The Europeanisation of German asylum policy and the "Germanisation" of European asylum policy: the case of the "safe third country" concept

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Comments welcome!

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ABTRACT

Considering the considerable dynamics of EU migration policy both at the constitutional and legislative level, and the potential constraints for governments to pursue certain policies domestically as the result of European integration, more attention is merited to explain why and how member governments have managed to maintain control over the (legislative) process. This paper analyses how the German government remained in charge over the process and safeguarded its key preferences with regard to the development and implementation of the "safe third country" concept at both at the national and European level. Our paper explores the boundaries and interplay between Europeanisation and European integration and thus seeks to contribute to the wider Europeanisation debate. We look at the Europeanisation of asylum policy, both as a top-down process (domestic change caused by EU level developments) and as a bottom up process (whereby Member States transfer their policies to the European level in order to avoid costs when "down-loading" European policies at a later stage in the process). The latter dimension as well as the interaction between the two-levels has so far received insufficient attention in EU/Europeanisation research.

The "down-loading" of a security oriented European policy has been a means to legitimise reforms of the German constitutional right to asylum. The reform replaced the liberal and open asylum system of the post-War era with a restrictive system, finding its expression in the institutionalisation of the "safe third country rule". Since Germany was one of the first countries in Europe to overhaul its asylum system it became the "pace-setter" in the policy-making process at the EU level. It successfully up-loaded/exported its policy reforms of the early1990s to the European level and thus avoided high adaptational costs (e.g. another constitutional reform). We thus argue that while German asylum policy has been Europeanised at the beginning of the 1990s, the recently adopted common asylum standards with regard to the safe third country concept have been "Germanised". We argue that the policy transfer from the EU to the domestic and vice versa can be explained by three factors: (1) the discourse, (2) the institutional set-up/context, and (3) exogenous and functional pressures.

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1. INTRODUCTION

EU asylum policy can be regarded as one of the most dynamic areas of European integration. At the constitutional level, it has shifted from an intergovernmental regime, in which only a handful of Member States participated outside the Treaty framework, towards an almost fully communitarised EU policy area in less than 15 years. On the EU legislative level – even though processes were often cumbersome and usually reflected the "minimum standards" stipulated in the Treaty – output in quantitative terms has been remarkable.[1] In view of the significant dynamics of EU migration policy at both levels and the potential constraints for governments to pursue certain policies domestically as the result of European integration, what merits further explanation is that member governments often seem to have retained control over the process – both at home and in Brussels – and managed to push through their preferred policy line. In this paper we seek to substantiate this on the case of Germany with regard to the development of the "safe third country concept"[2] within EU/European and domestic asylum policy. How can the emergence and development of the concept at the domestic level and European level be accounted for? And, how can it be explained that the German government – in both uploading and downloading Europeanisation processes – stayed in charge and managed to realise its preferences? We argue that three, somewhat interrelated, factors can explain this process: (1) the discourse, (2) the institutional set-up/context, and (3) exogenous and functional pressures.

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1 Since 1999 the Council has adopted on average each month ten new texts on JHA issues, many of which on asylum policy. Monar 2004, 4.

2 According to the safe third country rule, "an asylum seeker is denied access to substantive refugee determination procedures, on the ground that he could or should have requested and if qualified, would actually have been granted refugee protection in another country." Kjaergaard 1994, 652.

Our paper is the linked to the (wider) debate on whether Europeanisation restricts or enhances Member governments' scope for manoeuvre.[3] However, our paper goes beyond the still predominating focus on top-down processes, by including bottom-up processes in our analysis, as well as feedback processes from both levels. From an empirical perspective our paper also provides insights for explaining Germany's transformation from "vanguard to laggard"[4] in EU asylum policy.

We proceed as follows: section two defines key concepts and explicates the framework for analysing our empirical data. Section three analyses the Europeanisation of German asylum policy leading to a change of the German Basic Law. Section four considers how and why Germany managed to export its safe third country concept to the European level, i.e. we look at the Germanisation of EU asylum policy. Finally, we draw some conclusions.

2. CONCEPT AND FRAMEWORK

Our analytical framework is made up of three factors: (1) the discourse, (2) the institutional set-up/context, and (3) exogenous and functional pressures. The framework is not meant to constitute a full-fledged theory. It rather comprises building blocks that may be used for more formal theorising. The explanatory factors of the framework have been derived inductively from prior research (Post and Niemann 2005, Post 2004). The subsequent factors are intertwined in several ways and cannot always be neatly separated from each other.

The discourse

Discourses have been described as institutions (here broadly defined) in their own right that shape actors' "boundaries of the possible"[5] and "guide political action by denoting appropriate or plausible behaviour in light of an agreed environment."[6] Discourse analysis points to the existence of hegemonic conceptions, elements which have acquired the status of knowledge for which reason they are located largely

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3 Cf. e.g. Lavenex 1999, Thielemann 2002.
4 Hellmann *et al.* 2005.
5 Jachtenfuchs 1997, 47.
6 Rosamond 2000, 120.

outside the realm of the contestable. Language here constitutes the central element through which the dominant (policy) frames[7] are generated.

It has been noted that "discourses do not exist 'out there' in the world; rather, they are structures that are actualized in their regular use by people of discursively ordered relationships".[8] The terms assigned to specific issues concentrate the attention on certain elements and lead to the neglect of others. Through the selection of certain words over others frameworks of meanings are established. Put differently, "discursive interventions contribute towards establishing a particular structure of meaning-in-use which works as a cognitive roadmap […]." Such structures create pressure for adaptation on all actors involved.[9] In this analysis, the study of discursive interventions has taken place through an investigation of official documents, (especially parliamentary) debates, speeches and major media.

Institutional composition/context

The institutional context enables or facilitates the appearance of certain actors and (thus also) discourses, while excluding or hampering others. This may happen, as the institutional composition tends to reinforce the position of a particular advocacy coalition (to the detriment of another group), thereby fostering the implementation of its promoted policy.[10] In other words, the institutional structure shapes the access of actors (and thus discourses) to the decision-making arena, which in turn favours the development of certain policy lines or 'cognitive roadmaps' over others. On the EU/European level, the degree of involvement of supranational institutions and the type of decision rules (e.g. qualified majority voting or unanimity) may have an important impact on policy outcomes, as the agenda-setting powers of different actors as well as veto points are thus established. At the domestic (here German) level, the division of powers of certain groups of actors, such as the Chancellery (Kanzleramt), the Federal Foreign Office (Auswärtiges Amt) and the Ministry of the Interior (Bundesministerium des Inneren), and among the various political parties, constitutes an important element of the institutional composition.

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7 "A frame is a perspective from which an amorphous, ill-defined problematic situation can be made sense and acted upon." Policy frames are shared understandings concerning a given issue, which reflect actors' perceptions and definitions of the issue (Rein and Schön 1991, 264).

8 Milliken 1999, 231.

9 Wiener 2004, 201.

10 Cf. Lavenex 2001b, 855-856.

Another feature of the institutional context is the potential for *two-level games*. These may be played when domestic and international politics are entangled.[11] The insight of the "two-level" metaphor is that governments, acting in the domestic and international arenas simultaneously, have to conciliate domestic demands with international pressures. In doing so, governments can act as gate-keepers between the two levels. One of the key insights from two-level games is that in international negotiations (national) policy-makers can refer to domestic constraints in order to strengthen their negotiating position at the international level. The negotiating power depends on the size of domestic-level "win-sets", i.e. the set of all possible international-level agreements that would win sufficient domestic support in order to be viable. The smaller the domestic win-set, the larger the negotiating power at the international level.[12] Furthermore, two-level games can be played the other way round: national policy-makers can draw on the international level (or European level for that matter) in order to bring about policy changes in the domestic arena, which they would not have been able to produce without indirect 'support' or legitimacy from constraints at the international level. Constraints or necessities at either level may be purposely carried into the discourse arena (where it may also be exaggerated or, to some extent, strategically constructed) in order to increase one's own bargaining space/power on the respective other level. By advancing the need for action through two-level "strategic gaming" actors may induce the resonance with a particular policy discourse.

