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**The Prospects for Policy-Change in EU Asylum Policy:  
Venue and Image at the European Level**

Draft version.

The upgrading of the European Commission and the European Parliament's role in the EU policy-process from 1999 might have been expected to herald a shift away from the previous security- and control-orientation of asylum policy. No such shift occurred. This paper traces the continuity in EU asylum policy's trajectory to the continuity in its 'policy-image': actors seeking to fashion institutional environments in which they can more effectively pursue their preferences can facilitate institutional change by shifting the 'image' of a policy – in other words, they can highlight new or neglected problems related to that policy, creating broader pressure for these to be dealt with by new actors in new venues. We disaggregate policy-images into two elements: an element justifying an actor's presence and function in policy-making, and an element justifying the pursuit of its substantive preferences. We argue that institutional change laid down in the Treaty of Amsterdam was facilitated by a policy-image that lacked the latter element. The newly empowered actors have subsequently struggled to assert their substantive preferences despite their institutional upgrade.

**Change and continuity in European asylum policy**

With the entry into force of the Amsterdam Treaty (1999), the EU's asylum policy might have been expected to shift away from its previous control- and security-orientation: although still dominated by the national interior ministry actors which had been the driving forces behind a security-centric – or 'securitarian' – policy since the inception of cooperation, the institutional framework introduced by the Treaty formally boosted the power of the European Commission and European Parliament (EP). Yet, any expectations that the upgrading of these actors in the policy-process would lead to policy-change have scarcely been met.

It is here argued that the failure of institutional change to translate into policy-change can be traced back to the continuity in the 'image' underpinning EU asylum policy (i.e. in the broadly held perceptions of how EU asylum policy should be handled, around which support can be mobilised for political purposes).

It is widely recognised that particular institutional set-ups can mould policy-making outcomes by privileging select actors, and thus the matching of certain problems to certain solutions. One body of analysis suggests that actors' behaviour is therefore characterised by efforts to remould institutional arrangements, or seek out institutional configurations favourable to the realisation of their preferences ('venue-shopping').<sup>1</sup> According to this body of analysis, actors can facilitate and legitimise institutional alteration, or a full shift of policy-making venues, by successfully changing an issue's policy-image. In other words, they can alter broader perceptions of how a policy area should be dealt with, highlighting new or neglected problems, and instrumentalising the general expectation that these will be treated by new actors in new venues in order to facilitate institutional change.

Our focus is upon what happens *after* institutional change has been achieved. We suggest that, in order to ensure that they can effect policy-change subsequent to an institutional upgrade, actors must have

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<sup>1</sup> Much of this builds on the work of Baumgartner and Jones, for example: Frank Baumgartner and Bryan Jones, *Agendas and Instability in American Politics*, (Chicago: UoC Press, 1993).

legitimated institutional alterations by changing the policy-image along two axes: Firstly, they must have altered it in such a way that it legitimates their *function* in the policy process (hereafter the functional dimension). This function might be to provide policy ideas, or to legitimise outcomes. Secondly, and perhaps more importantly, they need to have altered it in such a way that it legitimates the pursuit of their *substantive preferences* (the substantive dimension). We argue that institutional change laid down in the Treaty of Amsterdam was facilitated by a policy-image that lacked the latter element. The newly empowered actors have subsequently struggled to assert their substantive preferences.

This paper begins with a brief overview of the image/venue school of analysis, highlighting its utility in efforts to shed light upon recent institutional change. It also shows how a distinction between the functional and substantive dimensions of a policy-image can be employed to explain change and continuity in policy *after* institutional change (I). The paper then turns its focus to the institutional changes laid out under the Amsterdam Treaty. It argues that, although the EP and Commission successfully altered the policy-image to legitimate their *presence* in the policy-process, they failed to legitimate the subsequent pursuit of their *substantive preferences* (II). In a review of the subsequent negotiations on the Asylum Reception Directive<sup>2</sup>, the paper suggests that the lack of change in the substantive dimension of the policy-image is an important reason for the continuity in EU asylum policy. MEPs' relatively successful opposition to the proposals for the 'joint external processing' of asylum-seekers does suggest, though, that an *ex-post* alteration to the substantive dimension is possible (III). The paper ends with a consideration of the prospects for policy-change (IV).

## I.1 Venue-, image- and policy-change

The image/venue school employs a line of analysis to which relatively few have had recourse in the specific context of EU Studies<sup>3</sup>; however it has already been successfully applied to the early development of European migration policy.<sup>4</sup> According to this school, continuity and change in policies can often be traced to a change in the institutional venues in which policies are drawn up. For scholars like Baumgartner and Jones, competition for influence over policy is therefore characterised by actors' search for policy-making venues that offer a more congenial environment for the realisation of their preferences.<sup>5</sup>

The shift to new venues can be legitimated by actors who successfully alter the 'policy-image' of an issue. Policy-images are defined by this school as public understandings of policy problems, and the public become convinced of a policy-image through a cocktail of empirical data and emotive appeals presented by actors.<sup>6</sup>

A common means of using policy-images to facilitate institutional and policy-change is offered by 'conflict expansion'.<sup>7</sup> This term describes how institutionally marginalised actors can expand their ranks, perhaps by politicising new problems and rendering them worthy of broader, public attention. By mobilising broader perceptions that an issue should be treated by different actors and in a different way, previously sidelined actors can create bottom-up pressure for institutional change.

Efforts to shift a policy-image will often take their cue from the occurrence of problems that are not currently being met by policies. Although new or neglected problems should not, however, be understood as in some way pre-given (they depend upon how actors perceive and process them), the

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<sup>2</sup> Council of the EU, *Directive Laying Down Minimum Standards for the Reception of Applicants for Asylum in the Member States* (2003/9/EC) adopted 27<sup>th</sup> January 2003.

<sup>3</sup> A useful overview of the relevance for the EU of this School's analysis of agenda-setting is given by: Sebastiaan Princen, "Agenda-setting in the European Union: A Theoretical Exploration and Agenda for Research", NIG Annual Conference, Nijmegen, 2005.

<sup>4</sup> Guiraudon (2000).

<sup>5</sup> Baumgartner and Jones (1993).

<sup>6</sup> James True, Bryan Jones and Frank Baumgartner, "Punctuated-Equilibrium Theory: Explaining Stability and Change in American Policy-Making", in: Paul Sabatier (ed.) *Theories of the Policy Process* (Boulder: Westview, 2007) 155-189. For reasons of conceptual clarity, this paper refers to a policy-image (singular). In actual fact, there are as many images as there are actors to perceive them. The principal referent actors here are the broader public and the European Council.

<sup>7</sup> Roger Cobb and Charles Elder, *Participation in American Politics: The Dynamics of Agenda-Setting*. (Baltimore: John Hopkins, 1983).

solutions that actors propose often *are* to a large extent predefined. Actors may set off on an active search for suitable problems that might allow them to legitimise the pursuit of their preferences.<sup>8</sup>

### *The dimensions of a successful policy-image*

These ideas require some modification for our purposes.

It should, for example, be recognised that EU policy-making is often low-key and its details are largely unknown to the public. The possibilities for actors to mould and re-mould ‘public understandings’, let alone translate these into political resources at the European level, are therefore limited. For that reason, we argue that a policy-image can be considered successful if it allows actors to mobilise the critical mass of political support necessary to effect policy- or institutional change. Far from directing arguments and empirical evidence at the broader public, actors in the EU context might seek exclusively to convince higher placed political actors of the merits of their priorities, mobilising elite-based support. We recognise, though, that a policy-image mobilising narrow, elite perceptions can be of a different quality and utility to one garnering broad, bottom-up support.

Further, whilst the image/venue school has focussed primarily on the question how actors can facilitate institutional change, we are principally interested in what happens *afterwards*. We argue that a successful policy-image, which not only facilitates institutional change but also ensures that newly empowered actors can subsequently assert their preferences, will consist of two dimensions:

- *first*, a dimension that legitimates actors’ presence and function in the policy process. In the case of EU asylum policy-making, this function might be to provide legitimacy, expertise and/or new ideas to policy-making.
- *second*, a dimension that legitimates the pursuit of their substantive preferences. In the case of EU asylum policy, these substantive preferences might be of a political (electoral), ‘administrative’ (related to social, economic, foreign or internal security policy concerns) or legal-normative (relating to the rights afforded to non-nationals) nature.

