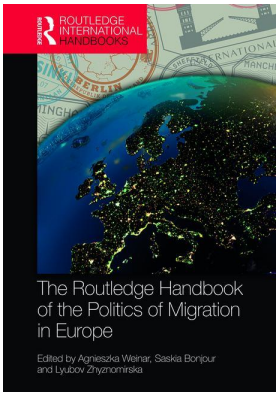

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A common European asylum system?

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A COMMON EUROPEAN ASYLUM SYSTEM?

How variation in Member States' administrative capacity undermines EU asylum harmonisation

Natascha Zaun

Introduction: EU asylum policies after almost two decades of policy harmonisation

Since the Treaty of Amsterdam, the European Union (EU) has gradually communitarised the asylum policies of its Member States. By June 2013, it was supposed to have created a Common European Asylum System (CEAS) with *common* protection standards across EU Member States.

The so-called European 'refugee crisis' of 2015 and 2016, however, has clearly shown that the EU has failed this goal. After almost two decades of policy harmonisation, asylum policies across EU Member States remain as diverse as ever. While some traditional recipients of refugees such as Germany or Sweden have comparatively strong protection standards, border countries such as Italy and Greece continue having relatively weak asylum systems and are unable to receive and accommodate larger numbers of asylum applicants. Moreover, also some of the Central Eastern European Member States that joined the EU since 2004 have only a recent history of receiving refugees. Their asylum systems clearly do not provide the same level of protection to asylum-seekers and refugees as Member States that have a longer history in this area. The maltreatment of asylum-seekers in Hungary, which entailed the unilateral suspension of the Dublin Regulation by Germany in late August 2015, is a point in case (Euractiv, 2015).

Drawing on two earlier publications (Zaun, 2016, 2017), this contribution aims to address the puzzle why EU asylum policies are still largely diverse after almost two decades of EU asylum harmonisation. Special focus will be given to the first phase of the CEAS (1999–2005) when the foundations for today's policies were laid. I argue that incomplete harmonisation can be explained by the fact that *only* a small group of Member States, whom I call 'strong regulators', have actively shaped the harmonisation negotiations. Key to their success were their (relatively) smoothly and efficiently working administrations and their strong administrative capacity. Having received the largest shares of asylum-seekers prior to the negotiations, their administrations had built credible expertise from the large amount of asylum cases they had processed. During the negotiations these comparatively efficient administrations were able to use their regulatory expertise to build strong and well-informed positions. Hence, strong regulators such as Germany, the Netherlands, Sweden, the United Kingdom or France were well equipped for the negotiations. Member States that did not possess these capacities (weak regulators) were

unable to build this expertise. At the time, most of these weak regulators, especially Italy and Greece, received only very few asylum applications and had little experience in the area. However, even with application numbers rising significantly in these countries after the so-called 'Arab Spring' in 2011, they were not able to leave a substantial mark on the legislative instruments of the second phase of the CEAS (2008–2013) either. Given their low levels of administrative capacity, these countries were unable to build credible expertise and were hence largely sidelined.

The dominance of strong regulators in the negotiations eventually can also explain why EU asylum policies did not lead to substantive policy-change in the Member States. Strong regulators had effectively influenced EU directives with the aim of avoiding any pressures to change their domestic policies. Weak regulators had little influence on EU legislative output in the area, given their low levels of regulatory expertise and administrative capacity. They also faced severe difficulties when implementing EU asylum policies domestically, precisely due to their low levels of administrative capacity. While on paper EU Member States had at least achieved harmonisation of some degree, in practice, policies remained largely diverse.

The structure of this chapter is as follows: In the next section, I will briefly present the state of the art on the research on EU asylum policy harmonisation to point out the research gap that my research addresses. Subsequently, I will present the theoretical argument of this contribution, which is based on misfit and regulatory competition. In the fourth section, I will then describe the legislative outputs and the domestic implementation outcomes of the three core directives (first phase CEAS), namely the Reception Conditions Directive, the Qualification Directive, and the Asylum Procedures Directive. To illustrate some of the underlying dynamics, special focus will be given to three examples from the Reception Conditions Directive, namely *freedom of movement*, *access to material reception conditions*, and *withdrawal of reception conditions in case of late application*. I will show that indeed EU legislative output mainly represents the standard previously present in the strong regulators and that weak regulators had to adopt significant changes through EU legislation (which they were often unable to implement). In the fifth section, I will then provide an explanation for the dominance of strong regulators in EU asylum policy-making and for the implementation deficit among the weak regulators, based on misfit and regulatory competition. The conclusion will summarise the findings and draw lessons for the 2015/2016 crisis situation.

The state of the art on EU asylum harmonisation

Research on EU refugee policies can be divided around two dimensions, an external and an internal dimension. Scholars investigating the external dimension of EU refugee policies mainly investigate the impact of these policies on third countries and the rights of refugees and migrants who are the addressees of these policies (see for instance Acosta Arcazo and Geddes, 2014; Lavenex and Uçarer, 2003) as well as the impact of potential power asymmetries on policy outcomes (Betts and Milner, 2006; Greenhill, 2016). Research on the internal dimension of EU refugee policies usually revolves around three main questions. Early research on EU asylum policies asked why EU asylum policies were communitarised. This was explained either through neofunctionalist pressures (Niemann, 2006), strategic venue-shopping (Guiraudon, 2000; Bigo, 1996, see below) or the fact that intergovernmental cooperation led to regulatory competition and thus a very uneven distribution of asylum-seekers across Europe (Barbou des Places, 2003; Stetter, 2000). A second branch of the literature asks whether EU asylum policies are liberal or restrictive and why this is so. A third branch tries to explain why responsibility-sharing initiatives have had little success so far. Thielemann (2003), Thielemann and Dewan (2006) and

