new decision-making procedures were adopted relatively recently, there has not been a systematic attempt to explore this interplay.

Why focus on the interaction of EU and national asylum policy? The importance of asylum policy for domestic politics has already been elaborated upon above, but it is also necessary to justify the "value added" of taking the EU dimension into account.

If the "escape to Europe" thesis is indeed correct and governments can use the EU level policy-making to avoid domestic constraints to develop and enact restrictive policies, then this has serious normative implications for the European Union as a democratic polity. Certainly, if the EU, instead of presenting "a novel political structure that might have served as the basis for new forms of societal self-organisation in a region where the presence of

large numbers of non-nationals in national societies was an unavoidable reality" (Maurer and Roderick, 2007: 111) may be a source and means of reducing domestic human rights standards, this suggests that there is a need to re-think the basis of EU's legitimacy as a beacon of human rights.

If, on the other hand, the EU is not the cause of the development of such policies, then attributing the blame for the creation of a "Fortress Europe" to the EU might be premature. Some empirical studies already point in this direction: for example, Vink (2002) has demonstrated that while the EU may have facilitated the introduction of more restrictive asylum policies in the Netherlands it has by no means been the cause of enacting these policies.

Moreover, cooperation in the field of asylum is an instance of political integration in a highly sensitive field where states are keen on protecting their sovereignty. Thus, it is crucial to examine the extent to which European cooperation actually affects national policies. Can the EU also bring domestic change in such field or are governments still firmly in control despite the deepening of integration in this area? By studying the interaction effects between domestic and EU asylum policies, some generalizations can also be made with regard to the likely impact of EU integration in other areas of police and judicial cooperation and thus answer important questions with regard to the possibilities and limits of EU integration in these fields. The basic question that this dissertation addresses is: what explains the impact of EU asylum policy cooperation on domestic asylum policies?

1.2. The impact of EU policies: bringing the preferences back in

A useful starting point to study this research question is the literature on Europeanization: a new research agenda exploring the domestic impact of the EU which emerged in response

to the need to conceptualize and theorize how EU cooperation affects national policies, politics and polity. It complements classic integration theories which are concerned with explaining the nature of EU cooperation, thus considering it as the dependent variable, by focusing instead on its impact on national political systems and taking EU cooperation as the independent variable. However, research demonstrated that the EU affects national political systems differently and thus produces variegated outcomes in different Member States. Thus, it is not sufficient to designate the EU as an independent variable to explain domestic change. Additional factors must be taken into consideration in order to account for the differential impact across member states.

Various strands of Europeanization literature emphasize a number of such factors which can broadly be divided into two categories: adaptational pressures, arising from the mismatch between domestic institutions and policies which necessitate change at the national level and domestic factors such as national political and administrative structures which facilitate or prevent such change. Most studies employing this analytical framework conceptualize Europeanization as a top-down process, with Member States simply responding to pressures coming from the EU, without taking into consideration the possibility that Member States also seek to shape these pressures. Such omission is problematic if one is to understand the interplay between EU and national policies because "what Europe does is actually inspired to a great extent by what its member states want it to do" (Geddes, 2007: 49). Thus, it is essential to understand what it is that the member states want Europe to do, in order to understand what impact EU cooperation has on them. Therefore, one has to take two processes into account: "uploading", that is, the process through which member states seek to shape EU policies and "downloading", that is, the way in which member states adjust to these policies.

So far, few studies have explored the interaction between the two processes. Those

empirical studies which constitute important exceptions from the general state of the literature posit that a useful way to conceptualize the relationship between uploading and downloading is to focus on the role of national governments who are the key actors in both processes and their preferences (Börzel, 2002; 2005). Their goal is to upload their national policies to the EU level so as to minimize the adaptational costs arising from the subsequent adjustment to these policies once they have been adopted. However, such reading prescribes a very limited role to governments who are seen as simply attempting to maintain the status quo. In other words, their preferences with regard to EU policy are simply deduced from their current level of regulation. Countries with a high level of regulation would necessarily prefer to have the same high standards adopted at the EU level while those with low levels of regulation would prefer exactly the opposite. This rather narrow perspective on state preferences is problematic not only because it has a status quo bias but also because it fails to provide an adequate account of the origins of state preferences regarding a specific policy. Consequently, in order to understand how EU affects national asylum policies, any analytical framework needs to specify the variables that affect the projection of national concerns into EU decision-making as well as the subsequent reception of EU policies domestically.

The theoretical account proposed here conceives of preferences as the crucial variable connecting the processes of uploading and downloading. My main argument is that governments try to project their policy *preferences* which reflect their desire to change or retain domestic status quo and to download policies in accordance with these preferences. At the EU level, governments seek to upload or support policies in line with their domestically-shaped preferences and oppose those which contradict them or at least seek flexibility allowing them to maintain existing policies. At the national level, states download EU policy selectively, in line with their domestically-shaped preferences, leading to over-

implementing, under-implementing or not implementing certain provisions.

In addition, I locate the sources of these preferences on asylum policy in public opinion, party ideology, and the number of asylum seekers. I show that issue salience in the media and among the general public affects the relationship between these variables.

Depending on the political-institutional context, the factors identify above interact with each other, resulting in differential impact of EU asylum policy on domestic policy. Following Schmidt (2006), I distinguish between *simple* and *compound* polities, and show how they differ in their responsiveness to the variables identified above, in the frequency and stability of reforms, and in the way they use the EU to facilitate domestic change. I also demonstrate that in compound polities preferences are mostly influenced by party ideology while in simple ones they are more likely to reflect public opinion.

In order to trace the impact of EU cooperation in asylum policy on domestic policy, I employ a three-step analytical framework which encompasses preference formation, EU-level negotiations and implementation. Such framework allows me to answer the question of the impact of EU asylum policy on national ones without under- or overstating the role of the EU. It is important to note that this is a distinction employed for analytical purposes; in practice governments, as will be demonstrated, may engage in the processes of preference formation, EU-level negotiations and implementation almost simultaneously. However, it is also crucial to underscore that preference formation stage is enjoys a causal priority.

This theoretical framework is especially suitable for studying asylum policy as it takes into account the nature of legislative measures adopted in the field. These consist of a mixture of non-binding measures, adopted largely before the entry into force of the Amsterdam Treaty, and binding ones, enacted after its entry into force. Even the binding legislation adopted in this area contains a number of clauses which allow Member States large discretion in the implementation phase. In particular, there are a number of clauses

where the word "shall", indicating a binding obligation is used; however, there are numerous other clauses containing the word "may", which is interpreted to mean that it is up to the member states to decide whether to comply with the provision. This flexible arrangement was a source of considerable apprehension among NGOs active in the field because of their fear that Member States would make use of these provisions in order to introduce more restrictive measures when implementing the directives. By specifying the sources and constraints on governments preferences one can account not only for the way states implement legislation but also for the reason why this legislation was designed to allow flexibility in the first place.

The dissertation will demonstrate the greater utility of employing this framework over an exclusive focus on "fit/misfit" explanations in a policy area characterized by national sensitivities and flexible legislative measures. It will argue that the ability of the EU to affect national asylum policies is conditioned not by pressures to adapt to a specific European model – which is difficult to identify – but, rather, on their domestic policy preferences which determine the contents, direction, and extent of policy change.

1.3. Case selection: countries and legislative instruments

Although a number of Europeanization scholars have raised criticism against the predominant focus of studies on "big" member states, the choice of Germany and the UK for this study is justified in light of the theoretical considerations identified above. The choice of countries is driven by the need to select cases which are very similar with regard to the number of asylum seekers, recognition rates, population size, and GDP: factors which have been demonstrated in the literature to affect asylum policy (Neumeyer 2005). They are

liberal democratic states, signatories of Geneva Convention and European Convention on Human Rights and have a tradition of providing protection. Both countries experienced large-scale immigration (although for different historical reasons and with surges in different periods) which has put pressure on public services and shaped attitudes. Both countries witnessed an increase in the number of asylum seekers following the end of the Cold War.

Where the countries differ is their institutional structure. Germany's federal system and proportional electoral system (compound polity) contrasts with the UK's unitary one and majoritarian electoral system (simple polity) and thus makes a good case for studying the impact of political-institutional context.

The choice of the cases (resolutions and directives) to be studied was guided by a number of considerations. The first one was the need to contrast the impact of legally binding and non-binding measures so as to investigate whether the presence of strong governmental preferences can facilitate change even in the absence of binding legislation. In addition, in order to demonstrate the recursive nature of uploading and downloading over time, a case from the initial stages of EU asylum cooperation had to be selected.

On the basis of these considerations, the first instruments selected are the *Schengen and Dublin Convention* adopted in 1990 as well as the so-called *London Resolutions* adopted in November 1992 which provided the basis for many of the current principles on which the subsequent Common European Asylum System was built.

The second case is *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive)*[8].

The third case is *Council Directive 2004/83/EC of 29 April 2004 on minimum*

[8] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p. 18–25.

standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive)[9].

The last case selected is the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive)*[10].

The three Directives were also chosen due to their importance in the process of building a Common European Asylum System (CEAS). They constitute three out of the four basic instruments on which the system is based. The last one is the *Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation)*[11]. This technical regulation, unlike Directives, is directly applicable and does not grant Member States flexibility in the implementation process. Its implications for domestic policy, however, have been considered.

The time period investigated starts with the adoption of the first instruments selected here in 1990 and ends with the deadline for the transposition of the last Directive (2007) which marked the completion of the first phase of the CEAS.

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9 Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ L 304, 30.09.2004, p. 12-23.

10 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 p.13-34.

11 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10.

1.4. Organization of the thesis

The dissertation proceeds with the chapter presenting the theoretical framework. It outlines the concept of Europeanization and the dominant analytical approaches to the study of the subject. It points out their limitations and makes the case for the need to conceptualize the impact of EU on domestic policy as a reiterative processes of uploading and downloading so as to fully capture its dynamics. Furthermore, it introduces the concept of preferences and specifies how it can be utilized in asylum policy by identifying the sources of preferences in this particular field. The theoretical account then proceeds to identify how the process of preference formation differs in compound and simple polities and how the EU would affect domestic policy in each.

I then put forward the three-step framework of Europeanization and elaborates on its advantages over alternative frameworks.

Chapter 3 discusses and explains the rationale behind the case selection with regard to the country cases and the specific legislative instruments. A detailed description of the methods used to collect and analyse the data is also provided.

Chapter 4 presents an overview of political-institutional context of asylum in Germany and the UK and specifies expectations for each case.

The goal of Chapter 5 is to present an overview of the institutional and policy developments in the EU in the field of asylum since the beginning of EU cooperation in justice and home affairs matters in the mid 1970s until 2007 and to demonstrate how while asylum policy-making started encompassing more actors, governments remained largely in control.

Following this overview, the next chapters proceed towards a narrative analysis of the four selected cases. Each of the four chapters follows the same three-step analytical

framework to study the impact of the EU, presented in the theoretical chapter, consisting of preference formation, EU negotiations, and implementation. It systematically demonstrates the crucial role played by state preferences in each state which ultimately determine the impact of EU asylum policy on domestic asylum policy.

The conclusion summarizes the findings of the dissertation and their implications for the study of Europeanisation, acknowledges the limitations of the project, and provides suggestions for further research.

2. Theoretical Framework

In order to determine the impact of the EU on domestic asylum policy, we need to answer three questions: whether, when and how EU matters. This chapter will seek to answer each of these questions by exploring both theories of European studies and those dealing with asylum policy. So far, scholars from each theoretical domain have not engaged sufficiently with each other, to the detriment of the understanding and explaining of the past and current developments in both fields.

2.1. Does the EU matter for domestic asylum policy?

The first question – whether the EU matters for domestic asylum policy – might seem surprising: if EU integration in this field made no difference, then governments would not engage in it. One could object that such statement would only be true if a particular view of the EU – as an intergovernmental, rather than a supranational entity – were to be adopted. These two different conceptualisations of the EU lie at the heart of two of the major theories explaining European integration: liberal intergovernmentalism and neo-functionalism, respectively. Both theories have their place in explaining EU integration in specific domains as the EU uses different forms of governance in various policy areas and even within the same policy. I will argue that for the period investigated in this study, liberal intergovernmentalism provides a more accurate description of the nature of cooperation in asylum policy and the relationship among the different actors.

Neo-functionalism assumes that once governments decide to cooperate in one field, they will be compelled to extend this cooperation to other, functionally-related fields. Central to neo-functionalist thinking is the concept of spillover: "a situation in which a

given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action and so forth" (Lindberg, 1963:10).

This inherently expansive logic of the process of integration gradually spurs the inclusion of more and more sectors in the integration web (Rosamond, 2000: 58). At the same time, the process of integration, "persuaded actors to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing nation-states" (Haas, 1968: 34) thus culminating in the development of a supranational entity. In addition to functional policy demands, integration is assumed to be driven by supranational actors, especially the EU commission.

Critics of neo-functionalist theory have pointed out two major limitations of the theory: the neglect of the role of the Member States as agents of (dis)integration and the limits of functional spillover. These limitations are especially significant in the context of asylum policy, making neo-functionalism less suitable for explaining cooperation in this field.

Accepting refugees and granting them asylum are issues that challenge the boundaries of the territory, the welfare and belonging which characterize the essence of modern statehood (Geddes, 2008). It is unlikely that Member States would agree to cooperate in this policy without retaining as much of their influence as possible. Moreover, while many scholars agree that a number of functional pressures stemming from the dynamics of integration do exist, there are doubts whether spillover can occur from "low" to "high" politics issues, i.e. from integrating economic policies to developing a common asylum policy.

While a connection between the Single European Act of 1986 and the decision to implement the principle of free movement of people in the context of the completion of the

common market and the need for “compensatory measures” in the field of asylum and immigration has been made (Stetter 2000), it is unlikely that the development of policies in the field can be attributed to a spillover. As Guiraudon (2000: 255) argues, cooperation in asylum and immigration did not arise from the functional imperatives of previously integrated policies but were developed in expectation of future developments, thereby challenging an explanation based on potential spillover. In addition, the Commission, which is normally considered a powerful actor driving policy according to neo-functionalist reasoning, took the back seat and was unable to make use of its gradually increased powers (Parkes and Maurer, 2007: 195).

It is important to highlight that this criticism of neo-functionalism is levelled at the theory itself and is not intended to question the relationship between the Member States' desire to remove internal borders and ensure the free movement of persons on the one hand; and the need to introduce common rules for the reception and treatment of asylum seekers and refugees on the other (Guild, 2006). Since neo-functionalism would expect the consequences of integration in functionally-related policy areas, rather than the governments' future expectations about them to drive cooperation, the applicability of the mechanism put forward by the theory must be questioned in the context of asylum and immigration policy.

In addition to these theoretical limitations, neo-functionalist explanations also do not address the question of the content of the policies expected to be adopted: more open or more restrictive ones as they lack an explicit theory of preferences.

In contrast to neo-functionalism, liberal intergovernmentalism sees governments as the major actors driving European integration, with supranational institutions taking a secondary role. According to the theory, the substantial decisions about the course of European integration are made at major intergovernmental conferences (Moravcsik, 1998).

Each round of negotiations can be subdivided into three parts: national preference formation, interstate bargaining and the choice of international institutions and each of these processes is explained by a separate theory. According to Moravcsik, the process of integration strengthens the state as it allows governments to realize at the EU level those domestically-formed preferences which they would not be able to address unilaterally.

Liberal intergovernmentalism provides good theoretical lenses through which to explore asylum policy cooperation. When it started in mid-1980s, it was conducted informally outside the EU Treaties framework. It became institutionalised as part of "third pillar" of the EU in the Maastricht Treaty in 1992, where the intergovernmental basis of cooperation was retained. In 1997, the Amsterdam Treaty "communitarised" asylum and immigration policies but they were to operate under decision-making rules which again privileged Member States over supranational actors: unanimity voting in the Council, shared right of legislative initiative between the Commission and the Member States and consultation with the European Parliament and limited jurisdiction of the European Court of Justice.

An alternative approach which could be used to explain the emergence of cooperation in asylum and immigration policy is constructivism. Unlike the two other theories discussed above, constructivism does not represent a single theoretical approach towards European integration but rather signifies a set of approaches sharing common assumptions and emphasizing various ideational factors such as norms, ideas and identities which shape actors' behaviour. Constructivism, which occupies a middle-ground between rationalist and reflectivist approaches, does not claim, like liberal intergovernmentalism, that it can explain the entire process of European integration; rather, it focuses on illuminating particular aspects of the process which cannot be understood by utilizing other theoretical accounts, which employ a rationalist ontology.

Social sciences distinguish between behaviour which is guided either by a logic of consequences or by a logic of appropriateness. The former postulates that actors' behaviour is guided by their future expectations of the consequences of their actions: they make decisions by calculating the utility of alternative courses of action and choosing the one which maximizes their utility (March, 1994). In contrast, according to the logic of appropriateness "human actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations" (March and Olsen 1998, p. 951).

Constructivism starts from the premise that reality is socially constructed. Human agents do not exist independently from their social environment. Thus, agents and structures are mutually constitutive: on one hand, the social environment defines the identities of the actors and on the other, these same actors create, reproduce and change the environment through their daily practices (Risse, 2004). Furthermore, constructivists' accounts do not view institutions as setting external constraints on actors but rather as endogenous to interaction through which they can shape the identities and, subsequently, the interests of actors.

Identity, which is one of the most frequently used constructivist variables explaining actors' behaviour, can be defined as "images of individuality and distinctiveness […] held and projected by an actor and formed (and modified over time) through relations with significant others" (Katzenstein 1996:59). Identity can generate as well as shape interests: actors cannot decide what their interests are until they know who they are which, in turn, depends on their social relationships (Katzenstein 1996). This does not imply, however, that all interests are embedded in such relationships: some of them such as survival and minimal physical well-being can exist outside social identities, they are generic. Nevertheless,

especially in the field of asylum and immigration which is closely connected with the fundamental questions of state sovereignty, constructivists would maintain that the construction of self-identity vis-à-vis the conceived identity of others is prior to the formation of interests.

Constructivism explores the social effects of European integration over time, how preferences and identities of actors may change as a consequence of sustained interaction under certain conditions (Checkel 2001). It also investigates how elites start adopting a European perspective on asylum and immigration issues, often focusing on the role of ideas and political leaders acting as moral entrepreneurs disseminating new ideas to the political elite and striving to ensure popular legitimacy (Geddes and Money, 2011: 41).

Constructivists place a great emphasis on communication and discourse in explaining behaviour. Underlying such explanations are theories of communicative action (Habermas, 1987) which emphasize the role of argumentative rationality: actors seek a consensus about their understanding of the situation as well as justifications for the principles and norms guiding their actions. This implies that the parties are open to be persuaded by the better argument. Thus, actors' preferences are subject to discursive challenges. The logic of argumentative rationality also points to a new way of conceptualizing European institutions as discourse where reasoned consensus can be established rather than purely bargaining arenas where actors seek to maximize their utility.

The role of factors emphasized by constructivists in explaining EU integration have been applied to the study of the emergence of asylum and immigration policy cooperation and its further development. Kaunert (2005) has argued that norms have been constructed in such a way that the Area of Freedom, Security and Justice has set in motion a project which aims to create a true 'European Public Order'.

But while the role of ideas, norms and identities in EU integration in general and

asylum policy in particular should not be underestimated, so far there is little evidence to suggest that Member States were motivated primarily by logic of appropriateness when deciding to cooperate in this policy area. As Thielemann et al. (2010: 160) have argued in relation to refugee burden-sharing, "even if norms are likely to play some role one can expect interest-based motivations to be paramount for most (if not all) states". The logic of appropriateness and associated explanatory variables such as norms are unlikely to provide a satisfactory explanation to the genesis and impact of EU cooperation in asylum policy.

Understanding the motivation of Member States for enacting certain policies is necessary in order to be able to explain why EU matters for domestic policy.

Most studies indeed agree that the reasons for intergovernmental cooperation in asylum policy were rational, based on how actors could benefit from its consequences domestically. Numerous scholars (Joppke, 1998; Guiraudon, 2000; 2003; Geddes, 2003) have argued that governments have "escaped to Europe" in an attempt to realize their preferences for more restrictive asylum policies which they would have been unable to pursue at home due to the constraints imposed by courts and NGOs protecting asylum-seekers' rights. In mid-1980s, when EU Member States started discussing how to put the principle of free movement of people into practice by removing internal borders, Interior Ministers emphasized the possible negative consequences of freedom of movement such as the unregulated flows of asylum-seekers and irregular immigrants. They argued that "compensatory measures", consisting of various mechanisms for strengthening the external borders, needed to be put in place in order to prevent these consequences. Informal cooperation between officials from Interior Ministries, who had been "wining and dining" (den Boer 1996) together offered a suitable venue where they could discuss more restrictive policies. The initial intergovernmental and secretive nature of cooperation had the advantage of isolating officials from both domestic actors opposed to restrictive asylum

measures as well as from the involvement of the Community institutions such as the European Commission, the European Parliament, and the European Court of Justice which are also assumed to take a more liberal stance towards asylum-seekers.

Some scholars contend that officials have deliberately sought to portray immigration as a threat to society in order to justify the undertaking of extraordinary measures to tackle it which would otherwise not be seen as legitimate (Buzan et al, 1998). This process of securitization was conducted through discourse which increasingly emphasized the way in which "hordes" of immigrants were "swamping" the territory of member states and undermining the fundamental values upon which their societies are built and threatening their identity. Securitization of immigration at the EU level thus provided the ministers of Justice and Interior with additional justification for the tightening of borders and imposing restrictions (Huysmans, 2000, Kostakopoulou 2000; Bigo 2001). Following the 9/11 terrorist attacks, the images of the 'threat' posed by asylum seekers and refugees have been reinforced through political discourse emphasizing a relationship between terrorism and opportunities to seek protection which expose the vulnerability of the state (Guild 2003).

The securitization thesis has been questioned empirically by Boswell (2007) who finds no evidence that migration policies in Europe have been securitized as a result of 9/11 or the subsequent terrorist attacks in Madrid in 2004 and London in 2005. Huysmans and Buonfino (2008) also argue that political leaders are reluctant to introduce and sustain a connection between terrorism and migration, although they do find evidence of alternative framing.

Although there is little evidence to suggest that cooperation in asylum policy was driven by the Member States commitment to European integration per se or the desire to establish a common refugee protection area as the appropriate thing to do given that the granting of asylum to those fleeing from persecution has been part of European state

practice for decades, this does not mean that the cooperation has been devoid of a normative component. Certainly, the provisions of the Geneva Convention as well as the practice of granting other forms of protection to those who do not qualify as refugees under the strict terms of the Convention as well as the rights of refugees and asylum seekers have all been part of the discussions albeit as secondary and more difficult to agree on (Lavenex, 2001a). The point is that cooperation has not been driven by such norms but by the preference of large refugee-receiving states to share the burden of asylum seekers fairly across Europe: "harmonization is seen particularly by Germany and Sweden as a means to ensure burden-sharing – a "fairer" distribution of asylum seekers around Europe, or at least a fairer sharing of the financial burden" (Schuster 2000: 129).

Some scholars have remarked that the strategy resembles burden-shifting (Kumin, 1995; Noll, 2000) or burden-shirking (Ucarer, 2006) on the part of refugee-receiving states. The former refers mainly to the efforts of some European states to make other countries in Europe (and beyond) responsible for accepting refugees while the latter refers to their attempts to avoid their responsibilities towards refugees. Gibney (2004: 220) makes a similar point alluding to ulterior motivations of governments by stating that "states often see it as more in their interests to cooperate to *insulate* themselves from refugee flows".

This fairly cost-benefit motivation for creating a common policy in order to deflect the refugee burden and minimize domestic costs associated with the reception of refugees suggests that constructivism, while useful in shedding light on some aspects of cooperation especially at the later stages of the creation of a common asylum policy, is not well-suited to account for the majority of the adopted measures.

A strategy focusing on deflecting the responsibility for providing protection would not be in line with the preferences of those states which have low number of asylum seekers who would normally not agree to share the "burden" and would only agree to accept

refugees if they can successfully negotiate side payments in return. A number of scholars (Suhrke 1998; Hatton 2005; Betts 2006, 2011) have conceptualized asylum and refugee policy as a global public good: states collectively value the provision of protection but each state individually has little incentive to provide it because the humanitarian and security benefits accruing from providing protection are non-excludable and non-rival. This creates free-riding opportunities and leads to the under-provision of protection (Suhrke 1998). Czaika (2009) has argued that cooperation to tackle large-scale immigration flows is possible only among fairly symmetrical countries; highly asymmetrical ones have no incentive to join and remain in a coalition.

Thielemann (2004) questions the categorization of "burden-sharing" as a global public good and instead focuses on the "global product" model which recognizes that certain benefits arising from the provision of protection may be both excludable (private) and "rival" in character. He demonstrates that both cost/benefit calculations and norms play an important role in states' efforts to find a common approach to burden-sharing.

Given that today all Member States are involved in asylum cooperation and this is one of the most prolific and advanced areas of harmonization in the Area of Freedom, Security and Justice, we can safely assume that those states which were unwilling to cooperate initially have been drawn into cooperation for primarily rational reasons – either because of desire to reduce their own "burden" of asylum seekers or by accepting side payments as a compensation – and we can assume EU asylum policy to have had an effect on all Member States. I will argue that the timing of cooperation is crucial and refugee-receiving states which initiated the reforms were able to set the terms of cooperation and to a large extent determine its future course.

2.2. What determines the impact of European integration on domestic policy?

2.2.1. From misfit to preferences

For some decades, the relationship between the EU and Member States' policies has mostly been conceptualized either as top-down, focusing on the impact of the EU on the domestic level, or as bottom-up, emphasizing the influence of Member states on EU policy-making. Usually, the latter has been the object of study of European integration theories, while the former has been the domain of Europeanisation theories.

A number of scholars, however, have pointed out that although focusing on each dimension separately might be appropriate for analytical purposes (Radaelli, 2003), it certainly does not reflect the reality of interaction between the EU and the domestic level. For example, Börzel (2002, 2005) emphasizes this interaction by arguing that governments are not simply passively taking policies from the EU level but they also seek to shape them in the course of EU policy-making. She distinguishes between the process of "uploading", characterized by Member States' attempts to have their preferred policies adopted at the EU level and "downloading", that is, the national adaptation to EU polices. Similarly, Bulmer and Burch (2000) distinguish between the notions of "reception" and "projection", with the former referring to the incorporation of the EU's structures and policies into the domestic ones and the latter pointing to the ability of the Member States to channel their concerns into the EU decision-making process.

However, postulating that there is a relationship between the phases of uploading and downloading amounts to little more than simply stating a truism. It has already been demonstrated in the preceding section that the expectation of the consequences of cooperation domestically determines Member States willingness to engage in it. The main

question is to identify the variable that connects uploading and downloading. According to Börzel, the link is provided by Member States governments who "hold a key position in both the decision-making and the implementation of European policies and thus influence the way in which Member States shape European policies and institutions and adapt to them" (Börzel, 2005, p. 62). This, in turn, highlights the question of the source and the content of Member State governments' preferences.

Börzel identifies two types of cleavages which determine these preferences and structure Member States' negotiating position: the level of socio-economic regulation and the regulatory structure (Börzel, 2003). Implicitly, this model also includes a meta-preference for adhering to the status quo as it assumes further that each member state government is interested in exporting its national policies and institutional structures. In particular, it argues that the governments always have a preference for minimizing the adaptational costs which arise from the need to adjust to EU policies and structures and, therefore, they seek to upload "their" policies as this would not require them to make later costly adjustments when they have to download them afterwards. Thus, the notion of "goodness of fit" that is, "the compatibility between European and domestic processes, policies, and institutions" (Börzel and Risse, 2003: 63) becomes the crucial determinant of government preferences.

The main argument of the "goodness of fit" literature is that due to the nature of the EU policy-making process, which is mainly based on negotiation and bargaining, and complex decision-making rules giving different voting power to different countries, it is not possible for each country to upload its often diverging policies and thus a certain degree of misfit between national and European policies and regulatory structures becomes inevitable.

This degree of misfit, in turn, determines the impact of the EU on the implementation of the specific policy. In particular, in a situation of a large misfit, there will

be strong resistance to implementation manifested through non-compliance (Duina, 1997, 1999; Knill and Lenschow, 1998) as governments are unwilling to engage into the costly implementation process.

The central tenet of the "goodness-of-fit" hypotheses has been challenged by a number of empirical studies which demonstrated that the "misfit" variable cannot completely account for implementation as countries showed different rates of compliance regardless of the existence or lack of fit/misfit (e.g. Knill and Lenschow, 1998).

In response to these findings, Cowles et al. (2001) sought to redefine the relevance of the proposition by asserting that the presence of fit/misfit is a necessary albeit not a sufficient condition for Europeanization whose impact on the domestic level is mediated through intervening variables. Börzel and Risse (2003) identify two sets of distinct variables which determine states' response to the adaptational pressures of Europeanization. Each of these sets of variables is located in a variant of institutionalist theories, namely, rational-choice and sociological institutionalism.

Within the former, Europeanization is seen as a process which alters the domestic opportunity structure and presents some actors with additional venues to realize their objectives while it disadvantages others. However, the extent to which they can make use of these opportunities depends first, on the existence of both formal and informal veto players in the system who could obstruct the proposed changes and second, on the existence of formal institutions which provide the necessary means to actors for exploiting the newly created opportunities (Börzel and Risse, 2003).

According to sociological institutionalism, domestic change in response to EU-level norms would require a process of socialization and learning during which actors would internalize new norms and develop new identities. Again, this is not an automatic process but depends on two factors: the mobilization of norm entrepreneurs such as epistemic

communities or advocacy networks and the existence of cooperative informal institutions conducive to consensus-building. Although this increased attention to domestic politics is a valuable refinement of the "goodness of fit" theory, the question of the relevance of the notion of misfit in the way it has been conceptualized remains. Some authors even gone further by suggesting that it should be dropped from the analysis in the interest of arriving at a parsimonious explanation (Mastenbroek, 2005, Mastenbroek and Kaeding, 2006).

The basic problems of the notion of the "goodness-of-fit" literature are its status-quo bias and its superficial treatment of state preferences (Treib, 2006). It assumes that Europeanization would have a tangible effect on the domestic level only in situations of medium adaptational pressure because in case of a high pressure the costs of compliance would be prohibitively high and thus governments would be concerned with preserving existing policies and institutional structures (Cowles et al., 2001). Thus, it neglects the possibility that governments may themselves want to transform these elements and act as agents of change (Héritier et al. 2001; Treib, 2003).

Moreover, the goodness of fit theory is more suitable for explaining domestic adaptation when the EU legislation offers a clear model that Member States must follow, leaving them little scope for manoeuvre. The instruments comprising EU asylum policy, however, do not fall into such category. Those agreed in the initial stages of cooperation are mainly politically binding while the binding ones adopted more recently contain a number of clauses which allow Member States large discretion in the implementation phase. In particular, there are a number of clauses where the word "shall", indicating a binding obligation is used; however, there are also a number of other ones containing the word "may" which is interpreted to mean that it is up to the Member States to decide whether to comply with the provision. Member states' room for manoeuvre is further enhanced by the lack of provisions explicitly precluding them from lowering their existing domestic

standards when implementing the Directive, which exist in other EU policies (Costello, 2006: 16). The directives contain standstill clauses allowing Member States to maintain or introduce more favourable standards in so far as these are compatible with the respective Directive. My argument is that it is the Member States' preferences that determine the way they make use of these provisions.

Therefore, it is crucial to take into account domestic preferences and go beyond the simple supposition that governments are mainly interested in minimizing adaptational costs. In doing so, one does not need to reject the idea of a misfit; certainly, it is reasonable to assume that adaptation necessitates some kind of a discrepancy between the domestic and the EU-level; however, it is not a policy or institutional misfit between existing domestic arrangements and EU-level ones but rather a misfit between domestically-shaped preferences and European policies. At the same time, it is possible that it was the government's preferences that created this misfit in the first place.

2.2.2. Preference formation

Perhaps the most explicit account of state preference formation is provided by Andrew Moravcsik who defines preferences as: "an ordered and weighted set of values placed on future substantive outcomes, often termed as 'states of the world,' that might result from international political interaction" (Moravcsik, 1998: 24). In order to explain the mechanism of preference formation, Moravcsik (1997) employs a liberal theory of International Relations, claiming that the main actors in international politics are rational and risk-averse individuals and private groups which seek to promote differentiated interests under the constraint of material scarcity, conflicting values and unequal societal influence. "The state"

is not an actor in itself, but rather a representative institution shaped by coalitions of social actors. It serves as a "transmission belt" by which the interests and the power of the domestic actors are turned into state policy.

At the international level, the state is the primary instrument through which domestic actors can influence the international negotiations. There it functions as a unitary actor pursuing national preferences which reflect the interests of the above-mentioned domestic groups and vary according the specific issue to be discussed.

In order to explain governments' preferences for European integration, Moravcsik employs a political economic account which emphasizes the importance of direct economic consequences of integration. Thus, economic cooperation is seen as an effort of governments to restructure the pattern of economic policy externalities which result from economic activities among countries and are transmitted through international markets, to the mutual benefit of those countries. If markets render preferred policies incompatible or allow costless adjustment of unilateral policy to achieve the desired outcome, the situation resembles a zero-sum game and cooperation is unlikely. Conversely, when cooperation can eliminate negative externalities or create positive such more efficiently than unilateral action, states will have an incentive for it.

Most important among these winners and losers are producers whose interest is often advanced at the expense of consumers, taxpayers etc due to the former's "more intense, certain, and institutionally represented and organized interests" (Moravcsik, 1998: 36). However, governments are constrained in advancing the interests of producers by general demands for regulatory protection, economic efficiency and fiscal responsibility.

Moravcsik's theory of preference formation has raised a number of criticisms which need to be addressed if our understanding of preference formation is to be enhanced.

First, his conceptualization of the state as simply a "transmission belt" for the

interests of various domestic groups "seriously over-estimates the control that civil society may exercise over government in EU affairs, while considerably underplaying the extent to which the state may act with relative autonomy" (Dimitrakopoulos and Kassim, 2004: 248). Moreover, domestic groups do not necessarily mobilize along all issues that are discussed at the EU level as only some policies have distributive effects large enough to clearly pit "winners" against "losers" and to warrant mobilization.

Even Moravcsik admits that in fields like foreign policy where few domestic interest groups with clear-cut interests can be identified, governments do enjoy a certain "slack" in determining state preferences. Apart from pointing to the possible importance of geopolitical factors in such cases, Moravcsik does not provide a clear source of preferences in policies in which domestic groups do not have a stake or are unable to mobilise support.

I argue that in the field of asylum policy, governments enjoy a relative autonomy from other societal actors compared to other policy areas (Guiraudon, 2003; Statham and Geddes, 2006). One reason for this autonomy stems from the distribution of costs and benefits to society of providing asylum. According to Freeman (1995; 2006), immigration policy can be disaggregated into analytically distinct components according to different types of migration flows, and the policies developed to manage each of them tend to produce distinctive modes of politics. In line with Lowi (1964) who argues that "policy determines politics", Freeman adopts a framework proposed by Wilson (1980) which sees policies as producing objective distributive consequences, leading to specific type of politics. Benefits and costs can be concentrated or diffuse, producing four distinctive policy modes. Concentrated benefits and diffuse costs produce client politics, with resource-rich well-organized groups lobbying in favour of policies which benefit them, with no resistance from the rest of society unable to mobilize around diffuse costs. Diffuse costs and benefits produce majoritarian politics, while concentrated costs and benefits result in interest groups

politics. Finally, diffuse benefits and concentrated costs lead to entrepreneurial politics, entailing the efforts of a group or individual to mobilize dissent on behalf of those bearing the costs (Messina and Thouez, 2002: 81). According to Freeman, asylum policy falls into the latter category, because providing protection constitutes a public good from which citizens benefit only marginally while the costs are borne either by asylum seekers themselves or, in some cases, the municipalities where they are located, depending on the structure of the reception system. The extent to which asylum policy falls into this category and thus gives rise to entrepreneurial politics is not clear: the costs, in fact, are shared among many different actors, including municipalities, and various departments of the central government, while the ability of each of them to play the role of policy entrepreneur successfully will depend on the political-institutional context in each country.

Nevertheless, Freeman's theory is a useful point to start mapping the positions of various policy actors and their potential to mobilize for or against particular policy changes. One could expect that, depending on the direction of policy change – restriction or expansion – the main actors promoting or resisting change would be organized groups of asylum seekers or refugee-assisting NGOs. Despite the existence of numerous refugee-assisting NGOs, their influence is small due to their lower ability to mobilize support and chronic lack of resources which allows elites considerable freedom in formulating policies (Geddes, 2005). This does not mean that NGOs, working at the national and the European level have no influence on policy both in the formulation and the implementation stage. Certainly, NGOs have played an important role in introducing certain legislative changes; with the changing institutional structure of the policy field we can expect them to become even stronger in forming alliances and making their voices heard. However, during the period with which this study is concerned, their influence was relatively limited not least because of the predominance of intergovernmental policy-making in the field.

Apart from NGOs, ethnic minority groups also play a role in asylum policy. They have very strong views and may be able to mobilise their supporters to vote coherently. However, their vote is often taken for granted by politicians on the left who tend to assume that these groups constitute more or less homogeneous entities which vote coherently on ideological basis. This somewhat diminishes their power to influence policy.

Given the limitations of theoretical models of preferences, a more fine-grained explanation of their emergence is necessary.

The literature has identified two sources of governmental preferences: material and ideational. Material preferences are rooted in the desire to retain or expand resources. In case of governments, this is manifested chiefly in a preference for maintaining themselves in office and ensuring possible re-election so as to maintain their power position. Wolf (1999) has argued that governments have a higher-order preference for achieving autonomy vis-a-vis society and thus seek international cooperation; he terms this the "new *raison d'etat*". Introducing this preference, however, still leaves largely open the question of the contents of government's specific policy preference.

In the absence of pressures coming from specific interest groups, one materially-oriented source of preference is public opinion. Immigration scholars have long debated whether public opinion influences immigration policy; in fact, one of the most famous puzzles which the literature has sought to address is that of a gap between the government rhetoric focusing on control and negative public opinion towards immigration on the one hand, and the reality of increased number of immigrants and relatively liberal policies on the other. This gap, originally formulated by Cornelius et al. (1994, updated in 2004), in fact has two separate aspects which should not be conflated (Boswell 2007). The first one concerns the gap between policy output and outcomes and was already discussed above in the context of asylum policy and the need to take into account human agency as well as the

situation in the countries of origin. The second issue concerns the gap between protectionist public opinion and liberal immigration policies which scholars have sought to address either by adopting a political economy framework as described by Freeman (2006) or relied on "judicial activism" or domestic liberal norms (Cornelius et al., 1994; Joppke 1997, Guiraudon 2000).

The existence of a gap between public opinion and policy, however, has been questioned empirically. Lahav (2004) demonstrates that the disjuncture between the two has been overstated and provides evidence that support from both elite and public opinion has led to the adoption of restrictive policies and that there is sufficient evidence to conclude that public opinion influences policy formulation. Kivisto and Faist (2010: 215) confirm these findings, stating that "public opinion cannot be simply or readily discounted by political and economic elites as some adherents of the gap hypothesis would suggest".

Public opinion can *directly* translate into specific policy position on a given issue believed to be salient and a potential vote-winner; alternatively, it can impact on preferences *indirectly*, by urging the government to adopt a certain stance due to fears of voter radicalization. For example, in the case of migration policy, "the mere presence of anti-immigrant parties can push mainstream parties towards a tougher line on immigration for fear of being outflanked" (Sides and Citrin, 2007: 477). Public opinion is a concept which is notoriously difficult to define but opinion polls often give a sense of "what the public wants" which is then pursued by politicians who expect to be re-elected after having satisfied the demands of the public. The causal link could also run the other way, that is, politicians may seek to influence public opinion in order to gain approval for their policies. In both cases, however, public opinion matters for policy choices but, as I will argue below, the extent of its importance depends on the type of polity.

Even more important than establishing that public opinion affects the content of

policy, however, is specifying the conditions under which it is expected to do so. An important part of democratic theory concerns the responsiveness of elected officials to voters' demands. Citizens who care about a particular issue are likely to use it to reward or punish parties during elections. In turn, this forces political leaders to respond to the demands of the electorate. Numerous studies have pointed to the need to take salience into account when gauging the impact of public opinion on policy. In a seminal article Page and Shapiro (1983) find evidence for considerable congruence between changes in preferences and policies, especially with regard to stable opinion changes concerning salient issues. Monroe (1998) also demonstrates that the consistency between public opinion and policy is greater on issues of highest salience. However, he also calls for more attention to be paid to political-institutional variables which affect the opinion-policy nexus. In a review of studies dealing with the issue of public opinion and policy, Burstein (2003) finds that the impact of public opinion is substantial and is enhanced when the issue is salient.

In relation to immigration policy, Givens and Luedtke (2004: 150) define salience as "the level of attention paid to, or awareness of, the immigration issue, which can be operationalized as references in newspapers or the ranking given the importance of the issue in public opinion surveys". By alluding to both aspects – media attention and issue importance – they capture the well-documented role of media in agenda-setting. According to the theory of agenda setting, the news media can have an impact on what issues are considered important by giving more salience to certain events and issues and they can also speed up policy change (Baumgartner and Jones 1993).

Media can also serve as a critical conduit between governments and the public, informing the public about government actions and policies, and helping to convey public attitudes to government officials (Soroka et al., 2012). In this sense, media can serve as an intermediary, helping the government shape public attitudes. Kaye (1998) explores how the

media served this role in “an orchestrated government campaign to downgrade the public perception of refugees in 1990–1 and 1992–3 to control the numbers entering the UK” (Kaye 1998:177–8).

Media can also influence public opinion directly. For instance, Boomgaarden and Vliegenthart (2009) explore attitudes towards immigrants and asylum seekers in Germany from 1993-2005 and conclude that news evaluations of immigrants are a strong predictor of immigration problem perceptions, indicating that the more positively news outlets cover immigrants, the less people are concerned about immigration. However, the also argue that strength of the effect of the news depends on contextual variation in immigration levels and the number of asylum seekers.

This overview of the impact of public opinion on policy in general and on asylum and immigration policy in particular, has shown that while there is evidence to support such an impact, there are some shortcomings in focusing solely on public opinion and salience in order to explain the government's preferences for maintaining status quo or introducing policy change. Other variables need to be added if we are to account for when and how it would be expected to exert and impact. In addition, as with studies focusing on political opinion themselves, the institutional context also needs to be considered.

Indeed, material factors and the concern for maintaining itself in power are not the only ones which can affect the government's preferences; ideational ones can also play a role as emphasized by constructivist theories. Constructivists argue that interest and ideas are endogenous to interaction (Rosamond, 2000). This implies that there may be sources of preferences different from material interests identified by rationalist scholars. The sources of preferences emphasized by constructivists are various: norms, identities, culture, discourse, and ideas.

Constructivist theories, which emphasize the role of these factors, have often been

accused of failing to demonstrate the causal mechanism through which they affect outcomes. Part of the constructivist challenge is rooted in its epistemological premises which reject positivism. Since this thesis is taking a positivist approach, it would be difficult to operationalise these concepts and still remain within the constructivist epistemology.

Although some scholars have sought to bridge the gap between the constructivist and rationalist theories, I believe it would be more appropriate to use the concept of party ideology in order to capture the influence of norms and beliefs. Party ideology incorporates and promotes domestic and international norms to various degrees. In particular, with regard to preferences on European integration, Aspinwall (2002) maintains that "party ideology matters: the location of parties and governments in Left-Right space serves as a good independent explanation of preferences on integration" (Aspinwall, 2002: 82). With regard to asylum policy, there is still an ideological division between the left and right even if its impact on policy differs depending on the particular political system. Some authors (Solomons and Schuster 2002) have questioned the extent to which Labour's asylum policy differs from that of their conservative predecessors. However, one should not forget that asylum policy has been closely connected with other policies such as immigration, integration and citizenship; so while a left party may appear to be "tough" on asylum seekers, it may be more open to immigrants which would be in line with its ideological position.

Usually, the two sources of preferences – material and ideational – do not necessarily exclude each other: a number of scholars have argued that they are complementary, rather than contradictory (Fearon and Wendt, 2002; Checkel, 2005). Governments do take into account both sets of considerations and try to reconcile them if possible. For example, a general preference for restrictive asylum policy seen as a response to a negative public opinion towards asylum-seekers could co-exist with a concession of

taking a small quota of Iraqi Christian refugees consistent with a Christian-Democratic government's preference stemming from its ideological position. Thus, while this thesis takes a rationalist perspective, by focusing on party ideology it does take into account the impact of norms and beliefs, in so far as they are reflected in these ideologies.

Such conceptualisation is not at odds with a rationalist framework if the important distinction between "thick" and "thin" rationalism is taken into account (Ferejohn, 1991). Rational choice explanations follow the logic of "desire + belief = action" (Fearon and Wendt, 2002), with "thick" versions specifying the content of desires (self-interest) and beliefs (complete information) and thin ones being agnostic to both, as long as the causal logic is followed. A "thin" rational choice explanation would be able to accommodate both material and ideational sources of preferences.

Certainly not all theories about party behaviour rest on assumptions about "thin" rationality. In *An Economic Theory of Democracy*, Anthony Downs (1957) relies on "thick" rational choice theory and its assumptions about self-interest and information to explain electoral behaviour. He assumes that parties seek to win elections not because they are motivated by a desire to implement certain policies but in order to gain prestige and power. Thus policy formulation is instrumental to winning elections, rather than the other way round. Downs argues that as parties are vote-maximizers, they would choose issue positions that reduce their distance to the voters' preferences to a minimum. This means that, in electoral competition, parties have the choice between moving their positions towards those of their main competitor (policy convergence) or away from them (policy divergence), depending on where their voters position themselves.

Such conceptualizations of parties have been criticized for failing to take into account the possibility that candidates may have policies that they wish to be implemented and not just a desire to win elections (Wittman, 1973). Moreover, the Donwnsian understanding of

parties assuming that parties are simply responding to the positions of other parties and implying that "Europe's mainstream parties are somehow incapable of coming to their own conclusions on the seriousness of the issues and the policy direction they should take on them [...] is not only potentially patronizing, it is misleading" (Bale, 2008: 320).

Parties have frequently been neglected in the study of immigration policy which often focuses on political-economic explanations of policies. This omission has been criticized by Perlmutter who, already in 1996, asserted the need to "bring parties back in" (Perlmutter, 1996). However, apart from a few studies focusing on the impact on far-right parties on the political system and the position of mainstream parties, scholars have only recently begun to take into account the role of mainstream parties' ideology on immigration policy. Concerning the former, that is, the impact of far-right parties, studies have found that it influences policy mostly indirectly, by forcing governments on the left and the right to co-opt and gain control of the issues of immigration and security, often by moving their position further to the right (Norris, 2005; Schain 2006, Williams 2006).

With regard to the role of mainstream parties' ideology on policy, research is scarce, although Bale (2008), Marthaler (2008), Smith (2008), Spehar et al. (2011) have all dealt with the topic, showing not only the importance of taking party political ideology into account but also the need to be sensitive to contextual factors which may facilitate or mitigate its impact. Spehar at al. (2011) have also challenged the traditional understanding of strict immigration policies as the 'norm' among right-of-centre parties in Western Europe (Neumeyer 2005). They have shown that Swedish 'non-socialist' parties have formulated and implemented open immigration policies. This is not surprising: Benoit and Laver (2007) state that substantive meaning of left and right is not constant, either from country to country or even across time within a single country. Thus, it is important to acknowledge differences in party ideology across time, issues and countries.

How can these insights on party ideology be combined with the role of salience and public opinion? Adams et al. (2004) have argued that parties respond to shifts in public opinion but only in situations where it is shifting away from the party's policy position. As opinion and policy move together in salient policy domains, it can be expected that in case of increasing salience and a gap between party ideology and public opinion, the party may shift its position, leading to policy change.

Finally, the extent to which the benefits from changing legislation outweigh the costs of maintaining the status quo is also an important factor to take into account when explaining preferences. One reason for this is that an increase in the number of asylum seekers implies increased costs for their reception and the processing of their claims as well as their subsequent integration or removal. Whether diffuse or concentrated, these costs fall primarily on the taxpayers and government needs to take these into account. In addition, the number of new entrants also influences the degree of community hostility towards the reception of refugees and asylum seekers (Gibney, 2004).

Policy-making in this policy area takes place under uncertainty, due to the unpredictability of asylum flows, which are affected by geopolitical situations much more than by government policies. Potentially, an increase in the number of applications could have both a financial dimension and a political one, with increased number of asylum seekers leading to greater visibility and hostility, increased salience of the issue and potential electoral losses.

The number of applications can also lead to a blockage of the entire system which may not be designed to deal with an increase in requests. This can manifest itself into a backlog at first-instance decision-making bodies or in clogging up other bodies such as courts. Such inefficiencies may also provide incentives to governments to introduce reforms, especially in the context of the tendency of voters to place emphasis on the managerial competences of

parties and their ability to control migration (Saggar, 2003).

