INSTITUTE FOR EUROPEAN STUDIES

ISCTE IUL
Instituto Universitário de Lisboa

School of Sociology and Public Policy

Department of Political Science and Public Policy

Understanding the Negotiation Behaviour of Member States in the Council of the EU: The Case of the Recast Asylum Procedures Directive

Sara da Conceição Pereira Silvestre

Thesis specially presented for the fulfilment of a double degree of

Doctor in Political Science and Public Policy

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March, 2019

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ACKNOWLEDGEMENTS

Firstly, I would like to express my sincere gratitude to my supervisors Professor Robert Ladrech, Professor Florian Trauner and Professor João Carvalho for the continuous support and guidance.

A special thanks goes to Professor Robert Ladrech that from day one was part of this academic journey, and always had a kind and wise word to make me feel confident about my research and path. Thanks a million to Professor Florian Trauner for accepting to jump up in a moving train. His constant encouragement helped me to progress and to have a fruitful stay in Brussels. Last but not least, I would like to express my gratitude to Professor João Carvalho for pushing me out of my comfort zone.

I am really grateful for my research period at the Institute for European Studies (IES) at the Vrije Universiteit Brussel (VUB), specifically with the Research Cluster on Migration, Diversity and Justice. Thank you very much to Prof. Ilke Adam, Prof. Florian Trauner, and senior researcher Richard Lewis for the warm welcome to the institute and cluster. I would also like to thank the secretariat, with a special courtesy to Hilde Vanderheyden, Maja Kovačević, Jacintha Liem, Paula Cantero Dieguez, and Anamaria Bacsin.

At the ISCTE – University Institute of Lisbon my gratitude goes to all the Professors that I have met and were part of my academic path. For their core role in the PhD programme my special appreciation goes to: Prof. Maria de Lurdes Rodrigues, Prof. Helena Carreiras and Prof. Pedro Adão e Silva. I also want to thank the secretariat, especially Sara Silva and Lara Carregã.

I am also indebted to all the officials that accepted to participate in the study, particularly from the Permanent Representations of the Member States, the EU institutions, and from the inter-governmental body.

Being a self-funded PhD student while working full-time can be quite an overwhelming experience and without the support of my family and friends I would not have managed. A big cheer for my colleagues-turned-friends that made this journey an unforgettable experience. Thank you so much to Nadine Batista and Ana Serrano for the laughs, and memorable moments in person and virtually. Faro – Lisbon – Barcelona – Geneva – Brussels – Florianopolis witnessed our achievements and success, and I am looking forward to what is coming next. Lea Mateo, Asma Akbar, and Yijia Huang thank you so much for making my days in Brussels brighter, happier and full of life.

With all my love, a big thank you to my mother Fátima Pereira, my little brother João Silvestre, my grandmother Cristolinda Pereira, and my boyfriend Rúben Santos, for all the support and patience. You were my rock throughout this journey and I hope I have made you proud.

ABSTRACT

This study aims at explaining the factors that influenced and shaped European Union (EU) member states' negotiation behaviour and strategies in the Council of the EU, in particular in the case of the recast Asylum Procedures Directive (APD). Based on a series of interviews with officials of member states and EU institutions, this research suggests that the Council negotiations in the post-Lisbon Treaty period are better explained through an institutionalist lens. Previous scholarship has shown that issue-salience along with regulatory expertise and administrative capacity was important to understand negotiation behaviour, bargaining success and policy output during the first phase of the Common European Asylum System (CEAS). However, this study demonstrates that these variables are no longer sufficient to fully explain member states´ negotiation behaviour in the second and third phase of the CEAS. Thus, based on the actor-centered institutionalism framework (ACI), this study proposes a bargaining model that not only considers issue-salience, but also formal and informal institutional rules such as voting rule, consensus norm, ´co-decision´ and the type of legal instrument, as explanatory variables for the observed ´mixed-motive game´ in the Council. Furthermore, this research argues that the commonly used typologies on EU negotiations literature do not sufficiently portray the dynamic in the APD. It is not just a matter of bargaining strategies to maximise member states´ self-interest, nor just the search for creative joint solutions to the problems. Rather, there is a coexistence of both conflict and cooperation, in which self-interested actors accommodate joint solutions to obtain a non-zero-sum game. To sum up, actors are still perceived as rational, who seek to maximise their self-interests. Yet their course of action and behaviour are constrained by the EU institutional setting.

Keywords:

Council of the EU; negotiation behaviour and strategies; asylum policy

ABSTRACT

Deze studie richt zich op het verklaren van de factoren die het onderhandelingsgedrag en de strategieën van de Europese Unie (EU) lidstaten in de Raad van de EU hebben beïnvloed en vormgegeven, met name in het geval van de herziene Richtlijn voor Asielprocedures. Gebaseerd op een serie interviews met ambtenaren van de lidstaten en de EU-instellingen, suggereert dit onderzoek dat de onderhandelingen van de Raad in de periode na het Verdrag van Lissabon beter worden toegelicht door middel van een Institutionalistische lens. Eerdere wetenschappelijke studies hebben aangetoond dat kwestie-saillantie samen met regelgevende expertise en bestuurlijke capaciteit was belangrijk om de onderhandelingsgedrag te begrijpen, succes te onderhandelingen en beleidsresultaten te leveren tijdens de eerste fase van het Gemeenschappelijk Europees Asielstelsel. Deze studie toont echter aan dat deze variabelen niet langer voldoende zijn om het onderhandelingen gedrag van de lidstaten in de tweede en derde fase van het CEAS uit te leggen. Dus, op basis van de acteur-gecentreerde institutionalisme kader, stelt deze studie een onderhandelingspositie model dat niet alleen rekening houden met kwestie-saillantie, maar ook formele en informele institutionele regels zoals stemregel, consensus norm, "medebeslissingsprocedure" en het type van juridisch instrument, als verklarende variabelen voor de waargenomen "gemengd-motief spel" in de Raad. Bovendien, selt dit onderzoek dat de meest gebruikte typologieën op EU-onderhandelingen literatuur onvoldoende beeld van de dynamiek in de APD geven. Het is niet alleen een kwestie van onderhandelen strategieën om het eigenbelang van de lidstaten te maximaliseren, noch alleen het zoeken naar creatieve oplossingen voor de problemen. Integendeel, er is een coëxistentie van zowel conflict en samenwerking, waarin zelf geïnteresseerde acteurs geschikt voor gezamenlijke oplossingen om een niet-nulsomspel te verkrijgen. Kortom, acteurs zijn nog steeds als rationeel gezien, die proberen om hun eigen belangen te maximaliseren. Toch, hun handelwijze en gedrag worden echter beperkt door het institutionele kader van de EU.

Sleutelwoorden:

Raad van de EU; onderhandelingsgedrag en strategieën; asielbeleid

RESUMO

Este estudo tem como objetivo explicar os fatores que influenciaram e moldaram o comportamento e estratégias de negociação dos Estados-membros da União Europeia (UE) no Conselho da UE, especificamente no caso da Diretiva de Procedimentos de Asilo adotada em 2013. Com base numa série de entrevistas conduzidas com as Representações Permanentes dos Estados-membros e Instituições da UE, esta investigação sugere que as negociações no Conselho após o Tratado de Lisboa são melhor explicadas através de uma lente institucionalista. Estudos anteriores demonstraram que a saliência do assunto, juntamente com a experiência regulatória e a capacidade administrativa dos Estados-Membros foram importantes para compreender o comportamento de negociação, o sucesso de negociação e o resultado da política durante a primeira fase do Sistema Europeu Comum de Asilo (SECA). No entanto, este estudo demonstra que estas variáveis já não são suficientes para explicar o comportamento de negociação dos Estados-membros na segunda e terceira fase do SECA. Desta forma, com base no *actor-centered institutionalism framework* (ACI), este estudo propõe um modelo de negociação que não só considera a saliência do assunto como também as regras formais e informais das instituições. Mais especificamente a regra de voto no Conselho, norma de consenso no Conselho, ´codecisão´ e o tipo de instrumento legal como variáveis explicativas para o *´mixed-motive game'* observado no Conselho. Ademais, esta investigação argumenta que as tipologias comumente utilizadas na literatura das negociações da UE não retratam suficientemente a dinâmica observada na diretiva em análise. Não se trata apenas de estratégias de negociação para maximizar o interesse dos Estados-membros, nem apenas a busca de soluções criativas para os problemas comuns. Mas sim uma coexistência de conflito e cooperação, na qual atores racionais acomodam soluções conjuntas para obter um jogo de soma não zero no Conselho. Em suma, os atores continuam a ser racionais, procurando maximizar seus interesses, no entanto, o seu curso de ação e comportamento são condicionados pelo contexto institucional da UE.

Palavras-chave:

Conselho da UE; comportamento e estratégias de negociação; política de asilo

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LIST OF ABBREVIATIONS

ACI	Actor-Centered Institutionalism
APD	Asylum Procedures Directive
APR	Asylum Procedures Regulation
AT	Austria
AWP	Asylum Working Party
BE	Belgium
BG	Bulgaria
CEAS	Common European Asylum System
CEECs	Central and Eastern European Countries
CJEU	Court of Justice of the European Union
CY	Cyprus
CZ	Czech Republic
CFR	Charter of Fundamental Rights
DK	Denmark
DE	Germany
EASO	European Asylum Support Office
EC	European Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice

EE	Estonia
EL	Greece
EP	European Parliament
ERF	European Refugee Fund
ES	Spain
EU	European Union
FI	Finland
FR	France
GDP	Gross Domestic Product
HU	Hungary
IE	Ireland
IT	Italy
JHA	Justice and Home Affairs
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
QD	Qualification Directive

QMV	Qualified Majority Voting
RCD	Reception Conditions Directive
RO	Romania
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SE	Sweden
SI	Slovenia
SK	Slovakia
TEU	Treaty on European Union
TPD	Temporary Protection Directive
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
V4	Visegrád Group

INTRODUCTION: COUNCIL OF MINISTERS AS A DECISION-MAKER IN THE EU ASYLUM POLICY

Research on the asylum policy has shown that the Council of the EU (hereafter referred to as the Council) with a ´centralized gate-keeping function´ (Lewis, 2015: 221) has been one of the most influential EU institution and the heart of decision-making in this policy area (e.g. Ripoll Servent & Trauner, 2014). Despite this key role few studies have focused on Council´s decision-making dynamics. Topics such as voting and negotiation behaviour, as well as decision-making in the different levels of the Council remain under-researched (Roos, 2018).

Studies on decision-making in the Council have demonstrated that Member States normally avoid to explicitly voting or vetoing a decision at the ministerial level (Hayes-Renshaw, Van Aken, & Wallace, 2006; Mattila, 2008; Mattila & Lane, 2001); showing that consensus is the norm in Council negotiations (Heisenberg, 2005). Consensus in the Council is either explained by rationalists, constructivists or a combination of both approaches (*inter alia* Hayes-Renshaw et al., 2006; Heisenberg, 2005; König & Junge, 2009, 2011, Lewis, 1998, 2003; Majone, 2005; Mattila & Lane, 2001; Novak, 2013a).

By drawing on a conception of norms, Lewis (1998, 2003) claims that the ´consensus reflex´ is a ´distinctive part of the Council's culture´, in which socialised member states know that it is wrong to behave otherwise (Lewis, 2003: 1008). In addition to this postulation, Lewis argues that consensus occurs independently of the voting rule. Nonetheless, qualified majority voting (QMV) rule seems to be ´the best guarantee for consensus´ (Lewis, 2003: 1007). Some rational perspectives understand Council consensus as a way to maximise national interests either by vote trading (Mattila & Lane, 2001) or by proposal linkage (König & Junge, 2009, 2011). Like Lewis, Heisenberg (2005) challenge these rational claims by relating consensus with democratic legitimacy and accountability, meaning that reaching agreement by consensus rather than by voting is explained by an existing informal norm that strives to protect both the EU democratic system and opponents from citizens' scrutiny about the possible democratic deficit in the Council.

Alternatively, Novak (2013a) considers consensus as a combination of internal norms and a strategic tool to avoid blame. She argues that the publication of votes instead of increasing transparency of the process as planned, has actually become an extra reason for opponents to be silent and avoid exposure in the Council and amongst their electorate. Moreover, it is seen as inappropriate to compel states to declare their explicit voting position, because it can affect the Council´s working environment and originate future retaliations. This scholar also points out that consensus under QMV should be understood as an 'absence of explicit opposition´, rather than unanimity (Ibid.: 1094). Therefore, one can argue that consensus under QMV may not mean the same as under unanimity voting rule.

There is some evidence that Council decisions in the Justice and Home Affairs (JHA) are mainly reached without vetoing or explicitly voting (Hayes-Renshaw et al., 2006). However, there is still a gap in the literature on the underlying motives for this pattern (see Roos, 2018). The exceptions in the literature to this claim are the studies on the Dublin II Regulation adopted by unanimity voting rule (Aus, 2008), and on the Reception Conditions Directive (RCD) adopted under QMV (Ripoll Servent & Trauner, 2015). The decision-making in the Dublin II Regulation was characterised by ´a phase of purposive-rational intergovernmental exchange followed by a phase of value-rational adherence to institutionalized rules´ (Aus, 2008:116). In other words, throughout the negotiations the member states were able to rationally push for their national reservations as bargaining chips for future EU measures on illegal immigration and external border control, but ultimately the decision was adopted by consensus. This was mainly due to an informal code of conduct present in the Council (in this case the informal silent procedure) (Ibid.: 114). Regarding the RCD, according to Ripoll Servent & Trauner (2015: 46-47) the new institutional setting in the second phase of the CEAS resulted in a new norm of consensus and inter-intra-institutional relations. Co-decision and changes in the configuration of institutional actors resulted in a convergence between the European Parliament and Council´s positions, but it did not trigger major policy alterations.

Another relevant aspect of the decision-making in the Council is the dynamic between the three levels of the Council (i.e., Working Party (WP); Permanent Representatives Committee

(COREPER); and Council configuration). While Hayes-Renshaw et al. (2006) concluded that 85 percent of the negotiations and decisions are grasped during the preparatory bodies, Hage (2008) observed that approximately one third of the final decisions are reserved for the highest Council level. In the JHA area, for example, Hague shows that, in 2003, even if 58.3% of the decisions were made in the WP, 41.7% of the decisions were still completed at the ministerial level. Smeets (2013: 17) presents a different perspective by arguing that `decisions result not from the proceedings at specific levels, but are the result of the interplay between these levels`. Concerning the asylum policy area, this question remains to be addressed. Other issues that remain under researched in the EU academic literature are: the factors that influence and shape negotiation behaviour in the Council in the asylum policy; to identify the states that are more successful in influencing and shaping the EU asylum policy; the adopted negotiation strategies to influence and shape the policy output; and who tends to vote with whom and why (see Roos, 2018).

A notable exception is two recent studies on the policy-making of the EU asylum policy (Zaun, 2016, 2018). In the first study the author draws on concepts of regulatory expertise and ´misfit´ to explain why the EU asylum directives are the lowest common denominator (LCD) of strong regulators[1], rather than of all member states as claimed by other scholars (e.g. Lavenex, 2001c; Maurer & Parkes, 2007). In short, strong regulators that attached a high level of importance (issue-salience) to the policy and had a vast regulatory expertise were more active during the negotiations and consequently more efficient in uploading their national preferences and interests into the EU policy framework (Germany, the United Kingdom, the Netherlands, France and Sweden). The strong regulators preferred to uphold their *status quo* policies rather than changing them and incur higher administrative costs. States such as Portugal, Italy and Greece were weak regulators in both phases of the CEAS. Even during the second phase when some of them had already received a large number of asylum applications. According to this model the medium regulators were: Austria, Belgium, Spain, Finland and Luxembourg (Zaun, 2016). As regards the negotiation behaviour and strategies, Zaun (2017) noted that stronger regulators have adopted hard

[1] Zaun (2016:238) defines strong regulators as ´member states with a regulatory tradition in a certain field, have regulatory expertise, which weak regulators with a much younger tradition lack´.

bargaining strategies to push for their national *status quo* and even threatened to block the decision if their preferences were not accommodated. In contrast, most weak regulators were ready to compromise and did not threaten to block the decision (e.g. Italy, Greece).

This research line makes a notable contribution to the literature on intergovernmental bargaining in the area of EU asylum policy, but its focus is mainly on the first phase of the CEAS in which decisions in the Council were still decided under unanimity voting rule. With the promulgation of the Lisbon Treaty on 1 December 2009, the national veto power in this area was replaced by the QMV. If under unanimity voting rule every country, regardless of their characteristics, could veto a decision, under QMV an opposing state must seek to build coalitions to form a blocking minority. Whereas in the first phase of the CEAS the European Parliament (EP) only had an advisory role, during the second phase the ordinary legislative procedure (previously known as the co-decision procedure) was introduced (article 294 of TFEU). This means that the decision-making on this policy is now shared between both the EP and Council.

Furthermore, while in the first phase the decision-making in the Council was between twelve countries[2], during the second phase twenty-four countries were involved in the negotiations[3]. There are many scholars that suggest that the enlargement had little impact on EU decision-making (see Mattila, 2008), however, Zaun (2018) shows that the negotiations of asylum quota system has challenged this postulation. The ´new´ members, particularly the Visegrád Group (V4), were quite vocal against the idea of a quota system and have managed to block the decision, showing a new configuration in the Council´s decision-making (Zaun, 2018). Therefore, upcoming empirical research should take into consideration this new institutional dynamic. As argued by Bonjour, Servent and Thielemann (2017: 7) there is a need ´to pay more attention to the institutional conditions under which policies are (re-)formulated and how this happens (that is, which actors and mechanisms drive or hinder policy emergence and change)´.

[2] Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden.

[3] Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

Accordingly, this study seeks to contribute to the institutionalism debate by addressing the following research question: ´which factors influenced and shaped EU member states´ negotiation behaviour and strategies in the Council in the second phase of the Common European Asylum System? ´. The study focuses on the recast APD adopted in 2013. Nevertheless, the study includes a comparative dimension by looking at the negotiations of the recast APD in comparison with the negotiations of the asylum procedures during the first and third phases of the CEAS. The objective of this research is twofold: i) to study the actor and institutional-related factors that influenced and shaped member states' negotiation behaviour in the Council after the Lisbon Treaty developments; and ii) how the interests and preferences of ´Europeanised´ member states were pursued in the EU political system during the second phase of the CEAS.

The core empirical finding of this research is that ´institutions matter´ when it comes to member states' negotiation behaviour in the post-Lisbon treaty period. An intergovernmental, state-centred approach no longer explains EU cooperation on asylum policy. Based on the ACI framework (Scharpf, 1997), the study brings to light the causal mechanisms that explain EU states´ negotiation behaviour in the recast APD. Therefore, the proposed bargaining model considers issue-salience, formal and informal institutional rules, such as voting rule, consensus norm, the ordinary legislative procedure, and the type of legal instrument, as explanatory variables for the observed ´mixed-motive game´ in the Council. The ´mixed-motive game´ theory characterises negotiations as a ´mixture of mutual dependence and conflict, of partnership and competition´ (Schelling, 1980: 89).

However, it is important to highlight that a single factor does not explain member states´ behaviour in the post-Lisbon treaty period, but rather the interrelation and interaction between the different factors. By discussing the findings through a historical lens, the study also shows that the 2015 refugee crisis not only lead to a greater cleavage in terms of policy preferences and interests in the Council, but also to rekindle the ´securitisation' debate in the asylum policy. Furthermore, the findings demonstrate that in case of a polarised decision-making process, the consensus norm might be undermined. In short, the 2015 refugee crisis has marked a turning point for the asylum

applications in the EU27 as well as on the negotiation behaviour and decision-making in the Council.

The actors under investigation are the following ten member states: Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden. This study concentrates on the old member states, because the newly acceding member states do not have the historical perspective and political experience on the impact of the institutional developments in the Council. In other words, the ´new´ member states were not involved in the first phase of the CEAS adopted under unanimity voting in the Council. Therefore a point of comparison with the following phases agreed under a different institutional framework could not be found.

The study is designed as a within-case analysis as it focus on the process that occurred in one specific EU policy (asylum policy), and in a particular point in time of that policy (second phase of the CEAS). Nevertheless, there is an implicit comparative dimension by considering the first and third phases of the CEAS as well. The method adopted to conduct this within-case analysis was process tracing. By focusing on the theoretic-centric process tracing approach, this study aims at both testing and building on existing theory. Process tracing revealed: the negotiation behaviour in the Council after the Lisbon Treaty; which factors influenced and shaped member states´ negotiation behaviour; and which strategies were adopted to influence the policy output. Therefore, process tracing allowed an in-depth study of the negotiation process in the Council and to assess the influence of the different factors on member states' negotiation behaviour.

Structure of the dissertation

Chapter 1 presents a brief summary of the evolution of the literature on European Integration in the asylum policy. While early studies explain the European integration in the immigration and asylum policies by relying on a state-centric approach, more recent studies resort to the institutionalism theory to address the circular causality in the European Process. The next chapter introduces the state-of-the-art of the bargaining and power resources literatures. This section is fundamental to provide clues on the impact of different factors on the negotiation behaviour and

strategies in the Council; and to better comprehend states' uploading capacity and bargaining success. Chapter 3 sets out the research design. It starts by indicating the research question and objectives, followed by the discussion and operationalisation of the chosen theoretical framework of the study. Chapter 4 presents an overview of the political process of the recast APD. It highlights two key moments in the decision-making in the Council. One is characterised by a deadlock in the Asylum Working Party (AWP), and the other by a revised compromised at COREPER.

Turning to the chapter 5, it introduces the empirical findings on the following issues: i) decision-making in the Council; ii) negotiation environment in the Council; iii) influence of both actor and institutional-related variables on member states' negotiation behaviour; iv) actors' capabilities in the political process; and v) the adopted negotiations strategies. In Chapter 6 the findings are discussed in the context of the research question and existing literature. It highlights how the study reflects and extends the current knowledge on the EU asylum decision-making. Finally the last chapter presents the conclusion and elaborates on the empirical and theoretical contributions to the current literature; on the avenues for future research; and on the policy implications and societal relevance of the study.

1. THEORETICAL APPROACHES FOR UNDERSTANDING EUROPEAN INTEGRATION IN THE ASYLUM POLICY AREA

1.1. Venue-shopping and the role of the EU institutions

European Integration in the area of immigration and asylum policies has been often explained in the literature by an intergovernmental, state-centred approach. Building on the theory of ´policy-venues´ (Baumgartner & Jones, 1993), Guiraudon (2000: 251) argues that ´venue-shopping´ seems the most appropriate thesis not only to explain the beginning (mid-1980s) of EU cooperation on migration and asylum policy, but also to account for the shape and content of this policy. The idea behind the ´venue-shopping´ theory is that member states are in control of European integration, and pursue a new policy venue to overcome the existing institutional constraints in their domestic policy-making arena. It is argued that this new type of vertical policy-making allows actors to foster their restrictive political goals by avoiding national judicial restrictions, eliminating possible national opponents, and by finding new international allies (Guiraudon, 2000).

While Guiraudon (2000) and Lavenex (2001b) claim that this new EU venue permitted the development of a more restrictive domestic asylum policy, Kaunert and Léonard (2012) argue that cooperation on EU asylum has actually raised protection standards for asylum seekers in several Member States. According to this last study, two main factors explain why the adopted EU asylum legal instruments have not turned out to be as restrictive as anticipated by Guiraudon, namely because: i) the ´changes in the EU institutional framework´; and ii) the ´increasing "judicialization" of the EU asylum policy venue´(Kaunert & Léonard, 2012: 1404). With the analysis of the development of the EU asylum policy, the authors demonstrate that throughout the years there was an ´increasing communitarization of asylum, with growing roles for the European Commission, the European Parliament and the ECJ´ (Ibid.: 1406). The growing role of these institutions prevented the most restrictively-minded member states to influence the development of a more rigid legal framework. Furthermore, the strengthening of the role of the European Court of Justice (ECJ), the influence of the European Court of Human Rights (ECHR), and the incorporation of

both the Geneva Convention and the EU Charter of Fundamental Rights (CFR) in the EU treaties resulted in the ´judicialization´ of this venue and in the promotion of a more liberal agenda.

Trauner and Ripoll Servent (2016: 1429) also recognise that ´the dynamics of supranationalism have become more discernible´ in this policy area. However, they argue that member states still remained the key players, and that the existence of new actors was not sufficient to change the ´core´ of the policy (Ripoll Servent & Trauner, 2014: 1154). These authors emphasise the states´ ability to unite forces when in need of confronting the other EU institutions. In other words, despite the new institutional framework, national governments have proven to be successful in shaping the policy debates and setting standards of legitimacy in the Area of Freedom, Security and Justice (AFSJ) (Trauner & Ripoll Servent, 2016). This new research line calls for new analytical perspectives to account for the major institutional changes, particularly the enhanced powers of the EU supranational institutions, their role and capacity to impact the decision and policy-making in the asylum policy (e.g. Kaunert & Léonard, 2012; Maurer & Parkes, 2007; Ripoll Servent & Trauner, 2014, 2015).

Even if cooperation in asylum policy may have raised the legal standards in a number of member states, different ´securitisation' dimensions have been observed in the decision-making process of this policy area (Boswell, 2003; Chou, 2009; Guild, 2006; Huysmans, 2000; Karamanidou, 2015; Lavenex, 2001c; Trauner, 2016). Lavenex (2001a), for example, noted that there was a notable concern during the Central and Eastern European countries (CEECs) accession negotiations to safeguard the security of the rest of the Union. The EU made clear to the CEECs that the accession would not take place before they have ´fully implemented the Schengen acquis and secured their borders´ (Ibid.: 38). This position was prompted by a twofold concern. The first apprehension was with the fact that the CEECs still needed to implement more liberal values to respect the rule of law, international human rights and fundamental freedoms. Secondly, they lacked the practices and institutions to maintain internal security and immigration control, which ultimately could affect all member states.

The securitisation of the EU asylum policy has been also endorsed by linking migration and asylum with issues such as economic and financial crisis (Trauner, 2016), criminal activity and

terrorism (see Karamanidou, 2015). According to Trauner (2016) the financial burden of increasing the rights of asylum seekers during the economic crisis became a relevant discursive argument in the EU. The first countries that felt the pressure of the new economic situation in their administrative asylum structures were the Southern member states. During the 2015 refugee crisis, this pressure increased and frontline countries, such as Greece and Italy, were not able to contain the influx of asylum seekers seeking to reach the northern part of the EU (Ibid.). As highlighted by the author, Europe´s migration crisis brought to light a clear division in the Council that culminated in a´ breach of an informal consensus norm in the Council´ (Trauner, 2016: 322) – even with a clear opposition from the Eastern European states to the new instruments proposed by the European Commission (EC), especially the relocation scheme, the decision was upheld. Nevertheless, in other negotiations new member states were successful in influencing the decision-making and the policy actually end up not being adopted in the Council, as in the case of the asylum quota system (Zaun, 2018). Clearly the refugee crisis has enhanced the division in the Council in terms of preferences and positions, and it is harder to see a pattern in the decision-making amongst all the new legislative proposals.

This logic of securitisation translated into different arguments and migration control tools seems to contradict the policy efforts undertaken to enhance and harmonise the protection of asylum seekers (Boswell, 2003). In other words, The EU normative commitment to rights has been clearly constrained by discourses and practices of securitisation (Karamanidou, 2015; Trauner, 2016).

1.2. Europeanisation

From a historical perspective, the development of the EU political system had a profound effect on member states, resulting in an evolution of the dynamic between the EU and its members (Ladrech, 2014).Theories of European integration, by and large, do not take in consideration what Coman (2009) called the circular causality in the European Process, i.e., there is a loop whereby integration defines a new phenomenon (Europeanisation) that ultimately leads back to integration. As a result, a new theoretical framework was needed to better understand how member states have adjusted to integration. Ladrech (1994: 69) provided a conceptual starting point when he stated that ´Europeanisation is an incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making´. However, by assuming that national states are both actors in EU decision-making and drivers of the European integration, other scholars comprehend Europeanisation more broadly as a two-way process, i.e., it not only encompasses a process of domestic adjustment of member states to the European Union (downloading), but also a process of uploading national preferences to the EU level (Börzel, 2002a, 2002b; Börzel & Risse, 2000; Bulmer & Lequesne, 2005)

In accordance with Börzel and Risse (2000), some scholars argue that when studying the asylum policy one should not dissociate the EU from the national policy level (for a wider debate see Lavenex, 2007; Menz, 2011; Radaelli, 2004; Toshkov & de Haan, 2013). In other words, the analysis of the Europeanisation process in this policy area should consider not only the impact of the EU into domestic institutions and policies, but also the member states´ response to EU policy pressures (Ibid.). As Lavenex (2007: 318) pointed out ´the evolution of the harmonization agenda in asylum policy may be interpreted as a reaction to the imbalances created by Europeanization based on negative integration´. However, Menz (2011) argues that one vulnerability of the current Europeanisation debate is to assume that this process is sequential. He claims that the process may well overlap or occur simultaneously. The idea behind this argument is that national governments play a multilevel game by actively shaping the EU policy, according to national preferences, even

before the impact of the Europeanisation is felt. Germany, for example, has successfully stalled the EU process on the Qualification Directive (QD) adopted in 2004. Only after a domestic compromise was reached on labour market access rights for individuals eligible for subsidiary protection and on the recognition of persecution by non-state actors as a legitimate legal basis for asylum, Germany proceed with the negotiations (Ibid.: 450-452).

An early contribution on the interplay between bottom-up and top-down processes of integration was the study of Lavenex (2001b) on Germany and France. Regarding the European level, the author found that due to a prioritisation of internal security over human rights considerations, specific national histories and identities, and the high politicisation of this issue in the member states, cooperation in this field was shaped by intensive ´transgovernmentalism´. This has reinforced the influence and restrictive position of JHA officials at both national and European level. At the national level, while the European restrictive asylum frame ´resonated well with the long-lasting politicisation of asylum seekers´ in Germany; in France it was required to modify the traditional republican discourse and understanding of France as a land of asylum (Ibid.: 203). In short, Lavenex argues that the requirement to adapt to the European asylum legislation changed the cleavage of structures and validated the ideational basis for a more restrictive asylum policy in both countries.

By building on the ´misfit model´ (Börzel & Risse, 2000), Zaun (2016) also made a valuable contribution to the Europeanisation literature. She has shown that whereas strong regulators (mostly Western and Northern countries of the EU) have actively and successfully uploaded their *status quo* policies into the EU legislation in order to avoid domestic administrative costs; weak regulators avoided adaptation costs by not complying with EU law, resulting in an ineffective domestic policy transposition. Contrary to what the venue-shopping theory suggests, she demonstrates that member states did not rely on the EU asylum policy to lower their domestic standards, but rather pursued ´policy *stasis*´ according to their *status quo* (Zaun, 2017).

In addition to this literature, scholars have also been focusing on the impact of Europeanisation on the asylum recognition rates and the numbers of admitted refuges; on the convergence of national policies and outcomes; and the distribution of asylum burden. Contrary to

what some academics defend (e.g. Czaika, 2009; Monheim-Helstroffer & Obidzinski, 2010), Toshkov and de Haan (2013) argue that the harmonisation of the asylum policy has not produced a race to the bottom with regard to asylum applications and decisions during the first decade of its existence. In other words, the authors did not find evidence that the asylum policy outcomes in the 29 states under analysis have competed to discourage asylum seekers by promoting more restrictive admission standards or lower recognition rates. Regarding the convergence of national policies and outcomes hypothesis, Toshkov and de Hann concluded that, even if national variation exists in terms of recognition rates according to country of origin, there is still a convergence tendency amongst states in terms of percentage of people they offer protection.

However, in agreement with Thielemann, et al. (2010), the authors observed that the asylum burden share (according to the absolute levels of Gross Domestic Product (GDP) of the destination countries) has not become more balanced. While ´the UK and France have received just about the 'right' number of applications given their (absolute) wealth´, Germany has received less according to its wealth capacities (Ibid.: 678). Turning to the Southern countries, between 2000 and 2010, three countries stand out for their asylum application numbers, namely: Cyprus, Malta and Greece. Despite their geographical positions, Portugal and Spain received less than expected in accordance to their GDP. The ´new´ Eastern member states also received a smaller amount of applications. In short, the authors have observed convergence with regard to percentage of people admitted, but it has not been sufficient to achieve the CEAS´s goal of reducing the unbalanced asylum ´burden-sharing´ within the EU.

In sum, this chapter presented a brief summary of the theoretical and empirical evolution of the literature on European integration in the asylum policy. Whereas early studies focused on explaining integration through a state-centred approach, recent studies rely on institutionalism theory to address the circular causality in the European Process. According to the majority of scholars, member states continue to have a key role in this policy area, despite the new supranationalism dynamic. Another important conclusion is that the ´2015 refugee crisis´ has increased the cleavages in the Council, and the ´new´ member states are now much more vocal and active in negotiations.

2. NEGOTIATION BEHAVIOUR IN THE COUNCIL: WHAT HAVE WE LEARNED SO FAR?

The bargaining literature relies expressly on two competing behavioural concepts to explain negotiations in the Council, i.e., rationalism and social constructivism. These approaches diverge in the way they perceive actors' behaviour, the role of institutions, and how cooperation occurs among actors. Rationalists assess outcomes according to actors' power, fixed interests and preferences. While constructivists interpret negotiations as an argumentative process, in which actors seek mutual understanding and optimal solutions accordingly to an embedded collective norm. Rationalists find it difficult to assume the veracity of actors' arguments, nevertheless, some recognise that the exchange of information, for example on peers' preferences can be in the actors' interest (for a comprehensive discussion see Muller, 2004). This mixed approach is no longer simply a rationalist mode of action, where political processes are only determined by individual behaviour and constrained by individual preferences; instead it gives space to what Risse (2000) called an argumentative ´self-entrapment´. Even unwittingly, states might be ´forced into a dialogue by the pressures of a fully mobilized domestic and transnational network´ Ibid.: 332).

The core literature makes a distinction between the following typologies of negotiation: bargaining versus problem-solving (Elgström & Jönsson, 2000; Hopmann, 1995; Scharpf, 1997); distributive versus integrative bargaining (Da Conceição-Heldt, 2006); strategic action versus communicative action (Niemann, 2004; 2006); arguing versus bargaining (Kotzian, 2007; Muller, 2004; Reinhard, 2012); and hard versus soft bargaining (Dur & Mateo, 2010).

Bargaining and problem-solving models of negotiation provide us with a debate between ´absolute versus relative gains´ (Hopmann, 1995: 31). In other words, actors relying on bargaining negotiation strategies seek to maximise their self-interests, contrasting with others that actively look for a creative joint solution for problems (Elgström and Jönsson, 2000). In the EU context, state-centric models perceive the EU as a bargaining arena, ´in which the benefits received under the present policy become the base line below which nobody will settle´ (Scharpf, 1988: 264). This trend suggests that decisions reflect the lowest common denominator (Moravcsik, 1993; Marks et al., 1996). Contrary to Moravcsik (1998), Scharpf argues that bargaining does not necessarily mean

the adoption of hard strategies. This more confrontational dimension is interpreted as a third decision style that he called ´confrontation´, in which a dominant member state or coalition `resort to power and coercion´ to influence the outcome (Scharpf, 1988: 259).

In problem-solving, the focus is on pursuing solutions that satisfy the interests of the different actors. It is claimed that continuous contact with the EU system promotes common interests, values and norms that facilitate cooperation amongst states. The perception is that ´membership matters´ and states become more embedded with EU interests as time evolves (Sandholtz, 1996). Although conflicting interests still exist, there is a search for optimal solutions, translating the negotiations into non-zero-sum-games (Elgström & Jönsson, 2000; Hopmann, 1995, 1996). According to Scharpf, the capacity to reach an agreement is not only dependent on the decision style adopted by each member state, but also by the decision rule (unanimity vs. QMV).

A study on distributive and integrative bargaining[4] in fisheries policy also pays special attention to the institutional setting (Da Conceição-Heldt, 2006). One of the main conclusions is that actors´ bargaining power in decisions under unanimity voting rule is enhanced, and reaching an agreement under unanimity can be costly (Da Conceição-Heldt, 2006). Turning specifically to the negotiation strategies (or tools as called by the author) in the integrative bargaining situation, Da Conceição has identified two main strategies: coalition building and issue linkage. As to the distributive bargaining situation, deadlocks were only overcome by side deals or threats of excluding the most unwilling states.

Authors such as Elgström and Jönsson (2000) claim that problem-solving is predominant in the EU negotiations, but under some circumstances bargaining can also occur. They conclude that both aspects coexist, side by side, in the Council. Yet, they also suggest that the adoption of a particular mode of negotiation is dependent upon different contextual factors. Besides decision-

[4] ´Integrative bargaining as a bargaining method designed to increase the joint gains available to all negotiating parties´, and distributive bargaining ´are concerned with more competitive behaviors, intended to affect the division of limited resources´ (Walton & McKersie, 1965 cf. Da Conceição-Heldt, 2006: 147-48).

making rules, Elgström and Jönsson also consider the level of politicisation, the stage in the decision-making process, the type of policy, and the characteristics of the network.

Dur and Mateo (2010) conclude that a substantial part of the variation in bargaining strategies can be accounted for member states´ bargaining power. In other words, powerful actors are more likely to adopt hard bargaining strategies than their weaker peers, because they have less to lose. Compared to other classifications, the hard and soft bargaining typology simply classifies strategies according to their confrontational nature. They identify four hard bargaining strategies, namely: i) to make a public commitment of not giving in; ii) to criticize the other side; iii) to promote a defensive coalition to block a compromise; and iv) to use a threat, for example, to veto a decision. As regards soft bargaining, the strategies identified were: i) to assume a flexible position from the beginning; ii) to make conciliatory statements; iii) to seek partners for a compromise; and iv) to make a proposal for compromise. While the majority of typologies are concerned with the intentions of actors, Dur and Mateo (2010: 563) try to move ´away from assumptions about the underlying intentions´ and propose to deconstruct actors' negotiation behaviour ´into clearly observable actions´.

A second body of literature proposes a constructive perspective in which actors seek to reach understanding through argumentative processes (e.g. Habermas, 1981; Niemann, 2004, 2006a; Reinhard, 2012). In contrast to traditional negotiation theories (e.g. bargaining vs. problem-solving), Niemann (2006: 490) asserts that ´actors do not just compromise but fully concur in the agreement, since learning processes are more profound´. However, he argues that the communicative action in the EU is only possible according to six conditions: 1) a strong common lifeworld, i.e., actors share a common system of values and norms; 2) lack of knowledge that motivates contact to gather new information and learn with others; 3) complex issues that require more expert knowledge and a more discursive analysis; 4) length of time to develop arguments and reflection; 5) persuasive negotiators; and 6) policies with low level of politicisation ((Niemann, 2006). But these six conditions are not present in all stages of the policy process, for example, the conditions 2, 3 and 6 were more present during pre-negotiations.