Thielemann and El-Enany (2010) most prominently argue that responsibility-sharing initiatives have been unsuccessful, given the collective action problems that characterise cooperation on refugee protection. They argue that refugee protection is a collective good and therefore non-rivalrous and non-excludable. This implies that even states that do not actively contribute to refugee protection through hosting refugees, still benefit from the security and stability thus produced. This incentivises states to free-ride rather than actively contribute to refugee protection. These findings for the European level also resonate with the debate about global responsibility-sharing, which comes to similar conclusions. Scholars investigating global responsibility-sharing have usually explained unsuccessful attempts at responsibility-sharing with the help of the Prisoner's Dilemma (Noll, 2003; Suhrke, 1998). In this game, two states have the choice to cooperate or defect on responsibility-sharing. Their collectively optimal strategy would be to cooperate, but their individually optimal strategy is to defect, because they would be worse of if they cooperated and the respectively other state did not cooperate. This leads to a situation where both states defect. Betts, however, has argued that instead global responsibility-sharing can be better explained through the Suasion Game (2009), because there is usually a power asymmetry between states that already host refugees and want to redistribute these through responsibility-sharing initiatives and states which would have to take additional refugees under these schemes. Drawing on Betts, Zaun (2018) has recently argued that also the failure of a permanent refugee quota system can also be explained through the Suasion Game. While the EU has not yet developed a genuine responsibility-sharing mechanism, *de jure* most of the responsibility for processing asylum applications rests with the border countries. According to the Dublin Convention, which was decided in 1990 and implemented in 1997, the first country of entry is usually responsible for an asylum-seeker – unless other factors intervene, such as family members of the applicant being present in another Member State or a visa being granted from another Member State. The Dublin Convention was replaced by the Dublin Regulation in 2000 (Council, 2000a) after the partial communitarisation of EU asylum policies in the Amsterdam Treaty. Thielemann and Armstrong (2013) explain the border countries' agreement to the Dublin Convention through a package deal: border countries were only allowed to join the Schengen area if they also agreed to the Dublin Convention. This contribution focuses on EU asylum harmonisation and discussions on whether EU asylum policies are liberal or restrictive and why this is so. Early attempts to harmonise asylum policies in the European context date back to the London Resolutions and several Joint Positions/Council resolutions in the early and mid-1990s. The London Resolutions of 1992, for instance, aimed to harmonise asylum policies by establishing criteria for manifestly unfounded applications (Council, 1992a), a common understanding of the notion of 'host third countries' (Council, 1992b) and conclusions on countries in which there was generally no risk of persecution (Council, 1992c). A Joint Position on the reception conditions for asylum-seekers was being debated in the 1990s, but the Council was not able to agree on it (Zaun, 2017, pp. 74). The Joint Position on the harmonised application of the definition of the term 'refugee' (Council, 1996a) and even more so the Council Resolution on minimum guarantees for asylum procedures (Council 1996b) only laid down very general ideas, as practices between Member States largely diverged. Especially the London Resolutions were considered largely restrictive (e.g. Guiraudon, 2000; Lavenex, 2001; Vink, 2005). Some scholars provide an explanation for the intergovernmental adoption of these restrictive policies. Guiraudon (2000) and Bigo (1996), for instance, explain these restrictive policies as the result of venue-shopping dynamics: restrictively-minded Interior Ministers chose the EU level to circumvent domestic liberal veto players by adopting restrictive policies in a purely intergovernmental setting. When implementing these policies domestically, the Ministers would not need to consult their liberal veto players and thus had much more leeway than

they had in domestic policy-making. Focusing on a similar period, Lavenex (2001) and Vink (2005) investigate EU asylum policy from the perspective of Europeanisation. Both authors investigate how Member States, France and Germany in the case of Lavenex and the Netherlands in Vink's analysis, implement European intergovernmental decisions domestically. They find that domestic implementation largely concurred with domestic demands and were much less driven by European level politics and policies per se.

The first scholars to investigate EU asylum harmonisation after its partial communitarisation with the Treaty of Amsterdam were Law scholars. These scholars were mainly interested in whether EU asylum legislation and particularly the Qualification Directive (Council, 2004), the Reception Conditions Directive (Council, 2003) and the Procedures Directive (Council, 2005), complied with international human rights and particularly refugee law (e.g. Baldaccini *et al.*, 2007; Battjes, 2006; Peers and Rogers, 2006). Generally, most of them concluded that EU asylum law implied severe human rights violations. They thus expected that EU asylum law probably represented the Member States' lowest common denominator and that they would lead to a race to the bottom in protection standards domestically. Some of these scholars therefore also investigated how EU legislation was transposed domestically and whether Member States restricted or liberalised domestic policies (e.g. Odysseus, 2006, 2007; Zwaan, 2007, 2008). While none of these studies systematically compared all Member States and all three core directives, they provided a much more mixed picture than scholars initially expected. EU asylum policies did not usually lead to policy restrictions, but to both restrictions and liberalisations. Additionally, very often Member States did not change their policies at all to comply with EU directives.

Soon, Political Scientists became interested in why the expected lowest common denominator and race to the bottom dynamics had not occurred (Thielemann and El-Enany, 2011). First attempts to explain policy liberalisation based on empirical analysis ascribed them to increasing levels of communitarisation of asylum policies through the Amsterdam Treaty in 1999 and the Lisbon Treaty in 2010 (Kaunert, 2009; Kaunert and Léonard, 2012; Thielemann and Zaun, 2018; critical of this view are: Ripoll Servent and Trauner, 2014). These developments have either been attributed to processes of juridification resulting from enforceable EU legislative instruments being adopted (Kaunert and Léonard, 2012) or to the increased competences of EU institutions. As non-majoritarian institutions, these do not have to respond to populist pressures, which allows them to promote more balanced positions than national governments (Thielemann and Zaun, 2018; see also Kaunert, 2009).

While standards beyond the lowest common denominator after the Lisbon Treaty (EU, 2007) can thus be explained, they still remain puzzling in the post-Amsterdam Treaty (EU, 1997) phase, which is the first phase of the CEAS. Although policies were partly communitarised, allowing the EU to pass legislation, this legislation was generally passed in a rather intergovernmental setting. At that time, decisions in the Council were taken under unanimity, the Commission shared the right to initiative with the Member States, and the European Parliament was only consulted and not a co-legislator.[1] Under these conditions Interior Ministers were still able to negotiate with very little interference. Had they been interested in restricting domestic legislation through EU policy, they would still be able pursue this strategy in the *post*-Amsterdam setting. Under these conditions, lowest common denominator output at the EU level and domestic restrictions during the implementation of these policies would have been likely. The venue-shopping argument obviously could not be easily reconciled with empirical findings post-Amsterdam. I argue that this is because, generally, Member States have a preference for preserving their policies and try to avoid policy-change through EU legislation that is associated with costs. Instead, they try to influence EU legislation by 'uploading' their national status quo

to avoid pressures for change resulting from misfit between EU and national policy. However, strong regulators were more effective in doing so, given their significant expertise. Standard upgrades have thus been mainly achieved among the weak regulators that were unable to influence EU legislation. However, these have only upgraded their standards on paper but not in practice, which explains the large degree of diversity between asylum policies in Europe (Zaun, 2016, 2017).