While it is difficult to assess what level of asylum applications would be considered "high" and therefore would trigger the need to introduce policy change, it is nevertheless useful to outline three important concepts. The first one concerns "sustainability" and reflects what was stated above about the need to maintain an asylum system which runs smoothly, with applicants having their cases heard within a reasonable period.

The second one concerns the use of the number of asylum applications as a measurement of the success or failure of a policy when assessing the extent to which the status quo should be maintained, with a reduction in the number of application seen as "success" and an increase as "failure".

Similarly, the expected outcome of a policy regarding the number of applications could also be used to evaluate the consequences of policy change; that is, whether the proposed change is likely to result in an increase or decrease in numbers.

Finally, an assessment of current policy may take place on the basis of the government's evaluation of whether the country is taking a "fair" share of the asylum seekers compared to the rest of the EU: a suspicion that other countries are free-riding may constitute a trigger for change.

The number of asylum applications, however, is necessary but not sufficient to determine the speed and direction of policy change. It needs to be combined with the other variables identified above as well as with political-institutional context.

2.3. Political-institutional context and preferences

From the previous discussion it is clear that preference formation will differ according to

the type of polity where it takes place. Vivien Schmidt (2006) has introduced the useful distinction between "simple" and "compound" polities. Simple polities are "characterized by unitary states in which power and authority have traditionally been concentrated in the executive; by statist processes in which the executive has had a monopoly on policy formulation but accommodates interests through more flexible policy implementation; and by majoritarian representation where voting and voice are polarized long partisan lines" (Schmidt, 2006: 229).

In contrast, compound polities are "characterized by federal or regionalized institutional structures with a high diffusion of power through multiple authorities; by corporatist processes with a moderate level of interest access and influence, in which certain privileged interests are involved in policy formulation and implementation; and by proportional systems of representation with an emphasis on consensus or compromise-oriented politics, despite partisan patterns of voting and exercising voice" (Schmidt, 2006, p. 229). She argues that it is easier for simple polities than for compound ones to project national preferences onto the European stage as well as to comply with EU policies. This is due to the fact that executives in such polities do not need negotiate with various political actors during the policy formulation and the policy implementation stages. In contrast, executives in compound polities face multiple veto players both during policy formulation and in the course of implementation.

The impact of institutional constraints on the state's capacity to introduce policy change has long been recognized. These constraints have been referred to as *veto players*: an individual or collective actor whose agreement (by majority rule for collective actors) is necessary for changing the status quo (Tsebelis, 1995: 301). Veto players are determined either through constitutional arrangements, specifying the division of power along horizontal and vertical lines or through the political system, determining the members of a

government coalition or, in Tsebelis's terms, institutional and partisan (Tsebelis, 2002). Institutional players are those whose consent is required by constitution or law. In a parliamentary system, the parliament is an institutional veto player and in bicameral systems there are two veto players if the agreement of both houses is necessary in order to pass the bill. According to Tsebelis, institutional veto players are a necessary and sufficient condition for policy change.

Partisan veto players, on the other hand, are parties that belong to the government coalition and their agreement, strictly speaking, is neither necessary nor sufficient for policy change (Tsebelis, 1995). Tsebelis also assumes, however, that a government proposal has to be approved by a majority of actors within each party of the government coalition. Tsebelis also explicitly assumes that there is no de facto difference between the approval of a policy by an institutional and a partisan veto player (Tsebelis, 1995: 302)[12]. Concerning the impact of partisan veto players, Dimitrakopoulos and Kassim (2004) argue that "the experience of preference formation in coalition governments is likely to differ from the process in single-party governments" (2004: 253).

In addition to institutional and partisan veto players, Tsebelis also talks about "other" veto players, which vary depending on the policy field and may include courts, local governments and other institutional devices. He argues that in small-n studies it is important to identify all relevant veto players. However, Tsebelis' framework does not take into account the fact that a policy may be challenged by "other" veto players once it has already been adopted formally but not implemented in practice because, depending on the state's institutional structure and procedures, their agreement may not have been necessary for its

[12] Institutional veto players, however, should not simply be added to the partisan veto players in order to determine the effective number of veto players. In cases where there are identical partisan majorities in both chambers they have to be counted as one veto player. In cases where the majorities in parliament are congruent with the parties in government they will be absorbed and only the number of partisan veto players is relevant. Tsebelis refers to this as the "absorption rule" (1995: 310).

adoption. This is especially the case in simple polities, where, as argued above, executives enjoy considerable discretion in the formulation and adoption of policies. Thus, in such polities, the impact of such de facto veto players is usually felt once the policy has been formally adopted. For example, the policy may be challenged by courts or resisted by local government or civil society actors.

Although Tsebelis' theory has undoubtedly provided an important contribution to the understanding of policy stability in different political systems, his explanation does not adequately capture the role party politics plays in facilitating or hindering change, especially in compound systems. According to Scharpf (1988), systems where central government decisions are directly dependent upon the unanimous agreement of constituent governments lead to sub-optimal policy outcomes. These outcomes tend to persist because once a binding rule is agreed upon, the veto of one or a few constituent governments will prevent all others from correcting or abolishing it in response to changed circumstances or preferences (Scharpf 2006). The "joint decision-making trap" becomes especially problematic when party-political differences are taken into account. According to Scharpf (2005), "minimum-winning" coalition governments in Germany were always challenged by a strong opposition with its own policy program and with realistic hopes for displacing the government, resulting in a competitive, even confrontational style of interactions between governing and opposition parties. When the Bundesrat, representing the interests of the *Länder*, acquires an outright veto position, i.e. when *Länder* governments controlled by the national opposition parties have sufficient votes to prevent a pro-government majority, the joint decision-making system turns into a trap. For this reason, it could be expected that policy changes in compound systems would be infrequent and difficult to negotiate but very stable. Due to the need to take into account the interests of various actors during policy negotiation, it could also be expected that reforms would not be limited to asylum policy but

would include related policy areas such as immigration and integration policies: when presented with an opportunity to introduce a difficult reform, actors usually attempt to conduct it comprehensively even if, following negotiations, some compromises have to be made. Therefore, one can expect that in compound polities, changes in response to EU developments will be hard to bring about but durable and difficult to unravel.

In contrast, simple polities, which have a higher capacity for change, would find it easier to introduce reforms but these would also be easier to reverse in case they do not bring the desired result or are contested after a decision is taken to implement them. It could also be expected that in such polities asylum policy reforms do not entail changes in related policy areas.

So far, I have focused on political-institutional context and explained how it may affect policy change: an approach which is typical of various institutionalist theories. These theories, attempt to counter the two dominant explanations of political outcomes: the behavioralist claims of outcomes as product of aggregated societal behaviour and the view that outputs directly reflect solely the interplay of actors' interests (Immergut1998, Rosamond 2000). There are different types of institutionalism: three different institutionalisms, each with a separate definition of what institutions are and how they matter for political outcomes: rational-choice, historical, and sociological institutionalism (Hall 1996). Schmidt (2008) adds discursive institutionalism as a separate one. Despite the differences among them, they share the core theoretical assumption that institutions pattern politics.

Institutional approaches have been recently criticized for failing to specify the mechanism through which institutions affect outcomes in specific policies as they often neglect policy-level variables. Dente et al. (2011: 14) argue that institutionalist approaches should specify "the causal chain linking the institutional level variables and the policy

outcomes, necessarily passing through the behaviour of policy actors. Otherwise the correspondence between given institutional setting and a given policy outcome – does not matter how frequent it is – does not provide a true explanation but is indeed a theoretical conjecture without theoretical foundations".

Therefore, below I link the political-institutional context as described above to the policy-specific variables determining preference formation in asylum policy identified in the previous section including responsiveness and preferences for change as opposed to maintaining the status quo.

I expect that simple polities would be more responsive to changes in the number of asylum seekers, shifts in party ideology (e.g. if a new government comes to power) or public opinion because of their higher capacity for introducing changes. In contrast, I expect compound polities to respond less quickly to such shifts.

Given the lower capacities for change in compound polities, reforms tend to have long-lasting effects. When presented with an opportunity to introduce a difficult reform, actors usually attempt to conduct it comprehensively even if, following negotiations, some compromises have to be made. Therefore, one can expect that in compound polities, changes in response to EU developments would be, hard to bring about but durable and difficult to unravel. Conversely, I expect that in simple polities, changes will be easy to introduce but subject to frequent revisions.

One way through which the EU policy could contribute to brining about domestic change is the strategy of two-level games. According to Putnam (1988) in international negotiations governments play a two-level game simultaneously. According to him:

> "at the national level, domestic groups pursue their interests by pressuring the government to adopt domestic policies, and politicians seek power by constructing coalitions among these groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures,

> while minimizing the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision-makers" (Putnam, 1988: 434).

At the EU level, governments have to negotiate with their counterparts from other EU governments (Level I) and seek to achieve approval domestically (Level II). Crucial to the success of the governments involved in such games is the size of the win-set, that is, the set of all Level I agreements which could win, i.e. gain majority among the constituents (Putnam, 1998: 437). Domestic constraints such as strict ratification procedures tend to reduce the win-set but may confer an advantage to the negotiator during Level I negotiations by allowing them to refer to these constraints in order to achieve concessions.

A two-level games approach has already been applied to asylum policy (Vink, 2001, Thielemann 2003, Menz 2011, Bendel et al. 2011) but I seek to extend it further by studying how it applies in different institutional contexts. In particular, I argue that compound polities are likely to use two-level games to facilitate domestic asylum policy change but I do not expect that governments in simple polities would make use of them.

This does not mean, however, that governments in simple polities do not make use of "Europe" in order to provide additional normative legitimacy to the changes they want to introduce. The choice of justification will depend on whether the actors can rely on high level of popularity of the EU domestically (Stiller, 2006). In countries where European integration is generally seen as something positive, there is less fear of EU imposing rules and governments can "play the EU card". In contrast, in countries where the EU does not enjoy high levels of popular support, governments are more likely to downplay the importance of the EU and emphasize the national origins of the change or to point to the practice in other (EU) countries.

Schmidt (2004, 2006) emphasizes the role of discourse in bringing about policy change and how each type of polity privileges a certain type of discourse. Simple polities tend to

have an elaborate *communicative discourse* focused on persuading the general public of the necessity to conduct reforms. Compound polities have an elaborate *coordinative discourse* focused on reaching agreement among the actors involved in policy formulation (Schmidt, 2004). Schmidt uses the term discourse to encompass "both the policy ideas that speaks to the soundness and appropriateness of policy programmes and the interactive processes of policy formulation and communication that serve to generate and disseminate those policy ideas" (Schmidt and Radaelli, 2004: 193).

Since simple polities have to rely on communicative discourse to convince the general public, it follows that the governments in such countries would be more sensitive to the level of EU popularity in their countries when deciding how to justify changes. Due to the importance of communicative discourse and the lack of veto players, governments in simple polities will also tend to be more sensitive towards the role of public opinion than those in compound ones. For the latter, public opinion is only one factor to be taken into consideration, among many others.

On the basis of the considerations outlined above, I summarize the expectations regarding simple and compound polities and domestic change.

	Responsiveness to changes in numbers, party ideology, public opinion	**Stability and frequency of reforms**	**Mechanism of EU impact**	**Preferences likely to reflect public opinion**	**Preferences likely to be influenced by party ideology**
Simple Polity	high	frequent and unstable	additional normative legitimacy by reference to practices in other countries	Very likely, especially if issue is salient	More likely if issue salience is low
Compound Polity	low	rare and stable	two-level games	Not likely, unless issue salience very high	Very likely
	Indicator: policy change following increase in number of asylum seekers, government change, public opinion	*Indicator*: changes in policy and how often new ones are introduced	*Indicator*: references to practices in other countries in documents and debates evidence of two-level games	*Indicator*: congruence between preferences and public opinion	*Indicator*: congruence between preferences and party ideology

Table 1: Political-Institutional Context

I have argued that the impact of EU on national asylum policy depends on the state preferences mediated by political-institutional context and introduced expectations regarding preferences and domestic change. I have also suggested a number of concrete mechanisms through which EU policy is used domestically to facilitate change.

I have suggested that preferences connect the uploading and downloading processes, ultimately shaping domestic impact of EU asylum policy.

I argue that governments try to shape policies at the EU level in accordance with their preferences which reflect their desire to change or retain domestic policies; when

downloading, they selectively implement EU legislation in a way that reflects these preferences which leads sometimes to over-implementing certain aspects while not implementing or incorrectly implementing those elements that contradict these preferences.

By taking the issue of domestic preferences seriously, we arrive at a broader understanding of when and how EU matters as it becomes possible to account also for cases where broad changes were enacted at the domestic level even in the presence of a large misfit between existing domestic policies and institutions and EU level ones. Moreover, such conceptualization prevents us from drawing the incorrect conclusion that given the absence of domestic adaptation, EU-level cooperation had no influence; there could be cases where the government successfully transferred its preferences at the EU level thus strengthening its position vis-a-vis domestic actors demanding changes.

There are a number of ways in which EU cooperation could help the government realise its preferences. Concerning uploading, where the government is satisfied with domestic policy, it may seek to institute this policy at the EU level in order to signal a "credible commitment" and commit other governments to adopting this policy. The government may also be unable to make use of existing policy due to lack of cooperation from other governments or their policies' negative externalities, leading again to efforts to seek to upload its existing policy.

Conversely, if the government wants to bring about domestic change, EU policy may provide additional legitimacy to its proposals. In such cases, the policy must of course either be proposed at the EU level, in which case the government would simply support it, or be uploaded there by the government itself.

At the same time, EU level cooperation may present a challenge to the government. If it is satisfied with a given domestic policy but proposed EU legislation challenges it, the government would seek to upload it preferred policy or seek sufficient flexibility in order

not to have to introduce domestic changes.

At the EU level, governments seek to upload or support policies in line with their domestically-shaped preferences and resist those which contradict them or at least seek flexibility allowing them to maintain existing policies. If the government prefers maintaining the status quo domestically, it would seek to upload or support policies which ensure it can be preserved and block those which would require domestic adaptation. If the government wants to introduce domestic change, it would seek to upload or support policies which are in line with this change.

When downloading, the EU level can again be used instrumentally. At the national level, states download EU policy selectively, in line with their domestically-shaped preferences, leading to over-implementing, under-implementing or not implementing certain provisions. If the government wants to introduce domestic reforms and EU policy offers such an opportunity, it would seek to selectively download policies, using the EU as an additional leverage to strengthen the legitimacy of the reforms and may even go beyond what EU policy requires. If, however, the government is satisfied with domestic status quo and the EU challenges it, it would seek to resist reforms and implement the minimum requirements or not implement policy. Finally, if the government prefers the status quo and EU policy allows the government to maintain it, as is often the case under flexibility clauses, the status quo would remain.

It should be acknowledged, of course, that the institutional set-up of EU cooperation in asylum policy has changed; while at the beginning cooperation was entirely driven by governments which were relatively unconstrained in bargaining over outcomes, in later stages of cooperation, the Commission used its shared right of legislative initiative to table legislation. This, of course, makes it more difficult for governments to upload "their" policies and thus, failing that, states demand flexibility, i.e. the possibility to derogate from

the provision in order to maintain domestic policy as described above. Flexibility has been a fundamental component of EU asylum and immigration cooperation, ensuring the accommodation of diverse Member State interests (Papagianni, 2006: 290). In such case, we could expect domestic policy to be maintained and, consequently, no change.

The expectations presented above start from the premise that the state preferences with regard to the status quo are known. I have already elaborated a mechanism to explain preference formation which will subsequently be examined in each case study. The causal mechanism, leading from preferences through EU level to domestic policy output is presented in the next chapter.

Below I explore how the analytical framework proposed here to examine the impact of EU asylum policy on domestic policy overcomes gaps in existing literature on the subject and advances the understanding of the interaction between the two.

So far, there has been relatively little systematic exploration of the interaction between EU and domestic asylum policy. Most explanations have focused on "venue-shopping" and the assumption of an almost automatic implementation of more restrictive asylum policies domestically, once they were agreed at EU level. Recently, these approaches, which were developed in order to explain emerging cooperation in the field of asylum policy, have been criticised for failing to provide an adequate explanation of recent liberalising aspects of asylum policy and for neglecting any other mechanisms of EU impact, apart from vertical ones. Concerning the former, Thielemann and El-Enany (2008) argue that contrary to the expectations of analytical approaches emphasising venue-shopping, European asylum policy has had positive (rights-enhancing), rather than negative (rights-restricting) effects. Similarly, Kaunert and Leonard (2011: 1) contend that various recent changes in asylum policy changes have rendered the "venue-shopping" model problematic because a thorough examination of the evolution of the policy "demonstrates that, overall, it has become more

liberal, and less restrictive, than had been envisaged by policy-makers and scholars".

The reliance solely on top-down explanations of asylum policy change has also been challenged. In study on immigration policy in the Netherlands, Vink (2002) shows that the Dutch government justified the need to introduce more restrictive policies with reference to those already adopted in Germany. Similarly, Guiraudon (2001) refers to "snowball effects" in which decisions taken in one country force neighbouring countries to reassess their policies. Such reassessment may result in lowering domestic standards due to fear of becoming a "magnet" for asylum seekers who have been deterred from neighbouring countries which introduced a more restrictive asylum policy.

Finally, a pre-condition for the success of a strategy whereby governments escape to Europe in order to justify restrictive domestic reforms through the necessity to bring national policies into line with European ones is the existence of a misfit. The limitations of the explanatory power of "goodness of fit" theories has already been discussed above. Moreover, given that initially asylum policy cooperation was based on conventions concerned with allocating responsibility for asylum seekers rather than substantial harmonization of asylum policy and on politically binding instruments, it would be difficult for the government to argue that the pressure to adapt domestic policies stemmed from legal obligations. I do not suggest that governments would not attempt to make such arguments but I do contend that they would not be sufficient to bring about change. Moreover, as it will be argued below, institutional constraints shape the government's ability and the necessity to make use of such arguments.

While deficiencies in the predominant explanatory model have been identified, so far little has been done to address them[13]. One of the few edited volumes focusing on the

[13] The theoretical approaches discussed here do not cover one specific mode of EU governance: conditionality. It refers to the requirement that candidate countries have to adopt EU legislation (*acquis*)

Europeanization of asylum and immigration policy and politics (Faist and Ette, 2007) provides important insights on the impact of Europeanization in various Member and candidate States. It concludes that the mode of Europeanization, that is, prescriptive or discursive (corresponding to the degree of coercion exerted by the EU in the form of binding or non-binding laws) is the major explanatory variable rather than the goodness of fit. According to their findings, discursive Europeanization has produced greater effects in old member states while the prescriptive mode resulted in more change in new member states. The approach adopted in that volume does not answer the important question of how each mode produced specific policy outputs and why.

A number of scholars have focused on assessing the impact of EU asylum policy on domestic policy by focusing on policy outcomes, i.e. on the number of asylum seekers and recognition rates and the extent to which there has been redistribution and/or convergence across the EU. Vink and Meijerink (2003) find an overall trend of decreasing disproportionality in the distribution of asylum applications in the EU for the period 1982-2001, suggesting that early instruments of asylum policy cooperation such as the Dublin and Schengen Conventions and the London Resolutions intended to ensure burden-sharing among EU Member States resulted in redistribution of asylum applications.

More recent studies have shown however, that the progressive harmonization of asylum policy has not resulted in convergence of the burden of applications. Hatton (2012) uses various measures to calculate the relative burden of each country: asylum applications

as a condition for their membership in the EU. The EU asylum *acquis* was an important element in the accession negotiations with Eastern and Central European countries. Conditionality is not a strategy which the EU can adopt towards Member States so it is not discussed here. Nevertheless, the approach I have proposed and employed here could also provide insights into the policies adopted by candidate countries. Challenging the dominance of conditionality's vertical explanatory mechanism for asylum policy changes in these countries, Byrne et al. state that "although adaptation of legislation was often motivated with a reference to the acquis [...] in national debates, the dire necessity to adapt domestic law there and then was rather a result of concrete sub-regional pressures" (2004: 361). The authors refer to a specific provision in Hungarian legislation which emulated German and Austrian practice "rather than the abstract and imprecise formulations of the acquis" (2004: 362). For an in-depth exploration of the adoption of EU asylum and immigration acquis see also Lavenex (1999), Grabbe (2000), Jileva (2002).

per capita and per GDP. He finds that from 1996-2000 to 2006-2010 the coefficient of variation of applications per capita increased from 1.08 to 1.43 and the coefficient of variation per unit of GDP increased from 0.84 to 1.62. He also registered some convergence within the EU-15 with the coefficient of variation decreasing from 1.15 to 0.89 in per capita terms and from 0.88 to 0.75 per unit of GDP. These results are consistent with the findings of Bovens et al. (2012) who look at applications in the period between 1999-2009 also find that while responsibility-sharing over applications oscillates strongly, there is an overall trend towards greater inequality.

Somewhat paradoxically, one of the reasons behind the lack of convergence in the countries' share of asylum seekers may be policy harmonization. The goal of policy harmonization is to reduce policy disparities among Member States in order to discourage secondary movements of asylum applicants among Member States. This strategy assumes, however, that policies determine asylum seekers' destination choice. Thielemann (2004) has shown that structural factors, such as the share of foreign nationals from the top five asylum countries residing in the destination country, unemployment rate and the country's liberal reputation are at least equally, and in some cases more important. Concerning policies, he finds that only two of those commonly associated with deterrence of asylum seekers: prohibition to work and below average recognition rates have an impact on reducing asylum applications; measures allowing states to return asylum seekers to safe third countries, reducing asylum seekers' freedom of movement and providing assistance in vouchers instead of cash have no significant impact. Neumeyer (2004) finds that existing communities of past asylum seekers are the most important variable determining the asylum seeker's destination choice, followed by country's income level, the share of right-wing populist parties, geographical proximity, language ties, colonial links, Schengen membership, recognition rates and GDP growth.

Thielemann (2004) suggests that given the importance of structural factors guiding asylum seekers' choice of destination, policy harmonization will not only leave inequalities in terms of relative burden intact but will also undermine burden-sharing by reducing the states' ability to make unilateral decisions on the relative restrictiveness or openness of their asylum policies.

These findings are in line with those of Hatton (2009) who also finds that policies on access to the territory and on the toughness of asylum processing had significant deterrent effects on applications while policies on reception conditions did not. He also shows that while tightening asylum policy contributed to a fall and convergence in the overall number of applications, in terms of applications per capita, divergence among 11 EU countries increased between 2001-2006 and argues that in the absence of policy change divergence would have been much smaller.

In addition to the question of the impact of asylum policy harmonization on the number of applications, scholars have also explored the issue of the relationship between asylum applications and recognition rates. Vink and Meijerink (2003) demonstrate that there is a negative correlation between the relative number of asylum applications and recognition rates, suggesting that countries are able to deter asylum applicants by introducing restrictive policies.

Neumayer (2005) finds that refugee recognition rates are lower in times of high unemployment in destination countries and when many asylum seekers from the same country of origin have applied in the past. He also shows that there has been a lack of convergence in recognition rates across Western European countries between 1980 and 1999, demonstrating that recognition rates vary also in line with political oppression, human rights violations, inter-state armed conflict and events of genocide and politicide in countries of origin.

As mentioned above, all these studies focus on asylum policy outcomes, not on policy outputs. David Easton (1965: 361) introduced the distinction between the two stating that "outputs produced by the authorities include the biding decisions, their implementing actions and […] certain associated kinds of behaviour". Outcomes, on the other hand, were seen as "all the consequences that flow from […] the outputs of the system." In asylum policy, the policy outputs should be conceived of in terms of the laws and policies comprising the regulation asylum and refugee policy, whereas policy outcomes would be the consequences of these policies such as asylum applications and recognition rates. Potentially, outcomes do result from outputs, and more importantly, expected outcomes may motivate the adoption of specific outputs. However, as some of the studies cited above have shown, the link between policies and outcomes may sometimes be tenuous, with human agency (asylum seekers' choices) and the situation in the countries of origin affecting outcomes and limiting states' capacity to control asylum flows.

While examining policy outcomes is an important part of understanding asylum policy, it is also necessary to explore policy outputs as they do – or are at least intended to have – an impact on outcomes and are the main instrument which governments have in order to maintain the appearance that the admission of asylum seekers and refugees is orderly and controlled (Gibney, 2004). Moreover, if it can be shown that differences in policy output persist despite the efforts to establish a common European asylum system, this could also at least partially account for the lack of convergence in asylum applications across the EU noted by studies focusing on policy outcomes which have so far offered only limited explanations of this phenomenon.

The approach presented here, which contends that government preferences determine the impact of EU on domestic asylum policy, is able to address the limitations of previous accounts.

2.4. Other actors in asylum policy

Before discussing the case selection and the methodology, I would like to address potential criticisms to the theoretical framework proposed above.

Any account of the impact of EU policy on domestic policy which focuses primarily on state preferences may be seen as painting an inaccurate picture of the EU which privileges intergovernmental actors at the expense of supranational ones. I have already argued above why, in the field of asylum policy for the period under consideration, the role of supranational actors was limited. Undoubtedly, once the Commission was given the shared right of legislative initiative following the Treaty of Amsterdam, its institutional capacity was strengthened. The Amsterdam Treaty had already affirmed the commitment to establish minimum standards on the treatment of asylum seekers and the Commission tabled its proposals for the content of these standards. I have taken this agenda-setting role into account and specified how governments develop preferences vis-a-vis the Commission's proposal.

It is also worth noting, however, that the Commission usually does not develop its proposals in vacuum; it consults widely before drafting them. Thus, it is aware of the position of other supranational actors or national governments. The latter, using their shared right of initiative may also seek to bring forward their proposals before the Commission publishes its own.

With the limited involvement of the European Parliament and under the conditions of unanimity in the Council of Ministers, the Commission's influence was constrained by what governments wanted and were prepared to agree on. Once the Commission gained the right to sole legislative initiative, the EP was given co-decision powers and the Council moved to QMV as opposed to unanimity, this undoubtedly influenced the policy-making

process and changed the balance of the importance of the preferences of each actor. Explaining developments in asylum policy and their impact on domestic policy which occurred after these new arrangements entered into force in 2005 would require a theoretical model which takes the consequences of these arrangements into account. However, the model presented here places an emphasis on the role of governments in accordance with the institutional context in which the content of EU asylum policy studied here was developed.

In addition to the EU Commission and the European Parliament, another supranational actor, namely the European Court of Justice, is also a potentially important player whose role, however, has not been made explicit in the proposed theoretical framework. Again, this omission is justified on the grounds of the court's limited powers and relevance for asylum policy during the first phase of the creation of the Area of Security, Freedom and Justice. It is only following the deadline for the implementation of the directives adopted[14] and the entry into force of the Lisbon Treaty which allowed lower courts to send requests for preliminary rulings directly to the ECJ that the court has taken a more active role in interpreting EU asylum law.

In addition to its role in interpreting EU law, the ECJ could also play a role in the process of Europeanization by ruling against a Member State which fails to transpose certain legislative instruments by the given deadline or transposes them incorrectly. In some cases, even the threat by the Commission to bring the state to ECJ is sufficient to trigger swift implementation measures. While such measures by the Commission may explain the timing of reforms, the Member State would still have to decide on the content of the measures which, as argued above, would be determined by the state's preferences.

[14] The respective deadlines for implementation of each directive were: Reception Conditions Directive: 2005, Qualification Directive: 2006 and Asylum Procedures Directive:2007

In addition to ECJ, there is another court which has been increasingly relevant for the protection of refugees, namely the European Court of Human Rights (ECtHR). While the ECtHR is not an EU institution, it has made a number of important judgements which found states' practices to be inconsistent with their obligations under the European Convention of Human Rights[15]. While the court's rulings are binding only on the state against which they were issued, they are taken into consideration by other states facing similar issues which prefer to adjust their domestic practices instead of facing prolonged litigation at the court. A judgement by the ECtHR may exert pressure on government to change their existing policies. However, the content of the changes would again be determined to a large extent by the process of preference formation[16].

Should any development induced by a decision from the ECtHR be considered as Europeanization? The answer depends on the meaning of the term. Some scholars have suggested that Europeanization is not limited to the impact of the EU; while others have cautioned against such concept-stretching (Radaelli, 2000). Since the question that this thesis addresses is the impact of the EU on domestic policy, it only focuses on the ECHR and ECtHR's judgements to the extent in which they have consequences for EU-related aspects of asylum policy, i.e. to provisions which are also part of EU legislation. Such limitation is necessary in order to ensure that the impact of EU integration – as opposed to other regional integration initiatives – can be investigated.

The role of domestic courts for the expansion of the rights of immigrants and asylum

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15 The Convention for the Protection of Human Rights and Fundamental Freedoms, more widely known as the European Convention on Human Rights (ECHR) was adopted by the Council of Europe in 1950 and entered into force in 1953. It has been ratified by the 47 Member States in the Council of Europe. Currently, there are negotiations between the EU and the Council of Europe on the EU's accession to the Convention.

16 Implementing a judgement by the ECtHR is a complex process which involves legal and political elements. I do not suggest that governments are completely free to implement any decision as they see fit: obviously certain legal constraints apply. Nevertheless, they enjoy a sufficient – if ever shrinking – room for manoeuvre.

seekers has been well documented. Courts have used their powers based on domestic and international law to balance some restrictive tendencies among governments. The extent to which courts have provided such balance depends on many factors, including the legal system and the balance of powers between the executive, legislative and judiciary as well as whether the country has a common or civil law judicial system. While they are not the focus of this dissertation, those landmark judgements that have challenged current government policy have been taken into consideration.

3. Methodology

The main question addressed in this dissertation is the conceptualization of the impact of EU policy on domestic asylum policy, i.e. explaining when and how the EU matters for domestic policy output. The preceding chapter identified the proposed mechanism through which this impact may be conceptualised, i.e. governments form their preferences on maintaining the status quo or seeking policy change domestically, negotiate at the EU level accordingly, blocking or adopting specific provisions and implement policies in line with these preferences. What is the most appropriate method to study the proposed mechanism?

Social sciences have recently seen an increase in the interest in causal mechanisms and their ability to serve as a second basis for causal inference in addition to covariance, which is often employed to test the causal effects of a variable, mostly in quantitative studies (George and Bennett 2005; Bennett 2008; Bennett and Checkel 2011; for a contrasting view on the difference between causal effects and causal mechanisms see Gehring 2007, 2010). As George and Bennett (2005) explain, tests of covariation between observed outcome variables and hypothesized causal variables, focus on estimating the causal effects of variables. The causal effect of an explanatory variable can be defined as "the change in the probability and/or value of the dependent variable that would have occurred if the explanatory variable had assumed a different value" (Bennett, 1997: 17). This is a counter-factual conditionality as it focuses on what would have happened if one variable had been different while they others had stayed the same (King, Keohane, Verba, 1994). However, it impossible to observe both outcomes at the same time, leading to what has been termed the fundamental problem of causal inference (Holland, 1986). Large-N studies, relying on quantitative methods make a number of assumptions and use control

variables to overcome this problem while qualitative ones often rely on careful case selection.

Regardless of the use of qualitative or quantitative methods, however, while covariance may shed light on whether X causes Y, it is of limited use if one wishes to specify how X influences Y. In order to explain the latter, we need to specify the causal mechanism, i.e. "the causal processes and intervening variables through which causal or explanatory variables produce causal effects" (Bennett, 1997: 18). Put simply, causal mechanisms are concerned with the pathway or process through which outcomes are produced.

This distinction between causal effects and causal mechanisms has prompted a methodological debate regarding which one should be considered ontologically prior, or at least more important for demonstrating causality. King, Keohane and Verba (2001: 85-86) prioritise causal effects by stating that they are "logically prior to the identification of causal mechanisms" while Yee (1996: 84) maintains that causal mechanisms are ontologically prior to causal effects. Brady (2004: 58) argues that resolving the issue is not something to be regarded as very important while Bennett also dismisses the controversy by stating that "causality involves both causal effects and causal mechanisms and its study requires a diversity of methods, some of which are better adapted to the former and some to the latter" (Bennett, 1997: 25).

Thus, the choice whether to study causal effects or causal mechanisms should be determined by the question that the researcher wishes to explore. As the goal of this dissertation is to explain how EU policy influences domestic policy, I focus on studying the causal mechanism.

There is a broad consensus that the appropriate method for studying causal mechanisms is process tracing (George and Bennett, 2005; Bennett and Checkel 2011;

Rohlfing 2012). Process tracing has been defined as a method which "attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable" (George and Bennett, 2005: 206).

Process tracing is compatible with rational choice and has frequently been used within rational choice frameworks to construct detailed historical case studies or analytical narratives (e.g. Moravcsik 1998).

Process-tracing involves generating and analysing data on the causal mechanisms, or processes, events, actions, expectations, and other intervening variables, that link putative causes to observed effects (George and Bennett, 2005). It seeks to explain more completely a given phenomena by identifying the causal mechanism which generated the outcome at hand (Checkel 2005: 17; Mayntz 2004: 238). It is particularly useful in cases where the researcher seeks to explain phenomena characterized by multiple causal interactions (or complex causality), making it difficult to isolate a few number of variables independent of each other (George & Bennett 2005: 13, 206, 212).

When used to test a theory, process tracing involves the explicit tracing of causal mechanisms in a single case. What is being traced is not a series of empirical events, but the underlying theorized causal mechanism itself by observing whether the expected case-specific manifestations of its existence are present or not in a case. Identifying a mechanism entails clearly specifying the causal chain which links the output to a given initial condition (input) (Mayntz 2004: 241). Mechanisms can have linear and non-linear structures, and even involve repetitions of the same elements, or feedback loops (Mayntz 2004: 242).

In this respect, process tracing differs from historical narrative (Büthe, 2002; Rubach, 2010). The detailed narrative is turned into an "*analytical* causal explanation couched in explicit theoretical forms" (George and Bennett 2005: 211).

Process-tracing is usually used for within case analysis, making generalizations to whether the mechanism functioned as theorized in this particular case. However, it can also be used in cross-case analysis, tracing the process in each case individually but drawing them together in a common theoretical framework (George and Bennett 1997; 2005).

The precise causal mechanism this study investigates is presented below:

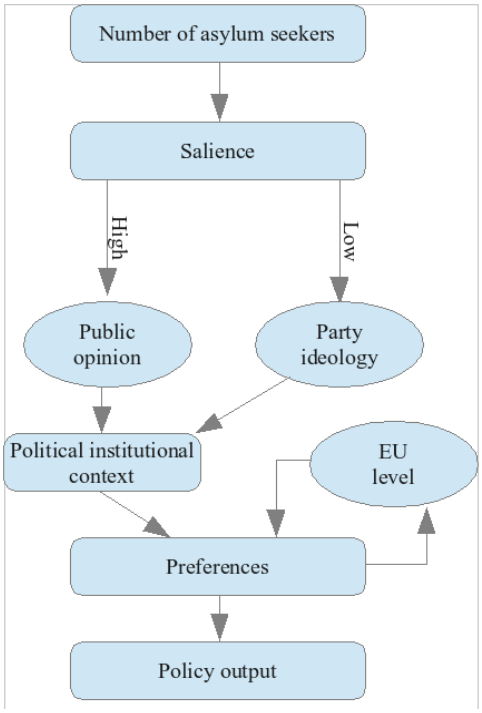

Figure 1: Causal Mechanism

According to the proposed mechanism, governments assess the status quo and the need for change in asylum policy on the basis of the number of asylum seekers, depending on issue salience. If salience is low, governments are likely to react on the basis of party-political ideology while if it is high, they are more likely to see it through public opinion. These considerations are then filtered through political-institutional context, leading to the formation of government preferences with regard to maintaining the status quo or introducing reforms. Governments then upload and download EU policies in line with these

preferences, shaping domestic policy output.

I trace the impact of EU asylum policy on domestic asylum policy in Germany and the UK. Although a number of Europeanization scholars have raised criticism against the predominant focus of studies on "big" member states, the choice of Germany and the UK for this study is nevertheless justified.

Apart from their institutional structure, the countries are very similar with regard to the number of asylum seekers, recognition rates, population size, and GDP: factors which have been demonstrated in the literature to affect asylum policy. They are liberal democratic states, signatories of Geneva Convention and European Convention on Human Rights and have a tradition of providing protection. Both countries experienced large-scale immigration (although for different historical reasons and with surges in different periods) which has put pressure on public services and shaped attitudes. Both countries witnessed an increase in the number of asylum seekers following the end of the Cold War.

Where the countries differ is their institutional structure. Germany's federal system and proportional electoral system (compound polity) contrasts with the UK's unitary one and majoritarian electoral system (simple polity) and thus makes a good case for studying the impact of institutional, partisan and other veto players. In the course of the negotiation and implementation of the directives, Germany has been governed by different coalitions: FDP/CDU, SPD/Green party, and finally, a grand coalition between SPD and CDU which allows the researcher to trace whether the change of government had any impact on preferences and just influenced the EU impact on domestic policy. In contrast, the UK has been governed by Conservative and Labour single-party governments, i.e. it constitutes a case where there were no partisan veto players.

In addition, both countries were undergoing domestic reforms in parallel to the EU level negotiations and thus by studying them it is possible to identify the interaction

between the two levels.

The countries also held different positions with regard to the development of asylum policy: Germany was initially an enthusiastic supporter of EU cooperation and even changed its constitution in order to comply with EU non-binding legislation of 1992 but in 2001-2005, when legally-binding directives were negotiated, it continuously stalled the negotiations. The UK had the opposite experience: from a reluctant participant at the early stages usually attributed to its unwillingness to surrender any powers to the EU, it became one of the staunchest supporters of the efforts to build common EU asylum policy. Both countries have undergone substantive transformations which are puzzling and deserve to be explored in depth.

One might argue that by focusing on the two 'big' countries the study creates a selection bias as due to their size and voting power, Germany and the UK might have a greater ability to influence the negotiations and upload their policies. However, during the period of study the decisions were taken by unanimity which ensures that even small countries had the opportunity to block the adoption of provisions which ran against their preferences.

The choice of the legislative instruments studied was guided by a number of considerations. The first one was the need to contrast the impact of legally binding and non-binding measures so as to investigate whether the presence of strong governmental preferences plays a more significant role than the nature of the measures themselves. In addition, in order to demonstrate the recursive nature of uploading and downloading over time, a case from the initial stages of EU asylum cooperation had to be selected. The so-called London Resolutions adopted in November 1992 provided the basis for many of the current principles on which the subsequent Common European Asylum System was built. Even though they comprise two resolutions and one conclusion, it is reasonable to treat

them as a whole since the principles of safe countries and 'unfounded' applications they establish are closely linked and the documents refer to each other. These measures are briefly discussed below.

The *Resolution on manifestly unfounded applications for asylum* introduced a common streamlining tool in national examination procedures. It provided a definition of an unfounded claim: if the applicant's fear of persecution lacks substance, for example, if it is not based on Geneva Convention grounds or he used deceptive documents to access the asylum procedure. It established the possibility of an accelerated procedure in such cases under which the asylum seekers' right to appeal was restricted.

The *Resolution on harmonized approach to questions concerning host third countries* tried to generalize the principle of 'country of first asylum' or 'safe third country'. The term 'host third country' was chosen to differentiate it from 'safe country of origin'. It specified criteria according to which a country may be designated as 'safe': one where life and freedom are not threatened. It should also offer protection guarantees against *refoulement*, i.e. the return of the applicant to a state where he can be persecuted[17]. Furthermore, it provides the possibility that the request of an applicant, who has been granted protection from such state or had the opportunity to seek refuge there may not be examined.

Finally, the *Conclusions concerning countries in which there is generally no serious risk of persecution* were designed in order to designate safe countries of origin. Applicants originating from such countries could have their claims examined through an accelerated procedure and had to provide evidence to counter the prima facie assumption that their

[17] The non-refoulement obligation is enshrined in Article 33 of the 1951 Geneva Convention which states that No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

claim is unfounded.

The second case under investigation is *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* which was aimed at harmonizing the conditions granted to asylum seekers including access to accommodation, welfare, healthcare, education and legal assistance. Germany was satisfied with the reception conditions it was providing and ensured that even its most restrictive domestic practices would not be jeopardised by the Directive while the UK asked for a re-opening of the negotiations in order to ensure that the Directive complied with stringent reforms which it had just introduced domestically.

The third case discussed here is *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (*Qualification Directive*). The purpose of the directive was two-fold. First, it aimed at harmonizing the interpretation of the Geneva Convention with regard to who qualifies as a refugee as well as arriving at a common definition of grounds for subsidiary protection (protection given on humanitarian grounds to people who do not qualify as refugees according to the Geneva Convention but may be exposed to a risk of serious harm if returned to their country of origin). Second, it aimed at harmonizing the rights granted to beneficiaries of international protection. In the course of the negotiations, Germany blocked the expansion of the grounds on which persecution is recognized to include non-state actors and to the granting of the same rights to both refugees and beneficiaries of subsidiary protection and managed to obtain a special clause which allowed it to maintain the distinction of the rights granted to refugees and to beneficiaries of subsidiary protection. The UK, however, from the very beginning insisted on equal treatment of the two groups and, consequently, did not make use of this provision even

though it would have allowed it to lower its standards of protection: something many NGOs feared would happen due to the introduction of such flexibility clauses.

The last case selected is the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive)* which directly relates to the London Resolutions as it also discusses the criteria for designating countries of origin or transit as safe as well as the procedures for dealing with applications from such countries but it is legally binding and the time lag between its adoption and the London Resolutions allows for investigating the consequences of the implementation experience with the London Resolutions and how this affected Member States preferences towards the Directive. In particular, it is a good case to illustrate and explain Germany's puzzling stance: during the negotiations of the London Resolutions, the country was a strong proponent of EU cooperation and even changed its constitution in order to comply with the Resolutions while its behaviour during the negotiations of the Procedures Directive was one of a "laggard" (Hellmann, 2006). It demanded a number of concessions aimed at preserving its domestic policy for determining which country was to be regarded as safe. The UK, which had been much less enthusiastic about asylum policy cooperation in the 1990s turned to be one of the countries most interested in the adoption of the Directive.

The three Directives were also chosen due to their importance in the process of building a Common European Asylum System. They constitute three out of the four basic instruments on which the system is based. The last one is the *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*. This technical regulation, unlike Directives, is directly applicable and does not grant Member States flexibility in the implementation

process. Its implications for domestic policy, however, have been considered.

In line with suggestions made by Radaelli (2003) and Haverland (2007), this study adopts a bottom-up research design which starts at the domestic level, analyses if and how the EU provided for a change of any component of the domestic structure of interaction, and then assesses whether it led to actual domestic change. This makes it possible to trace the precise influence of the EU on domestic policy.

The governments' preferences have been deduced from a number of primary sources including parliamentary debates, speeches, newspapers and EU documents from the negotiation stages. These have been supplemented by interviews with civil servants from the permanent representations, the Commission, the European Parliament and the Council involved in the policy formulation, negotiation and implementation phase. Shorter interviews were held also with legal practitioners and NGO representatives from the Scottish Refugee Council and the European Council on Refugees and Exiles (ECRE), and Frontex. The researcher spent a six-month research period in Brussels at ECRE where she had the opportunity to attend a number of conferences and meetings on asylum policy.

Interviews were primarily utilised when there was a need to clarify issues which are not evident from the documents or to provide the researcher with sufficient background to understand the position and importance of various actors, the interrelationships among them and the decision-making process; the main emphasis was on primary sources as identified above. This has been relatively unproblematic due to the availability of the Council's minutes from all preparatory meetings on the three directives. The primary sources on the legal instruments adopted in 1980s-1990s were considerably more limited and therefore the chapter investigating their impact relies primarily on secondary sources to reconstruct decision-making especially at the EU level. At the national level, parliamentary debates

were available and have been studied.

The choice to focus primarily on parliamentary debates and minutes has been guided by a number of considerations. First, it was important to ensure consistency among the data sources in order to allow for comparisons across all cases throughout the seventeen years' period studied. At the national level, I have focused on minutes from parliamentary debates which, despite covering only a limited part of the domestic political system, provide "potentially solid ground for empirical research on disentangling the European and national systems that influence a politically contested issue like immigration policy" (Vink, 2010: 42). As I am investigating both the process of preference formation and implementation, a focus on the policy debates in the parliament, before, during and after the negotiation of the directives and domestic reforms has the potential to reveal wider societal debates as Members of Parliament voice the concerns of their constituents (Vink 2010). Moreover, it also allows the researcher to trace possible inter- and intraparty differences.

The focus on parliamentary debates, despite having the advantages outlines above also poses questions for the reliability and validity of the findings. Concerning reliability, one major advantage of parliamentary debates is that the records are easily accessible electronically, making the results easier to replicate. Such an understanding of reliability as the extent to which the findings can be replicated is of course more applicable to quantitative research; in qualitative research reliability is usually seen as dependability or consistency (Lincoln and Guba 1985), i.e. whether the results are consistent with the data collected. Although minutes possibly pose fewer questions to reliability than interviews (see below), they are not necessarily unproblematic. Politicians may have an incentive to downplay or overemphasize the importance of the EU, depending on their objectives or to misrepresent the extent to which they attach particular significance to, for example, responding to the demands of the public. Unfortunately, there is no alternative way of

establishing preferences other than referring them from the actors' earlier rhetoric and action and using them to explain subsequent behaviour (George and Bennett, 2005). Nevertheless, reliability may be increased if the actors engage in costly signalling, rhetoric or actions that impose high political or material costs if preferences are not consistent with these statements or acts. Thus, in view of the fact that costly signialling is more likely to occur if the actor in question is making a public statement, rather than in an interview with a researcher, focusing on parliamentary debates has the potential to yield more reliable indications of preferences. Moreover, given that the study is looking at the large time period, it is unlikely that a few instances of downplaying or overemphasizing the role of the EU or the importance of party ideology or public concerns would significantly affect the findings.

Concerning the debates at the EU level, most sources are documents from the proceedings of the Asylum Working Party, the Strategic Committee on Asylum, Immigration and Frontiers, Justice and Home Affairs Council's Minutes and Council Presidency's notes to Member State delegations and press releases following summit meetings. Each document produced has been studied from the beginning of the negotiations until the final adoption of the respective legislative instrument. It is essential to include the minutes from the negotiations below the ministerial level given their enormous significance for the final outcome (Hayes-Renshaw and Wallace, 2006). These have been supplemented by documents produced by the Commission (consultation papers, legislative proposals: both initial and recast) as well as the European Parliament and proposals by national governments.

Council documents are a reliable and inter-subjectively verifiable source of information on the negotiation process (Aus, 2006). Their importance is highlighted by the fact that they are not publicly accessible before the negotiations are completed and, in some

cases, even after the end of negotiations, some documents remain only partially accessible. Although they have some advantages compared to interviews, they are not immune to criticism. The outcome of proceedings is supposed to be a neutral and accurate summary of the discussions but nevertheless the way the national positions are presented "can have a positive or negative impact on the negotiating position of the Member State concerned" (Papagianni 2006: 226). For example, a detailed explanation of the position of one Member State could help elucidate a stance which the negotiator was unable or unwilling to express orally, forcing the Member State to express a preference which it may or may not have had. Moreover, casting the position of a Member State as an isolated one, and highlighting how it blocks compromise and progress may put pressure on the Member State to adopt a particular position. In addition, a Member State may put a reservation to a Directive not because it is against a specific provision but because it is seeking to gain some political capital domestically by showing that it is protecting the national interest.

Although there is no universal solution to this potential difference between actual and revealed preferences as explained above, triangulation[18] could be used to mitigate some of the methodological problems. Data triangulation refers to the use of different data sources and I have relied on national newspapers, Agence Europe and notes from NGOs[19] summarizing the outcome of negotiations. National newspapers were searched for a period of three days before and after Justice and Home Affairs Council meetings (both formal and informal) and for the same period preceding and following an EU summit.

In addition, since the research focused both at the national and the EU level, I was able to detect whether there was any discrepancy between the position taken at the EU level

[18] Denzin (1989) develops the concept of triangulation, distinguishing between data, investigator, theory and methodological triangulation.

[19] I acquired access to these documents during my internship at ECRE. They contain summaries of the discussions of each directive and were prepared by NGO representatives who relied on information from insiders to the negotiation process. I have only used these notes to check the consistency of the state's position against the records produced by the Council.

and the one presented domestically. Looking at the content of the directive allowed me to examine whether claims by national governments that the adoption of certain provisions was mandatory under EU law; conversely, as I have also studied the institutional structure and relationships among actors domestically, I was also able to determine the extent to which domestic constraints highlighted in EU negotiations by Member States were actually present.

As explained above, I have relied on interviews[20] to elucidate aspects of the decision-making process which could not be understood from the documents. The strategy of relying on less on interviews compared to written sources is in line with the recommendation of Seldon and Pappworth who state that "[i]nterviews are usually best confined to those areas where primary written evidence is either unavailable […] or non-existent" (1983: 57). In addition, there are a number of methodological and practical reasons behind this choice. One of the main advantages of interviews is the possibility to obtain information which is unavailable from other sources, especially concerning decisions or interactions which took place informally and for which there is no paper trail. At the same time, elite interviews also raise issues of reliability and validity (Berry 2002). In particular, elites are prone to exaggerating or minimising their own role or presenting the process depending on the political capital to be gained in case of politicians and on the expectations about their role, in case of civil servants (Tansay 2007). George and Bennett (2005) remark that policy-makers may present a particular account of events in order to portray a "careful, multi-dimensioned process of policy-making" to the public. Fitz and Halpin (1994) found that their interpretation of events was influenced by the coherent arguments put forward by skilled elite interviewees.