Difficulties arise because institutional change can be facilitated by the functional dimension alone; in such cases, actors may subsequently struggle to pursue their substantive preferences even after their position in policy-making has been bolstered.

The distinction between the two dimensions of the policy-image can be illustrated by reference to the case of the European Commission: it will be suggested below that at the 1996 IGC, the Commission justified an upgrade in its role in asylum policy-making by convincing other political actors of the failures inherent in Third-Pillar policy-making, and of the useful function it might play in overcoming the slow progress of negotiations (for example by ‘neutralising’ agenda-setting or providing new ideas for the realisation of policy aims). Although such a change to the functional dimension of the policy-image helped win it an institutional upgrade, the Commission subsequently struggled to pursue its own preferences and priorities in policy-making: it had merely showed that it could play a useful role in facilitating the conclusion of the kind of substantive policies already being drawn up. Other political actors resisted its efforts to assert its own substantive priorities where these differed from those of the Council.

By contrast, a successful policy-image allowing actors not only to facilitate institutional change, but also to effect subsequent policy-change, will contain both a functional and a substantive dimension. In order to create such an image, actors will point to problems in the current substantive treatment of asylum, and show that only they have the capacity to deal with them. The Commission might point to the idea that EU asylum policy in its current form is neglecting important social, economic and foreign policy problems, and that only it has the expertise to deal with these. The EP might, meanwhile, mobilise support by pointing to the problems arising from the restriction of asylum-seekers’ rights in favour of the Executives’ scope for manoeuvre, and play on expectations that only it – thanks to its ‘normal’ control-function over the Executive – can solve such problems.

We do not argue that the lack of a fitting substantive dimension will *entirely* prevent an actor from pursuing its preferences; however, should it attempt to assert itself without a fitting substantive image,

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<sup>8</sup> These assumptions therefore share much with conceptions of ‘organisational anarchy’: John Kingdon, *Agendas, Alternatives, and Public Policies* (New York: Harper Collins, 1984).

the actor in question is likely to meet with opposition from other policy-makers and will be unable to mobilise broader political resources in its support. Nor do we contend that it is impossible for actors to make up a policy-image deficit once institutional change has occurred; however, an initial deficit can have a short-, and perhaps even long-, term effect on newly empowered actors' capacity to pursue their preferences: Not only will newly empowered actors have to persuade a broad range of actors of the merits of their substantive preferences, they may also have to discredit those of their rivals. In response to newly empowered actors' efforts to shift the policy-image, policy-makers benefiting from the current substantive policy-image may seek to alter the presentation of the way in which an issue is handled, redrawing the lines between their opponents and supporters.<sup>9</sup> In this way, a 'policy monopoly' may maintain its hold over substantive policy outcomes even as its formal power has diminished.

Whilst a change in institutional fora is a key factor to matters of access and influence in the policy-process, we recognise that there are many other forms of change in the inter-actor balance that can precede policy-change (the development, maturation and sophistication of non-governmental organizations, the emergence of new problems). We cannot, therefore, hope to explain all the factors behind the lack of policy-change after Amsterdam.

Despite these limitations, we seek to show that the concept of a policy-image, and its disaggregation into these two relatively distinct dimensions, can be used to illuminate not only the extension of formal powers to actors, but also –and more importantly for our purposes– these actors' subsequent capacity to influence policy. The construction of a powerful, substantive policy-image might afford actors influence beyond that which they enjoy *de jure*; the absence of one might have the opposite effect. We seek to show that the substantive dimension was missing for those actors which underwent an institutional upgrade at Amsterdam; hence, the Commission and EP have been unable to effect policy-change. They failed either to persuade other, higher placed actors of their substantive priorities or to mobilise broader public support in favour of their preferences.

## **1.2 Explaining the pre-Amsterdam security-orientation of EU asylum policies**

On the basis of an analysis of a core group of member states (Germany, France and the Netherlands), it has been shown how, by shifting policy-making to the European level, national interior ministry officials overcame the institutional barriers that blocked the realisation of their security- and control-oriented policy aims at the national level.<sup>10</sup> Cooperating in venues set up for European cooperation on core matters of internal security, and largely spared the bothersome interference of their political masters as well as of other ministries, parliament, legal professionals and of NGOs, interior ministry officials thereby sidelined impediments to their control- and security-oriented agenda. The participating officials can thus be shown to have successfully 'venue-shopped'.<sup>11</sup>

### *Disaggregating the policy-image*

It is possible to disaggregate the policy-image that legitimised this venue-change into two semi-distinct dimensions - one related to the substance of policy, the other related to the institutional framework in which it was to be handled. To deal with the substantive dimension first: interior ministry officials are shown to have sought out problems in order to promote solutions which were sometimes predefined.<sup>12</sup> In order to legitimise security- and control-oriented asylum cooperation, these actors emphasised the threat posed by uncontrolled migration in the context of member states' efforts to remove intra-EC/EU borders. These were then linked to a 'continuum' of hard (terrorism), soft (transnational criminality)<sup>13</sup> and even broader security threats (threat to welfare systems; employment prospects of citizens; national social and cultural cohesion<sup>14</sup>). Despite the presentation of

<sup>9</sup> This dynamic is also described by True, Jones and Baumgartner (2007).

<sup>10</sup> Virginie Guiraudon, (2000); "Seeking New Venues: The Europeanization of Migration-Related Policies", *Swiss Political Science Review*, 7,3 (2001), 99-120.

<sup>11</sup> See also: Eiko Thielemann, "The Soft Europeanisation of Migration Policy." Paper presented at ECPR Joint Sessions of Workshops, Turin, 22-27 March 2002.

<sup>12</sup> Virginie Guiraudon, "The EU 'Garbage Can': Differential Development, Adhocratism, Opportunism in the Immigration Domain" European Community Studies Association, Madison, WI, 31May -2 June, 2001.

<sup>13</sup> For an analysis of the idea of a security continuum: Didier Bigo, "The European Internal Security Field Stakes and Rivalries in a Newly Developing Area of Police Intervention", in: Malcolm Anderson and Monica den Boer (eds), *Policing Across National Boundaries*, (London: Pinter, 1994), p. 164.

<sup>14</sup> Jef Huysmans, "The European Union and the Securitization of Migration", *Journal of Common Market Studies*, 38,5 (2000) 751–77.

reasoned, emotive and empirical arguments that security is not in fact endangered to the degree claimed, these actors succeeded in generalising a security threat from limited evidence.<sup>15</sup>

Meanwhile, a second, functional, dimension of the policy-image legitimated officials' presence in (or rather their almost total monopoly of) the policy process. That officials were able to show that they alone had the necessary expertise to deal with these problems, was just one aspect of this: another aspect justified the exclusion of other actors from policy-making. Although the policy-image that underpinned the institutional set-up had a strong European flavour – based, as it was, upon arguments concerning the risks arising from the removal of Europe's internal borders - it was nevertheless an image that justified cooperation outside the integrated European Community (EC) framework, and thus the exclusion of a broad number of actors usually present at the European level: officials highlighted the need for effectiveness in migration-control policy-making; this may be understood as an 'executive priority', and has subsequently justified the removal or circumvention of the legal, normative-democratic and politico-administrative constraints that reduced executive scope for manoeuvre at the national level.<sup>16</sup> The policy-making venue carved out at the European level was thus one which limited judicial and parliamentary oversight of the Executive associated with the traditional 'Community method'; it also justified the circumvention of some of the constraints on effectiveness internal to the Executive itself: 'horizontal' consensus-building between different domestic ministries and even 'vertical' coordination between the political and administrative level of the national Executive was subsequently minimal in early European asylum cooperation.

The arguments underpinning this image as a whole were seldom communicated by the participating officials directly to the public: measures responded, and were justified by reference, to a highly politicised conception of asylum, citing the dangers it posed to internal security, society and the economy. This proved convincing to the political level of national governments, which were faced with electoral pressures over asylum issues. Furthermore, "[n]ational leaders supported international co-operation on migration control because it demonstrated activism yet diffused the responsibility for and efficacy of control".<sup>17</sup> National interior ministry officials thus operated with the backing of powerful political patrons, insofar as these were aware of their activities.<sup>18</sup> The participating officials appear to have achieved a policy-image accepted by both governmental elites and the broader public.

## II. Explaining the institutional changes at Amsterdam

Prior to the entry into force of the Amsterdam Treaty, there were numerous actors jostling to change the way that policies were drawn up at the European level. They sought to challenge the dominance of the interior officials and ministers of a core group of member states (actors from France, Germany and even the Netherlands and the UK may be seen to have operated to a large degree as a 'policy monopoly').