Theorising the power of strong regulators

The theoretical model which I draw on in this contribution is an adapted version of the so-called 'misfit and regulatory competition model' in Europeanisation research, which has been applied to EU environmental and safety at work policies (Börzel, 2002; Eichener, 1997; Héritier, 1996).

The key idea of this model is that most of the times states do not want to change their policies, but to preserve their status quo. In order to prevent potential 'misfit' between EU and domestic policies that would entail pressures for change, states usually try to influence EU legislation, often from the agenda-setting phase on. Some Member States, however, are generally better at doing so than others. Strong regulators are usually more effective in influencing EU legislation than weak regulators. Strong regulators are countries with high levels of bureaucratic capacity (here measured through the World Bank Government Effectiveness Index from 2000; see Kaufmann *et al.*, 2010). When they receive large numbers of asylum applications (exposure), strong regulators can build credible regulatory expertise and precedent (see Figure 25.1). Since

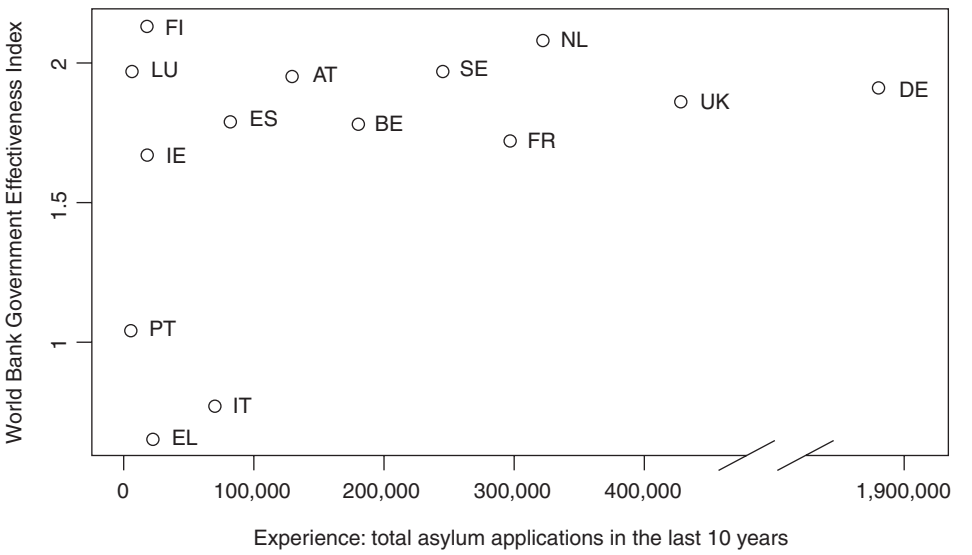

Figure 25.1 Strong and weak regulators in asylum policies in 2000

Source: Eurostat, 2013; Kaufmann *et al.*, 2010.

Legend
AT: Austria; BE: Belgium; DE: Germany; EL: Greece; ES: Spain; FI: Finland; FR: France; IE: Ireland; IT: Italy; LU: Luxembourg; NL: Netherlands; PT: Portugal; SE: Sweden; UK: United Kingdom.

I am interested in the expertise Member States had at the beginning of the negotiations of the first phase of the CEAS in 2000, I operationalise exposure through the number of asylum applications a state has received ten years prior to the negotiations. Of course, strong and weak regulators are poles of a continuum and it is hard to draw a clear line, determining where strong regulation ends and weak regulation begins. However, one can see tendencies. Germany, the UK, the Netherlands, France, and Sweden tend more towards the strong regulating end. Italy, Greece and Portugal are obviously on the weak regulating end. A couple of other Member States[2] take a middle-ground position and can be defined as medium regulators. Medium regulators can be expected to act sometimes more like strong regulators and at other times more like weak regulators.

Being strong regulators helps states influence EU policy-making in two ways (Zaun, 2017, pp. 41–51). First, given their high numbers of asylum applications, strong regulators usually have a stake in the issue. Their effectively working administrations turn this into clearly defined and strong positions that they defend in the Council. They know exactly what they want and they are ready to fight for it. Weak regulators lack these capacities. At the same time, strong regulators have the already bespoken expertise. Their effectively working administrations are able to turn this expertise into well-informed positions that have weight in the negotiations. Strong and informed positions are two sides of the same coin: to defend a position strongly, states need to have a (informed) position in the first place. Weak regulators are unable to develop the same degree of positionality. Even if they face higher numbers of asylum applications, they will not adopt strong positions as their weak administrative systems are unable to deliver them. And as they do not have significant regulatory expertise to begin with, they only advance weakly informed positions in the negotiations. Strong regulators are therefore likely to dominate the EU level decision-making processes at all stages. They will try to influence the agenda-setting phase and define the issue at stake. They will then also try to 'upload' their regulatory model to the EU level and introduce it into EU legislation during the Council negotiations. Having previously defined the issue at stake, their solutions should usually be a good fit for the problem defined. When minimum standards are adopted, as they were in the first phase of the CEAS, strong regulators adopt two different strategies, depending on whether they have more liberal or more restrictive policies as compared to other Member States. In case they have more restrictive policies in place, strong regulators need to influence EU legislation to avoid misfit. If their standards are more liberal, however, they can accept other strong regulators introducing their restrictive standard into EU legislation, as a directive laying down minimum standards still allows them to preserve their more liberal standard.

In the implementation phase, strong regulators do not face substantial misfit pressures. Where necessary, they have influenced EU legislation so that it allows them to maintain their regulatory approach. Weak regulators on the other hand remain relatively passive both at the agenda-setting and the policy formulation phase. They subsequently phase immense misfit pressures when having to implement EU policies. Given their weak regulatory systems, they are unable to make the necessary adjustments and are hence incompliant with EU legislation.

EU asylum policies: the lowest common denominator of the strong regulators entailing little policy-change

In this section, I will demonstrate that there is empirical support for the misfit and regulatory competition model from comparing Member States' *status quo ante* with the EU level legislative output on the one hand and domestic implementation of EU policy on the other hand.

