
European Integration and Migration Policy: Vertical Policy-making as Venue Shopping

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Abstract

Since the beginning of the 1980s, migration and asylum policy in Europe has increasingly been elaborated in supranational forums and implemented by transnational actors. I argue that a venue-shopping framework is best suited to account for the timing, form and content of European co-operation in this area. The venues less amenable to restrictive migration control policy are national high courts, other ministries and migrant-aid organizations. Building upon pre-existing policy settings and developing new policy frames, governments have circumvented national constraints on migration control by creating transnational co-operation mechanisms dominated by law and order officials, with EU institutions playing a minor role. European trans-governmental working groups have avoided judicial scrutiny, eliminated other national adversaries and enlisted the help of transnational actors such as transit countries and carriers.

I. Introduction

Migration control is a domain rarely associated with ‘multi-level governance’ in the literature on the European Union (EU) (Marks *et al.*, 1996) since it remains an emblem of national sovereignty. Migration policy has never been confined to single national ministries since it has implications for a range of

policy areas, including labour, economics, foreign affairs and social affairs. In this respect, it has a transversal character. Decisions regarding the entry and stay of foreigners and refugees have traditionally been taken at the national level, even in federal states such as Germany where the *Länder* only implement federal laws. Therefore, migration control decision-making has tended to be horizontal. One must now add a vertical dimension, given that all levels of governance have acquired prerogatives in this area. In particular, policy elaboration and implementation have shifted upwards into the EU in the 1980s and 1990s.

To understand this evolution, I first ask whether the timing and character of the internationalization of migration control is congruent with existing EU theories. Second, I argue that it constitutes a response to the constraints that national migration policy-makers face. Drawing upon the literature on 'policy venues' (Baumgartner and Jones, 1993), I analyse the internationalization of migration control policy as a case of 'venue shopping'.

The rules guiding decision-making and the character of the participants at different levels of governance privilege a specific set of actors and mobilizing strategies. Political actors seek policy venues where the balance of forces is tipped in their favour. Law and order officials responsible for migration control gain from operating in international venues in three ways. Firstly, they are not under the same judicial constraints as is the case at the national level. Secondly, they contend with less opposition from other ministries, parliamentarians, or migrant aid groups than arises in the national framework. Thirdly, they have enlisted 'sheriff's deputies' (Torpey, 1998) in these venues, in particular transit and sending countries.

The time frame for the analysis covers the period from the second half of the 1970s to 1999. The discussion is based on archival and interview material collected in Brussels as well as in Germany, France and the Netherlands, three founding members of the EC and Schengen. They have comparable numbers of foreigners on their soil with national totals situated around the European median.¹ Moreover, they have set similar migration and asylum policy goals since they stopped recruiting foreign labour and, albeit unwillingly, welcomed family members of the migrants in the 1970s.²

¹ In 1990, when comparative census data were available, foreigners made up respectively 4.6 per cent, 8.2 per cent and 6.4 per cent of the population in these countries. They situate themselves around the median in the EU 12 (the average was 4.4 per cent in 1990). If one examines the percentage of non-EU foreigners, the cases are even closer with 3.5 per cent in the Netherlands, 4 per cent in France and 6 per cent in Germany (SOPEMI, 1992, 1998).

² A full-length comparative and longitudinal study of migration and immigrant policy since 1973 is presented in Guiraudon (1997). The findings presented here also stem from a larger ongoing research project on the denationalization of migration control. This dynamic includes the involvement of private actors such as employers, carriers, security agencies and individuals through sanctions and contracting out and the localization of control through the granting by law and decree of migration functions to regional/local elected officials (Guiraudon and Lahav, 2000).

II. The Internationalization of Control

Alternative Explanations

Title IV of the Amsterdam Treaty calls for the progressive establishment of an 'area of freedom, security and justice'. Within five years, the Council should unanimously adopt measures on asylum, refugees and displaced persons, on the absence of any controls on persons crossing internal borders (both EU citizens and third country nationals), on the crossing of external borders (including rules on visas for intended stays of no more than three months), and on the freedom of movement of third country nationals within the EU, conditional upon the duration of their stay being shorter than three months. This five-year deadline does not apply to refugee 'burden-sharing', and the harmonization of the conditions of entry and residence, standards for the issue of long-term visas and residence permits, or the right of residence in other states of the Union for third country nationals.

Although Member State responsibilities with regard to the maintenance of law and order and internal security are upheld, the scope of the policy area that will be transferred to the community's 'first pillar' after five years is impressive.³ How can we account for the outcome at Amsterdam? More generally, one may wonder about the reasons behind the increasing use of the EU framework for the elaboration of migration and asylum policy, and seek to identify the motors and processes that characterize the European migration policy domain. In so doing, we may account for its largely 'intergovernmental'⁴ institutional form and for policy outputs (or lack of them).

From a liberal intergovernmentalist perspective (Moravcsik, 1998), the convergence of national preferences independently of previous integration is a precondition for co-operation. National representatives seek to maximize domestically aggregated interests in interstate bargaining whose outcomes reflect the relative weight of the Member States. The EU framework, like other international institutions, increases bargaining efficiencies by providing a set of transaction-cost reducing rules. In the case to hand, international co-operation could be attributed to the similar problems that northern European receiving countries faced, namely a massive influx of asylum-seekers at a time when political elites 'resort[ed] to blame avoidance in the face of rising unemployment' (Ugur, 1995, p. 974).

