

# Between East and West? The Problem of 'Transit' with Reference to Chechen Asylum- seekers in Poland

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**Michal Tudorowski**

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Department of Politics

University of Sheffield

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## Summary

This dissertation analyses the construction of transit migration as a policy issue in Poland through an exploration of dynamics within the multi-level migration governance system. This system minimises the probability of asylum-seekers treating Poland as a destination country by exerting pressure on them to move west. This study examines the legal and bureaucratic arenas that are organised through the process of the implementation of the European Union's (EU) key asylum instruments: the qualification directive, the procedures directive, the reception directive, and the Dublin regulation at three policy-making levels: the EU, the Polish government, and the grassroots; and that enable certain types of social interaction that emphasise policy learning, and information and knowledge sharing. The evolution of this multi-level institutional and social milieu produces policy deficiencies that provide the setting for the discursive construction of 'transitiness'. The research is grounded in a meta-theoretical method that seeks to bridge rational and constructivist variants of institutional analysis. This dissertation reveals that the formation of 'transitiness' occurs through discursive strategies enabled by an interaction of particular legal and bureaucratic venues.

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## **List of abbreviations:**

ASQAEM: Asylum Quality Assurance and Evaluation Mechanism

BBP: Berlin-Budapest Process

BDT: Border Defence Troops

BG: Border Guard

CEAS: Common European Asylum System

CEE: Central and Eastern Europe

CEECs: Central and Eastern European countries

CI: constructivist institutionalism

CJEU: Court of Justice of the European Union

CoE: Council of Europe

COI: country of origin information

EAC: European Asylum Curriculum

EASO: European Asylum Support Office

ECtHR: European Court of Human Rights

ECRE: European Council on Refugees and Exiles

EMN: European Migration Network

ENARO: European Network of Asylum Reception Organisations

ERF: European Refugee Fund

EU: European Union

FDQ: Further Developing Asylum Quality in the European Union

GAMM: Global Approach to Migration and Mobility

HNLAC: Halina Nieć Legal Aid Centre

IIP: Individual Integration Programmes

IO: international organisations

IOM: International Organization for Migration

MFA: Ministry of Foreign Affairs

Mol: Ministry of Interior

Mol DMP: Ministry of Interior Department of Migration Policy

MLSP: Ministry of Labour and Social Policy

MP: member of parliament

NI: new institutionalism

NGO: non-governmental organisation

OCEI: Office of the Committee for European Integration

OF: Office for Foreigners

OF DRP: Office for Foreigners Department of Refugee Proceedings

OF DSA: Office for Foreigners Department of Social Assistance

PHARE: Poland and Hungary: Assistance for Restructuring their Economies

RB: Refugee Board

RCI: rational-choice institutionalism

SAC: Supreme Administrative Court

SI: sociological institutionalism

UN: United Nations

UNHCR: United Nations High Commissioner for Refugees

VP: Vienna Process

WRAC: Warsaw Regional Administrative Court

Note: This list does not give abbreviations of Polish provinces and of member states of the European Union. These are explained at the relevant point in the text. To do otherwise would merely expand further an already lengthy list.

## Chapter 1: Introduction

This study explores the discursive construction of 'transitiness' as a policy issue in Poland enabled by particular legal and institutional arenas within the Polish migration system. This chapter first defines transit migration and analyses the evolution of this concept. Second, it presents the aims of this study and the research questions. Third, it analyses the transit migration literature and identifies the contribution of this research project. Finally, it outlines the stages of the analysis.

The concept of 'transit migration' entered the migration policy debate in the early 1990s, at the time of the demise of communism and a geopolitical change in Central and Eastern Europe (CEE) (Düvell 2006a: 3-5; 2006b: 4-5) that created a new migration space. First, democratisation and the lifting of restrictions on movement from the former Soviet bloc spurred the emigration of Central and Eastern Europeans. For example, in Germany, between 1990 and 1991 Polish, Czech, Slovak and Hungarian citizens submitted over 300,000 temporary and permanent stay applications. Second, Central and Eastern European countries (CEECs) were facing significant immigration from neighbouring states. The number of border crossings in Poland rose sharply from 6.2 million in 1988 to 87.5 million in 1997. The majority of foreign entrants were short-term visitors from Germany and the former Soviet republics (Stola 2001b). Third, CEE became a 'waiting room' for transit migrants (illegal immigrants and asylum-seekers) from the former Soviet Union, the Middle East and North Africa heading to Western Europe (IOM 1994d). The Polish Border Guard refused entry to over 35,000 persons in 1991 (Mol 1993b). In the same year Polish and German border officers recorded more than 13,000 attempts to cross the Polish-German border. In 1992 the number grew by 147% to over 33,000 (IOM 1994b: 14).

These developments prompted increased research on migration in CEE and a core element of this focussed on transit migration. The first attempts to define transit migration were undertaken by international organisations (IOs), notably the United Nations (UN) and the International Organization for Migration (IOM). One of the earliest definitions described transit migration as 'migration from one country with the intention of seeking the possibility there to emigrate to another country as the country of final destination' (UN/ECE 1993: 7). The IOM characterised the phenomenon as: 'migratory movements to

one or more countries with the intention to migrate to yet another country of final destination. These intentions or plans can develop or change at any stage, from the initial outset to any time while in transit, a process that can take a few days or several years. Such plan involves routes, means of travel (air, train, bus) and means of subsistence (work, trade) in transit countries' (IOM 1994d: 5). The 1994 IOM study classified transit migrants as: 'conscious migrants' with primarily economic motivations who have detailed information on the intended countries of transit and destination and the necessary resources for their journey; and 'accidental migrants' who lack accurate information on migration routes, procedures, and sufficient financial means. Their strategy is often spontaneous and disorderly. The latter category includes asylum-seekers who are usually forced by the circumstances in their country of origin and rather than planning their journeys, they seek a safe place to stay and the country of destination is of secondary importance to them (IOM 1994d: 23-6). Thus, transit migration was quickly framed as a problem.

The early 1990s' meaning of transit migration was also forged within the European Union (EU). Fears among Western societies and political elites of a possible mass and uncontrolled influx of CEEC citizens and transit migrants (Wallace and Stola 2001; Boswell 2003) constituted one of the key factors that prompted the extension of migration control to EU-adjacent countries. This included 'externalisation' of border control measures, capacity-building of asylum systems and migration management, and readmission agreements that facilitated the return of asylum-seekers and illegal migrants to CEECs (Boswell 2003: 622). The recognition of CEECs as 'safe' and capable of managing the flows (Kjaergaard 1994; Collinson 1996; Lavenex 1999) defined them as a kind of 'buffer zone' to absorb some of the migration potential that could otherwise have been directed to the EU (Geddes 2003: 181).

The reformulation of EU migration and asylum policy in the early 2000s gave a new impetus to the development of the transit migration concept. The changing dynamics of migration to, and within, the EU and the enlargement project prompted the revamp of the EU framework. The Amsterdam Treaty (1998) ceded migration competences to the EU level. Under the treaty the Commission was assigned powers to, among others, initiate legislation, negotiate international agreements and manage external cooperation. This facilitated the development of the Common European Asylum System (CEAS) that

recognises harmonisation of EU legislation and convergence of procedural and reception standards between member states as means most effectively addressing transit migration ('secondary movement') across the EU (CEC 2008c; CEC 2009a: 5; CEC 2009b: 10). At the same time 'by ensuring that asylum-seekers have equal access to protection in all MS [member states], this harmonisation constitutes a prerequisite for fair and efficient operation of the Dublin system, which limits the possibility of asylum-seekers to choose the MS which will examine their application' (CEC 2009d: 10). Therefore, 'secondary movement' come to be understood as 'the phenomenon of multiple applications for asylum submitted simultaneously or successively by the same person in several Member States. The main reasons for this are differences in recognition rates as well as the level of reception conditions established at national levels and the rights granted' (CEC 2008c: 20).

The reform of EU institutions has been complemented by reformulation of EU external action on migration. The latter was prompted by the 2004 enlargement<sup>1</sup> that moved the EU border eastwards and confronted the Union with a new migration environment. Ukraine took over Poland's position of being the EU's largest Eastern transit country for illegal migrants and the country producing labour migration heading to the EU via Poland. Second, North African and Middle East countries generated significant illegal immigration to the EU. Third, EU states and the Commission realised that, due to a growing complexity and multidimensionality of immigration, the tools to address this phenomenon had to go beyond fortifying the borders and readmission, and focus on long-term capacity building in countries of origin and transit that would assist them in keeping people in their territories (CEU 2006). As a result, EU external engagement has been built upon the EU Global Approach to Migration and Mobility (GAMM) considered as 'the overarching framework of EU external migration policy, based on genuine partnership with non-EU countries and addressing migration and mobility issues in a comprehensive and balanced manner' (EC 2011c: 5). The GAMM situates the problem of transit migration within a broader EU strategy aiming at improving the dialogue and cooperation with countries of origin and transit to manage more effectively illegal inflow to the EU and strengthen those countries' admission capacity and reception conditions (CEC 2005; CEU 2006).

The foregoing understandings of transit migration within and outside the EU prepare the conceptual ground for an exploration of the institutional and social reality of a transit state.

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<sup>1</sup> On 1 May 2004 the EU was joined by ten countries: Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

In order to demonstrate how policy recipients' understandings of migration feed into this reality, the analysis takes Chechen asylum migration as a case study. First, as opposed to illegal transit migrants or refugees (who having legalised their status in the country of application can freely travel across the EU), asylum-seekers (who submit an asylum application, are fingerprinted, and undergo asylum proceedings) are easily identifiable within member states' migration systems. Second, asylum matters are regulated by EU legislation, whereas integration and social assistance schemes for already established refugees is an exclusive competence of EU states (and, therefore, the degree of Europeanisation in this field is relatively low). Third, the analysis focuses on Chechens because since the early 2000s they constitute the largest refugee group in Poland. Out of nearly 15,000 asylum applications lodged in the country in 2013, more than 12,000 were submitted by Chechen migrants (Russian citizens of Chechen nationality). In 2012 the numbers surpassed 10,000 and 6,000 respectively (Office for Foreigners statistics 2014). The bulk of Chechens who seek protection in Poland subsequently move to Western European states, in particular France and Germany. This makes Poland one of the biggest asylum recipients in the region (UNHCR 2014) and at the same time the main transit country on the Eastern edges of the EU.

This dissertation analyses the construction of transitiveness in Poland that occurs through discursive strategies that emerge from an interaction of legal and bureaucratic venues at various levels within the Polish migration governance system over time. This system minimises the probability of asylum-seekers settling in Poland by exerting pressure on them to leave the country. The dissertation centres on four research questions: What is transitiveness? Second, how (and why) does it emerge and evolve? Third, what implications does it bring about? Central to these questions is Poland's membership of the EU. It is embedded in the EU institutional and legal framework, thus Polish migration and asylum policy must be understood within the constellation of national (member states) and EU actors. A fourth question is, therefore: how does the EU, by introducing a common asylum policy, shape Poland's transit country construction? The study addresses these questions in the Polish context by analysing the adoption of key EU asylum instruments: the qualification directive<sup>2</sup>, the procedures directive<sup>3</sup>, the Dublin regulation<sup>4</sup>, and the reception

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<sup>2</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004).



directive<sup>5</sup> at three policy-making levels: the EU, the Polish government, and the grassroots. Each of these levels produces the instrumental and social motives that inform the construction of transitness. The analysis draws on extensive empirical material collected in Brussels and Poland. It uses semi-structured interviews conducted with EU and Polish government officials, NGO representatives, and Chechen asylum-seekers; EU and Polish government documents; and various secondary sources.

This study locates the emergence of transitness in a wider understanding of how policy is made within the EU. It is argued that since the early 1990s European integration has been the major factor organising – initially through conditionality and then, after EU accession, through intensive multi-level cooperation and bargaining – the institutional and legal setting of Polish migration and asylum policy-making. Within this setting, Polish decision-makers across policy levels conceptualise ideas about migration and asylum, and reflect upon the various aspects of transit. The dominant role of the EU in shaping Polish migration policy and discourse has been framed by the formal incorporation of migration norms into a broader network of relationships with the EU (e.g. inclusion of migration and asylum affairs into EU accession negotiation process) as well as by Polish officials' perceptions of the EU as a modernising force and enabling an effective and timely translation of migration policy models, legislation, and learning templates.

The conceptualisation of transit migration within Europeanisation has occurred in the conditions of feeble non-EU migration policy ideas. In 1989 Poland emerged as 'an incubator in which a new and previously unverified migration policy model was born. It was shaped by two processes: systemic transformation following the collapse of communism, and European integration' (Weinar 2006: 17). In order to understand and explain new migration patterns and tendencies, and to empirically measure their implications, the bulk of the 1990s literature on immigration in Poland focused on the technicalities of migration flows (Iglicka *et al.* 1997; Frejka *et al.* 1998; Głąbicka *et al.* 1998; Okólski 1998b; Iglicka and Sword 1999; Iglicka 2001). This, however, indicated an absence of research into the philosophical or sociological aspects of migration policy creation and evolution. It is

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<sup>3</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005).

<sup>4</sup> Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003).

<sup>5</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003).

therefore difficult to identify notions and beliefs about immigration that developed outside the EU setting and how they influenced on the Polish governance.

One can distinguish two policy traditions that emerged at the outset of the post-1989 Polish migration system creation within which ideas of transit were formed. The first tradition has its roots in the democratic opposition against communism and the Solidarity movement in Poland. Since Solidarity was founded upon principles of democratisation and a strong attachment to human rights and fundamental freedoms, those policy-makers who came from this background and took part in the democratisation process appealed to humanitarian values and obligations towards immigrants. This structured their approach to nascent Polish migration institutions and regulations (Weinar 2006: 82).

The most striking example of the translation of post-Solidarity human rights ideas into the migration debate in the early 1990s were deliberations over Poland's new immigration law. The Foreigners' Act, the first regulation comprehensively regulating migration in Poland after the collapse of the Soviet Union, was discussed in the Parliament between 1995 and 1997. A number of politicians who took part in parliamentary discussions, whilst referring to their opposition experiences in the 1970s and 1980s, emphasised the need to extend the procedural and substantive rights of asylum-seekers. This included their unequivocal advocacy action to ensure the protection asylum seekers' guarantees at the time of application submission (Sejm 1997a, b). Others lobbied for a greater flexibility of admission and reception institutions introduced in new provisions and adjustment to asylum-seekers' needs and preferences. Weinar (2006) characterises this process as the emergence of the 'humanitarian approach' to immigration.

In this context, transit migration appeared as a new category. Polish political elites, while morally obliged to provide shelter to refugees and admit Eastern Europeans fleeing from regions of political and/or economic instability and turmoil, were fully aware of the transit status of their country, a country that was unable to generate incentives to settle and put down roots in Polish society (Kozłowski 1994, 1999). In this sense, the post-1989 humanitarian approach to immigration developed as detached from the intentions of those wishing to go west.

An alternative tradition that influenced policy deliberation within the Polish migration and asylum system prior to Europeanisation arose within the Ministry of Interior (MoI) and centred around restricting movement (Weinar 2006: 82). Shevel (2011: 240) traces the origins of a strong MoI officials' attachment to border control and deportation as the most effective instruments to deal with immigration developing in the process of the post-communist formation of Polish political elites. She argues that statements of key Polish asylum policy officials from that period demonstrate that they held rather conservative beliefs both about how the state should respond to asylum-seekers and to the UNHCR criticisms. And she adds: 'in the case of Kozłowski [the then head of the MoI Bureau for Migration and Refugees], his conservative attitudes were a product of his professional background in the communist period when he was an official of the communist Polish Scouting and Guiding Association (ZHP)' (Shevel 2011: 240). These two sets of opinions and understandings influenced the development of the 1997 Foreigners' Act. Whereas parliamentarians of post-Solidarity background lobbied for a greater scope of foreigners' and asylum-seekers' rights and liberties, the government (MoI) decision-makers stood for 'restricting legal and illegal migration' as the key purpose of new legislation (MoI 1995a: 2).

The government's conceptualising a view of migration that embedded migration policy in the control and readmission paradigm had, of course, implications for the construction of transitness. The legal and border management mechanisms were conceived as indispensable to mitigate transit flows through Poland, and thus, to prevent the country becoming 'a waiting room for a growing number of illegal migrants' (MoI 1995a: 2-3; see also Kozłowski 1999). Poland's transit status was discursively associated with inflows for Eastern Europeans triggered by political and economic turbulences. Immigration constituted a threat to public security and implied the transformation of Poland's territory into the 'migration bulwark' for Western Europe (MoI 1995a: 2; see also Okólski and Kozłowski 1993, Kozłowski 1994, 1999).

The humanitarian and restrictive views on immigration that germinated in Poland in the early 1990s coevolved with attempts to define the transit space: its meaning, nature and implications for the state and migrants. Simultaneous to conceptual work on transit undertaken by international organisations (see earlier in this chapter), the research was carried out by a handful of Eastern European researchers. Stola (2001a), for example, contends that post-1989 Central and Eastern Europe emerged as the 'middle-zone' that

resulted from 'the region's geographic position between Western Europe (that is, the European Union) and as a pole of attraction for Eastern Europe along with the rest of the Eurasian continent' (Stola 2001a: 86). The region, with the leading role of Poland, acted as a migration buffer (Wallace *et al.* 1996; Wallace 1999, 2001): a shock absorber protecting Western Europe from inflows of people from East and South, and at the same time, as a space of intensive intra- and extra-regional mobility, attracting millions of people from Germany, former Soviet Union states, and the former Yugoslavia (Stola 2001a: 85). Those academic deliberations proved to be a useful source of data and information for migration decision-makers as well as left their mark on how transit migration was addressed within the government before EU accession (see e.g. Kozłowski 1994).

The ideas and philosophies about migration, asylum and transit, which developed at the beginning of the post-communist transformation, were gradually and selectively absorbed (restrictive approaches) or marginalised (human rights dimension of addressing inflows) in the process of EU integration. Due to conceptual incoherence, institutional fragmentation, and a lack of a tradition of immigration in Poland, the EU could promote only those values and policy models that were of importance for Western European states, including measures related to border control and readmission and deportation (Stola 2001b: 197). This research project analyses the emergence of the idea and practice of transit within EU-structured legal and bureaucratic change of Polish migration and asylum governance.

This study covers the period from the early 1990s (the post-communist systemic transformation) until the end of 2013, which marks the consolidation of Poland's post-EU accession asylum legal and institutional framework. This broad timeframe enables an in-depth analysis of the creation of Polish migration and asylum institutions before EU accession (1990-2003), and how they evolved during EU membership (2004-2013). Poland is a good example of a country that, following the collapse of the Soviet Union, and as a response to growing immigration, built its migration and asylum setting from scratch according to EU norms and policies, and since 2004 has taken part in EU migration and asylum policy-making.