EU asylum policies represent the lowest standard present among the strong regulators, while the standard provided by the weak regulators is often surpassed by EU legislation. This is illustrated by Table 25.1, which addresses three highly contested issues from the Reception

Table 25.1 Three core issues reception conditions directive (before and after transposition of the directive)

	Freedom of Movement: May Be Restricted		*Access to Material Reception Conditions: Provided*		*Withdrawal of Reception Conditions if Application Is Late: Yes*	
	Before TP	*After TP*[1]	*Before TP*	*After TP*[2]	*Before TP*	*After TP*[3]
Austria	Yes	Restricted[4]	Yes	Yes	No	No
Belgium	Yes	Yes	Yes	Yes[5]	No	No
Finland	Yes	Yes	Yes	Yes	No	No
France	Yes	Yes	Yes	Yes	No	No
Germany	No	No[4]	Yes	Yes	No	No
Greece	Yes	Restricted[4]	No	Yes[6]	No	Yes
Italy	Yes	Yes	No	Yes[6]	No	No
Luxembourg	Yes	Yes	Yes	Yes	No	No
Netherlands	Yes	Yes	Yes	Yes	No	No
Portugal	Yes	Yes	Yes	Yes	No	No
Spain	Yes	Yes	Yes	Yes	No	No
Sweden	Yes	Yes	Yes	Yes	No	No
United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes

Notes

1 Sources: Odysseus (2007: 45).

2 Sources: Odysseus (2007, p. 32); for Greece: ECtHR (2011); European Database of Asylum Law (EDAL) (2014); for Italy ECtHR (2014), Electronic Immigrant Network (2014), Schweizerische Flüchtlingshilfe/Juss-Buss (2011: pp. 5, 27).

3 Sources: Odysseus (2007: 51–52).

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

5 Access to health care is only granted to asylum-seekers holding a valid asylum-seeker card.

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

Conditions Directive, namely *freedom of movement*, *access to reception conditions* and *withdrawal of reception conditions*. The restriction of freedom of movement adopted in the directive represents the standard of strong regulator Germany, which at that time restricted freedom of movement of asylum-seekers as part of its *Residenzpflicht*. The introduction of an obligatory access to material reception conditions reflects previous practice in all Member States, except for the weak regulators Italy and Greece. Although under unanimity vote in the Council no Member State could be outvoted, these Member States obviously agreed to a practice that exceeded their previous level of protection and consequently implied additional costs. The withdrawal of reception conditions in case an application arrives late was a policy only followed by strong regulator UK previously (and ruled unlawful by the House of Lords shortly after the Reception Condition Directive was adopted, see Odysseus, 2006, pp. 51–52). Although no other Member State applied this practice previously, strong regulator UK managed to get this practice accepted by EU law by way of negotiating this policy into the Reception Conditions Directive. In a nutshell, strong regulators seem to be able to get their policies accommodated by EU law, even if they are the only Member State following this approach, whereas a team of two weak regulators is unable to block policy which is out of line with its domestic approach (see Zaun, 2017, pp. 80–97).

Most Member States that had more liberal standards in place domestically than required by EU legislation persevered them when implementing EU asylum policies. For instance, except for Greece no other Member State introduced the restrictions of *freedom of movement* or a *withdrawal of reception conditions in case of late applications* allowed by the directive. Greece arguably did so because it had to adopt several liberalisations and thus needed to save costs (see Zaun, 2017, pp. 230–231). However, overall, the adoption of EU asylum policies entailed a lot more policy liberalisations than restrictions. Out of 248 decisions taken, Member States opted for policy-change in only 47 instances. The status quo was maintained in 201 cases, which is 80 per cent. In 76 instances, this was even true were the domestic standard exceeded the standard of the directive. While 30 of these changes were liberalisations, 17 changes resulted in restrictions. Interestingly, in 16 cases liberalising changes meant the adoption of a standard that exceeded the one required by the directive (Zaun, 2017, pp. 98–99). Strong regulators did not have to adopt substantial changes, as they had previously been able to upload their policies to the EU level. Only weak regulators faced pressures to change their policies. However, as the case of *access to material reception conditions* shows, countries like Italy and Greece were able to do so on paper but failed to do so in practice (Schweizerische Flüchtlingshilfe/Juss-Buss, 2011; UNHCR, 2007; Zaun, 2017, pp. 2016–218).

Explaining EU policy output: the power of strong regulators

Process-tracing (Beach and Brun Pederson, 2013; Rohlfing, 2012, pp. 150–167) of the negotiations (Zaun, 2017, pp. 124–176) on the three directives shows that in the majority of cases indeed all Member States tried to 'upload' their *status quo ante* policy. This refutes the venue-shopping thesis, as it indicates that Interior Ministers did not use EU level policy to change domestic policies. Instead, it provides support to the misfit and regulatory competition model. Strong regulators played a prominent role in shaping the debates in the Council, while weak regulators were rather passive. This can explain why EU asylum policies represent the lowest common denominator of the strong regulators, while the standard provided by weak regulators was often surpassed.

The European Commission and the European Parliament (EP) remained background actors in the negotiations, which is related to the low level of communitarisation at the time. As decisions in the Council were taken under unanimity and each Member State had a veto, the

Commission needed to accommodate every Member State ready to defend its position. If it wanted any policy to be adapted, it eventually had to accept the watering-down of all three of its legislative proposals. As the *raison d'être* of the Commission is to initiate EU policy, it had a strong preference for any EU policy being adopted. It was hence in a weaker bargaining position vis-à-vis the Member States, which were more patient in this regard and for whom no EU policy was still better than policy that run counter to their preference (of preserving their national legislation). Under consultation procedure, the EP was in a rather weak position as well, as the Council could (and did) widely ignore the EP's positions. As it could not leave a mark on policy, it took very strong humanitarian stances to make itself heard. These positions, however, did not find any support in the Council, which explains why the EP's positions and the legislative output differ hugely (Zaun, 2017, pp. 176–183).

Strong regulators have put asylum policies on the EU's agenda and thus framed the debates from the early on. After unsuccessful attempts to harmonise asylum policies through intergovernmental agreements throughout the 1990s, a group of strong regulators including Germany, Sweden, the UK, France, and the Netherlands promoted the idea of harmonising asylum policies across Europe through EU regulation (Stetter, 2000; Zaun, 2017, pp. 64–71, 183–189). Having been top recipient countries of asylum-seekers during the 1990s, these countries thus hoped to ensure a more even distribution of asylum-seekers across Europe. If all Member States provided the same protection standards to them, asylum-seekers would no longer favour certain Member States over others, these countries hoped. Although the impact of the generosity of asylum policies on asylum-seekers' destination choice is highly contested (see Thielemann, 2006), strong regulators at the time clearly assumed that weak regulators did not receive a comparable share of asylum-seekers because of the absence of any asylum regulation in these countries. But interestingly, many of the strong regulators also considered their own regulatory system as the most generous among the strong regulators, only to find out during the negotiations that this perception was erroneous (Zaun, 2017, pp. 183–189). Having defined the unequal distribution and 'secondary movements' of asylum-seekers towards Northern European Member States as the problem to be addressed (e.g. Council, 2000b, p. 3), strong regulators were subsequently better able to 'upload' their regulatory model than weak regulators whose non-regulation of asylum was defined as a part of the problem.