The timing of events does not validate the intergovernmentalist hypothesis. In the early to mid-1980s, immigration and asylum issues emerged in the

³ Moreover, the Council, acting by a qualified majority on a proposal from the Commission, can adopt provisional measures of a duration not exceeding six months for the benefit of a Member State which is confronted with a sudden inflow of third country nationals.

⁴ I use the term in the meaning of Sandholtz and Stone Sweet (1998).

discussions of supranational clubs groups (or 'clubs') involving civil servants and police officials dedicated to other policing themes such as drugs or terrorism (Trevi and, in 1984, the Club of Bern and the STAR group).⁵ France, Germany and the Benelux countries signed the Schengen agreement in 1985 and the issue-specific 'ad hoc immigration group' was set up in 1986.⁶ These events therefore took place a few years *before* the rise in the number of incoming asylum-seekers, refugees and illegal migrants (1989–93) at one of the lowest points in the flows of legal migrants (between 1982 and 1985).⁷ In fact, international forums on migration and asylum emerged before national reforms in immigration and asylum criteria in the early 1990s led more people to go underground, and before the fall of the Berlin wall and the emergence of East–West 'pendulum' migration (Moravska, 1998).

The single market project and, more generally, the *relance* of Europe with its 'citizens' Europe' agenda arguably created the need for co-operation on migration and asylum, as explanations based on functional spillover would predict. After 1985, there was indeed a trend towards institutionalization, a more frequent use of the EC as the proper framework for international co-ordination, and a more explicit connection between the abolition of internal borders within the EC and the need for 'compensatory measures' in the field of immigration, asylum and external border control policies. Schengen was reinterpreted as a 'laboratory' for EC-wide co-operation.

Neofunctionalist interpretations would posit that international co-operation to fulfil a functional task generates pressure to co-ordinate adjacent issue-areas, since integration in one area results in unforeseen problems that can only be solved by integrating others. Allowing for the free movement of persons, as opposed to labour, might indeed serve as a means of reviving the European project through a 'people's Europe' rhetoric in times of economic recession. Europeans moving freely within a passport Union (agreed upon in 1981) would realize the benefits of European integration and develop a European identity. Moreover, the removal of internal EC border checks would further facilitate the free movement of goods.

Yet, there remain a number of unanswered questions. Co-operation on migration and asylum should derive from earlier integration efforts, yet it did

⁵ The Club of Bern included representatives from the EC and Switzerland and focused on anti-terrorism whereas the STAR group (*Standige Arbeitsgruppe Rauschgift*) concentrated on drug trafficking and involved the German BKA, France, the Netherlands, Austria, Denmark, Switzerland and Luxembourg (Bigo, 1996). Trevi was created in the mid-1970s under the auspices of the European Political Co-operation to combat terrorism and extremism.

⁶ The Europeanization of migration control is now well documented (see, *inter alia*, Monar and Morgan, 1994; Anderson and den Boer, 1994; Bigo, 1996; Miles and Thränhardt, 1995; Hix and Niessen, 1996; Lavenex, 1999).

⁷ The data can be found in SOPEMI (1994). See Lu (1999) for a chart of the major events in European co-operation and the number of foreign labour and asylum applications in the EU (Figure 1, p. 4).

not stem from the past application of the free movement of labour provisions but rather from the concomitant *future* planning of the single market.⁸ The countries that pushed the single market agenda such as the UK in fact did not wish to be bound by EU migration discussions, thereby undermining the link between the two developments. The Commission, whose competence-maximizing outlook and agenda-setting function (Pollack, 1994) are key according to neofunctionalist theories, took a back seat in these matters. According to Wenceslas de Lobkowicz, who worked in the Commission Secretariat's taskforce on Justice and Home Affairs (JHA), the Commission thought it wiser to leave the field to the discretion of Member States (1993, p. 12). Neofunctionalist perspectives do not seem to provide adequate analytical tools.

In counterfactual fashion, one may wonder whether European states would have co-operated in the absence of the EU. In fact, they have engaged in co-operation, and are still involved in an array of international forums and organizations to pursue their national policy goals. Even within the EU, different groups co-exist, such as the High Level Task Force and the EU working groups on JHA. Although the incorporation of the Schengen *acquis* at Amsterdam seemed to confirm the EU's status as the proper frame for co-operation on immigration and asylum, not all EU members accepted the new arrangements. Amsterdam consecrates the idea of a Europe *à la carte*. The United Kingdom (including Northern Ireland) and, consequently, the Republic of Ireland have opted out of the new area of freedom, security and justice. Denmark, albeit a member of Schengen, is not bound by the new title or the Schengen *acquis* and will co-operate only on the common visa policy. Conversely, although they are not EU Member States, Iceland and Norway will be bound by the Schengen protocol of the Amsterdam Treaty via their membership of the Nordic Passport Union.