This analysis emphasises the importance of institutional mechanisms and logics of social action at EU and domestic levels. Consequently, the project is framed within the Europeanisation approach and draws on elements from rational choice institutionalism

(RCI) and constructivist institutionalism (CI). These explanations enable an understanding of the institutional context of asylum policy-making, how it is interpreted by policy actors, and how intersecting structural and discursive drivers prompt policy change, and, therefore, shape Poland's transit construction. To reconcile the ontologically incongruent rationalist and constructivist positions, the analysis employs middle-range approach theory (Jupille *et al.* 2003; Checkel 2005a, b).

Let us now present the strands of transit migration literature that this project appeals to. The pioneering work to define the phenomenon was done by IOs that sought to understand population flows in post-1989 CEE: the IOM, for example, produced a series of studies focusing on 'pull' and 'push' factors shaping transit migration<sup>6</sup>, the socio-economic costs of this phenomenon, and the profile of transit migrants (IOM 1994 a, b, c, d, e). This framed an academic debate on transit. Düvell, who traces the meanings of transit migration through exploration of policy documents produced by migration organisations, concludes that transit has become 'a code for "illegal immigration", as well as for ineligible asylum-seekers, who according to the Dublin Convention (1990) are supposed to make their claim in the first safe country instead of moving on' (Düvell 2006b: 6; see also Düvell 2005, 2006a, 2012). Second, the concept 'appears to be as politicised as it is blurred; its emergence is not free from political motivation, and its use is often politically loaded, if not negatively connotated' (Düvell 2006b: 4; see also Bredeloup 2012). Collyer and de Haas (2012), on the other hand, see the concept of transit migration as often applied in a rigid way by states to pin down particular categories of migrants or to re-brand *de facto* settlers as people who should leave. It also ignores the dynamic character of journeys that could be made in stages and that often do not have fixed end-points. Therefore, although the concept 'may look innovative, it does not challenge but actually reinforces the notion that migratory moves have fixed starting and end points, and, by doing so, it essentialises the transit space by reducing it to a "through space" ' (Collyer and de Haas 2012: 479).<sup>7</sup>

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<sup>6</sup> The IOM defines 'pull' factors as: i) economic reasons related to the improvement of migrant's economic status; ii) living standards: the perceived higher standards of social and cultural life in the country of destination; and/or iii) personal reasons related to better opportunities in a foreign country (education, career advancement, marriage). 'Push' factors, on the other hand, are: i) war; ii) persecution and discrimination; and/or iii) poverty (IOM 1994d: 22-23).

<sup>7</sup> In order to overcome this definitional problem, Collyer and de Haas (2012) advance the idea of 'fragmented journeys' as a way of conceptualising migration as a process, in which people shift from one categorisation based on time/space, location, direction and causes to another.

Most migration authors conceptualise transit by exploring the migrants' motivations as key determinants of movement (e.g. İçduygu 1995, 2005; Düvell 2006a, b). The studies, largely based on interviews conducted with migrants in countries of transit, identify three sets of factors shaping decisions about migration. First, their journey is shaped by cost-benefit calculations: people move 'if this maximizes their individual utility (usually through higher income), and cease to move or even move back if the cost-benefit equation changes' (Castles 2004: 208). Düvell (2006a, b), for example, mentions the availability of financial means as the main determinant of transit: the lack of funds forces migrants to stop their journey in the middle of the path they have trodden and bolster their finances. Second, migration may be disrupted by the country of destination's migration regulations and/or border restrictions. In this case, the transit state is a 'train station' from where travellers hope to reach their final destination. As Düvell (2006b: 13; see also IOM 1995, 2003; Futo *et al.* 2005; Hess 2012) argues, '[t]his is possible because such [transit] countries offer specific conditions such as liberal travel regulations with the country of final destination, lax border controls or porous borders, black market for visa, smuggling networks or corrupt authorities from who to buy a visa'. Third, transit migrants tend to originate from countries in close proximity to the destination state, have knowledge of the transit countries' culture and language, and access to social networks. This 'build[s] [their] social, and possibly also human capital that will enable them to move to their final destination' (Düvell 2006b: 13).

Another strand of literature goes beyond migrants' motivations and choices and argues that transit migration can be better captured from the perspective of migrant networks (Koser 1997; Robinson and Segrott 2002; Gilbert and Koser 2004; Koser and Pinkerton 2004) that have two functions<sup>8</sup>. First, they provide the most relevant and up-to-date information about migration routes (Koser and Pinkerton 2004: 1) and the basis for processes of settlement and community formation in the immigration area (Castles 2004: 208). Second, the information that is disseminated to migrants through networks before they arrive in their destination country is to a large extent determined by smugglers. They provide services, ranging from simple advice on falsified documents or the ways to cross the border to extensive travel packages that arrange journeys from start to finish (Koser 1997; Koser and Pinkerton 2004; Düvell 2008a, b, c). In this sense, social networks that

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<sup>8</sup> Although no clear definition of migrant networks exists, they usually consist of family and friends, community organisations, intermediaries (such as those who recruit labour) and travel agents. A distinction is often made between networks based on 'personal' ties, including family and friends, and those based on distant relationships (Koser and Pinkerton 2004: 2).

develop in transit countries assist migrants in preparing for the onward journey and determine their chances of arriving at their final destination.

In order to build a more comprehensive picture of transit migration, some scholars explore geography of transit routes and/or zones that constitute 'waiting rooms' for migrants heading to the EU (Içduygu 2000, 2010; Düvell 2006b, 2008a, 2012; Papadopoulou-Kourkoula 2008). Düvell identifies four 'quadrants' of transit migration around the Union: the Eastern quadrant (Azerbaijan, Belarus, Russia, Ukraine), the South East European quadrant (the Balkans, Cyprus, Turkey), the Central Mediterranean quadrant (Egypt, Libya, Malta, Tunisia), and the Western Mediterranean and Atlantic quadrant (Algeria, Mauritania, Morocco). The quadrants and trajectories of migration change over time, being shaped by internal and external factors, including states' migration and border management regulations and socio-economic policies (Düvell 2006b: 11). Druke (2004: 120), for instance, notes that migration policy reforms undertaken in CEECs in the early 1990s altered their migration status and improved the capacity to admit asylum-seekers.

The recent research on transit in EU adjacent countries has been informed by the development of EU external action on migration and asylum (Collyer *et al.* 2012: 411). The strengthening of cooperation between the EU and third states on migration spurred an academic debate on the latter's institutional capacity to manage the movements. Düvell (2008b, c) analyses asylum legislation, procedures and reception policy in Ukraine, this being the major transit country in the EU's Eastern neighbourhood. A number of deficiencies that emerge in the system make the country unable to meet the most fundamental international protection standards, and expose asylum-seekers, in particular Chechens, to deportation. This drives migrants into irregularity and/or exerts pressure on them to move illegally to the EU. At the same time, however, Ukraine's flawed asylum system has been bolstered by the EU sending mixed and vague signals with respect to the country's membership and fortifying external borders. On the other hand, in Turkey, a prime location for transit en route to the EU in the southwest, the bulk of migrants have not been assured access to work and provided with integration support. This 'prompts them to search for alternative destinations' (Düvell 2006b: 11). Other migration scholars go beyond institutions to look into the social processes of constructing transit reality. Taking Turkey as a case study, Içduygu and Yüksek (2012: 441) argue that securitisation of the EU migration regime have resulted in politicisation of transit migration 'precipitating an

obsession with transit migration on the peripheries of the continent' that led to an extension of EU measures to combat illegal migration and manage external borders, and created a discourse about migration control in the process of Turkey's EU membership negotiations.

Some studies also evaluate EU external policy *per se* and what kind of implications it brings about in transit states. The research on EU European Neighbourhood Policy shows the Union's impact on improving the neighbouring states' admission capacity and border management to mitigate illegal transit movement (see e.g. Guild 2005). Düvell points to the EU-Ukraine Action Plans on Justice and Home Affairs (2001, 2004) as 'road maps' for the implementation of EU migration norms (2006b: 21). On the other hand, the dialogues and processes developing within broader political frameworks, such as the above-mentioned GAMM, facilitate exchange of knowledge, provision of equipment and seconding of staff and joint operations. Others see EU migration policy externalisation, such as an expansion of EU return instruments and readmission, as shifting the responsibility to prevent 'unwanted' migrants from entering the EU (McKeever *et al.* 2005; Düvell 2006a, b; İçduygu 2007, 2012).

Hess (2012), on the other hand, conceptualises the EU impact on transit in its neighbourhood by drawing upon the concept of 'border zones' (Lahav and Guiraudon 2000; Guiraudon 2001; Walters 2002; Bigo and Guild 2005), understood as 'structurally perforated systems', to explain border control as driven by clandestine and multidirectional forms of mobility (Sciortino 2004). Here, EU migration policy externalisation through such instruments as the GAMM, is perceived as an extension of the EU border regime that reduces sovereignty of third states and renders them as objects of EU 'risk analyses' and border interventions. This, along with the effects of migrants' own objectives and strategies, e.g. to exploit informal labour markets, generates 'highly precarious transit zones' around the EU that 'keep people caught in mobility and transforms border regions into zones of heightened circulation' (Hess 2012: 435-6).

The research on transit builds knowledge of transit migrants, formation of their decisions, transit routes, and of the role of the EU in forming institutions and discourses in transit states that is necessary to conceptualise the structural and cognitive factors that shape the construction of transitness. This research project adds to the transit migration scholarship



in three ways. First, it contributes to the understanding of an institutional reality of a transit country. Whilst acknowledging that there are 'push' and 'pull' factors that generate transit migration (IOM 1994d), this analysis explores the state (Hollifield 2000; Sciortino 2000) that migrants pass through. The focus is put on the process of policy adoption, i.e. '[the] process of interaction between the setting of goals and actions geared to achieving them' (Pressman and Wildavsky 1984: xxiii) and bureaucratic adaptation. By exploring 'the gaps between stated policy objectives and outcomes' (Cornelius and Tsuda 2004: 5) that emerge through putting EU asylum instruments into practice, this analysis examines the formation of the deficient milieu within which motivations and strategies of asylum-seekers travelling to/through Poland develop. The legal and institutional deficiencies are embedded in social interactions that are shaped by policy actors. The latter make sense of the reality in which they operate, pondering over the policy process and communicating with their colleagues. At the same time, they reflect on transit/transit migration, and whether (and how) it is influenced by the policy environment.

Second, this project explores transitiveness within the context of institutional change. It traces the origins of transitiveness in the 1990s creation of the Polish migration and asylum setting. It analyses the process of formulating the response to an increasing inflow following the fall of the Iron Curtain, and whether and how this shaped understandings of transit. An important role in moulding the then meaning of transit was played by the EU that, through involving government officials into multilateral cooperation and readmission, oriented the Polish asylum policy towards tightening the borders and effective governance of transit migration to alleviate migration to Western Europe. Poland's EU accession has altered the transit concept formation: the interpretations of transit have been formed through complex multi-level processes of EU rule translation. The implementation of EU asylum instruments produces the legal mechanisms to tackle transit migration. On the other hand, an engagement of Polish civil servants with various EU deliberation and learning networks prompts an incorporation of asylum meanings, exchange practices and conceptualisation of instruments to deal with transit. The learning opportunities arise across levels of governance and change over time.

Third, the use of qualitative methods and an additive research design (drawing on elements from the rationalist and constructivist positions) surpass the mainstream migration literature, which usually explores transit from the perspective of agency and emphasises

migrants' motivations and strategies. Employment of RCI and CI accounts enables the motives to be traced that inform the transit country construction and that emerge within the asylum system and its interpretations by policy actors. This study develops a theoretical framework allowing reconciliation of these competing dynamics to operationalise the research question and to render the two approaches additive. The conceptualisation of the scope conditions within which EU-induced learning and persuasion are more likely to be effective and the causal mechanisms enables the role of discourse to be understood and the terrain of RCI-CI interaction to be delineated through empirical investigation.

This study is organised as follows. Chapter two introduces the analytical framework of the project. It presents the Europeanisation approach and the mechanisms to explore the EU-induced domestic change. It then conceptualises this setting within the RCI-CI reconciliation mechanisms. Finally, the chapter presents the methodology and the research design employed to investigate the research question.

Chapter three contextualises the analysis of EU asylum policy adoption and the emergence of transitness. The first section provides an overview of migration and asylum trends and settlement in Poland, and situates the Chechen case within these trends. The second section explores the country's legal response to post-1989 migration: the implementation of refugee protection provisions, deportation mechanisms and border management regulations; and the establishment of key migration institutions: the MoI and the Border Guard (BG). The third section investigates the process of Poland's engagement with the EU and how EU conditionality shaped Polish asylum arrangements and provided opportunities for learning. The EU-driven transformation of the Polish setting influenced the response to transit (seen as being informed by structural economic factors) that came to be associated with EU readmission agreements and measures to tighten and control borders.

Chapter four constitutes the first part of the empirical analysis of post-EU accession EU asylum policy and law adoption. It focuses on the implementation of CEAS instruments: the qualification directive (that regulates the criteria for granting protection), the procedures directive (that establishes the common standards of the asylum determination procedure), the Dublin II regulation (that allocates responsibility to examine asylum claims within the EU), and the reception directive (that establishes the minimum standards for reception of asylum-seekers) across the EU. The analysis identifies the institutional and legal

deficiencies that develop in the course EU law transposition, how they are interpreted by EU actors, and whether (and how) they are rectified. The analysis finally examines the contribution of Polish officials to EU debate on asylum instruments and the responses to transit. This EU legal and bureaucratic setting produces the underlying calculative and social logics that mould the construction of transit and that are transferred into the Polish level.

Chapter five investigates the translation of EU asylum instruments at the Polish core executive level. It explores the EU-induced change of asylum qualification, procedures, reception, and redistribution legislation, and bureaucratic adaptation. The institutional (e.g. allocation of the resources to effectively implement EU instruments, and marginalisation of social aspects of asylum policy) and legal (e.g. EU law adoption detached from the country's long-term migration strategy) deficiencies that develop within these processes, and that are shaped by social interactions that emphasise policy learning, produce the ideas about transit and inform an incorporation of EU conceptions to deal with the phenomenon.

Chapter six explores the grassroots dynamics of EU asylum policy adoption. It analyses an on-the-ground restructuring of asylum procedures, reception and integration arrangements, and institutional adjustments. The latter refer to an extension of the capacity of structures responsible for asylum claim examination (the Office of Foreigners (OF) and the BG), and to increasing engagement of Polish bureaucrats with EU asylum learning platforms. The construction of transit at this level is enabled by a constellation of structural (e.g. narrow discretion of OF grassroots officials), legal and socio-economic (e.g. flawed access to the labour market), and discursive (e.g. decision-makers' and asylum-seekers' incongruent interpretations of instruments to address transit) flaws that emerge in the implementation process.

Chapter seven organises the empirical findings. It illustrates how the deficiencies that emerge in the process of asylum policy implementation inform the creation of instrumental and social logics that then enable the multi-level construction of transit. It focuses on the development of interpretations of transit migration, perceptions of institutional and policy responses to transit, and how understandings about migration of Chechen asylum-seekers contribute to this transit environment. Finally, the chapter investigates the implications of

Poland's transit construction for the asylum system, integration policy, and asylum-seekers themselves, and formulates recommendations on how the existing flaws might be bridged.

Finally, Chapter eight offers some conclusions in relation to the three main contributions of the study, namely on the emergence and evolution of transitness; the EU-induced policy change driven by rationalist and constructivist institutions; and on the reconciliation of these competing accounts.

## Chapter 2: Analytical Framework and Methodology

### 1. Introduction

This chapter builds the framework to explore the interactions between the EU and Polish asylum policy and how this shapes the concept of transitness. The analysis is grounded within the Europeanisation approach that ‘orchestrates’ (Featherstone and Radaelli 2003: 340) the existing concepts and theories to investigate vertical and horizontal relationships between EU and domestic levels, and how the EU brings about adaptation and change. Vertical interaction means the transposition and implementation of EU rules into domestic politics; horizontal interaction is the provision of ‘the terms of reference, or the opportunities for socialisation of domestic actors who then produce “exchanges” (of ideas, power, policies, and so on) between each other’ (Radaelli 2004: 5).

In order to explain how Polish migration and asylum institutions are created and have evolved within Europeanisation, the theoretical setting builds on RCI to account for the institutional adjustment to the EU; and CI that examines policy actors’ preferences and motivations and how they adapt to these changes both nationally and at the EU level. To reconcile the RCI and CI positions, the analysis employs the mid-range approach (Jupille *et al.* 2003; Checkel 2005a, b) that asks whether and how rationalist and constructivist accounts leave distinct empirical ‘trails’ (Checkel and Moravcsik 2001) to conceptualise the ground between theory and empirical data, and when to locate this interaction over time. This enables an understanding of EU asylum policy implementation and how policy actors interpret this policy, and therefore, how instrumental and social motives that develop within this policy setting mould the discursive construction of transitness.

This chapter first defines Europeanisation and shows how it frames the empirical analysis. Second, it develops an understanding of EU-induced domestic change and its implications. Third, it explores the logic of a rationalist-constructivist interaction and outlines the scope conditions and mechanisms of this dialogue. Finally, the chapter operationalises the research question and provides the methodology of the study.

## 2. Europeanisation

This section first explains the drivers and mechanisms of Europeanisation and how it prompts domestic change, driven by a 'logic of consequences' and a 'logic of appropriateness'. Second, it analyses the dynamics of pre- and post-EU accession Europeanisation.

### 2.1. Europeanisation: defining the concept

One can identify three ideal types of Europeanisation that emphasise the process of EU norms' translation and an EU-spurred domestic change (Radaelli 2004: 6-8). First, Europeanisation refers to the process of governance (Kohler-Koch and Eising 1999; Scharpf 1999; Buller and Gamble 2002; Bache 2003). Whereas Bache (2003) grounds his analysis in contemporary models of governance, such as the 'differentiated' polity model put forward by Rhodes (1997), Kohler-Koch and Eising (1999) treat Europeanisation as a process of evolving understandings of governance in Europe. Radaelli (2004: 6) points out that: 'Europeanisation has modified shared notions of governance in EU member states by establishing the principle of partnership between private and public actors, and by inserting regions into a complex set of layers of governance.'

Second, Europeanisation refers to institutionalisation (Green-Cowles *et al.* 2001; Olsen 2002; Börzel 2005). Green-Cowles *et al.* (2001: 3) define Europeanisation as 'the emergence and development at the European level of distinct structures, that is, of political, legal and social institutions associated with political problem solving that formalize interactions among the actors, and of policy networks specializing in the creation of authoritative European rules'. The process includes both the strengthening of organisational capacity for collective action and the development of common ideas, such as new norms and meanings of citizenship and membership (Checkel 2001a). This understanding of Europeanisation is based on the claim that the exclusive factor triggering domestic change is the 'misfit' between EU and domestic policies (Green-Cowles *et al.* 2001) (see section 2.2).