In the subsequent negotiations, both strong and weak regulators tried to influence EU legislation by 'uploading' their national policies (see also Ackers, 2005, p. 32). Liberal strong regulators did not try to restrict their domestic policies through EU legislation. The negotiations show that, for instance, the Netherlands and Sweden, which treated refugees and subsidiary protection holders equally, also promoted this approach at the EU level. While they expected to benefit from more liberal policies on this issue being adopted in countries with currently lower levels of protection, they did not try to impose their policies onto the others in the negotiations. The reason is that they could still preserve their higher standard, because only minimum standards were adopted. They hence had less to lose than restrictive strong regulators, which would have faced pressures to change their policies, if they had agreed to the adoption of more liberal policies than their national ones. Restrictive strong regulators therefore fought harder to have their *status quo ante* accommodated. Weak regulators on the other hand remained relatively passive and did not fight for their positions to be accommodated, even if they had initially presented them in the discussions (Zaun, 2017, pp. 189–193).

The negotiation success of the restrictive strong regulators and the weak regulator's incapacity to influence EU legislation can be related to their positionality, i.e. the intensity and the quality of their positions. Strong regulators defended their positions more vigorously, adopting strong positions. They were even ready to defect from cooperation if necessary. Some Ministers

of strong regulators were ready to veto a directive altogether if their positions were not accommodated (Interview IM_DE_1). This is also supported by the following state of a Member of the German delegation:

> There were only two or three states [supporting us on the issue], but that left us unimpressed, because this was a demand which also the Minister brought forward on the highest level. The presidency soon understood that they were not able to change our position by putting us under pressure just a little bit.
>
> *(IM_DE_1)*

Italy and Greece on the other hand adopted much more flexible positions and did not fight them through. One case in point is that of Italy and Greece opposing the idea of material reception conditions for asylum-seekers. Material reception conditions were alien to their national regulatory approach, as both countries do not even provide social benefits for their unemployed citizens. However, in the course of the negotiations they gave up on this issue without receiving any compensation in exchange (Zaun, 2017, pp. 125–142, 198–200).

In addition to defending their positions more vigorously, strong regulators also advanced positions that were better informed. Observers and participants of the negotiations suggest that Germany, France, Sweden, the UK and the Netherlands had well-developed legislation, which served them as a basis for their positions during the negotiations:

> The top […] asylum destination countries […] have been working on these issues for a very long time. They are experienced, and their systems are robust. I mean Germany, France, the Netherlands, the UK, Sweden have asylum systems which are fully respected.
>
> *(Interview PermRep_UK)*

Having been applied on a daily basis, their regulations are tried and tested:

> […] our rules are the result of extensive experience and […] a trialogue between the three powers. The government proposes [a law], the legislature passes it and amends it already. And [in case of a review in court] the courts [either] approve it or it is amended again. And if you have such a rule, then it's tried and tested and you can rely upon it.
>
> *(IM_DE2)*

In addition to being able to draw on concrete regulation, strong regulators also had smoothly working administrations, which could turn regulatory expertise into sound positions. One observer of the negotiations referred to this, suggesting that 'some administrations are better than others', with the good ones being 'very well prepared, very effective' (Interview COM 1). Proposals advanced by weak regulators on the other hand were considered less convincing, because they were less routed in long-standing experience with refugees and asylum-seekers. Their positions were often unspecific and formulated ad hoc, as the following comparison of a representative from a strong regulator shows:

> Our position in the negotiations was so specific since we have a rather dense regulatory framework on asylum. Other states did not have that. They could be more passive, as they did not have a corresponding national provision concerning some of the Commission's proposals.
>
> *(Interview IM_DE2)*

As weak regulators had less informed positions or only adopted positions towards the end of the negotiations (Interview IM_DE1), these states had more difficulties to influence EU legislation and often left no mark on it (Zaun, 2017, pp. 192–204).

(Non-)implementing EU legislation

After having explained why only strong regulators have been able to influence EU legislation, I will now turn to the explanation of the low level of harmonisation of asylum policies across the EU. As I have suggested above, policy stasis generally prevails over change in the implementation of EU asylum directives.

For states with more liberal policies than those of the directives, this can be explained by the fact that EU directives of the first phase of the CEAS only provide minimum standards and thus allow for the provision of more liberal standards. Generally, these states did not opt for a restriction, because they valued their current national approach and did not intend to change it. This is also underlined by following statement on the implementation of the Asylum Procedures Directive in the Netherlands:

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

Like Member States with a more liberal policy, restrictive strong regulators did not face substantial misfit in the implementation phase. Having uploaded their restrictive practices with the purpose of maintaining discretion for these practices, restrictive strong regulators did not need to change their policies to be compliant. In the few instances where strong (or medium) regulators adopted policy-change when implementing any of the three directives, this change generally occurred in response to a domestic demand and was either based on domestic legislative processes or the result of a Member State copying practices applied in other Member States (Zaun, 2017, pp. 230–231).

Weak regulators such as Italy and Greece faced substantial misfit pressures, as they had to introduce asylum systems almost from scratch, which included the systematic provision of housing, free legal aid and other forms of material reception conditions (Olivetti, 2008, p. 183). This proved to be a challenge for these countries, particularly given their low levels of administrative capacity. While these states hence complied with EU law on paper, they were unable to do so in practice. While Italy's and Greece's non-compliance with the Dublin Regulation has often been associated with strategic 'wave-throughs' (Costello and Mouzourakis, 2016), non-implementation of the three directives is less strategic and instead a question of insufficient administrative capacity. In contrast to the Dublin Regulation, which clearly disadvantages border countries, weak regulators partly saw benefits in filling domestic regulatory gaps through EU legislation, as the case of Italy shows. With rising numbers of asylum applications since the late 1990s, Italy saw a stronger need to adopt secondary legislation on the issue in the early 2000s. However, with national elections coming up, politicians feared the potential electoral costs of legislating on such a contested issue and therefore preferred EU legislation stepping in (PLS Ramboll, 2001, p. 22; Zaun, 2017, p. 187).