Functional and exogenous pressures

Our third explanatory cluster is made up of pressures/tensions in the 'real' (material) world that can be distinguished from the institutional set-up/context. Functional pressures come about when an original goal can be assured only by taking further (integrative) actions.[13] The basis for the development of functional pressures is the interdependence of issues (or policy sectors). As regards European integration, functional interdependence means that individual sectors and issues tend to be so interdependent in modern polities and economies that it is likely to be difficult to isolate them from the rest.[14] (Endogenous-)functional pressures thus encompass the tensions, contradictions and interdependencies arising from within (or which are closely related to) the European integration project and its policies, politics and polity,

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11 On two-level games see Putnam 1988. For use of this concept in EU studies see, for example, Moravcsik 1993.

12 Putnam 1988, 440.

13 Cf. Lindberg 1963, 10.

which induce policy-makers to take additional cooperative/integrative steps in order to achieve their original objectives. In the context of (EU) migration policy the "free movement of persons" principle constitutes an important functional pressure. It is closely linked to the idea of abolishing border controls at the EC's internal frontiers.[15] This objective sets in motion certain functional pressures as the original goal could only be achieved by taking a number of compensatory measures, for instance, concerning asylum policy, as the possibility of "asylum-shopping" posed a more serious problem in a borderless Europe. The subsequent Schengen and Dublin Convention(s), in turn, activated new functional pressures, as they arguably affected – to varying extends – national practices and legislations.

Exogenous pressures encompass those factors that originate outside the integration process itself, i.e. that are exogenous to it. They affect the behaviour of national and supranational actors and also influence EU and domestic structures. In the European context of asylum policy exogenous pressures constitute large numbers of asylum-seekers and refugees entering the Community and staying there, legally or illegally.[16] This, combined with socio-economic problems in Western Europe – especially rising levels of unemployment – resulted in the perceived need to limit the number of third country nationals seeking asylum in the Community. In addition, as several Member States began to introduce more restrictive national legislations, other Member States were, to some extent, pressured to follow suit, as the gradual abolition of internal Community/Schengen borders threatened to increase the migratory burden for those countries with relatively liberal asylum legislations. Moreover, the pressure was on for a common European solution as the nature of the (migration) 'problem' went beyond the governance potential of individual states, not least due to the 'free movement of persons' principle and the restrictive competitive policy-making across Western Europe.[17] The terrorist attacks of 11 September 2001 also constitute an important exogenous pressure.

Functional and exogenous pressures – similar to the institutional set-up – provide the (physical) background that helps to enable certain discourses. It is assumed here that discourses are embedded in 'reality' in the sense of actions, materiality and institutions.[18] We thus (also) imply that 'discursive' structures resonate particularly well, when they are supported by 'material' structures. On the other hand, we also

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14 Cf. Haas 1958, 297, 383.
15 E.g. Niemann forthcoming 2008.
16 Cf. Collinson 1993; Butt Philip 1994.
17 See Baldwin-Edwards and Schain 1994, 11; Achermann 1995.
18 Cf. Wæver 2004, 199.

acknowledge that functional and exogenous pressures, to some extent, only represent pressures and constraints, when actors perceive them as such. In addition, we suggest that these pressures can be strategically instrumentalised in order to raise the legitimacy of actions and discursive arguments.[19]

The concept of Europeanisation[20]

Research on Europeanisation has gradually increased since the mid-1990s and has developed into an academic growth industry over the last decade. The term Europeanisation has been used in a number of different ways to describe a variety of phenomena and processes of change.[21] Most frequently Europeanisation is referred to as domestic change, in terms of policy substance and instruments, processes and politics as well as polity caused by European integration.[22] Existing policies (in integrated sectors) are increasingly made at the European level, which leads to substantial changes in the policy fabric (and content) of EU member states.[23]

As a field of inquiry, Europeanisation merits continued systematic academic attention, for several reasons. First, the Europeanisation research agenda arguably focuses on a set of very important research questions, related to *where*, *how*, *why*, and *to what extent* domestic change occurs as a consequence of EU integration and governance at the European level. Second, compared to several decades that European integration studies have focused on explaining and describing the emergence and development of a supranational system of European cooperation, research on Europeanisation is still in its infancy. Third, it is difficult to make firm cause-and-effect generalisations in this field of inquiry, given, for example, the considerable variation in national institutional histories, actor constellations, and structural differentiation as well as the complex interplay between mechanisms of change at both the domestic and European levels.[24]

As a starting point, Europeanisation is understood here as the process of change in the domestic arena resulting from the European level of governance. However, Europeanisation is not viewed as a unidirectional but as a two-way-process, which develops both top-down and bottom-up. Top-down perspectives largely emphasise

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19 This is reminiscent of Schimmelfenning's (2001) rhetorical action.
20 This section heavily draws on Brand and Niemann 2005.
21 Cf. Olsen 2002.
22 Cf. e.g. Radaelli 2000, 3; Ladrech 1994, 69.
23 See e.g. Caporaso and Jupille 2001.
24 Cf. Olsen 2002, 933ff.

vertical developments from the European to the domestic level.[25] Bottom-up accounts stress the national influence concerning European-level developments (which in turn feeds back into the domestic realm). This perspective highlights that Member States are more than passive receivers of European-level pressures. They may shape policies and institutions on the European level to which they have to adjust at a later stage.[26] By referring to Europeanisation as a two-way process our conceptualisation underlines the interdependence between the European and domestic levels for an explanation of such processes. In contrast to a unidirectional top-down usage of the concept, studying Europeanisation as a two-way process entails certain disadvantages in terms of (waning) conceptual parsimony and methodological straightforwardness. However, we argue that these problems are outweighed by a substantially greater ability to capture important empirical phenomena. It has suggested, for example, that Member States´ responses to Europeanisation processes feed back into the European level of decision-making. European/EU policies, institutions and processes cannot be taken as given, but are, at least to some extent, the result of domestic political preferences and processes which are acted out on the European level.[27]

It should be pointed out that for us Europeanisation does not equate "EUisation". Rather the EU is only part – albeit an important one – of the wider fabric of cross-border regimes in Europe in which other (transnational) institutions and frameworks, both formal and informal, also play a role. Hence the EU is not the monopoly source and channel of Europeanisation.[28] This may include institutional arrangements at the European level which are related to European (integration and) cooperation in a broader sense, such as the Schengen Agreement, the Council of Europe (COE) or the Organization for Security and Co-operation in Europe (OSCE).[29]

While working with a fairly wide notion of Europeanisation, it is important to clearly delimit the concept in order to avoid the danger of overstretching it. For example, we would reject "the emergence and development *at the European level* of distinct structures of governance" as an appropriate definition of Europeanisation.[30] Closely related, Europeanisation as conceived of here is to be distinguished from

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25 Cf. e.g. Ladrech 1994, Schmidt 2002.

26 Börzel 2002.

27 Cf. e.g. Börzel 2002; Dyson 1999.

28 Wallace 2000, esp. 371, 376.

29 By not restricting Europeanisation to change induced by the EU, it is possible to escape the n = 1 dilemma in European integration studies where the EU is only an instance of itself, as a result of which findings cannot be generalised because of this uniqueness (cf. e.g. Rosamond 2000, 17). EU Europeanisation processes can thus be compared with larger/other Europeanisation processes in Europe and with other cases of regional integration (also cf. Vink 2002, 6-7).

30 Cf. Risse *et al.* 2001, 3; emphasis added.

"political unification of Europe".[31] Although above we have pointed out that our conceptualisation relates to interaction with the European integration process and to changes on the European/EU level, the core focus remains on the process of change *in the domestic arena*.[32] In addition, Europeanisation should not be confused with "harmonisation" and also differs from "convergence". Europeanisation may lead to harmonisation and convergence, but this is not necessarily the case. Empirical findings indicate that Europeanisation may have a differential impact on national policy-making and that it leaves considerable margin for domestic diversities.[33] Moreover, there is a difference between a process (Europeanisation) and its consequences (e.g. potential harmonisation and convergence).[34]

3. THE EUROPEANISATION OF ASYLUM POLICY IN GERMANY: THE 1993 CONSTITUTIONAL REFORMS

By the early/mid 1990s ─ at which point our analysis of (domestic) asylum policy begins ─ migration policy (at the European level) can be characterised by securitisation and intergovernmentalism. Both the Ad Hoc Group on Immigration and the Schengen Group left national governments and administrations in control of the policy-making process, given the very minimal interference of supranational institutions, Member States authority over agenda-setting and above all the national veto. The third pillar of the Maastricht Treaty somewhat augmented the role of supranational institutions but left the unanimity requirement largely untouched. Characteristic of all these institutional set-ups was that they provided law-and-order officials with a prominent role in the policy-making process. Their dominance, the propensity towards lowest-common denominator agreements due to the unanimity requirement as well as the growing politicisation of migration and the linkage between migration and internal security facilitated the emergence of a security continuum, in which migration was merged with cross-border criminality, such as drug trafficking

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31 Olsen 2002, 940.

