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EU Asylum Policies

The Power of Strong Regulating States

Natascha Zaun

Transformations of the State

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The Power of Strong Regulating States

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List of Abbreviations

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

ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law
EJN	European Judicial Network
EL	Hellenic Republic of Greece
ELENA	European Legal Network on Asylum
EMN	European Migration Network
EP	European Parliament
EPP	European People's Party
ERF	European Refugee Fund
ES	Spain
ETA	Euskadi Ta Askatasuna
EU	European Union
FGM	Female genital mutilation
FI	Finland
FPÖ	Freiheitliche Partei Österreichs
FR	France
FRA	European Union Agency for Fundamental Rights
GDP	Gross domestic product
GDR	German Democratic Republic
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE	Ireland
IPA	International Protection Alternative
IT	Italy
JHA	Justice and Home Affairs
LIBE	Civil Liberties, Justice and Home Affairs Committee in the European Parliament
LU	Luxembourg
MEP	Member of European Parliament
MPI	Migration Policy Institute
NGO	Non-governmental organisation

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

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Introduction: European Asylum Policies in Crisis

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

With the rising numbers of refugees arriving in European border countries in late summer 2015, the deficiencies of their asylum systems became evident. Media reported maltreatment of asylum-seekers in Hungary, where they were brought to camps characterised through degrading general conditions and denied access to a fair procedure (Al Jazeera 2015). The other Member States' responses to these events differed widely. While some traditional recipient countries such as Germany and Sweden agreed to temporarily open their borders and to admit

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new asylum-seekers (Graham-Harrison et al. 2015), especially the new Member States in Central and Eastern Europe refused to do so (Lyman 2015). But also other traditional refugee receiving countries like the UK and France kept a low profile and received a relatively small share of the applicants.

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

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

effective protection to refugees. It has thus the potential to challenge the European integration project more generally. Additionally, it may have detrimental impact on the state of refugee protection on this continent.

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

Underlying these dynamics is one of the last decade's key research puzzles about EU asylum policy-making, namely why EU asylum policies routinely exceed the lowest common denominator of EU Member States, and, conversely, why the often-feared race to the bottom in asylum standards across Europe did not take place. I argue that since the 1990s, the core motivation for Member States to engage in EU asylum co-operation was to ensure responsibility-sharing. The top recipients of asylum-seekers, Germany and Sweden today and then among them, saw co-operation as a means to ensure that Member States that did not yet provide effective protection or that had restrictive policies in place, introduced functioning and liberal asylum systems, so that they would become more attractive asylum destinations. To this end, top recipients in North-Western Europe tried to impose their own refugee protection standards on presumably more restrictive Member States and particularly on Member States in Southern and Eastern Europe. Subsequent to the Amsterdam Treaty in 1999, when the EU was supposed to establish legislation in the field,

North-Western European Member States were very successful in introducing their standards into EU legislation. This implied that Member States in Southern and Eastern Europe would have to establish effective asylum systems which they did not previously possess. However, these countries neither had an interest in becoming top recipients themselves nor were their administrations capable of building robust asylum systems that could deal with the increased influx of asylum-seekers and refugees. In the end, policy harmonisation—at least in some instances—was a success on paper. In practice, it failed widely.

Background and Research Question

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

Interior Ministers and bureaucrats decide on common policies behind "closed doors" in the Council with their fellow ministers (Lavenex 2001a: 853–854). This excludes the liberal, rights-enhancing, veto players present at the domestic level, such as national courts or liberal parliamentarians. Using the concept of venue-shopping as introduced by Baumgartner and Jones (1993), Guiraudon (2000) argues that Interior Ministers have deliberately chosen the European level to pass restrictive policies in co-operation with their likeminded counterparts in other Member States and circumvent domestic liberal veto players.

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

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

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

[2] See ECtHR (2014) on *Tarakhel v. Switzerland.*

This study addresses these contradictory findings and aims to explain EU legislative output and domestic legislative outcome in the first phase of the CEAS. Others have highlighted the role of pro-immigrant supranational EU institutions functioning as additional veto players at the EU level (Kaunert/Léonard 2012; Ripoll Servent/Trauner 2014; Thielemann/Zaun 2013) in the second phase of the CEAS. In that phase, the competences of the supranational institutions were substantially enhanced in the asylum area. These new competences were introduced with the Lisbon Treaty and included co-decision of the EP, the exclusive right to initiate legislation for the Commission, qualified majority voting in the Council and full jurisdiction of the CJEU. Protection standards above the lowest common denominator are therefore more puzzling in the first phase of the CEAS, when community institutions were still weak and when intensive transgovernmentalism among supposedly restrictive Interior Ministers characterised asylum policy-making. Since moreover, unanimous voting was the rule and every Member State thus had a veto it is puzzling why some Member States, especially Italy and Greece, agreed to a protection standard that exceeded their *status quo ante*.

The core questions guiding the research are:

1. *Why do EU asylum policies exceed the lowest common denominator?*
2. *Why has there not been a race to the bottom in refugee protection standards across Europe subsequent to EU legislation?*

I am, in other words, both interested in EU level policy output and domestic policy outcome of its transposition.[3] In order to provide an alternative explanatory model to venue-shopping, this study draws lessons from standard setting in other areas of EU legislation, such as social policy and environmental policy (Eichener 1992, 1997; Héritier et al. 1994; Héritier 1996, 1997), and argues that to some extent asylum legislation follows a similar logic. These scholars have suggested that EU policy-making (and domestic transposition) is driven by two dynamics: First, Member States generally want to maintain their domestic policies

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

and try to avoid misfit pressures resulting from EU policies being different from national policies. Second, (some) Member States compete over the influence on EU legislation to avoid misfit before it occurs. This is subsumed under the notion of regulatory competition. I will build on and extend the theoretical approach of Misfit and Regulatory Competition and make it applicable for EU asylum policy, while further developing the approach and specifying some as yet neglected aspects.

Methodologically, I will combine process-tracing (Beach/Brun Pederson 2013; Rohlfing 2012: 150–167) with a Before-After Analysis (George/Bennett 2004: 166–167) of *status quo ante* policies and policies after transposition of EU asylum directives and triangulate various data sources, including EU documents, reports on the *status quo ante* and the transposition of EU law in Member States, and expert interviews, to answer the research questions.

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

State of the Art

Since the early days of intergovernmental European co-operation in the area of immigration and asylum policies, scholars have tried to answer the question whether the European policy output was more liberal or

restrictive than what European states had previously done domestically. Scholars have also wondered what impact these policies had on domestic immigration and asylum politics. I will first summarise the main findings of past research in the field and after that identify the gap I address with my study and describe to what extend my research will be able to fill this gap.

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

The idea underlying the notion of venue-shopping is that domestic actors deliberately choose to co-operate through intergovernmental framework and pass international agreements which (in contrast to treaties, for instance) do not require parliamentary ratification. Thus, they are able to circumvent potential veto players at the domestic level and foster their policy preferences through the backdoor. The argument has been put forward most prominently by Didier Bigo (1996) and Virginie Guiraudon (2000). According to them, restrictively minded Interior Ministers try to implement harsher immigration policies. On the domestic level, however, they encounter veto players, such as courts, other ministries with more liberal traditions such as the Ministries of Health, Labour or Foreign Affairs (Bigo 1996: 99), parliamentarians or migrant aid groups with more liberal preferences (Guiraudon 2000: 252). In order to circumvent these veto players, Interior Ministers used intergovernmental European networks since the mid-1980s to pass restrictive immigration measures, thereby excluding liberal veto players. In a framework of intergovernmental co-operation in a number of fora, such

as the Trevi group, the Club of Bern, the STAR (acronym for *Ständige Arbeitsgruppe Rauschgift*/Permanent Working Group on Narcotics) group and the *ad hoc* immigration group, European states were able to pass treaties such as the Schengen Agreement or the Dublin Convention. These again led to the adoption of very restrictive policies at the domestic level of the signing Member States as liberal veto players had no say in this vertical policy-making (Ibid.: 268).

Two notable contributions of Europeanisation scholars on intergovernmental co-operation in the 1990s are the study of Vink (2005) on the Netherlands and the study of Lavenex (2001b) on France and Germany. Both find that domestic opportunity structures were mainly responsible for restrictive changes. Hence, European policy-making did not cause restrictive policies, but Europe served as a scapegoat to cover the implementation of more restrictive moves by national policy-makers. Studying the Netherlands, Vink (2005) investigates co-operation in the areas of asylum policy, residential status and nationality. While his core argument is that European citizenship has not substituted for national citizenship (Ibid.: 4), he is hesitant to argue that Dutch immigration and asylum policies have been changed as a result of European rather than domestic developments. He thus poses the counterfactual question of whether "similar changes in domestic policies would have happened without being accompanied by an ongoing process of European integration" (Ibid.). Asylum is considered a particularly interesting case in this regard due to the number of related instruments passed on it during the 1990s (Ibid.: 7). Drawing on parliamentary debates concerning the Safe Countries of Origin Act (1994) and the Safe Third Countries Act (1995)—both based on concepts mentioned in the London Resolutions—Vink demonstrates that Dutch parliamentarians actually referred to the usage of these terms in Germany. This is supported by the fact that the parliamentarians almost exclusively referred to the German terms *sichere Drittstaaten* und *sichere Herkunftsstaaten* (Ibid.: 106). The Netherlands hence implemented these restrictive concepts to not be considered a "soft touch" in comparison to its neighbour Germany. Vink concludes that governments would have pursued these restrictive policies also in the absence of European co-operation, but could get away with it more easily by strategically profiting from the EU level playing field.

Lavenex (2001a: 853, 2001b: 200) investigates both the decision-making at the European level and domestic implementation of immigration policies in Germany and France. Concerning the European level she finds that due to the sensitivity of the issue, co-operation in this field was characterised by intensive transgovernmentalism, that is the close co-operation of Justice and Home Affairs (JHA) officials.[4] In the absence of an overarching normative framework on the issue, "intensive transgovernmental" co-operation led to rather restrictive policies (Lavenex 2001b: 201). In Germany and France, Lavenex argues, the reference to Europe changed the cleavage structure and legitimated the introduction of restrictive policies: In Germany, the restrictive asylum frame of EU intergovernmental co-operation resonated well with the rather critical discourse on asylum-seekers. At the same time, the reference to Europe provided the normative legitimation for a more restrictive approach to the constitutional asylum which had been introduced as a response to the crimes committed by the Nazis during World War II. On the contrary, in France the implementation of the European asylum frame was incompatible with France's self-understanding as a *terre d'asile* and was hence accompanied by a discourse linking the issue to questions of French identity. Under *cohabitation* (divided government) the socialists had to follow this restrictive approach, legitimising this move, again, by referencing Europe and the Schengen Agreement (Ibid.: 203). Both countries adopted convergent reforms implementing the European *acquis*. The outcomes in these countries were thus very similar, while the processes of restriction diverged significantly in both countries (Ibid.: 203–204). In a nutshell, Lavenex too finds that restrictive policy-change relied on the domestic opportunity structure and a climate for restrictive changes, while the European level mainly served as a tier to which blame was shifted for these developments (Lavenex 2001a: 863).

After the communitarisation of immigration and asylum policies with the Treaty of Amsterdam in 1999 both Political Scientists and Legal Scholars agreed that the restrictive trend of transgovernmental co-operation subsequent to the Maastricht Treaty was likely to be maintained.

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

Most legal scholars consider the asylum directives that have been passed after the Amsterdam Treaty to be at least partly incompatible with international human rights law and thus adopt a very critical stance towards these instruments (Costello 2007; Garlick 2006; Gil-Bazo 2007; Handoll 2007; Peers/Rogers 2006). More specifically, scholars suggest that EU asylum policies are lowest common denominator policies (Lavenex 2001a: 865) which eventually entail a race to the bottom, given that every Member State can be expected to downgrade their protection standard to meet the low standard allowed by the directive (Peers 2000: 1).

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

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

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

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

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

The reason for focusing on the first phase of the CEAS is mainly based on theoretical considerations. As scholars have already pointed

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

out, protection standards beyond the lowest common denominator after the Lisbon Treaty are likely, given the strengthened role of the supranational institutions (Kaunert/Léonard 2012; Ripoll Servent/Trauner 2014; Thielemann/Zaun 2013). Protection standards beyond the lowest common denominator in this first phase are, however, a much bigger puzzle, as the Community institutions were rather weak at the time and could not account for this legislative output at the EU level. Thus, even in a setting of intensive transgovernmentalism there seem to be dynamics at work which impede lowest common denominator policies and a race to the bottom.

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

The Argument in a Nutshell

This study argues that EU asylum policies are not lowest common denominator policies, for the following reason: All Member States try to impose their domestic protection standards (or anticipated results of domestic reforms) to the EU level to avoid adaptation costs, but some Member States are consistently more effective in influencing EU legislative output than others. Strong regulating[6] Member States in North-Western Europe, that is, states with effective governments and significant numbers of asylum applications, have used EU asylum policies as a tool

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

for responsibility-sharing since the early days of asylum co-operation. They have aimed to impose their own protection standards onto the weak regulators in mainly Southern Europe. Additionally, strong regulators have aimed to converge with other strong regulators, where they perceived them as having less generous policies than their own. Their motivation for doing so is based on the perception that asylum-seekers are law consumers who choose which asylum system they want to apply to, based on its generosity.

While weak regulators generally provide weak refugee protection due to a lack of capable institutions, strong regulators also vary significantly in the protection standards they provide. Member States that have effectively working governments and whose administrations experienced a broad range of cases and situations, when processing asylum claims, are more active and hence effective during the negotiations. Given their significant exposure to the issue and their administrative capacity to react to high numbers of applications, delegations representing strong regulating Member States such as Germany, Sweden, France, the UK and the Netherlands considered the issue to be much more salient and therefore adopted harder bargaining strategies. Under unanimous voting rules, all Member States with firm positions and that are ready to defend these positions at the political level are accommodated. For weak regulators such as Greece, Italy and Portugal the issue of asylum was less salient, as they were first, not confronted with refugees and asylum-seekers and second, even if they were, they tended to respond less to such pressures as their administration worked less effectively.

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

kind of legal status. Therefore, the asylum systems of weak regulators lack credibility and their delegations cannot draw upon a large body of expertise on how to regulate asylum. Thus, these states are highly ineffective in influencing EU asylum policies.

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

The absence of a race to the bottom can be explained by the fact that Member States do not want to change their domestic asylum policies in the first place. This is also true for liberal strong regulators which could downgrade their protection standards to be in line with EU legislation, but refrain from doing so at a national policy level. Costs of change in this regard include both material and ideational/norms-related costs in the sense that policies represent values and norms shared by the governments' constituencies. Thus, liberal Member States understand it as being within their self-interest to be liberal in the first place and therefore do not want any alien norms to invade their policy system. Where change occurs subsequent to EU legislation, this is mainly due to domestic legislative processes running in parallel to EU decision-making. This supports findings by Lavenex and Vink and is in line with an understanding of Europeanisation as a circular process in which uploading and downloading concur (Börzel/Risse 2000). These processes can account for legislative changes made by strong regulating Member States. These Member States used EU asylum legislation as a window of opportunity to reflect their own asylum policies and introduce desired changes. This approach was politically convenient, as it helped strong regulators to bolster their own reforms through EU policies, thus making these reforms in an unpopular area with little benefits for constituencies less noticeable at the domestic level. Yet, change occurring with weak regulators cannot be explained through domestic policy-making. In fact, these Member States transposed a large number of provisions on paper by inscribing them in their laws. Yet, they did not implement all of these reforms because of

the huge misfit between EU and domestic legislation in these countries, as well as their limited administrative capacities. At the same time, negotiations at the EU level were a means for Member States to learn about the practices of their neighbour countries. As occurred in the 1990s, some strong regulators as well as weak and medium regulators, copied effective practices (both liberal and restrictive) to manage asylum and reduce costs. This resembles the idea of the "copycat" approach observed by Vink (2005), according to which Member States copy the regulatory approaches of their neighbour countries.

Structure of the Study

The study is structured as follows: Following the approach of Actor Centred Institutionalism (ACI), I will carve out causal factors and develop a mechanism based on both institutional and actor-related factors in Chap. 2. While institutional factors function as intervening (i.e., moderating) variables, actor-related factors are key in building the central mechanisms that explain EU policy output and domestic legislative outcome. Drawing on the Misfit and Regulatory Competition Model, I suggest that strong regulators are more effective in influencing EU legislation than weak regulators are. Yet, I also will modify the approach: First of all, I suggest that strong regulation and high standards does not necessarily mean the same thing. Rather strong regulation can encompass both liberal and restrictive policies. Second, I develop criteria to determine which Member States are strong and which are weak regulators. Third, I develop an explanation for the enhanced effectiveness of strong regulators in comparison to weak regulators. Last, I elaborate on the design, methods and data used in this study. I chose a Case-Study Design. While studying only policy-making in the area of asylum, my design is implicitly comparative, as I compare my findings to those made in environmental and safety at work policies. These are "most different" policy areas (see Gerring 2007: 139–142; Seawright/Gerring 2008: 304–306), because they belong to the realm of low politics, whereas asylum policies is closely related to national sovereignty and high politics. The methods I apply are the following: To systematically establish whether Member States agreed on the

lowest standards available I compare the status of the directive to the *status quo ante* of the Member States. To see whether these standards led to a race to the bottom, I engage in a within-case comparison (Before–After Analysis), comparing national asylum policies before and after EU legislation (see George/Bennett 2004: 147–148). This is based on studies of asylum systems in Member States before and after EU asylum legislation. To explain policy output at the EU level I trace the processes of negotiations in the Council (Ibid.: 166–167; Beach/Brun Pedersen 2013; Rohlfing 2012: 150–167). This is done with the help of Council documents, original interview data from 39 semi-structured expert interviews, press sources and secondary data from Political Science studies on EU asylum policies. To account for the domestic legislative outcome I give exemplary evidence from the transposition processes of some Member States.

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

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

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

adopted different strategies and had different degrees of effectiveness in influencing EU asylum legislation.

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

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

2

A Theoretical Framework for the Study of EU Asylum Policy-Making

This chapter presents the theoretical framework of the study, based on ACI. Within the framework of ACI, I will formulate both institutions-based and actor-related expectations to account for the legislative output at the EU level as well as its implementation at the national level(s). These expectations are derived from middle range theories developed in the area of EU decision-making. In addition, I will specify causal mechanisms which link my independent variables to my dependent construct.

Policy research like the one at hand is usually concerned with explaining what fosters a certain policy output or outcome. This research focuses on the dependent variable (*explanandum*) rather than on a particular factor or small group of factors (*explanans*) and takes into account all relevant factors that have produced it (Héritier 2008). Scharpf (1997) proposes ACI as a framework to study EU policy research. The core idea of this approach is that actors pursue their rational interests, while being embedded in a certain institutional setting when they interact at the EU level. Hence, they are only able to introduce their national positions into EU law, for example, when the institutional setting allows them to do so (Scharpf 2000: 763). This is also subsumed under the notion of Interaction Oriented Policy Research. Interaction Oriented Policy

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Research looks at both rationalist and institutionalist arguments and studies their interaction. Following this approach, however,

> [a]ctors and their interacting choices, rather than institutions, are assumed to be the proximate causes of policy responses whereas institutional conditions, to the extent that they are able to influence actor choices, are conceptualised as remote causes (Ibid.: 764).

Yet, this does not mean that institutions are only a minor or secondary factor. Rather, institutions also determine which actors are involved in the decision-making process and which actors are not (Scharpf 1997: 40). ACI has an integrative approach towards action-theoretic or rational-choice paradigms on the one hand and institutionalist or structuralist paradigms on the other hand, which are often considered incompatible. Moreover, in policy studies, Scharpf highlights, we cannot assume that intentional actors either only follow institutional rules or that the interests they follow are invariant across times and actors. The reason for this is that actors can behave in a variety of ways and institutions cannot influence their choices in any deterministic way. Instead, by proscribing some and permitting other actions, institutions establish repertoires of action for those involved (Ibid.: 40).

Institutionally Set Modes of Interaction: The Council as the Core Actor

According to ACI, the institutional setting is crucial for understanding policy output in the EU. Looking at the strength of the position of the individual actor in this setting can help understand the development of policy output. Formal rules are important "institutions" for EU policy-making and set the context for decision-making processes. The actor that my study will focus on is the Council. Based on the institutional setting, I expect this actor to be dominant in negotiations. The institutional setup in which EU asylum legislation was passed in the first phase is quite unique in the EU context and was based on the reluctance of Member States to fully communitarise this policy area. EU institutions other than

the Council hence can be expected to have little impact on EU asylum directives, as I will show in the next section.

The Institutional Setup and Its Impact on Policy Output

Usually, the European Commission is considered the "formal agenda-setter" of the Community (Pollack 1997: 122). In the normal legislative procedure, the Commission has the sole right to initiate policy. From 1999 to 2005, however, the Commission shared the right to present initiatives with the Member States (art. 67I Treaty of Amsterdam; see EU 1997). The right to submit legislative proposals provides actors with extensive influence during the later negotiation process. Two mechanisms of informal agenda-setting can account for this: framing and anchoring (Héritier 1996: 152–153). Framing means (Rein and Schon [sic!] 1991: 263)

> a way of selecting, organi[s]ing, interpreting, and making sense of a complex reality so as to provide guideposts for knowing, analysing, persuading, and acting. A frame is a perspective from which an amorphous, ill-defined problematic situation can be made sense of and acted upon.

Actors able to frame a debate are in a dominant position (see Gamson 1988: 165), as a *problematique* underlying an issue does not exist *per se*, but is rather defined through the actors involved. Asylum policies for instance can be framed in very different ways. The way that EU asylum policies are framed and the idea behind the installation of the CEAS have much to say about the kind of policy that it produces. By framing debate, some arguments and positions are legitimised while others are delegitimised and considered unrelated to the topic. Hence, the actor that is able to frame an issue defines what the legislative process should ideally produce. The actor who submits a proposal is not only able to set the frame for the discussion, but it is also able to anchor its own ideas on how to solve the issue at hand (Tsversky and Kahneman 1974). The protection standard suggested by the legislative proposal will be the starting point for the discussions in the Council and the EP. Unless a proposal is completely rejected by these two bodies and rewritten by the proposing insti-

tution, it is the basis for dialogue and discussions will be biased towards the protection standard that it provides. Due to framing and anchoring, the actor submitting the proposal is considered to have significant influence over the legislative output. Given the shared right to initiate policy proposals, the Commission's agenda-setting powers of defining the starting point for the subsequent negotiations were weakened as compared to the normal procedure in which it holds the sole right to initiate legislative proposals (see Pollack 1997: 122).

Another factor that may have weakened the formal agenda-setting powers of the Commission is the fact that decisions in the Council are taken under unanimous voting rules in place during the phase investigated in this study, meaning that any Member State could block a proposal. Under qualified majority voting this is much more difficult, because Member States need to form a significant blocking minority in order to veto a proposal and decide on amendments by unanimity (Pollack 1997: 122). While the Commission always needs to take into account Member States' positions when formulating a proposal for it to successfully set the agenda, this is much more important under unanimous voting rules, where it cannot push through a proposal against a reluctant minority in the Council (Ibid.: 123).

The EP cannot be expected to have left an important mark on EU asylum policies during the first phase either. It was only consulted on the dossiers, which can be expected to have significantly limited its chances of influencing EU asylum legislation (see Scully 1997: 60). Under the consultation procedure, the Council could not be forced to effectively include the EP in the decision-making process. While the EP was to be formally consulted, it had no means to ensure that its suggestions were taken into account when deciding on the final piece of legislation. Under the consultation procedure, the Council is only formally obliged to wait for the amendments of the EP but it does not have to act upon them. This is different from the co-decision procedure, under which the Council cannot decide on a piece of legislation without the support of the EP. Given that both European institutions can be considered to have held rather weak positions in this first phase of the CEAS, NGOs which usually lobby the Commission and the EP can also be expected to have limited influence on EU asylum legislation (cf. Uçarer 2014: 128).

As far as the institutional setup is concerned, the Council of the EU was hence the strongest actor in first phase of the CEAS. The study will therefore focus on the negotiations in the Council. Given the veto of every Member State under qualified majority vote, it is quite remarkable that the EU directives were passed at all. Unanimous voting is usually expected to slow down the decision-making process in the Council and entail deadlock (see Héritier 1999: 2–3), because no Member State can be actually outvoted or side-lined. Since decisions are taken unanimously, all Member States were (at least formally) equally powerful. Under the unanimous voting format, lowest common denominator output should therefore have been likely.

Apart from EU institutional setting constraints, I assume that the international refugee protection regime also constrains EU asylum policy-making (Roos/Zaun 2014). While the EU is not directly bound to instruments such as the Convention relating to the Status of Refugees (CRSR; UNHCR 2010a) and the European Convention on Human Rights (ECHR), Member States are. Thus, they cannot lay down something in EU law which obviously violates their obligations derived from international human rights law. While Member States might *de facto* act contrary to these legal norms in practice without facing consequences, it is much more problematic to inscribe a glaringly unlawful practice into EU law, as it will be more easily detected and indeed contradicts the very idea of law-making as new laws need to be consistent with already existing legislation (see Franck 1990: 51). This is especially the case if only some Member States intend to introduce a potentially rights-breaking provision into a piece of legislation, as other Member States could act as "watchdogs" (see Krebs and Jackson 2007). Thus, lowest common denominator policies are an unlikely result if there is strong consensus that the lowest common denominator violates international human rights law. This could explain why in some instances lowest common denominator standards were exceeded. Yet, I assume this only plays a role when the human rights breaching character of a national practice is undisputed among the other Member States, which is arguably rarely the case. Thus, the threshold for international human rights law having an impact in this regard is rather high. After having elaborated on the potential impact of the institutional setting on EU legislative output, I will now discuss its possible effects on the subsequent domestic outcome.

The Institutional Setup and Its Impact on Domestic Policy Outcomes

While this institutional setting suggests low standards of protection and little change as compared to intergovernmental decision-making in the 1990s, the fact that Member States now decide on EU directives marks a substantial departure from the intergovernmental context. The Dublin Convention, to which Guiraudon refers when drawing on venue-shopping, does not need to be ratified to be applicable domestically. Yet, EU directives require national transposition. Domestic veto players hence can be expected to play an important role in the transposition process. While domestic courts, veto players regularly referred to by proponents of the venue-shopping theory in asylum policies (Guiraudon 2000), generally retain jurisdiction over domestic transposition law, parliaments are not everywhere in Europe involved in transposition to an equal extent: In Austria, Belgium, Germany, Spain, France, the Netherlands, Portugal, Sweden, Finland and the UK, parliament is generally involved in the transposition of EU directives, either as a general rule or on specifically crucial issues. In Greece, Ireland and Italy, however, transposition is mainly ensured by the government, with the parliament only having a right to *ex post* scrutiny (EP 2007). Besides the involvement of domestic parliaments, there are other factors that render venue-shopping unlikely: First, it is questionable whether EU asylum directives can be used to systematically pressure veto players into lowering protection standards by arguing that adopting a lower standard is necessary in order to be in line with EU law, because EU directives only lay down minimum protection standards which Member States are free to exceed. Second, national courts will likely scrap transposing laws that do not meet domestic norms. Third—and perhaps counterintuitively—there are more national veto players present at the EU level than domestically. In fact, the Committee of Permanent Representatives (COREPER) is composed of representatives from the Foreign Affairs Ministries who tend to be generalists and do not necessarily share the restrictive views of Interior Ministries' officials (Lavenex 2001b). Foreign Affairs officials are usually not involved in domestic asylum policy-making, but they are involved in asylum policy-making at the EU level. Classic venue-shopping, as

introduced by Baumgartner and Jones (1993), is hence unlikely in this context. This absence of venue-shopping can potentially contribute to explaining why EU asylum directives did not entail a race to the bottom in the EU, as (allegedly) restrictively minded Interior Ministers were not able to circumvent domestic veto players.

Additionally, it is questionable whether the core motivation for venue-shopping—to bypass national constraints—is actually present in the area. While proponents of the theory have usually expected Interior Ministers to face substantial criticism by NGOs and parliamentarians, I would argue that this criticism does not mobilise large sections of the electorate. As Alonso and Claro da Fonseca (2012) show, parliamentarians do not have incentives to adopt strong pro-immigrant positions, unless they represent a small pro-immigrant elite, as the Greens do for instance (Alonso and Claro da Fonseca 2012). The reason is that sizeable proportions of the electorates all over Europe hold diffuse anti-immigrant positions (see Eurobarometer 2000). Additionally, asylum-seekers themselves do not possess the right to vote and their positions are hence often neglected by parliamentarians (Bäck and Soininen 1998: 30). Hainmueller and Hanggartner (2013) have shown in a natural experiment that decisions taken by ministerial officials tend to be more liberal than those produced by, for instance, referenda. The underlying argument is that elites have more liberal preferences than the wider public and that administrations decide on the basis of (comparatively) objective criteria (Hainmueller and Hiscox 2007). In sum, given the strong anti-immigrant preferences of wider parts of the electorate, Interior Ministers cannot be considered preference outliers domestically who need to evade a domestic pro-immigrant discourse to pursue their aims. Actually, their restrictive preferences are rather a response to anti-immigrant preferences present in the electorate. Yet, they sometimes need to adopt liberalising legislative changes domestically, for example in response to court judgments and so on. Legislating on related issues in general and particularly introducing liberalisation might thus be costly for parliamentarians and members of government. To evade populist discourse it might, therefore, be wise for them to shift the adoption of any legislative changes, be they restrictive or liberal, to another arena away from the electorate. The EU level is an appropriate level for this, as policy-making tends to be highly technocratic and depoliticised.

Moreover, EU legislative processes arguably receive less attention than domestic ones. Hence, I argue that deciding on asylum policies at the EU level instead of domestically is a way to introduce policy-changes without paying the political costs of losing votes, for example to right wing populist parties promoting more restrictive policies. Governments could then shift the blame and argue that unpopular liberalising changes are necessary to comply with EU law. Probably this would not even be necessary, as policy-making at the EU level is to a much lesser extent part of the national political discourse and EU law passed on the issue will be less likely exploited by populists than national policy-making. In sum, restrictive venue-shopping is unlikely under this institutional setting.

Another factor restricting possibilities of a race to the bottom is the fact that EU asylum directives lay down minimum protection standards. Under minimum protection standards Member States may maintain more liberal standards than those suggested by EU legislation, while they may not maintain or introduce standards below these standards. Thus, the introduction of common minimum protection standards can be considered an attempt to impede a race to the bottom. If directives introduce common minimum standards, a race to the bottom is unlikely.

The institutional constraints which I have presented in this section can help to explain policy output and the domestic outcomes. While they can partly explain the absence of a race to the bottom, they would still suggest lowest common denominator policies, particularly, if this lowest common denominator is not obviously in breach of international human rights and refugee law. While human rights violating approaches might have entailed protection standards beyond the lowest common denominator in few instances, I assume that it cannot account for all examples of protection standards that went beyond the lowest common denominator in the Council. EU Member States can generally be assumed to be in line with international human rights, as they score high on pertinent indices (Freedom House 2014). In sum, while the institutional setting indeed suggests that a race to the bottom is an unlikely outcome, it would still lead to the assumption that the lowest common denominator is a likely output of the negotiations in the Council. Thus, the institutional setting cannot (entirely) account for legislative output at the EU level and transposition outcomes at the domestic level, which leads me to actor-related expectations.

Actor-Related Expectations: The Misfit and Regulatory Competition Model

The so-called Misfit Model[1] (see Treib 2010: 122) is taken from the Europeanisation literature, but has been employed effectively to both explain the behaviour of Member States' representatives in EU level negotiations and Member States' behaviour in transposition (Börzel 2002; Héritier 1996). This model presents a mode of policy-making which concedes little attention to the high degree of politicisation present in the area of asylum policies. Yet, I have suggested in the previous section that Member States can be assumed to have deliberately chosen the EU level for asylum policy-making, as this is a highly depoliticised level and significantly less amenable to populist forces than the national levels are. This hence allows for depoliticised and technocratic policy-making in an otherwise politically sensitive policy area.

The focus of the theory rests on the Member States in the Council. This works well in the study at hand, as in the previous section I have suggested that the Council was the strongest actor in shaping policy output during the period investigated. An underlying assumption of this approach is that actors are rational and attend negotiations bearing in mind the potential consequences of certain results of the negotiations. According to this approach, Member States have no interest in actively changing their domestic policies via EU legislation, as changes incur both ideational and material costs. Thus, their positions at the EU level generally reflect their domestic *status quo ante* policies. Yet, Member States differ with regard to approaches of how to do so. Some Member States which the model identifies as strong regulators[2] have a vested interest in common EU policies, as they help to overcome negative externalities of regulatory competition. Strong regulators are those Member States

[1] I use the terms Misfit Model and Misfit and Regulatory Competition Model interchangeably.

[2] In fact, Héritier (1996) and Börzel (2002) refer to these Member States as "high regulators." Yet, as I will show later on, in contrast to what can be observed in environmental and safety at work policies, strong regulation does not equal high standards in the area of asylum policies. To avoid the confusion between a high degree of regulation with high standards, I use the term strong regulation instead, also to emphasise that I mean effective regulation rather than just the existence of many yet ineffective norms.

which have a long-standing regulatory tradition in a field and hence have a strongly established, "closed meshed" and dense regulatory framework. They can be considered regulatory experts. Weak regulators on the other hand lack this regulatory tradition and their regulatory framework is "wide meshed." They benefit from regulatory competition and thus have no interest in EU policy-making in the area. In the subsequent negotiations scholars have observed strong and weak regulators adopting different strategies: While strong regulators try to upload their domestic policies to avoid subsequent pressures for change deriving from the misfit between EU and domestic policies, weak regulators on the contrary have been found to avoid adaptation costs through non-implementation (Börzel 2002; Eichener 1997; Héritier 1996; Holzinger 2003).

Who Are the Strong Regulators?

The dichotomy of strong versus weak regulators is an essential feature of the Misfit and Regulatory Competition Model. Strong regulators have a lot of codified laws that include both primary and secondary laws as well as case law and precedence on an issue. Moreover, this law is actively used and their asylum regime is a living institution. They have developed expertise concerning a large number of potential circumstances and constellations. Weak regulators on the contrary have mainly primary law and much less secondary law or case law on an issue. While weak regulators might also have secondary law on paper, for example because they were obliged to adopt it through international treaties, this law will not be as effective as the strong regulators' law.

The Misfit School does not establish systematically which Member States qualify as strong or weak regulators. Its proponents refer to either early industrialisation (Héritier et al. 1994: 14) or a large gross domestic product (GDP) (Börzel 2002: 208) as factors for becoming a strong regulator. Yet, I suggest that government effectiveness[3] and exposure to the phenomenon can account for a state being a strong regulator or not. While quantitative studies on Council decision-making and the imple-

[3] I use the terms administrative capacity and government effectiveness interchangeably.

mentation of EU policies have looked into government effectiveness (Börzel et al. 2010; Panke 2011), issue-related exposure is generally overlooked. Yet, it is arguably closely related to what Héritier et al. (1994: 14) refer to when saying that early industrialisation is a crucial determinant of strong regulation in environmental policies: In environmental policies those countries that industrialised at an earlier stage were also more likely to be faced with the environmental consequences of such development and hence faced pressures to address these issues much earlier than latecomers to industrialisation.

A different degree in administrative capacity highlights that some Member States have governments and administrations which are significantly more effective than others and are thus able to create stronger and more effective regulation in general. In line with earlier studies on Council decision-making (Panke 2011), I use the World Bank Government Effectiveness Index (Kaufmann et al. 2010) as a proxy for Member States' effectiveness as concerns government and administration.[4] According to Fig. 2.1, Finland, the Netherlands, Sweden and Luxembourg perform best as regards government effectiveness in 2000. On the other hand, Greece, Italy and Portugal are to be found on the lower end of government effectiveness. The year 2000 is chosen as a year of reference, as this gives me a good idea of what the situation was like at the time when the negotiations started. I only look at Member States which were actively involved in the first phase of the CEAS, meaning those that took part in the negotiations (and eventually were supposed to implement the policies). Hence, I only investigate the EU-15, excluding Denmark, which opted out of the asylum *acquis*.

[4] While others have argued that World Bank indicators lack "sufficient variance among EU Member States" (Börzel et al. 2010: 23), I argue that the fact that the World Bank Government Effectiveness Index looking at the entire world still finds measurable variance among EU Member States actually enhances the argument that EU Member States vary on this factor. By contextualising EU Member States in the world, the World Bank government effectiveness indicator does not over-represent variance among EU Member States and shows that while the EU consists of largely homogenous states (as compared to the rest of the world), Member States still vary on government effectiveness. Alternative indices such as the Corruption Perception Index of Transparency International (Herzfeld and Weiss 2003) focus on corruption only and do not cover a similarly wide range of issues as the World Bank Government Effectiveness Index.

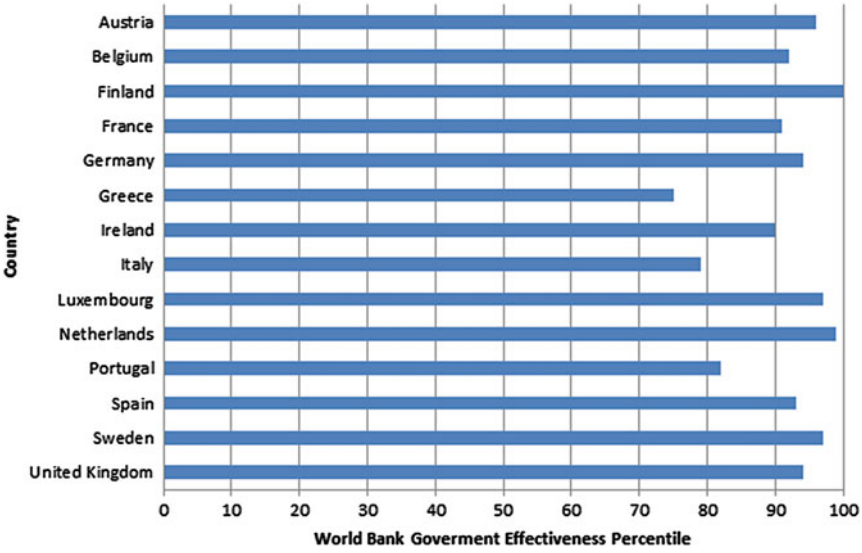

Fig. 2.1 World Bank Government Effectiveness Percentile in 2000 (Source: Kaufmann et al. 2010, Own Depiction)

Yet, government effectiveness is only a necessary and not a sufficient condition for being a strong regulator. If a state is not faced with asylum-seekers, there is no need to introduce regulation on this issue. The more a Member State receives asylum-seekers, the more likely it is to build expertise through precedence and being faced with a huge variety of cases. I operationalise exposure through the number of asylum applications (in total) a Member State has received during the ten years preceding measurement, that is prior to the start of the negotiations in 2000 (Eurostat 2013). It is essential to study total and not relative numbers of applications, as the more applications a state has processed, the more precedence and specific regulation it has been able to build. Obviously, as demonstrated in Fig. 2.2 between 1990 and 2000, Germany was an outlier as regards exposure. In fact, Germany received more than four times as many applications than the UK, which ranks second among top recipients. Other top recipients are the Netherlands, France and Sweden, followed by Belgium and Austria which still received more than 100,000 applicants between 1990 and 2000 (see Fig. 2.3).

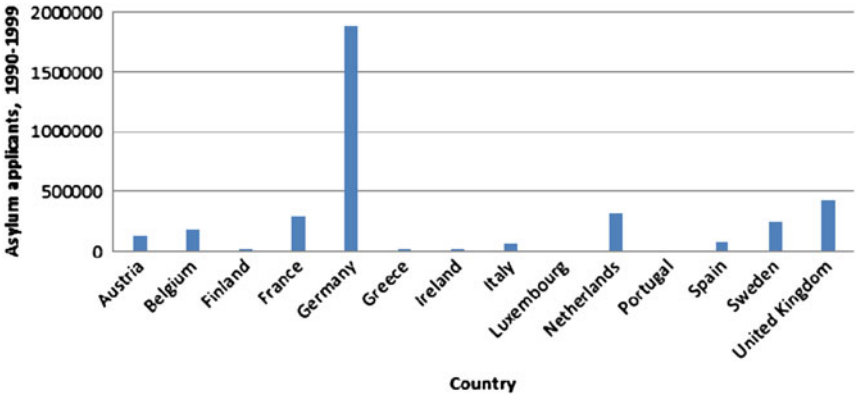

Fig. 2.2 Number of Asylum Applications 1990–1999 (Including Germany) (Source: Eurostat 2013, Own Depiction)

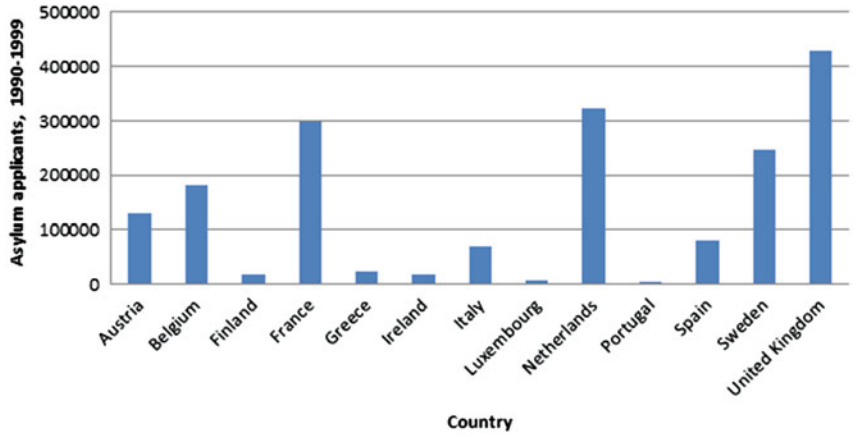

Fig. 2.3 Number of Asylum Applications 1990–1999 (Excluding Germany) (Source: Eurostat 2013, Own Depiction)

To sum up, those states which have effective institutions and have already experienced extensive exposure to the issue are able to build up a solid regulatory framework and become regulatory experts, whereas those with weak institutions that are not exposed cannot develop such expertise. Figures 2.4 and 2.5 indicate which Member States can be considered strong regulators and which Member States are weak regulators.

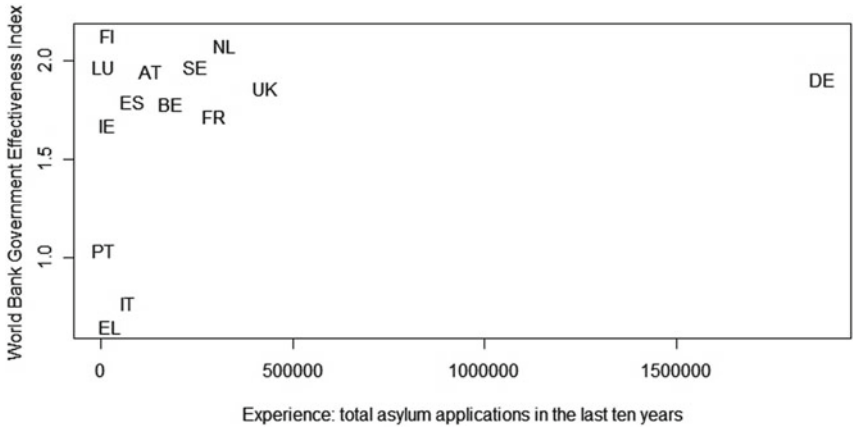

Fig. 2.4 Strong and Weak Regulators on Asylum in the EU in 2000 (Including Germany) (Sources: Eurostat 2013; Kaufmann et al. 2010, Own Depiction). Legend: *AT* Austria, *BE* Belgium, *DE* Germany, *EL* Greece, *ES* Spain, *FI* Finland, *FR* France, *IE* Ireland, *IT* Italy, *LU* Luxembourg, *NL* Netherlands, *PT* Portugal, *SE* Sweden, *UK* United Kingdom

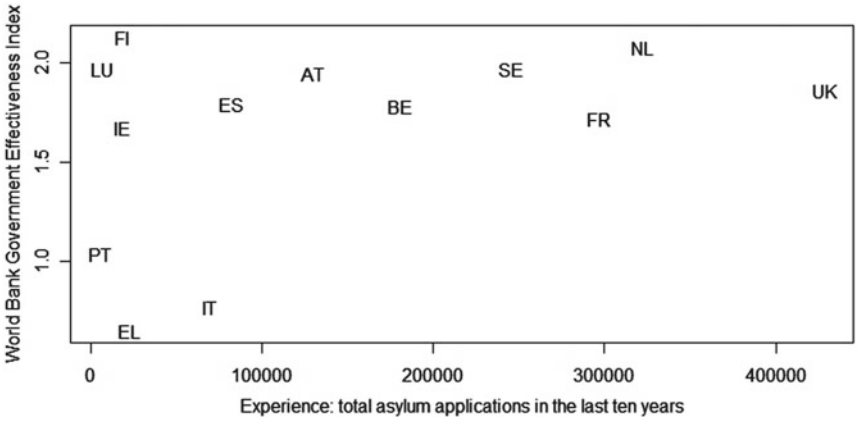

Fig. 2.5 Strong and Weak Regulators in the EU in 2000 (Excluding Germany) (Source: Eurostat 2013; Kaufmann et al. 2010, Own Depiction). Legend: *AT* Austria, *BE* Belgium, *DE* Germany, *EL* Greece, *ES* Spain, *FI* Finland, *FR* France, *IE* Ireland, *IT* Italy, *LU* Luxembourg, *NL* Netherlands, *PT* Portugal, *SE* Sweden, *UK* United Kingdom

Strong regulators are to be found in the upper corner on the right (high administrative capacity and high exposure) and weak regulators are to be found in the left lower corner (low administrative capacity and low exposure). Strong regulators in the area of asylum policies are first of all Germany, but also the UK, the Netherlands, France and Sweden. Austria, Belgium, Spain, Finland and Luxembourg can be considered medium regulators, as they receive less than 200,000 applications, but their bureaucracy is relatively efficient. Weak regulators are Greece, Italy and Portugal. As regards their strategies and behaviour, I expect medium regulators to take a middle course and sometimes act more like strong regulators, while acting more like weak regulators on other occasions.

One can hence broadly speak of a North-South divide as regards regulatory density in Europe. Strong regulators are generally situated in Northern Europe, while weak regulators are usually situated in the South. Yet, Spain obviously represents an exception, as Spain is a medium regulator and its administration is not less effective than the French or the Belgian administration. While I will thus stick to the notions of strong and weak regulators and do not refer to the North-South divide as an explanatory factor for different behaviour in negotiations and transpositions, it is important to bear in mind that both largely overlap and that the North-South dichotomy is much better known in the literature on asylum and immigration policies in Europe (see Baldwin-Edwards 1991, 1997; Finotelli/Sciortino 2009).

Scope Conditions: What Is Different About EU Asylum Policies?

While I argue that the Misfit Model bears strong explanatory power in the area of asylum policies, some of its core assumptions need to be qualified for it to be applied to this policy area. Given that it has been developed in the areas of safety at work and environmental policies, strong regulation is usually considered to equal high protection standards (see Héritier et al. 1994). This is very convincing as any piece of legislation regulating air pollution for instance means a higher degree of environmental protection. However, this is not the same with regard to

asylum policies in which strong regulation can encompass both policies enhancing the rights of asylum-seekers and refugees and policies trying to minimise their rights. By finding that a strong regulator introduced its position, one cannot infer that protection standards have been necessarily raised. Weak regulation on the other hand equals a *laissez faire* approach towards asylum-seekers whose rights can hardly be enforced. Yet, at the same time weak regulation means an absence of restrictive policies downgrading the rights of asylum-seekers. Thus, at any rate, stronger regulation means a higher degree of legal certainty as low regulation relies on informal structures involving a certain degree of arbitrariness. While strong regulators adequately identify refugees and asylum-seekers, the regulatory framework of weak regulators is often too "wide meshed" to do so. Potential refugees hence do not have access to an asylum procedure or status with weak regulators. In fact, in its extreme form weak regulation or non-regulation can equate to non-existence of an asylum system. This is clearly problematic for genuine refugees who do not receive the protection required by international human rights law. Yet, these people could find other ways of staying in the country "irregularly," albeit without any rights, as irregular immigrants do not have any status. An example of non-regulation being more favourable to immigrants than regulation is the case of Somali refugees who were previously not recognised by Germany. According to German regulations prior to EU asylum legislation, victims of non-state persecution were not recognised as refugees and could only receive a leave to remain which granted them no right to travel or work (see Chap. 4). Those people might not have been identified by the Italian regulatory system and hence could work and reside "irregularly." While weak regulator Italy was obviously *de facto* more liberal as regards access to work and freedom of movement for this group of people, it is hard to say which system is generally more favourable from the perspective of an individual concerned. Yet, given that irregular migrants are not registered, they neither have access to social benefits or health care, even if they have been present in a country for years and paid taxes at least in the form of value-added-tax (see Romero-Ortuño 2004: 252). Looking at Fig. 2.6, I hence argue that while combinations such as strong regulation/high standards and strong regulation/low standards leads to either effective protection or effective restriction,

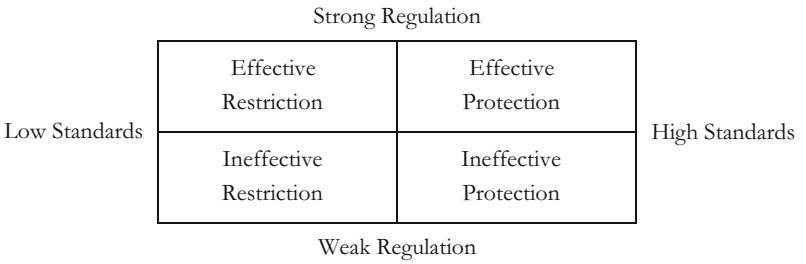

Fig. 2.6 Relationship Between Asylum Standards and Degree of Regulation (Source: Own Depiction)

the combination of weak regulation/low standards and weak regulation/high standards provides an ineffective system with regards to both protection and restriction. A total deregulation of asylum policies would violate international human rights law.

As strong regulation/high standards and weak regulation/low standards do not necessarily coincide, the notion of the lowest common denominator needs to be used carefully differentiating between the degree of regulation and the strength of protection. This is also true when talking about negative regulatory competition ("race to the bottom") and positive regulatory competition ("race to the top"): While in other policy areas the influence of strong regulators is expected to entail a "politique de la surenchère" or a race to the top[5] (Héritier et al. 1994), this expectation needs to be nuanced in the area of asylum policies, as in this field more EU regulation does not necessarily equal higher standards.[6] Given that the directives only aim at developing minimum protection standards and Member States are free to maintain or introduce a higher protection standard than the one enshrined in the directive, the highest degree of harmonisation is achieved if Member States agree on the combination of strong regulation/high standards.

[5] Scholars have found very different outcomes domestically, encompassing medium level standards (Golub 1996; Héritier 1999) and the highest standard available (Eichener 1992).

[6] The economists Monheim-Helstroffer and Obidzinski (2010), however, generally expect a race to the top through the introduction of common minimum standards in the area of asylum policies more broadly. While I agree that there is an upward tendency, I would be more cautious in expecting top standards, given the qualification I have just made.

By referring to high or low protection standards I mean relative standards and not absolute standards. A high protection standard refers to a high level of protection; a low protection standard means that not much protection is provided. In this study, a protection standard is considered high or low compared to what the same Member State had in place before EU legislation was passed (longitudinal comparison) or compared to what other Member States previously had in place (cross-sectional comparison). The terms "high standard" and "liberal Member State" on the one hand and "low standard" and "restrictive Member State" on the other hand will be used interchangeably. A liberal state will protect both admission rights and freedom rights of aliens present in a state (see Lavenex 2006: 1287). A restrictive state obviously will restrict these rights. While I refer to the dichotomy of liberal versus restrictive states I do not intend to say that some states reach a liberal ideal. Instead, when saying that Sweden is liberal on access to employment, I express that it is comparatively liberal (i.e., in comparison to other Member States) on this issue.

The Lowest Common Denominator of Strong Regulators and Policy Stasis at the Domestic Level(s)

After having described the main differences between strong and weak regulators, I will come to the factors that can explain both policy output at the EU level and domestic transposition. According to Héritier (1996), all Member States want to maintain their *status quo ante* policies. I follow this expectation and hence suggest that:

Expectation (E)1: All Member States prefer maintaining their status quo *policies over policy-change.*

Yet, strong regulators have a number of reasons for bringing their regulatory model to the EU level and initiating co-operation, the most prominent being regulatory competition. Originally, the concept of regulatory competition is taken from economics and holds that the basis for competition among rules is economic actors' responsiveness to differences in regulation. Economic actors select the best locations for investments and economic activity based on the regulatory environment. Generally, the lower the level of regulation (e.g., on environmental protection, protection

of workers, etc.), the more attractive a state is for a company, as costs are lower. This incurs "negative regulatory competition" between states (a race to the bottom) which entails a competitive disadvantage for the industries of strongly regulated states, for instance in the European Common Market. Hence, strong regulating states have incentives to co-operate (e.g., at the EU level) to even out these disadvantages. Co-operation on the other hand is usually expected to result in "positive regulatory competition" (race to the top) among strong regulators, as they are fighting to influence the regulatory model enshrined in EU law (Ibid.: 14).