Furthermore, Amsterdam developments should not obscure the fact that many other international organizations and co-operation processes co-exist alongside the EU. They have varying membership and overlapping goals. Justice and interior officials and major receiving countries always participate. Sometimes the Council Secretariat is represented, yet rarely does the Commission have a seat at the table. These forums range from Interpol to the OECD and include the Intergovernmental Consultations on Asylum, Refugees and Migration Policies (IGC), the Ad Hoc Committee of experts for identity documents and the movement of persons (CAHID). Within the Council of Europe, one finds the Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees, and Stateless People (CAHAR) and, within the United

⁸ For their part, neoinstitutionalist approaches (Pierson, 1996) would search for path-dependent phenomena since the Treaty of Rome's provisions for free movement. Yet, co-operation on migration is not an unintended but rather an anticipated consequence of the yet-to-be completed internal market.

Nations, both the UNHCR and the United Nations Commission on Crime Prevention.

By 1991, there was an influx of asylum-seekers in Germany and many emotional debates over immigration in other core Member States. The single market agenda was making headway. These developments may justify *post facto* the increasing intensity of routinized transgovernmental co-operation on asylum and migration in Europe, but cannot explain it. Spillover and the upgrading of common interests are 'causal stories' (Stone, 1989) identifying the origins and solutions of policy problems rather than causes *per se*. We therefore need to develop an alternative framework to account for the timing (early to mid-1980s), shape and substance of co-operation on migration and asylum.

The Form and Content of Internationalization

The form of EU co-operation on migration and asylum still privileges intergovernmental bargains over supranational institutional actors, although EU institutions are gradually being incorporated in the process. The content is consistently security oriented and restrictive. Outcomes often take the form of non-legally binding decisions or informal arrangements. The only operative and substantial agreements and conventions, Dublin and Schengen, were in fact adopted outside the EU framework and their implementation delayed: Dublin was signed in 1990 and came into force in 1997, while Schengen came into effect in 1995, 10 years after the signing of the first agreement.

In 1992, the Treaty on European Union (Arts. K 1–9) created the third pillar on Justice and Home Affairs with one full group (GD1) of the K4 committee dedicated to asylum, visa and migration, yet the framework required unanimous decisions by the Council and remained outside the Community legal order. Over five years, the JHA Council had agreed on only one joint position on the common definition of a refugee, and on five legally binding joint actions, regarding school travel for children of third country nationals, airport transit procedures, a common format for resident permits, burden-sharing for displaced persons and human trafficking. The formal harmonization of policy remains limited yet, on certain issues, significant as in the case of the definition of a refugee that excluded civil war victims.

The lack of formal agreements has been attributed to the complicated decision-making structure of the third pillar. This only adds to the puzzle. It is the same large Member States (France, Germany) that are most concerned with immigration and initiated the process of Europeanization that subsequently undermined it by insisting on labyrinthine procedures and unanimous voting.

Yet much has been achieved outside the 'third pillar' legal framework. Regarding policy elaboration, there is exchange of information, construction

of common terms such as 'safe country of transit', the definition of problems in a supranational context, common decisions such as the establishment of a list of countries requiring visas, and the generalization of certain policy instruments such as carrier sanctions. At the implementation level, there is operational co-operation between border police, liaison officers, intelligence personnel and magistrates, as well as data exchange through the Schengen Information System (SIS) and technological co-operation in areas such as fingerprinting of asylum-seekers and document fraud. If one adds the Schengen and JHA procedural arrangements, one sees the emergence of a supranational field, with its procedural rules, cognitive norms, and 'Schenglish' jargon.

Furthermore, transnational co-operation in the fields of asylum and immigration has taken on the characteristics of a multilevel governance regime in the sense that the relevant actors in policy-making can be found in Brussels, in certain national ministries and central agencies, and at the subnational level (at the Land level in Germany). As early as 1972, Bavaria belonged to the *Arbeitsgruppe Südst* with Austria, Canada and Eastern European countries. In 1978 and 1979, other Länder became involved respectively in the *Arbeitsgruppe Nord* and *Arbeitsgruppe Südwest* (Bigo, 1996, p. 94). Large states that also have external borders, such as Bavaria and Baden-Württemberg, are also present in Brussels to defend their interests (Bank, 1998). At different levels of governance, officials co-operate with private actors such as consultants, security agencies and carriers. At the international level, these links are institutionalized through programmes such as Odysseus⁹ or international organizations such as the ICAO (International Civil Aviation Organization).

Who benefits from this vertical type of policy-making and how? The answers to these questions will help us understand the driving forces behind the internationalization of migration control.

III. Vertical Policy-Making as Venue Shopping

In his seminal work, *The Semi-Sovereign People* (1960), E. E. Schattschneider argued that political 'conflicts are frequently won or lost by the success that the participants have in getting the audience involved in the fight or in excluding it as the case may be'. Depending on what Baumgartner and Jones (1993, p. 32) call 'policy venues' or the 'institutional locations where authoritative decisions are made concerning a given issue', different constituencies will be mobilized (1993, p. 32). The rules that guide each political arena favour

⁹ This training and co-operation programme adopted by the Council on 19 March 1998 (Common action 98/244/JHA, and published in *Official Journal* L99, 31 March 1998), has a budget of 12m euro until 2002 for training and co-operation on asylum, immigration and external borders.

different kinds of actors as they require different resources and call for different strategies (Immergut, 1992).

