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Do supranational EU institutions make a difference? EU asylum law before and after ‘communitarization’

Ariadna Ripoll Servent and Florian Trauner

ABSTRACT This article examines whether the empowerment of the European Union’s (EU) supranational institutions has had an impact on the development of EU asylum. By systematically investigating EU asylum law before and after ‘communitarization’, it argues that its ‘policy core’ has maintained a high degree of continuity. An advocacy coalition under the leadership of the interior ministers managed to co-opt pivotal actors in the newly empowered European Commission and European Parliament. By contenting themselves with changes of secondary order, these EU institutions accepted and institutionalized the restrictive and weakly integrated core of EU asylum set by the Council in the first negotiation round. Their role and decisions were driven not only by the negotiation dynamics and political expediency, but also by new inter- and intra-institutional norms fostering consensual practices.

KEY WORDS Advocacy coalitions; EU asylum; EU institutions; policy change; treaty reform.

INTRODUCTION

While it is evident that treaty reforms impact European Union (EU) decision-making processes (Stacey and Rittberger 2003), it is less clear how they affect the role of EU institutions and their capacity to influence the direction of particular policy areas. This debate is especially important for the Area of Freedom, Security and Justice (AFSJ), which has undergone a process of major institutional change with every treaty reform since Maastricht (Niemann 2008). The AFSJ has been characterized by its inter-governmental bias, which has led to security-oriented policies (Geddes 2000; Guiraudon 2000). With the gradual ‘communitarization’ of the field, the EU’s supranational institutions have moved ‘from the sidelines to the centre stage’ (Kaunert 2010; Uçarer 2001) and contributed to more transparent and democratic forms of decision-making (Grabbe 2002). In EU asylum, these dynamics are seen as a source of policy change – given the traditionally liberty-oriented positions of the European Commission and, particularly, the European Parliament (EP), it has been assumed that their full participation in decision-making should enhance the rights-based aspects of EU asylum law (El-Enany and Thielemann 2011;

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Kaunert 2009). According to Kaunert und Léonard (2012: 1405), the strengthened role of the EU's supranational institutions 'has reinforced the liberal character of the EU asylum venue, which renders the adoption of more restrictive asylum provisions less likely'. However, others are more sceptical about the actual implications of the treaty changes and refer to persistent weaknesses of the EU's supranational institutions in this field (Maurer and Parkes 2007; Ripoll Servent 2013).

This article seeks to contribute to this debate by systematically analysing the role and impact of EU supranational institutions on the development of asylum law before and after communitarization. Jenkins-Smith and Sabatier's (1993) framework serves for evaluating the extent of policy change in a longitudinal analysis of over 20 years. We examine both the substantive dimension of EU asylum law (its rationale) as well as its functional dimension (the degree and type of European integration). Asylum offers a unique opportunity to compare the negotiation processes and content of the same legislative texts before and after the empowerment of the EU's supranational institutions. The legislative architecture of the Common European Asylum System (CEAS) was defined between 1999 and 2005, when the EP was involved in consultation and unanimity was the decision-making mode of the Council of the European Union. Following the end of the Treaty of Amsterdam's transitional period in 2005, which extended co-decision to most first-pillar issues of the AFSJ, the same legislative texts became subject to a recast exercise that aimed to go beyond the common minimum standards of the first phase so as to develop fully harmonized EU asylum rules.

The article is structured as follows: the first section develops a research framework and presents the methodology of the project; this is followed by an investigation of the dynamics of decision-making in EU asylum before and after communitarization; the article concludes by offering a condensed view of the empirical findings and linking them back to the ongoing academic debate on the consequences of EU treaty reform.

THE ANALYSIS OF POLICY CHANGE: DEVELOPING A RESEARCH FRAMEWORK

In order to operationalize our research interest, we take recourse to the work of Jenkins-Smith and Sabatier (1993; 1994), as well as others (e.g. Schlager 1995; Weible 2005), on policy change and advocacy coalitions.

A central premise of Sabatier and Jenkins-Smith (1994: 178) is that 'understanding the process of policy-change ... requires a time perspective of a decade or more'. EU asylum policy is particularly suitable for a longitudinal analysis, given that the core texts building this policy area were passed before communitarization and later subject to a thorough process of re-evaluation. In order to analyse policy change, Jenkins-Smith and Sabatier (1993) differentiate between a 'deep (normative) core', a 'near (policy) core' and 'secondary aspects' of a public policy. This differentiation is useful to distinguish

between far-reaching alterations in the development of the policy and minor legislative and administrative changes. The ‘deep normative core’ relates to the ‘fundamental normative and ontological axioms’ of the belief system of political élites that underlie a policy system and is very difficult to change. The ‘near (policy) core’ is defined as the ‘fundamental policy positions concerning the basic strategies for achieving the normative axioms of deep core’. The policy core is of central relevance for the present research, given that this dimension reveals how actors seek to realize their deep normative beliefs. ‘Secondary aspects’ are moderately easy to change as they relate to ‘instrumental decisions and information searches necessary to implement the policy core’ (Sabatier 1993: 31).