Third, Europeanisation refers to discourse (Hay and Rosamond 2002; Kallestrup 2002). Hay and Rosamond conceptualise Europeanisation as the process enabling translation of

globalisation discourses into domestic politics. Schmidt and Radaelli (2004; see also Schmidt 2002, 2010), on the other hand, place discourse in an institutional setting through the development of the notion of discursive institutionalism or constructivist institutionalism that explains how discourse shapes actors' preferences and strategies, increases/decreases the value of resources, and reformulates policy (see sections 2.2 and 3.1).

These three understandings of Europeanisation taken together form the basis for Radaelli's definition of Europeanisation that this project employs. He defines Europeanisation as 'processes of a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated into the logic of domestic (national and subnational) discourse, political structures and public policies' (Radaelli 2000b: 3). The EU, first, shapes policy actors' understandings and motivations as the normative ground of their action. In turn, cognitive transformation may lead to EU norms' internalisation and preference change. As a result, an institutional development is structured not only by actors' interests but also by 'particular normative orders or structures of meaning' (Jachtenfuchs *et al.* 1999: 411). Second, the EU transforms domestic political structures, i.e. institutions, public administration<sup>9</sup>, intergovernmental relations and legal frameworks (Radaelli 2000b). Third, the EU frames the elements of public policy, i.e. actors, resources, instruments and policy styles and practices. Radaelli (2000b: 14) identifies the dynamics of public policy Europeanisation as 'a greater impact of Europe and in many instances convergence, direct and indirect transfer of models from Brussels, and a profound impact of EU regulation[s] on national competition policy and regulatory approaches.'

Radaelli understands Europeanisation as an interactive process that goes beyond a one-way transfer of EU norms and uni-directional reaction to 'Europe' (see e.g. Rometsch and Wessels 1996) and prompts the institutionalisation of EU norms, regulations and ideas into the domestic (national and/or local) political system. This enables the analysis of the Europeanisation of Polish migration and asylum policy: the translation of EU policies, laws

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<sup>9</sup> For example, Page and Wouters (1995) explore direct and indirect forms of EU impact on member states' administrations. The former is the European Court of Justice's jurisprudence translated into domestic civil service regulations. The latter refer to EU requirements to undertake administrative adjustments, transfer of EU administrative structures, and/or diffusion of administrative habits and practices.

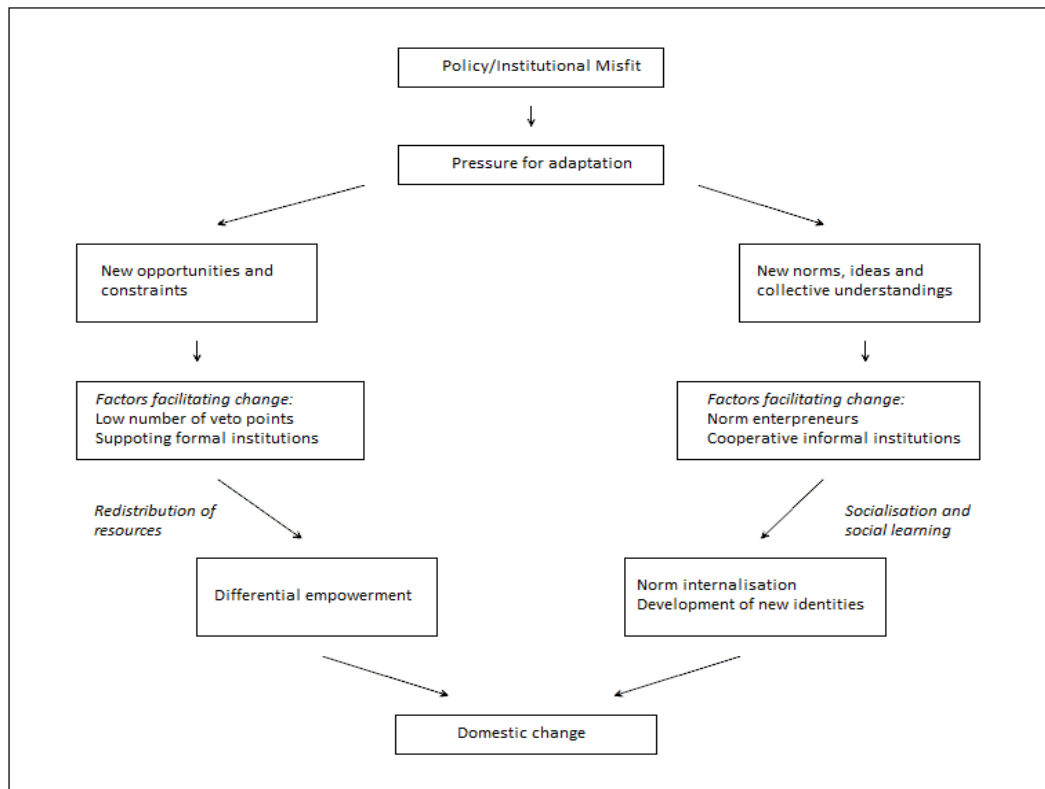
and ideas into the Polish framework, bureaucratic adaptation to the EU, and an incorporation of EU meanings and learning of EU policy processes and practices. Let us now examine how Europeanisation produces change and how to measure it.

## **2.2. Europeanisation and domestic change**

This study employs the ‘goodness of fit’ approach (Börzel 1999; Green-Cowles *et al.* 2001; Börzel and Risse 2003) to explain how politics (the policy-making process), policy (content and nature) and polity (domestic institutions) adapt to top-down pressures generated by engagement with the EU (Taylor *et al.* 2013: 10). The approach is based on the claim that the exclusive factor prompting domestic change is the degree of ‘fit’ between EU and national structures, rules and practices (Figure 2.1). This triggers ‘adaptational pressure’: the lower the ‘fit’ (compatibility) between European and national institutions, the higher the adaptational pressure (Green-Cowles *et al.* 2001: 7). If adaptational pressure is low, not much structural adaptation is required: actors easily incorporate EU institutions in their domestic ways of doing things. If, however, adaptational pressure is high, European institutions challenge national structures, practices or identities and prompt adjustments (Green-Cowles *et al.* 2001: 8-9).



**Figure 2.1 Two logics of domestic change**



Source: Börzel and Risse (2003: 69).

Börzel and Risse (2003) argue that rational choice institutionalism and sociological institutionalism (SI) identify different mechanisms of domestic adaptation in response to Europeanisation. In this section I draw upon sociological institutionalism in order to maintain coherence with Börzel and Risse's (2003) approach. However, the use of this type of institutionalism appeals to a specific ontological choice (constructivism). Therefore, I draw upon constructivist institutionalism (CI) as the second framework, next to rational choice institutionalism, explaining institutional change, to render ontological differences more explicit (see section 3). RCI is grounded in a 'logic of consequences' (March and Olsen 1998) according to which, actors with fixed preferences calculate strategically (by weighting the costs and benefits of different strategies and actions) to maximise those preferences. From this perspective, Europeanisation is understood as 'an emerging political opportunity structure which offers some actors additional resources to exert influence, while severely constraining the ability of others to pursue their goals' (Börzel and Risse 2003: 63). Taking this into account, Börzel and Risse (2003) point out that Europeanisation leads to redistribution of resources and prompts change only if a significant misfit exists

that provides domestic actors with additional opportunities and constraints, and if domestic actors have resources to use these opportunities.

Two mediating factors facilitate or hamper adaptational change. First, there are multiple *veto points* in a domestic policy-making structure that impinge on the capacity of domestic actors to achieve policy goals: '[t]he more power is dispersed across the political system, and the more actors have a say in political decision-making, the more difficult it is to foster the domestic consensus or "winning coalition" necessary to introduce changes in response to Europeanisation pressures' (Börzel and Risse 2003: 64). Second, there are *formal institutions* that equip actors with material and ideational resources necessary to translate EU policy into domestic levels of governance, and, therefore, to promote adjustment (Figure 2.1).

The 1990s saw a significant misfit between EU and Polish asylum structures. Poland inherited from the communist era obsolete asylum regulations incompatible with international protection standards and institutions unprepared to tackle immigration (see Chapter 3.3.1). This created pressure for adaptation and provided Polish actors with new opportunities, including EU legislative templates and learning opportunities. In the post-EU accession period, on the other hand, the EU has involved Polish officials in law and policy-making and the complex network of multi-level interactions. This, along with a scant number of veto points in the system (e.g. limited impact of NGOs on policy-making), have facilitated the translation of EU asylum policies and ideas (see Chapter 5.3).

SI, on the other hand, embodies a 'logic of appropriateness' (DiMaggio and Powell 1983, 1991; March and Olsen 1989, 1998) that treats actors as motivated by internalised identities, values and norms. Among alternative courses of action, they choose the (most) appropriate or legitimate one that shapes their policy goals. From this angle, Europeanisation means 'the emergence of new rules, norms, practices, and structures of meaning to which member states are exposed and which they have to incorporate into their domestic practices and structures' (Börzel and Risse 2003: 66). SI offers two explanations of EU-induced domestic change. The first is institutional isomorphism that is understood as the development of organisational, administrative and procedural similarities as a result of frequent interactions between institutions over time (DiMaggio and Powell 1983, 1991). Second are socialisation mechanisms, which this project draws

upon, through which decision-makers incorporate and internalise new norms and rules in order to become members of (international) society ‘in good standing’ (Finnemore and Sikkink 1998). Actors are socialised into new norms through persuasion and learning leading to reformulation of their interests, preferences and/or identities (see section 3).

In contrast to the instrumental explanation, the social perspective argues that high adaptational pressure is likely to meet strong institutional *inertia* preventing any domestic change since ‘[n]ew norms, rules and practices do not simply replace or harmonize existing ones’ (Börzel and Risse 2003: 70). Actors are more open to persuasion and learning if ‘new norms and ideas, albeit “inconvenient”, are compatible with collectively shared understandings and meaning structures’. Therefore, medium adaptation pressure is most likely to prompt domestic transformation (section 3.2 develops the conditions and mechanisms under which learning and persuasion are likely to be more effective). The following mediating factors shape the dynamic of this process. First, there are *norms entrepreneurs* that use socialisation and learning mechanisms to persuade domestic actors to redefine their interests and identities and, in consequence, spur change. Börzel and Risse (2003) identify two types of norm-promoting agents: epistemic communities and advocacy networks. The former are networks of knowledge-based experts that help decision-makers to define the problems they face by providing scientific knowledge (Haas 1992). The latter are actors bounded by shared beliefs and values that use collectively shared norms and understandings to persuade other actors to reformulate their policies (Keck and Sikkink 1998). Second, there is *a political culture and other informal institutions* that define the realm in which decision-makers can legitimately pursue their interests and respond to Europeanisation pressures. A consensus-oriented culture, as pointed out by Börzel and Risse (2003: 68), ‘helps to overcome multiple veto points by rendering their use inappropriate for actors... [; and] allows for a sharing of adaptational costs which facilitates the accommodation of pressure for adaptation.’

Since the 1990s the EU and EU states’ asylum ideas and policies have been seen by Polish civil servants as a natural point of reference (Interview. History Meeting House, Warsaw, 2 January 2013). Their absorption has been enabled by frequent interactions with EU and EU states’ officials (e.g. pre-EU accession learning as part of twinning and screening programmes, post-EU accession participation in EU asylum policy-making) (Chapters 3.4 and 5.4); and engagement with EU specialised platforms of asylum knowledge and

practices sharing (e.g. the European Asylum Support Office (EASO)) (Chapters 3.3.3 and 6.4).

The rationalist and social logics of domestic change intersect: they either work simultaneously or determine different stages of adaptation. Börzel and Risse (2003: 67-70; see also Green-Cowles *et al.* 2001; Radaelli 2000b, 2003) identify three types of domestic change in response to Europeanisation. First is *absorption* (low degree of domestic change): domestic institutions implement EU norms and regulations without substantially altering existing processes and policies. Second is *accommodation* (moderate degree of change): domestic institutions accommodate Europeanisation pressures by adapting to existing processes and policies without altering their key features/parameters and meanings. Third is *transformation* (high degree of change): domestic institutions replace existing processes and policies with new ones, or substantially alter their key features/parameters and meanings.

From the rational choice perspective, in the pre-EU accession period, high adaptational pressure between EU and Polish policies led to transformation of the Polish migration and asylum setting: European integration grounded Polish legislation in EU principles and prompted institutional development. The establishment of asylum structures from scratch according to EU preferences reduced adaptation pressure and resulted in accommodation in the post-EU accession period. Yet, the EU has remained the main driver of legislative and administrative evolution (e.g. the EU-induced development of the Office for Foreigners (OF)). From sociological and constructivist perspectives, on the other hand, medium pressure for adaptation (resulting from co-occurrence of 'ideational' misfit and Polish officials' perception of EU norms as essential to policy development) prompted reformulation of cognitive frames and meaning systems: whereas pre-EU accession European integration formed Polish bureaucrats' understandings of asylum concepts and definitions, post-EU accession interactions with the EU have facilitated incorporation of EU asylum qualification criteria, and the principles related to case examination and reception.

The Börzel and Risse's (2003) approach is useful for two major reasons. First, it is straightforward in explaining institutional creation. The framework identifies the 'goodness of fit' between Europeanisation and national bureaucratic settings and practices. The degree of fit/misfit generates adaptational pressure that induces domestic change:

absorption, accommodation, or transformation. Second, the framework conceptualises the causal mechanisms through which Europeanisation affects member states. The mechanisms are collapsed into two different, albeit intersecting pathways: one is based on resource redistribution and the role of actors in an opportunity structure altered by EU variables the other one is social constructivist and hinges on processes of socialisation and learning (Figure 2.1, p. 21). This analytical framework captures the pre-EU accession Europeanisation, i.e. how the gap between the EU and Polish migration and asylum institutions was created and what it meant.

The framework hinges on two mediating factors: multiple veto points in the domestic structure, and facilitating formal institutions/political culture to account for the degree to which domestic adaptation to the EU can be expected. However, Green-Cowles and collaborators (2001) argue that in order to fully comprehend the conditions under which change in response to the Europeanisation processes occurs one has to extend an exploration of structural factors to include the properties of actors because '[i]nsitutions might provide opportunities to actors or even affect their interests and identities. These actors ultimately have to exploit these opportunities in order to produce structural changes' (Green-Cowles *et al.* 2001: 11). Consequently, whether or not a country adjusts its institutional structure to 'Europe' depends on the presence or absence of five intervening factors: multiple veto points in the domestic structure, facilitating formal institutions, a country's organisational and policy-making cultures, the different empowerment of domestic actors, and learning.

The justification for using of Börzel and Risse's (2003) model with two mediating factors instead of the more inclusive framework (Green-Cowles *et al.* 2001) with five mediating factors is twofold. First, the former provides a plain explanation of a straightforward process of the pre-EU accession Polish migration setting formation. The setting was established from scratch according to EU norms and recommendations, and in the absence of alternative policy models (see Chapters 1 and 3.3 and 3.4). This analytical framework structures an investigation that focuses on key determinants of Polish migration institutions' creation: the degree of misfit emanating from Europeanisation and the adaptational processes. The latter, whilst being grounded in a rationalist institutional logic, was largely informed by the capacity of Polish policy actors to exploit new opportunities or circumvent constraints. This, however, was contingent on the presence of veto points in

the system, and the (in-) existence of supporting formal institutions that Börzel and Risse (2003) centre around.

Second, an investigation into the post-EU accession gap-narrowing process, which involves conceptualisation of how EU provisions, policies and ideas have been put in practice, requires transcending the 'goodness of fit' approach and theorising complex institutional and discursive interactions. In this sense, the Europeanisation framework offers only a point of departure for further inquiry into how the rationalist and social logics intersect over time. Under what conditions does instrumental adaptation to Europeanisation pressure suffice for domestic change, and when are more profound changes of preferences and identities necessary for Polish migration government structures to adjust to 'Europe'? The reconciliation mechanisms developed in section 3.2 identify what kind of policy actors through what kind of social processes (EU-steered communication, knowledge and practice sharing, and policy learning) absorb or internalise which EU asylum rules, norms and concepts. This constitutes therefore a more sophisticated theorisation of EU-informed institutional evolution and adaptation than the one offered by Green-Cowles *et al.* (2001).

The Börzel and Risse's (2003) approach, however, has been subject to criticism. First, the notion of 'goodness of fit' requires further clarification. Radaelli (2003) sees the metaphor of the 'fit' as covering too wide range of elements. He asserts that 'a country can have a bad or good "fit" because of the presence-absence of Roman law, strength-weakness of bureaucratic structures, corporatist-pluralist style of decision making... Given this broad range, there is no absolute compatibility or mismatch: it is up to political actors at the European Union and domestic level to define what they are' (Radaelli 2003: 45). The subjectively constructed degree of fit does not constitute an objective measure of domestic change. For example, much of the debate on welfare state reforms in Southern Europe in the late 1990s was shaped by those arguing that domestic policies were in line with European constraints (such as the Stability and Growth Pact) and those pointing out that the fit between domestic policies and the EU was poor, and thus requiring major reforms (Radaelli 2004: 7).

Second, some have questioned how valid misfit is as an explanatory factor (Knill and Lehmkuhl 1999; Haverland 2000; Héritier and Knill 2001; Thatcher 2004). The empirical evidence presented by Héritier and Knill (2001) shows how domestic actors exploit EU

opportunities to undertake policy reforms even if the conditions of European and national arrangements are congruent. Part of this difficulty stems from the 'goodness of fit' precondition itself better fitting policy areas where the EU sets a policy template that has to be put into effects in member states (or would-be states). However, Bulmer (2007: 52) contends that there are important areas of EU policy where there is considerable scope for national discretion. With the Open Method of Coordination, for example, EU states come together in a rather different setting, with the Union serving as a 'bourse' for policy transfer (see also Radaelli 2000: 29). On the other hand, in the case of telecommunications Thatcher (2004) demonstrates that whilst being under little pressure for adaptation, the governments used EU policy to justify and legitimate domestic change. The governments already seeking the reform were able to exploit EU policy as an opportunity rather than responding to a 'pressure'. The outcome of this type of Europeanisation was predominantly in terms of the clash between the reformers and those advocating for the *status quo* in telecommunications. Yet this, it was argued, was not captured by the 'goodness of fit' argument (Radelli 2003: 46).

Finally, Radaelli raises the question of the capacity of domestic institutions theorised in the 'goodness of fit' framework: 'what happens if these institutions are fragile?' (Radaelli 2003: 45; see also Morlino 1999). He asserts that in certain EU states, such as Belgium or Italy, national structures have been in a constant crisis or transition, and so they remain less capable of fencing or informing Europeanisation. Quite the opposite, in some cases Europeanisation emerges as a crucial component of domestic bureaucratic adaptation, as shown for example by the impact of the European Monetary Union on EU states. As a result 'the interaction between Europeanization and domestic institutions is dialectic' (Radaelli 2003: 45).