Similar dynamics of regulatory competition can also be found in the area of asylum policies. States expect asylum-seekers to be rational actors and "law consumers" who select which country they submit their asylum claim to, based on the level of protection it grants (Barbou des Places 2003: 3). Yet, instead of deregulating the sector (as is done in negative regulatory competition in other domains), states responded to negative regulatory competition by enacting restrictive regulation in order to deter asylum applicants (Ibid.: 8).[7] In a nutshell, Barbou des Places advances the hypothesis "that, in the field of asylum, competition has taken the form of deliberate use of national regulations as a strategic weapon in international competition and in which one country's gains become the others' costs" (Ibid.: 12). This is because granting asylum bears many characteristics of a "collective action problem" (Betts 2003; Roper and Barria 2010; Suhrke 1998; Thielemann 2003; Thielemann and Dewan 2006; Thielemann and El-Enany 2010) and a "zero sum game" (Noll 2003). The practice of providing refugee protection is costly and the international public good of "security and order through refugee protection" is non-excludable. Thus, any asylum-seeker that is protected by one state will not need to ask for the protection of another state. Hence, states have an incentive to discourage refugees from seeking protection in their territories and instead encourage them

[7] Barbou des Places refers to regulatory competition in this context by the notion of strategic deregulation (Ibid.: 8). I would, however, rather call it re-regulation, because the introduction of restrictive measures did not necessarily mean that policies became less regulated but regulated in a different way, namely a more restrictive one. Even other scholars that expected a race to the bottom in EU asylum policies never expected deregulation subsequent to EU legislation, but only a downgrading of standards (see Guiraudon/Lahav 2006; Parkes 2010; Peers 2000).

to seek protection elsewhere. This eventually leads to "devaluating races" (see Rotte et al. 1996: 14), in which Member States try to deter asylum-seekers by adopting increasingly restrictive policies. Co-operation, for example under the form of harmonisation of asylum policies, is hence a means to stop regulatory competition in the field (see Barbou des Places 2003: 24–25; Thielemann and Armstrong 2013: 151; Thielemann and El-Enany 2011: 103–104). Therefore, strong regulators have an interest in harmonising asylum policies along the lines of their own domestic *status quo ante* policies.

Scholars have shown that the best way to shape European regulation is by framing a problem in the agenda-setting phase of the policy cycle. By providing a frame, the respective Member State is able to sell its own solutions and its own regulatory model (Mayntz 1994). This is called the "first mover strategy." First movers in this context are those Member States that introduce the issue onto the EU agenda and frame the problem that needs to be addressed. Strong regulators are "first movers" and frame and define a shared problem at the EU level in order to later anchor their regulatory model at the EU level. Hence, I expect strong regulators to suggest co-operation at the EU level with the aim of shifting "costly" asylum-seekers to other Member States.

Expectation (E)2: Strong regulators actively frame the debates on EU asylum policies from early on.

Moreover, subsequently, I expect them to attempt to influence the Commission's proposal. While Héritier (1996: 2) expects the Commission to assume a "gate-keeper" function, I expect this function to be substantially weakened under unanimous voting rules and consultation procedure. Weak regulators usually have no interest in having a harmonised policy on a certain issue, as they benefit from regulatory competition and any type of regulation would mean a change to their system. States with low levels of regulation on an issue hence do not bring it to the EU agenda and remain rather silent and passive in the agenda-setting phase (Eichener 1997: 52). Analogously to my expectation on the strong regulators, I thus expect weak regulators to abstain from the first move, as they prefer the absence of any EU regulation.

During the policy formation phase, strong regulators try to upload their regulatory model. This is easier if they had already been able to

define the problem that EU legislation aims to address. Strong regulators try to upload their regulatory model to the EU level to save adaptation costs resulting from the misfit between EU legislation and domestic legislation.

While the best solution for strong regulators would be the adoption of their regulatory model at the EU level, the second best option would be if at least a substantive part of their own regulation is taken into account. The worst case for strong regulators is non-regulation which perpetuates negative regulatory competition (Héritier 1996: 154). Weak regulators still remain passive in this phase. According to Eichener (1992: 52), they participate less as the issue is less salient for them. They are less effective in influencing the legislative output as they are devoid of technical expertise which constitutes a power resource in negotiations. Hence, weak regulators can be expected to not upload their regulatory model to the EU level.

Taking these expectations on strong and weak regulators together, I would expect EU asylum directives to contain protection standards beyond the lowest common denominator if strong regulators as opposed to weak regulators provide standards higher than the lowest common denominator. Weak regulators that have the lowest standard among the Member States will not effectively upload it to the EU level. Under the institutional setting and especially with unanimity rule in the Council, the protection standards enshrined in the directive should represent the lowest common denominator of the strong regulators:

E3: Restrictive strong regulators effectively impose their positions on EU legislative output.

Drawing on the Misfit Model is crucial for understanding why EU asylum directives did not result in a race to the bottom in protection standards during the implementation phase. As (restrictive) strong regulators are—particularly under unanimous voting rules—able to upload their standards, they face little to no misfit between EU policies and domestic policies in the implementation phase. Since their administrations work effectively, minor revisions on issues they have not been able to upload are usually undertaken. Thus, strong regulators are compliant with EU law. Weak regulating countries, however, opt for other strategies than uploading to avoid policy misfit between EU and domestic legislation. They avoid misfit by not implementing policies rigorously. This

is usually subsumed under the notion of "calculated evasion" (Vedsted-Hansen 2005: 374) or "calculated non-implementation" (Héritier 1996: 154). In a nutshell, weak regulating countries might agree to a certain standard at the EU level, without planning to implement what they have agreed to in a very rigid manner. As Eichener (1997: 605) summarises it: "[A] factor that allows countries with low levels of regulation to agree to European regulations at high levels of protection is the opportunity to soften the impact of high requirements somewhat by weak implementation." What could thus explain the absence of a race to the bottom in asylum standards is that neither strong nor weak regulators actually want to change their policies. While strong regulators have uploaded their domestic approach to avoid change, weak regulators are incompliant with EU law to this end. Thus, policy stasis is the rule rather than policy-change.

E4a: Weak regulators refrain from implementing EU asylum policies to avoid costs.

While one could wonder why weak regulators agree to co-operation if they do not intend to implement policies anyway, an alternative explanation would suggest that non-implementation is again based on low levels of government effectiveness and the high degree of misfit between EU and domestic policies. Weak regulators are not effective at positioning themselves on the issue at stake and hence face strong pressures to adapt afterwards. They are generally placed under more pressure than any strong regulator, but even strong regulators that have not been able to upload their policies have been found to be laggards in implementation (see Börzel 2002: 201).[8] Following this alternative explanation, I would expect that weak regulators are not implementation laggards merely due to cultural factors (such as a stronger consensus orientation and a pro-EU stance among the Southerners as compared to the "tough and detail-minded negotiators" from the North), as seems to be suggested by the literature (see Eichener 1997: 605; Weiler 1988: 355–356). Rather, they are laggards due to their weak institutions which are a root cause for their

[8] Under qualified majority voting, Börzel (2002), Héritier (1996) and Eichener (1992) have found that strong regulators that did not have the highest standard in place were often side-lined. Thus, these strong regulators faced misfit during transposition and also responded with late or non-implementation.

poor performance in implementing EU policies (see Börzel et al. 2010) in combination with the considerable changes they would have to undertake to be compliant with EU law. My alternative expectation thus reads:

E4b: Weak regulators are unable to effectively implement EU asylum policies due to low administrative capacity.

How Strong Regulators Influence EU Decision-Making and Why Weak Regulators Go Along

While the Misfit and Regulatory Competition model suggests that strong regulators are most effective in influencing EU legislative output, it does not establish why and how they are able to do this. It only implicitly mentions that salience and expertise are important determinants of influence (e.g., Eichener 1992: 52). Thus, it neglects to identify both the mechanisms that link strong regulation and effective influence on legislative output and to establish the mechanisms through which strong regulation affects output.[9] Moreover, it does not systematically establish which Member States among the strong regulators are most effective in influencing EU legislation, but suggests that the Commission pays attention to reflect different approaches in different legislative proposals so that no Member State feels systematically side-lined (Héritier 1996: 153). This section will develop causal mechanisms that link strong regulation to effective influence. Moreover, it will show which group of strong regulators is expected to be especially effective in the negotiations.

I argue that the ability to take a position, that is positioning or "positionality" (see Bailer 2004: 102), is a power resource which is only available to (restrictive) strong regulators. This is particularly important under unanimous voting procedures when every Member State has a veto. Under unanimity vote every actor that has a position and particularly those that advance strong and extreme positions are more likely to draw the outcome towards their position (Ibid.: 103). Yet, the question remains

[9] Given the different degree of salience strong and weak regulators attach to the issue, it is problematic to say that strong regulators achieve their goals in EU level negotiations, while weak regulators do not (see Bailer 2004; Börzel 2002; Héritier 1996). It seems that weak regulators rather consider it less to be their goal to substantially influence EU policy-making.

why strong regulators possess and advance certain positions, while weak regulators remain silent. I argue that strong regulators have stronger positions for two reasons: First, they are more affected by the issue, given their high level of exposure and hence attach higher salience to it. The effectiveness of their working administrations translates this salience into strong positions in the negotiations. Second, strong regulators also "have more to contribute," that is more ideas that they can share during the negotiations. In fact, these are two sides of the same coin: To advance a strong position, one needs to have a defined position on the matter and substantive policy ideas. Since EU asylum directives are essentially about introducing regulation at the EU level, suggesting non-regulation or even deregulation is out of line with the overall policy frame and thus not a valid position.

It is the absence of these two factors that make weak regulators passive in negotiations. As they do not have the ability to advance strong and equally substantiated positions, they face misfit in the implementation phase. Resorting to non-implementation to alleviate misfit pressures for these Member States is not only strategic, but also due to their lack of administrative capacity: The same reason why they did not develop sound regulation on the domestic level in the first place, namely their lack of an effective administration, hinders them from transposing EU regulation. Thus, I would expect the poor implementation record that weak regulating Member States are said to have, did not only develop as a result of a lack of willingness or strategic non-implementation, but also due to their weak capacity to create and implement regulation.

In a nutshell, the two sides of positionality, that is the intensity of a position and the actual possession of an informed position can explain why strong regulators are more effective in influencing EU policy-making than weak regulators. In the following section I develop explanatory mechanisms around both sides of positionality. I will also link them to the determinants that explain why Member States become strong regulators, namely administrative capacity and exposure. In doing so, I show that it is useful to employ the aggregated concepts of strong regulators versus weak regulators, because while strong regulators can be empirically distinguished from weak regulators, both sides of positionality usually are expected to go hand in hand, as they both relate to administrative capacity and exposure.

Intensity of Positions

I suggest that advancing strong positions is an important power resource in negotiations. I furthermore posit, that administrative capacity, exposure and patience are important factors influencing the intensity of the positions an actor advances (see Fig. 2.7). By intensity of positions, I refer to whether Member States adopt hard positions or whether they defend their positions less vigorously.

Salience generally describes the importance an actor attaches to an issue (Hinich and Munger 1997: 52; Laver 2001: 69; McLean and MacMillan 2009; Warntjen 2011: 169). Constant exposure to an issue results in a high degree of salience in a Member State. Quantitative research on Council decision-making often refers to this as "the proportion of an actor's potential capabilities it is willing to mobilise in attempts to influence the decision outcome" (Thomson and Stokman 2006: 41). Also Eichener (1992: 52) refers to salience as an important power resource when investigating EU policy-making relating to safety at work: "The interest in the matter is an important corresponding variable, because the higher the interest is, the more resources will be invested in the committee work." According to Warntjen (2011: 169) "this importance can be based inter alia on its (estimated) policy impact, the political sensitivity of an issue or the attention it receives from core constituencies." The more asylum-seekers a state faces, the more pressure will be put on authorities to deal with this issue. Moreover, when an issue is salient, the electorate will follow how their government defends their interests more closely in EU negotiations. Low exposure creates low levels of salience, which provides governments with more leeway to act on the issue as they see fit. Both liberal and restrictive strong regulators in their ideal-typical form face high exposure, whereas ideal-typical liberal and restrictive weak regulators face low exposure.

While some consider salience an important power resource in negotiations (see Leuffen et al. 2014), I expect it as such not to translate into consistently strong positions. While indeed, salience is a necessary condition for becoming more active about an issue, only capable administrations will respond to salience with strong bargaining: Weak administrations are

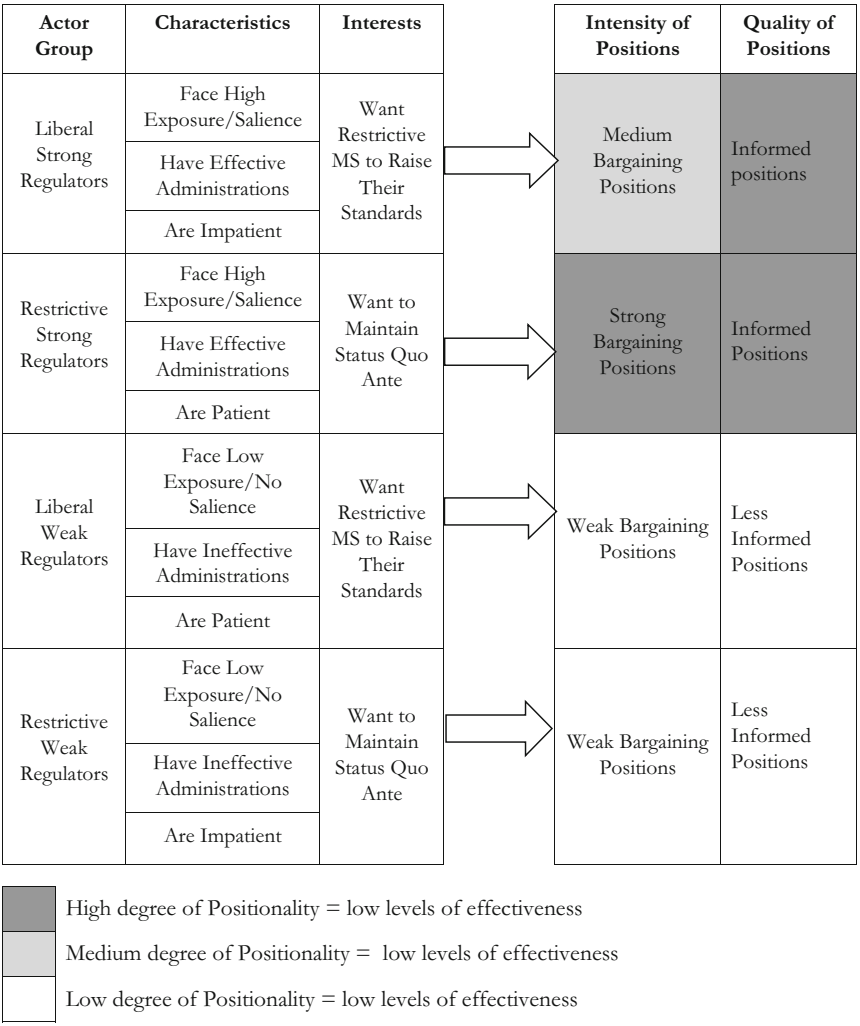

Fig. 2.7 The Two Paths of Positionality and Their Distribution Between Strong and Weak Regulators (Source: Own Depiction)

not able to build strong positions or maintain them over a longer period. Delegations in the Council will face problems getting consistent positions from national ministries in time (see Panke 2011: 50). Moreover, ineffective administrations are less capable of following their positions

through and will not revert to drastic measures such as threatening to block a piece of legislation entirely. Even if they initially adopt strong positions, other Member States are aware that they will not be able to maintain them throughout the course of the negotiations.

Higher salience on the background of an effective administration can also be used strategically. According to Schelling's "paradox of weakness" (1960), the commitment to a negotiation position might indeed be a bargaining device:

> The power to constrain an adversary may depend on the power to bind oneself; that in bargaining weakness is often strength, freedom may be freedom to capitulate, and to burn bridges behind one may suffice to undo an opponent (Ibid.: 22).

In short, states that have less room to manoeuvre can use this as a bargaining tool. Putnam (1988: 441) applies this to his theory of two-level games by suggesting that states can use constraints on the domestic level in interstate bargaining. By saying that they have a very narrow mandate, they can receive concessions from others. As strong regulators perceive the issue to be more salient, they generally adopt harder bargaining strategies than weak regulators.

Yet, one important condition for salience and administrative capacity developing into a strong position is patience: The more impatient an actor is, the less power it exerts (Rubinstein 1982). Patience is hence a negotiating advantage (Knight 1992: 135). If a state can accept heavy delays in EU legislation coming about and others have a stronger interest in its transposition, the patient state is more likely to be effective (see Bailer 2004: 104–105). The reason is that actors not in need of a specific legislation can threaten to defect if their position is not accommodated. Actors that are in need of a certain legal instrument do not want to deter other actors from co-operation. Instead, they are ready to compromise to make co-operation happen. This does not only apply to liberal strong and liberal weak regulators but is also true for EU institutions, as they are usually assumed to have a strong interest in EU legislation and hence should prefer some form of EU legislation over none.

Quality of Positions (Expertise)

The ability of a state to influence the negotiations is also based on the quality of its position. While the quality of one's positions hinges on the more general administrative capacity, it moreover depends on the existence of a specific and elaborate national regulatory system and pertinent expertise in the field (see Héritier et al. 1994: 17). Member States are not able to influence EU policy-making if their position is not substantiated.

States receiving large numbers of applications and facing the associated levels of salience can build up expertise, on condition that they have effectively working administrations.[10] Ineffective administrations will be "overwhelmed" by high numbers of applications and will thus not build up expertise through exposure. Those states that have been able to develop functioning asylum systems domestically can draw on their expertise in the negotiations. This makes their expertise a considerable power resource in EU negotiations. This is particularly so for the discourse in the Council Working Groups, exclusively composed of bureaucrats who can be considered "national regulatory experts," is driven by expertise rather than by politics. Expertise is their common ground and those that have more expertise can be expected to be more effective in influencing the legislative output. Therefore, expertise is a legitimate power resource in these negotiations and helps to successfully frame an issue at the EU level (cf. Héritier 1997: 539). Thus, Member States with a high degree of regulatory expertise are better at introducing their positions into EU legislation. As Eichener (1992: 52) notes:

> [In the working groups] [t]he debates tend to move quickly to a level of technical details (about what is technologically possible and at what cost) so that technical expertise is a crucial condition for effective participation.

Additionally, expert Member States have experience of a broad range of different cases relating to both asylum law and asylum decisions. If

[10] On the other hand, administrations with considerable expertise in the asylum area will be able to process applications faster and more effectively. Thus, administrative capacity and expertise are interrelated and two-directional. For my purposes I focus on the impact of administrative capacity on expertise.

Member States want to restrict the rights of asylum-seekers in order to deter future asylum applications, one can assume that expert Member States have effectively sounded out the possibilities of providing as little protection as possible and as much protection as necessary within the parameters of their legal obligations. These Member States are aware which boundaries of international human rights law cannot be crossed if one does not want to violate it (see section on institutionally set modes of interaction in this chapter). Thus, even though they might advance restrictive positions, these can be assumed not to be entirely out of line with international human rights law (or at least have not yet been condemned by pertinent courts to be so). Non-expert Member States lack this expertise and can be more likely to adopt uninformed positions which (openly) violate international human rights law.

While the European Commission is usually considered an actor with extensive expertise (e.g., Hooghe 2001: 7; Kassim et al. 2013), the EP can be expected to have much less expertise as Members of Parliament (MEPs) have to allocate their resources to a variety of dossiers instead of focusing on their specialisation, as their office requires MEPs to be generalists rather than experts (see Bouwen 2004: 476–477).

Positionality as a Power Resource for Restrictive Strong Regulators in EU Council Negotiations

I expect that restrictive strong regulators are most effective in influencing EU legislative output. Fig. 2.8 summarises this expectation. Restrictive strong regulators have an interest in maintaining their *status quo ante*. If they want to do so, they need to advocate for its inclusion in the directive. Under minimum standards, having a lower standard domestically than the one adopted in the directive would cause misfit and pressures for change.[11] Given the high numbers of asylum-seekers they receive,

[11] A lower standard being adopted would not pose a threat to their *status quo ante* under minimum standards. Yet, if there was a lower standard, these Member States would no longer be restrictive strong regulators, but liberal strong regulators (in this particular case). This clearly renders the negotiations more complex, as one actor supposedly adopts a variety of strategies (and identities) throughout the course of the negotiations.

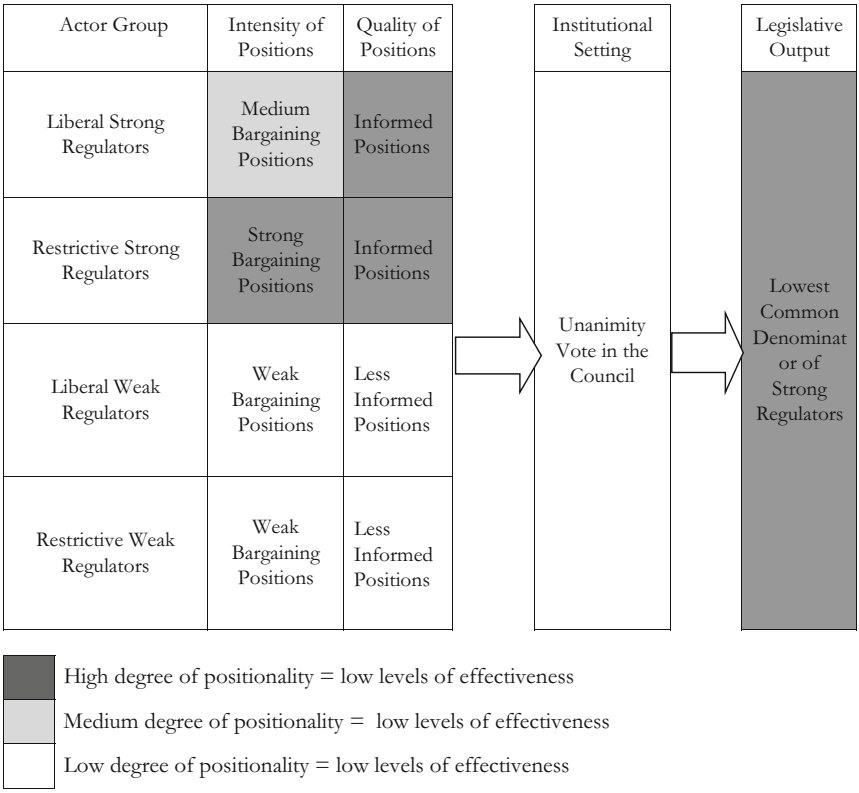

Fig. 2.8 Positionality as a Power Resource of Strong Regulators (Source: Own Depiction)

the asylum issue is a salient one for them. As they have effective administrations, they are able to translate salience into firm positions. They are able to adopt hard bargaining strategies as they do not care for common EU asylum policies in the first place, but are patient and concerned with maintaining their *status quo ante*. If EU directives take a direction that threatens their *status quo ante*, they are ready to defect from cooperation. This is due to their effective administrations which follow the negotiations closely and adjust their strategy swiftly. At the same time the restrictive strong regulators' positions are of high quality, because their effective administrations have vast experience in the area and have

adopted effective legislation at the domestic level in response. This expertise serves them in the negotiations as it provides an ideational basis for their positions and makes them convincing and consistent.

While liberal strong regulators are equally exposed and have equally capable administrations, their *status quo ante* is not at all threatened by EU minimum legislation. Their core interest therefore is only to raise the standards among restrictive Member States in order to avoid negative externalities (i.e., secondary movements) of negative regulatory competition. While they have high quality positions, as their capable administrations have transferred exposure into expertise, they adopt bargaining strategies of only medium intensity: The issue is salient for them and they are in principle able to transfer this salience into strong positions. Yet, they refrain from adopting hard bargaining positions, as they have a strong interest in having a harmonised EU asylum policy. In fact, having any EU regulation that makes the negative regulatory competition come to a halt is better than the current situation. Thus, they are ready to compromise. A factor that might further amplify these effects is that all Member States' primary interest is to be able to maintain their *status quo ante* and that in the case of liberal strong regulators this *status quo ante* is not affected at all by EU minimum standards: Decision scientists have shown that actors fear losses more strongly than they value gains (Kahneman and Tversky 2000: 2–4). Hence, those actors that are certain to lose something in case their position is not accommodated (i.e., restrictive strong regulators that want to maintain their *status quo ante*) are likely to adopt tougher bargaining positions than those actors which might gain something, albeit the gains are uncertain (i.e., liberal strong regulators that hope to reduce secondary movements by restrictive Member States adopting higher standards).

Restrictive weak regulators face low exposure and asylum is no salient issue for them. Even if it were, they would have difficulties translating this salience into a strong position, given their low levels of administrative capacity. Thus, they are not able to fight for their core interest, which is maintaining their domestic *status quo ante*. Even their patience and lack of interest in EU harmonisation cannot help them, as their weak administration does not adopt firm positions or even threaten to defect from co-operation. At the same time, their positions are weakly informed

and they are not based on the same amount of expertise as the positions of strong regulators. Their low levels of administrative capacity prohibit them from generating any expertise from their already low levels of exposure. This makes them adopt rather inconsistent positions on an *ad hoc* basis.

While I have said that weak regulators have the tendency to not provide high standards, as depending on their degree of low regulation they provide very few enforceable rights at all, weak regulators can be liberal in some instances, for example if they do not apply a restrictive concept used by a strong regulator. In such instances and analogously to liberal strong regulators, they can be expected to have a general interest in raising the standards among restrictive Member States. Yet, in general liberal weak regulators do not consider asylum a top priority, given their low levels of exposure. Their weak administrative capacities and the fact that they have little interest in the adoption of any legislation suggesting minimum standards, exclude them from advancing strong positions. Moreover, their positions are weakly informed, so that they cannot be expected to maintain prominence and suggest various ideas during the negotiations because of their lack of expertise.

Under the unanimity voting procedure, strongly defending a certain position can be particularly effective (Bailer 2004: 102–103), as no Member State can be outvoted. Yet, both liberal and restrictive weak regulating Member States neither adopt strong positions nor are particularly well informed. While the positions of both liberal and restrictive strong regulators are equally well-informed, restrictive strong regulators adopt harder bargaining positions and are ready to defect. Liberal strong regulators on the other hand have a stronger interest in common positions and hence only adopt medium bargaining strategies. Under unanimity voting rules, therefore, restrictive strong regulators are more likely to influence EU legislative output and the output is likely to reflect the lowest common denominator of the restrictive strong regulators. Overall, I expect the following to account for the effective influence of restrictive strong regulators, as suggested in *E3*.

E5: Strong regulators have positions which are better informed than those of weak regulators, enabling them to impact EU legislative output.

E6: Restrictive strong regulators adopt hard bargaining strategies and advance strong positions, providing them with more influence than liberal strong regulators.

Design and Methods

This section presents the design, methods and data employed in this study. I use a Case-Study Design in combination with Process-Tracing and Before-After Analysis. This helps to identify both causal factors and causal mechanisms. While this study, like most EU policy studies, focuses on explaining EU legislative output in one particular policy area, it does not limit itself to that alone. To some extent it also draws generalisable conclusions on EU decision-making processes based on the Misfit and Regulatory Competition Model in combination with positionality.

This study is designed as a single-case study in that I focus on processes that occurred in one particular point in time in EU asylum policies. Some scholars have criticised single-case studies in the past (e.g., King et al. 1994: 208–211), yet others have noted that causal mechanisms cannot necessarily be established through cross-case comparison (Beach and Brun Pedersen 2013: 4–5). By closely investigating one case and establishing the "deeper connection between a cause and effect" (Ibid.: 23), I will highlight both causal factors for how states effectively influenced EU legislative output and their underlying causal mechanisms. While my study is generally designed as a single-case study, I do at times compare the development of EU asylum policy with other policy areas, namely safety at work, environmental and transportation policies. Thus, my study is "implicitly" comparative. I use and further develop a theoretical model which has been established in these policy areas. I argue that if substantial parts of the model apply to the area of asylum policies as they did in the areas just mentioned this substantively enhances the explanatory leverage of the model: Asylum policies on the one hand and environmental, safety at work and transportation policies on the other hand can be regarded as "most different" cases in line with John Stuart Mills' "method of agreement" (Gerring 2007: 139–142; Seawright and Gerring 2008: 304–306). While the latter are "low politics," asylum policies relate to

"core state powers" (see Genschel and Jachtenfuchs 2014) and are part of "high politics" (on high and low politics see Keohane and Nye 2001: 20), as the question of who is allowed access to state territory is closely linked to issues of state sovereignty. Hence, if strong regulation can account for policy output across these diverse policy areas, it has strong explanatory powers for EU decision-making in general. While the generalisability of my findings is clearly limited and the study's focus rests on internal validity and consistency of the argument for the case under investigation, the implicit comparison enhances its external validity (on internal and external validity see Gerring 2007: 43).

If strong regulation can account for policy output in the area of asylum policies, this would be striking, since the literature has so far identified EU asylum policies to be "a most likely case" (see Gerring 2007: 120–121) for joint venue-shopping of restrictively minded Interior Ministers in Europe (see Giraudon 2000; Maurer and Parkes 2007; Parkes 2010). Whereas weak regulators might indeed show apathy in areas of low politics, this should not apply to areas of high politics, as apathy in this area could challenge state sovereignty. Asylum policies are hence a "least likely case" (Gerring 2007: 116–119) for the Misfit Model.

While I also briefly discuss implications of my findings for the second phase of the CEAS and beyond the focus of this research is on the first phase of the CEAS for several reasons. The first phase of the CEAS marked the first time that the EU met to define comprehensive and legally binding rules on asylum and it could not draw on any blueprint. The second phase of the CEAS, by contrast, could build on the first phase. In its recast proposals the Commission excluded many contested provisions to avoid any further reshaping and potential downgrading of protection standards. Closely related to the issue of limited competences of the community institutions, protection standards beyond the lowest common denominator in the first phase of the CEAS are more puzzling than they are in the second phase of the CEAS, given unanimous voting procedure in the Council in the first phase. Scholars have demonstrated that raised protection standards in the second phase of the CEAS have been significantly influenced by liberal-minded EU institutions (Ripoll Servent and Trauner 2014; Thielemann and Zaun 2013). This cannot account for raised standards in the first phase of the CEAS. As many of the character-

istics of the intergovernmental phase preceding the communitarisation of asylum policies are maintained during the first phase of the CEAS, asylum policies post-Amsterdam are likely to be susceptible to similar dynamics as intergovernmental asylum policies. By focusing on the first phase of the CEAS, I only investigate the EU-15. The transposition of the EU directives in the Member States acceding since 2004 is therefore not the focus of this research, as they had to "take" the asylum *acquis* without ever being able to substantially influence it.

Having explained my reasons for studying the first phase of the CEAS, I will now discuss the selection of directives for study. In order to study the case of EU asylum policies I look at the decision-making processes behind three core policy instruments, namely the 2003 RCD, the 2004 QD and the 2005 APD. These directives represent the three functions of an asylum system, access to status recognition for refugees (*via* a fair procedure: APD), determination of refugees (in a procedure based on clear criteria, APD and QD) and regulation of the relationship between the host state and the refugee or asylum-seeker (through social and "civil"[12] rights, QD and RCD). Besides the Dublin II Regulation and the Temporary Protection Directive these three directives have been regarded as key legislative instruments in the area by many scholars (see Hailbronner 2010; Peers and Rogers 2006). I chose not to study the Temporary Protection Directive and the Dublin II Regulation for the following reasons: In contrast to the Temporary Protection Directive, the three directives investigated here are "living" instruments and have been applied in practice. Moreover, they are all about standard setting, whereas the Dublin II Regulation dealt with the physical distribution of asylum-seekers. In contrast to the directives, which regulated the relationship between Member States and asylum-seekers, Dublin therefore rather regulated the relationship among Member States. Yet, while I do not study the decision-making processes behind the Dublin II Regulation systematically, I will draw upon it where it is necessary for my investigation.

[12] While "civil" alludes to citizenship, civil rights are not restricted to citizens. In most states, immigrants are granted some basic rights which are expected to expand with their degree of attachment to the host society (Carens 2013; Hathaway 2005: 154-155).

Methodologically, I combine a Before-After Analysis (George and Bennett 2004: 166–167) and Process-Tracing (Ibid.: 205–232; Beach and Brun Pedersen 2013; Rohlfing 2012: 150–167) with Qualitative Text Analysis (Kuckartz 2014). Instead of engaging in a cross-case comparison, one single case can also be studied from a "within-case" or "before-after" perspective. In this study, I use the Before-After Analysis to investigate the impact of EU legislative processes on domestic policies. This is necessary to subsequently study Member States' motivations and strategies. To this end I investigate domestic policies before the directives (t0), the EU legislative output (t1) and domestic policies after transposition (t2). Comparing domestic asylum policies before and after EU legislation helps me to understand whether any changes occurred and whether these meant an upgrade or a downgrade of protection standards. It is important to show systematically to what extent EU asylum standards exceed the lowest common denominator as has been claimed recently by Legal Scholars (Odysseus 2006) and Political Scientists (Thielemann and El-Enany 2011). The most common challenge for a Before-After Analysis is that not only the phenomenon under investigation changes but also other variables do change too (George and Bennett 2004: 166–167). Hence, domestic policy-change might be induced by something other than EU legislation. To eventually explain what *caused* policy-change or policy stasis domestically I need to trace the EU decision-making processes and provide exemplary evidence from the domestic transposition processes.

With the help of the Before-After Analysis, I investigate the standard Member States had in place before the negotiations and how EU legislative output affected their national policies. Did they use EU legislative output strategically to change domestic legislation? Wherever I find instances of change, these cannot be explained by the Misfit Model and I will need to put forward other explanations for these findings. One potential explanation for change is that a Member State was about to change its legislation anyways. Another option is that a Member State learned during the negotiation process about a certain practice used by other Member States. A third option is that Member States had a more liberal or restrictive practice in place and Interior Ministers tried to change it through venue-shopping. Yet, as I have shown in the theory chapter restrictive venue-shopping is institutionally highly unlikely,

for instance, because restrictively minded actors would face their more liberal counterparts again when implementing restrictive EU policy at the domestic level.

Process-Tracing will help me to explain how protection standards in EU asylum legislation developed. As compared to the Before-After Analysis, which selectively looks at one factor (in this case EU legislation) and leaves out any other issue, Process-Tracing means studying the negotiations in depth. Process-Tracing is best suited to carve out causal mechanisms (Beach and Brun Pedersen 2013: 1–2; Checkel 2005: 4–6; George and Bennett 2004; Rohlfing 2012: 150–167) and "seeks to make within-case inferences about the presence/absence of causal mechanisms in single case studies" (Beach and Brun Pedersen 2013: 4). Thus, "Process-[T]racing methods go beyond correlations by attempting to trace the theoretical causal mechanism(s) linking X and Y" (Ibid.: 5). By utilising Process-Tracing, I can investigate Member States' strategies and establish whether Member States tried to upload their *status quo ante*. Moreover, I can identify who was most active or passive in the debates. Whenever I find those Member States defined as strong regulators being highly active and effective, this gives support to the theoretical model applied. Whenever weak regulators are highly active and effective this undermines its explanatory power. Tracing the decision-making process will moreover help me to discover the motives for activity and the reasons of effectivity. It will help me to understand why certain positions were accommodated rather than others. Implementation processes will only be traced where change occurred domestically to show whether change was induced by venue-shopping, copying others, domestic legislation or something else.

In terms of data, I drew upon both written sources (existing data) and original interview data. The written sources consist of EU documents, particularly Council documents on the negotiations, domestic parliamentary debates, press releases, secondary data from publications in the areas of Political Science and Law, and reports by NGOs, legal experts, UNHCR and the Commission. The original data comprises 39 semi-structured expert interviews which I conducted between March 2012 and August 2013 in Brussels and different European capitals.

The data used for the Before–After Analysis are *status quo ante* (e.g., PLS Ramboll 2001; Bouteillet-Paquet 2002b) and transposition reports (e.g., ECRE 2008; Odysseus 2006; UNHCR 2007, 2010b) by NGOs, UNHCR, the Commission and legal expert networks. Results from these reports need to be assessed with extreme care, as their research aims diverge: While NGOs and UNHCR compare domestic or EU protection standards to international human rights law, Odysseus focuses on the transposition of EU directives. Yet, reports on transposition do not necessarily address policy-change subsequent to EU legislation and the non-compliance of EU law with international human rights law, which NGO reports discover, does not imply that Member States were previously compliant with international law. These reports only partly answer the question of how Member States changed their policies and thus additional sources will be used if it is not clear whether change occurred or not.

For the Process-Tracing of negotiations, I mainly drew on EU documents and interview data. Particularly, Council documents contain a lot of information concerning the positions of Member States in the negotiations. Sometimes these documents represent a summary of the positions advanced and provide reasons for Member States' positions. Alternatively, information about Member States' positions and motives can be contained in footnotes in which certain reservations are noted and in other comments. This information was supplemented by secondary data analysis from the literature, press sources and interview data. I drew on such a variety of data for reasons of data triangulation (see Denzin 1977: 297–313; Flick 2011). EU documents provide information about the positions of Member States, but they do not tell us why Member States took these positions and what strategies they pursued. Press releases, domestic parliamentary debates, secondary and especially interview data are better suited to filling these gaps.

Interview data was received through 39 semi-structured expert interviews (Gläser and Laudel 2010). Interview partners were selected either because they were directly involved in the negotiations (e.g., in the Council, the Commission or the EP) or because they were close observers of the process (UNHCR, NGOs and acceding Member States). Yet, while interview data for instance is very well suited to gaining insights

into what makes negotiators tick, it has to be handled with care, as interviewees might not remember all the details, have certain biases or might be tempted to present themselves and the role they played in a better light. Given that the processes under investigation occurred a decade ago, interviewees were not always able to remember every debate in detail. Especially where I investigate not only broader relations but also debates on specific issues, I therefore draw my conclusions from alternative data rather than the interviews or try to find other data to confirm or disconfirm my findings from interview data. Given that asylum policies in European Member States have been repeatedly criticised by NGOs, churches and parts of the media, interview partners might tend to soften their role in negotiations. Thus, dynamics of social desirability might skew my findings from interview data (Ibid.: 122–124, 135–140). In an area as sensitive as asylum policy, interview partners are concerned about confidentiality. Most interview partners are hence referenced only with a reference only to their institution. Interview partners that did not agree to this practice are cited anonymously. Still, all interviewees speak on their own behalf and their positions and interpretations might not necessarily correspond to the official position of their institutions.

3

EU Co-Operation, Asylum Policies and the Role of Strong Regulators

This chapter has two aims. First, it gives an overview of the evolution of the European asylum policies from its intergovernmental beginnings in the mid-1980s until today. A special focus will also be placed on the asylum directives in the post-Amsterdam phase. Second, it shows that the regulatory transfer from strong to weak regulators did not only start with the CEAS, but much earlier. In analysing the evolution of this policy area, I demonstrate that the Schengen Agreements in the late 1980s and early 1990s already marked the starting point for the regulatory transfer from strong to weak regulators. While strong regulators had regulations on asylum already in place during the 1970s, weak regulators only introduced their first modern regulations on asylum in the 1990s as a response to European intergovernmental co-operation (Bouteillet-Paquet 2002b: 219). At that time a group of strong regulators moved to frame EU asylum policies in a certain way. The most prominent among these "first movers" was Germany, which took a particularly active role. These Member States wanted to harmonise asylum policies so that they were no longer the most attractive states for asylum-seekers. This also explains why the very idea underlying the CEAS was not to

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downgrade standards, but instead to install effectively working asylum systems in weaker regulatory states in Southern Europe and the Eastern European States that acceded the EU in 2004.

Scholars working on European asylum policies have usually referred to the gap between strong and weak regulators by speaking of a North–South divide (Finotelli 2009). Countries which I have identified as strong regulators have traditionally been said to be the initiators of EU co-operation (Vink 2010: 45). Weak regulating states have usually been referred to as the Southern European laggards with ineffective asylum systems and weak border control (Baldwin-Edwards 1991, 1997). In the early 1990s, Baldwin-Edwards (1991: 203) identified a Mediterranean immigration policy regime that consisted of

> developing economies with histories of emigration and poor immigration infrastructure; they have little provision for immigrants and frequently exhibit outright discrimination against non-nationals […]. A saving grace is that bureaucratic procedures are generally ineffective, if not corrupt, and theoretical provisions may not exist in practice.

This quote supports my assertion that weak regulators such as Greece or Italy had low levels of administrative capacity. Scholars generally argue that Southern European immigration policies are not formalised through law, but rather follow informal practices. In Italy, for instance, the rather generous constitutional right to asylum which claims to give asylum to anyone not granted in their country of nationality the rights laid down in the Italian constitution (art. 10III; see Italy 1947) was never referred to in further legislation (Bouteillet-Paquet 2002b: 221).

The chapter is structured as follows: I will first give an overview of the background and conflict lines that lie at the heart of co-operation on asylum matters at the EU level. Subsequently, I will present early co-operation in the area in the mid-1980s. Thereafter, I will focus on the framing of the CEAS since the Amsterdam treaty, the phase that this study focuses most of its attention on. The fourth section of this chapter is dedicated to the core aspects of EU asylum directives.

Co-Operation to Ensure Responsibility-Sharing

Agenda-setting in the CEAS began already long before EU directives were debated. In fact, the framing of asylum policies as a means to prevent secondary movements, originated from developments which go back to the mid-1980s. Understanding these developments is hence crucial to understanding decision-making on EU asylum directives and today during the "refugee crisis."

In the early 1990s, both endogenous and exogenous factors highlighted the need to co-operate on issues of asylum policies for some strong regulating EU Member States: The main endogenous factor fostering co-operation was the abolition of internal borders with the Schengen Agreements which made the enforcement of the external EU borders a core priority for these states (Niemann 2006: 196–198). Since Member States in the European periphery and particularly in Southern Europe had relatively porous borders, Member States in North-Western Europe tried to incentivise their Southern counterparts to enforce their borders. The abolition of internal borders occurred at the same time the number of refugees fleeing conflicts fuelled by the end of the Cold War and the subsequent collapses of states increased. This mix of endogenous and exogenous factors posed a major challenge for strong regulators, since they were the main recipients of asylum-seekers at the time. Therefore, these states looked for co-operation at the EU level to ensure responsibility-sharing and distribute asylum-seekers more evenly across Europe. According to Stetter, they wanted to "use Community legislation to impose upon other [M]ember [S]tates their own approach to regulatory issues" (Stetter 2000: 84). This supports my expectations concerning the tendency of strong regulators to engage in regulatory competition.

With the Schengen Agreements in 1985 and 1990, some Member States felt the need to further co-operate on immigration and asylum (Callovi 1992; Thielemann/Armstrong 2013: 149). The reason was that asylum-seekers who had reached one Schengen country could travel to any other Schengen country without ever facing border controls. Strong regulators in Northern Europe were highly reluctant to open their borders as they feared that Southern weak regulators did not enforce their borders in an equally effective way. Indeed, weak regulating Member

States hosted comparatively large numbers of immigrants who had crossed their border irregularly, worked in the informal sector and were expected to move on to Northern Europe as soon as borders would open (Finotelli 2009; Thielemann/Armstrong 2013). As strong regulators had much better welfare and asylum systems than weak regulators (Baldwin-Edwards 1997; Finotelli 2009), they feared that large numbers of immigrants staying in Southern Europe would now move further North and be able to cross their borders unhindered to seek asylum. This has often been subsumed under the notions of "asylum shopping" or "bogus asylum-seekers" which imply that asylum applicants choose the most generous system (in terms of accessibility or benefits) to submit their asylum claim. Although research has shown at various instances that generous asylum systems are not necessarily a key factor determining the country in which somebody asks for asylum (Brücker et al. 2002: 89; Menz 2008: 401; Holzer/Schneider 2002: 75–102; Thielemann 2006), policymakers in strong regulating states at the time feared that their generous asylum systems would render them highly attractive to potential claimants (Barbou des Places 2003: 3). Thus, these Member States suggested introducing a so-called responsibility-sharing mechanism, since referred to as the "Dublin Convention." The Dublin Convention introduced the principle that the country responsible for the entry of the asylum-seeker is to be held liable and should thus process the asylum claim. Arguably, this should incentivise the perceived laggard Member States to eventually improve their border protection.

At more or less the same time as these policy developments took place, Europe had to cope with the appearance of the largest numbers of refugees since the post-war era. These numbers potentially aggravated the negative consequences of the Schengen agreements in the eyes of many strong regulators. Strong regulators scored high on issues which have been found to influence the choice of potential applicants such as the overall economic stability (measured through GDP) or existing asylum communities (see Keogh 2013; Neumeyer 2005), and they received the largest share of asylum applicants. This further fuelled debates in strong regulating states on responsibility-sharing and effective border control of the weak regulators. In many ways, the high inflow of refugees during the 1990s can serve as a blueprint for today's "refugee crisis" and the

behaviour of European governments at the time very much equals their behaviour during this crisis.

During the early 1990s, mainly applicants from former East Bloc states arrived in North-Western Europe. Germany received most of the applications and experienced a peak in applications with 438,190 in 1992 (Council 2009/14863 ADD 4: 13).[1] During the Cold War, Western Germany had been particularly welcoming to applicants from the Soviet Union and the German Democratic Republic (GDR) for political reasons: by granting refugee status to these people, Western Germany highlighted that these states were maltreating their people and ruled unjustly. In the early 1990s, Germany not only received large numbers of asylum-seekers from these countries but also many Russians of German decent whom it treated preferentially. As the numbers of applications rose, anti-immigrant discourse gained pace among politicians and in the media. This culminated in anti-immigrant attacks in Hoyerswerda, Rostock-Lichtenhagen, Mölln and Solingen (Germany) in early 1993 (Gaserow 2012). The wars in the former Yugoslavia from 1991 to 1995 and the Kosovo crisis in 1999 lead to a further increase in additional asylum applications in Northern Europe. Distribution of asylum-seekers and refugees at the time was still highly unequal with most asylum-seekers ending up in Northern strong regulating states (Eurostat 2013). As Germany, at the time a border country, was responsible for many applications in line with the Dublin Convention, it suggested an alternative mechanism of "responsibility-sharing" in 1994. Germany proposed that asylum-seekers should be distributed across Europe according to the *Königsteiner Schlüssel*, a distribution scheme applied in the German *Länder* based on factors such as GDP and size of population (Council Presidency Conclusions, 1 July 1994, Council Document 7773/94, quoted from Thielemann 2003: 259–260). No other Member State was interested in this scheme as it would have resulted in them having to take more applicants. Interestingly, distribution keys that were discussed since the failure

[1] With the exception of directives, Council documents are referenced in this study by year and document number. In case I refer to a revised document or to an addendum, this is also referenced to distinguish it from the original document.

of the Dublin Regulation in 2012 and during the "refugee crisis" are based on very similar proposals.

Despite these early intergovernmental policies, responsibility-sharing remained a core issue throughout the 1990s. When first debating the idea of a CEAS, the very idea underlying it was to ensure responsibility-sharing (Suhrke 1998: 412; Thielemann 2010: 88–89; Vink 2010: 45). Germany was particularly keen to communitarise action in the area with the aim of reducing the number of asylum-seekers in Germany (Henson/Malhan 1995: 139), as the following section shows.

From Maastricht to Amsterdam and Beyond

European co-operation in the area of asylum goes back to the 1970s and intensified from the mid-1980s onwards. According to the 1985 White Paper of the Commission on the completion of the internal market, the first steps to harmonise asylum law across the European Community should have been put in place by 1988 (Commission of the European Communities 1985: 15). At that time, co-operation, however, remained purely intergovernmental. Art. 28–38 of the Schengen Implementing Convention of June 1990 (EU 1990) laid down that states party to it were to coordinate their asylum policies and develop common criteria for the assessment of asylum applications. For instance, it established the one-chance-only principle according to which asylum-seekers could only apply to one Member State and repeat applications would not be considered. The Dublin Convention was signed at the same time but only entered into force in September 1997. It established the same criteria for states that wished to co-operate in the field but were not Schengen members. The London Resolutions of November and December 1992 aimed at further harmonising asylum policies by establishing criteria for manifestly unfounded applications (Council 1992a), a shared understanding of the notion of "host third countries" (Council 1992b) and conclusions on countries in which there was generally no serious risk of persecution (Council 1992c).

The 1992 Maastricht Treaty was the first European treaty to establish that asylum policies could be dealt with by the European Community.

Maastricht, however, did not accomplish the communitarisation of asylum policies. Instead, asylum policies were dealt with in the third, intergovernmental pillar alongside other issues of JHA (see art. K.1. to K.9; see EU 1992). While Germany had again supported full communitarisation of the issue area and qualified majority vote in the Council, the UK was not willing to take this step (Henson/Malhan 1995: 139). Thus, asylum policies were still dealt with intergovernmentally after Maastricht. The post-Maastricht structure did not entail any major policy-changes and was rather unsatisfying for Member States which still felt the need to foster responsibility-sharing. In 1995, for instance, a joint action on conditions for reception of asylum-seekers was discussed, but eventually the Council was not able to agree on the text (Peers/Rogers 2006: 299). Later, the Council agreed on a resolution on minimum guarantees for asylum procedures (Council 1996a) as well as a resolution that related to unaccompanied minors and that again contained specific provisions on asylum procedures (Council 1997). While these instruments were precursors of the asylum directives, intergovernmental co-operation failed in effectively regulating asylum policies due to uncertainties about the legal status of agreements. The unclear legal status made it difficult to ensure responsibility-sharing and to override the prisoners' dilemma which derived from the fact that regulatory competition was more attractive to Member States at a first glance (Noll 2003). Thus, countries unilaterally downgraded their standards to encourage asylum-seekers to seek protection elsewhere instead (Barbou des Places 2003). With increasing numbers of asylum applications, this approach, led to a race to the bottom, which led Member States to constantly lower their protection standards to respond to policy-changes in their neighbouring countries. Given the negative consequences that downward regulatory competition had, Member States agreed to deal with the issue in a communitarised context (Stetter 2000: 83–84). The memoranda of Sweden as well as Belgium, the Netherlands and Luxembourg (Benelux) in 1999 and 2000, asking for stronger and binding EU law in the area clearly support this interpretation. As Vink (2005: 103) notes: "This interest in greater European involvement in domestic asylum policies derives predominantly from the desire to achieve a more proportional distribution of asylum-seekers in Europe."

When the Amsterdam Treaty was negotiated, Germany stopped being a strong promoter of qualified majority voting in the Council. Due to

criticism by the *Länder* which were empowered through the principle of subsidiarity anchored in the Maastricht Treaty, Germany instead turned into one of its core blockers. In Germany, the *Länder* are responsible for the accommodation of asylum-seekers and hence bear an important share of the costs. Since numbers of asylum applicants were on the decline at the time (104,4355 applicants in 1997 as compared to 438,190 in 1992, see 2009/14863 ADD 4: 13), "the *Länder* were unwilling to dilute national sovereignty to an extent that could enable European decision[-]makers to reverse that trend" (Hellmann et al. 2005: 151–153). Therefore, qualified majority voting in the Council was not introduced with the Amsterdam Treaty, but made conditional on a positive decision from the Council five years later (art. 67II Treaty of Amsterdam, see EU 1997). Additionally, the Commission shared its right to initiate policies with the Member States, the EP was only consulted (art. 67I) and only tribunals with no judicial remedy under national law were able to request a preliminary ruling from the CJEU (art. 68). This provides evidence for the bargaining success of strong regulator Germany.

After five years, the Treaty foresaw a special form of treaty revision according to which the Council decided unanimously on the introduction of the "normal procedure" including qualified majority voting in the Council and full competitions for the EU institutions (art. 67II in combination with art. 251). The normal procedure was eventually introduced after the adoption of the APD in 2005. This was later than the initial deadline of 1 May 2004, the day of the accession of ten new Member States. Yet, again during the negotiations on the Constitutional Treaty Germany acted as the main blocker of full communitarisation (Brabandt 2011: 175; Deutscher Bundestag 2003a: 6036). An unlikely coalition consisting of Convention members Joschka Fischer (foreign minister, Green party), Erwin Teufel (prime minister of the Baden-Württemberg state representing the Bundesrat, *Christlich Demokratische Union Deutschlands*, CDU) and Jürgen Meyer (*Sozialdemokratische Partei Deutschlands*, SPD, representing the *Bundestag*), backed by Chancellor Gerhard Schröder and the German *Länder*, wrote a joint letter to Convention President Valéry Giscard d'Estaing, arguing in favour of maintaining a national veto on questions of immigration and asylum. They feared that qualified majority voting on the issue could lead to a high influx of asylum-seekers which

would have a detrimental impact on the labour market, as had been suggested earlier by the head of the state of Bavaria, Edmund Stoiber (Financial Times Deutschland 16 June 2003; EU Observer 16 June 2003).

The UK, which had been a major blocker of full communitarisation at the time of the Maastricht Treaty, had by then become a fervent proponent of communitarisation and particularly qualified majority vote in the Council. In 2002, the UK had experienced a peak in asylum applications (103,808 as compared to 71,365 in 2001, see Council 2009/14863 ADD 4: 13). Like Germany before, it considered harmonisation of asylum policies as an effective way of responsibility-sharing, hoping that higher standards in other EU Member States would make the UK less attractive. Interestingly, UK officials at the time considered UK policies much more liberal than those of other Member States, sometimes overestimating the actual openness of the UK asylum system (Interview Williams). Thus, they wanted rapid actions to be taken at the EU level. As Fella (2006: 14) notes:

> The belief within the [UK] government appeared to be that by adopting decisions in this area by QMV, it had a better chance of ensuring that a common policy was established which could ensure that its fellow [M]ember [S]tates could take a greater share of asylum-seekers and take back those that had passed through their territories, given the perception that the UK was receiving a disproportionally high number.

Eventually, Germany and the UK agreed on a package deal and the Constitutional Treaty suggested that asylum policies would become fully communitarised, as proposed by the UK, while other questions of immigration, especially that relating to labour immigration, were still decided under unanimity rules in the Council, as suggested by Germany (Hellmann et al. 2005: 154). While the Constitutional Treaty eventually did not pass due to negative referenda in France and the Netherlands, asylum policies were fully communitarised in 2005. Labour migration, on the other hand, was still negotiated in a hybrid institutional setting until the Lisbon Treaty.