This framework developed by American public policy scholars has the advantage of being agnostic about the relevance of international relations versus comparative politics, or political science versus sociology in EU studies.¹⁰ In this respect, I answer calls from EU theorists who urge a synthesis of international, comparative and American politics (Caporaso, 1998, p. 161; Moravcsik, 1999, p. 271) while drawing on the often-overlooked public policy analytical toolbox (Peterson, 1999, p. 21). The concept of venue shopping emphasizes actors' strategies, yet it also takes into account the rule-bound context to which actors respond. Actors seek new venues when they need to adapt to institutional constraints in a changing environment. To do so, they must resort to framing processes or policy images – the 'constructivist' moment. This approach does not preclude unintended consequences or change over time, as excluded actors become aware of international venues and/or seek to change the rules of the game. However, in this policy domain, it is too early to detect such changes.

A framework is a set of analytical tools rather than an explanatory device, but it allows us to ask the relevant research questions to construct an explanation: what were the motives behind policy-making in international venues, the alibi that allowed it and the means to achieve the initial goal? First, I analyse the rationale behind the initial transnationalization of policy-making. I trace it back to the beginning of the 1980s when migration control agencies faced a number of setbacks at the national level. In particular, judicial rulings, and calls from other ministries for the integration of settled foreigners and non-governmental actors, significantly reduced the room for manoeuvre of interior and justice personnel in charge of migration control. They set out to find policy venues more amenable to their ends by exploring new instruments and seizing upon windows of opportunity to occupy political space such as that opened up by the 1985 Schengen agreement. Second, I examine how the shift in venues was possible and, third, the value-added of operating in a transnational context.

The Rationale behind Venue Shopping: Solving the 'Control Dilemma'

Domestic constitutional principles (equality before the law, fundamental rights), general legal principles (due process, proportionality), national jurisprudence and laws and, albeit in a very limited fashion, international legal

¹⁰ Comparativists have also studied various political arenas as 'political opportunity structures' (McAdam *et al.*, 1996). Sociologists prefer to conceive of the EU as a 'field' where political actors compete for power by carving out jurisdictions through the construction of social problems and the legitimate expertise to remedy them (Bourdieu, 1981). International relations scholars may view this as a multi-level fusion process (Wessels, 1998).

instruments have developed since the 1970s in such a way as to constrain the restrictive objectives of migration control policy. The juridicization of migration policy through the jurisprudence of higher courts such as administrative and constitutional courts, is now well documented (Legomsky, 1987; Hollifield, 1992; Joppke, 1998, 1999; Neuman, 1990; Guendelsberger, 1988; Guiraudon, 1997, 1998). As a consequence, there has been a reduction of the arbitrary and discretionary powers of bureaucracies. In particular, certain categories of foreigners are protected against expulsion (family members, long-term residents). Moreover, there are more precise legal procedures and appeals in cases of expulsion for undocumented aliens, and rejected asylum-seekers and even foreign criminals.

To these judicial constraints, one must add the logistical difficulty and material costs of a policy that would seek to expel all undocumented foreigners or the problems associated with the monitoring of borders. Finally, the objective of preventing the entry and stay of 'unwanted migrants' is undermined by a number of other contradictory goals. European nation-states also want to provide for a tourist industry that has been booming thanks to cheaper air travel and paid holidays. Free trade requires some degree of openness that is at odds with calls for tighter border controls (Sassen, 1996).

As part of a larger reorientation of policy instruments in liberal democratic receiving countries, one key element has been 'remote control' policy (Zolberg, 1998). This serves to ensure that the pool of prospective migrants can be sifted and sorted before they arrive in the territory of receiving countries to separate the 'unwanted' migrants (Joppke, 1998) from the categories that countries want to welcome (skilled workers, tourists, business people, contract labourers). The premise of 'remote control' is that, once the migrants have arrived, it is more difficult to expel them because of the legal protection that I have described above. The first policy instruments included visa requirements, a key role for overseas consulates, carrier sanctions, and international waiting zones in airports and railway stations.

International co-operation on migration and asylum goes one step further by shifting policy elaboration away from national judiciaries. In turn, measures can be approved to enhance this strategy at the implementation level: a common visa policy, carrier sanctions (Art. 26 of the Schengen agreement), and the establishment of 'buffer zones' via the accession negotiations with the countries of eastern and central Europe.

What Made Venue Shopping Possible?

Settings for transgovernmental co-operation on security-related issues existed before the development of EU migration policy and the use of policy frames

that linked migration and security as global threats demanding transnational responses.

Yet migration control experts took advantage of new organizational settings not previously available to them. The 'wining and dining culture' of the 1970s Trevi group (den Boer, 1996) alerted law and order ministries to the potential European-wide scope of policy-making. Once a model had been set for security 'clubs' that discussed drugs or terrorism, it was easy to add new types of working groups responsible for other cross-border issues or to widen the subject matter of a pre-existing one.

These different groupings involving different countries were flexible and fairly informal. They allowed the building of trust and relationships between officials through repeated interactions, before the formal negotiations stage. Officials used them to set the agenda on transnational co-operation so as to become essential interlocutors at later stages. Key published texts on justice and home affairs reveal that the issues that are discussed today, their framing and their justification were already set by the mid-1980s (Bunyan, 1997).