This study responds to those concerns. As indicated above, the 'goodness of fit' framework proves useful in conceptualising the pre-EU accession Europeanisation of Polish migration and asylum policy. The analysis shows that the misfit between the EU and the Polish structures generated the necessary incentive to set up the governmental framework to address new migration challenges. In the conditions of scarcity of non-EU migration ideas and concepts and a lack of tradition of immigration in post-communist Poland, the 'goodness of fit' framework, which centres on EU-induced adaptational pressure and domestic adjustment, works well in explaining the transfer of EU pre-determined norms,

and how they laid the foundations for the Polish migration system. Let us now proceed to the analysis of the evolving dynamics of Europeanisation.

### **2.3. Pre- and post-EU accession Europeanisation**

In order to expose the evolution of Poland's engagement with the EU, this study distinguishes between pre- and post- EU accession Europeanisation. Whereas the former assumes an asymmetric relationship favouring the EU (Schimmelfennig and Sedelmeier 2004; Lavenex 2008; Lavenex and Schimmelfennig 2009), the latter is characterised by bargaining and facilitated coordination (Radaelli 2004).

Schimmelfennig and Sedelmeier (2004, 2005; see also Grabbe 2005) developed the external incentives model to analyse the EU impact on domestic change in the Central and Eastern European countries (CEECs) prior to the 2004 EU enlargement. They argue that the effectiveness of EU rule translation to non-member states increases with: first, a greater determinacy (clarity and formality) of the rule; second, the size and speed of rewards; third, the credibility of conditional threats and promises; and fourth, a lower number of veto points incurring adoption costs. Their model is grounded in a strategy of conditionality in which 'the EU sets its rules as conditions that CEECs have to fulfil in order to receive EU rewards. These rewards consist of assistance and institutional ties ranging from trade and co-operation agreements via association agreements to full membership... Under this strategy, the EU pays the reward if the target government complies with the conditions and withholds the reward if it fails to comply' (Schimmelfennig and Sedelmeier 2004: 663). The credibility that the EU will reward rule adoption with membership increases significantly once accession negotiations starts: 'the focus moves from political to *acquis* conditionality whereby candidate countries are required to accept the *acquis communautaire* and transpose it into domestic law. Combined, these aspire to create states capable of undertaking the duties and obligations of membership and conditionality's effects reverberate through politics, policy, and polity' (Taylor *et al.* 2013: 31).

This research project follows Schimmelfennig and Sedelmeier's (2004, 2005) argument to account for the pre-EU accession relationships between the EU and Polish migration and asylum institutions. The evidence is to confirm that the implementation of the EU *acquis* through conditionality generated a strong adaptation pressure and prompted an overhaul



of the Polish migration setting. However, along with the conditionality-driven action, the process of norms absorption and learning – albeit fragmentary – occurred (see Chapter 3.4.4). The analysis identifies the post-1989 novel and uncertain environment as intensifying Polish officials' internalisation of EU norms (see section 3.2).

EU enlargement altered the dynamics of Europeanisation and bureaucratic adaptation: an interaction grounded in a hierarchical relationship of superiority and subordination has evolved into negotiation and coordination; and 'downloading' of EU norms has been complemented by 'uploading' of domestic preferences at the EU level to avoid later adjustment (Börzel 2002, 2005). First, EU membership provides domestic actors with bargaining opportunities. Radaelli (2004: 12) notes that: 'there is a lot of bargaining at the level of domestic actors and between governments and the EU when directives are transposed into national legislation and implemented... When actors bargain, the main mechanism of Europeanisation is adaptation as a result of anticipated reaction... They may calculate that it is better for them to change before the process of bargaining is concluded in order to gain some credits at home, or to limit the negative consequences of future decisions'. Bargaining over EU legislation and policies coexists with 'facilitated coordination': the EU operates as a forum where EU and member states' civil servants meet regularly to discuss good practices and to evaluate EU policy implementation across policy levels. This 'codifies and somewhat institutionalises governance by learning, socialisation and policy transfer' (Radaelli 2004: 13). The empirical analysis is to illustrate the emergence of post-EU accession learning opportunities, including the EU Council working groups (see Chapter 4.4) and EU platforms to discuss policy adoption (see Chapter 6.4), and their role in shaping discursive frames and ideas in the Polish asylum system.

Second, post-EU accession bargaining and coordination imply 'uploading' of national preferences at the EU level. Börzel (2002: 194) argues that 'national executives strive to minimize the costs which the implementation of European norms and rules may impose on their home constituencies. Therefore, they have a general incentive to upload their domestic policies to European level... Since [m]ember [s]tates have distinct institutions, they compete at the European level for policies that conform to their own interest and approach.' Börzel builds the conceptual framework to explain different member states' responses to Europeanisation. Member states, depending on their interests and capacity adopt one of the following strategies: i) *pace-setting*: 'actively pushing policies at the

European level, which reflects a [m]ember [s]tate's policy preference and minimizes implementation costs'; ii) *foot-dragging*: 'blocking or delaying costly policies in order to prevent them altogether or achieve at least some compensation for implementation costs'; and iii) *fence-sitting*: 'neither systematically pushing policies nor trying to block them at the European level but building tactical coalitions with both pace-setters and foot-draggers' (Börzel 2002: 194). The empirical analysis is to show that, due to, among others, limited resources and scant public and political pressure, the Polish government undertakes a fence-sitting strategy in EU asylum law- and policy-making: it neither initiates nor prevents the attempts of other member states' representatives to do so (see Chapter 4.4). This hinders the country's engagement with EU debate on transit as well as with formulation of initiatives to tackle this phenomenon at the EU level.

To sum up, this section has presented the Europeanisation approach to study the EU impact on Polish migration and asylum policy. It has explained the incentive-based and socialisation mechanisms and outcomes of EU-induced domestic change. Second, it has framed Europeanisation within the pre- (imposition of EU pre-determined norms) and post-EU accession (coexistence of 'downloading' and 'uploading') dynamics in order to expose the evolution of state adaptation to the EU. This enables the analysis of the legal and institutional arenas that emerge in the process of EU rule translation and that produce structural and discursive drivers of the transit country construction. However, in order to comprehend the evolution of these arenas and how they are understood by policy actors, one has to explore how rationalist and constructivist variants of institutional analysis could be bridged. Let us now turn to this issue.

### **3. Conceptualising institutional creation and evolution**

This section theorises the dialogue between RCI and CI accounts to explain the evolution of asylum practice. Due to time and space constraints, the analysis rather than evaluating each theory against a null model of random effects without controlling for the variables in the other theory (Zürn and Checkel 2005), focuses on the constructivist position to understand how domestic actors acquire (and internalise) new values, meanings and experiences at different stages of 'the making'. This is to enable the testing of constructivist assumptions against empirical evidence and whether and how they add to RCI explanations of institutional change. This section first analyses RCI and CI accounts and their different

ontological and epistemological bases. Second, it employs a middle-range theory approach to account for the relationship between the two, and delineates the conditions and mechanisms that enable norms' absorption and socialisation to be traced.

### **3.1. Rational choice institutionalism and constructivist institutionalism**

As mentioned above, the conceptual basis for this study is new institutionalism (NI) that refers to a 'set of theoretical ideas and hypotheses concerning the relations between institutional characteristics and political agency, performance, and change' (March and Olsen 2006: 4). As opposed to its 'older' version, NI adopts a broader understanding of institutions (that are not just formal arrangements) and rather than objects of study, treats them as explanatory variables (March and Olsen 1984). Increased attention is paid to the way in which institutions embody values and power relationships, the obstacles and opportunities that determine institutional design, and to the interaction between institutions and individuals (Lowndes 2010).<sup>10</sup>

This project explains this interaction and how it shapes institutional evolution by drawing on both RCI and CI. The former is grounded in assumptions of individualism and optimality (Jupille *et al.* 2003). In the centre of the analysis are individuals seen as the basic units of social interactions, whose preferences are transitively fixed and given. RCI does not theorise preferences, but deploys exogenous preferences in explaining individual and social choice (Jupille *et al.* 2003: 12). Optimality assumption, on the other hand, establishes a consequentialist logic of action: actors calculate strategically to maximise the preferences and, in the absence of institutions that promote complementary behaviour through co-ordination, confront collective action problems (March and Olsen 1998: 949). As Jupille and others assert: 'rational choice is straightforward. Individuals want things, and they act in such a way as best to obtain what they want (to the best that they can discern this and subject to the constraints they face)' (2003: 12).

However, one can identify several weaknesses of RCI. First is the way in which it conceives agency: actors, having the same exogenously given, fixed and self-interested preferences, if

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<sup>10</sup> The development of NI has been shaped by different strands of political science that resulted in the approach to spread into different branches. Many new institutionalists agree on the typology that focuses on rational-choice, historical, sociological and constructivist institutionalisms (see e.g. Schmidt 2006).

faced with the same choices and the same structural incentives, will behave in the same manner (Hay 2002: 103-4; Hindmoor 2010: 54-5). However, individuals may not always have the information needed to make the best possible decision, or they may not make the best possible use of this information. Also, ideas can and do make a difference to the way in which they behave (Hindmoor 2010: 53-5). Second, RCI has difficulty in dealing with institutional change endogenously: whilst ignoring the possibility of individual agency and the causal role of ideas (Hindmoor 2010: 54), rather than on change, RCI focuses on institutional creation and endurance (Caporaso 2007).

Constructivist institutionalism addresses these criticisms by assuming that the context in which actors act is social as well as material and provides them with understandings of their interests ('constitutes' them) (Jupille *et al.* 2003: 14). The institutions of constructivist institutionalism are internal to 'sentient' actors, serving both as 'structures (of thinking and acting) that constrain action and as constructs (of thinking and acting) created and changed by those actors' (Schmidt 2010: 14; see also Hay 2006).

The internal capacity to create and maintain institutions derives from actors' 'background ideational abilities' (Schmidt 2008, 2010, 2011) that enable them to make sense of given meaning contexts. Actors acquire new values, meanings and experience through deliberation, information exchange, bureaucratic networks and/or technical assistance. They think, talk and act but also think about their thoughts, reflect upon their actions, form and alter preferences as a result of their thoughts about actions and/or in response to persuasion by others (other domestic policy actors, and/or EU institutions) regarding what they are thinking, saying and doing (Schmidt 2010: 17). In this sense, ideas do not 'float freely' (Risse-Kappen 1994), but are 'carried' by actors. However, even where actors are treated as 'carriers of ideas', the connection between ideas and collective action remains unclear. Schmidt (2011: 115) argues that the missing link in this interaction is discourse, and the way in which ideas conveyed by actors through discourse lead to action.

Discourse is therefore defined 'in terms of its content as a set of policy ideas and values, and in terms of its usage, as a process of interaction focused on policy formulation and communication' (Schmidt and Radaelli 2004: 184). Consequently, discourse must be set in an institutional context informed by the vast range of culturally framed or interest-based rules that shape policy-making in a particular socio-economic milieu. This conceptualisation

permits an exploration of how the construction of transitiveness occurs through policy actors' discursive frames enabled by EU, national and local legal and institutional settings.

Constructivist institutionalism, and how it explains institutional evolution, draws upon socialisation, which refers to 'the process of inducting new actors into the norms, rules, and ways of behavior of a given community. Its end point is internalization, when the community norms and rules become taken for granted' (Checkel 2006: 364; see also Checkel 2005b). Socialisation is considered as an alternative to the rationalist pathway through which Europeanisation occurs (see section 2.2 in this chapter). Whilst covering relationships among policy actors acting across levels of governance on EU issues, it appears as a process of EU norms' production, dissemination and institutionalisation (Radaelli and Pasquier 2007: 43).

This study argues that in order to understand how internalisation occurs and how it leads to policy change, one has to explain the social mechanisms that shape interactions between actors, as well as the properties of those actors. This involves the conceptualisation of social processes of communication that lead to changing beliefs, attitudes of behaviour (Checkel 2006: 364). This draws on dynamic processes of persuasion and social learning (that may sometimes change people's minds, acting as a motor and a mechanism of socialisation) and identify the conditions under which policy change is likely to occur (see next section). This requires that one distinguishes between situations in which change results from socialisation and situations in which it is induced by a calculation of costs and benefits (Checkel 2005: 805).

The SI framework constitutes a significant intellectual foundation of this research project: it delineates the shared understandings and norms that inform action, shape identities, influence interests, and impact on what is perceived as problems and/or solutions (Schmidt 2006: 108). However, on its own, SI does not have the capacity to inform an endogenous account of complex institutional evolution, adaptation, and innovation (Hay 2006: 63). This niche has been filled in by CI. First, SI appears 'culturally deterministic': when emphasising cultural routines and rituals, it excludes individual action that breaks out of the cultural norm, i.e. rule-creating action as opposed to rule-following action (Schmidt 2006: 109). Institutions emerge as structures external to agents that constitute rules about acting in the world that serve mainly as constraints by cultural norms that frame action (Schmidt

2010: 14). Here, the state is taken for granted in the environment in which action occurs. Constructivists, on the other hand, go further, and see actors' preferences and motivations not as a contextually given fact, a reflection of social circumstance, but as 'irredeemable ideational', reflecting a normative orientation towards the context in which they will have to be realised (Hay 2006: 63-4). All social phenomena are explicable on ways that only involve individual agents and their goals and actions; the starting point of the analysis is actors with given propertities (Jupille *et al.* 2003: 14).

Second, the focus on macro-patterns makes SI appear like 'action without agents' (Hall and Taylor 1996: 954) or worse 'structures without agents' (Schmidt 2006: 109; see the critique by Checkel 1998: 335). As a result, SI can appear too static or too focused on equilibrium, and so unable to account for change over time. Although the focus on ideas gets us closer to why institutional changes occur, the framework still does not explain how ideas themselves promote such changes (Schmidt 2010: 15). CI rectifies this problem by placing a greater emphasis on policy process (Checkel 2001: 557) that is seen to reside in the relationship between actors and the context in which they operate (Schmidt 2010).

The analysis of rationalist and constructivist institutionalisms requires an explanation of their ontological and epistemological foundations. Ontology refers to 'the claims or assumptions that a particular approach to social enquiry makes about the nature of social reality – claims about what exists, what it looks like, what units make it up and how these units interact with one another' (Blaikie 1993: 6). In this sense, RCI adopts a foundationalist ontology that sees the world as composed of discrete objects that are independent of the observer. On the other hand, CI takes an anti-foundationalist ontological perspective according to which reality does not exist out there, rather it is socially constructed through communication and socialisation processes (Furlong and Marsh 2010: 190-1).

Epistemology refers to 'the claims or assumptions made about the ways in which it is possible to gain knowledge of reality' (Blaikie 1993: 6-7). In consequence, RCI assumes positivist epistemology that aims to establish causal relationships between social phenomena (Furlong and Marsh 2010: 194). The relationships are established using theory to generate hypotheses that can be verified by direct observation as an independent tool. Therefore, an observer can be objective in the way he/she undertakes such observations (Furlong and Marsh 2010: 194). On the other side of the spectrum is CI, which adopts an

interpretivist epistemology that seeks to understand and interpret human behaviour rather than to generalise and predict causes and effects. In consequence, knowledge generated from this discipline is perceived through socially constructed and subjective interpretations.

This research project draws on assumptions from RCI and CI to comprehend institutions, laws and mechanisms of change, and how actors make sense of them. As a result, it follows Hay's (2007) approach whereby a researcher cannot prove the relationship between ontology and epistemology and should adopt a position which makes sense to him/her and use it consistently, whilst recognising that it is contested. In this sense, the analysis builds upon a modern realist epistemology that recognises an interactive relationship between the 'real' world and the discourses. It acknowledges that, first, 'while social phenomena exist independently of our interpretation of them, our interpretation/understanding of them affects outcomes' (Furlong and Marsh 2010: 205). Institutions do not determine, but constrain or facilitate. Second, our knowledge of the world is fallible and so 'we need to identify and understand both the external "reality" and the social construction of that "reality" if we are to explain the relationship between social phenomena' (Furlong and Marsh 2010: 205).

This therefore permits an exploration of the underlying strategic-based and social logics that shape the formation of transitivity: whereas the former emerge in the process of institutional creation and adaptation explained by RCI, the latter are driven by policy actors' interpretations and exchange of ideas and meanings conceptualised by CI. Let us now explore the framework to reconcile these ontologically different positions.

### **3.2. A middle ground between rational choice institutionalism and constructivism?**

This section builds the dialogue between RCI and CI by developing the mid-range approach and emphasising social learning and persuasion. It first examines the logic of the rationalist-constructivist conversation. Second, it explains the interaction between the context and actors by formulating the conditions within which the latter are more prone to learn and change values. Third, it presents the mechanisms to explore the significance of ideational factors in the causation of political outcomes.

Whilst recognising an unresolvable ontological divide between RCI and CI positions, this study rejects viewing the ontologies as ‘manifest truths’ and sees them as ‘tentative empirical assumptions about actors, taken for purposes of pursuing a particular set of theoretical questions about political behaviour’ (Lepgold and Lamborn 2001: 28). Therefore, less time is spent asserting the superiority of one’s preferred social theory and more is spent at a very practical and operational level (Checkel and Moravcsik 2001). The implications of each theory are elaborated and the expectations of each are then compared against empirical evidence (the EU-induced legal and institutional change, and the translation of EU norms and ideas into behaviour of Polish officials) (Zürn and Checkel 2005: 1057). By doing so, one is likely to learn something about the scope of each theory’s predictions, where the overlap occurs, and thus where they are observationally equivalent or distinct (Jupille *et al.* 2003: 26). If the relationships are independent, linear and additive, it is possible to combine separate empirical results into one comprehensive explanation (Blalock 1969: 35-6).

This study reconciles RCI and CI accounts from a constructivist angle. A broadly constructivist approach allows us to better explain the dynamics of norm development. For example, Rise and others (1999) see socialisation mechanisms as developing a greater theoretical balance between structure and agency. This leads to incorporation of individualist ontologies and rational choice mechanisms. Crucially, it makes a constructivist behavioural logic consistent with thin rationalism (Checkel 2005; Zürn and Checkel 2005) where agents may pursue nonmaterial goals (normative values) but consequentialism means and ends calculations underpin their choices. This means that any kind of motivation and desire – be it material or nonmaterial, egoistic or altruistic – can determine preferences. However, thin rationalism is unable to explain the formation of those preferences ‘without reference to processes of arguing and deliberation and without reference to the normative structure of the social environment’ (Zürn and Checkel 2005: 1064). In order to fill in this missing social dimension, and at the same time, to open a venue for the rationalist-constructivist complementarity, this study draws upon argumentative persuasion, i.e. ‘a social process of interaction that involves changing attitudes about cause and effect in the absence of overcoercion. It is thus a mechanism through which preference change may occur’ (Checkel 2001b: 562).