Other scholars offer an alternative view to explain the use of arguments in negotiations, by promoting a discussion between arguing and bargaining. Reinhard (2012), for example, claims that the use of arguments by member states is influenced by their individual characteristics. Whereas, Risse and Kleine (2010) consider three institutional factors, viz., the influence of the institutional setting on the different role identities; the transparency of the process (the degree of publicity of negotiations); and the extent to which the institutional setting permits the emergence of ´honest brokers´. However, according to Muller (2004: 397) arguing and bargaining cannot be confused with the strategic and communicative action typology, because while countries relying on arguing seek to convince others through factual truths or normal validities, countries that use bargaining as a negotiation strategy aim to change behaviour through promises and threats (Muller, 2004).

This branch of literature does not offer a consensual argument on the predominant type of negotiation behaviour in the Council, though, it provides important clues on the impact of different factors on the negotiation behaviour and strategies in the Council of the EU (e.g. bargaining power, level of politicisation, individual characteristics, and decision rules, amongst others). Focusing specifically in the asylum policy, the existing literature demonstrates that the behaviour and strategies of the member states in the first phase of the CEAS was clearly shaped by issue´s salience and regulatory expertise. Countries that were particularly affected by a high inflow of asylum applications and preferred to maintain their legal *status quo* have adopted hard bargaining strategies. On the other hand, most weak regulators were passive and did not adopt conflictual positions in the negotiations (Zaun, 2016). Nevertheless, Zaun´s study is more concerned with legislative output at the EU level and its transposition than with member states´ behaviour in the Council. Therefore, there is room to further investigate this question, with particular attention to the following phases of the CEAS, which were negotiated under a new institutional framework.

2.1. Uploading capacity: from structural to individual power resources

The different types of negotiation behaviour and strategies that can be observed in the Council of the EU have now been discussed, but in order to better understand the dynamic between member states it is also essential to reflect on bargaining success. The Europeanisation literature contributed highly to this debate by not only analysing how member states have responded to the European integration, but also by identifying which power resources can explain actors' capacity in shaping the EU policy output.

As one of the early scholars on the Europeanisation literature, Börzel (2002a: 197) has argued that depending on their domestic preferences and capacities, states may pursue three different uploading strategies to respond to EU policy pressures: pace-setting, foot-dragging and fence-sitting. Pace-setters are defined as the Member States that actively seek to upload their policy preferences into the EU. Drawing on the field of EU environmental policy-making, Börzel (2002a: 199-200) makes a slight reference to some of the mechanisms adopted by the six pace-setters to influence and shape the policy (Germany, the Netherlands, Denmark, Austria, Finland and Sweden) – expertise and information, tactical coalition building, presence in various networks, and strategic appointment of national environmental bureaucrats in Brussels. By contrast, foot-draggers seek to delay or block other member states´ action in order to avoid heavy implementation costs at the domestic level. For example, the Southern foot-draggers lacked the capacity to support the strict environmental measures pushed by the pace-setters, however, they were able to trade their consent for some form of exemptions, financial compensation or package deals (Börzel,2002a: 205). Thirdly, fence-sitting is a more ambivalent strategy, in which Member States neither initiate nor block specific policies at the European level. Fence-sitters tend to have a neutral position in the European policy-process, and to engage in changing coalitions with both pace-setters and foot-draggers, depending on their interests (Börzel, 2002a: 206).

It is argued that these uploading strategies are adopted to maximise the benefits and minimise the domestic implementation costs of European policies. However, the successful shape and influence of EU policies depends on states' policy preferences and action capacity. Therefore,

Börzel states that ´both factors are largely influenced by the level of economic development of a Member State, broadly measured by GDP per capita´ (Börzel, 2002a: 208). In a nutshell, countries are more likely to become pace-setters and policy-makers at the European level if they present a high level of economic development. Along with Moravcsik (1998), Börzel identifies the economic size as a power resource. Yet, not all scholars agree with this postulation (e.g. Bailer, 2004; Slapin, 2006). A quantitative study about the role of exogenous and endogenous power resources of member states concluded that a high GDP hardly helps in EU negotiations (Bailer, 2004: 114). Bailer only observed a positive influence within the agricultural policy area. Endogenous sources of powers, such as policy preferences and proximity to the Commission seem to be better predictors of policy outcomes. Slapin (2006: 70) also concluded that size, by virtue of larger populations and economies ´is neither a necessary nor a sufficient condition for IGC bargaining strength´; because even if small, a state with domestic constraints appears to perform better.

The power of a player in the Council game, has been also assessed in the literature by calculating the number of votes it holds under QMV rules. The voting power literature has been especially useful to study the power dichotomy between small and big member states, and the voting patterns before and after accession of new member states. Scholars have addressed voting power in the Council in three main ways. A first approach builds on the theory of power indices to measure not only the power of potential coalitions according to the distribution of voting power among EU members, but also the effect of institutional changes or EU enlargement on that distribution (Aleskerov, Avci, Iakouba, & Türem, 2002; Bârsan-Pipu & Tache, 2009; Hosli, 1996, 1999; Le Breton, Montero, & Zaporozhets, 2012; Sutter, 2000). For example, Bârsan-Pipu and Tache (2009), by using a simulation model to assess the advantages and disadvantages of different voting systems, concluded that the Lisbon model can be both effective and unfair at the same time, because the power is not distributed equally and it gives advantage to big countries as Germany.

Another study, based on the Shapley-Shubik power index, studied the relative influence of EU states and coalitions in the Council of Ministers under QMV, and observed that ´in the process of different enlargements, the original Community Member States have lost considerably in relative voting leverage´ (Hosli, 1996: 270). However, these studies have only focused on the

analysis of voting rules, and avoided the discussion about preferences, and the possible advantages and disadvantages that a state holds according to its number of votes.

Therefore, a second approach on voting power introduces to the debate the importance of member states' preferences (Badinger, Mühlböck, Nindl, & Reuter, 2014; Pajala & Widgren, 2004; Steunenberg, Schmidtchen, & Koboldt, 1999; Thomson, Stokman, Achen, & König, 2006; Widgrén, 2003). Previous voting power indexes seem to fail to consider factors such as agenda-setting and actors´ preferences, which can constrain coalition building and voting patterns in the Council (Garrett & Tsebelis, 1999, 2001). The Decision-making in the EU (DEU) project, for example, made a great contribution to the literature by gathering data on the initial positions of the member states on 70 Commission proposals, during 1999 and 2000 (Thomson et al., 2006). The DEU dataset highlights that the preferences are closely related with states' geographical position. This means that there is a North-South dimension in Council´s coalition patterns (Kaeding & Selck, 2005; Thomson et al., 2006; Zimmer, Schneider, & Dobbins, 2005). The DEU data not only includes in the Northern group the countries identified in the vote data studies (i.e. Sweden, Denmark, the Netherlands and the UK), but also Germany and Finland. Zimmer et al. (2005) uses the DEU data, but their interpretation on the states´ preferences is different than the one supported by Thomson et al. (2006). According to Zimmer et al. (2005: 417) ´the preferences of the member states greatly depend on their respective status as net-contributors or net-receivers of EU-subsidies´, rather than preferences between market-based solutions to policy problems (northern countries) and more regulatory approaches (southern countries) (Thomson et al., 2006).

A third approach concentrates specifically on voting patterns, i.e., who tends to vote with whom and which variables can help to explain these patterns (Hayes-Renshaw et al., 2006; Hosli, Plechanovová, & Kaniovski, 2018; Mattila, 2004, 2008; Mattila & Lane, 2001). Different variables can be found in the literature to explain the interaction in the Council, namely: redistributive cleavage (Zimmer et al., 2005); free market versus regulatory solution (Thomson, et al., 2004); north-south (Matilla & Lane, 2001); left-right/actor ideological position (Hagemann, 2008; Hosli et al., 2018); and pro-anti EU dimension (Marks & Wilson, 2000; Mattila, 2008). The dimension that appears to be the most common in the literature is the north-south one. According to Matilla

and Lane (2001), during the years 1995-1998, the voting pattern was clearly divided into two geographical blocs: the Nordic countries as Sweden, Denmark, the Netherlands, and UK; and the Southern countries as Spain and Italy. Mattila (2008) has also analysed the voting in the Council of Ministers after the 2004 enlargement and concluded that the ten new member states did not change the voting patterns in a significant way. However, Naurin and Lindahl (2008) argue that the post-enlargement demonstrates the presence of a new Eastern latitude dimension in the Council. Nevertheless, big states continued in the centre of the picture. In this new East-North-South dimension, the new Eastern European countries seem to cooperate more often with the North than with the South. In addition to this, Hagemann (2008) found evidence of a left-right dimension structuring coalition patterns before the 2004 enlargement.

Scholars as Tallberg (2008, 2010) and Slapin (2007, 2008) identified other possible sources of power in EU negotiations, such as the ability to exit, veto and set institutional agendas. The veto power in the negotiations of the Council applies when the decisions are reached under unanimity, meaning that all parties have to agree with the proposal or at least not actively block an agreement. In this situation the size of a country can be irrelevant to determine a policy output. Different studies have shown that the ability to veto can strengthen the bargaining position of weak states or coalitions that normally cannot rely on their state resources (for example, economic power) (Zartman, 1971; Habeeb, 1988; see also Tallberg, 2008). Regarding the Presidency of the Council, it rotates among the EU member states every six months, and during this period the presidency chairs meetings at every level in the Council. Empirical research has shown that actors in control of the chair have the ability to shape the outcomes of negotiations (Hampson & Hart, 1995; Odell, 2005; Tallberg, 2006, 2008, 2010). In this position the actors have privileged access to ´a set of power resources, notably asymmetric information and procedural control´ (Tallberg, 2008: 696), which allow them to shape the agenda according to their national preferences (Tallberg, 2003).

Along with state and institutional sources of power, the bargaining literature also brought to light the individual sources of power, i.e., the study of the level of bargaining skill according to psychological characteristics (Snyder & Diesing, 1977); education, experience and selection of mechanisms (Hopmann, 1996). In the context of EU Council Summits, Tallberg (2008) argued

that peer recognition and expertise are more important than the size of a country. In contrast, Bailer (2004) claimed that within the Council of Ministers, skill was not found to have a strong influence overall. Instead, the capacity of positioning oneself close to the Commission and keep a moderate position seems to have more positive returns from negotiations. Still, according to Zaun (2016) rather than voting power and size, geographical notions, or cultural differences, having a strong and informed bargaining position can explain the different impact of member states on EU legislation. In other words, a high level of expertise and information on legal procedures, technical issues, and the preferences of other actors can be an advantage.

Panke (2010b, 2010a, 2012a) demonstrated that the commitment of a state on a particular issue, also known in the literature as the preference intensity or salience, can explain paradoxes of power in which smaller/weaker states prevail on structurally advantaged states (issue-specific power) (Bueno de Mesquita & Stokman, 1994; Habeeb, 1988; Panke, 2010a). In short, if a state cares deeply about an issue it will deploy all its resources, even if scarce, and negotiate firmly to obtain its aspirations (Bailer, 2004; Bueno de Mesquita & Stokman, 1994; Hopmann, 1996). In the EU literature this dimension is pictured by the expression ´punch above their weight´, to express the capacity of small member states to exercise more influence on specific issues beyond what their structural resources would suggest (*inter alia* Björkdahl, 2008; Jakobsen, 2009; Panke, 2009, 2010b, 2012b; Pastore, 2013).

Studies on old and new small member states have shown that they punch above their weight and successfully influence the EU policy-making by using strategies, such as: the use of their EU Presidency effectively (Bunse, 2009; Panke, 2010a); norm advocacy strategies (Björkdahl, 2008); cooperative behaviour and compromise (Pastore, 2013); coalition building with bigger member states; regional co-ordination; prioritisation of issues (Panke, 2010a); contact with EU institutions (Panke, 2010a; Pastore, 2013); state lobbying (Grøn & Wivel, 2011; Panke, 2012); building a good reputation or the use of their reputation; and through strengthening the domestic uploading capacity (Jakobsen, 2009; Panke, 2010a, 2011; Pastore, 2013).

According to their responses to the structural disadvantages, Panke (2010a, 2012) divided small member states into: activity leaders (Denmark, Luxembourg, Ireland, Belgium, Sweden and

Finland), middle-field players (Austria, Slovenia, Hungary, Portugal, Czech Republic, the Slovak Republic and Latvia), and stragglers (Cyprus, Bulgaria, Greece, Estonia, Lithuania and Malta). To explain this activity variation, the study discussed hypotheses on: learning effects, co-ordination capacities, and the role of legitimacy. The study concluded that the longer the states have been EU members, the more they learn and become active; and that co-ordination capacities are important to guarantee that small states can develop high-quality positions for the working group negotiations (Panke 2010a). By contrast, the legitimacy considerations hardly influence the activity level of states (support for EU membership, and specific benefits from membership).

Pastore (2013: 73) also agreed that learning ´how to interact in the complex system of the EU decision-making´ is crucial for small states to successfully upload their preferences. By exploring the efforts of six new small member states in the EU foreign policy (Cyprus, Estonia, Latvia, Lithuania, Malta, and Slovenia), Pastore (2013: 81) claimed that there ´was a gradually shift of strategies from unsophisticated towards smarter strategies´. The study demonstrated that the degree of success of their uploading efforts was ´mixed´ and that they resorted to various tactics to influence the policy outcome, namely: cooperative and compromise behaviour; building a good reputation; persuasive advocating; lobbying in the EU institutions; coalition-building, and strengthening the domestic uploading capacity (Pastore, 2013). To sum up, the literature has also demonstrated that there is a significant difference between old and new small members in their negotiation success (Panke, 2010a), and that it is not possible to identify a single group of actors nor a single strategy to influence the policy process across all policy areas (Hofmann and Türk, 2006).

In the asylum policy area, member states are categorised as strong, medium and weak regulators according to their behaviour and policy-making capacity. Zaun (2017) makes this distinction because she claims that strong regulation in this policy it is not equivalent to high standards as it was observed in environmental and safety at work policies. In this approach countries´ capacity to influence policy output is determined by their high expertise and government

effectiveness[5]. Nevertheless, a state will only seek to shape the EU policy if faced with a high influx of asylum seekers. For example, although Luxembourg presents a good performance in terms of government effectiveness, it was a medium regulator at the time of the first negotiations because they received less than 200,000 asylum applications. The question that remains to pose is whether these factors that explain actors' capability to influence the policy output during the first phases of the CEAS can also explain the dynamic in the following phases of the CEAS.

This chapter was important to better understand the state-of-the-art of the bargaining and the power resources literature. These insights will allow in the following chapters the proposition of a comprehensive bargaining model to study member states' negotiation behaviour and strategies in the second phase of the CEAS. According to the literature, two concepts can help to explain negations in the Council, i.e., rationalism and social constructivism. On one hand rationalists perceive the negotiations as a zero-sum game, where actors actively seek to maximise national interests. On the other hand, social constructivists perceive the negotiations as a non-zero-sum game, where actors actively look for creative joint solutions for problems. As previously demonstrated this literature does not offer a consensual position on the predominant type of negotiation behaviour in the Council, but provides valuable insight on the different variables that might explain or result into a certain type of negotiation behaviour. In addition, the literature on member states' power resources is not only central to understand negotiation behaviour in the Council, but to comprehend bargaining success. Both branches of literature will enrich the discussion in the following chapters.

[5] The author relies on the World Bank Government Effectiveness Index as a proxy for Member States' government effectiveness.

3. RESEARCH DESIGN

3.1. Research question and theoretical framework

The core question guiding this research is: ´which factors influenced and shaped EU member states´ negotiation behaviour and strategies in the Council in the second phase of the Common European Asylum System?´. The objective is twofold: i) to study the actor and institutional-related factors that influenced and shaped member states' negotiation behaviour in the Council after the Lisbon Treaty developments; and ii) how the interests and preferences of ´Europeanised´ member states were pursued in the EU political system during the second phase of the CEAS.

The existing literature already provides some clues on the factors that may have influenced and shaped EU members' states negotiation behaviour and strategies in the Council during the first phase of the CEAS, i.e., salience and expertise (Zaun, 2016, 2017). However, as previously highlighted, Zaun´s (2016, 2017) study is mostly concerned with bargaining success and policy output during the first phase of the CEAS, in which decisions were only made by the Council and under unanimity voting. Therefore, by focusing on the second phase of the CEAS, it is necessary to account for the impact of the new institutional arrangement on member states´ negotiation behaviour and strategies. In other words, instead of assuming a dominant and unique role for the actors, in line with the new institutionalism approach it is argued that ´institutions´ also matter. Four main strands of analysis dominate the new institutionalism approach, namely: rational choice, sociological, historical, and discursive institutionalism.

In the rational choice institutionalism the actors are expected to calculate the best course of action to pursue their interests and to maximise their personal utilities, but their actions and power are constrained by the institutional formal rules (see Lowndes & Roberts, 2013; Peters, 2012). The sociological approach gives emphasis to the institutional norms and values. In short, this perspective claims that actors' behaviour is shaped by the institutional and cultural context of the institutions and follow a ´logic of appropriateness´ (March & Olsen, 1989). Whereas historical institutionalism relies on the concept of ´path dependency´ to claim that once actors decide to follow a specific institutional path there is a tendency to further move in the same direction, because

the relative benefits of the current activity compared with other possible options increase over time. To put it differently, ´the costs of exit – or switching to some previously plausible alternative – rise´ (Pierson, 2000: 252). The fourth and newest strand of institutionalism focuses on the power of ideas. Within this approach, the actors have a central role because they generate the ideas that are the basis for collective action and identity within an institutional setting. Thus, institutional change is explained by the discursive interactions (Schmidt, 2006).

In line with Lowndes and Roberts´argument (2013), it is acknowledged that a more robust institutional model should consider the different mechanisms discussed by the competing variants of the institutionalism. By way of explanation, in order to comprehensively study how institutions shape actors' behaviour one should consider not only formal rules, but also norms and culture, institutional path and narratives. As Schmidt (2006: 116) emphasises ´ problem-oriented scholars mix approaches all the time, using whichever approaches seem the most appropriate to explaining their object of study´. One good example is the Sharpf´s framework that gives equal weight ´to strategic actions and interactions of purposeful and resourceful individual and corporate actors´ and to ´institutionalized forms´ (Scharpf, 1997: 34).

The Actor-centered Institutionalism framework (ACI) is not a theory, but instead a framework that provides guidelines for empirical research (Scharpf, 1997: 37), specifically by discussing the following concepts: institutions; actors and actor constellations. This framework has been widely used amongst EU scholars for its integrative approach (*inter alia* Elgström & Jönsson, 2000; Heisenberg, 2005; Petersohn, Behnke, & Rhode, 2015; Zaun, 2016). As Scharpf (1997:36) notes:

> ´What is gained by this fusion of paradigms is a better "goodness of fit" between theoretical perspectives and the observed reality of political interaction that is driven by the interactive strategies of purposive actors operating within institutional settings that, at the same time, enable and constrain these strategies. What is lost is the greater parsimony of theories that will ignore either one or the other source of empirical variation´.

Hence, based on the ACI framework that combines both rational-choice and sociological institutionalism, this study will formulate both actor and institutional-related explanations to account for member states´ negotiation behaviour and strategies in the Council of the EU during the second phase of the CEAS. The basic assumption of the ACI framework is that policy processes are driven by individual, collective or corporative actors that pursue their rational interests within a certain institutional setting (Scharpf, 1997: 37).

3.1.1. Actor-centered institutionalism: an overview

The first step in the framework is to identify the *set of interactions, i.e.* the unit of analysis that is to be explained and produces the policy outcomes. Only after this step it is possible to identify the involved actors (individual and/or corporate), whose choices will eventually determine the policy outcome. Actors are perceived as rational, who seek to maximise their self-interests and are characterised by ´specific capabilities, specific perceptions, and specific preferences´ (Scharpf, 1997: 43). Capabilities are all the action resources, which an actor can use to influence the policy outcome (from actors' individual characteristics to physical resources). Perceptions and preferences are assumed to be relatively stable, but they may change through learning and persuasion. Furthermore, these characteristics are triggered by a specific policy problem or issue; and will allude to the existing state of the affairs, the causes of the problem, the efficiency of the courses of action, and the possible outcomes (Ibid.).

Another aspect of the framework is the notion of actor constellations, which describes the plurality of actors involved in policy interactions, the available strategies, the combination of strategies and its outcomes, and actors' preferences over these outcomes. By mapping the substantive policy problem onto the actor constellation there is a crucial connection between substantive policy analysis and interaction-oriented policy research (Scharpf, 1997: 45). In contrast to game-theoretic literature, Scharpf argues that constellations can have different modes of interaction, namely: as a ´non-cooperative game´; ´cooperative game´ (when strategies are jointly

agreed); ´voting game´ (when strategies are determined by majority voting); and as a ´hierarchical game´ (when strategies of one actor or more are driven by a unilateral choice of another).

This game-theoretic illustration allows to characterise different levels and types of conflict between actors, which scholars have always considered as a relevant dimension to better formulate assumptions on the policy outcome. Policy in this sense can be studied as an independent variable that influences the political behaviour, i.e., the study of demands of a particular policy and process in the capacity of conflict resolution (Scharpf, 1997: 44-45). In short, by analysing the actor constellation the researcher is able to observe where actors´ preferences diverge and converge, the link between policy and actors´ interaction and its impact on policy outcomes. However, learning solely about the level of conflict and the actors´ preferences in a constellation is not enough to predict or explain the difficulties regarding conflict resolution over a particular policy outcome. To do so, according to Scharpf (1997) it is essential to also analyse the mode of interaction between actors.

In addition to the previous dimensions, the ACI framework emphasises the influence of institutions on actors´ perceptions, preferences, capabilities and their modes of interaction. The concept of ´institution´ in this framework comprehends both notions of formal rules and social norms. As the author puts it:

> ´We prefer (…) to restrict the concept of institution to systems of rules that structure the courses of actions that a set of actors may choose. In this definition we would, however, include not- only formal legal rules that are sanctioned by the court system and the machinery of the state but also social norms that actors will generally respect and whose violation will be sanctioned by loss of reputation, social disapproval, withdrawal of cooperation and rewards, or even ostracism. (Ibid.: 38).

To sum up, institutional rules, either formal or informal, not only facilitate and constrain the range of potential behaviour, strategies, and the mode of interactions of actors, but can also shape their preferences. However, it is important to note that actor-centered institutionalism do not claim that institutions influence choices and policy outcomes in a deterministic way. Instead, it suggests

that even if an institution defines ´repertoires´ of courses of actions, it leaves scope for tactical strategies of rational actors (Ibid.: 42), meaning that intentional actors can still respond differently to institutional constraints, opportunities and across time (Ibid.: 36-37).

3.2. Operationalisation of the actor-centered institutionalism framework

This research employs an interaction-oriented policy research (Scharpf, 2000) by considering actors´ preferences and capabilities as well as the institutional setting in which decisions are made. This research will follow the concept of ´institution´ used by the ACI framework, which includes both formal rules and social norms to study the behaviour and strategies of actors (Scharpf, 1997).

3.2.1. Set of interactions and rules

As far as the set of interactions is concerned the study will focus on the Council of the EU. This institution represents the interests of the member states, and it plays a key role in decision-making in the EU (Lewis, 2010). The Council is organised by specific fields, and it is attended by member states´ ministers holding the office for that political area (Wallace, 2005). The asylum policy is under the JHA Council configuration. The Council has a three-stage procedure encompassing the WP, COREPER and Ministerial configuration. Furthermore, the Council has a rotating presidency between the EU member states (every six months) (Council, 2018c).

Specifically in the asylum policy there are two preparatory bodies, namely the Asylum Working Party (AWP) and the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). The following levels are COREPER II and the Ministerial configuration. The AWP is mostly attended by civil servants from the capitals, while SCIFA is mainly constituted by senior officials responsible for or involved in the policy area, most known as Justice and Home Affairs Counsellors. SCIFA was set up by COREPER following the entry into force of the Treaty of Amsterdam (doc. 6166/2/99, point 3) as part of a new working structure to prepare the Council's

discussions about immigration, frontiers and asylum[6]. The COREPER, in turn, is constituted by member states' permanent representatives (ambassadors) and chaired by the permanent representative of the country holding the presidency of the General Affairs Council. JHA Counsellors can also attend these meetings in order to brief and support the ambassador during the sessions. At last but not least there is the Council level attended by the Ministers, whom can be accompanied by the permanent representatives and JHA counsellors (Council, 2018a, 2018c).

Currently the Council is composed by 28 EU member states[7], but some member states have opted out from the common immigration, asylum and civil policies, specifically: the United Kingdom, Ireland and Denmark. Therefore, in the first phase of the CEAS, 12 member states were involved in the negotiations, namely: Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden. With the ´newly´ ascending member states, during the second phase of the CEAS, 24 countries made part of the negotiations, specifically: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden. In the current reform there is an additional member state, i.e., Croatia.

With the implementation of the Lisbon Treaty in 2009, the ordinarily legislative procedure was extended to the asylum policy. Most known as ´co-decision´, this procedure implies that now the asylum policy is jointly and on equal footing adopted by both the Council and EP. The Lisbon Treaty also changed the voting rule in the Council. Unanimity used to be the rule in the first phase of the CEAS, but after the Treaty revision QMV became the voting rule in the asylum policy. This means that each member state has a certain number of votes depending on its population weight. Until November 2014, qualified majority was reached if 255 out of 345 votes were cast at least by

[6] Council of the EU. Coordinating Committee in the area of police and judicial cooperation in criminal matters (ex-"Article 36 Committee" or "CATS")- Continuation until 1 January 2012 and re-evaluation by Coreper, Brussels 16 November 2009, DOC 16070/09 POLGEN 187 CATS 123

[7] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom.

14 member states (EUR-Lex, 2009b). After November 2014, there is a new system, i.e., in order to achieve a qualified majority it is necessary that at least 55% of member states representing no less than 65% of the population of the EU to cast a favourable vote. On the other hand, a blocking minority is only achieved if at least four member states, representing more than 35% of the EU population, build a coalition (EUR-Lex, 2009b). Considering the demography weight, Germany, France, United Kingdom, Italy, Spain and Poland have the higher number of votes amongst the EU28 member states. On the opposite end there is Slovenia, Latvia, Estonia, Cyprus, Luxembourg, and Malta with the most reduced number of votes (Council, 2009b).

However, as the literature demonstrates the decision-making in the Council is not merely influenced by formal institutional rules. Informal institutional rules also have a role to play. According to Stacey & Rittberger (2003) social norms can either complement or prevail over formal rules. Therefore, one of the challenges in this research will be to assess how the ´consensus reflex´ (Lewis, 2003) observed in the asylum policy (Aus, 2008; Hayes-Renshaw et al., 2006; Ripoll Servent & Trauner, 2015) operated in conjunction with the formal institutional rules. In sum, the complex institutional setting of the Council is going to be studied by taking into account the formal rules such as the voting rule in the Council, the ´co-decision´ procedure between the Council and the EP; as well as by exploring the consensus norm.

3.2.2. Research hypotheses

Whereas previous research on EU asylum policy mainly focuses on the policy output and decision-making under unanimity, this study will pay special attention to the EU member states' negotiation behaviour in the Council during the second phase of the CEAS, adopted under QMV. Therefore, the research question posed is: ´which factors influenced and shaped EU member states´ negotiation behaviour and strategies in the Council in the second phase of the Common European Asylum System? ´.

It is essential to proceed by clarifying the use of some terms in this research. Therefore, negotiation in this study is defined as ´a form of decision making in which two or more parties talk with one another in an effort to resolve their opposing interests´(Pruitt, 1981: xi). To put it in another way negotiation is ´the process of collective choice through which conflicting interests are reconciled´ (Moravcsik, 1993: 497). Behaviour in general terms is defined as the ´way in which one acts or conducts oneself, especially towards others´ (Oxford Dictionaries, 2018). For the purpose of this research, negotiation behaviour as the dependent variable entails both the actions and intentions of the political actors. The most common typologies on EU negotiation allows to analyse the negotiation in terms of ´ absolute versus relative gains´ (Hopmann, 1995: 31), i.e., there is a dichotomy between bargaining strategies to maximise member states´ self-interest and the search for creative joint solutions for the problems. Nevertheless, this research also incorporates dimensions from the negotiation typology discussed by Dur and Mateo (2010). These scholars classify strategies according to their confrontational nature, i.e., between hard and soft bargaining tactics/strategies.

The independent variables, i.e., the factors that influenced and shaped EU member states´ negotiation behaviour will be actor and institutional-related as proposed by the ACI framework. Political actors are characterised by their orientations and their capabilities, and the concept of 'institution´ entails notions of formal and informal rules (Scharpf, 1997). In order to complement the guidelines provided by the actor-centered institutionalism framework, it is necessary to formulate both the actor and institutional-related explanations by relying on the knowledge derived from the literature on the EU decision-making, bargaining, power resources, and Europeanisation.

Salience: an actor-related explanation

According to Cross (2012) salience is one of the key determinants to account for states´ intervention behaviour during negotiations at the Council. The definition and measurement of salience in political science may vary according to different scholars. For example, Moravcsik

(1993: 480) discussed salience as the relative intensity of national preferences. Whereas Thomson and Stokman (2006: 40-1) have differentiated two broadly interpretations of the concept:

> ´In the first, salience is interpreted as the proportion of an actor's potential capabilities it is willing to mobilize in attempts to influence the decision outcome. In the second, salience is understood as the extent to which actors experience utility loss from the occurrence of decision outcomes that differ from the decision outcomes they most favour´.

Others define salience as the relative level of importance that a member state attaches to an issue (Thomson, 2011; see Warntjen, 2012). Departing from a rational choice institutionalism notion of ´preference formation´ in which actors' preferences tend to be exogenous and prior to the institutions (Moravcsik, 1993, 2018), this study defines salience as the relative level of importance attached to an issue by a political actor in accordance to national preferences and interests.

In line with Zaun´s study (2016), it is expected that the negotiation behaviour of the EU states during the second phase of the CEAS was closely connected and influenced by the salience attached to this policy. Three aspects are hypothesised to interfere with the level of importance attached by the countries, namely: the number of asylum applications in total numbers and relative to the size of population (exposure to the phenomenon); the ´misfit´ between European and national policy; as well as the salience attached to this policy by the citizens.

Zaun´s concept of exposure (2016) is adopted to refer to the number of asylum claims a state has received prior and during the negotiations of the second phase of the CEAS. In contrast to her definition, exposure is not only operationalised by considering the total number of asylum claims that a country has received prior and during the negotiations of the policy, but also by the number of applications relative to the resident population during the same period. The second measurement allows a more comprehensive view of the asylum applications in the EU. Thus, it is expected that:

> *H1a: The higher the level of exposure to asylum claims (in total and/or relative to the size of population), the higher the level of importance that a member state attaches to the asylum policy.*

By focusing on the level of exposure to asylum applications in total numbers and relative to the resident population it is expected that countries such as Germany, the Netherlands, France, Sweden, Belgium and Luxembourg (according to Eurostat data) attached a high salience to the asylum policy in the second phase of the CEAS.

In addition to this variable, it also hypothesised that the ´misfit´ between European and national policy also influenced the salience attached by the states. According to the ´misfit model´ member states normally seek to influence the European policy-making to minimise the implementation costs (Börzel, 2002a; Héritier, 1996). In the first phase of the CEAS, Zaun (2016) found evidence that member states preferred to maintain their domestic legal *status quo*, but not all were successful in uploading their domestic preferences. As the Europeanisation literature shows the European integration has substantially affected national/subnational institutions, policies, political parties, public opinion, and identity. Furthermore it demonstrated that the impact of the EU on domestic level differs across member states, and Europeanisation presents both constraints and opportunities for institutions, national state actors, and national non-state actors (*inter alia* Andretta & Caiani, 2005; Arampatzi & Nicholls, 2012; Borrass, Sotirov, & Winkel, 2015; Börzel, 2002b; Eising, 2007; Fink-Hafner, Hafner-Fink, & Novak, 2015; Gerda, 2001; Hrbek, 1992; Koopmans, Erbe, & Meyer, 2010; Ladrech, 2005, 2007, 1994; López Aguilar, 1992; Poguntke, Aylott, Carter, Ladrech, & Luther, 2007; Schmidt, 1997).

Therefore, in order to reduce the impact of Europeanisation on the national asylum systems it is argued that in the second phase of the CEAS member states were also keen on uploading their national preferences into the European level to reduce the costs of legal and administrative adaption. As Börzel (2002a: 196) puts it ´the more a European policy fits the domestic context, the lower the adaptation costs in the implementation process´. So, it is hypothesised that:

> *H1b: The higher the ´misfit´ between European and national policy, the higher the salience attached by the EU member states.*

Member states ought to be studied not merely as passive takers of EU demands, but also as proactive actors that seek to shape and influence European policies, institutions and processes. In

other words, Europeanisation should be understood as "circular rather than unidirectional, and cyclical rather than one off" (Goetz, 2002: 4). Finally, this research postulates that the salience that decision-makers attached to this policy area was also related with the salience attached by the national citizens. While the link between public opinion and EU policy has often been assessed by scholars (Carrubba, 2001; Franklin & Wlezien, 1997; Hatton, 2016; Lahav, 2004; Toshkov, 2011; Wratil, 2018), less attention has been given to the interrelation between the level of importance attached to an issue across actors (Beyers, Dür, & Wonka, 2017; Bruycker, 2017).

According to Franklin and Wlezien (1997), and Toshkov (2011) there is a close relation between EU political output and public opinion. As observed by Toskov (2011) there was a great volume of EU legislation output when citizens´ support for EU membership was higher. During the period under analysis (1973-2008) this correlation seemed more prominent between the 1980s and 1990s. Carrubba´study (2001), in turn, focuses on the connection between electoral attitudes towards the European integration and the representatives´ preferences over the integration between 1977 and 1992. The author also concluded that representatives' preferences were indeed consistent with the electorate´s opinion. By way of explanation, when voters were more favourable towards integration, their representatives took a more supportive position in the integration process. A more recent study argues that national governments try to align their positions in the Council of the EU in accordance to the domestic public opinion to ensure re-election (Wratil, 2018).

Turning specifically to the immigration and asylum policies, several scholars studied different countries in Europe and argued that there is a gap between the public preferences and policy developments on immigration (Freeman, 1995; Freeman, Hansen, & Leal., 2013; Morales, Pilet, & Ruedin, 2015; Thomassen, 2012). The central argument is that immigration policies remain elite-dominated and are adopted out of public view. Nevertheless, by focusing on the EU level, Lahav (2004) suggested that public support for immigration cooperation has been reflected on the EU policy developments.

Therefore, considering the relationship between public opinion and the EU political responsiveness should one also expect an interrelation in the level of importance attached by EU decision-makers and citizens? Beyers et al. (2017) did not found a significant interrelation between

the salience attached by policy-makers and citizens. Bruycker (2017: 13), though, argues that political elites are more predisposed to address public interests when issues ´grow politicized´, i.e., issues that are ´publicly salient´ and on which civil society vigorously mobilise. Yet, not all the EU institutions respond in the same way. The author concluded that the EP in comparison with the Council and the EC seems to be the most vigorous when it comes to represent citizens' interest (Ibid.: 14). Given that it is a recent research agenda, this study is proposing to test whether there was an interrelation between the level of importance attached by the EU decision-makers and the citizens in the asylum policy. Contrary to what Beyers et al. (2017) argues, it is assumed that in the asylum policy:

> *H1c: The salience attached by the EU decision-makers was interrelated with the salience attached by the citizens.*

In sum, the available research on the EU asylum policy identifies issue-salience along with expertise and administrative capacity as the key determinant to account for state´s behaviour and bargaining success (Zaun, 2016). However, this research argues that issue-salience along with expertise is no longer a sufficient variable to explain member states´ negotiation behaviour in the post-Lisbon treaty developments. Therefore, it is proposed that a more accurate bargaining model, in line with the ACI framework, should not only consider issue-salience, but also formal and informal institutional rules. Hence, the following subtopic formulates hypotheses to account for the impact of the EU institutional rules on member states´ behaviour.

EU formal and informal rules: an institutional-based explanation

In accordance with the ACI framework, this study considers the institutional setting as a value explanation for member states' behaviour in the Council. It is important to acknowledge that the institutional changes adopted in the asylum policy after the Lisbon Treaty, in particularly the new voting rule in the Council (QMV), and the new power player in the legislative procedure (the EP) might have constrained or facilitated actors' negotiation choices and power. Furthermore, it is

necessary to also take into account the consensus norm discussed by the literature, in particularly its conjunction with the formal rules.

While there is significant research on how the distribution of votes might affect voting behaviour and policy output in the Council (*inter alia* Hayes-Renshaw & Wallace, 2006; Kóczy, 2012; Warntjen, 2017), there is still little research that explores empirically and systematically the extent to which institutional formal rules, in particular voting rules, motivate behavioural changes in the Council (e.g. Da Conceição-Heldt, 2006; Novak, 2013b; Pollack, 1994; Scharpf, 1988). As stated by Aksoy (2012: 538) actors' behaviour during the negotiation phase ´is at least as interesting as their voting records´, given that during this process their positions might change often and influence the policy output.

Scharpf (1988), for example, argued that unanimity seems to facilitate the search for individual interests; thus, decisions dependent upon this rule might be difficult to achieve if supporters of the policy adopt a ´confrontational´ negotiation style. In short, unanimity rule seems to respond better to a more cooperative style of negotiations. As Da Conceição-Heldt (2006: 156) puts it, as the states´ bargaining power increase with unanimity voting the costs under this voting rule are high, because a state is only ´willing to give up something of value with respect to one issue´ if he receives in exchange ´concessions with respect to another more important issue´. Pollack (1994) developed a different approach based on the analysis of voting rules and policy types and concluded that if on the one hand unanimity hinders agreements on distributive and regulative policies, on the other it might facilitate the establishment of new redistributive policies, as this type of policy often requires side-payments to get all players on board.