Migration control officials meeting their counterparts in the early 1980s established linkages between migration, asylum and crime-related issues, and emphasized technical issues that required their expertise. Interior, justice and police personnel ensured that they were the most well equipped to provide solutions to the problems that they had themselves identified, such as illegal migration, human smuggling, bogus asylum claims (Anderson and den Boer, 1994; Bigo, 1996; Koslowski, 1998). In the EU context, technocrats linked European integration, migration and security issues by underlining the criminal activities associated with free movement.

When given a chance to occupy a new policy space, as was the case during the negotiations leading to the second Schengen agreement, civil servants in the interior and justice ministries seized upon these 'windows of opportunity' (Kingdon, 1984). While the 1985 Schengen agreement contained only three articles on immigration, the issue came to dominate the discussion of the four Schengen groups in charge of the implementation agreement. Group 1, on police and security, included a subgroup called 'border control and border surveillance' later called 'immigration' or 'illegal immigration' alongside subgroups on drugs, arms and munitions. Group 2, on movement and persons, solely contained subgroups dedicated to migration and asylum. The same amalgam between migration and cross-border criminality has been institutionalized in the post-Maastricht 'third pillar'. As Lavenex's study of the development of a 'securitarian frame' to address asylum issues shows, after an initial political prompting in 1985, Schengen and other forums such as the Ad Hoc Immigration Group were composed of the same bureaucrats (without academics or UNHCR personnel in attendance). They had a technocratic and secretive

mode of functioning that was justified by the urgency symbolized by the 'Europe 1992' deadline (Lavenex, 1999b, pp. 114–15).

Bigo (1996) has highlighted the social construction of the notion of a 'European security space' to legitimize the presence of police and interior ministries personnel at the supranational level and to underline that the media and academia also play a role in this construction. Political leaders did not hamper migration control agencies in their efforts. National leaders supported international co-operation on migration control because it demonstrated activism yet diffused the responsibility for and the efficacy of control. Politically, the link between security, migration and European integration allowed for strange bedfellows: liberal pro-EU politicians could not disapprove of calls for European migration control harmonization coming from anti-EU restrictionist politicians. These dynamics can be observed among various political camps in 1993 when the French right-wing coalition government and the German CDU/CSU/FDP government discussed asylum reform to comply with Schengen. It was difficult in France for liberals such as the Social Affairs Minister Simone Weil, an ex-EP President, to criticize a project that involved 'more Europe' although she did not like the content of the agreement. In Germany, European integration provided a pretext for SPD and FDP party members to agree – perhaps reluctantly – to restrict the right of asylum.

In brief, pre-existing international security forums allowed law and order officials to set the agenda of migration as a European security issue where they would be seen as the legitimate policy-makers – contrary to other ministries or services – with the tacit assent of political circles.

What did Venue Shopping Achieve?

In international forums, political actors are less encumbered than in national or federal settings where a number of institutions, levels of government or social groups can act as 'veto points' and prevent reforms (Immergut, 1992). The rules of and participants in international venues foster the goals of national migration control officials in three ways: they can avoid judicial constraints, eliminate adversaries, and enlist much-needed co-operating parties.

Avoiding constraints. Among the plurality of responses to judicial constraints (Guiraudon and Lahav, 2000), law and order officials have sought to elaborate and implement policy away from the judge's gaze in venues more favourable to restrictive control policies. The ECJ had no role to play in the Maastricht 'third pillar' framework. In the post-Amsterdam era, the application of preliminary rulings in areas covered by Title IV is restricted. Furthermore, the ECJ will have no jurisdiction with regard to national measures adopted in relation to the crossing of borders in order to maintain law and order and

safeguard internal security. Finally, the ECJ may be asked for a ruling on the interpretation of the new Title IV or measures based on it, yet its judgment will not apply to national judgments that have already become *res judicata*.

The circumscribed role of the ECJ is testament to its influence in other areas of European integration and its expansive jurisprudence on the free movement of workers. The controversial rulings on the direct effect of association agreements with Turkey and the Maghreb countries have convinced national governments not only to exclude free movement provisions from the Europe agreements with the ex-Soviet bloc countries (Guild, 1996), but also to prevent the ECJ from applying its integrationist outlook to migration and asylum issues.

Moreover, decisions taken in international settings have also diminished the role of national courts at the policy implementation level. Art. 26 of the Schengen agreement, for instance, requires signatory states to establish carrier sanctions. This prevents would-be migrants from ever reaching the territory of liberal democratic states where they would have access to legal assistance. A common visa policy serves the same aim. In the area of asylum-seeking, accelerated procedures have been put in place in Germany, France and the Netherlands and others on the basis of decisions taken among European states on 'manifestly unfounded claims' and safe third countries.¹¹ These fast-track procedures mean that the relevant agencies and courts of appeal will not review asylum-seekers' claims. For instance, in France, since the law of 24 August 1993 and the constitutional revision of 19 November 1993, asylum-seekers can be denied entry on a number of grounds agreed upon among core EU Member States and Schengen signatories and therefore be denied access to the French refugee agency (OFPRA) and its appeals commission (Commission des recours), and the Conseil d'Etat. Similar reforms were adopted in Germany and the Netherlands in the same year.