Content-wise the Amsterdam Treaty set the goal of having common standards in the area of asylum policies (art. 61b) and the gradual installation of a CEAS. As a first step, it agreed that common minimum

standards should be introduced. As a second step, the CEAS was committed to installing equal standards across Europe and full harmonisation of protection standards. The post-Amsterdam phase only aimed at introducing minimum standards. According to art. 63I, legislation should encompass the following areas: (a) criteria and mechanisms for determining which Member State was responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; (b) minimum standards on the reception of asylum-seekers in Member States; (c) minimum standards with respect to the qualification of nationals of third countries as refugees and (d) minimum standards on procedures in Member States for granting or withdrawing refugee status. Whereas (a) bound states to the Dublin Regulation, (b) to (d) were transformed into slightly weaker instruments, namely directives, which left Member States with some discretion as to their implementation. (b) was transposed with the RCD, (c) resulted in the QD and (d) became the basis for the APD. These three directives are the focus of this study.

Framing the CEAS: Policy Harmonisation as a Means of Responsibility-Sharing

As I have demonstrated in the previous sections, responsibility-sharing had been the key motivation for some Member States to foster communitarisation of asylum policies. According to Thielemann and Dewan (2006), responsibility-sharing eventually was ensured in three different ways, including the sharing of money (financial compensation for Member States receiving disproportionate numbers of applicants), the sharing of people (redistribution mechanisms for asylum-seekers) and the sharing of policies (harmonisation of asylum standards).

First, concerning the sharing of money, the EU introduced the European Refugee Fund (ERF) in 2004 which compensated those Member States receiving the highest numbers (in total) of asylum-seekers. The fund was renewed in 2007. From January 2005 to December 2006, the ERF comprised 114 million Euros (art. 2I of 2004/904/EC; see Council 2004a), and from 2008 to 2013, it comprised 628 million Euros (art. 12I of

573/2007/EC; see Council 2007). For the period of 2014–2020, the ERF has been replaced by an Asylum, Migration and Integration Fund of 3.137 billion Euros that aims to promote efficient migration management and implementation of EU immigration policy more generally (European Commission 2016).

Second, the Dublin Regulation (Regulation 2003/343/EC; see Council 2003a), the successor of the Dublin Convention and therefore often referred to as Dublin II (later replaced by the Dublin III Regulation), was established to ensure the physical relocation of asylum-seekers. The Dublin Regulation established a number of criteria for determining the Member State responsible for examining an asylum application. Most of them had already been part of the Dublin Convention (see European Communities 1997): For instance, applications from minors should be processed where they have family (art. 6–8) and applications of people holding a residence permit or a visa issued by a Member State should be dealt with by this Member State (art. 9). The perhaps most controversial dispersal mechanism is the rule enshrined in art. 10, which is subordinated to those mentioned before, and according to which the country of first entry is responsible for an asylum application. Here again, the idea is to "punish" those Member States responsible for the asylum-seeker's entry by not sufficiently securing the external EU border. During the 1990s, strong regulators had already criticised a lack of border enforcement among the weak regulators in Southern Europe (see Finotelli 2009: 886–887). The Dublin Regulation was not only introduced to impose border enforcement in the South, but also in the Member States that acceded the EU in 2004 (Byrne/Noll/Vedsted-Hansen 2004: 367–372). To ensure a rigorous application of the Dublin regime, Member States agreed on introducing a fingerprint data base, Eurodac (Council Regulation No. 2725/2000; see Council 2000). On first apprehension in Europe, third country nationals without a visa—which accounts for most asylum-seekers—would have to submit their fingerprints. These fingerprints would be introduced into a computer system. Member States where the third country national was later apprehended would again take this person's fingerprint, introduce them into the system and thus be able to track the person's travel route throughout Europe and find the state responsible for the application in line with Dublin II. However,

the functionality of Eurodac again was conditional on the willingness of countries of first entry to take the finger prints of applicants. Arguably, border countries have no incentives to do so, as this would incur further costs upon them and forces them to take back asylum-seekers that already have travelled further North-West.

This study is dedicated to the "sharing of policy through harmonisation." The underlying idea of this approach is that harmonisation of asylum policies contains a redistributive element because an improvement in protection standards in one country makes this country more attractive to asylum-seekers as compared to the other countries. Member States in North-Western Europe, particularly Germany, Sweden and the Netherlands (see Vink 2010: 45), but also the UK (Interview Williams), perceived harmonisation as a means to raise protection standards in other Member States, especially in Southern Europe, in order to even out differences as regards attractiveness. At the same time, many strong regulators perceived themselves as being more generous than their neighbours, which was not necessarily a perception based on facts. Yet, due to this perception they understood EU minimum harmonisation as a means to raise standards in other Member States, where standards were presumed to be lower than theirs (Interview PermRep_Anon 1; Interview Williams). Moreover, the drivers of EU harmonisation wanted EU asylum *acquis* to pass before the accession of the ten new Member States in 2004. This was a core reason to set 2005 as the deadline for the first phase of the CEAS. According to Schuster (2000: 129), "[h]armonisation is seen particularly by Germany and Sweden as a means to ensure responsibility-sharing – a 'fairer' distribution of asylum-seekers around Europe, or at least a fairer sharing of the financial burden." This is supported by the fact that as early as 1991, the European Commission called for an approximation of reception conditions with the aim of "prevent[ing] any diversion of the flow of asylum-seekers towards the Member State with the most generous arrangements" (Commission of the European Communities 1991: 7). Sometimes, harmonisation was even framed as a compensatory mechanism for Dublin to ensure that applicants who could no longer decide where to apply for asylum, actually be granted comparable rights and benefits in all Member States (e.g., Commission of the European Communities 2008a: 7). This framing clearly accommodated the interests

of the strong regulators in the North-West but probably not those of the weak regulators in Southern European (or Eastern) Member States.

In a nutshell, the idea of harmonisation was characterised by an imposition of the North-Western regulatory model(s). While the North–South divide is evident in a number of policy areas (see Börzel 2003; Eichener 1992; Héritier 1997), it is particularly obvious in the area of asylum and immigration policies. Whereas Northern European states became countries of immigration in the 1950s/1960s, immigration to Southern Europe only dates back to the 1980s. At a time when immigration to Northern Europe was only possible as an asylum-seeker, Southern Europe still had a demand for unskilled labour migrants, who mainly stayed in the country irregularly and were from time to time regularised. As Finotelli (2009) rightly notes, asylum-seekers in Northern Europe and irregular immigrants in Southern Europe are very often the same groups of people and they only differ with regard to the type of status they receive or that is denied to them, based on the prevailing regulatory systems. Hence, people who become asylum-seekers in the North are simply labelled "illegal immigrants" or "clandestine immigrants" in the South.

The International Refugee Regime and the Three Directives Under Investigation

EU legislation did not develop in a legal vacuum. In fact, refugee protection is ruled by international law like no other aspect of immigration (see Roos/Zaun 2014). The most important instruments are the CRSR, the International Covenant on Civil and Political Rights (ICCPR; UN 1966) and the Convention against Torture (CAT; UN 1984). But also the Convention on the Rights of the Child (CRC) and the ECHR are important international treaties decision-makers had to take into account when negotiating legislation in the area. The ECHR is a particularly strong tool for the protection of asylum-seekers, as the European Court of Human Rights (ECtHR) is the only court worldwide that can enforce the human rights of asylum-seekers enshrined in international law (Ibid.: 52).

These legal instruments have important pre-structuring functions. If states have bound themselves through international treaties to provide specific rights, they have to comply with these commitments when designing European law. Yet, oftentimes legal norms laid down in international treaties are contested or contain "regulatory gaps" themselves (Héritier 2014). This is quite common, as any legal norm needs to be general enough to be applicable to a larger set of cases with different characteristics. Moreover, at the time these legal instruments were passed, some future areas of their application might not have been foreseen. While the rights of recognised refugees and the grounds for qualification laid down in international refugee law are in large parts recognised by EU Member States, the question to what extent these rights have to be applied to asylum-seekers or to beneficiaries of alternative forms of international protection is much more contested. Moreover, international refugee law remains relatively silent on what a fair asylum procedure looks like. The different degree of formalisation and "robustness" of norms on the international level can account for differences within debates and variance in how issues were contested. While no Member State in principle questioned the CSRS's assertion that somebody persecuted because of their "race, religion, nationality or belonging to a certain social group" (art. 1AII) should qualify for refugee status, the issue of whether non-state actors can also be persecutors or the question of which criteria a personal interview with an applicant should fulfil were contested (Roos/Zaun 2014: 51–56). Different degrees of pre-structuring through international human rights law can also account for different degrees of contestedness of entire legal instruments. The absence of international human rights law on asylum procedures and the very divergent practices among EU Member States can hence explain why the APD was most contested both in the first and the second phase of the CEAS. The QD deals with the status and the content of refugee protection and is more than any other directive pre-structured through international law and particularly the CRSR. The RCD which deals with rights of asylum-seekers during the application phase takes a middle-ground position, as parts of it were regulated by the Refugee Convention and other international human rights treaties. A core reason for the fact that parts of the CRSR are also applied to

asylum-seekers is that asylum-seekers potentially are refugees and hence need to be treated adequately during the determination procedure.

The Modest Regulation of Rights for Asylum-Seekers in International Human Rights Law

Council Directive 2003/9/EC on Reception Conditions (Council 2003b) lays down minimum standards for the reception of asylum-seekers with regards to material (social) and basic rights. Denmark and Ireland opted out of this directive, while the UK has opted in (preambular clauses 19–21). The most contested issues of this directive were freedom of movement, access to work, material reception conditions and the withdrawal of reception conditions. On these issues, the directive lays down the following: Freedom of movement can be restricted and Member States are allowed to decide on the residence of an asylum-seeker for "reasons of public interest, public order, or, when necessary, for the swift processing and effective monitoring of his or her application" (art. 7II). Access to work has to be granted to applicants whose case has not been decided one year after the application had been made, under conditions to be determined by the individual Member State. Member States can for instance give priority to nationals and EU citizens or restrict labour market access, depending on the labour market situation (art. 11). On material reception (art. 13–15), conditions such as housing, living allowances, health care and a large variety of exceptions were introduced. For instance, Member States can decide whether they would provide reception conditions in kind, through vouchers or by giving applicants an allowance. However, the directive clearly stated that material reception conditions needed to be provided. An issue that proved particularly controversial was the rule suggesting that reception conditions could be withdrawn when an asylum-seeker did not make his or her claim as early as possible (art. 16II).

International human rights law remains relatively silent on the issue of reception conditions for asylum-seekers. Yet, states party to the CRSR are not completely free to treat asylum-seekers as they please. In fact, international law is ignorant of the notion of asylum-seekers, a term that has been

introduced by states. The UNHCR Handbook (UNHCR 2011a) specifies that people become refugees as soon as they *de facto* fulfil the criteria for refugee status. This can be before their status is formally determined by a state. Hence, "[r]ecognition does not […] make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee" (paragraph 28). Accordingly, international law experts agree that asylum-seekers need to be provided with at least some rights enshrined in the CRSR, especially those that are "subject to a state's jurisdiction," "simply present" and "lawfully present" (Goodwin-Gill/McAdam 2007: 524–528; Hathaway 2003, 2005: 154–192).

In the absence of strong international human rights law in the area, the overarching aim of the RCD is twofold. According to preambular clause 7, the minimum standards should "suffice to ensure them [the applicants] a dignified standard of living and comparable living conditions in all Member States." Moreover, "[t]he harmonisation of conditions for the reception of asylum-seekers should help to limit the secondary movements of asylum-seekers influenced by the variety of conditions for their reception" (preambular clause 8). Member States had always perceived reception conditions to be an important way to tackle secondary movements, since differences in Member States' welfare system and generosity concerning access to the labour market have been considered important pull factors (Interview PermRep_DE). Having equivalent standards as regards material reception conditions is hence highly important. While in 1995 a joint action on conditions for reception of asylum-seekers had been proposed, the Council was not able to agree on the text. According to Peers and Rogers (2006: 299), "[…] in complying with the Tampere agenda, the obvious disadvantage from any drafter's perspective would be that a baseline had never been agreed by the Member States." When the negotiations on the directive started in 2001, the legal framework and the administrative practices concerning reception conditions hence differed widely across Member States (Ibid.: 300; PLS Ramboll 2001). A cover note (Council 2001/11347: 2) which UNHCR wrote for the Council concerning a study it had conducted on reception conditions in Europe, provided proof of this diversity:

> At present, the reception conditions of asylum-seekers in the EU Member States vary significantly from country to country. Even with regard to basic

> necessities of life, such as a means of subsistence, housing and health care, State practice varies considerably. Some States provide subsistence to all asylum-seekers, others only to those residing in a reception centre and still others provide no assistance at all until the asylum-seeker is admitted to the substantive procedure. Many countries have centralised reception facilities with adequate capacity, but there are also countries where many asylum-seekers do not benefit from any State housing. In some countries, asylum-seekers have access to all basic health care services and psychological care on equal footing with nationals, while in many others access is limited to emergency health care only.

Broadly speaking, two approaches towards reception conditions can be distinguished. On the one hand, welfare states usually provided at least some kind of reception conditions, although generosity again differed with Scandinavian Member States being generally more generous than corporatist/continental or liberal welfare states in the EU. Southern European Member States on the contrary provided little to no welfare benefits for nationals (other than pensioners or people with disabilities) and hence rarely provide social benefits to asylum-seekers (cf. Sainsbury 2006, 2012). Most of these latter countries did not have sufficient reception facilities either. Reception conditions in these states were mainly provided by NGOs, if they were provided at all (see European Migration Network, EMN 2006: 7). Therefore, it can be questioned whether they actually had working reception systems at all (Baldwin-Edwards 1991: 203; Bouteillet-Paquet 2002b: 221). At the same time, the Southern European Member States had not yet received high numbers of asylum-seekers and only started receiving irregular migrants in the 1980s. These people worked in the informal sector and did not claim asylum even if they came to Europe fleeing persecution. Thus, insufficient reception facilities for asylum-seekers were for a long time less of an issue than in Northern Europe, where asylum was the only viable pathway of immigration and subject to strict state control. Yet, as growing numbers of asylum applications began to be submitted in some Southern European Member States as a consequence of the Dublin system, problems deriving from insufficient facilities became increasingly salient (see EP 2006; Schweizerische Flüchtlingshilfe/Juss-Buss 2011).

Status and Rights of Refugees: Two Areas Strongly Regulated by International Refugee Law

Council Directive 2004/83/EC lays down "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" (Council 2004b). The UK and Ireland have opted in to this directive, while Denmark has opted out (preambular clauses 38–40).

There were a variety of contested issues in this directive. First, the directive states that not only victims of state persecution but also victims of non-state persecution (art. 6b) shall be recognised as refugees or beneficiaries of subsidiary protection. During the negotiations on the 1996 Joint Position (Council 1996b), Member States had not been able to agree to recognise victims of non-state persecution. Moreover, the directive establishes a new (European) subsidiary protection status for claimants who are found not to be refugees but who are otherwise in need of international protection (art. 15–19) and thus is a first attempt to also harmonise the variety of alternative protection statuses provided in the EU. Third, the directive uses two restrictive principles, namely non-state actors of protection and the Internal Protection/Flight Alternative (IPA). According to the idea of non-state actors of protection (art. 7Ib), applications can be rejected if in an asylum-seeker's home country a non-state actor provides protection. Most Member States *de facto* did not recognise NGOs as non-state actors that could provide protection, but International Governmental Organisations such as the UNHCR or other United Nations (UN) bodies, were recognised (Hailbronner/Alt 2010: 1050). According to the IPA, refugee status can be refused if applicants could have availed themselves of protection in another area of their home country (art. 8I). Fourth, while refugees are entitled to a residence permit of at least three years (art. 24I sentence 1) as well as a access to work (art. 26I) and social benefits (art. 28I), beneficiaries of subsidiary protection have residence permits for only one year (art. 24II) and more limited access to work (art. 26III) and social benefits (art. 28II). Family unity shall be maintained (art. 23I). The family definition of the directive is a rather conservative one and mainly considers the spouse and minor

children as family. However, a liberal element was introduced, suggesting that Member States should also consider non-marital partners as family if they do so generally under national alien law (art. 2h).

More than any of the other directives, the QD is heavily influenced by international human rights law. In fact, most of the protection standards laid down in this directive can be found in international treaties and/or ECtHR case law. Where there was only case law on a certain issue, the QD can be considered a codification of this case law. This is not only true for ECtHR case law; the QD also codified Member States' case law establishing the norm of protection with regard to non-state persecution. Yet, aspects which were not specifically regulated by international human rights law were particularly contested due to differing state practice. This is particularly true for subsidiary protection, a status which is not previously recognised in international law and which is based on pertinent state practice and case law (Hailbronner 2010: 1138).

Asylum Procedures as a Purely Domestic Area of Regulation

Council Directive 2005/85/EC establishes minimum standards for procedures in Member States for granting and withdrawing refugee status (Council 2005). Denmark opted out of this directive (recital 34), while the UK and Ireland opted into it (preambular clauses 32 and 33).

International refugee law provides almost no standards on asylum procedures. The CRSR neither contains any detail about what a fair asylum procedure should look like. In fact, as the UNHCR Handbook (UNHCR 2011a) holds under paragraph 189,

> [i]t is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, that is the determination of refugee status, although mentioned in the 1951 Convention (see Article 9), is not specifically regulated. In particular, the Convention does not indicate what type [sic] of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.

Subsequently, the Handbook identifies a number of "essential guarantees" which are, however, of a rather general nature. These assert that: (1) a competent official who is aware of the international human rights obligations of the state should deal with the issue, (2) there must be provision for the necessary guidance for the applicant, (3) a clearly defined authority should take the first instance decision, (4) provision of the facilities for asylum-seekers to submit their case should be provided, (5) information and documentation should be provided in cases where the applicant is recognised, (6) there should be a reasonable time to appeal in case of rejection, (7) and there should be a right to remain on the territory while awaiting a first instance decision if the request has not been fraudulent, as well as a right to remain during the appeal. These are general principles for a fair procedure rather than clear and robust norms (Roos/Zaun 2014: 55–56).

This chapter has presented the historical and legal setting in which the EU asylum directives under investigation were decided. The situation at the time was very similar to the situation we have today: strong regulating Member States were facing a high inflow of forced migrants, coming at that time from the Balkans. To minimise their share of asylum-seekers, these Member States wanted to foster European co-operation, including the alignment of asylum standards across Europe. This harmonisation of standards was supposed to make all Member States equally attractive to asylum-seekers and ensure a more even distribution of asylum-seekers. In Chap. 4, I will show systematically that the three directives neither were based on a lowest common denominator decision nor resulted in a race to the bottom.

4

EU Asylum Policies: A Case of Lowest Standard and Race to the Bottom Dynamics?

This chapter systematically investigates whether EU asylum policies represented the lowest standard of the Member States and whether EU asylum policies entailed a race to the bottom in protection standards across Europe. Following the theoretical model advanced here, one would expect that EU asylum policies do not represent the lowest standard of all Member States, but the lowest standard among the strong regulators. Where the lowest standard of all Member States is provided by a weak regulator, this should not be reflected in EU law. In the next section, Iwill systematically assess which Member States' standards appeared most similar to those laid down in the three directives. Subsequently, I will investigate whether Member States changed their policies after the directives were adopted or whether they maintained their *status quo ante*. The venue-shopping theory would expect states to change their policies, but the theoretical model I advance instead suggests that states will maintain the *status quo ante*. Strong regulators should be able to maintain their policies, as they had uploaded their *status quo ante* to the EU level. Weak regulators are expected to maintain their *status quo ante* due to either calculated non-implementation or their low levels of government effectiveness and the substantial degree

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of misfit which overburdens the already ineffective administrations of these countries. In the third section, I will summarise the key findings of this chapter.

The Lowest Standard of the Strong Regulators

A systematic comparison of the standard in the directive and the *status quo ante* policies of Member States shows that EU asylum standards do not represent the lowest standard of all Member States but the lowest standard of the strong regulators. Sometimes this low standard is shared by a weak regulator, but a lowest standard previously only in place in a weak regulator states has never been adopted. A closer look at Tables 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10 and 4.11 shows that this finding is consistent across all three directives. Medium regulators' lowest standards were sometimes reflected in EU law, but not always. This finding is striking, as it means that medium and weak regulators have not used their veto but accepted the adoption of standards higher than those they had previously in place.

Arguing that the standard adopted represents the lowest standard among the strong regulators is not the same as saying that states adopted the lowest common denominator of the strong regulators. Conceptually, the lowest common denominator refers to the position of Member States during the negotiations or the standards suggested by the Member State with the most restrictive position, whereas the lowest standard among Member States only refers to their *status quo ante* policies. Following the venue-shopping theory, one could expect that Member States advance a standard which is even more restrictive than their *status quo ante*. Thus, from an analytical perspective it is important to distinguish the lowest standard among Member States from their lowest common denominator. Only if Member States advance the same policies that they have in place domestically, as suggested by the Misfit Model, do the lowest common denominator and the lowest standard among Member States match. To find out whether this occurred, it is necessary to compare *status quo ante* policies with the positions advanced during the negotiations. In Chap. 5, I will show that indeed the positions advanced by Member

States in the vast majority of cases followed their *status quo ante* policies. A standard lower than the policies in place in the most restrictive Member State was never advanced.

Table 4.1 shows that out of the 18 policy issues presented in Tables 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10 and 4.11, 12 issues represent the lowest *status quo ante* standard among Member States. Yet, on some of these issues, namely the safe third country concept, the safe country of origin concept and the internal protection alternative, I find a strong degree of harmonisation already prior to the directives. Six issues clearly exceed the lowest standard available among EU Member States. Therefore, while there are more lowest common denominator standards than upgrades, one cannot conclude that the directives follow a strict lowest common denominator dynamic.

Now I will compare the *status quo ante* of Member States with the legislative output on the core issues of the directives (to be found in ital-

Table 4.1 The Lowest Standard Available? Assessment of Core Issues (Source: Own Depiction)

Issue	Lowest standard available (yes = 1, no = 0)
Access to work (RCD)	0
Access to material reception conditions (RCD)	0
Freedom of movement (RCD)	1
Withdrawal of reception conditions (RCD)	1
Non-state protection (QD)	1
Non-state persecution (QD)	0
Internal protection alternative (QD)	1
Residence permit (refugees) (QD)	0
Residence permit (beneficiaries of subsidiary protection) (QD)	1
Family definition (QD)	1
Access to work (subsidiary protection status; QD)	1
Access to social benefits (subsidiary protection status; QD)	1
Subsidiary protection status (QD)	0
Free legal aid (APD)	0
Personal interview (APD)	1
Suspensive effect of appeals (APD)	1
Safe third country concept (APD)	1
Safe country of origin concept (APD)	1

ics on the upper part of the tables) which I identified in Chap. 3. Thus, I will show systematically for each directive first, whether the standard provided by the directive represents the lowest standard present among the strong regulators and, second, whether the standard exceeds the *status quo ante* protection standard of the weak regulators.

The Reception Conditions Directive

Out of the four core provisions of the RCD (Council 2003b) investigated in this study, two provisions clearly exceed the standard of the most restrictive Member States (see Table 4.1). These are access to the labour market and the provision related to material reception conditions. On freedom of movement and the withdrawal of reception conditions for late applications, the standard adopted is both the lowest standard of all Member States and the lowest standard among the strong regulators.

The standard on access to the labour market (art. 11) in Table 4.2 was the same as already in place in Germany, a strong regulator. France, another strong regulator, had also planned to introduce similar rules. Other strong regulators, such as Sweden and the Netherlands, provided for earlier labour market access. Yet, the standard adopted in the directive exceeds the standard provided by weak regulator Italy and medium regulators Austria and Luxembourg, which had banned asylum-seekers from their labour markets. While the UK had also introduced a labour market ban for asylum-seekers in 2002, I will show in Chap. 6 that this labour market ban was rather a reaction to crisis events and out of line with the UK's overall regulatory tradition of having an open labour market but restricting access to social benefits (see Sainsbury 2006: 231–234).

The amount and accessibility of material reception conditions varied significantly among Member States. Nevertheless, some form of access to material reception conditions had been provided by all Member States with the exception of the weak regulators Greece and Italy, as Table 4.2 indicates. The standard on access to material reception conditions represents the lowest standard among the strong regulators, as all their exceptions

Table 4.2 Reception Conditions Directive: Access to Work and Access to Material Reception Conditions (Before Transposition)

	Access to work: provided after one year	Access to material reception conditions: provided
	Before transposition[1]	Before transposition[2]
Austria	No access	Yes
Belgium	After AP[3] exhaustion	Yes
Finland	After three months	Yes
France	Only under exceptional circumstances[4]	Yes
Germany	After one year[5]	Yes
Greece	Immediate access[6]	No[7]
Italy	No access	No[8]
Luxembourg	No access	Yes
Netherlands	After six months	Yes
Portugal	After AP exhaustion	Yes
Spain	After six months	Yes
Sweden	After four months	Yes
UK	No access[9]	Yes

Notes

[1]Sources: Council (2002/5430: 3); also see for AT: Bank (2000: 273); FR: PLS Ramboll-FR (2001: 24); for Germany: PLS Ramboll-DE (2001: 36–37); EL: PLS Ramboll-EL (2001: 26); UK: PLS Ramboll-UK (2001: 25).

[2]Sources: PLS Ramboll-AT (2001: 21–22, 24–25); PLS Ramboll-BE (2001: 19–20, 22–23); PLS Ramboll-FI (2001:23–24;27–28); PLS Ramboll-DE (2001: 30–32, 38); PLS Ramboll_EL (2001: 24, 27–30); PLS Ramboll-IT (2001: 18–19); PLS Ramboll-LU (2001: 14–16); PLS Ramboll-NL (2001: 17–19, 22–23); PLS Ramboll-PT (2001: 20–22, 24–25); PLS Ramboll-ES (2001: 20–21, 23–24); PLS Ramboll_SE (2001: 18–19, 21–22); PLS Ramboll-UK (2001: 21–22, 25–26).

[3]Admissibility procedure.

[4]This was due to change to one year in 2000.

[5]Before a resolution (Bundesminister für Arbeit und Sozialordnung 2000) was passed in December 2000, access to the labour market was denied. Access to the labour market after one year, however, was not yet enshrined in law (Flüchtlingsrat Thüringen e.V. 2001).

[6]Access to work is granted once the applicant holds a valid asylum-seeker card. In practice, "[t]his can sometimes take more than a year" (Odysseus 2006: 35).

[7]Only access to health care is granted to asylum-seekers holding a valid asylum-seeker card.

[8]While the admissibility procedure lasts up to 12 months, Financial assistance is provided for less than two months. Moreover, health care is provided only under exceptional circumstances.

[9]Access to the labour market was provided after six months before 2002.

are accommodated under the directive, while Italy's and Greece's standard of "no material reception conditions at all" is not reflected in the directive. Instead, art. 13 RCD holds that "Member States shall ensure that material reception conditions are available to applicants" (art. 13I)

and that material reception conditions should "ensure a standard of living adequate for the health of applicants" (paragraph 2). Thus, clearly Greece and Italy agreed to a standard in the directive that exceeds their own *status quo ante*. In fact, the standard laid down in the directive even exceeds the standard suggested by the CRSR which only requires states to bestow the same treatment on refugees as nationals regarding access to social benefits and housing. Italy and Greece only provided social benefits to nationals in exceptional cases (e.g., in case of old age, disability, etc.; see Interview Caritas Europa; Interview Williams; Ramboll-EL 2001: 34) and thus would now have to treat asylum-seekers more favourably in this regard.

At the same time, the provision remains very general and accommodates all the restrictive practices of high regulators. Material reception conditions may, for instance, be provided in kind, in the form of financial allowances or vouchers (paragraph 5). The practice of providing material reception conditions in kind or through vouchers is often criticised by NGOs. Vouchers restrict asylum-seekers' choice to buy the items they need and are considered stigmatising (Refugee Council et al. 2006). Countries that provided material reception conditions in kind or in vouchers include Germany (PLS Ramboll-DE 2001: 30–31) and the UK. Other countries, such as Belgium, provided relatively generous financial allowances. In Sweden there was no system of assistance in kind (Ramboll-SE 2001: 19). According to the directive, access to health care can be restricted to emergency health care and the essential treatment of illness (art. 15I). This reflected among others the practice of Germany, Austria and France (PLS Ramboll-AT 2001: 24–25; PLS Ramboll-DE 2001: 38; PLS Ramboll-FR 2001: 24). Yet, some Member States provided more generous access to health care. Countries such as Luxembourg (PLS Ramboll 2001: 16), the Netherlands (PLS Ramboll-NL 2001: 22), Sweden (PLS Ramboll-SE 2001: 21) and the UK (PLS Ramboll-UK 2001: 25) provided (almost) equivalent access to health care for asylum-seekers as that received by nationals. While some kind of housing was to be provided, the directive places no stipulations on the type of accommodation provided (art. 14). Practice varied from reception centres in Germany and Finland, a mixed approach of reception centres and private housing in Austria, France, Luxembourg and Belgium and practically no

housing in Greece and Italy. Portugal, Austria, France and Spain provided very limited housing (PLS Ramboll-AT 2001: 17; PLS Ramboll-BE 2001: 16; PLS Ramboll-DE 2001: 17; PLS Ramboll-EL 2001: 20–21; PLS Ramboll-ES 2001: 16; PLS Ramboll-FI 2001: 20; PLS Ramboll-FR 2001: 17; PLS Ramboll-IT 2001: 17; PLS Ramboll-LU 2001: 11; PLS Ramboll-PT 2001: 18). In sum, the directive accommodated all potential approaches to providing material reception conditions, while not questioning generally the obligation to provide reception conditions.

The restriction of freedom of movement introduced into the directive had only been in place in Germany (cf. Table 4.3). No other Member State restricted the freedom of movement for "the swift processing and effective monitory of […] an application" (art. 7II). The possibility of

Table 4.3 Reception Conditions Directive: Freedom of Movement and Withdrawal of Reception Conditions (Before Transposition)

	Freedom of movement: may be restricted	Withdrawal of reception conditions if application is late: yes
	Before transposition[1]	Before transposition[2]
Austria	Yes	No
Belgium	Yes	No
Finland	Yes	No
France	Yes	No
Germany	No[3,4]	No
Greece	Yes	No
Italy	Yes	No
Luxembourg	Yes	No
Netherlands	Yes	No
Portugal	Yes	No
Spain	Yes	No
Sweden	Yes	No
UK	Yes	Yes

Notes

[1]Sources: PLS Ramboll-AT (2001: 25–26); PLS Ramboll-BE (2001: 23–24); PLS Ramboll-FI (2001: 28–29); PLS Ramboll-FR (2001: 25); PLS Ramboll-DE (2001: 41); PLS Ramboll-EL (2001: 30–31); PLS Ramboll-IT (2001: 20) PLS Ramboll-LU (2001: 17); PLS Ramboll-NL (2001: 23); PLS Ramboll-PT (2001: 25–26); PLS Ramboll-ES (2001:24–25); PLS Ramboll-SE (2001: 22); PLS Ramboll (2001: 27).

[2]Sources: Interview Williams; Odysseus (2006: 51–52).

[3]While the German Residenzpflicht is an extremely restrictive practice applied to all asylum-seekers, Austria and Greece have only introduced specific restrictions.

[4]However, Ireland, the Netherlands, Sweden and the UK employ a dispersal mechanism, too (Schuster 2004: 13).

refusing reception conditions in cases where an asylum-seeker had failed to demonstrate the asylum claim was made "as soon as reasonably practicable" (art. 16II) after arrival, already existed in the UK, but in no other Member State. This, again, represents the most restrictive standard among the strong regulators (and the most restrictive standard among all Member States).

The Qualification Directive

As Table 4.1 illustrates, three of the core issues of the QD (Council 2004b) clearly exceed the lowest standard previously available among the EU Member States. These were the standards agreed upon relating to actors of persecution, the duration of residence permits and the introduction of a subsidiary protection status. The lowest standard of the strong regulators was adopted on non-state protection, the IPA, the family definition, residence permits for beneficiaries of subsidiary protection and rights attached to subsidiary protection status (i.e., access to work and social benefits).

As regards the restrictive concepts "IPA" and "non-state protection," Table 4.4 shows that there was already a high degree of convergence among Member States. The restrictive concept of non-state protection (art. 7) was previously recognised in Austria, Germany, (France), Ireland, Luxembourg and the UK. Germany was the country that had first introduced this notion in its asylum policy through case law (Hailbronner/Alt 2010: 1050). The IPA (art. 8) had previously been applied by all Member States with the exception of Ireland and Italy. While in both cases the adoption of these concepts represents the lowest standard available among EU Member States, it still reflects earlier practice of at least the vast majority of Member States rather than the standard of one single restrictive outlier.

Non-state persecution in art. 6 might be something of an exception in the entire directive, as two strong regulators, Germany and France followed a more restrictive practice and did not provide any protection status for victims of non-state persecution prior to the directive. Moreover, they had blocked the recognition of non-state actors as persecutors in the

Table 4.4 Qualification Directive: Non-State Protection, Non-State Persecution and the Internal Protection Alternative (Before Transposition)

	Non-state protection: recognised	Non-state persecution: protection view	Internal protection alternative: applied
	Before transposition[1]	Before transposition[2]	Before transposition[3]
Austria	Recognised	PV[4]	Applied
Belgium	Not recognised	PV	Applied
Finland	No evidence	PV	Applied
France[5]	Recognised	PV	Applied
Germany	Recognised	AV	Applied
Greece	Not recognised	PV	Applied
Ireland	Recognised	PV	Not applied
Italy	Not recognised	AV/PV	Not applied
Luxembourg	Recognised	PV	Applied
Netherlands	Not recognised	PV	Applied
Portugal	Not recognised	PV	Applied[6]
Spain	Not recognised[7]	PV	Applied
Sweden	Not recognised	PV	Applied
UK	Recognised	PV	Applied

Notes

[1]Sources: ECRE (2008: 16).

[2]Sources: UNHCR (1999: 9).

[3]Sources: AT: ECRE (2000: 16); BE: ECRE (2000: 21); FI: ECRE (2000: 30–31); FR: Chetail (2007: 87–88); DE: ECRE (2000: 33); EL: European Parliament (2000: 95); IE: European Parliament (2000: 102); IT: ECRE (2000b: 38); LU: ECRE (2000: 38); NL: ECRE (2000: 38); PT: ECRE (2000: 48); ES: ECRE (2000: 49); SE: ECRE (2000: 50); UK: ECRE (2000: 55).

[4]PV: protection view; AV: accountability view. According to the accountability view, the state needs to be the persecutory actor, the protection view focuses on the question of whether someone receives protection by a state. Thus, the accountability view only recognises victims of state persecution, while the protection view also recognises victims of non-state persecution (see Battjes 2006: 245).

[5]France changed its policies on all three issues in December 2003; this was arguably in anticipation of the qualification directive.

[6]Whereas the IPA concept "has not been applied by the Portuguese authorities per se […] [it] is sometimes applied to support a negative decision" (ECRE 2000: 48).

[7]According to Odysseus (2007b: 45), the provision has not been transposed at all (even not through prior case law). Thus, one can assume that the concept was not previously in use.

1996 Joint Position any previous EU document (Council 1996b). They had even resisted pressures by the UK to change this restrictive practice which led to many secondary movements to the UK (Bouteillet-Paquet 2002c: 80). As I will show in Chap. 6, EU legislation was not the primary reason for their decision to introduce protection for victims of non-

state persecution. Instead, the policy-change in Germany was based on changes of government in favour of a coalition of the Social Democrats (SPD) and the Green Party, which traditionally took a more liberal stance on immigration policies than the conservatives. French jurisdiction, on the other hand, had accepted most policy ideas related to the protection view (cf. Teitgen-Colly 2006) and thus only needed to make minor adjustments.

The duration of residence permits (Table 4.5) for refugees in art. 24I follows the restrictive practice of the Netherlands, another strong regulator. Some strong and medium regulators provided a more liberal standard previously: France provided residence permits for ten years and Austria, Belgium, Spain, Sweden and the UK provided them for an unlimited period. Finland, a medium regulator, followed a more restrictive practice and only provided residence permits for refugees for one year. Italy only provided residence permits for two years. Thus, the standard laid down in the directive exceeds the protection standards of Finland and Italy.[1] Residence permits for subsidiary protection holders, as laid down in art. 24II, are valid for one year, which represents the standard followed by the majority of Member States. Only the Netherlands, the UK and Portugal had aligned both statuses in terms of the duration of residence permits and hence provided residence permits of a longer duration for beneficiaries of subsidiary protection.

The family definition in art. 2h (Council 2004b) encompasses the spouse as well as minor, unmarried children. This basically reflects the minimum definition of the core family (see Chap. 3). Thus, refugees and beneficiaries of subsidiary protection only benefit from core family unification under the QD. According to Table 4.6, there seems to be a tendency among strong regulators in Northern Europe to recognise unmarried partners (both heterosexual and homosexual) in addition to the core family. Weak regulators in Southern Europe tend to recognise other depen-

[1] Assessing the degree of liberality and restrictiveness is difficult on this issue: A longer duration of a residence permit does not necessarily imply a higher standard. If after a short residence permit unlimited residence is granted, this gives refugees a much better perspective to stay in the country and start a new live there. Yet, for the logic of the decision-making process this does not matter. A Member State that initially provides a residence permit of a duration shorter than three years, agreeing on three years means would have to change its standard to be in line with the directive.

Table 4.5 Qualification Directive: Duration of Residence Permits (Before Transposition)

	Duration of residence permits…	
	…for refugees: limited to three years	…for those with subsidiary protection[1]: limited to one year
	Before transposition[2]	Before transposition[3]
Austria	Unlimited	Limited to one year
Belgium	Unlimited	Limited to one year; in principle unlimited
Finland	Limited to one year; unlimited after two years	Limited to one year; Unlimited after two years
France	Limited to ten years	Limited to one year
Germany	Unlimited after five years	Limited to two years; unlimited after eight years
Greece	Limited to five years	Limited to one year
Ireland	Unlimited	Limited to one year
Italy	Limited to two years	Limited to one year
Luxembourg	Limited to five years	No duration specified
Netherlands	Unlimited after three years	Unlimited after three years
Portugal	Limited to five years	Limited to five years
Spain	Unlimited	Limited to one year
Sweden	Unlimited	Unlimited
UK	Unlimited[4]	Limited to four years

Notes

[1]In this column, I present the *status quo ante* of protection comparable to subsidiary protection, as subsidiary protection was only introduced with the directives.

[2]Sources: Bouteillet-Paquet (2002b: 255); also see for DE: Ausländergesetz 1990, paragraph 27(3)3 (see Germany 1990); EL, IT and UK: Liebaut (2000: 124, 164, 303); for LU: European Parliament (2000: 116); for PT: Conselho Português para os Refugiados (1999).

[3]Sources: Bouteillet-Paquet (2002b: 255); also see for DE: Hailbronner (2002: 520–521); EL: PD 61/1999, art. 81 (see Greece 1999); for NL: Spijkerboer (2002: 678).

[4]Unlimited after four years before 1998.

dent family members such as parents of adult refugees. Interestingly, the option selected by many strong regulators, that is, family unification with unmarried partners, has been taken up by the directive as a suggestion. According to the directive unmarried partners should be considered as family "where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens" (art. 2h first sentence, Ibid.). The provision, however, remains completely silent on the status of other (dependent) family members who are usually protected in weak regulating stated. This

Table 4.6 Qualification Directive: Family Definition[1] (Before Transposition)

	Family definition[2]			
	Before transposition[3]			
	Spouse	Children	Parents	Others
Austria	Yes	Unmarried Minors	Of minors	No
Belgium	Yes	Minors	Of minors[4]	No
Finland	Yes	Minors	Of minors	Het.[5]/Hom.[6] partner; unmarried siblings of minors
France	Yes	Minors	Of minors	No[7]
Germany	Yes	Unmarried minors	Of minors	Heterosexual partner
Greece	Yes	Unmarried minors	Yes	No
Ireland	Yes	Minors; dependants under 21	Of unmarried minors	Dependent relatives on discretionary basis
Italy	Yes	Unmarried minors	Yes	Ill/disabled relatives (up to third degree)
Luxembourg	Yes	Minors	No[8]	No
Netherlands	Yes	Under 21	No[9]	Het./Hom. partner; dependent relatives in exceptional cases
Portugal	Yes	Under 21	Yes	Siblings; dependent relatives
Spain	Yes	Minors	Only if 65+ years of age	Heterosexual partner

Sweden	Yes	Unmarried minors	See "Others"	Het./Hom. partner; "Close Relatives" living in the same household
UK	Yes	Minors; dependent children	No[10]	Het./Hom. partner

Notes

[1]The family definition in the directive comprises the spouse of the beneficiary of refugee or subsidiary protection status or his and her unmarried partner from a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens. It includes the minor children of this couple or the beneficiary of protection on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under national law.

[2]It seems that the transposition reports assess criteria differently. Some distinguish between parents of minors and parents in general, others conflate the two categories. Moreover, some specifically assess which criteria parents and other family members have to fulfil (e.g., dependency).

[3]Sources: AT: ECRE (1999: 5–6); BE: ECRE (1999: 10–11); FI: ECRE (1999: 22–24); FR: ECRE (1999: 31–32); Code Civil L 314/11 al. 8; DE: ECRE (1999: 38–39); EL: ECRE (1999: 49–50); IE: ECRE (1999: 54–55); IT: ECRE (1999: 60–61); LU: ECRE (1999: 66); NL: ECRE (1999: 72–73); PT: ECRE (1999: 80–81); ES: ECRE (1999: 86); SE: ECRE (1999: 91–92); UK: ECRE (1999: 98–99).

[4]Or on humanitarian grounds.

[5]Heterosexual.

[6]Homosexual.

[7]ECRE suggests that common law spouses and/or non-marital partners are entitled to family reunification. Yet, I assume that this only concerns common law spouses as suggested by Code Civil L 314/11 al. 8 (see France 2015).

[8]Only if over 65 years of age or dependent.

[9]Only if over 65 years of age and under the condition that the child can take care for the parent.

[10]Only if over 65 years of age and wholly financially dependent on child if the child is not a minor.

suggests that the weak regulators either did not attempt to or did not achieve in making EU legislation reflect their domestic approach, while strong regulators seem to have shaped the directive along the lines of the most restrictive practices among them, allowing for a more liberal approach without prescribing it.

Concerning access to work in art. 26 (Table 4.7), the directive allows for a differentiation between refugees and subsidiary protection holders. Table 4.7 shows that the majority of Member States previously provided similar rights to beneficiaries of subsidiary protection as for refugees regarding access to work and social benefits.

Whereas the vast majority of Member States did not differentiate between refugees and those granted subsidiary protection, Germany, a strong regulator, Austria, a medium regulator, and Greece, a low regulator, did. With regard to access for social benefits (art. 28 and art. 29)[2] a similar picture emerges: Most Member States did not treat refugees and subsidiary protection holders differently, but Austria, France and Germany gave fewer social benefits to those with subsidiary protection than to refugees. Again, the rights accrued to those with subsidiary protection reflected the lowest standard of the strong regulators.

Some scholars criticise the introduction of subsidiary protection status because they fear that Member States may misuse it as alternative status for people who would have otherwise received refugee status (Holzer/Schneider 2002: 42). UNHCR (2007: 66) is more positive:

> Many EU Member States had already developed national statuses complementary to refugee status. These were referred to by many names, and their scope and the rights attached to the status were disparate. The Qualification Directive sets minimum standards for the definition and content of subsidiary protection.

I also consider the introduction of a subsidiary protection status as an upgrade in standards. A closer look at Table 4.8 suggests that certain medium regulators, such as Belgium and Luxembourg, did not have any subsidiary protection status prior to the directive. For these Member

[2] For the purpose of this study, I combine art. 28 (social welfare) and art. 29 (health care).

Table 4.7 Qualification Directive: Access to Work and Social Benefits for Subsidiary Protection Holders (Before Transposition)

	Access to work: differences compared to refugees	Access to social benefits: differences compared to refugees
	Before transposition[1]	Before transposition[2]
Austria	Limited access[3]	No financial assistance; limited accommodation options
Belgium	*No comparable status*	*No comparable status*
Finland	No	No
France	No	Only access to health care[4]
Germany	WP required	Depends on status[5]
Greece[6]	Only temporary WP	No
Ireland	No	No
Italy[6]	No	No
Luxembourg	*No comparable status*	*No comparable status*
Netherlands	No[7]	No
Portugal	No	No
Spain	No	No
Sweden	No	No
UK	No	No

Notes

[1]Sources: AT: Liebaut (2000: 22, 24); FI: Liebaut (2000: 78, 81); FR: Liebaut (2000: 100, 102); DE: Liebaut (2000: 120, 122); EL: PD 189/1998 (Greece 1998), art. 4; Liebaut (2000: 159, 163); IT: Liebaut (2000: 175–176); NL: Liebaut (2000: 222); PT: Liebaut (2000: 251); ES: Liebaut (2000: 270–272); SE: Liebaut (2000: 283–284); UK: Liebaut (2000: 320, 322).

[2]Sources: AT: Liebaut (2000: 21–24); FI: Liebaut (2000: 65); FR: Bouteillet-Paquet (2002a: 483–484); DE: Hailbronner (2002: 524–526); EL: Liebaut (2000: 120,123); IE: Liebaut (2000: 125); IT: ECRE (2004: 54–55); NL: Liebaut (2000: 220, 222); PT: Liebaut (2000: 251); ES: Liebaut (2000: 270–272); SE: Liebaut (2000: 283–284; UK: ECRE 2004: 93).

[3]Other job-seekers are prioritised.

[4]This applies only to holders of "asile territorial" and not to persons granted Constitutional asylum, which are treated like statutory refugees (ECRE 2004: 38).

[5]Tolerated persons have limited access to social benefits. Humanitarian refugees only have limited access to family benefits, but are treated like refugees with respect to social assistance.

[6]No financial assistance and housing are available to refugees or subsidiary protection holders in Greece (ECtHR 2011) and Italy (Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 5, 27).

[7]However, during the first two years of residence asylum-seekers work for a maximum of 12 weeks per year (Liebaut 2000: 222).

States the introduction of a subsidiary protection status thus meant substantive policy-change. Germany and UK, as well as Ireland, a medium regulator, had a highly discretionary system in place. While they had to introduce a more binding status subsequent to the directive, this was not as significant a change as Belgium and Luxembourg had to undergo.

Table 4.8 Qualification Directive: Existence of Statuses Comparable to Subsidiary Protection Status (Before Transposition)

	Existence of statuses comparable to the subsidiary protection status
	Before transposition[1]
Austria	Yes
Belgium	No
Finland	Yes
France	Yes
Germany	Discretionary
Greece	Yes
Ireland	Discretionary
Italy	Yes
Luxembourg	No
Netherlands	Yes
Portugal	Yes
Spain	Yes
Sweden	Yes
UK	Discretionary

Notes

[1]Sources: AT: ECRE (2004: 6–10); BE: ECRE (2004: 11–14); FI: ECRE (2004: 34–35); FR: ECRE (2004: 36–38); DE: ECRE (2004: 39–42); EL: ECRE (2004: 43–45); IE: ECRE (2004: 49–53); IT: ECRE (2004: 54–56); LU: ECRE (2004: 61–62); NL: ECRE (2004: 66–69); PT: ECRE (2004: 73–76); ES: ECRE (2004: 85–88); SE: ECRE (2004: 89–91); UK: ECRE (2004: 92–96).

Additionally, Germany was at the time already reforming its subsidiary protection scheme, introducing a more binding status, as I will show in Chap. 6.

The Asylum Procedures Directive

The APD (Council 2005) has often been criticised for containing a large number of lowest common denominator standards (see Lavenex 2006: 1295–1296; Peers/Rogers 2006: 410–411). Although it frequently allows for several restrictive conditions in strong and medium regulators (e.g., the absence of an automatic suspensive effect of appeals against negative decisions, as occurs in Spain, and free legal aid only being provided for

special counsellors, as is the case in Austria), it does not reflect the lowest standard available on the provision of free legal aid. The directive establishes access to free legal aid as a general rule and weak regulators Greece and Italy did not previously provide this.[3]

As Table 4.9 shows the directive asserts that free legal aid for the judicial review of a negative decision should be provided if the applicant has insufficient means (art. 15II/III). These criteria represent the lowest standards among the strong regulators. Most Member States made free legal aid conditional on a means test (that is the absence of sufficient means) and some made it also conditional on its prospective chances of success (merits test). Austria only provides free legal aid through specific counsellors, which is accommodated in art. 15IIc. One weak regulator, Greece, did not provide free legal aid for any non-nationals. Additionally, in some Italian regions free legal aid was only provided for holders of a residence card, which systematically excludes large numbers of asylum-seekers, as they usually do not have such a card (UNHCR 2010b: 449). These countries thus clearly agreed on a standard that would exceed their *status quo ante* and that they would clearly face difficulties fulfilling.

In relation to the requirement to provide a personal interview for applicants to substantiate their claims, the directive lays down that "[…] the applicant […] shall be given the opportunity of a personal interview on his/her application […]" (art. 12I). Yet, it allows for derogation where an official from the decision-making authority had helped the asylum-seeker filling in the form. This was the case in Spain and to some extent also in France, as can be seen in Table 4.9.

According to Table 4.10, an appeal against a negative decision generally suspended extradition of an asylum-seeker (art. 39IIIb) in EU Member States. Only Greece and Spain differed in this respect. The standard provided by the directive represents the standard of Spain and Greece. As I will show in Chap. 5, medium regulator Spain actively pushed for the introduction of its restrictive standard into the directive and acted like

[3] In Italy, it was provided in principle, yet, in some regions it was *de facto* not provided for asylum-seekers (see Chap. 6).

Table 4.9 Asylum Procedures Directive: Free Legal Aid and Personal Interview (Before Transposition)

		Free legal aid: recognised as principle	Personal interview: provided as a general rule
		Before transposition[1]	Before transposition[2]
		Conditions	
Austria	Yes	Means test Merits test Special counsellors	Provided
Belgium	Yes	—	Provided
Finland	Yes	Means test	Provided
France	Yes	If not manifestly unfounded In possession of valid residence permit for at least one year Legal Entry Means test	Provided[3]
Germany	Yes	Means test Merits test	Provided
Greece	No	—	Provided
Ireland[4]	Yes	Means test Merits test	Provided
Italy[5]	Yes	If not manifestly unfounded Legal entry Means test	Provided
Luxembourg	Yes	Case not manifestly unfounded Means test	Provided
Netherlands	Yes	Means test Merits test	Provided
Portugal	Yes	Means test	Provided
Spain	Yes	Means test	Not provided
Sweden	Yes	If not manifestly unfounded	Provided
UK	Yes	Means test Merits test	Provided

Notes

[1]AT: Ackers (2005: 5, 10); ECRE (2001: 33); BE: ECRE (2001: 51); FI: ECRE (2001: 101–102); FR: ECRE (2001: 113); DE: (2001: 122); EL: Ackers (2005: 17); ECRE (2001: 146); IE: ECRE (2001: 161); IT: ECRE (2001: 174); LU: ECRE (2001: 203–204); NL: ECRE (2001: 212); PT: ECRE (2001: 242); ES: ECRE (2001: 259–260); SE: ECRE (2001: 273, 282); UK: ECRE (2001: 298).

[2]AT: ECRE (2001: 33); BE: ECRE (2001: 49); FI: ECRE (2001: 99); FR: ECRE (2001: 111); DE: ECRE (2001: 122–123); EL: ECRE (2001: 139); IE: ECRE (2001: 162); IT: ECRE (2001: 174); LU: ECRE (2001: 203); NL: ECRE (2001: 210); PT: ECRE (2001: 241); ES: ECRE (2001: 261); SE: ECRE (2001: 273–274); UK: ECRE (2001: 299).

[3]However, this seems to be a *de jure* provision (Ackers 2005: 31).

[4]In Ireland, only low-cost legal aid is provided.

[5]Free legal aid is in practice often not provided, as asylum-seekers do not hold a residence permit, which is required for applying for free legal aid. This problem existed before and after transposition of the directive (UNHCR 2010a: 449).

a strong regulator on this issue. As I have argued previously, medium regulators under the APD often acted more like strong regulators.

Both the safe third country concept and the safe country of origin concept (Table 4.11) had already been applied by the vast majority of Member States and the fact that these restrictive concepts were introduced in the directive reflects the high degree of prior convergence. This can be explained by the fact that both principles had already been part of intergovernmental co-operation in the 1990s, more specifically the London Resolutions (Council 1992a, b, c). Only Ireland did not recognise the safe third country concept by the time the directive was negotiated. The safe country of origin concept was applied in all Member States except Belgium, Italy, Spain and Sweden.

In this section, I have shown that EU asylum standards do not systematically represent the lowest standards of all Member States, but those of the strong regulators. In the next section, I will show that EU asylum standards did not lead to a race to the bottom in protection standards across Europe; instead most Member States maintained their *status quo ante*.

Policy Stasis Prevails Over Policy-Change

Contradicting the expectations of the venue-shopping theory, EU asylum legislation did not result in a race to the bottom in asylum standards across the EU-15. Instead, Member States tended to maintain their *status quo ante* policies subsequent to the adoption of EU legislation. Where change occurred, Member States decided to both upgrade and downgrade protection standards and there seems to be no clear trend towards downgrading. I will now demonstrate that this finding is consistent across all three core directives and policy areas.

By comparing the *status quo ante* policies and the transposition of the directives (see Tables 4.12, 4.13, 4.14, 4.15, 4.16, 4.17, 4.18, 4.19, 4.20 and 4.21), it is clear that EU Member States did not use EU legislation to water down national protection standards. Out of 248 decisions[4] taken

[4] The number of decisions results from a multiplication of the number of Member States involved in the negotiations/transposition and the number of core provisions.

Table 4.10 Asylum Procedures Directive: Suspensive Effect of Appeals (Regular Procedure Only) (Before Transposition)

	Suspensive effect of appeals: no harmonisation
	Before transposition[1]
Austria	Provided
Belgium	Provided
Finland	Provided[2]
France	Provided[3]
Germany	Provided[2]
Greece	Not provided[4]
Ireland	Provided
Italy	Provided
Luxembourg	Provided
Netherlands	Provided
Portugal	Provided
Spain	Not provided[5]
Sweden	Provided
UK	Provided[2]

Notes

[1]Source: European Parliament (2000: 22–23).