Turning specifically to QMV, some scholars argue that it appears to inhibit issue-linkage, because there is no need to look for jointly solutions and there is always the possibility of pursuing a winning coalition (Scharpf, 1988; see also Elgström & Jönsson, 2000: 690), which might result into a more confrontational intergovernmental decision-making arena. In contrast to this argument, Novak (2013b: 179) claims that the majority voting allows a more constructive behaviour, because member states know that they can easily be outvoted. According to this scholar QMV creates incentives to negotiate, because: 1) the actors aim decisional productivity, thus, they have to

negotiate and reach a general agreement or consensus because otherwise it would be difficult to reach a qualified majority; and 2) the ´high threshold of qualified majority´ and ´shadow of the future´ encourages the opponents to remain in silent (Ibid.: 192-193)

Therefore, in accordance with Novak (2013b), it is hypothesised that QMV enables a more cooperative environment in the Council. If under unanimity voting rule states are more likely to resort to hard bargaining strategies in issues with high salience (e.g. the threat to veto), resulting into a tenser intergovernmental decision-making arena with a ripple effect in future negotiations; under QMV the impossibility to veto a decision poses a significant constraint on the individual actions of member states. In short, it is expected that:

> *H2a: QMV rule is likely to enable a cooperative environment in the Council, and empower coalition-building, compromise and trade-offs.*

Academics do not offer us a consensual position on the predominant type of negotiation in the Council, much less is known on the mode of negotiation expected on the asylum policy. Nevertheless, according to Elgström and Jönsson (2000) problem-solving behaviour seems to be predominant in the Council´s negotiations. Furthermore, there is evidence that QMV unshackles the legislative process and results in optimal institutional conditions for policy transfer (Bulmer, Dolowitz, Humphreys, & Padgett, 2007; Héritier, 1996). Therefore, building on the existing literature, it is hypothesised that in the asylum policy:

> *H2b: QMV is more likely to lead member states to adopt a problem-solving approach to negotiations, than a bargaining approach.*

In agreement with the existing literature (*inter alia* Hayes-Renshaw et al., 2006; Lewis, 1998, 2003) it is also anticipated that the decision-making in the Council was reached by consensus during the second phase of the CEAS, despite the change of the voting rules. What remains under-researched is the underlying motives for this pattern in the asylum policy (see Roos, 2018). Few scholars combine both rationalism and constructivism theories to explain consensual decisions in

the Council. The known exceptions are Novak´s work (2013a) that considers consensus as a combination of internal norms and a strategic tool to avoid blame; and specifically on the asylum policy the study conducted by Aus (2008: 116), which describes the negotiations of the Dublin Regulation II as ´a phase of purposive-rational intergovernmental exchange followed by a phase of value-rational adherence to institutionalized rules´. Building on the two conceptual strands it is argued that in order to better understand consensus in the Council in the asylum policy, it is necessary to consider both approaches. Therefore, it is hypothesised that:

H3a: Consensus in the asylum policy under QMV is likely to result from a combination of (1) an existing informal institutional rule (norm) in the Council and (2) rational decisions by pondering the pros and cons of standing alone in a decision.

Another important element to this discussion is how formal and informal institutional rules interact in the Council (Stacey & Rittberger, 2003). Considering Aus´ conclusions (2008) one should expect that both rules co-exist in the Council and were complementary to each other also in the recast APD. In short, it is expected that in the asylum policy:

H3b: Consensus norm is more likely to complement the formal institutional rules than supersede them.

Due to the new decision-making rule in the asylum policy, it is also necessary to contemplate a control variable to account for variation of power between member states and consequently difference in the negotiation behaviour and capacity in the Council, i.e., the relative size of states according to their voting power under QMV. As Hosli (1996) argued, QMV changed the voting power distribution among member states to the detriment of small member states. A more recent study also concludes that the Lisbon model does not distribute equally the power and it gives advantage to the bigger countries (Bârsan-Pipu & Tache, 2009). Therefore, in line with this literature it is expected to observe in the asylum policy that:

H4a: Under QMV larger member states have more power than smaller member states

Nonetheless, according to Zaun (2016) rather than voting power and size, geographical notions, or cultural differences, having a strong and informed bargaining position can explain bargaining success in the asylum policy. In other words, a high level of expertise and information on legal procedures, technical issues, and the preferences of other actors can be an advantage. Furthermore, as Panke (2010b, 2010a, 2012a) argued, the salience attached to an issue can explain why smaller/weaker states can succeed over structurally advantaged states (Bueno de Mesquita & Stokman, 1994; Habeeb, 1988; Panke, 2010a). Thus, the size of a member state may not interfere with the capability to influence the policy output, even under QMV, but it may well interfere with the behaviour and strategies in the negotiation process (Dur & Mateo, 2010). As Dur and Mateo argued small member states have more to lose as they cannot as easily form winning coalitions in the Council. So, it is assumed that in the asylum policy:

H4b: Smaller member states resorted to a ´smart state strategy´ to compensate the loss of vetoing power in the asylum policy.

According to Grøn & Wivel (2011: 535) there are three smart strategies that small member can employ to overcome the institutional challenges: i) the state as lobbyist focusing on the EP and Commission; ii) the state as self-interested mediator in the Council; and iii) the state as norm entrepreneur by focusing on policies rather than institutions. Nevertheless in light of the new institutional setting (i.e. mainly the new decision-making rule in the Council) despite the level of importance attached to the asylum policy and the size of a member state it is hypothesized that in the asylum policy:

H4c: Under QMV member states, regardless of their voting power, are more like to resort to soft bargaining strategies than to hard bargaining strategies.

According to Dur and Mateo (2010: 561) soft bargaining is characterised by the use of ´friendly tactics´ in contrast to hard bargaining that are characterised by ´conflictual or aggressive tactics´. However, regardless of the cooperative environment under QMV and the expected

consensus in this policy area it does not mean that there is no possibility to rely to more confrontational strategies. Member states are expected to take advantage to one particular conflictual tactic, i.e., what Golub (1999) referred to as the ´shadow of the vote´. In other words, member states that attach a high level of importance to the issue and are able to build a blocking minority, will use it as a ´bargaining chip´ with other member states and the Presidency to get their preferences heard and accommodated in the final decision.

In addition, it is expected that the EU member states´ negotiation behaviour and strategies to be influenced by the new ordinary legislative procedure. The majority of studies focus on the empowerment of the EP (Héritier & Moury, 2011; Hix & Høyland, 2013; Kaunert & Léonard, 2012; Lovec & Erjavec, 2015; Trauner & Ripoll Servent, 2016), but less is known on how member states might benefit from this empowerment. One study is known for its strategic view on how the member states benefit from the empowerment of the EP (König, 2008). According to König´s rational approach member states can strategically misinform the conciliation bargains to influence the policy output closer to their *status quo*.

By discussing states as lobbyists, Panke (2012c) sheds some light on whether and how often states engage in lobbying with three main EU institutional actors, namely: The European Commission, the Presidency and the EP. Specifically on the Parliament, the author concluded that normally the EP is less lobbied in comparison with the other two institutional actors mainly due to: a) a ´transaction-cost effect´, i.e., the EP does not participate in the Council negotiations so there is less opportunities to informally reach the EP; and b) because it only makes sense if the policy under negotiation is adopted under the ´co-decision´ procedure (Ibid.: 145). Yet, according to this scholar this strategy might increase the chances that the EP become responsive to member states preferences and interests (Ibid.). Nevertheless, there are still some blind spots in this topic, for example, how this new legislative procedure might facilitate or constraint states action in the Council. Therefore, this study will focus on the perspective that perceives the empowerment of the EP as a benefit for member states under QMV, by hypothesising that:

H5: The ordinary legislative procedure is a new strategic opportunity to member states upload their preferences and interests, and it compensates the loss of the veto power in the Council.

In summary, the main argument of the study is that states´ negotiation behaviour in the Council in the asylum policy are influenced by both actor and institutional-related factors. Although, the current literature shows that states might ultimately agree by consensus either to avoid exposure among peers, public scrutiny or to comply with norms, during the negotiations at the preparatory bodies of the Council it is expected that member states actively push for their national interests. Furthermore, their negotiation behaviour and strategies are assumed to be influenced and shaped by the salience attached to the issue and by the institutional rules, in particularly the decision-making rule in the Council, the ´co-decision´ procedure, and consensus norm in the Council.

3.2.3. Case selection and policy background

The focus of this research is the EU asylum policy, in particularly the second phase of the Common European Asylum System (time period between 2009 and 2013). Nevertheless, it is useful to discuss the findings through a longitudinal perspective by considering the period before and after this phase to enhance understanding of the factors that influenced and shaped member states´ behaviour in the asylum policy area after the Lisbon Treaty's ratification. There are several reasons to focus in this phase, namely: i) the second phase of the CEAS marked the first time that decisions in the Council in this policy area were made by qualified majority voting; ii) the ordinary legislative procedure was introduced, i.e. the EP is now a co-legislator; iii) the decision-making in this phase has become a lot more complex with the accession of 12 new Member States; and iv) while the first phase aimed at established minimum standards, the second phase aimed at ensuring better and more harmonised standards amongst member states (*inter alia* Bačić, 2012; Chetail, 2016; Hailbronner & Thym, 2016). By focusing on the second phase of the CEAS it is possible to

investigate, apart from the actor-related explanations put forward by previous scholars, the impact of the EU institutional setting in actors´ negotiation behaviour and strategies in the Council.

After exploring the reasons to focus on the second phase, it is now identified the legislative instrument under analysis. Hence, this research will look at the decision-making process behind the recast APD adopted in 2013. Together with the Dublin Regulation, this directive is regarded as a key legislative instrument in the asylum package, as it sets clear principles and guarantees for persons seeking international protection, and defines member states' asylum procedural responsibilities within the CEAS (International Association of Refugee Law Judges, 2016; Monar, 2014). This directive is one of the first measures to be considered in an asylum process, and it has a very high impact on national asylum systems (Ackers, 2005). The decision-making process behind the whole asylum package has not been systematically analysed, but the study design makes it possible to analyse if the decisions in the different legal instruments are interconnected and/or respond to different factors. In order to enhance understanding of the development of the EU asylum policy, the next section will address the different legislative instruments observed throughout the different phases of the CEAS.

The Common European Asylum System in a nutshell

In the mid-1980s five Member States (Germany, France, the Netherlands, Belgium and Luxembourg) shared their desire to abolish the internal borders among the EU to facilitate the full achievement of the single market (Faist & Ette, 2007). With the abolishment of the borders, states orientated by a ´realist´ policy frame of internal security, pushed for the so called ´compensatory measures´ that included strengthening external border controls and cooperation in the field of asylum and immigration (Lavenex, 2001a: 27; Niemann, 2006: 196-98). Accordingly, these five countries signed the Schengen agreement in 1985, which established common rules regarding visas, the right to asylum and checks at external borders – though, only after signing the Treaty of Amsterdam this agreement was incorporated into the EU acquis.

Other non-binding cooperation initiatives were launched during the 1990s. The Dublin Convention signed in 1990 (entered into force in 1997) aimed to prevent the phenomenon of ´asylum shopping´, by establishing that ´the Member State responsible for examining the application for asylum´ is the country where the first application for asylum is lodged (article 3(6), Dublin Convention, OJ C 254/01, 19.8.1997). Additionally, there were also other initiatives like the ´London Resolutions´ in 1992, which sought to harmonised specific criteria and definitions such as: ´safe third countries´ (outside the EU) for asylum application purposes; ´safe countries of origins´; and ´manifestly unfounded´ claims that could be dismissed without a reconsideration (Faist & Ette, 2007: 33; Hatton, 2005: 108).

These first intergovernmental efforts to cooperate at the European Level coincided with the influx of refugees into several Member States, especially Germany and France, following the conflicts in the Balkans, the dissolution of the Soviet Union, and the fall of the Berlin wall (Hatton, 2005; Lavenex, 2001a). However, only with a new chapter on asylum and immigration policies in the Amsterdam Treaty, which came into force in 1999, it was granted legislative powers to EU institutions in this sensitive policy area – asylum policy was now part of the First Pillar (Bačić, 2012; Bank, 1999). In other words, the Treaty gave to the EC the right of initiative to propose a set of harmonised legislation on asylum[8].

Despite this change, the Amsterdam Treaty foresaw a transitional period of five years in which ´member States were still left with a wide range of powers and remained the main actors in the asylum policy area´ (Bačić, 2012:48; see also Ripoll Servent & Trauner, 2014; Trauner & Ripoll Servent, 2016). By way of explanation, during this transitional period the Commission had to share its right of initiative with the Member States, and the EP only had an advisory role (Guiraudon, 2000: 263-264; Kaunert & Léonard, 2012: 1404-1405). Only with the Lisbon Treaty, which entered into force on 1 December 2009, the national veto power in this area was replaced by the qualified majority voting, and the ordinary legislative procedure (previously known as the co-decision procedure) was introduced (article 294 of TFEU). Nevertheless, the Amsterdam Treaty

[8] However, not all member states adopted this new institutional framework. The United Kingdom, Ireland and Denmark have opted out of the common immigration, asylum and civil law policies.

showed that member states were ready to take the next step in this policy area, by accepting to adopt (article 73K):

> ´(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
>
> (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
>
> (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,
>
> (d) minimum standards on procedures in Member States for granting or withdrawing refugee status (…)´

This commitment was reinforced during the special European Council meeting held in Tampere (1999). Since this meeting, according to the European Commission 'the EU has been working to create a CEAS, and improve the current legislative framework´(European Commission, 2014: 3). The European Council has agreed to work towards this common system in order to address the large differences in asylum systems and practices among them. Other challenges were the idea of ´asylum shopping´, already mentioned in 1990, and the ´burden-sharing´, as the asylum seekers seemed to gravitate towards countries with higher recognition rates and social benefits (Faist & Ette, 2007).

The first phase of the CEAS

Based on the Tampere Conclusions, the first phase of the CEAS introduced a number of legislative instruments, namely:

- The Eurodac Regulation, 2000 [9] (entered into force on 15 December 2000);
- The Temporary Protection Directive, 2001 [10](entered into force on 7 August 2001);
- The Dublin II Regulation, 2003 [11] (entered into force on 17 March 2003);
- The Commission Regulation laying down detailed rules for the application of the Dublin Regulation, 2003 [12] (entered into force on 5 September 2003);
- The Reception Conditions Directive (RCD), 2003 [13] (entered into force on 6 February 2003);
- The Qualification Directive (QD), 2004 [14] (entered into force on 20 October 2004)
- The Asylum Procedures Directive (APD), 2005 [15] (entered into force on 2 January 2006).

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[9] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1

[10] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12

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

[12] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a a third-country national [2003] OJ L 222/3

[13] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18

[14] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12

[15] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13

The Dublin II Regulation that replaced the 1990 Dublin Convention established the criteria and mechanisms for determining the member state responsible for processing an asylum application. Only one state can be responsible for examining the application in accordance with the following criteria: a) ´principle of family unity´ (article 6, 7 and 8); b) ´issuance of residence permits or visas´ (article 9); c) ´illegal entry or stay in a Member State´ (article 10); d) ´legal entry in a Member State´ (article 11); and e) ´application in an international transit area of an airport´ (article 12) (EUR-Lex, 2011). The Eurodac Regulation facilitated the application of the Dublin Convention by creating a Central Unit to operate a comprehensive asylum fingerprint database. This database allows member states to compare asylum seekers´ fingerprints, to verify if an individual have already lodge an application in other member states; and to cooperate in terms of criminal investigations.

Another important act was the Temporary Protection Directive (TPD) that in the event of a max influx of asylum seekers from extra-EU countries provides an immediate temporary protection. This directive aims to reduce the differences between the policies of the member states on the reception and treatment of these individuals (European Commission, 2017). However, in order to activate this directive only the Council can declare a situation of max influx, after a proposal from the Commission or a request from a member state (European Commission, 2016: 1-2). Italy and Malta requested its activation in 2011, but according to the 2016 Commission study on the TPD it was never triggered (European Commission, 2016c).

As regards the asylum instruments, three directives have established common minimum standards for: the reception of asylum seekers; qualification and status of third country nationals or stateless persons as refugees; and procedures for granting and withdrawing refugee status. The RCD, adopted in 2003, introduced minimum standards on the conditions provided for the reception of asylum seekers, such as housing, education, employment, residence and freedom of movement, health care, among others. With this directive the EU expected to ´limit the secondary movements of asylum seekers´ that could be ´influenced by the variety of conditions for their reception´ among member states (Council, 2003). The QD, in turn, clarified the definition of refugee and introduced

the criteria on which ´applicants for international protection are to be recognised as eligible for subsidiary protection´(Council, 2004). According to article 2(c) of the Directive a refugee is:

> ´ a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it (…)´

It was the first legislative act that specifically indicated the necessary qualifications for a third-country national to be considered as a refugee, and transposed the criteria of the Geneva Convention (Bačić, 2012). Finally, the APD established minimum standards for granting and withdrawing refugee status. Although, it was the last and most time-consuming adopted directive, it is one of the first measures to be considered in an asylum process. Similarly to the RCD, the EU hoped that the provisions in this directive would limit the secondary movements of asylum seekers. Furthermore, the preamble of the directive states that EU member states had ´the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection´ than foreseen by the minimum standards. This directive systematised the basic principles and guarantees of refugees, such as the right to make an application for asylum on his/her own behalf and/or on behalf of his/her dependents; the right to remain in the Member state during the examination of the application; the right to legal assistance and representation; among other rights (Council, 2005a).

The second phase of the CEAS

In November 2004[16], after a five-year period from the first phase of the CEAS, ´the European Council called for the Commission to submit the second-stage instruments and measures to the Council and the EP with a view to their adoption before the end of 2010´ (Council, 2005b). However, only by June 2013 the second stage was completed[17]. According to the Hague Programme, the aims of the CEAS in the second phase were (Council, 2005b):

> ´the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It [was to] be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase´ (pp. C 53/3).

The article 78 of the Treaty on the Functioning of the European Union (TFEU), which entered into force in December 2009[18],provided one of ´the legal basis for the development of the second phase of the CEAS´ (International Association of Refugee Law Judges, 2016:16-17). Other ground rules for EU action in this policy are the Treaty on European Union (TEU), and the Charter of Fundamental Rights of the European Union. According to article 78(2) of the TFEU, the decision-making on this policy is now shared between both the European Parliament and Council (under the ordinary legislative procedure). Furthermore, the Lisbon Treaty empowered the Commission as the only EU institution with the right to initiate legislation in this policy area, and introduced full jurisdiction to the Court of Justice of the European Union (CJEU), and QMV in the Council.

With the exception of the Temporary Protection Directive and the Commission Regulation that established detailed rules for the application of the Dublin Regulation (adopted in 2003), the

[16] European Council, 'Brussels European Council, 4-5 November 2004, Presidency Conclusions' 14292/1/04 Brussels 8 December 2004 - The Hague Programme.

[17] See European Council, European Pact on Immigration and Asylum, 24 September 2008, EU Doc 13440/08; and European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens, 2 December 2009

[18] Consolidated version as amended by the Treaty of Lisbon.

other legal instruments adopted in the first phase of the CEAS suffered amendments (International Association of Refugee Law Judges, 2016). Therefore, the second phase of the CEAS encompassed the following legislation:

- The Qualification Directive (recast), 2011 [19] (entered into force on 9 January 2012);
- The Eurodac Regulation (recast), 2013 [20] (entered into force 19 July 2013);
- The Dublin III Regulation (recast), 2013 [21] (entered into force 19 July 2013);
- The Reception Conditions Directive (recast), 2013[22] (entered into force 19 July 2013);
- The Asylum Procedures Directive (recast), 2013[23] (entered into force 19 July 2013).

The Recast Dublin III Regulation aimed at enhancing not only the efficiency of the system, but also the overall protection of asylum seekers (recital 9 of the Dublin III Regulation). The criteria for determining the member state responsible for processing an asylum application remained the same, but a new mechanism ´for early warning, preparedness and crisis management´ was

[19] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9

[20] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of finger-prints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1

[21] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III) [2013] OJ L 180/31

[22] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96

[23] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60

introduced (article 33). Furthermore, the revised Regulation clarified the rules and rights that apply to member states and asylum seekers, respectively. The new mechanism foresees that states facing a substantial ´pressure and/or problems in the functioning of its asylum system´ must be invited by the Commission to draw up a preventive action plan. The member state has to ´ensure that the deficiencies identified are addressed before the situation deteriorates´, and ´when drawing up a preventive action plan, the Member State may call for the assistance of the Commission, other Member States, European Asylum Support Office (EASO) and other relevant Union agencies´(article 33 (1))[24] (see Hruschka, 2014) . Regarding the Eurodac Regulation, the change was mainly in terms of law enforcement, i.e., under specific circumstances and under strict conditions of crimes, such as murder and terrorism, the national law enforcement authorities and Europol are allowed to access the EU database to compare fingerprint data (article 1(2)).

If in the first phase of the CEAS the objective was to agree on common minimum standards, on the second phase the aim was to reach a higher level of policy harmonisation amongst member states on the basis of ´high protection standards´ (Council, 2005b; European Commission, 2008). The recast QD, for example, had a curious development by adapting the terminology to ´beneficiary of international protection´ to comprehend both the ´refugee status´ and ´subsidiary protection´ (article 2(b)), and by bringing closer the rights and benefits granted to a person who has been granted a subsidiary protection status and individuals granted refugee status (International Association of Refugee Law Judges, 2016: 42). It is a central instrument because it provides ´standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted´ (article 1).

Turning to the recast RCD, it provided more harmonised standards on living conditions for applicants seeking international protection in all EU states, in terms of housing, health care and education. Compared to the previous directive, the recast has an expanded application to:

[24] For a comprehensive analysis of the revised Dublin convention see Hruschka (2014).

´ all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law´ (Recast RCD, article 3(1)).

Another noteworthy provision present in this directive is the one related with the detention of applicants. According to article 8 (1) of the RCD ´an applicant shall not be detained ´ for the sole reason that he or she is an applicant […] ´. Nevertheless, a member state, based on an individual assessment of each case, may detain an applicant:

´a) in order to determine or verify his or her identity or nationality;
(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
d) when he or she is detained subject to a return procedure […].´ (article 8(2)).

According to Velluti (2016) even if some material reception provisions have improved in the recast, there is still a margin for interpretation of these conditions. In other words, it means that there is scope for variation on the hosting conditions provided by the different EU member states. Furthermore, the prevalence of a ´securitisation´ paradigm empowers an inadequate standard of living for persons seeking international protection, because there is still a ´distinction between those who are members of a given political community and those who are not members´ (Ibid.: 217).

As regards the directive under analysis, the recast APD, it was articulated with the QD as it also adopted the ´international protection´ terminology. There is now a unique procedure for both asylum seekers and individuals eligible for subsidiary protection (articles 6-29), showing an effort to improve the coherence between the CEAS legal instruments. According to Monar (2014) the recast directive not only improved the guarantees for applicants, for example, in what concerns the

personal interviews (article 14), the reporting and recording of personal interviews (article 17), the conditions for free legal assistance and information (article 21), and the training of personnel to conduct interviews (article 4(3)); but also became more efficient by implementing a time limit to reach a decision, more precisely within six months (article 31(3)).

The third phase of the CEAS

In 2016, the Commission tabled to the Council and Parliament two legislative packages to reform the CEAS, which are still being negotiated. This reform was a response to the European Council´s request in February 2016 to ´rapidly stem the flows, protect our external borders, reduce illegal migration and safeguard the integrity of the Schengen area´ (Council, 2016). The two packages tabled on 4 of May 2016 and 13 July 2016, respectively, include the following proposals:

- A revised Dublin regulation[25];
- A reinforced Eurodac regulation[26];
- A regulation establishing a European Union Agency for Asylum[27].

[25] Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Brussels, 4.5.2016, COM(2016) 270 final, 2016/0133 (COD).

[26] Proposal for a regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] , for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast). Brussels, 4.5.2016 COM(2016) 272 final 2016/0132 (COD).

[27] Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010. Brussels, 4.5.2016 COM(2016) 271 final 2016/0131 (COD).

- A regulation on the asylum procedures[28]
- A regulation on standards for the qualification of applicants[29]and;
- A revised directive of the reception conditions of applicants[30].

The main objective of the reform of the Common European System is to ´form a medium term response to future migration challenges´ (European Commission, 2016d). As the Commissioner for Migration and Home Affairs stated:

> ´ If the current refugee crisis has shown one thing, it is that the status quo of our Common European Asylum System is not an option. The time has come for a reformed and more equitable system, based on common rules and a fairer sharing of responsibility (European Commission, 2016d).´

Three key policy/structural changes were envisioned by the Commission. The first is related with the Dublin system. The crisis has shown that there is a need to improve the management of high influxes of asylum seekers in specific points of entry in Europe, and to guarantee both solidarity and responsibility mechanisms (European Commission, 2016a). The second change is the replacement of asylum procedures and qualification directives with a regulation. This change aims at harmonising further the CEAS and to reduce the pull factors of asylum seekers to the EU (European Commission, 2016a). Whereas the directives set out a goal that have to be incorporated

[28] Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. Brussels, 13.7.2016 COM(2016) 467 final 2016/0224 (COD)

[29] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Brussels, 13.7.2016 COM(2016) 466 final, 2016/0223 (COD)

[30] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down standards for the reception of applicants for international protection (recast). Brussels, 13.7.2016, COM(2016) 465 final, 2016/0222 (COD).

into national law within a transposition period but according to individual member states' national characteristics and choices; the regulations are binding legislative acts that apply automatically, entirely and uniformly to all EU states. The third proposal is associated with the EASO. The Commission aims to strengthen the mandate of EASO by proposing to turn it into a fully-fledged agency (i.e., European Union Agency for Asylum). Its main objective should be to guarantee that member states have the necessary operational and technical support to implement the CEAS (European Commission, 2016b, 2016a).

Turning now to the state of affairs of the negotiations of the reform, the 2018 June European Council conclusions highlighted that several files were closed to finalisation. However, the APR and Dublin regulation still required further examination, showing that a consensual decision was not yet reached in these two files (European Council, 2018b). During the European Council meeting on 18 October 2018 the Austrian Presidency was encouraged to continue its work on the reform of the EU asylum system, demonstrating that a final decision has yet to be reached (European Council, 2018a). Similar to June 2018, in October the JHA Council was still struggling to achieve a consensual decision on the Dublin regulation. In the APR file there were some developments, and the discussions are now at the JHA Counsellors level but a final compromise was still not reached (Council, 2018b). Furthermore, three files seem to foster disagreement among member states, specifically the qualified regulation, the resettlement regulation, and the reception conditions. The EP stands by the provisional agreements and does not intend to continue the negotiations with the Council for now in these three files (Council, 2018b). The European Council is pushing for a decision as soon as possible, but it seems that the third phase of the CEAS have a long road ahead. Thus, it is difficult to predict whether the entire package will collect the support of the Council.

3.2.4. Actors and modes of interaction

The actors under investigation are the following ten EU member states: Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden[31]. As previously referred this study concentrates on the old member states because the ´newly acceding´ member states do not have the historical perspective and political experience on the changed voting rules in the Council. In other words, the new member states were only involved in the second phase of the CEAS, which was adopted under QMV in the Council. Therefore, a point of comparison with the previous phase that was adopted under a different institutional framework was hence not possible with this group of countries.

In order to avoid case selection bias it was made the decision to study all the old member states involved in the second phase of the CEAS. This was a theory-based decision to guarantee that the different variables identified by the literature that explain the interaction in the Council would not compromise the results. These variables are: voting power and size, geographical position, cultural differences and salience. However, two out of twelve old member states involved in the negotiations did not accept to participate in the study (Austria and Greece). Two main reasons were given to justify the non-participation, namely: i) there is an internal policy to not respond to questions when a file is still active and under negotiations; ii) the government has changed and the previous colleague no longer works at the Permanent Representation.

This can be seen as a limitation because the conclusions drawn from the sample of the old member states may not fit entirely to the cases of Greece and Austria. However, both Greece and Austria were referred by their peers in different circumstances making possible not only to understand how salient the topic was for these two countries, but also what were they aiming for and were able to get from the negotiations. This insight was not specifically referred in the findings, but allowed the researcher to have a better understanding of the political process and to acknowledge how some of the factors also constrained the action of these two actors. Furthermore,

[31] Denmark, Ireland and the United Kingdom did not participate in the decision as they have an opt-out from certain measures relating to justice and home affairs.

the other ten countries share some features with the lacking two states (geographical position, high number of asylum claims, etc.), what can be considered as a proxy.

In addition to the ten old member states, two ´new´ member states were included in the study to have a first insight on the third phase of the CEAS from the perspective of the ´new´ states (i.e., Malta and Poland). In the current reform, both countries are attaching a high salience to this policy area, but they have three main different characteristics: geographical position, size of the country, and the number of asylum applications. This sample is not representative of the twelve ´new´ member states, but they provide some clues on why the environment and behaviour in the Council between the second and third phases of the CEAS have changed. This decision was made after talking with key political actors from the old member states and realising that the ´new´ member states are at the centre of the discussions in the current reform.

According to the ACI framework, two features characterise the actors: their orientations (perceptions and preferences) and their capabilities. As previously indicated capabilities refers to all the action resources that are used to influence a policy outcome. The actors' orientations are triggered by a specific policy problem or issue, and are related to ´desirable or undesirable nature of the status quo´, the effectiveness of courses of action, and the preferred outcomes (Scharpf, 1997:43). One important aspect of this discussion is that perceptions and preferences might be influenced but not determined by the institutions, rather it is mostly related to individual or organisational self-interests and aspirations (Scharpf, 1997, 2000).

Turning specifically to the modes of interaction, Scharpf distinguishes between: ´mutual adjustment´; ´intergovernmental negotiations´; ´joint-decision making´; and ´hierarchical direction´ (Scharpf, 2001). This research lies within the ´joint-decision making´ mode, which comprehends both intergovernmental and supranational features. In this mode of interaction the policy is proposed by the Commission, adopted by the Council and increasingly by the EP as well. In this mode of interaction, institutional capacity and policy choices vary considerable because they are not only dependent upon the ´institutional resources and strategies of supranational actors´, but also on ´the convergence of preferences among national governments´(Ibid.: 12). The existing literature already provides some clues on what to expect from the institutional dynamic in the

asylum policy, i.e., the Council is still the main player in this policy area despite the new supranationalism dynamic, and there is an indication that decisions in this policy area are mainly reached in the Council without vetoing or explicitly voting (e.g. Hayes-Renshaw et al., 2006; Ripoll Servent & Trauner, 2014).

3.2.5. Research methods

The present study is designed as a within-case analysis as it focuses on the process that occurred in one specific EU policy (asylum policy), and in a particular point in time of that policy (second phase of the Common European Asylum System). Within-case analysis is an ´ in-depth exploration of a single case as a stand-alone entity´ (Mills, Eurepos, & Wiebe, 2010: 970). As George and Bennet (2005: 47) argue within-case analysis has the potential to accomplish high levels of conceptual validity, to foster new variables and hypotheses, and to assess complex casual mechanisms. Furthermore, this analysis allows to be immersed in the data, and thoroughly understand all the elements that constitute the phenomenon under study (Mills, Eurepos, & Wiebe, 2010).

One of the main critiques to the case-study method is that the knowledge generated in one particular case-study may not necessarily be generalised to other cases. As it is going to be presented in the following chapters, the empirical data shows that the old member states attached different levels of salience to the different legislative instruments within the asylum policy, which could mean that the behaviour in these legislative instruments might not be the same as observed in the APD. The same is true for other EU policy areas. However, there are strategies that can be applied to the generalisation of qualitative data, namely: empirical generalisation, analytic generalisation, case-to-case transfer, internal/external generalisation, and lower-order/ higher-order generalisability, amongst other (see Maxwell & Chmiel, 2014). As an illustration, the knowledge generated in this study can be transferred to another asylum legislative instrument or policy, i.e., the case-to-case transfer strategy allows the reader to transfer some properties of the research to a new situation and adapt it according to their own context and study.

In line with numerous studies on European Integration (see Schimmelfennig, 2015) the method adopted to conduct this analysis is process tracing. Process-tracing has a unique position in the study of the European Integration because it is ´generally studied as a series or sequence of individual big decisions´ (Ibid.: 99). George and Bennet (2005: 206) define process tracing as a method that ´ attempts to identify the intervening causal process - the causal chain and causal mechanism - between an independent variable (or variables) and the outcome of the dependent variable´. By using archival documents, interviews and other sources (Ibid.: 6) the researcher is not only able to analyse how the processes or patterns of a specific case fit with existing explanations predicted in theory; but also to generate new theory by learning about the casual factors or mechanisms that explain a specific phenomenon (Bennett, 2004: 19-55; Mills et al., 2010: 970-973).

According to Beach and Pedersen (2013) the process tracing method can be used for three different research purposes: theory- testing; theory-building; and explaining an historical outcome. While the first two are ´theoretic-centric´, the last is a ´case-centric process tracing´ (Ibid.: 11). Focusing on the theoretic-centric process tracing approach, this study aims at both testing and building on existing theory. Although the research is mainly based on explanations formulated by Zaun (2016), it goes further by analysing and developing additional explanations for the member states' negotiation behaviour (dependent variable) in the second phase of the CEAS. Process tracing should reveal: how was the negotiation behaviour in the Council after the Lisbon Treaty; which factors have influenced and shaped member states´ negotiation behaviour; and what were the strategies adopted by the member-states to influence the policy output. . In a nutshell, process tracing allows the in-depth study of the negotiation process in the Council and to assess the influence of the different factors on member states' negotiation behaviour.

To trace the process in this policy area it was used two research techniques: document analysis of existing data and semi-structured interviews with policy-makers and experts. The existing written sources consisted of Council documents, in particularly minutes of individual meetings at the WP, JHA Counsellors and COREPER meetings; EP documents; and EC documents. Furthermore, it was analysed secondary quantitative data provided by the

Eurobarometer survey and Eurostat database. The Eurobarometer data was important to better comprehend the ´most important national concerns´ amongst EU citizens between the years 2009 and 2013; and the Eurostat data to have a clear picture of the asylum claims within the EU27.

The EU documents provide preliminary information about the political process and key actors involved in the asylum policy, but they did not allow to understand why and how political actors sought to influence and shape the policy outcome. Therefore, in order to better answer the research question it was necessary to triangulate the existing data with data collected through semi-structured interviews. Triangulation of data sources permits the researcher not only to cross-check the casual inferences resulted from process tracing, but also to have a greater confidence in findings (Bennett & Checkel, 2015: 28; Bryman, 2012: 392).

Regarding the original data it was collected by conducting 21 semi-structured interviews with: Permanent Representatives of the European Union; experts from the capitals, the EU institutions, and from an inter-governmental body dedicated to asylum. The interviews were conducted between November 2017 and July 2018 in Brussels. The interviews with the Brussels-based experts were conducted in person, while the ones conducted with experts from the capitals were conducted either via telephone or Skype call. The institutions were firstly contacted via e-mail with an invitation to participate in the project and to schedule a meeting with the expert(s) working in the field. Not all the institutions were keen in providing me the contact of the experts, thus, some of the contacts were gather through snowball method.

Given that the policy developments of the first and second phase of the CEAS were such a long time ago it was difficult, or even impossible, to reach all the key players involved in the negotiations of the asylum procedures. For example, the Commissioner for Justice, Freedom and Security, Jacques Barrot, in functions between 2008 and 2010 died in December 2014. Other difficulties were, for instance, because the experts no longer worked at the institution or the current government had a different political colour and did not have contact with the previous colleagues. Furthermore, given that the current reform of the asylum package is still being negotiated in the Council and EP some experts refused to participate. Nevertheless, for each researched member

state it was possible to either talk with both permanent representative and expert from the capital, or just one of the two experts.

Given the sensitivity of the topic, the interviewees were asked to sign a consent form to confirm that they accepted to be recorded. They had to choose from the two following options: 1) I agree for my recorded quotes to be used and cited with the identity of my institution; 2) I agree for my recorded quotes to be used but cited anonymously. The majority of the respondents chose option 2, thus, in order to guarantee the confidentiality the study does not make reference to the institution name, only the number of the interview and the name of the country.

The interviews were conducted with the support of an interview guide comprising between 11 and 23 questions. There were three main interview guides, i.e., one for the Permanent Representation, one for the EU institutions and one for the inter-governmental body. The questions were mostly similar but adapted to each institutional reality and phase of the CEAS (annex A). The interview guides had three key topics: 1) issue-salience; 2) shape and influence of policy output according to national interests; and 3) negotiation strategies. In a nutshell, the interviews focused on the i) the level of importance attached by the country to the APD/R; ii) the aspects of the directive that were most relevant for the country (delegation), and accordingly that they had to negotiate on behalf of the country; and iii) the negotiation strategies adopted by the delegation and other Member States to shape and influence the policy output.

The interview data was analysed and coded by using the Qualitative Data Analysis Software MAXQDA. The coding scheme is composed by 20 codes, namely: issue-salience; member states' resources; public opinion; misfit; costs of transposition; APD/Issue; recast APD/issue; APR/issue; actors' effectivity in negotiation (influence); negotiation environment in the Council; negotiation strategies; impossibility of vetoing; factors that influence/shape negotiation behaviour; member states´ attitude in negotiations; change in member states´ positions throughout phases of the CEAS; EU inter-institutional relations; EU intra-institutional relations; Council levels; type of policy; other aspects (annex B). The interview guide and coding scheme of this research were developed not only based on the literature, with particular attention to the findings provided by (Zaun, 2016, 2017, 2018), but also based on the existing and collected data.

By adopting a qualitative research approach, this study aims to contribute to the branch of the empirical literature that seeks to provide a detailed insight on the negotiations in the Council and explain how formal and informal institutional rules can influence and shape member states´ negotiation behaviour, preferences and capacities (see Hagemann, 2008). As argued by Mattila (2008: 24) quantitative studies produce a limited picture of the way Council works. The analysis of roll calls can provide some understanding on the coalitions in the Council, however, it cannot shed light on the question under research. As previously shown the decisions in the asylum policy area are normally reached without explicitly voting, making it impossible to even analyse the possible coalitions, and states' preferences. Therefore, the secrecy around negotiations in the Council is only breached by interviewing key political actors.

Finally, the findings are discussed through a historical lens, providing an implicit comparative dimension to the study. In other words, the key political actors were invited to discuss the negotiations of the second phase of CEAS in comparison with the first and third phases of the CEAS. Furthermore, the findings are compared with previous studies on the EU asylum policy.

4. AN OVERVIEW OF THE POLITICAL PROCESS OF THE RECAST ASYLUM PROCEDURES DIRECTIVE

In December 2007 de European Council emphasised the necessity for a renewed commitment for the progress of the Common European Asylum System[32]. The European Council invited the Commission to evaluate the implementation of the first phase of the CEAS and present a new proposal in 2008. Focusing specifically on the recast APD, the Commission submitted the proposal to the Council and EP on 21 October 2009[33]. It was adopted an amendment proposal by the Council at the first reading on 6 June 2013[34], with the approval of the EP on 12 June 2013, and finally signed by both institutions on 26 June 2013.

The leading person from the Commission in this file was the European Commissioner for Justice, Freedom and Security, Jacques Barrot (EUR-Lex, 2009a). In the EP the responsibility lied on the rapporteur MEP Sylvie Guillaume from the Committee on Civil Liberties, Justice and Home Affairs (LIBE) (Ibid.). In the Council, the negotiations were chaired by nine Presidencies as the following table shows:

[32] Presidency Conclusions, Brussels European Council, 14 December 2007, 16616/1/07, REV, 1 CONCL 3, 14 February 2008, Brussels.

[33] European Commission, proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), Brussels, 21-10-2009, COM(2009) 554 final

[34] There was no negative votes or abstentions in the Council voting of the recast APD. See: Council (6 – 7 June 2013). Voting result. Position of the Council at first reading with a view to the adoption of the European Parliament and of the Council on common procedures in Member States for granting and withdrawing international protection (Recast) (First reading), Luxembourg, Brussels, 07-6-2013, 10720/13, Vote 31, INF 100, Public 36, CODEC 1391.