The roots of 'rival' actors' dissatisfaction are not difficult to isolate: The proper regulation of national economies and welfare systems had been disrupted by control-centric, securitarian policies, giving domestic and Commission actors dealing with social and economic affairs an incentive for action<sup>19</sup>: EU asylum and immigration policy-makers failed to acknowledge the benefits that immigration affords social and economic systems, dealing principally with the social and economic problems caused by immigration and addressing them via simplistic, control-oriented policies. They also appropriated social and economic policy tools for the purposes of border control efforts, restricting access to labour markets and social systems in an effort to deflect prospective immigrants. Similarly, domestic and Commission officials dealing with the EU's external relations found that the control

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<sup>15</sup> Didier Bigo, (2002) "Security and Immigration, toward a Critique of the Governmentality of Unease" in *Alternatives*, vol. 27, pp. 63-92. See also Geddes, A (2000) *Immigration and European Integration: Towards Fortress Europe?* MUP: Manchester pp.22-26.

<sup>16</sup> For a recent overview in the context of the German EU-Presidency: Daniela Kietz and Roderick Parkes "Die deutsche EU-Ratspräsidentschaft: Möglichkeiten und Grenzen einer ausgewogenen Inneren Sicherheits- und Migrationspolitik", *Internationale Politik und Gesellschaft* (2007).

<sup>17</sup> Guiraudon (2000).

<sup>18</sup> For an analysis of the relations between the political and administrative levels in this early cooperation: Adrian Favell, "The Europeanisation of Immigration Politics", in: *European Integration online Papers* 2,10 (1998).

<sup>19</sup> For an analysis of welfare changes and immigration see: Michael Bommes and Andrew Geddes (ed.s) *Immigration and Welfare: Challenging the Borders of the Welfare State*, (London: Routledge, 2000). For analysis of Commission officials' efforts to break open policy-making: Favell (1998).

orientation of the 'external dimension'<sup>20</sup> of migration policy undermined their policy aims (for example of development policy<sup>21</sup> and diplomatic efforts<sup>22</sup>), souring relations with third states expected to function as extended border controls for the EU.<sup>23</sup> Such developments were of concern to MEPs and NGOs, who were also motivated to break open the secretive, security-centric policy-making, which had seen the formulation of policies that reduced the legal and normative-democratic constraints on Executive power in society.<sup>24</sup> Finally, the requirements imposed on the EU's peripheral southern and eastern members within the framework of successive enlargement processes have seen new member states implement migration-control policies that reflect their interests less than those of the "old" members.<sup>25</sup>

The policy-making framework drawn up in the Amsterdam reform of the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC) did indeed empower previously marginalised actors to exert influence in, and potentially to reform, asylum policy. Article 67 TEC gives the Commission a shared right of initiative alongside the member states, shifting to a sole right after five years. Through its proposals, the Commission enjoys a not insignificant capacity to frame debates and negotiations, as well as to steer its priorities through the policy process.

The Amsterdam Treaty also upgraded parliamentary input into policy by introducing the EP as a consultative body within the new Title IV of the TEC (Articles 61-69) covering the "Area of Freedom, Security and Justice". Whilst until May 2004 the EP was only to be consulted, Article 67 TEC allowed the Council to introduce the co-decision procedure after the end of this transitional period. One should not exaggerate the formal influence that consultation powers afford the EP in the policy-process; however, should the EP be in possession of strong substantive arguments, and even be able to mobilise broader support behind them, it might be able to directly frame the form and substance of the EU's policies with regard to: asylum, refugees and temporary protection; regular immigration including relevant measures on integration of third country nationals; rights of regular third country nationals including the right to reside in another Member State; and irregular immigration including return measures.

We suggested above that actors might facilitate this kind of institutional upgrade merely by pointing to the useful function that they could play in policy-making (by legitimising or facilitating the conclusion of current substantive preferences). Yet, if they wished to be able to assert their own preferences immediately after an institutional upgrade, they would have to have created a policy-image with a strong substantive dimension. It is, therefore, worth identifying whether the institutional changes laid down at Amsterdam were the result of a change of policy-image, and – if so - whether this image had a strong substantive, or merely a functional, dimension.

## **II.1 Image change at Amsterdam and the missing substantive dimension.**

Although they do not explicitly recognise it as such, some analyses of the Amsterdam Treaty do trace the institutional change laid down in that document to an image-shift: the European Parliament created arguments that justified its involvement in asylum policy-making by highlighting the sensitivity of justice and home affairs policies for national citizens as well as the marginalisation of national

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<sup>20</sup> "The 'external dimension' of EU asylum and immigration policies was officially embraced only in 1999 at the Special European Council on Justice and Home Affairs in Tampere. [...] Yet European cooperation in these matters has always had an external dimension." Sandra Lavenex, "Shifting Up and Out: the Foreign Policy of European Immigration Control", *West European Politics*, 29, 2, (2006) 329-350, p.333.

<sup>21</sup> Christina Boswell, "The 'External Dimension' of EU Cooperation in Immigration and Asylum", *International Affairs* 73,3 (2003), 619-38; For an analysis of more recent developments: Ben Hayes and Tony Bunyan, "Migration, development and the EU security agenda", in: *Europe in the World: Essays on EU Foreign, Security and Development Policies*. (London: BOND, 2003) 71-80.

<sup>22</sup> Sandra Lavenex, (2006).

<sup>23</sup> Roderick Parkes, "Joint Patrols at the EU's Southern Border", SWP Comment, (SWP: Berlin, 2006a).

<sup>24</sup> For an analysis of the way that these legal constraints have been overcome: Thielemann (2002).

<sup>25</sup> For an analysis of the migration requirements imposed on accession states in the 2004 and previous EU enlargements see: Catherine Phuong "Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries", *International and Comparative Law Quarterly* 52,3, (2003) 641-664; More specifically on the new member states: Sandra Lavenex, "EU Enlargement and the Challenge of Policy Transfer: the Case of Refugee Policy" *Journal of Ethnic and Migration Studies* 28, 4 (2002) 701-721. Although the southern member states have signed up to security-oriented policies, and appear to accept their merits, they still have reservations. These reservations have more to do with their lack of the necessary infrastructure to carry them out, than their concerns specific social, economic or foreign policy problems. Nevertheless, these states might expect to find an ally in the European Commission, which, as a supranational actor, could promote the European interest and solidarity between the member states.

parliaments in the policy-process.<sup>26</sup> These concerns fed into ideas and discourses accepted by the Treaty negotiators about the legitimisation of policy, and about the role of parliaments in policy-making<sup>27</sup> (the twin aims of increasing accountability and transparency had also strongly informed the IGC agenda). This shift in the policy-image can thus be seen to have created a degree of elite-based pressure for institutional change, and somewhat altered a policy-image that had stressed the importance of effectiveness in policy-making (and thus of overcoming normative-democratic constraints on Executive action).

Meanwhile the Commission was apparently able to convince the member state governments that the communitarisation of policy-making –and more specifically, the upgrading of its role - would help neutralise agenda-setting and reduce defection from common policies on the part of the member states. This latter aspect was particularly important in the political environment prior to the 2004 enlargement, since a number of states with a poor infrastructure and immigration policy requirements considerably diverging from the EU-15 ‘norm’ were being groomed for accession. The Commission might also perform a role generating policy-proposals that member state Executives would be free to pick and choose from.<sup>28</sup>

Treaty change can, therefore, be partly explained by the way that the Commission and EP convinced the Treaty negotiators, and perhaps even a broader range of actors, that they would be able to perform a useful function in policy-making (increasing the legitimacy of policy or overcoming a number of problems that arose under the Third Pillar policy-making arrangements). Yet, the EP and Commission did not appear to have altered the substantive dimension of the policy-image, nor created a policy-image successfully marrying the two dimensions. The EP and Commission did not apparently succeed in showing that problems were being neglected or, indeed created, by the current substantive form of asylum policy, let alone shown had the necessary skills and resources to meet these problems. Although the EP had traditionally stressed the importance of respecting migrants’ rights and liberties, and the Commission, had pushed for substantive change on grounds of social, economic and foreign policy<sup>29</sup>, these arguments, and the idea that only they could overcome them, did not apparently foster a critical mass of either elite-based or bottom-up pressure for institutional change in the service of substantive change.