Another problem with interviews arises from the very nature of elite interviews and

[20] See Appendix B

the power relationships embedded in them (Ball 1994). According to Walford (2012), political interviews in themselves are quite political. In this case, the political nature of the interview and the power relationship was enhanced by the position of the researcher who was also affiliated with the European Council on Refugees and Exiles. On the one hand, this role which was helpful in gaining access to interviewees but possibly made them more unwilling to share information on the highly sensitive topic of asylum policy as, despite reassurances, they could not be completely certain that the information would not be used for the purposes of the organization.

In addition to the methodological considerations outlined above, the researcher faced a number of practical concerns. The research investigates a long time period and focuses on legislative measures which had been adopted more than fifteen years ago. Even the latest measure considered here had been adopted in 2005, three years before the start of the research. In the course of the interviews, respondents claimed that the time lapse may lead to incomplete or inaccurate information, further limiting the usefulness of further interviews (Tansay, 2007).

In addition, there are practical difficulties in securing interviews with civil servants at the EU institutions as they tend to move to different roles after a few years. Similar problems occur when trying to trace politicians or civil servants at the national level. In order to ensure comparability, interviews would have had to be conducted with politicians and civil servants in Brussels, London and Berlin, analyzed and then triangulated with the data from the sources identified above. Given the limited added value of interviews due to the concerns mentioned, I decided to focus on parliamentary debates and minutes from Council meetings and attempted to mitigate some of the inevitable disadvantages resulting from choosing these primary sources. While I do not deny that interviews would have strengthened the study, I argue that their absence does not substantially detract from the

robustness of the findings.

I measure the salience of asylum and immigration issues in the media and among the public. Concerning media, I have used references to asylum issues in newspaper articles: a fairly standard way of measuring political salience (Baumgartner & Jones, 1993: 252-268; Givens & Luedtke, 2004: 150). In particular, I have chosen three newspapers in each country, taking into account their political allegiance. In the UK, I have focused on The Guardian (left-leaning newspaper), The Times (right-leaning until 2001 when it supported Labour), The Daily Mail (tabloid newspaper, traditionally right-leaning but supported Labour in 2001 and for a brief period after that) switched support back to the Conservatives in 2005. It would have been preferable to use the Daily Telegraph, a consistently right-leaning newspaper, but this was not possible due to the lack of searchable archives encompassing the entire period under study either through the newspaper or in online databases.

In order to measure political salience of asylum in the media in Germany I have chosen to look at Sueddeutsche Zeitung (centre-left newspaper), Frankfurter Allgemeine Zeitung (centre-right newspaper) and Tageszeitung (left). Germany's biggest tabloid newspaper, Bild, does not have a searchable online archive covering the study period.

It was not possible to obtain access to all newspapers from 1990 until 2007 but at least one newspaper in each country was available throughout the entire period. Concerning Germany, data from Tageszeitung is available from 1990 while in the UK The Guardian and The Times are also available starting 1990. Sueddeutsche Zeitung and the Daily Mail are available from 1992 while Frankfurter Allgemeine Zeitung has been included in the measure from 1993.

Due to the different availability of archives, the newspapers were searched differently. German newspapers were searched using the newspapers' own archives while

the UK ones were searched through the database LexisNexis. In Germany, the search term 'Asyl' (asylum) was used and the same term in English was employed to search articles in UK newspapers. Only articles relevant to current debates in the asylum system in the country or in Europe have been included.

With regard to issue salience among the general population I have constructed my own measurement on the basis of opinion polls conducted by Ipsos MORI in the UK and Forschungsgruppe Wahlen in Germany. In the UK, every month Ipsos MORI asks respondents two questions: "What would you say is the most important issue facing Britain today?" and "What do you see as other important issues facing Britain today?" The combined answers to these questions are available for every month; I have constructed a yearly average for every year from 1990 to 2007. The data has some limitations, including the fact that the category covering asylum includes race relations and immigration but it still provides a good indicator of the importance of the issue to the general public, especially given that research has shown that the public often conflates the categories of immigrants and asylum seekers (Citrin 2008).

For Germany, aggregate raw data from Politbarometer has been used to construct a measurement for political salience, using the question: "What are the two most important problems facing Germany today?". In different years of the survey, the categories subsuming asylum seekers have included immigrants and foreigners. The wording of the question can also been regarded as problematic as it refers to a "problem", rather than an "issue". Nevertheless, it again gives an indication of the importance of the issue to the public.

Public opinion, which is a contested and difficult to define concept, has generally been understood as referring to the expressed attitudes and views of people on issues of public concern (Brooker & Schaefer, 2006). Kepplinger (2008: 192) maintains that as a

quantitative concept public opinion can be regarded as distribution of individual opinions within a population and can be measured by opinion polls, aiming to identify the majority opinion on issues. I have used data available from various opinion polls conducted at the national and European level to measure public opinion.

Concerning public opinion on asylum, in the UK I have used Ipsos/MORI opinion polls as well as British Social Attitudes Survey. In Germany, I have relied on Allbus Social Survey (Allgemeine Bevoelkerungsumfrage der Sozialwissenschaften) and Politbarometer. In addition, results from local elections and the performance of right-wing parties at these elections have been taken into consideration (Guiraudon 2003).

Parties' stances on asylum policy have been estimated by analayzing political manifestos of the major parties, supplemented by secondary sources. I have looked at party manifestos produced by major parties for each general election during the period under study. For Germany, the manifestos of SPD, CDU/CSU, FDP and the Green Party were considered in 1994, 1998, 2002 and 2005. In the UK, the manifestos of Labour and Conservatives in 1992, 1997, 2001, and 2005 were analyzed for references to asylum/immigration policy.

The statistics on the number of asylum seekers have been taken from the data provided by the United Nations High Commissioner for Refugees (UNHCR) in order to ensure comparability across countries. The numbers cited always refer to first applications. The statistics on recognition are based on data from UK Home Office and BAMF.

The thesis faced the practical problem of focusing on a number of legislative instruments consisting of numerous provisions. Although during the initial phase of the research and in the course of interviews it became clear that the studied countries had a specific preference on the majority of the provisions, ranging from clear opposition through amendments to acceptance, it would be impossible to provide a theoretical model which

would explain the state's position on every provision. Moreover, interviews with policy makers made confirmed that only the most controversial issues of EU legislation become subject to political discussion among political actors; issues regarded as "technical" are usually resolved by civil servants. The decision-making on these issues is characterized by a governance mode often referred to as "intensive transgovernmentalism" which emphasises the prominent role of bureaucrats and state officials below the level of government representatives in establishing networks with their counterparts in other member states that develop a certain degree of autonomy in decision-making and implementation (Wallace, 2000).

A distinction between "political" and "technical" issues is inherently problematic especially when applied to asylum policy: granting a residence permit for three as opposed to six months period may be seen as a technical issue of little political significance but is nevertheless of vital importance to an asylum seeker. While I am fully aware of the normative implications of relegating certain aspects of asylum policy to being simply a technical matter, in order to provide a coherent and parsimonious theoretical account, I focus on the most contentious aspects of each directive.

4. Political-institutional context and asylum policy-making

4.1. Germany

The impact of Germany's political-institutional structure on policy outputs has long been recognized. In his 1987 book *Policy and Politics in Germany: the Growth of the Semisovereign state*, Peter Katzenstein explains how West German policy was characterised by "incremental outcomes" regardless of changes in the government. He argues that these outcomes could be attributed to the "semi-sovereign" structure of the state, limiting the power of the centralised state both externally and internally. While the external constraints are most clearly visible in the openness of the German Basic Law to transfer powers to supranational institutions, the internal ones concern the decentralization of power domestically in order to protect the citizens from governmental excess (Schmidt, 2003). The German polity is characterised by a strong system of checks and balances and a high degree of power-sharing across the government (Klusmeyer and Papademetriou, 2009). This is particularly visible in three dimensions, which Katzenstein refers to as "network nodes": federalism, political parties and parapublic institutions.

Germany's federal system has been identified as "cooperative": it is designed to foster cooperation between the various levels of government, i.e. among the Länder, representing territorial interests (horizontal level) and between the Länder and the central government (vertical level). The need for cooperation between these levels stems from the provisions of the Basic Law. In addition to defining Germany as a "federal state" (Article 20 (1), German Basic Law) and making this principle unchangeable by constitutional amendment (Article 79 (3)), the German constitution specifies a peculiar division of powers

whereby the federal government is responsible for policy formulation and the Länder are in charge of policy implementation (Benz, 2002). Consequently, federal government requires expertise from the *Land* administration when designing a law, and *Land* governments affected in their administrative competences by federal legislation have a stake in this process. This interdependence creates a symbiotic relationship between the two levels.

The responsibility for asylum policy is divided between the Federal government, which is in charge of policy-making, and the Länder, which are responsible for the provision of accommodation and assistance. In accordance with the German Basic Law and the division of competences between the Länder and the Bund, any law adopted by the Bundestag which affects the responsibilities of Länder requires the consent of the Bundesrat, granting them direct influence over policy-making through this upper legislative chamber. These laws, whose enactment requires the approval of both chambers (Bundestag and Bundesrat) are known as "Zustimmungsgesetze" (consent laws). If the Bundesrat rejects a law, their veto cannot be overturned by the Bundestag. However, both the Bundestag and the Federal Government may refer the matter to a Mediation Committee and attempt to reach a compromise.

There are a number of policy areas which require the consent of the Bundesrat which could broadly be grouped into three categories. The first one concerns laws which propose a constitutional amendment and require a two-thirds majority in the Bundesrat (and the Bundestag). The second category consists of laws that affect the Länder's financial revenues and the third one covers laws which impinge on the Länder's administrative competences. The latter category is particularly important because even if a proposed law contains only one provision which affects the Länder's competence, the law must be approved by the Bundesrat in its entirety.

As almost all measures in the area of migration and asylum affect the Länder

directly by burdening them with administrative tasks and expenses, they need to be adopted by the Bundesrat. This constitutional design imposes a high degree of consultation and policy coordination in asylum policy at the domestic level.

This system of "joint decision-making" (*Politikverflechtung*) (Scharpf 1997: 143-145) has become the characteristic of German federalism. It implies that practically all politically salient policy initiatives, with the notable exception of foreign and defense policy, need to be based on broad consensus or even on unanimous agreement between the governing majority at the national level and the governments of the sixteen Länder (Scharpf 2005).

Although this vertical cooperation between the Federal government and the Länder has come to be seen as the major characteristic of German federalism, the horizontal dimension, that is, cooperation among the Länder is also important, even if less prominent and embedded in the vertical one (Benz 2009). Governments of the Länder coordinate their policies either in negotiations with the federal government, or in order to build coalitions against the federal government. These coalitions vary, depending on issues at stake or the political situation. In immigration and asylum policy, this horizontal coordination may be carried out through the Innenministerkonferenz (IMK), consisting of representatives of interior ministers of the Länder which meets twice a year.

The German political system, however, is not solely shaped by the interaction between the federal and the Länder level; if that was the only dimension, it could have been characterized as a system consisting of multiple veto players (Tsebelis 2002). However, party politics plays a significant role in the system as well. The proportional electoral system and the style of parliamentary politics at the national level places Germany in the class of "competitive democracies" (Bräuninger and Ganghof 2005; Lehmbruch 1998), not “consensus” ones (Lijphart 1999).

Parties are structured on a federal basis, creating strong regional leaders at the Länder level, and mutual dependence between the political leaders at the Länder level and those at the federal level. The former cannot afford to ignore the national party line as they are highly visible in national public opinion and play an important role in national party policy-making (Scharpf 2005), while party leaders at the federal level need the support of regional ones in order to avoid becoming a "lame duck" (Green and Patterson, 2006: 5).

The pressure on the Länder governments controlled by opposition parties increase when their votes become politically decisive and they have sufficient votes to block an initiative presented by the government. In this case, the Länder may have an incentive to oppose legislation for a number of reasons: genuine Land interests, different party-political preferences stemming from ideological differences between government and opposition parties as well as strategic: defeating initiatives which could strengthen the federal majority (Scharpf 2005). They may, of course, also be motivated by a mixture of these.

As explained in the theoretical chapter, systems where central government decisions are directly dependent upon the unanimous agreement of constituent governments lead to sub-optimal policy outcomes. These outcomes tend to persist because once a binding rule is agreed upon, the veto of one or a few constituent governments will prevent all others from correcting or abolishing it in response to changed circumstances or preferences (Scharpf 2006). This "joint decision-making trap" becomes especially problematic when party-political differences are taken into account, leaving the government's initiatives at the mercy of their political opponents.

The joint decision-making trap is not always insurmountable and the German political system is capable of introducing policy changes. However, since such reforms tend to require difficult, extensive and lengthy negotiations in order to achieve consensus, they are rare and difficult to unravel.

The German party system is also a peculiar feature of the German political system, as political parties are accorded a formal role in interest mediation through the Constitution (Article 21). Since the German Basic Law was introduced, the party system and thus the government have been dominated by two large parties, the Christian Democratic CDU/CSU and the Social Democratic SPD. But rather than being simple class-based parties, the CDU/CSU and SPD have consciously defined themselves as mass organisations, with relatively large memberships and broad electoral bases, which bridge traditional electoral cleavages, especially class and religion. These "people's parties" (Volksparteien), and especially the CDU/CSU, have been approximated to the ideal-type of 'catch-all party' identified by Kirchheimer (1966). Precisely because of this broad appeal, the Volksparteien must reconcile a wide range of interests within their ranks (Green and Petersen 2006).

Concerning specifically immigration policy, the fact that these parties have a broad electoral appeal (Katzenstein 1987: 39), means that a rights-based approach, often associated with the SPD may also be present within CDU/CSU while the latter party's emphasis on German cultural homogeneity may find some resonance within the SPD (Green 2004: 19).

In contrast to the big two parties, the smaller ones (Free Democratic Party (FDP)) and the Greens appeal to a smaller share of the electorate and gain power due to Germany's proportional representation system and participation in coalition governments. They are usually associated with advocating rights-based, liberal policies (Green 2004: 19). The position of coalition parties in Germany and their respective influence on policy is strengthened through another feature of the institutional system, namely the *Ressortsprinzip*: individual ministers, once appointed, are independent in the political and practical leadership in their offices, within the overall general guidelines of the Chancellor (Green and Paterson 2006: 3). Together with coalition treaties, the *Ressortsprinzip* ensures

that smaller coalition partners are furnished "with a formal power that should not be underestimated" (Green, 2004: 20).

Another important node characterizing policy making in Germany is the densely organized civil society, which contrasts with the state's decentralized institutional structure. It is through this densely organised civil society that various collective and private interests find representation in the policy process (Conradt 2005). Both business and labour interests are highly organized into large umbrella associations such as the Confederation of German Employers' Association or the Federation of German Industries.

However, in immigration and asylum policy societal interests are structured differently, resulting in foreigners and their interests being largely unrepresented at the policy formulation stage for two reasons. First, their direct representation has been "fragmented, difficult and largely unsuccessful", owing to both their low membership in political parties and the tendency of foreigner associations to organize around ethnic or nationality lines, underscoring their separation from one another and the rest of society (Klusemeyer and Papademetriou, 2006: 13). Second, representation of interests through German public interest groups such as churches or welfare organizations which provide support to foreigners is weakened by the fact that for these interest groups, non-nationals are only a small part of the clientele (Klusemeyer and Papademetriou, 2006; Green 2003). Thus, as also argued in the theory chapter, foreigners in Germany and asylum seekers in particular, are expected to be "subjects of policy rather than active agents" (Klusemeyer and Papademetriou, 2006: 13). This leaves substantial policy latitude to the government to shape policy, subject to the constraints of the political system as outlined above.

In particular, it can be expected that asylum policy would be affected by various cleavages. One is territorial, along the Federal/ Länder dimension and the other one political between SPD and CDU/CSU, where ideological differences may be expected but may not

be as large as compared to the position of FDP and the Green party. Thus, potential conflict may also arise within coalition governments on the grounds of ideological differences between the main party and the junior partner.

Concerning the role of public opinion, it has already been argued in the preceding chapter that in compound systems it would be expected to matter less than in simple ones. Of particular relevance to Germany in this respect is the federal political structure. Federalism increases the number of different governments making policy, making it less clear what a particular level of "government" is doing (Downs 1999). At the national level, this reduces the incentives of the federal government to respond to changes in public opinion.

At the same time, the multiple actors involved in policy-making in Germany and the need to foster consensus force parties in the government to compromise on their political commitments, superseding electoral concerns.

Asylum policy-making in Germany at the federal level is of the competence of the Ministry of Interior, although various aspects are coordinated with relevant ministries, should they concern matters within their competence (Interview C). The Ministry also supervises the Federal Office for Migration and Refugees (BAMF).

At the European level, the Ministry of Interior also currently plays a leading role although this was not the case at the early stages of EU cooperation in this area: the Federal Chancellry negotiated the Schengen Agreement in 1985 in cooperation with the Foreign Ministry. As cooperation progressed, civil servants from the Ministry of Interior became more involved in the negotiations in Brussels, leading to a gradual shift of influence towards the Ministry of the Interior (Boesche 2006; Niemann and Lauter 2011).

As asylum policy is a matter of shared competence between the Länder and the Bund, according to the German Constitution (Article 23), the opinion of the Länder has to

be taken into account when negotiating at the EU level. This was not always the case during the period studied here; constitutional reform granting Länder a say in decision-making was introduced after the Treaty of Maastricht, with the performance of duties and responsibilities codified in the Act on Cooperation between the Länder and the Federation in EU Affairs, which was passed in 1993. This lack of direct say in decision-making by the Bundesrat in measures introduced before the constitutional reform may be expected to affect the strength of the position of the government vis-a-vis the Bundesrat by allowing it relative autonomy in policy-making at the EU level where it could upload its preferred policies and then use them to help legitimise domestic reforms.

This institutional structure may provide an incentive to the government to play two-level games at the EU level where it is likely to be successful because it can credibly point out to its small domestic win-set. At the same time, it can also rely on a generally pro-European elite who, given Germany's tradition of power-sharing, is less concerned with losing autonomy.

The institutional structure also matters with regard to the opportunities to contest domestic EU policies, both at the stage of preference formation and uploading and downloading – whether formal transposition or domestic policy reform, not necessarily initiated by EU legislation.

4.2. Britain

The British political system has been characterized by the so-called Westminster Model: executive supremacy upheld by single party majority governments, a majoritarian electoral system, a subordinate legislature with a weak second chamber an adversarial

political culture, and a subordinate judiciary (Lijphart 1999). Britain retains a centralized government, even if following devolution it is less of a unitary state (Dunleavy et al., 2006).

The majoritarian system leads to the concentration of power in the hands of the largest party, on the grounds that this promotes accountability with effective governance: the party in government is empowered to take and implement difficult decisions during tenure in office. It has the ability to pass its legislative program without many checks and balances. At the end of their term of office the government can be held clearly accountable for the results of their actions and removed if unpopular.

At the heart of the system lies the doctrine of parliamentary sovereignty. The classic definition was expressed by Dicey who argued that:

> The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e. as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament (Dicey, 1915 [1982])

Unlike Germany where the constitution constrains the government's ability to impose its will, the British executive faces no such limitations. The government does not need to negotiate consensus and find compromises. The constitutional features of the Westminster model "ideally ensure that the government's ability to carry out its policies is maximized and not constrained by any significant domestic institutional checks" (Saalfeld 2003: 620). According to Schmidt, policy making processes in the UK are thus characterised as statist ones in which the executive has a monopoly on policy formulation but accommodates interests through more flexible policy implementation by limiting the number of rules to allow self-governing arrangements (Schmidt 2006). At the same time, however, the failure to take into account the issues raised by various actors in policy formulation may lead to blocking policies at the level of implementation, forcing the government to make changes, introduce further reforms

or abandon them entirely. Pressure in such cases could come from veto players such as backbenchers, courts or organised local interests.

Asylum policy has been dominated by the Home Office: one of the largest and most traditional departments of Whitehall (Richards and Smith, 2002; Somerville 2007). The interests of asylum seekers and refugees are represented mainly through two channels but the statist policy-making process means that in practice there is little scope to incorporate their concerns. The first way they may be represented is through refugee-assisting NGOs and larger human rights organizations while the second one is through professional legal associations. Despite the existence of formal networks between some of these organizations and the government (Somerville 2007), a network analysis by Statham and Geddes (2006) confirms that the state dominates a weak pro-immigrant lobby. This reinforces the argument presented in the theoretical chapter and the decision not to focus on civil society but on government preferences.

In addition to the responsible department, the Prime Minister's office may also play a role in policy development under certain circumstances (Heffernan, 2003). Particularly in asylum policy in the UK there is evidence that Tony Blair played such a role, by making public statements and pushing the Home Office into action (Seldon 2007).

Traditionally, Britain has been described as having a two-party system. However, while this description is accurate in relation to the period between 1945-1970 which can be seen as the classic era of two-party majoritarianism, the period post 1970s is best described as "two-party-plus" (Dunleavy et al., 2006). This description reflects the fact that while many more parties compete for votes, only two parties, Labour and the Conservatives, are still most likely to form a single party government by winning an overall majority of seats in the House of Commons. Therefore, while it can no longer be

described as a classical two-party system, Britain does not yet constitute a genuine multi-party system. However, as this research covers a period during which single-party governments were in power, I focus on the role of ideology of the Conservative party and Labour.

In order to assess each party's ideology and position on asylum policy, one concept particularly relevant to the UK constitutes a good starting point: the so-called "race card". It refers to the idea that one party has a structural advantage over its rival on the issues of race and immigration. In particular, in the UK this addresses the advantage that the Conservative party has had over Labour over immigration, with the latter frequently seen as "soft" on the issue (Saggar; Geddes 2000; Somerville 2007). Playing the race card, then, refers to exploiting an electoral advantage based on the assumption that there is an in-built attitudinal bias among the general population towards immigrants and race relations in general.

In addition to Labour's perceived vulnerability on immigration policy, it was also seen as "pandering" to ethnic minority interests. While the party sought to modernise itself and change this image, it still could not ignore the fact that it was receiving a disproportionate share of the ethnic minorities' votes and thus be cautious to move its position too close to that of the Conservatives and remain true to its values.

It could therefore be expected that, in the highly politicized British system, both parties could be expected to bring their positions on asylum closer but some differences would be visible, with Labour emphasizing a rights-based approach. However, salience of the issue would be important, with increased salience likely to lead to a shift in government policy more in line with public opinion.

In contrast to Germany, where the government faces many domestic constraints, the UK government is not expected to resort to two-level games as this particular

strategy is neither necessary nor likely to be successful[21]. As argued in the theory chapter, simple polities rely on cooperative discourse to build consensus and thus must pay attention to how supportive the public is towards the EU if it is to use provisions at the EU level to strengthen the legitimacy of domestic reforms. UK's "chronically contentious" (Gifford, 2010) relationship with the EU and an "awkward partner" (George 1998) position have been attributed to concerns about sovereignty. In contrast, initiatives which refer to policies in other countries and no not appear to have been imposed from the EU do have the ability to strengthen legitimacy.

In addition to the above, there is also a disagreement on the role of the EU along party lines with Labour being, at least in the last three decades, broadly pro-European and the Conservatives increasingly Eurosceptic (Smith 2012). This creates yet another problem for a Labour government which wants to participate in asylum policy-making at the EU level, putting additional pressure on it to downplay the importance of direct EU impact on domestic legislation.

[21] Compared to Germany, the UK has a crucial advantage: it can threaten to opt out of an agreement if its demands are not met.

5. EU Asylum Policy: History, Actors and Institutions

EU cooperation in the filed of justice and home affairs policy in general and asylum policy in particular has undergone enormous transformation from its humble beginnings as informal meetings of officials in charge of internal security to a full-fledged policy made with the increasing involvement of supranational institutions. This chapter provides an overview of the history and the institutional context of asylum policy in the EU. It describes the main actors involved in policy-making and traces how their role has changed in line with changes to the EU introduced by different treaty reforms. In addition, it shows that while international and European human rights commitments and especially the Geneva Convention have been anchored in primary and secondary legislation, the blurring of the distinction between asylum and immigration has continued to affect the foundations of the policy.

The issue of immigration has featured in the EU agenda as a part of broader security cooperation initiatives since the 1970s and the establishment of the TREVI[22] group: an intergovernmental forum, consisting of justice and interior ministers of EU member states, policy experts and police officers. The major driving force behind the creation of the TREVI Group in 1975 - which was established at the initiative of Germany and Britain - was the need to coordinate anti-terrorist work among EU governments. It represented more of a loose network rather than an institution, with no secretariat, the meetings of the ministers being sporadic rather than regular and much less frequent than originally envisaged (Monar, 2001: 750). It operated outside the scope of the EC Treaty, as a part of

[22] TREVI is the French acronym for "Terrorism, Radicalism, Extremism, and International Violence" as well as the name of the fountain in Rome close to where the first meeting of the group took place.

the European Political Cooperation, with the results of the consultation not binding upon members. In 1985 the mandate of the group was expanded to include other issues of internal security such as drugs and arms trafficking and cross-border crime.

In October 1986 the TREVI ministers decided to set up an Ad Hoc Group on Immigration in order to deal with the matter of freedom of movement within the European Community: a goal to which the member states reiterated their commitment in the Single European Act, signed in 1986.

Initiatives of cooperation among a group of member states also took place. Most notable in this respect was the "Schengen Group" which grew out of the desire of some states (Germany, France, Belgium, the Netherlands and Luxembourg) to ensure a complete free movement of people across their borders as opposed to others such as the UK which insisted that free movement could only apply to EU-citizens and not the third country nationals (TCNs), residing on the territory of the EU. In 1985, the above-mentioned group of five countries signed the Schengen Agreement creating amongst themselves and outside the EU Treaty framework an area without internal borders with the respective compensatory measures ensuring the maintenance of security within it.

Although conceived as a compromise and a way of overcoming the unwillingness of some member states to create a genuine area of free movement, the Schengen Agreement became a model for future cooperation in the JHA field. It effectively connected the removal of borders with the need to introduce "compensatory" measures aimed at enhancing security and counteracting the externalities of the decision. For example, due to a concern for the facilitation of "asylum shopping", i.e. submitting multiple asylum claims to different member states, a mechanism was instituted to determine one state as responsible for processing it. A common list of countries which require visas to enter the Schengen area was also drawn up. In addition, judicial cooperation was strengthened, especially with

regard to removing obstacles to extradition and cooperation on law enforcement matters was also envisaged (Uçarer, 2003: 298).

These developments, coupled with increased security concerns about the growth of organized crime and inflows of asylum seekers and illegal immigrants, brought the issue of cooperation in the fields of police, asylum and immigration to the agenda of the 1991 intergovernmental conference leading to the Maastricht Treaty. Due to lack of agreement among the governments, however, the issues were not placed under the Community competence but rather they were transferred into a separate "pillar" consisting of nine areas of "common interest" including asylum policy, immigration policy, fight against drugs and international crime, judicial cooperation in civil matters etc, implying that these are fields where member states could cooperate but without setting any objectives or a timetable for their fulfilment. Effectively, this structure served the purpose of only bringing the existing intergovernmental framework of cooperation under the EU umbrella, keeping its supranational institutions including the Commission, the European Parliament and the European Court of Justice marginalized. The Commission was given the shared right of initiative for the adoption of joint positions, joint actions and conventions: the new instruments introduced in order to structure cooperation in the third pillar.

The legal status of the former two remained unclear: while strictly speaking they were not legally binding (O'Keeffe 1995, Den Boer 1996), they imposed certain obligations on the member states who had to defend the common positions within international organizations and international conferences (Maastricht Treaty, Article K5). The conventions, which were binding under international law, required unanimity for their adoption and subsequent ratification by each member state (Article K3 2(c)). The role of ECJ in interpreting the conventions and adjudicating any disputes was to be decided by the convention itself. The European Parliament was to be regularly informed of discussions

under this pillar and consulted on the "principal aspects of activities"in these areas (Article K6).

The task of coordinating the new structure fell on the Coordinating Committee, consisting of senior official from each member state. It became known as K4 committee in accordance with the Treaty article under which it was created. It had three steering groups, each with a number of working groups. The Immigration and Asylum steering group consisted of working parties on asylum, immigration, visas, control of external frontiers, and clearing houses on asylum and immigration.

The complex decision-making procedure, requiring both unanimity and, with regard to conventions, ratification by each member state, made progress in the third pillar difficult, forcing governments to resort to non-binding instruments. The frustration among some member states with the slow decision making procedures and the lack of implementation of the measures agreed led to calls for changes in the "inadequate and clearly deficient" provisions of the pillar (Reflection Group, 1995: 26)

The Amsterdam Treaty attempted to remedy the situation by communitarizing policies on visa, asylum and immigration, incorporating them into the Treaty of the European Community and asserting a new objective for the Union, namely, "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border control, asylum and immigration" (Stetter, 2000: 93). One of the greatest innovations achieved through the communitarization of asylum and immigration policy was the provision that after a transition period of five years after the Treaty's entry into force during which the Commission would share the right of legislative initiative with the member states, the former will acquire the exclusive right to propose legislation. During the transition period, asylum and immigration matters would formally be placed in the first

pillar but would be subject to different decision-making mechanisms: decisions in the Council of Ministers was to be taken by unanimity rather than Qualified Majority Voting (QMV), the European Parliament was only to be consulted in all newly communitarized matters with the exception of visa procedures and conditions and visa uniformity rules where co-decision was envisaged in five years after the Treaty's entry into force. With regard to asylum and immigration, the Treaty stipulated that after the five years' period the Council, acting unanimously, and after consulting the European Parliament, would decide to which policies to apply the same legislative procedure which governs other first-pillar matters, i.e. QMV, co-decision with the European Parliament and an extended role of the ECJ[23].

Before such decision is taken, the jurisdiction of ECJ would be limited as only domestic courts of last instance would be allowed to make references for a preliminary ruling and the ECJ would be prohibited from ruling on national measures with regard to crossing borders adopted with the view of safeguarding internal security.

While the Maastricht Treaty had identified the issue of asylum, among others, as a matter of "common interest", the Amsterdam Treaty went much further by enshrining a commitment to enact a number of measures in asylum policy in line with the Geneva Convention and within fiver years of the Treaty's entry into force. These included: criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; minimum standards on the reception of asylum seekers; minimum standards on the qualifications of third-country nationals as refugees; minimum standards on procedures in member states for granting and withdrawing refugee status; minimum standards for giving

[23] The decision was adopted in December 2004 and entered into force in January 2005 (Council of the EU, 2004c). QMV was extended to all asylum and immigration issues except for legal migration.

temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection, and promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons[24].

The UK, Ireland and Denmark secured opt-outs from EU immigration and asylum law set out in a Protocol to the Treaty of Amsterdam. The protocol specifies that once a proposal for legislation in this area is presented, the UK and Ireland have three months to decide whether they would participate in the discussions of the proposal. If a proposal is adopted without their participation, they can decide to opt-in later, subject to the approval of the Commission.

The commitment to the establishment of an Area of Freedom, Security and Justice was reiterated at the special EU Summit in Tampere devoted to this issue which took place in 1999 where Member States agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution. (Council Conclusions, 1999).

In line with the Commission's expanded role, a new Directorate General of Justice, Freedom and Security within the Commission was established, along with a "scoreboard", published by the European Commission biannually, evaluating the progress made towards to achievement of AFSJ (Niessen, 2004). These institutional developments allowed the European Commission to move "from the sidelines to center stage" (Uçarer, 2001) role in asylum policy in particular at least in terms of generating legislative proposals.

The work of the Council was also re-organized to reflect the communitarization of asylum policy. The Strategic Committee on Immigration, Frontiers, and Asylum (SCIFA)

[24] Treaty of Amsterdam, 1997, Article 73k 1a),b),c),d) and 2a),b)

was established in order to ensure the coordination of the preparatory work of the Council in these policy areas. It was envisaged that it would direct working parties' proceedings in such a way that they carry out their tasks while resolving any technical differences that arise and cannot be resolved within the working parties. The SCIFA can also take on the role of a body passing political strategy defined at JHA council level or as a result of close links with various capitals (Council of the EU, 2000). The establishment of SCIFA meant that there was little improvement in the complex decision-making procedure in asylum policy in the Council: instead of having three main bodies: working groups, COREPER, and Council of Ministers, as is customary in other first-pillar areas, another body was added to the hierarchy[25].

Following the Treaty of Amsterdam and the Tampere agenda, the field of asylum has been subject to even more activity than that of migration (Hansen, 2004). Most efforts of the Commission focused on the actual establishment of the common European asylum system based on common minimum standards in various areas such as protection of temporarily displaced persons, qualification and status of TCNs or stateless persons as refugees, reception of asylum seekers and procedures for granting or withdrawing the refugee status as well as on the adoption of the Dublin II regulation and ensuring its proper functioning by making the European Automated Fingerprint Recognition System (EURODAC) operational. EURODAC, whose purpose is to collect and store the fingerprints of all people above the age of 14 who have applied for asylum or have been detained due to illegally entering or residing on the territory of a member state became fully functional in 2004[26].

In addition to the gradual expansion of the efforts to establish common minimum

[25] This decision-making structure is nevertheless an improvement over the Maastricht Treaty which envisaged five negotiating levels.

[26] Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. OJ 2000 L316, pp. 1-10.

standards for the treatment of asylum seekers in member states, the European policy in this field started developing an external dimension. This dimension concerned the relationship with third countries and the role they could play in the protection of European borders and in "burden-sharing" of asylum seekers. In October 1998, the Dutch government, on the basis of an initiative of the Foreign Ministry, proposed the establishment of a new body: the High Level Working Group on Asylum and Immigration (HLWG). Adopting a cross-pillar approach, targeting the situation in the countries of origin of asylum seekers and migrants, the purpose of the HLWG would be to produce common country reports on third countries covering human rights situation, potential to produce migration and asylum flows, possibilities for concluding readmission agreements, information gathering and exchange. The HLWG would constitute a horizontal, pillar-bridging task force which should draw up a list of priority countries of origin on which reports would be written and with whom further cooperation would be considered. The choice was to be made based on the statistics concerning arrivals in the EU Member States (van Selm, 2003). By the end of 2007, the EU had concluded readmission agreements with Albania, Hong Kong, Macao, Sri Lanka, Russia, Ukraine, Serbia, Montenegro, Moldova, Bosnia and Herzegovina, and Macedonia. The readmission agreements concern the return of both nationals of the State to which a request is addressed and of persons who have illegally entered the requesting State from the requested State.

Gradually, the EU started moving towards a full-fledged asylum policy, concerned not only with the harmonizing standards across Member States but also cooperation with third states outside the EU. In 2003, only a few years after the foundations of the "external dimension" were laid, the EU was grappling with the idea of establishing extraterritorial processing centres for asylum claims in third countries following the increased number of asylum seekers arriving in some Member States (Garlick, 2006; Levy 2010). The discussion

was triggered by the British government which submitted a paper on "New Approaches to Asylum Processing", outlining a way of dealing with the increased number of asylum seekers by establishing Regional Protection Areas (RPAs) and Transit Processing Centres (TPCs). The former would be established in regions of origin of asylum seekers. Asylum seekers from certain countries could then be returned to their home regions where "effective protection" could be offered to them, and where they would be processed with a view to managed resettlement in their home regions or, for some, access to resettlement schemes in Europe. Transit Processing Centres (TPCs) were to be established along major transit routes to the EU, close to EU borders, to which those asylum seekers arriving spontaneously in the UK or another EU member state would be removed and where their claims would be processed. Those given refugee status could then be resettled in participating EU states whilst other would be returned to their country of origin. The Commission's evaluation of this proposal, and especially the reference to TPC, was that it raised "various legal, financial and practical questions" which needed to be addressed (EU Commission, 2003). NGOs, on the other hand, were openly highly critical of the proposals (ECRE, 2003).

UNHCR responded with its own counter-proposal for dealing with asylum claims by suggesting a three-pronged strategy including access to solutions in the regions of origin, improved national asylum systems of destination states as well as EU-based processing centres dealing with manifestly unfounded cases (UNHCR, 2003).

None of the proposals survived in their original form and the idea of Transit Processing Centres has been dropped but they did provide an impetus for the creation of 2005 the European Commission-funded and established Regional Protection Programmes (RPPs). The main goals of theses RPPs are to enhance the protection capacity of third countries and to better protect the refugee population in these countries by providing durable solutions for refugees (EU Commission, 2005).

In addition to asylum policy, the EU Member States also stepped up their efforts to harmonize immigration policy. Immigration policy, and in particular measures aimed at reducing migration, have a direct impact on refugees mainly by restricting their access to the territory of the EU. There are no legal channels which asylum seekers can use to enter the EU and seek protection; they would need to be in a possession of visa or enter illegally[27].

A number of measures were adopted in the field of illegal migration which has been seen as crucial component of the creation of common immigration policy from the outset of cooperation in this area. The legislation focused on preventing unauthorized entry, transit and residence, combating trafficking of human beings and facilitation of the process of expulsion of unlawfully resident TCNs through mutual recognition of decisions for expulsion as well as mutual assistance among member states (Niessen, 2004). A step towards the transfer immigration control to a private entity was also made in 2001 by adopting a Directive on the harmonization of financial sanctions imposed on carriers which transport to the territory of a member state TCNs not in possession of documents of authorized entry which also obliges the carriers to take these TCNs back to their original point of departure.

Apart from changes in EU Treaties, adoption of secondary legislation and multi-annual Presidency programmes[28], cooperation in asylum policy has been affected by external events (Monar, 2001). While the terrorist attacks in the US on 11 September 2011 did not have the same wide-ranging influence on immigration and asylum policy in the EU as they did in the US, they nevertheless played a role in catalysing efforts among EU

[27] Few countries operate the so-called Protected Entry Procedures (PEPs): extraterritorial processing of asylum claims at diplomatic missions but they operate mostly informally, on a case-by-case basis

[28] These programmes contain the direction and priorities in Justice and Home Affairs policy for a period of five years and are intended to ensure the coherence and continuity of these policies. The first such five-year programme was the Tampere programme (1999-2004) which was followed by the Hague Programme (2005-2010).

Member States to complete the CEAS (Theilemann, 2009).

Finally, the impending EU enlargement also played the role of a catalyst of asylum policy: by pressuring Member States to agree on the directives which were being negotiated among 15 Member States in order to avoid having them being negotiated among 25. Moreover, concerned with the shifting of EU's external borders to regions which produced a high number of refugees and immigrants, EU Member States increased their efforts to strengthen these borders by establishing "an integrated border management, which would ensure a high and uniform level of control and surveillance, an essential prerequisite for an area of freedom, security and justice" (EU Commission 2003a). In order to render a more effective the implementation of Community policy on the management of the external borders by better coordinating the operational co-operation between the Member States, it was proposed to create an agency dealing with these matters. In 2003, the proposal for a European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (FRONTEX) was presented by the Commission and the agency was established in 2004[29].

This chapter has traced the development of EU asylum policy and presented the major actors and institutions involved in it. The next chapters will look at how the instruments constituting the CEAS were negotiated and what impact they had on domestic asylum policy in Germany and the UK.

[29] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L 349, 25.11.2004*

6. Schengen, Dublin, London: Setting the Scene

The previous chapter provided a historical overview of the major developments in the field of asylum policy by tracing its roots to the informal intergovernmental cooperation which started in mid-1970s and describing how it transformed into full-fledged asylum policy in by 2007. This chapter will explore in detail the first formal agreements concluded in the early stages of cooperation namely the Schengen Agreement of 1985, the Schengen Implementation Convention of 1990 and the Dublin Convention of the same year as well as three other non-binding measures commonly referred to as the London Resolutions of 1992. These measures were agreed at an intergovernmental level outside the EC Treaty framework and did not have a binding effect but nevertheless contributed to a number of changes in domestic policy.

It is often assumed that the measures themselves provided the impetus for the tightening of Germany's and UK's liberal asylum policies. Such top-down conceptualization, however, conceals a number of important factors which contributed to the adoption of these instruments in the first place and risks pre-judging the impact of EU commitments. This chapter will show how domestic preferences shaped the impact of EU asylum cooperation on Germany and the UK.

6.1. Preference formation

6.1.1. Germany

Due to Germany's unique historical experience which generated a sense of obligation towards politically-persecuted people, the German Basic law of 1949 included the right of

asylum as a basic political right, enshrined in Article 16 (2), stating that: "persons persecuted for political reasons shall enjoy the right of asylum". Initially, the number of asylum applications was relatively small – around 5,000 per year – and they were lodged by persons coming from Eastern Europe (Bosswick, 2000). Granting asylum to a relatively low number of political refugees persecuted by communist governments was unproblematic with regard to both financial and political costs. On the contrary, receiving refugees from these countries meant Western states could assert their superiority in the ideological struggle against communism (Schuster, 2003).

However, this situation changed rapidly at the end of the 1970s, following the military coup in Turkey: in 1979 there were 51,000 applications which increased to 108,000 in 1980 (Martin, 1994). The large increase can be explained by the absence of a visa requirement for Turkish nationals and by the practice of granting asylum applicants a work permit while their applications were being processed. The latter reason became particularly important since the oil crisis in 1973 caused Germany to stop recruiting foreign workers through the so-called *Anwerbestopp*. Thus, asylum became an important channel for gaining access to Germany's labour market. At the same time, the tightening of the visa rules discouraged foreign guest-workers already settled in Germany from leaving the country. The combination of rising number of asylum-seekers of non-Eastern European origin as well as the realization that most guest-workers were not going to leave the country led to growing if sporadic instances of social unrest (Borckert and Bosswick, 2007). Unsurprisingly, asylum became an important issue at the regional elections in Baden-Würtemberg in 1980 and the national elections of the same year.

In order to understand why the issue was so prominent, it has to be emphasized that Germany's asylum policy is affected by two types of cleavages: one is territorial and the other one partisan (Lavenex, 2001). The former refers to a constant power and resources

struggle between the Länder and the Federal Government: the Länder are responsible for bearing the costs for asylum seekers on their territory including housing, food and clothing so they frequently call for a more restrictive policy so as to minimize these costs. Germany employs a special system to distribute asylum applicants to different Länder, called EASY (Erstverteilung von Asylbewerbern- Initial Distribution of Asylum Applicants), based on quotas determined by the tax income and the population of each Land, so that the higher the two variables, the higher the percentage of asylum applicants allocated to the respective Land. The system was introduced in 1982.

The other cleavage which characterizes asylum policy is a left-right one, with the CDU/CSU favouring a stricter asylum policy and the SPD emphasizing the importance of safeguarding human rights.

These cleavages clearly came to the fore during the electoral campaigns in 1980 with the CDU/CSU accusing the ruling SPD/FDP coalition of being too lenient towards asylum-seekers (Bosswick, 2000). Consequently, after coming to power in late 1980s, the new coalition conservative-liberal coalition enacted a new Asylum Procedure Law (Asylverfahrensgesetz) in 1982 which reduced the right to appeal and to receive welfare support and facilitated expulsion (Schuster, 2002; Bosswick, 2000).

Initially, the law seemed to have achieved the desired results as asylum requests dropped down from 37,400 in 1982 to 19,700 in 1983 (UNHCR, 2001). However, the effect was only temporary as the next year saw a return to the 1982 level and a steady increase afterwards. Consequently, "the asylum issue became prominent again in several election campaigns at state and national level from 1984 onwards" (Bosswick, 2000: 46). In addition, in 1985, the Länder launched a campaign for more restrictive legislation (Schuster, 2003). As a result of these pressures, already in 1987 the government made a number of proposals regarding the amendment of the constitutional right to asylum, including the

abolition of Article 16 and transforming it into a simple administrative guarantee. Since amending the German constitution required a two-thirds majority, and SPD was staunchly opposed to a constitutional change, the proposals could not be realized.

It is not surprising that the conservative-led government introduced such changes: politicians within the CDU/CSU, especially at the Länder level we vocal in their opposition to the arrival of increased number of asylum seekers, with the issue frequently becoming prominent in regional but not national elections (Perlmutter, 1996).

Constrained by the constitutional requirement to gather majority in order to change to limit the right to asylum, the government then sought to find additional leverage to overcome domestic opposition and turned itself to a new venue: that of EC interior ministers who were just starting to discuss issues of asylum and immigration informally at an intergovernmental level. Given the German government's dissatisfaction with domestic status quo in asylum policy, driven by increase in the number of asylum seekers and conservative ideology, we would expect the government to seek policy change at the EU level and, if successful, to subsequently use the measures agreed upon there to facilitate domestic change, thus engaging in a two-level game.

6.1.2. Britain

Unlike Germany, the issue of asylum in Britain was rarely prominent until mid-1980s due to the relatively small number of asylum applications: in 1984 there were only 2,905 applications (UNHCR 2001). The relative absence of asylum on the political agenda was also reflected in the absence of specific legislation devoted to this policy and a complex, non-transparent procedure for granting refugee status. Asylum applications were handled as part of Immigration Law and were consequently governed by the 1971 Immigration Act,

which did not mention refugees explicitly, as well as the immigration rules which were an administrative measure (Stevens, 2004).

The first signs that the issue of asylum needed to be tackled more comprehensively appeared in 1985 following an increase in the number of Tamil asylum seekers from Sri Lanka. The Home Office responded, however, not with a proposal to reform the asylum system but with the decision to impose visas on Sri Lanka nationals (Stevens 2004: 93). From then on, imposing visas became the default way of dealing with an increase of asylum applications from a particular country: in 1989 visas were introduced for Turkish nationals following an increase in the number Kurdish asylum seekers, followed by visas for Ugandan nationals in 1991 and for Bosnians fleeing the war in former Yugoslavia (Schuster 2003: 144).

In addition, in 1987 the UK government introduced the Carriers' Liability Act which made carriers – airlines and shipping companies – liable for passengers who arrived in the UK without the necessary travel documents. Initially, fines amounted to £1,000 per passenger. These measures, although not directly aimed at asylum seekers but at reducing immigration flows, had the effect of further restricting their access to UK territory and turning airline officials into de-facto immigration officers who were required to check the validity of immigrants' documents.

By mid-1980s Britain had started to experience some relative increase in the numbers of asylum seekers which was a sufficient incentive for the Home Office to take part in the intergovernmental negotiations at the EC level. It can be expected that the conservative government would react to this increase and seek to ensure more restrictive measures at the EU level; however, given the fact that the government is unlikely to need to overcome domestic constraints in order to enact changes, but rather the need to demonstrate that it is in control of its domestic policy, it should be expected that it would downplay the

direct role of "Europe" in introducing changes.

6.2. EC cooperation

In 1985 Germany, France and the Benelux countries agreed to lift the internal border controls among their countries in a step towards the building of a true common market by signing the Schengen Agreement[30].

The abolition of internal border controls was first put forward at a bilateral meeting between the German Chancellor, Helmut Kohl and French President, Francois Mitterand in May 1984 (Bösche, 2006: 34). The Benelux countries, with had been operating a passport union and had abolished border controls among them, quickly expressed desire to join France and Germany.

The Schengen Agreement did not mention asylum but – at the insistence of Interior Ministers – included a commitment "to avoid the adverse consequences in the field of immigration and security that may result from easing checks at the common borders" (Article 7) and, as a long-term measure, "to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities" (Article 17).

The vague formulations of some of the provisions and the lack of details contained in the Schengen Agreement – especially the long-term measures – necessitated that it be supplemented by another instrument: Schengen Implementation Convention, signed on 19 June 1990. Chapter VII of the Convention was dedicated to allocating responsibility for the examination of asylum applications among the Schengen countries. The provisions in the chapter would cease to be applicable once the Dublin Convention, dealing entirely with this

[30] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985. Official *Journal L 239 , 22/09/2000 P. 0013 - 0018*

matter but covering all EU countries, entered into force. Since the measures in the two conventions are very similar, and since the Dublin Convention remained the blueprint for the subsequent development of allocating responsibility for asylum seekers among Member States, I focus on the provisions outlined there.

Before discussing these, it is important to outline the process through which these conventions and other instruments related to asylum policy were arrived at. The announcement of the Schengen Agreement served as a catalyst for the cooperation of interior ministers and officials both within the Schengen institutions, including the Secretariat and the Schengen Executive Committee, as well as outside, at the level of all EU Member States.

While the UK had preferred to stay outside the Schengen Agreement, the government was quite willing to cooperate with its European partners regarding asylum and immigration issues. In 1986 an *Ad Hoc Group on Asylum and Immigration* was set up under the initiative of the UK government in order to coordinate visa policies and the national rules for granting asylum (Boccardi, 2002). The Ad Hoc Group consisted of senior civil servants from all the 12 EU member states and its presidency rotated together with that of the Council of the EC, with the secretariat also being provided by the Council. The European Commission was given the status of an observer.