32 As pointed out by Vink (2002, 6) it is rather questionable to add a new concept (Europeanisation) as a synonym for notions such as European integration or communitarisation (also cf. Radaelli 2000, 3).

33 Cf. Héritier *et al.* 2001; Caporaso and Jupille 2001.

34 Radaelli 2000, 5.

and terrorism. At the same time the discourse framed asylum increasingly as a question of economic, social and cultural (in)security.[35]

The security continuum was reflected in the Schengen Convention, Dublin Convention and London Resolutions. These instruments were regarded to be necessary compensatory measures in light of the abolition of internal borders. They aimed at the establishment of a burden sharing system, which would enable Member States to regain control over refugees, for example by determining that the first entry state had to deal with asylum applications. The London Resolutions[36] were an attempt to define some minimum standards with regard to the processing of asylum claims, including the application of the safe third country concept. They set forth that asylum claims by applicants entering from a safe third country, designated by the Member State on a case-by case basis, were to be considered under accelerated procedures, excluding an examination of the merits of the case. Hence, the Resolution limited the access of asylum seekers to status determination procedures and to the territory, thus questioning the principle of *non-refoulement*.[37] Moreover, the Resolution caused an externalisation of responsibility for asylum claims to countries outside the EU, in particular its eastern neighbours.[38] Although they were legally non-binding, the resolutions contributed to the increasing securitisation of the normative framework. They served as instruments to legitimise restrictive reforms in the Member States, in particular in the Netherlands and Germany, without however harmonizing substantial or procedural standards.[39]

The notion of asylum has been closely tied to the self-understanding of the Federal Republic of Germany. The subjective right to asylum stipulated in the old Article 16 (2) 2 Basic Law was understood by the founders of the Federal Republic as a "continuous humanitarian" duty of Germany towards persecuted people regardless of short-sighted political considerations.[40] It was a reaction by the political elite to the experience of National Socialism and the Holocaust. The notion of asylum was therefore embedded in the broader ideational context of the "new" German State based on a humanitarian orientation and the notion of the rule of law. This humanitarian orientation was upheld, above all, by the support of Social Democrats (SPD) and

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35 This development towards a security continuum has been described for example by Bigo 1996, Huysmans 2000, Lavenex 2001a, Post and Niemann 2005.

36 There were three resolutions (Council 1992a; Council 1992b; Council 1992c). For this context, the resolution on a harmonised approach to questions concerning host third countries is the most relevant. When referring to the London Resolutions, we particularly refer to that one (Council 1992c).

37 See Kjaergaard 1994, 653-654.

38 See Lavenex 2001a, 114.

39 See Schwarze 2001, 211; Uçarer 2002, 25.

40 Ernst Benda, cited in Lavenex 2001a, 36.

Liberals (FDP). Conservatives (CDU), on the other hand, increasingly argued in favour of more restrictive asylum laws and amending Article 16 of the Basic Law.[41]

The 1993 reform of the Basic Law marked a watershed in that it brought about a substantially more restrictive domestic asylum regime. Even though Article 16 a (1) GG still guarantees that "persons persecuted on political grounds shall have the right to asylum", it has been extended by a long list of specifications and restrictions, changing the character of its wording from the style of a constitutional right into an administrative regulation.[42] According to Article 16 a (2) I GG, a person entering Germany from "a Member State of the European Union" may not invoke Article 16 (1) GG. Hence, Germany can send a refugee back to another Member State unless it is itself responsible for examining the application.[43] The clause goes beyond the objective to establish a burden-sharing system among the Member States of the European Union but also extends it to non-member states.[44]

Although the German government partly justified the implementation of the safe third country concept in the Basic Law with the necessity to comply with European standards, the German application of the safe third country concept differed from the standards set out by the London Resolutions. Contrary to that resolution, the German Basic Law does not provide for an individual assessment of the safety of a country, but allows for the general presumption of countries being safe. Germany thus exceeded the standards set out by the London Resolution.[45] Moreover, according to Article 16 (2) in connection with § 18 (2) (2) Asylum Procedure Act, a refugee entering from a designated third country can automatically be sent back by the border authorities, even if he or she merely travelled through the country. Such a border procedure also goes beyond the standards set forth in the London Resolutions and has become a "hallmark" of Germany's restrictive asylum praxis.

How can the constitutional amendments be explained? Particularly how can this reform, which required a 2/3 majority in the *Bundestag*, be explained in face of Germany's (hitherto) liberal asylum tradition and the support for this humanitarian orientation by Liberals and Social Democrats in (up to) the early 1990s? In addition, legally speaking neither the Dublin Convention nor the Schengen Convention necessitated a constitutional change.[46] We argue that (1) functional and exogenous

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41 Cf. Münch 1993, Schwarze 2001.
42 Bosswick 2000, 50.
43 § 18 (3) Asylum Procedure Act.
44 Davy 2001, 38.
45 Para. 2 (a) RSTC.
46 Huber 1989, 59; Kröning 1989, 101; Kimminich 1989, 301.

factors; (2) the institutional set-up/context and (3) the discourse can explain this change.

Functional and exogenous pressures

By the end of the 1980s and the beginning of the 1990s, Germany experienced a major flow of migration including asylum seekers[47], refugees from the civil war zones of post-communist countries, and ethnic Germans from the Soviet Union, Poland and Romania. Altogether, about three million migrants arrived in Germany between 1989 and 1992.[48] These developments put an immense strain on public funds and challenged the territorial integrity of the Federal Republic.[49] Parts of the population felt overburdened by this number of immigrants, causing public resentment against foreigners[50] and increased frustration with the German political elite that was unable to solve the problem, making xenophobia socially more acceptable.[51] There were violent attacks by neo-Nazis on asylum centres marking the beginning of the worst wave of xenophobic violence Germany had seen since the end of the Third Reich. Conservatives linked these xenophobic incidents to the rising number of asylum seekers. Hence, even though opposing the violent outbreaks, politicians accepted the definition of the problem as one of internal stability and security and thus legitimated the violence.[52] By the end of the 1980s the immigration problem was magnified to become the leading political issue in public debates, thus creating an "institutionalized phobia".[53]

An increased number of migrants and an institutionalised phobia have to be seen in the context of free movement of persons principle and the policy response in other EC Member States. The adoption of the Schengen Agreement on the gradual abolition of controls at the common frontiers by five Member States in 1985, and the Single European Act of 1986, aiming for the realisation of an internal market by the end of 1992, reinforced the free movement of persons objective.[54] As other EC Member

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47 1989: 120,610 asylum applications; 1990: 148,842; 1991: 168,023 asylum applications; 1992: 216,356 asylum applications; 1993: 512,561 asylum applications. See Federal Ministry of the Interior, at http://www.bafl.de/template/asylstatistik/content_entscheidungen_teil1.htm.

48 Joppke points out that this number was "no small thing for a country that defines itself as not an immigration country." See Joppke 1998, 127.

49 See Joppke 1998, 128.

50 Becker 1993, 141-150.

51 See Bade 1994, 117.

52 See Neuman 1993, 525; Bade 1994, 126.

53 Bielefeld 1993, 37.

54 Niemann 2006.

States had introduced more restrictive asylum provisions in their national legislations in the 1980s and early 1990s, it was foreseeable that in a borderless Europe those countries with more liberal asylum regimes (such as Germany until 1993) would have to take much of the burden.[55] In addition, the Dublin Convention, which sought to tackle "asylum-shopping" by determining that the first entry state had to deal with asylum applications, seemed for some to be difficult to reconcile with the constitutional right to asylum in Germany. This combination of functional and exogenous policy structures put pressure on Germany to change its asylum law.