The Advocacy Coalition Framework (ACF) allows for establishing not only what has changed (policy core vs secondary aspects), but also how policy change has been triggered or policy stability has been maintained. Policy-making in modern societies is seen to take place in different ‘policy subsystems’, in which actors from a range of public and private organizations seek to influence public policy and can thus be aggregated into competing advocacy coalitions. Each of them ‘(a) share[s] a set of normative and causal beliefs and (b) engage[s] in a non-trivial degree of co-ordinated activity over time’ (Sabatier 1998: 103). Identifying an advocacy coalition therefore implies analysing the belief systems of actors and organizations as well as their interactions in a given policy subsystems. ‘The principal glue holding a coalition together is agreement over *policy core* beliefs’ (Sabatier 1998: 105). Each advocacy coalition seeks to translate its shared beliefs into policy outputs and influence the behaviour of other actors (Sabatier and Jenkins-Smith 1993: 212). In so doing, policy change can be triggered in different ways. In the early work of Sabatier and Jenkins-Smith, ‘policy learning’ and ‘external perturbations or shocks’ were considered the dominant pathways towards achieving policy change. Scholars using the ACF have eventually put a stronger focus on coalition resources and their opportunity structures in a given subsystem (e.g., Sabatier and Weible 2007; Schlager 1995). This is of particular relevance for the present work, given that the introduction of co-decision in EU asylum potentially re-allocates the resources of competing advocacy coalitions. A change in the formal distribution of legal competences can determine a coalition’s opportunity structures and is therefore likely to impact the development of a policy.

Operationalizing the research interest

The four legal texts we took into consideration were the Receptions (2003/9/EC; 2013/33/EU), the Qualifications (2004/83/EC; 2011/95/EU) and the Procedures Directives (2005/85/EC; 2013/32/EU) as well as the Dublin II and III Regulations (343/2003/EC; 604/2013/EU). These texts are the constituting elements of EU asylum law and have all been subject to a recast exercise, concluded in June 2013. The reasons for not including the remaining two asylum-related texts – the Eurodac Regulation (2725/2000/EC; 603/2013/EU) and the

Table 1 Basic coding scheme

Dimensions	Coding			
	0	<50	50>	100
Substantive dimension (restrictive vs liberal)	Positions restricting or rolling back existing rights	Restrictive positions (i.e., not according to new rights) but no rolling back of existing rights	More liberal positions (e.g., making existing provisions more stringent or adding safeguards)	Most liberal positions offering new rights
Functional dimension (weak. vs strong integration)	Full national control; practical co-operation only	Harmonization with high degree of flexibility and discretion for member states	Harmonization with low degree of flexibility and discretion for member states	Full harmonization and no discretion for member states

Temporary Protection Directive (2001/55/EC) – were twofold: firstly, the latter was excluded from the recast exercise, making a comparison impossible; secondly, the Eurodac Regulation constituted a technical complement to the implementation of the Dublin system and, thus, is not a cornerstone of the EU asylum regime.

In order to analyse the degree of change, we distinguish between the substantive dimension (policy content) and the functional dimension (degree and type of integration). In each of the chosen EU asylum laws, we have identified the issues that have proven central to the negotiations in both waves of legislation. All of these issues are specified and coded in the article's annex. Following the example of the dataset on decision-making in the EU (DEUII) (Thomson *et al.* 2012), we have taken the initial positions of the three EU institutions (Commission, Council, EP)¹ and placed them on a continuum ranging from 0 to 100. On the substantive dimension, those positions close to the extreme (0) reflect restrictive solutions that roll back rights; the scale then moves up towards those solutions that offer less generous positions but do not necessarily restrict rights (<50). On the other side of the continuum (50–100) are positions that offer more generous provisions including new rights for third-country nationals. On the functional dimension, solutions close to 0 mean that an issue remains either under full national control or through practical co-operation only. Moving up to 50, we see positions that call for EU harmonization but with extensive leeway and discretion for member states. The further up, the more harmonized EU rules are and the less discretion is left to member states (MS). (See Table 1).

To reconstruct the dynamics of negotiations, we have gathered insights not only from official documents and secondary literature but also from 11

expert interviews with Members of European Parliament (MEPs), Commission and Council officials, and diplomatic sources. They were conducted between November 2012 and August 2013 in Brussels.

THE FIRST GENERATION OF ASYLUM LAWS: NEGOTIATING UNDER CONSULTATION

This section elaborates on the dynamics of the first generation of asylum laws (1999–2005). [Table 2](#) summarizes the (initial) positions of the EU institutions, as well as the final outcome of the negotiation process.