Table 1- Presidency of the Council of the EU, 2009 - 2013

Year	Month	Member State	Minister
2009	Jan–Jun	Czech Republic	Mirek Topolánek Jan Fischer (from 8 May)
	Jul–Dec	Sweden	Fredrik Reinfeldt
2010	Jan–Jun	Spain	José Zapatero
	Jul–Dec	Belgium	Yves Leterme
2011	Jan–Jun	Hungary	Viktor Orbán
	Jul–Dec	Poland	Donald Tusk
2012	Jan–Jun	Denmark	Helle Thorning-Schmidt
	Jul–Dec	Cyprus	Demetris Christofias
2013	Jan–Jun	Ireland	Enda Kenny

Source: Council (2009b)

First proposal from the European Commission

The first proposal was a recasting of the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Before tabling the proposal to the Council and the EP, the EC held a consultation with interested parties, and conducted a comprehensive analysis of key reports and studies (European Commission, 2009: 3). The main conclusion drawn from this initial step was that the minimum standards were not able to ensure a fair and efficient procedural system. Therefore, according to the EC, this proposal aimed at addressing the previous procedural shortcomings and to ensure a more harmonised system with higher standards for third country nationals or stateless persons (European Commission, 2009). Another objective of this proposal was to decrease the secondary movements of asylum seekers within the EU. This phenomenon was perceived as one of the results of the existing divergent procedural arrangements amongst the member states (Ibid.).

In brief, the EC proposed to address the following issues with the recast proposal: i) ´consistency between different asylum instruments´; ii) ´access to procedures´; iii) ´procedural guarantees in procedures at first instance´; iv) ´procedural notions and devices´; ´and v) access to effective remedy´ (Ibid.: 6-8). To make the APD more consistent with the QD, the Commission proposed a single procedure for both forms of international protection defined in the QD, and made specific modifications on the rules related with this procedure. For example, it extended the rules applicable to the withdrawal of refugee status to cases of the subsidiary protection (European Commission, 2009: 5). In the second issue the EC enhanced the guarantees for the asylum seekers, by including for instance the right to have access to information on procedures and access to legal advice and counselling (Ibid.: 6). Furthermore, in line with the jurisprudence of the European Court of Human Rights, the proposal advanced with three main amendments aiming to provide a real opportunity to asylum seekers to support their claim for international protection. The amendments: reduced ´exceptions to the procedural principles and guarantees´; added the right to free legal assistance at first instance applications; and introduced ´ special guarantees for vulnerable asylum applicants´ (Ibid.: 6).

The following issue intended to consolidate and simplify key procedural notions, such as third country, accelerated procedures, manifestly unfounded applications, safe country of origin and subsequent applications. At last, the proposal addressed the question about the access to effective remedy to asylum applicants, by providing ´a full and *ex nunc* review of first instance decisions by a court or tribunal and specifies that the notion of effective remedy requires a review of both facts and points of law´ (Ibid.: 8). These changes were considered by the EC as crucial to reduce the administrative errors in asylum procedures, and to ensure a more harmonized system with higher standards for asylum applicants. This initial proposal shows that the Commission was aiming for a more rights-based approached to the asylum procedures. However, as it will be discussed later in this section this first proposal was not well accepted by the member states, resulting in an amendment proposal in 2011[35].

[35] European Commission, Amended Proposal for a Recast Asylum Procedures Directive, COM/2011/0319 final - COD 2009/0165.

JHA Council negotiations: a deadlock in the Asylum Working Party

In November 2009, the JHA Council discussed the state of play of the CEAS and reported on the agreement reached between the Council and the EP on the establishment of the EASO; on the decision to seat this office in Valetta, Malta; and on the changes on the European Refugee Fund (ERF). Furthermore, it was highlighted that the Ministers held a first exchange of views on the two last legislative instruments tabled by the Commission, specifically the recast of the APD and the QD. The Presidency concluded the discussion by stating that a number of issues still needed to be addressed within the Council and the Parliament, by identifying three principles for that negotiations: ´more efficiency, greater cost effectiveness and a high level of protection´ (Council, 2009a: 14).

The preparatory bodies of the Council only started to examine the Commission proposal for the recast of the APD after this initial exchange of views in the Ministerial level of the Council. Therefore, the first meetings at the AWP were chaired by the Sweden and Spanish Presidencies on the following dates: 14 December 2009, 12/13 January 2010, 27/28 January 2010, and 10 February 2010. This level is composed by the officials from the capitals and the discussions are quite technical. In this first step the states identify their reservations, and in the JHA Council dynamic there are five main types of reservations indicated in the footnotes of the proposal, namely: general reservation, scrutiny reservation, linguistic reservation, parliamentary reservation, and substantive reservation. The document does not explain the meaning of this typology, but from the insight obtained from the interviews it became known that this is a specific practice (norm) from the asylum group in the Council.

This typology is used to organise and facilitate the negotiations. Therefore, general reservation means that the experts did not have enough time to examine in detail the text, and need more time to have a position on the overall text. Scrutiny reservation means that the experts have doubts about a specific issue, and will ask for clarification to the Presidency or Commission. After this clarification they need to analyse it further to assess the impact to the national system.

Linguistic reservation means that they need to read the document in their native language; whereas parliamentary reservation means that the national parliament need to analyse it and have a position on it; and finally the substantive reservation, means that the member state really have a problem with the substance of the article/issue (e.g. Interview 1_Belgium; Interview 20_Malta). The first meetings resulted in more than one hundred reservations between all member states. The scrutiny reservation, for instance, was raised more than sixty times throughout the all text. There were scrutiny reservations from general issues such as the definitions to more specific issues like access to the procedure or personal interview. In almost every article a member state raised a reservation.

These meetings are quite technical and provide the first opportunity to member states examine the proposal in accordance to their national system. Therefore, only after finding a compromise in the AWP level, the Presidency puts the discussion to the following levels. The first proposal from the Commission was discussed in six more AWP meetings, but it was not put forward to another stage in the Council. In other words, there was a political deadlock in the first level of the Council, i.e., it was difficult to find a consensual solution during the AWP´ negotiations, making it impossible for the Council to reach a position on the first proposal. In contrast to the Council, the European Parliament on 6 April 2011 adopted a first reading position on the first Commission proposal[36], which in general terms supported the proposed amendments (European Commission, 2011a).

The European Council conclusions in 2009 were crystal clear on the commitment to establish the CEAS in 2012 and how this was a priority for the EU (European Council, 2009). Therefore, in order to achieve this commitment, the following Presidency (Belgium) presented a strategy at the informal meeting of the Justice and Home Affairs Ministers on 15 and 16 July 2010 (Council, 2010). The strategy consisted in dividing the CEAS´ work in three elements: legislation; practical cooperation and solidarity. In the first element the Belgian Presidency gave primacy to four legislative proposals, in which the negotiations seem to be on the right path to conclusion (Dublin

[36] European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) (COM(2009)0554 – C7-0248/2009 – 2009/0165(COD))

and Eurodac Regulations, Long Term Residence and Qualification Directives). Furthermore, it was also important to ensure coherence in the other two tabled legislative instruments (Reception Conditions and Procedures Directives) at this stage, as it was agreed that more time was needed for the institutions to decide on the right course of action.

Concerning the other two elements the Presidency organised a ministerial conference entitled ´Quality and efficiency in the asylum process´, which occurred on 13 and 14 September 2010. This conference aimed at addressing issues such as asylum seekers with special needs, decision making, and intra-European solidarity and responsibility sharing (Council, 2010). According to the Presidency´s report on the state of play of the CEAS in 2010 (Council, 2010), this conference was not only essential to identify good practices at national and EU level, but also to promote discussions on some of the more contentious issues where negotiations were difficult, and to reiterate the commitment with the further harmonisation of the EU asylum policy.

Furthermore, according to one of the interviewed Belgian experts this conference had also a key role to lead the European Commission to submit a new proposal in 2011 (Interview 10_Belgium). The JHA Council meeting held two months after the ministerial conference seems to reinforce this statement (Council, 2010a). The JHA Council conclusions highlighted how the Commission welcomed the progress made in the different legislative proposals, and the EC intentions to submit in 2011 amended proposals for the Receptions and Procedures Directive. Therefore, the negotiations in the Council on the recast APD were only resumed when the new proposal was transmitted to the Council by the Commission on 6 June 2011.

An amendment proposal from the European Commission

The European Commission used its right of initiative and tabled an amendment proposal to both the Council and the Parliament in 2011. With this new proposal the EC wanted to guarantee that the CEAS was not put aside, and that the Union commitment to reach a decision by 2012 was not undermined (European Commission, 2011a). The modified proposal was drafted taking into account the information and experience gathered during the discussions of the previous proposal,

mostly under the Spanish and Belgium Presidencies. The discussions were held at the AWP under the Spanish Presidency, and also during the Ministerial conference organised by the Belgian Presidency. Furthermore, the EC promoted several technical consultation meetings between January and April 2010 (European Commission, 2011a).

During the technical discussions in the AWP of the first proposal, many member states did not agree with specific provisions, because they did not fit with the singularities of their national asylum system. Thus, it was impossible for the Council to find a joint solution for the first proposal. Moreover, in its first reading position, the EP proposed some amendments to strengthen the applicants' guarantees. Therefore, the Commission perceived an opportunity to revise the proposal and put forward a comprehensive solution for the Council and EP that would safeguard the added value of the directive (European Commission, 2011a).

The main aim of this revised proposal was to simplify and clarify the rules to meet the legal particularities of the different national legal systems, and to propose a more cost-effective system for all the EU. Yet, without undermining the full respect for fundamental rights of the asylum applicants. In sum, six issues were addressed by this new proposal: ´making implementation easier for Member States´; `better addressing potential abuse´; 'frontloading': fast, fair and efficient procedures´; ´guaranteeing access to protection´; ´clear rules on repeated applications´; ´increased coherence with other instruments of the EU asylum acquis´ (Ibid.: 5-7). More than thirty articles were changed in the new proposal (European Commission, 2011b).

Turning specifically to one of the most contentious issues in the Council, the EC changed, for example, the terminology of ´applicants with special needs´ to ´applicants in need of special procedural guarantees´. It also introduced clearer terms in this definition. One example is the replacement of the wording ´mental health´ with "serious physical illness, mental illness or post traumatic disorders" (Article 24, corresponds to Article 20 of the 2009 proposal) (European Commission, 2011b: 2). In this specific article the Commission aimed at reducing to bare bones the provisions on persons with special needs. It provided the main principles but permits the EU states to find the most suitable modalities in line with the Reception Conditions Directive.

An interesting change was not only the division of the article 20(1) in two paragraphs in the new amendment proposal (article 24), but also the altered wording. While the past proposal combined in one paragraph notions of the obligations of the states and guarantees for the applicants with special needs; in the second proposal there were paragraphs in which the wording was simplified but still more open to interpretation. For example, in the first text it stated that: ´ Where needed, they shall be granted time extensions to enable them to submit evidence or take other necessary steps in the procedure´ (article 20 (1)). Whereas in the second document it was changed for ´ Member States shall ensure that this Article also applies if it becomes apparent at a later stage in the procedure that an applicant is in need of special procedural guarantees´(article 24 (1). The phrase was also softened by using words such as ´ensure´ or ´due time´ in contrast to ´take appropriate measures´ and ´time extensions´. This amendment proposal was more in line with the interests vocalized by the Council, showing that this institution was a key player in this negotiations (as argued by Ripoll Servent and Trauner, 2014).

JHA Council negotiations: a revised compromised at COREPER

The first meeting of the AWP after the submission of the amendment proposal was on 28 June 2011. This meeting was followed by several other meetings on: 5 July 2011, 20 July 2011, 27 September 2011, 5 October 2011, 16 November 2011, 6 December 2011, 5 January 2012, 24 January 2012, 21 March 2012. The amendment proposal was passed on to the SCIFA in February 2012, and reached the COREPER in May 2012. Again, it was a long process at the technical level, but a revised compromise package was adopted at the COREPER level on 27 November 2012 (Council, 2012a). Nevertheless, only on 6 June 2013, the Council adopted a final position on the recast APD (Council, 2013b; EUR-Lex, 2009a). Throughout the entire process the four Presidencies were very active in proposing compromise suggestions, and were involved in eight Trialogue meetings with representatives from the Parliament and the Commission.

By the end of 2012 there were still two issues that the parties in the trialogues were struggling to find a global compromise, namely: i) the time limits for the examination procedure in case of an

uncertain situation in the country of origin (Article 31(3)); and ii) special guarantees for unaccompanied minors and applicants with special needs that are victims of any kind of serious forms of violence (articles 24 &25) (Council, 2012b). The last was the most contentious, thus, the COREPER resumed on this issue on 5 December to discuss the most appropriate approach.

Furthermore, the Presidency prepared a compromise suggestion on other issues to be discussed by the COREPER on December 17, of the same year (Council, 2012b). The issues were related with the: ´requirements for the examination of applications´(article 10 (2)(b)); ´obligations of the applicants for international protection (article 13(2)(d)); ´requirements for a personal interview´(article 15(3)(c)); ´procedure in the case of implicit withdrawal or abandonment of the application´(article 28(1)(b) & article 28(2) 2nd); and `examination procedure´ (article 31(7)) (Council, 2012b). The proposed amendments were mainly in terms of phrasing to make the action of member states or applicants cleared. For example, where it read in the EC proposal (article 31(7)):

> ´Member States shall lay down reasonable time limits for the adoption of a decision in the procedure at first instance pursuant to paragraph 6 which ensure adequate and complete examination.´

The Presidency proposed the following reading:

> ´Member States shall lay down time limits for the adoption of a decision in the procedure at first instance pursuant to paragraph 6. Those time limits shall be reasonable. Without prejudice to Article 31(3), *Member States may exceed those time limits where it is necessary in order to ensure an adequate and complete examination of the application for international protection.´*

During the year 2012, the European Council only referred to the CEAS in the meeting that took place in June. In the other European Council meetings the concern was mainly on the economic and social policies. So, in June 2012, the European Council welcomed the progressed achieved but reiterate its commitment to the conclusion of the CEAS by the end of that year

(European Council, 2012). However, it was not possible to achieve that goal given that on 21 March 2013, the Presidency was still engaged in the 8th Trialogue on the APD (Council, 2013a). Despite the delay, the EU institutions were able to reach a final compromise by June 2013, and ensure on paper a more harmonised system with higher standards for third country nationals or stateless persons with effect from 21 July 2015. By December 2013, the European Council invited the Council to monitor regularly the implementation of the CEAS at the national level, and informed that it would returned on the issue of asylum and migration in June 2014 to define the future strategic guidelines for the area of freedom, security, and justice (European Council, 2013).

5. TESTING THE ACTOR AND INSTITUTIONAL-BASED HYPOTHESES

This chapter will present the findings regarding: i) the decision-making in the Council; ii) the negotiation environment in the Council; iii) the influence of both actor and institutional-related variables on member states' negotiation behaviour; iv) actors' capabilities in the political process, specifically in the APD adopted in 2013; and v) the adopted negotiations strategies to shape the policy output according to national preferences and interests. Nevertheless, as previously mentioned the findings will have a comparative dimension by reporting on details from the different phases of the CEAS.

The results are substantiated not only by 21 semi-structured interviews conducted with Permanent Representatives of the European Union; with experts from the capitals, the EU institutions, and from an inter-governmental body dedicated to asylum; but also by the analysis of existing EU official documents and data. The ten old member states under analysis are: Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden.

5.1 Decision-making in the Council under QMV

This section presents the findings on two main dimensions: decision-making in the Council and the negotiation environment in the Council during the second phase of the CEAS. As initially expected the decision of the recast APD was reached with all member states in favour. Denmark, Ireland and the United Kingdom did not participate in the decision as they have an opt-out from certain measures relating to justice and home affairs. Both Council documents[37] and interviews show that no member state explicitly voted or opposed to the decision. Nevertheless, Germany, and Slovenia made a written statement on some of the provisions present in the adopted directive, namely:

[37] Council of the European Union, Monthly Summary of Council acts June and July 2013, Brussels, 21 October 2013, Doc 13375/1/13 REV 1

Statement by Germany:

> ´The German delegation believes that the provisions under Article 23 (4) (b) of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status are covered by Article 31 (8) (a)-(j) of the Commission's recast proposal for the Directive in the version of Council document 8260/13.´

Statement by Slovenia:

> ´Slovenia wishes to express its concern over some provisions of the Directive for it believes they could have a negative impact in practice. While acknowledging the necessity to establish an effective asylum reception system aimed at ensuring the rights of asylum seekers and meeting the specific needs of vulnerable persons, we must also provide for an effective means to tackle the abuse of the asylum system. Slovenia believes some of the provisions lack the necessary balance. In particular: the arrangement of detention, especially with regard to the restricted conditions to apply detention as provided for in Articles 8 and 9, treatment and accommodation of persons legally staying in the EU and not being formal applicants for international protection in asylum facilities. According to Slovenian understanding persons legally staying in the EU and applying for international protection should be not be subject to any material and reception conditions provided for in the Directive´ (Council of the European Union, Monthly Summary of Council acts June and July 2013, Brussels, 21 October 2013, Doc 13375/1/13 REV 1).

The Statement from Slovenia demonstrates a key concern with the balance of the asylum system. Slovenia recognises the importance of adopting a common EU asylum system to guarantee the rights of asylum seekers and meeting the specific needs of vulnerable persons. However, it argues that the system should have also the means to tackle the abuse of the asylum system. The point raised by Slovenia in terms of material and reception conditions may reveal a concern with

the possible costs that these provisions can incur into the domestic asylum system. Yet, Slovenia did not explicitly vote against this directive.

Turning specifically to the countries under analysis, it is also noticeable that the old member states, regardless of their size, were not able to get all their preferences incorporated in the final text, and yet they did not vote against the recast APD. Belgium and Luxembourg, for example, were pushing for a more rights-based approach in what concerns unaccompanied minors and vulnerable persons, but did not gather enough support in the Council. These two countries were a ´slightly little annoying mosquito´ during the negotiations in the Council, but ultimately they said to the Presidency ´ we don't agree, but OK you have a qualified majority so go and negotiate´ with the Parliament (Interview 1 and 10_Belgium; Interview 19_Luxembourg).

Bigger countries as Germany and France also had to reach a compromise and ´exchange favours´ in two dividing topics – frontier procedures and vulnerable persons (Interview 5_France; Interview 15_Germany). France had instructions from the capital to keep its position on frontier procedures and vulnerable persons, but if necessary it could be more flexible on the second aspect. France and Germany tried first to have a position together on both aspects, but it was not possible because they were not in the same page. So, the agreement made was that France would support Germany in their position regarding vulnerable persons, and Germany would support France in their position on the frontier procedures even if they did not agree 100 percent with each other´s position (Interview 5_France).

Despite the different positions and preferences in the Council the collected data shows distinctly that the decision-making in this directive was reached by consensus. As stated by one of the policy-makers involved in the negotiations: ´with the recast the QMV was introduced for the EU asylum, but there really was a sense of consensus still in Council negotiation´ (Interview 1_Belgium). So, the first question one should seek to answer is: why has the Council adopted the directive by consensus under QMV? The interviews demonstrate that the consensus in the second phase of the CEAS ,in particular in this directive, was due not only to a social norm in the Council formed in the first phase of the CEAS, but also due to a rational consideration on the pros and cons of standing alone in a decision and on the implications of a no decision for the harmonisation of

the EU asylum policy (e.g. Interview 1_Belgium; Interview 2_Portugal; Interview 3_Sweden; Interview 5_France; Interview 11_Italy; Interview 10_Belgium). As well-expressed by two experts (Interview 3_Sweden; Interview 10_Belgium):

> ´we try as best as we can , and most member states I think do, and definitely the Presidencies to find more or less consensus, because that's the best way of compromising, you give and take and that to make sure that everybody is satisfied as possible. So that it is also our ambition, we understand that we are one of the ,now 28, and that we cannot have it all in our way, and that means that even if we don't like everything a lot it doesn't … automatically mean that we would use a veto and vote no, and even if we would be part of a blocking minority we would also ask ourselves about the added value of importance of the issue, compared to not agreeing in the Council, because it also costs a bit in terms of maybe confidence, trust and … cooperation, it is a matter about cooperation, so I think we are a small country, and then you maybe need to think a bit differentially with regard to that, we cannot decide anything on our own, so we always need to have, find different coalitions, and that´s what we strive for, and in the end if we didn't manage to have the text changed as we wished, then it doesn't necessarily mean that we would vote no anyhow.´

> ´[…] even before the time of qualified majority it was not in the interest of member states, to be the blocking member state. I mean, this is not an image you want to give, except on really fundamental issues, so also then you try to build consensus, and building consensus also means to try to find compromises.´

In short, the interviews revealed that the consensus norm observed in the recast APR was inherited from the previous phase. There was a collective institutional norm appropriation on how the Council should behave in such a sensitive and divisive topic. Additionally, member states were aware of their limitations. They knew that they could not successfully influence the policy output by standing alone in a position or by having a confrontational behaviour in the Council. This concern was mainly observed within the smaller member states, i.e., Belgium, Finland,

Luxembourg, Portugal and Sweden (Interview 1_Belgium; Interview 2_Portugal; Interview 3_Sweden; Interview 8_Finland 2_ Interview 10_Belgium; Interview 14_Finland; Interview 19_Luxembourg).

As explained by one of the experts: ´since we are a small country it always comes to the coalition building. If we want to have the vote on our side we need other countries, so it always comes down to finding like-minded countries to do it´ (Interview 8_Finland). Nonetheless, bigger member states as France, Germany, Italy and Spain also recognised not only the need to build coalitions under the new voting rule, but also to have a constructive behaviour as they support the development of a European policy on asylum (Interview 5_France; Interview 11_Italy; Interview 12_Spain; Interview 15_Germany). The influence of voting rule on member states' negotiation behaviour will be further developed in point 5.3 of this chapter.

However, it is important to highlight that not all legal instruments adopted in the second phase of the CEAS were reached by consensus. The example of this is the ´regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180, 29.6.2013, p. 31–59. This legislative instrument was adopted without the support of Greece because the member state expected a more ambitious regulation:

Statement by Greece

> ´1. The completion of the Common European Asylum System (CEAS) will allow for further development of initiatives, focusing on sincere and genuine solidarity towards Member States, especially those at the EU external borders. The Treaty for the Functioning of the European Union (TFEU) institutionally establishes, for the first time, the notion of "solidarity" as well as the fair sharing of responsibilities between Member States (art. 80) in the areas of Migration and Asylum.
>
> 2. Asylum issues are of particular importance and priority to Greece, as one of the Member States facing strong pressures at its external borders due to mixed flows of illegal migrants.

In this context Greece is implementing a comprehensive reform of its Asylum and Migration Management systems, thus supporting in an effective and constant manner the CEAS development.

3. Greece believes that the "Dublin Regulation" recast has proved to be less ambitious than it should have been since, among others, it does not offer substantial answers to the concerns and pressing issues that Member States at EU's external borders face. This is due to three majors reasons:

• The first entry criterion provision was never examined at the discussions of the "Dublin Regulation" recast.

• A provision for the suspension of transfers was not included in the final text.

• The new art. 33 limits itself to the Asylum System and does not contain any reference to pressures which are due to mixed migratory flows.

4. For the above reasons, Greece cannot offer its support to the adoption, as presented in the "A" items.´ (Council of the European Union, Monthly Summary of Council acts June and July 2013, Brussels, 21 October 2013, Doc 13375/1/13 REV 1)

Turning now to the negotiation environment in the Council, it was analysed whether the member states under analysis have considered it confrontational or cooperative during the second phase of the CEAS. With the exception of two policy-makers, the interviewees characterised the environment in the negotiation of the recast APD as friendly, constructive and cooperative. As explained by one of the policy-makers: ´traditionally the group is not conflictual, we are like a club. We can have different positions but we have a friendly approach´ (Interview 5_France). In order to reinforce this idea the majority of interviewees compared the negotiations of the recast with the most recent reform of the asylum policy by stating that it is much more confrontational now than it was before. The observed division in the current negotiations of the APR, in terms of preferences and positions, was not perceived in the previous phase (e.g. Interview 2_Portugal; Interview 11_Italy).

According to the data the environment during the recast was calmer because less member states attached a high salience to this issue (e.g. Interview 2_Portugal; Interview 3_Sweden; Interview 5_France). In other words, during the second phase this issue was mainly a concern for the member states that traditionally received a large number of asylum applications and consequently faced a higher pressure in their domestic structures (e.g. Interview 5_France; Interview 2 Portugal; Interview 12_Spain).

Regarding the two experts, whom considered the negotiations rather tense and confrontational during the recast APD claimed that ´each member state tried to defend its own national system´; the negotiations lasted longer than expected; and half way through the Belgian Presidency the Commission had to put a revised proposal on the table ´cause the Council were going nowhere with the first recast version´ (Interview 1_Belgium; Interview 19_Luxembourg). Though, the experts pointed out that they considered the environment confrontational but not necessary between member states. It was more related with the fact that each member states was trying to defend its own system and were ´all together against too much harmonisation´(Interview 1_Belgium). In addition, several policy-makers highlighted that the tension was also more expressive between the Council and the European Commission (Interview 8_Finland; Interview 10_Belgium; Interview 17_The Netherlands):

> ´I remember very clearly that I felt like, I don't know, many of the colleagues from other countries felt the same, I know because we discussed it, that *we were opposing the Commission very heavily*. We felt that the Commission had … made all these proposals listening very much the NGOs, and there was a lot of legal safeguards in place, and less efficiency´ […]. It was a bit tense during the official negotiations on the table, obviously in the margins we really good friends and everybody was just fine and we were able to clear our positions and talk, so it was not unfriendly or difficult or anything like that, but I just remember we were opposing the Commission very heavily.´

´So, in fact under our Presidency we didn't really negotiate a lot on that directive, because it became clear that at that time that there was no support for the Commission proposals as a basis for negotiations.´

´I think the environment is, well of course a bit formal but also friendly … and I don´t think it´s conflictual, *but everyone looks at their own interests also*. So, *I remember at the first proposal of the Commission, a lot of member states did not agree with each other and did not agree with the Commission*, and this is a problem of course, and it´s very difficult to find a compromise, and that´s why the Commission at a certain point had decided to withdraw the text and come up with a new proposal in 2011.´

According to key informants there has been a change in how the European Commission is approaching this issue. Compared to the previous negotiations, the Commission in the 2016 reform is more in tune with the Council in terms of tackling abuse. Nevertheless, the Commission and the European Parliament still ´tend to go a bit towards the rights-based approach, and the member states want more obligations, so there is a balance to be found' (Interview 13_Netherlands). These observations are important to recognise the complexity of the negotiations in the Council and the inter-institutional relations in this policy area.

Within the Council is also essential to take a closer look to the three stage procedure to better understand the negotiation dynamic and environment in the Council of the EU. In the asylum policy as previously explained, there are two preparatory bodies, namely the AWP and the SCIFA. The other levels are COREPER II and the Ministerial configuration. The interviews show that in the recast APD there were significant differences in the negotiation environment within the levels of the Council. The AWP was described as a formal and technical setting where various officials from each member states' capital were mostly concerned to analyse if the text was in accordance to their national preferences and national legal status quo. In the SCIFA the environment was more informal and open.

This occurred because the SCIFA is attended only by the JHA Counsellors that live and work in Brussels, meaning that everybody knows each other very well. Nevertheless, at this level it

becomes clearer where the more political or strategical issues lay. During this phase the JHA Counsellors are continuously in touch not only with their experts from the capital who give them the input on the technical level, but also with the Ministry to have the more political position. Therefore, JHA counsellors should be able in light of the discussions to quickly change their positions or to give a feedback to their peers on the more political issues. Then there is the COREPER level, which again was more formal and political, but where the ambassadors were able to reach a compromise. In this particular directive the final compromise or ´informal voting´ happened at the COREPER level; the Ministers only formally approved what was already decided in the previous levels (e.g. Interview 1_Belgium 1; Interview 3_Sweden; Interview 10_Belgium ; Interview 17_The Netherlands ; Interview 2_Portugal; Interview 19_Luxembourg).

Overall, this section demonstrated that the decision in the APD was made by consensus and that it was mainly due to an informal norm in the Council that was formed in the first phase of the CEAS (as the unanimity voting rule applied), and also because member states rationally reflected on the pros and cons of standing alone in a decision, and on the implications of a no decision for the harmonisation of the CEAS. Furthermore, in general terms the environment in the Council in the recast APD was friendly, constructive and cooperative. Nevertheless, there were significant differences in the negotiation environment within the levels of the Council. While the first level is more formal and technical (AWP), the other levels are considered more open and easier to reach a compromise (SCIFA and COREPER).

5.2. Actor-related variable: Salience

This section presents the findings on the salience attached by the member to the recast APD, and the dimensions that influenced the level of importance attached by the policy-makers to this issue. Three aspects are assumed to interfere with the salience attached by the policy-makers to this policy during the second phase of the CEAS, namely: the salience attached to this policy by the citizens; the number of asylum applications; and the ´misfit´ between European and national policy.

5.2.1. Public salience

The public salience dimension is addressed by two data sources, i.e., secondary quantitative data from the Eurobarometer surveys, and primary qualitative data collected through semi-structured interviews conducted with policy-makers directly involved in the negotiations of the APD.

Eurobarometer results – main concerns in the European Union

With the standard Eurobarometer data it is possible to understand the ´most important national concerns´ amongst EU citizens between the years 2009 and 2013. The question asked to the EU citizens is: ´What do you think are the two most important issues facing (our country) at the moment? ´. This measure captures the salience of issue areas instead of specific policies, but it allows to have an overall perspective if the immigration issue, as a proxy for asylum, dominated the main concerns of European citizens during the period under analysis.

Between 2009 and 2013, the average of EU27 citizens that mentioned immigration as a concern was only 10% (Table 2). The three most frequently mentioned concerns in this period were: unemployment, economic situation, and rising prices/inflation (Figure 1-5).

Table 2- Immigration issue between 2009 and 2013, Eurobarometer

	2009	2010	2011	2012	2013	EU Average
EU27	**9%**	**12%**	**7%**	**8%**	**12%***	**10%**
EU15	**10%**	**14%**	**9%**	**8%**	**11%**	**10%**
AT	17%	27%	12%	12%	13%	
BE	18%	27%	20%	12%	16%	
BG	1%	1%	2%	1%	23%	
CY	14%	17%	14%	9%	5%	
CZ	4%	2%	4%	3%	2%	
DK	15%	15%	5%	9%	17%	
DE	4%	16%	6%	8%	16%	
EE	0%	2%	0%	1%	2%	
EL	8%	7%	4%	7%	5%	
ES	6%	7%	4%	2%	2%	
FI	11%	16%	8%	5%	5%	
FR	6%	9%	7%	9%	12%	
HU	1%	1%	13%	1%	2%	
IE	2%	3%	6%	9%	9%	

IT	10%	13%	6%	2%	8%
LT	3%	10%	6%	10%	8%
LU	8%	8%	21%	8%	11%
LV	4%	4%	7%	11%	11%
MT	34%	14%	14%	20%	63%
NL	8%	17%	11%	1%	4%
PL	2%	1%	0%	3%	3%
PT	1%	1%	1%	0 %	1%
RO	1%	3%	2%	1%	1%
SE	9%	14%	5%	13%	13%
SI	1%	0%	2%	1%	0%
SK	2%	1%	0%	1%	1%
UK	29%	27%	21%	24%	33%

***EU28**

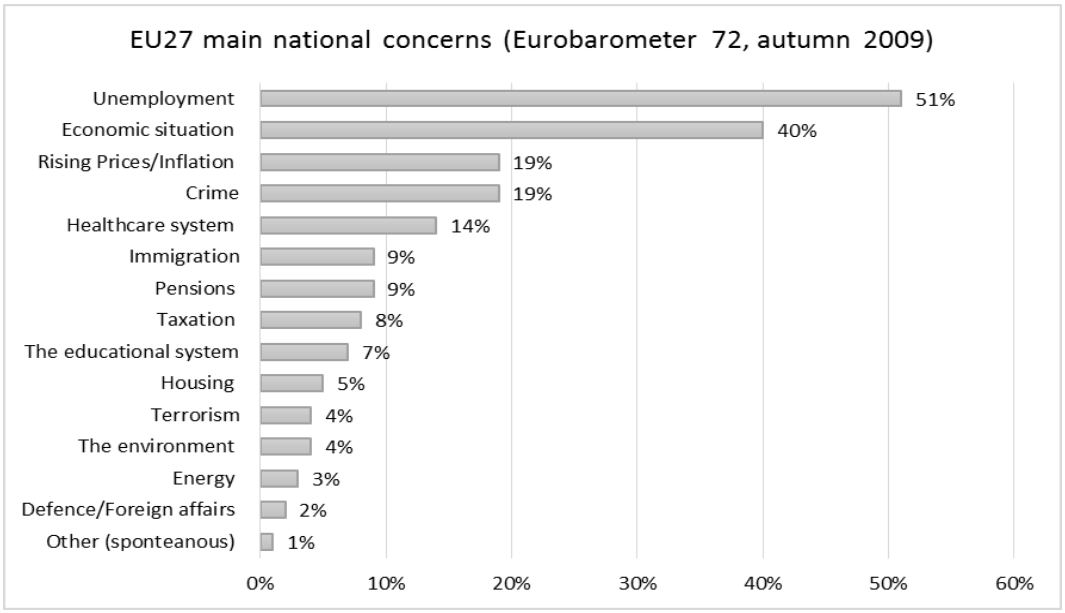

Figure 1 - EU27 main national concerns in 2009

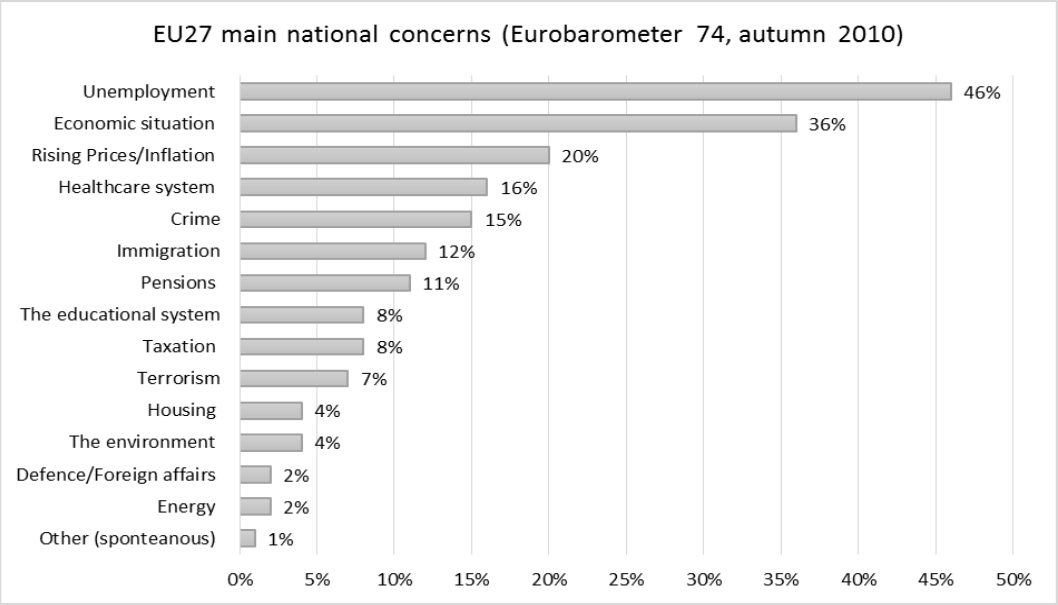

Figure 2 - EU27 main national concerns in 2010

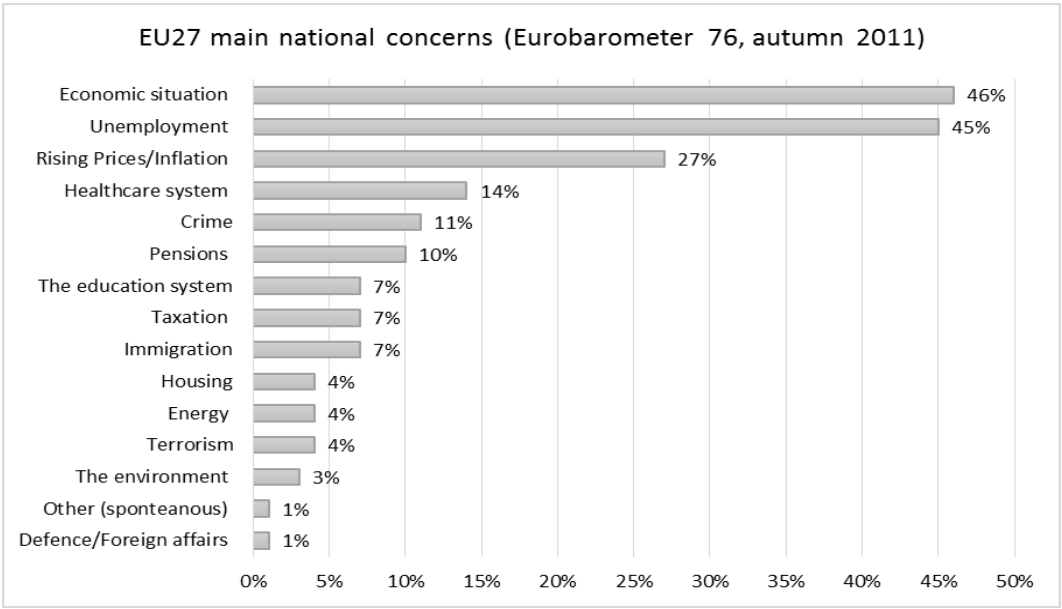

Figure 3 - EU27 main national concerns in 2011

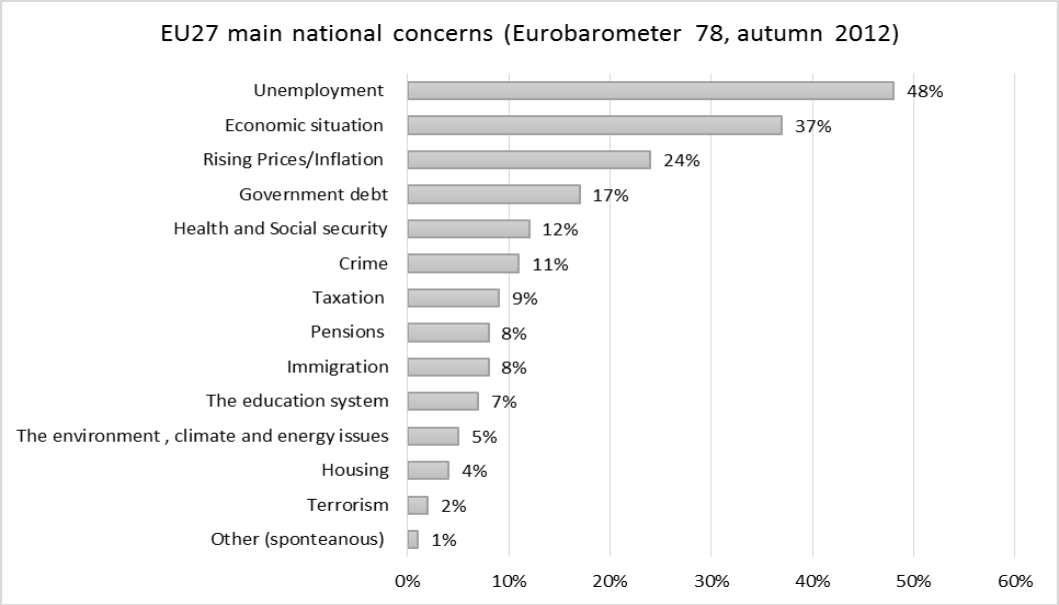

Figure 4 - EU27 main national concerns in 2012

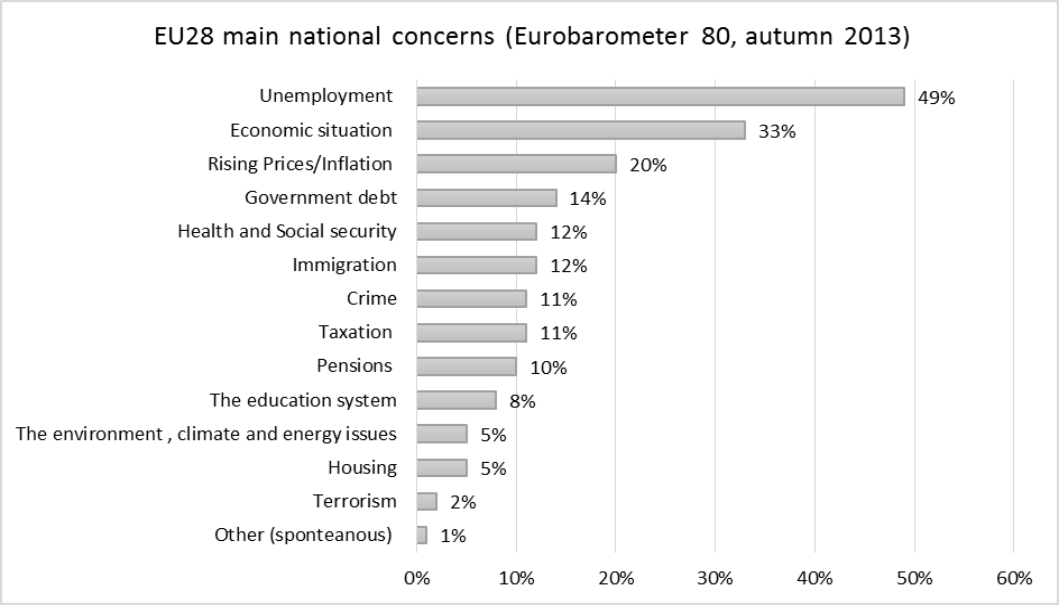

Figure 5 - EU28 main national concerns in 2013

During this five-year period immigration was ranked between the 5th and 8th position in the EU27 score (Figure 1-5). Nevertheless, six out of the ten countries under investigation ranked this topic above the EU27 average, namely: Belgium (18%), Italy (10%) and Finland (11%) in 2009; Belgium (27%), the Netherlands (17%), Germany (16%), Finland (16%), Italy (13%), and Sweden (14%) in 2010; Luxembourg (21%) and the Netherlands (11%) in 2011; Sweden (13%), Belgium (12%), and France (9%) in 2012; and finally, in 2013,Belgium (16%), Germany (16%), and Sweden (13%) (Tables 3-7). Only the Belgians ranked the immigration as one of the top two main concerns during this period, more specifically in 2010, as shown in Table 4. Besides Belgium, the Eurobarometer results do not demonstrate that the citizens in the other nine old member states attached a high salience to the immigration issue between 2009 and 2013.