Conclusion

The 2015/2016 so-called 'refugee crisis' has shown that even after almost 20 years of EU asylum harmonisation practices between Member States differ widely. Strong regulators have tried to use EU policy harmonisation as a tool to ensure a more equal distribution of refugees across the EU. However, while they wanted to raise the protection standards in weak regulating and other strong regulating countries, they were not ready to change their own standards. Strong regulators therefore tried to have all their restrictive policies accommodated by EU directives to have the discretion to preserve them. This led to EU directives that were barely ambitious about the level of harmonisation that they aimed to achieve in the first place. However, in some of the weak regulating Member States, EU asylum directives could have potentially caused drastic changes. This was an ambitious aim to begin with. It became even more of a challenge for weak regulators, given the increased inflow of asylum-seekers and refugees they received subsequent to the first phase of the CEAS. Given the low level of administrative capacity, it proved unsuccessful.

Future reform of the CEAS will have to have to better account for the different capacities of Member States. Turning the EU asylum directives into regulations, as has been recently proposed by the Commission (European Commission, 2016a, 2016b) is unlikely to achieve the desired effects of immediate bindingness and higher levels of compliance. The reasons for non-compliance with EU asylum directives lie much deeper. Instead of being merely based on a lack of will, they result from systemic deficiencies.

Notes

1 This changed with the Lisbon Treaty, when the Parliament became a co-legislator, the Commission had the sole right to initiative, and decisions in the Council were to be taken under unanimity. Also the competences of the Court of Justice of the EU were significantly expanded with the Lisbon Treaty (see EU, 2007, art. 63).

2 The states addressed here are only the EU-15, as focus on the first phase of the CEAS which took place before/around the accession of ten new Member States in 2004.

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SECTION COMMENTARY

Asylum and international protection

Anne Wetzel

The four chapters in this section all describe the difficulties in establishing protection mechanisms for asylum seekers and refugees in Europe. This theme can easily be extended to the European post-communist and former Yugoslavian countries,[1] where the difficulties are even more severe. This section commentary takes up some of the main arguments from the chapters and puts them into a Central Eastern, Eastern, and South Eastern European perspective. Given the limited space, this will be done in a rather general manner. Nevertheless, it should be noted that refugee policy developed in quite different and puzzling ways in the post-socialist countries (cf. Shevel, 2011; Barnickel and Beichelt, 2013).

Post-socialist European countries as rule takers rather than rule makers

Phil Orchard's chapter on the historical development of refugee protection in Europe carves out the tensions between Western countries, in particular the United States, and the Soviet Union in establishing international rules and organisations on this issue. The long-term implications of the described historical trajectory will be addressed in this commentary. During the Cold War, the communist countries remained outside of the emerging refugee protection regime.[2] The Soviet Union 'viewed the UNHCR [United Nations High Commissioner for Refugees] as an instrument of the Western powers and of anti-Soviet propaganda' (Loescher, 2001, p. 51). It had never become a party to the 1951 Refugee Convention and the 1967 Protocol. It was only after the end of the Cold War that Russia, as the successor state, and other post-socialist countries acceded to the two treaties (for accession dates see Table A).

This sudden change resulted in a two-way shock. On the one hand, these countries did not have any working asylum and refugee protection schemes in place.[3] Knowledge about the UNHCR and the international refugee regime had been minimal in the region. Up until this point, they had been rather closed and had almost no experience with asylum seekers and refugees. On the other hand, becoming involved in the post-socialist space meant that the UNHCR was entering 'uncharted territory' and facing a completely new context (Loescher, 2001, p. 278). Thus, in comparison to Western European countries, which represented the majority of the signatories to the 1951 Refugee Convention,[4] post-socialist European countries were norm-takers who acceded to the Treaty around 40 years after its entry into force. This put the UNHCR in a very special and prominent position, which was much different from its role

Table A Accession of European post-socialist countries to the Convention relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967)

Albania	18 August 1992	Latvia	31 July 1997
Armenia	6 July 1993	Lithuania	28 April 1997
Azerbaijan	12 February 1993	Poland	27 September 1991
Belarus	23 August 2001	Republic of Moldova	31 January 2002
Bulgaria	12 May 1993	Romania	7 August 1991
Czech Republic	11 May 1993	Russian Federation	2 February 1993
Estonia	10 April 1997	Slovakia	4 February 1993
Georgia	9 August 1999	Ukraine	10 June 2002 (Conv.)
Hungary	14 March 1989		4 April 2002 (Prot.)

Source: UN (2017a and b).

in Western European countries. In the post-socialist countries, asylum and refugee policy had to be developed almost from scratch, and UNHCR was among the first to assist with this tremendous task.

Later on, migration and asylum policy became part of the Europeanisation process. As was the case with other parts of the European Union (EU) acquis, the countries included in the 2004, 2007 and 2013 EU enlargements had to adopt the EU's rules on migration and asylum that were valid at the time. The same is true for the current (potential) candidate countries. However, Europeanisation reaches further than that, as Petra Bendel's chapter shows. The EU has included migration and asylum issues in its external relations, such as in its Neighbourhood Policy. Adopting a conditionality approach, the EU offers visa facilitation and visa liberalisation in exchange for the signing of readmission agreements and adopting EU rules in the field of asylum, among other areas. While these rules leave room for customisation (i.e. the introduction of more liberal standards in national legislation than demanded by EU law), the post-socialist countries did not have an opportunity to shape these policies. Except for those countries that acceded to the EU, they remain mainly norm-takers. As such, the European role in creating rules on asylum and refugee protection, as well as in establishing the respective international organisations described by Orchard, is a *Western* European role. It is exceptional in the sense that no post-socialist 'counter-model' has evolved.

One problem of norm-taking from an institutional environment is that the rules to be adopted may conflict with existing efficiency criteria (however these are defined). In order to reconcile conformity to external standards of legitimacy and the deviating practice on the ground, structures may be decoupled (Meyer and Rowan, 1977). Presenting a façade of formally compliant laws and programmes to the outside world, policy actors do not change their behaviour but instead continue to act according to established procedures. This leads to the chapter by Natascha Zaun, who points out the existing gap between rule adoption and rule implementation in some EU member states. This divergence is a problem not only among EU member states; it also applies to the EU's Eastern and South Eastern neighbours (Freyburg *et al.*, 2015).