Some patterns appear in [Table 2](#), pointing to a ‘policy core belief’ that the Council developed over time. On the one hand, member states favoured solutions that put forward narrow rights and benefits for asylum-seekers. A feeling of suspicion towards those applying for any type of international protection appears in most Council positions. This negative vision of asylum led to the introduction of controversial measures, such as a shifting of responsibility to third countries (especially countries that border the EU territory) or the restriction of movement to specific areas of the territory (Council doc 7802/02, Article 7). This measure served to legitimize the detention of asylum-seekers during the examination of their proposal or while awaiting transfer under Dublin rules.

On the other hand, member states emphasized the need to keep harmonization to a minimum. [Table 2](#) shows that the emphasis on weak integration affected mostly those texts dealing with procedures; both the Dublin Regulation and the Procedures Directive avoided any major changes to domestic structures. As a result, initial proposals such as the creation of a single authority responsible for examining applications or the creation of a three-tier system for appeals were quickly questioned in favour of full national discretion (Council doc 1189/01). The core principles of the Dublin system, based on responsibility-shifting rather than responsibility-sharing, were also considered the *status quo* and were only slightly tweaked (Council doc 14990/02).

On the substantive dimension, the EP was in clear opposition to the Council, questioning the restrictive rationale favoured by member states. Positioning itself as a human rights advocate, it insisted on a uniform status between asylum-seekers and those seeking other forms of subsidiary protection (A5-0333/2002). It frowned upon restricting the freedom of movement of applicants (A-5-0112/2002), and clearly opposed restrictive notions such as the ‘safe country’ principle (Guild 2006: 642) or the insertion of non-state entities as agents of protection (A6-0222/2005). The EP also pushed for higher levels of harmonization. For instance, it insisted on a common list of safe countries of origin to be decided under co-decision. The aim was to reduce the discretion of member states and ensure that applicants from the same country would enjoy the same chances to have their cases examined (A6-0222/2005).

During the first wave of negotiations, the Commission stressed a rights-based approach and sought a certain degree of harmonization (Brinkmann 2004: 186). However, the difference between the Commission’s proposals

Table 2 The EU negotiations on the first generation asylum laws

	Substantive dimension				Functional dimension			
	Council	Com.	EP	Final	Council	Com.	EP	Final
First generation								
Receptions								
Scope	30	30	100	30	0	30	100	10
Freedom of movement	0	30	60	0	0	30	80	0
Health care	20	40	100	30	30	40	50	30
Employment	0	60	80	30	0	30	70	30
Dublin								
Allocation of responsibility	30	30	40	30	30	30	50	30
Co-operation between MS	20	0	20	20	20	20	20	20
Suspensive effect of appeals	30	0	30	30	30	0	100	30
Definition of family	10	20	70	10	40	70	70	70
Qualifications								
Scope	10	30	90	10	70	70	70	70
Definition persecution	30	35	70	30	70	100	70	70
Definition protection	0	45	90	0	40	40	70	40
Refugee vs subsidiary status	10	30	80	10	40	70	70	40
Procedures								
First-instance decisions	0	100	100	30	0	70	90	0
Suspensive effect of appeals	30	45	100	30	0	45	100	0
Safe countries	40	40	100	40	0	70	100	40
Accelerated procedures	10	45	100	10	30	100	100	30
Implicit withdrawal	0	40	100	30	0	0	100	0

Note: Com. = Commission; Final = final text.

and the Council's positions could well be owing to the fact that the Commission's proposals were released before the 11 September 2001 attacks.² In fact, a revised proposal of the Procedures Directive issued in 2002 incorporated more restrictive stances, such as derogations to the right to a personal interview or more difficult access to the examination stage (COM [2002] 326 final). The Commission also attempted to achieve some degree of harmonization, especially in those instruments dealing with procedural law. It supported the view that one single authority should be allowed to examine an application and tried to harmonize the structure of the appeals procedure (COM [2000] 578 final). It was in the area of procedural law that member states showed particular reluctance towards common standards.

Dynamics of decision-making before communitarization

The negotiations on the first generation asylum laws reveal a high level of contestation and competing 'policy core beliefs'. The Council set a direction towards a restrictive vision of asylum and insisted on maintaining flexibility

for member states. Under consultation, member states had the last word on legislation and, therefore, were able to shape the policy field to their convenience. They displayed a 'relative neglect of the Parliament as an actor' (Kaunert 2010: 142–3).

The EP positioned itself in clear opposition to the Council and put forward proposals for more liberal and harmonized EU asylum policies. This finding is in line with Hix and Noury's study (2007: 202), demonstrating that a coalition of socialists, liberals, greens and radical-left MEPs managed to position the EP as a 'pro-migrant' actor between 1999 and 2004. The EP often defended positions that overlapped with refugee-friendly organizations such as the European Council on Refugees and Exiles (ECRE). Frustrated by its lack of influence, the EP sought to forge an alliance with the Commission on asylum matters, which the latter used partly to legitimize its own positions (Kaunert 2010: 142–3). Until 2005, the Commission had to share the right of initiative with member states. Also, the existence of unanimity in the Council and the absence of the EP as a balancing force often trapped the Commission into feeding the wishes of national governments (Lavenex 2001).