The European council in Rhodes in 1988 set up a Coordinators Group on the Free Movement of Persons, consisting of senior civil servants and vice-president of commission which drafted a detailed program of measures to be implemented by January 1993. What became known as the Palma document – adopted in 1989 by Madrid Council – contained two groups of measures to be adopted in order to implement the objective of free movement in line with the objective of the Single European Act. These measures were divided into "ad intra" (terrorism, law enforcement, judicial cooperation) and "ad extra" (strengthening

external borders by harmonizing the treatment of non-EU citizens). Measures with regard to asylum were prominent among the latter. They included determining the state responsible for examining the application for asylum, simplified or priority procedure for the examination of clearly unfounded requests, conditions governing the movement of applicants between Member States, acceptance of identical international commitments with regard to asylum as well as a study on the need for a financial system to fund the economic consequences of adopting a common policy (Coordinatiors' Group, 1989).

With the Palma document setting out the priorities in development of asylum policy and the European Council meeting in Strasbourg in 1989 setting a deadline for the completion of the Dublin Convention by the end of 1990 (Boccardi, 2002), the Ad Hoc asylum and immigration group's work resulted in a number of measures[31] which laid the foundations of European asylum policy: the Dublin Convention and the London Resolutions.

The Dublin Convention aimed to designate a single Member State as responsible for the handling of each asylum application. The most important objectives of the Convention were the prevention of two phenomena which had become increasingly prevalent in Europe: "refugees in orbit" and "asylum shopping".

"Refugees in orbit" is term which has been used to describe the situation of refugees who do not find a state willing to take responsibility for examining their asylum applications and are therefore forced to move from country to country in search for asylum. This situation arose mainly because of the differing interpretations of Geneva Convention by states, and especially of the application of the principle of "first country of asylum"

[31] The Ad Hoc Immigration Group also developed the "External Frontiers Convention" but it was not adopted due to a dispute between Spain and the UK about whether Gibraltar should be included in the EU external frontier (Gibney and Hansen, 2005: 220).

(Boccardi, 2002: 42)[32].

The preamble of the Dublin Convention makes an explicit reference to the commitment to end the "refugees in orbit" problem by stating that Member States are "concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum"[33].

The other aim of the Dublin Convention was to deal with the problem asylum-shopping whereby asylum-seekers made multiple application claims in different Member States following their rejection in another state.

The Convention assigned specific, hierarchically-ordered criteria according to which responsibility was allocated with the primary one being that the state responsible for the entry of the applicant on the territory covered by the Convention should also examine their application. The first criterion is family unity: the State where certain members of the family of the asylum applicant already have refugee status is the State responsible, subject to the consent of the asylum seeker. Secondly, the Member State who issued a valid residence permit is responsible. Thirdly, the Member State who issued a valid visa is the competent authority. Fourthly, in cases of illegal entry, the Member State through which the applicant entered is responsible unless the applicant has been living in the country where they lodged the application for six months.

[32] Countries gradually started declining responsibility to examine asylum applications on the grounds that the applicant could have sought protection in another country (or that they have been granted protection in such country). Such exclusion has become possible because the Geneva Convention, under Article 33 prohibits only refoulement, i.e. a return to a country where their life or freedoms may be threatened. Moreover, the Convention prohibits the imposition of penalties on refugees coming directly from a territory where their life or freedom were threatened.

[33] The claim that the Dublin Convention would deal with the problem of refugees in orbit has been questioned (Boccardi, 2002; Marinho and Heinonen, 1998). The concept of responsibility does not provide the guarantee that the asylum application will be examined in substance by one of the Member States and any State responsible for an asylum claim has the right to send an applicant to a third state, provided that the non-refoulement principle is respected (Artilce 3(5))

Notwithstanding these criteria, the Convention also stipulated that every country retained the right to examine an asylum application even if it was not responsible under the current rules[34].

Both the Schengen Agreement and the Dublin Convention were agreed upon outside the scope of the EC Treaty with the European Commission taking the back seat (Guiraudon, 2001). Germany was one of the major proponents of the establishment of these instruments (Faist and Ette, 2007; Bösche, 2006). Although the negotiations of the Schengen Convention were concluded in 1989, the German government delayed its signature until the issue of German re-unification was resolved (Bösche, 2006). The British government wholeheartedly supported the Dublin Convention and this stance reflected the position that closer cooperation with their European partners was vital for the protection of UK's borders.

The Ad Hoc Immigration Group also negotiated the adoption of the so-called London Resolutions on 30 November 1992. These legally non-biding resolutions constituted the first attempts at harmonizing certain aspects of asylum policy.

The *Resolution on manifestly unfounded applications for asylum (Document WG I 1282 Rev 1)* introduced a common streamlining tool in national examination procedures. It provided a definition of an unfounded claim: if applicant's fear of persecution lacks substance, for example, if it is not based on Geneva Convention grounds or if it is based on deliberate deception or is an abuse of asylum procedures. The resolution stated further that an application for asylum may not be subject to determination by a Member State if it falls

[34] The specific articles on the so-called sovereignty clause have a slightly different wording in the Schengen and Dublin Convention but express the same principle. Article 29 (4) of the Schengen Implementation Convention states that: "Notwithstanding paragraph 3, every Contracting Party shall retain the right, for special reasons connected in particular with national law, to process an application for asylum even if, under this Convention, the responsibility for so doing lies with another Contracting Party". According to Article 4 of the Dublin Convention, "each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto". The latter is somewhat more generous towards asylum seekers as it stipulates the asylum seeker's agreement as a pre-condition.

within the provisions of the Resolution on host countries. It established the possibility of an accelerated procedure which allowed states not to include full examination at every level of the procedure as well as to operate simplified appeal or review procedures.

The *Resolution on harmonized approach to questions concerning host third countries (Document WG I 1283)* tackled the question of dealing with applications from claimnants arriving from countries where they have already been granted protection (“first country of asylum”) or have had a genuine opportunity to seek such protection (“safe third country”). The term “host third country” was chosen to differentiate it from “safe country of origin”. The resolution provided the possibility that if there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country. The examination of whether such country exists precedes the allocation of responsibility for the examination of the claim under the Dublin convention. The resolution specified criteria according to which a country may be designated as 'safe': one where the applicant's life and freedom were not threatened and where they would not be exposed to torture or inhuman or degrading treatment. Such safe country should also offer protection guarantees against refoulement. Furthermore, the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection.

Finally, the *Conclusions concerning countries in which there is generally no serious risk of persecution (Document WGI 1281)* were designed in order to designate safe countries of origin. Applicants originating from such countries could have their claims examined through an accelerated procedure and had to provide evidence to counter the prima facie assumption that their claim was unfounded. Assessment of the general risk of persecution in such countries is to be conducted on the basis of previous numbers of

refugees and recognition rates, observance of human rights (both formally and in practice), existence democratic institutions, and stability.

At the same time the ministers also discussed other possibilities of dealing with asylum seekers such as introducing an EC-wide burden-sharing mechanism similar to the one currently operating in Germany. The proposal came from Germany as it was struggling to cope with an ever increasing number of asylum applications. However, the other Member States and especially the UK, opposed such mechanism[35]. This put more pressure on the German government to find a national solution to the problem of asylum seekers.

By the end of 1992 the foundations of EU cooperation on asylum were in place. What was their impact in Germany and the UK?

[35] Following the failure to act together in response to the refugee inflows from the wars in Yugoslavia in early 1990s and the Kosovo crisis in 1999, the EU Member States agreed on a burden-sharing instrument in case of mass influx through Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. The Directive states that in the event of existence of a mass influx of displaced persons established by a Council Decision adopted by a qualified majority on a proposal from the Commission, the decision shall have the effect of introducing temporary protection for the displaced persons to which it refers, in all the Member States. The Directive specifies the reception conditions to be granted to beneficiaries of the directive.
In addition to these efforts, EU Member States have also introduced financial burden sharing. In 2000, in order to share the costs of reception, integration and voluntary repatriation of people in need of international protection, European member states agreed to set up a European Refugee Fund (ERF) (Council Decision 2000/596/EC of 28 September 2000).

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
Austria	6,724	8,639	11,406	15,790	21,882	22,789	27,306	16,238	4,745	5,082	5,919	6,991	6,719	160,230
Belgium	5,299	7,644	5,976	5,078	8,112	12,963	15,173	17,647	26,882	14,353	11,420	12,433	11,788	154,768
Denmark	8,698	9,299	7,583	11,309	5,282	18,994	12,912	20,071	16,473	7,992	10,055	7,391	5,569	141,628
Finland	18	23	49	64	179	2,743	2,134	3,634	2,023	839	854	711	973	14,244
France	28,925	26,290	27,672	34,352	61,422	54,813	47,380	28,872	27,564	25,964	20,170	17,405	21,400	422,229
Germany	73,832	99,649	57,379	103,076	121,381	193,063	256,112	438,191	322,614	127,210	127,937	116,367	104,353	2,141,164
Greece	1,398	4,230	6,934	8,424	3,000	6,166	2,672	1,850	813	1,303	1,312	1,643	4,376	44,121
Ireland	-	-	-	-	-	-	31	39	91	362	424	1,179	3,883	6,009
Italy	5,423	6,478	11,032	1,236	2,118	4,827	26,472	6,042	1,647	1,786	1,732	675	1,858	71,326
Luxembourg	-	-	-	-	-	114	-	-	-	-	394	240	427	1,175
Netherlands	5,644	5,865	13,460	7,486	13,900	21,208	21,615	20,346	35,399	52,573	29,258	22,170	34,443	283,367
Portugal	70	275	442	326	156	75	255	686	2,090	767	450	269	297	6,158
Spain	2,360	2,280	2,477	4,586	4,077	8,647	8,138	11,708	12,615	11,992	5,678	4,730	4,975	84,263
Sweden	14,500	14,600	18,114	19,595	30,335	29,420	27,351	84,018	37,583	18,640	9,047	5,753	9,662	318,618
United Kingdom	4,389	4,266	4,256	3,998	11,640	26,205	44,840	24,605	22,370	32,830	43,965	29,640	32,500	285,504
EU Total	157,280	189,538	166,780	215,320	283,484	402,027	492,391	673,947	512,909	301,693	268,615	227,597	243,223	4,134,804

Table 2: Asylum Applications in the EU, (1985-1997) [Source: UNHCR 2001]

6.3. Implementation

6.3.1. Germany

In 1988, the number of asylum applicants in Germany exceeded 100, 000 for the first time, reaching a peek of 438,200 in 1992 (see Table 1). The increase has largely been attributed to the fall of the Iron curtain which enabled a large number of nationals from former Communist countries to seek refugee status in Germany. Tensions among the local population and asylum seekers became a commonplace. Since mid-1991, there had been more than 4,000 attacks on foreigners, some of which received extensive coverage and huge outcry (Martin, 1994). In September 1991 and August 1992, foreigners were attacked in Hoyerswerda and Rostock in Eastern Germany where asylum-seekers had been sent following the quota distribution in accordance with EASY but without any regard for the fact that these Länder faced serious economic hardship and population which had not been exposed to visibly different minorities (Joppke, 1999: 92). A number of neo-Nazi supporters attacked the houses in which asylum-seekers were staying while thousands of by-standers were watching them (Karapin, 2007).

The sudden influx of foreigners during this period was not limited to asylum seekers. The collapse of communism allowed a large number of ethnic Germans – persons of German origin predominantly from the former USSR, and, until 1992 from Central and Eastern Europe – to make use of their "constitutional right to obtain German citizenship as a refugee or expellee of German ethnic origin or as their spouse or descendant, provided that they had been admitted to the territory of the 'German Reich' within its borders of 31 December 1937" (Hailbroner, 2010: 4)[36]. In a period of only two years, 1989-1990, almost

[36] Article 116 of the German Basic Law states that "unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been

800,000 ethnic Germans arrived in the country. This represented a substantial increase over previous years: in 1988 Germany admitted 200,000 ethnic Germans, while in 1987, the number was below 100,000 (Zimmerman, 1999: 29). These ethnic Germans are not considered immigrants or foreigners but are referred to as *Aussiedler*, (literally: "out-settlers"). After 1992, the term used was *Spätaussiedler*, ("late out-settlers"). Their status entitles them to German citizenship as well as to various integration assistance, including the payment of pensions, unemployment and welfare benefits (von Koppenfels, 2004: 762). Despite the fact that legally speaking the *Aussiedler* were not immigrants, the sudden increase in their numbers contributed to the pressure which the authorities were experiencing in dealing with the large number of people entering Germany.

At the same time, there was a danger that the social unrest would translate into political gains for far-right parties was also looming large: the Deutsche Volksunion (DVU) received 6.2 per cent of the votes at the Länder elections in Bremen in 1991 (almost double their share of 3.4 per cent in 1987) and 6.3 per cent in Schleswig Holstein in 1992 (the party had not run in the previous elections) while the Republikaner gained 10.9% of the votes in Baden Wuertemberg (an increase of more than 10 times compared to their performance in 1988 when they garnered 1,0 per cent) (Solsten, 1999; Veen, 1993: 11-12). These results – "the strongest electoral showing for Germany's rightists since the 1950s" (New York Times, 1992) – occurred despite the CDU/CSU having picked up the tone of the right parties and arguing that tight immigration and asylum restrictions were necessary. The party's response to the results from these local elections was to shift even further to the right (Schuster, 2003: 211).

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admitted to the territory of the German Reich within the boundaries of December 31, 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person." The details of how refugees or expellees can formally reinstate their citizenship have been regulated by the Federal Expellees Act (Bundesvertriebenengesetz) since 19 May 1953.

Faced with this serious situation, the government increased its pressure on the opposition to withdraw its objection to a constitutional change while at the same time it also directed its efforts towards a stronger institutionalization of cooperation on asylum matters at the EU level.

In the course of the debates in the German Parliament, the government initially attempted to convince the opposition that a constitutional change was necessary in order to adhere to Germany's European commitments which they themselves had negotiated (Deutscher Bundestag, 1992: 3; Lavenex, 2001). The government proposed that the a new paragraph be added to Article 16 as follows:

> Politically persecuted persons enjoy the right to asylum. Persons who arrive from a country in which they are not exposed to the danger of being politically persecuted or of being returned to a country where they may be under a threat for political persecution do not enjoy the right to asylum. The details are to be determined by law. The law can stipulate that asylum seekers from states which fulfil the conditions in the preceding sentence, can be returned at the border or have their stay terminated immediately (Deutscher Bundestag, 1992: 5)

From a strictly legal point of view, a constitutional change was not necessary for the ratification of the Dublin and Schengen Conventions because both contained a sovereignty clause which allowed countries to examine each asylum application even if they were not responsible for it (Article 3(4) and Article 29 (4), respectively) and the London Resolutions were politically but not legally binding.

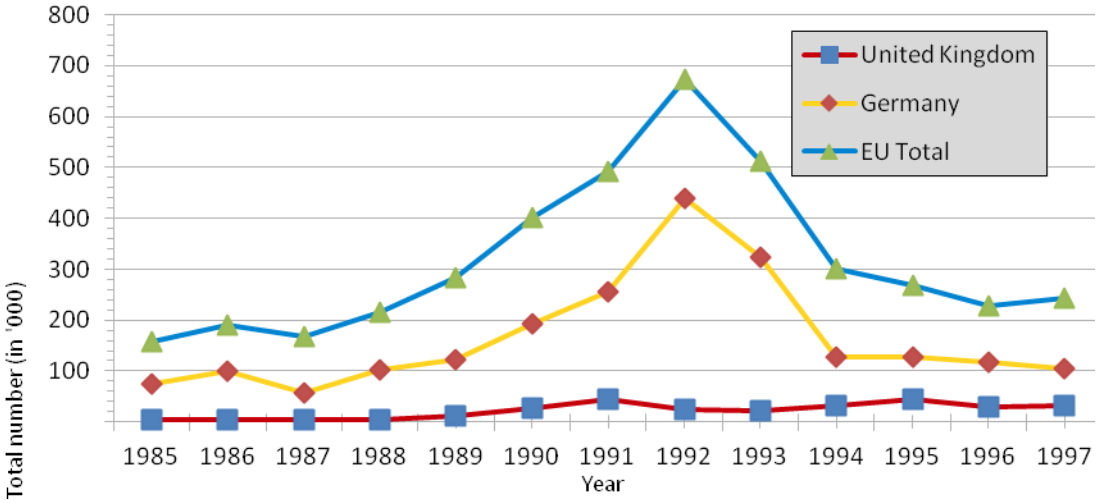

Figure 2: Number of asylum applications in Germany, Britain and EU (1985-1997)

The government accepted that a strict legal obligation to change the constitution did not arise from the Schengen Implementation Convention but still tried to play the European card by insisting that Germany's meaningful participation in European harmonization policy as well as the negative consequences it would suffer if it did not make full use of it, necessitated the required changes. Wolfgang Schäuble (CDU/CSU) admitted that "of course […] we could ratify the Schengen Implementation Convention without a constitutional change" but he explained that, without such change, "under the requirements of the agreement, we would have to accept asylum seekers also from the other Member States – France, Belgium, Luxembourg, the Netherlands, Italy – without being able to make use of our corresponding right to send asylum seekers there when the conditions of the agreement for this are fulfilled, because of constitutional constraints" (Deutscher Bundestag, 1992a: 7313). The CDU also argued that without the constitutional change, Germany would also turn into the "reserve" asylum country for all applicants who have had their claims rejected in other Member States who would subsequently be able to claim asylum in Germany, thus contradicting the principle that every asylum seeker should have their claim examined in the EU only once (ibid.).

The problem with such outcome was not only that the number of asylum seekers in Germany would increase but also that other Member States would have even less interest in harmonizing asylum policy; Germany had been receiving more than 50 per cent of all asylum claims in Europe and at the height of the Yugoslav crisis, Germany the number reached 75 per cent (see Figure 1)[37].

The pragmatic argument about European cooperation was not the only one through which the government used EU cooperation to strengthen the case for constitutional change. It tied the question of the ratification of Schengen to that of amending the constitution. The main purpose of Schengen, however, was the removal of the internal borders and it contained only one chapter devoted to asylum, under "accompanying measures". By presenting the two measures together the government made it difficult for the opposition to decline the constitutional amendment because that would have made them vulnerable to the criticism that they were opposing the freedom of movement of goods, services, capital and persons and hindering the process of European integration. The interior minister, Rudolf Seiters (CDU/CSU), expressed this succinctly by insisting that "those who say 'yes' to a Europe without borders must also say 'yes' to a common European asylum policy because it is only through European solutions that we can deal with the constantly increasing flow of refugees and asylum seekers" (Deutscher Bundestag, 1992a: 7297). He also argued that because of the specific German constitutional provisions the government had to enter a reservation to the Schengen Convention which, in turn, limited its scope for manoeuvre in the discussions of asylum policy harmonisation.

Another interesting aspect of the government's strategy was to relate the issue of constitutional amendment to the ratification of the Schengen – which did not include all EU

[37] The difference between the number of asylum seekers from former Yugoslavia in Germany and the UK is especially pronounced: in 1992 Germany received 122.666 applications while the UK had 5.635 (Schuster, 2003: 232).

Member States and did not concern itself primarily with asylum – rather than the Dublin Convention which included all EU countries (and, upon ratification the possibility for non-EU members to conclude parallel agreements) and was solely devoted to the issue of determining which EU Member State is responsible for an asylum claim. The SPD complained about the fact that the Dublin Convention had not been debated in the Parliament[38]. Referring to Dublin would have been somewhat effective in strengthening the argument about the consequences on the numbers of asylum seekers in case it entered into force and no constitutional amendment was passed because of its applicability to a large number of countries. However, the government would not have been able to juxtapose the removal of internal borders – a highly significant and positive, from a German point of view, achievement of European integration – with the need to reform the Basic Law.

Such framing of the debate was both possible and effective because of the cross-party support for European integration, especially among German elites. The government did not see the removal of internal borders as a threat to Germany's security, so long the flanking measures were implemented; on the contrary, according to Seiters, "internal security becomes not a victim, but an engine and pillar for European unification" (Deutscher Bundestag, 1992a).

The smaller coalition partner, FDP, initially opposed the proposed constitutional changes but gradually shifted their position. Some of the reasons for this change were due to changes within the party: unlike his predecessor Hans-Dietrich Genscher, FDP's new leader, Klaus Kinkel, was quickly sidelined by Chancellor Helmut Kohl. Furthermore, conservative eastern delegates were able to exercise more weight in the new unified party (Marshall, 2000: 90). The position of the smaller coalition partner was of lesser importance to the CDU/CSU than that of the main opposition party. Edmund Stoiber declared: "The position

[38] The Dublin Convention was presented for ratification in September 1993, months after the asylum compromise had been agreed.

of the FDP no longer interests me at all. I care only about the stance of the SPD because I can only change the Basic Law with the support of the SPD" (quoted in Schuster, 2003: 212).

During the debate, SPD expressed its disappointment that the government decided to present the ratification of Schengen with a proposal for constitutional change and continued to resist the amendments by insisting on the sanctity of the constitutionally-enshrined asylum right and Germany's human rights obligations. They also believed that the proposed amendments to the Basic Law did little to resolve the problem with the increasing number of asylum applications because the most important problem was the identification of asylum seekers and establishing which country they came from. Without such identification it would be difficult to make use of the opportunities which the government claimed the Schengen Convention provided. Instead, SPD suggested that accelerating the asylum determination procedure would be a much better way to deal with the rising number of asylum seekers without the need for a constitutional change.

SPD asserted that having a list of countries where there is no risk of persecution and denying asylum to people coming from such countries was also problematic. Hans-Ulrich Klose (SPD) stated that "coming from non-persecuting country should not lead to an automatic rejection of the asylum claim because – here Amnesty International is certainly right – individual persecution can take place in any country" (Deutscher Bundestag, 1992a).

SPD had misgivings about the "safety" of neighbouring countries and the extent to which the standards used in their asylum determination procedures corresponded to the ones established in Germany, especially with regard to the interpretation of the Geneva Convention. This does not suggest that SPD did not share the government's enthusiasm for a common European asylum policy; but it believed that any possible talk about changing domestic German legislation would have to follow the harmonisation of the interpretation of

European and international refugee protection instruments (Deutscher Bundestag, 1992a)[39].

CDU insisted on the opposite approach. It maintained that the greater the number of countries around Germany which could be designated as "safe" and would have to process applications from asylum seekers who otherwise would have come to Germany, the greater the chances that they would see asylum policy as an issue of common concern. This explains why the proposed constitutional amendment was not limited to Schengen or Dublin Member States but contained a rather loose definition of safe countries which would allow Germany to make full use of readmission agreements with Poland and Czech Republic.

Increasingly, SPD found itself in an awkward position: as an important electoral year, 1994, was very close, it had to address the issue of asylum without risking a loss of votes, or, even worse, a repeat of the local election results in which far-right parties made significant gains, but on a national level. As explained in the theoretical chapter, the increasing salience of an issue forces the parties to react, moving them closer to public opinion.

The salience of the issue is evident both in media reports and issue ranking. The table below shows the salience of "asylum" in newspaper publications. Due to the lack of data from other newspapers for the time period in question, the table refers only to newspaper articles in the Tageszeitung which nevertheless give a good indication of the difference in attention the issue received from 1990 to 1992.

While in 1990 there were only 70 articles dealing with asylum, in 1992, at the peak of the asylum crisis, the number increased almost four times, reaching 260.

[39] The SPD initially supported EU harmonisation which would take into account the German constitutional provisions on asylum (Deutscher Bundestag 1990) but the government made it clear that there was not sufficient support among other Member States to agree on establishing such level of protection.

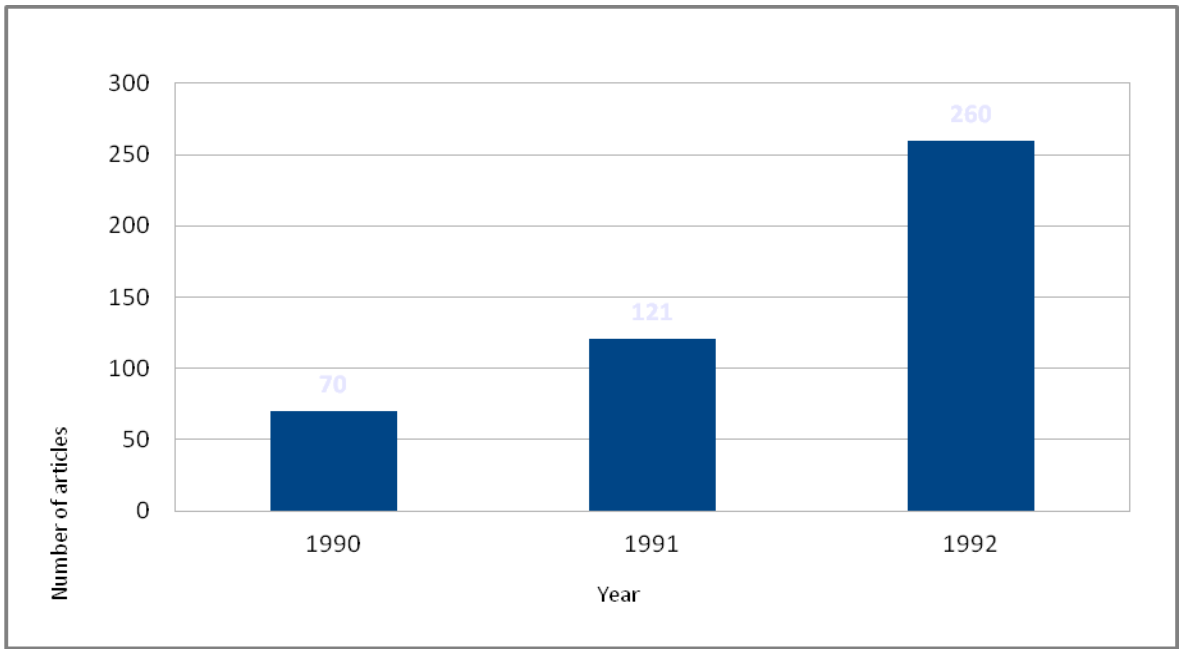

Figure 3: Asylum Salience -- Newspaper Articles Germany (TAZ)

The salience of the issue is also evident in the change in issue rankings of the most important problem facing Germany from 1990 to 1992. In 1990, only 8.08 per cent of the population thought that asylum was one of the most important problems facing Germany. In 1991, more than three times as many people (27.47 per cent) thought that was the case while in 1992, more than half of the population (56.82 per cent) believed asylum was one of the two most important problems in the country.

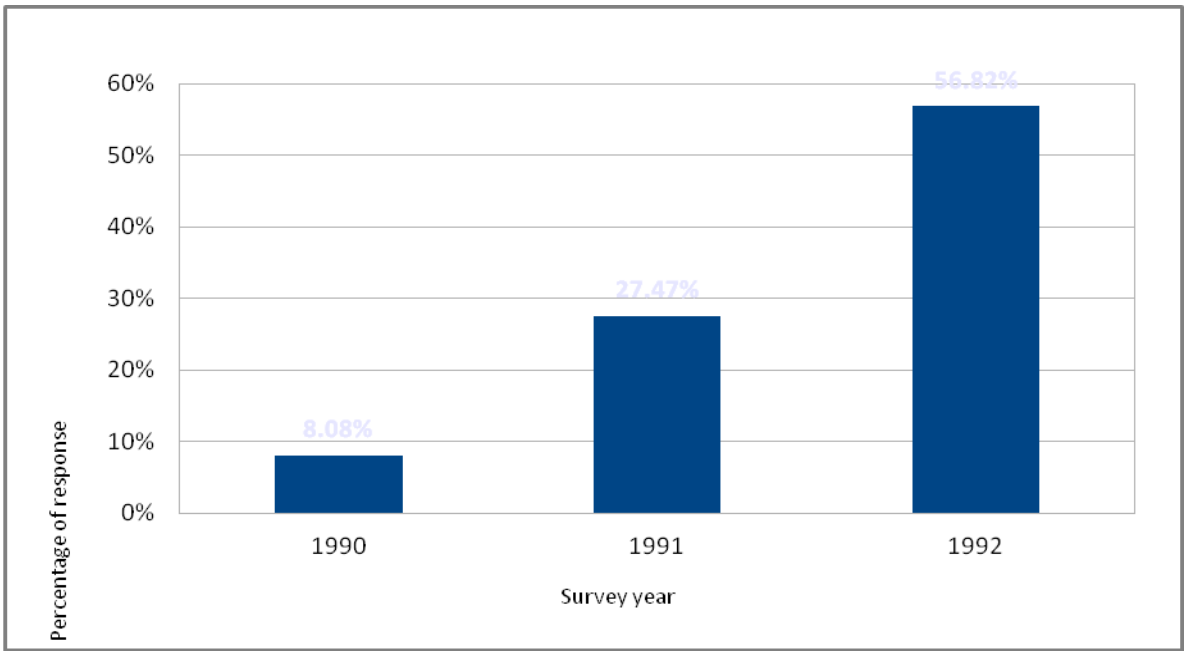

Figure 4: Asylum Salience -- most important problem facing Germany

The direction of change of government policy which the public expected was also very clear and relatively stable although with a clear trend towards restrictionism: while in 1990 almost 20 per cent of the population believed that asylum seekers' access to the territory should not be limited, by 1992 almost 87 per cent of the population stated that access to asylum should either be limited (64.2 per cent) or prevented completely (22.7 per cent).

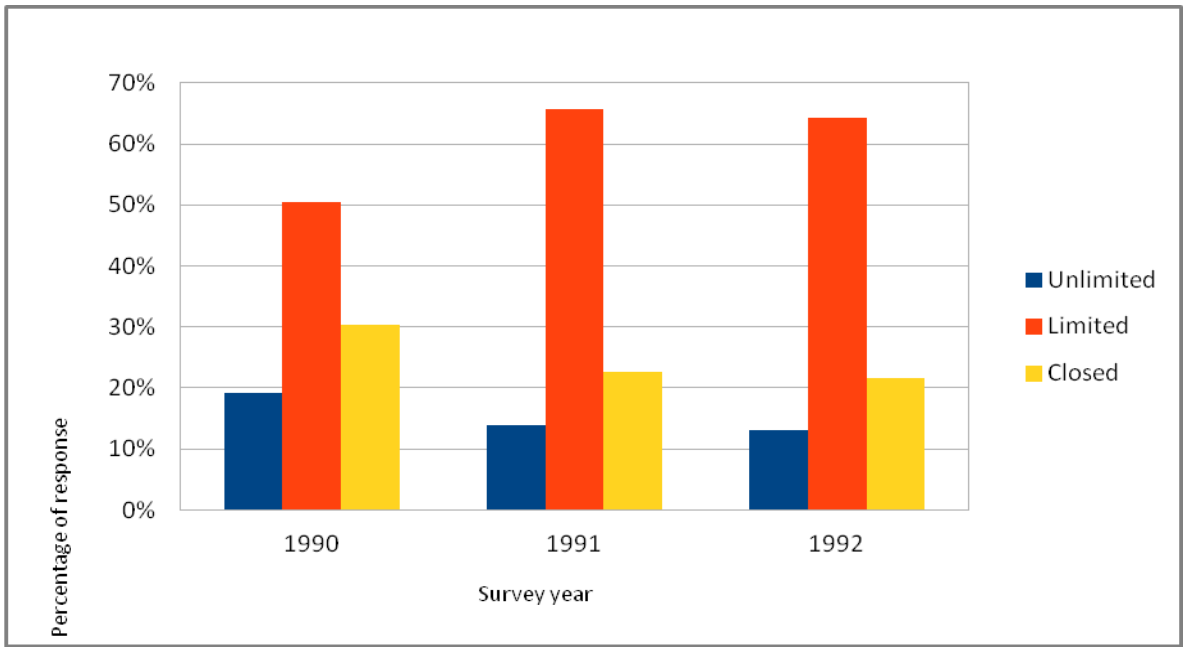

Figure 5: Public Opinion on Access to Asylum -- "Do you believe access to asylum in Germany should be..."

Clearly, with the increasing salience of the issue of asylum, the SPD could no longer afford to hold a position which was clearly out of step with the public opinion.

The situation in the country was becoming unmanageable and the attacks in Rostock in August 1992 led to intra-party discussion among CDU/CSU regarding an even stricter change in asylum policy and the replacement of the constitutional right to asylum with an institutional guarantee on the basis of the Geneva Convention (Schwarze, 2000: 224). FDP also signalled that, in view of preserving the "social peace" and dealing with the abuse of the asylum system, it was no longer opposed to a constitutional change but this should be based on the preservation of the individual right to asylum (ibid., 227).

Chancellor Kohl increased the pressure on the opposition by warning that he would have to declare a state of emergency in order to cope with the increasing number of asylum seekers (Der Spiegel, 1992). There was a sense that SPD held the key to the resolution of the crisis but was refusing to act on the government's proposals, without proposing an alternative.

Pressure on the party was also coming from SPD-governed local municipalities which were no longer capable of coping with the influx of asylum seekers. At the end of August 1992, with the strong insistence of SPD's party leader, Bjorn Engholm, who wanted to "give a clear signal" to the voters before the 1994 (Der Spiegel 1992), the party signalled its willingness to support a constitutional change, subject to maintaining the individual right to asylum and insisted on a number of additional changes in immigration policy.

On 6 December 1992, SPD, FDP and CDU/CSU came to an agreement on a broad package of measures concerning immigration which has commonly been referred to as "asylum compromise" (*Asylkompromiss*)[40]. The German constitutional law was amended in a way that the original constitutional right of asylum was retained in a newly-introduced article in the Basic Law (Article 16a (1)) but it was subject to a number of limitations listed in the subsequent paragraphs.

Article 16a (2) stipulated that the constitutional right to asylum may not be invoked by a person who enters Germany from a Member State of the EU or from another third state in which application of the Geneva Convention and ECHR is assured. The states to which the criteria of apply shall be specified by a law requiring the consent of the Bundesrat. In such cases, measures to terminate an applicant's stay may be implemented without regard to

[40] In addition to the question of asylum, as part of the Asylum Compromise, the parties agreed on a reform facilitating the acquisition of German citizenship. While originally subject to an administrative discretion, the compromise created an individual right to citizenship to anyone who fulfilled the criteria. Citizenship would be granted to foreigners aged sixteen to 23, provided that they renounced their previous citizenship, had lived permanently and lawfully in Germany for eight years, had attended school in Germany for at least six years and had not been prosecuted for a criminal offence. In addition, German citizenship would be granted to a migrant who had legal habitual residence in Germany for fifteen years, renounced their previous nationality; had no criminal conviction; and had ability to earn a living (Hailbroner, 2010). In addition, an yearly quota for the acceptance of ethnic German was introduced. Finally, the SPD managed to ensure the adoption of another provision applying specifically to war and civil war refugees who would be taken out of the regular asylum procedure and given "temporary protection" as a group for an initial period of 3 months, with a possible extension should the situation not improve (Foreigner's Law, 1990, Art 32a). The status contains a number of restrictions, including the freedom of movement and the withdrawal of the recipient's right to apply for a refugee status (Van Selm, 31). Since the adoption of the EU Directive on Temporary Protection and its transposition in German law through the Immigration Law of 2005, the status has been regulated on the basis of Article 24, Aufenthaltsgesetz.
The legislation agreed through the asylum compromise was adopted in May 1993 and entered into force on 1 July 1993.

any legal challenge that may have been instituted against them. This formulation differs from the government's initial proposal which had defined safe third countries only vaguely, without a specific reference to Geneva Convention and ECHR. It provides slightly more stringent criteria for determining the safety of a third country than the Resolution on a harmonized approach to host third countries by referring to ECHR, instead of only to "torture and inhuman and degrading treatment". At the same time it is a "hard" version of the safe third country (Byrne et al., 2004: 361) in that appeals do not have a suspensive effect (the respective Resolution does mention the issue of appeals).

Moreover, the Resolution stipulated that an assessment of whether a country is safe should be made on an individual basis, i.e. whether it is safe for the individual applicant; in contrast, the constitutional change provided for a general designation of a country as "safe", i.e. Germany went beyond what the European instrument prescribed.

According to Article 16a (3) of the German Basic Law, an accelerated asylum procedure would be applied to those who are nationals of safe countries of origin, i.e. countries for which, on the basis of their laws, enforcement practices, and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading treatment exist. There is a rebuttable presumption that a person from such country is not persecuted; the burden of proof to prove individual risk of persecution falling on the applicant. Appeals in such cases have suspensive effect only in limited circumstances. The list of safe countries of origin is also to be determined by law with the consent of the Bundesrat.

Within the package of measures agreed upon through the Asylum compromise, Germany also introduced, in the Asylum Procedures Law, a special "airport procedure" applicable to those arriving in Germany by air from safe countries of origin or those a not in possession of identity documents. The procedure is a form of accelerated asylum

determination procedure which is conducted in the transit zone of the airport, before the applicant enters the territory of the state. Decisions on applications are issued within 2 days and if the application is rejected as manifestly unfounded appeals do not have suspensive effect. It is possible to apply for an interim measure against deportation within 3 days of receiving the decision and if the court approves the emergency application or has not ruled on it within 14 days, the asylum applicant may enter the country. This means the airport procedure must be concluded within 19 days. During entire procedure the applicant is to be confined to the transit zone at the airport.

Moreover, Germany also adopted the *Asylbewerberleistungsgesetz* (Asylum seekers' benefits law) which entered into force in November 1993 and removed the social benefits for asylum seekers from the main social benefits law. It postulated that these can be 30 per cent lower than the benefits to which citizens are entitled. These benefits were intended to meet only the basic needs of asylum seekers and were granted to a large extent in kind or in vouchers. The reason behind these measures was to reduce the incentives of asylum seekers to prolong the asylum procedure or to use the asylum channel for economic reasons (Hailbroner, 1994).

This overview of the path to the Asylum Compromise demonstrates that the impact of the EU on this particular case is far from straightforward. This analysis rather shows that the government, motivated by party ideology and increased number of asylum requests sought additional venues at the EU level to realise its preference for changing domestic status quo and introducing a restrictive asylum policy. Initially, adopting the reform domestically proved difficult, with SPD firmly opposed to limiting the right to asylum. However, public fears over the rise of the number of asylum seekers, far-right mobilization, increased salience of the issue finally led to SPD making a compromise and relaxing its opposition. Even though it had to make some concessions to the SPD due to their position

as important veto players, the government managed to attain its preferred policy outcome and went beyond what the EU rules prescribed. It seized the opportunity to introduce a comprehensive reform of Germany's asylum policy.

6.3.2. Britain

Despite the introduction of visas and fines for carriers, the number of asylum seekers in the UK increased steadily, reaching 26, 200 in 1990 and an unprecedented 44,800 in 1991 (See Table 1). Thus, in July 1991 the government announced its intention to introduce the Asylum Bill which was going to become the UK's first statutory measure devoted to asylum. Due to the upcoming elections, the Bill could not be passed through the Parliament. Once the conservative government under John Major came to power, it introduced the Asylum and Immigration Appeals Bill in October 1992. It is worth noting that by 1992 the asylum applications had fallen substantially in comparison to the previous year to around 24,600 but nevertheless the Conservative government thought it was appropriate to introduce a package of measures designed to address the growing number of asylum applications, a large proportion of which the government considered abusive and leading to unfair use of public resources. Introducing the Bill to the Parliament, the government argued that the proposed law:

> "will lead to giving quicker security to those who are entitled to seek refuge here or to settle here permanently. It will enable us to turn away more promptly and fairly those who are not entitled to be here. That in itself will ease the pressures on all our public services. It will mean that our public services will have to face the demands that come from those whom the British public want to be here as our contribution to those suffering in international troubles. That is not the case at present, and we need the system to provide a better service to would-be settlers and to the general public" (House of Commons, 1992: Col. 22)

The Bill put forward by the government in 1992 contained a number of provisions

which were intended to introduce a coherent asylum procedure. It provided a definition of a claim for asylum, stipulated the primacy of the 1951 Geneva Convention in determining the refugee status, the right to fingerprint asylum seekers, and, crucially, a right to appeal against a refusal of an asylum claim which had previously not been available.

The UK courts had long criticized the lack of an opportunity for all asylum seekers to appeal against a negative decision which, according to the government, added further to the complexity and length of decision-making (House of Commons, 1992). While the Act granted an in-country right of appeal against any refusal of an asylum claim, it introduced separate rules of appeal depending on the asylum claim: those whose claims were considered to be "without foundation" were subject to a 'fast-track' (accelerated) procedure which imposed very tight time limits to lodging an appeal. Claims "without foundation" were those that did not question UK's obligations under the Geneva Convention or were considered "frivolous or vexatious". The majority of such claims were those falling under the 'safe third country' rule (McGuire, 1999: 66). The Immigration Rules defined "safe third country" as one where an applicant could be sent on account of the fact that he or she is not a citizen of that country, his life or liberty would not be threatened and the government in that country would not expose the applicant to a risk of refoulement.

The regular appeals procedure also introduced time limits but these were more generous than the ones in the fast-track procedure.

Despite the fact that the safe third country rule and the fast-track procedures show a clear resemblance to the provisions agreed among the EC ministers in the context of the London Resolutions, in its justification of the need of the proposed reforms, the government did not refer to the need to bring its legislation in line with that of the rest of Europe. Rather, it chose to emphasize the consequences which would ensue if the UK did not adopt the proposed reforms. The timing of the Bill, which coincided with the drop in the asylum

applications, made it difficult to argue that current problems necessitated an urgent solution. The government was quite careful to refute the claims that the changes were dictated by an agreement among EC home affairs ministers:

> "it is certainly true that we have a working party of officials in the Community looking at ways of harmonising our approach to this important problem: how to have a streamlined procedure for dealing with manifestly unfounded claims. That will be on the agenda at the Council of immigration Ministers which I will chair in a few weeks' time. We are presiding over the preparations for that, but this is not a particularly British document. The same problem is being faced in every European country, and it plainly makes sense to deal with it" (House of Commons 1992: Col. 30).

Nevertheless, 'Europe', and more specifically the situation in France and Germany, was used as an important justification for the need of reform. The Home Secretary Clarke argued that he accepted that "the pressures on Germany are much greater than our own, as are the difficulties. I do not, however, believe that we should wait for the problem to to assume German dimensions here before we take action to get rid of the manifest inefficiencies in our system" (House of Commons, 1992: Col.31).

The situation in Germany and France was considered problematic also because of the rise of xenophobia in these countries; a conservative MP warned that migration has brought "a phoenix-like rise of fascism in Germany", made it "respectable in French political circles to use hateful racist language" and led to "rise of fascism and unrest". It was claimed that if Britain found itself in the same situation, Britain it would risk the resurgence of the National Front (House of Commons, 1992: Col. 71)[41].

The British government believed firmly that it had achieved a good balance in race relations which were "better than they are almost anywhere else in western Europe or north America. One reason for that is that our host population feels comfortable with a system that restricts to manageable numbers the influx of people from overseas" (House of

[41] Margaret Thatcher had managed to neutralise the National Front by adopting language and policies which appealed to the party's supporters. In the run-up to the 1979 the Conservatives made considerable electoral gains by mobilising the voters' fears that Britain could be 'swamped by people of different culture' (Schuster, 2003).

Commons 1992: Col. 21). While the government was clear that the new law would help preserve good race relations, the opposition accused it of having the opposite effect: harming race relations by treating members of some communities unfavourably.

The Home Secretary was also quick to point out that the new provision allowing the fingerprinting of asylum seekers was in line with that with the rest of the community. However, such provision was not to be found in in the London Resolutions or the Dublin Convention. The latter only stated that apart from personal information and travel documents Member States would share "other information necessary for establishing the identity of the applicant"[42]. Germany, on the other hand had already successfully introduced a fingerprint database which it was using also for storing the fingerprints of asylum seekers (Aus, 2006). This suggests that the UK government was aware of and learning from the policies implemented in other EC countries.

Even though the UK government did not face the same pressure at the sub-national level as the German one, some provisions in the Bill were directly aimed at addressing the concerns of local authorities. In order to alleviate the impact of increased number of asylum seekers on the availability of housing in some local authorities, the Bill imposed certain limits on their statutory duty to house asylum seekers: they were no longer obliged to house asylum seekers who had accommodation available, however temporary.

While the 1992 Bill, which was eventually adopted in 1993, contained some elements from the London Resolutions (and even some provisions going beyond them such as fingerprinting), it did not encompass all provisions on safe third countries: there was no reference, for example, to safe countries of origin. One reason for this could be the fact that the government did not face the same obstacles to introducing reforms compared to Germany and could afford to adopt a piecemeal approach. More crucially, however, the

[42] Dublin Convention, Article 15 (2).

need to find a solution to the question of asylum was not as pressing as in Germany: the fear of what the future state of affairs might look like without reforms was not enough to justify a comprehensive reform. And while the newspapers often talked of "bogus" asylum seekers and the way they exploit the benefits system there was no talk of a "crisis" and "emergency".

The situation started to change when it became clear that the 1993 Act failed to prevent the increase in the number of asylum applications or clear the backlog of previous ones. In 1994 the number of applications increased to 32,800 and reached almost 44,000 in 1995 (see Table 1). The issue was becoming politically salient and the government thought it could gain some political advantage from announcing more restrictive measures on asylum and immigration policy in 1996, in the run-up to the general election in the following year. A former head of research in the Conservative head office stated that the issue of immigration was successfully raised in the 1992 national and 1994 European elections as it "played particularly well in the tabloids and still has the potential to hurt" (quoted in Stevens, 2004: 170).

Indeed, the salience of the issue increased in 1992 and although no clear trend is visible across the newspapers, the coverage of asylum issues in the Daily Mail (a tabloid) and in the Times is higher in 1992 than in 1993 (and in the Times, compared to 1991), suggesting that a conservative government, alarmed by the increase in numbers in 1991, sought to politicise the issue in order to gain political advantage, with the issue remaining on the agenda despite falling numbers.

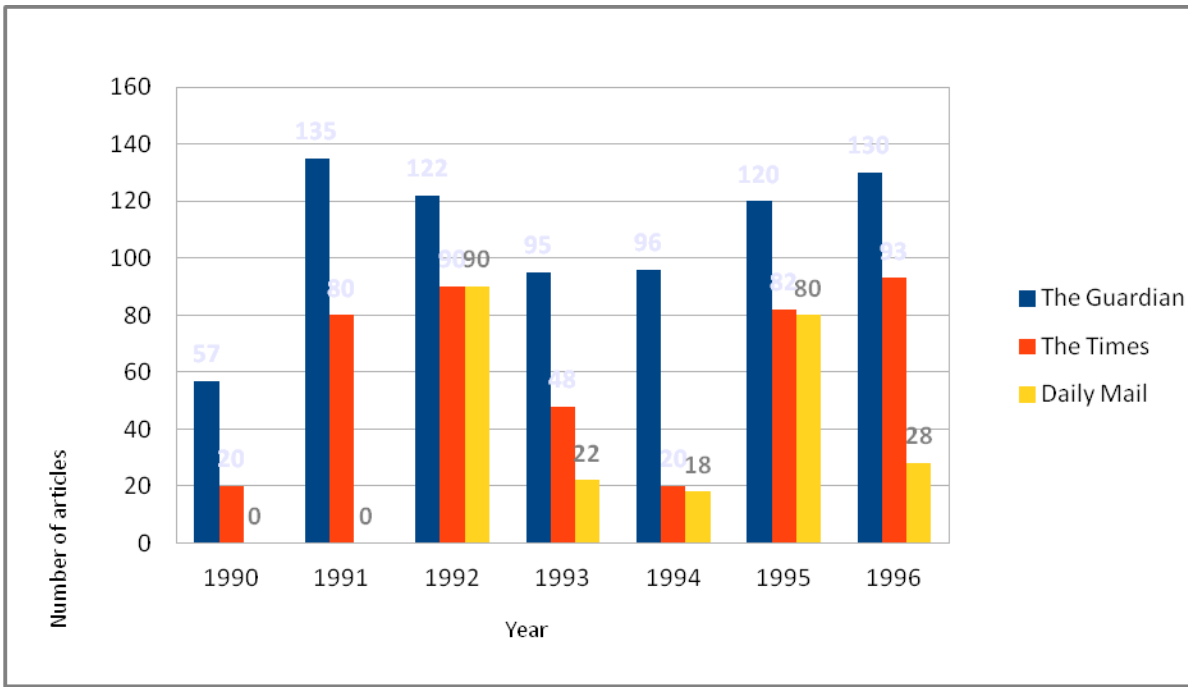

Figure 6: Asylum salience -- newspaper articles

This potential for gaining political advantage, however, is unlikely to have been very large: in 1991, only 1.33 per cent of the voters thought immigration was among the two most important issues facing Britain and in 1992, 3.86 per cent thought it was the case: almost a threefold increase but yet a fairly low number compared to Germany.