## II.2 Explaining the failure of substantive policy-image change

Since it is of relevance to actors’ subsequent attempts to make up the substantive deficit in a policy-image, it is worth asking what explains actors’ failure prior to Amsterdam to change the substantive dimension of the policy-image? The fact should not be ignored that even some actors that appear broadly opposed to the securitarian agenda have certain incentives to promote the predominant security-centric vision of asylum:

- Since the Commission’s position in policy-making is partly dependent on the degree of European integration achieved, it has previously supported restrictive, control-oriented measures where these have promoted European integration *per se*.<sup>30</sup> On a more abstract level, the identification of a security threat can be understood as part of the EU’s process of self-constitution and -definition: by identifying the threat to an entity, the entity to be protected is also constituted.

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<sup>26</sup> See for example: Jörg Monar, (1995) "Democratic Control of Justice and Home Affairs: The European Parliament and National Parliaments" in Roland Bieber and Jörg Monar (ed.s), *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (Brussels: Interuniversity Press, 1995).

<sup>27</sup> For an analysis of these norms see: Berthold Rittberger *Building Europe's Parliament. Democratic Representation beyond the Nation-State* (Oxford: Oxford University Press, 2005).

<sup>28</sup> Brendan Smith and William Wallace, "Constitutional Deficits of EU Justice and Home Affairs: Transparency, Accountability and Judicial Control", in: Jörg Monar and Wolfgang Wessels (eds.) *The European Union after the Treaty of Amsterdam*, (London/New York: Continuum 2001), 125-149; Mark Gray, "The European Commission: Seeking the Highest Possible Realistic Line", in: Finn Laursen (ed.), *The Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome*, (Odense: Odense University Press, 2002), 381-404; Andreas Maurer, "The European Parliament: Win-Sets of a Less Invited Guest", in: Laursen (2002) 405-452; Monica Den Boer "A New Area of Freedom, Security and Justice: The Shaping of a Hybrid Compromise" in: Laursen (2002), 509-535. Guiraudon, meanwhile, traces the changes to domestic interministerial competition, and the efforts of Treaty negotiators in national Foreign Ministries to get one over on their colleagues in interior ministries: Guiraudon (2000) p. 265.

<sup>29</sup> Favell (1998); Lavenex (2006).

<sup>30</sup> Andrew Geddes *Immigration and European Integration. Towards Fortress Europe?* (Manchester: MUP, 2000).

- MEPs might, meanwhile, strengthen their electoral position by identifying groups outside the electorate as a threat to citizens. Although the relative distance between the European Parliament and the electorate in many ways reduces the potential gains for MEPs from this kind of behaviour, the search to bolster its own legitimacy may encourage the European Parliament as a whole to pursue policies more obviously responding to citizens' narrow interests. In this way, MEPs' efforts to shift the functional dimension of the policy-image by highlighting justice and home affairs' sensitivity to the electorate may have come at the expense of their scope to alter the substantive dimension of an image which is based on arguments that refer so acutely to the political (electoral) problems of asylum.

Moreover, interior ministry actors were well able to defend their substantive preferences. This was in no small part down to the fact that their dominant institutional position in pre-Amsterdam asylum cooperation had redistributed political resources in their favour; these could then be instrumentalised to lend weight to their vision of asylum. Scholars have previously touched on this phenomenon, noting that “the link between security, migration and European integration made for strange bedfellows: liberal pro-EU politicians could not disapprove of European migration-control harmonisation coming from anti-EU, restrictionist politicians”<sup>31</sup> Thus, since European cooperation, even outside the EC/EU framework, is underpinned by strong ideological justifications, agreements concluded could be legitimated, not solely by reference to their substantive merits, but also to their desirability for maintaining cooperation. Yet, this observation captures just one of the ways in which European cooperation redistributed political resources in favour of those most closely involved<sup>32</sup>:

- idea exchange between participants from different member states was facilitated through their cooperation within the Trevi and EU frameworks. On the basis of these exchanges, participants could diffuse responsibility for policy ideas, and disguise their own vested interests when presenting them at the national level. They could also lend normative acceptance to a proposed measure by pointing to its application and acceptability in another state.
- information exchange between officials on asylum matters also occurred within these frameworks. Informational asymmetries between the officials most closely engaged in cooperation and other actors thus increased. These officials could make selective use of the information they gathered — it could be released or withheld, depending on whether it would mobilise opposition or support.

Whilst political resources accrued to those actors most directly involved in EU policy-making, they seeped away from those seeking to insert themselves into the European policy process. It was, for example, difficult for marginalised actors to engage in conflict expansion over an alternative substantive dimension of EU asylum: whilst actors could excite public attention for the functional dimension of the policy-image (by playing on general pro-, or anti-, European sentiment and fostering support or opposition for the treatment of specific policy-areas by actors at the EC/EU-level), trying to raise public attention for the substantive form of the policies drawn up at the European level was much harder given the low-key nature of much of the policy-making.<sup>33</sup> Even assuming that conflict expansion were easily practicable in the EU-context, it would hardly be helpful for those seeking to shift the current substantive asylum policy-image; indeed, the somewhat populist conception of asylum-seekers as a threat to the state and national citizenry infers that conflict expansion and the politicisation of asylum issues will actually be detrimental to those promoting a non-security-oriented policy.

Furthermore, irrespective of the institutional position of its proponents, the substantive dimension of the securitarian asylum policy-image was robust: The problems arising from policy failure (problems

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<sup>31</sup> Guiraudon (2000) p.261.

<sup>32</sup> For a conceptualisation of this redistribution of domestic political resources through European integration: Andrew Moravcsik, *Why the EC Strengthens the State*, Centre for European Studies Working Paper 52, Harvard Department of Government, Cambridge MA 1994). For a conceptualisation specific to Justice and Home Affairs: Eiko Thielemann, *The Soft Europeanisation of Migration Policy*, ECPR Joint Sessions of Workshops, Turin, 22-27.3.2002; Roderick Parkes and Andreas Maurer, *Britische Anti-Terror-Politik und die Internationalisierung der Inneren Sicherheit. Zur Balance zwischen Freiheit, Sicherheit und Demokratie*, SWP Study, (Berlin: SWP, 2007).

<sup>33</sup>For an analysis of ‘contentious protest’ in the EU: Imig and Tarrow (eds) (2001).



which the image/venue school expects would create political opportunities for an image-shift) may, in the case of a security-centric asylum policy, have actually *strengthened* its substantive image: critics identify the ‘virtualism’ of efforts to combat unwanted immigration; they suggest that measures taken against illegal immigration often criminalise further categories of immigrant, thus creating higher levels of illegal immigration and with them an apparent reason for more of the same policies.<sup>34</sup> A similar effect can be identified in the efforts to reduce the numbers of asylum-seekers recognised as in need of protection: In reality, dips in recognition rates for refugees are not simply a reflection of a growth in the numbers of unfounded asylum applications- in many cases they also indicate a more restrictive interpretation of asylum laws; yet they may easily be presented as such.<sup>35</sup> Asylum policies restricting asylum-seekers’ social and employment rights have, meanwhile, added to precisely those phenomena they professed to prevent- a dip in ‘social cohesion’, a rise in welfare dependence and increased recourse to unregulated employment.<sup>36</sup> Thus, the negative effects of the sub-optimal management of a policy-area actually serve as justification for its continued regulation in the same way. The ‘problems’ evidencing the fact that a reactive, control-centric policy cannot fully steer migration (for example the continued presence of large numbers of ‘bogus’ or failed asylum-seekers on the national territory) are used to legitimate rather than negate its continuance.

### **II.3 Missed opportunities to shift the substantive image: The external dimension of asylum policy**

It should not be inferred that actors pursuing alternative preferences enjoyed *no* political opportunities for asserting themselves and their priorities in policy-making: even in the pre-Amsterdam phase of asylum cooperation, one aspect of asylum in particular had begun to create new problems for policy-makers and thus new political opportunities for both dominant and marginal actors- the ‘external dimension’ of asylum policy.

Interior ministry actors are not the only ones to turn their attention to the external dimension of asylum. Not only do those actors dealing with external security have an interest in these problems, so too do diplomatic, development and trade policy actors. Inter-institutional tension has, however, arisen because previously unimportant differences in the underlying principles held by internal and external policy actors have gained salience. At the risk of over-generalising, it is possible to differentiate these principles in two broad ways<sup>37</sup>:

*Firstly*, actors in domestic external policy ministries and the relevant Commission units frequently justify their activity partly with reference to the interests of third states, or to the interests of the citizens of third countries (the latter through arguments concerning humanitarianism or ‘human security’). They do so to a degree in order to extend the range of their activities away from those external affairs that directly affect the narrow interests of their state and citizens. By contrast, interior policy actors are primarily interested in external events when they have a direct effect on the state. It is the security of the state and citizens that counts, and it is with reference to this that policy is legitimised.