However, three qualifications have to be made, which call into doubt the "need" for a *constitutional* change in Germany. First, it can be argued that the free movement of persons logic (and its implications for asylum matters) has its limitations, as (a) borders have always been more permeable and more difficult to police than usually suggested and (b) personal identity controls increased in the wake of the abolition of internal borders.[56] Secondly, European level provisions, especially the Dublin Convention and the Schengen II Convention that were already signed (but not yet ratified), as well as the London Resolutions, alleviated the "problem", for example, by introducing the safe third country concept and by making provisions for burden-sharing. Thirdly, legally speaking, neither the Dublin Convention nor the Schengen Convention required a constitutional change.[57] Both conventions included an opt-out clause that would have allowed to maintain the subjective right to asylum, and to review asylum claims already rejected in another Member State. Although they already constituted a certain rationale for a change of German legislation, functional and exogenous pressures cannot by themselves convincingly explain why the reform of Article 16 GG came about.

The institutional context/composition

Since migration is a very multidisciplinary topic, different ministries as well as Germany's Chancellery competed for power in that policy field.[58] The organisational structure of the integration process led to a redistribution of power as Germany's Ministry of the Interior was able to enhance its position *vis-à-vis* the other ministries. While European integration in the field of migration was first determined by the

55 But cf. Hatton, 2005.
56 Cf. Huysmans 2000, 759; Niemann 2000
57 Huber 1989, 59; Kröning 1989, 101; Kimminich 1989, 301. And the London Resolutions were not legally binding.

Federal Chancellery, which negotiated the Schengen Agreement in 1985 in cooperation with the Federal Foreign Office, there was a gradual shift of influence towards the Federal Ministry of the Interior.[59] This was due to the fact that civil servants of this ministry, in particular of the police department in the ministry, became more and more involved in the negotiations at the working group level. The transgovernmental policy-making process at the EU level provided ministers and civil servants with the possibility to draft instruments reflecting their own domestic asylum agendas behind closed doors.[60] They were then able to utilise these instruments as a tool for advancing their position in domestic political forums and to link their own agenda of internal security (and restrictive migration policy) with the moves towards an abolition of the internal borders. The various ministers of the interior (Zimmermann, Schäuble, Seiters) subsequently called for the restriction of the constitutional right to asylum as the precondition of harmonisation of asylum policy. They took on the role of policy advocacies in the domestic arena in their attempt to persuade other actors involved in the policy discourse by using membership in the EU as an *alibi* for justifying restrictive measures to the parliament and the public.

This leads us to the second element of the institutional composition, that of two-level games. Moravcsik drawing on Putnam has demonstrated that policy-makers can draw on the European level to bring about policy changes in the domestic arena, which they would not have been able to produce without indirect support and legitimacy from the European level.[61] Such behaviour can be attributed to officials from the German Ministry of the Interior.[62] More prominently, CDU/CSU politicians managed to advance their policy objective by repeatedly referring to the 'inherent necessities' stemming from the EU level. By making reference to the European level they could add legitimacy to their privately held preference for a constitutional change of German asylum law. CDU/CSU politicians played a number of variations of the two-level game: (1) by linking the discussion concerning the Schengen II ratification to a CDU/CSU motion for a reform of Article 16 GG[63], they argued that the ratification of Schengen is only possible after Germany changed Article 16 of its Basic Law[64]; (2) after it was exposed in the *Bundestag* debate that this was legally untrue, it was held that without changing the *Grundgesetz*, Germany would only be a 'limping

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58 Ellwein and Hesse 1992, 319.
59 Cf. Lavenex 2001a, 152.
60 See Favell 1998.
61 Putnam 1988, Moravcsik 1993.
62 Favell 1998. On the subsequent also cf. Thielemann 2002.
63 Lavenex 2001a, 156

participant' in the Schengen regime, able to fulfil its duties, but unable to make use of its rights (of transferring asylum claims to other countries) [65]; (3) going one step up on the two-level game bargaining ladder, the head of the CDU parliamentary group, Schäuble, threatened to advice the CDU parliamentary group not to ratify Schengen II, unless Article 16 GG was 'supplemented'[66]; (4) most frequently it was (unspecifically) argued that changing the Basic Law would enable Germany to take part in the future development and harmonisation of EU asylum policy. This line was particularly intensified when some (Social Democrat and Liberal) MPs further questioned the relevance of Schengen for the issue of reforming Article 16 GG[67]. The above also indicates the most of these two-level games were played strategically in the sense that claims and implications of European-level developments were opportunistically exaggerated. In any case, by playing the "European card" the CDU/CSU managed to influence decisively the German political discourse.

The discourse

By analyzing the development of the discourse we attain a more complete understanding of the policy transformation in Germany. The two-level game described above strongly contributed to the empowerment of a certain discourse. Framing the restrictive reforms as a requirement for Germany's participation in a European asylum policy (and to a lesser extent as a precondition for realising the abolition of internal borders) resonated well with the strong normative appeal of European integration across all German political parties. In addition, the securitarian policy frame adopted at the European level resonated well with the policy discourse at the domestic level. This facilitated the redefinition of the "problem" to be a European, and not a domestic one. By getting legitimacy from pursuing domestic policy in the name of European integration, the dictum of a constitutional change as means for enabling a European asylum policy became the hegemonic conception. Subsequently, this gradually developed into the dominant discourse on asylum among the German political elites.

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64 Cf. e.g. then Minister of the Interior, Rudolf Seiters in Deutscher Bundestag (1992b: 7299). Also cf. Lavenex (2001a, 155).

65 See Wolfgang Schäuble in Deutscher Bundestag (1992b: 7313)

66 Deutscher Bundestag (1992b: 7313).

67 Cf. Deutscher Bundestag (1992b: 7300, 7334).

Politicians favouring the reform[68] referred, above all, to the need for a common European asylum approach, requiring Germany to bring its asylum legislation in line with a more restrictive approach taken by most of its European partners and at the European level.[69] Even a number of Social Democrats and Liberals began to carry this discourse. Gerhard Schröder (SPD), for example, stated that, "we want [further] European integration, in good times and in bad times. Hence, we need European asylum [legislation] because refugee streams are a European problem. […] For this reason – and only for this reason – do we want to supplement the Basic Law. […]".[70] For the SPD and FDP European integration provided a means for legitimising their agreement to a constitutional reform to their electorate.[71] The legitimizing effect of European integration is also reflected in the ruling of the Federal Constitutional Court of 14 May 1996. In its reasoning, the Court repeatedly pointed to the establishment of a European burden-sharing system and justified the reform as the basis for a European asylum policy.[72]

In addition to legitimising the 'pro-constitutional reform' discourse by tapping to the strong appeal of European integration, this discourse was further cemented by drawing on the securitarian approach inherent in European instruments, which corresponded with fears of increased numbers of bogus asylum seekers that have been part of the long-lasting asylum discourse in Germany. The participation of Germany in the burden-sharing system of the Dublin Convention and the Schengen Convention was defined as an indispensable means to guarantee Germany's internal security in a borderless Europe. The reform of the German asylum regime was framed as a precondition for participation in a common European asylum system and thus as a condition for its internal security.[73] Furthermore, the characterisation of Germany turning into the *Asylreserveland*[74] of Europe complemented the discourse and led to growing support for downgrading German standards to lower European ones.

The European argument had been used by Conservative politicians since the mid-1980s.[75] But why did the policy change only occur in 1992/93? This can be explained fourfold. Firstly, discursive structures generally need a certain time to develop. When

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68 Only the Bündnis 90/Die Grünen (The Greens) and the PDS (Partei des Demokratischen Sozialismus) collectively opposed the constitutional amendment (there were some MPs of both the SPD and the FDP that also opposed the reform). See Deutscher Bundestag 1993b.