Table 3-Main national concerns per member state in 2009, Eurobarometer 72

2009														
%	**unemployment**	**Economic situation**	**Crime**	**Rising prices/inflation**	**Healthcare system**	**Immigration**	**Pensions**	**Taxation**	**The educational system**	**Housing**	**Terrorism**	**The environment**	**Energy**	**Defence/Foreign affairs**
EU27	**51**	**40**	**19**	**19**	**14**	**9**	**9**	**8**	**7**	**5**	**4**	**4**	**3**	**2**
EU15	**50**	**39**	**19**	**17**	**15**	**10**	**8**	**7**	**8**	**5**	**4**	**6**	**3**	**2**
BE	42	35	15	24	3	18	18	11	4	6	2	5	8	1
BG	48	51	33	25	14	1	9	3	4	1	1	1	3	1
CZ	50	53	17	22	13	4	14	5	5	7	1	2	2	1
DK	36	29	39	4	24	15	2	2	14	1	9	16	4	3
DE	**58**	46	13	16	21	4	7	7	14	0	3	4	2	1
EE	**68**	53	19	10	22	0	6	7	3	1	0	1	3	1
IE	**61**	50	23	14	24	2	3	8	5	3	1	2	1	0
EL	46	60	22	23	7	8	4	8	6	0	5	3	0	2
ES	**66**	55	11	10	2	6	2	6	3	7	12	2	0	2
FR	59	31	16	22	11	6	14	6	8	10	2	10	1	1
IT	45	41	18	31	6	10	4	15	3	3	4	3	2	1
CY	31	43	36	26	6	14	4	3	5	6	1	1	2	4
LV	64	50	17	6	20	4	8	11	8	1	0	0	1	0
LT	64	49	19	19	7	3	7	16	3	1	1	1	7	0
LU	52	29	12	24	6	8	8	4	14	21	3	4	3	2
HU	58	51	12	30	16	1	9	5	3	3	1	1	3	0
MT	21	32	5	41	10	34	4	8	2	2	0	8	24	0
NL	32	50	21	7	26	8	19	4	11	2	3	7	3	1
AT	43	36	18	28	11	17	9	7	13	2	2	5	2	2
PL	48	25	10	27	34	2	15	7	4	4	4	1	1	4
PT	57	36	18	29	11	1	11	10	4	2	1	1	0	2
RO	36	53	23	39	13	1	9	8	4	4	1	2	1	0
SI	56	52	16	19	12	1	10	10	2	4	0	2	1	7
SK	64	45	20	18	13	2	10	4	4	6	1	2	3	1
FI	58	27	10	9	35	11	12	10	5	2	1	7	7	2
SE	63	30	14	2	26	9	6	3	16	3	1	20	6	1
UK	38	28	36	8	10	29	6	5	6	8	6	2	6	5

Table 4 - Main national concerns per member state in 2010, Eurobarometer 74

2010														
%	**unemployment**	**Economic situation**	**Crime**	**Rising prices/inflation**	**Healthcare system**	**Immigration**	**Pensions**	**Taxation**	**The educational system**	**Housing**	**Terrorism**	**The environment**	**Energy**	**Defence/Foreign affairs**
EU27	**46**	**36**	**15**	**20**	**16**	**12**	**11**	**8**	**8**	**4**	**7**	**4**	**2**	**2**
EU15	**46**	**39**	**14**	**17**	**17**	**14**	**10**	**8**	**9**	**5**	**5**	**5**	**3**	**1**
BE	41	36	16	16	3	27	24	11	4	3	3	3	4	1
BG	48	45	24	26	26	1	11	4	4	1	3	2	2	0
CZ	42	42	15	29	20	2	18	6	4	6	1	3	5	1
DK	41	49	21	2	26	15	2	2	15	1	6	9	4	3
DE	30	19	12	18	29	16	13	7	16	0	19	5	6	4
EE	61	41	9	42	11	2	7	8	7	1	1	1	2	0
IE	61	68	10	13	21	3	3	6	5	2	1	0	1	0
EL	57	68	15	18	4	7	6	11	3	0	1	1	0	1
ES	79	60	8	8	2	7	6	4	2	6	8	1	0	1
FR	57	31	17	18	11	9	16	5	9	10	6	6	1	0
IT	48	40	15	24	8	13	6	13	6	2	4	5	1	2
CY	46	44	30	22	5	17	5	2	4	2	1	3	1	1
LV	61	52	8	16	16	4	5	21	4	1	0	1	1	0
LT	53	43	13	30	8	10	7	21	2	1	0	1	4	0
LU	38	16	8	26	16	8	13	5	17	30	3	6	3	1
HU	62	50	13	24	14	1	11	5	3	4	1	1	2	1
MT	20	32	3	45	10	14	6	9	3	4	2	11	31	0
NL	16	46	24	7	32	17	17	4	13	5	3	7	2	1
AT	23	29	15	29	12	27	10	10	19	5	5	4	2	2
PL	48	20	11	36	30	1	16	7	4	4	2	3	3	2
PT	55	50	6	36	7	1	8	17	3	2	1	0	0	1
RO	36	50	16	28	19	3	14	11	7	4	2	2	0	2
SI	55	56	25	8	5	0	22	8	1	2	0	2	1	1
SK	54	43	19	26	15	1	9	7	4	7	5	3	0	1
FI	45	24	10	17	35	16	13	12	4	2	1	7	6	1
SE	56	23	12	2	34	14	3	4	16	4	1	18	8	2
UK	36	33	24	16	9	27	7	7	9	6	12	3	3	2

Table 5 - Main national concerns per member state in 2011, Eurobarometer 76

2011														
%	**unemployment**	**Economic situation**	**Crime**	**Rising prices/inflation**	**Healthcare system**	**Immigration**	**Pensions**	**Taxation**	**The educational system**	**Housing**	**Terrorism**	**The environment**	**Energy**	**Defence/Foreign affairs**
EU27	**45**	**46**	**11**	**27**	**14**	**7**	**10**	**7**	**7**	**4**	**4**	**3**	**4**	**1**
EU15	**44**	**48**	**11**	**21**	**15**	**9**	**10**	**8**	**9**	**5**	**2**	**4**	**4**	**1**
BE	28	45	12	30	3	20	20	12	4	5	3	3	6	1
BG	57	55	13	27	19	2	10	2	4	1	1	1	3	0
CZ	30	49	19	37	15	4	17	7	2	4	1	1	1	1
DK	49	65	13	13	13	5	3	5	13	1	1	10	6	1
DE	18	27	14	34	22	6	12	7	21	1	10	4	14	2
EE	47	44	7	48	13	0	8	9	9	1	0	0	3	1
IE	64	54	13	11	19	6	2	11	5	4	0	0	1	0
EL	61	75	11	12	2	4	4	15	3	0	0	1	0	2
ES	81	65	6	6	6	4	3	5	3	6	3	1	0	1
FR	49	41	14	29	11	7	11	5	9	10	3	4	2	1
IT	47	61	5	29	3	6	10	14	2	1	2	2	1	1
CY	56	62	13	17	4	14	2	5	1	2	1	0	3	3
LV	50	52	6	22	18	7	8	17	7	1	0	1	1	0
LT	43	45	12	42	8	6	6	20	2	2	1	0	5	0
LU	34	26	8	24	5	21	8	3	25	20	1	5	3	3
HU	59	50	8	31	13	1	7	6	3	6	0	0	3	0
MT	14	51	4	47	8	14	11	9	2	1	1	5	15	0
NL	15	65	12	13	38	11	21	3	9	4	1	4	1	1
AT	23	39	10	41	11	12	15	8	18	4	2	4	2	1
PL	52	33	5	50	22	0	9	5	1	3	0	0	1	2
PT	62	48	8	28	4	1	8	9	2	7	1	0	0	2
RO	34	50	20	30	20	2	13	8	5	3	2	1	1	1
SI	57	67	16	12	5	2	12	7	2	3	1	1	1	0
SK	46	44	9	42	31	0	8	2	2	2	1	1	1	1
FI	36	36	6	24	34	8	15	11	4	4	1	5	6	2
SE	50	34	8	4	40	5	7	2	19	5	0	15	7	2
UK	48	36	18	20	10	21	8	4	5	6	5	2	4	1

Table 6- Main national concerns per member state in 2012, Eurobarometer 78

2012													
%	**unemployment**	**Economic situation**	**Crime**	**Rising prices/inflation**	**Health and social security**	**Immigration**	**Pensions**	**Taxation**	**The education system**	**Housing**	**Terrorism**	**The environment, climate and energy issues**	**Government debt**
EU27	**48**	**37**	**11**	**24**	**12**	**8**	**8**	**9**	**7**	**4**	**2**	**5**	**17**
EU15	**50**	**40**	**10**	**18**	**14**	**8**	**7**	**9**	**7**	**6**	**1**	**6**	**16**
BE	44	40	10	23	4	12	13	12	2	4	1	4	23
BG	55	41	16	35	21	1	10	4	5	1	0	3	1
CZ	35	37	11	35	12	3	15	10	3	2	1	1	23
DK	61	58	13	10	9	9	1	5	9	1	1	12	6
DE	22	22	12	29	9	8	15	5	18	3	3	15	34
EE	30	37	7	58	24	1	9	9	6	1	0	4	1
IE	65	43	15	14	10	9	2	8	5	3	0	1	21
EL	58	55	10	13	6	7	4	17	2	0	1	0	20
ES	78	55	4	9	10	2	3	6	4	8	1	0	10
FR	59	35	18	20	10	9	7	6	5	7	2	3	16
IT	51	45	6	25	4	2	4	28	2	1	1	1	14
CY	73	65	12	10	2	9	1	1	1	0	1	0	12
LV	51	41	5	23	14	11	10	18	5	2	0	0	8
LT	42	36	9	43	5	10	5	24	3	1	0	3	8
LU	45	31	7	21	7	8	13	8	12	23	0	3	11
HU	59	40	11	30	9	1	5	5	3	2	1	2	24
MT	12	33	11	39	7	20	8	8	4	3	1	12	24
NL	32	55	7	10	46	1	8	7	7	6	0	5	14
AT	26	32	11	36	11	12	10	10	11	3	1	8	24
PL	65	26	5	40	18	3	9	6	2	2	1	0	8
PT	57	43	3	25	6	0	6	14	1	12	2	0	14
RO	32	48	20	37	16	1	12	9	7	3	1	1	6
SI	55	60	14	9	5	1	9	7	2	3	1	2	22
SK	50	40	8	38	16	1	7	6	5	4	1	2	13
FI	44	28	6	17	40	5	8	7	4	4	1	12	21
SE	65	31	8	1	28	13	3	1	21	3	0	22	1
UK	40	30	21	18	10	24	7	6	6	6	3	4	18

Table 7 - Main national concerns per member state in 2013, Eurobarometer 80

	2013												
%	**unemployment**	**Economic situation**	**Crime**	**Rising prices/inflation**	**Health and social security**	**Immigration**	**Pensions**	**Taxation**	**The education system**	**Housing**	**Terrorism**	**The environment, climate and energy issues**	**Government debt**
EU28	**49**	**33**	**11**	**20**	**12**	**12**	**10**	**11**	**8**	**5**	**2**	**5**	**14**
EU15	**51**	**34**	**11**	**15**	**15**	**11**	**8**	**11**	**9**	**6**	**1**	**6**	**14**
BE	43	30	17	18	6	16	13	17	4	6	1	5	18
BG	50	43	16	19	22	23	8	2	4	1	1	2	1
CZ	46	35	13	30	13	2	16	6	2	3	1	3	21
DK	45	36	19	7	22	17	3	5	16	2	2	15	6
DE	20	13	12	25	12	16	19	7	20	7	2	15	23
EE	31	33	7	50	25	2	13	10	10	0	0	2	1
IE	65	40	14	13	15	9	3	13	4	4	1	1	16
EL	65	52	13	7	8	5	3	20	2	1	3	0	15
ES	74	48	6	9	11	2	6	5	8	4	1	1	7
FR	59	37	16	15	7	12	8	13	5	6	1	5	13
IT	56	42	6	22	3	8	4	27	1	2	1	1	11
CY	77	74	9	5	1	5	1	5	1	1	0	1	11
LV	48	37	6	26	18	11	10	19	7	2	0	0	5
LT	37	31	19	40	9	8	7	23	4	2	0	3	8
LU	49	20	9	15	4	11	7	7	13	38	1	5	12
HU	53	36	15	29	15	2	7	6	3	5	1	2	11
MT	11	19	9	19	11	63	13	6	3	6	1	15	15
NL	48	53	10	7	31	4	11	6	7	3	1	4	13
AT	35	28	10	31	11	13	12	9	14	3	2	5	24
PL	63	23	4	32	17	3	11	6	2	3	1	1	12
PT	71	39	3	22	9	1	8	14	3	1	1	0	14
RO	33	41	18	34	18	1	14	12	8	4	1	1	8
SI	50	46	17	10	6	0	6	30	2	1	0	1	18
SK	61	34	8	32	18	1	9	6	4	4	1	3	11
FI	49	32	5	12	34	5	8	6	4	4	0	8	26
SE	57	18	9	1	35	13	4	3	31	5	1	21	1
UK	35	23	15	18	15	33	8	6	7	10	4	6	14

Therefore, the question that remains to be addressed in this section is whether the salience attached by the policy-makers to this policy was interrelated to the salience attached by the citizens. In order to validate the initial assumption that there is an interrelation between the salience assessments of these two actors, a data source triangulation is needed. As a result, the following section will present the findings collected through semi-structured interviews, and compare it with the Eurobarometer results.

Interviews

The interviewees were firstly asked to indicate the level of importance of the APD to their country, according to a three-point response scale between highly important, somewhat important, and not so important. In ten old member states, six responded highly important and four somewhat important (Table 8). Contrary to what was expected the majority of responses did not coincided with the Eurobarometer results. In other words, member states such as France, Germany, Italy, the Netherlands and Sweden attached a high salience to this policy, despite the fact there is no evidence of a significant salience amongst citizens. So, why was this directive highly important, somewhat important, or not so important for these countries? The answers varied between the following categories: the influx of asylum seekers; the costs of transposition; geographical position; the balance between rights and obligations; European harmonisation; and to maintain domestic legal status quo. Public opinion was not indicated as one of the key reasons for the level of importance attached to the issue in the second phase of the CEAS (Interviews 1 – 19).

Table 8- Salience attached by the policy-makers

Member State	Response
Belgium	Highly important
Finland	Somewhat important
France	Highly important
Germany	Highly important
Italy	Highly important

Luxembourg	Somewhat important
Netherlands	Highly important
Portugal	Somewhat important
Spain	Somewhat important
Sweden	Highly important

Source: interviews

When the policy-makers were asked if national public salience/opinion influenced the level of importance that their country attached to the recast directive, the ten member states reinforced that it did not have any influence. Even Belgium, where the citizens scored immigration in the top two concerns during this period, disregarded public opinion/salience as a relevant dimension for the level of importance attached to this issue. As stated by one of the Belgian experts (Interview 10_Belgium):

> ´Well, I will not say that our position changed throughout negotiations on the base of the public opinion, but as I said it was always there a file was important for Belgium … (…) Politically, and historically it was important for Belgium and I think there was an agreement on that, also in the public opinion, and Press and so on … but it´s not that … [*there was a pressure from the public opinion*].´

As observed by both the Eurobarometer and interview results the issue of asylum was not a concern during 2009-2013, amongst EU citizens in these member states. The following quotes reinforce not only that the asylum topic was not a salient issue for the general public, but also that there was not at the time an interrelation between the salience attached by the policy-makers and the salience attached by the citizens:

> ´ So there was some feedback in the public opinion, but I would not say that it was a major topic like it was in 2015, now, because then everything changed of course´ (Interviews 1 and 10_Belgium).

´The public opinion in 2010-2013 was not very intense. Quite neutral´ (Interview 14_Finland).

´The number of asylum applications was not very high at this time, which means the asylum issue was not on top of public interest´ (Interview 15_Germany).

´I think … that the public opinion … was … well, first of all the issue of migration was not as important to the voters, to the public in 2013 as it is now … and that it is probably because of what happened in Europe in 2015 when a lot of people arrived at the same time to our Borders, and also in particularly to Sweden, so in general the public attached a bit less importance to migration at that time, but it was still quite high´ (Interview 3_Sweden).

Even though during the current asylum reform the public opinion/salience is perceived by the policy-makers as higher, it continues to not have empirical support as being one of the important factors to account for issue-salience amongst old member states. Therefore, it was noted that decision-makers' salience was mainly motivated by other dimensions, specifically institutional and political ones (Interview 15_Germany; Interview 11_Italy; Interview 17_The Netherlands; Interview 19_ Luxembourg):

´Our aim during the negotiations was to avoid new provisions and pull factors causing an increase of asylum claims. I don't remember a lot of pressure from media/public opinion during the negotiations. Relevant NGOs tried to influence Member States of course. I would say the "potential" public opinion in case of bad provisions was a factor.´

´(…) the attention was mainly from my administration, from the Ministry of Interior, our offices were all mobilised in order to follow the negotiations, that´s for sure.´

`Because public opinion normally, or cannot have the all perspective of the package, so politically speaking it´s easier to have a position than having a position considering the public opinion if the positon is so divided in the country.´

´(…) ´how exactly the directive would have been formulated on that or this issue?´ I don´t think public opinion played so much of a role.´

In brief, the public salience variable did not get empirical support, i.e., there is no evidence that the level of salience attached to the recast APD by the member states were interrelated with the salience attached to the asylum policy by their citizens.

5.2.2. Asylum applications in the EU member states

The influx of asylum seekers was indicated by some of the policy-makers as one of the most important factors for the level of importance attached to the asylum policy. In order to better understand this phenomenon the first part of this section will present data provided by Eurostat[38] on asylum applications in the European Union; followed by a triangulation with the results obtained through the semi-structured interviews conducted with the policy-makers.

Eurostat results

The 90s

In the beginning of the 90s, with the fall of the Iron Curtain and the collapse of the Soviet Union there was a steady upward trend in the number of the asylum applications in the EU15 Member states, reaching a total of 672.385 applications (Figure 6).

[38] Statistical office of the European Union.

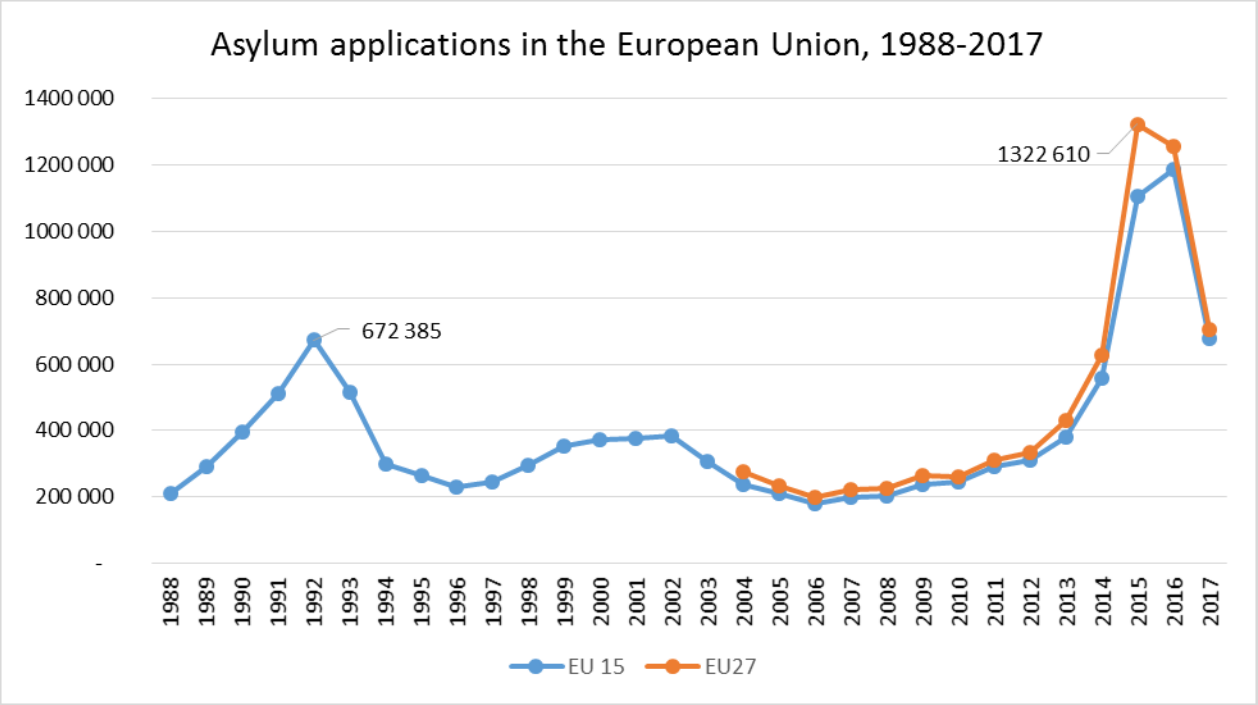

Figure 6 - Asylum applications in the European Union, 1988-2017, Eurostat

In absolute numbers the top EU15 receiving countries between 1988 and 1992 were Germany (1,111.760 applicants or 53,37%), France (226.835 or 10,89%), Sweden (190.720 or 9,16%), United Kingdom (166.425 or 7,99%), Austria (104.005 or 4,99%), the Netherlands (84 555 or 4,06%), Belgium (58 765 or 2,82%), Spain (37 085 or 1,78%) Italy (34 190 or 1,64%), Denmark (33 045 or 1,59%) and Greece (24 710 or 1,19%) (Table 9). Germany alone accounted for about two thirds of the EU15 total applications in 1992 (438.190 applicants) (Table 9). On the other hand, the countries with less claims were: Finland (8760 applicants or 0,42%), Portugal (1315 or 0,06%), Luxembourg (605 or 0,03%) and Ireland (220 or 0,01%). By 1996 the asylum claims in the EU15 fall to a total of 227.805 (Table 9).

Table 9 - Total asylum applications in the EU27, 1988-2017, Eurostat

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
EU15	210 740	291 645	397 030	511 185	672 385	516 705	300 280	263 655	227 805	242 780	295 505	352 225	370 290	375 445	385 425	305 360	236 980	208 940	178 145	197 610	201 630	238 400	243 645	291 670	312 080	381 640	557 170	1 104 555	1 186 905	677 200
EU27	:	:	:	:	:	:	:	:	:	:	313 645	380 450	406 585	424 180	421 470	344 800	276 675	234 675	197 410	222 635	225 150	263 835	259 390	309 040	335 285	430 010	626 515	1 322 610	1 258 695	704 705
Austria	15 790	21 880	22 790	27 305	16 240	4 745	5 080	5 920	6 990	6 720	13 805	20 130	18 285	30 125	39 355	32 360	24 635	22 460	13 350	11 920	12 715	15 780	11 045	14 420	17 415	17 500	28 035	88 160	42 255	24 715
Belgium	4 510	8 190	12 945	15 445	17 675	26 715	14 340	11 410	12 435	11 790	21 965	35 780	42 690	24 505	18 800	13 585	12 400	12 575	8 870	11 575	15 165	21 615	26 080	31 910	28 075	21 030	22 710	44 660	18 280	18 340
Bulgaria	:	:	:	:	:	:	:	:	:	:	835	1 350	1 755	2 490	2 890	1 320	985	700	500	815	745	855	1 025	890	1 385	7 145	11 080	20 365	19 420	3 695
Cyprus	:	:	:	:	:	:	:	:	:	:	225	790	650	1 620	950	4 405	9 675	7 715	4 540	6 780	3 920	3 200	2 875	1 770	1 635	1 255	1 745	2 265	2 940	4 600
Czech Republic	:	:	:	:	:	:	:	:	:	:	4 085	7 355	8 790	18 095	8 485	11 400	5 300	3 590	2 730	1 585	1 645	1 235	775	750	740	695	1 145	1 515	1 475	1 445
Denmark	4 670	4 590	5 290	4 610	13 885	14 345	6 650	5 105	5 885	5 100	5 700	6 530	10 345	12 510	5 945	4 390	3 235	2 280	1 960	2 225	2 350	3 720	5 065	3 945	6 045	7 170	14 680	20 935	6 180	3 220
Estonia	:	:	:	:	:	:	:	:	:	:	25	25	5	10	10	15	10	10	5	15	15	40	35	65	75	95	155	230	175	190
Finland	65	180	2 745	2 135	3 635	2 025	835	850	710	970	1 270	3 105	3 170	1 650	3 445	3 090	3 575	3 595	2 275	1 405	3 670	4 910	3 085	2 915	3 095	3 210	3 620	32 345	5 605	4 990
France	34 350	61 420	54 815	47 380	28 870	27 565	25 960	20 415	17 405	21 415	22 375	30 905	38 745	47 290	51 085	59 770	58 545	49 735	30 750	29 160	41 840	47 620	52 725	57 330	61 440	66 265	64 310	76 165	84 270	99 330
Germany	103 075	121 320	193 065	256 110	438 190	322 600	127 210	127 935	117 335	104 355	98 645	94 775	78 565	88 285	71 125	50 565	35 605	28 915	21 030	19 165	26 945	32 910	48 475	53 235	77 485	126 705	202 645	476 510	745 155	222 560
Greece	9 300	6 500	4 100	2 700	2 110	860	1 105	1 280	1 640	4 375	2 950	1 530	3 085	5 500	5 665	8 180	4 470	9 050	12 265	25 115	19 885	15 925	10 275	9 310	9 575	8 225	9 430	13 205	51 110	58 650
Hungary	:	:	:	:	:	:	:	:	:	:	7 120	11 500	7 800	9 555	6 410	2 400	1 600	1 610	2 115	3 420	3 175	4 665	2 095	1 690	2 155	18 895	42 775	177 135	29 430	3 390
Ireland	50	40	60	30	40	90	360	420	1 180	3 880	4 625	7 725	10 940	10 325	11 635	7 485	4 265	4 305	4 240	3 935	3 855	2 680	1 935	1 290	955	945	1 450	3 275	2 245	2 930
Italy	1 300	2 240	3 570	24 490	2 590	1 320	1 830	1 760	680	1 890	13 100	18 450	15 195	17 400	16 015	13 705	9 630	9 345	10 350	14 055	30 140	17 640	10 000	40 315	17 335	26 620	64 625	83 540	122 960	128 850
Latvia	:	:	:	:	:	:	:	:	:	:	35	20	5	15	25	5	5	20	10	35	55	60	65	340	205	195	375	330	350	355
Lithuania	:	:	:	:	:	:	:	:	:	:	160	145	305	425	365	395	165	100	145	125	520	430	495	525	645	400	440	315	430	495
Luxembourg	45	85	115	240	120	225	260	280	265	435	1 710	2 930	625	685	1 040	1 550	1 575	800	525	425	455	480	780	2 150	2 050	1 070	1 150	2 505	2 160	2 430
Malta	:	:	:	:	:	:	:	:	:	:	160	255	160	155	350	455	995	1 165	1 270	1 380	2 605	2 385	175	1 890	2 080	2 245	1 350	1 845	1 930	1 840
Netherlands	7 485	13 900	21 210	21 615	20 345	35 400	52 575	29 260	22 855	34 445	45 215	39 275	43 895	32 580	18 665	13 400	9 780	12 345	14 465	7 100	15 230	16 135	15 100	14 590	13 095	13 060	24 495	44 970	20 945	18 210
Poland	:	:	:	:	:	:	:	:	:	:	3 425	3 060	4 660	4 480	5 170	6 810	7 925	5 240	4 225	7 205	8 515	10 590	6 540	6 885	10 750	15 240	8 020	12 190	12 305	5 045
Portugal	250	115	60	235	655	2 090	615	330	270	250	355	305	225	235	245	115	115	115	130	225	160	140	155	275	295	500	440	895	1 460	1 750
Romania	:	:	:	:	:	:	:	:	:	:	1 235	1 665	1 365	2 280	1 000	885	545	485	380	660	1 175	980	885	1 720	2 510	1 495	1 545	1 260	1 880	4 815
Slovakia	:	:	:	:	:	:	:	:	:	:	505	1 320	1 555	8 150	9 745	10 300	11 395	3 550	2 850	2 640	895	885	540	490	730	440	330	330	145	160
Slovenia	:	:	:	:	:	:	:	:	:	:	335	745	9 245	1 510	650	1 050	1 090	1 550	500	370	255	190	240	355	295	270	385	275	1 310	1 475
Spain	4 515	4 075	8 645	8 140	11 710	12 645	11 990	5 680	4 730	4 975	4 935	8 405	7 925	9 490	6 310	5 765	5 365	5 050	5 295	7 195	4 515	3 005	2 740	3 420	2 565	4 485	5 615	14 780	15 755	31 120
Sweden	19 595	30 335	29 420	27 350	84 020	37 580	18 640	9 045	5 775	9 680	12 840	11 220	16 285	23 500	33 015	31 355	23 160	17 530	24 320	36 205	24 785	24 175	31 850	29 650	43 855	54 270	81 180	162 450	28 790	26 325
United Kingdom	5 740	16 775	38 200	73 400	32 300	28 500	32 830	43 965	29 640	32 500	46 015	71 160	80 315	71 365	103 080	60 045	40 625	30 840	28 320	27 905	0	31 665	24 335	26 915	28 800	30 585	32 785	40 160	39 735	33 780

2000 – 2014

The asylum applications reached a new peak of 385.425, in 2002. As shown by the figure 6 and table 9, a gradual fall in the numbers of applicants in the EU15 was registered until 2006 (178.145 applicants). Between 2000 and 2005 was the first phase of CEAS. Looking at the EU15, the states that registered the highest numbers of applicants in that period were the: United Kingdom (386.270 applicants or 20,52%), Germany (353.060 or 18,76%), France (305. 170 or 16,21%), Austria (167.220 applicants or 8,88%), Sweden (144 845 or 7,69%), the Netherlands (130.665 or 6,94%), and Belgium (124.555 or 6,62%) (Table 9).

The lowest numbers were observed in Portugal with 1.050 applicants or 0,06%; Luxembourg (6.275 or 0,33%), Finland (18. 525 or 0,98%), Greece (35. 950 or 1,91%), and Spain (39. 905 or 2,12%). Nonetheless, Table 10 shows that Austria (20.680 asylum requests per million inhabitants), Sweden (16.222), Luxembourg (13.998), Ireland (12.567), and Belgium (12.089) received the largest number of applications relative to the resident population between 2000 and 2005. In contrast, countries as Germany and France are amongst the member states that received less applicants per million inhabitants, 4.287 and 4.945, respectively (Table 10).

Table 10 - EU 27 Asylum applications per million inhabitants, 1998-2016, Eurostat

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
EU27	652	789	842	877	870	709	567	479	401	451	454	530	520	620	671	858	1 246	2 623	2 487
Austria	1 732	2 522	2 285	3 756	4 881	3 995	3 025	2 739	1 617	1 439	1 530	1 893	1 322	1 722	2 071	2 071	3 296	10 280	4 862
Belgium	2 155	3 503	4 169	2 388	1 824	1 312	1 193	1 204	844	1 094	1 422	2 010	2 406	2 901	2 530	1 884	2 031	3 974	1 616
Bulgaria	101	164	214	298	367	169	127	91	66	108	99	115	138	121	189	981	1 529	2 828	2 715
Cyprus	333	1 157	941	2 322	1 346	6 172	13 384	10 524	6 102	8 946	5 049	4 015	3 510	2 108	1 897	1 449	2 034	2 674	3 466
Czech Republic	397	715	855	1 768	832	1 118	520	352	267	155	159	118	74	72	70	66	109	144	140
Denmark	1 077	1 229	1 941	2 339	1 107	815	599	421	361	408	429	675	915	709	1 083	1 280	2 609	3 699	1 083
Estonia	18	18	4	7	7	11	7	7	4	11	11	30	26	49	57	72	118	175	133
Finland	247	602	613	318	663	594	685	687	433	266	692	922	576	542	573	592	664	5 911	1 021
France	373	514	640	776	832	966	940	792	486	458	654	740	815	882	941	1 010	975	1 146	1 262
Germany	1 202	1 155	956	1 073	863	613	431	350	255	233	327	401	593	664	965	1 574	2 509	5 869	9 068
Greece	276	142	286	508	520	749	409	825	1 115	2 276	1 798	1 435	924	837	864	747	863	1 216	4 740
Hungary	693	1 122	763	937	630	237	158	159	210	340	316	465	209	169	217	1 907	4 331	17 973	2 994
Ireland	1 252	2 070	2 896	2 694	2 984	1 888	1 059	1 047	1 008	907	865	593	425	282	208	206	315	708	475
Italy	230	324	267	305	281	240	167	161	178	241	514	299	169	679	292	446	1 063	1 374	2 027
Latvia	14	8	2	6	11	2	2	9	4	16	25	28	31	164	100	96	187	166	178
Lithuania	45	41	87	122	106	115	49	30	44	38	162	141	158	172	215	135	149	108	149
Luxembourg	4 052	6 856	1 441	1 560	2 342	3 458	3 462	1 734	1 119	893	940	973	1 554	4 201	3 906	1 992	2 092	4 450	3 748
Malta	416	660	412	396	887	1 145	2 488	2 893	3 136	3 402	6 387	5 804	423	4 554	4 981	5 328	3 174	4 297	4 443
Netherlands	2 888	2 492	2 767	2 038	1 159	828	602	757	886	434	930	979	911	876	783	778	1 455	2 661	1 234
Poland	89	79	122	117	135	178	208	137	111	189	223	278	172	181	282	400	211	321	324
Portugal	35	30	22	23	24	11	11	11	12	21	15	13	15	26	28	48	42	86	141
Romania	55	74	61	102	46	41	25	23	18	31	57	47	44	85	125	75	77	63	95
Slovakia	94	245	288	1 515	1 812	1 916	2 121	661	530	491	166	150	100	91	135	81	61	61	27
Slovenia	169	377	4 651	759	326	526	546	776	250	184	127	93	117	173	144	131	187	133	635
Spain	123	209	196	233	154	138	126	117	120	161	99	65	59	73	55	96	121	318	339
Sweden	1 451	1 267	1 838	2 646	3 706	3 507	2 580	1 945	2 688	3 973	2 699	2 612	3 410	3 149	4 625	5 679	8 417	16 666	2 923
United Kingdom	788	1 215	1 366	1 210	1 740	1 009	679	512	467	457	0	510	389	427	454	479	509	619	608

With the new ascending member states[39] the overall trend for the whole European Union did not significantly change in the first ten years. The number of asylum applications in these countries amounted, on average, to approximately 12 per cent of the EU total between 2004 and 2014 (69.354 applicants). During this period, the highest numbers in the EU15 were registered in Germany (673 015 applicants or 22,08%); France (559.720 or 18,36%); Sweden (390 980 or 12,83%); United Kingdom (302 775 or 9,93%); Italy (250 055 or 8,20%); Belgium (212 005 or 6,96%); Austria (189 275 or 6,21%); the Netherlands (155 415 or 5,10%) and Greece (133.525 or 4,38%) (Table 9).