THE SECOND GENERATION OF ASYLUM LAWS: NEGOTIATING UNDER CO-DECISION

This section shifts attention to the dynamics of decision-making of the second generation of asylum laws (2005–2013).

Table 3 demonstrates that the (initial) positions of the EU institutions were more similar to one another than in the first wave of EU asylum legislation. On the substantive dimension, the Council continued to position itself on the restrictive side, defining individual rights in a narrow way. For instance, member states were adamant about the necessity of detaining asylum-seekers and they aimed to maintain a high threshold for granting international protection by preserving the wide scope of accelerated procedures. At the same time, the Council became more open to enhancing rights in some limited areas, prioritizing family reunion and persons with special needs. In some of these cases, the changes were the product of external factors, such as the necessity to comply with case law from the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU) (own research interviews; see also Kaunert and Léonard 2012: 1406–7). For the Procedures Directive, the Commission produced a summary of issues affected by the Courts' jurisprudence, which affected central issues such as the right for automatic *suspensive* effect or effective access to EU rights (Council Doc 11345/10).

Regarding the EP, its opposition to the Council became less pronounced. The EP was closer to the position of the Council in some of the most controversial issues, such as the possibility to reduce or withdraw reception conditions (A6-0285/2009) or the scope of accelerated procedures (A7-0085/2011). In other negotiation points, the EP continued to put forward more liberal positions,

Table 3 The EU negotiations on the second generation asylum laws

Second generation	Substantive dimension				Functional dimension			
	Council	Com.	EP	Final	Council	Com.	EP	Final
Receptions								
Scope	30	45	100	70	0	70	100	45
Freedom of movement	10	30	45	30	30	60	70	50
Health care	55	55	55	55	50	100	50	50
Employment	30	45	60	45	30	70	70	40
Dublin								
Allocation of responsibility	40	40	40	40	45	60	60	60
Co-operation between MS	30	100	100	45	40	100	70	40
Suspensive effect of appeals	30	45	45	45	30	30	45	45
Definition of family	30	45	40	40	40	70	70	60
Qualifications								
Scope	30	55	55	40	70	100	70	70
Definition persecution	45	60	100	50	70	70	100	70
Definition protection	40	70	40	60	40	70	40	40
Refugee vs subsidiary status	10	80	30	50	30	70	30	50
Procedures								
First-instance decisions	30	45	100	45	40	70	70	55
Suspensive effect of appeals	30	45	45	45	30	80	80	45
Safe countries	40	40	40	40	40	40	100	40
Accelerated procedures	30	45	45	35	30	100	50	45
Implicit withdrawal	30	70	45	45	45	75	75	45

Note: Com. = Commission; Final = final text.

for instance, on issues of gender and individuals with special needs (A7-0271/2011; A6-0285/2009: 21).

The Commission displayed an ambivalent pattern on the restrictive/liberal dimension but tried, overall, to shift towards more rights-based provisions. In the Qualifications Directive, the Commission clarified and nuanced some of the provisions that had proved controversial in the original directive (A6-0285/2009). It suggested, for example, extending the definition of family and narrowing down the conditions in which a non-state actor could be an agent of protection. It also made it more difficult to apply the 'internal flight' alternative without an effective proof of safety for the applicant. However, in other texts, especially those dealing with access to procedures, it maintained more restrictive solutions (COM [2008] 820 final; COM [2009] 554 final).

The positions of EU institutions differed more on the functional dimension. The Council was reluctant to move towards stronger integration and thereby stood in opposition to both the Commission and the EP. The supranational EU institutions sought to limit the flexibility for member states by developing common standards. For instance, the EP continued to oppose the 'safe country'

principle, although now the emphasis rested on the necessity to have common EU lists rather than on opposing the principle in itself (A7-0085/2011). More significantly, the EP received the proposal to suspend transfers under the Dublin system if member states failed to implement the Procedures Directive positively, demanding the same principle be applied if they made a wrong or insufficient use of the Qualifications Directive (AA6-0284/2009).

Comparing the first and second generation of asylum laws

When comparing [Table 2](#) and 3, we can see changes on both dimensions. On the substantive dimension, the second generation asylum laws became less restrictive in some respect (e.g., restricting the detention of vulnerable persons, in particular unaccompanied minors) and included new rights (e.g., for asylum-seekers with special needs). Still, in Jenkins-Smith and Sabatier's (1994) terms, these changes can be classified as 'secondary', given that they did not question the core of the different asylum laws.