[2]However, the effect of appeals during the accelerated procedure cannot be automatically suspended in some states, for example, in safe third country cases in Germany and the UK and manifestly unfounded applications in Finland (Ackers 2005: 24, EP 2000: 24).

[3]Unless the application has been refused in accordance with the Dublin Convention.

[4]Although suspensive effect is in principle possible, the decision is made by the Minister of Public Order, which could imply a high degree of discretion. Arguably, there has not been any change after transposition (EP 2000: 23).

[5]Only after an explicit application, and this was granted only under exceptional circumstances.

related to the implementation of the directives, Member States opted for policy-change in only 47 instances. Thus, the *status quo* was maintained in 201 cases, equalling 80 % of transpositions. In 76 cases, this was even true where the domestic standard exceeded the standard of the directive. While 30[5] of these changes were a liberalisation of policies in Member

[5] Three of these 30 cases, however, represented only a liberal change on paper and not in practice and should be thus handled with care.

Table 4.11 Asylum procedures directive: safe third country concept and safe country of origin concept (Before Transposition)

	Safe third country concept: recognised	Safe country of origin concept: recognised
	Before transposition[1]	Before transposition[2]
Austria	Recognised	Recognised
Belgium	Recognised	Not recognised
Finland	Recognised	Recognised
France	Recognised	Recognised
Germany	Recognised[3]	Recognised
Greece	Recognised	Recognised
Ireland	Not recognised	Recognised[4]
Italy	Recognised	Not recognised
Luxembourg	Recognised	Recognised
Netherlands	Recognised	Recognised
Portugal	Recognised	Recognised
Spain	Recognised	Not recognised
Sweden	Recognised	Not recognised
UK	Recognised	Recognised

Notes
[1]Source: European Parliament (2000: 19–20).
[2]Sources: Engelmann (2014: 289–290); European Parliament (2000: 18–19).
[3]In Germany, the concept was only applied to asylum-seekers applying for constitutional asylum (art. 16a Basic Law, see Germany 2014) and not to applicants in line with EU law (UNHCR 201 Oa: 303).
[4]Ireland introduced the safe country of origin concept in 2003, arguably in the light of European negotiations (Engelmann 2014: 290).

States, 17 resulted in further restrictions. Interestingly, in 16 instances liberalising changes meant the adoption of a standard exceeding the one required by the directive.[6]

The Reception Conditions Directive

On access to work Austria, Belgium, Finland, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden provide more liberal standards than necessary according to the directive. Belgium, Finland,

[6] For further information on how I assessed changes on individual policy aspects, consult the supplementary material available at nataschazaun.wordpress.com.

Greece,[7] the Netherlands, Portugal, Spain and Sweden maintained the standard they had in place prior to the directive, instead of downgrading it to meet the standard proposed by the directive (see Table 4.12). Luxembourg, a medium regulator, and Italy, a weak regulator, had previously banned asylum-seekers from the labour market. When transposing the directive, however, they did not only transpose access to the labour market after one year, as laid down by the directive, but after six months (Italy) or nine months (Luxembourg) respectively. Interestingly, strong regulators such as the UK and France had also previously banned asylum-seekers from the labour market but introduced access (as required by the directive) subsequent to the directive. However, these were perhaps less dramatic changes than occurred in Luxembourg and Italy, as France had already planned to introduce access to the labour market after one year (PLS Ramboll-FR 2001: 23–24) and the UK had a long-standing tradition of providing early labour market access, only abolishing it in 2002 due to public pressure (PLS Ramboll-UK 2001: 25).

I have stated in the first section of Chap. 4 that apart from Italy and Greece, all Member States provided material reception conditions of some sort and were compliant *ex-ante*. Hence, most Member States did not have to change their policies to comply with EU law, as Table 4.12 indicates. Italy and Greece at least on paper changed their policies to comply with the directive. As we will see in Chap. 6, however, they faced substantial difficulties in practice, when implementing the directive.

Prior to the RCD only Germany restricted asylum-seekers' freedom of movement for administrative purposes. Table 4.13 shows that after the transposition of the directive the vast majority of Member States still did not restrict freedom of movement, except Austria and Greece. Yet, while the restriction of freedom of movement for asylum-seekers in Germany applied to all, Austria and Greece only restricted freedom of movement for some types of asylum-seekers. In Austria, for instance, freedom of

[7] The case of Greece, however, should be regarded more critically, as labour market access was often significantly delayed due to administrative problems (Odysseus 2006: 35).

Table 4.12 Reception Conditions Directive: Access to Work and Access to Material Reception Conditions (Before/After Transposition)

	Access to work: provided after one year		Access to material reception conditions: provided	
	Before transposition	After transposition[1]	Before transposition	After transposition[2]
Austria	No access	After three months[3]	Yes	Yes
Belgium	After AP exhaustion	After AP exhaustion	Yes	Yes[4]
Finland	After three months	After three months	Yes	Yes
France	Only under exceptional circumstances	After one year	Yes	Yes
Germany	After one year	After one year	Yes	Yes
Greece	Immediate access	Immediate access[5]	No	Yes[6]
Italy	No access	After six months	No	Yes[6]
Luxembourg	No access	After nine months	Yes	Yes
Netherlands	After six months	After six months	Yes	Yes
Portugal	After AP exhaustion	After AP exhaustion[7]	Yes	Yes
Spain	After six months	After six months	Yes	Yes
Sweden	After four months	After four months	Yes	Yes
UK	No access[8]	After one year	Yes	Yes

Notes

[1]Sources: Odysseus (2006: 69); also see for Austria Odysseus-AT (2007: 51–52); for Portugal: Odysseus-PT (2007: 20–21).

[2]Sources: Odysseus (2006: 32); also see for Greece: ECtHR (2011); European Database of Asylum Law (EDAL) (2014); for Italy ECtHR (2014), European Immigrant NetWork (2014), Schweizerische Flüchtlingshilfe/Juss-Buss (2011: 5, 27).

[3]Obtaining; a work permit depends on finding an employer who will apply on the asylum-seeker's behalf (ECRE 2005: 30).

[4]Only access to health care is granted to asylum-seekers holding a valid asylum-seeker card.

[5]Access to work is granted once the applicant holds a valid asylum-seeker card. In practice, "[t]his can sometimes take more than a year" (Odysseus 2006: 35).

[6]However, material reception conditions are only provided on paper. For Greece: Presidential Decree (PD) 220/2007, art. 12 (see Greece 2007). For Italy: Decreto Legislativo (DL) 140/2005, art. 6, 9, 10 (see Italy 2005).

[7]Max. 20 days.

[8]Access to the labour market was provided after six months before 2002 (PLS Ramboll-UK 2001: 25).

movement is restricted for applicants whose cases might potentially involve another Member State within the Dublin II framework.

In a similar vein, apart from Greece no other Member State has introduced the restrictive concept of "withdrawal of reception conditions in case of late applications," which was previously only applicable in the UK.

The Qualification Directive

Table 4.14 highlights that six out of 13 Member States had already applied the restrictive concept of non-state protection before the QD was transposed. Of the remaining Member States only Belgium, Greece, Italy and the Netherlands introduced the concept subsequent to EU

Table 4.13 Reception Conditions Directive: Freedom of Movement and Withdrawal of Reception Conditions (Before/After Transposition)

	Freedom of movement: may be restricted		Withdrawal of reception conditions if application is late: yes	
	Before transposition[1]	After transposition	Before transposition	After transposition[2]
Austria	Yes	Restricted[3]	No	No
Belgium	Yes	Yes	No	No
Finland	Yes	Yes	No	No
France	Yes	Yes	No	No
Germany	No	No[3]	No	No
Greece	Yes	Restricted[3]	No	Yes
Italy	Yes	Yes	No	No
Luxembourg	Yes	Yes	No	No
Netherlands	Yes	Yes	No	No
Portugal	Yes	Yes	No	No
Spain	Yes	Yes	No	No
Sweden	Yes	Yes	No	No
UK	Yes	Yes	Yes	Yes

Notes

[1]Sources: Odysseus (2006: 45).

[2]Sources: Odysseus (2006: 51–52).

[3]While the German *Residenzpflicht* is an extremely restrictive practice that applies to all asylum-seekers, Austria and Greece have only introduced specific restrictions.

legislation. Portugal, Spain and Sweden did not introduce it, although the directive would have allowed them to do so. The same applies to the IPA which only Ireland but not Italy had introduced with the directive, while the majority of Member States already used the concept before the directive (see Table 4.14).

Protection against non-state persecution was already provided by all Member States with the exception of two strong regulators, Germany and France. As I will demonstrate in Chap. 6, however, policy-change in these Member States occurred due to domestic developments rather than European ones.

Generally, Member States did not change the duration of residence permits either for refugees or for beneficiaries of subsidiary protection (see Table 4.15). Those that had a more liberal standard than the directive suggested, such as Austria, Belgium, Ireland, Spain and Sweden, providing unlimited residence permits for refugees, or France, Portugal and Greece, which provided residence permits for ten (France) or five years (Greece, Portugal), did not downgrade their standards to meet that of the directive. Domestic policy-change on residence permits was not necessarily influenced by the time-frame laid down in the directive. Instead of providing residence permits for three years, Germany liberalised its practice and gave unlimited residence permits to refugees after three years, instead of five years, as was previously the case. Subsidiary protection holders received residence permits for three years and unlimited permits after seven years, which also reflected a liberalisation compared to earlier practices. Finland, by contrast, restricted its practice, as it previously granted residence permits for refugees and holders of subsidiary protection for an unlimited period after two years, while only doing so for four years after the directive. The same is true for the Netherlands, whose *status quo ante* resembles the status laid down in the directive. The Netherlands also introduced unlimited residence permits for both refugees and beneficiaries of subsidiary protection after five instead of three years and the UK introduced unlimited residence permits after five instead of four years. While at first sight this is a standard that exceeds that laid down in the directive, it is in fact a restriction, because the issuance of unlimited residence permits is delayed. Portugal limited the duration of residence permits for subsidiary protection holders.

Table 4.14 Qualification Directive: Non-State Protection, Non-State Persecution and the Internal Protection Alternative (Before/After Transposition)

	Non-state protection: recognised		Non-state persecution: protection view		Internal protection alternative: applied	
	Before transposition	After transposition[1]	Before transposition	After transposition[2]	Before transposition	After transposition[3]
Austria	Recognised	Recognised	PV	PV	Applied	Applied
Belgium	Not recognised	Recognised	PV	PV	Applied	Applied
Finland	No evidence	Recognised (only IO[4])	PV	PV	Applied	Applied
France[5]	Recognised	Recognised (only IO)	PV	PV	Applied	Applied
Germany	Recognised	Recognised	AV	PV	Applied	Applied
Greece	Not recognised	Recognised	PV	PV	Applied	Applied
Ireland	Recognised	Recognised	PV	PV	Not applied	Applied
Italy	Not recognised	Recognised	AV/PV	PV	Not applied	Not applied
Luxembourg	Recognised	Recognised	PV	PV	Applied	Applied

Netherlands	Not recognised	Recognised	PV	PV	Applied	Applied
Portugal	Not recognised	Not recognised	PV	PV	Applied[6]	Applied[7]
Spain	Not recognised[8]	Not recognised	PV	PV	Applied	Applied[9]
Sweden	Not recognised	Not recognised	PV	PV	Applied	Applied
UK	Recognised	Recognised	PV	PV	Applied	Applied

Notes

[1]Sources: ECRE (2008: 16); Odysseus (2007b: 43–45).

[2]Sources: ECRE (2008: 15); Odysseus (2007b: 42–43).

[3]Sources: Odysseus (2007b: 46).

[4]International organisations.

[5]France has changed its policies on all three issues anticipating the QD in December 2003.

[6]Whereas the IPA concept "has not been applied by the Portuguese authorities per se […] [It] is sometimes applied to support a negative decision" (ECRE 2000: 48).

[7]The implementation of the provision is problematic due to legal ambiguity surrounding the issue (Odysseus 2007b: 47).

[8]According to Odysseus (2007b: 45), the provision has not been transposed at all (nor through prior case law). Thus, one can assume that the concept was not in use previously.

[9]Although Spain does not directly implement the IPA provision, "some case law that acknowledges the possibility of an internal flight alternative [IPA]" does exist (Odysseus 2007b: 46, footnote 69).

Table 4.15 Qualification Directive: Duration of Residence Permits (Before/After Transposition)

	Duration of residence permits…			
	…for refugees: limited to three years		…for those with subsidiary: limited to one year	
	Before transposition	After transposition[1]	Before transposition	After transposition[2]
Austria	Unlimited	Unlimited	Limited to one year	Limited to one year
Belgium	Unlimited	Unlimited	Limited to one year; in Principle Unlimited	Limited to one year; Unlimited After five years
Finland	Limited to one year; Unlimited after two years	Unlimited after four years	Limited to one year; Unlimited after two years	Unlimited after four years
France	Limited to ten years	Limited to ten years	Limited to one year	Limited to one year
Germany	Unlimited after five years	Unlimited after three years	Limited to two years; unlimited after eight years	Limited to three years; unlimited after seven years
Greece	Limited to five years	Limited to five years	Limited to one year	Limited to two years
Ireland	Unlimited	Unlimited	Limited to one year	Limited to three years
Italy	Limited to two years	Limited to five years	Limited to one year	Limited to three years

Luxembourg	Limited to five years	Limited to three years	No duration specified	Limited to one year
Netherlands	Unlimited after three years	Unlimited after five years	Unlimited after three years	Unlimited after five years
Portugal	Limited to five years	Limited to five years	Limited to five years	Limited to two years
Spain	Unlimited	Unlimited	Limited to one year	Limited to one year
Sweden	Unlimited	Unlimited	Unlimited	Unlimited
UK	Unlimited[3]	Unlimited after five years	Limited to four years	Limited to five years

Notes

[1]Sources: AT: Odysseus (2007b: 99); BE: EMN (2009c: 2); FI: EMN (2009c: 3); Finnish Aliens Act 301/2004, Sections 53VII and 56IV (Amendment 323/2009) (see Finland 2009); FR: Service-Public.fr (2014); DE: EMN (2009c: 4); EL: PD 96/2008, art. 24I (see Greece 2008); IE: Odysseus (2007b: 99); IT: Sistema di protezione per richiedenti asilo e rifugiati (SPRAR 2009: 168); LU: Loi du 5 mai 2006, art. 46I (see Luxembourg 2006); NL: EMN (2009c: 5); PT: EMN (2009c: 6); ES: EMN (2009c: 7); SE: EMN (2009c: 8); UK EMN (2009c: 8–9).

[2]Sources: AT: Asylgesetz 2005 paragraph 8(4) (see Austria 2005); BE: EMN (2009c: 2); FI: EMN (2009c: 3); Finnish Aliens Act 301/2004, Sections 53VII and 56IV (Amendment 323/2009) (Finland 2009); FR: Office français de protection des réfugiés et apatrides (OFPRA) (2011); DE: EMN (2009c: 4); EL: PD 96/2008, art. 24 paragraph 2 (Greece 2008); IE: EMN (2009a: 3); IT: SPRAR (2009: 169): LU: Loi du 5 mai 2006, art. 46II (Luxembourg 2006); NL: EMN (2009c: 5); PT: EMN (2009c: 6); ES: EMN (2009c: 7); SE: EMN (2009c: 8); UK: EMN (2009c: 8–9).

[3]Unlimited after four years before 1998.

Table 4.16 indicates that few Member States changed their policies on family unification subsequently. Some, such as Belgium and Greece, however, introduced a recognition of heterosexual unmarried partners and Belgium and Germany, introduced the recognition of homosexual partners.

According to Table 4.17, Finland, France, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the UK did not differentiate between refugees and subsidiary protection holders regarding access to employment either before or after the directive. The same is true as in relation to access to social benefits for both refugees and beneficiaries of subsidiary protection in Finland, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the UK. Austria, Germany and France further aligned access to employment and welfare of those with refugee status and those with subsidiary protection status.

Luxembourg's and Belgium's newly introduced subsidiary protection status (see Table 4.18) provided beneficiaries with equal access to social benefits, while restricting access to the labour market. After the directive had been implemented all Member States provided subsidiary protection in a systematic manner, even those states that had previously only applied it on a discretionary basis, such as Germany, Ireland and the UK. While the introduction of a binding subsidiary protection status thus raised standards among Member States, I will show in Chap. 6 that among the strong regulators this was less a result of EU policies and more due to domestic pressures for liberalisation.

The Asylum Procedures Directive

According to Table 4.19, the vast majority of Member States provided free legal aid for appeals against a negative first instance decision prior to the directive. Most Member States made the provision of free legal aid conditional on insufficient means (means test) and the likelihood of success of the appeal (merits test). Austria additionally restricted free legal aid to legal representation by special counsellors both before and after the directive. Overall, Member States maintained their *status quo ante* policies. Differences in Table 4.19 before and after transposition arguably

Table 4.16 Qualification Directive: Family Definition (Before/After Transposition)

	Family definition[1]							
	Before transposition				After transposition[2]			
	Spouse	Children	Parents	Others	Spouse	Children	Parents	Others
Austria	Yes	Unmarried minors	Of minors	No	Yes	Unmarried minors	Of minors	No
Belgium	Yes	Minors	Of minors	No	Yes	Unmarried minors; dependent adults	Of minors	Registered partner (Het./Hom.)
Finland	Yes	Minors	Of minors	Het./Hom. partner; unmarried siblings of minors	Yes	Unmarried minors	Of minors	Het./Hom. partner; dependent relatives
France	Yes	minors	Of minors	No	Yes	Under 19[3]	No[4]	No
Germany	Yes	Unmarried minors	Of minors	Heterosexual partner	Yes	Unmarried minors	Of minors	Het./Hom. partner; cases of hardship
Greece	Yes	Unmarried minors	Yes	No	Yes	Unmarried minors; dependent adults	Yes	Heterosexual partner

(continued)

Table 4.16 (continued)

	Family definition[1]							
	Before transposition				After transposition[2]			
	Spouse	Children	Parents	Others	Spouse	Children	Parents	Others
Ireland	Yes	Minors; dependants under 21	Of unmarried minors	Dependent relatives on discretionary basis	Yes	Unmarried minors	of unmarried minors	Dependent relatives on discretionary basis
Italy	Yes	Unmarried minors	Yes	Ill/disabled relatives (up to third degree)	Yes	Unmarried minors	Yes	Ill/disabled relatives (up to third degree)
Luxembourg	Yes	Minors	No[5]	No	Yes	Unmarried minors	No	No
Netherlands	Yes	Under 21	No[6]	Het./Hom. partner; dependent relatives in exceptional cases	Yes	Minors; dependent adults	If dependent	Dependent non-marital partner
Portugal	Yes	Under 21	Yes	Siblings; dependent relatives	Yes	Unmarried minors	Of minors	Dependent relatives in exceptional cases

Spain	Yes	Minors	If 65 + years old	Heterosexual partner	Yes	Minors	If dependent	Heterosexual partner
Sweden	Yes	Unmarried minors	cf. others	Het./Hom. partner; "Close Relatives" in the same household	Yes	Unmarried minors	Of unmarried minors	Het./Hom. partner; "Close Relatives" in the same household
UK	Yes	Minors; dependent children	No	Het./Hom. partner	Yes	Unmarried minors	No	Het./Hom. partner

Notes

[1]It seems that the transposition reports assess criteria differently. Some distinguish between parents of minors and parents in general, others conflate the two categories. Moreover, some specifically assess which criteria parents and other family members have to fulfil (e.g., dependency).

[2]Sources: AT: Odysseus (2007a: 37); Odysseus (2007b): 94–95; BE: UNHCR-BE (2013: 13); FI: Odysseus (2007b: 94–95); UNHCR-FI (2014): 9; FR: UNHCR-FR (2014: 7); DE: Odysseus (2007b: 94–95); UNHCR-DE (2014: 7); EL: Odysseus (2007b: 94–95); PD 220/2007; art. 1IV (Greece 2008); IE: UNHCR-IE (2014: 12); IT: DL 251/2007, art. 22; LU: Odysseus (2007b: 94–95); NL: UNHCR-NL (2014: 9); PT: UNHCR-PT (2011: 6–7); ES: Spain (2009), art. 40; SE: Odysseus (2007b: 94–95); UNHCR-SE (2014: 9); UK Odysseus (2007b: 94–95).

[3]These are arguably minors.

[4]This constitutes no change, as previously only parents of minors were recognised.

[5]Cases of hardship have been considered before as well. Yet, this is clearly a discretionary status.

[6]Only for those over 65 years of age and under the condition that the child can take care of the parent.

Table 4.17 Qualification Directive: Access to Work and Access to Social Benefits for Subsidiary Protection Holders (Before/After Transposition)

	Access to work: differences compared to refugees		Access to social benefits: differences compared to refugees	
	Before transposition	After transposition[1]	Before transposition	After transposition[2]
Austria	Limited access[3]	No[4]	No financial assistance; limited accommodation options	Depending on region
Belgium	No comparable status	WP[5] required	No comparable status	No
Finland	No	No	No	No
France	No	No	Only access to health care[6]	No
Germany	WP required	Limited access[7]	Depends on status[8]	Fewer family benefits
Greece[9]	Only temporary WP	Only temporary WP	No	No
Ireland	No	No	No	No
Italy[9]	No	No[10]	No	No
Luxembourg	No comparable status	Limited access[9]	No comparable status	No
Netherlands	No	No	No	No

	Access to work: differences compared to refugees		Access to social benefits: differences compared to refugees	
	Before transposition	After transposition[1]	Before transposition	After transposition[2]
Portugal	No	No	No	No
Spain	No	No	No	No
Sweden	No	No	No	No
UK	No	No	No	No

Notes

[1]Sources: AT: ECRE (2009: 15); BE: ECRE (2009: 20); FI: ECRE (2009: 33); FR: ECRE (2009: 41); DE: ECRE (2009: 45); EL: PD/ 96/2008, art. 26 (Greece 2008); IE: ECRE (2009: 51); IT: Malena (2012: 108); LU: Loi du 5 mat 2006, art. 48 (see Luxembourg 2006); NL: EMN-NL (2010: 41); PT: Act 27/2008, art. 71 (see Portugal 2008); ES: Lev 12/2009, art. 36 (see Spain 2009); SE: ECRE (2009: 56); UK: ECRE (2009: 69).

[2]Sources: AT: ECRE (2009: 15); BE: ECRE (2009: 21); FI: ECRE (2009: 33–34); FR: ECRE (2009: 41); DE: ECRE (2009: 46); EL: PD 96/2008, art 28, 29, 31 (Greece 2008); IE: ECRE (2009: 51); IT: Malena: (2012: 108); LU: Loi du 5 mat 2006, art. 50, 51 (see Luxembourg 2006); NL: EMN-NL (2010: 41); PT: Act 27/2008, art. 72, 73 (see Portugal 2008); ES: Lev 12/2009, art. 36 (see Spain 2009); SE: ECRE (2009: 56–57); UK: ECRE (2009: 69).

[3]Other job-seekers are prioritised, temporary protection holders are only in priority category "three."

[4]Since 2008.

[5]Work permit.

[6]This applies only to holders of "asile territorial" and not to persons granted Constitutional asylum, as these are treated like statutory refugees (ECRE 2004: 38).

[7]In Germany and Luxembourg, access to work may be limited for subsidiary protection holders due to the labour market situation.

[8]Tolerated persons have very limited access to social benefits. Humanitarian refugees only have limited access to family benefits, but are treated like refugees with respect to social assistance.

[9]No financial assistance and housing are available to both refugees and subsidiary protection holders in Greece (ECtHR 2011) and Italy (Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 5, 27).

[10]Holders of subsidiary protection are excluded from employment in the public sector.

Table 4.18 Qualification Directive: Existence of Status Comparable to Subsidiary Protection Status (Before/After Transposition)

	Existence of statuses comparable to subsidiary protection status	
	Before transposition[1]	After transposition[2]
Austria	Yes	Yes
Belgium	No	Yes
Finland	Yes	Yes
France	Yes	Yes
Germany	Discretionary	Yes
Greece	Yes	Yes
Ireland	Discretionary	Yes
Italy	Yes	Yes
Luxembourg	No	Yes
Netherlands	Yes	Yes
Portugal	Yes	Yes
Spain	Yes	Yes
Sweden	Yes	Yes
UK	Discretionary	Yes

Notes

[1]Sources: AT: ECRE (2004: 6–10); BE: ECRE (2004: 11–14); FI: ECRE (2004: 34–35); FR: ECRE (2004: 36–38); DE: ECRE (2004: 39–42); EL: ECRE (2004: 43–45); IE: ECRE (2004: 49–53); IT: ECRE (2004: 54–56); LU: ECRE (2004: 61–62); NL: ECRE (2004: 66–69); PT: ECRE (2004: 73–76); ES: ECRE (2004: 85–88); SE: ECRE (2004: 89–91); UK: ECRE (2004: 92–96).

[2]Sources: AT: ECRE (2009: 13–18); BE: ECRE (2009: 19–25); FI: ECRE (2009: 32–38); FR: ECRE (2009: 39–43); DE: ECRE (2009: 44–49); EL: PD 96/2008, art. 15 (Greece 2008); IE: ECRE (2009: 50–54); IT: LD 251/07, art. 14; LU: Loi du 5 mai 2006, art. 7 (Luxembourg 2006); PT: Act No. 27/2008 art. 7 (Portugal 2008); ES: Spain (2009), art. 10; SE: ECRE (2009: 55–60); UK: ECRE (2009: 67–73).

Table 4.19 Asylum Procedures Directive: Free Legal Aid and Personal Interview (Before/After Transposition)

	Free legal aid: recognised as principle				Personal interview: provided as a general rule	
	Before transposition		After transposition[1]		Before transposition	After transposition[2]
		Conditions		Conditions		
Austria	Yes	Means test Merits test Special counsellors	Yes	Means test Merits test Special counsellors	Provided	Provided
Belgium	Yes	—	Yes	—	Provided	Provided
Finland	Yes	Means test	Yes	Means test	Provided	Provided
France	Yes	If not manifestly unfounded in possession of valid residence permit for at least one year Legal entry Means test	Yes	If Not manifestly unfounded Means test Merits test	Provided	Provided
Germany	Yes	Means test Merits test	Yes	Means test Merits test	Provided	Provided
Greece	No	—	Yes[3]	If not manifestly unfounded Merits test	Provided	Provided
Ireland	Yes	Means test Merits test	Yes	Means test Merits test	Provided	Provided
Italy[4]	Yes	If not manifestly unfounded Legal entry Means test	Yes	If not manifestly unfounded Means test Merits test	Provided	Provided
Luxembourg	Yes	If not manifestly unfounded Means test	Yes	If not manifestly unfounded Means test Merits test	Provided	Provided
Netherlands	Yes	Means test Merits test	Yes	Means test Merits test	Provided	Provided

(continued)

Table 4.19 (continued)

	Free legal aid: recognised as principle				Personal interview: provided as a general rule	
	Before transposition		After transposition[1]		Before transposition	After transposition[2]
		Conditions		Conditions		
Portugal	Yes	Means test	Yes	Means test	Provided	Provided
Spain	Yes	Means test	Yes	Means test	Not provided	Not Provided[5]
Sweden	Yes	Case not manifestly unfounded	Yes	Means test	Provided	Provided
UK	Yes	Means test Merits test	Yes	Means test Merits test	Provided	Provided

Notes

[1]AT: ECRE/European Legal Network on Asylum (ELENA) (2010: 27, 29, 78); BE: EMN (2009b: 2–3); ECRE/ELENA (2010: 27); FI: EMN (2009b: 5–6); FR: ECRE/ELENA (2010: 27, 29); DE: EMN (2009b: 6); EL: ECRE/ELENA (2010: 29); PD 114/2010, art. 11 paragraph 2 (see Greece 2010); IE: ECRE/ELENA (2010: 27, 29); IT: ECRE/ELENA (2010: 27, 29); LU: European Judicial Network (EJN) (2007); EMN (2009b: 10); PT: European Judicial Network (2006); ES: EMN (2009b: 12–13); SE: EMN (2009b: 13–14); UK: EMN (2009b: 14–15).

[2]AT: ECRE/ELENA (2010: 103); BE: ECRE/ELENA (2010: 104); FI: ECRE/ELENA (2010: 105); FR: ECRE/ELENA (2010: 105); DE: ECRE/ELENA (2010: 106); EL: ECRE/ELENA (2010: 106); IE: ECRE/ELENA (2010: 107); IT: ECRE/ELENA (2010: 108); LU: Loi du 5 mai 2006, art. 9 (see Luxembourg 2006); NL: ECRE/ELENA (2010: 110); PT: Act 27/2008, art. 161 (see Portugal 2008); ES: UNHCR (2010a: 67); SE: Asylum Information Database (2013: 16); UK: ECRE/ELENA (2010: 111).

[3]Legal aid is not free, but under certain circumstances costs may be reduced (UNHCR 2010a: 451).

[4]Free legal aid is in practice often not provided, as asylum-seekers do not hold a residence permit, which is required for applying for free legal aid. This problem existed before and after transposition of the directive (UNHCR 2010a: 449).

[5]The personal interview in Spain only serves the purpose of formalising the application procedure and thus differs from a substantial interview which tries to determine the grounds for seeking asylum.

Table 4.20 Asylum Procedures Directive: Suspensive Effect of Appeals (Regular Procedure Only) (Before/After Transposition)

	Suspensive effect of appeals: no harmonisation	
	Before transposition	After transposition[1]
Austria	Provided	Provided
Belgium	Provided	Provided
Finland	Provided	Provided
France	Provided	Provided
Germany	Provided	Provided
Greece	Not provided[2]	Not provided
Ireland	Provided	Provided
Italy	Provided	Provided
Luxembourg	Provided	Provided
Netherlands	Provided	Provided
Portugal	Provided	Provided
Spain	Not provided[3]	Not provided[4]
Sweden	Provided	Provided
UK	Provided	Provided

Notes

[1]Sources: UNHCR (2010a: 455); also see for AT: European Union Agency for Fundamental Rights (FRA)-AT (2010: 4); IE: FRA-IE (2010: 4); LU: FRA-LU (2010: 4); PT: FRA-PT (2010: 4); SE: FRA-SE (2010: 5).

[2]Although suspensive effect is in principle possible, the decision is made by the Minister of Public Order, which implies a high degree of discretion. Arguably, there has been no change after transposition (EP 2000: 23).

[3]Only after an explicit application and granted only under exceptional circumstances.

[4]In 2010, Spain introduced a new asylum law that contained an automatic suspensive effect (UNHCR 2010a: 457).

result from different *foci* of the sources employed. The only Member State that changed its policy (on paper) was Greece, introducing free legal aid for asylum-seekers for the first time ever subsequent to the APD.

Like in the case of Italy, however, free legal aid for asylum-seekers in Greece mainly existed on paper and was not systematically granted in practice.

A personal interview, too, was provided by the vast majority of Member States although the directive would have allowed for a derogation. Member States, however, did not downgrade their standard and for the only country that did not provide a personal interview subsequent to the directive, Spain, this was a continuation of their practice before the directive.

Table 4.21 Asylum Procedures Directive: Safe Third Country Concept and Safe Country of Origin Concept (Before/After Transposition)

	Safe third country concept: recognised		Safe country of origin concept: recognised	
	Before transposition	After transposition[1]	Before transposition	After transposition[2]
Austria	Recognised	Recognised	Recognised	Recognised
Belgium	Recognised	Recognised	Not recognised	Not recognised
Finland	Recognised	Recognised	Recognised	Recognised
France	Recognised	Recognised	Recognised	Recognised
Germany	Recognised	Recognised	Recognised[3]	Recognised
Greece	Recognised	Recognised	Recognised	Recognised
Ireland	Not recognised	Recognised	Recognised[4]	Recognised
Italy	Recognised	Recognised	Not recognised	Not recognised
Luxembourg	Recognised	Recognised	Recognised	Recognised
Netherlands	Recognised	Recognised	Recognised	Recognised
Portugal	Recognised	Recognised	Recognised	Recognised
Spain	Recognised	Recognised	Not recognised	Not recognised
Sweden	Recognised	Recognised	Not recognised	Not recognised
UK	Recognised	Recognised	Recognised	

Notes

[1]Sources: UNHCR (2010a: 302); also see for AT: Asylgesetz art. 41 (see Austria 2005); IE: S.I. 51/2011, art. 9 (see Ireland 2011); LU: Loi du 5 mai 2006, art. 16II (see Luxembourg 2006); PT: Act 27/2008, art. 19IId. ii (see Portugal 2008); SE: Act amending the Aliens Act (Sweden 2005: 716), Chap. 5, Section 1b paragraph 3 (see Sweden 2009).

[2]Sources: Engelmann (2014: 289–290).

[3]Germany only used this concept for applicants for constitutional asylum (art. 16a Basic Law; see Germany 2014) and not for asylum in line with EU law (UNHCR 2010a: 303).

An appeal against a negative decision led to the suspension of enforcement of the decision (extradition) in the vast majority of Member States (see Table 4.20). Although the directive would have allowed for derogation from the principle of a suspensive effect of appeals, Member States did not downgrade their standard subsequent to the directive. Arguably, this was supported by a rather clear international norm, namely the norm on non-refoulement as laid down in art. 33 CRSR and art. 3 ECHR, because the extradition of a potential refugee could imply exposing this person to torture or degrading treatment. The right to non-refoulement has an absolute character in international human rights law and therefore appeals against negative decisions should usually have a suspensive effect. Countries such as Spain and Greece, which did not provide it before and

after the directive, however, did not recognise the principle of suspensive effects of appeals in their administrative laws more generally and hence reforming their asylum law in this regard would have required a reform of their entire administrative legal system.

As I have shown in the first section of this chapter, Member States already showed a high degree of convergence regarding both the safe third country concept and the safe country of origin concept. With the exception of Ireland, all Member States applied the safe third country concept prior to the directive. Ireland also introduced this restrictive concept after the directive. The safe country of origin concept was already applied by all Member States except Belgium, Italy, Spain and Sweden. None of those Member States introduced the concept after the directive. The only Member State that introduced it during the negotiations was Ireland, which has applied the concept since 2003. New Member States were not allowed to introduce the concept due to a standstill clause which only allowed national lists of safe third countries that were in place prior to December 2005 (art. 36VII, Council 2005).

Ireland introduced the SCO concept in 2003 arguably in the light of negotiations (Engelmann 2014: 290).

Neither the Lowest Standard, Nor an Impetus for a Race to the Bottom

This chapter set out to answer whether EU asylum standards represent the lowest standards available among the EU Member States and whether the policy process entailed a race to the bottom in asylum standards across Europe. While research dating back to the beginning of EU asylum legislation post-Amsterdam presumed both lowest common denominator output and a race to the bottom, more recent research has found this not to have been the case, without however, systematically substantiating these claims.

This chapter provides rich empirical evidence to inform this debate. As it turns out, EU asylum policies do not represent the lowest standards

among EU Member States, but rather the lowest standard among the strong regulators. While the standards in the directives thus represent the lowest standards of all Member States if a strong regulator provided the lowest standard, it systematically exceeds the lowest standard of the weak regulators. Thus, it confirms the expectations of the theoretical model advanced in Chap. 2.

In addition to finding that the standards provided did not represent the lowest standard of all Member States, my findings also suggest that in the vast majority of cases, namely in 80 % of decisions, Member States have opted for maintaining their *status quo ante*. This supports the Misfit Model, according to which Member States have a strong preference for maintaining the *status quo ante* to avoid policy-change. Interestingly, they even do so if the directive allows them to lower their standards. Such examples are not restricted to strong or weak regulators or to a certain group of Member States which could be considered particularly generous. This is striking, as Member States would be able to do so given the absence of a still-stand clause in the directives. While downgrading of protection standards would clearly contradict the overall goal of asylum harmonisation, which is to provide minimum standards and stop secondary movements, Member States cannot be hindered from lowering protection standards if they really wish to do so to save costs. Thus, it seems that Member States do not necessarily intend to lower their domestic standards.

Chapters 5 and 6 will explain this state of affairs. In Chap. 5, I will first investigate the negotiations and show that all Member States indeed tried to upload their *status quo ante* standards. Yet, as I will demonstrate, the strong regulators were much more effective in doing so than the weak regulators. I argue that this can account for the standard in the directive representing the lowest common denominator of the strong regulators. Additionally, I will provide an explanation for the effective influence of strong regulators and the lack of influence of weak regulators, bringing together my findings from the analysis of pertinent Council documents with findings from 39 semi-structured expert interviews.

In Chap. 6, I will explain why Member States generally maintained their *status quo ante* and had no incentive to actually lower their standard. At the same time, I will provide an explanation for situations in which Member States changed their policies and show that this is either due to the fact that they had planned policy-change at the domestic level or because they learnt from other Member States how they could close regulatory gaps at the domestic level.

5

Why EU Asylum Directives Exceed Lowest Common Denominator Standards

The aim of this chapter is twofold: First, its purpose is to explain what can account for the legislative output agreed upon in EU directives. As I find that the legislative output can be explained by the effective influence of the strong regulators, I furthermore address the question of why these strong regulators have been so influential in the negotiations. The second aim of this chapter is hence to establish what power resources strong regulators have that weak regulators lack.

In this chapter, I will first trace the decision-making processes of all three core directives in this area, namely the RCD, the QD and the APD. In doing so, my analytical focus will rest on the different roles of strong and weak regulators. To this end, I will study whether it was indeed the group of Member States which I refer to as strong regulators that most effectively influenced the EU's legislative output in the asylum area. Comparing my findings from Chap. 4 on Member States' *status quo ante* to the policies that they advanced at the EU level, I investigate which policies Member States tried to upload, more specifically whether they tried to upload their domestic *status quo ante* as suggested by the Misfit and Regulatory Competition Model or whether they instead attempted

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to upload something more restrictive, as suggested by the venue-shopping theory.

In the second part of this chapter, I will condense my findings from the previous section and compare them to the expectations I formulated in the theory chapter. Bringing together my findings from Chap. 4 and the first section of Chap. 5, I show that Member States in the majority of instances tried to upload their *status quo ante*, which is in line with the theoretical model I advance. Moreover, I find that the strong regulators were effective in influencing the legislative output of the asylum directives, while the weak regulators were ineffective. Drawing on my interview data, I provide an explanation for this and compare my findings with my expectations on Member States' effectiveness in negotiations as laid down in Chap. 2. In the third section, I will summarise and contextualise my findings.

Tracing Negotiations

In following sections, I will trace the negotiation processes around the three core directives, presenting them in a chronological order, beginning with the 2003 RCD, moving on to the 2004 QD and ending with the 2005 APD. The theoretical model I apply would expect the following behaviour from Member States: those Member States which I have defined as strong regulators, namely Germany, the UK, the Netherlands, France and Sweden, are expected to have been very active and to have adopted hard bargaining strategies. As I have shown in Chap. 2, Germany has been confronted with the issue of asylum with a particular intensity which leads me to the assumption that this Member State should have adopted especially strong positions and was not willing to compromise. Weak regulators such as Greece, Italy and Portugal are expected to have kept a low profile and to have remained rather passive. They are not expected to have adopted hard bargaining strategies but instead should have been ready to compromise. Medium regulators such as Austria, Belgium, Spain, Finland and Luxembourg are expected to have adopted a middle-ground position and sometimes have acted more like strong or weak regulators.

The Reception Conditions Directive: Imposing the Introduction of a Reception System on Weak Regulators

The most contested issues in the RCD negotiations were freedom of movement, material reception conditions, and the cross-sectional question of whether the directive should apply to subsidiary protection applicants. Withdrawal of reception conditions for late applications was not a core issue during the beginnings of the negotiations, but was later introduced at the instigation of the UK.

Debates on the RCD started in June 2000 when the French Council Presidency submitted a discussion paper to the Asylum Working Party. After initial debates in the Council, the Commission submitted its proposal on 18 March 2001 (Council 2001/9074: 1). Access to the labour market remained highly contested in the Asylum Working Party. Hence, on its meeting in January 2002, the Spanish Presidency submitted a questionnaire to the Member States to attain a better overview of each Member State's policy on the issue (Council 2002/5430: 2). The results of this questionnaire were then discussed in the Strategic Committee on Immigration, Frontiers and Asylum[1] (SCIFA). While Member States also held different positions on providing access to material reception conditions, these debates were less intensive. On 22 March 2002, the Council Secretariat sent an introductory note to the COREPER suggesting that it should find a resolution on the controversial issues of freedom of movement and the scope of the directive. COREPER is composed of diplomats and thus better suited to finding a compromise on highly controversial and political issues. Three days later, the EP adopted its amendments to the Commission proposal, which were entirely ignored by the Council (Peers and Rogers 2006: 301). The directive was officially adopted by the Council in January 2003.

[1] SCIFA is composed of national heads of departments from the Interior Ministries.

The French Discussion Paper as a Strong Regulator's First Move

Discussions on reception conditions were not, as usual, initiated by a Commission proposal, but by a discussion paper the French Council Presidency submitted to the Asylum Working Party in June 2000. This was considered a necessary prerequisite to better understand the controversy linked to the issue, as in contrast to asylum procedures or qualification, Member States had never been able to agree on common minimum standards for reception conditions (recital 8 of Council Conclusions; European Council 2000/457). The discussion paper (Council 2000/9703: 3) provides clear evidence of a strong regulator (France) assuming the role of a first mover, anchoring the frame of harmonised asylum policies as a means to prevent secondary movements. It states that

> [T]he harmonisation of conditions for the reception of asylum applicants is an essential objective in European asylum policy. It makes a clear contribution to the creation of an area of freedom, security and justice by making it possible to prevent the flow of asylum applicants being influenced by the variety of conditions for their reception. The disparity between reception arrangements in Europe makes certain Member States more attractive than others for asylum applicants. Harmonisation in this respect would reduce these secondary movements and thus relieve pressure on the mechanism for determining the responsible State.

The French delegation frames the introduction of common minimum standards as a means to prevent secondary movements. This confirms the expectation that strong regulators have an incentive to make other, particularly but not exclusively weak regulating Member States, adjust their standards so that they themselves are no longer considered especially attractive by asylum-seekers.

France attempted to upload its own regulatory approach on the core issues of the directive: Regarding material reception conditions, it promoted a system based on the principle that "Member States' **care should be as comprehensive as possible**, in the form of benefits in kind or of financial assistance allowing individuals to live with dignity" (Ibid.: 3;

emphasis in the original). To this end Member States' care should encompass accommodation, food, basic daily expenses and free health care. This aimed at introducing a comprehensive reception system among the weak regulators since they did not provide any of these reception conditions.

By contrast, France advanced a restrictive approach on access to work, suggesting that "the principle should be that asylum applicants do not have access to the labour market since experience shows that, if the opposite is the case, then many asylum applications are made for purely economic reasons" (Ibid.: 4). Only in exceptional circumstances, for instance if the competent authorities are unable to take a decision "within a reasonable period, which could be set at one year" could access to the labour market be authorised (Ibid.). The regulatory model that France promoted was one where the state acted as a "care giver." This means that the state provided asylum-seekers with access to welfare, but tried to protect its labour market and thus made asylum-seekers dependent on social benefits. This is an approach that France itself followed domestically. Moreover, the period of one year was not suggested at random, but reflected France's intention to keep as much leeway as possible for potential reforms on the domestic level. As demonstrated in the second section of Chap. 4, France actually intended to introduce access to work after one year, as this was when financial assistance for asylum-seekers ended and when many asylum-seekers started working "illegally" (PLS Ramboll-FR 2001: 23).

On freedom of movement, the Working Paper noted that applicants should be able to move freely about the host state's territory. Yet, their place of residence may have been decided by the competent authorities of that state, for "reasons of general interest or public policy" (Ibid.: 6). This also reflected the French approach. France did generally not restrict freedom of movement and attempted to upload its own regulatory model.

Controversial Discussions After the French Working Paper

At its meeting on 7 July 2000, the Asylum Working Party exchanged views on the French delegation's paper. The Council documents record how contested the core issues of the document were, particularly as most

Member States wanted to raise standards in other Member States, while having maximum discretion to maintain their own practice. While the vast majority of delegations welcomed the paper and "could subscribe to its broad lines" (Council 2000/10242: 2), the Dutch and the Swedish delegations wanted "harmonisation to go further than the French delegation's proposal, to provide more extensive and uniform protection for asylum-seekers" (Ibid.). Ireland, on the other hand, took the notion of minimum standards literally and said that they "should allow Member States the flexibility to take rapid decisions in the event of crisis, enabling them to depart from the normal procedures in situations such as massive influxes of people" (Ibid.). The approach followed by the Swedish and the Dutch delegations clearly contradicts the claim that Member States tried to use the formation of new rules at the EU level to water down domestic protection standards. Instead, Sweden and the Netherlands wanted other Member States to raise their standards to meet those employed in Sweden and the Netherlands and thus prevent secondary movements. A similar trend can also be observed concerning the scope of the directive. Germany held a discretionary standard on subsidiary protection and wanted to maintain leeway. It therefore supported France in restricting the directive to applicants for protection under the CRSR (Council 2000/9703: 5; Council 2000/10242: 3). Sweden and the Netherlands on the contrary treated all applicants equally and wanted the directive to cover all forms of international protection.

Positions also substantially diverged between Member States on conditions for freedom of movement. While Germany asked for more flexibility to restrict freedom of movement, Belgium wanted the right to freedom of movement to have a stronger binding force. Whereas the German delegation highlighted that

> in Germany asylum applications were dealt with by the 'Länder' administrations and consequently freedom of movement was restricted to the territory of the corresponding 'Land'. That territorial restriction enabled procedures to be processed more quickly as it made it easier to locate and contact asylum-seekers,

the Belgian delegation, on the contrary, "felt that freedom of movement should be more forcefully expressed, avoiding the use of the conditional [in the original text]" (Ibid.: 4). This again shows that Member States wanted domestic approaches to be accommodated in the directive. Member States such as Belgium that provided a comparatively liberal standard on freedom of movement did not propose or even welcome a more restrictive standard. Instead, these Member States promoted higher protection standards, namely those they had in place domestically. This rebuts expectations formulated by proponents of the venue-shopping theory.

As far as financial and material assistance were concerned all Member States seemed to be satisfied with the French proposal. According to the outcome of proceedings, "some delegations" in the Working Party explicitly agreed with the French delegation on the influence of widely divergent practices concerning migratory flows (Ibid.). This clearly reflected the perspective of the strong regulators, which provided material assistance in contrast to weak regulators that did not have a regulatory system in place that provided material assistance. Moreover, "most delegations agreed with the French delegation's paper […] that allowing the right to work could swell the number of asylum applications on purely economic grounds." The possibility of the right to work was therefore meant to be exceptional and would only be granted if the hosting state had not been able to take a decision within a certain time period. Germany did not agree with this position and argued that this matter, and particularly the period of one year suggested in the paper, required further discussion (Ibid.: 4). While I have shown in Chap. 4 that asylum-seekers in Germany at the time had access to the labour market after one year, this had only just been secured through a cabinet resolution and was not yet enshrined in law (Flüchtlingsrat Thüringen e.V. 2001). Germany had had a labour market ban for asylum-seekers in place until a court judgment by a Social Court in Lübeck had ruled on 22 March 2000 that banning asylum-seekers completely from the labour market was unlawful. Both employer associations and unions had also lobbied for the abolition of the ban (Spiegel 2000). Thus, Germany introduced access to the labour market after one year on 6 December 2000 through a resolution of the cabinet (Flüchtlingsrat Thüringen e.V. 2001). In adopting labour market access after one year, Germany may have been inspired by the French sug-

gestion that in exceptional cases labour market access should be allowed after one year. Some Member States, however, favoured a more liberal approach on the issue. The Portuguese delegation shared their domestic experience and said that in Portugal asylum-seekers who submitted a justified application after a brief period were granted a temporary residence permit which included the right to work. The Netherlands and Sweden, which grant access to employment after six and four months respectively again felt that the proposed text was too restrictive and promoted a more liberal approach (Ibid.: 5).

The Council Conclusions in November/December 2000: Taking No Clear Stance

Following the meeting of the working party, the RCD was also on the agenda of the Council meeting in November/December 2000 (European Council 2000/457). The Council Conclusions reflect the contradictory approach, trying to achieve both a high degree of harmonisation to prevent secondary movements and maximum discretion to allow for flexibility in crisis situations, when stating that it both

> considers that the harmonisation of conditions for the reception of asylum-seekers should help to limit the secondary movements of asylum-seekers influenced by the variety of conditions for their reception (recital 6, Ibid.)

and

> considers that application of the principles of subsidiarity and proportionality should leave Member States some room for manoeuvre with regard to the reception of asylum-seekers (recital 7, Ibid.).

Whereas most topics were only briefly mentioned, the Council Conclusions proposed options on how to proceed regarding the highly contested issues, without, however, providing clear guidelines on what to do. For instance, the Council Conclusions left open

whether the instrument should also apply for people asking for other forms of protection (paragraph 1 in the ANNEX of the Conclusions, Ibid.). On access to work the Conclusions suggested three options for further discussion: a general ban on access to work, free access or access under certain conditions (recital 6). Regarding material reception conditions the Conclusions accommodated the French suggestion of providing accommodation, food, basic daily expenses and urgent health care (recital 5 and 7). Thus, while it suggested that Member States needed to have some kind of material reception conditions in place, it did not propose any specific standards. This accommodated the restrictive outliers among the strong regulators, while *de facto* exceeding the standard of the weak regulators that so far had not provided any material reception conditions. Moreover, the Council proposed two options under which freedom of movement could have been restricted. The liberal option (1) was to fix the place of residence as the location where the asylum-seekers received social benefits (recital 4). The restrictive option (2) was to limit freedom of movement to an administrative subdivision for the swift processing of the application. This represented the two dispersal mechanisms applied in the EU. While Sweden and the UK, for instance, made use of the first mechanism and distributed asylum-seekers by making residence in remote areas a pre-condition for receiving material reception conditions, Germany strictly limited freedom of movement to districts for the swift processing of applications under the notion of *Residenzpflicht* (see Chap. 4).

These conclusions show that the initial debates in the Council did not help overcome the controversies of the 1990s on issues such as access to work, freedom of movement and the applicability of the directive to beneficiaries of subsidiary protection. Yet, there was a general agreement that having some sort of material reception conditions (housing, subsistence, health care) for asylum-seekers was necessary. The negotiation basis at this early stage thus already exceeded the standard provided by the weak regulators. As I will demonstrate later, weak regulators became more vocal in the subsequent phases of the negotiations, without being able to leave a mark on the directive.

The Commission Proposal: A Pragmatic Compromise Between Raising Protection Standards and Accommodating Member States' Positions

Given the fact that Member States had already debated the core issues subsequent to the French discussion paper, the suggestions made by the Commission proposal submitted to the Council on 18 May 2001 (Council 2001/9074: 1) were much less progressive than the proposals on the other directives. It seems that the Commission was aware of potential red lines that Member States would not cross from the previous debates.

As regards the scope of the directive, the proposal already suggested that Member States *could* also decide to apply it to asylum-seekers claiming subsidiary protection status (art. 3I/III). This was clearly not an ambitious move by the Commission, as it did not make application to these cases obligatory but optional. The same applies to freedom of movement and material reception conditions on which the proposal accommodated the restrictive German practice (Ibid.: 32, art. 7I). Concerning the aspects of material reception conditions discussed, the proposal suggested the adoption of the lowest common denominator of the strong regulators. In the general rules section, the proposal held that Member States should make provisions on material reception conditions to ensure a standard of living "adequate for the health and the well-being of applicants and their accompanying family members as well as the protection of their fundamental rights" (art. 15II sentence 1). At the same time, the proposal left Member States with the discretion to provide reception conditions in kind or in the form of financial allowances and vouchers (Ibid.: 36, art. 15III). It also allowed Member States to choose which form of housing (reception centres, private housing and financial allowances for housing) they would provide. This accommodated all approaches present among the strong regulators.

The Commission only in two instances suggested higher standards than the ones debated in the Council. The Commission proposed that asylum-seekers also have access to psychological health care as part of material reception conditions (art. 20I). On access to employment the

Commission proposal (Council 2001/9074: 34) took a rather affirmative stance, stating in art. 13I that

> Member States shall not forbid applicants and their accompanying family members to have access to the labour market for more than six months after their application has been lodged.

Framing access to the labour market as a rule rather than an exception and suggesting that asylum-seekers should be able to access the labour market after six months signalled a clear departure from the French working paper and the positions previously advanced by the majority of Member States. Not surprisingly, neither of these two liberal suggestions later made it into the directive.

First Controversial Discussions in the Asylum Working Party Under the Belgian and the Spanish Council Presidencies

The first Council meetings after the proposal from July 2001 to January 2002 show that while restrictive weak regulators did vocalise their concerns, they did not follow their positions through to the end and hence failed to effectively influence the document under discussion, for example by introducing their restrictive approach on material reception conditions. At the same time, restrictive strong regulators saw their positions being accommodated. Sometimes restrictive strong regulators and liberal ones agreed on a "package deal."

Concerning the cross-sectional topic "scope of the directives" the following conflict line could be observed: While Spain, France and Greece, among others, wanted the directive to be applied only to people who claimed refugee status under the CRSR, the Netherlands and the UK, which had generally aligned rights attached to both statuses (see Table 4.7) wanted it to cover applicants for all forms of protection.