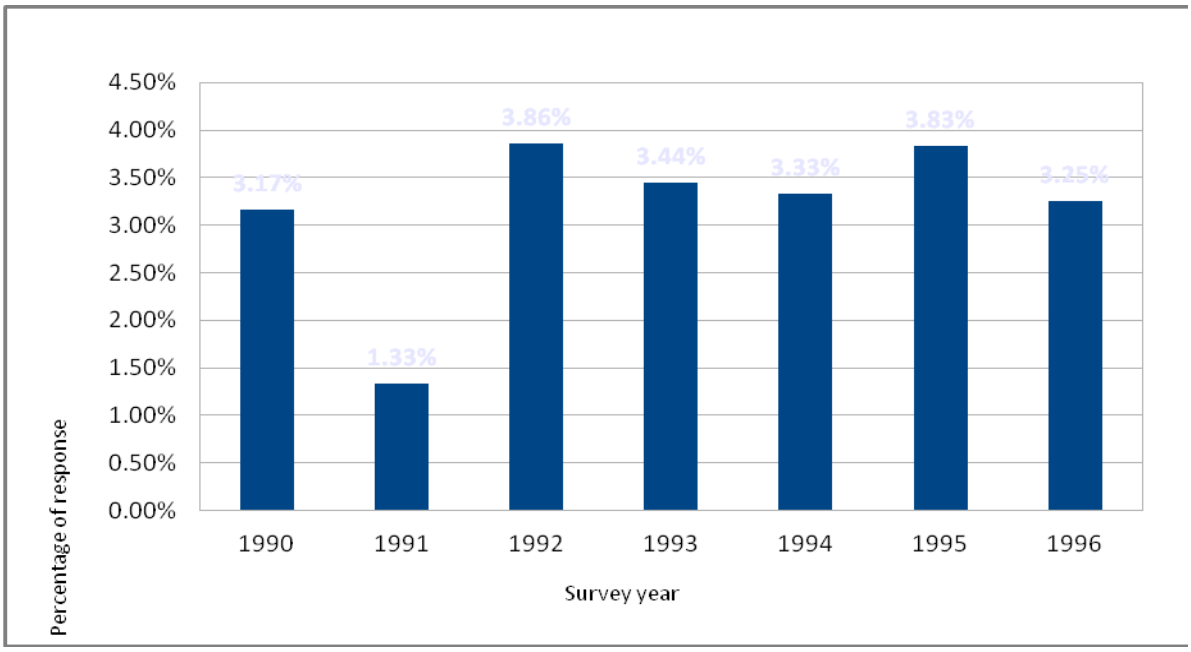

Figure 7: Asylum Salience -- most important issues facing Britain

The government commissioned a report on the impact of the 1993 Act to KPMG. The report suggested that accelerating the appeals procedure, extending the visa restrictions to more countries and introducing a "white list" of countries could help increase the efficiency of the asylum system (KPMG, 1994).

The 1996 Asylum and Immigration Act introduced many important changes in line with the recommendations of the KPMG report. One of the most controversial provisions was the granting of the power to the Secretary of the State to designate "safe countries" in which there was "no serious risk of persecution" which came to be known as the "white list". It was the responsibility of the applicant to rebut the presumption that he is not exposed to an individual risk of persecution if sent to that country. In the course of the debates on the new legislation the government was quick to point out that the "white list" was "not a new concept and it is not unique to the United Kingdom. Germany, the Netherlands, Switzerland, Denmark and Finland already operate similar arrangements." (House of Commons, 1996: Col. 696).

The government stated that it would use three criteria to designate countries as safe: there is in general no serious risk of persecution, they generate significant number of asylum claims in the UK and a very high proportion of them prove to be unfounded (House of Commons, 1995). This approach appears to be stricter than the one agreed by ministers in the Conclusions on Countries where there is no serious risk of persecution which focuses on the observance of human rights both formally and in practice, the existence of democratic institutions and stability, in addition to the number of refugees and recognition rates. In contrast, Michael Howard, the Home Secretary, stated that there would be no requirement for such countries to have "political and judicial institutions that function to western standards […] What we will be saying is that a country has functioning institutions, and stability and pluralism in sufficient measure to support an assessment that, in general, people living there are not at risk" (House of Commons, 1995: Col. 703).

Applications from such countries were processed through the 'fast track' appeals procedure: only an appeal to an independent adjudicator was possible and there was no further right of appeal to the Immigration Appeal Tribunal. With reference to this arrangement, Michael Howard again stated that Germany, Finland, Switzerland and the Netherlands operated a system of that kind (House of Commons, 1995). The opposition objected to this argument by explaining that the fact that other countries operated the procedure did not make it intrinsically right and raised doubts about the fairness of the procedure and the human rights record of the countries to be designated as safe.

The first order designating safe countries was laid before the Parliament in 1996 and included Bulgaria, Cyprus, Ghana, India, Pakistan, Poland and Romania.

The government was convinced that unlike the case in the UK, measures enacted in other European countries had led to a drop in the number of asylum applications:

> The problem [of the high number of applications] cannot be solved by resources and efficiency alone. Further strengthening of the legislation is needed. We must send a

> clear message that abusive claims will be dealt with robustly. The recent experience of our European neighbours supports that view. Most of them have already introduced measures similar to the ones we are proposing. Germany and the Netherlands are examples of countries where stricter procedures since 1993 have been followed by substantial reductions. Over the past two years, the number of claims has more than halved in the main western European countries, but in this country it has nearly doubled. The Government are not prepared to allow this country to become a soft target for those intent on abusing asylum procedures (House of Lords, 1996: Col. 960).

Moreover, the 'fast-track' procedure was extended to cover the majority of asylum cases. In some cases, where safe third country – another EU country or a "designated state" was involved, the in-country right of appeal was abolished. The government justified the withdrawal of appeal rights which it had granted only in 1993 with the delays which such appeals were causing in removing asylum seekers to safe third countries which were not willing to accept them after a prolonged period of time spent in the UK. The government did not, however, refer to the EU-level agreements on this subject[43].

In the course of the discussions, the government was again quick to dispel any notion that the safe third country provisions were inspired by measures agreed by the EU: Home Secretary Michael Howard insisted that asylum law was made in the UK, not Brussels (quoted in Pirouet, 2001: 135, fn.25).

The Act also limited the asylum seekers' access to housing and social security benefits. Regarding the latter it stipulated that applicants who did not claim asylum on arrival were excluded from receiving benefits[44] and all asylum seekers were no longer entitled to child benefits. Concerning housing, asylum seekers' access to accommodation was restricted further and was subject to the same pre-conditions as those for receiving benefits. The justification for the new provisions was the need to protect public services and spread the message that the UK should be viewed as "a haven, not a honeypot" (House of

[43] In addition to the London resolutions, in 1995 EU Member States adopted a Resolution on asylum procedures: *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures* [Official Journal C 274, 19.09.1996]. The resolution permitted an exception to the principle of non-suspensive appeals in safe third country cases.

[44] The only exception to that rule concerned asylum seekers who were subject to a "state of upheaval" declaration, i.e. when the circumstances in a country were of such nature so that any returns to that country would be suspended.

Commons, 1995: Col. 700).

> "People in the great world outside may not realise that all a person has to do is say "asylum", whereupon the whole contraption of welfare support and assistance comes into play immediately, just as it does for genuine asylum seekers. Apart from anything else, that is not fair to the many people waiting for housing in London, or to the people complaining about the inadequacy of their social security payments. A great deal of money is being wasted on people who do not deserve it, do not need it and have no right to it" (House of Commons, 1995)

The Court of Appeal ruled[45], however, that local authorities had obligations under the 1948 National Assistance Act to provide accommodation to provide at least 'shelter, warmth and food' to applicants and thus prevented the government from achieving its goal to withdraw support from asylum seekers.

Despite the lack of reference to concrete EU policy instruments, many of the policy changes could be attributed to policy developments in Europe. In particular, domestic changes were also prompted by the fear that the abolition of border controls in the Schengen area would make it easier for people to reach the shores of Britain and make use of its "soft touch" approach. The fear of being "swamped" by hordes of irregular migrants, asylum seekers, drug dealers and terrorist coming from the continent was shared by MPs and media alike: media scare stories preceded the announced changes by about a month (Statewatch, 1995).

The salience of the asylum issue is visible in the substantial increase in the number of articles focusing on asylum in the media: their increase is evident across all three newspapers but it is most remarkable in the Daily Mail and the Times: in 1994 the former published only 18 articles dealing with asylum while in 1995 there were 159. Similarly, the Times went from only 20 articles in 1994 to 82 in 1995. The increase in the number of articles in the Guardian is smaller but conforms to the trend (Figure 5).

In terms of salience to the public, the situation does not appear to have changed

[45] R v Hammersmith and Fulham LBC, ex Parte M, 8 October 1996

substantially: immigration remained among the most important issue only for 3.83 per cent of the population: only a slight increase compared to the previous year (Figure 6).

While the salience of immigration was not particularly high, the negative sentiments towards the growth of illegal immigration among the public were clear: in 1995, the British Social Attitudes Survey showed that around 63 per cent of the population wanted to see immigration reduced. In response to the question whether the number of immigrants to Britain should be increased a lot, increased a little, remain the same as it is, reduced a little, or reduced a lot, round 25.19 % wanted to see immigration "reduced a little" while 41.96% thought it should be reduced a lot (British Social Attitudes Survey).

In addition to its concerns about the potential impact of the removal of internal borders on the continent, the government also started to worry that as other EU countries were starting to tighten their procedures, the number of asylum seekers in the UK was increasing, suggesting that comparisons with other countries and the number of asylum applications received in each country played an important part in spurring the government 's dissatisfaction with current policy. Michael Howard stated:

> Many other western European countries have taken action to tighten their procedures. As a result, asylum applications are falling in the rest of western Europe—down from 500,000 in 1993 to 320,000 last year, while applications in this country rose by about 45 per cent. during the same period. (House of Commons, 1995).

In the course of the debates on the 1993 and the 1996, the government faced fierce opposition from the Labour Party. The accusations ranged from a failure to comply with international obligations through providing the wrong data on the number of successful appeals to questioning the justification of introducing restrictive legislation by reference to provisions in other Member States. The opposition also claimed that the government was punishing asylum seekers for its own inefficiency. For instance, Jack Straw pointed out that the reason why the costs of administering the asylum system were high were because of the

significant time delays in the asylum procedure; he stated that had the system been efficient the benefits paid to asylum seekers would have cost £40m instead of £200m (House of Commons, 1995). Despite these objections, however, the government managed to pass the proposed changes.

The British case demonstrates the relative ease with which the government managed to introduce some important changes in the asylum system based on non-binding agreements among EC ministers. One of the main incentives for implementing the measures was the fear of the consequences which would ensue in case the reforms were not introduced. Initially, the negative examples were Germany and, to some extent France: UK politicians constantly appealed to the instability and xenophobic mood in these countries and warned that the same could happen in the UK and threaten the good race relations in the country. Despite the fact that the government did fear an increase in the asylum numbers, the relatively smaller-scale reform than that in Germany suggests that they still thought the numbers could be managed mainly by making the system more efficient. Initially, they curtailed only a small part of the benefits which were perceived to be attracting asylum seekers and whose 'abuse' was putting pressure on the local authorities mainly with regard to housing.

However, once it became clear that the reforms in Germany and France were associated with lower numbers in these countries and higher numbers in the UK, the government felt forced to “compete” and demonstrate that it was not a “soft touch”. The timing of the discussions was also important as they took place against the announcement of Schengen entering into force. The government defended its position to stay outside Schengen by pointing out to the need to maintain border controls which ensured that the UK was protected from the negative consequences of irregular migration, drugs, and terrorism which the removal of borders would supposedly lead to. It is not surprising then that the

media and the public expected the removal of internal borders among Schengen countries to lead to the UK being "swamped" by irregular migrants and asylum seekers. The conservative government's behaviour is entirely consistent with its ideology: it introduced restrictions even in the face of falling number of asylum seekers, when there was only limited electoral advantage to exploiting the issue.

Comparing the cases of Germany and the UK, it is surprising to see how different the "numbers" threshold was in both countries to trigger a policy change. In Germany, the numbers had to reach hundreds of thousands before the opposition finally agreed to a compromise as explained, compromising on its ideological position only in the face of increased salience and almost unanimous negative public opinion. In contrast, in the UK the reform went ahead when numbers were ten times smaller. Both historical and institutional reasons might account for this difference. Many people in Germany believed that the country should maintain its asylum provisions as memories of persecution and the World War II were still vivid, which was not the case in the UK. Moreover, the right to asylum was enshrined in the German Basic Law and the majority required to change it enabled SPD to act as veto players. In the UK the granting of asylum was initially a subject of an administrative procedure and could be easily amended in the absence of veto players. But more importantly, the speed and the timing of the reforms reflect the different responsiveness of the two polities, as well as the difficulties associated with the "joint decision trap" and the ability to conduct domestic reforms.

But the number of asylum applications played another interesting role in shaping the reforms which is rarely acknowledged. The slight increase in the UK was sufficient to justify domestic reforms by a conservative government and to provide incentives for the UK to engage in cooperation at the EU level where there was an opportunity to enact restrictive policies aimed at curtailing the abuse of the asylum policies. Germany, on the other hand,

tried to introduce a burden-sharing mechanism, based on the one it operated at home but did not find the necessary support among other Member States. The only way left to deal with the asylum numbers then, was to adopt radical domestic reforms and "force" burden-sharing across the EU. This distinct lack of solidarity among Member States, together with the perceived success of the policy reforms introduced would shape Germany's preferences on asylum policies for decades to come. The German government played a two-level game, which, along with the other factors emphasized above, helped it achieve its desire to introduce domestic change, following years of dissatisfaction with the status quo.

In UK the reform was not a result of painstaking compromises and the desire to use a unique window of opportunity as was the case in Germany. It was introduced hastily and without taking the ensuing ramifications for local authorities into account. These only became visible once it was implemented and almost immediately challenged by the courts. Unlike Germany, the British government did not face serious opposition when enacting domestic reforms and did not need to resort to justifying reforms with reference to European requirements; rather, it sought to emphasize it was firmly in charge of policy-making. Whenever there were references concerning the need to bring policy in line with "Europe", these concerned the need to either introduce appropriate changes in advance so as to avoid the consequences suffered by other countries, or, later on, once it appeared others had devised successful policies, the need to introduce similar ones. The impact of these reforms would affect the development of British asylum policy in the coming years.

7. Reception Conditions Directive

The question of reception conditions provided to asylum seekers who have lodged a claim for international protection is an important element of asylum policy and the Amsterdam Treaty contained a formal commitment to introduce minimum standards on the reception of asylum seekers (Treaty of Amsterdam, Article 73k (1)(b)). The issue is a contentious political question. On the one hand, states are bound by international human rights treaties to guarantee every human being on their territory a dignified standard of living. At the same time, however, reception conditions are often considered by governments to be one of the main so-called "pull factors" which influence the asylum seekers' decision to seek protection in a specific country[46]. Thus, asylum policy aims to strike a balance between fulfilling the state's international obligations and setting reception standards so as to avoid attracting a disproportionately large number of asylum seekers.

This chapter will explore the impact of the EU on reception conditions for asylum seekers in Germany and the UK by focusing on *Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers* (Reception Conditions Directive).

The Directive was the first piece of legislation adopted as part of the Common European Asylum System under the Amsterdam Treaty[47]. Its aim was to regulate the material reception conditions that asylum seekers are entitled to such as housing, food, clothing, and daily allowance as well as their access to health care, education, and the labour market. While the Directive specifies only minimum standards – i.e. the level of

[46] The existence of a relationship between material reception conditions and asylum seekers' choice of country is heavily disputed. Many studies (e.g. Crawley 2010) have found that the asylum seekers' choices are primarily influenced by the proximity of a safe country rather than the benefits it offers. This research shows that the majority of asylum seekers are unaware of the benefits they would receive in the host country. Cf. also Chapter 2 which discusses various other studies exploring the alleged link.

[47] See Chapter 5 for a discussion of the Amsterdam Treaty and the changes it introduced in asylum policy.

support below which Member States could not lower their reception standards – it is an important piece of legislation since it prevents regulatory competition among Member States which could have engaged in a "race to the bottom" in an attempt not to offer more attractive conditions than those found in neighbouring countries (Barbou des Places, 2003). In the absence of minimum standards, there is no limit to which a Member State could downgrade its reception standards in response to a similar move by another Member State. At the time of the adoption of the Directive, however, many NGOs and the UNHCR raised the concern that "certain aspects of the Directive" might provide an incentive to those Member States whose standards were higher than those in the Directive to lower them in the course of implementation (UNHCR, 2002).

A detailed examination of the most important provisions in the Directive will demonstrate that its direct impact on German and British asylum policy has been quite limited. It will show that the reason for this limited impact is to be found in domestic politics. The three-step analytical framework outlined at the beginning of the thesis – preference formation, EU level negotiations and implementation – captures well the complex interrelationship between domestic and EU policies.

The most difficult issues during the negotiations were the questions of access to employment, freedom of movement within the territory of the Member State, the type of accommodation provided, and the withdrawal of reception conditions. Thus, the analysis will focus on these provisions.

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
Austria	13,805	20,896	18,284	30,135	37,074	32,340	24,630	22,460	13,350	11,920	224,894
Belgium	21,970	35,780	42,690	24,550	18,810	16,940	15,360	15,960	11,590	11,120	214,770
Denmark	9,370	12,330	12,200	12,510	6,070	4,560	3,240	2,260	1,920	1,850	66,310
Finland	1,270	3,110	3,170	1,650	3,440	3,080	3,860	3,570	2,330	1,430	26,910
France	22,380	30,910	38,750	47,290	51,090	51,400	58,550	49,730	30,750	29,390	410,240
Germany	98,640	95,110	78,560	88,290	71,130	50,450	35,610	28,910	21,030	19,160	586,890
Greece	2,950	1,530	3,080	5,500	5,660	8,180	4,470	9,050	12,270	25,110	77,800
Ireland	4,630	7,720	11,100	10,330	11,630	7,900	4,770	4,320	4,310	3,990	70,700
Italy	11,120	33,360	15,560	9,620	7,280	13,500	4,720	9,550	10,350	14,050	129,110
Luxembourg	1,710	2,920	620	690	1,040	1,550	1,580	800	520	430	11,860
Netherlands	45,220	42,730	43,900	32,580	18,670	13,400	9,780	12,350	14,470	7,100	240,200
Portugal	370	310	220	230	250	110	110	110	130	220	2,060
Spain	6,650	8,410	7,930	9,490	6,310	5,770	5,540	5,250	5,300	7,660	68,310
Sweden	12,840	11,230	16,300	23,520	33,020	31,360	23,160	17,530	24,320	36,370	229,650
United Kingdom	58,500	91,200	98,900	91,600	103,080	61,050	40,620	30,840	28,320	28,300	632,410
EU-15 Total	311,425	397,546	391,264	387,985	374,554	301,590	236,000	212,690	180,960	198,100	2,992,114

Table 3: Asylum Applications in EU-15 Member States (1998-2007) [Source: UNHCR 2004 and 2008]

7.1. Preference Formation

7.1.1. Germany

The most important reforms in German asylum policy were agreed upon in 1993 during the Asylum Compromise[48] and went well beyond what the existing non-binding and limited EU level measures prescribed. After the introduction of the reforms the number of asylum seekers in Germany declined significantly and consistently: from 438, 200 in 1992 to 88,920 in 2000 (see Table 2). This decline has been almost unanimously attributed to the combination of restrictive measures introduced in 1993 (Hailbronner 1994). A number of scholars have raised doubts over the extent to which the decline is attributable to domestic reforms as opposed to other factors. Marshall (2000: 161) suggests that out of the 438, 200 applications, around 123,000 were submitted by asylum seekers from former Yugoslavia, whose applications had no chance of succeeding given the fact that they were not being persecuted by state actors: the sole justification for granting asylum in Germany at the time. She also suggests that the reduction in the number of applications is at least partly due to a change in the way the statistics were calculated: after 1993, dependants were no longer included in the numbers which now reflected only the number of main applicants (Marshall, 2000: 162). Bosswick (2000) also questions the extent to which the asylum compromise led to a decrease in the number of asylum seekers; he attributes it to very speedy decisions by the Federal Office for Recognition of Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge (BAFI)) for applicants from the so-called "easy countries of origin" (mostly Central and South-east European ones where around 70 percent of applicants came from) and a the introduction of fingerprinting of asylum seekers which

[48] See Chapter 6

helped weed out 33,500 multiple applications (Bosswick, 2000: 50).

Despite these doubts over the effectiveness of is the asylum compromise and the change in the numbers and composition of refugee flows since the early 1990s, the belief that the asylum compromise was a success which should be preserved persists both among the public and politicians, including many from SPD and FDP. The German Constitutional Court's decision confirming that the safe third country provisions were not contrary to the German Basic Law helped the institutionalisation of these principles[49].

Calls to scrap the compromise or radically alter its provisions entirely have come mainly form the Green Party or the far-left party, Die Linke (e.g. Deutscher Bundestag, 2008). According to an official from the German Permanent Representation in Brussels, preserving the asylum compromise has become the most important goal of German asylum policy vis-a-vis the pressures of Europeanization (Interview A, 2010). Subsequent chapters will show how various elements from the Asylum Compromise have also influenced Germany's position regarding all aspects of EU asylum policy.

With regard to reception conditions, the previous chapter explained how Germany had introduced the *Asylbewerberleistungsgesetz* (Asylum seekers' benefits law) as part of the asylum compromise. The law entered into force in November 1993 and dissociated the social benefits given to asylum seekers from the main social benefits law. It postulated that these can be 30 per cent lower than the benefits to which citizens are entitled. These benefits were intended to meet only the basic needs of asylum seekers and were granted to a large extent in kind or in vouchers. These included food, accommodation, heating, clothing. In addition, a limited amount of pocket money was also granted, mostly in vouchers. Health care was only provided for the treatment of acute illness and pain (Odysseus Network, 2007).

[49] BverfG 2 BvR 1938/93; 2 BvR 2315/93 14 May 1996.

Unlike the determination of refugee status, which is a Federal competence, the reception of asylum seekers is entirely dealt with by the individual Länder. They are responsible for providing and financing accommodation, clothing and a monthly subsistence allowance. In order to prevent confrontation among the Länder regarding the fair distribution of asylum seekers among them, the EASY (Erstverteilung von Asylbewerbern – Initial Distribution of Asylum Applicants) system is used. As explained before, the distribution is based on quotas determined by the tax income and the population of each Land. Once allocated to a specific Land, the asylum seekers are further dispersed to a municipality where accommodation is provided in an accommodation centre. Regardless of whether they request social assistance, asylum seekers are obliged to take residence in accommodation centres.

The system is often justified in terms of financial burden-sharing, fair dispersal of the social service costs associated with accommodating asylum seekers, and ensuring the authorities maintain contact with asylum seekers. The system is upheld through the so *Residenzpflicht*, i.e. an obligation to reside in the particular municipality where the asylum seeker has been allocated. This obligation is enshrined in the *Asylverfahrensgesetz* (Asylum Procedure Law, Article 56). Article 85, section 2 of the same law states that asylum seekers are faced with fines if they leave the municipality without the permission of the local authorities. The request for permission to leave the municipality must be justified and the cost of issuing the permission must be borne by the asylum seeker.

Regarding access to work, in 1997 the CDU/FDP government introduced an administrative provision which stated that asylum seekers who lodged their claim after May 1997, civil war refugees as well as those who had their application for refugee status refused were no longer entitled to access the labour market. This blanket restriction on employment was criticised even by the German Labour Ministry on the basis of a number of political and

legal considerations. In particular, concerns were expressed that the decision of the government undermines the will of the legislative expressed in the asylum compromise. The latter "should be understood as allowing the asylum seeker, after a short period of time, to support himself by participating in the job market and not by relying on welfare support" (Beauftragte der Bundesregierung, 2000: 67).

It is likely that the employment ban was introduced with a view to appeasing the public opinion shortly before the upcoming federal elections. The fact that the change was introduced through and administrative decree and not a change in the law which would have required the parliamentary approval also lends credibility to such explanation. Moreover, shortly before the ban was introduced the number of asylum seekers who actually received work permits was very low – around 7 per cent – due to the priority given to German and other EU citizen enjoyed in accessing the labour market which again points to the primacy of political considerations behind the decision (Marshall, 2000: 50).

The conservative-led government introduced introduced yet another restriction on access to benefits for asylum seekers, by expanding the personal scope of those falling under the provisions of Asylum seekers' benefits law. While initially, as agreed under the asylum compromise it was supposed to apply to asylum seekers only during their first year and to tolerated foreigners under limited circumstances, from 1997 the period was increased to three years. War refugees were also to receive benefits under this law instead of mainstream support. SPD and the Greens tried to stop the passage of the law but only succeeded in delaying it (Marshall, 2000).

The changes were motivated by the financial and political implications of the fact that in 1995, every fifth person living on benefits was a foreigner (Beuftragte der Bundesregierung 1997). The salience of the issue was still relatively high: around 21 per cent of the population believed that asylum and immigration were one of the two most

important problems facing Germany. The topic of asylum also remained prominent in the media.

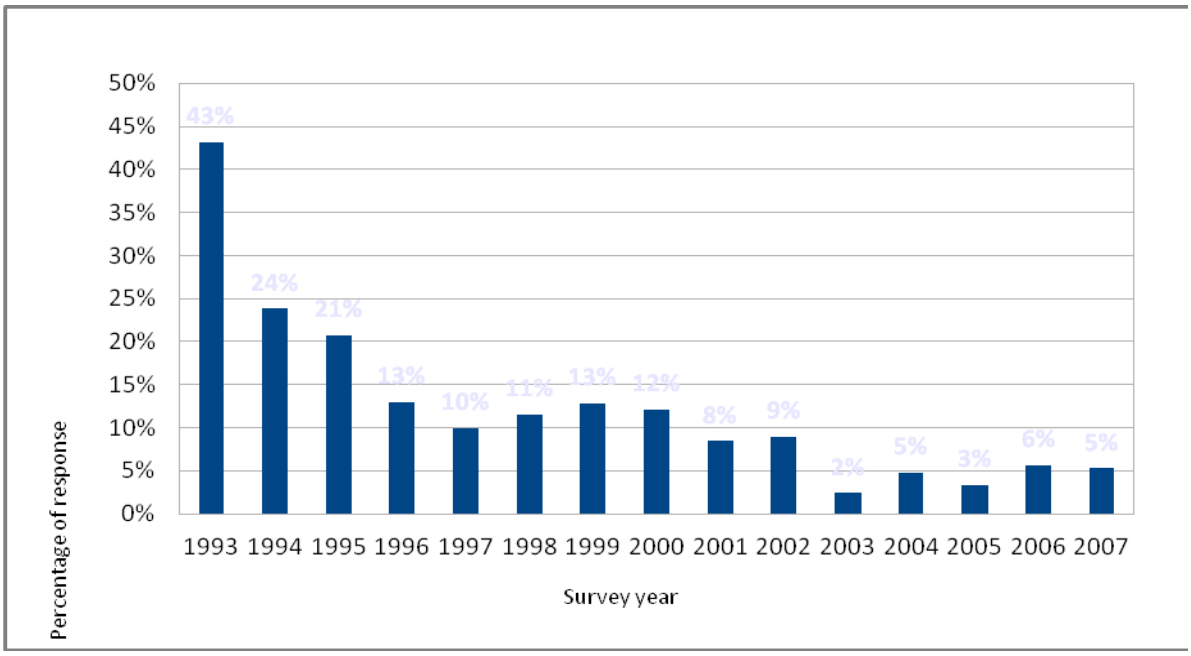

Figure 8: Asylum Salience - most important problem facing Germany

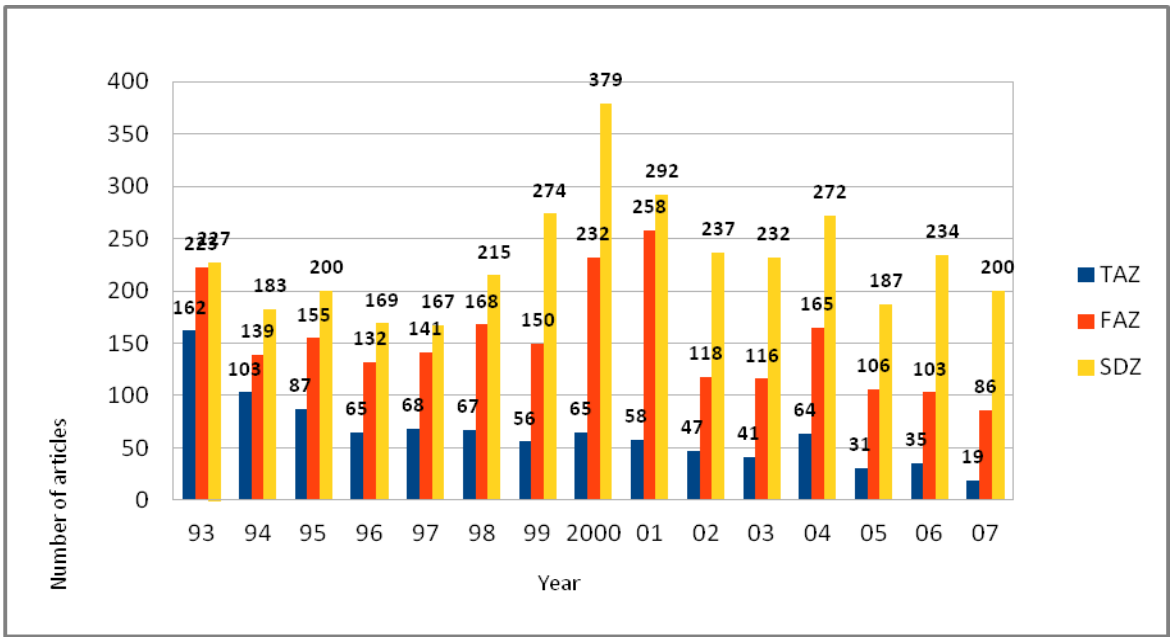

Figure 9: Asylum Salience -- newspaper articles in Tageszeitung, Frankfurter Allgemeine Zeitung and Sueddeutsche Zeitung

Public opinion was firmly supportive of restriction on benefits: an opinion poll conducted in 1996 showed that 68.3 per cent of the population was against asylum seekers having the same rights as German nationals (Allbus Survey, 2010).

Thus, when the German coalition government composed of SPD and the Green Party came to power in 1998 it inherited a fairly restrictive asylum policy based on the asylum compromise of 1992 which had obtained the consent of all three major political parties at the time. Initially, the change of government brought with it also the expectation of a more liberal immigration and asylum policy (Prantl,1999; Howard, 2008), especially given the presence of the Green Party which had promised a human-rights oriented asylum policy and had openly criticized a number of elements in the Asylum Compromise and called for the return of the right to asylum, which as their manifesto stated, had been "practically cancelled" (Bündnis 90/Grünen, 1998: 118). They also expressed their desire to see the law on reception conditions for asylum seekers (*Asylbewerberleistungsgesetz*), "with

its discriminatory provisions" abolished (Bündnis 90/Grünen, 1998: 118). Given that asylum and immigration were the considered second most important issues during the 1998 campaign – although the campaign itself was dominated entirely by unemployment which was the most important issue – the SPD manifesto was much more cautious. It contained a commitment to a "common European asylum and refugee policy" and a sentence emphasizing the distinction between "immigrants" and "refugees", stating that those who are politically persecuted have a right to protection (SPD 1998).

However, in the course of the coalition negotiations, the Greens were forced to tone down their position on asylum policy as they had obtained some concessions on immigration policy regarding the introduction of a new Citizenship Law which significantly expanded the possibilities for foreigners to obtain German citizenship[50]. Thus, the Green party had to carefully select the issues on which it was possible to achieve progress without jeopardizing the asylum compromise. It chose to pursue the battle which it had already started by bringing the case for recognition of gender-specific persecution as grounds for asylum to the German Parliament[51] (Vitt and Heckmann, 2002) and to attempt to introduce some human rights guarantees in the asylum procedure administered at the airport[52]. Consequently, the Green Party's desire to abolish the *Residenzpflicht* and repeal the *Asylbewerberleistungsgesetz* was superseded by other priorities.

With a large number of asylum seekers expected to arrive due to the conflict in Kosovo, the SPD could also not afford to risk undermining the entire system of distribution of asylum seekers. Furthermore, the Länder were also not ready to adopt this change even though SPD and the Greens had the majority in the Bundesrat.

Nevertheless, the new government showed some willingness to relax its restrictive

50 See Chapter 7 for a detailed analysis of the new Citizenship Law.
51 See Chapter 7 for a detailed explanation on how the Green Party pursued this goal
52 See Chapter 8.

asylum policy without undermining the principles of the asylum compromise. In early 2000, a working group consisting of representatives of the Labour and Interior Ministries proposed that asylum seekers who had been in the country for more than two years would be allowed to apply for a work permit and would be entitled to receive one if there was no suitable German or EU candidate to take the position (Netzwerk Migration in Europa, 2000). The principle of giving priority to German and EU citizens was maintained in order to ally fears that the concession would lead to increased unemployment. This change was going to be enacted through an administrative measure and did not require the approval of the Bundesrat. Under pressure from the Green party which had initially insisted that access to the labour market be obtained after a period of three months, a compromise of one year was reached (Netzwerk Migration in Europa, 2000b).

The pressure to grant asylum seekers access to the labour market albeit after a waiting period came mainly from employers who alerted the government to the large labour shortages facing various low- and high-skilled sectors. Initially, Chancellor Schröder wanted to find sector-based solutions to the problem of labour shortages and thus avoid a comprehensive reform of immigration law (Die Welt, 2000). The difficult debates surrounding the new Citizenship law had barely been settled. In May 2000, the governing coalition lost the regional elections in Hesse to the CDU which had based its entire campaign on anti-immigration rhetoric[53]. This loss also cost the coalition its majority in the Bundesrat. Easing asylum seekers' access to the labour market through an administrative reform was the only way Schröder could have managed to satisfy employers' demands without having to resort to a comprehensive reform. The premise was that asylum seekers would fill in unskilled jobs and a special 'Green Card' scheme would be introduced for highly-skilled workers. Thus, lengthy discussions with the CDU/CSU opposition, which

[53] See Chapter 7 for a detailed discussion of the Immigration Law debate

was opposed to any immigration reform and called the lifting of the ban on employment 'a slap in the face of the unemployed' (Christean Wagner, CDU, quoted in Netzwerk Migration in Europa, 2000b), were to be avoided.

Eventually, although asylum seekers were allowed to access the labour market, the immigration law reform could not be avoided. The opposition saw a window of opportunity arising through which they could push through their long-standing preference on restraining asylum policy even further by removing the right to asylum form the German Basic Law and enshrining it in a simple legal act. Given that the opposition had the majority in the Bundesrat, and the pressure to reform immigration law, the government was tightly constrained in the extent to which it could improve the situation of asylum seekers.

It should be noted that the Interior Ministry, which was leading the immigration law reform, was also not willing to introduce measures to expand the rights of asylum seekers. Moreover, the fact that this rule is unique among all EU countries and that the German Commissioner for Foreigners suggested that a debate might be held with regard to reforming the *Residenzpflicht* in light of EU-level harmonization were also not sufficient to change the government's position. The Commissioner suggested that "the negotiations of the [Reception Conditions] Directive could be an occasion to undertake a critical examination of some German regulations" (Beauftragte der Budesregierung für Ausländerfragen, 2000: 161).

Not only did the first draft of the Immigration Law fail to abolish the *Residenzpflicht* but it also expanded it to cover asylum seekers whose applications have been refused but who could not be removed from the country. The *Residenzpflicht* would extend to these categories of persons until the authorities explicitly decide to lift it on a case-by-case basis. The decision was taken despite demands from various refugee-assisting NGOs and a number of organized protests against the rule (Spiegel, 2001). Although the view was not

shared by everybody in SPD, Dieter Wiefelspuetz, the interior policy speaker for the SPD's political group summed up the reasons why many believed the *Residenzpflicht* was "indispensable" and the demands of refugee NGOs to abolish it were "excessive": "without it, asylum seekers would simply settle in a few cities. This could lead to rejection by the local population and financial consequences for the local authorities concerned" (TAZ, 2001). The Green Party, which had opposed restrictions on freedom of movement could also not achieve much progress. As Volker Beck (Gruene) explained, "we did not have 50 per cent (of the votes) as the Greens; we only had a majority in the Parliament together with SPD. And the SPD minister was called Otto Schily. There was some progress made but we could not achieve 100 per cent because SPD was part of the coalition which negotiated the asylum compromise" (Deutschland Radio, 2012).

Thus, given the relatively high salience of asylum and immigration policy and negative public opinion towards asylum seekers, the lack of clear political leadership among the Greens to steer through liberalising reforms and the interior minister's and SPD's unwillingness to liberalize policy, it can be expected that at the EU level the German government would strive to maintain the status quo and ensure that it can keep the *Residenzpflicht* and the right to regulate access to employment.

7.1.2. Britain

The nature of the UK political system and especially the high degree of autonomy which the executive enjoys differs markedly from the German federal system and this is reflected in the policy outputs which the two systems produce. In Germany the government is often forced to seek compromise before reforms may be introduced. Thus, radical reforms such as the asylum compromise which require a consensus among all major parties tend to be rare

but comprehensive and with long-lasting effects, as they are difficult to overturn. In contrast, the UK government does not need to foster consensus before it introduces reforms. These are very often introduced top-down and their effectiveness or lack thereof is assessed in the course of their implementation. If the results are not satisfactory, or – as it is very often the case with asylum policy - are challenged in court, the government introduces changes.

As explained in the previous chapter, the UK did not face an unprecedented surge of asylum seekers in the early 1990s to the same extent that Germany did. Thus, in 1993 and 1996 the government introduced reforms aimed at curtailing the possibilities to 'abuse' the asylum system and at relieving the local authorities from some of the pressures they faced in housing asylum seekers. Asylum seekers who were entitled to benefits still received them as part of the main social security system.

Upon coming to power in 1997, the Labour government found an outdated asylum system which was struggling to cope with the increasing number of asylum seekers and a backlog 52,000 cases (Spencer, 2007: 341). Aiming to deliver an efficient yet fair asylum policy, the new government ordered a review of the existing policy and introduced the 1998 Human Rights Act. The 1998 Act was presented as a cornerstone of its legislative programme. It enshrined the European Convention of Human Rights into UK law and thus empowered judges to adjudicate if actions by public authorities contradicted the provisions of the ECHR. It represented a major advancement of human rights in general and migrants' rights in particular (Somerville, 2007: 59).

While the government's review of asylum policy was under way, the number of asylum seekers continued to increase: from 29, 640 in 1996 to 46, 015 in 1998 (Table 1 and Table 2). Following the extensive review, the government outlined its answer to the challenge of policy reform in the 1998 White Paper *Fairer, Faster, Firmer – A Modern*

Approach to Immigration and Asylum, which became the basis of the Asylum and Immigration Act introduced in 1999 (Bloch, 2000).

In the preface to the White Paper, the Home Secretary Jack Straw stated that "the government's approach to immigration reflects our wider commitment to fairness […] The Human Rights Bill currently going through Parliament will prove a landmark in the development of a fair and reasonable relationship between individuals and the state in this country" (Home Office, 1998). The White Paper also revealed the government's attempts to look for solutions on how to balance its commitment to protect refugees and the increasing public discontent with increasing numbers of asylum seekers.

It was not only the perceived public discontent that spurred the government into action. Because the UK did not have a compulsory dispersal system but the local authorities did have an obligation to provide accommodation to destitute asylum seekers, pressure built up on the authorities in the south-east part of the UK where the majority of the asylum seekers chose to stay. Prior to the introduction of such scheme (see below), London was estimated to house 100,000 asylum seekers, who constituted 90% of the total (Boswell, 2001: 16). In addition to accommodation, the presence of asylum seekers also put pressure on healthcare and educational services in the south-east. As the Parliamentary under-secretary for the Home Office stated, "it was pressure from many conservative authorities which led to the introduction of that [dispersal] scheme" (HL Deb, 14 February 2001, c248).

When Labour came to power in 1997, the issue of asylum and immigration was hardly salient: less than 4 per cent of the population believed it to be one of the two most important issues facing Britain. In its manifesto the Labour party recognised the problems associated with the asylum system but at the same time it was careful to avoid casting asylum seekers as those who abuse it; rather, it focused on the deficiencies in the system itself or on other actors involved in it such as immigration advisers. Recognising the

existing backlog of cases, it promised "swift and fair decisions" and control on "unscrupulous immigration advisers" (Labour Party, 1997). This emphasis on fairness and efficiency was central to New Labour's political vision, embodied in the so-called "third way" approach, inspired by the values of social democracy and liberalism (Blair 1998). The third way movement, which was originally developed by the centre-left in the US and then the UK gained traction in Britain following successive defeats in the polls which led to party to start questioning its adherence to old values. The gradual transformation of the party, which has already begun in the 1980s culminated in *New* Labour under Tony Blair.

There were some, albeit nuanced, differences between the approach to asylum policy taken by the Conservatives compared to that of Labour. While the latter apportioned the blame for the dysfunctional asylum policy mostly to systemic errors and inefficiencies, the Conservatives openly spoke of "genuine" asylum seekers who would be treated "sympathetically" and those who were abusing asylum provisions, hoping to avoid immigration controls (Conservative Party, 1997).

The salience of the asylum in the media started to increase in 1998, as the table below demonstrates.

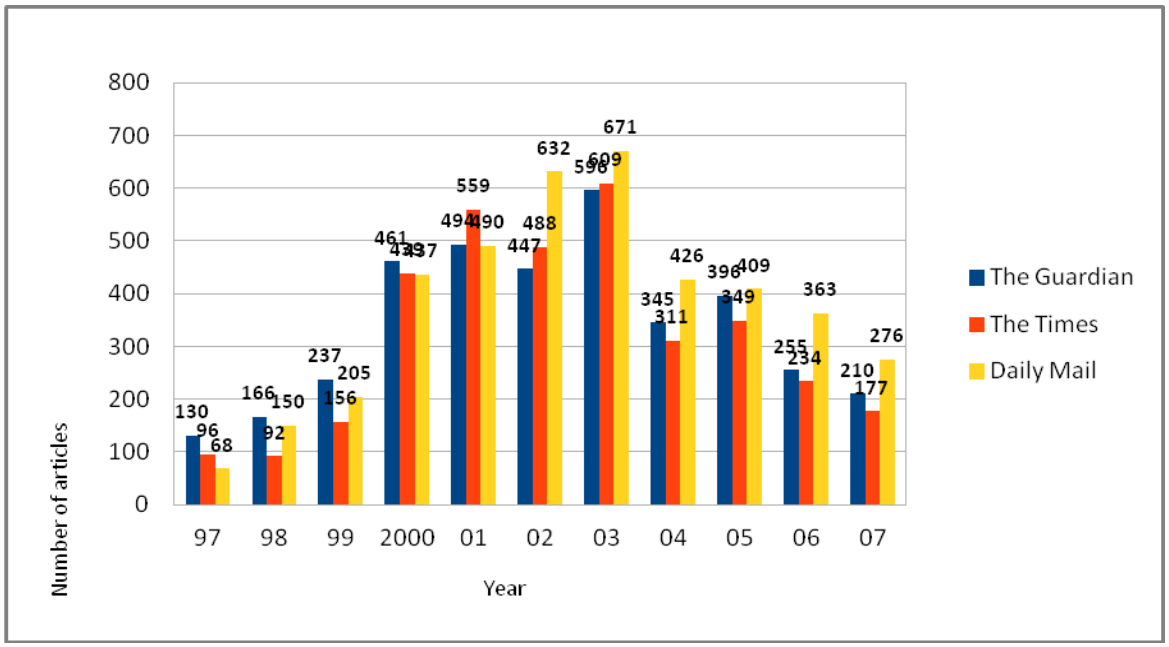

Figure 10: Asylum Salience -- newspaper articles

The difference is especially striking in the number of publications devoted to the topic in the Daily Mail, which increased more than two-fold between 1997 and 1998, in line with the number of asylum seekers and the government's announcements about how they intended to clear the backlog of asylum cases inherited from the previous government. Labour was keen to maintain its developing image of a party which was capable of delivering on its promises and was not a 'soft touch' on migration, as it had come to be perceived.

Many of the changes proposed in the White Paper stemmed from the experience of other EU countries. For instance, the Paper notes that:

> a significant number of EU countries provide accommodation and other support in kind rather than by payment of cash allowances. In Germany, all benefits are paid in kind with a small cash payment for everyday needs. The Netherlands, Belgium and Denmark provide reception centre or similar communal accommodation for most or all asylum seekers. In Belgium, asylum seekers receive no support if they choose not to live in one of the centres. In countries where a cash payment is made, such as France and Italy, the period of payment is strictly limited. In almost all countries, the provision for asylum seekers is separate from the standard welfare and other support for residents of that country (Home Office, 1998).

On the basis of this survey of different practices in Europe and the government's calculation that the previous reduction of benefits had led to a decrease in the number of asylum applications by 30 per cent[54] in 1997 - the year after the reductions were introduced - the government announced that it intended to separate the benefits given to asylum seekers from mainstream statutory benefits. Support would only be available to destitute asylum seekers or those likely to become destitute within a prescribed period. Asylum seekers could no longer rely on the National Assistance Act 1948 to receive support[55]. They were entitled to free treatment under the National Health Service.

The Act envisaged that accommodation would be provided on a no-choice basis and basic needs such as food and other living essentials would also be met. The government stated that it would strive to provide this support through vouchers or other non-cash means in order to reduce the incentive for abusing the asylum system, although it admitted that vouchers would be more costly and cumbersome to operate:

> Cash-based support is administratively convenient, and usually though not inevitably less expensive in terms of unit cost. Provision in kind is more cumbersome to administer, but experience has shown that this is less attractive and provides less of a financial inducement for those who would be drawn by a cash scheme (Home Office, 1998).

The 1999 Asylum and Immigration Act duly introduced the changes outlined in the White Paper. It created the National Asylum Support Service (NASS) to manage the benefits granted to asylum seekers, who could choose between accommodation and

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54 NGOs have disputed the figures and the government's claim that the reduction of benefits led to a decrease in the number of asylum seekers. The Refugee Council noted that: "The government believes that the drop in asylum applications during 1996 was a consequence of the removal of benefits for in-country applicants. However, there is little evidence linking the drop in asylum applications, which began three months before benefits were withdrawn, with the removal of benefits. The fact that 1995 saw the second largest number of asylum applications ever recorded in the UK made it highly likely that the figure would drop in 1996, regardless of changes to benefit legislation. Furthermore, since the 1996 Act came into force, applications have risen fairly steadily and there has been little change in the ratio of port to in-country applications. This strongly indicates that a cashless system in not a major disincentive to those making asylum applications in the UK" (BBC news, 1999).

55 As shown in Chapter 6, the judiciary had used this Act to argue that local authorities had a duty to provide shelter, warmth and food to 'those in need of care and attention' and destitute asylum seekers fell in this category.

subsistence or subsistence-only support. Those who preferred the former option were allocated to a specific location where accommodation was available in accordance with the newly introduced dispersal policy. The goal of the policy was to alleviate pressure on the authorities around London by dispersing asylum seekers throughout the rest of the country. Asylum seekers were dispersed to those regions where housing was available. These were very often areas with few economic opportunities and little previous experience with immigration (Boswell, 2003; Somerville, 2007). It is difficult to say whether the dispersal policy was influenced by the one in Germany since the two were administered quite differently, and the UK could draw on its previous experience with dispersal of Ugandan and Vietnamese refugees in 1970s as well as those from former Yugoslavia and Kosovo. Moreover, in comparison to Germany, the UK regime was much more liberal as it did not restrict the asylum seekers' freedom of movement in the same way that the German *Residenzpflicht* did: asylum seekers were free to move within the territory of the UK. They could also choose the subsistence-only option and live with friends or relatives.

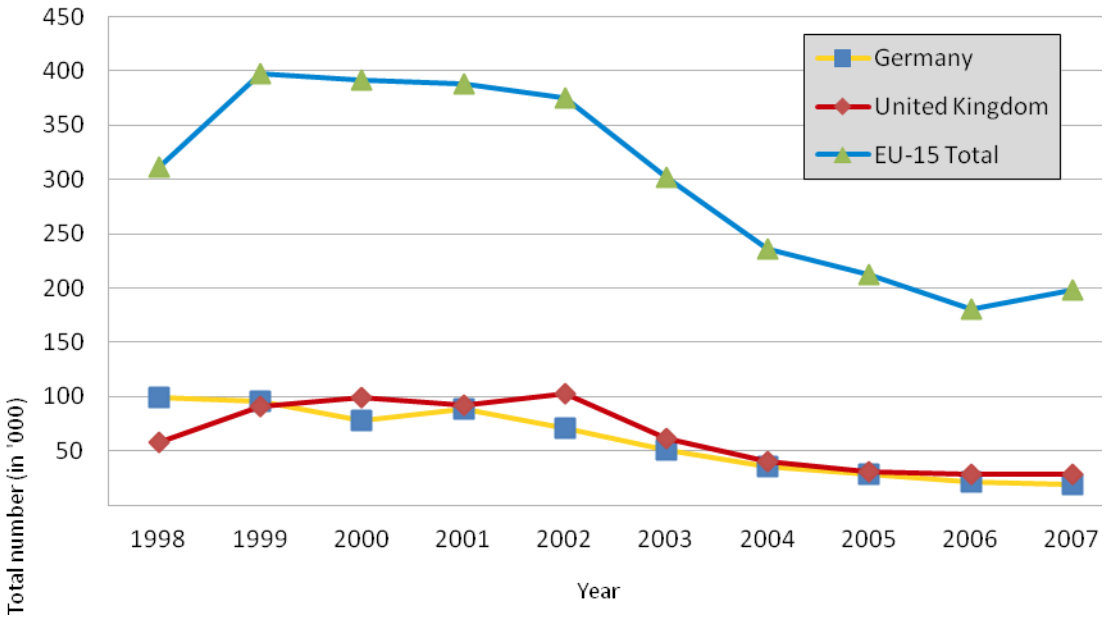

Figure 11: Number of asylum applications in Germany, Britain and EU-15 (1998-2007)

According to the Act, such maintenance support could be provided partly in vouchers. The switch from cash support to vouchers was introduced in April 2000. The support received by asylum seekers consisted of 70 per cent income support available to UK citizens and was provided through vouchers and a £10 cash allowance. The vouchers could be used only at specific shops and could not be exchanged for cash. Refugee-assisting NGOs including the Refugee Council and Oxfam were strongly opposed to the introduction of vouchers, which they saw as stigmatizing and inadequate to ensure a decent standard of living (BBC News 2000). Opposition to the vouchers system also came from within the Labour party and threatened to provoke the "worst Labour rebellion since the government came to power" (BBC News, 1999). Home Secretary Jack Straw managed to appease the backbenchers by agreeing to introduce a cash element amounting to £10 per week. Once the voucher system was in place, the negative consequences for asylum seekers which had only been a matter of speculation became apparent. The vouchers prevented asylum seekers from participating in normal everyday activities which required cash and singled them out as

different and dependent (Schuster and Bloch, 2005).