69 See Monar 2001, 757. Cf. e.g. Stoiber in Deutscher Bundestag (1993b).

70 Quoted in Greiner 1993, 271 (authors' translation).

71 See Monar 2001, 756; FDP 1992.

72 Federal Constitutional Court (1996). Ulmer (1996, 26 ff).

73 See Deutscher Bundestag 1993a.

74 See Tomei 1996, 4. This notion was carried, for example, by Rudolf Seiters, Wolfang Schäuble and Edmund Stoiber in Deutscher Bundestag (1992b).

tracing the discourse in the German *Bundestag*, it is notable that speeches/statements underlining the necessity to change the *Grundgesetz* for coming in line with European initiatives became more frequent over time while the liberal argument concerning Germany's continuous humanitarian duty became less pronounced. Secondly, in 1992 the CDU/CSU parliamentary group explicitly linked the ratification of the Schengen II Convention to the change of Article 16 GG and thus pronounced the 'European card' in the discourse (even) more severely. Thirdly, since the 1980s the free movement of persons argument and its (alleged) impact on EU and domestic policy-making gradually gained currency, until it almost acquired the status of knowledge outside the realm of the contestable in the early to mid 1990s.[76] As a result, the discourse linking the free movement of persons principle to domestic internal security problems in terms of migration also became more forceful. Finally, discursive structures resonate particularly well, when they are supported by "material" structures that can be pointed to. In this case, the exogenous pressure in terms of rising numbers of asylum seekers until 1993 reinforced the (prevailing) discourse concerning the danger of turning into the *Asylreserveland* of Europe.

4. THE "GERMANISATION" OF EU ASYLUM POLICY: THE NEGOTIATIONS OF THE ASYLUM PROCEDURE DIRECTIVE

The Treaty of Amsterdam set forth that within a period of 5 years binding minimum standards on the reception of asylum seekers, a common refugee definition, asylum procedures as well as criteria and mechanisms for a burden sharing system were to be adopted by the Member States.[77] Hence, the integration process became more hierarchical and non-voluntary than under the Maastricht regime. Nevertheless the institutional structure remained "hybrid"[78], reflecting the continuous tension between state sovereignty and European integration. Although the supranational institutions were granted additional powers, the Council and hence the Member States remained more influential than in other policy areas. For example, during the transnational period of five years, the Council retained a shared right of initiative and unanimity which remained the general rule in the Council. Moreover, the European Parliament

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75 Cf. Schwarze 2001, 80; Lavenex 2001a, 155.
76 Cf. Niemann 2000.
77 See Article 63 Treaty of Amsterdam.
78 Monar, 2002a, 64.

was merely to be consulted on matters of asylum policy. Decision-making in the Council and the role of the EP remained largely unchanged during the 2000 IGC. Concerning Article 63 (1) (measures on asylum) a switch to qualified majority voting and co-decision was made conditional on prior *unanimous* adoption of legislation defining common rules and basic principles. Hence, a switch was postponed until after adoption of the respective directives, which were in progress (including the procedure directive). Thus, the Member States remained the dominant actors during the negotiations on the asylum directives.

Our analysis of the safe third country rule focuses on the asylum procedure directive, which laid down the concept. Yet, the analysis considers the directive as well as the safe third country concept within the context of a comprehensive asylum approach.[79]

Exogenous and functional pressures: illegal immigration, the terrorist attacks of 9/11, the right-wing election victories and EU enlargement

When analyzing the development of European asylum policy in general, and the directive on asylum procedure in particular, several exogenous factors have to be taken into consideration. Although these events were not always directly linked to the negotiations of the asylum directives at the EU level, they shaped their context and constituted the material structures within which the public discourse was framed.

When in 2000, 58 illegal immigrants were found dead in a Dutch truck in Dover, there was a public outcry, followed by demands for a more effective policy against illegal immigration.[80] At the same time, the media and right-wing parties were accusing illegal immigrants to abuse the asylum systems as well as social security systems.[81] After further refugee tragedies, especially in the Mediterranean Sea, Southern European countries demanded a system for ensuring a fairer burden sharing.[82] Consequently, there was growing public pressure to find agreement on a common European immigration policy, including common asylum standards, which were seen to be important measures to develop a genuine system of burden-sharing as well as to deter illegal immigrants from abusing European refugee systems.[83]

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79 Altogether 11 directives have been adopted: ….
80 Roche 2000.
81 Ibid.
82 Neue Zürcher Zeitung Online, 2003.
83 See European Council 2002.

In addition, the terrorist attacks of 9/11 lifted internal security matters to the top of the agenda of every Member State. As the attacks were carried out by foreign nationals, the measures taken in the wake of the attacks and the public discourse (see below) focused on the tightening of border controls and immigration rules. While the attacks had no direct effect on the negotiations on asylum policy they, however, strengthened the link between internal security and migration.

Following the debate on illegal immigration as well as the terrorist attacks, right-wing parties were gaining public support. Most notable were the success of the French right-wing populist, Le Pen in the Presidential Elections of 2002, and the success of the Dutch populist, Pim Fortuyn. Both gained votes due to a racist and islamophobic rhetoric and by accusing their governments of being unable to curb illegal immigration and the abuse of asylum.[84] Although neither of the two politicians got into power, they pressured their governments to take more restrictive measures both at the national as well as EU level.[85]

Moreover, Member States still felt the "negative" implications of the gradual implementation of the free movement principle. The burden-sharing system that had been established by the Dublin Convention was working insufficiently, partly because of substantial differences between refugee laws and procedural standards in the Member States. The primary aim of the minimum standards was hence to "limit secondary movements influenced solely by the diversity of applicable rules." Harmonisation of conditions was regarded to be necessary to "avoid negative effects for the Member States' interests."[86]

Lastly, Member States were eager to find an agreement on a general framework for a common asylum policy before the enlargement of the EU in May 2004. Since it was already difficult to agree among 15 Member States on minimum standards, the Member States were concerned that an agreement among 25 States would be impossible. Moreover, Eastern European states which were constituting the Eastern external borders of the Union, were thought to have substantially different interests than the EU-15.[87]

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84 Levy 2003, 9-14.
85 Grice and Castle 2002.
86 European Commission 2000b.
87 Financial Times 2003.

The discourse: between liberal economic migration and global terrorism

The European discourse: The Tampere Conclusions and the fight against terrorism

At the turn of the century, a discursive change towards a less security oriented discourse and a more liberal approach to the issue of migration as well as a common asylum policy at the European level seemed likely. Most notable, the Tampere Conclusions which are considered to be a milestone in the development of a common EU asylum and immigration policy, underlined the "commitment to freedom based on human rights, democratic institutions and the rule of law" and envisioned the establishment of an "open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention, and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.[88] At the same time, there were efforts by the Commission as well as some Member States to pursue a more liberal policy on labour immigration due to a growing shortage of skilled and unskilled labour and an aging population.[89]

These liberal discourses were, however, flanked by a discourse that further criminalised both illegal immigrants and asylum seekers. As has been noted above, the increasing number of refugee tragedies especially when crossing the Mediterranean Sea as well as the terrorist attacks of 9/11 prompted a right-wing and racist discourse in different European countries. In Great Britain, for example, the yellow press complained that illegal migrants enrich themselves at the expense of the British people.[90] At the European level the aim of a common immigration and asylum policy was reformulated: to strike a "balance" between on the one hand the commitment to international Conventions, principally the Geneva Convention, and on the other hand the need for "resolute action to combat illegal immigration and trafficking in human beings".[91]

Following the 9/11 attacks, migration as a cross-border phenomenon became embedded in a broader discourse in which the systemic referent object was no longer the security of the state, internally and externally but emerging "standards of civilization"[92] such as democracy, freedom and the rule of law. The European Council defined the attacks "as an assault on our open democratic, tolerant and multicultural

88 European Council 1999, para. 4.
89 See European Commission 2000b. Levy 2003, 6.
90 Roche 2000.
91 European Council 2003.
92 Buzan et al. 1998, 153.

societies. They are a challenge to the conscience of each human being".[93] While the earlier discourses had constructed an us-them logic, identifying the other as an existential threat to the cultural homogeneity of the national community, the migrant was now framed as a "political threat", attacking the democratic standards of Western societies. Consequently, the discourse strengthened the link between trust within the political community, and fear of the "other", the foreigner, who is in the case of terrorism the "carrier of death"[94], and thus a physical threat. Even though the European leaders explicitly rejected any "equation of fanatic terrorists with the Arab and Muslim World"[95], it can be argued that by engaging in the meta-politics of migration and security, "politicians produce the very 'clash of civilization' from which they verbally abstain."[96]

Moreover, the post-9/11 discourse drew a clear link between terrorism and migration by arguing that "terrorism is, because of its cross-border dimension, a migration issue."[97] Hence, immigration policies were seen as "an important vehicle for addressing it [terrorism], particularly to ensure better application of law enforcement and intelligence".[98] Consequently, the post 9/11 discourse strengthened the nexus between migration and terrorism and legitimated "politics of exception" at the national as well as EU level.