The problem of limited state capacity

Zaun's chapter addresses states' administrative capacity as a major obstacle to the harmonisation of EU asylum policies. In brief, the chapter argues that EU countries with a weak regulatory

capacity differ from 'strong regulators' in a couple of ways: (1) They receive fewer asylum applications, (2) exert less influence on harmonisation negotiations, (3) face a larger policy misfit after decisions have been taken, and (4) are less capable of implementing the new rules. In fact, parts of this argument can be extended to the post-socialist countries. Based on the same data source that Zaun used, Figure A shows the differences in government effectiveness between Western EU countries (EU-W), Eastern EU countries (EU-E), (potential) EU candidate countries (EU-C), and Eastern neighbours (EU-0). The scale ranges from –2.5 (weak) to +2.5 (strong).

Limited governance capacity is a major hindrance for the development of adequate asylum procedures and protection schemes in post-socialist countries. For two and a half decades, states and international organisations have continuously tried to enhance the protection capacity through institution-building, the provision of office equipment, training, informal working relationships, visits etc. In the early 1990s, '[c]apacity-building … tended to be the main activity for the eight UNHCR offices in Central Europe' (Crisp, 1996). A little bit later, capacity-building became an issue in the Eastern and South Eastern countries as well (Crisp, 1996; UNHCR, 2000). These efforts are ongoing, as recent projects such as the EU-funded and UNHCR-administered 'Quality Initiative in Eastern Europe and South Caucasus I and II' (2013–2017) show. With regard to the Western Balkans, asylum issues are mentioned, among other efforts, in the EU's Multi-Country Indicative Strategy Paper 2014–2020 on the Instrument of Pre-Accession Assistance (European

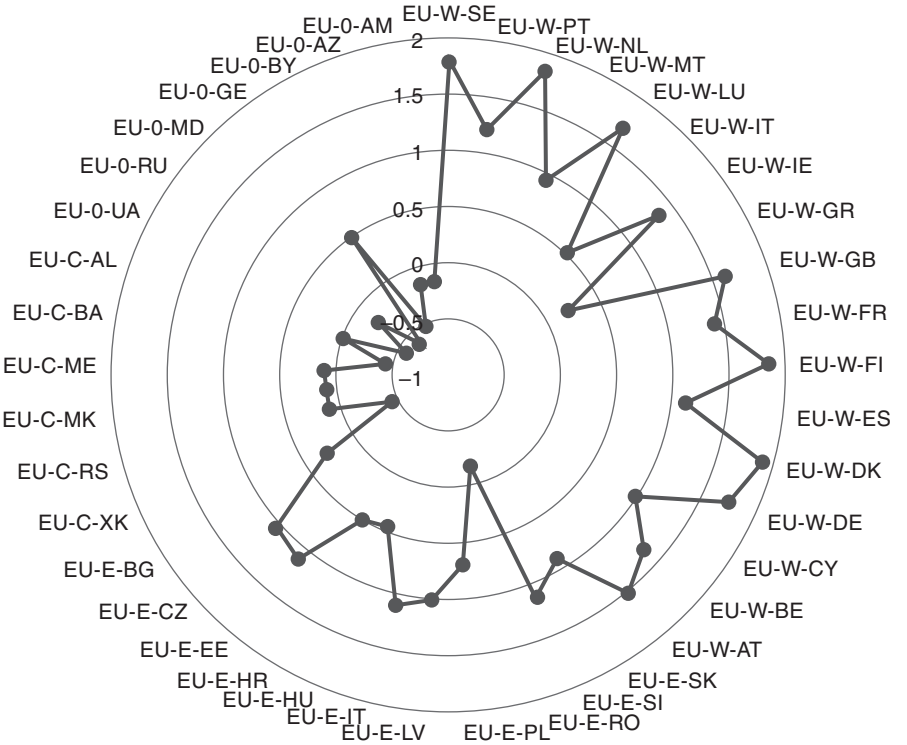

Figure A The Worldwide Governance Indicators, Government Effectiveness, Estimates 2016 (WGI 2017), for country codes see www.iso.org/obp/ui/#search/code/

Commission, 2014, p. 16). Thus, the consequences of limited state capacity for asylum and protection are an issue in both Western and Eastern/South Eastern Europe, even though in the case of the latter the problem is much more severe.

Public opinion towards refugees

It would be short-sighted to trace back the implementation problems in the fields of asylum and protection solely to limited state capacity. An additional factor that reflects the East–West divide mentioned in the chapter by Joanne van Selm on European refugee policy is the lack of political priority for refugees at the government level, as well as the public's disinterest in this issue, in many post-socialist countries. This also resonates with Bendel's reference to the increased polarisation between Western European countries and the 'Visegrad group', which consists of the Czech Republic, Hungary, Poland and Slovakia. When comparing the data from the European Social Survey on the question of how generous the government should be in judging applications for refugee status, the post-socialist countries included in the survey are, on average, more sceptical than the Western European countries. Of course, this should not hide the fact that there are huge differences among the Eastern and Western countries, as the examples of the Netherlands or Poland show. The Polish case also shows that attitudes are complex even within single countries. Whereas many Poles are favourable towards the acceptance of refugees from Ukraine, they have become less favourable towards migration from the Middle East and Africa (CBOS, 2016, pp. 5, 7).

Overall, however, according to the European Social Survey, Eastern European countries are less open towards immigrants with a different background. When asked whether to allow immigrants who are of a different race or ethnic group compared to that of the majority of the respective country, on average 7.6 per cent of respondents from the included post-socialist countries were in favour of allowing many (18.2 per cent on average in the Western European countries), 28 per cent were in favour of allowing some (vs. 49.7 per cent), 40.7 per cent were in favour of allowing few (vs. 24.9 per cent) and 23.7 per cent replied that none should be allowed (vs. 7.3 per cent).[5]

The East–West divide and the polarisation of positions referred to in van Selm's and Bendel's chapters are also reflected in a 2016 Eurobarometer survey. Concerning the statement that 'Our country should help refugees', only Croatia (where 69 per cent agreed and 27 per cent disagreed; the rest 'don't know') was above the EU-28 average (63 per cent agree, 30 per cent disagree) with regard to agreement. All other Eastern enlargement countries rank below the EU average (European Commission, 2016, p. 49).[6] Thus, taking van Selm's chapter as a point of departure, one could ask whether European refugee policy will come into existence in the near future. A recent title of an Economist article on how '[o]pposition from Eastern Europe threatens to scupper refugee reforms' (*Economist*, 2017) succinctly summarises the pessimist outlook on that issue.