Within the EU15 the countries with less applicants were: Denmark (52.675 applicants or 1,73%); Spain (49.250 or 1,62%); Finland (35.355 or 1,16%); Ireland (29.855 or 0,98%); Luxembourg (11.460 or 0,38%); and Portugal (2550 or 0,08%). However, considering the number of asylum applications relative to resident population, the leading countries between 2004 and 2014 were: Sweden (41.777 per million inhabitants); Luxembourg (22. 866); Austria (22. 726) and Belgium (19.518) (Table 10).

The second phase of CEAS occurred between 2009 and 2013, and the highest and lowest asylum claims in absolute numbers were observed in the same member states mentioned above (Table 9). Though, in terms of the number of applications relative to the resident population there was a slight difference, i.e., Belgium had more applications per population than Austria (Table 10). Similarly to the previous phase of the CEAS, Germany and France continued to not have a significant number of claims per inhabitants, 4.196 and 4.389 per million inhabitants, correspondingly (Table 10).

[39] In 2004 and 2007, respectively.

2015 refugee crisis

The refugee crisis in 2015 marks a turning point for the asylum applications in the EU27, with a total of 1.322.610 applications (Figure 6). According to the data there was a growth of 77 % in the number of asylum applications, compared with the average asylum applications registered between 2004 and 2014 in the EU27 (307.329 applicants) (Table 9). In 2015, the highest number of applicants within the EU27 was registered in Germany (with 476.510, representing 36,03 % of total of applicants in the EU member states), followed by Hungary (177.135 or 13,39%), Sweden (162.450 or 12,28%), Austria (881.60 or 6,67%), and Italy (835.40 or 6,23%) (Table 9). The new member states represented 17 % of the EU total asylum claims lodged in 2015 (218.055 applicants). Hungary, Bulgaria and Poland received 96% of the asylum applicants within the new member states, representing 209.690 applicants.

Considering the population of each member state, the following countries recorded the highest number of asylum applications in 2015: Hungary with 17.973 applicants per million inhabitants, Sweden with 16.666, Austria with 10.280, Finland with 5.911, and Germany with 5.869 (Table 10). Compared with the previous year, the number of asylum applications in 2015 increased the most in Finland (794%), followed by Hungary (314%), Austria (214%), Spain (163%), and Germany (135%). In contrast, the states that received less applications than in 2014 were: Slovenia (-29%), Lithuania (-28%), Romania (-18%), and Latvia (-12%).

Interviews

Looking specifically at the period of the negotiations of the recast APD (2009-2013), the states under analysis with a higher number of asylum applicants were: Germany, France, Sweden, Belgium, Italy, and the Netherlands. The countries with fewer claims were: Portugal, Finland, Luxembourg and Spain. However, Luxembourg, along with Sweden and Belgium, registered the largest number of applications relative to the resident population. In accordance with the Eurostat data, policy-makers from the member states that received higher numbers of asylum claims identified the influx of asylum seekers as an important factor to attach a high salience to this policy

(Interview 3_Sweden; Interview 5_France; Interview 15_Germany; Interview 10_Belgium: Interview 17_The Netherlands) (Table 8). The exception was Luxembourg that considered the APD only ´somewhat important´.

Since the early nineties, the member states with a high influx felt a greater pressure in their national administrations and were obliged to continuously develop and improve their asylum systems to respond to the new demands (e.g. Interview 3_Sweden; Interview 13_The Netherlands; Interview 15_Germany). The Western and Northern member states that attached a high salience to the asylum policy due to the high influx were active in the negotiations because they aimed at reducing secondary movements of asylum seekers in the European Union, and to maintain their *status quo* in terms of national legislation.. They believed to have already a quite developed system that was both efficient and cost-effective, as the following quotes demonstrate (e.g. Interview 3_Sweden; Interview 15_Germany; Interview 17_The Netherlands):

> ´Since the first mass influx of asylum seekers in the early nineties Germany made many efforts to maintain asylum numbers at a reasonable level and thus guaranteeing public support for the reception of asylum seekers. The aim was to avoid any new provisions making the asylum procedure more complicated, lengthier and more cost intensive. We did not want to create new pull factors or possibilities for abuse of the asylum procedure. We also wanted to keep instruments such as the concept European safe third countries and the concept of safe countries of origin untouched. (…) We also wanted to continue our efforts to reduce the number of secondary movements inside the EU.´

> ´(…) if you receive a lot of asylum seekers, you have a system in place and you need to change it, and those changes cost money, and then of course this has an impact on your position as well. You always … it doesn´t really matter what kind of the negotiation it is, you would need to look "what do we need to change in our national system in order to adapt to the European System?", and "do you think that the added value is bigger than the cost-efficiency?". So cost-efficiency is always important for us and … since Sweden is a NET payer to the European Union budget, quite a lot, we are also restrictive on how the money is used and we need to see

how do we spend the money that is a very important factor for us. So, definitely the cost-efficiency was one of the main, I would say main targets in the negotiations, to make sure that all the changes were cost-effective both nationality, but also from a EU perspective, but mainly from a national perspective.´

Because [the APD] has … a big influence on our asylum procedures … on one hand, it has an influence on what we do nationally, and on the other hand we think … that the harmonisation process is important. (…) We always have quite high influx of asylum seekers, of course, we don´t want to the costs to be too high, so … at one point we said: ´well this is going to cost us too much´, and … of course we were quite happy with our own system, so we tried to maintain that as much as possible.

However, it is important to make a distinction within the group of countries that attached a salient interest to this directive, i.e., between frontline and destination states. In contrast to member states from Western and Northern Europe, known as destination countries, Italy as a frontline member state was less concerned with the secondary movements, compared to the likely added responsibilities and procedure costs under the new legislative instruments (Interview 11_Italy). Under the Dublin Regulation the asylum request by a third country national is to be presented and registered in the first country of entry, meaning that Italy´s geographical position is prone to a high influx, and consequently higher administrative costs. Thus, as stressed by the Italian expert, the APD was highly important for Italy because (Interview 11_Italy):

´ (…) border procedures as you can imagine for a country of frontline (…) would imply a lot of changes in terms of procedures … with additional burden and we need a lot of resources, human resources, and also in terms of costs (…).´

Similarly to Italy, Spain emphasised the geographical position as a concern. ´As an external border country in the European Union, [it] was potentially an important destination country for asylum seekers coming from Africa and other regions of the world´ (Interview 12_Spain).

Nevertheless, along with Finland, Luxembourg and Portugal, Spain has considered this policy ´somewhat important´. Two main reasons were indicated as an explanation, i.e., the low number of asylum applications; and no significant misfit between the European proposal and national policy (e.g. Interview 8_Finland; Interview 2_portugal; Interview 12_Spain; Interview 19_Luxemboug):

> ´(…) since the number of asylum seekers in Finland at the time wasn´t that high, we had several years around 4.000, 3.000, 4.000 applicants a year. So the issue of asylum seekers wasn't on a very high level at the agenda of the government. In that way it´s not … if you compared with other policy areas, asylum issues wasn´t that important. But inside this area we wanted to have very effective procedures, so in that way it was important.´

> ´Well, I would say ... somewhat important. But note this is ... due to the fact that we didn´t have that much difficulty in accepting … most of the Commission's initial proposals, therefore, there was not raised ... pressing needs for legislative amendment at sensitive points. Eventually in other Member States where the directive ... prompted the need for a relevant change in national procedures, it would have motivated more political debate than it did in Portugal. Spain, as external border country in the European Union, was potentially an important destination country for asylum seekers coming from Africa and other regions of the world. Nevertheless, actually it was not the case at the beginning of the negotiations, as the main reception countries were the North and Central European Member States. ´

> ´I mean somewhat important in the sense that … of course it´s highly important, but I think it didn´t result in majorly sort of changes … in the existing legislation in a way that would have been uncomfortable for Luxembourg, let´s say like that.´

Luxembourg, as previously stated, was an exception amongst the investigated member states. Even though Luxembourg had ´a significant amount (…) of asylum seekers at the time´ and it was very interested in this policy area, the policy-makers explained that it was ´somewhat important´

because the directive under negotiation would not change significantly the national policy as ´ the directive stayed sort of (…) below Luxembourg´s standards´ (interview 19_Luxembourg). In other words, Luxembourg´s national policy was already ´generous´ and there was not much at stake for Luxembourg, i.e., there would not be any additional implementation costs.

To conclude, the empirical data has supported the assumption that the salience attached to the asylum issue, specifically the APD, was related to the influx of asylum seekers. Member states with a higher number of asylum applications attached a higher importance to this policy area. However, the concerns differed according to the geographical position of the countries under scrutiny. Destination countries were mainly concerned with reducing secondary movements and to maintain their well-developed national asylum systems; while frontline states had an interest in avoiding too much additional procedural costs and responsibilities under the new legislative instruments (APD and Dublin regulation). Nevertheless, this dimension it is not sufficient to explain the level of importance attached by all states. The example of Luxembourg is a case in point. The country had a high number of asylum claims but not a salient interest in the directive. This is primarily explained by the lack of a ´misfit´ between the proposed directive and national policy. The ´misfit´ dimension will be further discussed in the following topic.

5.2.3. Misfit

When asked to the policy-makers whether there was a significant misfit between national asylum policy and the proposed directive, all of them responded negatively. According to the interviewees, the Commission´s proposal was more or less in line with their national procedures and systems. However, as the following quote demonstrates, the first proposal put on the table by the Commission was not well accepted by several actors in the Council (e.g. Interview 10_Belgium):

> ´So, in fact under our Presidency we didn't really negotiate a lot on that directive, because it became clear that at that time that there was no support for the Commission proposals as a basis for negotiations. So, what we tried to do in that file, because we have worked on

> other files like the Dublin regulation, but on the APR we organised a high level conference, I think, and our aim was to get confirmed there that member states said that they wanted to continue the harmonisation of the asylum procedures, but not on the basis of the Commission proposals, which lead then the Commission to come with new proposals after our Presidency´.

Therefore, the interviewees were mainly considering the amendment proposal presented by the Commission in 2011[40]. Despite the fact that all respondents did not observed a significant misfit, they all had to negotiate and influence some dimensions of the text in order to maintain their national legislative *status* and/or to minimise the transposition costs (either material, political or ideational costs) (e.g. Interview 1 and 10_Belgium; Interview_Portugal; Interview 5_France; Interview 11_Italy; Interview 15 Germany; Interview 17_The Netherlands).

Belgium, for example, has an asylum system and procedures that require two separate bodies, i.e., the Migration Department and the Office of the Commissioner General for Refugees and Stateless Persons (Interview 1_Belgium). The Migration Department is ´responsible for the overall entries, stay and removal of any kind of migrant but within the asylum procedure they are also responsible for the Dublin check, for the registration and lodging of the asylum application, and for the public order check´. Whereas the other body is only responsible ´for the assessment of a claim itself´ (Interview 1_Belgium). So, it is recognised that ´the more we harmonise at the EU level, the more difficult it becomes to keep the national systems´. Thus, the member states have tried their best to influence the text in accordance to their national needs. As pointed out by one of the Belgian interviewees (Interview 1_Belgium):

> ´(…) on the border procedure I do remember that given the specificity we had with the Migration Authority and Asylum Authority there we could influence the negotiations in allowing the procedures directive …. Or allowing our system to continue working under the new procedures directive, but we could ally with France there that is always something that is

[40] European Commission, Amended Proposal for a Recast Asylum Procedures Directive, COM/2011/0319 final - COD 2009/0165

very helpful If you have a big country by your side. As well on the articles on effective remedy, ‘cause there is where we have this parallel appeals process which is specific for Belgium and at the time also for France. So there as well we managed to find a solution that would allow our systems to work, and at the same time [it] did not interfere with the other national systems.´

If Belgium was not able to successfully influence the directive according to its national needs there would have been ´a huge impact both financially and legally´ on the way asylum procedures were organised in Belgium (Interview 1_Belgium). The Netherlands also identified one important ´misfit´, specifically the Dutch one-status system. The one-status system means that the ´beneficiaries of international protection are entitled to the same rights and benefits regardless if they have refugee status or subsidiary status´ (Interview 17_The Netherlands). According to the respondent the Commission intended to make a differentiation between both beneficiaries, and the Netherlands had to be vocal in the negotiations by claiming that: ´ we want to keep our one one-status system, which is beneficial for the asylum seeker as well as for the state´ (Interview 17_The Netherlands). The one-status system was an important point for the Netherlands because it was made an impact assessment and ´it would cost a lot of money to abandon this system´. At the end, the Netherlands was able to influence the process and ´an extra subparagraph [was] added to the directive, which made it possible [to the Netherlands] to keep the one-status system´ (Interview 17_The Netherlands).

All the interviewed officials of EU member states identified red lines for them, i.e., issues in the proposal that they could not accept and had to be vocal and strategic about it. One particular red line for Portugal and France was the proposed automatic procedural guarantees for unaccompanied minors (Interview 2_Portugal; Interview 5_France). Two main arguments were used to keep this provision out of the directive: i) there is an age range where it is very difficult to perceive and accurately determine the age of the people and ii) by automatically foreseeing that a minor has the right to stay in the territory the European Union may send ´a wrong message to third countries, and it could enhance [the] human trafficking of children´ (Interview 2_Portugal; Interview 5_France). Thus, by giving automatic procedural guarantees for this age group there is

the possibility to take advantageous of the system, i.e., ´asylum seekers that are no longer minors can invoke minority to precisely have more favourable reception conditions and automatically have access to the national territory´. There was also other issue where Portugal was really vocal as a matter of principle – the conditions of detention of asylum seekers. Portugal was against the possibility of having tougher detention conditions for the asylum seekers than for migrants who remained irregularly in Portugal (Interview 2_Portugal):

> ´But let me add in relation to the … detention conditions, it was a matter of principle. It was an issue because we understood and understand that under no circumstances could there be any toughest detention rules on the possibility of detention, restriction of movement to asylum seekers than for economic migrants in an irregular situation. Therefore, as I said, the final text finally included our position.´

Germany also suggested that its main objective was to avoid additional costs and to prevent the expansion of the number of asylum claims due to the new provisions. This was closely related to their concern with secondary movements. Germany wanted to maintain the ´instruments which were successfully introduced in the nineties´ and to reduce the ´pull factors for those using the asylum procedure for other purposes´ (Interview 15_Germany). The main procedures that Germany wanted to keep were the boarder procedure (airport procedure), first country of asylum and accelerated procedures.

While in the previous examples the member states were successful in shaping the directive according to their national preferences and positions, there were also cases in which the countries could not find enough support in the Council. Sweden, for instance, was against having fixed processing times. Yet the final text, specifically section I (article 31) of the APD, foresees a time limit of six months for the examination procedure. According to one of the Swedish policy-makers (Interview 3_Sweden):

> ´[it] does not help putting down the processing time, if you have a fixed [number of] months, or something in the directive. Also it doesn´t give you any flexibility and it´s difficult

> because it should be adaptable also in times of crisis, "how many countries who received many asylum seekers were able to follow the processing times of 6 months?". And that was what we were saying during the negotiations: that this is problematic to put in the legislation, that it can´t accede, and then you have to provide an explanation if you can´t stick to it. It´s a lot of administration and as well we saw that it doesn´t really help in lowering the processing times.´

To sum up, along with the influx of asylum seekers the ´misfit´ dimension, connected with costs of implementation and national law adaptation, appears to be the most relevant dimension to account for the level of importance attached by the member states during the recast procedure of the APD. In contrast, the public salience did not have much empirical support. In line with what was initially hypothesised issue-salience alone does not explain member states' behaviour in the Council in the institutional environment post-Lisbon Treaty. The interviews showed that the EU institutional setting was a key explanatory variable for states´ behaviour in the second and third phases of the CEAS. The institutional-related variables are going to be addressed in the following section (5.3.).

5.3. Institutional-related variables: Formal and informal rules

In this section the findings on the institutional-related variables are presented. Three initial factors were expected to influence and shape member states´ negotiation behaviour and capabilities, i.e., voting rule in the Council, the consensus norm in the Council, and the ordinary legislative procedure. The data brought into view one more factor, i.e., the type of legal instrument under negotiation.

5.3.1. Member States´ capabilities under QMV

With the new voting rule in the Council, EU member states lost their capability to unilaterally veto a decision in the asylum policy area. In the first phase ´it was quite easy´ to influence the directive according to national government´s position and interests as the Council decided under unanimity voting and it ´didn´t have to negotiate with the Parliament´ (Interview 7_Finland). However, in the second phase with QMV, states knew ´that regardless of their position, if there is no minority blocking the act would be adopted´ (Interview 2_Portugal). As pointed out by two experts (Interview 2_Portugal; Interview 12 Spain):

> ´If you have the legal possibility of vetoing it is easier to ensure that the essential national interests will be preserved. [Even though] in practice, the veto is used only in exceptional circumstances but the possibility is always there.´

> ´I remember a proposal for a directive... about immigration (…) in 2003 or 2004. At the time I was working in the working group (…) in that directive … we were isolated. We ended up by starting out as a majority group of Member States defending the same position (…) and we were convinced that our position was right and were ... the only Member State with the same position from the beginning to the end and because it was a rule of unanimity, it turned out to be the Portuguese position that won.´

In contrast, QMV requires a more active role in the negotiations, i.e., it was clear for the member states that they absolutely needed to build coalitions on specific issues. ´It was not sufficient to hope that other countries would have similar interests by chance´ (Interview 15_Germany). Under QMV even bigger states had to ´make informal deals with other member states´ in order to have their support in specific issues. It would otherwise not pass in the Council (e.g. Interview 5_France; Interview 15_Germany). This ´favour exchange´ was essential with QMV, because member states knew that they could not block something on their own (e.g. Interview 2_Portugal; Interview 8_Finland; Interview 10_Belgium; Interview 5_France; Interview 11_Italy; Interview 15_Germany). The delegations had already strived for compromise under unanimity voting (Interview 7_Finland), but with QMV there was really no other option. They had to negotiate ´even with regard to matters of essential interests´ (Interview 12_Spain).

It was also observed that QMV favours bigger over smaller member states due to the voting power. The majority of the respondents acknowledged that bigger countries might have more influence in the process as they have more votes (e.g. Interview 13 and 17_The Netherlands; Interview 1 and 2_Beglium; Interview 11_Italy). Before the Lisbon Treaty every member state had one vote and one possibility to veto the decision. During the negotiations of the recast APD the number of votes considering the demography weigh was what ultimately determined whether a decision was to be reached or not. As explained by different interviewees (Interview 10_Belgium; Interview 13 and 17_The Netherlands; Interview 19_Luxembourg):

> ´(…) it depends on how important the member states consider this file, and how big the member state is, because unfortunately a very small member state will have much more difficulties defending its interest. Then you have Malta and Cyprus, which… are very small and will have to build a big coalition, and you have Germany and France on the other hand, if they say something the Presidency will almost immediately say ´OK but if you don't have Germany on board'

> ´Well … I think normally the bigger countries have more influence … because also they have more votes … So normally they have more influence.´

´It´s the size of the country, that plays a big [role], I mean, obviously. But then also some countries, Germany then maybe is the same size of Poland, but has more of a voice than Poland.´

´If Germany and France in COREPER say ´we can´t agree with this´, then you can say: ´OK sorry but you don´t have a minority´ … But a lot of Presidencies don't! (…) If it´s Germany and France saying: ´No´, then they will try to adapt the text and adjust in order to have them on board.´

Nonetheless, the capability to influence the policy output in the second phase of the CEAS was not just dependent upon the size of the country. As underlined, countries with a slight difference in terms of the number of votes in the Council (e.g. Poland and Germany) might not have the same voice in the asylum policy. One of the explanations put forward was leadership (Interview 11_Italy). According to the Italian interviewee ´in terms of leadership there are quite evident differences between member states´. The countries that historically have received more asylum claims ´have a lot of experience, [so] they can explain exactly and thoroughly what the consequences of some choices would be´ (Interview 11_Italy).

In addition to this finding, as the empirical data shows, small member states were also successful in influencing the text according to their national interests. Not only by building coalitions with bigger member states, but also by relying on their expertise and their good reputation in this policy area (e.g. The Netherlands), and by resorting to strategies such as cooperative behaviour and compromise and contact with EU institutions (e.g. Portugal). In other words, small member states had to adapt their behaviour and strategies to the new institutional reality (this dimension will be further developed in point 5.3.2). Furthermore, there was an inherited norm in the Council that the Presidency should aim for consensus, thus, making it easier for small member states to also have their red lines accommodated in the text.

According to the data, the member states´ negotiation behaviour and strategies were also influenced by the new ordinary legislative procedure. Having a new power player in the asylum policy (EP) meant that member states could apply a new strategy to influence the policy output.

By maintaining contact with the EP, in particular with the rapporteur and her assistant, some states were able to keep track of the position of the EP and to know if their positions were in agreement, as the following statement shows (Interview 10_Belgium):

> ´So, I would say we have indeed used the strategy of making coalitions when it was possible, but it was not always possible. We had another advantage, or I had another advantage this was that we had the Presidency and during the Presidency you make very good contacts within the Commission and also with the European Parliament, **so** *I had very good direct contacts with the people also in the Parliament, not from the political. I knew some people from the political side, but also in the secretariat in the LIBE Committee, which was actually drafting the proposal, so in an informal way you try to get in touch with these people and see what´s happening and try to explain why in the Council some things go in another direction* to see … so, this is also a way of negotiating. It´s more informal but it has been used.´

This also allowed some member states to choose their battles in the Council. When member states did not have a blocking minority, but knew that the EP would have the same position in the trialogue meetings, they accepted the compromise in the Council. They knew that it would be probably discussed and rejected by the EP afterwards (e.g. Interview 2_portugal; Interview 10_Belgium):

> ´I remember that at that time we were only few member states having the same [preferences] but we were in line with the Commission and the European Parliament. … This issue was then again linked with other articles where other Member states would have problems. In that time you were calculating to see ´has the presidency enough support or other alternatives or alliances we can build?´, but in the end we could accept the compromise. We didn't accept at that time - I think, it was the end of 2012 - we didn't approve the compromise … the Presidency put to us at COREPER, but we were alone with I think Luxembourg and another member state. Then it´s clear you have tried your best, you have

said to the Presidency: ´we don't agree, but OK you have a qualified majority so go and negotiate´. So, the presidency went to negotiate, but at the end, of course, we knew that the Parliament was more in our line. So the Presidency had to come back to say: 'we didn't find an agreement with the Parliament on the base [that] we proposed´. We saw the compromise moving towards our direction again. It was something we knew beforehand.´

´ (…) when the general position of the Council was against our position [regarding] the possibility of detention of asylum seekers under toughest conditions than the migrants who remained irregularly in Portugal (…) we knew that the European Parliament would have the same position as us [Portugal and Belgium]... we therefore ended up to be one of the players that influenced, or one of the parts that influenced the text in the sense of suppressing this situation, which eventually fell [out of the proposal] during the negotiating stage with the European Parliament .´

This strategy permitted member states, mostly small ones, to maintain a cooperative behaviour and to not expose themselves in the Council, while still succeeding to upload their preferences to the EU. However, the contact with the EP as a strategy has been used more in the current reform of the CEAS (third phase), than it was during the second phase (e.g. Interview 8_Finland; Interview 12_Spain; Interview 11_Italy; Interview 13_The Netherlands). The Netherlands, for instance, has decided to invite the ´rapporteur from the Parliament to see the Dutch asylum procedure and to explain the Dutch´s position. According to the expert the Netherlands has ´a Ministry with experts and they are just one MEP, one office, and they just do not know about the practice, but they have to write law about it´. So, it was important for the rapporteur to see a ´little bit more the actual practice´ (Interview 13_The Netherlands). The objective was not only to promote knowledge-based policy making, but also to attempt to influence the Parliament´s position according to the Dutch preferences.

Italy has also been more in contact with the EP in the current reform due to two main reasons: firstly, the current rapporteur is Italian so it is easier to have an `interlocution´ with the EP; and secondly, the Italian JHA counsellor is ´somehow obliged to contact, to explain, to let them also

understand why the Council made specific choices on some of the provisions´. By way of explanation, the Italian JHA Counsellor is the mediator between both institutions to ´facilitate the comprehension´. The language can be a barrier in understanding some of the ´vague and ambiguous formulas´ present in the text. ´There is always a background and that´s why the exchange of views with the rapporteurs, assistants is important´ (Interview 11_Italy).

Last but not least, the empirical data has brought to light another important factor that was and still is important to influence states´ negotiation behaviour in the asylum policy, i.e. the type of the legal instrument under negotiation. As reported by one of the policy-makers the fact that the previous asylum procedures was a directive there was still a ´bit more room for manoeuvre´. ´As long as it doesn´t contradict the directive´ there exists the possibility to have ´more generous rules´ at the national level' and not necessarily to implement everything as there is ´usually a bit more exceptions than in a regulation´ (Interview 3_Sweden). In other words, a directive set out a goal that has to be incorporated into national law within a transposition period. Yet it may allow individual member states to safeguard national characteristics and choices. A regulation is a binding legislative act that applies automatically, entirely and uniformly to all EU states.

As an illustration, Portugal is one of the countries that in the second phase of the CEAS was not so vocal or active in the negotiations. However, with the asylum package proposed by the Commission in 2016 things have changed. In the asylum procedures, Portugal recognises that with a regulation the country will have to ´follow more closely the procedural rules to be adopted, than in the case of a directive´ (Interview 2_Portugal). Therefore, even if Portugal is ´known as a member state that seeks compromises, either in the EU, United Nations or in all the International forums´, in the negotiations of the APR it has been vocal to make sure that issues that are red lines to Portugal are considered and translated into the asylum policy. The third phase of the CEAS will be further discussed in point 5.4.

5.3.2. Member States´ negotiation behaviour under QMV

As previously introduced the negotiation environment in the Council during the recast APD was friendly, constructive and cooperative. Does this mean that all member states throughout the negotiation process maintained a friendly and cooperative attitude? Additionally, which negotiation strategies have been adopted by the EU states to influence the policy output according to their domestic preferences and interests? In order to answer these questions this section draws on semi-structured interviews with both policy-makers and external experts.

According to the interview data, member states tried in general not to have a confrontational position in the Council during the recast APD. However, four out of the ten countries under analysis when asked ´Did your delegation need to resort to a stronger and confrontational position to achieve its aims? ´ explicitly answered yes. The following quotes reinforce this finding (Interview 1 & 10 Belgium; Interview 5_France; Interview 15_Germany; Interview 19_Luxembourg):

> ´yes on the one or two issues that were of principal concern to Belgium – the border procedure and the appeals system - there we had to stand strong, since we were more or less in a minority together with France. It was so important for both our countries that we had to be strong in those aspects.´

> ´We tried not to have, but as I said when it was necessary we did …stand on the position. [it was] very clear also to the Presidency that we were thinking that they were not going in the right direction and that it could have consequences if they would lose a certain number of member states, also for the negotiations with the Parliament. We knew very well that the compromise - I think it was the Cypriot Presidency - was never going to work with the Parliament. This was something we made clear, not only because we cared about the negotiations, but also because we cared about our national position and our national position was not enough reflected in the text.

´Yes, France had a stronger position on the issue of minors. The Parliament wanted any minor to have the right to stay. Although France already does it by principle, it didn´t want it on paper.´

´Yes, so we were conflicting, I mean because we wanted to make a point, but it was more of a moral point that anything else (…) We just intervene continuously not because it was a problem for our legislation but because we thought it was a problem for the whole system [the expert was talking about issue on minors]´

Nevertheless, the interviews confirm that the majority of the member states at some point of the negotiations had to be more active or vocal to see some of their domestic preferences accommodated in the text. Two examples are Portugal and Finland. Despite their usual cooperative behaviour in the Council they had to push for specific issues, showing that cooperation and conflict can co-exist in the Council (e.g. interview 2_Protugal; Interview 8_Finland):

´Portugal did not have... many difficulties during the debates, because our law on asylum was already sufficiently generous at the time [notably with regard to] resources which was one of the issues that most motivated debate at Council level ... therefore, for us it were relatively easy negotiations ... although we have had some reservations and strong positions... on some specific issues.´

´drafting the detention article … there was one of the final things that we had to push. We had a strong position within the Government and we had to try to pursue something.´

As established earlier, the size of a member state may not interfere with the capability to influence the policy output. However, it may well interfere with member states' behaviour in the negotiation process. According to the policy-makers, bigger member states as France and Germany under QMV ´are always strong in their position, because they have a lot of votes´ (e.g. Interview 10_Belgium). As reported by some of the interviewees, if Germany and France had a common position in the APD negotiations, this could imply that a decisions was reached in general (e.g.

Interview 5_France; Interview 10 Belgium; Interview 15_France; Interview 11_italy). The Presidencies are ´always looking to have everyone on board´ as ´that's the best way of compromising, you give and take … to make sure that everybody is as satisfied as possible´ (interview 1_Beglium;Interview 3_Sweden). However, if it comes to a decision between a position defended by a small member state as Malta, for instance, and one presented by a big member state such as Germany, the Presidency will almost immediately resolve it in favour of Germany, as it has more voting weight in the Council (e.g. Interview 10_Belgium; Interview 17_The Netherlands).

Therefore, small member states had to adapt their negotiation behaviour and strategies under QMV. Smaller member states needed ´to think a bit differentially´ given that they could not ´decide anything on [their] own´ (Interview 3_Sweden). Thus, there was a need to build different coalitions and resort to other strategies. Nevertheless, if ´in the end [they] didn´t manage to have the text changed as [they] whished, it does not necessarily mean that [they] would vote 'no' anyhow´. They would ponder about the pros and cons ´of not agreeing in the Council´. ´It costs a bit in terms of maybe confidence, trust and cooperation´ (Interview 3_Sweden). Does this mean that smaller EU member states have relied on soft bargaining strategies in contrast to bigger states? Or, given the new institutional framework, all member states resorted to soft strategies in Council´ negotiations? The following section will address these questions.

Negotiation Strategies under QMV

Nine negotiation strategies were pointed out by the policy-makers, namely: coalition-building; contact with EU institutional key players (EC, EP and Presidency of the Council); coalition with the EC; ´shadow of the vote´; Presidency mandate; expertise; argumentation; cooperative behaviour and compromise; and trade-off.

The main strategy indicated by all member states was coalition-building with like-minded member states. With the new decision-making rule in the Council all the interviewed policy-makers acknowledged the importance of not standing alone in a position. It was clear for the member states

that they needed to ´find allies somewhere´ (e.g. Interview 11_Italy). Thus, before finding allies the priority was to ´make a very thorough analysis´ of the document to identify the red lines for their countries (e.g. Interview 3_Sweden). This was followed by a presentation of their positions during the meetings. Some of the member states even made written comments and text proposals (Germany, France, the Netherlands, and Austria[41]) (e.g. Interview 17_The Netherlands; Interview 3_Sweden). After these initial steps, states had a better understanding on others´ preferences and positions and could start building coalitions. According to the data there were at least two main coalitions in the Council, i.e., one composed by the EU member states most known in the asylum policy as destination countries (member states from the Western and North of Europe), and the other composed by the frontline member states (Southern European member states). However, it

[41] Note from the Germany Delegation on the Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast). Brussels, 8 March 2010. Interinstitutional file n. 2009/0165 (COD), doc. 7235/10.

Note from the Austrian Delegation on the Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast). Brussels, 15 April 2010. Interinstitutional file n. 2009/0165 (COD), doc. 8610/10.

Note from the Netherlands on the Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast). Brussels, 19 November 2010. Interinstitutional file n. 2009/0165 (COD), Interinstitutional file n. 2009/0165 (COD), doc.16625/10.

Note from the Netherlands on amendment proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast). Brussels, 22 July 2011. Interinstitutional file n. 2009/0165 (COD), doc. 13131/11.

Note from the Germany Delegation on amendment proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast).Brussels, 30 September 2011. Interinstitutional file n. 2009/0165 (COD),doc. 14909/11.

Note from France on amendment proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast). Brussels, 11 October 2011. Interinstitutional file n. 2009/0165 (COD) ,doc. 15395/11.

is clear from the statements that the coalitions were not static. As one of the experts said (Interview 12 Spain):

> ´During the negotiations, we do not take part in any permanent coalition. Of course, there were many approaches and we kept talking with delegations which shared the same problems because we frequently have similar positions. In these cases, we support each other during the negotiation, but not in the form of a permanent coalition. ´

In other words, member states might be grouped by macro political views and preferences, but it is important to highlight that in the APD negotiations some of the coalitions were informally built around the table in terms of ´article by article or issue by issue´ (Interview 10_Belgium):

> ´Before you can determine ´we will do it like that or' … it can happen that a lot of your issues are already dealt within the technical level and they are solved. At that time you don't look actively for alliances*, but around the table you come to concertation: ´OK they have the same …´ if [the Presidency then] sees that a couple of member states have the same issues they try to change the text, and then it is not a formal alliance I would say. It´s only at the end of negotiations when the two or three big political issues get clear. Of course you have done the coalition- building article by article or issue by issue to see who is our ally because you try to defend your interest and it best doing by having and alliance* … But, I would say on a more political view of things you have more coalitions of member states on a more political view on the European migration asylum system of the same view. We have a group of member states still working and that already was existing at that time of some like-minded member states. We see each other when there are SCIFA committee, strategy committee … and there we see each other regularly with for example France, Germany, Denmark, and Sweden.´

Another often-used strategy indicated by the EU member states in this policy process was the contact with EU institutional key players, in particularly the EC, the EP and the Presidency of the Council. The contact with the Commission was done before the proposal was tabled by the EC,

and during the Council´s negotiations. Sweden and Finland, for instance, have contacted the EC ´before the proposal was put on the table´ to explain their position on different matters and ´of course the purpose here was to, if possible, to get the understanding by the Commission on how the [member state] see certain things, and maybe avoid certain things being in the proposal from the very beginning´ (Interview 3_Sweden; Interview 8_Finland). However, according to one of the Finish experts ´the proposals came out [and] it didn't resembled anything that [they] had said´ to the Commission. In fact, ´it resembled the opposite, and then [the member states] had to start pulling away from all these wonderful legal safeguards that went too far´ (interview 8_Finland). As mentioned before the first policy proposal was not well accepted by the Council. It actually lead to a tension between the Council and the EC (Interview 8_Finland; Interview 10_Belgium; Interview 17_The Netherlands).

However, not all member states used the contact with the Commission as a strategy. In contrast to other member states, France did not try to influence the Commission beforehand. It rather focused its efforts with the Commission on the period after the proposal entered the Council (Interview 5_France). The cooperation with the Commission seems to be constant and it was important for the member states to ´understand, which were the objectives that inspired the proposal and to see if in that framework [they] could manage to add elements that would, let´s say, be more favourable and positive for [their country]´ (e.g. Interview 11_Italy). In brief, this exchange of information is essential to explain to the Commission their positions. It also allowed ´to explain to … [their capitals] when some request would not have been accepted because they were completely outside of the scope´ (Interview 11_Italy). But this contact with the Commission is not one-sided. The Commission also actively contacted the delegations to clarify some specific points, with a particular focus on the member states that were more vocal (e.g. Interview 1 Belgium; Interview 3_sweden; Interview 8_ Finland; Interview 15_ Germany). Portugal, for instance, was not contacted by the Commission with regard to the APD. According to the interviewee, Portugal has (Interview 2_Portugal):

> ´good relations with the Commission staff, the asylum unit ... the Commission knows our position and our reality on asylum ... in most cases it knows it can count on Portugal to follow most Commission´s positions on asylum. So, apart ... from the issue of the other directive, there were no contacts [from the Commission].´

Another dimension of this strategy was that the Commission might also serve as an ally in the negotiations. Portugal and Belgium have built a coalition with the Commission on the issue related to the detention of asylum applicants to have a stronger voice in the Council and maintain their preference in the text (e.g. Interview 2_Portugal):

> ´the Council can only amend a Commission proposal ... in two situations: either if the Commission relaxes its position and agrees or at least accepts the position of the Council; or, if the Commission maintains a reservation on the position of the Council. There is unanimity of Member States ... with a position different from the Commission's position.´

The EP can also have this role. By maintaining contact with the EP, in particular with the rapporteur and her assistant, some states were able to keep track of the position of the Parliament and to know if their positions were in harmony, as discussed previously. Again, Portugal and Belgium took advantage of this new power player in the asylum policy to influence the policy output (e.g. Interview 2_portugal; Interview 10_Belgium). They accepted their loss in the Council knowing that in the trialogue meetings the EP would have the same position regarding the detention of asylum applicants. It was likely that the EP would block the decision. This strategy permitted member states, mostly small ones, to keep a cooperative behaviour and not to expose themselves in the Council. However, not all member states resorted to this strategy. Luxembourg, for instance, did not contacted the European Parliament because this political process ´wasn´t that fundamental´ for Luxembourg (Interview 19_Luxemboug).

However, lobbying the EP is being more used in the current reform of the asylum policy than it was during the second phase of the CEAS (e.g. Interview 8_Finland; Interview 12_Spain; Interview 11_Italy; Interview 13_The Netherlands). As explained before, the Netherlands and Italy

are two examples of EU members that are now more in contact with the EP. In the case of the Netherlands, the objective is not only to promote knowledge-based policy making, but also to attempt to influence the Parliament´s position according to the Dutch preferences. Italy is more in contact because the current rapporteur is Italian (MEP), so it is easier to have an `interlocution´ with the Parliament. It is also because the Italian JHA counsellor is ´somehow obliged to contact, to explain, to let them also understand why the Council made specific choices on some of the provisions´ (Interview 11_Italy).

The following strategies are all related to the Presidency of the Council, specifically the contact with the Presidency, ´shadow of the vote´, and Presidency mandate. Regarding the contact with the Presidency, all member states under investigation reported contacts with the Presidency at some point of the negotiations. This contact was essential because the Presidency is the mediator between the member states in the Council. It chairs the meetings and is responsible for driving forward the legislation in the Council. Therefore, the EU states kept talking with the Presidency to guarantee that their preferences were heard and accommodated in the text.

According to the data, the Presidencies ´often like to help countries that have something that is really dear to them´ (Interview 8_Finland). Therefore, it is important to make sure that the Presidency knows the red lines and the issues in which countries may compromise. In the negotiations of the APD ´there was a clear sense of the Presidency looking for an overall consensus´ (Interview 1_Belgium). Nevertheless, by the end of the negotiations ´when the text goes to COREPER or [it is necessary to reach a position in the] Council to go to the negotiation with the Parliament or to approve a possible compromise with the Parliament, the Presidency needs qualified majority´ (Interview 10_Belgium). If the states have the impression that the ´Presidency doesn´t listen [their claims] and is going into another direction', interviewees reported that they will use an existing 'blocking minority' as an advantage with the Presidency – the so-called ´shadow of the vote´ (Interview 10_belgium; Interview 15_Germany; Interview 5_France).