This study employs Checkel's (2001b, 2005b, 2006) categorisation of the scope conditions under which actors are especially open to argumentative persuasion. This theorises EU-Polish social interactions and the role of the EU (the persuader) as the driver of the processes of EU norms' incorporation by Polish asylum actors (the persuadee(s)) over time. First, 'argumentative persuasion is more likely to be effective when the persuadee is in a novel and uncertain environment generated by the newness of the issue, a crisis, or serious policy failure'. It is argued that at times of uncertainty symbols, emotions and rhetoric play a greater role than interests and calculations (Checkel 2005b). People may not know where the interests lie (Przeworski 1991) or are, and therefore are more open to non-material incentives (Andonova 2005). This analysis identifies two periods of uncertainty within the Polish asylum policy development. The first period was the early 1990s' systemic transformation and formulation of migration and asylum policy objectives, and institutions. The Polish government officials sought ideas and norms to establish the structures to admit and integrate immigrants. Since the country oriented towards the West, their natural point of reference became the EU. The second followed Poland's accession to the EU, when migration institutions had to adapt to a new policy environment and learn how to communicate, cooperate and push forward national priorities in Brussels.

Second, 'argumentative persuasion is more likely to be effective when the persuader is an authoritative member of the in-group to which the persuadee belongs'. EU accession led Poland to become a fully-fledged participant of the EU decision-making structure ('in-group'). This implies, among others, an intensification of interactions between EU and Polish officials, engagement with EU discussion platforms, and participation in EU law and policy-making. This environment facilitates the EU asylum norms' absorption into the Polish setting.

Third, 'argumentative persuasion is more likely to be effective when the persuader "acts out principles of serious deliberative argument"'. EU membership not only has increased the number of links between EU and Polish officials, but also altered their character. For instance, Polish core executive and grassroots officials have become increasingly involved in various kinds of deliberation processes shaped by the Commission and/or EU executive agencies, such as the EASO, that facilitate knowledge and practices sharing, identify asylum challenges and enable policy solutions to be sought. This includes issues emerging from the adoption of EU asylum qualification, procedures and reception instruments.

Fourth, 'argumentative persuasion is more likely to be effective when the persuader-persuadee interaction occurs in less politicised and more insulated, private settings'. Since the early 1990s Polish asylum policy has evolved within a highly technocratic and managerial framework: the key migration and asylum institutions (the Ministry of Interior (Moi), the OF, and the Border Guard (BG)) operate under conditions of limited public scrutiny; interest in migration among Polish society is low; and non-governmental organisations (NGOs), due to, among others, meagre financial resources, have a scant impact on migration policy-making (see Chapter 5.2.3). The government thus plays the leading role in setting migration policy objectives, implementing EU law, and incorporating asylum meanings, ideas and 'ways of doing things'.

Participation in EU policy process and absorption of EU norms under the above conditions shape Polish civil servants' actions and motivations. This study employs the mechanisms through which identities and norms have an impact on policy (Checkel 2005b; see also Risse *et al.* 1999). First is 'strategic calculation' (political conditionality) that plays a role in the socialisation process on the basis of incentives triggering actors' desired behaviour change. Incentives can be material (financial assistance, trade opportunities) or social (status, shaming) (Checkel 2005b: 808-9). Second is 'role playing', where actors adapt to certain roles because they are appropriate in a particular institutional/political/organisational setting (passive, non-calculative acceptance of new roles). However, no process of reflective internalisation driven by the communicative process occurs (Checkel 2005b: 810). Third is 'normative suasion' that means that actors actively and reflectively internalise new roles, norms, standards. It constitutes a logical continuation of 'role playing socialisation' and indicates that the switch from a logic of consequences to a logic of appropriateness is complete (Checkel 2005b).

In order to trace empirically the mechanisms of interpretation, accommodation and adoption of EU asylum ideas and meanings across time, this analysis examines the role of learning and knowledge in migration policy-making. Learning in public policy can be defined as 'the updating of beliefs based on lived or witnessed experiences, analysis or social interaction' (Dunlop and Radaelli 2013: 599). Zito and Schout (2009: 1104) note that the main conceptual advantage of learning is its 'explicit emphasis on change' because it underlines that policy interactions are not only about redistribution of power, but also

about changing the context and perceptions. Therefore, learning ‘contrasts with rational policy theories’ in which assumptions about optimality are derived from static analysis. Learning can be intentional and cautious (Hall 1993), more organic or ‘unintended’; it can also be ‘single-loop’ and ‘simple’ where actors alter their strategies, or ‘double-loop’ and ‘complex’ where preferences are revised (Levy 1994). Checkel adds that complex social learning constitutes the setting where the constructivist analysis adds value with its focus on the reformulation of identities as well as preferences (Checkel 2001b: 561). This study seeks to show the evolution from instrumental learning to social learning across levels of governance, driven by the change in the dynamics of European integration (pre- and post-EU accession) as well as by the formation of conditions increasing the propensity for socialisation.

This project frames the teacher (the EU) – learner (Polish government officials) relationship by characterising learning in the ‘shadow of hierarchy’, where the shadow of the EU creates pressure to learn. Dunlop and Radaelli (2013: 612-13) identify four types of shadow: i) ‘instrumental’ learning: learners act within exogenous objectives of learning, yet they do control the means and content of learning. The shadow structures interaction among learners; ii) ‘delegation’ learning: learners are autonomous to set objectives of learning, but can be constrained as to the means and content of learning. The shadow organises the production and dissemination of knowledge; iii) ‘hetero-directed’ learning: learners are entirely driven by the shadow as they cannot control the means and content of learning; and iv) ‘autonomy’ learning: learners although still acting within the shadow, are autonomous to decide on the means and content of learning. This analysis expects an ‘escape from hierarchy’ along with the evolution of interactions with the EU. An increment in these interactions and change of their content and drive the transformation of pre-EU accession ‘hetero-directed’ forms of learning, informed by the transfer of EU pre-arranged objectives and avenues of norm interpretation, into post-EU accession ‘autonomy’ learning, where decision-makers, whilst interpreting EU provisions and policies, decide on what they want to learn and how.

Learning involves the production of knowledge and how it is used and deployed by political actors. According to Geddes (2014: 11) knowledge ‘plays a key role in challenging [the organisational and conceptual] boundaries [that are associated with ‘ways of doing things’ in member states] and of developing new understanding of key issues in international

politics'. Boswell (2008, 2009) identifies three functions of knowledge. First is *instrumental knowledge* that is used by an organisation to enhance the quality of its output, thus contributing to the achievement of performance targets. Second is *legitimising knowledge* applied by an organisation to secure its legitimacy: to demonstrate its capacity to mobilise resources to produce and use research. Third is *substantiating knowledge* that is drawn upon by decision-makers to substantiate their policy preferences.

Utilisation of a particular type of knowledge is contingent on characteristics of the organisation, features of its environment, and the nature of the policy area. Boswell (2009) distinguishes between two types of organisation that determine knowledge application: action organisations and political organisations. The former derive legitimacy from their output: they are judged on their performance and the quality of delivery. If the legitimacy of this delivery is questioned, they seek to mobilise resources to improve efficiency of their services. This includes application of knowledge 'to ensure that they [action organisations] optimize their production, or achieve the relevant societal impacts. In other words, they will set store by the instrumental function of knowledge' (Boswell 2009: 13). The latter derive legitimacy from their formal structures and decisions: actions of political organisations have been framed by adjustments to external expectations about what constitutes legitimate behaviour. In order to garner support, such organisations may seek to demonstrate competence in a given policy area and/or alter their policy styles or practices through e.g. improving the research capacity. In this sense, these organisations are likely to draw on knowledge as a sense of legitimation (Boswell 2009: 13). My research associates political organisations with those institutions in the Polish migration setting that produce policy and are governed by politically appointed ministers, and thus exposed to public scrutiny and external pressures: the MoI, and the Ministry of Labour and Social Policy (MLSP). On the other hand, action organisations are regulatory agencies subordinated to the MoI and oriented to accurate and timely policy implementation: the BG, and the OF. The empirical analysis will illustrate how these organisations draw on knowledge of EU decision-making and policy adoption, and how the instrumental and legitimising functions of knowledge evolve within Europeanisation and how this informs migration and asylum policy.

In summary, both RCI and CI are deemed necessary to investigate the process of policy evolution: whereas RCI accounts for institutional rules and inducements within which

individuals attempt to maximise their utilities, CI explains actors' behaviour and how it is shaped by the ideas and meanings through deliberation and persuasion. In order to reconcile the ontologically incongruent dynamics, this analysis is grounded in the middle-ground theory approach whilst emphasising learning and persuasion. This adds to Europeanisation and enables understanding of how Polish migration and asylum institutions adapt to exogenous (EU) pressures, interact with individuals, and how the latter bring about change endogenously. This framework permits the analysis of structural (specification of actions and practices within EU policy translation) and social (the role of persuasion and learning in policy process) factors that inform Poland's transit construction.

## **4. Methodology**

This research project is a comparative case study within a single country. It is comparative because it, first, investigates the dynamics of policy-making and bureaucratic adaptation across levels of governance and across time (pre- and post-EU accession dynamics). Second, the migration governance is analysed across multiple subject areas: asylum qualification, procedures, reception and distribution. The project operationalises the analytical choices made in the above by employing qualitative research methods. They are coherent with the choice of epistemology and enable the cause and effect processes to be traced (Bennett and Elman 2006: 457-8) and interpreted (Caterino and Schram 2006: 5). This section first examines the process tracing mechanism and how it enables the research question to be addressed. The analysis uses triangulation (Denzin 1970; see also Yin 2003, Burnham *et al.* 2004) to enhance the project's credibility. Second, it presents the research techniques upon which the study is grounded, i.e. semi-structured interviews and documentary analysis. Third, it depicts the key challenges in undertaking research.

### **4.1. Operationalisation**

To study the mechanisms of institutional change, this research project uses a method of process tracing. It allows a chain of events to be identified in a 'very specific, theoretically informed way' (Checkel 2006: 363): the researcher collects and explores empirical data dealing with a specific process or phenomenon through a series of predicted intermediate steps (A causes B, B then causes C, C then causes D, and so on). This 'produces a series of

mini-checks, constantly pushing the researcher to think hard about the connection (or lack thereof) between expected patterns and what the data say' (Checkel 2006: 366). Process tracing is useful for teasing out the more fine-grained distinctions and connections between rationalist and constructivist accounts (Fearon and Wendt 2002; Jupille *et al.* 2003; Checkel 2005a, b). Checkel (2006: 363) points out that this method 'move[s] us beyond unproductive "either/or" meta-theoretical debates to empirical applications in which *both* agents and structures matter as well as are explained and understood through *both* positivist and post-positivist epistemological-methodological lenses.' Process tracing allows us to assert plausibly a causal role for persuasion as a mechanism of institutional change. It enables an identification of how the processes of social interaction and communication shape beliefs, attitudes, and/or behaviour of policy actors 'in the absence of overt coercion' (Checkel 2001b: 562), and therefore, how they inform policy evolution.

This research project uses the multiple data streams, consisting of interviews, governmental and non-governmental documents, and various secondary sources, and triangulates across them and 'uses multiple methods in the study of the same object' (Denzin 1970: 301) to double-check the analytical result. Both correspondences and discrepancies are of value: if two sources provide the same message then, they cross-validate each other; if there is a discrepancy, its exploration may help in accounting for the phenomenon of interest (Robson 1993: 383). This project, first, triangulates data: it traces as many different sources as possible which bear upon the events under analysis. According to Denzin (1970: 301-2), a focus on time and space as observational units recognises their relationship to the observations of persons. A focus on time means that the analysis samples activities by pre- and post-EU accession periods. A focus on space implies organisation of evidence into supranational, national and local levels that reflect the stages of EU asylum policy adoption. A study of persons through time and space means that the analysis uses the data obtained from a range of actors: EU officials, Polish government decision-makers, NGO representatives and asylum-seekers. Second, the project triangulates research methods: semi-structured interviews with policy actors, which is the major strategy for uncovering patterns of policy change and bureaucratic adaptation, are used in conjunction with documents produced by the EU, the Polish government and NGOs.

The use of different data sources and methods increases the study's reliability and avoids a common methodological pitfall of relying upon the data favouring the research proposition, and generates objective analyses (Burnham *et al.* 2008: 246). Let us now present the range of interview and documentary data employed in this research.

#### **4.2. Semi-structured interviews**

A semi-structured interview is an exploratory and qualitative research method that concentrates on the distinctive features of situations and events, and on the beliefs and experiences of individuals. It 'provide[s] information on understandings, opinions, what people remember doing, attitudes, feelings and the like. [It is often used]... to study political behaviour inside and outside political institutions' (Vromen 2010: 258).

The present study draws upon 55 semi-structured interviews with policy actors representing three governance levels: the EU, the Polish core executive and the grassroots (see List of Interviews, p. 314-5). The interviews were conducted between July 2012 and January 2013 in Brussels, Warsaw, reception centres for asylum-seekers across Poland and at the Polish (and EU) Eastern border. They were recorded and/or noted. The former were fully transcribed.

The interviewees were identified by the position and the role in one of the three policy processes. First, was the respondents' engagement with asylum law and policy-making across levels of governance, their function in EU-level negotiations on the CEAS; and/or contribution to EU law and policy implementation, including involvement in government consultations, legal transposition, and putting asylum provisions in practice at the grassroots. Second, were informants' experiences with the evolution of Polish migration and asylum bureaucracy: knowledge of the post-1989 system creation and involvement in national- and/or local-level institutional adaptation to the EU, including in EU platforms of social interaction enabling asylum data and good practices sharing. Finally, came asylum policy reception, i.e. engagement of NGO and IO representatives with asylum law and policy creation and adoption at the national level (e.g. through participation in governmental consultations on legal transposition or policy strategy drafting) and/or with assistance provision to asylum-seekers; and the voice of Chechens themselves. The latter

were identified on the basis of their status in the asylum procedure and willingness to speak about their experience with institutions responsible for admission and reception.

The informants were enlisted through, first, the policy networks that I established at the time of my work in the Office for Foreigners (prior to the commencement of doctoral research) with migration and asylum officials from the Office, the BG, the MoI, and the MLSP. This enabled quick and timely identification of the functions and competences of given government departments/units as well as bureaucrats engaged with various stages of policy-making processes. Second, my own experience with negotiations on EU migration provisions in EU Council allowed me to map areas of responsibility and relationships within EU institutions. Moreover, an internship in the Migration Policy Group, a Brussels-based migration NGO, which collaborated with EU officials and migration non-governmental activists and experts, gave me an opportunity to liaise with representatives of the European Commission working on different aspects of the CEAS, and seek information on both the technicalities of EU law-making and the policy climate that shaped EU-level bargaining and policy exchange. Finally, suggestions on whom to contact provided by researchers from the Centre for Migration Research at the University of Warsaw, with which I was affiliated at the time of my empirical work in Poland in summer 2012, facilitated communication with Polish government officials and NGO representatives involved in advocacy, research, and legal assistance provision to protection seekers. On the other hand, my colleagues, who volunteered for Chechens and took care of Chechen children in Poland, lent me a hand in getting access to often withdrawn and distrustful Chechen asylum-seekers in reception centres across Poland.

The informants were organised into three categories. The first group comprised Brussels-based officials, including representatives of the Commission (6), the EU Council Secretariat (1), the member states' permanent representations (4), and IOs and NGOs (2). In order to draw a comprehensive picture of institutional and legal dynamics of EU asylum decision-making, respondents working in EU institutions were selected across levels of administrative hierarchy. Whereas desk officers provided an in-depth knowledge of technical issues and specific legal provisions, heads of units and higher officials offered a broader view of political and inter-institutional matters. On the other hand, interviews carried out with representatives of IOs and NGOs enabled verification of information



obtained from EU bureaucrats and provided assessments of the direction and dynamics of EU asylum policy.

The second group consisted of civil servants from the Polish government: the MoI (5), the OF (12), the BG (5), and the MLSP (2). The core executive officials, ranging from a Deputy Minister of Interior to heads of departments involved in steering asylum policy and legal agenda provided valuable interpretations of the process of EU asylum rule absorption, how it reverberated within the Polish setting and shared their assessments of various policy choices. On the other hand, respondents working at the grassroots level represented mainly BG and OF units responsible for entertaining and examining asylum claims. Although in many cases officials' responses were confined to their, often very narrow, area of competence, they provided insights into procedural and administrative habits, practices related to treatment of migrants, and evaluated communication and learning opportunities created by the EU.

The third group was a less consistent set of policy recipients whose responses helped to corroborate or disprove facts and views expressed by government civil servants. Representatives of NGOs, IOs and academics (10) evaluated the quality of law and policy adoption. Chechen asylum-seekers (7), on the other hand, were helpful in identifying shortcomings of different stages of asylum procedure and shared their interpretations of policies and events.

The interviewees were asked four types of questions. The first, which reflected the governance level, enquired about interpretations of key EU asylum instruments and their implementation into the Polish system. The second enquired about reflections on bureaucratic adaptation to the EU. The third was to identify the perceptions of (causes and implications of) transit migration. The fourth asked about assessments of the state's response to transit, how it was shaped by the EU, and what it meant in the context of respondents' work. The analysis traces the causal role of arguing/persuasion: whether (and how) interpretations of transit and of the ways to deal with it, which emerge from (EU-steered) policy process, have been internalised by asylum civil servants and/or translated into policy action.

The questions were adjusted to informants' position in the implementation chain (policy creation, implementation, and reception) and location within the administrative structure (Brussels-based diplomats, senior officials, heads of department/unit, case workers, and social support officers or border guards). To provide some examples of questions asked, and how they correlated with the governance level, let us list three types of actors enquired about policy implementation and institutional adaptation. To begin with the head of the Mol Migration Department, who was asked: i) *How would you describe the changing dynamic of inter-institutional cooperation on migration and asylum within the government after EU accession?* ii) *How do you use the flourishing channels of formal and informal collaboration with the EU?* OF asylum case workers were requested to address the following problems: i) *From the practitioner's perspective how would you assess collaboration between the OF and the BG within the scope of the Refugee Protection Act, specifically Arts. 28-31, 41 and 87? Has (and how) this collaboration evolved?* ii) *What kind of shortcomings of the Refugee Protection Act, specifically concerning the implementation of Arts. 13-54 and 70-89, would you identify? How have those deficiencies affected your work and/or the quality of asylum determination procedure?* On the other hand, Chechen asylum-seekers were requested to evaluate the asylum system: i) *In the course of determination procedure, how would you assess the institutions that examined your case? Would you be able to say that they have been efficient?* ii) *Drawing on your own experience, which aspects of the procedure would you improve, and why?* iii) *What kind of difficulties have you encountered in Poland? Can you count on the support of migrant organisations or NGOs in overcoming them? Has this assistance been sufficient?*

As far as the questions on the emergence of the transit county construction were concerned, in the case of government officials, including those representing the Mol and the OF, an emphasis was put on their perceptions and understandings. The number and nature of questions were similar: i) *How do you understand the idea of transit migration/transit country?* ii) *How would you define it in the Polish context?* iii) *Do you discern an introduction of this idea into policy-making? If so, through what kind of channels?* The queries about transit directed to Chechens were simplified and referred to their migration experience: i) *Has Poland been the country of final destination for you?* ii) *Why did you decide to seek protection just in Poland?* iii) *What are your plans for the future in the case if protection is granted or refused?* iv) *Would you consider yourself to be an asylum-seeker in transit? If so, why?*

### 4.3. Documentary analysis

This project integrated extensive documentary data. It mainly used primary sources, understood as 'original documents produced by political actors ranging from executive, parliamentary or judicial arms of governments, policy-making agencies or non-governmental documents... [that are] generally considered to be documents that reflect a position of an actor and do not have analysis in them' (Vromen 2010: 261-2).