The issue of detention is a case in point. In the negotiations of the 2003 Receptions Directive, the EP strongly opposed the possibility of detaining an asylum-seeker. During the 2013 recast, this point was negotiated from a different angle. Negotiations primarily revolved around the questions of length and conditions of detention – but no longer on whether this practice should be allowed at all. The agreed changes (fewer reasons for detaining an asylum-seeker and minimum conditions in reception centres) can therefore be considered secondary; the practice of detaining an asylum-seeker has now become widely accepted among the EU institutions.

The example of detention illustrates a broader pattern. While most asylum laws have become less restrictive compared to their forerunners, they have not moved from the restrictive to the liberal side. In highly controversial issues, the Council's position prevailed. This was the case for the Dublin III Regulation, where both the Commission and the EP favoured a suspension of transfers of asylum-seekers if a member state cannot cope with this practice. Their position was influenced by ECtHR and CJEU court rulings maintaining that an asylum-seeker subject to a Dublin-II-transfer back to Greece would 'face a real risk of being subjected to inhuman and degrading treatment' (Court of Justice of the European Union 2011). These decisions were considered landmark rulings, but they did not alter the Dublin system; the Dublin III Regulation primarily sought to remedy these shortcomings by installing an early warning mechanism and *ad hoc* support for countries such as Greece, but it did not introduce any genuine burden-sharing instruments.

The Qualifications Directive was the only EU asylum law that made a substantial move on the restrictive–liberal continuum. Here, it was easier for member states to accept more generous definitions, since these are anyway put into practice for individual cases, which leaves large leeway to national authorities. During the recast, the main field of inter-institutional contestation concerned the degree of flexibility and discretion for member states. Disagreement

on the functional dimension caused major delays during negotiations. As can be seen in [Table 3](#), the final outcome was substantially less harmonized than the EP and the Commission had suggested – especially on those procedural aspects that affected the administrative organization of member states. The Council welcomed this solution, considering that ‘the new EU rules take also better into account the different national legal systems, avoid unnecessary administrative and financial burden and enable member states to fight abuse of their asylum systems more effectively’ (Council doc 10411/13: p. 1). However, some already sense the potential pitfalls of preserving high levels of flexibility and rather ambiguous definitions: UNHCR maintained that ‘some new articles have been introduced which raise difficult questions of interpretation and of principle’ (UNHCR 2013: 1).

Explaining the outcome: insights from the ACF

With the introduction of co-decision, inter-institutional coalition-building has intensified and gained importance. Under the leadership of interior ministers, an advocacy coalition was formed including EP centre-right party groups, notably the European People’s Party (EPP). This advocacy coalition was able to frame the debate and nudge a competing coalition consisting of the Commission and centre-left EP groups into accepting the core of EU asylum policy.

Since the ‘policy core beliefs’ had remained more stable in the Council than in the other EU institutions, interior ministers were able to take the lead. According to research interviews, centre-left interior ministers often put forward solutions similar to their centre-right colleagues. The negotiations within the Council focused on administrative costs of different asylum laws and accommodating national practices rather than on ideological questions.³ Coalition-building inside the Council primarily consisted of finding an acceptable solution for the handful of member states that received most asylum applications.⁴ While changes in the composition of the Council had only a minor impact on the development of common positions, they were crucial for the EP and the Commission. The EP elections of June 2009 led to a conservative-dominated chamber and a change of Commissioner. Jacques Barrot (French conservative), was substituted by Cecilia Malmström, a former liberal MEP. The pre-eminence of the conservatives in Parliament and the presence of a liberal Commissioner reinforced the EPP and the Alliance of Liberals and Democrats for Europe (ALDE).

By themselves, however, these structural changes cannot account for policy outcomes. Cecilia Malmström and ALDE were initially unwilling to buy into the Council–EPP advocacy coalition. Quickly after Malmström entered into office, the Commission pushed for a more rights-based approach and sought to achieve a higher level of harmonization (COM [2009] 554 final; COM [2008] 815 final). The Commission’s first proposals, however, faced intense debate and led to a stalemate in the Council. Member states had only recently completed the implementation of the first generation asylum laws and refrained

from being put under pressure; they were more willing to see the negotiations fail than accept a change in the asylum ‘policy core’.

Centre-left groups in the EP and the Commission, by contrast, believed in the added-value of more harmonized asylum rules. The Commission (2013: 3), for instance, took over arguments that ‘asylum must not be a lottery’ in the EU. This depiction was first developed by refugee-friendly groups such as ECRE to illustrate the fact that an asylum-seeker had a very different prospect of getting asylum in the EU depending on where they lodged an application (ECRE 2008). Following this argument, the proponents of the competing (centre-left) advocacy coalition, claimed that the differences in the style and quality of national implementation were too substantial and required stronger forms of integration (see, for instance, the EP report A6-0050/2009). However, the coalition of interior ministers and the EPP group made clear to Malmström that they would not accept these ‘unrealistic rules’.⁵ Eventually, the Commissioner – and, following her example, liberal MEPs – came to recognize a need to do a ‘recast of the recast’⁶ so as to allow for an outcome closer to the Council’s position. In 2011, the Commission issued new proposals with regard to the Procedures and the Receptions Directives. On several occasions, these revised proposals reintroduced older provisions that the Commission had attempted to delete or change.⁷ In the end, in order to finalize the asylum package, it was necessary to convince parliamentarians from ALDE to join the coalition between the EPP and the Council and vote in favour of the proposed compromise.⁸