In this context, Tony Blair stated in the House of Commons, that the anti-terrorist legislation will "increase our ability to exclude and remove those whom we suspect of terrorism and who are seeking to abuse our asylum procedures. It will widen the law on incitement to include religious hatred. […]"[99]. This statement reflects as Huysmans points out, the link between immigration, otherness and terrorism.[100] Within this British discourse the institution of asylum as well as the adherence to the European human rights regime was questioned. For example the Conservative MP George Osborne said with regard of inclusion of the EHRC into British law, "I hope that we are aware that we are undermining the rights of our citizens because we have given so many rights to people, including suspected terrorists, who come to this country and claim asylum"[101].

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93 European Council 2001b.
94 Faist 2002, 10.
95 European Council 2001b.
96 Faist 2002, 10.
97 International Organization for Migration (IOM) 2003, 2.
98 Koslowski 2004, 3.
99 Cited in Huysmans and Buonfino 2006, 11.
100 See Huysmans and Buonfino 2006, 5.
101 Huysmans and Buonfino 2006, 13.

At the same time, the European discourse continued to merge different social phenomenon into one continuum legitimating the continuous strengthening of border controls and the use of new surveillance technologies. The Laeken European Council of December 2001 declared that "better management of the Union's external border controls will help in the fight against terrorism, illegal immigration and the trafficking of human beings"[102]

Thus, in the discourses at the national as well as European level the crossing of borders has become increasingly an issue of external and internal security, in which states having EU external borders or associated third countries were perceived as "battle line states (*Frontstaaten*)".[103] This term illustrates the securitisation of the borders, including those crossing them.

This security oriented discourse, underlining the us-them dichotomy as well as the potential threat of abuse of the asylum systems by potential terrorists, resonated well with the discourse in Germany. The next section will illustrate that despite the opening of the German discourse on immigration with the proposal for a comprehensive immigration system in 2000, the traditional exclusionary portrayal of foreigners as well as the security dominated debate on asylum regained momentum following the 9/11 attacks.

The German discourse: "Zuwanderungsgesetz" and European asylum procedures

Parallel to the European-level discourse, in Germany the discourse shifted towards a more liberal perspective regarding economic immigration. While at the EU level it was the Commission taking the lead, at the German level it were the Greens and later the Chancellor, Gerhard Schröder, as well as social and economic interest groups that were pushing for a comprehensive immigration policy including labour migration.

When the coalition government of Greens and SPD took power in 1998, it became apparent that a change of orthodoxy was taking place in the German immigration debate. Even though the coalition treaty of 1998 did not explicitly call for an immigration policy, it was implicitly accepted as Germany was *de facto* an immigration country. Such a concession was "revolutionary" in a country that until then had claimed to be a "non-immigration country".

With the Green Card initiative for IT specialists in 2000, the government inspired a general debate on immigration among different interest groups as well as political

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102 European Council 2001a.

103 Frankfurter Allgemeine Zeitung 17.5.2001, 10.

parties. Most importantly, the government set up an expert Commission involving different stakeholders (scientists, churches, economy and unions) – the so-called "Süssmuth Commission" – which tabled a report on the possibilities and chances for an immigration law. It was argued that immigration was necessary due to a rapidly declining population and an acute scarcity of labour, in particular of highly qualified workers. The discourse distinguished between on the one hand, those highly skilled and effortlessly "integrationable" (*integrationsfähig*) immigrants who were needed to secure the future economic growth and the sustainability of social security systems in Germany; and on the other hand all the other immigrants, including asylum seekers, who constituted an economic and cultural burden for the society.[104] The proclaimed aim was to encourage immigration into the labour market while preventing immigration into the "social systems".[105]

In order to avoid an immigration that would overburden the German society, the Interior Minister, Otto Schily, demanded that an immigration policy was not to allow persons who were not in need of protection but were eager to exploit generous social protection systems, to stay in Germany.[106] In particular conservatives were calling for more restrictive measures to halt abuse of the asylum system, including the demand to abolish the constitutional right to asylum as set forth in article 16 Basic Law.[107] Similar to the debate on the reform of the asylum law in 1992, it was once again claimed that Germany would not be able to uphold its liberal asylum policy in light of the harmonisation of standards in Europe. In the parliamentary debate on the Tampere Conclusions Jürgen Rüttgers of the CDU, for example put forward, "all our European partner countries are, as we know, thank God, liberal Western democracies and constitutional states. If however the predominant fraction of all asylum seekers arriving in Europe are still drawn to Germany, then there must be reasons. This is certainly related to our high benefits"[108] Manfred Kanther, former Secretary of the Interior (CDU) stressed that in particular Germany was still "suffering" due to the lack of security in Europe.[109] The majority of MPs of the SPD, the Greens, and the PDS (Socialists) framed the process of European integration as a means to establish an area of freedom, security and justice. Hence, the process of harmonisation should also entail a strengthening of the human rights dimension.[110] Interestingly, both, those

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104 Prantl 2001.
105 Müller 2001.
106 Süddeutsche Zeitung 2003.
107 Süddeutsche Zeitung 25.4.2001.
108 Deutscher Bundestag, 1999a (authors' translation).
109 Deutscher Bundestag 1999a.
110 Deutscher Bundestag 1999a, 5595-5596.

securitizing as well as those de-securitising asylum policy continued to draw a link at the national level between immigration, security and Europeanisation.

With the attacks of 9/11, and rising unemployment, the issue of immigration and asylum was increasingly "securitised" by drawing a close linkage between asylum and security, similar to the discourse at the EU level and other European Member States, i.e. Great Britain.[111] Otto Schily thus argued that "[t]he security problem regarding immigration is not at all primarily a problem of workers' immigration … but the question of which persons are coming to us under the heading of refugee protection."[112] Secondly, the discourse raised concerns about the cultural threats posed to the German society by the development of "parallel societies" (*Parallelgesellschaften*) of Germans and Muslims, which would threaten the cultural homogeneity and would thus demolish European societies.[113] Thirdly, these Muslim communities would grant safe heaven to so-called "sleepers". The "sleeper", who was staying unrecognised in Germany, and who could turn at any time from being an inconspicuous student into a fanatic terrorist became a new "deterring enthrallment" (*abschreckendes Faszinosum*).[114] Consequently, any political measures encouraging migration were rejected while stricter asylum measures were defined as instruments of "self-protection"[115]. The discourse on immigration thus, turned into one of internal security and "danger prevention" (*Gefahrenabwehr*), leading to an immigration law (2004) that primarily focused on instruments discouraging immigration and excluding immigrants.

In sum, it may be argued that both the debate on the immigration law as well as the political discourse after 9/11 in Germany and at the EU level favoured a further restriction of asylum rights and hence reduced the policy options during the negotiations on the procedure directive.

Negotiating the Asylum Procedure Directive: Exporting German standards?

Since the Member States remained the dominant actors under the Amsterdam regime the negotiation process and the outcome were largely depending on the interests of the Member States. Hence, before tuning to the negotiations at the EU level the process of preference formation in Germany, in particular the debate on the first German

111 See Diez 2006, 14.
112 Cited in Diez 2006, 14.
113 Müller 2004, 1.
114 Geis 2004b, 4.
115 Müller 2004, 1.

immigration law as well as the German election campaign of 2002 have to be taken into consideration.