*Secondly*, external policy actors have increasingly taken a pre-emptive and curative approach to those external phenomena such as poverty or human rights abuse which may cause migration flows to the EU. Again arguments about the desirability of pre-emptively dealing with phenomena that *may* one day be of significance to the state can be used to extend the scope of external actors’ activity beyond those elements of immediate relevance to state-interest. By contrast, interior policy actors have only had to deal with these issues when their side-effects reach the state. Subsequently, the latter’s policy tools and ways of dealing with problems are highly reactive to external events (border controls, for example, deal with migration flows once they have begun). The opening up of new opportunities for

<sup>34</sup> Michael Samers, "An Emerging Geopolitics of Illegal Immigration in the European Union" *European Journal of Migration and Law*, 6 (2004), 23-41.

<sup>35</sup> For a pertinent analysis of the way that efforts to restrict immigration can affect asylum policy: Aninia Nadig, "Human Smuggling, National Security, and Refugee Protection" *Journal of Refugee Studies*, 15,1, (2002) 1-25.

<sup>36</sup> See for example: Pamela Jackson and Roderick Parkes, "Immigration Policy and the Social Exclusion of Minorities: British Securitization 1948-2003" *Journal of Social and Ecological Boundaries*, 1,2 (2006), 5-31

<sup>37</sup> For a more in-depth analysis on the specific topic of external and internal security see: Ferruccio Pastore, *Reconciling the Prince's Two 'Arms': Internal-External Security Policy Coordination in the European Union* EU-ISS Occasional Paper 30, October 2001. For an analysis of the priorities of ‘internal’ and ‘external’ actors in migration policy: Joanne van Selm "Immigration and Asylum or Foreign Policy: The EU's Approach to Migrants and their countries of origin", in: Sandra Lavenex and Emek Uçarer (eds.), *Externalities of EU Immigration and Asylum Policies* (Lanham: Lexington Books, 2002).

external action has been treated by these actors as a means to redeploy their reactive policy tools abroad- a process which can, though, only occur via the use of external policy actors' tools.

Even prior to Amsterdam, the 'external dimension' of asylum became a contested area, with competing actors seeking to control the way that it is dealt with. All the same, none of the external actors apparently succeeded in instrumentalising these differences of approach in order to justify a policy-change<sup>38</sup>; the external dimension of asylum policy continued to be characterised by the reactive-restrictive measures preferred by interior policy actors that used third countries as buffer zones against unwanted immigration to the EU.<sup>39</sup>

Certainly, the external dimension of asylum policy seems fertile terrain spawning ready arguments which interior ministry actors can cite in order to extend the application of their security-centric agenda: an approach reactive to those external events of most immediate relevance to state interests intuitively accords with electoral imperatives in a politically sensitive policy-area; more altruistic proposals based on humanitarian imperatives would probably not tread water with actors faced with the political consequences of electoral dissatisfaction. Yet, the promise of the 'external dimension' of asylum as a political opportunity for actors currently marginal to asylum policy-making lies in the fact that there are entrenched ideas and approaches underpinning states' and the Union's external action. Ideas about the merits of curative external policies undertaken in the mutual interests of member states and third countries/ their citizens appear increasingly established. Furthermore, external policy actors can lend normative weight to the arguments about their substantive priorities by recruiting vocal political allies outside the EU (third countries and their citizens). Finally, the positive or negative effects on the electorate deriving from external policies regulating asylum are somewhat more diffuse and more difficult for citizens to trace than internal policies; there may indeed be more room for the interests of third countries and their nationals in policy-making.

### **III. After the institutional change at Amsterdam: policy-change without substantive image-change?**

Although some actors, notably the EP and Commission, may, then, be seen to have shifted the policy-image of asylum at Amsterdam to legitimate their *presence* in policy-making, none appeared to have successfully shifted this image to allow for the pursuit of their *substantive preferences*. In the absence of change to the substantive policy-image, would the actors be able to exploit their institutional upgrade and assert their preferences? To address this question, we here analyse the progress of a major piece of EU asylum legislation (the Reception Directive) as well as of a high-profile proposal (that of the 'joint external processing' of asylum applicants). Whilst the EP and Commission remain our prime focus, we examine not only those actors who enjoyed a formal institutional upgrade at Amsterdam, but also the other actors described above as dissatisfied with the pre-Amsterdam substance of EU asylum policy (particularly NGOs and the southern member states).

The Reception Directive provides an example of a measure unlikely to excite much public attention. The Directive deals with social, economic and security problems that have previously offered few political opportunities for other actors to contest the dominant security-centric image. Against this background, we would expect the newly upgraded actors to struggle to alter the substantive policy-image *ex-post*, undermining their capacity to pursue their preferences.

By contrast, the external dimension provides opportunities for actors to create an alternative to the existing substantive dimension of the asylum policy-image. Against this background, we expect an analysis of the opposition to the proposal on external processing on the part of MEPs, NGOs and – although on a rather more low-key level – the Commission to show that these actors are capable of making up the 'image-deficit' as well as the way that a powerful substantive image can allow actors to exert influence 'beyond' their formal powers.

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<sup>38</sup> For a discourse analysis of the development of the external dimension, and in particular the so-called 'comprehensive approach', see: Steven Sterkx, *The Comprehensive Approach off Balance: Externalisation of EU Asylum and Migration Policy*, PSW Paper 2004/4, (Antwerp: UA, 2004).

<sup>39</sup> See for example: Sandra Lavenex, "Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe", *Journal of Refugee Studies* 11,2 (1998) 126-145; Johannes van der Klaauw, "European Asylum Policy and the Global Protection Regime: Challenges for UNHCR", in Sandra Lavenex and Emek Ucarer (eds.), (2002) 33-53.

### III.1 Case study 1: the Reception Directive <sup>40</sup>

The Amsterdam Treaty called for the adoption of common minimum conditions for the reception of asylum seekers. A proposal for a relevant directive was duly presented by the Commission in April 2001. It progressed through the unusual four-tiered Council structure set up in 1999 for dealing with first-pillar JHA policies (proposals are usually dealt with initially by the Asylum Working Party, before being passed up to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), then COREPER and finally for treatment by Ministers in the JHA Council). After the EP had given its opinion in April 2002, the measure was adopted in January 2003.

*How would a securitarian reception directive look?*

It may seem curious to analyse this piece of legislation in order to measure continuity in EU asylum policy, when it had no precedent at the European level<sup>41</sup>; nevertheless it is possible to identify the principles underpinning previous ‘securitarian’ policies, and to gauge their salience in the Reception Directive.

As alluded to above, European asylum cooperation has seen security- and control-oriented solutions matched to complex social and economic problems, and social and economic policy tools used in the service of interior ministry actors’ goals. A securitarian reception directive would be no different.<sup>42</sup> The prevalence of securitarian priorities during the negotiations can thus be fathomed in an analysis of those articles regulating asylum applicants’ access to society (free movement provisions; education), the social system (welfare benefits; healthcare) and to the economy (access to the labour market).

The restriction and increased control of migration would be offered as a solution to the complex social and economic problems inherent to the reception of asylum-seekers. Problems related to the social system, economy and society would be met simply by blocking applicants’ access to welfare and the labour market, and restricting their social contact during the handling of their claims. Given the default assumption that applicants are ‘bogus’, the question of the long-term integration of successful asylum-seekers into these structures would not arise.

Social- and economic-policy tools would, meanwhile, be deployed for the purposes of increasing control over access to and exit from the EU. Asylum-applicants’ access to social and economic systems would, for example, be restricted as part of an effort increase control over migration flows by removing the ‘pull factors’ of ‘unwanted’ migration to the EU; such restrictions would also be seen to facilitate the eventual removal of failed applicants.

*Access to society (free movement and education)*

According to unofficial sources, German negotiators were particularly active in seeking to reduce applicants’ freedom of movement, pushing for a restriction of the relevant provisions in the Commission proposal (particularly Article 7). They argued for the power to restrict applicants’ freedom of movement during the treatment of their claim, and without offering applicants a right of appeal. On the other side, Sweden apparently led those in the Council who called for a liberalisation of the free movement provisions in the Commission proposal. Despite the concerns of the Parliament and NGOs, the opposition of the Commission and a small group of member states, the Commission proposal was, however, further restricted: Article 7(5) of the proposal, laying down that applicants had the right to “bring proceedings before a court against the limitations on freedom of movement”, was missing from the adopted text.