Conclusion and perspectives

To conclude, Western migration concepts are relevant for the post-socialist countries. They represent the templates on which post-socialist states have modelled their migration policies, partly with the help of incentives and active support from Western actors. The issue of state capacity illustrates that problems that exist in some Western European countries are also an issue in the post-socialist space. Any solutions would thus be relevant for this region as well. On the other hand, the past years have shown an alienation between Western and many post-socialist

Table B European social survey, ESS8–2016, ed.1.0, row percentage, population size weight, design weight (ESS 2016)

The government should be generous judging applications for refugee status	*Agree strongly*	*Agree*	*Neither agree nor disagree*	*Disagree*	*Disagree strongly*	*Total*	*N =*
Country							
Austria	6.6	20.7	23.1	27	22.7	100	730
Belgium	9.9	20.5	19.5	33.4	16.6	100	935.8
Switzerland	7.1	29.3	28.7	26.7	8.3	100	702.1
Germany	6.1	21.1	23.8	36.5	12.4	100	7,085.9
Finland	8.3	29.8	32.1	23.9	5.9	100	454.4
France	23.9	30.4	18.7	14.6	12.4	100	5,369.2
UK	11.5	39.3	25.8	18.9	4.4	100	5,319.4
Ireland	11.4	49	18.8	15.5	5.3	100	358.8
Israel	5.6	15.7	29.3	29.2	20.3	100	582.6
Iceland	15.6	41.6	26.4	12.8	3.5	100	26.1
Netherlands	1.4	15.3	16	52.1	15.2	100	1,407.3
Norway	12	43.5	24.5	15.9	4	100	425.8
Sweden	10.1	38.1	34.8	14.1	2.9	100	796.1
Total Weighted Average West	11.5	28.5	23.2	26.1	10.7	100	24,193.5
Czech Republic	2	9.9	18.7	30.5	39	100	865.2
Estonia	2.1	10.8	19	43.9	24.2	100	108.9
Poland	7.5	39.4	32.4	16	4.7	100	3,047.5
Russia	2.3	13.4	31.7	26.4	26.3	100	11,461.1
Slovenia	3.7	23.6	28.9	34.4	9.4	100	172.4
Total Weighted Average East	3.3	18.4	31	24.8	22.6	100	15,655.1

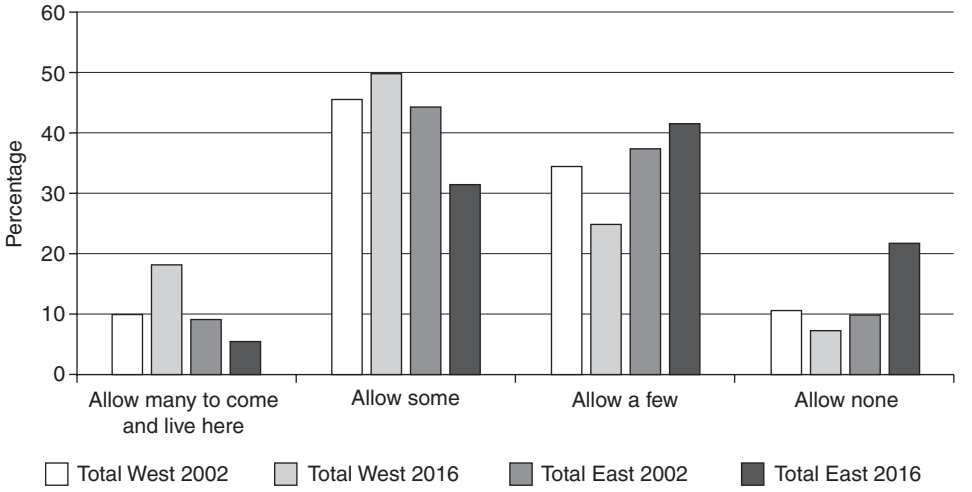

Figure B Averages of replies in Eastern and Western European countries included in both European Social Surveys (ESS 2002 and 2016), Population size weight, Design weight (EES 2002 and 2016)

states with regard to asylum and protection issues. A comparison of weighted averages for Western and Eastern European countries included in the European Social Surveys[7] 2002 and 2016 reveals an increasing polarisation of opinions, especially on allowing immigrants with a different ethnic background, which was the case during the 2015/2016 refugee crisis (see Figure B).

A similar tendency of negative attitudes towards the European refugee crisis and the subsequent policy responses can also be detected in Russian public opinion, even though this may reflect more general tensions between Russia and the West to some degree (Levada Centre and InterCentre, 2016, pp. 162, 168). Against this background of limited ownership of policy concepts, limited state capacity and a reluctant public opinion, it is questionable as to whether a comprehensive European refugee policy will be emerging soon.

Notes

1 For simplicity, in the following the chapter refers to European post-socialist countries.
2 In contrast, the former Yugoslavia had signed and ratified the Convention on 28 July 1951 and 15 December 1959, respectively, and had acceded to the Protocol on 15 January 1968 (UN 2017a, UN 2017b).
3 The right to asylum provided in the 1977 Soviet constitution was granted on an individual basis by decision of the presidium of the Supreme Soviet (Shevel 2011: 3).
4 Among the 19 signatories were: Austria, Belgium, Denmark, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Sweden, Switzerland, Turkey, and the UK. Today, there are 145 Parties (see https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en).
5 See ESS (2016), with population size weight and design weight; West: Austria, Belgium, Switzerland, Germany, Finland, France, United Kingdom, Ireland, Israel, Iceland, Netherlands, Norway, Sweden; East: Czech Republic, Estonia, Poland, Russian Federation, and Slovenia.
6 The values are: SI: 56 per cent 'agree' vs. 39 per cent 'disagree'; PL: 49/40; LT: 45/47; EE: 44/45; LV: 39/54; RO: 36/56; SK: 30/61; BG: 29/60; HU: 27/68; CZ: 21/71; rests to 100 per cent =

'don't know'. The two Western European countries below EU average with regard to agreement are France and Italy.

7 West: Austria, Belgium, Switzerland, Germany, Finland, France, United Kingdom, Ireland, Israel, Netherlands, Norway, Sweden; East: Czech Republic, Poland and Slovenia.

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PART VI

Labour migration in European context

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