Hence, the Council–EPP coalition successfully used political negotiations and expediency to make liberal actors accept its position. However, to fully understand the dynamics of the negotiation process, it is important to also consider how the EP’s co-decision rights prompted a new understanding of its role. The EP developed an increased feeling of shared responsibility for policy outcomes. As interviewees put it, the EP learned to ‘get its hands dirty’.⁹ Some in the EP even considered that, after the long and difficult negotiations, voting against the measure would have made them ‘look like a fool’.¹⁰ This new understanding also led the EP to exhibit a more conciliatory behaviour, avoiding amendments that had few prospects of being met by the Council. In fact, informal negotiations started so early in the procedure that it became increasingly difficult to differentiate and single out the positions of each EU institution.

The Council was also effective in framing its ‘core policy beliefs’ as the most legitimate. Member states appealed to the current economic climate to retain more flexibility and block the attempts to raise, for instance, the level of reception conditions (Peers 2012: 1).¹¹ This argument provided a powerful frame in view of the current economic rationale calling for more austerity measures. The EP’s conservative groups adopted and developed this discourse emphasizing the need for a more ‘pragmatic behaviour’ of the Parliament. The latter was accepted and promoted not only by those interested in watering down the EP’s more liberal positions, but also by actors that had been involved in co-

decision negotiations for a longer time; agreeing on a compromise solution was 'how things were done'¹² — even if it meant giving up former EP positions.

CONCLUSIONS

The objective of this article was to examine the impact of treaty reforms on EU asylum law. Adapting Jenkins-Smith and Sabatier's (1993; 1994) research framework, the decision-making processes in EU asylum policy have been systematically and comparatively analysed over the period of 1999–2013.

The article has demonstrated that the negotiations on the first generation of asylum laws (1999–2005) were fraught with conflict, in particular between the Council and the EP, where actors developed opposing 'policy core beliefs'. While the EP constantly put forward liberal, refugee-friendly proposals and acted as an advocate for more harmonization (stronger integration), the Council insisted on restricting rights and benefits for asylum-seekers as well as maintaining flexibility for member states (weak integration). Under consultation, the Council was able to see most of its positions translated into law, which enabled it to settle the EU's asylum 'policy core'.

What has changed after the empowerment of the EU supranational institutions? The comparison reveals that the second generation became slightly more harmonized and less restrictive. The present study therefore seems to confirm scholars claiming that the EU had a 'significant rights-enhancing effect' (El-Enany and Thielemann 2011: 97; Thielemann and Zaun 2013), and that the empowerment of the EU's supranational institutions made the 'EU asylum policy venue more liberal' (Kaunert and Léonard 2012: 1409). However, the comparative analysis highlights that the EP and the Commission modified their positions to a larger extent than the Council, which offers a different perspective on the extent and nature of these changes. The modifications introduced in the recast operation nuanced and tweaked existing EU asylum laws, but they did not question their core. On the contrary: by contenting themselves with changes of secondary order, the newly empowered EU institutions accepted and institutionalized the restrictive and half-heartedly integrated core of the asylum regime set by the Council in the first negotiation round.

This policy outcome has been explained by the prevalence of an advocacy coalition under the leadership of the Council that included the centre-right groups of the EP, in particular the EPP. This coalition competed with an alternative advocacy coalition involving the Commission and centre-left groups of the EP, all of which were convinced of the value added of more harmonized and potentially more liberal asylum laws. During negotiations, the Council insisted on compromises close to its position — even at the risk of failing to agree. In view of the negotiation stalemate and pressured by the Council–EPP advocacy coalition, the liberal Commissioner, Cecilia Malmström, eventually issued new proposals on key asylum laws resulting in a *de facto* rapprochement of the Commission's position to the Council's. MEPs

from ALDE became pivotal actors by following the example of the (fellow liberal) Commissioner and joining the Council–EPP coalition, which made way for a positive EP vote of the asylum package. The behaviour of ALDE was driven not only by the negotiation dynamics and political expediency but also by new inter- and intra-institutional norms fostering consensual practices.

These findings are of broader relevance for European integration studies. They show how the formal empowerment of EU institutions expected to introduce changes in a policy area may not be sufficient to modify its ‘core’ characteristics. Once institutionalized, even the presence of new actors may prove to be an insufficient condition to change the ‘core’ of a given policy field – particularly if it is endorsed by pivotal decision-makers inside those EU institutions that have been empowered after communitarization.