Meanwhile, over the course of negotiations, the Commission’s proposed rules governing the provision of education for minor asylum-seekers and the children of applicants were restricted. An important

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<sup>40</sup> This analysis is based on interviews and questionnaires carried out during 2002-2003 with policy-makers in the EP, Commission and Council, as well as other actors (particularly NGOs, UNHCR) involved in the policy-process. It also draws on the official documents found in the relevant Statewatch file <http://www.statewatch.org/semdocfree/legobs1B2.html> and the EP’s proposed amendments: European Parliament *Position on the Commission Proposal for a Council Directive Laying down Minimum Standards for the Reception of Asylum Applicants*, P5\_TA(2002)0202.

<sup>41</sup> Nicola Rogers "Minimum Standards for Reception", in: *European Journal of Migration and Law*, 4, (2002) 215-230., p.216.

<sup>42</sup> For a useful analysis see: Roland Bank "Europeanising the Reception of Asylum-Seekers: the Opposite of Welfare State Politics" in Bommers and Geddes (ed.s) (2000) 148-169; "Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom", *Nordic Journal of International Law* 69,3 (2000) 257-288. See also Geoff Gilbert, "Is Europe Living Up to Its Obligations to Refugees?" *The European Journal of International Law* 15 ..5(2004) .963-987.

provision with implications for asylum applicants' capacity to socially integrate was removed altogether: There is thus no rule on providing minors with language education (Art. 12(3) of the proposal). This was despite a proposed amendment from the EP which would actually have strengthened states' obligations in this area.

#### *Access to the labour market*

The Commission, in line with UNHCR advice, proposed that states not be allowed to refuse applicants access to the labour market for more than six months, but left some leeway to the states to decide upon the specific conditions under which they would allow access. Again according to unofficial sources, a group of states led by France wished to further restrict access to a bare minimum in order to reduce a 'pull factor' and cut down the incidence of 'voluntary immigrants' posing as asylum-seekers to gain labour market access. Those states which rely upon asylum-seekers' working in order to minimise the cost of their care (foremost Greece, Sweden, Portugal) pushed for more liberal provisions. The Parliament, meanwhile, sought for access to be allowed after four months. Those pushing for a more liberal regulation were unsuccessful, as indicated by the provisions (Article 11) adopted in the final text. Where these were well-defined, they were restrictive, and - where lax - allowed the member states significant leeway to introduce their own standards. This can be partly put down to German influence: citing insuperable pressure from the *Länder*, the German government had reopened negotiations on the Directive even after initial political agreement between the member states had been reached. Germany succeeded in having the relevant Article changed to allow more scope for the member states to maintain their own rules about labour market access.

A number of southern (and Scandinavian) member states prefer to offer asylum-seekers generous access to the labour market in order to relieve the load on the welfare system and allow applicants to care for themselves. These concerns were in evidence until the UK pushed the 2001 Belgian Presidency to propose a provision in which member states could test the level of financial means at applicants' disposal, and thus whether they were able to contribute to their own reception. This formalised the practice whereby applicants look after themselves, but shifted from a liberal to a state-controlled process, and was seen as a good compromise by the officials of all the member states. As a late addition to the text, it escaped the consideration of the Parliament, which was drawing up its position on the basis of the original proposal. A slightly modified version appeared in the adopted text (13(4)).

#### *Access to the social system*

Access to the labour market was a more contentious issue in the Council negotiations than access to the social system, since it was perceived to straddle more centrally the legal and conceptual distinctions between voluntary (economic) immigration and forced migration. Offering generous access to the labour market was thus deemed to constitute more of a pull factor for abuse of the asylum process by economic immigrants than access to the social system.

Reflecting its more limited salience, access to the social system was not restricted to the same degree as equivalent provisions on the labour market. One or two of the standards for access to the social system were actually above those proposed by the Commission. Provisions in the Commission proposal permitting the withdrawal of benefits from those who prevent children attending school, or who partake in certain forms of 'negative behaviour' were deleted (Art. 22 of the proposal).

Where a core group of north-western member states sought to reduce the standards in the Commission proposal, they were largely successful. The UK, for example, exploited the reopening of negotiations on the Directive by Germany to push for the inclusion of new grounds for the withdrawal of benefits. It successfully introduced the provision that if the asylum applicant had not lodged a claim within a "reasonably practicable" time after arrival, then reception conditions could be refused (Art. 16(2)). This provision was aimed at preventing the abuse of the asylum system by voluntary immigrants who make claims when their illegal status has been discovered and who thereby seek to delay their removal. After feverish telephone calls to his counterparts, the then UK Home Secretary, David Blunkett, secured the amendment. This brought it into line with provisions that the UK government was seeking to introduce at the national level. Beyond the arguments underpinning the securitarian

agenda, the UK delegation was also able to cite its possible opt-out<sup>43</sup> from the Directive to pressure the other member states to accept its proposal; it was then able to add normative acceptance to the domestic measure by showing that it was in line with its European obligations.

### *The influence of 'rival' actors*

This analysis does indeed suggest that, above all, a core group of interior ministry actors from France, Germany and the UK succeeded in leaving their mark on the Reception Directive. Despite the recommendations of the Commission, Parliament and NGOs as well as some of their counterparts in the JHA Council, they considerably restricted asylum-seekers' access to society, the social system and the labour market. None of the newly empowered actors really succeeded in asserting their preferences despite the new formal opportunities afforded them. How can this be explained?

None of the 'failed' actors appears to have successfully engaged in conflict expansion over substantive concerns during the passage of the Reception Directive. EP, Commission, UNHCR and NGOs could not, therefore, rely upon bottom-up support for their various positions. Beyond the difficulties associated with garnering broader interest in the European level, these newly empowered actors were wary of endangering their still precarious position in policy-making. UNHCR had, for example, been afforded the unusual privilege of an invitation to sit in on a meeting of the Council's Asylum Working Party.

As for elite-based support, whilst the Commission and EP might have appealed to the European Council for support in justifying their *presence* in policy-making, they received little support from the European Council for their *substantive* priorities: although the European Council's 1999 Tampere Conclusions contained pronouncements from which previously marginalised actors might have drawn political leverage<sup>44</sup>, the European Council quickly returned to more familiar terrain, exhorting the Council of Ministers to tackle illegal immigration and to adopt measures quickly.<sup>45</sup> Empirical and emotive arguments concerning specific substantive issues were thus largely confined to intra- and inter-institutional bartering.

It is important to recognise the activism of the member states in setting the framework for the Commission proposal, and thus removing some of its opportunities to insert its preferences in policy-making: the French Presidency (second semester of 2000), for example, submitted a discussion paper for debate amongst the Asylum Working Group and Strategic Committee on Immigration, Frontiers and Asylum (SCIFA).<sup>46</sup> Conclusions were adopted by the JHA Council in December 2000 (though these remained open on the issues of free movement and access to the labour market). All the same, the British Immigration Law Practitioners' Association has analysed the minutes of JHA meetings, and concludes that, even within the restricted scope of activity allowed to it by the member states, the Commission failed to steer even its proposals made on the basis of these Conclusions through Council meetings.<sup>47</sup>

There is, therefore, little evidence that the Commission succeeded in formulating arguments persuasive to the core triangle of France, Germany and the UK. The Prodi Commission advocated a relatively open Community immigration policy<sup>48</sup>; yet, it struggled to justify the liberalisation of asylum in the same terms as it has 'voluntary' migration. Whereas voluntary immigration can be promoted by appealing to states' economic and demographic self-interest, it might prove irresponsible to defend asylum in the same way: this would reinforce the conceptual link between asylum and voluntary immigration, and encourage the perception that access to asylum can be regulated with

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<sup>43</sup> The UK and Ireland enjoy a special arrangement whereby they can selectively opt-in to asylum measures.

<sup>44</sup> The emphasis on 'solidarity' offered leverage to the southern member states (and the accession states); the emphasis on the societal integration of legally resident third-country-nationals offered opportunities for social policy actors; 'pro-migrant NGOs' might refer to the call for civil society involvement, and the references to international norms and standards; external actors could draw on the premium set on partnership with countries of origin and their development needs.