Initially, Germany had been alone in promoting a restriction of freedom of movement for the swift processing of applications. Later, it was joined by Austria and Greece (Council 2002/5444). Germany (Council 2001/12839: 7, footnote 1) at that time also supported Greece suggesting

that it should also have been possible to invoke reasons of national security and public policy to restrict freedom of movement (Council 2001/11320: 16, footnote 1; Council 2001/11541: 15, footnote 1). In this regard, Germany provided an argument for the Greek position, citing a sentence from art. 64I TEC stating that title IV shall not affect Member States' responsibilities concerning the "maintenance of law and order and the safeguarding of internal security." Here, it seems that Germany and Greece mutually supported each other (in a package deal) on issues they considered important. At the same time, it seems that Member States such as Greece and Austria learned about effective regulatory approaches practiced in strong regulating Member States, which they eventually adopted as well. The fact that they had only started advancing this position after the German model towards restricting freedom of movement had been on the negotiation table some time supports the argument that they learned about this practice during the negotiations and that it did not represent a form of strategic venue-shopping. Argued counterfactually, if Austria and Greece had really planned to introduce this restrictive practice via the EU level from the beginning of the negotiations, as venue-shopping would suggest, why would they have waited until a later stage of the negotiations to propose it? While Sweden wanted its own dispersal mechanism to be accommodated (Council 2001/11320: 15, footnote 1; Council 2001/11541: 14, footnote 1; Council 2001/12839: 6, footnote 1), it "[c]onsidered that the restriction on freedom of movement [as suggested by Germany] was contrary to human rights" (Council 2001/11320: 15, footnote 1; Council 2001/11541: 14, footnote 1). Later on, when joined by Finland, Sweden repeated its contention that "[t]here were other ways to assist rapid processing of asylum applicants, without it being necessary to restrict their freedom of movement" (Council 2001/12839: 7, footnote 1) and suggested to delete the paragraph altogether (Council 2001/11320: 16, footnote 1; Council 2001/11541: 15, footnote 1).

Debates on employment also remained particularly controversial. Due to the contrast between the Commission's article and Greece, Spain, Italy, Luxembourg, Portugal and the UK's national policies, these Member States maintained a scrutiny reservation on the article. In the case of Italy and Luxembourg, this can be explained by the fact that they had banned asylum-seekers from the labour market entirely. The UK was at that time

already revising its domestic legislation and planning to ban asylum-seekers from the labour market (see Chap. 6). France tried to upload the anticipated results of its domestic reform on access to work and held that "the principle should be that of preventing access to employment with some exceptions" (e.g., if the procedure takes too long and the fault for this delay is not the applicant's responsibility) (Council 2001/11320: 21, footnote 1; Council 2001/11541: 20, footnote 1). Belgium, Germany and Greece maintained a scrutiny reservation on the six-month period, France wanted to replace this period with "after a reasonable period" (Council 2001/11320: 21, footnote 4, Council 2001/11541: 20, footnote 4). These Member States all wanted to maintain discretion, as Germany and France were at the time revising their national laws on access to work. Belgium did not apply a time-frame but instead made reaching the admissibility procedure a necessary condition for accessing the labour market. The restrictive position in the case of Greece might be surprising, as Greece gave access to its labour market immediately, more specifically as soon as an applicant held a valid asylum-seeker card (called "Pink Card"). However, due to the asylum procedures being extremely slow in Greece, it could in practice take one year and even longer until asylum-seekers received a Pink Card (Odysseus 2006: 35). Therefore, codifying a time-frame of six months may have been problematic for Greece, as it could practically not fulfil this provision. Liberal Sweden on the other hand felt that the phrasing ("Member States shall **not forbid** […] access to the labour market"; emphasis added) sounded too negative (Council 2001/11320: 21, footnote 2; Council 2001/11541: 20, footnote 2) and moreover, stipulated a period of "less than six months" (Council 2001/11320: 21, footnote 4; Council 2001/11541: 20, footnote 4), the reason being that it provided labour market access after four months.

Italy had a scrutiny reservation on the entire chapter III which dealt with all forms of material reception conditions. This is not surprising, as Italy did not systematically provide social benefits for asylum-seekers. On art. 15II sentence 1 Germany, Spain, France and Austria said that the wording (standard of living adequate for the health and the well-being of applicants) was too vague and not suited to the content of the directive. Germany instead suggested the following alternative wording: "Member States shall ensure that applicants have an appropriate standard

of living […].” France and Austria, whose accommodations for asylum-seekers were in poor conditions (PLS Ramboll-AT 2001: 17–21; PLS Ramboll-FR 2001: 17–18), supported a slightly less generous approach by suggesting that the need to ensure an adequate standard of living was only necessary in the recitals of the directive and not in the directive itself (Council 2001/11320: 25, footnote 1; Council 2001/1154: 23, footnote 1). Member States also criticised the idea of reducing and withdrawing material reception conditions three months after access to the labour market had been granted, as suggested by the Commission proposal. Germany, Luxembourg, the Netherlands, Finland, Sweden and the UK specified “that the possibility of access to the labour market is not a sufficient condition to reduce the level of benefits. It is the fact of having found a job and the level of remuneration that would make it possible to reduce or withdraw material benefits.” This, of course, was the position of Member States which provided social benefits for asylum-seekers who did not have sufficient resources of their own. Clearly, they wanted to make other Member States that did not yet provide material benefits adopt such a policy as well. Greece, Italy and the UK, moreover, had a reservation on the three-month period, as they considered the fact of having found a job most important and did not want to financially support anyone who was employed and hence (at least partially) financially independent. Arguably, the motivation for Greece and Italy to join the second but not the first reservation on this paragraph was based on the fact that those Member States did not want to support asylum-seekers three months after they could potentially access to the labour market, as they did not provide social benefits in any systematic way. The alternative wording suggested by Italy (Council 2001/11320: 26, footnote 1; Council 2001/11541: 25, footnote 1) to change this paragraph supports this interpretation:

> Member States may reduce or withdraw material reception conditions as soon as applicants have begun an occupation within the meaning of Article 13. However, if they are still not financially independent, Member States shall grant them a food allowance and access to basic social care.

The framing indicates a focus on the reduction of material reception conditions and much less on the economic independence considered crucial

by the Member States making the first reservation. Moreover, the wording suggests only food allowance and access to basic social care should be provided, which was clearly below the proposals of the other Member States. This supports my suggestion that this second reservation was based on motivations to minimise costs. The first one was rights-enhancing in that it tried to raise protection standards in the weak regulators.

SCIFA and Access to the Labour Market Under the Spanish Presidency

As the Asylum Working Party had still not reached consensus on access to work by mid-January 2002, the Spanish Presidency submitted a number of questions on current practices to the Member States. The results of this questionnaire were then to be discussed in the SCIFA (Council 2002/5430: 2). In view of the domestic practices, the Spanish Presidency suggested the following compromise on article 13:

> 1. Member States may authorise applicants for asylum to have access to the labour market only after the expiration of a period of six months from the date on which their application has been lodged.

This actually follows the Spanish approach, as Spain granted access to the labour market after six months. However, to soothe countries which were more restrictive on this issue, it seems that the six months became a minimum time-frame during which asylum-seekers should not be allowed to work. This did not fit the frame of having minimum protection standards to avoid secondary movements and clearly contradicted the idea that Member States were free to provide more favourable standards. Instead, it established a maximum standard not to be exceeded, which contradicted the overall design of the CEAS.

SCIFA did not agree with this framing. At its meetings on 28 and 29 January 2002, most delegations and the Commission representative said that Member States should be obliged to give access to the labour market no later than one year after the application had been lodged. This changed the frame so that it fitted with the general approach of defining minimum

standards. Moreover, it represented the same standard which Germany had already in place. The French and the Italian delegations' reluctance to agree to such a standard continued (Council Doc. 5791/02: 1–2).

Final Negotiations in the Permanent Representatives Committee

On 22 March 2002, the Council Secretariat sent an introductory note to the Permanent Representatives Committee. According to the Council Secretariat, among the difficulties which persisted, two could be singled out as being of political nature, namely the scope of the directive and freedom of movement. Access to work also remained highly controversial due to the scrutiny reservations of Italy and France.

Concerning the scope of the directive, the Netherlands, Finland and Sweden, "consider[ed] that the inclusion of subsidiary protection [in the RCD] must be compulsory for Member States." To support their arguments for widening the scope, these countries highlighted its humanitarian benefits, the need to ensure swift and efficient procedures and the number of people that were already granted some form of subsidiary protection in Member States (Council 2002/7307: 3). As I will show in the negotiations on the procedures directive, the question of integrating holders of subsidiary protection status into the directives was presented in all negotiations by Finland, Sweden and the Netherlands. These treated both refugees and subsidiary status holders equally and wrote a note to the Council in which they argued that having one procedure and also one status would be in line with the Amsterdam Treaty (see Council 2001/12063). Obviously, these states wanted to upload their domestic approach to the EU level. On the other hand, France, supported by Austria, did not want to include asylum applicants that applied at the border in the directive. These two Member States have special border procedures in which they granted a lower level of protection to some applicants. Moreover, France had so far applied different procedures for refugee status applicants and subsidiary protection status applicants. The other Member States that wanted finalise both the scope of the directive and its stipulation about access to work suggested a package deal. They

said that they could accept Austria and France not applying the directive to border applications if, in exchange, both France and Austria withdrew their reservations about the scope of the directive and France also withdrew its reservation on access to the labour market. This resulted in a package deal (Council 2002/7307: 9, 18, footnote 1). As the only concern France had *vis-à-vis* the scope related to the accommodation of its border procedure and as it had planned to introduce access to the labour market after one year anyways, this did not represent a major concession from the French delegation.

On freedom of movement the Secretariat stated that the draft directive established that asylum-seekers "may move freely within the territory of the host Member State with no limitations other than those that may result from the constitutional structure of this Member State and the attribution of administrative competences within it" (Council 2002/7307: 4). Germany suggested a text which establishes limitations on freedom of movement "solely on reasons of public interest, administrative procedures or the attribution of administrative competences and costs within that Member States." France and Sweden introduced a scrutiny reservation stating that it "cannot accept the text suggested by Germany" (Ibid.). Yet, the German approach was introduced into the document in the negotiations and France, the Netherlands and Sweden maintained their scrutiny reservation on the German proposal (Council 2002/7802: 9, footnote 1, footnote 3).

Debates on both material reception conditions and access to the labour market remained controversial. Greece wanted Member States to have the possibility of reducing and withdrawing material reception conditions a reasonable period of time after access to the labour market had been granted: "In such cases, if they are not financially independent, Member States shall grant them, at least food allowance and access to health care" (Council 2002/7307: 22, footnote 1). Greece did not provide for any material reception conditions at the time and hence wanted to minimise additional costs. Moreover, Greece maintained a reservation on the need to defining "a daily expense allowance" as part of material reception conditions (Ibid.: 5, footnote 1). However, the daily expense allowance figured in the text adopted by the Permanent Representatives (Council 2002/7802: 5) and Greece's move to reduce or withdraw

material reception conditions when applicants had received access to the labour market was not accommodated. Rather, it was stated that they may be reduced or withdrawn, if applicants "have been working for a reasonable period of time" (Ibid.: 14).

On access to employment the draft by then said that "Member States shall determine a period of time, starting from the date on which an application for asylum has been lodged, during which an applicant shall not have access to the labour market." France no longer criticised the access to work provision *per se*, but nevertheless introduced a reservation because it wanted to specify a concrete period of time, in order to ensure harmonisation. Italy, which had banned asylum-seekers from the labour market domestically, maintained its reservation on employment (Council 2002/7307: 15), even after debates among the Permanent Representatives (Council 2002/7802: 12, footnote 1; Council 2002/8090: 9, footnote 1). Nonetheless, Italy never forcefully fought the introduction of labour market access and remained rather passive.

Indifference Towards the EP's Opinion

On 25 April 2002, the EP adopted its amendments to the Commission proposal. However, these were completely ignored (Peers and Rogers 2006: 301). On the core issues identified above the Parliament made several amendments. Some of these far exceeded those discussed in the Council or even those suggested by the Commission. For instance, the EP suggested that Member States should allow labour market access "as soon as possible but not later than four months" (EP 2002b, amendment 51), whereas the Commission had suggested labour market access after six months. Moreover, the EP wanted a higher standard on material reception conditions, especially relating to health care (Ibid., amendment 63). The EP suggested the deletion of a sentence stating that material reception conditions could also be provided in vouchers (Ibid., amendment 59), as "[e]xperience has shown that providing vouchers could lead to discrimination and was of no tangible benefit" (EP 2002a). This was a position advanced by many NGOs (see Chap. 4).

On freedom of movement, however, the EP generally followed the restrictive approach advanced by Germany which was already part of the Commission proposal, yet it tried to formulate this as an exception rather than a rule (EP 2002b, amendment 41). Concerning the scope, the European Parliament suggested that the directive should cover other applicants for international protection as well, as was also proposed by the Netherlands and Sweden (EP 2002b, amendment 114). It was not introduced into the directive due to the EP's Opinion but rather because of to the package deal completed between the Netherlands and Sweden, on the one hand, and France on the other.

In fact, debates in the EP seemed to be very much detached from debates in the Council. As a result of tough negotiations and package deals debated in the Council, the directive had developed considerably. Member States did not want to reopen these discussions. Moreover, suggestions by the EP were often more liberal than those made by the Commission, which had already been harshly criticised by some Member States for being too lenient. The timing of the EP, which issued its amendments on the day the European Council met to finalise the directive, meant that the chances of their positions being recognised were further reduced.

Final Package Deals and the Withdrawal of Reception Conditions for Late Applications

The European Council met on 25/26 April 2002 in Luxembourg and discussed the RCD, among other things. During the meeting the Council instructed its bodies to examine the Opinion of the EP. However, at this point the Netherlands and the UK entered parliamentary scrutiny reservations again. In the case of the UK, this was due to the fact that it wanted to introduce another ground for the withdrawal or reduction of reception conditions, namely in cases where the applicants did not make an asylum claim as soon as possible after their arrival in the host country (Peers/Rogers 2006: 301). This eventually found the support of Austria in the Council negotiations (Council 2002/14658 ANNEX I: 23) and made its way into the directive. Germany opened up negotiations again on the question of whether access to the labour market was really covered

by art. 63 TEC and asked the Council Legal Service for an opinion on the matter (Council 2002/8351: 23). The German delegation's change in position arose because the *Zuwanderungsgesetz* (Immigration Law) was still being debated. While the government had already introduced access to work after one year in cabinet this had still to go through Parliament. Members of the opposition at the time became aware of the fact that the position that the German delegation defended in the Council reflected this cabinet decision and not the *status quo ante* and criticised the government for circumventing the Parliament (Deutscher Bundestag 2003b: 2344; Deutscher Bundestag 2003c: 3660–3661). Thus, Germany tried to maintain discretion for the ongoing debate. However, Germany was not able to reopen this negotiation, as the Legal Service said access to work was covered by EU primary law (Council 2002/9077). Therefore, Germany suggested replacing at least the wording "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 2002/14658 ANNEX I: 16, footnote 1). This is the wording that eventually made it into the directive.

The Qualification Directive: More Than a Codification of International Refugee Law

In contrast to reception conditions on which Member States had never before been able to adopt a common position, the QD had its predecessor in the 1996 Joint Resolution, which provided a solid grounding for discussions. This resolution already introduced a common refugee definition. Thus, in contrast to the RCD, the QD required no preliminary debates in the Council and the Commission could immediately submit its proposal in September 2001 (Commission of the European Communities 2001).

The first reading of the directive started in April 2002 and focused on art. 1–12. Skipping the second reading, the Danish Presidency suggested amendments to some core provisions, including the family definition and the status and rights of both refugees and beneficiaries of subsidiary

protection. By September 2002, a common refugee definition had been established, but the definition of subsidiary protection status remained a focus for debates during the informal ministers meeting in Copenhagen on 13 and 14 September 2002. A common definition of subsidiary protection status had still not been found by November 2002. While France had eventually accepted that protection against non-state persecution would be incorporated into the directive, Germany then introduced a scrutiny reservation on this issue. On 22 October 2002, the EP submitted its resolution. Its suggestions were—as in the case of the RCD—totally ignored in subsequent negotiations.

The remaining issues were debated during the Greek presidency in early 2002. Yet, the content of subsidiary protection remained a major issue for some Member States, particularly for Germany, as Germany did not want to align the content of CRSR's refugee status with subsidiary protection status. The Irish Presidency eventually forged a compromise: Germany would be accommodated on the content of subsidiary protection status. Thus, the directive would allow for fewer rights to be provided to beneficiaries of subsidiary protection status. In addition, Germany successfully introduced a recital in the directive according to which subsidiary protection status for claimants coming from situations of generalised violence would only be provided if the threat they were exposed to was "individual." In return, Germany accepted the introduction of a protection against non-state persecution. Throughout the debates, the restrictive concepts of "IPA" and "protection by non-state actors," which were heavily criticised by legal scholars for potentially violating internal refugee law (Peers/Rogers 2006: 336–337) were not debated in detail among Member States.

The Commission Proposal: Systematically Suggesting Higher Standards of Protection

The Commission proposal on qualification for international protection and rights attached to international protection of September 2001 (Commission of the European Communities 2001) systematically suggested protection standards higher than both the final legislative output

and the *status quo ante* in most Member States. The proposal's explanatory memorandum provides evidence for this liberal orientation by saying that the Commission has drawn from disparate Member States' systems and based their proposal on "best practices" (Ibid.: 6) among Member States. In a few instances, however, the Commission proposal accommodates restrictive practices followed by some strong regulators.

The Commission proposal suggested a more expansive definition of the family compared to that laid down in the directive. According to the proposal, the family should comprise the spouse of the applicant or his/her unmarried partner, where Member States treat both types of couples equally (art. 2 j i.), and unmarried and dependent children (ii.) or other dependent relatives (iii.). This is a higher protection standard than the one provided by the directive which does not cover dependent relatives and adult children. The directive only protects partners where they are treated equally to married couples in a state's alien's law. Furthermore, the Commission proposal suggested the introduction of protection against non-state persecution, which exceeded the *status quo ante* of Germany and France, as I have shown in Chap. 4. The Commission arguably tried to sell this as a package deal by linking this provision to the restrictive concept of non-state protection, suggesting that non-state actors can either act as protectors or persecutors (art. 9). Another restrictive concept taken up by the Commission is the IPA (art. 10). This accommodated the restrictive practice followed by the vast majority of Member States that made use of the concept of IPA. At the same time, the proposal tried to establish a number of safeguards.

The definition of subsidiary protection as laid down in art. 15 was more encompassing than that later presented by the Council. For instance, art. 15c suggested subsidiary protection status should be provided for war refugees, which Germany for instance, only provided on a discretionary basis (see Chap. 4). By contrast, the final directive held that war refugees should only receive subsidiary protection status if they were individually threatened in the context of generalised violence. The Commission proposal did not require such an individual threat. The proposal, in addition, suggested that residence permits should be issued for refugees for five years and should be renewable automatically (art. 21I). This represented the standard applied in Greece and Germany,

but (at first glance) it was more liberal than what was in place in the Netherlands and Finland up until then.[2] Residence permits for holders of subsidiary protection status would be valid for at least one year (art. 21II), which represented common practice in most EU Member States. According to the Commission proposal, holders of both types of status would be allowed to work (art. 24), in the case of refugees immediately after status has been granted (paragraph 1), for holders of subsidiary protection status no later than six months after status has been granted (paragraphs 2 and 3). This was more liberal than the eventual legislative output. The proposal suggested equal access to social welfare, health care and accommodation for holders of both statuses (arts. 27, 26 and 29). Again, this was more liberal than what many Member States had in place, including those that provided subsidiary protection on a discretionary basis such as Germany, the UK and Ireland or those Member States that did not provide any subsidiary protection, namely Belgium and Luxembourg. The reason for aligning the content of both types of status was "to reflect the fact that the needs of all persons in need of international protection are the same" (Commission of the European Communities 2001: 4). Moreover, the Commission argues that differences between the statuses resulted in a situation that "leaves a potential gap in the European protection regime and allows for differences in Member State practice in this area to continue with a possible negative affect [sic!] on the goal of limiting unwarranted secondary movement of asylum-seekers within the European Union" (Ibid.). Thus, the Commission arguably used the argument that the protection gap provoked secondary movements strategically to gain the support of those Member States that felt over-proportionally affected by the asylum issue.

[2] I have already highlighted in Chap. 4 that it is not necessarily more liberal in practice, as some Member States gave unlimited residence permits after an initial period of three years. In this case, providing residence permits for five years would be more restrictive, as unlimited residence permits were granted later. For the logic of negotiations, however, this would have implied that Member States providing residence permits for three years and then indeterminately would have to change their practice.

Initial Debates Under the Spanish Presidency

The first reading of the directive started in April 2002. It focused on arts. 1–12. Most Member States wanted to restrict the family definition. Germany, Greece, Spain, Ireland, Austria and the UK wanted to restrict family reunification for non-married partners to cases where Member States treat them equally "under its law relating to aliens." Moreover, only minor and not otherwise dependent children would be included in the family definition and other dependent relatives would be excluded, according to these states (iii) (Council 2002/7882: 4, footnote 1; Council 2002/9038: 4, footnote 1). Obviously, these Member States tried to adopt their domestic *status quo ante*. Austria, Ireland and Greece did not treat unmarried couples the same as married ones under its aliens law. Other relatives were not recognised by the vast majority of Member States with the exception of Sweden, Portugal, Italy and Greece, which accepted parents and family members of adults, including "children" of applicants who were over eighteen.

France had a scrutiny reservation on art. 9c according to which non-State actors could be considered sources of persecution where the state was unable or unwilling to provide protection. The French delegation held that "[i]n principle, no protection should be offered in these cases, unless certain conditions are met (for example that these activities of non-state actors are tolerated or encouraged by the public authorities)" (Council 2002/7882: 11, footnote 2; Council 2002/9038: 11, footnote 2). This was in line with French case law at the time, which recognised victims of non-state persecution only under specific conditions (Teitgen-Colly 2006).

The Netherlands suggested that refugees should be given residence permits valid for three years instead of five years (Council 2002/9038: 27, footnote 2) which reflected Dutch domestic practice at the time. As regards access to employment, Germany held that rules for refugees and beneficiaries of subsidiary status should be more clearly separated (Ibid., footnote 2). As I have demonstrated earlier, Germany made a clear distinction between holders of subsidiary and refugee status, providing fewer rights for beneficiaries of the former. The Netherlands and Sweden, which treated holders of both statuses equally, wanted the same time limits for access to employment for them (Ibid.: 29, footnote 1). Austria,

Germany, Portugal, Sweden and the UK had a scrutiny reservation on access to social benefits and France explicitly said that its scrutiny reservation concerned the equal treatment of refugees and beneficiaries of subsidiary protection status (Ibid.: 30, footnote 5). Arguably, Member States based their scrutiny reservations on very different foundations: While Sweden preferred equal access to social benefits being expressed more forcefully, Germany and the UK were more sceptical of aligning the statuses, as they had previously provided subsidiary protection on a discretionary basis. Indeed, for the same reason, Germany also wanted to distinguish between holders of the two different types of status in the area of health and psychological care (Ibid.: 31, footnote 2). Finland which treated minor asylum applicants like nationals in relation to access to health and psychological care (see PLS Ramboll_FI 2001: 30), said that "protection [for unaccompanied minors] must be provided at least at the same level as that provided for national minors who have been taken into care" (Council 2002/9038: 32, footnote 1). Overall, the initial debates under the Spanish Presidency highlight that Member States tried to upload their *status quo ante* policies.

The Danish Presidency: Achieving Compromise on Core Definitions

Skipping the second reading, the Danish Presidency suggested amendments to some core provisions. Discussions on definitions followed. Core definitions (refugee and subsidiary protection) were almost finished in November 2002 (Peers/Rogers 2006: 327).

The revised proposal contained a highly restricted family definition which reflected Member States' comments and only covered partners in a stable relationship "where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens" (Council 2002/11356: 5). The Commission and liberal strong regulators, such as Sweden and the Netherlands, wanted at least to integrate the option to consider other close relatives which were dependent on the applicant as family members (Ibid.: 5, footnote 1; Council 2002/12620: 5, footnote 2). They were

at a later stage joined by Italy (Council 2002/14308: 4, footnote 1), a Member State that applied a very large family definition, including ill relatives up to the third degree (see Chap. 4).

A qualification was introduced asserting that non-state actors can be considered actors of persecution and serious harm if it can be demonstrated that state or non-state actors of protection "are [either] unable or unwilling to provide effective protection […]" (Council 2002/11356: 11). France maintained its scrutiny reservation and was then joined by Germany (Ibid., footnote 2).

This change of the German position in the Council can be explained by looking at what was happening in the German national political arena. When Member States were negotiating the directive, Germany was domestically debating changes on non-state persecution. The *Bundesrat* passed the *Zuwanderungsgesetz* (Immigration Law) on 22 March 2002. Among other things this law introduced protection against non-state persecution. In the *Bundesrat*, however, majorities for the government coalition, composed of Social Democrats (SPD) and Greens were tight. The *Land* Brandenburg at the time had a grand coalition, composed of the Social Democrats and the conservative Christian Democrats (CDU). The Prime Minister of Brandenburg, Manfred Stolpe (SPD) and the Interior Minister of Brandenburg, Jörg Schönboom (CDU), were not able to agree on a common position. Their vote, however, was needed for the law to be passed. Although Interior Minister Schönboom voted against the law, the then president of the Council, Klaus Wowereit (SPD), counted only the favourable vote of his partisan, Minister Stolpe, and considered that the law had passed. The CDU-led *Länder* subsequently submitted an appeal to the Federal Constitutional Court, arguing that the voting procedure had not been in order and that the law was accordingly null and void (Brabandt 2011: 167–168).

The fact that Germany introduced its scrutiny reservation exactly when the immigration law was being reviewed by the Constitutional Court suggests that Germany tried to maintain flexibility so that the outcome of these proceedings could be accommodated. After the Federal Constitutional Court ruled that the immigration law had been passed improperly and was therefore null and void (BvF 1/02) on 18 December 2002, the law was revised, but still provided protection against non-state

persecution. By then, France had already lifted its scrutiny reservation on non-state persecution (Council 2002/12620: 11, footnote 1). France had recognised large parts of the protection view (cf. Teitgen-Colly 2006) already in its case law and adapting its law accordingly therefore did not represent a radical departure from the *status quo ante*. In fact, many observers considered that non-state persecution had not been as much of an issue for France as it had been for Germany, despite the scrutiny reservation France had maintained for a long time (Interview UNHCR Brussels; Interview Churches Commission for Migrants in Europe, CCME; Interview ProAsyl). Germany, on the other hand, maintained its scrutiny reservation, at least concerning the recognition of non-state persecution in subsidiary protection cases (Council 2003/8858 ADD 1 ANNEX 1: 8, footnote 3; Interview Ministry of Interior_DE 3). Although Germany was no longer opposed to the recognition of victims of non-state persecution *per s*e and had taken steps domestically to strengthen the status of victims of non-state persecution, particularly those that had a background of gender-related persecution and honour crimes (see Brabandt 2011: 146–183), Germany eventually used this scrutiny reservation as a bargaining tool to be accommodated on other restrictive *status quo ante* policies.

Subsidiary protection status remained a core issue for some time because it was not established in international human rights law (besides non-refoulement) nor was there any harmonisation on this issue (e.g., through a Joint Position) prior to the legislation process. During an informal Ministers Meeting in Copenhagen on 13–14 September 2002, ministers discussed the issue more broadly (Council 2002/12148: 2). On the definition of grounds for subsidiary protection, Member States tried to codify ECtHR jurisprudence. Germany, moreover, still had a reservation on giving subsidiary protection to war refugees, as it usually provided them with *ad hoc* schemes. To solve this issue, the Chair suggested the addition of a recital to the preamble, suggesting that people fleeing due to a "general sense of insecurity" in internal or international armed conflicts were not covered by this directive (Council 2002/13646: 3, footnote 2). When a sentence in art. 18 on the content of international protection was entered saying "[t]he level of rights granted to a refugee or a person eligible for subsidiary protection status shall not be lower than that

enjoyed by applicants during the determination process" (paragraph 3), Germany and Sweden held that this standard of protection was too low. Sweden even suggested making the levels of rights enjoyed by beneficiaries of this status comparable to that enjoyed by refugees in Member States (Ibid.: 27, footnote 1) because Sweden itself treated refugees and subsidiary protection holders alike.

Towards the end of the Danish Presidency, Member States agreed that resident permits would be valid for (at least) three years in the case of refugees and one year for the beneficiaries of subsidiary protection (Council 2002/15627: 3). This standard was more liberal than what was previously provided by Finland which issued residence permits only for one year. The three-year period, moreover, accommodated the Dutch position, as the Netherlands issue residence permits for three years. Belgium and Sweden that provided unlimited residence permits for both CRSR refugees and beneficiaries of subsidiary protection (see Chap. 4) immediately after status recognition said that they could only accept a three-year period if the same time-frame was applied also for beneficiaries of subsidiary protection (Ibid., footnote 1). Clearly, they wanted to find a compromise by at least aligning the rights attached to both statuses, if they could not achieve unlimited residence permits for both forms of international protection.

The Opinion of the European Parliament

On 22 October 2002, the European Parliament submitted its legislative resolution. As it was again based on the Commission proposal as, it was entirely detached from Council debates. Obviously, debates in the Parliament developed in a completely different direction than in the Council. The Parliament's amendments thus barely spoke to the *status quo* document under negotiation in the Council. Again, the European Parliament aimed at raising the standard of protection: It suggested inserting a standstill clause saying that "[t]his directive may under no circumstances be used to amend more favourable provisions existing in Member States" (EP 2002c: 138). Other suggestions included, the deletion of the concept of non-state protection (Ibid: 139), conditions related

to the IPA (Ibid.: 141), the extension of grounds for subsidiary protection status (including for instance sexual mutilation and serious and persistent discrimination) (Ibid.: 145–146). Moreover, the Parliament wanted to further align protection standards for subsidiary status holders with those of refugees by providing them with, among other things, a residence permit for five years (Ibid.: 147) and immediate access to the labour market (Ibid.: 148).

Final Debates and Package Deals Under the Greek and the Irish Presidencies

In January 2003, Member States discussed access to employment for beneficiaries of subsidiary protection status. The Greek presidency (Council 2003/5293: 4) conceded:

> In a number of Member States, a national subsidiary protection regime already exists, whereas in others, the concept as such, has not been (fully) developed. Therefore, these Member States are not familiar with the legal status, nor the envisaged size of the group of persons concerned, nor to what extent the setting up of [a] subsidiary protection regime at EU level would affect the situation within their labour market.

Certain Member States voiced their concern for the unintended consequences that newly introduced policies might have. I have shown in Chap. 4 that Luxembourg and Belgium had no subsidiary protection in place and Ireland, Germany and the UK provided subsidiary protection on a rather discretionary basis. Furthermore, the content of subsidiary forms of protection already in place in Member States varied. Member States that treated refugees and subsidiary protection holders differently, wanted to "maintain discretion" (Ibid.) as regards regulating access to employment for beneficiaries of subsidiary protection status. Other Member States, that is those that had aligned the statuses, on the contrary wanted to ensure that similar conditions were in place for holders of both statuses (Ibid.). The presidency suggested the following to overcome this issue: As a basic rule, beneficiaries of subsidiary protection shall have immediate access to the labour market, but Member States may establish

exceptions to this rule based on labour market policies conditions (Ibid.). Later attempts to have a maximum period of one year for this limitation were criticised by Austria which restricted labour market access for beneficiaries of subsidiary protection, saying that either this should be deleted or a period of five years should be inserted (Council 2003/6566 ADD 1 ANNEX I: 26, footnote 3). Germany, moreover, suggested a new wording on social welfare and health care which better reflected its national practice of restricting it to core benefits (Ibid.: 28 footnote 1; Ibid.: 29, footnotes 2 and 3).

A final compromise on the content of international protection status was reached in March 2004 under the Irish Presidency. In a package deal Germany, compromised on non-state persecution and in exchange received a provision that allowed it to differentiate between refugees and beneficiaries of subsidiary protection in terms of rights, and with regards to the rights of family members of status holders (Council 2004/7482 ANNEX I: 27). The differentiation between the content of refugee and subsidiary protection status was coherent with the German *status quo ante* practice (Peers 2004: 247–249). To respond to labour market concerns raised by Austria a paragraph was introduced stating: "**In exception to the general rule laid down in paragraph (3) Member States may**, for reasons of labour market policies, […] give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third country nationals who receive unemployment benefits" (Council 2004/7469: 4, emphasis in the original). On social assistance for beneficiaries of subsidiary protection, Germany was accommodated again, as the directive now held that "Member States may limit equal treatment with nationals […] to core benefits" (Ibid.: 5). In a similar vein, Germany has also been accommodated with regards to health care for subsidiary protection holders (Ibid.).

While agreeing to non-state persecution could be regarded a major step for Germany, it had mainly concerns regarding non-state persecution in subsidiary protection cases (Interview Ministry of Interior_DE 3). As I have shown earlier, Germany was about to introduce this standard due to ongoing domestic pressures in this area and had used its scrutiny reservation mainly for strategic reasons as a bargaining tool. In addition to

being accommodated on rights attached to subsidiary protection status, Germany, also received the recital that it had wanted to add to the preamble concerning art. 15c (Council 2004/7944: 9, Council 2004/8042: 5), which stated that "[r]isks to which **a** population of a country **or a section of the population** is generally exposed do **normally** not **create in itself an individual threat in line with Art. 15 (c)**" (bold in the original; Council 2003/9945 ADD 1 ANNEX I: 8, footnote 1, emphasis in the original). This highlights that strong regulators not only tended to adopt hard bargaining strategies in order to accommodate their restrictive *status quo ante* practices, but also how well they used their positions for strategic purposes. Moreover, the Netherlands was accommodated on residence permits for refugees, which were to be issued for a minimum of three years (Council 2004/7469: 3).

Interestingly, the restrictive concepts of the IPA and non-state protection (the recognition of non-state actors as potential actors of protection) were not debated in a contested manner and did not figure at all in the entire discussions on this directive. This, however, was not a case of venue-shopping. Instead, the absence of any controversies related to these issues was the result of significant *ex-ante* compliance in this regard. As the vast majority of Member States had applied these concepts anyways and wanted to be able to continue to apply them, their inscription into EU law was not contested, but highly consensual.

The Asylum Procedures Directive: The Persistence of National Administrative Law

Compared to the other two directives, negotiations on the APD were extremely intense and lasted five years. Asylum procedures were particularly difficult to harmonise as they were deeply embedded in domestic administrative law. Harmonising asylum policies could thus have significant repercussions on the broader corpus of administrative law and Member States were therefore reluctant to introduce ideas alien to their domestic system into law via EU legislation (Ackers 2005). The most controversial issues were access to free legal aid, the right to a personal interview, suspensive effect of appeals, the safe third country principle and the safe country of origin principle.

The Commission submitted its legislative proposal on 20 September 2000. As debates remained highly controversial and Member States continued to reject the Commission's proposal despite the efforts of three presidencies to find solutions, the Commission amended its proposal and adopted it on 19 June 2002. Yet, negotiations on the core issues remained problematic. The controversy surrounding the negotiations meant that debates over the APD even continued after the original deadline of 1 May 2004, the date of the accession of ten new Member States. The directive was finally passed on 1 December 2005 when all parliamentary scrutiny reservations were lifted. As the EP was again completely ignored by the Council, it initiated a trial against the Council before the CJEU stating that the Council had exceeded its competences by introducing a minimum safe country of origin list. The provisions on this list were declared void by the CJEU on 6 May 2008.

As Member States were not ready to make any concessions and forego their domestic practices, the directive achieved very little real policy harmonisation. Yet, while the 1995 Resolution on minimum guarantees for asylum procedures had left maximum discretion to Member States (Ackers 2005: 4; Commission of the European Communities 2000: 45), the APD at least tried to establish common minimum protection standards as a rule from which discretion was possible under the conditions mentioned in the directive. A point in case is the establishment of a suspensive effect of an appeal, on which Member States could not compromise in the 1995 Resolution on procedures, but which was established as a general rule (with possibilities for discretion) in the directive.

The Commission Proposal

On 20 September 2000, the Commission adopted a proposal for a Council Directive on Minimum Protection Standards on Asylum Procedures. It was based on an earlier Commission working paper, entitled "Towards Common Standards on Asylum Procedures" (Commission of the European Communities 1999). Like many other policy suggestions made in this field, this proposal was divided by its two underlying aims of harmonising policies to reduce secondary movements, while

leaving Member States with a certain amount of discretion. It thus lacked clear direction. The main goal of the directive was that implementing minimum standards would "help to limit secondary movements of asylum applicants as resulting from disparities in procedures in Member States. Henceforth, applicants for asylum will decide on their country of destination less on the basis of the procedural rules and practices in place than before" (Commission of the European Communities 2000: 8). However, the intention of the directive was not to establish uniform procedures or to adopt common concepts and practices: "For example, if a Member State does not wish to apply the safe third-country concept to reject asylum applications, the measure will not oblige this Member State to adopt the concept" (Ibid.: 3). This was in line with the provision referred to in all three directives, namely that Member States could provide higher standards than those laid down in the directive and hence could choose not to adopt restrictive concepts such as the safe third country provision.

The proposal exceeded the protection standards the Member States later agreed to introduce in the directive (see Chap. 4) by suggesting that these standards were obligatory. Concerning the scope of the directive, the proposal held that it should also apply to EU nationals and not only to third country nationals (explanations to art. 3, Commission of the European Communities 2000: 10). As a common definition on subsidiary protection did not exist at the time (it was only introduced with the QD), applicants for this status were not included in the proposal. Nonetheless, the proposal obliged Member States to regard any application for protection as valid under the directive, unless the applicant explicitly claimed a status not recognised by EU law[3] (art. 2 b, Commission of the European Communities 2000: 33). In addition, judicial review would generally have a suspensive effect (see art. 33 for a short list of exceptions). In the final version of the directive, an automatic suspensive effect was no longer provided. As there was little support for the idea of a common list for safe countries of origin and safe third countries among Member States and since UNHCR rejected the idea altogether, the proposal only laid down common criteria for Member States

[3] The majority of applicants do not claim a specific status.

to determine which countries were safe (Ackers 2005: 4; Commission of the European Communities 2000: 4–5, 53). This would have meant a rise in standards, as previously Member States were completely free to choose what criteria were necessary to decide whether a country was safe or not. Moreover, the Commission would be notified of national lists (Commission of the European Communities 2000: 7). The proposal held that the applicant "must be given the opportunity of a personal interview on the admissibility and/or substance of his application for asylum with an official competent under national law" (Ibid.: 35), whereas eventually the directive allowed for considerable discretion in this area. Moreover, it established a number of criteria the interview needed to fulfil. Legal assistance would be provided free of charge, if applicants could not pay for it themselves (Ibid.: 36). Moreover, the proposal wanted to further develop rules for the application of the safe third country concept, for example that the country was safe for the individual, that the applicant would be *de facto* readmitted and that the applicant had close links with this country (Ibid.: 41). Also, the proposal introduced criteria for the application of the SCO principle, that is stable institutions, judicial review, commitment to human rights and so on (Ibid.: 53; 45). These safeguards clearly represented an increase in standards that the Member States were not ready to make and which hence did not make their way into the directive.

Initial Debates Under the French and Swedish Presidencies

The Council received the proposal on 24 October 2000 (Council 2000/11622). It was first discussed by the Asylum Working Party during its meeting on 7 December 2000 (Council 2000/14531). The initial reactions demonstrated the potential problems that the directive would raise. The French and Spanish delegations felt that the proposal "was too detailed and did not take sufficient account of the principle of subsidiarity." Sweden and the Netherlands, which repeatedly advanced more liberal positions, complained that it was "too unambitious and left the Member States too much room for manoeuvre" (Council 2001/5229: 2, footnote 1; Council 2001/9998: 2, footnote 1; Council 2000/14531: 2). Treating both refugees and holders of other forms of international

protection equally, the Netherlands (Council 2000/14531: 2), later joined by Sweden (Council 2001/9998: 7, footnote 1), regretted the exclusion of subsidiary protection from the proposal. A group of Member States consisting of Belgium, Germany, Greece, Spain, France, Finland and the UK underlined the difficulties posed by a number of provisions in the proposal. Concerning appeal procedures these Member States pointed out that "the adoption of such rules would entail fundamental amendments to their laws and judicial systems" (Council 2001/5229: 4, footnote 1; Council 2001/9998: 4, footnote 1; Council 2000/14531: 2). Many Member States had fundamental objections to the proposal and one rejected the proposal altogether "as it did not adequately incorporate a series of national practices deemed essential to the maintenance of their national system" (Ackers 2005: 5). Germany was the foremost critic of the proposal (Hellmann et al. 2005: 154). This confirms my suggestion in the theory chapter that Germany had a special role among the strong regulators, as it had by far received the highest number of asylum-seekers.

Spain did not accept the suggestion that the directive should cover EU nationals. Spain had a strong interest in such a rule because members of Euskadi Ta Askatasuna (ETA) had earlier been granted asylum in Belgium. In response, Spain had fostered the adoption of an agreement in 1996 according to which EU citizens were not allowed access to asylum in any other Member State on the basis that all Member States consider each other safe (Interview Commission 3). Clearly, Spain did not want this agreement to be jeopardised by the directive (Ackers 2005: 5; Council 2000/14531: 2). France and Spain criticised the principle that every applicant should have the possibility to present their case in a personal interview, "as in their respective national systems an administrative practice based on the examination of written documentation (a questionnaire) prevailed" (Ackers 2005: 5). "Referring to their national legislation," both Germany and Austria suggested introducing certain conditions for access to free legal aid (Ibid.). Moreover, Spain did not accept a directive in which an appeal could have an automatic suspensive effect, as in Spanish administrative law the court had to decide upon a suspensive effect and only did so at the request of the person concerned (Ibid.).

The Belgian Presidency: Finding a Compromise on Cross-Cutting Issues

Member States were highly critical of most aspects of the proposal. For instance, Germany doubted that having common criteria for the application of the safe third country concept would work, while other Member States held that asylum applications should always be based on individual assessments (Council 2001/11844: 28, footnotes 1–3). Germany and France, moreover, had a scrutiny reservation on the use of the safe third country principle (Ibid.: 41, Footnote 1). The UK suggested only reasonable assistance should be provided free of charge and Germany wanted to make the provision of free legal aid conditional on the prospects of success, which followed its domestic approach of applying a merits test (Ibid.: 14, footnote 5). In fact, the vast majority of Member States used such a merits test, as Chap. 4 indicates. Nevertheless, it was Germany that raised the issue. This highlights the importance of salience and government effectiveness: Those Member States for whom the issue was particularly salient took an active role in the negotiations. Those with effective administrations were more likely to develop clear positions. Other Member States for whom the issue of asylum was not as pressing, adopted a more passive role.

Problems emerged between Member States once again. The Netherlands suggested that applicants should always have a personal interview, while Spain which did not systematically provide a personal interview held that an "applicant should be allowed to forego a personal interview" (Ibid.: 29, footnote 3). This would make the interview optional and not obligatory. Moreover, the Netherlands, Sweden and Finland submitted a paper suggesting the inclusion of applications for subsidiary protection in all three directives (Ackers 2005: 6; Council 2001/12063).

Given the controversies, the Belgian Presidency focused much of its attention on broad themes underlying the directive, instead of further discussing particular provisions (Ackers 2005: 6; Peers and Rogers 2006: 370) in preparation for the JHA Council meeting at the end of September 2001. The idea was to come to conclusions on these broad issues at a political level in order to facilitate debates at the technical level. The issues that

the Belgian presidency concentrated on were the scope and the structure of the proposal, as well as the procedures and the decision-making process (Council 2001/11891). Based on these debates, the Belgian Presidency suggested the adoption of Council Conclusions to COREPER which were revised a number of times (Council 2001/14227; Council 2001/14767). The Council adopted conclusions in December 2001 which were meant to help the Commission draft an amended proposal by the end of April 2002 (European Council 2001: 11; Peers/Rogers 2006: 371). Overall, however, the Conclusions were not able to solve the more significant controversies. On the scope and the structure of the directive, for instance, the Conclusions held that the question of the mandatory application of the directive to other forms of protection remained open (recital 7). Concerning legal assistance, the guidelines only held that the future instrument would make it possible to guarantee "reasonable legal assistance" (recital 12, bullet point 4), a wording previously suggested by the UK. Moreover, the question whether there should be a suspensive effect of appeals remained open (Council 2001/15107: 6; Council 2001/15107/1: 6).

The Amended Commission Proposal: Aligning More Ambitious Standards with the Status Quo Ante of Strong and Medium Regulators

To attain more clarity on how to deal with contradictory positions and guidelines, the Commission invited asylum experts from the 15 Member States. The idea was to identify the issues that Member States might find compromises on and those that were problematic. On 19 June 2002, the Commission adopted a modified proposal (Commission of the European Communities 2002). The revised proposal stated that Member States could make free legal assistance at the appeal stage conditional on applicants having insufficient resources, but also on a legal merits test. It could also restrict assistance to counsellors designated by national law (Ibid.: 30). This accommodated the positions of Germany and Austria, but also benefitted other Member States that employed the means and merits tests. Since a common approach on appeals had proven difficult,

the proposal restricted itself to two rather general procedural guarantees, namely the obligation to ensure "an effective remedy before the court" and the obligation to provide the applicant with the right to at least request suspension of extradition in case of a negative decision where there was no automatic suspensive effect (Ibid.: 43). This accommodated the Spanish approach, where there was no automatic suspensive effect of an appeal. Yet, a standstill clause was introduced, forbidding Member States from restricting their practice regarding this issue. As regards the personal interview, the amended proposal introduced a number of exceptions. Hence, the personal interview could be omitted, if applicants were not capable of taking part in the interview, for example for reasons related to their health, or if there was no interpreter available (Ibid.: 28–29). Yet, this did not accommodate the concerns of France and Spain, where there was no personal interview but where instead a counsellor helped the applicant to fill in an application. On both the safe third country and the safe country of origin concept, the amended proposal did not undertake any steps to accommodate the major concerns of Member States. On the safe third country concept, the amended proposal retained some of the general conditions for the application of this concept, for example the existence of close links between the applicant and the country deemed safe (Ibid.: 37, 48). This did not accommodate the concerns of countries that wanted to maintain discretion and did not have specific rules for the designation of safe third countries in their national legislation. It also retained specific criteria for the definition of a safe country of origin (Ibid.: 38, 51). In both the safe third country and the safe country of origin rules, the amended proposal suggested that Member States needed to inform the Commission of their current legislation within a timeframe of six months in case where it significantly differed from the proposal (Ibid.: 37, 38). If this had been adopted in the directive, it would have significantly restricted the discretion of Member States. At the same time, the fact that the Commission was ready to integrate concepts not in line with its proposal highlighted its openness to adapt to Member States' preferences. The Commission was aware that it would not be successful in its attempt to introduce sound protection standards if it went beyond the accepted limits of Member States. Therefore, it adopted a co-operative approach and integrated the concerns of Member States

that vocally presented them. Weak regulators tended to put forward their problems much less vocally and were therefore not accommodated in the same way. While Greece and Italy did not provide free legal aid for asylum-seekers before, for example, the introduction of free legal aid in general remained in the directive.

Overall, the amended Commission proposal accommodated the concerns of restrictive strong and medium regulators regarding free legal aid and the suspensive effect of appeals. It did not, however, do so as regards the personal interview, the safe third country and the safe country of origin provisions. These remained highly contested, as I will show below.

The Danish Presidency: Debating the Applicability of Safe Third Country Policies to Citizens of Acceding Member States

The Danish Presidency initiated the first debates on the directive at the JHA Council of Ministers on 15 October 2002, after the Spanish presidency had focused mostly on the RCD and Dublin II. Subsequent debates highlighted that Member States were highly concerned with the safe third country provisions. Austria was concerned about a high influx of applicants from candidate countries. Thus, it wanted these countries to be regarded as safe in order to be able to consider applications from these countries "manifestly unfounded." Austria had already suggested in the negotiations on the RCD that a reference should be introduced saying that people coming from the acceding countries were not eligible for material benefits (Council 2002/7307: 9). In its subsequent draft statements to the Council Minutes, the Council noted that all new Members States acceding the EU in 2004 were considered safe countries of origin to alleviate Austria (Council 2002/7802: 29). Eventually, the Council wanted to introduce an amendment into the RCD saying that Austria considers these states as safe, but Austria did not want to be thus exposed and said it could not accept such an amendment. It instead suggested introducing an article saying that Member States may decide not to apply the directive to nationals from candidate countries (Council 2002/8090/1: 23, footnote 2). In the course of 2002, an increasing number of Member States supported the Austrian position and a declaration was passed by

the European Council in November 2002 (European Council 2002: 11–12), designating the acceding Member States as safe.

The Greek Presidency: Negotiations on the First Part of the Directive

Aware of the difficulties the Belgian presidency had faced when wanting to deal with the whole directive at once, the Greek presidency focused only on the first part of the directive. The first part dealt with general provisions and basic principles and guarantees. On the scope of the directive negotiations were as follows: Sweden, Finland and the Netherlands, which treated all applicants for international protection equally, pushed for the directive to be applied to all applications for international protection (Council 2003/7214: 3, footnotes 2, 3, Ibid.: 5, footnote 1; Council 2003/8327: 3, footnote 2). France eventually joined them to promote the inclusion of applicants for subsidiary protection into the directive (Council 2003/8801: 3). This was because France intended to introduce a single procedure for applications for both statuses (Ackers 2005: 14). France had learned that employing a single procedure could help to streamline previously lengthy asylum procedures, which at the time caused problems in France (PLS Ramboll-FR 2001: 23–24). Spain continued to voice its resistance to applying the directive to applicants from the EU and asked to refer to third country nationals and stateless persons to make sure that it did not apply to EU citizens (Council 2003/7214: 3, footnote 1; Council 2003/7254: 9, 10; Council 2003/8327: 3, footnote 3; Council 2003/8801: 2). This was in line with Spain's position subsequent to its conflict with Belgium. The directive hence did not establish a more restrictive practice than the *status quo ante*, but rather represented a codification of this arguably restrictive standard. By the time the SCIFA met in May 2003, Spain had been accommodated and the text only referred to third country nationals and stateless persons (Council 2003/9329: 3).

What proved much more difficult were discussions related to the personal interviews and legal assistance. On the issue of personal interviews, Member States introduced an exhaustive list of derogations, accommodating among other things the demand of Spain where applicants only had

to fill in a questionnaire in the presence of an official and did not undergo an interview but instead had a conversation while completing the questionnaire (Council 2003/7254: 12). On free legal assistance, Germany and Austria were able to negotiate their *status quo ante* into the directive, namely a legal merits test and the restriction of free legal aid to legal support by specially designated counsellors (see Council 2003/7214: 18). Greece also had a scrutiny reservation on free legal aid from early on in the negotiations (Council 2003/7214: 18, footnote 2; Council 2003/7797: 18, footnote 1). As Ackers highlights: "[…] to accommodate Member States which would have to introduce from scratch a legal aid system in this field, a provision was introduced to reduce the cost on the basis of a 'not more favourable [than nationals] treatment clause'" (2005: 15). Yet, this still implied substantial misfit pressures for Greece, as Greece did not have any legal aid for third country nationals. Suggesting equal treatment with citizens was thus still a major step away from the *status quo ante* in Greece and there was no real accommodation of Greece's position. This highlights once again the difficulties weak regulators face when trying to influence EU asylum policies even on issues whose change will lead to these same Member States incurring substantial costs. Overall, free legal aid still remained highly controversial for some time.

Member States were able to "freeze" the first two chapters of the directive at the Council meetings on 5 and 6 June 2003. Nevertheless, a number of reservations remained. Several Member States wanted to apply the directive to applications for subsidiary protection. Germany and Austria still wanted to make free legal aid conditional; and Greece remained critical of the introduction of free legal aid in general.

The Italian Presidency

During the Italian Presidency debates focused especially on a common approach towards safe countries of origin and safe third countries.

At a Council meeting on 5 June 2003, France, the UK, Germany, Spain and Italy published a joint statement on a common minimum list of "safe countries of origin" (Council 2003/10235 ADD 1) which was later supported by the Benelux countries and Austria (Council 2003/10456:

12, footnote 1; Council 2003/11575: 12, footnote 1). Finland, Portugal and Sweden opposed this list (Council 2003/12639: 2). In the case of Sweden, this was due to the fact that it did not possess a safe country of origin policy at all.

The unity between the North-Western strong regulators and Italy, a Southern weak regulator, in promoting the introduction of a common minimum list can be explained by the fact that this issue did not have a redistributive dimension. While strong regulators in the North usually considered EU asylum harmonisation a zero sum game in which they tried to make other Member States (particularly but not exclusively weak regulators in the South) adopt higher standards so that these would become more attractive to asylum-seekers, the introduction of a common list of safe countries of origin did not follow this logic. In fact, by introducing such a list strong regulators would make sure that all Member States excluded applicants from certain countries as a general rule. This implied no redistribution among Member States, but with other parts of the world. At the JHA Council in October 2003 general agreement was reached towards safe countries of origin (European Council 2003: 8), though with a parliamentary scrutiny reservation of Sweden and a reservation of the UK (Council 2003/12734/1 REV 1: 16, footnote 1). The common minimum list was agreed as part of the directive (Ibid.: 8).

On the issue of personal interviews, Spain and France were accommodated. However, this was criticised by liberal outliers Finland and the Netherlands, which argued that "[a] personal interview should always be possible" (Council 2003/13901: 25, footnote 1).

The safe third country concept debates focused on a number of issues (see Ackers 2005: 20–22). A group of Member States, comprising the UK, Denmark and the Netherlands had suggested the offshore processing of asylum applications, as it was carried out by Australia, in so-called Transit Processing Centres (Noll 2003). This group developed the concept of "effective protection" and argued that even if applicants did not have the opportunity to receive asylum in a country in the past, the mere possibility of obtaining it should be sufficient in the future. The second approach was advanced by Germany where the political establishment sought for recognition of the 1993 asylum compromise (Ackers 2005: 20–21; Council 2003/13901: 24, footnote 1). According to the then

inserted art. 16a of the German Constitution there was no right to apply for asylum if someone entered Germany via a safe third country, irrespective of the remedy sought there. Hence, German border guards were allowed to send someone back who came to Germany via a safe third country. When the *Asylkompromiss* was introduced, all countries neighbouring Germany were declared safe. This approach has not only been heavily criticised by NGOs (ProAsyl 2012), but it was also not necessary for Germany to be part of the directive, as it did not concern those with refugee status or subsidiary protection status, but the German constitutional asylum status (UNHCR 2010b: 303). However, Germany pushed for the inclusion of this status in the directive and was later supported by Austria and the UK in this regard (Council 2003/13369: 11, footnote 1; Council 2003/13901: 24, footnote 1). A third group of Member States on the initiative of Austria wanted to have a common list for safe third countries, albeit each of them had different reasons (Council 2003/13369: 10, footnote 2). In addition, the UK wanted to anticipate the practice which was laid down in the 2003 Asylum and Immigration bill (House of Commons 2003) to be reflected by EU law. This bill foresaw an even more restrictive practice of using safe third country provisions to reduce appeal rights.