Excluding possible adversaries. Partisans of a restrictive control policy strategically push for the extension of policy jurisdiction to venues where participants are less likely to oppose their views. The fact that migration appeared relatively recently on the European agenda was an advantage, as policy-makers had the hindsight of previous integration history and therefore knew the functioning and the outlook of EU institutions. If we examine the rules guiding decision-making in the migration policy domain, we can see that institutions sympathetic until then to migrant interests were unable to influence the JHA discussions on migration control in the pre-Amsterdam intergovernmental setting.

¹¹ The relevant texts include Schengen, Dublin, the 1992 London resolutions, and the 1995 'Resolution on minimum guarantees for asylum procedures' in the third pillar.

With regard to procedure, Art. G of the Amsterdam Treaty provides for joint initiative by the Commission or the Member States during the five-year transitional period. Later, the Commission will have exclusive right of initiative, while the Council will act unanimously throughout.¹² The unanimity rule, on which the Germans insisted, will make the adoption of measures very difficult. Compared to other policy domains (Sandholtz and Stone Sweet, 1998), the rules governing immigration and asylum remain 'intergovernmental' in the sense that the big players remain the Member States with the Commission playing a minor role (Sandholtz and Stone Sweet, 1998).

One major consequence of the Maastricht Treaty and the 'third pillar' has been the way in which it has divided the Commission. Before 1992, DG V, the Commission Directorate General for Employment, Industrial Relations and Social Affairs, was the only DG with a unit (D.4) responsible for the free movement of labour since 1958 and subsequently for matters relating to the integration of migrants, refugees and anti-racism. Yet, the unit has no official competence or informal influence when it comes to the rights of third country nationals residing in other Member States. After 1992, some personnel were located in DG XV, the Directorate General for internal market and financial services, in a unit dedicated to the 'free movement of persons and citizens' rights' and focused on EU migrants. Concomitantly, a small taskforce was set up within the General Secretariat of the Commission to liaise with the Council on JHA migration discussions – the original staff of two has expanded since to ten. Responsibility is split, personnel scattered but, more importantly, divergent points of view have emerged since 1992 within the Commission. According to my interviews, the Secretariat taskforce considers the Commission's Employment and Social Affairs Service to be 'old-fashioned' and 'maximalist'.

The taskforce does not interact with pro-migrant NGOs as the Social Affairs Directorate does. The present head of the unit for 'External Borders, Immigration and Asylum', Jean-Louis de Brouwer, believes that one needs to be a 'realist, in the sense of International Relations theory. One needs to talk to the big players, the ministers of interior of the Member States who usually are political heavyweights in their respective governments.'¹³ The taskforce tries to evaluate proposals that could be an acceptable basis for compromise among Member States ('lowest common denominator') rather than push for a particular vision. The Commission's quest for closer European integration appears as the only driving force behind its positions on Justice and Home Affairs. Geddes points to the Amsterdam Treaty's Protocol on Asylum that

¹² As an exception to the general five-year deadline, after consulting the EP, the Commission will be able to make proposals that shall be adopted by qualified majority voting on the list of third countries whose nationals must be in possession of visas when crossing the external borders, a uniform format for visas, and the procedures and conditions for their issuing.

¹³ Interview, General Secretariat of the European Commission, Brussels, March 1999.

forbids asylum applications between EU Member States, noting that the Commission supports the measure although it violates the Geneva Convention and thus 'a "federalizing" logic outweighs a "human rights" one' (1998, p. 705). A new Directorate General responsible for the application of the Amsterdam Treaty provisions was constituted in autumn 1999 and, for the first time, there is a Commissioner in charge of justice and home affairs, António Vitorino. Moreover, many lower-level civil servants in the new DG come from other services and may bring a different outlook. However, since unanimity remains the rule for Council of Ministers voting in this policy area, the Commission still has little room for manoeuvre.

The European Parliament had long been a friend of third country nationals, ranging from the Vetter report in the 1970s which called for rights of political participation for migrants to its support of the European Migrants' Forum and numerous declarations on anti-racism. However, the Parliament was excluded from the third pillar negotiations. Although Maastricht stipulated that the EP had to be consulted, this proved most frustrating in practice, as a number of reports by MEPs Jean-Louis Bourlanges and David Martin illustrate.¹⁴ Unhappy with the outcome of Amsterdam, MEPs have mostly expressed their anger by rejecting Commission proposals in related areas, for instance on visa policy. Amsterdam sets a very high hurdle for the EP to have a policy role. During the five-year transitional period, the EP will have only a consultative role. Afterwards, codecision may be extended to cover all or part of the areas covered by Title IV only after a unanimous vote by Council members.

Migrant aid organizations also have difficulty in trying to supervise transgovernmental policy-making. For instance, the ECRE (European Council for Refugees and Exiles), an umbrella organization for refugee councils founded in 1973, has had problems monitoring European-level negotiations on asylum policy. There is also a small Brussels-based NGO *cum* 'think tank' called the Migration Policy Group. While it has managed to exchange funding and access to information for expert advice with the Social Affairs Directorate (formerly DG V), the group does not weigh in on 'third pillar' issues. During the 1996 ICGC, they lobbied instead for the inclusion of an anti-discrimination article in the EU treaties. Needless to say these two NGOs do not constitute a 'transnational activist network' equivalent to EU lobbies in other fields such as the environment (Keck and Sikkink, 1998). Similarly, their resources pale in comparison with those of the established national migrant aid organizations or the thousands of local migrant associations in the Member States.