The documents were organised into four categories and analysed at three policy levels: the EU, the Polish core executive, and the grassroots. The focus was put on the texts produced in the post-EU accession period (2004-2013); however, in order to provide the historical context (the process of institutional creation and Poland's engagement with European migration and asylum structures) for contemporary developments, the pre-EU accession (1990-2003) documents were also examined. First, the legal documents, including EU asylum directives and regulations, Polish legislation transposing EU law, legislative proposals negotiated in the EU Council, draft Polish regulations deliberated in parliamentary committees, and Polish asylum case law, were useful to trace the legislative process and to analyse whether (and how) EU rules have informed the Polish legal mechanisms to tackle transit. Second, the policy documents, such as EU programmes delineating asylum policy objectives, Polish government migration and integration strategies, and NGOs' policy recommendations, were used to illustrate the emergence of ideas about transit in the policy process and how they have been shaped by European integration. Third, the implementation documents: evaluations of asylum instruments produced by the Commission and the Polish government, and NGOs' and IOs' reports on the functioning of 'street-level' asylum structures proved essential for examining the multi-level asylum policy deficiencies, and what implications they have had for transit. Finally, the procedural documents, such as Polish government's orders regulating relationships within the core executive, intra- and inter-institutional government circulars, and reports on Poland's engagement with the EU, enabled the tracing of the administrative practices, and how European integration has organised Polish asylum institutions, procedures and reception conditions.

Documents and interviews yield different insights about policy-making and deliberation. The documentary analysis builds knowledge about the formation and evolution of the

multi-level migration setting within which policy actors produce ideas about transit. It permits to trace institutional creation (examination of information of how the Polish migration and asylum government institutions were established in the 1990s) and evolution (evaluation of data on EU adjustment and the post-EU accession interaction, involving legal transposition and learning, that has reformulated the EU-Polish relationships in the field of migration). Furthermore, the documents constitute a valuable source of information about law-making processes: negotiation, consultation, and implementation of EU asylum qualification, procedures, reception and redistribution instruments. At the same time, the documentary analysis proves useful in mapping the legal and policy deficiencies that affect transit migration in the EU and Poland.

The interviews, on the other hand, enable to infer how the formal documents are put in practice, and what do they mean to policy actors. First, they enable to grasp decision-makers' perceptions of EU migration and asylum policies, how they communicate between each other, and how their understandings guide their action. This then permits to verify the implementation deficiencies identified in the documentary analysis and how they contribute to the creation of the transit concept within the Polish governance. Second, the respondents share their views and assessments of EU-steered social interactions emphasising on learning and practice and knowledge exchange: what is the role of those interactions in Polish asylum policy-making? How do they inform policy change at the national and local levels? Finally, interviews allow the researcher to get to know motivations of asylum-seekers, identify factors shaping their decisions about (transit) migration, and the way(s) these decisions inform the transit country construction.

#### **4.4. Practical challenges**

The empirical work structured by the above analytical and methodological framework revealed several challenges. First, accessing EU officials proved difficult. The dynamics of EU policy-making determined the availability of interviewees: since the research was conducted at the time of finalisation of CEAS instruments, informants were either difficult to liaise with and/or did not have much time for conversation. Also, due to the rotation of staff within the Commission and the EU Council Secretariat, many of those responsible for asylum dossiers in the past had migrated to other units or Directorates and were less willing to discuss given problems. However, an internship in the Migration Policy Group

between October and December 2012 turned out to be helpful in mitigating these challenges. Experienced and well-informed experts from this organisation provided me with useful advice on how to approach EU bureaucrats.

Second, gaining access to government documents turned out to be challenging. Whereas EU rules made accessing EU legislative and non-legislative texts a straightforward enterprise, vague and imprecise Polish public access regulations slowed down the work in Warsaw. For instance, some institutions, such as the OF, did not have any internal procedures established to communicate with researchers, and to coordinate the process of handing over the documents produced by different departments. Furthermore, due to high sensitivity of the researched problems and a relative closure of government migration bodies, the officials made available only the already published materials. This ruled out the analysis of working documents reporting on-going policy processes. The foregoing problems were rectified to some degree by arranging the research stay in the OF Department of Refugee Proceedings, between August and September 2012. This enabled familiarisation with administrative practices and organisational habits related to the document flow, and gaining access to the OF's archives.

Third, a problem of temporality and reliability of interview data emerged. A number of EU and Polish government officials had difficulty with remembering the details, specifically factual information, of policy processes stretched over a longer period of time (five/six years). On the other hand, if the discussed problems were too recent, in many cases the interviewees' responses were clouded by personal impressions, beliefs or emotions. This was mitigated by, among others, consulting as wide a range of actors as possible who were involved in the same policy processes and located at different levels of administrative hierarchy.

Finally, a concern emerges over the measurement of the causal role of persuasion and the degree of norms' absorption and internalisation, and therefore, of recognition of policy change. This project addresses this challenge through, first, tracing respondents' interpretations of EU asylum policies and ideas, including transit, and whether (and how) they have been translated into policy documents and actions. Second, it defines the relationships between actors' understandings of transit/transitiness and their behaviour.

For example, the analysis investigates the link between the perception of Chechen asylum-seekers as economic migrants and the OF's international protection decisions.

To conclude, this section has presented the methodological framework to undertake an empirical investigation of Polish migration and asylum policy evolution. The analysis uses process tracing to capture the causal role of persuasion and socialisation, and therefore, of change; and triangulates across data and research methods. The analysis draws on documentary materials and semi-structured interviews.

## **5. Conclusion**

The chapter has defined the mechanisms through which the EU transfers policies, regulations, ideas and 'ways of doing things', and spurs domestic change. This process starts with adaptational pressure created by the misfit between EU and domestic institutions, and it is driven by instrumental and social motives that necessarily entail persuasion. Whereas according to the former Europeanisation means an emerging political opportunity structure providing actors with additional resources to exert influence, the latter defines Europeanisation as the development of new rules, norms, and ideas, which are incorporated into domestic practices and structures. This framework enables an exploration of the scope, drivers and implications of the pre- and post-EU accession Europeanisation of Polish asylum policy.

Second, the chapter provides the tools to reconcile the rationalist and constructivist dynamics driving EU-induced domestic adaptation. The middle-ground approach, whilst acknowledging distinct RCI and CI ontologies, seeks to reconcile them through an empirical investigation of operational-level policy-making. The analysis builds the dialogue between rational and constructivist variants of institutional analysis from a constructivist position whilst emphasising learning and persuasion. This analytical setting frames an examination of Polish asylum policy: how are EU asylum instruments translated at different policy levels? What does it mean in terms of the stories that policy-makers tell to each other? How do they make use of the acquired EU meanings? This then allows a study of the calculative motives and the effects of socialisation, which develop through policy and practice within the Polish system, to see how transit is constructed as an issue.

Finally, the research uses process tracing and triangulates across data and methodology to obtain empirical evidence necessary to answer the research question. The data have been collected from a wide range of documents and interviews that constitute valid and reliable sources.

## **Chapter 3: The Pre-EU Accession Europeanisation of Polish Migration and Asylum Policy**

### **1. Introduction**

This chapter sets the historical context of the emergence of ideas about transit. It constitutes an introduction to the discussion on the post-EU accession construction of transit in Poland. This chapter analyses first how the pre-EU accession development of Polish migration and asylum institutions, regulations and policies shaped the setting in which ideas and discursive frames about transit emerged. Second, how this process was informed by European integration. Third, how it laid the foundation for the post-EU accession transit formation.

This chapter, first, presents the main migration and asylum trends and focuses on why foreigners come to Poland, for how long they stay, and where they settle. Second, it investigates Poland's response to these flows in two periods: the first period covers the 1990s' institutional creation and establishment of relationships with the EU; the second period is EU enlargement (1998-2003) that determined an institutional and legal overhaul of the Polish migration system, and learning of EU asylum norms and values.

### **2. Immigration in Poland**

This section first examines migration in Poland following the demise of the communist system. Second, it presents migration tendencies, sources of immigration, and issues associated with settlement. Third, it examines asylum migration (the nature of inflow, and the provision of international protection) and focuses on Chechen inflow. Finally, it introduces the problem of discontinuation of asylum cases, and how it reflects transit.

#### **2.1. Border crossings**

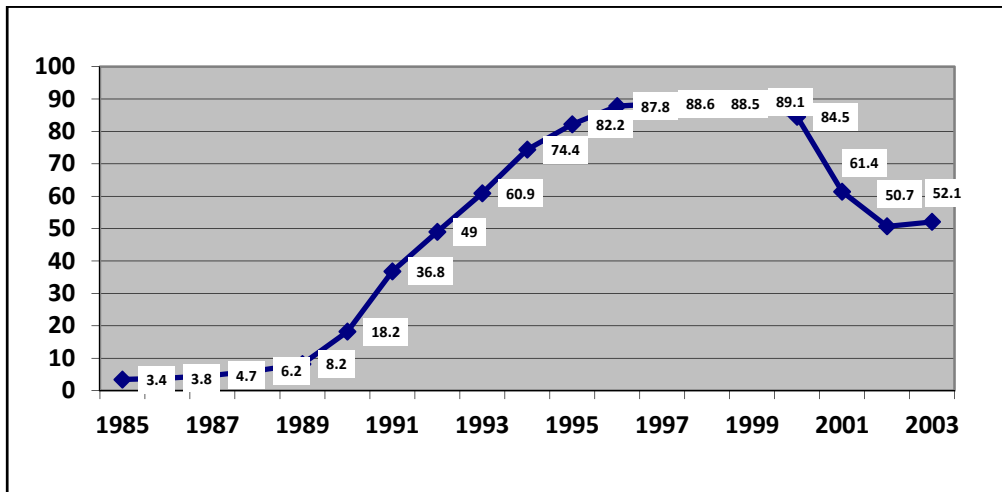


The collapse of the Soviet Union and subsequent reforms in Central and Eastern Europe (CEE) led to the establishment of new forms and patterns of migration in the region (Okólski 1998, 2004). Poland underwent transformation from the communist regime into rule of law and democratic state and developed a political, economic and military reorientation to the West (Stola 2001b: 175).

‘From a purely emigration country, Poland transformed into one of both emigration and integration’ (Kicinger 2009: 79). The removal of border obstacles led to a ten-fold increase of foreign entries into the country, from 3.8 million in 1986 to 36.8 million in 1991 (Figure 3.1). The number continued to rise sharply until 1997 when the annual inflow stabilised and continued until 2000/2001 at a level of over 85 million. Five factors brought immigrants to Poland. First were wage disparities: wages in Central Europe were several times higher than in Ukraine, Belarus or Russia. Second was liberal entry policy, i.e. visa-free entry under agreements signed during communist times. The third factor was geographical and cultural proximity. Fourth, the significant size and accessibility of an informal labour market provided a ‘space’ for new migration. Finally, there was a facilitating role of migrant networks, institutions and migrant-oriented services (Wallace and Stola 2001: 34).

According to Stola, ‘most of the movement was across the Western border and the majority of foreign entrants were Germans. These were one-day visitors to shops and open-air markets along the Polish border towns and regular tourists’ (Stola 2001b: 179). Migration across the Southern border had a similar dynamic: in 1990 the border constituted an entry channel for more than 300,000 Romanians, nearly 150,000 Bulgarians, and over 1.3 million Czechoslovaks (Mol 1993b). The Eastern border, on the other hand, was crossed by citizens of the Soviet Union states: from around 1 million in 1986 to 4 million in 1990 (Mol 1993b; on the post-1989 inflows see also Kozłowski 1999).

Figure 3.1 *Foreigners' entries into Poland, 1985-2003 (millions)*



Source: Adapted from CSO (1996, 1999, 2000, 2002, 2004).

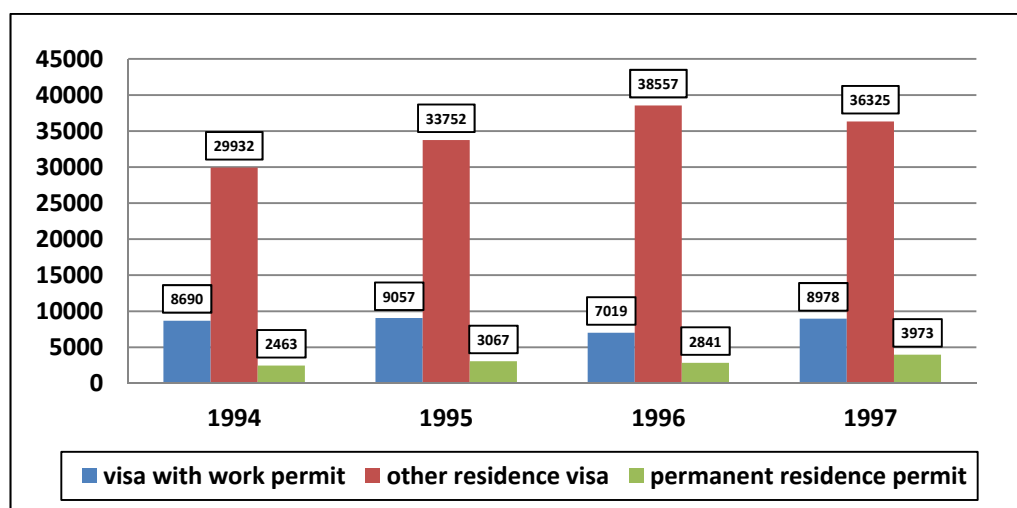
Simultaneous to a surge in foreign entries, Poland experienced transit migration. The majority of foreigners entering or attempting to enter Poland illegally were heading west. In 1991 the Polish Border Guard refused entry to 37,859 persons (Mol 1993b). The number grew to 56,604 in 1992 and to 65,039 in 1993, of which the nationals of Russia, Ukraine and Belarus represented over 40% (IOM 1994). As the then Mol official put it in his 1993 paper: 'on their entry to Poland they [transit migrants] pretend to be tourists but in reality their sole objective is passage to the west, or, more specifically, to Germany. In case of failure, many of those transit migrants undertake border crossing several times, even though as a rule they are instructed to leave Poland within 24 hours (and a number of them actually deported)' (Kozłowski and Okólski 1993: 4).

The statistics and the above statement reflect the very origins of the setting enabling the construction of transit country: Poland, due to proximity to the West, specifically Germany, and 'the stricter visa requirements of most European countries [that] in the eyes of eastern Europeans [were] creating a "fortress" of the West', became 'a centre for increasing mobility, a waiting room, where all sorts of preparations [took] place for a next move' (IOM 1994d: 36). The post-1989 illegal character of transit movement evolved over time to comprise other categories of immigrants, including asylum-seekers (see section 2.3).

## 2.2. Residence of foreigners<sup>11</sup>

A considerable number of the early 1990s' visitors and tourists 'decided to extend their stay in Poland and undertake illegal occupations' (over 250,000 persons in 1993) (Mol 1993b: 2). Others legalised their residence. Up until 1998 (when a new type of permit for temporary stay was introduced as a result of the system's overhaul), there were two types of residence permits: visas for temporary residence/short-term stay (including a visa for work permit)<sup>12</sup> and a permanent residence permit<sup>13</sup>. Figure 3.2 illustrates that the vast majority of foreigners stayed in Poland on the basis of visas and their number has been gradually increasing since 1994. Permanent residence permits, on the other hand, due to, among others, a lengthy and complex application process, remained at a level of 2,500 – 4,000 permits issued annually.

**Figure 3.2 Residence permits issued in Poland, 1994-1997**



Source: Stola (2001b: 180).

One can identify four groups of immigrants in Poland. First, there were Eastern Europeans attracted to the country, among others, by geographic proximity, personal relationships (Stola 1997) and the changing structure of the labour market (Golinowska 2004).

<sup>11</sup> This analysis examines residence of third-country nationals and does not cover the movement of EU citizens into Poland after the country's accession to the EU (2004). The latter is regulated by separate legislation: Act of 27 July 2002 on rules and conditions of entry and residence of the citizens of the EU member states and their family members (Journal of Laws 2002, No. 141, item 1180, with further amendments).

<sup>12</sup> Art. 3 and 4 Act of 29 March 1963 on foreigners (Journal of Laws 1963, No. 15, item 77).

<sup>13</sup> Ibid., Art. 13.

Ukrainians, leading the statistics, were undertaking occupations in small family-run trading firms or working as teachers, instructors or trainers. The majority of Belarusians, on the other hand, sought employment in sub-contracting foreign companies, primarily as manual workers (Grzymała-Kazłowska and Okólski 2003: 16). Second was Vietnamese immigration, linked to Polish-Vietnamese socio-economic networks established in the 1970s and 1980s. After graduating from Polish universities, many Vietnamese either settled in the country after marrying a Polish partner or upon return to Vietnam maintained cultural links with Poland, and engaged in trade between the two states. The early 1990s' Polish transformation brought various economic opportunities and a chance for small-scale entrepreneurship to flourish. Consequently, Vietnamese who had begun to open small businesses in Poland, were joined by their compatriots such as former graduates of Polish universities (Grzymała-Kazłowska and Okólski 2003: 19-20). Third were Armenian migrants, who seized fast-growing entrepreneurship opportunities and undertook employment as petty traders or manual workers. Similar culture, religion, and social networks established in communist times between Armenian communities in Poland and their homeland (Iglicka and Gmaj 2010) significantly facilitated their migration. Finally, the 1990s saw an inflow of highly-educated managers and specialists from Western Europe and the United States engaged with supermarket trade, real estate, education and construction industry (Grzymała-Kazłowska and Okólski 2003: 16).

The 1990s' institutional developments in Poland included the relaxation of foreign labour restrictions and enactment of new immigration law (the foundational 1997 Foreigners' Act<sup>14</sup>). The latter, through an introduction of temporary residence permit (issued for up to two years<sup>15</sup>) and reformulation of the visa system<sup>16</sup>, affected immigration so it assumed a more permanent character: a greater number of migrants were legalising their stay (Iglicka 2001) and establishing social and economic networks in the country.