Towards the end of the Italian Presidency two sets of provisions had emerged in the draft directive, namely the German version of the "neighbouring safe third country concept" and another one based on the amended proposal (Ackers 2005: 322, Council 2003/15198: 36–38). At the same time the liberal outliers Finland, the Netherlands and Sweden wanted to preserve the possibility of having an individual assessment in all cases; Sweden and Finland even wanted to have such a right as a general rule (Council 2003/12734/1 REV 1: 9, footnote 3; 10 footnote 2; 11 footnote 1). Concerning the German version three Member States introduced a proposal according to which the Council would decide when the neighbouring safe third country concept should apply (Council 2003/15198). In addition, Germany had some reservations, "because the text did not fully represent their national law" (Ackers 2005: 22). This highlights the fact that Germany aimed to upload its domestic status. It is interesting to see that Germany cared so much about uploading this concept, as Germany did not

apply this concept to any of the forms of protection discussed at the EU level and did not need it to be part of EU law to maintain its current practice. Yet, it seems that because the issue was highly salient at the time, Germany was extremely cautious to maintain as much room for manoeuvre as possible. This correlates with the overall picture presented by members of the German delegation and others who had worked in the German Ministry at the time and who suggested that they had a rather narrow mandate (Interview Ministry of Interior_DE 4; Interview PermRep_DE). Other approaches were also contested. Concerning the national designation of safe third countries, a group consisting of Austria, Belgium, Germany and the Netherlands held that the "designation of safe third countries should be done on a common basis, through the establishment of criteria, leading to a single list. Otherwise, there would be a risk of secondary movements between Member States" (Council 2003/14020: 10, footnote 3). Obviously, the strong regulators feared that separate lists would again lead to the kind of race to the bottom that was observed in the 1990s. On the other hand, Sweden, Portugal and France were against the establishment of a single list (Ibid.).

On the suspensive effects of appeals, Spain suggested alternative wording to prevent it from becoming a general rule (Council 2003/13902: 36, footnote 1). As demonstrated earlier, Spanish law did not provide for such an effect. Sweden which has been shown to be generally rather liberal, held that "[a]ppeals should always have a suspensive effect" (Council 2003/14686: 55, footnote 1). Member States were only able to agree on a recital reflecting the community law principle that decisions must be subject to an effective remedy before a court or a tribunal. Member States could not agree on anything beyond that as practices diverged significantly (Council 2003/13368; Ackers 2005: 23–24). Thus, Member States eventually agreed on having either an automatic suspensive effect or a suspensive effect upon request. Moreover, a list of derogations was added, covering inadmissible cases, safe third country cases and border procedures, which represents the *status quo ante* of strong and medium regulators, such as Germany, France and Austria (Ackers 2005: 24).

The Finalisation of the Directive Under the Irish Presidency

The Irish presidency focused on five highly contested issues in view of finalising the directive by 1 May 2004. These were the scope of the directive and particularly whether to apply the directive to applicants for subsidiary protection, legal aid, the safe country of origin principle, appeals and the two safe third country concepts. As negotiations at the technical level proved difficult, Member States agreed to having negotiations in COREPER along with debates in the Council of Ministers. The Council of Ministers on 30 March should have brought about a general approach on the directive so that the remaining issues could be dealt with at the 29–30 April JHA Council of Ministers session, the day before ten new Member States would join the EU.

Concerning the scope, Member States agreed to apply the directive to applicants for refugee status and to applicants for subsidiary protection if Member States had a single procedure for both forms of applications. Member States were free to apply it to applicants for other forms of international protection as well. This compromise had been suggested by France, Finland, the Netherlands and Sweden in November 2003 (Council 2003/14686: 5, footnote 1). In fact, most Member States had introduced such a single procedure subsequent to the QD.

On legal assistance two proposals were up for debate, one submitted by France, and later supported by Germany, restricting free legal assistance to those who usually resided in the territory or who had entered it legally (Council 2003/8801 ADD 1: 17, footnote 1) and another one by the UK suggesting ceilings concerning the amount of hours of work to be reimbursed and so on (Council 2003/15153: 20, footnote 1). The first proposal was heavily criticised by the other Council Members as it could prevent genuine refugees from obtaining legal aid and could challenge the legality of decisions. The second proposal was therefore the one which was discussed as a real option, but some further adjustments were made. A reference to objective criteria was made in order to not arbitrarily limit access to legal assistance so as to meet the underlying criteria of effective access to justice enshrined in a number of international treaties and particularly the ECHR. Greece and France, which did not *ex-ante* comply

with the provisions on legal assistance, hence asked for "a time-limit of 36 months after the date of the adoption for the transposal of this specific provision" (Council 2004/7184/1 REV: 20, footnote 1). These states were accommodated. Yet, while France already provided free legal aid to asylum-seekers and hence only needed to undertake minor adjustments, Greece had to introduce free legal assistance from scratch. Thus, the time limit of 36 months was not realistic and failed to alleviate the pressures on Greece. However, Greece did not fight vociferously enough against positions that differed considerably from its own practice. France was the Member State that actively asked for the time limits, while Greece followed, although this time limit remained completely unrealistic for a country that would have to introduce a legal aid system for non-nationals for the first time.

Given the previous controversy that arose in discussions about safe third country provisions, the Irish Presidency scheduled an Informal Council of Ministers session on 22 January 2004. Subsequently, it was agreed that the neighbouring safe third country concept would be applied only to countries which had ratified and observed the ECHR and the CRSR. There was support for a common list, but because Germany wanted to secure its *status quo ante* policies it asked if it could be done without prejudice to their existing national list. Moreover, Member States agreed that the safe third country provisions should only be applied when a clear link between the applicant and the third country could be established.

During the JHA Council on 19 February 2004 the Irish Presidency organised a debate on appeals (European Council 2004). Appeals against transfer in line with the Dublin Regulation were left out of this directive and agreement was reached under the political assumption that judicial review in the UK constituted an effective remedy, although it did not foresee a suspensive effect in the case of inadmissible applications on the basis of safe third country concepts (Ackers 2005: 27).

By the end of March 2004, a deadlock was reached, with the UK threatening to not take part in the directive if the proposal was not changed (in this particular case because of the safe country of origin provision)(see Council 2004/7484: 7; Council 2004/7184/1 REV: 46, footnote 1). Indeed, the UK at the time was revising its law on in-country

appeals (suspensive effect of appeals) in safe country of origin cases and wanted this to be reflected in EU law (Ackers 2005: 21–21). Safe third country policies remained highly controversial among Member States: "While some delegations had shown a willingness to compromise on many articles, a small number of delegations had indicated they would not be able to compromise on their position," particularly as regards the safe third country concepts, the safe country of origin concept and the chapter on appeals (Ibid.: 3). Concerning safe third countries, the debate was as follows: The UK and Spain did not want access to an asylum procedure in the third country to be part of the criteria designating whether a country was safe (Council 2004/7184/1 REV: 38, footnote 4; Council 2004/7729: 4). Belgium, Germany, Luxembourg and Sweden, moreover, insisted that there should be an opportunity for the applicant to rebut the presumption of safety in every case and hence wanted the pertinent derogation which was fostered by the UK to be deleted from art. 28II (Ibid.). On appeals the main problem was still the fact that the idea of an automatic suspensive effect was alien to Spanish administrative law and hence Spain claimed that "its legal system is not fully reflected in these appeals procedures" (Council 2004/7729: 5). In addition, Germany still advanced its exceptional safe third country concept and wanted to have a national list of safe countries in addition to the common EU list (Ibid.: 6).

Since no end to the negotiations on the reservations appeared to be in sight, the presidency opted for "an alternative approach – a radical streamlining of the provisions" (Ibid.). To deal with the safe country of origin list, the presidency suggested the following: A five-year to ten-year standstill clause for those Member States that wanted to maintain national safe country of origin concepts to accommodate the UK (Council 2004/7729: 4).

Member States reached agreement on 29 April 2004. During this session, Member States discussed the safe third country concept (Council 2003/15153: 23, footnote 1). Based on concerns shared by the Commission, UNHCR and Sweden, protection standards were improved when compared to previous versions of the draft on safe third countries. Whereas an earlier version of the text only provided that Member States had to lay down "rules setting out the matters which shall be the subject

of an international examination," the next text laid down that these rules should be "in accordance with international human rights law, allowing an individual examination [as to] whether the third country concerned is safe for a particular applicant, which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment." Germany accepted the idea of a common list of exceptional or "super safe" European countries, according to Ackers, because the provisions allowed Germany to maintain its national list until the Council adopted a common list. Sweden, moreover, withdrew its reservation on the German exception, as this was subject to a standstill clause which meant that no other Member State was able to introduce such a provision subsequently (Council 2003/13901: 24, footnote 1; Council 2003/14686: 50). The introduction of this standstill clause highlights the fact that Member States did not aim to lower their standards: They instead tried on the one hand to maintain *their status quo ante* by uploading it, while on the other hand they tried to control other Member State's options for downgrading their standards. The Council hence agreed on a general approach which was subject to Parliamentary scrutiny reservations from Germany, the Netherlands, Sweden and the UK (Council 2004/8771: 1). The activity of these Member States supports the idea that negotiations were mainly led by and revolved around the views of strong regulators. Moreover, it shows that national parliaments were not circumvented, but included into these negotiations.

By mid-November 2004, all parliamentary scrutiny reservations had been lifted (Council 2004/14203: 1; Council 2004/14203 ADD 1: 1). As the JHA Council of 19 November 2004 could not agree on a common list of safe third countries, it decided to postpone the establishment of this list to a point in time after consultation of the European Parliament (Ibid.: 2).

The Opinion of the European Parliament

The European Parliament delivered its opinion on the amended proposal on 27 September 2005 (Council 2005/14579: 2). The EP suggested that

the exception introduced on behalf of Spain and France allowing Member States to derogate from the principle of providing a personal interview should be deleted (EP 2005a; Amendment 68, Article 10, paragraph 3).

The article on legal assistance had been completely restructured by the EP, eliminating restrictions (e.g., the application of free legal aid only to certain procedures) but also safeguards (e.g., not to limit free legal aid arbitrarily) contained in this article (see Ibid.; Amendments 83–89). The suggestions gave the impression that the EP was not at all aware of how controversial the Council debates were or the substantial effort invested by various presidencies to find a compromise. On the safe third country concept, the EP wanted to enable the applicant to challenge the application of the safe third country concept. Moreover, it wanted an examination whether the country was safe for the individual applicant (see Amendment 137). This contradicted the aims of the Member States when introducing such a provision, as the reason why so many used this instrument was to facilitate rejection of asylum-seekers, by providing fewer safeguards. The suggested provision from the EP would have essentially made the safe third country provision superfluous. In relation to the minimum list of safe countries of origin the EP wanted to enhance its own role, by adding that not only the Council but also the EP itself would be able to request the Commission to submit a proposal for removing a third country from a common list (see Amendments 136–137). This had been justified earlier by the draftsman stating that the EP should be integrated "in any further decision involving the adoption and modification of the minimum common list of third countries regarded as safe countries of origin," as "according to article 67 TEC [Treaty establishing the European Community], after the approval of this directive further decisions should be adopted with the co-decision procedure" (EP 2005b: 85). The EP suggested deleting the entire article on the national designation of third countries as safe countries of origin (Amendments 140 and 189). The (exceptional) safe third country provision should also be deleted according to the EP (Amendment 157).

The EP's opinion again provided for decisively better protection standards than the proposal amended by the Council on almost every contested issue. In fact, the EP's positions were heavily influenced by the initial Commission proposal and thus they were very different from those

of the Council. At the same time, the EP neither questioned restrictive policy ideas, such as the safe third country concept suggested by the Commission nor tried to raise protection standards on these issues by adding further safeguards but instead took the Commission proposal as a blueprint. As with the other two directives the EP's amendments were completely ignored and the directive was passed on 1 December 2005 without reflecting any of them. Hence, the EP initiated a trial against the Council stating that it had exceeded its competences on the minimum safe country of origin list. Accordingly, the provisions on this list were declared void by the CJEU in on 6 May 2008 (CJEU 2008).

Effective Actors in the Negotiations on the Three Directives

My analysis of the negotiations has shown that Member States in the vast majority of cases tried to upload their domestic *status quo ante* standard to the EU level. This refutes the venue-shopping hypothesis in that the Member States did not use the EU level to change their domestic asylum policies. Instead, it provides support for the Misfit Model, which proposes that Member States try to upload their standards to the EU level to avoid misfit pressures deriving from EU policies being different from domestic policies.

Regarding the question of which Member States were particularly effective, I find that strong regulators played a prominent role in shaping the debates in the Council. While both strong and weak regulators advanced their positions when they felt that the text under discussion was out of line with their domestic approaches, strong regulators successfully followed their positions through whereas weak regulators did not. The standards in the directives therefore generally represent the lowest common denominator of the strong regulators.

The standard agreed on regarding material reception conditions (RCD) was the lowest common denominator of all strong regulators. It thereby clearly exceeded the standards provided by low regulators, most notably Italy and Greece, which did not previously provide any material reception

conditions and thus were forced to substantially revise their policies. The restriction of freedom of movement accommodated Germany's *Residenzpflicht*. Strong regulator Germany had successfully used the pressure of the Länder to maintain the *Residenzpflicht*. This provides support for the paradox of weakness. Access to the labour market after one year was a policy idea that France suggested, based on its national reform process, and Germany eventually advanced as its *status quo ante* policy in the negotiations.

Non-state protection and the IPA were restrictive concepts used by the vast majority of Member States. Their introduction into the directive could thus be no surprise from the perspective of the Misfit Model and indeed both restrictive concepts had already been suggested in the Commission proposal for the QD, arguably because the Commission realised that most Member States would not forego these national concepts (although they did perhaps not use them on a regular basis domestically).

The adoption of a provision on the protection against non-state persecution, as I have shown, was only possible due to the changes in government in Germany which was the only Member State that consistently obstructed the recognition of victims of non-state persecution throughout the 1990s. The newly elected government in 1998 consisting of comparatively pro-immigrant parties, the SPD and the particularly pro-immigrant Greens, aimed at changing Germany's restrictive policy course on asylum policies. While the restrictive rhetoric of Interior Minister Schily suggested otherwise, Germany witnessed a number of liberalisations in asylum and immigration policies in the early 2000s, as I have shown in Chap. 4. These were *not* primarily due to EU law but to a new political climate in Germany. Previously, Germany had never considered itself a country of immigration and had propagated a policy of zero immigration. However, in 2001 Chancellor Gerhard Schröder promoted the immigration of highly skilled workers in the area of information technology at the trade fair on information technology "CeBIT" in Hannover. Around the same time, politicians began to officially recognise Germany as a country of immigration and the *Zuwanderungskommission* (Commission on Immigration) developed proposals for a reform of German national immigration law, which aimed at demonstrating that

immigration was actually positive for the country (Interview Angenendt; Brabandt 2011: 160).

On residence permits for refugees the Netherlands, a "restrictive"[4] strong regulator, succeeded in including residence permits for three years into the directive, while residence permits for subsidiary protection holders were provided for one year, as was done in the vast majority of Member States.

The family definition reflected the lowest common denominator of the strong regulators and recognised only the core family (spouses and minor children). Since some Member States also recognised non-married couples (both heterosexual and homosexual) in their laws, a similar clause was made optional in the directive. Other dependent relatives (parents of adults, disabled family members up to the third degree) were recognised as part of the family by some Member States, especially weak regulating ones, but this was not recognised in the directive, although Member States, of course, were free to adopt a more liberal policy in this regard if they desired.

Regarding social benefits and access to work for beneficiaries of subsidiary protection the QD accommodated all restrictive exceptions of strong regulating Member States. Germany was effective in negotiating its exceptions concerning social benefits into the directive as part of a package deal. Weakly regulating Member States such as Italy and Greece did not provide any social benefits for subsidiary protection holders (or refugees) and hence faced substantial misfit pressures, but did not fight to retain their *status quo ante* in the same way as strong regulators did and hence had to conform to new EU standards.

In the APD, access to free legal aid represented the lowest common denominator of the strong regulators but exceeded the standards of weak regulators, especially Greece. While many Member States actually used a merits test as a condition for free legal aid, it was again Germany that vocalised its support for having this as a possible condition in the directive. The derogation on the right to a personal interview accommodated

[4] As I have mentioned before, the Netherlands were not necessarily restrictive, as they provided unlimited residence permits after three years. Yet, under the logic of the negotiations they would have had to change their policies if residence permits for five years (as laid down in the Commission proposal) were adopted.

the concerns of Spain, a medium regulator, and France, a strong regulator. The automatic suspensive effect of appeals as a general rule from which derogation is possible reflected the restrictive practice of Spain, which had adopted a hard bargaining strategy to be accommodated in this regard. As I have suggested medium regulators indeed sometimes act like strong regulators. What adds to Spain's vigour in this regard is the fact that a suspensive effect of appeals would have negatively impacted on Spain's entire administrative law, which did not recognise the concept of an automatic suspensive effect. Hence, this was not only an issue related to asylum policies but of a more general nature. Given that Spain has a generally effective administration (see Chap. 2), it hence concentrated its efforts on this key issue of concern.

Regarding the restrictive safe third country concepts (i.e., safe third country and safe country of origin), the directive generally reflected previously existing Member State practice. Yet, it is again striking that Germany, which had a specific role due to the disproportionate impact of asylum in the 1990s (see Chap. 2), negotiated substantial parts of the German safe third country concept into the directive. This was despite the fact that it did not need to do so to maintain its domestic practice because it only applied the safe third country concept to applicants for its constitutional right to asylum. This indicates how carefully Germany followed the negotiations and how narrow the mandate of the members of the German delegation was at the time. Germany wanted to maintain maximum discretion for its own policies and was indeed highly effective in doing so. Even today Germany is one of the strongest proponents on maintaining the safe third country provision in the directive, which for other Member States has a rather symbolic character (see UNHCR 2010b: 303, Interview ECRE).

In sum, the analysis of the negotiation shows that strong regulators indeed adopted hard bargaining strategies and even threatened to block the negotiations if their policies were not accommodated. Prime examples include the behaviour of Germany, which forcefully fought for the accommodation of its policy on freedom of movement in the RCD or the UK, which would have blocked the APD if its approach on safe countries of origin had not been reflected in the directive. While weak regulators were entirely passive, they were more ready to compromise and did not

follow their positions through until the end. Points in case were Italy and Greece, which did not provide any material reception conditions (RCD) of note to asylum applicants before negotiations began but agreed to them being inscribed in the directive, or Greece agreeing to free legal aid (APD) which it never provided for aliens before. Whether this openness to compromise was really due to the "pro EU stance" or a lack of detail-mindedness prevailing in these countries, as Eichener holds (see Chap. 2) remains questionable and could not be answered through the process-tracing of the negotiations alone. It will be thus discussed in the next section which is based on interviews with policy-makers, among others, who elaborate on the differences between Member States in the negotiations.

The Effectiveness of Restrictive Strong Regulators

As the previous sections have shown, restrictive strong regulating Member States in the Council were most effective in influencing EU legislative output. In this section, I will condense my findings from the previous sections and relate them to my expectations derived from the Misfit and Regulatory Competition Model on the one hand and my expectations concerning what explains actors' effective influence in negotiation processes on the other hand. I will substantiate my findings on both questions with the help of semi-structured expert interviews that I conducted with 39 experts involved in EU level negotiations on the CEAS.

The European Commission and the European Parliament as Background Actors

The Commission and the EP rather held the role of background actors in the negotiations on the directives, although the former was much more involved than the latter. As the cases of access to work in the RCD, recognition of non-state persecution or the provision of free legal aid show, the Commission has often put forward protection standards that

were much more liberal than those later agreed upon in the Council. Observers suggest that the Commission in general is very progressive on human rights issues (Interview Commission 1), because it is supposed to be a visionary (Interview PermRep_SE). In other instances, however, such as on the *Residenzpflicht*, the safe third country provision or non-state actors of protection, the Commission has already anticipated and thus accommodated potential reservations by Member States. A striking case involved the amended proposal for the APD. Due to substantial reservations from Member States, the Commission eventually drafted a proposal that accommodated all potential reservations. Thus, already the (amended) proposal was highly conciliatory. What can account for the evolution of the Commission's views on some issues but not in others? This study argues that the clarity and the forcefulness of some Member States' objections can explain the Commission's revisions. Germany, for instance, stated clearly from early on that its *Residenzpflicht* or its safe third country concept constituted red lines that it was not ready to cross. As my analysis of the APD has demonstrated, the vast majority of Member States—except the weak regulators—were extremely vocal throughout the negotiations and the Commission was hence not able to push for higher protection standards but instead needed to take Member States' concerns into account. The weak regulators, on the other hand, kept a low profile on free legal aid, although it caused substantial misfit pressures on them. Given their passivity on the issue, the Commission arguably did not accommodate their *status quo ante* on free legal aid. The same dynamic can also be seen in cases where strong regulators advanced no clear positions on an issue: Germany and France remained rather unclear for some time about which time period they would use for asylum-seekers' access to employment. Thus, the Commission advanced more progressive positions and suggested access to work after four months.

The fact that the Commission accommodated the red lines of individual Member States supports my expectation that under unanimous voting rules the Commission had restricted agenda-setting powers and always needed to accommodate restrictive outliers in their proposals. The shared right to initiate legislation seemed to have played a rather insignificant role in this regard: Despite France initiating debates on the RCD no Member State ever put forward an entire directive. According

to an observer from the German Interior Ministry working at the time on EU asylum policies (Interview Ministry of Interior_DE 1) this can be explained by the fact that the Commission was the only institution that had an overview of all asylum systems in Europe:

> During the time-frame which we are talking about, the Commission shared the right to initiative with us Member States. But particularly small Member States did not have the manpower to propose a reasonable directive. I remember, we ourselves tried to make suggestions in the early beginnings, but an entire directive, no […]

Given the controversies over the directives, the Commission arguably was the only institution that could make legitimate legislative proposals that were accepted by all Member States. Looking back at the intergovernmental instruments and resolutions passed on procedures and qualification in the 1990s, it is clear that Member States on their own were not able to find a compromise on the most pressing issues and thus the Commission could act as an honest broker.

Yet, this did not allow the Commission to successfully introduce some of its core suggestions. The reason for this is the fact that the Commission has nothing really to offer to Member States. Member States are the ones that have to implement EU legislation and that are faced with the pertinent financial, administrative and political costs. Thus, the Commission can only leave a mark when it persuades Member States that a certain practice does not entail additional costs or foster abuse of the asylum system. While the Commission has always to support its positions through arguments and evidence, the Member States "don't owe an explanation for [their positions]" (Interview Commission 2; see also Interview Council 1).

The EP was even weaker than the Commission. As I have shown, its positions were entirely ignored under consultation procedure. This supports the finding that Member States displayed a "relative neglect of the Parliament as an actor" under the consultation procedure (Kaunert 2010: 142–143). Moreover, the EP did not even know which issues were debated in the Council at a certain point in time. In contrast to the Commission the EP did not know about state practices

from any prior consultations. Therefore, debates in the EP were entirely detached from both debates in the Council and national practices. The EP's amendments consequently came across as a wish list rather than a set of well-grounded proposals. While the EP was usually much better informed under the co-decision procedure and was regularly in touch with the Council, it only received sparse information from the consultation procedure during the first phase of the CEAS. Thus, two out of three directives, namely the RCD and the APD, were almost passed by the time the EP delivered its opinion. This further weakened the suggestions of the EP, as no Member State in the Council was ready to reopen the whole directive, on which compromise had proven highly difficult.

While the EP is today described as being "more pragmatic" (Acosta Arcarazo 2009; Interview Amnesty International Brussels; Interview Caritas Europa), in the first phase of the CEAS it was even more progressive than the Commission. Comparing the first and the second phase of the CEAS, one interviewee from Caritas Europa explains this as follows:

> If you only can give an opinion, […] you can say what you want, of course. But if you have a right to co-decide legislation then you create legislation. So, then, what you say, what you decide, will be in the legislation. [….] The opinions were very often not in the line with what Member States or certain Member States wanted. And […] we saw that after the change [to co-decision], that […] not in everything, of course, but in certain dossiers, [….] the position of Parliament was more in line with the certain opinions in the Council, let's say.

This suggests that in the first phase of the CEAS the EP promoted higher standards because it was aware of its limited possible impact on the outcome and thus used strong positions to enhance its visibility as a promoter of human rights. Today under co-decision procedure, the EP has become much more pragmatic, as it is actually involved in the negotiations and needs to be regarded as a credible partner in the decision-making process. At the same time, it is presumably now more closely watched by its (national) voters (Interview ECRE). With the EP taking a middle-ground position since the second phase of the CEAS, the Commission

had assumed the role of the more radical defender of human rights. This again weakens the Commission's role as an honest broker (Interview Council 2), but it helps the Commission to strengthen its profile as a liberal visionary in the new institutional constellation with a strengthened and more restrictive EP.

In the theory chapter, I suggested that expertise is an important factor in determining an actor's success in negotiations. Indeed, my interviewees highlight that both the Commission and the EP lack the expertise of the Member States in the Council. For the EP the following statement by an MEP from the European People's Party (EPP) highlights that a lack of practical expertise, for example in processing cases, makes its arguments less powerful for Member States, whose national administrations have all the expertise in processing asylum applications:

> The one thing you can say about asylum legislation is that the Council is much stronger influenced through the practical realties than the individual MEP who has never experienced the reality of an asylum procedure and the problems associated with it, such as abusive applications. This is where you see that the Member States are much more influenced through what happens on the ground.

Indeed, besides UNHCR and some NGOs which support applicants during the process, Member States' administrations are the only actors in the EU legislative processes that have ever been involved in asylum procedures on the ground. The fact that the supranational institutions have not processed asylum applications in the past and will not do so in the future clearly diminishes the credibility of their positions and their right to make strong claims in the eyes of the Member States. Administrative capacity and manpower play a key role in building this expertise, as a representative from the Commission explains with a special focus on the second phase of the CEAS (Interview Commission 2):

> [In the Commission] there is usually one person behind [one file]. It seems to be a huge apparatus, but it is one person. In the Parliament it is the same. […] It is a lot of pressure. […] The rapporteur has […] an assistant who probably does a million other things because […] MEPs have their

> constituencies to address as well. […]. And my impression in negotiations was that EP assistants are really not very much into the file. It is really LIBE secretariat,[5] and within the LIBE secretariat it is one person and that person does a lot of other things as well […].

This she contrasts with the manpower and capacity of Member States in the Council:

> Whereas again in the Council you have 27 delegations, each delegation has several experts. – Probably not a hundred. […] There will be one real expert that deals everyday with this file, in an agency that actually applies it, there will certainly be one in the ministry, which is coordinating the agency. You will have [….] a lot of people that go through one particular proposal and think over it. You have at least three or four people - for each delegation - which think about it and have an opportunity to give a view. And multiply that by 27.

For the Commission officials working on the file this means that they will on the one hand face a lot of criticism from Member States and on the other hand Member States will use the Commission's lack of resources against them:

> So, there is a lot of potential there when they don't want something [to take place] or they don't want someone to find […] an error in something you said […], and things go incredibly fast. […] in general, […] for every single thing there is very little time. You are supposed to react quickly. If it doesn't look bad at first sight, you say yes, and then in two days' time you realise that there is a trick there, which – because it connects with other provisions in other files – actually ends up into something which is not very good. So, it is very difficult to overcome all of it […] (Interview Commission 2).

In the absence of practical expertise, the positions of the supranational institutions were strongly influenced by NGOs. This was considered critically by Member States as they were the ones that eventually had to

[5] This is the Secretariat of the Civil Liberties, Justice and Home Affairs Committee in the EP.

implement EU asylum policies and thus felt that their preferences should be considered and taken seriously (Interview Commission 1; Interview Council 2; Interview Migration Policy Institute Europe, MPI Europe; Interview PermRep_DE). At the same time, the fact that Member States eventually had to implement the policies arguably made them adopt harder bargaining strategies, as they in contrast to both the EP and the Commission had "something to lose," and as I suggest in the theory chapter actors that will lose something with certainty are more prone to adopt hard bargaining strategies than actors that expect gains, but are uncertain about the extent of them.

While clearly both the Commission and the EP have never processed an asylum application and have much less personnel than the Member States, there seems to be a significant difference even between the Commission and the EP in terms of expertise and the Commission seems to be much more a legal expert than the EP (Interview MEP Green Party). In fact, many interviewees highlight that there is indeed a qualitative difference between the Commission and the EP as concerns manpower and expertise. The Commission has at least one person mainly dedicated to the dossier, but one MEP has to deal with a variety of different topics in different committees and thus faces huge difficulties building solid expertise (see Interview Commission 2 above; Interview MEP EPP; Interview MEP Green Party; Interview MEP, Party of European Socialists, PES). A factor that further weakens the position of the supranational institutions is that they have a stronger interest in EU asylum legislation being passed than the Member States (Interview MPI Europe) in the Council which are ready to block it if it entails any dramatic changes. As suggested in the theory chapter, patience is an important power resource. Both the Commission and the EP are less patient than the Council and are more in need of EU regulation than EU Member States. This need for EU regulation is due to their self-understanding as supranational institutions and their interest in intensified European integration, which further enhances their own roles. This makes the Council particularly influential as compared to the supranational institutions which need to compromise if they want to secure the passing of a directive. This situation has largely remained in place during the second phase of the CEAS, even though the Parliament is now a co-legislator. Still, even today "[t]his is a tango led

by the Council" (Interview Commission 2) which is barely ready to lose control. Indeed, also in the second phase of the CEAS Member States were more patient and suggested that "content was more important than speed" (Interview PermRep_NL), as they feared policy-change more than they valued the potential alleviation of costs due to fewer secondary movements. They were hence ready to block directives both during the first and the second phase of the CEAS. Member States refused, for instance, to further negotiate the Dublin III Regulation if they could not first reach agreement with the Commission on Eurodac. Ironically, the Commission had first blackmailed the Council into stopping negotiations over Eurodac if no consensus could be found on the Dublin III Regulation (Interview Council 2; Interview PermRep_EL). The Council later reversed this situation, knowing that it was in a better position to do so (Interview PermRep_DE). In the second phase of the CEAS, the Commission had to amend both the recast proposals on reception conditions and asylum procedures (Commission of the European Communities 2011a; Commission of the European Communities 2011b).

This analysis has shown that the Commission and the EP acted as background actors. Their positions were considered negligible by the Council and the EP, in particular, was entirely side-lined in the sense that none of its positions affected the directive. This confirms the expectations I have raised concerning the impact of these two actors based on the institutional setting and their actor-related resources in the theory chapter.

Strong Regulators Framed the Debates from Early On

As I have shown in Chap. 3 and the first section of Chap. 5 strong regulators framed debates from early on. It was not a particular Member State, but rather a group of strong regulators consisting of Germany, the Netherlands, Sweden, the UK and France that initially had a stake in the issue of asylum policies and had therefore initiated intergovernmental co-operation in the field. As I have demonstrated in Chap. 3, earlier studies referred to this through the notion of a North-South divide and held that the "North" used intergovernmental co-operation and particularly the Schengen Agreements to impose the introduction of asylum regimes and

border protection in Southern Europe. Baldwin-Edwards describes this North–South transfer as follows (1997: 514):

> Without doubt, though, [S]outhern Europe has had little or no impact on Schengen or the EU in this policy area. First of all, the Schengen policies predated most [S]outhern attempts at policy creation; secondly, there is no evidence that even to suggest that any of the [S]outhern countries has initiated discussion seriously at odds with northern 'norms' – for example the role of the 'black' economy as means of economic growth. […]

For the strong regulators co-operation on asylum and migration policies from the beginning was essentially a way to alleviate the increasing pressures on their own systems subsequent to the fall of the Berlin Wall and the conflicts and wars resulting from the dissolution of Tito's Yugoslavia in the 1990s. Policy-makers at the time believed that generosity of the asylum system was a core factor determining which Member State received most applicants, as the following statement by a former Member of the German delegation shows (Interview Ministry of Interior_DE 4):

> At the time everybody was talking about 'asylum shopping' and particularly the Reception Conditions Directive aimed at harmonising policies in the sense that people do not choose their destination country on the basis of the generosity of its asylum system.

Interestingly, all strong regulators at the time seemed to believe that their asylum system was particularly generous and that this accounted for the amount of asylum applications they received. It was only in the course of the negotiations that each strong regulator understood that it was not the most generous Member State. While they initially embraced the idea of high standards to stop secondary movements, as each of them believed that they provided the highest standards, they later on became more critical towards this notion and realised that this would force all of them to raise standards on some issues (Interview Williams). During the second phase of the CEAS, decision-makers in the Council were aware that the generosity of the asylum regime is not a primary pull factor, but that factors such as migratory networks for instance are much more

important (Interview PermRep_Anon 1; Interview Williams). Thus, the overall frame of harmonising policies to prevent secondary movements has become less prominent during and after the second phase and Member States focused instead on providing practical co-operation to weak regulators (Interview Amnesty International Brussels; Interview LIBE Secretariat).

At the time of the negotiations of the first phase CEAS instruments, however, Member States strongly believed in the link between generous policies and high numbers of applications and even openly tried to disincentivise asylum-seekers from applying, as the following quote shows (Interview PermRep_Anon 1):

> [A]t the time there was significant activity by Member States to try and move on asylum-seekers from one country to the other. In so far as it was easier […] and sometimes cheaper to encourage immigrants to continue their onward journey, which they were intending to do anyway, rather than to seek to process the claim in the first save country they came to. [… And there was] in particular the concern amongst a number of ministers, in particular a number of the Northern European countries, but also *between* […] Northern European countries, that certain countries were simply putting in place such a low standard, at the time in processing that [it] actually encouraged onward movements […].

It was not only weak regulators that tried to set incentives for asylum-seekers to move onward. In fact, weak regulators did not actively pursue this policy, but it was rather a by-product of their non-regulation of this issue area. Strong regulators, however, have used negative regulatory competition to incentivise asylum-seekers to seek protection elsewhere, as I have shown. Thus, policy harmonisation was eventually discovered as a tool to stop negative regulatory competition and to ensure responsibility-sharing and a "fairer" distribution of asylum-seekers (Interview PermRep_Anon 1; Interview Commission 1; Interview MPI Europe; Interview PermRep_NL; Interview Odofin; Interview Williams). As an observer from Caritas International describes the idea of responsibility-sharing underlying policy harmonisation:

> […] Some countries had a relatively well-developed reception system. And they wanted the other countries to have the same [standards…]. [I] f the reception conditions are the same in all countries, then, maybe, fewer people will come to our country, [these countries expected], because they will say: 'Oh, it's just as good in Italy, or in Greece. Then why should we cross the border further to another European country?' – Which was originally also the basis to create a Common European Asylum System – to have the same, or similar, conditions for asylum-seekers, both on procedures and reception conditions for the whole European Union. And then in the end we would not need the Dublin Regulation anymore, because it would automatically [sort itself out] But it doesn't work […].

All these statements support my expectation that strong regulators have significant incentives to foster co-operation on the issue and that they were the ones who initiated the harmonisation process as such. While the Misfit and Regulatory Competition Model suggests that there is usually one Member State that initiates co-operation, I find that in asylum policies it has often been a group of Member States which, as I demonstrated above, all considered themselves as particularly liberal. No single Member State has particularly fostered co-operation, although Germany played an important, yet not un-contradictory role in this regard. Given the salience of the issue in Germany in the 1990s which culminated in attacks on asylum reception centres in 1992 and 1993, Germany was one of the strongest proponents of co-operation in the area in the mid-1990s. By the time asylum policies became part of the first pillar of the EU, the number of asylum applications in Germany had decreased and the issue was less salient. Thus, Germany was reluctant to transfer sovereignty to the EU in this area, which resulted in the defence of the idiosyncratic institutional structure in this field. Later, when faced with the highest numbers of applications in its history, the UK, usually not notorious for being highly pro-integrationist, fostered the introduction of qualified majority voting in the Council to speed up processes (see Chap. 3). This shows that indeed strong regulators and particularly those for whom an issue was highly salient through exposure had an interest in co-operation and were the ones that fostered co-operation. This dynamic can also be observed during today's "refugee crisis."

Yet, none of the Member States were particularly active or effective during the later agenda-setting phase, that is when the Commission issued a proposal. While the French delegation initiated debates on the RCD, the later proposal was again a mixture and represented the lowest common denominator of all strong regulators. Moreover, no Member State suggested an entire directive, arguably because a proposal that only considers the practice of one Member State could hardly be considered legitimate by the majority of Member States.

Strong regulators had real incentives to cooperate on the issue, but weak regulators usually had fewer incentives to do so because the introduction of stronger regulation would lead to significant change. These countries rarely detected potential refugees on their territory and hence introducing a stronger regulatory framework could bear the risk of uncovering these refugees and attracting additional applications. Policy harmonisation was meant to prevent secondary movements from restrictive to liberal Member States, but also from weak regulators to strong regulator Member States. As I suggested in Chap. 2, while weak regulators employed fewer restrictive deterrence policies, they provided little protection either, essentially due to the fact that their procedures were not effective in determining potential refugees. Thus, weak regulating Member States at the Southern European border benefited from secondary movements and could not be expected to actively support the idea of preventing secondary movements. Interestingly enough they never contradicted the general policy goal of harmonising EU asylum policies. Yet, in contrast to what the Misfit and Regulatory Competition Model expects weak regulators were not entirely opposed to EU legislation. As the case of Italy shows, some border countries were already encountering rising numbers of applications due to the Dublin Convention which became effective in 1997. As a study by the consultancy Ramboll Management on behalf of the Commission shows, policy-makers in Italy perceived a need to tackle problems of insufficient reception conditions, but they had no real concepts or ideas about how to do so. The reason was the lack of trained staff and institutional capacities, the lack of "a particular and detailed legal base on asylum, including implementation regulation," and a lack of central co-ordination or government policy and programmes which could deal with the issue coherently (PLS Ramboll-IT 2001: 22).

With upcoming elections in 2001 and the public's rather mixed attitude towards immigration and asylum, it was moreover unlikely that politicians would bring such a delicate issue to the domestic political agenda (Ibid.: 23; Interview PermRep_Anon 1). Therefore,

> strong and binding rules on asylum procedures at the EU level [were] […] in Italy's declared interest, not only to achieve greater harmonisation of conditions and "responsibility-sharing", but also as a lever for more rapid progress on the domestic level (Ramboll-IT 2001: 22).

In Italy, the central government was comparatively weak compared to the regions in asylum policy-making and national policies were unlikely to be enforced at the regional level. Creating pressures for enforcement through EU policies was therefore considered a way to circumvent these structural obstacles. Somewhat ironically, this actually represents a case of venue-shopping in EU asylum policies post-Amsterdam, but it does not necessarily relate to a restrictive dimension, but aims at the introduction of working structures. In this case, EU law was supposed to close various gaps on reception conditions which domestic law had failed to control. In a similar vein, also Greece already in the 1990s had "a strong interest in allowing supranational involvement with border controls (and possibly, therefore, for maintenance of those borders) because of its continuing disputes with Turkey and to a lesser extent with other neighbouring Balkan states" (Baldwin-Edwards 1997: 506).

While being pressured into taking more asylum-seekers and developing a functioning reception system, weak regulating Southern European Member States also perceived this is as a chance to reform their asylum system. To do so, weak regulators in the area of asylum wanted to use the experience of strong regulating Member States in Northern Europe which had received much larger quantities of asylum-seekers over time. Based on the strong regulators' experience, the weak regulators in the South wanted to establish a sound asylum system, particularly a working reception system. But fostering EU legislation in the field was not only a way to learn from the expertise of strong regulators. Instead, the EU level was also particularly opportune for politicians who did not want to pay the political costs of reforming the national asylum system and could

hence point to Europe in case voters complained about the introduction of a costly reception system.

In a nutshell, my findings support the Misfit and Regulatory Competition Model in that strong regulators were indeed the initiators of co-operation because it helped them to do two things at the same time. First, they tried to counteract negative regulatory competition among strong regulators which those had engaged in to deter asylum-seekers. For these strong regulators negative regulatory competition was no longer practicable, arguably because they had ratified a multitude of international treaties that meant that they could not endlessly downgrade their standards to compete with other strong regulators and thus wanted a stronger co-ordination of their policies. Second, they tried to impose an asylum system on those (low regulating) Member States that previously (almost) did not have such a system and hence did not host a substantive share of asylum-seekers.

My findings provide additional nuances to the Misfit and Regulatory Competition Model concerning the weak regulators' interest in common EU standards. In fact, when faced with higher salience (e.g., as a result of a raise in asylum applications), weak regulating Member States face pressures to respond. Yet, given their low degrees of government effectiveness, they have substantial difficulties when attempting to introduce working regulations. EU law can close this gap and can moreover help to circumvent veto players that block reforms (such as the regions in Italy). By introducing an asylum system through EU law, weak regulators also avoided paying the political costs of adopting measures that may not have been welcome by the electorate, which did not welcome rights-enhancing policies for asylum-seekers.

Most Member States Try to Upload Their Domestic Status Quo Ante

The analysis of the negotiations has shown that in the vast majority of cases Member States indeed wanted to upload their domestic *status quo ante*. During the negotiations all Member States tried to do so, no matter if they had a liberal or restrictive policy in place or whether they were strong or weak regulators.

Liberal strong regulators did not try to restrict their domestic policies through EU legislation. The negotiations show that for instance Sweden and the Netherlands consistently fostered the equal treatment of refugees and subsidiary protection holders and supported asylum-seekers' early access to work, which represented their *status quo ante* (Interview PermRep_SE). Weak regulators also attempted to upload their policies. In fact, Italy and Greece tried to block access to material reception conditions and access to work. Yet, the study of the negotiations on the RCD suggests that there were differences among the weak regulators. While Italy was still comparatively active in the negotiations, Portugal and Greece kept a low profile throughout the negotiations and rather engaged in bandwagoning with strong or medium regulators or gave in much earlier when they were isolated on a position. This shows that also weak regulators are by no means a homogenous group.

Compared to the states that I have defined as strong regulators, most of those I refer to as weak regulators have been reported to keep a much lower profile in general and did not adopt hard bargaining strategies or threaten to block EU legislation (Interview Jesuit Refugee Service Europe), although they generally did try to maintain their *status quo ante* and to advance certain positions. This could arguably account for the finding of Héritier (1997), Eichener (1997) and Börzel (2002) that weak regulators do not try to upload their policies. This could well be explained by their lack of administrative capacity. Indeed, the negotiations have shown that weak regulators did not adopt equally hard bargaining strategies as strong regulators did. At the same time, weak regulators were more obviously out of line with international human rights law: The weak regulators' reception systems were regularly proven to be out of line with international human rights law, especially the ECHR, as the cases of *MSS v. Belgium and Greece* (Edal 2014) and *Tarakhel v. Switzerland* (ECtHR 2014) show for Greece and Italy.

The preference for an uploading of domestic policies was also confirmed by the vast majority of my interviewees (Interview Amnesty International Brussels; Interview Commission 1; Interview Commission 4; Interview Council 1; Interview Council 2; Interview ECRE; Interview ECRE; Interview Jesuit Refugee Service Europe; Interview Ministry of Interior_DE 1; Interview Ministry of Interior_DE 2; Interview PermRep_Anon

1; Interview PermRep_AT; Interview PermRep_DE; Interview PermRep_DE; Interview PermRep_MT; Interview PermRep_NL; Interview PermRep_PL; Interview PermRep_SE; Interview PermRep_UK; Interview UNHCR Brussels; Interview Williams). A representative of the German Interior Ministry (Interview Ministry of Interior_DE 2) summarises this as follows:

> Our negotiation basis was rather simple. […] We negotiate on the basis of our national law, we try to implement as much as possible from our national law.

With a special focus on the APD, Ackers confirms this observation and suggests that "[m]ost Member States attempted to make the text reflect what they were doing at the time" (Ackers 2005: 32). Indeed, Member States are averse to change, as change implies costs. According to Ackers, Member States wanted to keep room for manoeuvre, because binding standards on a high level of protection would "endanger the flexibility needed to adjust national practice in case of new influxes or successful legal challenges to those practices" (Ibid.: 3).

Member States try to upload their policies with the aim of reducing costs. Interviewees suggest that avoiding costs is a core motivation for them to upload their domestic *status quo ante*. According to interviewees, these include material, ideational and political costs (Interview Ministry of Interior_DE 1; Interview PermRep_SE). Material costs result from misfit and the administrative costs of change as well as the potential for an unintended rise in the number of asylum applications lodged. Ideational costs are costs connected to the introduction of norms and concepts which are alien to the legal and broader normative system of a state. Political costs result from the introduction of policies that run counter to the interests of the electorate and thus can "cost" the governments votes in upcoming elections (Interview Commission 2). Costs are also often used by Member States as an argument against change *vis-à-vis* the Commission. Member States usually do not accept provisions because they are useful or necessary, but they only accept them if these changes do not mean additional costs (Ibid.).

The notions of ideational and political costs also go hand in hand. The norms associated with a certain asylum system are expressions of a certain value system present in a society and therefore change can be very difficult. These (legal) norms are the product of a struggle between different political and societal actors that are not keen on instigating substantive changes without compensation. But besides the values underlying a certain policy, the (legal) norms created have also been tried and tested over previous years and Member States do not want to give up policies which they are familiar with and for which there is no great reason to change. According to Ackers (2005: 32), "Member States [are] not willing to trade in known national certainties for unknown policy tools in the name of a vague ideal of harmonisation" (Ibid.: 32). Member States are much more open to changing law domestically, as they can reverse changes again if the political climate demands it. As this is much less the case at the EU level, Member States are rather averse to changes through EU legislation and prefer maintaining discretion for future policy-making (Interview Jesuit Refugee Service Europe; Interview PermRep_DE; Interview UNHCR Brussels).

I will show in Chap. 6 that there are some instances in which Member States uploaded a standard different from the one they had in place previously. Yet, this was not an attempt to change national policies via the European level but rather due to ongoing national legislative reforms and the fact that Member States wanted to maintain discretion by uploading the anticipated result of these reforms.

Restrictive Strong Regulators Are Most Likely to Successfully Upload Their Policies

The analysis of the negotiations has shown that restrictive strong regulators were particularly effective at uploading their policies. While liberal strong regulators effectively negotiated the cross-cutting issue of subsidiary protection into the directives, they were not able to raise protection standards on any other issue. This supports my expectation that liberal strong regulators usually did not introduce their (high) protection standard into the directive. Observers and participants of the negotiation processes suggest that this is due to the fact that these countries could

maintain their more liberal standards anyway, given that EU directives only laid down minimum standards. Thus, these countries had less to lose than restrictive strong regulators that would have to change their systems in response to higher EU protection standards (Interview Jesuit Refugee Service Europe; Interview MEP PES; Interview PermRep_DE). This also supports my expectation that restrictive strong regulators adopt harder bargaining strategies than liberal strong regulators for whom the potential gains of uploading their standards are less clear than the losses of not uploading are for restrictive strong regulators. Clearly, defection from co-operation was not an option for liberal strong regulators, as they had a strong commitment to the CEAS.

Weak regulators were rather ineffective at influencing EU legislative output. They never followed their positions through to the end. An obvious case involves material reception conditions and social benefits for status holders, which weak regulators initially sought to block but eventually accepted. While international refugee law only suggests that states should treat refugees in ways comparable to nationals, EU law introduced a right to social benefits for asylum-seekers and status holders. Some Member States did not provide this kind of assistance to their own nationals and hence now had to deliver asylum-seekers and status holders with more state benefits than their own nationals (Interview Ministry of Interior_DE 3; Interview Ministry of Interior_DE 4). Introducing these protection standards equals hence a harmonisation of welfare regimes through the backdoor and it is striking that weak regulating Member States accepted this, because it puts potential voters in a less favourable position than asylum-seekers and refugees who are not allowed to vote.

To conclude, all Member States try to upload their policies. Yet, (restrictive) strong regulators are more effective in doing so than others. The reason is that they adopt stronger positions and that these positions are better informed, as I will now demonstrate.

Intensity of Positions

My analysis has shown that adopting strong positions is an important power resource in negotiations, especially under unanimity vote. As I

have suggested in Chap. 2 strong regulators adopt harder bargaining positions than weak regulators because of the prominence of asylum in national debates and because of their superior administrative capacity. The costs of policy-changes are much higher for strong regulators, as they are top recipients of asylum-seekers and costs multiply with the amount of asylum-seekers a state receives. Referring to legislative changes induced by court rulings, one interviewee (Interview PermRep_Anon 1) describes how Member States calculate material costs:

> [As a court] you have an individual in front of you and of course the case is very worthy, and therefore you treat that individual as generously as you can. […] they as a court […] don't take into consideration the effects of multiplying that individual decision by 200, 300 or 5000. Well, states do. […] [Court rulings will] then have an impact on three or four hundred or potentially thousands of other cases. And each of those cases […] will encourage subsequent unfounded applications. So, you can often see a single court ruling […] resulting in […] millions […] being spent on claims that were not otherwise noted […].

While the issue of changes due to court rulings may be a different one, the underlying reflections are very much the same: Legislative changes can affect large numbers of potential cases. Therefore, top recipients are faced with more costs and are hence more reluctant to instigate changes that could potentially raise the numbers of applications further or the number of people granted protection status or specific rights (see also Interview Commission 3; Interview Hailbronner). As the implications of adopting a new policy are often unclear, top recipients may be reluctant to agree to any changes at all and prefer to instead follow their own tried and trusted domestic policies. Thus, they try to minimise the risk of additional material costs.

Given the stronger salience they face and their effectively working administrations, strong regulators in contrast to weak regulators were hence expected to actively try to influence EU legislative output to reflect their own policy approach. The vast majority of my interviewees confirm this expectation. They indeed note that the group of Member States which I have identified as strong regulators were very

active on EU legislative issues because asylum was highly salient for them (Interview Caritas Europa; Interview Council 1; Interview Council 2; Interview MEP EPP; Interview PermRep_IT; Interview UNHCR Brussels; Interview Williams). Accordingly, their effective administrations (Interview Commission 1) formulated substantiated positions. The weak regulators on the other hand were described as passive and negotiations were characterised by a "notable silence" of the majority of those weak regulating Member States which eventually faced problems transposing the directives (Interview Ministry of Interior 3_DE; Interview Ministry of Interior_DE 4). Moreover, given the absence of adequate asylum regulation in these states, weak regulators often felt that EU legislation did not concern them, as the following quote shows (Interview Ministry of Interior_DE 2):

> Our position in the negotiations was so specific since we have a rather dense regulatory framework on asylum. Other states did not have that. They could be more passive, as they did not have a corresponding national provision concerning some of the Commission's proposals. But when the directive was accepted, they would also have to implement them.

As EU provisions did not target specific rules in their domestic regulatory system, weak regulators attached less importance to preventing their introduction. They were not aware of the potential consequences and lacked the expertise and administrative capacity to foresee the effects of agreeing to individual provisions in the long run.

The earlier a Member State became actively involved in the negotiations, the better it was for its negotiation success (see Interview LIBE Secretariat; Interview PermRep_DE; Interview PermRep_MT). The following statement by a German official shows that strong regulators tried to influence the directives already at an early stage (Ministry of Interior_DE 2):

> It was generally striking that many Member States only made suggestions at a later stage. Arguably, because the issue is not equally sensitive for them. We've had more experiences with large numbers of asylum applications and thus also with different regulating models and procedure designs.

> Thus, we put forward wording proposals early on in the debates. Other Member States only did so in the last phase [of the negotiations]. At that point negotiations were already quite advanced contentwise.

When the vast majority of Member States was indifferent and passive, those Member States with strong positions could suggest wording and thus frame the negotiation basis as the following quote emphasises (Interview Ministry of Interior_DE 3):

> Interestingly, the Qualification Directive debates were stuck for a while and I remember we had substantive reservations on individual provisions. And there was no movement. But the Irish Presidency had the great idea to take our suggestion and introduce it in the draft and then presented it asking who is against […] and that was arguably a good trick, as the notable silence was there again.

Thus, Member States with a salient interest in the issue can exploit the silence of those less willing to fight to have their own positions accommodated. This trick was later used by Italy with the aim of sidelining Germany. On the APD, the Italian Presidency asked which other Member States actively supported Germany on its safe third country provision and again there was a notable silence due to the fact that some strong regulating Member States did not support it (e.g., the UK) as well as the overall passivity of weak regulating Member States (Interview Ministry of Interior_DE 3). Yet, in this case Italy was not successful in sidelining Germany because the issue at hand was very important for Germany and it hence negotiated hard for its position to be accommodated. Top recipient Germany was hence particularly active and the German delegation had a rather narrow mandate, which did not allow it to compromise on any issue (Interview Ministry of Interior_DE 4). Overall, the German delegation was described as one of the most effective delegations in the first phase of the CEAS (Interview Caritas Europa; Interview Commission 1; Interview ECRE; Interview MEP Green Party; Interview UNHCR Brussels) because of its hard bargaining positions.

Reflecting on the question why Germany had been effective in influencing EU asylum policies in a number of areas, a representative from the

German Interior Ministry highlights the important role of unanimous voting procedures (Interview Ministry of Interior_DE 1):

> Well, this [the veto available under the unanimity rule] was the strongest weapon of the German position, and also used by the Minister. It would have been highly problematic to introduce certain provisions on the national level and to defend them there against NGOs and then, when it comes to negotiations in Brussels, say, we don't need these provisions. And therefore we were much more active and under the unanimity voting rule in the first phase it was a lot easier to effectively implement these positions.