<sup>45</sup> See for example: European Council *Presidency Conclusions*, 21-22 June 2002.

<sup>46</sup> Note from the French Delegation to the Asylum Working Party "Conditions for Reception of Asylum Seekers", Brussels, 23 June 2000, 9703/00 ASILE 28. For an analysis of developments in Council prior to the presentation of the Commission proposal: Rogers (2002).

<sup>47</sup> ILPA *ILPA Response to the Commission's Communication: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations COM (2004)401 final*, 2 June 2004, [www.ilpa.org.uk](http://www.ilpa.org.uk) (as of January 2007)

<sup>48</sup> European Commission *Communication on a Community Immigration Policy*, COM (2000) 757.

regard to states' material self-interest. More altruistic concerns, although reiterated by the Commission in official documents<sup>49</sup>, did not apparently appeal.

Besides, the strategies of the EP and Commission did not always seem well-suited to making the most of their formal powers. In their arguments, parliamentarians generally failed to play on the idea that the EP could only perform a legitimising function if it were allowed to substantively change the form of the proposals.<sup>50</sup> On occasions, the Parliament also paid too little attention to the practicality, and thus credibility, of its proposals. One telling, if banal, example concerned the question of asylum-seekers' access to education: In her proposed amendment, the Liberal group altered the Commission's proposal that applicants be given access to education within 65 days, to 21 working days in her proposed amendment.<sup>51</sup> The EP took over this proposed amendment.<sup>52</sup> Since the initial 65 day period was already felt to be impractical if applicants arrived at the beginning of the summer vacation, the amendment was unrealistic. (The Council altered the time period to three months, with a possibility of extending it to a year (Art.10)).

Whilst the kind of principled and emotive argumentation, employed particularly by groups and parties of the Centre and Left, might have proved effective had they engaged in conflict expansion, it proved ill-suited to dealing with the Council. Yet, in the European Parliament, the Centre/Left groups' lack of concern for empirically-based argument was encouraged by its exasperation at the Parliament's still limited institutional position. In the Reception Directive, Council reached initial political agreement on a 'general approach' before the EP had delivered its opinion. Council actors do not appear to have perceived the necessity of the Parliament being allowed to pursue its substantive preferences in order for it play its legitimating function in policy.

Like the Commission, the Parliament had to justify its substantive priorities with reference to arguments made in Council because of its continued centrality to policy-making. Taking the Council's priorities as their reference point and normative standard, some parliamentarians felt that the Parliament's goals were unrealistic. As the Parliament's *rapporteur* on the proposed Reception Directive, Jorge Hernandez-Mollar, stated in the plenary debate, "I believe that neither the Socialist Group nor the Liberal Group [...] are up to taking responsible, rigorous and serious positions in the face of the phenomenon of immigration and asylum. It will therefore be very difficult for [...] Parliament's views in this area to be taken into account by the Council..."<sup>53</sup>

### III.2 Case Study 2: joint external processing

In March 2003, the UK's document, "New Vision for Refugees", put forward the idea of the 'external processing' of those making applications for asylum on its territory. In a nutshell, the UK government signalled its intention to "continue to take refugees but on a managed basis, processing applications in [...] source regions. Central to this approach, and in the interests of equity, we would also return those who apply for asylum here to these source regions for protection and potentially processing. Movements away from source regions would take place through managed refugee resettlement programmes enabling more effective integration of refugees."<sup>54</sup> The European component of these plans was unclear: the paper mooted the possibility of cooperating with EU-partners under the burgeoning Common European Asylum System, but it also mentioned cooperation with states like Australia.

A subsequent letter from the UK Prime Minister, Tony Blair, to the then Greek Prime Minister, Costas Simitis, distinguished between the processing of asylum claims in 'regions of origin' and that in

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<sup>49</sup> Ibid.

<sup>50</sup> One near exception may be found in Anna Terron i Cusi's speech to the Plenary as it debated the Report on the reception proposal: European Parliament, *Minutes of the Sitting of Thursday 25<sup>th</sup> April 2002* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20020425+ITEMS+DOC+XML+V0//EN#creitem2> (as of January 2007).

<sup>51</sup> European Parliament *Draft Report of Hernandez Mollar: Amendments 116-224 PE302.296/AM* (2002), p.26.

<sup>52</sup> European Parliament *Position on the Commission Proposal for a Council Directive Laying down Minimum Standards for the Reception of Asylum Applicants*, P5\_TA(2002)0202.

<sup>53</sup> European Parliament, *Minutes of the Sitting of Thursday 25<sup>th</sup> April 2002* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20020425+ITEMS+DOC+XML+V0//EN#creitem2> (as of January 2007).

<sup>54</sup> UK Government, *New Vision for Refugees*, 7 March 2003.

'transit processing centres' (TPC). In both cases, asylum applicants making claims within the EU would be sent to third countries to have their claims dealt with; TPC could, though, be situated in any third country. Again, the EU component was left open, although close cooperation with the European Commission was favoured.<sup>55</sup>

Insofar as these plans can be tied down (they have been described as "a moving target"<sup>56</sup>), they may still be seen to have borne the hallmarks of the securitarian approach<sup>57</sup>:

*Firstly*, the proposals constitute a response to the symptoms of the failure of current policy, rather than an alternative to this policy. The UK's document and letter refer, for example, to the need to respond to the problem that most asylum-seekers are forced to enter the EU illegally paying criminal organisations in the process. Of course, one might ask whether this phenomenon is not down to the reactive-restrictive policies brought in by the EU in the first place.<sup>58</sup>

*Secondly*, the proposals offer a simplistic control-oriented response to complex and varied societal, social and socio-economic problems. Questions of how to safeguard the employment prospects of national citizens and to deal with public hostility against asylum-seekers are met with a response that sees the complete exclusion of certain forms of migrant from society and the economy.<sup>59</sup> Problems of how to ensure the societal integration of successful applicants or to offset the costs of caring for applicants would scarcely be overcome by these developments.

*Thirdly*, although ostensibly based on the premise of solidarity with third countries, the proposals potentially shift the burden for caring for displaced persons to other states; broader foreign policy tools would probably have to be subordinated to the purposes of 'encouraging' third states to agree to accept (transit) processing centres on their territory.<sup>60</sup> Ideas about removing applicants from the EU for the purposes of extraterritorial processing represent a reactive rather than a curative approach to the causes of migration.

*Fourthly*, the proposals sought to reinterpret UK's legal obligations, and thus the constraints upon the Executive, suggesting that "[i]n order to make such removals the norm, the courts would need to be persuaded that such removal was in compliance with the Geneva Convention and Article 3, EHCR."<sup>61</sup>

Despite its strong securitarian logic and the support it received from the Netherlands and Denmark<sup>62</sup>, Italy and Spain<sup>63</sup>, the proposals met with scepticism from many of the UK's EU-partners- foremost Sweden and (initially at least) Germany.

Meanwhile, the Commission, responding to a request from the European Council, presented its own priorities in June 2003.<sup>64</sup> The Commission apparently sought to take the political momentum behind the idea of extraterritorial activity in a less reactive-restrictive direction, breaking with the main proposals of the UK. It put forward the idea of a resettlement scheme and procedures for protected entry.<sup>65</sup> The EP, in its response to the Commission Communication expressed concern that Regional Protection Zones and transit centres would not offer the same level of protection as asylum-seekers and refugees might find in the EU. It also warned that TPC might undermine the Geneva Convention.<sup>66</sup>

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<sup>55</sup> Tony Blair, *Letter to His Excellency Mr Costas Simitis: New International Approaches to Asylum Processing and Protection*, 10 March 2003.

<sup>56</sup> Gregor Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones", *European Journal of Migration and Law*, 5, (2004), 303-341.

<sup>57</sup> For an in-depth analysis of these and subsequent proposals: Noll (2004).

<sup>58</sup> On the effects of carrier sanctions and other tools of migration control, see: Nadig (2002); Samers (2004).

<sup>59</sup> For example: Observer, *Secret Balkan Camp Built to Hold UK Asylum Seekers*, 15 June 2003.

<sup>60</sup> See Madeline Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" *International Journal of Refugee Law*, 18,3, (2006), 601-629 on the reaction of Ukraine to the Austrian proposals for extraterritorial efforts to intercept Chechen asylum-seekers.

<sup>61</sup> UK Government (2003), p.2.