Thus, it was observed that member states indeed count the votes using the Council´s voting calculator application[42]. They want to know where they stand in the negotiation and to use it as a ´bargaining chip´ with the Presidency, as the following statements show (Interview 5_France; Interview 10_Belgium; Interview 15_Germany):

> ´I have the voting calculator as an app in my mobile phone, so you try to see and of course sometimes this is irrelevant … other times it can be very clear that you are totally isolated or that everyone is agreeing or that the Presidency doesn't have support at all. So it is not that you are calculating all-time, but at the point you have a difficult position as a member state you want to know where you stand (…). ´

> ´We build coalitions according to Member states´ interests and calculation of votes. It is a ´power struggle´, like a game to see who is able to have more votes and can influence more the decision.´

> ´R: During negotiations have you counted the votes to make sure you had a winning coalition in specific aspects important for Germany? Have you used this advantage to pressure the Presidency to not push a decision until your preferences were heard?
> I: Yes.´

Another strategy was the use of the Presidency mandate as an institutional opportunity. Belgium had the opportunity to actively influence the political process of the APD when it held the Presidency between July and December 2010. It was clear for the Belgian Presidency that ´there was no support [from the Council] to the first Commission proposal as a basis for negotiations´. Therefore, the Belgian Presidency organised a high level conference to obtain confirmation that member states still ´wanted to continue the harmonisation of the asylum procedures´ and to agree on basic principles (Interview 10_Belgium). According to one of the Belgian experts, the first

[42] Voting calculator Consilium: https://www.consilium.europa.eu/en/templates/voting-calculator.aspx/?id=244

proposal of the APD was ´too ambitious´ and ´it would be nearly impossible to have a deal´ on the basis of it (Interview 10_Belgium). So, the ministerial conference was a ´well-considered´ strategy of the Belgian Presidency to make 'the Commission come with a new proposal´ (Interview 10_Belgium). During the Belgian mandate the APD was not negotiated in the Council, but Belgium was able to influence the Commission´s decision on presenting a new proposal more in line with Council´s preferences.

The Presidency mandate also permitted another advantage. ´During the Presidency, [Belgium] made very good contacts within the Commission and also with the European Parliament´. This allowed a more direct contact with some people who was ´actually drafting the proposal´ (Interview 10_Belgium). After the Presidency mandate, in a ´more informal away´ Belgium could maintain contact with those people and ´see what was happening [in the other EU institutions] and try to explain [not only] why in the Council some things [were going] in another direction´, but also to discuss Belgium preferences (Interview 10_Belgium). During the mandate both Belgium (July-December 2010) and Sweden (July-December 2009) were ´loyal´ and a ´honest broker´ towards the Council mandate. However, both countries recognised that the contacts made during that period were important for the rest of the negotiations (Interview 3_Sweden; Interview 1 & 10_Belgium).

The four remaining strategies were: trade-off; cooperative behaviour and compromise; expertise, and argumentation. One example of trade-off was the one mentioned previously about Germany and France. They had to reach a compromise between two contentious issues, namely frontier procedures and vulnerable persons. In the end, France endorsed Germany´s position regarding vulnerable persons, while Germany gave support to the frontier procedures. This strategy was important to secure what was a red line for each capital (Interview 5_France; Interview 15_Germany). This tactic goes hand in hand with the one relying on cooperation and compromise. All interviewees referred the need to cooperate and seek compromises during the recast APD in order to find a solution that could please all the players. Consensus was the goal because if the final decision was to be explicitly reached by qualified majority voting it could get to a ´political stalemate [*deadlock*]´ as it happened with the relocation mechanism (Interview 1_Belgium). So,

the option is to seek compromise in a creative way ´to find a solution which does not imply dangerous for the country´ (Interview 11_Italy).

This compromise is normally reached through two other negotiation mechanisms: argumentation and expertise. These negotiations strategies are essential to convince the peers and influence the policy output. Presenting your case in the Council with valid arguments, and supporting it with concreate proposals can be fruitful (e.g. Interview 1 and 10_Beglium; Interview 2_Portugal; Interview 3_Sweden; Interview 8_ Finland; Interview 17_The Netherlands). The countries that historically have received more asylum claims ´have a lot of experience, [so] they can explain exactly and thoroughly what would be the consequences of some choices´ (Interview 11_Italy). This expertise was translated into leadership. Countries such as Germany, France, the Netherlands, and Belgium were among the most active and successful in uploading their preferences. Nonetheless, countries that are normally indicated in the literature as being weak regulators also resorted to argumentation to convince their peers in the Council and were successful. However, it is important to highlight that all interviews have shown that EU member states never resort to a unique negotiation strategy. They rather rely on a combination of strategies throughout the discussions in the different levels in the Council.

To sum up, the empirical data strongly suggests that the institutional setting had an impact on states' negotiation behaviour and strategies in the recast APD. Of particular relevance were the voting rule in the Council, the ´consensus norm´, the ordinary legislative procedure and the type of the legal instrument under negotiation. The adoption of QMV resulted in three changes in the member states' behaviour and capabilities: i) there was an additional effort in negotiations and a greater flexibility of the positions; ii) QMV required a more active role in the negotiations, especially in what concerns coalition-building; and iii) QMV was more favourable for bigger than smaller member states due to the voting power. Nevertheless, the capability to influence the policy output was not only dependent upon the size of the country. Smaller member states were able to ´punch above their weight` by resorting to soft negotiation strategies (e.g. expertise, cooperative behaviour and compromise). As regards the ordinary legislative procedure, it has permitted a new strategy. With the empowered EP, member states not only found a new ally in the negotiation

process, but also a new way of avoiding conflict in the Council. Finally there is evidence that the type of the legal instrument was and still is important not only on how states behave but also for the level of importance attached to the issue. The more binding a legal instrument is, the more active and vocal a member state appears to be in the negotiations of the asylum policy.

Turning specifically to the negotiation strategies, it was observed that both small and big member states resorted mostly to soft bargaining strategies that are characterised by more ´friendly tactics´ in contrast to hard bargaining strategies that resort to ´conflictual or aggressive tactics´. Nevertheless, one strategy can be identify as a more confrontational tactic, i.e., the use of the voting power as a bargaining chip with the Presidency.

5.4. Is the Council still aiming for consensus in the current reform?

The analysis of the negotiations of the current reform (third phase of CEAS) has shown that the environment in the Council is very different compared to the previous phases. While in the previous negotiations policy-makers characterised the environment as constructive and cooperative, in the current reform the environment is rather confrontational and tense (Interview 1 and 2_Belgium; Interview 2_Portugal_Interview 3_Sweden; Interview 5_France; Interview 6_Spain; Interview 11_Italy).

According to a majority of respondents, in the previous phases of the CEAS, the asylum file was mainly a concern for the member states that traditionally received a large number of asylum applications. In the current reform there is more at stake for more member states. As emphasised by one expert: 'I would say, it´s a bit different now, because many member states attach even more importance to these issues now than before […]´(Interview 3_Sweden). There are two main factors standing out as an explanation as to why more member states consider this policy highly important in the current reform of the EU´s asylum system, namely: i) the changed international context; and ii) the type of the EU legal acts under negotiation (e.g. Interview 1_Belgium; Interview 2_Portugal; Interview 5_France; Interview 6_Spain).

The international context refers to the 2015 refugee crisis in Europe. As previously shown, 2015 marked a peak time in terms of asylum applications in the EU27, with a record of 1.3 million asylum claims being submitted. As pointed out by one of the policy-makers (e.g. Interview 2_Portugal):

> ´*The environment is different, in fact ... because the migratory crisis has come ... to reveal a clear division between Member States.* Discussions on all instruments of asylum ... are highly affected by the political debate on solidarity and responsibility. So it is about the Dublin regulation and the relocation mechanisms ... *And given the existing division in the Member States' positions ... Member States tend to ... take firmer positions on all instruments and to take a stand … that: 'nothing is agreed until everything is agreed´.* This is the debate on each of the proposals. There are currently seven that are being negotiated, their conclusion will be dependent on the overall agreement that will be reached on the whole package; therefore, the six asylum proposals, plus the proposal for a non-asylum resettlement regulation [that is] also about immigration and humanitarian admission.´

Therefore, in general terms three blocks of member states can be observed in the Council in the current reform. One is constituted by the countries with a longer history of asylum applications interested in avoiding secondary movements, limiting the abuse of the asylum system, securing the Schengen agreement, and maintaining their national *status quo* (most known as destination countries, mainly from Western and Northern Europe) (e.g. Interview 1 & 10_Belgium; Interview 3_ Sweden; Interview 13_The Netherlands; Interview 15_Germany). The following quotes reinforce this finding (e.g. Interview 1 & 10_Belgium; Interview 15_Germany):

> ´(…) *of course we will not be in favour of many changes in our national system because we think it is actually a very good system. But we also understand the notion of harmonisation and we think that´s very important as well as a goal of this recast of the common European asylum system. We all benefit from a harmonised asylum procedure, and the goal of the CEAS in the end is that it doesn't really matter where the asylum seeker puts forward his*

or her asylum claim. When you look at the end result, so the procedure is very important for that, for reaching that goal. So, we are trying to harmonise as much as possible. Through the procedures regulation, I think more than even through the other negotiations on the other proposals one can actually tell how big the differences are between the member states. It´s enormous!´

´Since the first mass influx of asylum seekers in the early nineties Germany made many efforts to maintain asylum numbers at a reasonable level and thus guaranteeing public support for the reception of asylum seekers. The aim was to avoid any new provisions making the asylum procedure more complicated, lengthier and more cost intensive. *We did not want to create new pull factors or possibilities for abuse of the asylum procedure.* We also wanted to keep instruments such as the concept of European safe third countries and the concept of safe countries of origin untouched.´

´I would say first of all the political view on the asylum system and in the fact that within the Schengen zone without internal frontiers, you need a common system. If not you would have secondary movements and it would undermine Schengen. Schengen is one of the biggest achievements of the Union. For Belgium as a founding member of the Union and of Schengen it is important to keep that. So, I would say that from this more long term political perspective it was very important to have such a more harmonise system.´

The other group is composed by the frontline member states that not only want to avoid ´the additional burden´ in terms of human and administrative costs that they can incur with the adoption of new the regulations (mostly regarding the procedures and responsibilities of the country of first entry), but also to secure the solidarity mechanism in the asylum policy, as the following quotes show (Southern European member states) (e.g. Interview 6_Spain; Interview 11_Italy):

´(…) because we have a special geographical position. So, obviously, all the movements now … come from Africa, all the flows come from Africa. Of course southern countries of Europe are the most interested in this question. Of course, because we receive all the flows.´

´Accelerated procedure, pre-Dublin check, inadmissibility, these are points that in a more general sense … could be understood, you can explain why such changes were made, but in terms of responsibility and additional burden for frontline member states, we are going into a very … problematic direction.(…) *Firstly, because border procedures for a country of frontline, the frontline would imply a lot of changes in terms of procedures … with additional burden and we need a lot of resources, human resources, and also in terms of costs* ´

´We have to be those who control the external borders, those who have to bear the burden of asylum applicants, finger printing, accelerated procedure … and I would also say stop the secondary movements. This is the way how our role is conceived in the Council - without thinking that maybe if secondary movements continue to occur, this is maybe because we have a very limited definition of family members. An applicant may have a sibling in Germany and would like to go and live with his sibling, brother, sister, whatever it is. The family reunification is an enormous element which acts as a pull factor.´

The last group is mainly composed by the ´new´ EU member states, with particular attention to the Visegrád Group (Czech Republic, Hungary, Poland, and Slovakia) that are mostly vocal on the mandatory allocation mechanism under the Dublin regulation. According to the respondents these countries are more in favour of a preventive approach (an external dimension by focusing on the sending countries) rather than focusing on how to deal with a crisis in Europe when it happens (e.g. Interview 18_Poland). They are against a European solution that requires an extra burden and obligation to member states. Some experts have said that in the current reform and in particularly in these member states there is a close link between the public opinion and the political colour of

the national governments, defining their political positions in the Council (e.g. Interview 5_France; Interview 10_Belgium; Interview 18_Poland).

Nevertheless, within these macro-level divisions there are also different positions on key issues. One example is the case of Finland and Sweden. In the current reform they have a different position regarding the allocation scheme, as emphasised by one of the experts: ´it is very strange, considering that Nordic countries usually have the same positions´ (Interview 6_Spain). Sweden is in favour of the allocation, while Finland is against it. Italy and Spain also have a completely different position regarding the allocation of refugees. Spain is in favour of allocation but only for people in need of international protection. Italy would like to extend this scheme to other migrants from Ethiopia, Nigeria, etc. as they receive a lot of people from these countries. In short, the influx of refugees in 2015 and its resulting pressure on the domestic asylum structures in many EU member states (even if differentially) has changed the negotiation environment and coalitions in the Council.

In addition to the altered external context, the policy-makers have highlighted the importance of the type of the legal acts under negotiation. The asylum package that the Commission put forward in 2016 only has one directive (Reception Conditions). The rest of the legal acts are all regulations[43]. As previously underlined (point 5.3) the regulations have direct application and have to be transposed and implemented in full. Therefore, the majority of member states are now more active and vocal to minimise the impact of the European Integration on their domestic policy and structures (Interview 1 & 10_Belgium; Interview 2_Portugal; Interview 3_Sweden; Interview 6_Spain; Interview 11_Italy). This argument is supported by the following quotes:

> ´Completely different from the second phase, the abuse or tackling the abuse is now top of the agenda certainly for the Asylum Procedures regulation. Firstly because it is a regulation now; and secondly one of the lessons we learnt from the asylum crisis is … if you make the

[43] Proposal: a regulation to reform the Dublin system; a regulation to amend the Eurodac; a regulation to establish an EU Asylum Agency to replace the European Asylum Support Office (EASO); and a proposal to reform the Reception Conditions Directive - Regulation establishing a Union Resettlement Framework.

> system too complex it might work very well when the weather is fine. But it collapses as soon as bad weather is coming. The focus within the Council is really on how we can have a lean, fair and efficient asylum process´.
>
> ´Yes, and I think procedures would certainly come in second, because now that becomes a regulation. It will have a very high impact on national asylum systems.´

As already discussed, in the last recast and in the current process the institutional rules changed, i.e., the Council is now deciding under QMV, and the EP is a co-legislator (article 294 of TFEU). Nevertheless, member states avoided to explicitly vote in the second phase of the CEAS. However, is the Council still aiming for consensus in the current reform? According to some of the interviewees, even if in the current negotiations member states are still aiming for consensus ´everybody knows that if there is no consensus in June [2018], from July-on the rule will be qualified majority´ (Interview 6_Spain). This means that given the high salience of this policy for a majority of the member states, and given the division in the Council in core issues, the countries are actively seeking to build winning coalitions in order to be able to say ´ well if you don't like that, we have a minority blocking´, and use it as a ´bargaining chip´ with the Presidency and other states or ultimately explicitly vote (interview 6_Spain).

The European Council has emphasised in December 2016[44] the importance to achieve consensus in this policy area. However, it is clear from the statements of key policy-makers that they do not exclude the possibility of using their voting power in the Council. According to the June European Council conclusions (29 June 2018) the APR requires further examination, showing that a consensual decision was not yet reached in this file (European Council, 2018b):

> ´As regards the reform for a new Common European Asylum System, much progress has been achieved thanks to the tireless efforts of the Bulgarian and previous Presidencies. Several files are close to finalisation. A consensus needs to be found on the Dublin

[44] European Council (2016). European Council meeting (15 December 2016) – Conclusions. Brussels, 15 December 2016, EUCO 34/16, CO EUR 10, CONCL 5.

> Regulation to reform it based on a balance of responsibility and solidarity, taking into account the persons disembarked following Search and Rescue operations. Further examination is also required on the Asylum Procedures proposal. The European Council underlines the need to find a speedy solution to the whole package and invites the Council to continue work with a view to concluding as soon as possible. There will be a report on progress during the October European Council.´

Similar to June 2018, in October the JHA Council was still struggling to achieve a consensual decision in the Dublin regulation. In the APR file there were some developments in October 2018, but the discussions were still at the JHA Counsellors level (Council, 2018b). Nevertheless, according to an external observer, in July 2018 the Austrian Presidency decided (Interview 21_International Organization):

> ´not to go for a vote at least at the moment on the big ones, so Dublin and the APR, as long as there is not a consensual approach; but at the same time in a bit of conflicting position the Austrians are also saying that they would like to reach the Council position by the end of the mandate [December 2018]. Probably by the time discussions are advanced they will have a plan on whether they wish to vote for this one.´

Furthermore, the expert argued that in ´the European Council conclusions the emphases on the consensual approach is more for Dublin than really for the APR´ (Interview 21_International Organization. So, given that the negotiations are still ongoing at the time of writing, it is still difficult to predict whether or not the decision in the APR will be decided by consensus. The only certainty is that the Presidency is still aiming for consensus. They will ´not risk to put the file to vote if they don´t think they will have a qualified majority´ (Interview 21_International Organization).

6. AN ACTOR-CENTERED INSTITUTIONALIST APPROACH TO NEGOTIATION BEHAVIOUR AND STRATEGIES IN THE EU ASYLUM POLICY

The findings presented in the previous chapter cast a new light on the negotiation dynamics in the Council of the EU, specifically in the asylum policy. From the results, it is clear that the decision-making in the recast APD adopted in 2013 was reached by consensus. As initially expected the consensual decision was due not only to an existing social norm in the Council, but also because member states rationally pondered about the pros and cons of standing alone in a decision. Furthermore, there was a general concern with the implications of a no decision for the harmonisation of the EU asylum policy.

The literature usually relies on rationalism or constructivism theories to explain consensual decisions in the Council. However, Novak´s work (2013a) shows that it is necessary to consider both approaches to better understand consensus in the Council. It is not just a ´reflex´ of the Council´s culture (Lewis, 1998; 2003) nor just a way to maximise national interests (König & Junge, 2009, 2011; Mattila & Lane, 2001). Instead, in the case of the asylum policy it was a combination of a collective institutional norm appropriation that was inherited from the first phase of the CEAS and a rational decision to not stand alone in the Council. The acknowledgement that a no-decision would be worst for the EU as a whole played an important role as well. Elgström and Jönsson (2000: 700) claim that ´existing procedures tend to be perpetuated by repetition, especially if they are initially evaluated as being successful in coping with perceived problems'. Nevertheless, as shown, this normative mechanism per se is not enough to explain consensus in the asylum policy. Rather it is necessary to embed it with a more rational approach that recognises self-interests.

As pointed out by Novak (2013a) consensus in the Council under QMV is not the same as consensus under unanimity voting. Throughout the negotiation process of the recast APD there were different positions and preferences in the Council. Some member states even decided to attach formal statements to the Council minute on the recast APD (Germany and Slovenia). In other words, member states complied with the consensus norm of not explicitly voting the decision, but

still made public their exact political positions. This dimension was not studied in detail. However, this might be due to what Hagemann calls as a 'two-sided game' in which outvoted governments act out a ´sense of willingness to cooperate´ at the EU level without ´sending a political signal´ to internal and external actors that they diverged from their initial preferences and positions (Hagemann, 2008: 47).

In order to better understand ´which factors influenced and shaped EU member states´ negotiation behaviour and strategies in the Council during the second phase of the Common European Asylum System´, it is essential to discuss the findings on the overall negotiation environment in the Council. The present research concludes that the negotiation environment of the recast APD was friendly, constructive and cooperative. This constructive environment occurred because few member states attached a high salience to the issue during the second phase of the CEAS. Only member states that traditionally received a large number of asylum applications and consequently faced a higher pressure in their domestic structures were keen to shape this policy. Therefore, a less pronounced division in the Council contributed to a more positive negotiation environment.

Additionally, the old member states under analysis were aware of their limitations. They knew that they could not influence the policy output by standing alone in a position or by having a confrontational behaviour in the Council under QMV. Therefore, contrary to the assumptions of Elgström and Jönsson (2000) and Scharpf (1988) QMV rule enabled a cooperative environment in the Council and empowered coalition-building, compromise and trade-offs with regard to the APD. As Novak (2013b) asserts, under QMV member states have no other option but to negotiate. Otherwise it would be difficult to reach a decision. A similar pattern of results was obtained with regard to individual negotiation behaviour. Old member states tried in general not to have a confrontational position. Nonetheless, all of them had to adopt a stronger position at some point of the negotiations (by being more active or vocal) to get their red lines accommodated in the final text. This shows that cooperation and conflict co-existed in the Council during the second phase of the CEAS.

Academics do not offer us a consensual position on the predominant mode of negotiation in the Council, much less is known on the type of negotiation expected on the asylum policy. The existing typologies on EU negotiations fail to portray the observed dynamic in the APD. Assuming the most common typology in the EU negotiation literature between bargaining and problem-solving (Hopmann, 1995; Scharpf, 1988) or integrative bargaining and distributive bargaining (Da Conceição-Heldt, 2006), it is argued that this dichotomy is too rigid to grasp the dynamic of the negotiations of the asylum policy. The negotiations of the recast APD and also of the current CEAS´s reform were not just bargaining strategies to maximise member states´ self-interest nor just the search for creative joint solutions for the problems, but rather what Schelling (1980) called the ´mixed-motive game´. As Schelling (1980: 89) puts it:

> ´Mixed-motive refers not, of course, to an individual´s lack of clarity about his own preferences but rather to the ambivalence of his relation to the other player - the mixture of mutual dependence and conflict, of partnership and competition.´

Building on Schelling´s work, one should perceive the negotiations of the EU asylum policy in the Council as a non-zero-sum game. However, mutual gain does not mean no scope for conflict. As Iklé (1964: 2) emphasises ´without common interests there is nothing to negotiate for, without conflict nothing to negotiate about'. Member states were quite aware of their policy preferences and on how salient the issue was for them. At the same time they knew that the post-Lisbon institutional developments would create a mutual dependence and would constrain their ability to pursue a zero-sum game in the asylum policy. Thus, self-interested actors accommodated joint solutions in order to obtain a win-win situation in the Council. What remains to be discussed are the actor and institutional-related factors that influenced and shaped old member states' negotiation behaviour in the asylum policy. In other words: which factors can explain this mixed-motive game approach to negotiations of the recast APD?

The main argument is that the mixed-motive game observed in the asylum policy in the post-Lisbon Treaty period can be explained by three macro factors: issue-salience; formal institutional rules; and informal institutional rules (Figure 7).

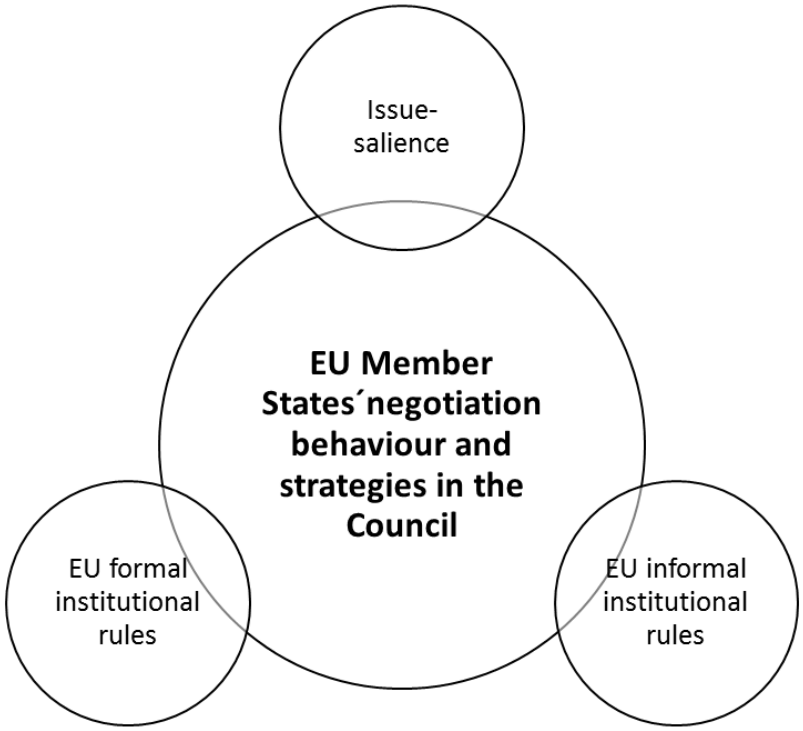

Figure 7 - Interrelation and interaction between the different factors in the asylum policy

It is important to highlight that a single factor does not explain member states´ behaviour in the post-Lisbon treaty period, but rather the interrelation and interaction between the different factors (Figure 7). As Glennan (2002: 344) remarks:

> ´A mechanism for a behavior is a complex system that produces that behavior by the interaction of a number of parts, where the interactions between parts can be characterized by direct, invariant, change-relating generalizations.´

Departing from a rational choice institutionalism notion of ´preference formation´ in which actors' preferences tend to be exogenous and prior to the institutions (Moravcsik, 1993, 2018; see Peters, 2012), this empirical study shows that the member states under investigation had a clear knowledge on how salient the issue was for them and how the level of importance attached to the issue would translate into clear policy preferences and positions in the negotiations of the recast APD. According to the findings, the salience attached to the asylum policy in the second phase of the CEAS was related to the number of asylum claims a member state had received prior and during the negotiations (in total and/or relative to the size of the population). Another factor was the misfit between national and European policy. In short, as initially hypothesised, the higher the level of exposure to asylum claims and the higher the ´misfit´ between European and national policy were, the higher was the salience attached to the asylum policy by the EU member states. However, the public salience variable did not get empirical support. In line with Beyers and colleagues' general conclusion (2017) there is no evidence that the level of salience attached to the recast APD by the policy-makers from the old member states were interrelated with the salience attached to the asylum policy by their citizens.

Up until now, scholars such as Zaun (2016) expected salience along with expertise to be the most important factor to account for member states' negotiation behaviour and strategies in the asylum policy. However, the present study found evidence that issue-salience and expertise are no longer sufficient variables to explain the complex negotiation behaviour and strategies adopted by the member states after the Lisbon treaty. As Scharpf (1997: 42) emphasises, the institutional rules, either formal or informal, can facilitate but also constrain the actors in terms of behaviour and strategies. In line with the ACI framework, it is argued that institutional rules, such as voting rule, consensus norm in the Council, the ordinary legislative procedure and the type of legal instrument under negotiation have a key role in influencing and shaping member states´ negotiation behaviour and strategies in the asylum policy.

Focusing specifically on the influence of QMV, four main conclusions can be drawn: i) QMV required a more active role and an additional effort in the negotiations from the member states, especially with regard to coalition-building; ii) QMV resulted in a greater flexibility of positions

in the Council; iii) QMV was more favourable for bigger than smaller member states; and iv) QMV constrained both big and small member states of using hard bargaining strategies, regardless of how salient the issue was for them.

By comparing the first and second phases of the CEAS, it is possible to assert that the negotiation efforts from the old member states were higher when QMV applied in the Council. Before, states could unilaterally veto the decision and even use it as a hard bargaining strategy with the Presidency and their peers. With the new voting rule member states had to actively seek for coalitions to successfully upload their national interests and preferences. It was clear for them that if there was not a blocking minority, the act would be adopted. Even with the consensual norm in the Council, there were some issues in the APD that did not get the support of all member states and yet the Presidency decided to put forward the majority position to the trialogue meetings.

Therefore, states were quite aware of their limitations and their need to have a more active role within the new institutional setting. Furthermore, QMV enhanced compromise between countries. A good example was the ´favour exchange´ or the ´informal deal´ between Germany and France regarding vulnerable persons and frontier procedures. Under the old decision-making rule, these two big member states would probably stand their ground and would threat to use their veto power. Different scholars have shown that the threat of vetoing a proposal constituted an important source of bargaining power for both big and small states, which probably superseded other power sources (e.g. structural or individual) (*inter alia* Slapin, 2011; Tallberg, 2008). Hence, another related finding is that QMV was more favourable for bigger than smaller member states. As highlighted by the majority of respondents, bigger countries tend to have more influence in the process and a higher capacity to build coalitions given their number of votes. Overall, this conclusion is in accordance with findings reported by the literature on power indices arguing that the QMV gives advantages to big countries, specifically in terms of coalition-building (e.g. Bârsan-Pipu & Tache, 2009; Le Breton et al., 2012).

Nonetheless, it is clear from the results that the capability to influence the policy output in the second phase of the CEAS was not only dependent upon the size of the country. Features such as leadership and capability to ´punch above their weight´ explain variances in bargaining success.

Leadership or regulatory expertise as Zaun (2016) calls it help us to understand why two big member states did not have the same bargaining success in the asylum policy. Poland and Germany are presented as an example. Countries like Germany that historically received more asylum claims and consequently have a regulatory tradition in this policy are more capable to explain the consequences of certain policy choices. As a result, regulatory experience is respected and perceived by the peers as an asset for the policy development.

In addition, as the empirical data shows, small members have ´punched about their weight´ and have also successfully influenced the policy output according to their national interests. As initially hypothesised smaller member states resorted to a ´smart state strategy´ to compensate the loss of the veto power. According to Grøn & Wivel (2011: 535) there are three smart strategies that small member might employ to overcome the institutional challenges: i) the state as lobbyist focusing on the EP and EC; ii) the state as self-interested mediator in the Council; and iii) the state as norm entrepreneur by focusing on policies rather than institutions. Different small old member states applied these three strategies at different moments during the negotiations of the APD.

For example, by maintaining contact with the EP, Portugal and Belgium were able to keep track of Parliaments´ position and to know in advance if the EP would have the same position in the trialogue meetings. This strategy permitted these two countries to maintain a cooperative behaviour and not to expose themselves in the Council while still successfully uploading their preferences to the EU regarding the detention of asylum applicants. The second strategy was employed, for example, by Belgium when it held the Presidency. Belgium was a ´honest broker´ in the Council, but it was able to take advantage from its position. The last strategy was observed in the case of the Netherlands that focused on the policy by relying on its expertise and good reputation in this policy area to influence its peers and other institutions. In accordance with Grøn & Wivel (2011), this research also found evidence that the small member states did not rely only on one strategy, but rather on a combination of strategies.

Furthermore, as Panke (2010b, 2010a, 2012a) and Golub (2012) argue the salience attached to an issue can explain why smaller/weaker states can succeed over structurally advantaged states. In other words, if a state cares deeply about an issue it will deploy all its resources, even if scarce,

and negotiate firmly to obtain its aspirations (Bailer, 2004; Bueno de Mesquita & Stokman, 1994; Hopmann, 1996). In brief, the voting power did not interfere in a deterministic way with the member states´ capability to influence the policy output, but interfered with the negotiation behaviour and strategies (Dur & Mateo, 2010). Furthermore, in contrast to Zaun (2016), this study did not find evidence that the administrative capacity is an important factor for bargaining success.

Last but not least, the QMV constrained both big and small member states of using hard bargaining strategies. In the first phase of the CEAS the literature suggests that strong regulators resorted to hard bargaining strategies (Zaun, 2016). In the second phase such was not observed. This was mainly due to the QMV rule. This is consistent with what has been found by Novak (2013b). The author argues that QMV fosters ´decisional productivity´, and discourages the ´opponents from being obstructionist´ (Ibid.: 93). According to Ponzano (2002), some member states have long refused to pass from unanimity to QMV because they did not want to be outvoted. Thus, the QMV was intended to inspire states to tone down their positions in order to find compromises (Ponzano, 2002). In fact this was observed in the asylum policy area. Concerning the negotiation strategies, it was proved that both small and big member states resorted mostly to soft bargaining strategies[45]: coalition-building; contact with EU institutional key players (EC, EP and Presidency of the Council); coalition with the European Commission; ´shadow of the vote´; Presidency mandate; expertise; argumentation; cooperative behaviour and compromise; and trade-off. Amongst the nine strategies, only one can be identify as a more confrontational tactic, i.e., the use of the voting power as a bargaining chip with the Presidency. Yet even this more confrontational tactic was only used as a last resort during the negotiations of the recast APD. To be precise, it was only used when the Presidency seemed not to accommodate states' red lines.

QMV has a strong explanatory power, but one should not ignore the role of the consensus norm. As reported by the interviewees, the consensus norm inherited from the first phase of the CEAS was decisive to guide how the decision ultimately should be reached in the Council in the recast APD. It was accepted by the member states that the decision was not to be explicitly voted

[45] Dur and Mateo (2010) define soft bargaining as ´the use of friendly tactics´.

in the Council configuration. This finding is consistent with the argument made by Lewis (2003) that consensus in the Council occurs independently of the decision-making rule. However, what is added by this research is that although the Council ultimately aims for consensus, the way member states behave and strategically decide to influence the policy output during the first levels of the Council is more related to issue-salience and the voting rule in the Council than with the social norm of consensus. In other words, the existing informal institutional rule (consensus norm) did not impede the old member states to actively and rationally push for their national interests. They adapted their negotiation behaviour and strategies to the new formal institutional setting.

This is even more visible during the third phase of the CEAS. The Presidency is still aiming for consensus, but given the high division and confrontation in the Council member states are aware that if consensus fails the Presidency will have to rely on the formal rule of QMV. Thus, there is a pressing need to influence and shape the policy output according to their national interests as early as possible in the negotiations. Hence, in the case of the APD, the consensus norm did not supersede the formal rules. It rather complemented its formal counterparts.

As initially expected, another factor helps to explain states' negotiation behaviour in the Council, i.e., the ordinary legislative procedure. According to König (2008) member states benefited from the empowerment of the EP, because states can strategically misinform the conciliation bargains to influence the policy output closer to their *status quo*. This study shows that the empowerment of the EP also resulted in a benefit for the EU states, albeit of a different sort. The new power player in the asylum policy compensated in some way the loss of the veto power in the Council. This is mainly true for the smaller member states. By maintaining a constant contact with the EP, the states were able to keep track of the position of the EP, and to know if their positions were coinciding. This allowed smaller member states to choose their battles in the Council. When they did not have a blocking minority, and knew that the EP shared the same policy preferences they accepted the compromise in the Council knowing that it would be probably rejected by the EP at the trialogue meetings. Therefore, the new power player in the asylum policy, permitted member states, mostly smaller ones, to maintain a cooperative behaviour and to not expose themselves in the Council, but still being successful in uploading their preferences to the

EU. Nevertheless, this strategy is used more in the current reform of the CEAS, than it was used in the second phase of the CEAS. As stated by Panke (2012b) in the first period under ´co-decision´, the EU states may need time to adapt to the new powers of the EP. In the current reform, however, lobbying the EP seems to be an essential negotiation strategy to have another advantage in the political process.

Turning now to the dynamic between the three levels of the Council. The findings suggest that the main decisions in the second phase of the APD were reached during the preparatory bodies (Asylum Working Party and SCIFA), and the COREPER II. Nevertheless, there was an ´interplay between levels´(Smeets, 2013: 17). This means that the decisions were built by constant talks between national officials, JHA Counsellors, ambassadors, and the Ministers. The current reform is still ongoing, so it is too early to assess whether there was also a comparable interplay between levels or there was a level in the Council with a more prominent role.

When it comes to the third phase of the CEAS (current reform) two other factors explain the level of importance attached to the asylum issue: the type of legal instrument under negotiation, and the international context. In the current reform, the asylum procedures are now proposed as a regulation. This implies that member states will have to apply it directly without having room for national manoeuvre during the transposition process. Therefore, the majority of member states are now more active and vocal in order to minimise the impact of the Europeanisation on domestic policy and structures. This result ties well with the ´goodness of fit´ hypothesis advanced by the Europeanisation literature (e.g. Börzel & Risse, 2000). It states that the more binding the EU policies are, the bigger the adaptation pressures to domestic policies in cases of ´policy misfit´(see Graziano & Vink, 2013). There is hence evidence that the type of the legal instrument is relevant to understand the level of importance attached to the asylum policy and the negotiation behaviour of member states.

To illustrate this point, old member states that traditionally were not so vocal or active in this policy (e.g. Portugal), with the new legal instrument proposal are now following more closely the negotiations to make sure that their red lines are considered and translated into the final policy document. Another important observation is that the type of the legal instrument gains a greater

relevance with QMV. With this voting rule, EU states lost the capacity to veto the decision. Thus, there is a necessity for a more active role and an additional effort in the negotiations to achieve their national interests. In short, the more binding is the legal instrument under QMV the more active and vocal the member states appear to be in the negotiations in the asylum policy.

By discussing the findings in a longitudinal perspective, it was also possible to identify the international context as a key factor to explain the interest given by more member states to the asylum policy. The ´2015 refugee crisis´ marked a turning point for the asylum applications in the EU27, with a record of 1.3 million asylum claims. This crisis revealed a clear division in the Council not only between destination states, frontline states and the V4; but also within these three blocks of member states. According to key decision-makers, the crisis resulted into an additional economic and political burden to more member states. Thus, it made harder to find a common ground in the Council, especially with regard to responsibility-sharing. This division translated into a tenser and confrontational negotiation environment, calling into question the norm of consensual decision-making. In other words, the crisis has intensified the problem for more member states (higher issue-salience). As a result, the preferences and positions in the Council have become more diversified and polarised.

The preferences and positions of these three macro informal coalitions can be summarised as follows. For the destination countries (Western and Northern member states) the objective is to reduce secondary movements, maintain their legal *status quo* to continue to have efficient and cost-effective procedures, and to have a functioning CEAS. The main concern for the frontline member states (Southern member states) is the responsibilities and procedural costs under the new directive/regulation. The V4 are mostly against a European solution that would imply an extra 'burden' and obligation for member states. They are in favour of a preventive/externalisation approach that focuses on sending countries. They believe the current EU approach focuses too much on how to deal with a crisis in Europe.

There are many scholars that suggest that the enlargement had little impact on EU decision-making (see Mattila, 2008). In line with Zaun (2018), the findings on the current reform of the asylum package challenges such an assumption. When pressured, the ´new´ members stand their

ground in the Council´s negotiations. Similar to ´old' member states, a higher exposure to asylum applications combined with the altered EU institutional framework (QMV and regulation) has led ´new´ member states to attach a higher salience to the CEAS reform. They have become more vocal, active and organised in the Council.

Furthermore, along with Trauner (2016) and Zaun (2018) this study demonstrates that in case of a more divisive and confrontational Council, the consensus norm might be undermined. In other words, the belief that the Council´s decisions in the JHA are mainly reached without voting is no longer 100 per cent accurate. As Thomas König & Bräuninger (2004) explain, the more different the policy preferences between old and new member states are, the harder it is for the Council to act. The 2015 refugee crisis has marked a turning point for the asylum applications in the EU27 as well as on the negotiation dynamic in the Council. Nevertheless, if one reflects on the findings of Dehousse and colleagues (2017), there is still a possibility that the consensual system will prevail even under a situation of high conflict. In the current reform, it will only be possible to investigate this further by looking at it again after the end of the negotiation process.

CONCLUSION

The main aim of the study was to investigate the factors influencing and shaping the negotiation behaviour and strategies of old member states in the Council during the second phase of the CEAS. With the entry into force of the Lisbon Treaty, the veto power ended, and the EP became a co-legislator on an equal footing with the Council.