¹⁴Jean-Louis Bourlanges and David Martin 'Report on the functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conference' in European Parliament Committee on Institutional Affairs, 4 May 1995. See also, 'Note on the European Parliament's Priorities for the ICG and the New Amsterdam Treaty: Report and Initial Evaluation of Results' (European Parliament, 15 July 1997).

The internationalization of migration policy-making has also disempowered certain national actors. Most of the national ministries concerned with migration do not attend international negotiations and working groups.

The Commission negotiating team headed by Michel Petite won a battle, if not the war, in Amsterdam thanks to the Dutch Presidency of the Union with the adoption of the 'Protocol integrating the Schengen *acquis* in the framework of the European Union'. Officials in the national ministries of interior and justice were taken aback since they themselves were unclear about the content of the vaguely defined Schengen *acquis*, some 3000 pages of documents of various legal standing and levels of detail. In effect, the Treaty came into force without Member States having agreed on what the Schengen *acquis* actually constitutes.¹⁵

To understand why this development was possible, it is important to remember that ministries of foreign affairs negotiate treaty revisions in the EU. They were not acutely concerned with the consequences of the Amsterdam Schengen protocol, a task that their colleagues in law and order would have to undertake.¹⁶ It was sweet revenge given how many interministerial quarrels there had been between 1985 and 1990 in Schengen countries over the content of the implementation agreement. Michel Portal at the French Ministry of Interior recalled that, 'the interministerial conflicts were and still are considerable, severe, especially when the political leaders totally lost interest'¹⁷ and attributing the resulting confusion to traditional rivalries.¹⁸ The ministries of interior and justice had been the victims of their own success. Vendelin Hreblay, a French negotiator, admits that foreign affairs ministries – and in Germany the Chancellery – had been progressively ousted by justice and interior ministries (1998, p. 28).

While most of the executive has been marginalized in the policy process, the legislative branch has been bypassed as well. The German legislature was not informed of intergovernmental negotiations until 1989, and the first debate took place in April 1992 on the ratification of the Schengen agreement. The French National Assembly and Senate had access to the contents of the

¹⁵ Central and eastern European states that are supposed to comply with Schengen have no access to many relevant documents that are 'classified' (interview with Leszek Jesien, responsible for Polish EU accession negotiations, Office of the Polish Prime Minister in Warsaw, June 1999).

¹⁶ Interview with Michel Petite, chief negotiator for the 1996 ICG, European Commission, Cambridge, MA, April 1999.

¹⁷ Interview with Michel Portal, chef de bureau, Sous-Direction de la Circulation Transfrontière et des Visas, Ministry of Interior, Paris, December 1994. Also interviews with M. Malwald, German Federal Ministry of Interior, Bonn, April 1995, with Jürgen Haberlandt, German Federal Ministry of Interior, Berlin, June 1995, and with Nicolas Franken, Immigration and Naturalization Department, Ministry of Justice, The Hague, February 1995 (see also Hreblay, 1998, p. 28).

¹⁸ Indeed, in Germany, the security agenda of the Interior Ministry still clashes with that of the Federal Chancellery, as was the case in 1997 over admitting Austria within Schengen (Lavenex, 1999b).

Schengen agreement only a few weeks before ratification. National parliaments were presented with the final versions of the Schengen Agreement and, later, of the Dublin Convention and had to ratify them without amendments. The French Senate and, the Dutch Council of State and Parliament all criticized this *politique du fait accompli*. After the Schengen debate, the French Senate set up a parliamentary control commission *post facto*. Yet, here as elsewhere, the supranational policy process remains difficult to oversee.

Finding New Allies: Co-opting Sending and Transit Countries. Co-operation with sending and transit countries of immigration also developed in the 1980s and 1990s. Germany, in particular, pursued this strategy and signed readmission agreements with eastern European countries (such as Romania in 1993) and Vietnam, trading Deutschmarks for the return of unwanted migrants. Others followed suit. In 1993, Morocco agreed with the Netherlands to check the identity of and readmit deportable Moroccan offenders. New immigration or transit countries also resort to these agreements. In 1998, Italy and Tunisia signed a readmission agreement whereby Tunisia accepted the return of illegal Tunisians apprehended in Italy. In return, Italy promised to invest \$150 million over three years in Tunisia to create jobs and discourage emigration.