<sup>62</sup> Amnesty International UK/ EU/ UNHCR *Unlawful and Unworkable- Amnesty International's Views on the External Processing of Asylum-Seekers* (2003).

<sup>63</sup> Noll (2004) p.307.

<sup>64</sup> European Commission, *Communication to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems*, 3 June 2003, COM(2003) 315 final.

<sup>65</sup> Garlick (2006); Noll, (2004); Andrew Geddes, "Europe's Border Relationships and International Migration Relations" *Journal of Common Market Studies* 43,4, (2005) 787-806.

<sup>66</sup> European Parliament, *Report on the Communication from the Commission to the Council and the European Parliament entitled 'Towards more accessible, equitable and managed asylum systems'*, (COM(2003) 315 - C5-0373/2003, 2003/2155(INI).

Yet, Germany subsequently came round to a concept similar to the one originally put forward by the UK. In mid-2004, the then Federal Interior Minister, Otto Schily, set out his ideas for the establishment of ‘camps’ in North Africa with financial support from the EU.<sup>67</sup> The rationale behind the scheme was ostensibly humanitarian, seeking to prevent asylum-seekers from making the dangerous journey to the EU. Prospective migrants would have their claims jointly dealt with in such camps. Some of those found to be in need of protection would be offered protection in Europe. Those who were found to be undeserving of protection would be provided with information about the possible legal channels of immigration to the EU. North African countries would also be offered help to repatriate these individuals. Despite backing from his Italian counterpart<sup>68</sup>, Schily’s idea met with serious misgivings from a number of member states, as well as MEPs and representatives of civil society. Above all, there was concern that such policies were merely a means to keep asylum-applicants from the territory of the EU, where they might be able to activate a fuller range of rights.<sup>69</sup> MEPs signalled their intention to take the designated Commissioner for JHA, Rocco Buttiglione, to task over his support for the project.<sup>70</sup> In particular, the Liberal Group stated their fundamental opposition to the proposals.<sup>71</sup>

These arguments were played out before a wider audience<sup>72</sup>, somewhat unusually for EU asylum measures. Despite their careful management of the information released<sup>73</sup>, the proponents of external processing came in for something of a bruising in the media, as NGOs, MEPs and government ministers succeeded in conflict expansion, citing the undesirability of the plan for the EU’s humanitarian obligations and its relations with third countries.<sup>74</sup> It is impossible to say to what degree this conflict expansion – and the distasteful imagery of camps upon which it played - prevented the UK and German governments from recruiting otherwise willing allies to its plans; it does at the very least suggest that alterations to the policy-image are possible, even if this is on an *ad-hoc* basis and does not represent a fundamental, and long-lasting shift of the policy-image.<sup>75</sup> The Commission has not subsequently shown any great urgency in initiating the study called for in the Hague Programme<sup>76</sup>; indeed the study has been described as being ‘foreshadowed’ by these political manoeuvrings.<sup>77</sup> It has been able to push forward with its own priorities for the external dimension.

#### **IV. Conclusions: The prospects for policy-change under the Hague Programme**

This paper has sought to illustrate the importance of policy-images in explaining both institutional change, and actors’ subsequent capacity to exploit the new powers afforded them. It has suggested that the lack of a fitting substantive dimension to the policy-image can prevent actors from fully exploiting their formal powers (Reception Directive), whilst the presence of a powerful one can have the reverse effect (joint external processing). In the specific context of EU asylum policy, the paper also indicated that the EP and Commission are struggling to make up the image deficit, and will thus struggle to make full use of their formal powers for some little time.

What, then, are the prospects for policy-change? Various changes have given previously marginalised actors an institutional upgrade since the entry into force of the Amsterdam Treaty. In asylum policy, arrangements laid out in the Nice Treaty (Art.67(5)) accorded the EP co-decision rights alongside the Council. The Council’s 2004 decision on the activation of the transition regime<sup>78</sup> did not allow for co-

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<sup>67</sup> Garlick (2006), p.619; Statewatch, *Bulletin*, 08-10.2004, <http://www.statewatch.org/contents/swbul14n5.html> (as of January 2007).

<sup>68</sup> Garlick, (2006) p.619.

<sup>69</sup> For a brief analysis of such tactics in migration policy, see: Parkes (2006a).

<sup>70</sup> New Europe, *Asylum Camps Cause Europarlament Stir*, 24 September 2004.

<sup>71</sup> European Voice, *Asylum Camps Pose More Problems than they Solve*, 2 September 2004.

<sup>72</sup> Garlick (2006).

<sup>73</sup> Noll (2004).

<sup>74</sup> For just a handful of examples: Guardian, *Asylum Requests May be Handled in Russia*, 27 March 2003; Observer, *Secret Balkan Camp Built to Hold UK Asylum Seekers*, 15 June 2003; Deutsche Welle online *Asylum Camp Proposals Meet Opposition*, 1 October 2004, <http://www.dw-world.de/dw/article/0,2144,1344487,00.html>

<sup>75</sup> On the differences between ‘policy coalitions’ and ‘advocacy coalitions’ see: Alex Warleigh, “The Hustle: Citizenship Practice, NGOs and Policy Coalitions in the European Union - the Cases of Auto Oil, Drinking Water and Unit Pricing”, *Journal of European Public Policy*, 7:2 (2000), 229-243.

<sup>76</sup> Confidential Interview, March 2006.

<sup>77</sup> Garlick, M (2006) p.626.

<sup>78</sup> See: Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC), Official Journal of the European Union L 396/44, 31. December 2004.



decision in the area of legal immigration (Article 63(3)(a) TEC) nor on measures regarding rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States (Article 63(4) TEC). Nevertheless, to date, the EP's rights for legislative co-decision *do* apply for the following measures:

- Article 62(2) (b)(ii, iv) on border controls: issuing of visas; rules on a uniform visa
  - o Since 1 April 2005: Article 62(1), (2)(a), (3) on border controls
- Article 63(1)(a, b, c) for asylum measures
- Article 63(2)(a) for measures on refugees and displaced persons: temporary protection to displaced persons from third countries
  - o Since 1 April 2005 and subject to the conditions of the Nice Treaty: Article 63(1)(d) for asylum measures: minimum standards for granting or withdrawing refugee status; Article 63(2)(b) for promoting a balance of effort between Member States in receiving refugees and displaced persons; and Article 63(3)(b) illegal immigration, illegal residence and repatriation of illegal residents
- Article 65 judicial cooperation in civil matters (except family law)

These changes to the institutional balance appear to increase the chances of policy-change, even as the policy-image deficit remains. It was also noted above that a favourable institutional position can actually improve an actor's capacity to promote its preferred policy-image. All the same, their dominance of the substantive dimension of the asylum policy-image still affords JHA officials in Council the opportunity to engage in conflict expansion and mobilise broader political resources behind their preferences, even as their formal relationship with the EP has seen a diminution of their relative autonomy.

In the meantime, though, the 'functional dimension' of the securitarian asylum policy-image has been used to justify a further bout of venue-shopping. Interior ministry actors from Germany and other member states are falling back upon a policy-image which highlights the importance of effectiveness in migration policy-making in order to shift policy-making to venues more amenable to the realisation of their preferences. The mushrooming of groups – 'G6', 'Salzburg', 'Pruem' - in which not all member states participate, and from which the Union organs are largely excluded, is indicative of renewed efforts at venue-shopping.<sup>79</sup>

Of course, one might argue that these new institutional configurations outside the EC/EU framework and thus beyond the supranational parliamentary and judicial supervision that this framework imposes, are a perfectly rational response to the security situation in which the member states find themselves, as well as to the policy-making constraints imposed on national executives when they were cooperating in the EU under conditions of unanimity. It was suggested above, though, that rational and suitable solutions are not always matched to problems in the policy-process. In fact, actors may seek out problems to justify their preferred solutions. The terrorist attacks on Madrid and London have certainly thrown up new security problems related to the management of migration; on the basis of past experience it is, however, valid to ask whether the policies currently being drawn up to deal with this threat are either suited to the problem at hand or, indeed, are giving sufficient attention to the vast array of other problems and opportunities that asylum might throw up.

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<sup>79</sup> Roderick Parkes, (2006b) "Democracy and Security in Britain after the 'Heathrow Plot': Survival of the Fittest?", SWP Comment, Berlin; Daniela Kietz and Andreas Maurer, "Der Vertrag von Prüm: Vertiefungs- und Fragmentierungstendenzen in der Justiz- und Innenpolitik der EU" *Integration*, 29,3, (2006) 201–212.