The German preference formation and institutional context: party cleavages, Bund-Länder relations and the Basic Law

Within the coalition government, Greens and Social Democrats had different views regarding labour migration as well as the harmonisation of EU standards. The Interior Minister, Otto Schilly, and most Social Democrats had long been sceptical with regard to a law allowing for legal immigration. The SPD was representing an electorate, which felt threatened by immigrants, particularly with regard to their economic situation. At the same time, a central demand of the Greens had always been the establishment of a modern immigration policy. As for asylum policy, there was a heated debate between Social Democrats and Greens on the need for a broader refugee definition including non-state and gender-related persecution. These different positions were fostered during the election campaign in 2002 as both governing parties had to serve the interests of different voter groups.[116] Moreover, the CDU continued to oppose any compromise and was "populously" using the issue of immigration as an election theme, arguing that the government would use the negotiations at the EU level to circumvent domestic opposition against a liberal immigration law and to predetermine the substance at the EU level, resulting in an unrestricted immigration and an abolition of the safe third country concept.[117] The CDU opposition explicitly linked the negotiations on procedural law at the EU level with the domestic discussion on an immigration law, with a view to increase the pressure on the government in the domestic arena. As the political parties were not able to reach a compromise on the immigration law prior to the elections of 2002 it was clear that the government would not be able to seriously engage in negotiations at the EU level until after the election and the passing of the domestic immigration bill.

With a view to the EU harmonisation process, a "coalition" of CDU and SPD were in favour of a "transfer" of German standards to the EU level. The CDU feared that the harmonisation process would limit the German capacity to regulate refugee flows gained through the "Asylkompromiss", especially the safe third country concept. Both SPD and CDU viewed the compatibility of European standards with the German

116 Fried 2001.
117 Deutscher Bundestag 2003a.

asylum law of 1993 to be essential to the German interests.[118] Since the asylum law reforms of 1993 the numbers of asylum seekers had fallen by 76% by 1998 compared to 1993 figures.[119] As the CDU and the SPD were attributing this success to the implementation of a restrictive safe third country rule, they agreed that any derogation from this rule would lead again to an increase in asylum seekers and thus to societal instabilities.[120] The Greens argued against a simple transfer of the German minimum standards without however, questioning the already established German asylum procedures (safe third country concept).[121]

Considering that the *Länder* share competences with the Bund in the area of asylum and immigration policy, the *Bund* has to take the opinions and decisions by the *Länder* into account, when negotiating at the EU level (see Art. 23 Basic Law). A representative of the *Bundesrat* is also present throughout the negotiation process in order to represent the *Länder* position. As the *Länder* and communities had also benefited from the declining number of asylum applications, the *Bundesrat* resisted any EU agreement that would lead to higher protection standards in Germany. The *Länder* agreed that common European minimum standards should aim at providing protection, while at the same time limiting the abuse of asylum procedures by economic or other immigrants.[122] To this end they asked the government, to counter the Commission's proposal which did not include a provision allowing for the general designation of a safe third country nor a possibility for border officials to refuse the entry of an asylum seeker coming from a safe transit country.[123] At the same time the *Länder* had also a prominent role in the securitisation of migration.[124] The *Bundesrat* for example tabled its own proposals regarding the fight against terrorism focusing on immigration and asylum measures. The prime minister of Baden-Würtemberg demanded in this regard that "internal security must become a main aspect of all law dealing with foreigners and asylum"[125] This security-oriented move was also reflected in the subsequent negotiations between *Bundesregierung* and *Bundesrat* in the *Vermittlungsausschuss* (conciliation committee). At this point of time, there was a CDU/CSU majority in the *Bundesrat*, providing the Conservative opposition with a strong negotiating position, and demanding the government to make far reaching concessions to the *Länder* as well as the CDU/CSU, in particular with regard to the

118 Süddeutsche Zeitung 2003.
119 Frankfurter Allgemeine Zeitung 1998.
120 Geis 2004b.
121 Käppner 2001.
122 Deutscher Bundesrat 2001.
123 Deutscher Bundesrat 2002.
124 Diez, 2006.

inclusion of security measures. In the negotiations the *Länder*, in particular Bavarian interior minister Beckstein made clear that any concession at the European level especially concerning the "Asylkompromiss" would cost the government in the negotiations at the national level (Interview-3, Brussels, 2007).

Since the "Asylkompromiss" of 1993, the safe third country rule is set forth in Article 16a (2) of the Basic Law. Thus, a change of the third country concept due to the harmonisation process at the EU level could entail a constitutional change. Such a reform of the Basic Law, however, would bear high costs at the national level, as it would demand a two-third majority in the *Bundestag* as well as the affirmation by the *Bundesrat*. Moreover, the case law of Constitutional Court sets forth that the constitutional principles as established by the Basic Law were not negotiable. Consequently, the German government had to veto any agreement at the EU level that would alter the provisions of Article 16a Basic Law.[126] The Basic Law was therefore, also a barrier for change and thus it limited the negotiation position of a German government.

In sum, it may be argued, that there was a general consensus among Social Democrats and Conservatives as well as between *Bund* and *Länder* that the achievements of the *Asylkompromis*", in particular the safe third country concept, were not to be impaired by the European integration process.

The negotiations at EU level: intergovernmental bargaining under unanimity and two-level games (institutional context/set-up)

After the Treaty of Amsterdam the Commission took a leading role in initiating directives in the area of asylum. In 2000 it tabled its first proposal for a directive on common asylum procedures. Aware of the fact that the unanimity rule in the Council would not allow for a far reaching harmonisation of standards, the Commission took a two step approach: first, minimum standards which would hardly interfere with national rules were to be adopted and second, a process of genuine harmonisation was to be commenced.[127] The safe third country rule proposed by the Commission was based on an individual assessment, not allowing for the automatic return of an applicant at the border.[128]

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[125] Cited in Diez 2006, 16.
[126] Deutscher Bundestag 2003b, 25-26.
[127] European Commission 2000a.
[128] Ibid.

The negotiations in the Council on the directive proceeded cumbersomely. The notion of asylum policy touched the heart of state sovereignty, entailing great public sentiments and "strong national principles and views."[129] It was also the first attempt at the European level to harmonise procedural law, demanding an approximation of administrative rules and procedures which are strongly embedded in national traditions and peculiarities. At the same time, the implementation of procedural matters will be more easily controllable for applicants as well as the EU body responsible for the oversight of the implementation of the directive. Hence Member States´ room of manoeuvre with regard to the implementation is limited.[130] Moreover, the unanimity rule in the Council enabled Member States to block any policy that was incompatible with their own laws and perspectives. All Member States were eager to preserve their asylum standards in order to avoid adaptational "costs" and to preserve well established national instruments to deal with increased migratory pressures.[131] Member States were thus merely agreeing on the general aim of a harmonisation process: To ensure "efficiency" and "rapidity" of the examination procedures[132] and to establish a safe third country concept which would prevent asylum shopping[133]. Disagreement however, prevailed until 2004 with regard to instruments, including among others the notion of safe third country.[134]

The institutional structure of the Amsterdam Treaty, most notable the unanimity rule, permitted the Member States to play two-level games, and hence to uphold specific domestic procedures. Throughout, the negotiations several important Member States, including Germany, the UK, France, the Netherlands, and Austria were reforming their national legislations.[135] As a result, the respective positions of the States were shifting, which made the negotiations particularly difficult.[136]

During the negotiations on the procedure directive, the German government's aim was two-folded: first, to establish relative high procedural standards, in particular concerning the appeals; second, to have its specific rule as set forth in the *Asylkompromiss,* most importantly, the concept of safe third country and safe country of origin recognised at the EU level. With regard to upholding the safe third country

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129 Financial Times 2003, 8.
130 Vedsted-Hansen 2005, 374.
131 UNHCR News Stories 2003. See Ackers 2005.
132 Council 2001a.
133 Council 2002.
134 Even in February 2004, disagreement prevailed in the Council with regard to a wide range of issues: scope of the Directive, right to legal assistance and representation, provisions relating to safe third countries and safe countries of origin and appeal procedures. Council 2004b.
135 See Ackers 2005.
136 Ackers 2005.