Between 1998 and 2013 nearly 450,000 foreigners applied for a temporary residence permit. The most significant (almost ten-fold) increase in applications was recorded between 1998 and 2002, largely due to immigration of Eastern Europeans, who found immigration procedures accessible and a permit enabling them to undertake economic

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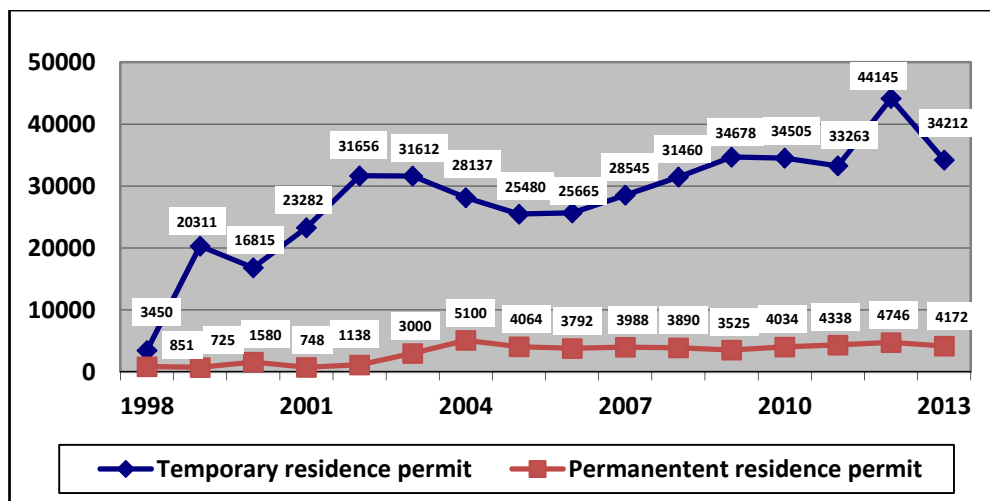
<sup>14</sup> Act of 25 June 1997 on foreigners (Journal of Laws 1997, No. 78, item 483).

<sup>15</sup> Ibid., Art. 17, Art. 18(1).

<sup>16</sup> Ibid., Art. 7.

activity. Following Poland's accession to the EU (2004), the trend stabilised and now oscillates between around 25,000 and 35,000 applications lodged annually (Figure 3.3).

**Figure 3.3 Applications for temporary and permanent residence permits, 1998<sup>i)</sup>-2013**



Notes:

<sup>i)</sup>The 1997 Foreigners' Act (Journal of Laws 1997, No. 78, item 483), which introduced the temporary residence permit, came into effect in 1998.

Source: Adapted from Office for Foreigners statistics (2014).

Most temporary residence applicants originate from the former Soviet Union. Although the presence of non-European nations, such as Vietnamese, who submitted over 6% of all applications in 2013, has been noticeable, Poland's Eastern neighbours dominate in the statistics: Belarusians, Russians and Ukrainians lodge jointly over one third of all applications (Table 3.1). The latter's share has been rising since the late 1990s: from 1,474 (15%) permits in 1998 to 10,441 (30%) in 2013.

**Table 3.1 Top 5 citizenships of applicants for temporary residence permit**

	1999		2005		2013	
1.	Ukraine	2776 16.6%	Ukraine	9123 35.7%	Ukraine	10441 30.5%
2.	Vietnam	1339 8%	Belarus	2004 7.8%	China	2937 8.5%
3.	Yugoslavia	1263 7.5%	Vietnam	1985 7.7%	Vietnam	2157 6.3%
4.	Russia	1001 5.9%	Armenia	1706 6.6%	Belarus	1764 5.1%
5.	Germany	799 4.7%	Russia	1635 6.4%	Russia	1688 4.9%

Source: Adapted from Office for Foreigners statistics (2014).

In the same period (1998-2013), the permanent residence permit applications constituted only one ninth of temporary stay applications. Since EU accession, the former have oscillated in the region of 3,500 – 5,000 per year (Figure 3.3) of which over 65% are claims lodged by Eastern Europeans (Office for Foreigners statistics 2014). This has been influenced by the stricter application criteria, such as an obligation to demonstrate a durable family or economic relationship with Poland, and at least a three-year residence in the country prior to application<sup>17</sup>; and the introduction in 2005 of the EU long-term resident permit enabling legalisation of stay under similar conditions<sup>18</sup>.

The vast majority of immigrants settle in three provinces: Mazowieckie, Dolnośląskie, and Małopolskie (Figure 3.4; Map 3.1). What brings them into these regions is, first and foremost, employment opportunities, specifically in the largest cities. Whereas in 2012 the unemployment rate in Poland amounted to 13.4%, in Warsaw (in Mazowieckie) it amounted to only 4.3%. On the other hand, in Wrocław (in Dolnośląskie) and Cracow (in Małopolskie) the rate went below 6% (CSO 2012). Also migrant networks and organisations matter. They are more easily accessible in urban areas and have greater capacity to offer various kinds of social and economic support as well as legal assistance to foreigners.

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<sup>17</sup> Art. 19(1) (Journal of Laws 1997, No. 78, item 483). Binding in December 2013: Art. 64(1) Act of 13 June 2003 on foreigners (Journal of Laws 2003, No. 128, item 1175, with further amendments).

<sup>18</sup> Art. 65(1) Act of 22 April 2005 on the change of the act on foreigners and the act of granting protection to foreigners within the territory of the Republic of Poland, and selected other acts (Journal of Laws 2005, No. 94, item 788).

**Map 3.1 Administrative map of Poland<sup>1)</sup>**

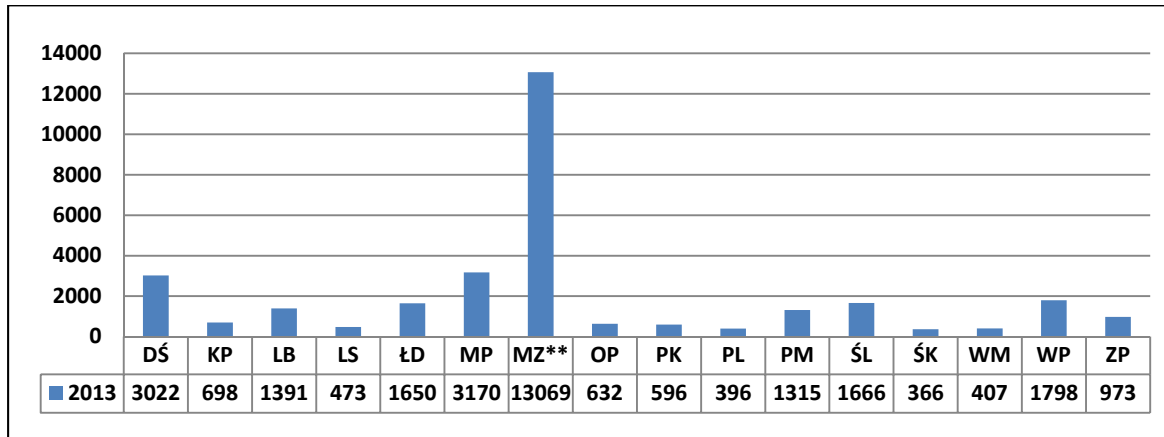


**Notes:**

<sup>1)</sup>The contemporary Poland's administrative-territorial division (16 provinces/voivodeships) was introduced in 1999. The linguistic errors on the map are the responsibility of the publisher.

Source: Maps of World ([www.mapsofworld.com](http://www.mapsofworld.com)) (2013).

**Figure 3.4 Persons granted temporary residence permit, Polish provinces\*, 2013**



Notes:

\*DŚ: Dolnośląskie, KP: Kujawsko-pomorskie, LB: Lubelskie, LS: Lubuskie, ŁD: Łódzkie, MP: Małopolskie, MZ: Mazowieckie, OP: Opolskie, PK: Podkarpackie, PL: Podlaskie, PM: Pomorskie, ŚL: Śląskie, ŚK: Świętokrzyskie, WM: Warmińsko-mazurskie, WP: Wielkopolskie, ZP: Zachodnio-pomorskie.

\*\* including Warsaw.

Source: Adapted from Office for Foreigners statistics (2014).

The picture of immigration in Poland assumes, however, different colours when analysed in the context of the foreigners' share of the Polish population. The OECD SOPEMI reports indicate that at the end of 2011, the latter amounted to 0.1% (foreign population) and 1.8% (foreign-born population). In the same year registered migration inflows came to only 15,500. Also, net migration was modest, at 1.1 per 1,000 inhabitants (2011), though 0.7 higher than in 2000 (OECD 2013a). An inflow to Poland should be assessed as low when compared to Western European states. For example, in Germany the foreigners' share in the country's population in 2011 totaled 8.5% (foreign population) and 13.1% (foreign-born population) (OECD 2013b). Net migration, on the other hand, was 10.3 per 1,000 inhabitants, almost ten times higher than in Poland.

### 2.3. Asylum migration

Between October 1989 and the early 1990s more than 7,000 asylum-seekers from the developing world headed for Sweden through Poland. In 1990 the Swedish government deported over 900 asylum-seekers of African and Arab origin back to Poland, 'prompting Poland's first refugee crisis. This crisis jump-started the formation of the Polish refugee



regime (Shevel 2011: 233). Poland, like other post-communist countries was not part of an international refugee regime<sup>19</sup> nor did it have domestic refugee legislation and structures.

The Polish Red Cross, together with local authorities, were provisionally tasked with providing shelter and assistance to newcomers. As a Mol official involved in assistance provision recalled:

There was a problem of what to do with them... The governor of Szczecińskie province [where they first arrived; it is now part of Zachodniopomorskie province (Map 3.1)] started to accommodate them in various seaside resorts and ordered to take care of them. He allocated welfare funding for this. However, it was 1990 and therefore the funding was at the level of more or less the cost of a tissue, whereas the needs were gigantic (Interview. Office for Foreigners, Warsaw, 17 July 2012).

Poland lacked legal and administrative capacity to manage the flows (Szonert 2000). The country was in the midst of systemic transformation and a severe economic crisis, and money was a major problem.

The end of communist rule in the late 1980s and liberalization of travel rules, Poland's attractive location at the crossroads of East-West and South-North migration routes (Kozłowski 1994), and the presence of smuggling networks (Grzymała-Kazłowska and Okólski 2003) brought an increasing number of people seeking protection. They were arriving from Africa, Asia, Eastern Europe and the Balkans torn by ethnic conflicts and civil wars. In 1991 the majority of asylum-seekers, specifically those who were deported from Sweden, came from Angola, Ethiopia and Somalia. 1992 and 1993 saw inflows from the former Yugoslavia. In 1993 protection seekers from Bosnia and Herzegovina, and Serbia and Montenegro submitted over 70% of all applications (Table 3.2).

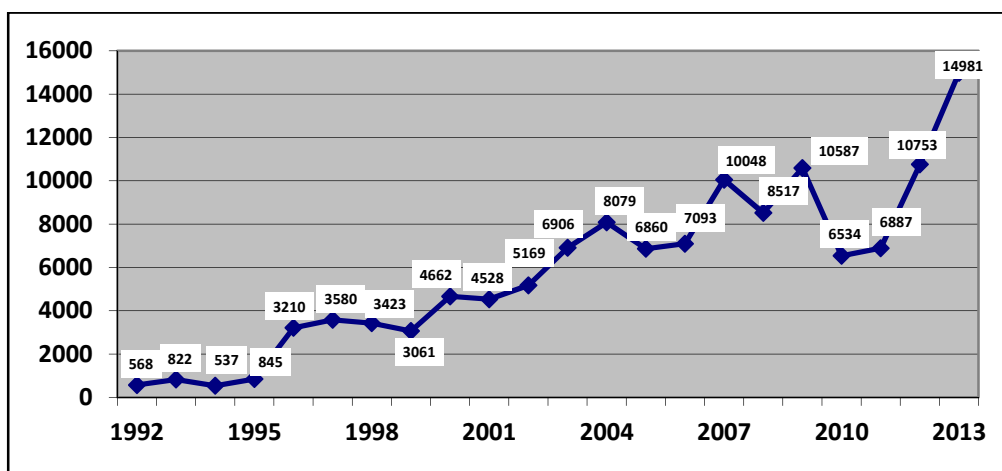
In the mid-1990s the volume of asylum applications started to gradually increase, mirroring rising short- and long-term (legal) immigration: in 1996 over 3,200 persons sought protection, which was five times more than in 1992 (Figure 3.5). However, along with the rise of applicants, one could see a high drop in the recognition rate (the number of persons

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<sup>19</sup> Poland ratified the 1951 Refugee Convention and its 1967 Protocol on 2 September 1991. The provisions of the Convention and its Protocol came into effect on 26 December 1991.

recognised as refugees<sup>20</sup>): whereas in 1992 it amounted to 56%, in 1996 it declined to 24.2% and in 1997 to 18.8%. In 1997 only 140 persons were granted refugee status (Figure 3.6). As the then director of the Ministry of Interior (Moi) Migration and Refugees Department explained: ‘Very often these were those who... were seizing this opportunity [to lodge the claim in Poland] to get away to the west. And this was the main reason why the recognition rate in Poland was always very low... We encountered very few evident asylum cases... because our key reservoir of countries of origin [of asylum applicants] were the countries of the former Soviet Union, as opposed to Western European states that dealt mostly with Asian and African cases.’ (Interview. History Meeting House, Warsaw, 2 January 2013). The perception of the asylum procedure as a mean for asylum-seekers to transit Poland was embedded in the cognitive systems of those who were laying the foundations for the asylum setting in the 1990s. Their understandings were shaped by practice: applicants arriving in the country that lacked fundamental resources to facilitate settlement (on the formation of understandings of transit see section 5).

**Figure 3.5 Asylum applications, 1992-2013**



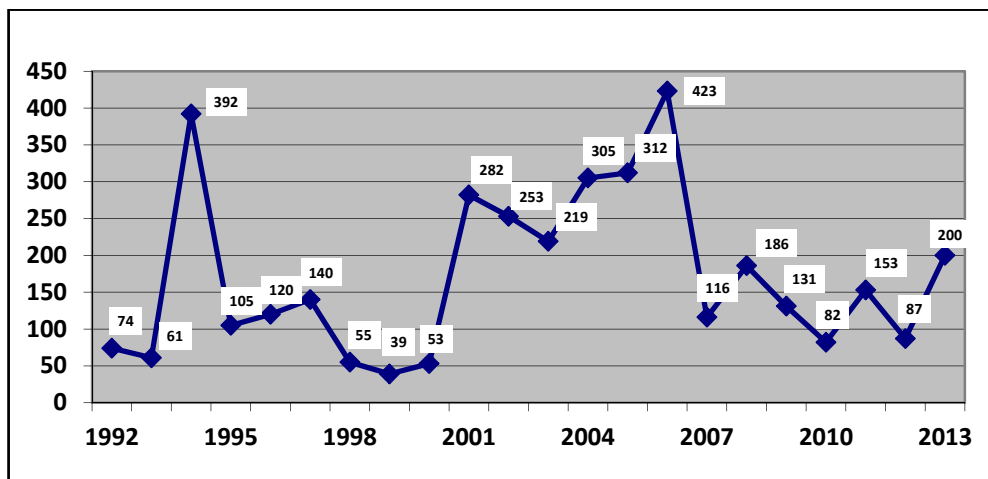
Source: Adapted from Office for Foreigners statistics (2014).

The flow continued to grow in the late 1990s and in the early 2000s, reaching over 8,000 applications in 2004, a 100% increase in comparison with 1996 (Figure 3.5). The most distinctive feature of this asylum immigration was the rapidly growing claims lodged by Russians (notably, Russian citizens of Chechen nationality): from 125 in 1999 to around

<sup>20</sup> Article 1 of the 1951 Refugee Convention, as amended by the 1967 Protocol, defines a refugee as: ‘[a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

5,500 in 2003, and 7,100 in 2004. This constituted over 80% of all asylum applications lodged in Poland (Office for Foreigners statistics 2014). The Chechen inflow resulted from two Chechen Wars (1994-1996 and 1999-2000) (see e.g. Youngs 2000), and the peak of 2004 was most probably a direct consequence of a Chechen attack at a Russian school in Beslan that prompted an intensification of Russian army operations in Chechnya. The foregoing tendencies have to be contextualised within the European context: between 1997 and 2006 Russian citizens, predominantly of Chechen nationality, submitted over 170,000 asylum applications in European countries, specifically in Poland, Germany, Austria and France (see Chapter 6.3.1). The sharpest increases took place between 1999 and 2000 (plus 79.2% in total applications) and 2002-2003 (plus 75.4%) (Hofmann and Reichel 2008).

**Figure 3.6 Persons granted refugee status, 1992-2013**



Source: Adapted from Office for Foreigners statistics (2014).

Poland's EU accession in 2004 did not bring significant changes in asylum trends: applications lodged after this date continued to grow (Figure 3.5), specifically on the eve of the country's entrance into the Schengen Zone in December 2007. 3,420 applications were made in the last two months of 2007, which brought the total to 10,048 and represented most of the increase over the previous year's total of 7,093 and illuminated a growing concern over stricter Schengen entry procedures (OECD 2008). The claims surpassed 10,000 again in 2009, 2012 and 2013 reflecting increases in Chechen and Georgian inflows (Table 3.2).

**Table 3.2 Asylum applications by country of origin, 2009-2013 (percentage)**

Country	2009	2010	2011	2012	2013
Russia	54.0	73.3	62.5	56.5	84.5
Georgia	39.8	16.5	25.1	30.0	8.0
Armenia	1.3	1.6	3.1	3.8	1.3
Belarus	0.3	0.7	1.1	0.6	0.2
Ukraine	0.3	0.6	0.9	0.6	0.2
Vietnam	0.6	0.7	0.4	0.5	0.2
Afghanistan	1.6	0.3	0.5	0.9	0.3
Kazakhstan	0.04	0.1	0.3	1.1	0.6
Total (absolute numbers)	10587	6534	6887	10753	14981

Source: Adapted from Office for Foreigners statistics (2014).