When Germany wanted to introduce its super safe third country concept, it only had support from two or three Member States; yet, the German delegation knew that under the unanimity rule it would still be able to get accommodated on this topic, as it could otherwise block the entire directive (Interview Ministry of Interior_DE 1):

> There were only two or three states [supporting us on the issue], but that left us unimpressed, because this was a demand which also the Minister brought forward on the highest level. The presidency soon understood that they were not able to change our position by putting us under pressure just a little bit.

Like other strong regulators (e.g., the UK on the safe country of origin concept) Germany was ready to block any legislation which would have forced it to change its *status quo ante*. Even if they were completely isolated on a position, strong regulators did not give in and adopted hard bargaining strategies referred to as a "bulldog" or "bulldozer" strategy by observers (Interview MPI Europe; Interview PermRep_DE; Interview PermRep_SE) which they followed through until the end. Being a restrictive outlier on many issues, Germany adopted such a bulldozer strategy and left an important mark on many issues, including access to the labour market for asylum-seekers after one year, restriction of freedom of movement and the European safe third country provision. What is most important when adopting a bulldozer strategy, particularly under the

unanimity rule, is not necessarily the size of the Member State but rather how serious it is about its threat to potentially block policies (Interview Ministry of Interior_DE 1):

> […] As Council Presidency you wonder how much a delegation will insist on its position. But if you have the impression that the state from the beginning tried all political options to effect its influence, then it is not only about size [that is whether it is a big Member State or a small one], but about how forcefully you advance your position.

As I have shown in the first section, having a narrow mandate on the *Residenzpflicht* which was part of the mandate of the *Länder*, helped Germany in being accommodated in this regard. The same applies to the *Länder* not accepting qualified majority vote in the Amsterdam Treaty. This gives support to the paradox of weakness.

While weak regulators were comparatively passive in the first phase of the CEAS and debates were mainly led by strong regulators, by the time the second phase of the CEAS began to be debated the weak regulators had received an increased number of asylum applications and therefore became more vocal (Interview PermRep_Anon 1). In the second phase of the CEAS there was therefore an alliance of Northern Member States against the Southern Member States (Interview PermRep_Anon 1). An observer of the two phases compares this to the first phase of the CEAS (Ibid.):

> [A]t the time [during the first phase of the CEAS], […] the co-operation between the Member States whom you would normally consider to be our allies was relatively weak actually because the negotiation was really one between the Northern Member States. […] So, it was more, a more tense negotiation if I recall correctly between the Northern Member States than between say the North and the South. […]

Although they became much more vocal on the recast instruments, weak regulators still did not follow their positions through to the end. One observer from the Jesuit Refugee Service Europe wondered why Italy did not call for the use of the 2001 Directive on Temporary Protection when it was faced with a mass-influx in 2011. While this directive had

never been applied before, the 2011 mass-influx that occurred after the "Arab Spring" might have been an ideal occasion to use this Directive (Interview Jesuit Refugee Service Europe):

> When in 2011 there was a mass-influx of asylum-seekers in Italy and Italy was very vocal. The EU normally has the 2001 Directive for such cases. And I have asked during an event at the Italian Permanent Representation: What are you going to do? Are you suggesting the application of the Mass Influx Directive? And they said: No, it's not *that* bad after all.

This anecdote provides evidence for the symptomatic deficiency to follow through positions from start to finish. While Italy indeed defended its position and was very vocal initially, it did not follow this position through or actively pursue a similar pathway as Germany in the mid-1990s when it experienced a peak in asylum-seekers. A point in case is the suspension of transfers suggested by the Commission on the Dublin III regulation which would have alleviated pressures on the border countries, Greece and Italy, which both initially strongly supported. This unwillingness to fight can be explained by less effective administrations which faced problems developing positions in time and often seemed indifferent as a result. As an official from the Council concluded (Interview Council 1) the Member States with the biggest bargaining success are "those with the biggest interest and the most effective administration." Well-equipped administrations have an advantage in the sense that "they can check every comma" (Interview PermRep_SE). Weak regulators are often indifferent and give up early on in the negotiations as they are insecure about their own aims and about how pressing an issue it is for them. Some weak regulators suggested that their communication with the national administration did not run smoothly and that positions arrived rather late (Interview PermRep_Anon 2; Interview PermRep_Anon 3). Germany, the UK and Austria are described as having rather effective administrations in comparison (Interview Commission 1). The Netherlands, moreover, have been frequently referenced as a Member State that very effectively communicated with its capital and hence could quickly react to new circumstances arising in the course of the negotiations (Interview Council 1; Interview MPI Europe; Interview PermRep_NL).

A factor that further weakened the bargaining success of weak regulators, such as Italy and Greece in the second phase of the CEAS was their weak transposition record which made Member States less willing to make concessions to these delegations. Italy, in particular, did not receive numbers of applicants in any way comparable to what Northern European Member States received. Indeed, while Italy hosted a refugee population of 58,060 people, Germany hosted almost ten times as many refugees in 2011 (571,684), followed by France (210,207), the UK (193,510) and Sweden (86,615) (see UNHCR 2015a). Thus, Northern European strong regulators even during the second phase of the CEAS argued that Italy (as opposed to Greece perhaps) has never faced a real mass-influx comparable to what Northern Member States receive for years. This makes its claims less legitimate in the eyes of the actual top recipients (Interview PermRep_AT; Interview PermRep_DE; Interview PermRep_NL; Interview PermRep_SE). Receiving larger numbers of applications also gives additional weight to a state's positions, thus making them more legitimate. Talking about why Germany has been so effective in shaping the CEAS, a representative from Caritas International sums up the situation as follows (Interview Caritas Europa):

> Germany was […] one of the biggest recipients of asylum-seekers. And this also probably played a role. Well, if you only have 50 asylum-seekers per year, like some of the smaller countries, your voice is probably less important. The concerns of countries receiving 400,000 asylum-seekers will be, let's say, considered more important or will be listened to more than, than if it's a country which is actually talking about 50 people – because of the consequences for the country, for the reception conditions system, the financial consequences for the country, and all the possible consequences that you can think of […]

While strong positions enhance an actor's likeliness to influence the legislative output under unanimity voting rules in the Council, expertise is necessary to substantiate claims and provides them with the ideational tools to do so, as I will now demonstrate.

Quality of Positions

Expertise is an essential requirement for being active in negotiations, as expertise provides the foundation for positions that can be brought into the negotiation process. Many of my interviewees suggest that Germany, France, Sweden, the UK, the Netherlands as well as Austria and Belgium have well-developed legislation in the area (Interview Commission 1; Interview Hailbronner; Interview LIBE Secretariat; Interview MEP EPP; Interview PermRep_FR; Interview PermRep_NL). What a legal expert says with regard to Germany is to a certain extent generalisable for other strong regulators (Interview Hailbronner):

> Germany had legislation on asylum procedures as early as 1982, 1986. And there were lots of reforms. There were states which did not have any legislation on asylum procedures […] that did not even have material asylum law either. [They] barely had any legislation on the rights of asylum-seekers. For those the situation was clearly different.

The seven strong regulating countries have very well-functioning systems as a representative from the UK Permanent Representation explains (Interview PermRep_UK):

> The top seven asylum destination countries like Sweden, France, the UK, Germany, Austria, Belgium, the Netherlands […] they have been working on these issues for a very long time, they are experienced, and their systems are robust. I mean Germany, France, the Netherlands, the UK, Sweden have asylum systems which are fully respected.

Their systems were, moreover, tried and tested due to being applied on a daily basis and undergoing various legal revisions over time (Interview Ministry of Interior_DE 2):

> […] our rules are the result of extensive experience and of a – let me call it a trialogue between the three powers. The government proposes [a law], the legislature passes it – and changes it already. And the courts need to approve it, or it's changed again. And if you have such a rule, then it is proved and tested and you can rely upon it […]

This enhances the legitimacy of their positions, as it is clear that their positions will—at least—not be in clear breach of international human rights law (Ibid.):

> The Commission later on recognised that proposals coming from Germany are reliable. Those are proposals which not only have proven themselves in practice, but they have also been tested and approved by the courts. That gives credit to our asylum system. We do not so to say quickly shoot something from the hip and put it on the table, but […] anything we propose is a result of a long discussion process and a process of judicial review.

Weak regulators had not developed these safeguards to the same extent. This can potentially explain why they had standards in place which violated the ECHR, for example as concerns free legal aid (see art. 13 ECHR "right to an effective remedy"; see Council of Europe 2010) and material reception conditions (see *M.S.S. v. Belgium and Greece*, ECtHR 2011; *Tarakhel v. Switzerland*, ECtHR 2014). This supports my expectation from Chap. 2 that international human rights law can constrain some Member States that try to upload their policies to the EU level under the condition that other Member States function as "watchdogs." Clearly, strong regulators have more effectively taken the role of "watchdogs" than weak regulators.

Given their legal expertise, strong regulators are more prone to suggest wording (Interview PermRep_NL). Their effective administrations, moreover, enable them to translate their domestic policy expertise into well-founded positions and arguments. Talking about a similar group of Member States a Commission representative (Interview Commission 1) argued that:

> Of course, […] especially [the] Germans have a very developed legislation on asylum. But the Germans are very prominent in negotiating in general. But they're all, the UK, very much. […] I think it's more to do with the organisations of public administrations and, and I think that is one thing: some public administrations are better at than others. The UK is very good. I mean, the UK civil service is good. They […] prepare the meetings very well […] they come with very good instructions. They have very good arguments to put forward. So the UK is also always very vocal, very well

> prepared, very effective. You know, usually these states, the UK are very good, the Germans. The Germans very much defend their system and Austria too […], France [as well].

The number of applications that states receive also plays a role in building expertise. Given the high numbers of applications submitted, strong regulating countries have dealt with a variety of individual cases and in combination with their working administration they have thus been able to build legal expertise. As one representative from the German Interior Ministry commented (Interview Ministry of Interior_DE 3):

> We have basically gone through anything you can go through. We had massive problems in the early 1990s and based on these experiences we were interested in very specific provisions. And other countries which did not have these experiences saw this differently.

The specific experience that strong regulators such as Germany had, helped them to develop clear positions and lines of argumentation (Interview Ministry of Interior_DE 2). Countries that have functioning systems believe that those that do not can actually benefit from their experience (Interview Ministry of Interior_DE 1):

> As concerns the Reception Conditions Directive, we have taken our own reception conditions as a starting point, as we considered [them]to be very good, even exemplary […] for other EU states [….] Some of them only had very weak asylum procedures, while we had ours for a long time already, with the then BAFL [*Bundesamt für die Anerkennung ausländischer Flüchtlinge*; Federal Agency for the Recognition of foreign refugees] today BAMF [*Bundesamt für Migration und Flüchtlinge*; Federal Agency for Migration and Refugees]. We also had judicial review, which other Member States did not provide. They did not have it, but rather provided administrative reviews or possibilities for appeals.

Weak regulators in Southern Europe lacked this experience, which significantly weakened their position. Weak regulators, particularly Italy and Greece, have an informal practice rather than any consistent asylum law. For instance, Italy has a rather progressive norm in its Constitution

suggesting that asylum was available for everyone not granted the same rights as provided by the Italian constitution in his or her home country (see Italy 1947). Yet, Italy did not have any secondary legislation at all up to the 1990s (Interview Amnesty International Brussels; Interview Hailbronner). The lack of regulatory expertise remains today as the issue has become more salient for Italy due to its higher exposure (Interview CCME):

> [They have little impact], as they are so badly positioned, so that the others say, if they had organised their asylum systems properly, then they would not have any problem. That is what they say very openly today with regards to Greece, but also Italy. […]

As compared to the proposals made by strong regulators, suggestions by weak regulators were considered less convincing, as they are not tried and tested (Interview Ministry of Interior_DE 1):

> Sometimes states [that had been rather passive previously] made more proposals, but our understanding was that they made the third step before the first and the second […] because they needed to respond quickly [to rising numbers of applications] and were under pressure domestically […] and then they made proposals where we said: Does that not go a little bit too far?

What further helped strong regulators to mobilise their expertise was the fact that at the time of the negotiations at the EU level, many strong regulating Member States, including Germany, the Netherlands, France, Sweden, Austria and the UK were revising their national asylum laws (see Chap. 3). These legislative processes and the special expert commissions such as the *Zuwanderungskommission* in Germany which accompanied these domestic processes provided an ideational reservoir which strong regulating Member States could exploit.

The Lowest Common Denominator of the Strong Regulators

This chapter set out to answer the question: What can explain standards beyond the lowest common denominator in EU asylum policies? In the first part of this chapter, I traced the negotiation processes behind the

three core directives. I found that strong regulators were much more active than weak regulators and that restrictive strong regulators were highly effective in influencing EU legislative output. The Commission and the EP acted mostly as background actors: While the Commission still initiated the debates on the individual directives by submitting legislative proposals which were the basis of the negotiations, particularly in the case of the APD and the QD, the EP's suggestions were entirely ignored under the consultation procedure. In the second part of the chapter, I analysed these findings to understand what had made restrictive strong regulators particularly effective in influencing EU asylum policies and why weak regulators, supranational institutions and also liberal strong regulators were not as effective. I found that besides the institutional setting, that is consultation procedure and decisions in the Council being taken under unanimous voting rules, the lack of practical expertise of supranational institutions in processing asylum applications significantly weakened their influence in the negotiation processes as they were not considered experts to the same extent that EU Member States were. Still the Commission had at least some expertise in the sense that it had the best overview of European practices in the field and was hence the only institution that could legitimately make legislative proposals. The shared right to initiate legislative proposals was hence not used by Member States. However, both the Commission and the EP had a much stronger interest in EU asylum directives being passed than the Council which further weakened their positions: For both the Commission and the EP, promoting EU co-operation is part of their institutional interest and fostering strong protection standards also resonates well with their self-understanding as visionaries (Commission) and promoters of human rights (EP).

Strong regulators were found to be particularly active and effective in the negotiations. This was on the one hand because the issue was so important for them and resulted in their effective administrations translating salience into strong positions during the negotiations. On the other hand, strong regulators had a lot of expertise in the field which was based on their comparatively long history of receiving asylum-seekers and because their regulations functioned well as a result of effective administrations responding to high exposure to asylum-seekers. Restrictive strong regulators were particularly effective in influencing EU asylum

legislation, as agreeing to any standard higher than the one they had in place would have entailed misfit pressures for them.

While liberal strong regulators negotiated the introduction of European subsidiary protection status into the directives, they did not raise the standards laid down in the directives on any other issue. This was mainly due to the fact that they did not adopt strong bargaining strategies as they—like all Member States—first and foremost wanted to maintain their *status quo ante*. Raising the standards of other, more restrictive Member States, was thus a secondary concern for liberal strong regulators. To achieve their aim of reducing secondary movements, they needed EU co-operation and thus, any co-operation (and any minimum standards) was for them preferable to negative regulatory competition which they were facing at the time. Thus, liberal strong regulators were ready to compromise on a number of issues and kept a rather low profile. The case of Portugal and access to work shows that indeed liberal weak regulators did sometimes share their domestic experience and practices (in the case of Portugal direct access to work) during the negotiations. Yet, they did not try to upload them to the extent that both liberal and restrictive strong regulators did or even restrictive weak regulators.

Restrictive weak regulators did try to ensure their domestic *status quo ante* was introduced into the directives. Yet, they only became active at a later stage of the negotiations and even at that point did not follow their positions through, but gave in to the strong regulators, without receiving any compensation. According to my interviewees, their lack of expertise in the field and their non-effective administrations can explain why they neither contributed a lot of ideas nor adopted hard bargaining strategies. In addition, delegations of weak regulating Member States faced problems receiving clear instructions from the relevant ministries in their capitals.

6

Why There Is No Race to the Bottom Subsequent to EU Legislation

In the previous chapter, I explained why the agreed protection standards did not represent the lowest common denominator of all Member States but only that of the strong regulators. In this chapter, I will explain the absence of a race to the bottom and illustrate why Member States did not change their policies in most instances when implementing EU legislation. Doing so is crucial to scrutinising the theoretical model proposed, which is based on the expectation that Member States try to maintain their current practice. I will also scrutinise whether the few instances of change that occurred were based on strategic venue-shopping or other dynamics.

In the first part of this chapter, I will scrutinise whether Member States tried to maintain their *status quo ante*, as the Misfit and Regulatory Competition Model expects. Given that strong regulators are most effective at influencing EU legislation, they can be expected to be compliant *ex-ante* and therefore not in need to change their policies. In contrast to the Misfit and Regulatory Competition Model, I have differentiated between liberal and restrictive strong regulators. While they should be both compliant with EU legislation, I will nevertheless reflect on the (diverging) reasons underlying their (converging) implementation

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behaviour. I expect liberal strong regulators to provide standards which exceed the minimum standards laid down in the EU directives and thus to be compliant *ex-ante*. Restrictive strong regulators are also assumed to be in line with the directives, as they played a prominent role in their evolution. Both types of strong regulators should thus not change their domestic policies. I will then assess the implementation behaviour of weak regulators. The Misfit and Regulatory Competition' Model (e.g., Héritier 1997; Eichener 1997) would expect weak regulators to strategically refrain from implementation to avoid misfit pressures. In line with the factors that I have suggested being constitutive of regulatory power (i.e., administrative capacity and exposure) I would, however, expect non-implementation among weak regulators to be rather based on their lack of administrative capacity.

In the second part of this chapter, I will analyse why Member States did occasionally opt for policy-change (see the second section of Chap. 4). These instances clearly cannot be explained by the Misfit and Regulatory Competition Model. This is to assess whether policy-change was induced by EU directives or if it was fostered by national pressures for change. In this section, I also aim to explain how strong and weak regulators diverged over the introduction of new policies. I show that with low regulators policy-change is inspired by policy ideas they have learned about from discussions at the EU level, while with strong regulators both domestic policy processes and EU level learning can account for policy-change.

Policy Stasis Prevails Over Policy-Change

The absence of a race to the bottom can be explained by the fact that Member States did not want to change their policies as a general rule, but rather favoured the maintenance of the *status quo ante*. As I have shown in the previous chapter, most Member States tried to upload their policies to the EU level so they would not have to make any adjustments. This preference for the *status quo ante* can explain why Member States eventually did not change their policies even if they could have done so, for instance because their *status quo ante* exceeded the protection standards provided by the directive.

The rationale for retaining the *status quo ante* is based on two grounds: First, as demonstrated in Chap. 5, Member States feel more certain about the consequences of tried and tested policies than they do about new policy ideas whose positive and negative effects on asylum management are vague. Since they do not know what the long-term effects of policy-change are, they are sceptical of change (Ackers 2005: 32; Interview Ministry of Interior_DE 2). Under conditions of uncertainty, they seem to fear potential losses (additional costs) more than they value possible gains or savings. Second, their current policies are based on values shared by the broader society. Any legislative change would change the balance of norms present in this society and the power relations that are underlying these norms. By changing a provision, the actors that have formerly brought the policy ideas underlying the provision into legislation are disadvantaged compared to the proponents of change. If change is thus induced from outside, for example through EU legislation, it has little legitimacy itself, as it has not been supported by these actors and does not resonate with domestic norms (see Börzel/Risse 2000). The latter can explain why liberal Member States did not downgrade their protection standards, even though EU asylum law would have allowed them to do so.

Policy Stasis with Liberal States in the Absence of Misfit

States with a more liberal standard than the one suggested by the directive were not forced to change it as EU asylum directives only laid down minimum protection standards. Instead, they were compliant *ex-ante* with the respective provision in the directive (see, e.g., Arenas 2008: 85; Pollet 2008: 73). Sweden and the Netherlands were two especially liberal Member States and provided more liberal standards than other Member States on almost every policy issue. According to a study commissioned to investigate how the directive should be best implemented in Sweden, most provisions were already implemented *ex-ante* in the sense that Sweden already guaranteed these minimum protection standards or even went beyond them (UNHCR 2007: 36). As regards the transposition of APD in the Netherlands, for example,

> [t]he implementation of the Procedures Directive did not lead to a lower standard of protection in the asylum procedure either. The Dutch government is of the opinion that there is no reason to make use of the many exceptions to safeguards provided for in the Procedures Directive. According to the government, these exceptions are based on practices in other Member States, and they are not necessarily useful in the Dutch context (Renemann 2008: 133).

Also Germany maintained its more liberal standards in the area of qualification and rights attached to asylum status. Art. 60I of the German Residence Act holds that the application of the QD is only complementary to German law. While this is problematic from an EU law perspective, Bank (2007: 112) rightly notes that this wording was only

> chosen in order to allow for a continued application of the German provisions and concepts in relation to refugee protection. This is not limited to maintaining the restrictive part of these concepts as far as possible but serves as well for preserving other specific concepts, for example the provision on gender based persecution which is supposedly wider than the provision in art. 10 (1) d Qualification Directive.

While the venue-shopping theory would expect Member States to use EU legislation to introduce restrictive standards, those that already had a more liberal standard in place on an issue did not use the directive to downgrade their protection standards. This is striking, as large parts of the directives are not covered by a still-stand clause[1] and thus downgrading to the EU standard would have been possible. The fact that they maintained their policies lends substantive support to the Misfit Model. Member States do not want to change their policies, as they value retaining their domestic policies as they are, regardless of what EU directives would allow for.

I have already indicated in Chap. 5 that countries such as Sweden consider providing high asylum standards to be part of their own national identity and hence regard their maintenance as being in their own national

[1] An exception is the list of super safe third countries, on which a standstill clause was introduced (see UNHCR 2010b: 303).

interest. Not only are current policies the result of power struggles within a society, they are also an expression of a country's values. Member States have thus no interest in changing their policies through EU legislation, unless there are domestic pressures for change, particularly those exercised by the electorate. When these pressures are absent, governments have a strong interest in keeping policies as they are, so as not to reopen debate with the different domestic stake-holders. The following quote by a Swedish official is revealing in this regard (Interview PermRep_SE):

> We have a long standing tradition in being so [that is liberal]. Since the early 1970s already. We are the third biggest donor to the UNHCR. We value solidarity a lot, also the public opinion is very pro-asylum. The far right that is xenophobic gained 20 seats in the last elections. […] So the centre-right government made a deal especially for asylum, so that the right-wing did not have a say on this issue. In Denmark that was different, there the right-wing party set the agenda. […] The Swedish […] do not want closed borders. We have a long standing tradition of asylum, no matter whether the Social Democrats or the Centre Right are in power. That never changes.

This quote shows that while (moderate) right-wing parties generally prefer more restrictive policies than left-wing parties (see Hix/Noury 2007), national diversities remain and Swedish conservatives adopt different policies from for instance Danish or Hungarian conservatives, as they have to respond to different societal demands. Of course, during the "refugee crisis" Sweden has also adopted more restrictive policies. At the same time, it is quite remarkable that for a long time such a small country (in terms of population) was ready to take a lead role in refugee reception in Europe. The fact that the Deputy Prime Minister from the Green Party clearly expressed strong remorses by calling the restrictions "a terrible decision" and bursting into tears when announcing them shows that these measures clearly contradicted some of her core values (Crouch 2015).

As the case of Sweden shows, countries that have a strong commitment to human rights and solidarity as well as "a concern for people beyond their border" (Thielemann 2006: 24) do not have an interest in restricting their policies arbitrarily, but rather see refugee reception on a high

level of protection as a part of their identity and their self-interest (see Betts 2003). Values held by wide parts of society impede arbitrary restrictions in some countries, while other countries are also bound to their more restrictive systems because of their electorates' stance (see political costs), as the following quote of a UK representative shows (Interview PermRep_UK):

> […] They [the Swedish] are so liberal, so very credibly liberal. They have such a liberal policy. We can't think like that. The press and the public would riot, we don't have the culture. It is not in our genetic make-up.

States that initially provided a comparatively high protection standard on certain policy issues considered their approach a role model for other Member States, as the following quote of an official from the German Ministry of Interior (Interview Ministry of Interior_DE 1, see Chap. 5) shows:

> […] We have taken our own reception conditions as a starting point, as we considered our own reception system to be very good, even exemplary. And it could serve as an example for other EU states [….] Some of them only had very weak asylum procedures, while we had ours for a long time already […]That is also why we did not have the change a lot of legislation in this context […].

Liberal strong regulators seem to be more critical towards the potential costs of policy-change and the uncertainties that can derive from it. They are averse to being more liberal than other Member States, which could result in them receiving more applicants through secondary movements. While restrictive policy-change subsequent to EU legislation could potentially reduce costs by limiting secondary movements, this is by no means guaranteed and policy-change could have unexpected implications and side-effects which again incur costs. This is also supported by the statement of Ackers (2005: 32), already referred to in Chap. 5, according to which "Member States [are] not willing to trade in known national certainties for unknown policy tools." Ackers highlights how cautious Member States are about introducing new policies because they potentially benefit an unknown number of asylum-seekers.

No Policy-Change for Restrictive Strong Regulators Who Successfully Upload

Like Member States that had a more liberal standard in place on a provision, restrictive strong regulators did not face substantial misfit as regards the directive. As I have shown in Chap. 5, they had uploaded the vast majority of restrictive practices with the purpose of maintaining discretion for these practices and thus did not need to change their policies to be compliant. This is also highlighted by the following quote:

> The implementation of the Asylum Procedures Directive has resulted in only very few changes with regard to pre-existing German legislation. Many key concepts now prominently included in the Directive, such as the concepts of 'safe third country' and 'safe country of origin', have been part of German law already since the amendment of the German constitution in 1993 (Duchrow 2008: 159).

A similar finding on Germany has been made concerning the access to work stipulation in the RCD:

> The directive had no impact in 5 Member States [investigated by the Odysseus Network in the 2006 study]. […] It is not at all surprising to find Germany in this list because this Member State used all of its power to influence the content of Article 11 in such a way as to not be obliged to change its domestic law on this point (Odysseus 2006: 72).

In contrast to Member States with a more liberal standard, Member States with a more restrictive standard needed to upload their policies in order to not be out of line with the minimum protection standards provided by the directive. Germany, the Member State with by far the highest number of applications in the previous ten years, was accommodated on almost every issue because of its hard bargaining strategies and hence did not need to change much of its domestic *status quo ante* legislation. Points in case are: access to work, freedom of movement and derogations from material reception conditions in the RCD; the IPA; the recognition of non-state protection; as well as fewer rights

for subsidiary protection holders than for refugees in the QD; and particularly the European "super safe" third country in the APD. The latter case is striking, as it was only introduced to accommodate Germany and was subject to a standstill clause suggesting that no other Member State was allowed to introduce it subsequent to EU legislation. It also shows how critically Germany felt about any potential changes to its system, as it did not apply the "super safe" third country concept to Convention refugees either, but only used it in the context of its constitutional right to asylum (UNHCR 2010b: 303). Interestingly, in addition to that, neither Germany nor any other Member State frequently applies the concepts "actors of protection" (UNHCR 2007: 49) or the "IPA" (Ibid.: 56) in practice. In sum, Germany tried to maintain its discretion by uploading these policies, while not requiring them. Another example of a Member State seeking discretion on one national peculiarity is the UK on withdrawing reception conditions if applications are made too late. Clearly, the UK wanted to have its practice accommodated, while no other Member State (with the exception of Greece) used the directive to introduce this restrictive concept.

While strong regulators wanted to maintain discretion for their own (restrictive) approaches, they did not want to impose these provisions upon other Member States and only introduced them as optional regulations into the directive (Interview Ministry of Interior_DE 2). Clearly, to avoid becoming more attractive to potential asylum-seekers, it made no sense for them to force other Member States to adopt similarly restrictive policies. Overall, strong regulators needed to make few adjustments, as they either provided standards that exceeded the standards of the directive or had influenced EU asylum legislation and made it reflect their domestic policy approaches. Yet, Chap. 4 has shown that there were a few instances where strong regulators did undergo (both liberalising and restrictive) policy-change. In the second section of this chapter, I will explain what can account for these changes.

At the same time, I would also suggest a more nuanced picture of the strong regulators as "reliable transposers," as presented by the Misfit and Regulatory Competition Model. When transposing EU law, both strong and weak regulators do not passively take policy ideas from Brussels.

Rather, they "pick and choose" policy ideas that are in line with domestic policy demands and therefore convenient. Bank (2007: 112) refers to this as "selective transposition." Selective transposition applies as long as EU Member States do not undermine the minimum standard provided by the directive. This is, however, often a question of interpretation, as the following example shows:

While art. 15c suggested that victims of indiscriminate violence (civil war refugees) qualified for subsidiary protection, art. 60VII sentence 2 of the German Residence Act 2004 holds that dangers generally threatening the entire population of a country or a specific group to which the alien belongs, will only be considered for temporary suspension of deportation and not subsidiary protection status. Germany had negotiated recital 26 into the directive by stating that "[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm" (Council 2004b: 13; cf. Interview Ministry of Interior_DE 3; UNHCR 2007: 68) and used this as a justification for the continued denial of subsidiary protection where the threat affects not just the entire population but also parts of it (Ibid.: 73; Bank 2007: 112–113). According to the Kassel Administrative Court this has been done to prevent an "unlimited expansion of its application" (UNHCR 2007: 73). Hence, subsidiary protection was rarely granted in art. 15c cases (Ibid.: 73–74). Although art. 15c was rather clear in this regard, as was later confirmed through the Elgafaji judgement (*Elgafaji v. Staatssecretaris van Justitie*, see CJEU 2009) "the interpretation given by the German authorities remains unchanged by the direct effect of the Qualification Directive" (Ibid.: 72). As demonstrated in the first section of Chap. 5, Germany struck a package deal in which it received discretion on the rights of beneficiaries of subsidiary protection in exchange for subsidiary protection being applied also to war refugees (art. 15c). A similar interpretation on victims of indiscriminate violence was also followed by the Netherlands. This clearly indicates a reluctance of strong regulators to change their policies. In sum, however, strong regulators have been strikingly successful in uploading their policies so that they are generally compliant with the directives.

Change on Paper But Stasis in Practice with Restrictive Weak Regulators

While strong regulators uploaded most of their *status quo ante* policies, weak regulators did not. They therefore faced considerable misfit with EU legislation. Still, they transposed directives literally, either agreeing on a decree saying that the directive is applicable domestically (see Italy 2005) or by copying it with only minor changes (see Greece 2007). While these countries were hence perfectly compliant on paper, later studies and case law showed that they were not at all in practice (see below). This provides a more nuanced picture of the implementation behaviour of weak regulators than the one of the Misfit and Regulatory Competition Model classifying weak regulators generally as weak implementers without differentiating between legal and practical implementation. In fact, Olivetti (2008: 183) comes to a very positive conclusion as regards the legal implementation of the APD in Italy:

> It is a fact that, after the Implementing Decree of Procedures Directive will enter into force, reception conditions will finally open their doors to applicants during day-time, the duration of the mandatory reception and detention periods will be shorter, time limits for appeals will be extended from fifteen to thirty days, the competent authority for examining appeals will be a Tribunal, instead of the same Territorial Commission that examined the application in the first instance and legal assistance for appeals will be accessible free of charge to all asylum-seekers without sufficient financial means. We can see these events as a proof that even from the least courageous EU directives we can derive significant improvements in the Member States' regulations with respect to their obligations under international and refugee and human rights' law.

While the Implementing Decree suggested that a number of improvements had taken place and Italy had also introduced a national reception system in preparation for the implementation of the directives in 2002 called *Sistema di protezione per richiedenti asilo e rifugiati* (SPRAR, System of protection for asylum-seekers and refugees), practical problems remained and most changes on paper did not translate into changes in practice.

For instance, material reception conditions and social benefits for refugees and subsidiary protection holders (including housing and health care) posed a challenge to weak regulators, as they did not foresee having to provide extensive state-funded support previously. Thus, weak regulators faced considerable misfit in this regard. A number of NGO reports show that Greece and Italy, especially, failed to introduce working reception systems. Even though the SPRAR had been introduced in Italy, reception centres do not provide sufficient space for applicants. Most asylum-seekers hence live in alternative accommodation, with many squatting in abandoned buildings. Those applicants who do not receive a place in a reception centre are less likely to receive other social support (food, sanitary products, clothing, integration), as it is provided principally at reception centres. There is also limited financial support for asylum-seekers. After six months, asylum-seekers receive a work permit and are expected to leave the reception centre. They are hence considered to be able to fully sustain themselves. Yet, due to the difficult labour market situation and prioritisation of Italians and other foreigners, it remains extremely difficult for asylum-seekers to find a job, especially at times of high unemployment (Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 5–7). There is almost no access to psychological health care for asylum-seekers in reception centres and *de facto* no health care for asylum-seekers who have left the reception centres. While in theory asylum applicants became entitled to health care under the new regulations, general practitioners rarely treat asylum-seekers or refer them to specialists (Ibid.: 25).

Greece provided particularly poor reception conditions, and received harsh criticism, including through European court judgments. The judgment of *M.S.S. v. Belgium and Greece* stated that the Greek reception system violated art. 3 ECHR (Clayton 2011: 759). The ECtHR established that while art. 3 ECHR did not contain an obligation to provide asylum-seekers with housing or financial support, Greece violated art. 3 ECHR, as asylum-seekers are a particularly vulnerable group and the RCD explicitly established the right to accommodation and material reception conditions for impoverished asylum-seekers (Ibid.: 766; Moreno-Lax 2012: 22–23, see ECtHR 2011, paragraph 250). The *M.S.S.* judgment confirms earlier ECtHR case law on Greece in which overcrowding (see ECtHR 2010, *A.A. v. Greece*), lack of clean water, sanitation and mattresses

(see ECtHR 2009, *S.D. v. Greece*) in detention facilities have been considered in breach of art. 3 ECHR (Clayton 2011: 763–764). The *N.S.* judgment of the CJEU built on this judgment and established that states could not automatically consider reception conditions in other EU states to be lawful, but rather had to ensure that this is the case (see CJEU 2011). This put the entire Dublin system into question, which was conceived as an (automatic) "mutual recognition of asylum decisions" (see EP 2008: 6) and challenges the assumption that all Member States provide sufficient standards of protection (for *M.S.S.* judgement see: Clayton 2011: 761; Moreno-Lax 2012). In Greece, asylum-seekers are not provided with housing and where this is the case, reception facilities and detention centres are poor. Since EU legislation has been transposed with a delay, some attempts to reform the system have been made recently (EMN 2012: 47). Yet, in practice there is still no access to health care for asylum-seekers (Ibid.: 50). While all Member States should grant refugees access to social benefits, including food, housing and health care not only since the directive, but also before in compliance with the CRSR, weak regulators, in particular, do not comply with this necessity. In fact, for those refugees who are no longer staying in a reception centre in Italy, it is impossible to receive any access to support (Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 6) and this is very similar in Greece (see *M.S.S. v. Belgium and Greece*, ECtHR 2011).

What is more, weak regulators faced significant problems implementing effective procedures. They provided for various norms in theory, but with little effect. In Greece, the overwhelming majority of asylum applications were not assessed with regard to qualification for subsidiary protection which might be in breach of art. 18 of the QD (see Council 2004b: 19; UNHCR 2007: 80–81). Considering that recognition numbers in Greece amounted to below 2 % for both refugee and subsidiary protection status at the time (UNHCR 2007: 12) and remain low today (Eurostat 2016), one can claim that there is no effective protection in Greece at all. According to a UNHCR study from 2007, out of 305 first instance decisions taken by the Greek Ministry of Public Order, not one received a positive decision, and all the decisions made, suggested significant procedural flaws:

> None of the decisions contained any reference to the facts and none contained any legal reasoning. All contained a standard paragraph stating that the applicant left his/her country to find a job and improve living conditions. A review of second instance decisions by the Ministry of Public Order found that the summary of the facts normally did not exceed two lines, and the negative decision was stated in a few lines in standardised format. As a result, it was not only impossible to deduce the interpretation of the law applied by the Ministry of Public Order, but it was not possible to deduce, from the decisions alone, whether the law was applied at all (UNHCR 2007: 13).

Clearly, Greece which did not provide for an effective asylum procedure previously now faced immense challenges when implementing the APD due to misfit. The introduction of free legal aid also caused problems for weak regulators. They had not provided free legal aid for aliens previously and had to introduce a whole new legal aid scheme. Since transposition, asylum-seekers in Greece have access to free legal aid unless the judge deems the application for annulment of the decision to be manifestly inadmissible or manifestly unfounded. However, in practice, applicants still need to pay the fees in advance and are only reimbursed part of the fees if the appeal is considered admissible or well-founded (UNHCR 2010b: 451). In Italy, there are practical obstacles in accessing free legal aid access in some regions, as a residence permit (which asylum-seekers do not hold) is an essential requirement for eligibility (Ibid.: 449). Both Italy and Greece have in place a merits test and Italy also has in place a means test (Ibid.: 451, 449).

This begs the question why weak regulators transposed such provisions on paper but failed to implement them in practice? Indeed, many of my interview partners have suggested that the weak regulators accepted a lot of provisions which they did not subsequently implement and could have never realistically planned to implement, as these provisions required massive reforms (Interview Ministry of Interior DE 4; Interview PermRep_AT; Interview PermRep_DE). I argue that weak regulators' poor implementation record is due to a lack of bureaucratic capacity rather than solely to a lack of political will. The introduction of the SPRAR, the general openness towards EU asylum regulation as

a means to close domestic regulatory gaps referred to in Chap. 5, and the implementation on paper highlight that Italy generally welcomes EU regulation in the field and that indeed the Southern European Member States considered EU asylum legislation to be in their interest (Interview Odofin). By introducing an asylum system via EU regulation, politicians bypass the political costs associated with such unpopular reforms. Yet, misfit between EU legislation and domestic legislation was substantial and states with ineffective bureaucracies are not able to administer these massive changes. Weak regulators had already experienced difficulties in 'uploading' their domestic policies due to a lack of government effectiveness and they faced the same problems when 'downloading' or implementing these policies. Thus, the unsuccessful implementation of issues that weak regulators were interested in, such as the introduction of a working reception system cannot be explained by a lack of will but a capacity deficit. Therefore, I would like to add nuance to the claim that non-implementation among weak regulators is necessarily strategic or calculated. Of course, weak regulators did certainly not intend to substantively increase their share of applicants through EU legislation, as was intended by the strong regulators. Still, this does not mean that they were opposed to improving their systems.

While indeed weak regulators could have known that the policies suggested by the directives would lead to substantial pressures for change, I argue that the dimension of these pressures and the amount of asylum applications these states would receive after 2005 was definitely not clear at the time. The weak regulators at the time could not foresee that the "Arab Spring" and subsequent turmoil in the Middle East and Northern Africa would lead to aggravated pressures on certain Southern European weak regulators' asylum systems. With regard to the Dublin Convention, the predecessor of the Dublin Regulation, a Commission official elaborates on very similar dynamics, highlighting that weak regulators could not forecast the pressures their asylum systems would be faced with (Interview Commission 1):

> But at the time, which was 1990 […] […] the situation was very different. I mean, Italy didn't have so many migrants. It didn't have so many asylum applications, either. Lampedusa wasn't an entry point. […] And Greece neither, I think it wasn't really an issue for them. But you know, in order to

> enter Schengen, you have to be part of Dublin. […] So, I don't think they thought about it, but I think that now they feel they are penalised. I asked also to Italy, "Why did you sign it?" I don't think they thought about it at the time, because it was so many years ago. 1990. That's 20 years ago. Very different situation. They've become [countries of immigration] now, though they're perceived by migrants and refugees more like countries of transit, countries where people get stuck.

It was the pressures emanating from the Dublin regime that highlighted the implementation problems of the weak regulators. This becomes most obvious when comparing the situation in Italy and Greece to that of Portugal. Whereas Italy and Greece have received increasing numbers of asylum-seekers since the early 2000s, with slightly less than 10,000 claims being submitted in Greece and over 60,000 claims being submitted in Italy in 2014, Portugal received almost constantly less than 500 claims a year (UNHCR 2015b). It can therefore be expected that Portugal would face problems similar to those of the other weak regulators if it faced a comparable influx of asylum-seekers, given its generally weak reception system, rudimentary immigration law (cf. Baldwin-Edwards 1997: 507) and low level of government effectiveness.

Explaining Change

So far, this study has shown that Member States did not aim to use the EU level for policy-change and that generally policies remained relatively stable after transposition of the directives. However, Chap. 4 shows that there are also some issues on which change did occur in individual Member States. This section will elaborate on why change can be observed in these cases. Whereas generally Member States prefer policy stasis over policy-change, I will explain when, that is under which circumstances, Member States are open for policy-change. I will show that policy-change is not based on strategic venue-shopping, but either on (1) domestic processes (particularly in the strong regulating states), or (2) on learning processes in which both strong and weak regulating Member States learned about policies pursued in other Member States from their counterparts in the Council negotiations.

Policy-Change Induced by Domestic Legislative Processes

Examining the negotiations at the EU level has shown that Member States sometimes uploaded a standard that was different from their domestic *status quo ante*. In some of these instances, Member States uploaded the presumed outcome of on-going national reforms. In fact, a number of strong regulating Member States, including France, the UK, Germany, the Netherlands, but also a medium regulator, Austria, were undergoing domestic legislative changes around the time of the EU negotiations (Ackers 2005: 2). This shows that strong regulators were more active in general as concerns producing legislation and that they tried to shape EU policy-making. The legislative process in national parliaments and the installation of working committees or expert groups such as the *Zuwanderungskommission* in Germany served to brainstorm and develop policy ideas and positions for the negotiations. This highlights that Member States did not as a general rule try to circumvent parliaments as the venue-shopping theory would suggest. Instead, they actively involved parliaments. Ackers (2005: 2) also highlights that the fact that domestic and EU legislative processes ran in parallel, made decision-making at the EU level much more complicated and entailed heavy delays, especially if governments needed to await a decision from their national parliaments before taking a clear stance at the EU level. Examples of uploading of the expected result of an ongoing domestic reform can be found in all three directives. Given the fact that asylum procedures are anchored in wider procedural law, which is generally not prone to policy-change, there are fewer changes to be found subsequent to the APD than the other directives, as I will show in the following.

The Asylum Procedures and the Reception Conditions Directive

In the APD, the UK sought accommodation of its newly adopted changes on the safe third country principle, which had been introduced in the 2003 Asylum and Immigration Bill. While previously the right

to an in-country appeal was already substantially limited for applicants from presumably safe third countries, these limits were extended and the safe third country concept was to be applied more widely (Ackers 2005: 21–22). Changes adopted in the UK on the safe third country concept did not result from the APD, but rather the APD served as a tool "to render [it] acceptable under Community Law" and legitimise the newly adopted approach (Ibid.: 21).

In the RCD, the UK uploaded the withdrawal of reception conditions in the case of late submission of an application which it was about to introduce at the national level towards the end of the negotiations (Interview Williams; Odysseus 2006: 51). Eventually, however, this practice was ruled unlawful by domestic courts which "condemned the use of this practice and set certain conditions," based on art. 3 ECHR (Ibid.: 51–52). From this time onwards authorities were only allowed to refuse or withdraw reception conditions for late applications if asylum-seekers had sufficient means to sustain themselves.

Germany (and France) successfully negotiated access to the labour market after one year into the directive. Previously, Germany had not recognised access to the labour market for asylum applicants, but due to a court ruling by the Social Court of Lübeck on 22 March 2000, which deemed the labour market ban for asylum-seekers unlawful, and lobbying by both employer associations and unions (Spiegel 2000), a cabinet resolution was passed which suggested that labour market access should be introduced after one year (Flüchtlingsrat Thüringen e.V. 2001; PLS Ramboll-DE 2001: 36–37; Özcan 2000). This was a time period France had also envisaged (PLS Ramboll 2001-FR: 23). While Germany needed to abolish its labour market ban on asylum-seekers as a result of the court ruling, it "learned" (on Learning, see the third section) about this time-frame through the negotiations and agreed to it, because most applications were decided in Germany within one year (see Interview PermRep_DE). In France, the previous labour market ban had resulted in serious problems with asylum-seekers taking up work illegally, as they only received material benefits for one year and asylum procedures often took longer (Ibid.). Both Germany and France hence uploaded the expected result of its ongoing domestic reforms, without this being already inscribed into law. While initially France criticised the time-frame of one year during

the negotiations, this was arguably just an attempt to maintain discretion for its ongoing domestic legislative processes.

One could argue that the German government engaged in (liberal) venue-shopping, as it suggested that it already granted labour market access after one year during the EU negotiations (Council 2002/5430: 3) while this was only a cabinet resolution and not yet legally binding. Indeed, when minimum protection standards are discussed, liberal venue-shopping can create commitments for Member States which restrictive venue-shopping cannot. Yet, I would be rather cautious with this interpretation since the opposition in the *Bundestag* was aware of the discussions taking place at the EU level and knew that they were debating access to work after one year. One Parliamentarian from the conservative *Christlich-Soziale Union in Bayern* (CSU), Reinhard Grindl, even accused the progressive SPD/Green-led government of venue-shopping, suggesting that the government was trying to create rules in Brussels that would result in policies that the conservatives were not ready to accept in the new *Zuwanderungsgesetz*. Grindl therefore asked the government to wait for the final results of the domestic legislative processes before agreeing to anything at the EU level (Deutscher Bundestag 2003c: 3660). This shows how effectively the German *Bundestag* actually monitored debates at the EU level.

The case of the UK might be puzzling, as the Member State was the only strong regulator that had introduced a labour market ban during the negotiations in 2002 and was now forced to reintroduce access to the labour market. Yet, I argue that the reintroduction of access to work was in line with the UK's overall regulatory approach and hence did not represent a significant policy-change. In fact, the UK had only just introduced the labour market ban due to international and partly due to domestic pressures: Domestically, an exponential growth of asylum claims in 2002 coincided with the suffocation of 58 Chinese immigrants smuggled to the UK in a refrigerated lorry in June 2000 with the presumed intention of claiming asylum and/or working irregularly in the UK. This entailed calls for labour market restrictions for immigrants (Ensor/Shah 2005: 2; Flynn 2003: 7). Internationally, the UK faced criticism from its neighbour France. According to France, the UK's liberal labour market policy was a major pull factor responsible for the installation of the irregular

refugee settlement of Sangatte in the Callais area. France held that most of the irregular immigrants staying in this settlement wanted to go to the UK to find work and thus the UK's liberal labour market policy was turning France into a transit country (Gully 2002; Home Office 2002; Kelland 2002; PLS Ramboll- UK 2001: 28; Savary 2003). Because of this pressure, the UK eventually changed its domestic policy on labour market access. Yet, early labour market access was very much in line with the UK's overall approach towards the issue, as the UK had provided labour market access after six months prior to 2002. Moreover, it was also in line with its overall welfare policy towards immigrants as generous access to work alleviated pressures on the welfare system (see Sainsbury 2006, 2012). Once the international pressures waned—as France had to introduce access to the labour market itself—the UK could reintroduce labour market access as well.

The 2004 Austrian *Asylgesetz* restricted freedom of movement subsequent to the RCD. This restriction of the freedom of movement was, however, only introduced for Dublin II cases. During the first 20 days of the admissibility procedure, asylum-seekers had to stay in the area of one out of three reception centres in the country, so that they could easily be apprehended and transferred in case another Member State was responsible for them under the Dublin II Regulation. Some observers attributed this change to Austria using the optional rule which Germany had negotiated into the directive (Flüchtlingsrat Brandenburg 2009). As I have shown in the first section of Chap. 5, however, Austria was rather vocal in the negotiations on freedom of movement and suggested to limit freedom of movement to save costs (see Council 2002/5444: 9; Council 2002/6467: 10), even though it did not previously restrict it (see the first section of Chap. 4). The fact that Austria tried to negotiate more restrictive standards than it provided for at the time can be explained by legislative changes the country was undergoing at the same time as EU negotiations were taking place. The government was then composed of the conservative *Österreichische Volkspartei* (ÖVP) and the populist *Freiheitliche Partei Österreichs* (FPÖ) which was known for its anti-immigrant positions. Anti-immigrant attitudes at the time were fuelled by fears of rising applications with the EU accession of ten new Member States which had rather poor asylum systems and weak border

control. The Interior Minister at the time was Ernst Strasser (ÖVP) who was involved in a number of scandals due to his hard-line positions on the issue. The 2004 Asylum Law which was passed under Strasser and which was later considered unconstitutional by the Constitutional Court, underlined his hard-line position. This shows that restrictive policies were already being introduced at the national level and did not just arise as a result of EU legislation (see Langthaler 2010: 211). Strasser did not need to rely on EU developments to circumvent a potentially more liberal coalition partner, as his coalition partner still considered his positions too lenient. The populist position advanced by the FPÖ made *all* parties adopt rather conservative positions on the issue and even the Greens felt the need to demonstrate that they were not a party which welcomed further immigration (Langthaler 2010: 201). This is arguably a situation similar to what occurred in Germany in the early 1990s when the CDU and eventually the SPD adopted more restrictive positions on asylum due to the electoral strength (see Howard 2010) of the right-wing extremist *Republikaner* which advanced such positions (Koopmans 1996: 198; Koopmans/Statham 1999: 36–27). Given the consensus on more restrictive policies, the Austrian delegation tried to anticipate legislative changes and negotiate their inclusion into EU law to maintain as much room for manoeuvre as possible for the legislative changes introduced by domestic politics.

The Qualification Directive

Both Germany and France for the first time recognised victims of non-state persecution subsequent to the QD. Yet, this was not necessarily due to the QD, but again a result of domestic processes. As I have shown in Chap. 4, France had already implicitly recognised (some) victims of non-state persecution and had introduced many elements of the more liberal "protection view" through case law. Yet, this more liberal perspective was not yet codified. Along with two further elements from the QD, namely the IPA and subsidiary protection status, France introduced the recognition of victims of non-state persecution into domestic law with the new asylum law of 2003. These were the only aspects France changed

in response to the QD. Yet, these changes were adopted in national legislation before the completion of negotiations on the QD (Chetail 2004, 2007: 87–88). This supports my finding that strong regulators change policies based on domestic legislative process and not because they simply transpose EU law. With the new asylum law of 2003, France also codified the IPA (Chetail 2007: 87), which it had already applied previously (ECRE 2000: 31–32). However, the IPA was applied less restrictively than the directive allowed for. In cases of persecution by the state it was not applied (Ibid.: 97–98) and it was only applied if the applicant had previously lived in the area constituting an internal protection alternative (ECRE 2008: 17). The wording in French law is also different from the wording in the directive: While the directive refers broadly to "parties or organisations" but limits the scope by requiring that such parties or organisations control the state or a substantial territory, the French legislation limits the actors to international and regional organisations but does not make it conditional on their control of a substantial part of the territory. Art. 7II/III of the QD is not transposed into French law (UNHCR 2007: 47). This again highlights that strong regulating Member States implement what they have planned to introduce domestically or what is convenient for them, rather than merely transpose the directives.

Germany had long been reluctant to recognise victims of non-state persecution. The recognition of victims of non-state persecution in Germany is, however, not primarily due to the EU directive but based on a unique window of opportunity for asylum policy liberalisation in Germany. With the SPD/Green coalition coming to power in 1998, traditional promoters of liberal asylum policies were in government. While Interior Minister Otto Schily and the SPD were often criticised for having become restrictive after assuming power, the Green Party maintained its liberal course on asylum policies because the Green electorate is in general much more pro-immigrant than SPD voters (see Alonso and Claro da Fonseca 2012). It was the Green Party, with support of the left-wing party *DIE LINKE* that fostered the recognition of victims of non-state persecution, emphasising that Germany had become a restrictive outlier on non-state persecution in Europe. During the 118th plenary

session of the German *Bundestag* Volker Beck of the Green Party stated (see Bundestag 2004: 10708):

> How ideological was the debate we led on this issue [the recognition of non-state persecution]! We would have almost delayed the entire movement in Europe, just because you [the CDU] did not want to join the pathway that has already been followed by other countries for a long time.

The Greens were supported by a variety of international law experts and NGOs, which had already lobbied for a liberalisation of this practice in 1999, entailing a hearing in the *Bundestag*. In the German debate, the issue was closely linked to the debate on gender-related persecution, honour crimes and female genital mutilation (FGM). There was a broad consensus in society that victims of gender-related persecution should be granted refugee status in Germany after cases of honour crimes and forced marriages had received extensive public attention. This can also explain why the German *Zuwanderungsgesetz* from 2004 eventually exceeded the protection standard on non-state persecution in the area of gender-related persecution. The German debate on gender-related persecution was simply much more progressive than the debate at the EU level. ECRE explicitly mentions the German transposition of gender-related persecution as being noteworthy (ECRE 2008: 20). Although EU legislation and the domestic law were passed at almost the same time, one was not the result of the other, but the processes instead ran in parallel (see Brabandt 2011: 168–172). During the early 1990s, gender-related persecution only resulted in a suspension of extradition (Brabandt 2011: 140–141). However, in June 1998, a resolution signed by different parties in the *Bundestag* held that FGM should at least be considered a human rights violation when an application was processed (Ibid.: 146; Deutscher Bundestag 1998). Subsequently, FGM was recognised as persecution in administrative law (Brabandt 2011: 159). It was later codified with the German *Zuwanderungsgesetz* which constituted a clear liberalisation in this regard, as previously only state related persecution (e.g., rape as part of ethnic cleansings) had been recognised. While the conservatives had initially blocked the *Zuwanderungsgesetz*, all liberalisations on asylum were passed in exchange for restrictions on long-term resident

immigrants (Ibid.: 171). In Germany, women persecuted on gender-related grounds have since received refugee status even though it is not required by the directive, which holds that gender does not in itself constitute a reason for persecution. Thus, the directive did not play a decisive or direct role in the introduction of the recognition of victims of non-state and gender-related persecution in Germany. Yet, it created the environment to reflect on these policies and codify administrative practices which had already been applied.