It soon became apparent that the changes introduced in the 1999 Act were not producing the expected results: the number of asylum seekers increased from 71,000 in 1999 to 80,000 in 2000 (Table 2). Moreover, as numbers in the rest of the EU, especially in Germany, were falling, it seemed that the UK was receiving an ever larger number of applications in comparison with the rest of the EU (See Figure 2). This strengthened the government's conviction that asylum seekers perceived the UK's asylum policy as a soft-touch one.

The media, and especially the tabloid newspapers, were constantly focusing on the "bogus" asylum applications and claiming that asylum policy was in "crisis". A survey of seven national daily papers over a 12-week period at the end of 2002 revealed that the *Daily Mail* and *Daily Express* published more articles on asylum than any other newspaper (Article 19, 2003: 14). At one point in 2003, in just 31-day period the *Daily Express* published 22 front page stories about asylum seekers and refugees (Greenslade, 2005: 21). The focus on the asylum "crisis" continued throughout 2003 and into 2004, with the Daily Express often devoting its front page to stories involving asylum seekers and immigrants which were sometimes entirely false or presenting genuine news in negative light (ibid.). Many stories focused on the cost of accommodating asylum seekers or on their alleged criminal behaviour.

Barbara Roche, an Immigration Minister between 1999 and 2001, has admitted that the media were central to the emerging controversy: "politicians are often accused of blaming the media for communication failures but it is a matter of record that the press played a major role in what was to become an increasingly polarised debate" (Roche, 2010: 18).

In fact, media reports about increased numbers of asylum seekers and government

announcements on how it was tackling "abuse" and discouraging applications contributed to increased salience of the issue among the general population. From 1998, when the White Paper was announced, until 2000 the proportion of the general population who regarded immigration and asylum issues as being two of the most important ones facing the country increased three-fold: from 4.33 per cent to 11.33 per cent (Figure 11). As explained in Chapter 2, with an increased salience of the issue, the party position is likely to reflect public opinion more closely. In this case, this may be expected to lead to even more restrictive asylum policies.

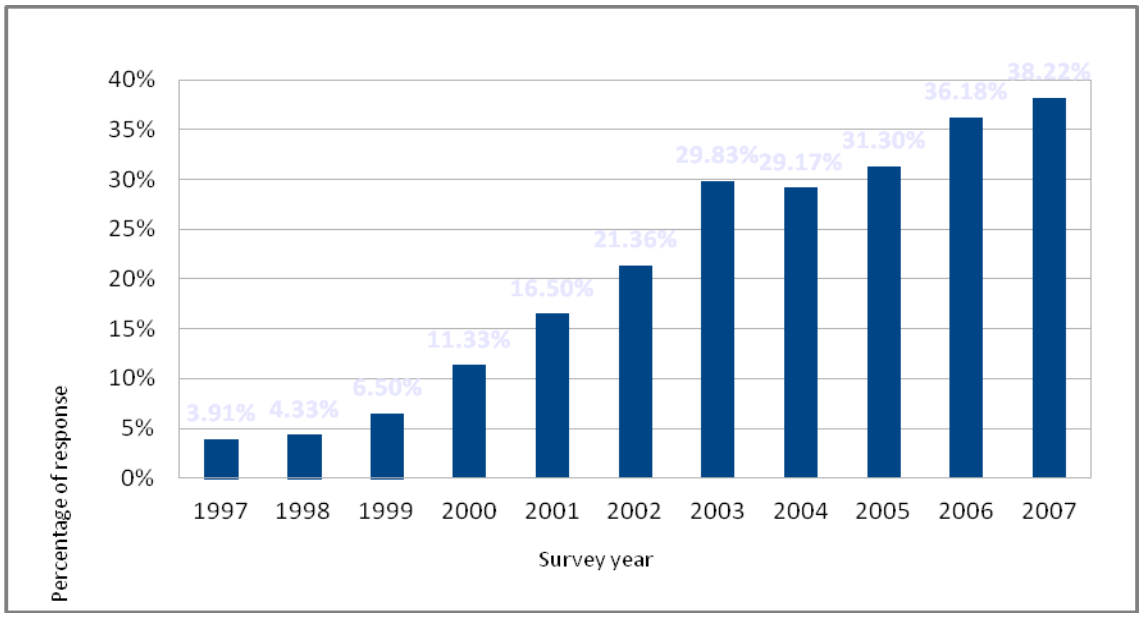

Figure 12: Asylum Salience -- most important issues facing Britain

In line with the expectations outlined in the theoretical chapter due to the relative ease with which governments in simple polities introduce legislation, often hastily and without taking into account dissenting voices, they are forced to introduce further changes when reforms fail to achieve the desired result or simply do not work as expected. In October 2001 the Home office conducted a review of the voucher scheme which exposed the faults of the

system: the number of post offices where the vouchers could be collected was limited and few shops accepted them. The system was vulnerable to fraud as many asylum seekers were forced to sell vouchers below their actual value in order to receive cash (Home Office, 2002a). Following this review, the Home Secretary announced that the government would phase out the voucher system by the end of 2002 (House of Commons, 2001: Col.627). Recognizing that the government's reforms had failed to achieve the desired results claimed that:

> the current system has suffered from genuine problems […] The system is too slow, vulnerable to fraud, and felt to be unfair by asylum seekers and local communities […] there have been social tensions in neighbourhoods across the country and considerable pressures on local education, social and GP services (House of Commons, 2001: Col.627)

The UK's short-lived experience with vouchers for asylum seekers[56] did not deter the UK government from experimenting with other solutions which were found elsewhere in Europe. In February 2002 the government published a new White Paper, *Secure Borders, Safe Heaven: Integration with Diversity*, which paved the way for the introduction of the Nationality, Immigration and Asylum Act of 2002. In comparison with its predecessor of 1998, this White Paper placed less emphasis on human rights as a solution to the problems of increased inflows of asylum seekers.

At the same time, however, the paper "marked a radical change in direction, recognising for the first time in Government immigration policy the value of economic migration whilst projecting an increasingly tough stance on asylum. One of the themes of this paper was that these measures together would prevent the asylum route from being abused by those who want to come to the UK for purely economic reasons" (House of

[56] It should be noted that a cashless system of support is still used for refused asylum seekers who are destitute and have exhausted all their appeal rights. However, these cases are outside the scope of EU legislation on reception conditions for asylum seekers. Currently, support is not provided through vouchers but through the Azure payment card.

Commons, 2006). Just as Germany, the UK was experiencing labour shortages in specific sectors but, at the same time, given the large number of asylum seekers, it needed to demonstrate that it could introduce a system of 'managed migration' and that it was in control of migration flows. The determination to prevent economic migrants from using the asylum route formed an important part of Labour's 2001 manifesto which stated that "asylum should not be an alternative route to immigration" (UK Labour 2001). Rather than focusing on fairness, as it had in the manifesto at the previous election, Labour emphasized its record on being able to manage the asylum system by reducing the backlog and on setting a clear removals target for refused asylum seekers of "more than 30,000 in 2003-2004" (ibid.). At the same time, Labour stated its intention to allow a more open immigration policy: "as our economy changes and expands, so our rules on immigration need to reflect the need to meet skills shortages" (ibid.). The party also pledged "to bring forward proposals to ensure a common interpretation of the 1951 Convention across the EU and to improve the international response to regional crises" (ibid.), which demonstrates how "Europe" and asylum was part of the national debate rather than simply an issue of concern to officials at the Home Office.

In contrast, the Conservative party maintained the position that "Britain has gained a reputation as a soft touch for bogus asylum seekers" (UK Conservative Party, 2001) and went on to suggest that the problem in the UK was "worse than anywhere else in Europe" (ibid.). These comparisons with Europe put further pressure on Labour to show that it was in control of the asylum system and was capable of delivering a policy which could not be regarded as being more generous than what was available in the rest of the EU and further increased its willingness to participate in shaping common EU standards.

The juxtaposition of asylum seekers and economic migrants played out to the detriment of asylum seekers following Labour's victory (Düvell and Jordan 2002; Flynn

2003). The government used the number of applications and of removals of those whose claims were rejected as a measurement of the success of its policy and as a proof that it was in control as well as to "send a clear message to the rest of the world that we are not prepared to be taken for granted" (House of Commons, 2001, col. 631).

The way to ensure that these goals were met was to reduce the "pull factors" and facilitate the removal of refused applicants by ensuring that the authorities had access to them. To this end, the White Paper announced the introduction of a complex new asylum policy regime which involved induction, accommodation and removal centres. The accommodation centres were a new development in the UK, but the government clarified that "these are widely used across Europe" (Home Office, 2002). Indeed, a closer look at the proposed set-up of the centres reveals remarkable similarities between them and the ones operating in Germany, Belgium and elsewhere in Europe. The centres would provide health care, education, interpretation, and legal advice services on-site. Asylum seekers allocated to these centres would have to accept the accommodation arrangements and would no longer choose to have subsistence-only support. A residence requirement was also introduced whereby asylum seekers would be required to reside at the centre throughout the procedure and report regularly to the authorities. This requirement, however, was not as strict as the German *Residenzpflicht* since asylum seekers retained their freedom of movement on UK territory, albeit with the additional requirement of regular reporting which, in practice, limits the time one could be away from the accommodation centre.

The introduction of asylum centres and the announced liberalisation of economic policy according to Blunkett demonstrated "a rational approach to a rapidly changing situation. I believe that it will send a message to the rest of the world that this country is not open to abuse, but nor is it a fortress Britain. We are not rejecting economic migrants, refugees from persecution or those seeking to visit our shores" (House of Commons 2001,

col. 629).

The entire plan to introduce accommodation came under severe criticism in both Houses of the Parliament despite the government's reassurances that they would be "welcomed because they avoid pressure on local services" (House of Commons 2001, col. 631). A host of questions were raised ranging from the staffing of the centres through the existence of an anti-bullying policy (Somerville, 2007). The provision that education could be provided on-site proved to be very controversial. David Blunkett, the Home Secretary, insisted that children of asylum seekers would be educated in such centres so as to stop them from "swamping" local schools (Guardian, April 2002). In the course of the debates, many MPs questioned the quality of the education to be provided on-site. Backbench Labour MPs threatened to vote against the government's proposals but David Blunkett managed to avoid the revolt through political manoeuvring and offering to review the cases of asylum-seeking children who spend more than six months in an accommodation centre and assess their needs, including education (BBC News, 2002).

MPs also raised issues regarding the location and size of the accommodation centres. While "all parties agree[d] that it is worth trialling accommodation centres" (House of Commons, 2002a: Col.744), details about their set-up were subject to a heated debate. Conservative MPs expressed concern over the fact that large centres, accommodating up to 750 people were to be built in remote rural areas. They argued that the plans were developed without extensive consultation with local services and communities[57]. Tony Baldry, an MP representing the constituency where the first such centre was to be built

[57] The Conservatives also complained that the Labour government failed to carry out the consultation properly because the proposed locations for such accommodation centres did not fall into Labour constituencies (House of Commons, 2002a). There are two possible explanations for this. One is that it was a deliberate move by the Labour government, anxious to avoid conflict with its liberal supporters. The other one is that it was a result of the fact that Conservatives have traditionally preformed better in rural constituencies, which are also more sparsely populated and, whose services, consequently, are considered to be under less pressure.

(Bicester, Oxfordshire), stated: "my information is that, as yet, not only has the Home Office not consulted other Departments or organisations such as the health service or education or social services in Oxfordshire, but there has been little if any consultation with Thames Valley police on the likely impact that the accommodation centre will have on their resources" (House of Commons, 2002a: Col.765). He added that "[t]here has been minimal consultation between the Government office for the south-east and the local planning authority on simple planning grounds, but there has not been any consultation with local people" (House of Commons, 2002a: Col.754). The Home Secretary David Blunkett admitted that he did "not think that we have handled the detailed consultation and the initial proposals as well as we might have done" (House of Commons, 2002a: Col. 752).

The size of the accommodation centres was also seen as problematic. The Refugee Council argued that large scale centres were expensive, risked institutionalising residents and entailed greater management risks (House of Commons, 2003a: Appendix 32). The government, however, remained adamant that the centres would be introduced on a trial basis. It spent a considerable amount of time and political capital and eventually won the battle to introduce the provisions on accommodation centres in the 2002 Nationality, Immigration and Asylum Act. The Act was adopted in November 2002, following a concession to the House of Lords allowing an independent monitor to assess whether the centres location affected the needs of those housed there (Guardian 2002a).

This proved to be a Pyhrric victory. The government had not anticipated the large scale of local protests which took place at all sites where the government considered building an accommodation centre (Stevens, 2004; Somerville, 2007). The case of the centre in Bicester, Oxfordshire is symptomatic of the government's policy failure on this issue. A report conducted by the House of Commons on the cancellation of the Bicester accommodation centre and conducted by the Committee of Public accounts in 2008

concluded that "the Home Office did not engage with, or seek to gain the confidence of, the local community or its elected representatives at an early stage in its site selection or planning considerations" (House of Commons, 2008: 10). Faced with local protest and a court case against the building of the centre lodged by the local council, the government was forced to announce in 2005 that the plans for this centre as well as all 10 other centres planned were being scrapped (BBC News, 2005a). The government cited a drop in the number of asylum applications as a reason for the cancellation of the plans (BBC News 2005), but it is clear that the "not in my backyard" position of the local authorities and MPs played a significant role (Interview B, 2010).

In addition to the measures mentioned above, the 2002 Act also introduced the provision that asylum seekers may be denied support if they have not submitted their asylum claim "as soon as reasonably practicable" after their arrival in the United Kingdom (Nationality, Immigration and Asylum Act, 2002, Section 55). This measure was intended to discourage people who had already been staying in the UK from claiming asylum in order to prolong their stay. The provision was introduced despite criticisms from the Refugee Council, which claimed that it would "potentially affect the lives and well-being of thousands of asylum applicants in the UK forcing them into extreme poverty and making it more difficult to pursue their asylum application" (Refugee Council, 2002). From the moment it entered into force, there have been numerous judicial challenges to this provision on the basis of possible violations of Article 3 of the ECHR[58]. While the courts' decisions have led to some improvements for asylum seekers, their impact has not been as significant as many had hoped (Clements, 2007) since the basic principle of the policy – namely that the provision of support is affected by the date on which when the application was lodged –

[58] R. (Q and Others) v Secretary of the State for the Home Department, 2003; R. on the application of Adam, Tesema and Limbuela) v Secretary of State for the Home Department, 2004.

remained intact.

Does the government preference for a restrictive asylum policy mean, however, that liberal asylum and immigration policy, traditionally associated with left parties was abandoned? The answer to this question is complex, since, as was the case in Germany, Britain was also facing labour shortages and needed immigration so the key point was to manage it properly as this was an important way to show the public that the government is in firm control over its borders. Thus, the government had to demonstrate that it is tough on "bogus", "undeserving" asylum seekers so that it could make the case for introducing more open policy for the desired, highly-skilled economic immigrants.

Concerning the right to work, until July 2002 asylum seekers enjoyed the so-called employment concession which allowed them to apply for permission to work if their application had remained outstanding for longer than six months without a decision being made. Initially, the government announced that there were "no plans to alter the way in which the concession operates" (House of Commons, 22 October 2001, c7; House of Commons 25 October 2001, c333W). In line with the government's new strategy to manage migration and reduce the opportunity to use the asylum channel as a means to enter the country for economic reasons, in July 2002 the government announced that the employment concession would be abolished (House of Lords, 2002: Col. 107W). The government cited both reasons of irrelevance of the employment concession in light of the increased speed with which the applications were processed and the need to reinforce the distinction between economic migrants and asylum seekers. Lord Filkin, parliamentary under-secretary for the Home Office stated:

> The vast majority—around 80 per cent—of asylum seekers receive a decision within six months, and work is continuing to improve that further. An increasingly small number of people, therefore, are entitled to apply for the concession. It is also the case that the great majority of new asylum applicants will have their cases decided within two months and the concession, which dates from a time when lengthy delays were

> widespread in the asylum system, is therefore no longer appropriate. We are determined to make it clear that there is a distinct separation between asylum processes and labour migration channels. It is essential that we have a robust asylum process that works effectively and swiftly in the interests of refugees and also is not open to abuse by those who would seek to come here to work. But that does not mean we are "Fortress Britain". The Government are putting in place an effective managed migration programme and continue to create a number of work routes to allow more people to come and work here legally in ways which boost our economy (House of Lords, 2002: Col. 107W).

The government retained discretionary powers to grant work permits in exceptional circumstances (House of Commons, 2010).

Opinion polls demonstrate that it was crucial for the government to separate the issues of asylum and immigration if its new managed migration policy was to have any credibility as the public increasingly believed that economic migrants were exploiting the asylum route: Ipsos MORI poll conducted in April-May 2002 showed that the number of people who believe that asylum seekers come to the UK for employment reasons, increased dramatically over just five years. In 1997, only 11 per cent considered this to be the case, rising to 31 per cent in 2001 and reaching 43 per cent in 2002 (Ipsos MORI, 2002).

The constant changes in asylum policy, driven by increased numbers of asylum seekers, apparent inability to cope with them and increased salience of the asylum issue in the media and gradually among the general population suggest that the government was dissatisfied with the status quo and was looking to introduce changes. Thus, the government is expected to support proposals at the EU level in line with those it wants to implement domestically (vouchers, accommodation centres) but would also try and upload changes which were not present in the directives but were seen as important for success of domestic reforms. Moreover, the government should, at least initially, support access to the labour market for asylum seekers after six months as initially, the government was satisfied with the status quo in this aspect of asylum policy.

7.2. EU-level negotiations

The debate on harmonising the reception conditions at the EU level started in July 2000 when the French presidency presented a discussion paper (Council of the EU, 2000a) which was subsequently discussed by the Asylum Working Party. In the course discussions, disagreements over a number of points became apparent. These included access to financial and material conditions, employment, and freedom of movement (Handoll, 2007). These contentious points were transmitted to the JHA Council which adopted Conclusions for the Reception of Asylum Seekers (Council of the EU, 2000b) which set out the general principles on which the future Directive was to be based. On 3 April, the Commission presented a proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States (EU Commission, 2001).

From the beginning, Germany made it clear that it wanted to maintain its restriction on the freedom of movement of asylum seekers. The German delegation stated that the wording of the provision should allow the restriction of freedom of movement in generic cases (Council of the EU, 2001b: 16). This contrasted sharply with the position of other countries, such as Sweden, which insisted that restrictions on freedom of movement were contrary to human rights (ibid., p.15). Germany eventually succeeded in adding its unique provision on *Residenzpflicht* to the Directive by including a 'may' provision (Pro Asyl, 2004). This confirms the initial expectation that when legislation proposed at the EU level which would necessitate domestic policy change would be opposed by a government which prefers maintaining the status quo. Given the heterogeneous preferences of other countries, flexibility emerged as the solution.

Germany also disagreed with the initial proposal to the grant labour market access to asylum seekers six months after they had lodged an asylum application and insisted that the

possibility of priority for EU citizens should be included in the Directive (ibid., p. 21). These preferences were broadly in line with the recommendations made by the Bundesrat, which had insisted that the Member States should be allowed to determine the conditions on labour market access, to retain the right to restrict the freedom of movement of asylum seekers and accommodate them in reception centres as well as to limit access to healthcare to what was strictly necessary, including for persons with special needs (Deutscher Bundesrat, 2001a).

In an apparent further concession to the position of the Bundesländer, Germany tabled a last-minute amendment in November 2002, after most of the provisions had already been agreed. Germany proposed to replace the formulation that "Member States shall authorise access to the labour market for the applicant subject to the conditions laid down by the Member States", with "Member States shall decide under which conditions access to the labour market for the applicant can be granted" (Council of the EU, 2002g: 16). This subtle shift in language made a lot of difference since it removed the explicit obligation to grant access to the labour market. It was a concession to the Länder which had been engaged in a long dispute with the government regarding whether the EU had the competence to rule on third country nationals' access to employment (Meyer, 2004). The insistence on re-drafting the provision was introduced even after the Legal Services of the Council, in response to a question by Germany, answered affirmatively the question whether the EU had such competence (Council of the EU, 2002b). The government was exercising extra caution given the domestic political situation and the need to obtain the Bundesrat's approval in order to pass the Immigration Law and, at a further stage, to implement the directive. The Parliamentary State Secretary for Internal Security Fritz Rudolf Koerper alluded to the need for this support and explicitly emphasized that the government had taken into account the demands of the Länder: "the following formulation

was agreed – and I quote – if there is no decision on the asylum request after one year, and the delay is not caused by the applicant, the Member States determine the conditions for access to the labour market. I would like to add that this formulation and this decision were made following an in agreement with the representative of the Bundesländer […] It affords a high level of flexibility to the Member States" (Deutscher Bundestag, 2002: 1135).

The government's responsiveness to the demands of the Länder is a necessity demanded through the Germany's constitutional reform following the Maastricht Treaty. According to Art. 23 (5) of the German Basic Law, when negotiating EU laws "in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account". Taking the Bundesrat position into account does not oblige the government to adhere to it strictly. According to an official from the German Permanent Representation in Brussels, "the government could also ignore the position of the Bundesländer but it would be foolish to do so" (Interview A, 2010). German legislation in many cases requires the consent of the Bundesrat when adopting asylum and immigration laws, and EU directives are implemented in accordance with the normal German legislative procedure. While the Bundesrat discusses every bill adopted by the Bundestag, only draft bills of major importance and/or those resulting in increase the administrative expenses of the Länder need the consent of the Bundesrat. In all other cases, a veto by the Bundesrat can be overruled by a qualified majority in the Bundestag. As almost all measures in the area of migration and asylum affect the Länder directly by burdening them with administrative tasks and expenses, they need to be adopted by the Bundesrat.

Germany's position in the course of the negotiations remained fairly consistent and in line with initial expectations of trying to maintain the status quo domestically in the face

of EU legislation which would have necessitated undesirable policy change by stating its opposition to the respective provisions and finally settling for flexibility allowing it to maintain the status quo. The UK government's stance was in accordance with the new provisions the government enacted at the national level again as expected.

With regard to accommodation centres and the possibility to provide education on-site, the UK kept a scrutiny reservation until March 2002 when Belgium raised this issue by insisting that Member States should be allowed to introduce special modalities of access to the education system in cases where minors are kept in a particular place (Council of the EU, 2002: 14). The UK then proposed to insert a sentence stating that "education may be provided in accommodation centres". The government's move did not go unnoticed at the national level, where the same provision in the 2002 Nationality, Immigration and Asylum Bill was being discussed. In the course of the domestic parliamentary scrutiny of the Directive, the Minister for Citizenship and Immigration Beverly Hughes was asked whether the government was using the Directive and this specific provision in order to help its adoption at the national level. She denied this by stating that: "the sentence that refers to education being provided on-site was not just a UK insistence. Several countries have accommodation centres, although the practice varies. In some countries, the education is off-site, but in others - for example, Denmark - it is on-site. Several countries support the possibility for on-site education within the terms of the directive" (House of Commons, 2002b: Col. 22).

The mention of Denmark, which is not bound by EU Justice and Home Affairs provisions and thus was not a party to the negotiations, suggests that the UK government had been looking for solutions across European states rather than taking guidance only from the content of the Directive. In the course of the national debates on the same provision in the Nationality, Immigration and Asylum Bill it also referred to the practice in other

Member States rather than the Directive as such. One reason why the government chose not to point to the constraints of the Directive might be the risk that it would be exposed as simply "taking orders" from the EU.

Regarding the right to work, the position of the government was initially in line with the status quo in the UK: that is, asylum seekers were to be allowed to work within six months after lodging an application. In the course of the negotiations and at the insistence of Germany, this period was increased to one year. The UK government stated that although it would have been "happy with a condition that allowed people to work at six months" it accepted the need for a compromise and insisted that the introduction of the employment provision showed that "far from being dictated to by other European countries, we are leading the change and improvement" (House of Commons, 2002b: Col.10).

As mentioned above, only a month after this statement, in July 2002, the government completely reversed its position regarding asylum seekers' access to work but it did not seek to upload this change in the Directive. There are two reasons why this might have been the case. First, the Directive stated that access to employment may be given if after one year after the submission of the application for asylum the applicant did not have a first-instance decision. Given that the Home Office had set the ambitious target of completing 90 per cent of all asylum cases within six months, the new provision was not likely to have such a significant impact. Second, the negotiations over the Directive had almost been completed and the UK government had another much more important amendment to introduce, namely the provision that a "Member State may refuse reception conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim has been made as soon as reasonably practicable after arrival in that Member State" (Council of the EU, 2002g: 23), i.e. the same provision which the government had introduced in the 2002 Nationality, Immigration and Asylum Act. As Home Secretary David Blunkett explained, the UK

government secured the inclusion of this amendment at the Justice and Home Affairs Council in Luxembourg in October 2002, where the "[p]residency agreed that the council should work with a view to incorporating an addition to the Directive, proposed by the UK, to allow a member state to refuse support in cases where the applicant does not submit his claim as soon as reasonably practicable" (House of Commons Debates, 28 October 2002, c628W). The agreement was apparently secured after the UK government threatened to opt-out from the Directive (Maurer and Parkes, 2007).

Both last-minute changes made by Germany and the UK were accepted and thus political agreement on the Directive was reached in December 2002 while the Directive itself was formally adopted in January 2003.

7.3. Implementation

Given the success of both Germany and the UK in obtaining the concessions they wanted, it is not surprising that the formal implementation of the Directive did not introduce substantive changes in these countries.

7.3.1. Germany

In Germany, the Directive was implemented through a special law enacted in 2007, whose purpose was to implement 11 outstanding EU Directives in the field of Asylum and Immigration[59].

With regard to the reception conditions, the Directive reflected the existing German legal situation with only some relatively small changes – such as the possibility for NGOs

[59] Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, BGBl I 2007 Nr. 42 27.8.2007

to have access to the accommodation facilities where asylum seekers are housed - having to be introduced. In line with its initial preference to restrict healthcare only to emergency treatment, even for persons with special needs, Germany did not implement the provisions of the Directive dealing with the treatment of such vulnerable groups. The provisions on access to employment for asylum seekers also remained intact.

The 2007 law introduced an amendment which, while not related to a specific provision in the Reception Directive nevertheless affected the material reception conditions of asylum seekers. As described above, asylum seekers receive benefits under a special benefits law. The period in which asylum seekers benefits under this law however, is restricted to a time period, which was increased from 36 to 48 months. It appears that this was a concession from the SPD in order to facilitate the agreement on granting foreigners with a toleration permit access to the labour market after four years as well as the possibility for those who have had such permit for a long time to obtain a more secure status (Deutscher Bundesrat, 2007: 161)[60].

More significant than the content is the timing of the implementation, more than 2 years after the deadline for transposing the directive expired. The reason for this was the change in government in 2005 in which the SPD/Green Party coalition government was replaced by a coalition between SPD and CDU/CSU. Since there were also some directives in the field of migration which also needed to be transposed and would have also required complex negotiations, it was decided that they would be adopted together in order to facilitate compromise. Moreover, the new German Immigration Law had only entered into force in 2005, following years of negotiations and there was very limited willingness among politicians to agree on the implementation measures earlier, especially given the fact that asylum numbers had become manageable and there was no need for urgent reforms. Finally,

[60] See Chapter 7.

Germany believed that its asylum legislation largely corresponded to the content of the directive.

7.3.2. Britain

The UK implemented the Directive in 2005 following a three-month consultation period and shortly before the two-year implementation deadline expired[61]. Although the government's plans for housing asylum seekers in accommodation centres were not progressing, it nevertheless made a reference to how the powers to establish such centres already existed in the 2002 Act, declaring that it would conform to the relevant provisions in the Directive once the centres were established[62].

On the issue of withdrawal of support in the case of late submission of asylum application, the government also noted that the Directive was consistent with national legislation.

Possibly the most significant change in the course of the implementation of the Directive was in the area of employment. The government had to reverse its current policy and specify conditions under which asylum seekers may be allowed to work. The government stated that any applicant who has not received an initial decision on their claim after one year through no fault of their own would be able to apply to the Home Office for access to the labour market. It argued that this provision did not deviate substantially from the current practice of permitting employment in exceptional circumstances on a case-by-case basis. It is difficult to say what the impact of the change actually was since the Home Office had previously not specified what "exceptional circumstances" actually meant

61 Explanatory Memorandum to the Asylum Seekers (Reception) Regulations 2005 No.7

62 In its response to the consultation, the Refugee Council argued that education provided in these centres would not be under similar conditions as that for nationals as the Directive requires (Refugee Council, 2004).

(House of Commons, 2010).

This chapter has shown that Germany successfully managed to maintain its existing asylum policy despite the fact that some of its strict provisions such as the *Residenzpflicht* were unique among EU Member States. The reasons for its success are to be found in the domestic politics. The Green Party, which was the only one consistently supporting the liberalisation of asylum policy chose to pursue liberalisation on other aspects while the majority of SPD was against the relaxing the *Residenzpflicht* on the grounds of fairness. The Laender, which were important veto players, were also against such reforms. In a situation of high salience of migration both in the media and among the general population and public unease with immigration against which the government had to push through controversial immigration reforms against reluctant veto players meant there was little scope for introducing more liberal asylum policy changes.

As the government preferred maintaining the status quo, it sought to resist any changes at the EU level which would have undermined it, which, in turn, resulted in the EU directive having no significant impact domestically.

The UK's policy on the other hand was influenced by the policies adopted in other countries and their introduction was justified with reference to the practice in these countries. While initially the government introduced reforms which carefully tried to balance fairness and restrictiveness and manage asylum policy in line with New Labour's ideology, the increased number of asylum seekers, increased salience in the media and among the population and negative public opinion spurred further restrictive policy changes which it sought to upload in the Directive.

The government's autonomy allowed it to introduce reforms swiftly without taking dissenting voices into account. This led to a policy failure in the case of vouchers and accommodation centres and a number of judicial challenges in the case of the provision to

refuse support in case of late applications. These policy failures demonstrate how simple polities often introduce reforms quickly without taking ramifications into account and are forced to cancel them or introduce further changes following resistance of de-facto veto players.

Even though the debates on national and EU legislations were occurring in parallel, the government clearly sought to differentiate between the two and to first set in place its national policy. It carefully avoided references to provisions in the Directive, preferring to justify policy changes by pointing to practices in other countries.

The findings of the chapter illustrate the advantages of focusing on preferences when explaining the impact of EU on domestic policy. Many of the provisions in the directive such as, for example, those regarding freedom of movement on the territory of the Member State left a large scope of discretion to Member States. The provisions did not exert pressure on the governments to comply with them; rather, governments adopted those which were in line with their preferences, resulting ultimately in different policy output domestically. Contrary to what many NGOs had expected, neither Germany nor the UK sought to downgrade their standards in response to the Directive although in some cases the UK lowered its domestic standards during the negotiations and uploaded them in the Directive.

8. The Qualification Directive

In line with the commitment enshrined in the Treaty of Amsterdam to establish minimum standards with respect to the qualification of third-country nationals as refugees (Treaty of Amsterdam, Article 73k(1)(c)), in 2001 the Commission tabled a *Proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (EU Commission 2001a) hereafter referred to as the Qualification Directive**.** The Directive was eventually adopted in April 2004.

The purpose of the directive was two-fold. First, it aimed to harmonize the interpretation of the Geneva Convention with regard to who qualifies as a refugee as well as arriving at a common definition of grounds for subsidiary protection (protection given on humanitarian grounds to people who do not qualify as refugees according to the Geneva Convention but could face serious harm if returned to their home country). Second, it aimed to harmonize the rights granted to beneficiaries of international protection.

The Geneva Convention defines 'refugee' as "a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Article 1A(2)). The main points of contention with regard to the interpretation of the Geneva Convention and refugee status related to the issue of who constitutes a member of a "particular social group" since many countries did not recognize women or homosexuals as

constituting such a group and, consequently their granting of a refugee status to members of such groups was based on the discretionary interpretation by courts (McAdam, 2005). Moreover, the Geneva Convention did not explicitly specify whether persecution should be attributed only to the state or whether it could originate from non-state actors. This again led to arbitrary decisions to the granting of refugee status.

Apart from the Geneva Convention, state practice has also constituted an important source of refugee protection mechanisms. Over the years, a number of states developed a special status for people who did not meet the strict conditions of the Geneva Convention but were allowed to remain in the country on humanitarian grounds as returning them would have constituted a risk of *refoulement*. Again, the conditions for granting of such 'exceptional leave to remain' (UK), (since 2003 called 'humanitarian protection'), and Duldung (toleration) status varied widely across the member states. The Directive aimed to harmonise existing interpretations by introducing a subsidiary protection status for "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm" (Article 2(e)). Article 15 defines "serious harm" as (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

In addition, not only the conditions for granting asylum or subsidiary protection but also the rights associated with them also differed across Member States, giving rise to secondary movements. It was expected that approximating these rights would help limit this phenomenon.

There was again a significant concern among countries Member States that the absence of minimum standards these differences might lead to a 'race to the bottom' in which each country would adopt an ever stricter interpretation of asylum legislation so as to grant protection to as few people as possible in order not to encourage asylum seekers to lodge application there.

It is important to note that the Qualification Directive concerns two aspects of asylum policy. One is the recognition of refugee status or subsidiary protection, regulated by international, regional and domestic norms. In principle, the state's interpretation of these norms – liberal or restrictive – may be thought of as a pull factor and there is some evidence that recognition rates vary not only in line with the political situation in the countries of origin but also with political and economic factors in the country of destination (Neumeyer 2004). Recognition rates may also serve an important political function: lower rates may be used to justify claims that many asylum applicants are not in need of protection and are simply abusing the asylum route. This is not necessarily the case: the composition of refugee flows, the nature of the conflicts or actors of persecution may change and it is possible that existing international and domestic legislation does not envisage a response in such cases. Data on asylum recognition rates is presented in Tables 4 and 5, showing the relatively low recognition rates in both countries and the potential problems arising from having to deal with a large number of applicants who have been refused protection and the potential impact this has on the general public's perception of the institution of asylum.

	Granted (%)		Refused (%)		Other* (%)		Total (%)	
1991	505	*(8)*	3,380	*(56)*	2,190	*(36)*	6,075	*(100)*
1992	1,115	*(3)*	18,465	*(53)*	15,325	*(44)*	34,905	*(100)*
1993	1,590	*(7)*	10,690	*(46)*	11,125	*(48)*	23,405	*(100)*
1994	825	*(4)*	16,500	*(79)*	3,660	*(17)*	20,985	*(100)*
1995	1,295	*(5)*	21,300	*(79)*	4,410	*(16)*	27,005	*(100)*
1996	2,240	*(6)*	31,670	*(81)*	5,055	*(13)*	38,965	*(100)*
1997	3,985	*(11)*	28,945	*(80)*	3,115	*(9)*	36,045	*(100)*
1998	5,345	*(17)*	22,315	*(71)*	3,910	*(12)*	31,570	*(100)*
1999	7,815	*(37)*	11,025	*(52)*	2,465	*(12)*	21,305	*(100)*
2000	10,595	*(13)*	62,720	*(74)*	11,420	*(13)*	84,735	*(100)*
2001	13,490	*(11)*	89,115	*(72)*	21,600	*(17)*	124,205	*(100)*
2002	10,255	*(12)*	54,305	*(63)*	21,015	*(25)*	85,575	*(100)*
2003	4,300	*(6)*	55,890	*(83)*	7,550	*(11)*	67,740	*(100)*
2004	2,085	*(4)*	44,070	*(88)*	4,205	*(8)*	50,360	*(100)*
2005	2,225	*(7)*	24,730	*(83)*	2,930	*(10)*	29,885	*(100)*
2006	2,285	*(11)*	17,050	*(78)*	2,410	*(11)*	21,745	*(100)*
2007	3,800	*(17)*	16,755	*(73)*	2,335	*(10)*	22,890	*(100)*

*Table 4: Asylum Recognition Rates UK (*Other refers to protection statues granted outside the Geneva Convention (Dis-cretionary Leave, Humanitarian Protection, Exceptional Leave to Remain (until 2005))*

	Granted (%)		Refused (%)		Other (%)		Total (%)	
1991	11,597	*(8)*	128,820	*(92)*		*(0)*	140,417	*(100)*
1992	9,189	*(5)*	163,637	*(95)*		*(0)*	172,826	*(100)*
1993	16,396	*(4)*	347,991	*(96)*		*(0)*	364,387	*(100)*
1994	25,578	*(10)*	238,386	*(90)*		*(0)*	263,964	*(100)*
1995	23,468	*(16)*	117,939	*(81)*	3,631	*(3)*	145,038	*(100)*
1996	24,000	*(16)*	126,652	*(83)*	2,082	*(1)*	152,734	*(100)*
1997	18,222	*(15)*	101,886	*(83)*	2,768	*(2)*	122,876	*(100)*
1998	11,320	*(11)*	91,700	*(87)*	2,537	*(2)*	105,557	*(100)*
1999	10,261	*(11)*	80,231	*(87)*	2,100	*(2)*	92,592	*(100)*
2000	11,446	*(15)*	61,840	*(83)*	1,597	*(2)*	74,883	*(100)*
2001	22,719	*(28)*	55,402	*(68)*	3,383	*(4)*	81,504	*(100)*
2002	6,509	*(7)*	78,845	*(91)*	1,598	*(2)*	86,952	*(100)*
2003	3,136	*(5)*	63,002	*(93)*	1,567	*(2)*	67,705	*(100)*
2004	2,067	*(5)*	38,599	*(93)*	964	*(2)*	41,630	*(100)*
2005	2,464	*(8)*	27,452	*(90)*	657	*(2)*	30,573	*(100)*
2006	1,348	*(7)*	17,781	*(90)*	603	*(3)*	19,732	*(100)*
2007	7,197	*(35)*	12,749	*(62)*	673	*(3)*	20,619	*(100)*

*Table 5: Asylum Recognition Rates Germany (*Other refers to Humanitarian Protection; Toleration (Duldung) not taken into account)*

Once recognized, beneficiaries of refugee status or subsidiary protection acquire certain rights, which raises the question of their integration in the host society. The state must then balance these integration needs against the supposed pull factor of granting protection to a larger number of people.

8.1. Preference formation

8.1.1. Germany

Germany's position in the course of the negotiations differs markedly from the one it had adopted some years ago; it seemed that the country had turned from vanguard to a laggard in European integration (Hellmann, 2006) in just about a decade. Numerous accounts point to the way in which Germany consistently stalled the negotiations (McAdam, 2005; Musekamp, 2004; Bösche, 2006).

In particular, Germany blocked provisions granting of refugee status to those persecuted by non-state actors. This objection was generally in line with the restrictive interpretation or refugee criteria practised by German courts (Guild, 1999). The other point on which Germany firmly insisted was the preservation of the distinction between the rights granted to those who have refugee status and those who are given subsidiary protection (Musekamp, 2004). Eventually, Germany accepted a compromise through which non-state actors persecution was recognized in exchange for other Member States limiting the entitlements of social assistance, health care and access to employment of beneficiaries of subsidiary protection (McAdam, 2005). However, as it will be demonstrated below, a straightforward causal relationship between the EU Directive and domestic change is difficult to establish although the German government did eventually engage in a two-level

game which eventually resulted in an expansion of the definition of agents of persecution to include non-state actors (Menz, 2011). Again, domestic politics were at the forefront and reveal how a focus on preferences can explain both Germany's adoption of more expansive provisions in some cases as well as its resistance towards others.

In order to understand Germany's position, one has to go back as far as 1998 when a new coalition government between SPD and the Green Party came to power. Initially, as mentioned in the previous chapter, the change came with the expectation of a more liberal immigration and asylum policy, especially given the presence of the Green Party which had long been calling for the recognition of gender-specific grounds for asylum and the need to recognise that persecution of women is often conducted by non-state actors (Bündnis 90/Die Grünen 1994: 68). In their 1998 election manifesto, the Greens again emphasized the importance of recognizing gender-specific persecution of women as well as the need to provide asylum to victims of persecution by non-state actors (Bündnis 90/Die Grünen 1998: 115).

Chancellor Schröder also made a number of statements underscoring the need for a liberal reform of German citizenship and immigration laws (Howard, 2008). It seemed, however, that this ideologically-motivated change was not in accordance with the public opinion: public opinion polls showed that 66% of Germans thought that immigration exceeded the bearable limits while 75% expressed the desire to limit the maximum time refugees can stay in the country to nine months (Martin, 2004).

However, due to the pressure from the Green party and pre-election commitments the SPD could not entirely abandon plans for reform in *Ausländerpolitik* (foreigners' policy). Thus, a compromise ground was found: Germany was to introduce a new Citizenship Law, replacing its previous one from 1913 based on *jus sanguinis* and introducing substantive elements of *jus soli* and allowing children at least one of whose

parents was born in Germany to receive German citizenship. The law would also allow dual nationality and reduce the time required to receive German citizenship. These points were agreed through the negotiations between the Green party and the SPD as part of their coalition agreement (SPD/Bündnis 90/ Die Grünen, 1998).

It soon became apparent that that was the maximum that the Green Party could have hoped for. According to Herta Däubler-Gmelin from SPD, immigration "in the present situation, can not be demanded seriously by anybody" (Süddeutsche Zeitung, 1998, own translation). The question of asylum reform, and especially the Green Party's intention to reverse the asylum compromise agreed in 1992, also did not garner much support, especially given the escalation of the conflict in Kosovo and the expectations that a large number of refugees might seek to flee to Germany[63]. The final version of the coalition agreement only vaguely promised to review the Airport Procedure[64] and to revise administrative guidelines with regard to the consideration of persecution on the grounds of gender (SPD/Bündnis 90/ Die Grünen, 1998).

Despite a fall in the number of asylum seekers compared to the peak in 1992 following the introduction of the asylum compromise, asylum and immigration remained salient topics (cf. Figure 9 and Figure 11, Chapter 7) both in the media and in the public mind.

From the coalition agreement it seemed clear that the new government would focus on introducing the citizenship law. Initially, this seemed to be unproblematic given the fact that the coalition had a majority both in the Bundestag and in the Bundesrat. Unexpectedly,

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[63] The German experience with the Kosovo crisis and EU-wide burden-sharing was similar to what it had encountered previously with refugees from ex-Yugoslavia. In 1999 it called on other EU Member States to resettle at least 20000 refugees from the region by pledging to take 10,000 (in addition to the number of spontaneous arrivals). The UK, on the other hand was initially unwilling to participate in the scheme but eventually took 4346 refugees under the Humanitarian Evacuation Programme. For a detailed discussion on EU's response to Kosovo see van Selm 2000.

[64] See Chapter 9.

however, this majority did not last long. The German public was divided over the issue of introducing dual nationality. According to a study conducted by Forsa, 39% of the population were in favour, while 49% were against dual nationality. If party preferences were taken into account, however, the ruling parties had the support of their voters: 48% of SPD supporters and 76% of the Green Party's supporters approved favoured dual nationality (Netzwerk Migration in Europa, 1999). Among the CDU/CSU supporters, however, the approval rate was just 26%. This public sentiment was exploited by the opposition which launched a petition campaign by collecting signatures against the proposal for dual citizenship in Hesse in January 1999, just one month before the local elections. The campaign was successful especially in mobilizing CDU voters and the party won a landslide victory which put an end, at least temporarily, the government's ambitious plans for change as it deprived the coalition from its majority in the Bundesrat (Joppke, 2005). The government was forced to amend the proposed law through a compromise with the FDP by introducing a limit to dual citizenship which could be retained only until the age of 23 (Green, 2004). Once the law was amended and the required majority secured, it was adopted in May 1999.

The campaign around the adoption of this law had important consequences for the possibility of asylum and immigration reform. As mentioned above, CDU/CSU campaigned very strongly against the new law and the government, especially the SPD was forced to make statements to calm voters who were genuinely concerned with immigration as the issue of *Ausländerpolitik* in Germany is often a comprehensive one. Especially the interior minister, Otto Schily, consistently rejected calls for liberalization. In November 1998 he declared that Germany's "capacity to take immigrants has been exceeded" and that there was no point in discussing a new immigration law, establishing a quota for immigrants as "it would have to be set at zero" (Die Welt, 1998, own translation). In December 1998, visiting

Frankfurt /Main, in the province of Hesse, he stated that the "airport procedure" for asylum-seekers arriving by air should be retained and emphasized alongside humanitarian aspects of it, the persistent attempts of people "to force their entry in Germany through the asylum procedure, especially on grounds which have nothing to do with asylum" (Die Welt, 1998a, own translation).

Schily's view was by no means shared by everyone in the party. Although there was some opposition to Schily's position within the party, such as from the interior minister of Schleswig-Holstein Ekkehard Wienholz who accused Schily of using "rhetoric fatally close to the one of radical right parties" (Spiegel 1998, Netzwerk Migration, 01/1999) while another SPD member warned that Schily should take into account that the "German language has many nuances" and that foreigners' policy was a "minefield (cited in Spiegel 1998). However, Chancellor Schröder stood firmly behind Schily by suggesting that further immigration is indeed something Germany could not afford to withstand at the moment as it was "carrying the major burden of refugee and migration movements in Europe" and that those who criticised Schily were making it more difficult to fulfil "the demanding task of reforming the citizenship law" (Schily, cited in Netzwerk Migration 01/1999).

The government's position towards immigration started to change in early 2000 when labour shortages in various low- and highly-skilled sectors became prominent. One computer industry association, BITKOM (Bundesverband Informationswirtschaft, Telekommunikation und neue Medien), called on the government to allow foreign professionals to fill in at least 30,000 of the 75,000 jobs available in the IT sector. In response Chancellor Schroeder announced the possibility of introducing Green Cards for highly qualified foreign workers in information and communication technology. He suggested that the scheme could initially attract around 20,000 IT experts to work in Germany on five-year temporary permits to fill in the shortages in the sector (Klusmeyer

and Papademetriou, 2009: 229).

This move was prompted by the demographic situation in the country which had one of the lowest birthrates in the EU65 and promoted by the lobbying of some industries, such as BDI (*Bundesverband der Deutschen Industrie*: German Industrial Federation) and BDA (*Bundesverienigung der Deutschen Arbeitsgeberverbaende*: Confederation of German Employers' Associations) which claimed that the technology sector was suffering from labour shortages and Germany's knowledge-intensive exports were under threat. BDI also made the case that foreign workers were necessary for Germany's prosperity (Caviedes, 2010: 73)

Schröder's announcement opened up a heated debate in Germany which had previously declared itself as "not a country of immigration" ("Deutschland ist kein Einwanderungsland", Manfred Kanther, German Interior Minister (CDU) Frankfurter Allgemeine Zeitung, 1996). The intensity of the debate took the government by surprise (Kruse et al., 2003: 131) as Schröder had expected to only respond to a specific need in a specific sector but, instead, ended up unleashing a wide-ranging discussion on asylum and immigration (Westerhoff, 2007: 4, Der Spiegel, 2000).

Both issues, asylum and immigration reform moved quickly to the top of the political agenda. Initially, the CDU/CSU was against the idea of bringing foreign workers and emphasized the costs for the Bundesländer that these would entail as people would move with their families (Netzwerk Migration in Europa, 2000a). However, the debate about immigration and the possible law regulating it, provided the CDU/CSU also with an opportunity to bring forward a proposal that the Union had been trying to realize for decades: the transformation of the right to asylum in an institutional guarantee. Wolfgang

[65] The fertility rate (the number of children born per woman) in 1999 stood at 1.3, well below the level needed to maintain the population: 2.1. At the same time, life expectancy was on the rise: 75 and 81 years for men and women, respectively.