concept the German government had considerable scope for playing two-level games. It could plausibly maintain during the negotiations that its capacity to compromise was very limited due to constraints at the domestic level – most importantly the ongoing negotiations on the immigration bill as well as the applicable constitutional law.[137] With regard to the immigration bill, the German delegation communicated from the start of the negotiations onwards that it would only be able to present a unitary position and make concessions after a compromise on the immigration bill was reached between the *Bund* and *Länder* in the conciliation committee. Although the asylum procedure directive only marginally touched the immigration bill in substance, there was an implicit link between the two, as the CDU/CSU opposition was prepared to use any concessions made by the German government in relation to the *Asylkompromiss* (safe third country rule) at the EU level, to demand a trade off in the negotiations between *Bund* and *Länder* on the immigration bill (Interview-3, Brussels, 2007). Here, the opposition indicated that any changes to the *Asylkompromiss* would seriously threaten, for example any compromise on the question of including non-state and gender-specific persecution in national law, as foreseen by the EU Qualification Directive.[138] Second, the government could credibly refer to constitutional constraints. Any agreement, which did not allow Germany to keep its version of the safe third country concept, would require a change of the *Grundgesetz*, so the argument went. And this was to be avoided given that a 2/3 majority was necessary was such as change. Third, the CDU-dominated *Bundesrat* would not have supported any European concept derogating from the German standards. Hence, the German government could credibly refer to domestic constraints making it politically imperative to have the German safe third country concept recognised at the European level.

The German delegation came in with its own proposal on a safe third country rule rather late in the negotiations process, in October 2003. It proposed a rule that would

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137 Cf. House of Lords 2004.

138 The Qualification Directive proposed by the European Commission included non-state and gender-specific persecution as asylum grounds. The government, particularly the Greens were in favour to include a similar provision in the new immigration bill. This was however opposed by the Conservatives and the *Bundesrat*. The latter and the government only found a compromise in 2004. Only then was the German delegation able to finally agree to the EU directive and to also agree on the Procedures Directive. In the national debate on the Immigration Law the government was able to refer to the EU Qualification directive and the fact that all other Member States had not voiced any concerns regarding the inclusion of non-state and gender related persecution to push through a clause on non-state and gender specific persecution. Without the Qualification directive, the reverse two-level game played by the German government back-home, it would have been unlikely that a similar provision would have been included in the Immigration Bill (Interview-3, Brussels, 2007).

allow the refusal of refugees at the border when entering from a "designated" third country – a super safe third country rule, modelled along Article 16 GG.[139] During 2004/05 there was a heavy debate among Member States in particular on the possibility of a common list of safe countries. This idea was first informally elaborated at the political level during a G5 meeting in 2003, when Germany presented its version of the safe third country concept as an effective measure to prevent mass influx of refugees (Interview-1, Interview-2, Brussels, 2007). A formal proposal for a common list was then made by Austria, Italy and Luxembourg in 2003 in order to avoid secondary movement[140], and especially France[141] regarded a common list as the best means to constraint German influence (Interview-2, Brussels, 2007). While Germany was not opposed to a common list, it made a reservation to ensure that it could keep its national list until the Council would decide on a common list.[142] In the end, the Council agreed on a concept that allowed Germany to retain its domestic regime and at the same time foresaw the establishment of a common list by the Council. It can thus be argued that Germany successfully exported its safe third country concept. The German government managed to get "its" safe third country concept accepted by other Member States and the Commission due to the unanimity rule and because it could play a credible two-level game by pointing to severe domestic constraints which further strengthened its negotiating position in Brussels.

The super safe country rule as laid down in the directive meant another "externalisation" of migratory pressure to neighbouring countries.[143] At the same time, it questions the *non-refoulement* principle and thus the international refugee regime. The European asylum regime hence moved further away from the liberal post-War refugee regime.

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139 Council 2003. The notion of super safe third country refers to article 36 of the Procedure directive, allowing to send a third country national, entering illegally from a third country, back to that country provided it is designated by the Council as safe and observes the ECHR and Geneva Convention.

140 Council 2003.

141 The French Interior Minister, Nicolas Sarkozy, also hoped to use an EU-level concept on safe third countries to circumvent national constraints (Interview-2, Brussels, 2007).

142 Ackers 2005.

143 Kusicke 2004.

5. CONCLUSION

All in all, our framework made up of (1) the discourse, (2) the institutional set-up/context, and (3) exogenous and functional pressures has proven robust. As regards the Europeanisation of German asylum policy, we have argued that the developments at the European level influenced and helped to legitimise the reform of the German Basic Law, despite the absence of clear-cut legal requirements stemming from the Dublin or Schengen Conventions. Functional and exogenous pressure provided the (material) basis for the predominating policy discourse and the two-level games played by actors. The perception and articulation of the free movement of persons rationale and the influx of asylum-seekers and refugees grew towards the peak of domestic reform discussions in 1992/93. In terms of the institutional set-up/context, in the early to mid-1990s the increased influence of the interior ministry also made itself felt. Moreover, two-level games contributed to a change in the domestic discourse, as Conservative policy-makers skilfully argued that a ratification and functioning of European initiatives required a change of Article 16 GG, thus redefining the issue as one about European integration, which brought the Social Democrats and Liberals on board. The securitarian and restrictive policy frame adopted at the European level resonated well with the policy discourse at the domestic level, which facilitated the redefinition of the "problem" as a European and not a domestic one.

In our analysis of the negotiations concerning the Asylum Procedure Directive we argued that Germany sought to – and succeeded in – exporting its safe third country concept to the European level, a process we have termed the "Germanisation" of EU asylum policy. The German government's specification of the "super safe third country concept" at the EU level has been explained as follows: first, in terms of the institutional set-up/context, facilitated by the unanimity requirement, Germany exploited the opportunity to strengthen its bargaining position by playing the two-level game. Pointing to the domestic level was effective given the substantiality of the domestic constraints, such as the need to avoid a constitutional change (given the 2/3 majority requirement), the parallel domestic negotiations of the *Zuwanderungsgesetz*, and the role of the CDU/CSU dominated *Bundesrat* in domestic policy-making on asylum. Second, the evolving policy discourse at the European and domestic level(s) additionally contributed to this outcome. The further securitised discourse in Germany increased the domestic constraints for EU level negotiations (thus also positively affecting the possibility to play credible two-level games). In addition, the German version of the safe third country concept fitted into, and resonated well with, the

securitised policy discourse across Europe. This discourse, in turn, can be largely attributed to the evolution of exogenous and functional factors like the terrorist attacks of 9/11, right-wing election victories. These exogenous and functional factors also contributed to the domestic constraints that the German government faced in its EU level negotiations concerning the procedure directive (and hence also to its negotiating power in terms of two-level games).

What insights does this paper generate concerning the Europeanisation research agenda? First, Europeanisation processes may not necessarily be instigated by EU-level *pressures*, exogenous from the domestic level.[144] In other words, Europeanisation may not be an external process, driven by EU-level (legal) requirements, but may be domestically framed and constructed (e.g. through the discourse and two-level games), as (particularly) section 3 has indicated. Second, and closely related, our analysis confirms the tendency – which is often articulated, but less often put into practise in terms of actual research – that we need to go beyond one-directional, top-down accounts of first-generation Europeanisation research. Third, and building on the previous point, our paper has shown that Europeanisation processes may, in fact, increase the scope for manoeuvre of national governments[145] that can thus retain considerable control over the process. Fourth, and following from the above, our paper – and particularly the parallel negotiation on the *Zuwanderungsgesetz* and the Asylum Procedure Directive – suggests that Europeanisation is not only characterised by both 'downloading' and 'uploading', but that a strict separation between the two categories is ultimately difficult to sustain, given frequent feedback processes and interaction between the two levels.

Despite the constant development of the EU asylum regime, this paper has indicated that Member governments can retain considerable control over asylum policy. Through the institutional set-up/context, the discourse as well as exogenous and functional pressures, (the) German government(s) managed to frame and influence internal and EU negotiations such that most of their preferences were downloaded from the EU level and uploaded from the domestic level. It remains to be seen to what extent the advent of qualified majority voting (and the exclusive right of initiative for the Commission) may affect Member State control over (EU) asylum policy in the future.

144 Cf. Knill 2001, Buller 2006.
145 Cf. Lavenex 1999, Thielemann 2002.

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