While the adoption of common protection standards on subsidiary protection significantly minimised the discretion of Member States, the introduction of subsidiary protection status did not mean a radical change for all Member States, as most, with the exception of Belgium and Luxembourg, already had some form of subsidiary protection standard in place. Germany provided subsidiary protection on a discretionary basis and often only issued a leave to remain for six months instead of granting a status. Having common minimum standards on subsidiary protection hence meant a substantive upgrade of protection standards in Germany, as it provided those which received it with rights and minimal security for the future. Yet, once again change was not mainly induced by EU law. Instead, it was based on the fact that the practice of "chain exceptional leave to remain," that is immigrants receiving one leave to remain after the other, was the source of much criticism and the SPD/Green-led government had already planned to abolish it (Deutscher Bundestag 2003c: 3652; see Schily in ddp 26 May 2004 quoted after Pelzer 2005: 4). In a similar vein, also the adoption of protection standards concerning the family definition in Member States which exceed those laid down in the directive is rather based on domestic than EU legislation. Many European Member States were at the time granting additional rights to non-married (homosexual) partners, which also had an impact on the family definition in the area of asylum policies (ILGA 2009).

This section has demonstrated that some changes Member States introduced subsequent to EU legislation were not necessarily the result of this legislation, but were instead the product of ongoing domestic reforms. This was only the case among strong regulators that had already regulated asylum policies to an extensive degree and now undertook substantive reforms at the same time as EU negotiations took place. In the next section, I will

demonstrate that other cases of change both among strong and weak regulators can be attributed to processes of learning.

Learning Processes and EU Legislation

Policy-change not only occurred as a result of Member States undergoing legislative changes at the domestic level, but also transpired due to Member States learning from one another. Maarten Vink (2005) had already shown for the *post*-Maastricht process that Member States gained information about effective practices to manage asylum immigration and deter asylum-seekers in other Member States through intergovernmental co-operation. They later on copied these approaches, for example to not stand out as being a soft touch and thus being attractive to asylum-seekers. Baldwin-Edwards (1997: 513) and Baldwin-Edwards and Schain (1994: 14) also highlight the role of International Learning as a factor in explaining immigration policy-convergence in Europe in the 1990s. However, as I will show in this section, Member States' learning does not only relate to restrictive policies, but can also lead to more liberal policies. Whether Member States opt for more liberal or more restrictive policies, depends on what there is a demand for domestically. As liberalisation of the labour market access for asylum-seekers in Luxembourg and Italy shows, Member States are willing to adopt more liberal policies if they believe that this alleviates pressures on the welfare system or helps to make procedures less cumbersome.

EU negotiations can consequently be considered a "pool of policy ideas" from which Member States can learn about different policy approaches pursued in other Member States. Thus, both strong and weak regulators can use EU negotiations to learn about policies that have been proven to work in other Member States. Indeed, several interviewees highlighted the role of learning processes (Interview PermRep_PL; Interview Williams). While learning is the main source of policy-change for the weak regulators who have few policy ideas in general, it can also be helpful for the strong regulators who are seeking to reform their own system.

These learning processes also occurred in the case of the Central and Eastern European Member States that acceded the EU in 2004. These

Member States, however, often did not adopt the standard suggested by the EU directive but a standard that Member States with a similar legal framework or whose courts enjoyed a good reputation in Eastern and Central Europe, such as the German Constitutional Court, already had in place (Byrne et al. 2004). In fact, for many of these Central and Eastern European Member States this just represented a continuity of the situation already in place prior to accession as asylum officials in these states participated in training seminars and exchanges with officials from countries such as Germany and Austria, which made this a condition of their accession (PermRep_PL). Byrne et al. (2004: 361) and Nagy (2002: 165) suggest that Poland and Hungary also copied Germany as regards safe country policies. I will now provide examples of learning processes on all three directives.

The Asylum Procedures Directive and the Reception Conditions Directive

In the RCD, the cases of Luxembourg and Italy are particularly interesting, as both did not implement the necessary minimum standard of one year when overturning their ban on access to the labour market, but granted access to the labour market even earlier, after nine months in the case of Luxembourg (Commission of the European Communities 2007: 8, Odysseus 2006: 69) and after six months in the case of Italy (Odysseus 2006: 69). This is a case of Policy Learning by weak and medium regulators. As the first section of Chap. 5 has shown for Italy, introducing access to the labour market after six months was a way of limiting costs associated with the introduction of a reception system, as applicants would be able to sustain themselves and thus not need social benefits (see Schweizerische Flüchtlingshilfe/Juss-Buss 2011: 5, 27). This arguably also played an important role in Luxembourg. Both Member States not only abolished their labour market ban for asylum-seekers, but introduced a standard that clearly exceeded the standard required by the directive. Additionally, in Luxembourg Lydie Err from the Socialist Party, which was at the time in a grand coalition with the conservatives, argued in parliamentary debates that an early labour market access

(after nine months) was a European interest ("préférence communautaire") (Chambre des députés 2005: 4). Indeed, the Commission had suggested even earlier access to the labour market (after six months) than later laid down in the directive (after one year). As Luxembourg is a very EU-friendly country that largely benefits from the EU this might have further enhanced Luxembourg's willingness to adopt a standard closer to the one proposed by the Commission initially. I have already highlighted in the previous section that Germany planned to introduce access to work during the negotiations after a court judgment ruling the German practice unlawful. However, the time-frame of one year was the same time-frame France had suggested earlier in its discussion paper and it can thus be assumed that Germany had learned about this time-frame and its advantages during the negotiations that took place at the EU level.

Another example of Learning was the case involving Greece and both freedom of movement and withdrawal of reception conditions in cases of late applications. As section "Tracing negotiations" in Chap. 5 has shown, Greece which did not previously restrict freedom of movement at all, at some point joined Germany and Austria in supporting the possibility of restricting freedom of movement for administrative reasons and the swift processing of applications, although this was not a policy option discussed extensively at the domestic level, where debate was either absent or focused on the phenomenon of irregular immigrants (see Kiprianos/Balias/Passas 2003; Triandafyllidou/Ambrosini 2011: 262). A draft decree in Greece later foresaw the possibility of limiting movement within a certain area designated by the government (Odysseus 2006: 45), which was a case of Learning from the German practice at the EU level.

A similar case is the introduction of the safe third country principle after the transposition of the APD and the safe country of origin concept even before the transposition of this directive in Ireland. Ireland was the only Member State that previously did not apply both concepts and there was obviously (domestic) pressure on it to align to other EU Member States. In fact, all debates in the Irish Senate mainly refer to the EU when discussing the safe third country and the safe country of origin provisions. Proponents of its introduction, such as the Minister for Justice, Equality and Law Reform, Michael McDowell from the Progressive Democrats which together with the conservative Fianna Fáil

party was in power at the time, suggested that the restricted appeal rights under the safe third country provision would lower costs resulting from fraudulent applications (Select Committee on Justice, Equality, Defence and Women's Rights 2003).

The Qualification Directive

As I have shown in Chap. 5, the Netherlands had adopted hard bargaining strategies to negotiate residence permits for refugees valid for three years into the directive. Yet, when transposing the directive, the Netherlands introduced residence permits valid for five years, which is the standard Germany previously employed. The Netherlands arguably copied policies from Germany, about which it had learned in intergovernmental negotiations. The Netherlands have copied (restrictive) German policies already in the 1990s (see Vink 2005). While at first sight it seems that the Netherlands liberalised their policies and adopted a higher standard of protection, residence permits for five years meant a restriction because previously the residence permit was granted for an unlimited period after three years (for both refugees and beneficiaries of subsidiary protection). Interestingly, Germany on the other hand introduced unlimited residence permits after three years. While Germany planned to liberalise residency rules for refugees and subsidiary protection holders anyway, the time-frame introduced might well be a result of having learnt from the Dutch practice and the standard laid down in the directive.

The reason why the Netherlands restricted its policy was because the conservative government at the time held a generally critical stance towards immigration and favoured restriction, particularly in the aftermath of the murder of Theo van Gogh and growing consciousness that the previous expansive approach to immigration and integration was no longer appropriate. Thus, the conservatives argued that being more liberal on residence permits than other Member States made the Netherlands more attractive to asylum-seekers than its neighbours. They also argued that the Netherlands needed to downgrade their protection standards (on residence permits for refugees) to be in line with the EU. The opposition was aware that the second argument did not hold and that Member States

could have maintained protection standards that exceeded the standard provided by the EU directive if it wanted to, as the following statement by Marijke Vos from the left-wing party "GroenLinks" demonstrates (Tweede Kamer der Staaten-Generaal 2003; translated by the author):

> My party has problems with this legislative proposal, as it questions the legal position of refugees. In short, the legislative proposal lays down that a refugee only gets a final decision on his or her right to stay in the Netherlands after five instead of three years. […] The minister first of all puts forward the argument in support of the legislative proposal that the Dutch norm would better fit the general European approach if it provides a time-frame of five years. Second, this time-frame would better fit what is common use in the law on foreigners. Last, the time-frame is what is currently used in the proposal for a directive [at the EU level]. My party finds none of these arguments convincing. How important and valuable it is also to close the gaps on important developments in Europe, our priority must naturally be that foreigners having a right to stay in the Netherlands are not obviously harmed in their legal position. I have always understood that the European Community agreed on minimum norms, from which one may deviate to the advantage of the person concerned. In short, the Netherlands do not need to go back to these minimum norms, but we can do better than the minimum norms agreed on in Europe.

While the conservative government tried to venue-shop, arguing that the Netherlands needed to downgrade their protection standards to be in line with EU legislation, the opposition was well aware that this was not true and said this openly. However, as the majority in parliament at the time was conservative, the opposition could not do much to block this decision.

As I have highlighted in the first section of Chap. 5, France introduced a single procedure for both refugee and subsidiary protection status in 2003, which was also inspired by the negotiations at the EU level and especially by the strong position taken by both the Netherlands and Sweden in this regard. While the French approach to the single procedure had been significantly influenced by European developments, France later presented the QD as a result of its successful influence, saying that the directive had been substantively influenced by French law and not vice versa.

Little Change Induced by EU Policies

This chapter aimed to explain why EU Member States generally try to maintain their *status quo ante*. Moreover, it showed that when change occurs it is not based on strategic venue-shopping but mostly on domestic pressures or International Learning. Linking my findings of Chap. 4 to the Misfit and Regulatory competition Model I found in the first section of this chapter that indeed Member States only in a limited number of cases opted for policy-change and that policy stasis is generally what occurred. This preference for maintaining the *status quo ante* is confirmed by the vast majority of my interviewees.

Liberal strong regulators, that is Member States that have a standard in place which is more liberal than the standard required by the EU directive, are not required to change their policies to comply with EU law. Additionally, they deliberately choose not to downgrade their standard, even if their domestic standard is more liberal than the EU directive. Member States even have a preference for their domestic *status quo ante* if the downgrading of standards could potentially save costs. They prefer "tried and tested" policies whose consequences and side-effects are known over potential gains from unknown policies with possible negative side-effects. Moreover, these liberal policies are an expression of values present in a society and states are hence only ready to change their policies, if there is a domestic demand for policy-change.

Restrictive strong regulators do not change their policies either. These states mobilised all their resources to influence EU legislative output and hence do not face misfit pressures. My findings on strong regulators add nuances to the Misfit and Regulatory Competition Model in that they distinguish between liberal and restrictive strong regulators. As I have suggested in Chap. 2, this is necessary in asylum policies, while strong regulators are more prone to equal liberal states for safety at work and environmental policies. Thus, while the original approach would suggest that strong regulators maintain their *status quo ante*, as they have successfully uploaded their standard, I would add that under minimum standards strong regulating Member States with a more liberal standard do not need to change their standard either. As far as the implementation behaviour is concerned, liberal and restrictive strong regulators hence converge.

In contrast to findings from the Misfit and Regulatory Competition Model, I find that in the area of asylum policies, weak regulators do transpose EU legislation and change their laws accordingly. Yet, these changes on paper are rarely followed by practical changes. However, I argue that the change of legislation (on paper) and the fact that low regulators often used EU legislation in the field to close domestic regulatory gaps suggest that weak regulators were in favour of EU regulation and did not refrain from implementation only on strategic grounds. Instead, I suggest that non-implementation among weak regulators is based on a capacity problem rather than a lack of will. The very absence of administrative capacity accounting for weak regulation at the domestic level comes back into play when these Member States transpose EU legislation. Therefore, weak regulators are often non-compliant with EU legislation. This broadly confirms the findings of Börzel et al. (2010) on compliance and non-compliance in the EU.

In the second section of this chapter, I investigated cases of domestic policy-change which were not required by EU legislation. I expected these to be the most likely examples of venue-shopping. Member States might have negotiated restrictive concepts into EU legislation in order to subsequently introduce them domestically via the transposition of EU directives. Yet, in Chap. 2, I already suggested that venue-shopping is rather unlikely under the institutional setting of EU asylum legislation even in the first phase of the CEAS. Not only do JHA officials encounter additional domestic veto players in the Council that are not present on the domestic level, namely representatives from the Foreign Service, but with minimum standards being adopted they cannot argue that EU law leaves them no option but to lower standards. This has been for instance illustrated by the restriction of policies on residence permits in the Netherlands. Indeed, one of my interviewees referred to a case where the Foreign Service almost changed a domestic approach. When Member States were trying to compile a common list of safe countries of origin, the German Foreign Service did not recognise two countries as safe. Thus, the officials from the Interior Ministry did not further pursue the idea of a common list, which would comprise fewer countries than its own national list, but rather opted for maintaining its national list (Interview Ministry of Interior_DE 1).

In the second section of this chapter, I additionally showed that among the strong regulators change occurred mainly due to domestic pressures for change. Changes to access to work in Germany and France (RCD), non-state persecution in Germany and France (QD), and further restrictions concerning the already restrictive safe third country concept in the UK (APD) were based on ongoing domestic reform processes rather than on what the EU directives contained. As the case of the German *Zuwanderungskommission* has shown, strong regulator governments mobilised all ideational resources at their disposal to build positions that they could resort to both in their domestic reform processes and at EU level negotiations. Weak regulators had only put in place asylum policies since the 1990s in response to the Schengen Agreements and the Dublin Convention. While Italy had also reformed its asylum system by 2002, introducing the SPRAR, these reforms did not rectify the significant deficiencies in the Italian asylum system. Thus, Italy was not able to exploit ideas developed in the reform process of the EU level negotiations.

Reforms among weak regulators were therefore mainly inspired by policy ideas developed by strong regulators. But strong regulators also learned from their neighbours about alternative approaches they pursued throughout negotiations at the EU level. This is broadly in line with findings on European asylum co-operation dating back to the 1990s which already highlighted the role of International Learning. The negotiations on the directives arguably provided a forum for Member States to learn about different approaches across Europe, similar to the negotiations on the intergovernmental instruments in the 1990s. Yet, Member States only adopted ideas that were correlated with broader domestic demands. Thus, the Netherlands, which at the time was in the process of implementing a rather restrictive policy course on immigration, copied the German practice of making residence permits indeterminate only after five years rather than after three years, as it had done previously. Weak regulators were forced to adopt a number of liberalising measures and implement an actual reception system, including a legal aid scheme for foreigners for the first time. They hence often opted for restrictions/liberalisations which alleviated pressures on the welfare system (e.g., Greece withdrew reception conditions in the case of late applications; Italy introduced of

access to employment after six months) or restrictions that minimised administrative costs (restriction of freedom of movement in Greece).

Overall, this chapter has shown that what is happening at the domestic level is highly important when analysing the policy-change that occurred following the implementation of EU legislation. This is in line with findings from the broader Europeanisation literature (Börzel/Risse 2000; Risse/Cowles/Caporaso 2001; Vink/Graziano 2007). The extent to which Member States maintain their *status quo ante*, however, is striking when judged against the overall idea of creating a level playing field. The Commission (Commission of the European Communities 2007: 10) comments that:

> Contrary to what was predicted following the adoption of the directive, it appears that Member States have not lowered their previous standards of assistance to asylum-seekers. However, the present report has clearly shown that the wide discretion allowed by the directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons, undermines the objective of creating a level playing field in the area of reception conditions.

While the directives did not result in the often proclaimed race to the bottom in standards across Europe, it clearly did not lead to a degree of harmonisation that rendered distribution along the lines of the Dublin II regulation fairer. Indeed, many interviewees highlighted the implementation deficit of many Member States and, in particular, the weak regulators during the first phase of the CEAS (Interview Angenendt; Interview Caritas Europa; Interview Commission 2; Interview Commission 3; Interview Council 1; Interview Council 2; Interview MEP Green Party; Interview MPI Europe; Interview PermRep_Anon 1; Interview PermRep_UK). Asylum-seekers were still exposed to an asylum lottery and could still be faced with asylum systems as disparate as the Greek system (which did not provide any protection) and the Swedish asylum system (one of the most liberal and protective asylum systems in the EU).

Harmonisation of qualification did not lead to an alignment of who was recognised in Europe and who was not. According to UNHCR (2007: 13), recognition rates in selected Member States differed substantially. In Germany, for example, 16.3 % of Iraqi applicants were recognised at first instance and 1.1 % received subsidiary protection status. In Sweden, the vast majority of Iraqi applicants (73.2 %) received subsidiary protection status almost exclusively (although the content of this status was the same), and only 1.7 % received refugee status. In Greece at that time recognition rates for Iraqi applicants were 0 %. Similar results can be also be expected for refugees coming from other countries. With regard to the IPA, practices diverge: Whereas France would not recognise different parts of Russia as an IPA for Chechens, Germany did (UNHCR 2007: 11).

EU legislation could not achieve a degree of policy harmonisation that prevented secondary movements, despite Member States' assumption that asylum-seekers targeted the most liberal countries and therefore engaged in secondary movements.

7

Conclusion and Outlook: The Power of Strong Regulating States

This chapter summarises the main findings of this study and provides an outlook on the 2015/2016 "refugee crisis," demonstrating how the key argument advanced here helps to understand today's crisis dynamics. The first section discusses the study's main empirical, theoretical and methodological contributions. In the second section, I will carefully generalise my findings to the second phase of the CEAS, the "refugee crisis" and other policy areas. In this vein, the third section applies my core argument about the power of strong regulating states to the "refugee crisis." The current high inflow of refugees has brought to light the diversity of national approaches towards asylum and the lack of working co-operation in the CEAS. These facts are not novel. They have, actually, challenged European asylum policy for more than two decades.

Main Findings

This study started from an empirical puzzle: Scholars traditionally expected EU asylum policies to follow a lowest common denominator logic, resulting in a race to the bottom in asylum standards across Europe.

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This study along with other recent publications has shown that EU asylum policies are neither at the lowest common denominator level nor do they result in a race to the bottom. Showing that only strong and medium regulators have left a mark on EU legislation and that all Member States have opted for preserving the *status quo ante* most of the time in the policy implementation process, this study provides an explanation for this state of affairs. While addressing this puzzle, the study makes a valuable empirical, theoretical and methodological contribution to the existing literature. I will now further summarise the contributions and limitations of this study. Empirically, the study accounts for the absence of both lowest common denominator standards and race to the bottom dynamics. Theoretically, the findings emphasise the importance of the Misfit and Regulatory Competition Model as well as of positionality, the possession and assertion of strong and informed positions. Methodologically, the study proposes a systematic study of EU decision-making, including a comparison of the *status quo ante* and the status after transposition.

The Influence of Strong Regulators

Empirically, the study refuted the assumption that EU asylum policies are lowest common denominator standards and entailed a race to the bottom. By systematically assessing the *ex-ante* standards in the Member States and comparing them with the legislative output of the EU directives in Chap. 4, I showed that EU policies did not represent the lowest *status quo ante* standard of all Member States but only the lowest standard among the strong regulators. Contrary to what proponents of venue-shopping expected, Member States based their positions in the negotiations on their domestic policies and did not attempt to adopt standards at the EU level that were more restrictive than their national standards (see Chap. 5). Subsequently, Member States did not strategically use EU asylum policies to lower their domestic standards, as the venue-shopping theory would have suggested, but rather opted for policy stasis (see Chaps. 4 and 6). According to the majority of my interviewees, there was a significant implementation deficit in the CEAS across Member States, which is a main obstacle for EU asylum policy harmonisation today.

This study's systematic analysis of both EU legislative output and domestic outcomes in asylum policy adds fresh insight to the literature. The existing contributions that argued against the lowest common denominator and race to the bottom theses lacked a solid empirical basis. The detailed information on asylum systems that I have gathered in Chap. 4 is a step towards the comparative study of European asylum systems that will someday hopefully lead to a typology of asylum systems or even a pertinent index, which so far is wanting in European asylum research. In addition to empirically *demonstrating* that EU asylum policies exceed the lowest common denominator and avoid a race to the bottom, the study also *explains* why this is so, indicating how EU legislation evolved and how it was transposed domestically.

Why EU Asylum Policies Exceed the Lowest Common Denominator

The dominance of strong regulators during both the agenda-setting phase in the mid-1990s and the policy formation phase in the 2000s explains why EU asylum policies fall in line with the standard of the strong regulators. The strong regulators not only initiated co-operation and framed harmonised EU asylum policies as a means to ensure responsibility-sharing, but subsequently they also managed to upload their national asylum policies to the EU. Weak regulators, on the other hand, remained passive in the agenda-setting phase and only started to build their asylum systems as a response to intergovernmental co-operation in the 1990s. When they sometimes actively advanced their positions, they rarely followed through with them.

Based on my theoretical model, I suggested that positionality—the capacity to possess and strongly defend an informed position—accounts for strong regulators' effective influence on EU legislative output under unanimity voting rules. Strong regulators held strong positions because they were the most affected by asylum applications. Any minor change in their asylum system could have an impact on a large number of asylum cases and drive costs up. At the same time, related, high profile national debates had sensitised their electorates towards the issue. Salience was

therefore much higher in these states. With their effective administrations, strong regulators could transform these pressures into hard bargaining positions in the Council negotiations. Their positions were also well-informed because of their long-standing and sound expertise in the asylum field. Well informed and strong positions are two sides of the same coin: A government with uninformed positions cannot put forward strong positions. In Chap. 5, I demonstrated that strong regulators indeed adopted hard bargaining positions and that they were ready to defect from co-operation if their domestic standards were not accommodated. Strong regulators employed effective asylum systems and regularly brought in their expertise and experiences so that their informed positions bore particular weight in the negotiations. Overall, strong regulators hence left a much stronger mark on the EU directives than did weak regulators. When weak regulators also brought their positions forward, they kept a much lower profile and were more open to compromise, without receiving any obvious benefits or side payments. This can explain why EU asylum standards do not represent the lowest common denominator of *all* Member States but only the lowest common denominator of the strong regulators.

Why There Is No Race to the Bottom

Chapter 3 showed that deregulation was never an aim of EU policy-makers in the first place. Instead, strong regulating states used EU asylum policy-making to intensify regulation among weak regulators. In fact, the absence of effective regulation in the areas of both refugee and border protection in the weak regulators was considered to attract asylum-seekers to the strong regulators and discourage them from seeking asylum with the weak regulators. Weak regulators lacked effective secondary asylum legislation at the time of early intergovernmental co-operation and only introduced it with the Schengen system. Asylum policy experts therefore never expected EU asylum policies to encourage deregulation, but rather to promote restrictive regulation (see Peers 2000; Parkes 2010; Guiraudon and Lahav 2006).

However, asylum policies neither became more restrictive, as Member States generally did not use EU decision-making processes to lower

domestic protection standards, as the venue-shopping theory would suggest. By contrast, they had a strong preference for ensuring the maintenance of the *status quo*, as I demonstrated in Chap. 6. National standards were the result of national power struggles, underpinned by domestic values. Additionally, Member States were reluctant to exchange their tried and tested approaches for policy ideas that were alien to their system. They rather preferred to maintain policies whose consequences and costs were clear over adopting new policies that might save costs but had unknown side-effects.

Complementary explanations to the Misfit and Regulatory Competition Model account for the few instances where policy-change did occur (see Chap. 6). I found that among the strong regulators policy-change is often explained by domestic processes and pressures. While policy-change coincided with the transposition phase of the directives, these directives were not necessarily its *cause*. Strong regulators mobilised ideational resources through domestic reform processes in tandem with the negotiations, which also helped them develop clear positions for the EU level negotiations. Both strong and weak regulators were, moreover, subject to International Learning processes. Through the negotiations Member States were confronted with policies that were tried and tested in other Member States. From this policy menu, they could choose the liberal or restrictive policies that fitted the respective domestic demand. Venue-shopping, by contrast, did not occur. The fact that Member States encountered additional domestic veto players at the EU level and the fact that minimum standards were by design meant to stop any race to the bottom inhibited venue-shopping behaviour. National parliaments, moreover, followed the EU level negotiations quite closely and debunked both initial attempts at liberal venue-shopping (see Germany and access to work) and at using EU legislation as justification for domestic restrictions (see the Netherlands and duration of residence permits).

Modest Improvements in European Refugee Protection

These empirical findings have normative implications for both the status of refugee protection in Europe and the legitimacy of EU legislation.

From a human rights perspective, it would be highly problematic if policy harmonisation diminished the level of protection that refugees receive in Europe. From the point of view of democracy theory, when only a certain group of Member States has the capacity to exert influence on EU legislation the "input legitimacy" (Scharpf 1999) of EU policies is limited further.

EU asylum policies have been criticised fiercely for being so restrictive as to build a "Fortress Europe." While it is true that both EU border policies and the Dublin system impeded effective access to protection for asylum-seekers in the EU, this study has demonstrated that asylum harmonisation did not make asylum policies in Europe more restrictive, contrary to the conventional expectation. Instead, EU co-operation has entailed a modest improvement of standards, particularly in weak regulating Member States. Although this so far is mainly an improvement on paper, it has created fresh normative pressures for these Member States to improve their systems. Points in case are the *M.S.S.* and *N.S.* judgments which have openly criticised the Greek asylum system for breaking international and EU law. With enhanced EU policy-making in the field, a number of external actors such as the EU, NGOs and scholars have started to monitor closely European asylum systems and national practices. This has created an environment in which systematic human rights violations will not go unnoticed.

Not only the weak regulators but also the strong regulators have sometimes opted for liberalisations during the EU level negotiations. The liberalisations, however, were rarely induced by EU legislation, but mainly driven by domestic politics. These standards are now "locked in" (Jupille/Caporaso 1999; Jupille 2004) and Member States can no longer relax them and provide less protection on a national basis without running the risk of being sued before the CJEU. While Member States may still introduce restrictive domestic policies as long as they do not openly violate these specific EU rules, the option to downgrade domestic standards in case of rising numbers of applications and electoral demands for restriction (as, for instance, in Germany in the early 1990s) is now more limited. Additionally, with further communitarisation and strengthening of the more liberal community institutions Commission, EP and CJEU after the Lisbon Treaty, asylum standards have been further liberalised

(Kaunert/Léonard 2012; Thielemann/Zaun 2013). In sum, while restrictive border policies and insufficient implementation have the potential to undermine positive effects of EU policy harmonisation, asylum harmonisation in general has a positive impact on the protection granted to asylum-seekers and refugees that are already present in EU Member States.

As concerns the legitimacy of EU policies, it might well be problematic that weak regulators barely had any effect on EU legislation in yet another policy area. Scholars have shown earlier, that these countries had little impact on, for instance, EU environmental and safety at work policies (Börzel 2002; Eichener 1997; Héritier et al. 1994). Hence, strong regulators' governments significantly affect policies in weak regulating countries, despite their lack of sovereign legitimacy. By not ensuring that their positions are taken into consideration, weak regulators arguably neglect their own interests and that of their electorates. Their lack of administrative capacity makes them systematically less effective in influencing EU legislation. The persistent North-South transfer of norms has lately resulted in strong contestation by governments and citizens of Southern and Eastern European Member States, as the examples of Hungary during the "refugee crisis" or the measures adopted to address the sovereign debt crisis in Greece have highlighted. Empirically, it seems, a purely formal chance to influence EU legislation does not guarantee input legitimacy.

The question of who is granted access to the territory is a core matter of national sovereignty. The dominance of strong regulators and the passivity of weak regulators are therefore especially problematic in the area of asylum policies. By improving asylum procedures and increasing regulation in weak regulating Member States, strong regulators effectively increase the number of asylum applications made in weak regulating states. Previously, many refugees would have remained undetected when passing through these countries *en route* to more attractive Member States. By imposing minimum material reception conditions for applicants and access to welfare benefits for protection holders in the weak regulating states, North-Western European strong regulators furthermore impose their welfare regimes on the Southern European weak regulators. This challenges the statehood of weak regulators, as they are, once more, governed by norms developed elsewhere.

Strong and Weak Players in Regulatory Competition

Theoretically, I modified and complemented the Misfit and Regulatory Competition Model advanced by scholars such as Héritier (1996, 1997), Eichener (1992, 1997) and Börzel (2002). I added a systematic element through which Member States could be identified as weak regulators and which could be regarded as strong regulators. This element had so far been missing from the debate. I argued that administrative capacity (measured through the World Bank Government Effectiveness Index) and exposure (measured through the amount of asylum applications received ten years prior to the start of negotiations) contributes to a Member State becoming a strong or a weak regulator. States that have capable administrations can transform high exposure into effective and strong regulation. States that faced little exposure and presided over ineffective administrations did not possess the same capabilities.

A further contribution of this study is that it developed causal mechanisms to explain why strong regulators are more effective in influencing EU legislation than weak regulators. Possessing strong and informed positions is a power resource in negotiations. This explains why strong regulators successfully affect EU legislation and weak regulators do not. The driving factors behind strong regulators' effective influence had until now been missing from the debate. The effective influence of strong regulators seems to be part of a wider dynamic and is often referred to as a North–South divide: Scholars have suggested that Northern European Member States have dominated Southern European Member States in the areas of safety at work (Eichener 1992, 1997) and environmental policies (Börzel 2002; Héritier 1997). A similar dynamic seems to exist between the Western and Eastern Member States after their accession in 2004 (Best/Settembri 2008; Hagemann/De Clerck-Sachsse 2007; Pollack 2009; Wallace 2007), more specifically, in the areas of labour market and public health policies (Kloka-Kohnen 2013). This study demonstrated that voting power and size, which are usually assumed to be a factor that can account for power in EU decision-making (see Thompson/Stokman 2006: 41–45), do not account for Member States' impact: Under unanimous voting procedures every Member State had

a veto. Smaller countries, such as Austria, the Netherlands and Sweden were much more effective in influencing EU legislation than Italy, despite its strong voting power. At the same time the study showed that discussing a North-South divide is incorrect, as Spain certainly was at least as effective in influencing EU asylum policies as Ireland or Finland. Rather than geographical location or cultural differences,[1] I posited that having strong and informed bargaining positions could explain the different impact that various Member States had on EU legislation. In sum, the modified Misfit and Regulatory Competition Model provides valuable insights into the causes of Member States' divergent influence on EU legislation and the nature of negotiation powers.

Concerning the proposed modification of some of the causal explanations of the Misfit and Regulatory Competition Model (e.g., as concerns the causes of non-transposition among the weak regulators), future research will have to determine whether these are specific to asylum policies or also apply to safety at work and environmental policies. I assume that asylum policies should not be significantly different from other EU policy areas in this regard. Since more recent publications on EU policy implementation suggest that administrative capacity accounts for why a Member State is a laggard in implementation (see Börzel et al. 2010), I would expect this to be part of a wider dynamic.

International Learning is another avenue for future research. In this study, the role of International Learning was a complementary explanation, limited to the few instances that were exceptions to the overall rule. In the vast majority of instances, Member States opted for policy stasis when transposing EU legislation, but I also found that this was not always the case. It would be interesting to further investigate the conditions under which International Policy Learning occurs and does not occur in EU decision-making. My empirical analysis suggests that domestic demands for policy-change coincide with a lack of ideas for change lay the ground for International Learning.

This study focused on Member States that were more significantly affected by asylum (exposure) and at the same time had the more effective

[1] Eichener (1997) mentions the detailed-mindedness of the North and the harmonious approach of the South.

administrations. While both factors are easy to distinguish analytically, empirically they coincide. However, my implicit comparison with the second phase of the CEAS suggests that administrative capacity is a necessary factor for effective influence. No matter how many applications they receive, states like Italy or Greece are unlikely to become asylum experts, unless they increase administrative capacity. In this vein, the study raises the question whether strong positions or expertise (informed positions) is the most important asset for influencing EU legislation. I suggest that while both parts of positionality can be theoretically distinguished, they are in practice two sides of the same coin: If actors have a defined interest in an issue, they will usually be informed about their options, preferences and underlying reasons. Being able to show that both strong and informed positions go hand in hand is a benefit of the qualitative approach chosen in this study.

The Value of Triangulation

Methodologically, I combined a systematic Before–After Analysis of EU policies, comparing the *status quo ante* (t0), the EU legislative output (t1) and the domestic transposition outcome (t2) with Process-Tracing of the EU level negotiations and exemplary evidence from the transposition process. Moreover, I triangulated secondary data, data retrieved from the analysis of EU documents, *status quo ante* and transposition reports and original interview data from 39 semi-structured expert interviews.

Triangulation significantly enhanced the reliability of my findings. The documents-based Before–After Analysis and the interviews both suggested that Member States had a strong preference for maintaining their *status quo ante*. Moreover, both the EU documents-based Process-Tracing and the interviews suggested that strong regulators were especially active in the EU level negotiations and were most effective in influencing them. Weak regulators not only seemed to be more passive, judged by the amount of scrutiny reservations they made according to the Council documents, but interviewees also confirmed that they kept a rather low profile during the negotiations. While interview data was not drawn upon regularly to reconstruct the negotiations, as they took place a long

time ago and interview partners could not be expected to remember all the relevant details, interview data was invaluable for understanding the overall dynamics of the negotiations and the role that regulatory expertise played in influencing EU legislation.

Triangulating various data and methods thus provides a promising tool box to ensure the reliability and internal validity for qualitative studies on EU decision-making. This is especially important against the background of the more recent Europeanisation literature, according to which Europeanisation should always be considered as a circular process and that EU decisions are usually taken in the shadow of domestic policy processes and vice versa (see Chap. 1). Following an equally systematic approach could help scholars in the future to enhance the quality of their policy studies. Despite the merits of the methodological approach, it does not lend itself to a high degree of external validity and generalisations. Given this study's interest in dissecting causal mechanisms, these limitations appear, however, acceptable.

Generalisability of the Argument

In the previous section, I said that my findings have a high degree of internal validity; their external validity, by contrast, is more limited. In this section, I discuss these limitations concretely by carefully generalising to the second phase of the CEAS and even to other policy areas. In the third section I will also discuss the 2015/2016 "refugee crisis."

The fact that many of the dynamics that I identified in the asylum policy area have also been observed in other policy areas, including safety at work (Eichener 1997) and environmental policies (Héritier 1996, 1997; Börzel 2002), enhances the external validity of my findings. It is highly likely that even my modifications are applicable to these policy areas. As I suggested in Chap. 2, EU asylum policies are "most different" from safety at work and environmental policies. The former are high politics, the latter belong to the realm of low politics. Given that similar dynamics apply to such diverse policy areas, they seem to be part of a wider dynamic of EU policy-making. It would thus be interesting to assess whether the Misfit and Regulatory Competition Model and positionality are also

applicable to traditional European policy areas such as competition law and product standards but also to newer areas relating to other "core state powers" than the regulation of immigration (see Genschel/Jachtenfuchs 2014), such as taxation.

As negotiations in the second phase of the CEAS have already been concluded, it is interesting to discover to what extent my findings on the first phase of the CEAS are also applicable to the second phase. Interviewees often compared the first and second phases of the CEAS or revealed useful information on the second phase that I was able to relate to my findings on the first phase of the CEAS. Yet, generalisations of this study's findings to the second phase of the CEAS face certain limitations.

The institutional setting between the first and the second phase of the CEAS is clearly different: In the second phase of the CEAS the EP acted as a co-legislator and decisions in the Council were taken under qualified majority vote, which potentially enhanced the agenda-setting power of the Commission. Scholars have suggested that the enhanced role of supranational actors in EU asylum policy-making entails higher protection standards (Kaunert/Léonard 2012; Thielemann/Zaun 2013). Kaunert and Léonard (2012) suggest that this is because supranational actors bring in new veto positions that limit the influence of domestic Interior Ministries with their restrictive preferences. Thielemann and Zaun (2013) highlight that the Commission, the EP and the ECJ are non-majoritarian institutions,[2] composed of liberal *élites*, that are able to advance more liberal positions than parliamentarians, as the latter must respond to the often restrictive preferences of their electorate.[3] In any case, the protection standards of the second phase instruments should be higher than those of the first phase.

This new institutional setting certainly makes a difference, but I do not expect it to explain the entire outcome of the second phase of the

[2] Of course, the EP by definition is an elected body and hence a majoritarian institution. Yet, the fact that voter turnout is comparatively low in European elections as compared to national elections, suggests that politics in the EP are less salient than in domestic parliaments. The bond between the voters and the parliamentarians is much weaker in the EU context than at the national level.

[3] In future research, it would be interesting to compare the first and the second phase of the CEAS to understand why the Commission has become more progressive, and why the EP became more restrictive.

CEAS. In fact, as the analysis of the first phase showed, the institutional setting was a moderating factor rather than a clear predictor of the legislative output. Others, too, have observed a "continuity of the policy core" (Ripoll Servent/Trauner 2014: 1142) from the first phase to the second phase of the CEAS. I therefore suggest that in the second phase of the CEAS the different degree of positionality between the strong and the weak regulators still accounts for a significant proportion of the output, although single Member States or restrictive outliers were no longer able to block a directive on their own, but needed to build coalitions to do so. Consider the example of Germany and France, which could no longer on their own block earlier access to the labour market under qualified majority voting rules in the recast RCD. The Council therefore had to agree on a compromise with the EP. The recast RCD grants access to the labour market after nine months, a period that is much closer to existing policies in most Member States than the standard provided in the original RCD. Yet, strong regulators were still not overruled when an issue was highly important for them. The introduction of safeguards on detention into the recast RCD on the instigation of the EP was only problematic for weak regulators (Zaun 2016). Additionally, weak regulators, again, accepted adjustments on material reception conditions that provided care for people with special needs (Commission of the European Communities 2008b: 19, 26–28; art. 17–22 of 2013/33/EU), although ECtHR case law had clearly indicated that these states did not even comply with general provisions on material reception conditions in the first phase of the CEAS (Ibid.). Freedom of movement in a broader sense, on the contrary, was not touched by the Commission's recast proposal, as Germany, a strong regulator, had clearly shown in the negotiations on the original RCD that it would never accept any legislation that went against its national distribution system.

Moreover, in Chap. 5, I demonstrated that weak regulators have indeed been more active in the second phase negotiations, as rising numbers of applications made the issue much more salient for them. Weak regulators still have not followed their positions through to the end, even in important cases, such as the suspension of transfers under the Dublin III regulation. While they received more applicants in recent years, they were not able to build informed and strong positions due to their lack

of administrative capacity and their ineffective asylum systems. Overall, the model developed in this study still applies to the second phase of the CEAS. However, the new institutional setting clearly modifies the outcome, most of all when strong regulators are restrictive outliers and lack support from other Member States (see also Thielemann and Zaun 2013).

Lessons for the "EU Refugee Crisis"

Now I will briefly discuss the "refugee crisis" in the light of my findings and make policy recommendations. While the "refugee crisis" is often referred to lately, it has so far not been defined. I argue that we currently witness both a crisis of the CEAS and a humanitarian crisis of refugees in Europe. In other words, there is both a "CEAS crisis" and a "refugee crisis" and the former is provoking the latter. The term "crisis" refers to a "a time when a difficult and important decision has to be made," a turning point at which important changes take place, indicating either an improvement or—more frequently—a worsening of the situation (see Stevenson 2015).

The current high inflow of forced migrants seeking protection constitutes such a turning point for the CEAS, as it further highlights its deficiencies. These include insufficient transposition of EU directives and the pertaining lack of harmonisation that result in a strong heterogeneity of asylum systems across Europe. This study has shown that these deficiencies are not new. With larger numbers of people seeking protection in the EU, however, they come to the forefront. Not states, but refugees and asylum-seekers mainly bear the consequences of this CEAS crisis. Due to the unilateral border closings, asylum-seekers are stuck in border countries where they have to live under unbearable conditions in refugee camps. At the same time, the EU's incapacity to establish a fair mechanism for the distribution of asylum-seekers makes it rely increasingly on harsh external border policies that deter asylum-seekers. A point in case is the EU's agreement with Turkey (Kingsley 2016b) that tries to compensate for the EU's failure to agree on fair responsibility-sharing by shifting the responsibility to an outside state. This stalemate forces genuine refugees to use the help of smugglers and embark on live-threatening

journeys to exercise their right to seek protection, a right, which they would be automatically granted once they reached EU territory. In sum, the failure of the EU to build effective co-operation on asylum policies and introduce a fair distribution scheme for asylum-seekers lie at the heart of the humanitarian crises both in EU border countries and in the Mediterranean.

It is therefore crucial to remember that the European "refugee crisis" is not *caused* by the—albeit unprecedented—inflow of refugees but by an unwillingness and incapacity of EU Member States to co-operate on this issue. From an economic perspective, the EU is much better posed to receive the current amount of refugees than many of the countries in the neighbourhood of the sending countries which receive much larger shares. Yet, the Member States' failure to setup a functioning system of responsibility-sharing turns the current inflow of refugees into a real political crisis. The core problem is that Member States are not ready to adopt policies that have the potential to raise their share of asylum-seekers. Instead, they try to minimise the share that they receive at the expense of other Member States. The failed relocation agreement (Council 2015) is another point in case for this attitude among EU Member States.

The political crisis we see in the EU is provoked by the same dynamics of responsibility-shifting which lie at the heart of EU asylum legislation. So far, strong regulators used EU policy harmonisation to raise protection standards in weak regulating states so that they would become more attractive to asylum-seekers. As I have shown, these dynamics can be observed in EU policy-making in the field throughout the last fifteen years, if not longer. Since the 1980s one strong regulating Member State after the other introduced restrictive policies to deter asylum-seekers. At that time, all legal pathways to immigration except asylum migration had been closed and some Member States started receiving higher numbers of applications than ever. Whenever a Member State made use of a restrictive practice, other Member States felt they had to do the same in order to not stand out as being soft and thus attract additional asylum-seekers. Currently, we observe a similar situation in which all Member States try to shift the responsibility onto other Member States. Some Member States in South-Eastern Europe do this by not taking responsibility for asylum-seekers in line with the Dublin Regulation. Others,

as the example of Hungary shows, do so through expressly adopting restrictive and sometimes clearly inhumane policies, with the aim of deterring asylum-seekers from entering their territory. Top destinations in the North-West of Europe on the other hand deter potential applicants through unilateral border closings, so that asylum-seekers are stuck in the neighbouring countries. The example of recent policy restriction in Sweden (see Chap. 6), highlights that also traditional recipients of asylum-seekers try to render themselves unattractive and thus to lower their share of applications, even if their measures are less dramatic.

In the 1990s, similar devaluating races have severely weakened refugee protection in Europe and were hardly to be sustained. Some Member States felt that even in the event of downward competition their policies were consistently more generous than those of other Member States that barely provided any refugee protection at all. Subsequently, these strong regulating Member States, among them Germany and Sweden, discovered policy harmonisation as a tool for responsibility-shifting. They have used the EU level to adopt policies that would raise protection standards in other strong regulating Member States and introduce functioning asylum systems in Southern European border countries as well as the acceding Member States. Policy harmonisation was meant to render weak regulators in Southern and Eastern Europe more attractive to asylum-seekers and thus lower the share of asylum-seekers moving to the North–West. At the same time, the Dublin system already started to divert refugee flows from top receiving countries in North–West Europe to Europe's periphery.

The "refugee crisis" has demonstrated that both attempts have clearly failed. As to the Dublin system, the vast majority of asylum-seekers still can be found in Germany and Sweden. Additionally, a large share of asylum-seekers is stuck in the border countries Italy and Greece whose asylum systems the ECtHR has repeatedly criticised for violating human rights. In terms of policy harmonisation, it is striking how strongly Member States' asylum systems differ after more than fifteen years of EU asylum legislation and despite the official completion of a "*Common* European Asylum System" in 2015. The gap between strong regulating Member States with asylum systems that generally work effectively and weak regulating Member States that are overwhelmed and paralysed by

rising numbers of asylum-seekers is even the more salient during the crisis. This is not surprising, as this study has demonstrated that EU legislation has not introduced effective refugee protection in weak regulating states, let alone effectively functioning asylum systems that manage to integrate refugees into their host societies. While some of the weak regulating Member States in Southern Europe were certainly ready to use EU co-operation to build a better working domestic systems, they never intended to become top recipients of asylum-seekers, as intended by the Dublin Regulation. In fact, every EU Member State still tried to deter asylum-seekers and to incentivise them to apply for asylum in other Member States. This presents a highly problematic background for co-operation and can account for Europe's incapacity to manage the 2015/2016 "refugee crisis."

In contrast to the phase I investigate, Member States in Central and Eastern Europe have been much more vocal during the "refugee crisis" than the Southern European weak regulators have ever been. They even tried to block the EU relocation agreement. This is striking, as I have demonstrated in Chap. 6 that many of them do not have a long history of immigration. They instead built their asylum system in preparation for their EU accession. Similarly, most of these states do not score particularly high on government effectiveness (Kaufmann/Kraay/Mastruzzi 2010). Their divergent behaviour has a number of reasons. First, the governments of some of these Member States have strong populist tendencies and have already in the past shown their rather critical stance towards the EU. Second, the current inflow of asylum-seekers is unprecedented since World War II and has rendered the issue highly salient—in fact, much more salient than ever before. Third, Central and Eastern European Member States have a more recent democratic and human rights history. Many of them have even themselves been refugee sending countries during the Cold War. When Slovakia's Prime Minister openly stated that the country would not accept Muslim refugees (Fenton 2016), he only confirmed the impression that authorities in Central and Eastern Europe do not fully subscribe to the idea of granting protection purely based on need and regardless of the religious and ethnic background of a refugee. This normative make-up distinguishes Central and Eastern European countries from weak regulators in Southern Europe, which even though

their laws exhibit "outright discrimination" (Baldwin-Edwards 1991: 203) never questioned the idea of refugee protection *per se*.

While the EU receives a lot of criticism for the current situation, this study also shows that the CEAS did not primarily fail due to the EU institutions. In fact, both the Commission and the EP had promoted further integration in the area of asylum policies and refugee protection on a high level of human rights standards. Yet, both institutions were repeatedly side-lined in the legislative processes that I investigated and they are again side-lined during the current crisis management processes. Back then, these institutions were side-lined, because they both had little to offer to the Member States that were eventually responsible for the implementation of asylum policies. Then and now, the Member States were the ones blocking enhanced co-operation, carefully watching not to change the *status quo* in any way that would raise the number of asylum-seekers they receive. The Commission, which had been criticised for its strong liberal stances by the Member States in the past, needs to work as an honest broker to overcome these dynamics. At the same time, the EU clearly serves Member States in search of a scapegoat to free them of blame for both the introduction of costly policies (see Italy and the introduction of a reception system) and for the negative effects of their restrictive practices on refugees. It is therefore important not to buy into this blame game and be aware that EU co-operation in asylum policies so far failed due to an unwillingness of Member States to pay the price of effective co-operation on a high level of protection for refugees.

Any attempts to reform the EU refugee regime will have to take into consideration the dynamics described in this study. EU Member States have two possibilities to overcome the crisis of the CEAS. The first is to focus on border protection and external co-operation, such as with Turkey and shift the responsibility to places outside Europe. The second is to establish a fair distribution mechanism within the EU. The EU, so far, has strongly relied on the first approach during the 2015/2016 "refugee crisis." Given the internal disparities and diverging interests, Member States find it easier to agree on these external policies. Following this approach, Member States do not have to overcome collective action problems, but can instead pass on refugees and asylum-seekers to third countries. This approach is not only highly problematic from a human

rights perspective, as it, again, forces refugees to engage in dangerous journeys across alternative travel routes. It is also hardly sustainable, because it makes the EU dependent on non-democratic and sometimes instable regimes with a questionable human rights record. As the example of Libya has shown, once a leader of such a country is overturned, the agreements are void and must be renegotiated. Dropping numbers of asylum-seekers since the agreement with Turkey (Leivada 2016) therefore do not mean that the issue is solved, as forced migrants can be expected to look for alternative routes. Accordingly, these policies help the EU buy time, but they are no durable solution.

Sooner or later the EU will have to consider establishing a fair distribution mechanism. This study has shown that using policy harmonisation as a tool for responsibility-sharing is not a viable solution, if it is not accompanied by such a mechanism. Member States in the EU's periphery suffer from ineffective administrations and recent histories of immigration, which imply that humanitarian protection is not deeply incorporated in their identity. It is therefore unrealistic to try to impose the introduction of functioning asylum systems on them and at the same time to try to turn them into main recipients of asylum-seekers.

A fair and sustainable distribution mechanism would take the different capacities into account. Recent proposals for reform build on the German distribution key, the *Königssteiner Schlüssel*, and focus on the GDP and population density as possible criteria for distribution. They propose to weigh each of these factors by 40 %, whereas the country's unemployment rate and number of applications are each weighted 10 %, but are capped so that they do not exceed 30 % of the population size and the GDP effects (European Commission 2015: 10–11). The strong focus on the actual capacities of a host state proposed by this distribution key is a good way forward, because as this study has demonstrated, states with low levels of (administrative) capacity face substantial difficulties processing asylum applications and integrating both applicants and refugees. These will only be able to gradually build effective asylum systems if they have enough time and get external support. Overwhelming these states with high numbers of applications will not bring the desired effect.

The stakes for the EU in the CEAS and refugee crises are high. Finding a durable solution for the distribution problem is essential to safeguard the human rights of asylum-seekers and refugees in Europe. Both the EU and its Member States constantly present themselves as promoters of human rights in the world. Now, their reputation suffers severely from the persistent and extensive human rights violations at the EU's external border. Moreover, the confidence crisis, which I described earlier has the potential to tear the EU apart. The closing of borders and the suspension of the Schengen Agreement show that the EU Member States' incapacity of finding a common response to responsibility-sharing is a threat to European integration more generally and bears the potential to entail a "spill-back" (Schmitter 1970: 846) in European integration altogether. Additionally, the fact that several Central and Eastern European Member States challenged the relocation agreement (Council 2015) before the CJEU, which was passed under qualified majority, shows that Member States question the sovereignty transfers made in the this policy area with the Lisbon Treaty.

We currently observe the renationalisation of a policy that may potentially question the freedom of movement, one of the key freedoms of the European project. Freedom of movement has often been considered a means to bring the elite project of European integration closer to the EU citizens. A "spill-back" in this crucial area will send a morbid signal as to the state of European integration more generally, at a time when the EU is not only facing a refugee crisis and a crisis of the CEAS, but also has been deeply rattled by the Eurozone crisis and Brexit.

Annex

List of Interviewees

Cited as	Institutional affiliation of interviewee	Date of interview
Amnesty International	Amnesty International, Brussels Office	19 March 2012
Angenendt	Steffen Angenendt, Expert for Migration and Development, former member of the Zuwanderungskommission	7 December 2012
Caritas Europa	Caritas Europa	21 November 2012
CCME	Churches Commission for Migrants in Europe	27 March 2012
Commission 1	European Commission, formerly DG Home Affairs, Asylum Unit	20 November 2012
Commission 2	European Commission, DG Home Affairs, Asylum Unit	21 November 2012
Commission 3	European Commission, DG Home Affairs, Asylum Unit	19 November 2012
Commission 4	European Commission, DG Home Affairs, Asylum Unit	19 November 2012
Council 1	Secretariat of the Council of the EU	20 March 2012
Council 2	Secretariat of the Council of the EU	10 April 2012

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Cited as	Institutional affiliation of interviewee	Date of interview
ECRE	European Council for Refugees and Exiles	5 April 2012
Hailbronner	Kay Hailbronner, Legal expert on asylum, former Professor for International and European aliens and asylum law	28 November 2012
Jesuit Refugee Service Europe	Jesuit Refugee Service Europe	20 November 2012
LIBE Secretariat	Secretariat of the European Parliament, LIBE Committee	28 March 2012
MEP EPP	Member of the European Parliament, European People's Party	20 March 2012
MEP Green Party	Assistant of a Member if the European Parliament, Green Party	23 March 2012
MEP PES	Assistant of a Member of the European Parliament, Party of European Socialists	13 April 2012
Ministry of Interior_DE 1	German Federal Interior ministry	5 December 2012
Ministry of Interior_DE 2	German Federal Interior ministry	16 October 2012
Ministry of Interior_DE 3	German Federal Interior ministry	16 October 2012
Ministry of Interior_DE 4	German Federal Interior ministry	6 December 2012
MPI Europe	Liz Collet, Director at Migration Policy Institute Europe	29 March 2012
Odofin	Clara Odofin, Consultant in EU asylum law and policy	19 August 2013
PermRep_Anon 1	Permanent Representation of an EU Member State (prefers to be cited anonymously)	8 August 2013
PermRep_Anon 2	Permanent Representation of an EU Member State (prefers to be cited anonymously)	3 April 2012
PermRep_Anon 3	Permanent Representation of an EU Member State (prefers to be cited anonymously)	13 April 2012
PermRep_AT	Permanent Representation of Austria	28 March 2012
PermRep_DE	Permanent Representation of Germany	30 March 2012, follow-up interview 21 November 2012
PermRep_EL	Permanent Representation of Greece	3 April 2012

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Cited as	Institutional affiliation of interviewee	Date of interview
PermRep_FR	Permanent Representation of France	23 November 2012
PermRep_IT	Permanent Representation of Italy	13 April 2012
PermRep_MT	Permanent Representation of Malta	16 April 2012
PermRep_NL	Permanent Representation of the Netherlands	3 April 2012
PermRep_PL	Permanent Representation of Poland	2 April 2012, follow-up interview 13 April 2012
PermRep_SE	Permanent Representation of Sweden	29 March 2012
PermRep_UK	Permanent Representation of the United Kingdom	11 April 2012
ProAsyl	German NGO ProAsyl	26 November 2012
UNHCR Brussels	UNHCR, Brussels Office	26 March 2012
Williams	Richard Williams, Consultant, former advocacy office at ECRE	24 March 2013

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