This research mainly focused on the negotiations of the recast APD adopted in 2013. Nevertheless, the study included a comparative dimension by looking at the negotiations of the recast APD in comparison with the first and third phases of the CEAS. The procedures are regarded as a key legislative instrument in the EU's asylum package. It sets principles and guarantees for persons seeking international protection, and it defines the member states' procedural responsibilities within the CEAS. Moreover, this legal instrument is one of the first measures to be considered in an asylum process. It tends to have a very high impact on national asylum systems.

The actors under investigation were the following ten old EU states: Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden[46]. This study focused on the old member states because the new member states lack experience with the first generation of EU asylum law. A historical perspective and investigation of the impact of changing voting rules in the Council was hence not possible with them. To trace the process in this policy area, two research techniques were used: document analysis of secondary data, and semi-structured interviews conducted with experts from all EU states under investigation. The primary data was collected by conducting 21 semi-structured interviews with the: Permanent Representatives of the European Union; experts from the capitals, the EU institutions, and an inter-governmental body dedicated to asylum. The interviews were conducted between November 2017 and July 2018 in Brussels.

[46] Denmark, Ireland and the United Kingdom did not participate in the decision as they have an opt-out from certain measures relating to justice and home affairs. Two out of twelve old member states involved in the negotiations did not accept to participate in the study (Greece and Austria).

In a nutshell, this study suggests that the Councils´ negotiations on the CEAS in the post-Lisbon treaty period are best explained by an actor-centered institutionalist approach. Contrary to what scholars detected in earlier negotiations, 'issue-salience' along with a high level of national expertise is no longer sufficient to fully explain member states´ negotiation behaviour in the asylum policy. Actors are still perceived as rational, who seek to maximise their self-interests. Yet, we can see that their action and behaviour in the Council are now more constrained by the institutional setting. Consistent with the ACI framework, this research considers both formal and informal rules within the concept of ´institution´. Therefore, the study proposes a bargaining model that considers not only issue-salience but also formal and informal EU institutional rules to account for the observed ´mixed-motive game´ in the Council.

It is claimed that most typologies put forward in the EU negotiation literature are not capable of fully explaining the dynamic in the negotiations of the asylum procedures during the second and third phases of the CEAS. The dichotomy between ´absolute versus relative gains´ (Hopmann, 1995:31) is too rigid. In other words, the negotiations of the recast APD were not just bargaining strategies to maximise member states´ self-interest nor just the search for creative joint solutions. Rather a ´mixed-motive game´ where self-interested actors accommodate joint solutions in order to obtain a non-zero sum game in the Council, in which mutual gain does not means no scope for conflict. There was a ´mixture of mutual dependence and conflict, of partnership and competition´ (Schelling, 1980:89).

The ´mixed-motive game´ observed in the recast APD, and also in the negotiations of the APR, is explained by an interrelation and interaction of the following five factors: issue-salience; voting rule in the Council, consensus norm in the Council; the ordinary legislative procedure; and the type of legal instrument under negotiation. Nevertheless, amongst the different factors issue-salience and voting rule stand out in importance. These two factors have a stronger explanatory power for member states´ negotiation behaviour in the post-Lisbon Treaty[47]. The following table

[47] The findings of this research were presented on the UACES 48th Annual Conference at the University of Bath, UK, 2-5 September 2018. Panel 208: Representations of Migration & Asylum in Policy, Politics

presents an overview of the initial expectations, and the new findings acquired through the empirical analysis:

Table 11 – Overview of hypotheses and new findings

Hypotheses		Validation
Issue salience	The higher the level of exposure to asylum claims (in total and/or relative to the size of population), the higher the level of importance that a member state attaches to the asylum policy	Confirmed
	The higher the ´misfit´ between European and national policy, the higher the salience attached by the EU member states.	Confirmed
	The salience attached by the EU decision-makers was interrelated with the salience attached by citizens.	Rejected
	The more binding is the legal instrument, the higher the salience attached by the EU states.	Complementary finding gained by the empirical analysis
QMV	QMV rule is likely to enable a more cooperative environment in the Council, and empower coalition-building, compromise and trade-offs in the APD.	Confirmed
	Under QMV larger member states have more power than smaller member states.	Confirmed
	Smaller member states are expected to resort to a ´smart state strategy´ to compensate the loss of vetoing power in the asylum policy.	Confirmed

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	Under QMV member states, regardless of their voting power, are more like to resort to soft bargaining strategies than to hard bargaining strategies.	Confirmed
	QMV is more likely to lead member states to adopt a problem-solving approach to negotiation, than a bargaining approach.	Rejected
	QMV is more likely to lead member states to adopt a mixed-motive game approach to negotiations in the asylum policy	Finding acquired through the empirical analysis.
Consensus norm	Consensus in the asylum policy under QMV is likely to result from a combination of (1) an existing informal institutional rule (norm) in the Council and (2) rational decisions by pondering the pros and cons of standing alone in a decision. Complementary finding: also rationally ponder about the implications of a no decision for the harmonisation of the EU asylum policy.	Confirmed but complemented by finding acquired through empirical analysis.
	Consensus norm is more likely to complement the formal institutional rules than supersede them.	Confirmed
´Co-decision´	The ordinary legislative procedure is a new strategic opportunity to member states upload their preferences and interests, and it compensates the loss of the veto power in the Council.	Confirmed
Type of legal instrument	The more binding is the legal instrument under QMV, the more active and vocal the member states appear to be in the negotiations in the asylum policy.	Finding acquired through the empirical analysis.

As regards the avenues for future research three main subjects can be highlighted. One of the entry points for future research may be the inclusion of the ´new´ member states in the analysis of the second phase of the CEAS. By focusing on the old member states it was possible to have an historical perspective of the evolution of the negotiations in the CEAS and the factors that influenced the old member states. However, future research should build on these findings and assess whether the ´new´ member states responded to the same triggers under QMV.

By interviewing two vocal countries from the group of the new member states (Malta and Poland) this research had a first insight on the motives for the changed behaviour in the asylum policy in the current reform. Nonetheless, this sample is not representative of the twelve ´new´ member states, and future studies should make an in-depth analysis of the factors that influenced and shaped ´new´ states´ behaviour between the second and third phases, and how potential ´weak regulators´ have become key players in this policy in the current reform. For example, in contrast to the old member states, the political positions of this group of countries seems to be closely related to public opinion, and the political colour of the national governments.

The second suggestion for future research is the application of the case-to-case transfer strategy to test the proposed bargaining model in other asylum legislative instruments or in other policy areas. It would be important to understand if the same set of factors explain the negotiation behaviour and strategies in different asylum instruments, and in other policy areas to refine the theoretical framework. Lastly, the limited theoretical attention to the ´consensus-norm breach´ (Trauner, 2016), the empowerment of the EP as a benefit for the member states, and the inter-institutional relations during the second and third phase of the CEAS provides another opportunity for future research.

Empirical and theoretical contributions

The dissertation proved that ´institutions matter´ when it comes to negotiation behaviour in the Council. In the first phase of the CEAS, issue-salience, regulatory expertise and administrative capacity were seen to account for the behaviour and bargaining success of member states (Zaun, 2016, 2017). In the second and third phase of the CEAS, this is no longer fully the case. The states' action in the Council is now also constrained and/or facilitated by formal and informal institutional rules. By systematically assessing the factors that influenced and shaped member states negotiation behaviour in the post-Lisbon Treaty period, it was possible to demonstrate the limits of an intergovernmental, state-centred approach in the field of asylum policy. Furthermore, this study brought to light a new insight not only on the type of negotiation behaviour that one should expect in the second and third generation of the CEAS, but also on the five factors that should be considered when analysing the negotiations of the asylum policy.

In short, this dissertation developed causal mechanisms to explain why the old member states behaved in a particular way with regard to the recast APD, but that could be transferred to another legislative instrument within the asylum package or even adapted and tested in other policy areas. Apart from Elgström and Jönsson´work (2000), no other study applied such a comprehensive bargaining model that incorporates different actor and institutional factors to explain negotiation behaviour in the EU. Thus, this study adds an important reflection to the bargaining literature that tends to consider these factors individually.

The existing typologies on EU negotiations rely either on rationalism or constructivism concepts to explain negotiations in the Council. However, this study demonstrated that separately these approaches do not answer the observed dynamic in the asylum policy. In the case of the APD and APR is no longer a matter of ´absolute versus relative gains´ (Hopmann, 1995:31). Instead, there is a coexistence of both conflict and cooperation. By relying on one of the games models advanced by the International Relations literature, the negotiations of the second and third generation of the CEAS were discussed and explained as a ´mixed-motive´ game (Schelling , 1980).

Moreover, four other contributions can be underlined. The findings showed that the importance attached to the asylum policy is not only dependent on the exposure to the phenomenon (high number of asylum claims) but also on the ´misfit´ between European and national policy and the legal instrument under negotiation. The latter has not been discussed explicitly and systematically in the literature on asylum policy. In short, it is claimed that the more binding is the legal instrument, the higher the salience attached to the policy and consequently the more active and vocal the member states appear to be in the negotiations in the asylum policy. Even member states that are categorised by Zaun (2016) as ´weak regulators´ became more active and vocal in the Council when confronted with the proposal of a regulation (e.g. Portugal). Another important element to this discussion is related to bargaining success. Under QMV, larger member states had more power compared to smaller member. However, the voting power did not interfere in a deterministic way with the member states´ capability to influence the policy output. In other words, the capability to influence the policy output in the post-Lisbon Treaty period was more related to the salience attached to the issue, the capability to smartly adapt the negotiation strategies to the new institutional setting, and to the reputation and expertise that states had in this policy area. In contrast with previous studies, the administrative capacity has been less important for the bargaining success.

The study also provides a contribution to the decision-making literature. The Council continued to search for consensus. Yet the way in which member states behaved and strategically decided was more related to issue-salience and the voting rule in the Council than with the consensus norm. Put differently, the existing consensus norm did not impede the old member states to actively push for their national interests and adapt their negotiation behaviour and strategies to the new formal institutional setting. If the second phase of CEAS is compared with the third, this becomes even more visible. While the Presidency is still aiming for consensus, the high level of division and confrontation in the Council has contributed to the fact that more decisions are reached by relying on formal QMV. Along with Trauner (2016) and Zaun (2018) the empirical data demonstrates that a polarised decision-making process may undermine the consensus norm. Put differently, the assumption that the Council´s decisions in the JHA are mainly reached without

explicitly voting is no longer true. The 2015 refugee crisis has been a critical point for the asylum applications in the EU27 as well as on the decision-making in the Council. Last but not least, this research sheds light on whether and how member states benefited from the empowerment of the EP in the asylum policy. They have lost the capacity to veto a decision in the Council, but they have potentially gained a new ally that can be of use to influence the policy output.

Policy implications and societal relevance

The findings of this research have societal and policy relevance. They shed light not only on how decision-making in the CEAS has evolved but also on how policy-making was affected by the 2015 refugee crisis. These two dimensions are of relevance in terms of how the protection of refugees in Europe is framed. In the first and second phase of the CEAS, there was a friendly and cooperative environment in the Council and the key players were a small group of countries that attached a high salience to this issue. In the current reform, the negotiation environment has become more confrontational and tense. There is a greater cleavage in terms of policy preferences and interests between EU states. This has changed the negotiation behaviour of member states in the Council. The policy cleavage has undermined the consensus norm in the Council, which, in turn, may affect the transposition and implementation of these laws to the domestic level.

The divisions in the Council may also have practical consequences in terms of responsibility-sharing in the asylum policy, the safeguarding of the integrity of the Schengen area, and in the protection of asylum seekers. If member states do not find a common ground, the evolution accomplished in the last twenty years might be jeopardised. This study showed that the 2015 refugee crisis led to an intensification of the ´securitisation' debate in the asylum policy. The main focus is now more on the tackling of the abuse of unfounded asylum claims and protecting the borders. Guaranteeing more rights to asylum seekers seem to have lost importance. According to the empirical data, the European Parliament is still pushing for a more rights-based approach, but the European Commission has come closer to the Council position. Therefore, the findings of this research might also help stakeholders from the civil society to better understand the dynamics in the EU.

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ANNEXES

A. INTERVIEW GUIDES

Introduction by the interviewer

Thank you very much for accepting to participate in the research project as one of the representatives of your country at the European Union level. My research mainly focuses in the decision-making process that led to the adoption of the Recast Asylum Procedures Directive. I am particularly interested in three dimensions: i) the level of importance that your country attached to this directive; ii) the aspects of the directive that were most relevant for your country (delegation), and accordingly that you had to negotiate on behalf of your country; and iii) the negotiation strategies adopted by your delegation and other Member States' delegation to shape and influence the policy output.

a) Interview guide for the first phase of the CEAS

Topic	Questions	Support Questions
Asylum Procedures Directive adopted in 2005 by unanimity voting rule	In the first part of the interview, I would like to focus on the EU Asylum Procedures Directive adopted in 2005 under unanimity voting rule. I am particularly interested in the level of importance that your country attached to this directive; the issues that were most controversial with regard to the adoption of this directive; as well as the adopted negotiation strategies to influence the directive output according to your country´s positions and interests.	
Warm-Up Questions	1. Can you tell me first for how long have you worked (been working) at the Permanent Representation, and accordingly in the Asylum Working Party of the Council of the EU and in any other relevant bodies (e.g. COREPER)? 2. Would you please briefly describe your role in the negotiation process of the first phase of the Asylum Procedures directive?	

(1) Issue-salience	3. According to a three-point response scale: highly important, somewhat important, not so important. Could you please start by indicating the level of importance of this directive to your country? 3.1. Why was this directive (highly important', 'somewhat important, not so important) for your country? *Examples:* ▪ Transposition costs ▪ Pressure from public opinion? ▪ Pressure from national parliament? ▪ Political ideology? ▪ The volume of incoming asylum seekers in your country? ▪ The density of asylum regulation in your country? ▪ Other? 3.1.1. Since your answer was very important, did this mean that greater attention/effort and resources were allocated to this negotiation process compared with other policies? Please consider a three-point response scale: 'more than average', 'about average' or 'less than average'. *Or* 3.1.1. Since your answer was not important, did this mean that not much attention/effort and resources were allocated to this negotiation process compared with other policies? 4. How would you evaluate the public opinion of your country regarding the asylum issue during the Council´s negotiation process of this directive? *Examples:* ▪ Favourable? ▪ Unfavourable? 4.1. Did national public opinion play any role in the level of importance that your country attached to this directive during the Council negotiation process? If yes, can you specify? 5. How developed was your country´s asylum policy during the negotiation period of this directive? *Example:* ▪ A general framework without detail? 5.1. Was there a significant misfit between national asylum policy and the proposed directive? 5.2. Did transposition costs of the policy, connected with implementation and national law adaptation, play any role in the level of importance that your country attached to this directive during the negotiation process? If yes, can you specify?	What was your reference to evaluate the public opinion?

(2) Shape and influence of policy output according to national interests	6. Which aspects of the directive were most relevant for your country and why? *Examples:* ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures; ▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? ▪ Other? 7. To what extent was your delegation able to influence the directive according to national government´s position and interests? Can you give examples? 7.1. Why was it important for your country to shape the directive in these aspects?	Can you remember the key points of discussions in the council negotiations?
(3) Negotiation strategies	About the negotiation environment: 8. How would you describe the negotiation environment in the Working Party and any other relevant bodies (COREPER, Council)? ▪ Cooperative ▪ Confrontational About the delegation under analysis: 9. What were your delegation´s strategies to influence this directive according to your country´s positions and interests? Please indicate specific strategies. *Examples:* ▪ Coalition building; ▪ cooperative behaviour and compromise; ▪ contact with other EU institutions; ▪ Threat to veto the decision; ▪ Trade-off with other policy areas. 9.1. Did the possibility of vetoing the directive at the ministerial level have any influence on your delegation´s behaviour and strategies in the negotiation process? 9.2. What were the most important factors for your delegation to decide the negotiation strategies? *Examples:* ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ The type of policy; ▪ Characteristics of the network;	If informal rules are highlighted by the interviewee develop this idea. Can you please give me more details about informal rules in the Council?

	▪ Informal rules in the Council (e.g. the norm of consensus) 10. Did your delegation need to resort to a stronger and conflictive position to achieve their aims? 10.1. According to the level of importance of this directive to your country, in case it was needed, would your delegation adopt a stronger and conflictive position to achieve your aims? About other member states: 11. Did any other member state resort to a stronger and conflictive position to achieve its aims? 12. Was your delegation contacted by other delegations? If yes, by which one(s) and why? 13. Was your delegation contacted by other European Institutions? If yes, by which one(s) and why? 14. Which Member state were the most successful in influencing the policy output and which were the least successful? and why?	For example, did you feel a lot of pressure to agree with the others? Did any state threaten to veto the act and if so, for which reason?
Final questions	15. Is there any other aspects of the negotiation process and/or interstate relations which you find interesting to mention? 16. Is there someone else that you think I should talk to about this directive?	

b) Interview guide for the second phase of the CEAS

Topic	Questions	Support Questions
Warm-Up Questions	1. Can you tell me first for how long have you been working (worked) at the Permanent Representation, and accordingly in the Asylum Working Party of the Council of the EU and in any other relevant bodies (e.g. COREPER)? 2. Would you please briefly describe your role in the negotiation process of the Recast Asylum Procedures directive?	
(1) Issue-salience	3. According to a three-point response scale: highly important, somewhat important, not so important. Could you please start by indicating the level of importance of this directive to your country? 3.1. Why was this directive (highly important', 'somewhat important, not so important) for your country? Examples: ▪ Transposition costs?	

	▪ Pressure from public opinion? ▪ Pressure from national parliament? ▪ Political ideology? ▪ The inflow of asylum seekers to your country? ▪ The density of asylum regulation in your country? ▪ Other? 3.1.1. Since your answer was very important, did this mean that greater attention/effort and resources were allocated to this negotiation process compared with other policies? Please consider a three-point response scale: 'more than average', 'about average' or 'less than average'. *Or* 3.1.1. Since your answer was not important, did this mean that not much attention/effort and resources were allocated to this negotiation process compared with other policies? 4. How would you evaluate the public opinion of your country regarding the asylum issue during the Council´s negotiation process of the recast directive? *Examples:* ▪ Favourable? ▪ Unfavourable? 4.1. Did national public opinion play any role in the level of importance that your country attached to the recast directive during the negotiation period? If yes, can you specify? 5. How developed was your country´s asylum policy during the negotiation period of this directive? Did it suffer any significant changes between both phases of the directive? *Example:* ▪ A more detailed framework after the first directive? 5.1. Was there a significant misfit between national asylum policy and the proposed directive? 5.2. Did transposition costs of the policy, connected with implementation and national law adaptation, play any role in the level of importance that your country attached to the recast directive during the negotiation process? If yes, can you specify?	What was your reference to evaluate the public opinion?
(2) Shape and influence of policy output according to	6. Which aspects of the recast directive were most relevant for your country and why? *Examples:* ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures;	Can you remember the key points of discussions in the council negotiations?

national interests	▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? ▪ Other? 7. To what extent was your delegation able to influence the recast directive according to national government´s position and interests? Can you give examples? 7.1. Why was it important for your country to shape the recast directive in these aspects?	
(3) Negotiation strategies	About the negotiation environment: 8. How would you describe the negotiation environment in the Working Party and any other relevant bodies (COREPER, Council) in the recast directive? *Examples:* ▪ Cooperative ▪ Confrontational About the delegation under analysis: 9. What were your delegation´s strategies to influence the recast directive according to your country´s positions and interests? Please indicate specific strategies. *Examples:* ▪ Coalition building; ▪ cooperative behaviour and compromise; ▪ contact with other EU institutions; ▪ Other. 9.1. Did the impossibility of vetoing the directive at the ministerial level have any influence on your delegations´ behaviour and strategies in the negotiation process of the recast directive? 9.2. What were the most important factors for your delegation to decide the negotiation strategies? *Examples:* ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ the type of policy; ▪ Characteristics of the network; ▪ Informal rules in the Council (e.g. the norm of consensus). 10. Did your delegation need to resort to a stronger and conflictive position to achieve its aims? 10.1. According to the level of importance of this directive to your country, in case it was needed, would your	In other policies that your delegation had the possibility of vetoing the decision, was there any difference in the negotiation strategies? Is the voting rule important for your negotiation behaviour? If informal rules are highlighted by the interviewee develop this idea. Can you please give me more details about informal rules in the Council? For example, did you feel a lot of pressure to agree with the other member states?

	delegation adopt a stronger and conflictive position to achieve your aims? About other member states: 11. Did any other member state resort to a stronger and conflictive position to achieve its aims in the recast directive? 12. Was your delegation contacted by other delegations? If yes, by which one(s) and why? 13. Was your delegation contacted by other European Institutions? If yes, by which one(s) and why? 14. Which Member state were the most successful in influencing the policy output and which were the least successful? and Why?	
Final questions	15. Has the position of your country changed significantly throughout both phases of the CEAS? 16. Is there any other aspects of the negotiation process and/or interstate relations which you find interesting to mention? 17. Is there someone else that you think I should talk to about this directive? 18. Compared to the previous negotiation processes, how would you describe the negotiation environment in the Working Party and any other relevant bodies (COREPER, Council) in the recent APD proposal? 18.1. Which aspects of the new proposal are the most relevant for your country and why?	2016/0224 (COD) - establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU Are you being able to understand the negotiation strategies that each country are adopting to influence the directive output?

c) Interview guide for the third phase of the CEAS

Topic	Questions	Support Questions
Warm-Up Questions	1. Can you tell me first for how long have you been working (worked) at the Permanent Representation, and accordingly in the Asylum Working Party of the Council of the EU and in any other relevant bodies (e.g. COREPER)? 2. Would you please briefly describe your role in the negotiation process of the current Asylum Procedures regulation?	
(1) Issue-salience	3. According to a three-point response scale: highly important, somewhat important, not so important. Could you please start by indicating the level of importance of this regulation to your country? 3.1. Why is this regulation (highly important', 'somewhat important, not so important) for your country? Examples: ▪ Transposition costs? ▪ Pressure from public opinion? ▪ Pressure from national parliament? ▪ Political ideology? ▪ The inflow of asylum seekers to your country? ▪ The density of asylum regulation in your country? ▪ Other? 3.1.1. Since your answer was very important, does this mean that greater attention/effort and resources were allocated to this negotiation process compared with other policies? Please consider a three-point response scale: 'more than average', 'about average' or 'less than average'. *Or* 3.1.1. Since your answer was not important, does this mean that not much attention/effort and resources were allocated to this negotiation process compared with other policies? 4. How would you evaluate the public opinion of your country regarding the asylum issue during this Council´s negotiation process? *Examples:* ▪ Favourable? ▪ Unfavourable? 4.1. Did national public opinion play any role in the level of importance that your country attached to this regulation during the negotiation period? If yes, can you specify? 5. How developed is your country´s asylum policy during this negotiation process? Did it suffer any significant changes between all phases of CEAS?	What is your reference to evaluate the public opinion?

	Example: ▪ A more detailed framework after the first directive? 5.1. Is there a significant misfit between national asylum policy and the proposed regulation? 5.2. Does transposition costs of the policy, connected with implementation and national law adaptation, play any role in the level of importance that your country attached to this regulation? If yes, can you specify?	
(2) Shape and influence of policy output according to national interests	6. Which aspects of the regulation are most relevant for your country and why? *Examples:* ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures; ▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? ▪ Other? 7. To what extent is your delegation being able to influence the regulation according to national government´s position and interests? Can you give examples? 7.1. Why is it important for your country to shape the regulation in these aspects?	Can you remember the key points of discussions in the council negotiations?
(3) Negotiation strategies	About the negotiation environment: 8. How would you describe the negotiation environment in the Working Party and any other relevant bodies (COREPER, Council) in the current negotiation process? *Examples:* ▪ Cooperative ▪ Confrontational About the delegation under analysis: 9. What is your delegation´s strategies to influence the recast directive according to your country´s positions and interests? Please indicate specific strategies. *Examples:* ▪ Coalition building; ▪ cooperative behaviour and compromise; ▪ contact with other EU institutions; ▪ Other. 9.1. Does the impossibility of vetoing the directive at the ministerial level have any influence on your delegations´ behaviour and strategies in the negotiation process of the recast directive? 9.2. What are the most important factors for your delegation to decide the negotiation strategies?	In other policies that your delegation had the possibility of vetoing the decision, was there any difference in the negotiation strategies? Is the voting rule important for your

	Examples: ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ the type of policy; ▪ Characteristics of the network; ▪ Informal rules in the Council (e.g. the norm of consensus). 10. Did your delegation need to resort to a stronger and conflictive position to achieve its aims so far? 10.1. According to the level of importance of this directive to your country, in case it is needed, would your delegation adopt a stronger and conflictive position to achieve your aims? About other member states: 11. Is any other member state resorting to a stronger and conflictive position to achieve its aims in the recast directive? 12. Was your delegation contacted by other delegations? If yes, by which one(s) and why? 13. Was your delegation contacted by other European Institutions? If yes, by which one(s) and why? 14. Which Member state are being the most successful in influencing the policy output and which are being the least successful? and Why?	negotiation behaviour? If informal rules are highlighted by the interviewee develop this idea. Can you please give me more details about informal rules in the Council? For example, do you feel a lot of pressure to agree with the other member states?
Final questions	15. Has the position of your country changed significantly throughout phases of the CEAS? 16. Is there any other aspects of the negotiation process and/or interstate relations which you find interesting to mention? 17. Is there someone else that you think I should talk to about this regulation?	

d) Interview guide for the inter-governmental body

Questions
1. Can you tell me first for how long have you been working at your organisation, and accordingly in the asylum folder? 2. How would you describe the role of your organisation in the asylum policy field? 3. Which aspects of the current AP regulation are being the most relevant for your organisation? And why? 4. Do you know which aspects of the current regulation are being the most relevant for the Member States? and why? *Examples:* ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures; ▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? 5. Do you have any knowledge on the negotiation environment in the Council in the recent Asylum Procedures regulation proposal? 6. Do you know which Member states are being the most successful in influencing the policy output and which are being the least successful? 7. Do you know if any member state is resorting to a stronger and conflictive position to achieve its aims in the current reform? 8. Are you being able to understand the negotiation strategies that each country are adopting to influence the policy? 9. In your opinion, the qualified majority voting in the Council have any influence on delegations´ behaviour and strategies in the negotiation process? 10. In your opinion, what are the most important factors that influence Member states' negotiation behaviour and strategies? Please specify. *Examples:* ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ The type of policy; ▪ Characteristics of the network; ▪ Informal rules in the Council (e.g. the norm of consensus) 11. Is there any other aspects of the negotiation process and/or interstate relations in the regulation which you find interesting to mention?

e) Interview guide for the EU institutions

Topic	Questions
Warm-Up Question	1. Can you tell me first for how long have you been working at the European Parliament, and accordingly in the Asylum folder? 2. Would you please briefly describe your role in the negotiation process of the second phase of the Asylum Procedures directive?
(1) Shape and influence of policy output according to national interests	3. Which aspects of the directive were most relevant for the European Parliament in the Recast Asylum Procedures Directive? and why? 4. Do you remember which aspects of the directive were most relevant for the Member States in the Recast Asylum Procedures Directive? and why? **Examples:** ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures; ▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? ▪ Other? 5. Do you remember which Member states were the most successful in influencing the recast directive output and which were the least successful? 6. How would you describe the negotiation environment/debates in the Committee of the European Parliament in the Recast Asylum Procedures Directive? 7. How would you describe the negotiation environment between the European Parliament and the Council and Commission in the Recast Asylum Procedures Directive? **Examples:** ▪ Cooperative ▪ Confrontational 8. Did any member state (Permanent Representation) contacted you during the negotiation process of the Recast directive? If yes, please specify the reasons for this contact. 9. Did any other member of the Parliament contacted you during the drafting of the report? If yes, please specify the reasons for this contact. 10. In your opinion, did the impossibility of vetoing the directive at the ministerial level of the Council have any influence on delegations´ behaviour and strategies in the negotiation process? 11. In your opinion, what were the most important factors that influenced Member states' behaviour and negotiation strategies in the recast directive? Please specify. **Examples:** ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ The type of policy;

	▪ Characteristics of the network; ▪ Informal rules in the Council (e.g. the norm of consensus) 12. Is there any other aspects of the negotiation process of the recast directive which you find interesting to mention?

Topic	Questions
Asylum Procedures Directive adopted in 2005 under unanimity voting	In the first part of the interview, I would like to focus on the EU Asylum Procedures Directive adopted in 2005 under unanimity voting rule and the issues that were most controversial with regard to the adoption of this directive; as well as the negotiation strategies adopted by the Member States to influence the directive output according to their positions and interests.
Warm-Up Question	1. Can you tell me first for how long have you (worked) been working at the European Commission, and accordingly in the Asylum folder? 2. Would you please briefly describe your role in the European Commission, and accordingly in the negotiation process of the first phase of the Asylum Procedures directive?
(1) Shape and influence of policy output according to national interests	3. Do you remember which aspects of the directive were most relevant for the Member States in the first phase of the Asylum Procedures Directive? and WHY? **Examples:** ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures; ▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? ▪ Other? 4. Do you remember which Member state were the most successful in influencing the directive output and which were the least successful? 5. How would you describe the negotiation environment in the Council (Asylum Working Party, COREPER, ministerial level) in the first phase of the Asylum Procedures Directive? **Examples:** ▪ Cooperative ▪ Confrontational 6. Do you remember if any member state resort to a stronger and conflictive position to achieve its aims in the first phase? 7. Were you able to understand the negotiation strategies that each country adopted to influence the directive output? **Examples:** ▪ Coalition building; ▪ cooperative behaviour and compromise; ▪ contact with other EU institutions; ▪ Threat to veto the decision.

	7.1. Did any member state contacted the European Commission during the drafting of the proposal and the negotiation process in the Council? If yes, please specify the reasons for this contact. 8. In your opinion, did the possibility of vetoing the directive at the ministerial level have any influence on delegations´ behaviour and strategies in the negotiation process? If yes, please explain. 9. In your opinion, what were the most important factors that influenced Member states' behaviour and negotiation strategies in the first phase of the directive? Please specify. **Examples:** ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ The type of policy; ▪ Characteristics of the network; ▪ Informal rules in the Council (e.g. the norm of consensus) 10. Is there any other aspects of the negotiation process and/or interstate relations which you find interesting to mention?
Asylum Procedures Directive adopted in 2013 under QMV voting	**In the second part of the interview, I would like to focus on the Recast Asylum Procedures Directive adopted in 2013 under QMV voting rule and the issues that were most controversial with regard to the adoption of this directive; as well as the negotiation strategies adopted by the Member States to influence the policy output according to their positions and interests.**
Warm-Up Question	11. Can you tell me first for how long have you been working (worked) at the European Commission, and accordingly in the Asylum folder? 12. Would you please briefly describe your role in the European Commission, and accordingly in the negotiation process of the second phase of the Asylum Procedures directive?
(1) Shape and influence of policy output according to national interests	13. Which aspects of the directive were most relevant for the Member States in the Recast Asylum Procedures Directive? and why? **Examples:** ▪ Border Procedures; ▪ First country of asylum; ▪ Accelerated procedures; ▪ Right to legal assistance and representation (free legal aid); ▪ Right to communicate with UNHCR; ▪ Return during/after first instance decision or after appeal? ▪ Other? 14. Which Member state were the most successful in influencing the recast directive output and which were the least successful? 15. How would you describe the negotiation environment in the Council (Asylum Working Party, COREPER, ministerial level) in the Recast Asylum Procedures Directive? **Examples:** ▪ Cooperative ▪ Confrontational 16. Did any member state resort to a stronger and conflictive position to achieve its aims in the Recast Asylum Procedures Directive?

	17. Were you able to understand the negotiation strategies that each country adopted to influence the recast directive? **Examples:** ▪ Coalition building; ▪ cooperative behaviour and compromise; ▪ contact with other EU institutions; 16.1. Did any member state contacted the European Commission during the drafting of the recast proposal and the negotiation process in the Council? If yes, please specify the reasons for this contact. 18. In your opinion, did the impossibility of vetoing the directive at the ministerial level of the Council have any influence on delegations´ behaviour and strategies in the negotiation process? 19. In your opinion, what were the most important factors that influenced Member states' behaviour and negotiation strategies in the recast directive? Please specify. **Examples:** ▪ Decision-making rule; ▪ Issue-salience; ▪ Public opinion; ▪ The type of policy; ▪ Characteristics of the network; ▪ Informal rules in the Council (e.g. the norm of consensus) 20. Is there any other aspects of the negotiation process and/or interstate relations in the recast directive which you find interesting to mention?
Final Questions	21. Do you recall if the position of the member states changed significantly throughout both phases of the CEAS? 22. Compared to the previous negotiation processes, how would you describe the negotiation environment in the Council (Asylum Working Party, COREPER, ministerial level) in the recent APD proposal? 22.1. Which aspects of the new proposal are being the most relevant for member states and why? 23. Is there someone else from the European Commission or other institutions that you think I should talk to about this directive?

B. DATA CODING SCHEME

Codes	Memo
Issue-salience	3. According to a three-point response scale: highly important, somewhat important, not so important. Could you please start by indicating the level of importance of this directive to your country? 3.1. Why was this directive (highly important', 'somewhat important, not so important) for your country?
Three-point response scale	
Highly important	
Somewhat important	
Not so important	
Why?	1. Why was this directive (highly important', 'somewhat important, not so important) for your country?
Influx of asylum seekers	
Costs of transposition	
Geographical position	
To maintain domestic status quo	
Balance between rights and obligations	
European harmonisation	
Member States Resources	3.1.1. Since your answer was highly important, did this mean that greater attention/effort and resources were allocated to this negotiation process compared with other policies? Please consider a three-point response scale: 'more than average', 'about average' or 'less than average'. OR 3.1.1. Since your answer was not important, did this mean that not much attention/effort and resources were allocated to this negotiation process compared with other policies?
more than average	
about average	
less than average	
Public Opinion	4. How would you evaluate the public opinion of your country regarding the asylum issue during the Council´s negotiation process of the recast directive? 4.1. Did national public opinion play any role in the level of importance that your country

		attached to the recast directive during the negotiation period? If yes, can you specify?
	2000- 2005	
	2009-2013	Impressions about the public opinion on the asylum during the recast negotiations. How would you evaluate the public opinion of your country regarding the asylum issue during the Council´s negotiation process of the recast directive?
	2015 - onwards	Impressions about the public opinion on asylum post-crisis
	Important	4.1. Did national public opinion play any role in the level of importance that your country attached to the recast directive during the negotiation period? If yes, can you specify?
	Unimportant	4.1. Did national public opinion play any role in the level of importance that your country attached to the recast directive during the negotiation period? If yes, can you specify?
	Misfit	5. How developed was your country´s asylum policy during the negotiation period of this directive? Did it suffer any significant changes between both phases of the directive? 5.1. Was there a significant misfit between national asylum policy and the proposed directive?
	Significant	
	Not Significant	
	Costs of transposition	5.2. Did transposition costs of the policy, connected with implementation and national law adaptation, play any role in the level of importance that your country attached to the recast directive during the negotiation process? If yes, can you specify?
	Important	
	Unimportant	
	Recast APD/Issue	6. Which aspects of the recast directive were most relevant for your country and why? Do you recall which one like the aspects that were more important?
	Effective remedy	
	UNHRC	
	Interviews	
	Guarantees	
	First country of asylum	
	Right of legal assistance	

	Accelerated procedures	
	Vulnerable people	
	Detention of asylum seekers	
	Sexual orientation	
	Unaccompanied minors	
	accelerated procedures	
	suspensive effective procedure	
	appeals procedure	
	border procedure	
	safe country of origin	
Actors´ effectivity in negotiations (influence)		Questions 7 and 14
	Own perspective	7. To what extent was your delegation able to influence the recast directive according to national government´s position and interests? Can you give examples of what were you able to negotiate and influence in the recast directive according to your national interests?
	Vulnerable people	
	Other	
	Accelerated procedures	
	Appeals	
	Interview registration	
	Unaccompanied minors	
	Sexual orientation	
	Detention of asylum seekers	
	Suspensive effect	
	border procedure	
	effective remedy	
	Why was it important to shape these aspects?	Why was it important for your country to shape the recast directive in these aspects?
	Reduce secondary movements	
	Principles	
	Efficiency	
	Costs of transposition	
	To maintain domestic status quo	
	Perspective about other MS	14. Which Member states were the most successful in influencing the policy output and which were the least successful? and Why?
	most successful	
	size	
	least successful	
Negotiation environment in the Council		8. How would you describe the negotiation environment in the Working Party and any

		other relevant bodies (COREPER, Council) in the recast directive?
	Consensual	
	Conflictual/tense	
	Cooperative	
Negotiation strategies		9. What were your delegation´s strategies to influence the recast directive according to your country´s positions and interests? Please indicate specific strategies.
	Trialogues	
	Ministerial conference	
	Coalition with the EC	
	Presidency mandate	
	Contacts with the Presidency	
	Expertise	
	Coalition-building	
	Cooperative behaviour and compromise	
	Trade-offs	
	´Shadow of the vote´	
	Contact with the EC	
	Contact with the EP	
	Argumentation	
Impossibility of Vetoing		9.1. Did the impossibility of vetoing the directive at the ministerial level have any influence on your delegations´ behaviour and strategies in the negotiation process of the recast directive?
	Unimportant	
	Important	
Factors that influence/shape negotiation behaviour		9.2. What were the most important factors for your delegation to decide the negotiation strategies? If it´s not the voting rule what are the main factors for your decisions in terms of negotiation strategies?
	Public opinion	
	Decision-making rule	
	Type of policy	
	Influx of asylum seekers	
	European harmonisation	
	Asylum crisis	
	National elections	
	To maintain domestic status quo	
	Other	

		Size of the MS	
		Costs	
		Efficiency	
		Salience	
	Member states' attitude in negotiations		10. Did your delegation need to resort to a stronger and conflictive position to achieve its aims?
		Own Perspective	
		Both	
		Strong/Conflictual	
		Soft/Cooperative	
		Perception about others MS	
		Strong/Conflictual	
		No	
		Yes	
	Change in MS´ positions throughout phases of the CEAS		15. Has the position of your country changed significantly throughout both phases of the CEAS?
		No	
		Yes	
	Asylum Procedures Regulation/Issue		
		Return procedure	
		Refugee status/subsidiary protection status	
		Frontline country	
		admissibility/Inadmissibility	
		Free legal assistance	
		Application	
		First entry	
		Permanent responsibility/solidarity/allocation	
		Subsequent applications	
		Vulnerable people	
		Appeal procedure	
		Costs	
		Efficiency	
		Procedural guarantees	
		Accelerated procedures	
		Border procedure	
		Type of policy	
		Maintain domestic status quo	
		Safe third country concept	

	1st APD/Issue		First phase of the CEAS
	Border procedure		
	Accelerated procedures		
	First country of asylum		
	EU inter-institutional relations		
	Council - European Parliament		
		Recast directive	
	Council – European Commission		
	EU intra-institutional relations		
	Council		
	European Parliament		
	Council levels		
	Type of policy		
	Other aspects		