After the fall of the Berlin wall, East–West co-operation on asylum and migration increased considerably. Germany initiated a number of fairly flexible transgovernmental working groups and international forums, designed to transplant the western migration and asylum regime into east and central Europe, known as the Vienna process, the Berlin Group and the Budapest Process (Lavenex, 1999a; Koslowski, 1998; Overbeek, 1999). The Amsterdam Treaty states that the Schengen agreements and subsequent measures within its scope ‘shall be regarded as an *acquis*, which must be accepted in full by all states which are candidates for admission’ as must be the third pillar norms. The internationalization of migration control has reached yet another stage in the establishment of a ‘buffer zone’ around Europe’s porous frontiers. The EU Commission, in lieu of EU states or their representatives, now assesses the compliance of central and eastern European aspiring Member States with respect to JHA matters in the context of *Agenda 2000* as if the latter were written in stone.¹⁹ Central and eastern European states have tried to adopt treaties and pass legislation in the area of migration and asylum to conform to elusive EU norms.²⁰ Sometimes, EU requirements conflict with their security, or trade interests. This is the case regarding travel restrictions for

¹⁹ See the 1997 ‘Commission’s opinion on Estonia, Hungary, Poland, the Czech Republic, Slovenia’s application for membership in the European Union’ in *Agenda 2000* (Brussels: CEC).

²⁰ Martin Baldwin-Edwards has argued that the same happened in southern Europe as states there tried to imitate north European norms to appear as trustworthy EC members (1997).

New Independent States traders in Poland, or for ethnic Hungarians in Hungary.

How does the venue shopping framework that we have applied to European co-operation on migration help explain its timing, shape and content? First, co-operation dates from the early to mid-1980s. The landmark court decisions in the main receiving countries in Europe date from the late 1970s.²¹ They established in particular the right to a normal family life and to a secure residence for long-term residents. In effect, this meant that governments could no longer prevent family reunification, or diminish the 'stock' of legal residents except by financial incentives as the new Kohl government did in 1983. It also meant that certain categories of foreigners could no longer be expelled. This period also saw the first major clashes between agencies in charge of the integration of settled foreigners and those in charge of migration control. The incentive to seek new policy venues thus dates from the beginning of the 1980s.

Regarding the form of international co-operation, I have noted that it has gone from a multitude of flexible arrangements to a system that still remains largely intergovernmental to the extent that EU institutions have played only a minor role, and the system remains biased towards non-binding decisions. Its intergovernmental character makes sense, given that one of the main advantages of international venues is to avoid 'veto points'. The flexible, secretive negotiating style and the non-binding character of many decisions also reveal the fact that a venue provides participants with a propitious setting for policy debates and agenda-setting.

The content of the emerging European regime is restrictive, emphasizing concerns about asylum fraud and smuggling, rather than the importance of achieving internal free movement. Given the fact that interior and justice officials dominate and have justified their transnational activities through security, this should come as no surprise. Furthermore, the intergovernmental mode of co-operation has favoured lowest common denominator measures.

²¹ In Germany, major rulings by the Constitutional Court in the late 1970s on entry and stay include the decisions of 26 September 1978 (*Entscheidungen des Bundesverfassungsgerichts* 1978, pp. 168–85) and of 7 January 1979 (*Entscheidungen des Bundesverfassungsgerichts* 1979, pp. 166, 175). In 1979, the Constitutional Court ruled in a case involving a married Turk accused of selling hashish that Art. 6 on family life and marriage had to be taken into account in entry and stay decisions (Neuman, 1990). In four decisions dated 7 July and 24 November 1978, the French Council of State voided a number of measures contained in seven regulations on entry and stay. In a decision of 8 November 1978, the Council of State annulled the contents of a decree curtailing family reunification.

IV. Conclusion

The internationalization of migration control is not a *deus ex machina* response to the evolution of migration patterns nor a *sine qua non* of the single market project. It constitutes a case of strategic 'venue shopping' by migration control agencies adapting to institutional and material policy constraints. A vertical network of experts has developed that can be contrasted with horizontal policy-making in the form of ministerial consultations. The power distribution between different actors involved in the management of migration varies in a system that privileges vertical links. The migration policy domain *includes* experts, consultants, liaison officers, and non-EU governments, but *excludes* also a number of actors that had better access in the national negotiating process.

In this respect, it is misleading to consider, as liberal intergovernmentalism does, that domestic actors come to the international bargaining table representing aggregated (domestic) interests. Instead, certain domestic actors bypass the process of interest aggregation by mobilizing in international venues. Internationalization has received the support of actors who believed that they could gain from such a shift. The potential gains included: autonomy for the civil servants involved, credibility for third countries in the east and bargaining power for those to the south.

What are the consequences of vertical policy-making on the status of foreigners? The national level might be where the rights of foreigners are more likely to be protected because of judicial review, the balance of points of view within the executive and the fact that migrant aid groups are mostly operational at that level. At the international level, some of these national actors 'disappear'. This implies that games played at different levels have different rules and players. Yet the security policy network is present at all levels. This case study should encourage scholars in other policy domains to assess coalitional distributions and institutional arrangements at different policy levels to understand which actors are likely to prevail and predict policy outcomes.

When considering the future prospects of the internationalization of migration control, one cannot readily discount the role of structural factors such as 'increasing returns' phenomena (Pierson, 1997) given the sunk costs of projects such as the Schengen Information System. The emergent EU migration regime is also flexible enough to allow for opt-outs and temporary walk-outs – in the case of France with Schengen – that do not endanger the system as a whole. As long as what is gained from Europeanization is seen as even marginally beneficial to the parties involved, it is likely to be self-sustaining, although we should expect that the process will remain a gradual one.

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