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NOTES

- 1 If the Commission issued a revised proposal, we took the latest version.
- 2 Except for the Qualifications Directive, which was released one day after.
- 3 Interviews with Council official, November 2012, and with EPP Political Advisors, August 2013.
- 4 Interview with diplomatic source A.
- 5 Interview with EPP Political Advisors, August 2013.
- 6 *Ibid.*
- 7 For instance, the new proposal reintroduced the possibility to treat cases of abuse or threats to the public order as manifestly unfounded applications (COM [2011] 319 final).
- 8 Interviews with ALDE MEP assistant, November 2012, and EPP Political Advisors, August 2013.
- 9 Interview EPP Political Advisors, August 2013.
- 10 Interview with MEP Antonio Masip Hidalgo.

11 Interviews with GUE/NGL political advisor; Council official; and diplomatic source B.

12 Interview with ALDE MEP assistant, November 2012.

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APPENDIX – CODING EU ASYLUM LAWS

1. Receptions Directives

Scope:

Substantive dimension:

0 – Exclude beneficiaries of subsidiary protection

30 – Inclusion of beneficiaries of subsidiary protection optional

45 – Include at least those requesting protection at the border

100 – Uniform status for all forms of international protection

Functional dimension:

0 – Possibility to suspend the instrument if costs of implementation become too high

10 – Member states free to set their own conditions regarding the scope of application

70 – Clarify standards and definitions rather than require full harmonization

100 – Full harmonization

Freedom of movement:

Substantive dimension:

- 0 – Detain asylum-seekers, especially if they may abscond
- 40 – Detention limited to serious grounds
- 60 – Strict limitations for administrative purposes (data verification)
- 100 – No limitations to freedom of movement

Functional dimension:

- 0 – Full flexibility to determine conditions for freedom of movement
- 45 – Detailed conditions but leave flexible provisions on detention
- 70 – Minimum common conditions
- 100 – Harmonized and all-encompassing list of conditions

Health care:

Substantive dimension:

- 20 – Cover only immediate needs
- 40 – Primary and emergency health care
- 55 – Essential and emergency health and psychological care
- 100 – Health and psychological care for all types of procedures

Functional dimension:

- 0 – Member states free to assess necessity of health care
- 30 – Member states may decide whether an applicant needs free health care
- 50 – Tighter conditions for people with special needs
- 100 – Same level of health care as nationals

Employment:

Substantive dimension:

- 0 – Ban access to employment market
- 30 – Limit access for at least 1 year
- 60 – Limit access for max. 6 months
- 100 – Allow full and immediate access

Functional dimension:

- 0 – Access left to the discretion of member states
- 30 – Time limit but member states free to introduce conditions of access
- 70 – Common time limit and restrict member states' capacity to add further requirements
- 100 – Harmonized conditions on access

2. Dublin II and III Regulations

Allocation of responsibility:

Substantive dimension:

- 0 – First-country of entry
- 30 – First-country except if another country has helped towards irregular entry or unlawful stay
- 40 – Exception to first-country rule in cases of family reunification and unaccompanied minors

100 – Asylum-seekers should be free to log their application in the country of their choice

Functional dimension:

0 – No common criteria

30 – Minimum criteria

60 – Minimum criteria and common definition of family and family reunification

100 – Harmonized and all-encompassing criteria

Co-operation between MS:

Substantive dimension:

0 – No need to exchange information on transfers

30 – Exchange of information on transfers

45 – Alert system and *ad hoc* support if a member state cannot cope

100 – Suspension of transfers if a member state cannot cope

Functional dimension:

20 – Left to bilateral and voluntary co-operation

40 – Operational co-operation (electronic database; co-operation with European Asylum Support Office [EASO])

70 – Burden-sharing instruments

100 – Commission in charge of suspension of transfers

Suspensive effect of appeals:

Substantive dimension:

0 – No suspensive effect

30 – Not necessarily decided by a judicial authority

45 – Decided by a judicial authority

100 – Automatic

Functional dimension:

0 – Member states free to decide whether to introduce a suspensive effect

30 – Suspensive effect but member states' discretion on whether it applies automatically

45 – Suspensive effect at the request of the applicant

100 – Compulsory

Definition of family:

Substantive dimension:

10 – Narrow definition (only spouses, unmarried partners and/or children)

30 – Differentiate between first degree and second degree relatives (including grandparents, grandchildren and siblings)

45 – Extend the definition of minors; broaden concept of family beyond nuclear family for unaccompanied minors

70 – Broad definition (include family members residing legally or nationals of another member state)

Functional dimension:

0 – No common definition

- 40 – Definition that leaves room for interpretation at the national level
- 70 – Minimum common definition with clear categories
- 100 – Harmonized and all-encompassing definition

3. Qualifications Directives

Scope:

Substantive dimension:

- 10 – Exclude EU nationals and narrow definition of family
- 30 – Narrow definition of family and only emphasize children rights
- 55 – Extend the definition of family for minor applicants and married minors
- 90 – Include EU nationals and broad definition of family (e.g., same-sex couples)