Bosbach, the vice-president of the Union's parliamentary group, made the party's position clear during a debate in the Bundestag in March 2000 by stating that such reform was necessary in order to prevent the abuse of the right to asylum as a route of entry for the purpose of finding work in Germany. He further justified this by arguing that the percentage of misuse was about 97%. It was only possible to allow the recruitment of new immigrants, selected according to Germany's interests, if the asylum route to migration was closed first since Germany was disproportionately burdened with asylum-seekers in comparison with other EU countries (Deutscher Bundestag, 2000: 8577). Thus, gradually, under the influence of the industry the Union started shifting its position towards the need for a comprehensive law which would regulate and restrict immigration and also allow for the revision of the constitutional right to asylum (Die Welt 2000).

This position became firmer after the CDU/CSU's failed attempt to mobilize voters against the IT scheme during the elections in North Rhine-Westphalia in May 2000. The party attempted to capture a larger share of the votes by catering to supposed anti-immigration sentiment among the population as it had done the previous year in Hesse. The CDU candidate, Jurgen Rüttgers led a campaign under the slogan 'Children, not Indians' (*Kinder statt Inder*), alluding to the potential beneficiaries of the IT scheme and insisting on higher birth rates as potential solution to labour shortages. The campaign – which did not enjoy unanimous support even among the CDU politicians who believed the rhetoric was needlessly reductionist – did not bring victory to the party and it even lost some of its vote share compared to the previous elections (Green, 2004).

Initially, the SPD did not intend to introduce a comprehensive immigration law and tried to keep the issues of asylum and immigration separate (Die Welt, 2000). Chancellor Schröder insisted on a sector-based solution which would cover the IT industry only (Frankfurter Allgemeine Zeitung, 2000). This unwillingness for a whole-scale reform was

also due to evidence acquired from opinion polls demonstrating that the public remained sceptical of an immigration overhaul: a survey conduced in 2000 showed that 67 per cent of the population believed that access of non-EU workers to the labour market should be limited and 24.6 per cent were in favour of abolishing such access altogether. Only 8.5 per cent supported unlimited access to the labour market (Allbus Survey).

SPD was initially unwilling to introduce any reforms of the asylum law as it saw no need to do so given that asylum numbers were falling and pointed out that, in "relation to its population size Germany was ranked number eight among EU countries receiving asylum seekers" (TAZ 25.04 2000, Netzwerk Migration 2000). This contrasted with public opinion which was in favour of reducing the number of asylum seekers: in 2000, 72 per cent of respondents were in favour of limiting access of asylum seekers to Germany while 11.3 per cent believed access should be prohibited altogether (Allbus Survey 2010).

The salience of the issue increased in the media and but there was no similar increase among the general public: immigration was regarded as the most important problem facing Germany by 12.08 per cent of the population, a slight drop compared to the previous year.

However, the CDU's failure to mobilize voters in the North Rhine-Westphalia elections, which showed that the public might have become less opposed to some forms of migration, led to a revision of this position and the announcement that a new law would be introduced ahead of the elections in 2002 (Green, 2004). This was also supported by the Green Party which saw this as an opportunity to realize its pre-election promises for a liberal asylum and immigration reform.

In an attempt to garner wide support for the new law, in June 2000 Otto Schily appointed a commission, chaired by Rita Süssmuth (CDU), comprising members of all different political parties, churches, employers' associations, unions, local authorities,

UNHCR, and academics. It was charged with the task to produce a comprehensive review of German immigration policy and make practical suggestions for its improvement which would then become the basis for the subsequent law.

The CDU decided to set up its own commission, chaired by Peter Müller. Within the CDU/CSU, however, there was a marked disagreement over the question of asylum. Within the CSU, Edmund Stoiber, was firmly standing behind the party's original demand of changing the constitution and transforming the right of asylum. However, this would require a two-thirds majority in the Bundestag which was not possible to achieve. The CDU had already abandoned this position and had decided to focus on making the asylum procedure quicker and the expulsion after a negative decision faster. Following intensive talks between Angela Merkel, the head of CDU and Edmund Stoiber, the head of CSU, the two parties agreed to follow "a two-level model which envisaged that at the first stage, all legal means, short of a constitutional change would be used; if these fail to stop the asylum abuse, such change would be sought" (Süddeutsche Zeitung, 2001).

The publication of the two reports of CDU (CDU Deutschland, 2001) in May and the Süssmuth Commission in July (Unabhängige Kommission Zuwanderung, 2001), respectively, opened up the political debate.

Even though the Commission's report was to be used as a basis for the new immigration law, the draft law proposed by the German Interior Ministry in August 2001 differed in some respects, including in its provisions on asylum. One of the central issues concerning asylum which were debated by the Commission were those of non-state actors and gender-related persecution. German courts had consistently developed the argument that under terms of "political persecution" under German constitution and the Geneva convention, persecution had to originate from the state or be attributable to it, including in

cases of "quasi-state persecution"66. In cases where persecution was due to the fact that the state was unable to protect its citizens or in a case of failed states where no state authority existed, German courts did not accept there could be political persecution and no refugee status was granted. Similar reasoning was applied with regard to subsidiary protection e.g. in cases where an applicant was not returned to a country where they could be exposed to torture or inhuman and degrading treatment, in line with Germany's obligations under ECHR. Even in such cases German courts stressed that the threat had to come from the state, despite the fact that ECtHR had ruled that threats emanating by non-state actors should also be considered67. Despite these different interpretations, however, the ECtHR also held that Germany's practice of not granting subsidiary protection did not constitute a violation of the ECHR because the state still had some mechanisms for providing protection in such cases68. German law granted discretion to the authorities to suspend deportation in case of a substantial danger for life, personal integrity or liberty of a person regardless of whether concrete individual danger results from State or private action.

The result of this restrictive practice regarding the recognition of non-state actors was that persons facing persecution or otherwise exposed at the risk of harm could only be granted the precarious status of Duldung. Coupled with the lack of formal recognition of gender-related aspects of persecution, this led to women – who are often exposed to persecution by non-state actors – being offered only limited protection in Germany69.

The Süssmuth Commission had found it difficult to agree on a specific recommendation regarding gender-related persecution and persecution by non-state actors

66 Persecution by actors who control part of the state. This interpretation was especially important in the context of the Taliban in Afghanistan.

67 Ahmed vs Austria ECHR 63, 17 December 1996

68 TI vs United Kingdom Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000

69 The extent to which Duldung offers protection is debatable as it is not a residence status but a temporary suspension of deportation.

but it nevertheless recognized the need to protect women who were "persecuted on the grounds of their gender and those whose life and freedom are threatened due to being in situations where there are no existing state structures, or where the state is unable to protect them" (Unabhängige Kommission Zuwanderung, 2001: 162).

The commission also examined the situation of those who received asylum on the basis of the German Constitution and those to whom the status was granted on the basis of Geneva Convention. The latter group was an inferior position, as it was granted an initial residence authorisation of limited duration, entailing less rights compared to the former who were granted unlimited residence permit and immediate access to the labour market. The Commission agreed that in light of the integration challenges that such differential treatment posed and the equal protection needs of the two groups, it was no longer justified. The Commission argued that such approximation of the rights of the two groups would not jeopardise the asylum compromise and the "safe third country" rule and it was therefore, advisable to "grant Geneva-Convention refugees a residence permit for three years, followed by an unlimited residence permit after this period if they were still in need of protection" (Unabhängige Kommission Zuwanderung, 2001: 164).

The Commission also addressed the situation of those who were granted Duldung (toleration) status, emphasising the need to ensure their successful integration of refused asylum seekers who could not be deported for a long period of time for humanitarian reasons. The Commission proposed that after the expiry of their "toleration" period, there should be a possibility to obtain a permit authorising their stay (Unabhängige Kommission Zuwanderung, 2001: 168).

Schily's draft Immigration Law, however, did not address the issue of non-state actors and gender-related persecution (Zuwanderungsgesetz, 2001). This was surprising given that SPD had called for "better protection of the refugees who are victims of non-state

persecution and those who face human rights violations on the grounds of their gender" in a paper outlining its position on the issues of immigration and integration (SPD, 2001a: 14).

The omission can be attributed to Schily's strong preference for a restrictive interpretation of the Geneva Convention which he himself argued "regulates the law of asylum and not the right to asylum" (Berliner Zeitung, 1999) and his denial of the existence of a protection gap regarding non-state and gender-related persecution in German asylum law (Berliner Zeitung 2001). He believed that recognising persecution by non-state actors as reason for granting asylum would be damaging to the sustainability of the asylum procedure (ibid.)

Schily's decision was also an attempt to enlist the support of CDU/CSU which was firmly against the inclusion of gender and non-state actors persecution on the grounds that it would expand the scope of the number of people who could be granted asylum (Green 2004).

In addition, he was also motivated by opinion polls which showed that the public prefers a more restrictive immigration law. A survey by the Institut für Demoskopie Allensbach conducted in June 2001 showed that 53% of the voters wanted the number of immigrants arriving in Germany to decrease (as opposed to 48% in November 2000) and 28% believed the current level of migration should be preserved (as opposed to 35% in November 2000) (Spiegel, 2001; Netzwerk Migration in Europa, 2001a).

In the course of the negotiations of this law within the coalition, Schily's position was firmly opposed by the Green Party. The party considered the inclusion of non-state and gender-related persecution in the new law essential. In their position paper on the new Immigration Law the Greens reiterated that the criteria for granting asylum should again be the need for protection and non-state and gender-related persecution should be recognised

as grounds for asylum (Bündnis 90/Die Grünen, 2000: 5). They eventually managed to secure it in the final version agreed by the government in October 2001. The proposed law now envisaged that "no foreigner shall be expelled to a country where their life or freedom would be threatened on the grounds of their race, religion, nationality, gender, belonging to particular social group or political opinion. These can also be valid for non-state persecution. It must first be ascertained whether the person lodging the claim could find protection from persecution in their country of origin" (Zuwanderungsgesetz, 2001a). Further negotiations resulted in adding an explicit reference to the Geneva Convention and clarifying the provision on non-state actors: this was only valid when it related to "persecution" within the meaning of the Convention (Zuwanderungsgesetz, 2002).

The Green Party defended the provision during the debate in the Bundestag by explaining that it was not something radical but "simply European practice" (Deutscher Bundestag 2001a: 20519). The opposition confronted the argument by arguing that no European country recognised gender-related persecution by itself as a reason for granting asylum under the Geneva Convention, in the absence of other Convention grounds and that the provisions in the new law would act as pull-factors attracting more asylum seekers to the country (ibid., 20528). The Green party refuted these claims by referring to the experience of countries which recognise gender-related persecution and had not seen any increase of asylum seekers as a consequence.

With regard to the other contentious point, namely the differential treatment of those who are accorded refugee status and those who are beneficiaries of subsidiary protection, the SPD insisted on retaining the distinction which prevailed in German asylum law and had been introduced through subsequent legal changes in 1997 and 1998 just before the new government came to power. SPD called for granting those who could not be expelled for humanitarian reasons "a residence status which would enable them to plan their lives and

offer them perspectives" (SPD 2001: 14) but fell short of advocating an equal status for all beneficiaries of international protection[70].

This was contrary to the preference of the Green Party which insisted on having the same rights for everyone who enjoys protection in Germany, in line with those guaranteed in the Geneva Convention (Bündnis 90/Die Grünen, 2000: 15).

Another contentious point was the situation of those who were allowed to stay in Germany due to humanitarian reasons, who were subjected to the procedure of Kettenduldungen, i.e. they had their toleration status renewed every three months. The Green party managed to secure a compromise that those who had been granted such status for a long time *shall*, under, certain conditions, be granted residence permits (Süddeutsche Zeitung, 2001a). The original BMI proposal had envisaged greater administrative discretion by stipulating that residence permits *can* be granted (Zuwanderungsgesetz 3.08.2001).

The CDU had also supported a "reduction in the discrepancy" between the status of those granted asylum under the German Constitution and those granted protection on the grounds of Geneva Convention or humanitarian protection, in line with the recommendations of the Mueller Commission (CDU-Deutschland, 2001; CDU-Bundesausschuss 2001).

Anxious to have the new law approved before the elections in September 2002 so as to avoid confrontational debate over immigration, the government submitted the law to the Bundesrat for approval on in March 2002. The law was declared adopted despite a disagreement between the two representatives of the coalition government in the state of Brandenburg over whether the Land would vote in favour or against it.

[70] This reluctance can in part be attributed to the large number of foreigners with toleration status in Germany. In October 2000, there were 266 525 people in possession of Duldung and 44% were asylum seekers whose claims were refused but who could not be deported for humanitarian reasons (Unabhängige Kommission Zuwanderung, 2001: 165).

The issue of asylum, while still contentious, had become less salient due to the fall in the number of asylum seekers. There was a tacit consensus among the political parties that the German Asylum Compromise and the associated policy changes had worked well: the number of asylum applications decreased significantly and in 2000, 88,290 applications were submitted while in 2003 the numbers dropped further, reaching 50,560 (See Table 2). Germany's major goal was to preserve these numbers and expanding the rights of beneficiaries of subsidiary protection was seen as making the country more attractive for asylum-seekers. At the same time, concerns about the effects which different residence statuses were having on the integration prospects of their beneficiaries were growing so a compromise of having a more secure residence status and an improvement on social rights was seen as reasonable.

As mentioned above, the government aimed to introduce a more open immigration policy towards highly-skilled migrants and thus an influx of asylum-seekers would have had serious repercussions. Initially, SPD was reluctant to introduce any asylum law reforms – restrictive or liberalising – reflecting its general satisfaction with the policy within the party. The Green party, however, was a staunch supporter of the inclusion of the non-state and gender-related persecution which had featured on its manifesto since 1994. It explicitly declared it as a 'non-negotiable' point (Tagesspiegel Online, 2004; Menz 2011). Using the opportunity of the introduction of a new comprehensive immigration law, it managed to secure the desired amendment.

It can be expected that introducing domestic reforms agreed in the new Immigration Law, reflecting the ideological commitment to liberalising refugee policy of the Green Party, would became the preference of the government. Therefore, the German government may be expected to support the inclusion of provisions on non-state actors and gender-related persecution and to seek to block efforts to grant equivalent rights to beneficiaries of

refugee status and subsidiary protection or, at least, insist on flexibility to allowing it to maintain the distinction.

8.1.2. Britain

Britain's experience with asylum policy cooperation contrasted markedly with that of Germany. From a country which showed little interest in asylum policy harmonization efforts at the beginning of the 1990s, it changed course and decided to opt into all EU Directives in this field. With regard to the Qualification Directive in particular, the UK government consistently advocated how beneficial for Britain's interests its participation in it would be, downplayed criticisms over sovereignty concerns with regard to asylum matters and even expressed slight disappointment that the agreement over the content of the protection granted to refugees and beneficiaries of subsidiary protection was based on minimum standards only. Furthermore, it insisted that the Directive should adopt a broad interpretation of the Geneva Convention by including non-state actors as agents of persecution and insisted on equal treatment of refugees and beneficiaries of international protection.

This somewhat puzzling position requires an explanation which, as was the case with Germany, again starts with a change of government. In 1997, the Labour government, headed by Tony Blair came to power and brought with it the expectation of policy change in many issues among which were asylum and immigration. This expectation came mainly from what the Labour party had demanded while in opposition and its constant criticism of the way the Conservative party had been dealing with the issue (Solomons and Schuster, 2004). Thus, once it came to power, the new government decided to focus on race relations in particular by tackling institutionalized racism by introducing the Race Relations

(Amendment) Act in 2000. It further demonstrated its willingness to pursue a more human rights oriented asylum policy by abolishing the "White list" which had long been criticized by refugee NGOs (Refugee Council, 2000). In addition, the government also granted leave to remain to around 70,000 asylum applicants whose asylum application had not been processed (Solomons and Schuster, 2004). However, shortly after the government had ordered a comprehensive review of asylum and immigration policy, the noticeable increase in the number of asylum applicants occurred: from 29, 640 in 1996 to 46, 015 in 1998 in addition to a backlog of more than 50,000 applications which also had to be examined. The government's answer how to deal with these developments was outlined in the 1998 White Paper *Fairer, Faster, Firmer – A Modern Approach to Immigration and Asylum* which then became the basis of the Asylum and Immigration Act introduced in 1999 (Bloch, 2000)[71]. The title of the working paper and the language used in it reflected to a large extent the drive for efficiency which characterized much of Labour's discourse even before it came to power and which constitutes an important part of New Labour thinking and policy-making (Somerville, 2007).

However, the numbers of asylum applications were not supporting the government's claims of tackling the issue of asylum efficiently: despite the legislative changes introduced in 1999, applications continued to increase and reached 80 315 in 2000 (See Table 2).

In addition, sensational events, such as the discovery if 58 deceased Chinese migrants in a back of a lorry in Dover brought to the fore the cases of unauthorized crossing by irregular migrants and asylum-seekers from the Sangatte camp in France (Somerville, 2007). The pressure on the government from both the opposition and the media was mounting, and the government was facing elections in 2001 (cf. Figure 9, Chapter 7). The

[71] The provisions of this act are discussed in the Chapter 7 and 9 dealing with the Reception Conditions and Asylum Procedures as it mainly concerns them.

Conservative party accused the Labour government of "mismanagement of the asylum system", and of being a "soft touch" for asylum seekers (UK Conservatie Party 2001; Squire, 2009).

This sentiment was also shared by the majority of the public: a MORI poll, conducted in 2000, showed that "80% of adults believe that refugees come to our shores because they regard Britain as a 'soft touch'", while another one conducted in 2001 showed that 44% of the voters agreed with the statement that "Britain should take no more asylum seekers" (Robinson et al., 2003: 19). The government appeared to be aware of the public's mood: Jack Straw said that "there was obvious public concern in the UK about the levels of unfounded asylum seekers" (BBC news, February 2001).

In 2001 the UK saw race-related disorder in Bradford, Burnley and Oldham: towns in economic decline, marked by near-segregation between local white population and Muslim minorities. Activity by the British National Party (BNP) contributed to the tensions (Geddes, 2003: 47). At the general elections which took place a few weeks after these riots, the BNP gathered its highest share of votes in the affected constituencies[72].

Although the riots were not directly related to the presence of asylum seekers, the government still needed to show that it was dealing with the issues of asylum and immigration efficiently. One way to demonstrate this was by reducing the number asylum seekers by swiftly removing those whose claims had been refused and returning those who passed through safe third countries on their way to the UK. Yet, it soon emerged that the current EU instruments dealing with the latter, such as the Dublin Convention were not helpful in this respect as the decisions of UK courts prevented the government from making

[72] The BNP averaged 3.9% of the vote where they fielded candidates. As a share of total UK vote, the BNP gained the votes of 0.18. The BNP exceeded 5% in seven seats – Oldham West andRoyton (16.4%), Burnley (11.3%), Oldham East and Saddleworth (11.2%), Barking (6.4%), Poplar and Canning Town (5.1%), Dagenham (5.0%), and Pendle (5.0%). By comparison, in 1997 BNP managed to exceed 5% in only 3 constituencies and gathered 0,1% of the total UK vote (House of Commons, 2009).

use of its provisions. In particular, in July 1999, in *R. v Secretary of State for the Home Department, ex parte Lul Adan, Siyyampalan Subaskaran & Hamid Aitseguer*, the Court of Appeal considered three cases, where the Home secretary, Jack Straw, had decided to return two applicants to Germany and one to France, as these countries were deemed responsible for the examination of the applications under the Dublin Convention. They challenged their removal to these countries on the grounds that neither Germany nor France interpreted the Geneva Convention correctly as they did not recognize persecution from non-state actors to give rise to well-founded fear of persecution and this constitute grounds for granting asylum. The Court held that there could be a risk of refoulement if applicants are returned to these countries. The Home Secretary appealed the case but the House of Lords upheld the decision in December 2001 ruling that was reached by the Court of Appeal in the *Lul Adam* case and thus overturned the Home Secretary's decision (Stevens, 2004).

This case was yet another confirmation that English courts were firmly taking a position of recognizing non-state actors as agents of persecution. The previous case, *Horvath v Secretary of the State for the Home Department* in 2000 dealt with a Slovakian citizen of Roma origin who was facing racially motivated persecution by skinheads. The House of Lords ruled that where a state was not willing or able to fulfil its obligations to protect its citizens, then this could amount to persecution even though it was not the state itself that was persecuting an individual (Stevens, 2004).

Faced with this court practice, the government clearly opted for supporting the inclusion of persecution by non-state actors in the EU Qualifications Directive. In its explanatory memorandum, the government referred to the cases cited above and argued that: “the effect of these decisions, by preventing the return of asylum seekers from the UK to France or Germany, has arguably been to create an incentive to claim asylum in the UK rather than elsewhere in Europe” and that

> "the EU draft Qualifications Directive provides for EU-wide harmonisation around the present, wider, UK interpretation of the Convention rather than the narrower Franco-German one. Adoption of this Directive would therefore remove the 'pull' factor towards the UK arising from the present difference of interpretation, although possibly at the expense of creating a greater 'pull' factor for Europe as a whole" (House of Commons, 2004).

While the governments' preference for the inclusion of non-state actors can be understood with reference to its utility for facilitating the application of the Dublin Convention (House of Commons 2001), and bringing down the number of asylum applications by facilitating removals to countries which UK courts had regarded as unsafe due to their interpretation of the Geneva Convention, the government also stated that it hoped that in the course of the negotiations "protection measures against non-state persecution will not be weakened as we consider them to be right and necessary" (House of Lords, November 2002: Col. 444).

Similar reasons of efficiency and responding to the individual's need were behind the government's the firm commitment to granting similar rights to beneficiaries of subsidiary protection and it thus strongly favoured harmonisation (House of Lords, 2002, Col.444). The government argued that: "there are a number of reasons for limiting the difference between the two protection statuses: an individual's needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection; and meaningful rights, including full access to employment, are significant factors in encouraging genuine integration" (House of Commons, 2002c)[73]. Integration was among the government's priorities at the time (Somerville, 2007) so the emphasis on the benefits of having similar rights for integration is not surprising. It also appears that on this occasion humanitarian considerations, coupled with effectiveness

[73] It should also be noted that the "exceptional leave to remain", as the permit granted to beneficiaries of humanitarian protection was then called, allowed the person to apply for settlement after four years so the UK did not have a large number of people living on a temporary permit for years without any route to settlement as Germany did.

concerns had trumped over concerns about attracting more asylum seekers.

Concerning gender-related persecution, the government could also rely on previous practice established by UK courts. In *Islam v Secretary of the State for the Home Department; R. v IAT, ex parte Shah,* the House of Lords found that women in Pakistan constituted a particular social group and, having a well-founded fear on the basis of membership of such group, were to be granted refugee status under the Geneva Convention.

In 2000, the Immigration Appellate Authority issued Asylum Gender Guidelines, addressing the specific situation of women in the asylum system which helped entrench awareness of gender-specific persecution in domestic policy (Kelley, 2001). The adoption of these guidelines followed a strong campaign by Refugee Women's Legal Group which had issued its own gender guidelines aimed at the asylum case workers in the Immigration and Nationality Division of the UK Home Office and which had received support for the principle of gender guidelines by a large numbers of MPs (Berkowitz, 2000; House of Commons Debate 22 Feb 1999). In 2000, the Home Office reviewed its "instructions to asylum case workers and incorporated some of the suggestions and principles contained in the guidelines produced by the Refugee Women's Legal Group" (House of Commons, 22 January 2002, Col. 833W).

The UK government expressed its support for the Directive as it believed that common standards would discourage asylum seekers from lodging a disproportionately high number of requests in some countries, including the UK, reinforcing the impression that it was a "soft touch":

> consistent interpretation of the definition of a refugee and ensure that each Member State accords refugees comparable rights and benefits. This should discourage those in genuine need of international protection from "asylum shopping". The reduction of both the real and the perceived advantages of applying in certain Member States over others should deter secondary movements of asylum applicants within the EU. (House of Commons, 12 May 2003, Col. 71W).

The absence of institutional or partisan veto players in the UK system meant that the government did not need to make compromises on its preferences. These were formed by the confluence of the three factors identified in the theoretical part: the high numbers of asylum seekers, ideological considerations about the 'management' of migration and asylum flows and humanitarian concerns as well as public opinion demanding that the UK should not appear as a 'soft touch' by offering higher level of protection than other states.

In this case, the government was not dissatisfied with the status quo in domestic asylum policy as it believed that the interpretation of the Geneva Convention by domestic courts regarding persecution by non-state actors was "right" and had made significant progress towards gender-based persecution; rather, it was dissatisfied that other countries did not have the same standards. Thus, it could be expected that the UK would support an EU level agreement that would allow it to maintain this status quo.

8.2. EU-level negotiations

The Asylum Working Party started examining the Commission's proposal in April, 2002 (Council of the EU, 2002a). As expected Germany's position reflected the domestic status quo and the government's desire to preserve it: Germany stated that the directive should be structured in two parts, one relating to refugee status and the other to subsidiary forms of protection (Council of the EU, 2002a: 7, fn.5).

In the course of the negotiations, it insisted that subsidiary protection should be clearly differentiated from refugee status and not constitute simply an alternative form of protection (Council of the EU, 2002c: 24, fn.1). The German delegation made the same reservation on the right to employment (ibid., p.28, fn.2), social welfare, healthcare and psychological assistance (ibid., p.21, fn. 2).

Interestingly, initially Germany made no reservations with regard to persecution by non-state actors as this was something that the government had agreed to after the negotiations with the Green party, and enshrined in the new Immigration Law before the EU-level negotiations had started (Council of the EU, 2002d). However, shortly after the six Bundesländer governed by CDU/CSU lodged a complaint against the adoption of the Immigration Law in the German Constitutional Court, the reservation appeared (Council of the EU, 2002e: 11, fn.1 and fn. 2)[74]. This was due to the fact that the rejection of the persecution by non-state actors was one of the major demands made by the CDU/CSU in the course of domestic negotiations and a possible new passage of the law would require the consent of the Bundesrat. In December 2002 the Constitutional Court declared the procedure through which the law was enacted unconstitutional[75]. In 2003, the government presented an amended version of the law which, however, was rejected by the Bundesrat and sent to a Conciliation Committee.

On the grounds of the stalled negotiations at home, the German Minster of Interior Otto Schily insisted that the negotiations of the EU directive could not continue which clearly demonstrates that Germany preferred to set its own national legislation in advance and was prepared to block the progress on the Directive in order to ensure the government's intention to introduce the required reforms were not jeopardized. The changed domestic situation forced the government to play a two-level game, using the EU level instrumentally to facilitate domestic change. This was not a change of preference – the government did not insist on restricting the definition – but simply a strategy to introduce domestic reforms in line with its preferences.

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[74] The complaint was lodged on 15 July 2002 and the Asylum Working Party discussed the proposal on 24-25 July 2002 when reservation was entered. According to the outcome of proceedings of the previous session of the Asylum Working Party, which took place on 2-3 July 2002, Germany had not entered any reservation (Council of the EU, 2002d).

[75] German Constitutional Court, 2 BvF 1/02 of 12/18/2002.

The opposition warned Schily not to use the EU to reach decisions which had not been agreed domestically first, accusing him of behaving as if the new Immigration Law had become the status quo. Rejecting accusations that Germany's position on non-state actors left it isolated, the opposition insisted that Schily should use his veto and "wait for the results of the talks on the Immigration Law. Or, better still, negotiate with the national interest in mind. Other Interior Ministers do the same in Brussels" (Deutscher Bundestag 2003a: 3660). While Schily appeared to heed these warnings by delaying the negotiations, members of the SPD stated that CDU/CSU's insistence on blocking the entire EU asylum and immigration policy on the grounds that it did not correspond completely to German legislation was "a denial of European integration. This is not only dangerously wrong, but it contradicts the policy of the party since Adenauer" (Deutscher Bundestag 2003b: 6035). The Green Party put additional pressure on the CDU/CSU by insisting that they were "the only ones in Europe who deny the improvement in the status of a few hundred people […] it cannot be the goal of German policy to remain at the bottom in the area of humanitarian protection" (Deutscher Bundestag 15/48, 4032).

In response to warnings from CDU/CSU that the inclusion of non-state actors would lead to an influx of asylum seekers and jeopardise the progress of the asylum compromise, SPD responded that this would not no lead to an increase but merely to "ensure legal certainty for those who cannot be removed due to the terms of the Geneva Convention anyway" (Deutscher Bundestag 15/31, 2347). The German government explained its support for the provision at the EU level with similar considerations about the need to ensure that "where there is the same protection need [under the Geneva Convention] there must be the same protection status" (Bundestag DrS. 15/1452, p. 5).

Only after the domestic deadlock of negotiations between the coalition partners and the CDU/CSU was resolved by reaching agreement in the Conciliation Committee

(Deutscher Bundestag, 2004), did Schily lift his veto on the directive (Süddeutsche Zeitung, 2004a). Agreement was reached in two steps. In fact, it was the provisions in the Directive which served as a focal point on which the parties could agree: non-state actors were to be considered as actors of persecution if it could be demonstrated that the state or parties and organisation controlling the state, including international organizations, are unable or unwilling to offer protection from persecution, regardless of whether a state authority exists, unless there is an internal flight alternative (Zuwanderungsgesetz, 2004, Art. 60 (1)(a))[76].

While the question of non-state actors of persecution was resolved in domestic negotiations, the CDU/CSU had serious concerns about the wording of the Directive which included non-state actors as actors of serious harm, i.e. it would require Germany to grant humanitarian protection to victims of such harm (Bundestag DrS. 15/1452). As mentioned above, in such cases protection was temporary and at the discretion of the authorities. CDU/CSU accused the coalition of attempting to go beyond the clear rules of the Geneva Convention (Deutscher Bundestag, 2003: 2324). This distinction was also reflected in Germany's position in the negotiations on the Directive: by 2004 had lifted its reservation on persecution by non-state actors it kept a reservation on including non-state actors as actors of serious harm (Council of the EU, 2004: 9, fn.2). When the domestic negotiations of the new immigration law were completed, Germany lifted its veto but the provision did not feature in the immigration law itself which only recognized non-state actors as agents of persecution. When discussing the results of the negotiations in the mediation committee,

[76] This provision introduced in the new German Law is in fact an amalgamation of provisions from two separate articles in the Qualification Directive: Article 8 which deals with internal protection and Article 6: actors of persecution and serious harm. According to Article 6 (c), actors of persecution or serious harm include non-state actors if it can be demonstrated that the State or parties or organisations controlling the State or a substantial part of the territory of the State including international organisations, are unable or unwilling to provide protection against persecution or serious harm. Article 8 simply allows Member States to determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

Interior Minister of Brandenburg, Jörg Schönbohm (CDU), briefly remarked that "regarding non-state actors and gender-specific persecution [...] we found a rule which is oriented towards the EU Directive. We will be moving within the framework of the Geneva Convention. We can live with this" (Deutscher Bundesrat, 2004: 343).

Apart from actors of persecution, the question of how to define the notion "particular social group" within the Geneva Convention also proved controversial not least because the initial Commission proposal included two different conceptualisations, corresponding to various national courts' approaches as well as UNHCR guidelines. One was a definition of social group based on certain fundamental characteristics such as sexual orientation, age and gender or characteristics fundamental to the group's identity or conscience. The other one was a definition based on the perception of the group by the surrounding society; social group comprised "individuals treated differently in the eyes of the law" (Council of the EU, 2002e: 15). In line with UNHCR's recommendations, meeting either definition would have sufficed to ensure that the person belongs to a particular social group (UNHCR, 2000).

As mentioned above, the new German Immigration law had already included "gender" alone as a reason for persecution so Germany registered no objections to this definition and neither did the UK where domestic courts had already provided guidance on defining "particular social group". Concerning gender-related persecution, the Green Party ensured that the German legislation offered a higher level of protection than the Directive. Neither of the countries objected to the explicit mentioning of gender as an example of characteristic constituting a particular social group. In September 2002, the provision on social group became subject to an extensive debate with Greece, Spain, France and the Netherlands insisting on deleting the reference to "gender" as a social group. Both UK and Germany, supported by Belgium, Ireland, Italy and Sweden opposed this suggestion (Council of the EU Council, 2002f: 15, fn.3). The final version of the Directive stated that

while gender-related aspects may be considered when determining what constitutes a particular social group, they do not by themselves create a presumption of existence of particular social group on such basis (Article 10 (1)(d)). In addition, the Directive also specified that a group shall be considered a particular social group where members of the group share an innate characteristic and have a distinct identity because it is perceived as being different from the surrounding society (ibid.).

While the Directive provided a good focal point for agreeing on the provision on non-state actors, the final version of the Directive was too vague for the Green Party (Süddeutsche Zeitung, 2004). Instead of the restrictive provisions in the Directive regarding gender as a particular social group, the Green Party pushed for a formulation which recognized women as a particular social group. According to Article 60 (1) of the Residence Act, "when a person's life, freedom from bodily harm or liberty is threatened solely on account of their gender, this may also constitute persecution due to membership of a certain social group". As the Green Party declared after the adoption of the law, "on this issue, we have gone considerably beyond the corresponding EU Directive. I am proud that we managed to defend that against your intervention [of CDU/CSU]" (Deutscher Bundestag, 2004a:10708).

During the negotiations, the government sought to link the lifting of its veto on non-state actors with a compromise on the social and health care benefits granted to those having subsidiary protection. Unlike refugees, who receive welfare and health assistance on the same conditions of access as nationals, states *may* choose to limit the benefits of those under subsidiary protection to the so-called 'core benefits' which are significantly lower than those granted to refugees (McAdam, 2005; ProAsyl, 2007). In particular, Article 28, dealing with social welfare and Article 29, dealing with health care, state that the general rule is that beneficiaries of refugee or subsidiary protection status receive access to health care and

social welfare under the same conditions as Member State nationals. By exception to this general rule, Member States may limit social assistance or health care granted to beneficiaries of subsidiary protection status to core benefits[77]. As the word 'may' suggests, this provision is not binding but it is up to the member states to decide whether they want to make use of it.

The UK maintained its position on the need to include persecution by non-state actors and, unlike Germany, did not object to having similar content of rights for all beneficiaries of international protection (Council of the EU, 2002c; Council of the EU, 2002d). However, as for the British government, the acceptance of non-state actors as actors of persecution at the EU level was much more important in view of the application of the Dublin Convention, than a strict adherence to the preference for maintaining the similar status of refugees and those under subsidiary protection. Thus, the government became instrumental and agreed to the compromise outlined above (Refugee Council, 2004).

8.3. Implementation

8.3.1. Germany

The Directive was formally implemented in Germany in August 2007 through a special law introduced in order to implement a number of EU Directives in the field of asylum and immigration. With regard to the persecution by non-state actors, however, there was no need to introduce changes since the inclusion of this provision had already been agreed upon and had become part of the Immigration Law[78] introduced in 2004. The law also envisaged the establishment of "hardship commissions" in every Bundesland which would decide whether

[77] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, Official Journal L 304, 30/09/2004, p. 0012-0023.

[78] Gezetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Intergation von Unionsbuergern und Auslaender (Zuwanderungsgesetz), BGBl. 2004 Nr. 41, 5.08.2004

to grant residence permit to foreigners who are subject to an enforceable obligation to leave the country, on the basis of their individual circumstances. With regard to immigration, the law allowed highly-skilled foreign workers the possibility to receive permanent residence permits and foreign students who graduated from a German university were entitled to a one-year permit in order to seek employment. The law also introduced mandatory integration courses consisting of German-language classes and an orientation course on German history, culture and legal system.

As mentioned above, the question of non-state actors of serious harm had not been addressed in the 2004 Immigration Law. Given the sensitivity of the issue and the debate it had provoked, the provision was implemented through the 2007 law by reference to a number of provisions on subsidiary protection in the Directive and strictly covered only cases falling under its scope[79].

Concerning gender, there was a possibility to lower Germany's existing standards which recognised gender as constituting particular social group. However, the coalition government chose to preserve the higher protection level regarding gender by clarifying that the provisions of the Qualification Directive would be applied additionally in order to establish persecution (Deutscher Bundestag, 2007a: 16).

The adoption of the 2007 law did not affect the distinction between benefits received by refugees and those with subsidiary protection. This demonstrates that Germany made use of this discretionary provision, which it had introduced itself, to retain its existing practice of granting different benefits to the beneficiaries of different categories of protection. With regard to social welfare, while refugees enjoy the same benefits as German nationals, the

[79] Following the 2005 and 2007 legislative changes, Germany has two separate grounds on which subsidiary protection may be provided: European and national. The European is based on the Qualification Directive and the corresponding article 60 (2), (3) and (7) sentence 2 of the Residence Act. The national ones are based on article 60 (5) and (7) sentence 1. The inclusion of non-state actors refers only to the former (Article 60 (11)).

benefits of those who only receive subsidiary protection may be reduced to the level of 'core benefits' if they leave the Bundesland which initially issued their residence permit80. They generally have no access to support grants for children and education in the first three years of their stay and are ineligible access to some specific benefits concerning medical treatment and financing of housing (ECRE, 2008). Beneficiaries of subsidiary protection would also continue to receive renewable residence permits for at least one year: the minimum period under the Directive. However, the issue of the permit is subject to exclusions which go beyond what the Directive envisages. After seven years, the person can obtain a settlement permit, provided certain conditions, including being able to secure one's livelihood are met. Germany also made use of the discretion to maintain the limitation on the access to employment for beneficiaries of subsidiary protection who, for a period of three years, could be granted work permits only if there was no suitable EU national to take a specific position.

This treatment again contrasts with the situation of refugees who are granted permits for three years which are transformed into settlement permits at the end of this period if the refugee is still in need of protection. Refugees are also granted immediate unconditional access to the labour market.

While the possibility of revoking the refugee status had been part of German policy and did not contradict the respective provisions in the Qualification Directive, in the course of implementation the Green Party and Die Linke challenged the restrictive German provisions and the practice of revoking the refugee status of Iraqis who had received protection from persecution by Saddam Hussein's regime shortly after his fall. Die Linke argued that the practice of revocation was unique in Europe. The government defended the policy by stating that Germany had received more refugees than all other EU countries

80 Sozialgesetz XII, 23 (5).

combined and that politicians had always tried to ensure that this did not lead to the mobilisation of extremists. “The German people's generosity towards refugees could only be maintained if they knew people would leave when they were no longer in need of protection. If this principle was not observed, right extremism and hostility towards foreigners would be provoked” (Deutscher Bundestag, 2007: 9070).

As was the case with the Reception Directive, the transposition deadline of 2006 elapsed before the law was passed. The need to transpose the legislation, however, presented an opportunity to go beyond a mere transposition of provisions in the directives but to address the situation of those asylum seekers who were not covered by the directive. This was the case with people who had been living on toleration permits for years and could not be deported for humanitarian reasons. Their toleration permits did not entitle them to any rights and did not offer a realistic prospect of regularising their stay. As Germany was already dealing with the issue of integration, it was recognized that this group of people, many of whom had been in the country for more than a decade, would face a problem. Proposals had been made during the negotiations of the Immigration Law and in 2005, but disagreement among the Interior Ministers of the Bundesländer along party lines prevented the proposals from being adopted. The new coalition government managed to agree on a relatively generous proposal which envisaged that families with children who had lived in Germany for more than 6 years (and in case of a person with no children, 8 years) would receive a residence permit of 2 years and the right to work. The Conference of Interior Ministers of the Länder, however, agreed the opposite, i.e. only those who already had a job could receive a residence permit while those who fulfil all the conditions but did not have a job would be given a temporary permit for one year during which they would be expected to find employment (Netzwerk Migration in Europa, 2006). As described in the previous chapter, the compromise was extracted on the basis of increasing the time asylum seekers

would only be eligible for lower social benefits.

8.3.2. Britain

In Britain, implementation of the directive started through a nine-week public consultation period launched with a government consultation paper outlining the changes to be introduced through *The Refugee or Person in Need of International Protection (Qualifications) Regulations 2006* and the amendments of the Immigration Rules (Home Office, 2006). Upon considering all 14 responses from the consultation process, the government submitted the final version to the Parliament on 18. September 2006, ahead of the transposition deadline of 9 October 2006.

With regard to actors of persecution, the Regulations transposed the Directive almost literally by stating that persecution or serious harm can be committed by a) the State; b) any party or organization controlling the State or a substantial part of the territory of the State; c) any non-state actor if it can be demonstrated that the actors mentioned in a) and b), including any international organization, are unable or unwilling to provide protection against persecution or serious harm (Home Office, 2006: 2). The UK also chose to maintain its broader grounds for granting subsidiary protection which included – in addition to the definition of serious harm found in Article 15 of the directive – "unlawful killing".

With regard to particular social group, the government implemented the definition of the Qualification Directive, including both elements of the definition discussed above but it did not transpose the specific reference to gender which would have gone against the domestic court's decision on *Shah and Islam* [1999] which recognised women in Pakistan as particular social group. UKBA's guidance on the matter emphasises that the approach of the regulations is similar to that taken by the court in this case and advises decision-makers to

rely on the Regulations and the court's jurisprudence (UKBA, 2010).

Concerning the status of refugees and beneficiaries of international protection, the UK did not make use of the possibility to introduce a distinction welfare benefits and healthcare access of those under subsidiary protection81. The government argued that once a person is granted refugee status or humanitarian protection, they have access to public funds as defined by the Asylum and Immigration Act 1999 and thus are entitled to the same income-related benefits as UK nationals (Home Office, 2006: 24). With regard to health care, both primary and secondary health care services are available free of charge to both refugees and beneficiaries of international protection (Home Office, 2006: 24). Beneficiaries of subsidiary protection and refugees enjoyed immediate and unlimited access to the labour market.

Concerning the duration of residence permits granted to refugees and beneficiaries of subsidiary protection, in 2005 the government stated its intention to introduce a requirement of five years of residence prior to being eligible for settlement for most categories of immigrants (Home Office, 2005a). This entailed substantial changes for both categories of beneficiaries of international protection. Refugees had previously been entitled to permanent residence after being granted asylum. Recognizing that "concerns over immigration have increased over the recent years" and "traditional tolerance is under threat", the government announced the introduction of a number of measures intended to control permanent migration in order to ensure it brought about economic and social benefits (ibid., p. 5). Refugees would be granted temporary leave, followed by a permanent status after five years, if the situation in their country of origin has not improved; otherwise they would be expected to return. They would be encouraged to work and participate in local communities, thus making a contribution to the UK during their stay and to the

81 In the UK, the status has been named "humanitarian protection".

country of origin upon return. The government justified the introduction of such temporary refugee status with reference to existing policies in other European countries: "a number of other European countries, including France, Germany, the Netherlands, Denmark and Norway grant refugees temporary leave to begin with rather than immediate settlement" (Home Office, 2005a: 22). No reference was made to the Qualification Directive which also envisaged temporary residence permit for at least three years. An interview confirmed that the government's policy was "inspired by similar provisions in Germany" (Interview B, 2010). The new five-year temporary permits were introduced in August 2005 and the respective provisions on the possibility of revoking or not renewing the person's grant of asylum were introduced in the Immigration Rules 2006, as part of the implementation of the Qualification Directive (Home Office, 2006a)[82].

Concerning beneficiaries of subsidiary protection, in 2002 the Home Secretary announced that the previous "exceptional leave" system would be replaced by Humanitarian Protection and Discretionary Leave so as to "end the widespread use of exceptional leave has acted as a pull factor, encouraging economic migrants to apply for asylum in the United Kingdom in the belief that they will be given exceptional leave when their claim is rejected" (House of Commons, 2003: Col. 55WS). This decision was also motivated by an increase in the number of people granted exceptional leave which reached 26,000 in 2002, compared to slightly above 5000 throughout most of 1990s (Migration Watch, 2003). From April 2003, Humanitarian Protection and Discretionary leave would be granted for three years (as opposed to four, as had been the case with exceptional leave). Following the changes introduced in 2005, beneficiaries of subsidiary protection would also be granted temporary

[82] Judging from the experience of the first cohort of refugees subject to the new rules who applied for indefinite leave to remain in 2010, it appears that UKBA is not enforcing the review of each individual case as originally intended. According to a letter sent to the Scottish Refugee Council, 100 per cent of those who were eligible for indefinite leave to remain received it (UKBA Letter to Corporate Partners 2011, on file with the author).

residence permits for an initial period of five years and would be eligible for settlement after this period following a review of their cases.

Thus, the government implemented the Directive in accordance with its initial, domestically-driven preferences and did not make use of the Directive to lower domestic standards by introducing a distinction between beneficiaries of subsidiary protection and refugees.

What does the experience of Germany and the UK this tell us about the impact of the EU Qualifications Directive their asylum policies? In both cases, it has been demonstrated that the EU's impact can be explained through government preferences.

In the case of Germany, it has been demonstrated that the government's preferences were formed domestically initially through a compromise among coalition partners necessitated by their ideological differences, and, later on, by the negotiations with the CDU/CSU opposition which constituted an important veto player through its majority in the Bundesrat. In line with initial expectations, strong support by the Green Party helped introduce a liberalising domestic change despite public opinion supporting restrictions. The Green party's insistence also resulted in provisions on gender which were more favourable than those in the directive. The EU level was used as an additional leverage to facilitate domestic compromise through a two-level game but only after it became clear that what the government's reforms were challenged. At the same time, when the common EU position ran counter to German preferences, efforts were made to block an agreement which would have necessitated undesirable changes to the status quo such as the approximation of the rights granted to refugees and beneficiaries of subsidiary protection, eventually settling for flexibility which allowed it to maintain domestic policy.

On the other hand, the pressure to transpose outstanding EU Directives played a role in facilitating the compromise on those with toleration permits, even if these persons fell

outside the scope of the directives although again a compromise had to be found which worsened the position of asylum seekers. However, as expected, the changes which had been introduced in the Immigration Law remained stable, even though through the new coalition government the provisions on gender-related persecution which CDU/CSU had objected to and which went beyond the scope of the Directive could have been altered.

In Britain, government preferences were driven by the number of asylum seekers, public opinion and ideological considerations. Even if at the EU level the government was prepared to make a compromise, in the phase of implementation, it adhered to its initial preferences.

The focus on preferences and domestic politics has again been useful in explaining Germany's initial preferences as well as the change in strategy during the negotiations, demonstrating, in line with previous studies (Menz 2011) the role of two-level games in facilitating policy change. However, the account here goes beyond the findings of these studies by showing that two-level games were only used when veto players effectively blocked the reforms which the government thought had been agreed.

The Qualification Directive is undoubtedly one example where EU cooperation resulted in harmonization above the usual "lowest common denominator" with regard to non-state actors as agents of persecution. Even if the focus on preferences helps explain the position of individual countries and the domestic impact, we should be cautious. On the one hand, there are limits to the flexibility in the provisions that Member States agree on: there is a trade-off between flexibility and achieving the goals of harmonisation. In the case of non-state actors, it would have not been possible to have a provision which allows a large margin of national discretion: as we saw, it would have blocked the functioning of the Dublin II system by not allowing states to return asylum seekers to countries which have a different interpretation of the Geneva Convention. Having a distinction between the rights

of refugees and beneficiaries of subsidiary protection, however, although potentially important for secondary movements, does not undermine the functioning of the entire common asylum system. It could be argued that the Green Party's position may have been less strong, had the German interpretation of the Convention not been almost exceptional and, at the same time, fundamental to ensuring the proper functioning of the Dublin system.

Similarly, the UK supported harmonization at the higher level, in line with the interpretation of the Convention by its domestic courts. In that case, ensuring that other Member States adopt the same interpretation served the goal of facilitating removals to other EU countries under Dublin which British courts had prevented on account of differing application of the Geneva Convention. This interpretation corresponded to the one adopted by the majority of EU Member States. However, the situation might have been different had the UK been in the minority with its more inclusive interpretation: one could argue that in that case the UK might have preferred to introduce lower domestic standards and justified those with reference to the practice in other Member States.

9. Asylum Procedures Directive

The *Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Procedures Directive) was the first measure to be proposed and the last one to be adopted in the context of the development of the first phase of the Common European Asylum System. The fact that the first draft of the Directive was tabled in September 2000 (EU Commission, 2000) and a political agreement on its adoption was only reached at the end of 2004 demonstrates that finding a common ground even on the minimum standards contained in the Directive was not a straightforward process not least because it was one of the first pieces of EU legislation attempting to harmonize procedural law (Ackers, 2005).

The Directive served two purposes. The first one, reflected clearly in the title, consisted of devising minimum standards of procedures for examining the asylum applications of those seeking protection in the EU. These included access to procedures, the possibility of obtaining legal aid, the right to a personal interview, the number of appeals against a decision and the right to remain in the country pending appeal. The second purpose of the Directive was to introduce common criteria for designating countries as 'safe' which would allow them to deal with applications from such countries more quickly and efficiently. In addition, the Directive also envisaged the introduction of a common minimum list of 'safe' countries, binding on all Member States. The adoption of a common lists never materialised. Initially, this was due to disagreement in the Council which could not come to consensus on which countries should be included in the lists and decided to adopt a general approach towards designating “safe countries” with the possibility of adopting a common list at a later stage. In 2006, the European Parliament challenged the decision-making

procedure specified in the Directive for the adoption of common lists envisaged in the Directive and the ECJ upheld its complaint[83].