Functional dimension:

- 0 – No common definition
- 40 – Definition that leaves room for interpretation at the national level
- 70 – Minimum common definition with clear categories
- 100 – Harmonized and all-encompassing definition

Definition persecution:

Substantive dimension:

- 0 – Exclude non-state actors as actors of persecution and social group or gender as sole ground for persecution
- 30 – Accept non-state actors as actors of persecution under conditions but narrow definition of social group and exclude gender as sole ground for persecution
- 45 – Persecution also considered when there is absence of protection; gender not sole ground but taken into account
- 70 – Accept non-state actors as actors of persecution, broaden definition of social group (include gender and sexual orientation)

Functional dimension:

- 0 – No common definition
- 40 – Definition that leaves room for interpretation at the national level
- 70 – Minimum common definition with clear categories
- 100 – Harmonized and all-encompassing definition

Definition protection:

Substantive dimension:

- 0 – Non-state actors can provide protection and 'internal flight' alternative should be made easier
- 40 – Non-state actors should be able to provide effective and durable protection; 'internal flight' alternative made easy if the person is expected to be able to settle in the area
- 70 – Non-state actors can only provide protection if they can enforce the rule of law; 'internal flight' alternative after individual examination

90 – International organizations cannot be actors of protection; ‘internal flight’ alternatives subjected to stringent conditions

Functional dimension:

0 – No common definition

40 – Definition that leaves room for interpretation at the national level

70 – Minimum common definition with clear categories

100 – Harmonized and all-encompassing definition

Refugee vs subsidiary status:

Substantive dimension:

10 – Refugees have more rights than those under subsidiary protection

30 – Refugees have more rights than those under subsidiary protection (but extend protection to family members)

80 – Uniform status (no differences depending on types of protection)

100 – Uniform status and ensure that refugee protection is not undermined by existence of subsidiary protection

Functional dimension:

0 – Rights for both statuses left to member states

30 – Minimum rights for refugee status and extension to subsidiary status left to member states’ discretion

70 – Common rights for both statuses

100 – Harmonized rights and provisions to ensure that subsidiary status is only examined after refugee status has been denied

4. Procedures Directives

First-instance decisions:

Substantive dimension:

0 – No limits to number of authorities allowed to examine applications

30 – One single authority except for a large number of cases (Dublin procedures, transfers to third countries, national security, etc.).

45 – One single authority except for border and Dublin procedures

100 – One single authority

Functional dimension:

0 – Member states have full flexibility to set standards

40 – Practical co-operation (e.g., help from EU asylum agency)

70 – Minimum common standards on time limits and characteristics of officials

100 – Harmonized standards on time limits and characteristics of officials

Suspensive effect of appeals:

Substantive dimension:

0 – No suspensive effect

30 – Not necessarily decided by a judicial authority

45 – Decided by a judicial authority

100 – Automatic

Functional dimension:

- 0 – Member states free to decide whether to introduce a suspensive effect
- 30 – Suspensive effect but member states' discretion on whether it applies automatically
- 45 – Suspensive effect at the request of the applicant
- 100 – Compulsory

Safe countries:

Substantive dimension:

- 0 – Applicants cannot rebut safety claims
- 40 – Narrow down conditions for determining safety
- 60 – Applicants should be able to rebut safety claims
- 100 – There should not be safe countries clauses

Functional dimension:

- 0 – National lists of safe third countries
- 40 – National lists for safe third countries under strict conditions and regular reviews
- 70 – Common list of safe countries but allow some flexibility to member states
- 100 – Common list of safe countries

Accelerated procedures:

Substantive dimension:

- 10 – Very broad definition of inadmissible, unfounded cases that includes applicants who failed to apply as soon as possible
- 45 – Broad definition centred on inadmissible, manifestly unfounded, subsequent applications or examinations at the border
- 60 – Limited to well-founded or clearly abusive cases
- 100 – No distinction between accelerated and regular procedures

Functional dimension:

- 0 – Member states free to define scope and conditions
- 30 – Loose definitions of inadmissible and unfounded cases and no time limits
- 50 – Minimum definition of cases and conditions; they can be extended by member states
- 100 – Harmonized definition of scope and conditions

Implicit withdrawal:

Substantive dimension:

- 0 – An application may lapse by law without any examination
- 30 – Guarantees for withdrawal procedure except if it lapses by law; applicants subjected to time limits to re-open file
- 45 – Discontinue the procedure but only allow one request to re-open file
- 100 – It should lead to discontinuation, not rejection; no time limits to re-open file

Functional dimension:

- 0 – Member states free to decide whether to discontinue the procedure or reject the application

45 – Member states may only decide to let an application lapse by law if citizenship is accorded

70 – Common rules on discontinuation but flexibility in setting time limits

100 – Common rules on discontinuation and ban on time limits