The major justification for the adoption of the Procedures Directive was to limit the secondary movements of asylum applicants between Member States where these were caused by differences in the legal framework. The final version of the document did not lead to substantive changes neither in Germany nor in the UK. However, this does not mean that the Directive did not exert any impact on the UK and Germany. On the contrary, both countries' domestic asylum and immigration policies were in a state flux and the contentious points of the Directive were an integral part of the domestic debate. These contentious points related to the issues of the definition of 'safe' countries, the possibility to derogate from the minimum guarantees contained in the directive in the case of special procedures for examining applications at the border, and the suspensive effect of appeals.

9.1. Preference Formation

9.1.1. Germany

The process of preference formation in Germany resembled to a large extent the one which took place during the negotiations of the Reception Directive[84] and the Qualifications Directive[85]. However, the debates on particular provisions of the Procedures Directive proved to be much more controversial as they threatened to undermine the Asylum compromise achieved in 1992 as their transposition would have required a constitutional change.

The first controversial issue concerned the definition of safe countries both with regard to safe countries of origin and safe third countries. Both concepts constituted an

83 ECJ case C-133/06 Parliament v. Council, judgment of 6 May 2008.
84 cf. Chapter 7
85 cf. Chapter 8

integral part of the Asylum Compromise and were anchored in the German Basic Law. With regard to the latter, Article 16a (2) maintains that those persons who have entered Germany from the territory of a EU country or another state which adheres to the Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms cannot invoke the constitutional right to asylum. Such persons can be sent back to these so-called 'safe third countries' independent from any judicial appeals they lodge. The list of such safe third countries is to be determined by law which requires the agreement of the Bundesrat. The crucial point of this provision is that it allows Germany to turn back asylum applicants without an individual examination of their asylum claim. Thus, there is no obligation to examine whether the country where the applicant is sent is safe in their particular case. The decisive factor in the German concept is the general definition of the third country as safe, as established by law[86]. However, the original proposal by the Commission envisaged an individual examination of the safety for each applicant in all cases (EU Commission, 2000: 20).

With regard to the concept of safe country of origin, that is, a country for which it is assumed that there exists no serious risk of persecution unless the applicant proves otherwise, there was also an incompatibility between the Basic Law and the Commission's proposal. Article 16 a (3) of the German Basic Law envisaged that in certain countries, due to the general political conditions and enforcement practices, it can be assumed that there is neither political persecution nor human and degrading treatment. Thus, a foreigner from this country is assumed not to be persecuted unless he can provide evidence to rebut this presumption. The Commission's proposal, however, envisaged high standards for the designation of a country as 'safe country of origin' which went beyond what the German

[86] This reasoning is based on the concept of *normative Vergewisserung*, that is, normative establishment of certainty.

Basic Law prescribed by including a detailed set of rights which must be observed by such states which should also allow monitoring by international organisations and NGOs (EU Commission, 2000: 53).

In addition, apart from these two provisions which conflicted directly with the provisions of the German Basic Law, the Commission's proposal also threatened to undermine another important component of the Asylum Compromise, namely, the airport procedure. As explained in Chapter 6, asylum applicants falling under this procedure are confined to the transit zone at the airport. This arrangement would have not been preserved under the Commission's proposal which explicitly prohibited detention of asylum applicants only on the grounds of them being asylum seekers (EU Commission 2000:16).

Thus, the Commission's proposal contained many provisions which would have necessitated serious changes in Germany's asylum policy. Instead, however, the government sought to introduce amendments in the Directive so as to preserve its domestic policy. This contrasts sharply with the situation in the early 1990s when the government brought up numerous arguments in support of the necessity to adopt even non-binding European resolutions despite their incompatibility with the German constitution. Now, European integration was seen not as the welcome additional factor in helping the government realize its preferences; on the contrary, it was seen as an attack on Germany's well-functioning asylum system (Die Welt, 2000; Deutscher Bundestag, 2000).

This position of the red-green government is surprising. When the Asylum Compromise was concluded in 1992, SPD was only reluctantly drawn into it, due to a complex interplay of various factors such as the increase in violence against foreigners, the surge of right-wing parties, the pressure from an incoming election, and the unprecedented number of asylum seekers.

The Green Party, on the other hand, which was not part of the asylum compromise,

had been a vocal critic of the 'inhuman' procedures agreed during the compromise and especially the airport procedure as well as the safe third country rule (Bündnis 90/Die Grünen, 1998). When the Commission made the first proposal, however, none of the factors that influenced SPD's decision to support the compromise in 1992 was present in 2000. In particular, the number of asylum seekers had fallen not only in relation to the 400,000 recorded in 1992 but also in relation the previous year, 1999 in accordance with a clear downward trend since the introduction of the policy changes. Thus, in 2000, 78 564 applications were lodged which constituted a 17,4% decrease in comparison with the 95 110 applications registered in 1999 (See Table 2).

In addition, Germany's insistence on maintaining the safe third country rule seems even more puzzling given the fact that after the enlargement of the EU, all countries surrounding Germany would be considered 'safe' as they will be either EU states or members of the Dublin Convention and thus they would be responsible for the examination of asylum requests of any person who arrived on their territory. Thus, the 'safe third country' rule would have played only a small role in Germany, only with regard to countries that the EU will in the future place on a common list of safe third countries. It should be noted, however, that even then the rule would be of less practical significance as it was devised to deal with applicants crossing a land border. Since all states surrounding Germany were also going to be part of the EU, the only way to reach Germany directly from a non-EU safe third country would be by air and would therefore be subject to the airport procedure. Given the number of visa restrictions and carriers' sanctions imposed on non-EU countries, however, it does not seem that this prospect could reasonably be supposed to lead to a great influx of asylum seekers.

Yet, despite these considerations, the German minister of interior pledged to maintain the German version of the 'safe third country' rule. He explicitly argued that the

Commission's proposal threatened to make the German asylum policy more expansive, especially through the abolition of the 'safe third country' concept (Frankfurter Allgemeine Zeitung, 2000a). Otto Schily maintained that the Commission's proposal in its original form regarding 'safe third country' concept was unacceptable and thus "in need of further negotiation" (Deutscher Bundestag, 2001: 16737). Although there were some doubts whether Schily's view was shared by everyone in his party (ibid.) there was no serious attempt to force a reconsideration of the issue of safe third countries in the Bundestag even though a party conference urged for the abolition of the principle (SPD, 2001). The same party conference also advocated the abolition of the airport procedure but this was also not taken up by the SPD parliamentary group which considered it as an integral part of the control of the asylum access even though it agreed that certain changes concerning its proportionality may be necessary (SPD-Bundestagsfraktion, 2001: 60).

The Green Party, on the other hand, had been unsuccessful in securing a commitment to abolish the 'safe third country' rule and the airport procedure during the negotiations of the coalition agreement in 1998 (Die Welt, 1998; cf. Chapter 5). It only managed to extract a promise that the airport procedure will be reviewed (SPD/Bündnis 90/ Die Grünen, 1998). Although the party did not change its position regarding the long-term need to abolish the airport procedure, the party chair, Marieluise Beck argued that as a smaller coalition partner, they had to accept the procedure and focus instead on ensuring that asylum seekers did not remain confined at the airport beyond the legal limit of the procedure of 19 days (Tageszeitung, 2000). Similarly to the case of the SPD, however, there was a discrepancy between the views expressed at the party conference and those of the Green parliamentary group. At a party conference in Stuttgart in March 2001, the delegates agreed to seek an amendment of the Basic Law to abolish the articles which introduced the concepts of safe third countries and safe countries of origin and restore the right to asylum

in its original form, as it had been enshrined in the Basic Law before the Asylum Compromise in 1992 (Netzwerk Migration in Europa, 2001). This discrepancy shows that while there was broad ideological support for the liberalisation of asylum policy among the Green party, the institutional constraints of being in government necessitated compromises.

The Green party's call for an amendment of the Basic Law was vehemently rejected by both the coalition partner SPD and the CDU/CSU opposition party. Gerhard Schröder asserted that there could be no return to the previous liberal asylum regime and that he had no intention to change the current laws while other SPD members described it as “hopeless” (Sueddeutsche Zeitung, 12.03.2001; Migration Report 2001; Netzwerk Migration 2001). The CDU/CSU's parliamentary group chair, Wolfgang Bosbach also defended the asylum compromise by calling it “one of the most successful political decisions of the last decade” in the struggle against the misuse of the right to asylum (Netzwerk Migration in Europa, 2001).

Even inside the Green Party, however, especially among members of the government, there was not much optimism towards the feasibility of the measures proposed at the party conference despite the general recognition of their compatibility with the Green party's program. The consumer affairs minister, Renate Künast, was sceptical with regards to the realization of the proposal given that a constitutional change would have necessitated a two-thirds majority in the Bundesrat which was, at the time, dominated by the opposition (Netzwerk Migration in Europa, 2001).

The CDU/CSU, as the reaction to the Green Party's proposal also shows, was firmly opposed to any changes of the Asylum Compromise and its 'pillars', that is the safe third country and safe country of origin rule and the airport procedure. They explicitly warned that the question of changing the terms of the compromise should not even be considered and that the government, making use of the unanimity voting principle at the EU level

should ensure that the cooperation in the field of asylum does not jeopardize this compromise (CDU/CSU, 2001). They expressed consistent concern with the Commission's proposals which they argued diverged to a large extent from the existing German provisions (efms September 2000). The CDU/CSU consistently reminded its opponents of the effectiveness of the asylum compromise which managed to achieve a decrease in asylum applications from 400,000 to 70,000 and argued that if the compromise was not preserved, Germany would face the same flood of asylum seekers it had to cope with in the early 1990s (Deutscher Bundestag, 2001).

The German Bundesrat, where the CDU/CSU had the majority, was also sceptical towards the Commission's proposed directive. In its discussion of the Directive, it argued that the contents of the proposal of the Commission did not deliver on its promise to ensure efficient asylum procedures as it proposes measures which fall behind the measures which Germany had introduced and which had proven their effectiveness in reducing asylum flows. According to the Bundesrat, not only does the proposal disregard these measures but it also jeopardizes their application in Germany (Deutscher Bundesrat, 2001). Thus, the Bundesrat also recommended that the government should strive to preserve the right to reject applications from safe third countries without an individual examination and the right to have an accelerated procedure conducted at the airport (ibid.).

Given these considerations, including lack of support by SPD and the opposition for any policy change which would jeopardise the asylum compromise and the high constitutional hurdle to be overcome, the Green Party's decision not to pursue the issue it can be expected that Germany would strive to preserve domestic status quo with which it was satisfied. It would oppose any EU provision that threatens to undermine it, especially regarding provisions on safe third countries which constituted the core of the compromise and, in case it is unsuccessful, would seek to obtain sufficient flexibility to retain its

provisions.

9.1.2. Britain

As explained in the previous chapter, upon coming to power in 1997, the UK labour government introduced some legislative changes which seemed to herald a move in new direction towards a human-rights-based asylum and immigration policy. One such piece of legislation was the Human Rights Act 1998, presented by the government as a cornerstone of its legislative programme. The Act enshrined the European Convention of Human Rights into UK law and thus empowered judges to adjudicate if any particular action by public authorities contradicts the ECHR provisions. This is of particular importance for asylum-seekers especially concerning their rights against deportation as Article 3 of ECHR prohibits deportation of individuals to countries where they may face inhuman or degrading treatment. Thus, the 1998 Act it introduced an additional ground to appeal a negative asylum decision on the grounds that a removal from the UK would constitute a violation of UK's obligations under the ECHR. It also obliged legislators and policy-makers to consider whether the measures enacted by them could be ruled as incompatible with the UK's obligations under the ECHR by the court.

This strengthening of judicial authority was clearly a part of government's strategy to deal with immigration and asylum (Somerville, 2007). As Jack Straw wrote in the forward to the 1998 White Paper *Fairer, Faster, Firmer – A Modern Approach to Immigration and Asylum*, "the government's approach to immigration reflects our wider commitment to fairness [...] The Human Rights Bill currently going through Parliament will prove a landmark in the development of a fair and reasonable relationship between individuals and the state in this country" (Home Office, 1998).

The government's efforts to ensure a fair treatment of asylum seekers were not limited only to the introduction of the Human Rights Act. It also recognized that the practice of relying on a 'White list' whereby applicants originating from countries on that list have their claims assessed in a special procedure involving limited appeal rights and a generalized assessment of the safety of the country was unfair. It proposed the abolition of the 'White List' and its replacement by a case-by-case assessment and certification of each individual case due to the "perception of unfairness in the use of a country-wide approach to designation" (Home Office, 1998). The changes were subsequently introduced in the 1999 Asylum and Immigration Act[87] in addition, however, to a number of restrictive measures such as the reduction of benefits available to asylum-seekers[88].

The legislation introduced by the government, however, failed to deliver the desired results as the number of asylum seekers kept increasing: from 71,000 in 1999 to 80,000 in 2000 (see Table 2). As numbers in the rest of the EU, especially Germany, were falling, it seemed that the UK was receiving an ever larger number of applications in comparison with the rest of the EU (see Figure 2). Part of this increase was paradoxically due to the decision of the UK to stay outside of the Schengen Agreement. The Channel crossing point at Calais proved to be a major and highly visible place where human traffickers and facilitating agents would try to help migrants enter the UK. Its visibility and the connection between the illegal attempts of individuals to cross the border and asylum-seekers was also enhanced by the presence of the Sangatte refugee camp nearby, managed by the Red Cross. The problem for the UK arose from the fact, that prior to 1997, when the Dublin Convention entered into force, there was a bilateral agreement between the UK and France which allowed the UK to return almost immediately those who entered its territory illegally through the Channel.

87 cf. Asylum and Immigration Act 1999, Section 11 and 12.

88 For a detailed elaboration of the restrictive changes on benefits introduced by the 1999 Asylum and Immigration Act see Chapter 7.

Once the Dublin Convention entered into force, it superseded the bilateral agreement.

However, as it was and instrument that had been negotiated before the large influx of asylum seekers in the early 1990s, it did not seem capable of responding to reality as it had not envisaged the increase of the number of asylum seekers. In particular, the procedures it envisaged for returning people to the first Member State where they arrived at were time-consuming and difficult to fulfil. For example, establishing the actual route which the applicants took relied to a great extent on the documents they possessed. However, many of them arrived without having any documents which made tracing their route difficult. As the government argued, complying with the provision of the necessity to prove where individuals came from stymied the effectiveness of the Dublin Convention because: "it is often impossible to prove where individuals entered the EU because the trafficking routes are hidden, because people often possess no papers and because it is not easy to establish their nationality. Some claim to be of a nationality other than their own" (House of Commons, 2002: Col.19WH)[89].

The government also had to deal with the fact that the French government was not particularly willing to cooperate on this matter because once asylum seekers left France and thus the entire Schengen area they were considered to be an issue for the UK the deal with and not for France. In particular, the opposition argued that: "the French Government know that they are there [in Calais] and they are not yet in the United Kingdom, but with the connivance of the French Government, they are effectively encouraged to move out. The problem is even slightly worse, because although other countries in the Schengen area do

[89] The problem of the difficulty of establishing the asylum seeker's route and the evidence required to prove it was one of the main reasons why the Dublin Convention did not operate effectively. In 2003, it was replaced by the Dublin II regulation which aimed to address the shortcomings of the Dublin Convention, including the questions of evidence and procedural delays. It imposed strict time limits in the procedures for taking charge and taking back asylum applicants and specified what constituted "proof" and "substantial evidence". The application of the Regulation is facilitated through the EURODAC database, containing the fingerprints of all asylum applicants and of every alien who is apprehended in connection with the irregular crossing of an external border of a Member State, if they are at least 14 years of age.

not deport asylum seekers, they tell them to move on to anywhere outside that area, and of course the United Kingdom is outside it. If the Belgians, Dutch or Germans want to get rid of someone, they say, "Off to England, please. It is outside the Schengen area, so you will have left our territory and no longer be our problem." (House of Commons, 2002: 10WH). Thus, although the UK had chosen to opt out of Schengen, it nevertheless could not ignore the externalities arising from the cooperation among other EU Member States.

In addition, the high number of asylum seekers crossing the Channel was presented as evidence that the UK was perceived as a 'soft touch' among asylum applicants which explained why they seek to enter the UK and did not claim asylum anywhere else in the EU, "making a mockery of the system" (House of Commons, 24 April 2002, Col. 389; cf. also House of Commons 29 January 2002).

The pressure on the government to act was constantly increasing. The media, and especially the tabloid newspapers, were focusing on Sangatte and claiming that asylum policy was in 'crisis'. The culmination came in June 2000, when 58 suspected irregular immigrants from China were found dead in a container lorry in Dover. The incident received a huge outcry throughout Europe and was taken up by the opposition party as a yet another example of the government's failure to control its borders. The media and the opposition attacks forced the government to act, especially since elections where approaching in 2001. Such was the intensity of the pressure that some policy-makers "stated that they had no room to manoeuvre or that if they were to take a particular policy line, they would have the proverbial *Mail*[90] reader on their back" (Somerville, 2007: 135) The data on the salience of the asylum issue in the media and among the general population confirm that the government was under pressure, facing an impending election and a three-fold increase in the number of people who saw immigration and asylum among the most important issues

[90] Refers to the Daily Mail, a tabloid newspaper known for its particular hostility towards asylum seekers

facing Britain and a dramatic increase in the number of articles in the media (cf. Figure 9 and Figure 11).

The government was not slow to react. In 2002, it published a new White Paper, *Secure Borders, Safe Heaven: Integration with Diversity* which preceded the introduction of the Nationality, Immigration and Asylum Act of 2002 (Home Office, 2002). While the emphasis was placed on more restrictive measures in asylum and immigration policy, the government tried to ensure that its new legislation would withstand judicial scrutiny. Increased court activism especially since the introduction of the Human Rights Act in 1998, as well as the commitments under this Act, had started to exercise an important check on the government's policy. Thus, the government was forced to seek a balance between meeting its human rights obligations and achieving efficiency.

The new Act removed the in-country right of appeal for applicants from safe third countries where an asylum claim was certified by the Secretary of the State to be clearly unfounded and allowed the designation of certain states or parts of them as 'safe'. The Secretary of the State had to certify the claim as clearly unfounded unless he was satisfied that it was not. Thus, the Act effectively marked the re-introduction of the 'white list' of safe countries which had been revoked as "unfair" just three years ago. Initially, these were restricted to the EU accession countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. However, in February 2003, Albania, Bulgaria, Macedonia, Moldova, Romania and Serbia and Montenegro were also added to the list. Shortly after, in June 2003, it was expanded further to include Brazil, Equador, Bolivia, South Africa, Ukraine, Sri Lanka and Bangladesh. Applicants from these countries had their claims processed in a fast-track procedure during which they could be detained while their claim was being processed.

While the government presented the non-suspensive effects of appeals and fast-track

procedures as measures to enhance the efficiency of the asylum system because it allowed quick removals, it also made a reference to the practice in other European states. Beverly Hughes, Minster of State for Immigration and Citizenship maintained, in repose to accusation from the opposition that the principle of suspensive effect of appeals was far removed from practice that: "the idea of having fast-track systems for manifestly or clearly unfounded claims is not uncommon in Europe, and indeed several countries do not have automatically suspensive appeals for such claims. That is the case in Denmark, Germany, France and Finland, for example" (House of Commons, 2002: Col. 822). Given that the Home Office had also commissioned a report on the assessment of the impact of asylum policies in Europe (Zetter, 2003), this suggests that the UK was looking at other EU countries for lessons to deal with the increase in asylum applications.

In order to increase the speed with which asylum claims were decided, the government had already started making greater use of detention shortly after the 1999 Act entered into force. In 2000, the government started detaining asylum seekers whose claims appeared to be ones on which decision could be taken quickly at the Immigration Removal Centre in Oakington while their claim was being examined. Following a decision, the majority were usually released and could pursue their appeal under the conditions of the fast-track system, i.e. within two days. In 2002, after the right to an in-country appeal was withdrawn also from those arriving from safe countries of origin and whose claims were clearly unfounded, only applicants from these countries were detained in Oakington. Since they had no right to an in-country appeal, they were removed to the country of origin.

In 2003, the government further expanded the categories of asylum seekers who could be detained while their claim was being processed by introducing the so-called Detained Fast Track procedure, whereby the appeals were also heard while the applicants remained in detention. According to the UKBA instruction on routing asylum claims, any

claim for which it appears that it may be decided quickly can be deemed suitable for the detained fast track (UKBA, 2010a), unless exclusion criteria apply[91].

The detention of asylum seekers during the procedure has been subject to judicial scrutiny but both domestic courts and ECHR upheld the practice[92].

Even though the new legislation and practices appeared to be effective in reducing the number of asylum applicants — in 2003 there were 49.405 applications — the government nevertheless continued to press for further reforms in asylum policy in an attempt to "modernize" it further and deal with "abuse" of the procedures. As Tony Blair admits in his memoirs, while the government managed to bring the asylum system into shape, concerns about immigration persisted among the population. He "watched with dismay as progressive parties around Europe, one after another, got the immigration issue wrong and lost" (Blair, 2010: 523).

The fact that the issue remained salient both in media and among the population is confirmed by the data: in fact, in 2003, when asylum numbers were falling, all surveyed newspapers published more articles on the matter than during the peak year of 2002. The salience of the issue was also higher in 2003 than in 2002: in 2002 around 21 per cent of the population believed asylum and immigration to be among the most important issues facing Britain; in 2003, this increased to almost 30 per cent (cf. Figure 9 and Figure 11, Chapter 7).

Thus, in 2004 – a year before the general election – the government introduced the Asylum and Immigration Procedures (Treatment of Claimnants etc) Act which streamlined the procedures of asylum applications and appeals for different categories of safe third country cases.

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91 Categories which are not suitable for Detained Fast Track are women over 24 months pregnant, families, disabled people and victims of trafficking. Survivors of torture who have independent evidence are also ineligible (UKBA 2010a).

92 *R (ex p Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481; *Saadi v UK* 13229/03 European Court of Human Rights 29.1.08

The first category of countries consisted of countries which after the EU enlargement would participate in the Dublin mechanism of allocating responsibility for asylum applications. Thus, these countries would be considered safe on Geneva Convention grounds. They would also be considered safe on ECHR grounds but only on the limited issue of refoulement. Any human rights challenge to removal based on other ECHR grounds would be certified as clearly unfounded unless the Secretary of the State is satisfied that it in not. This provision appears to be a way for the government to avoid judicial scrutiny by making use of EU-level agreement, in particular, the Dublin Regulation. As explained in the previous chapter, the government was faced with decisions of the court which ruled that asylum applicants could not be returned to France or Germany since these countries did not interpret the Geneva Convention as broadly as the UK did and thus, if removed to these countries and having their asylum claim rejected, they are in risk of refoulement. According to the Dublin regulation, all Member States, all respecting the principle of non-refoulement, are considered 'safe' for the third-country nationals. Following these amendments, the only option to challenge a removal to another Member State responsible for the examination of the claim under Dublin remained judicial review.

Regarding the second groups of countries which the 2004 Act introduced, there was similarly no scope for challenge on refugee convention grounds but also no automatic designation of the country as 'safe'. The Secretary of State is required to certify on all human rights challenges. If removal is to a country in the third group, there is again be no scope to challenge that removal on refugee convention grounds but a case-by-case consideration of any matters arising under ECHR. Regarding the fourth group of countries, provisions are made for a case-by-case consideration of both the refugee convention and ECHR challenges to removal. This gradual approach to removal again demonstrates the attempts of the government to balance between human rights, mainly due to anticipated challenges from the

court and the need to demonstrate efficiency. No countries have been listed in the last three categories.

With the UK government being in the process of introducing domestic changes, it could be expected that it would try to upload domestic provisions where the Directive envisages preserving the status quo.

9.2. EU-level negotiations

The initial proposal of the Commission, which incorporated generous procedural and judicial standards, proved too far-reaching for most Member States (Ackers, 2005). Germany, in particular entered a number of reservations on each issue which conflicted with its constitutional provisions. It insisted that border authorities should be able to refuse the entry into its territory to any person coming from a safe third country (Council of the EU, 2001: 4, fn.1). Furthermore, the German delegation also argued that there is a need to apply specific procedures to airport transit zones which would allow states to derogate from the provision of prohibiting detention only on the grounds of a person being an asylum seeker (Council of the EU, 2001a: 17, fn.1). The demand to exclude airport transit zones from the provisions on detention was consistent with a decision by the German Constitutional Court which had ruled that confining an asylum seeker to the airport transit zone did not amount to detention or limitation on the freedom as the person was free to leave the airport by, for example, going back to their country of origin[93].

Despite the efforts of the Swedish, the Belgian and the Finnish Presidencies, however, the discussions on the Directive did not make much progress. The contentious

[93] BVerfG, 2 BvR 1516/93 14.05.1996.

issues were tossed back and forth between the JHA Council meetings at the political level and the Asylum Working Party at the technical level. In December 2001, the Laeken European Council asked the Commission to come forward with a new proposal by May 2002 (European Council, 2001c).

The drafting of the new proposal was not an easy task. On the one hand, the Commission was forced to lower its ambitions to set high procedural standards due to resistance from the Member States. On the other hand, the European Parliament adopted an opinion through which it expressed its strong preference for high standards in the Directive and proposed 111 amendments to the text (European Parliament, 2001). The Commission, however, argued that accepting these amendments would not be feasible as the Member States would accept a proposal that changed the balance between efficiency and fairness to such extent (Ackers, 2005).

In June 2002, the Commission submitted an amended proposal which, compared to the original version, was much less ambitious (EU Commission, 2002). It allowed Member States to maintain their specific procedures to decide at the border on the entry to their territory of applicants for asylum who have arrived and made an application for asylum (EU Commission, 2002: Article 35). These procedures may derogate from the minimum standards applicable to all other procedures specified in the directive. Despite the amendments introduced, however, the negotiations progressed slowly as many Member Sates insisted on having their own procedures mirrored in the Directive.

In June 2003, France, Germany, Italy, Spain and the UK submitted a declaration on a minimum common list of safe third countries of origin. The matter was referred to the JHA Council which reached political agreement on a general approach towards designating countries as safe (Council of the EU, 2003a). The UK entered a reservation to the document in which it indicated that it wished also to include the possibility to designate part of the

country as safe (Ackers, 2005). This was in line with the amended Nationality, Asylum and Immigration Act of 2002, which contained such provision. The UK managed to obtain this concession and thus, the final version of the Directive stated that Member Sates may designate parts of a country as safe for the purpose of examining an application (Article 30).

Moreover, as the negotiations progressed, the UK government also tried to ensure that the appeals provisions in the Directive "reflect our common law practice" (House of Commons, 2004). What this referred to is again the amendment introduced in the 2002 Act which had denied the possibility of an in-country appeal for certain categories of cases. The specific procedures, introduced through the Asylum and Immigration Procedures (Treatment of Claimants etc) Act of 2004 had serious consequences for the UK's position regarding the suspensive effects of appeals. In order to make sure the Directive reflected domestic provisions, it tried to introduce a stand-still clause, which allowed Member States to retain existing legal provisions concerning the right to remain in a country pending appeal adopted prior to the entry into force of the Directive. After this attempt failed, it proposed to include a provision which clearly corresponded with its newly-introduced practice of certifying that appeals in certain cases can only be made from abroad (Council of the EU, 2004a: 61, fn.3). The timing of the amendments suggests that the UK preferred to set its own legislation in place and then try to ensure that the EU provisions conform to it. According to Caroline Flint, Parliamentary Under Secretary of State at the Home Office "we are still negotiating on issues around the appeals provisions and in terms of our situation we are satisfied that the right to apply to judicial review before removal for applicants who have had their asylum case unfounded meets our obligations under international law. It is one of our points of continued negotiation in this area" (House of Lords, 2004: 32). The final version of the Procedures Directive allowed the UK to maintain its domestic provisions by specifying that Member States shall lay down rules establishing

whether an effective remedy would have suspensive effect and, in cases where it does not, providing for a possibility of legal remedy or protective measures (Article 39 (3) a),b)).

As explained above, the British government had started detaining asylum seekers in 2000 and it consequently objected to the Commission's proposal which included a general principle prohibiting Member States from detaining an asylum seeker solely for the purpose of examining their application (Council of the EU, 2001a: 17, fn.1). It suggested enumerating the cases in which detention was allowed but was opposed by Sweden which insisted on preserving the general principle. Other countries such as Germany, Austria and Finland objected to the definition of detention and stated that airport transit zones should be excluded. Disagreements among Member States on the meaning of detention and the conditions under which it could be allowed proved to be insurmountable and the final version of the Procedures Directive contained a general prohibition on detention for the sole reason that an applicant was an asylum seeker and a guarantee that where an applicant is detained, there must be a possibility of quick judicial review (Article 18 (1) and (2)).

Germany's preference to exclude border procedures from the general principles applying to asylum applications which was supported by other countries which maintained similar border procedures involving examination of asylum claims before entry to the territory, also found its way in the final version of the Directive. Article 35 (2) allowed Member States which had introduced such procedures before December 2005 to maintain them even if they derogated from the guarantees established in the Directive.

Provisions on safe third countries also proved to be controversial not least because of the UK proposal on "New Approaches to Asylum Processing" submitted in 2003 which proposed the establishment of Transit Processing Camps outside the EU where asylum seekers arriving spontaneously in the UK or another EU member state would be removed and where their claims would be processed. The provision for sending asylum seekers to

safe third countries were spelled out in the amendments to the 2004 Act which, as noted above, enlarged the scope of non-suspensive appeals. The UK proposal was condemned by refugee-assisting NGOs as "unprincipled, legally problematic, unworkable and expensive" (Refugee Council 2003).

The UK nevertheless attempted to ensure that the Procedures Directive would make removal to such countries – where presumably the camps could be located – possible without them having even transited through these countries. In particular, the draft version of the Directive envisaged that a safe third country could only be one with which the applicant has either a connection or close links or has had an opportunity to avail himself/herself of the protection of the authorities of that country. The UK proposed to remove the reference to a past opportunity of seeking protection, effectively allowing an applicant for asylum to be sent to a safe third country that they have never passed through before (Council of the EU, 2003: 36, fn.3). UNHCR put pressure on the Council to repeal this provision which had no basis in international law and ensure that there must be a meaningful link between the applicant and the safe third country before they could be sent there (UNHCR, 2003). The UK government – which had gradually moved away from the idea of setting up the controversial processing camps outside the EU following the severe criticism of this part of its proposal – came to accept the idea that the "connection" between the applicant and the safe third country must be specified and stated that "we can accept such a provision even though it is not set out in domestic rules or legislation" (House of Lords 2004: 5). Since the Directive allowed Member States to set their own rules regarding what constituted a "connection", the government chose to introduce a very broad definition, applicable to any asylum seeker who has not arrived in the UK directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the third country to make contact with the authorities of that third country in order to seek their

protection; or there is other clear evidence of his admissibility to a third country *(Immigration Rules, para. 345 (2)).*

Germany, on the other hand, wanted to ensure that all provisions conform to the German Basic Law and the Asylum Compromise. Thus, apart from insisting on derogation in case of procedures conducted at the border, it also challenged the provisions on the suspensive effect of appeals and insisted that the issue be governed by national legislation (Council of the EU, 2004a: 63, fn.1). In addition, Germany also expressed concerns regarding the notion of safe third countries which still did not completely reflect German practice as it incorporated the obligation to examine the safety of the country to which the applicant is sent on an individual basis. As no agreement could be reached among all countries to allow a derogation from individual examination in all safe third country cases, a solution was found in creating a new concept of 'European safe third country'. The definition followed the one in the German Basic Law, that is, the country must have ratified and must observe the Geneva Convention and the ECHR. If an applicant has entered illegally from the territory of such 'European safe third country', then member states are allowed not to provide an examination of the asylum application and of the safety of the applicant in his or her particular circumstances (Article 36). Germany's ability to extract these concessions can possibly be attributed to the tight domestic constraints it could point to during the negotiations such as the incompatibility between the Directive and Germany's Basic Law (Post and Niemann, 2007).

At home, however, the Government did not try to extract concessions on these particular issues but rather used it during the negotiations with the opposition on the Immigration Bill and the EU Qualification Directive. The agreement of CDU/CSU to allow the inclusion of non-state actors as agents of persecution can, to a certain extent at least be attributed to the government's ability to preserve the asylum compromise (Post and

Niemann, 2007). According to an official from the Permanent Representation of Germany, while it is possible that negotiations at the national level take into account EU negotiations, "you clarify your domestic position first and then defend it at the EU level. That is how it works" (Interview A, 2010).

While the Procedures Directive included a commitment to establish a common list of European safe third countries and safe countries of origin, it also allowed Member states to maintain their own lists. In case of the former, Member States could maintain the states designated in accordance with their legislation and the requirements of the Directive before December 2005 until the adoption of a common list (Procedures Directive Article 36 (7)). Concerning safe countries of origin, states could maintain lists which they had adopted before December 2005 and could only designate new ones if they conformed to the criteria specified in the Directive (Article 30).

9.3. Implementation

Given the success of both Germany and the UK to realize their preferences, it is not surprising that the formal implementation of the Directive did not introduce any substantive changes.

9.3.1. Germany

In Germany, it was implemented with a special law, enacted in 2007, whose purpose was to implement 11 outstanding EU Directives in the field of Asylum and Immigration. With regard to the German asylum procedure, the Directive matched to a considerable extent the existing German legal situation and substantive legal changes were not necessary. Germany maintained its list of safe countries of origin, consisting of Ghana and Senegal.

9.3.2. Britain

In the UK, the Directive was also implemented in 2007, through changes introduced in the Asylum (Procedures) Regulations 2007 and through a Statement of Changes to the Immigration Rules (Home Office, 2007). The implementation followed a six-weeks consultation period, shorter than usual due to the 'technical nature of implementation and the small/limited cadre of interest it would generate' (Home Office, 2007: 5). Thus, the UK maintained the existing legislation for designating Sates or part of them as safe. It only added a provision that in deciding whether countries are safe, the Secretary of the State "shall have regard to all the circumstances of the State or part (including its laws and how they are applied), and shall have regard to information from any appropriate source (including other member States and international organisations)" (Home Office, 2007). Similarly, concerning non-suspensive appeals, the government argued that no action was necessary as removal could be challenged through judicial review.

With regard to detention, the government also stated that its policy conformed to the provisions of the Directive as "the UK does not detain people solely on the basis that they have made an application for asylum" (Home Office, 2007:19). However, UNHCR stated that "the detained accelerated procedures in the UK have been criticized for their failure to comply with the terms of Article 18 (1) of the Asylum Procedures Directive which states that Member States shall not hold a person in detention for the sole reason that s/he is an applicant for asylum" (UNHCR, 2010: 251). While the UK had objected to this principle during the negotiations, it was unable to prevent its adoption. When implementing the Directive, it chose to retain its domestic policy, arguing that it was acting within the scope of the Directive, thus confirming initial expectations that when downloading policy states do so selectively, on the basis of their preferences. In that case, EU policy challenged

domestic status quo, which the government wanted to preserve and thus, it chose not to implement the respective provision.

The discussion of the two cases has shown that while strong direct impact of the Directive on national asylum policy in the case of Germany and the UK is difficult to establish, nevertheless it played an important indirect influence domestically.

The case of Germany shows the importance of veto points as well as the way in which reforms, achieved on the basis of a difficult compromise during a particular critical juncture can influence the further path of a policy. In Germany, the asylum compromise, anchored in the constitution has become a deeply-entrenched symbol of a successful policy reform. The Green Party, which had successfully mobilized different arguments in order to support the inclusion of non-state actors as agents of persecution in the German legislation, shied away from attempting to use European integration as an argument to pressure the government to reform the German asylum policy even in the case of falling asylum application numbers and the relatively small significance of the safe third country provisions for Germany after enlargement, realising early on that there was little support for a constitutional amendment. Somewhat paradoxically, Germany succeeded in exporting its asylum policy provisions to the EU level despite their little practical utility for Germany. Comparing Germany's reluctance to change its domestic asylum policy and the continued insistence on preserving the Basic Law provisions to the situation in 1992 when the government was eager to introduce changes only in the face of a number of politically-binding EU resolutions, it can be argued that it is also the government's preference for change that determines the impact of EU legislation and not just its binding or non-binding nature.

The case of the UK, on the other hand, also shows how changing state preferences determine the impact of EU policies. Upon coming to power and in line with an

ideologically-driven, human-rights-based approach to asylum, the government introduced the Human Rights Act which turned the courts into de-facto veto players who challenged government's policies and forced the government to find ways to circumvent them once increased asylum numbers and increased salience of asylum among the media and the public led the government to respond to negative public opinion. Some European provisions, such as the designation of all EU Member States as safe clearly served this purpose. The government was also quick to introduce reforms inspired by the experience of other EU countries but adapted to its own domestic context and then tried to safeguard them from possible challenges arising from the EU legislation. In cases where Britain as unsuccessful at uploading its policies at the EU level, at the stage of downloading it implemented these policies in line with its preference for preserving the status quo, i.e. it did not implement the provisions.

In addition, the UK case demonstrates that the impact of EU policies is conditional upon the salience of a problem domestically. In the early 1990s, asylum was not such a prominent issue and the number of applicants was relatively low compared to other EU countries so the impact of early non-binding EU legislation was less pronounced compared to Germany and more transient: for example, the 'White List' was initially repealed by the Labour government upon coming to power. However, once the applications started to increase, and the salience in the media and the general public increased, the government was quick to look for various policy solutions to other EU countries and expressed willingness to engage in binding EU-level legislation. This demonstrates the high responsiveness of the UK government to domestic factors and changes in policy following changes in party ideology, numbers and public opinion.

Germany, in contrast, demonstrates policy stability: the SPD, which had criticised the asylum compromise and was drawn into it reluctantly, now saw it the cornerstone of

asylum policy.

The UK's approach is also an example of how initial EU cooperation may produce externalities which affect the government's preferences. The increased number of asylum seekers arriving in the UK, which in 2001 surpassed the number arriving in Germany, or the difficulties in sending applicants who crossed the Channel illegally back to France was not something the government had expected when it signed the Dublin Convention. EU cooperation then, can set in motion its own dynamic with initial cooperation efforts affecting the member states to an extent that further integration becomes necessary.

10. Conclusion

This thesis set itself the task of explaining how EU asylum policy affects domestic asylum policy. Based on an interactive framework which sees governmental preferences as the link between domestic and EU policy, it developed a model to explain preference formation and how preferences affect both the downloading and the uploading of policies, ultimately influencing the content of domestic policy. The thesis has shown that governments try to project their policy *preferences* which reflect their desire to change or retain domestic status quo and to download policies in accordance with these preferences. At the EU level, governments seek to upload or support policies in line with their domestically-shaped preferences and oppose those which contradict them or at least seek flexibility allowing them to maintain existing policies. At the national level, states download EU policy selectively, in line with their domestically-shaped preferences, leading to over implementing, under-implementing or not implementing certain provisions.

In addition, I locate the sources of these preferences on asylum policy in public opinion, party ideology, and the number of asylum seekers. I show that issue salience in the media and among the general public affects the relationship between these variables.

The thesis distinguished between 'simple' and 'compound' polities, postulating that they differ with regard to their responsiveness to the factors identified as shaping domestic preferences, namely, the number of asylum seekers, public opinion and party ideology, as mediated by salience.

In simple polities, when salience is low, preferences are likely to be affected by party ideology while when salience increases, preferences are more likely to reflect public opinion. In compound polities, unless issue salience is very high, preferences are

determined by party ideology.

It has also been shown that simple polities introduce reforms quickly which, however, also tend to unravel quickly, making the impact of EU policies transient, or, in some cases, non-existent as some provisions were never applied in practice. In contrast, compound polities have difficulties introducing reforms but, once in place, they are durable and difficult to unravel.

Finally, I have also demonstrated that EU asylum policy contributes to domestic policy change differently, depending on political-institutional context. In compound polities, this happens mainly through two-level games while in simple polities, changes are introduced by referring to models or practices found elsewhere in Europe, rather than binding obligations under EU law.

This thesis has contributed to the literature focusing on EU asylum and immigration cooperation and how states have adjusted to the supposed loss of sovereignty that such cooperation entails. Member States, far from being marginalised actors as supranationalist theories of EU integration would expect, have remained at the centre of decision-making, seeking to upload and download policies in line with domestically-shaped preferences and, depending on the institutional context, using the EU in various ways to strengthen reforms or maintain the status quo. Moreover, Member States do not support harmonisation proposals stemming from the Commission solely on the basis of desire to further European integration. In fact, the UK, traditionally cautious of measures furthering integration was a more enthusiastic supporter of introducing common standards in asylum policy than Germany, which had been at the forefront of European integration. Analysing their position from the perspective of state preferences helps explain these differences.

The results presented here contrast with venue-shopping arguments put forward to explain asylum and immigration policy by proponents of "escape to Europe" thesis. These

arguments focus on the ability of Interior ministers to realize their restrictive policy preferences at the EU level and use agreements reached at this venue to successfully bring about domestic change. I have shown that Interior Ministers are far from the only actors influencing Member States' positions at the domestic level in both uploading and downloading policy. In fact, both processes involve considerable amount of domestic contestation, at different stages and by different actors, depending on the political-institutional context. In compound polities, such opportunities exist both at the level of preference formation and of implementation while in simple ones veto players usually only have the opportunity to challenge government's decisions once they have been introduced. This further challenges venue shopping arguments which assume that using the EU level to add normative legitimacy to their justifications for introducing reforms, leads to sustainable policy changes. In fact, the effect of these reforms might be limited or even non-existent as shown especially in relation to simple polities. Therefore, as argued here, in order to explain the impact of EU policy on domestic asylum policy we need to have a better understanding of domestic politics.

Similarly, the thesis has demonstrated that Member States do not always support restrictive provisions as would be expected if indeed policy had been driven by Interior ministers seeking to "escape" to Europe. As some authors have argued more recently, EU policy can at least facilitate the adoption of liberalising measures. At the same time, Member States also do not necessarily seek to downgrade their domestic standards in response to EU directives although certain instances where standards were reduced and then uploaded at the EU level were identified. Nevertheless, the changes were introduced for purely domestic reasons, making it difficult to argue that EU legislation prompted the lowering of domestic standards.

Moreover, it has been shown that Member States demand and enjoy a large amount

of flexibility when it comes to domestic implementation of EU legislation, resulting in differences in policy output depending on preferences. These findings could help shed light on the causes behind discrepancies in recognition rates and limited convergence in asylum applications among Member States. Flexibility helps explain both why differences among Member States' policies persisted and why it is likely that at least some of them will remain, even after further efforts to harmonise policies, resulting in varying policy outcomes.

The results presented here demonstrate the utility of using detailed process tracing to trace the impact of EU policy on domestic asylum policy, thus helping show how EU provisions affected domestic ones and whether EU was the cause of domestic change or simply a contributing factor. Such an approach ensures that the researcher does not draw incorrect conclusions from the existence of the same provisions in both EU and domestic policy but, instead, focuses on establishing the precise causal mechanism.

The findings also challenge fit/misfit approaches which tend to place a lot of emphasis on the government's preference to minimize adaptational costs when explaining their motives for uploading and downloading policies. This thesis has demonstrated that, regardless of the fit or misfit, governments can bring about or resist domestic change, depending on their preferences.

This thesis has also contributed to liberal intergovernmentalist theories by showing how they can be adapted to explain areas of "high politics" such as asylum policy where governments are not considerably constrained by "winners" and "losers" from potential changes to the status quo and enjoy more freedom in policy formulation.

The argument that governments exercise considerable control over EU asylum policy and enjoy discretion at home should, of course, be qualified. Once governments agree to be bound by common policies, certain standards – albeit minimum ones – are established and they no longer have the possibility to introduce changes going below these

standards. The directives ensured that re-defining the Geneva Convention and introducing lower level of protection than that provided in the directives is no longer feasible. On the contrary, the EU is currently in the process of completing the second phase of the creation of the Common European Asylum System by adopting the re-cast versions of the directives discussed here which aim to enhance the level of protection of asylum seekers and refugees

One weakness of the model presented here is that does not perform well when it is necessary to explain Member State's support for a certain measure, if there are more than two policies which could help it realise its preferences. One example of this is the UK, which supported the expansion of the definition of agents of persecution to include non-state actors. Such an expansion of the definition was in line with the government's desire to increase the number of removals and help reduce the number of asylum seekers and, in general, ensure the effective functioning of the Dublin system. We cannot rule out, however, the possibility that if the majority of other EU Member States had used domestically and supported at the EU level a narrower definition, excluding the possibility of granting refugee status to those persecuted by non-state actors, the UK government would also have supported it and used the EU level agreement to introduce domestic change. The same argument could be made concerning Germany which found itself in the minority among Member States adopting a narrower definition of agents of persecution. We could not be certain that, had that not been the case, the Interior minister's preference for retaining the limited definition would not have prevailed against that of the Green Party. This exposes a shortcoming of the model, which does not take into account the position of other Member states and their influence on the strategies of other Member States in realizing their preferences as well as the positions of various actors.

Second, despite the fact that governments still remain in control of the negotiations, there are certain limits to the willingness of each state to accommodate the preferences of

others, especially through flexibility. While flexibility is essential to ensure agreement, too much of it undermines the goal of harmonization which drives cooperation in the first place. It is again, necessary to consider the position of other states and the intensity of their preferences to understand the outcome of negotiations, which, in turn, affects domestic policy.

Also, it may be easier for a Member State to ask for flexibility rather than upload its own policy, completely replacing the Commission's proposal, especially in the face of opposition from other Member States. This will depend on building alliances and, possibly, the Member State's ability to play two-level games. The case of Germany which succeeded in uploading the safe third country concept found in its Basic Law to the EU level, managing to introduce a completely new concept in addition to the original 'safe third country' one is a good illustration of such successful uploading. Investigating the bargaining power of each country, however, would require a different research design and in-depth knowledge of the negotiations, including interviews with participants and is beyond the scope of this thesis.

While the framework presented here was appropriate for the period under consideration it needs to be expanded in order to incorporate the new actors and take into account the changes of the relative strength of each of them which could be the task for further research. The ECJ has started issuing preliminary rulings on the interpretation of the Directives and on the compatibility of their domestic implementation with Member States' obligations under the Charter of Fundamental Rights[94]. Domestic courts have been taking EU legislation into account and the European Court of Human Rights has also delivered a number of significant rulings some which have had an impact on a number of Member

[94] Charter of Fundamental Rights of the European Union, 30.03.2010, OJ C 83, p.389-403.

States[95]. The decisions have also helped shape the negotiations on the re-cast proposals.

The European Parliament, which now operates under co-decision with the Council, is in a much stronger position than it was when the original directives where adopted while decisions in the Council are taken on the basis of QMV.

The Commission, with its exclusive right to propose legislation in asylum policy, has also been trying to play a role as a policy entrepreneur and help balance demands coming from Member States, the EP and various human rights NGOs in the second phase of harmonisation of asylum policy. NGOs have, in turn, have also become more skilful in both using existing EU legislation to challenge domestic practices and lobbying for further changes both at the national and the EU level. Local authorities, which often bear to majority of the costs associated with asylum seekers and refugees, are becoming more active in asserting their interests and even devising their own distinct policies within the framework of national ones.

In sum, the field of asylum policy now involves not only many more actors than it did originally, but the positions of these actors have been changed. The new, recast directives which are close to being adopted should offer a fruitful avenue for future research which could compare the extent to which governments were able to realise their preferences and whether the experience of implementing the previous legislative instruments has had an impact on their preferences. Further research is also necessary to establish whether it is still

[95] Among all cases, *MSS v. Belgium and Greece*, Council of Europe: European Court of Human Rights, 21 January 2011 stands out. The court ruled that the return of an asylum seeker from Belgium to Greece under the Dublin Regulation exposed him to an inhuman and degrading treatment (violation of Article 3 of the ECHR) and deprived him from his right to effective remedy (Article 13 of the ECHR). In the months preceding the ruling and shortly afterwards and pending other judicial challenges, most EU Member States, including the UK and Germany, suspended returns of asylum seekers to Greece. In December 2011 the ECJ ruled that Member States may not transfer an asylum seeker to the Member State indicated as responsible under Dublin II where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Joined *Cases C-411/10 N.S. v Secretary of State for the Home Department* and *C-493/10 M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*)

possible and desirable to distinguish between the EU level and the domestic level and whether it is necessary to analyse asylum policy from the standpoint of European governance instead.

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Appendix A: List of interviews cited in the text:

Interview A: Third Secretary of German Permanent Representation in Brussels, responsible for asylum policy (15 March 2010).

Interview B: Gary Christie, Head of Policy and Communication, Scottish Refugee Council (21 June 2010).

Interview C: Viktor Holleboom, General Secretariat of the Council of the European Union, DG H – Justice and Home Affairs, Directorate 1, Unit 1B: Asylum and Immigration (21 March 2010).

Appendix B: List of Background and short confirmatory interviews:

Kris Pollet, Senior Policy Officer, European Council on Refugees and Exiles

Alexis de Swaef, Immigration Lawyer, Belgium
Kay Hailbronner, Chair of Public Law, Public International Law and European Law at the University of Konstanz
Rui Tavares MEP
Jeanine Hennis Plasschaert, MEP (online correspondence)
Debora Singer, Asylum Aid
Michal Parzyszek, FRONTEX spokesperson
Andreas Kamm, Danish Refugee Council and ECRE Chair