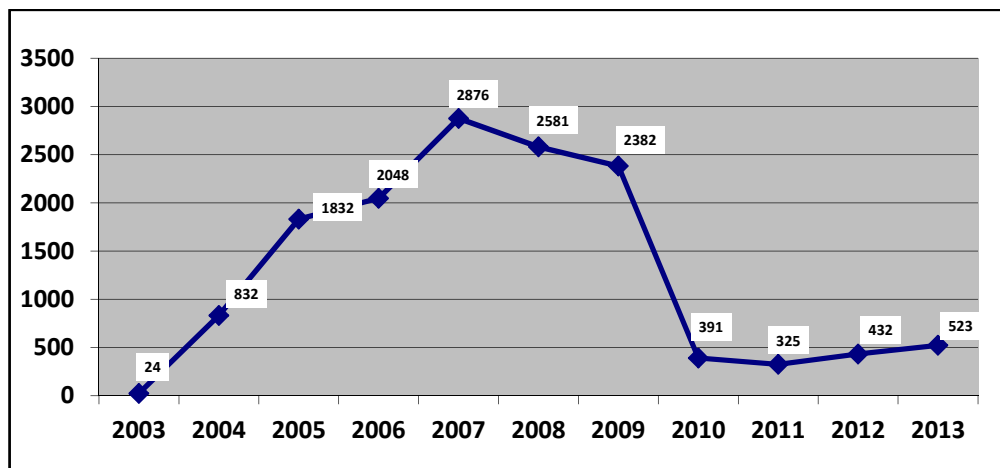
However, an increment in asylum claims has been in inverse proportion to the number of persons endorsed for international protection. The total recognition rate declined from 72.4% in 2006 to 25.2% in 2013. The refugee status decisions went down from 423 (2006) to 200 (2013) (Figure 3.6), and complementary protection decisions<sup>21</sup> from 2,876 (2007) to 523 (2013) (Figure 3.7). Since the majority of post-EU accession applicants in Poland have been Chechens, low recognition rates result predominantly from stabilisation of the military and political situation in North Caucasus following the end of the Russian counter-terrorism operation in Chechnya and the withdrawal of the Russian army from the Republic in 2009. Several IOs and NGOs, although identifying the current situation in Chechnya as dangerous, including high levels of violence (reports of extrajudicial killings and collective punishment), gun battles and assassinations (FH 2010), record human rights progress in certain areas. This includes reduction in armed conflict (ECRE 2011), a decrease in the number of security incidents (CHRCoE 2011) and abductions (MHRC 2010) as well as the government's actions to combat impunity and terrorism. NGOs also point out great advances in restructuring Grozny (the capital of the Chechen Republic) and other cities (ECRE 2011), and the augmentation of the standard of living (FH 2009). Some EU states, including Poland, which is one of the largest recipients of Chechen applicants in the Union, interpret these developments as the basis for recognising Chechnya as a 'safe' country of origin (i.e. the country does not expose individuals to a well-founded fear of being persecuted within the meaning of the 1951 Refugee Convention), and the majority of

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<sup>21</sup> Complementary protection includes subsidiary protection and tolerated stay that can be granted to persons who do not meet the Refugee Convention criteria, and at the same time, cannot be expelled to their country of origin due to the risk of the breach of their basic human rights (see section 4.3).

Chechens as not in need of international protection (for a discussion on the Polish government policy on this matter see Chapter 6.3.1).

**Figure 3.7 Persons granted complementary protection<sup>i)</sup>, 2003-2013**



Notes:

i) Complementary protection: 2003-2008: tolerated stay; 2008-2013: tolerated stay and subsidiary protection.

Source: Adapted from Office for Foreigners statistics (2014).

At the time of procedure, asylum applicants are accommodated in one of twelve reception centres, managed by the Office for Foreigners (OF) (December 2013). The largest centres, i.e. Dębak and Linin, are located in Mazowieckie, in close proximity to Warsaw (Map 3.1). Those who prefer private-rented accommodation are financially assisted by the government (Chapter 6.3.4), and settle in the capital, which is also the place of living for the majority of the already established refugees. The city offers employment opportunities and provides access to extensive social networks and NGOs.

These settlement trends largely concern Chechen asylum-seekers. At the same time, however, the seekers tend to disappear during proceedings and leave Poland. They take advantage of the country's geographical location (proximity to Germany) and use an opportunity of freedom of movement within the EU. Although the analysis will look at the causes of this problem and how it is interpreted by government officials at a later stage (see Chapters 5 and 6), it is important to have a glimpse into the phenomenon of asylum case discontinuations<sup>22</sup> that reflect transit across Poland. In 2003, along with a significant

<sup>22</sup> Applications are discontinued if, among others, an applicant did not appear in the reception centre having lodged his/her claim at the border, or left the centre without notice. The full list of criteria for case discontinuation is enumerated in Art. 40 and 42 of the Act of 13 June 2003 on

increment in discontinuations, the relationship between discontinued claims and decisions affording protection amounted to eighteen (4,366) to one (243). The 2004 EU enlargement did not substantially alter this imbalance: discontinuations started to rise again in 2007, after Poland entered the Schengen Zone. This increase has been directly proportional to the rise in asylum applications (of which over 60% have been lodged by Chechens) and inversely proportional to international protection decisions (refugee status, and complementary protection). In 2013 there were over 16,000 discontinued claims, yet only 723 persons were granted international protection. This shows that the majority of applicants abscond in the course of the asylum procedure.

In summary, one can identify four main trends in post-1989 immigration in Poland. First, following a significant increase in foreign entries to the country, an inflow assumed a more regular character: short-term touristic visits evolved into circular migration of Eastern Europeans in the 2000s. Second, temporary migrants, in particular from Ukraine, constitute the largest share of foreigners in the country, and their number has been rising since EU accession. Third, an increment in legal/regular immigration has been accompanied by an upsurge in asylum inflow. Yet, due to the Polish authorities' recognition of the majority of asylum applicants as economic migrants, this has been in inverse proportion to persons granted international protection (25% in 2013). Finally, Poland faces substantial transit migration that has its origins in illegal immigrants and asylum-seekers passing through Poland on their way west in the early 1990s. Most of the latter lodge an asylum claim at the Polish border and flee. This study focuses on the last two points: asylum-seekers and their travel across the country. The analysis of policy and state responses to this phenomenon over time and how Chechen applicants' perceptions of migration intersect with these responses aids in comprehending the setting within which the underlying logics of transitness develop. Let us now examine the pre-EU accession migration and asylum framework and how it produced notions of transit.

### **3. Institutional response (1990-1997)**

Rapidly growing post-1989 immigration prompted the government's response (Wizimirska 1992). Poland, whilst acting in times of democratic transformation, and political and

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granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws 2003, No. 128, item 1176, with further amendments) [binding in December 2013].

conceptual uncertainty, had to create migration institutions. This section first analyses the creation of the Polish migration and asylum setting. Second, it analyses the country's engagement with Western migration bilateral and multilateral agreements, and how it absorbed EU concepts and regulations. Finally, it analyses government officials' learning of European migration and asylum norms and ideas.

### 3.1. Creation of institutions and laws

The first government body to deal with asylum-seekers was established within the Ministry of Labour and Social Protection (Szonert 2000: 41). The Interministerial Group for Assistance to Refugees from Abroad<sup>23</sup> was formed in March 1990 and comprised representatives of, among others, the Ministry of Interior (Mol)<sup>24</sup>, the Ministry of Labour and Social Policy (MLSP), the Ministry of Foreign Affairs (MFA) and the Ministry of Health and Social Assistance; the Group undertook immediate action to support asylum-seekers staying in the country, and to build the Mol's capacity to tackle immigration and draft Polish migration policy (Interview. Office for Foreigners, Warsaw, 17 July 2012).

Due to, among others, fears about the massive flood of refugees from the East numbering in millions as a result of expected political turbulences within the Soviet Union, responsibilities for asylum policy were transferred from the Labour Ministry to the Mol, headed by security personnel (Shevel 2011: 234). The Bureau of the Plenipotentiary of the

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<sup>23</sup> The Group (*Międzyresortowy Zespół do Spraw Pomocy Uchodźcom z Zagranicy*) was created by the Government Presidium's decision of 26 March 1990. Subsequently, the Prime Minister's Order of 22 November 1990 institutionalised the Group into the Interministerial Commission for Refugees (*Międzyresortowa Komisja do Spraw Uchodźców*).

<sup>24</sup> Migration, asylum and border management, as part of 'internal/interior matters', falls within the competence of the Ministry of Interior since 1990 (§1 (3) (a) (b); (5) (d) Order of the Council of Ministers of 16 July 1990 on a detailed scope of activity of the Minister of Interior (Journal of Laws 1990, No. 49, item 287)). The coordinative role of the Ministry was confirmed in Art. 29 (1) (3) Act of 4 September 1997 on sectors of the government administration (Journal of Laws 1997, No. 141, item 943). However, in 1996 public administration matters were merged into the Ministry of Interior that was renamed into the Ministry of Interior and Administration (Act of 21 June 1996 on the Office of the Minister of the Interior and Administration (Journal of Laws 1996, No. 106, item 491)). In November 2011, as a result of the Prime Minister's decision, the Ministry of Interior and Administration was split into the Ministry of Interior (Order of the Prime Minister of 11 November 2011 on a detailed scope of activity of the Minister of Interior (Journal of Laws 2011, No. 248, item 1491)) and the Ministry of Administration and Digitalisation (Order of the Prime Minister of 11 November 2011 on a detailed scope of activity of the Minister of Administration and Digitalisation (Journal of Laws 2011, No. 248, item 1479)). Regardless of the above administrative rearrangements and changes in names, an institutional representation of migration, asylum and border management has not changed, being invariably part of 'internal/interior matters'. In order to maintain coherence this analysis employs the name 'the Ministry of Interior' (Mol).

Minister of Interior for Refugees<sup>25</sup>, instituted within the MoI, served four functions. First, it examined asylum applications (since June 1992), managed assistance during asylum proceedings and integration of already established refugees (MoI 1994a). However, the latter, due to a difficult economic situation, was limited to the provision of accommodation, food and medical care in the first 12 months following the refugee status decision<sup>26</sup> (MoI 1994d). Second, the Bureau drafted migration and asylum policy and legislation. Finally, it steered international cooperation, including with the United Nations High Commissioner for Refugees (UNHCR). Shevel (2011: 265-6) asserts that the UNHCR 'played the central causal role' in the Polish asylum system and 'proved a particularly important avenue of refugee policy liberalization'. Between 1990 and 1991, the agency sent several assessment missions to Poland to conduct status determination interviews and bestowed refugee status on over 800 persons (Szonert 2000). Following opening the liaison office in Warsaw, the UNHCR engaged with legislative amendments of Polish asylum regulations (see section 4.3).

The Bureau's resources were scarce: its broad functions were fulfilled by only eighteen civil servants (Wizimirska 1992), four of whom were responsible for examining asylum claims. This led to administrative delays, intra-institutional tensions (MoI 1994a) and UNHCR criticism of the overly long duration of the status determination procedures (Shevel 2011: 238). Also, the Ministry had to find its way through imprecise and vague provisions regulating institutional responsibility for asylum within the core executive. Although, according to the 1963 Foreigners' Act, asylum decisions were issued by the MoI in cooperation with the MFA<sup>27</sup>, it was the former that *de facto* defined asylum policy and dealt with the claims. On the other hand, due to the dispersal of competences, the MLSP, which was coordinating state social policy, did not have the resources to organise refugees' integration welfare support: social assistance on the ground was provided by provincial governors<sup>28</sup>, and not by the central administration.

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<sup>25</sup> In February 1993 the Bureau (*Biuro Pełnomocnika Ministra Spraw Wewnętrznych do Spraw Uchodźców*) was allocated new competences in the field of foreigners' stay legalisation and evolved into: the Bureau for Migration and Refugees (*Biuro do Spraw Migracji i Uchodźstwa*). In December 1996 the Bureau for Migration and Refugees was transformed into the Department for Migration and Refugees (*Biuro Migracji i Uchodźstwa*).

<sup>26</sup> Fully-fledged integration programmes for refugees were introduced only in 2000. By then the assistance was provided on an *ad hoc* basis by the MoI and local authorities (since 1998 by the MoI in cooperation with the MLSP), with the UNHCR's support.

<sup>27</sup> Art. 10 Act of 29 March 1963 on foreigners (Journal of Laws 1963, No. 15, item 77).

<sup>28</sup> Amendment to the Act of 29 November 1990 on social assistance (Journal of Laws 1990, No. 87, item 506); Act of 14 June 1996 on the change of the act on social assistance and the act on



Furthermore, the political context played a role. As a result of the late 1980s' negotiations between the communist party and Solidarity, the old elites remained in control of the three 'power ministries', including the MoI (Zubek 2005b). Thus, the transformation within the Ministry was rather punctuated and protracted. Although some changes at the high political level occurred following the first free elections in 1990, their impact on the middle- and low-levels of the Ministry was limited (Shevel 2011: 229). Also, due to a lack of political consensus to undertake lustration, most communist-era officials remained politically and economically independent. This affected the MoI migration structures' formation: the managers of the Refugee Bureau, who came from the anticommunist circle, had to maintain contacts with former communist officials as well as to build intra- and inter-institutional cooperation to push forward legislation and policies (Interview. History Meeting House, Warsaw, 2 January 2013).

The developments within the core executive took place under the conditions of meagre pressure from outside. Non-governmental organisations were at an early stage of development, and, due to scarce funding and expertise, were unable to influence the government agenda. On the other hand, immigration did not attract much interest in the parliament. As Stola (2001b: 191; see also Weiner 2006) argues, '[p]roblems which elsewhere [made] immigration headline news, the topic of public debates... and an opportunity to gather votes, were of only limited interest in Poland and weren't translated into major political issues. Migration was absent from electoral platforms and debates. Except for bills pertaining to immigration of ethnic Poles, almost all of the legislative initiatives in migration matters had been introduced by the government'. As a result 'outside the brief moments of high politicization of the refugee issues, the elites in charge of refugee policy agencies were in a position to determine policies virtually single-handedly' (Shevel 2011: 231).

Concurrent to the competence building in migration and asylum within the core executive, the Border Guard underwent an overhaul. Following the period of dependence on Moscow, the border infrastructure, protected by military formations, was not prepared for managing regular cross-border movements. Whereas Poland's Western border was tight so

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employment and prevention of unemployment (Journal of Laws 1996, No. 100, item 459). Art. 12(12) of the amended social assistance act allocated the competence to 'coordinate actions on integration of refugees in society' to the provincial governor/voivode.

as to isolate Poland from the West, the Eastern border with the former Soviet republics (Belarus, Russia, Ukraine) lacked the necessary infrastructure and personnel.

The post-1989 BG reconstruction comprised three elements. First, in November 1990 an expert group was established to disband the Communist military border structures (Border Defence Troops (BDT)) and to form a new formation – the Border Guard<sup>29</sup>. The foundational Act on the Border Guard entered into force in the same month<sup>30</sup> ‘to depart from the vision of border protection formulated in military categories towards a modern migration service of police standard. This was reflected in competences of the newly-established formation, dominated by police-like functions.’ (Lipski 2011: 3). The BDTs were officially disbanded<sup>31</sup> in May 1991. Second, many of those involved in BDT structures became part of the newly established BG structures. Those people, who – as a BG officer pointed out – ‘brought up in the army and had military education... so, they hardly understood the necessity for change’, were joined by new officers ‘who were only learning the border. Certain issues were also difficult to comprehend. Those young people did not have any knowledge [of border management]. Yet, they had potential, so they could learn or come up with something on their own’ (Interview. Border Guard Headquarters, Warsaw, 14 July 2012). Third, in order to diminish an illegal inflow, the first steps towards sealing the Eastern border were undertaken, including the improvement of border crossing resources and employment of new staff. The pace of reforms increased along with the late 1990s’ EU funds and regulations transfer (see section 4.2). The origins of the BG were, thus, embedded within the control paradigm. The key objective became to manage the movement, including migration of transit migrants (illegal migrants and asylum-seekers) seizing an opportunity to cross the porous Polish borders on the way to the EU. The Polish government officials saw these inflows as a threat to public order and security (MoI 1995a).

As well as reforming institutions, the government amended migration and asylum legislation. An obsolete legal framework inherited from the communist regime did not appropriately address new migration and border management challenges. The 1952 Polish constitution still in force under the first non-communist government generously promised asylum to anyone being ‘persecuted for the defence of the interests of the working masses,

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<sup>29</sup> Decision of the Minister of Interior No. 53/90 of 5 November 1990.

<sup>30</sup> Act of 12 October 1990 on the Border Guard (Journal of Laws 1990, No. 78, item. 462) [entered into force on 11 November 1990].

<sup>31</sup> Order of the Minister of Interior No. 47/91 of 16 May 1991.

struggle for social progress and national liberation, defence, peace or scientific activity'<sup>32</sup>. Immigration law<sup>33</sup> did not determine central institutions responsible for migration policy-making, nor did it regulate international protection criteria (MoI 1995a). In order to rectify these deficiencies the MoI Asylum Bureau officials amended the 1963 Foreigners' Act and introduced key asylum and refugee concepts and regulated illegal immigrants' deportation<sup>34</sup>. Also, Poland acceded to several international agreements: in 1991 it ratified the 1951 Refugee Convention and its 1967 Protocol that led the Polish asylum authorities (the MoI Asylum Bureau) to take over from the UNHCR the competences with regard to asylum claim examination (Szonert 1999). In December 1991 the government signed the Association Treaty with the European Communities that initiated a political dialogue with European institutions and member states and formed the legal basis for EU funding and expertise transfer to Poland<sup>35</sup> (see below).

The post-1989 formation of the Polish migration setting was prompted by rising immigration. An institutional change occurred largely within the core executive and resulted in the establishment of structures to set migration policy objectives and laws to deal with asylum applications. At the operational level, the BG undertook an organisational reform and improved structures to manage cross-border movement. An overhaul of migration legislation led to, among others, incorporation of international refugee protection standards into Polish legislation. This reactive and *ad hoc* migration framework determined the formulation of the response to transit. Polish migration institutions were designed to control transit migrants and ensure that they will not constitute a threat to public security.

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<sup>32</sup> Art. 88: *'Polska Rzeczpospolita Ludowa udziela azylu obywatelom państw obcych prześladowanym za obronę interesów mas pracujących, walkę o postęp społeczny, działalność w obronie pokoju, walkę narodowyzwoleniczą lub działalność naukową'*. Constitution of the Polish People's Republic enacted by the Legislative Sejm on 22 July 1952 (Uniform text of 16 February 1976) (Journal of Laws 1976, No. 7, item 36).

<sup>33</sup> Journal of Laws 1963, No. 15, item 77.

<sup>34</sup> Act of 19 September 1991 on the change of the act on foreigners (Journal of Laws 1991, No. 119, item 513). Act of 5 January 1995 on the change of the act on foreigners (Journal of Laws 1995, No. 23, item 120).

<sup>35</sup> The EC (European Communities)/EU-Poland relationships were steered by the Association Council, comprising Polish and EU states ministers and the Commission's representatives, which set overall policy and legislative objectives. The ministers were supported by the Association Committee and several sub-committees that, at the senior official level, dealt with implementation of specific EU provisions.

### **3.2. EU and EU states' impact (EU external governance)**

The emergence of the Polish migration setting was embedded in externalisation of EU policies. Poland and other CEECs aspiring to the EU were expected to play their part in controlling movement into the EU (Geddes and Boswell 2011: 154). The EU externalised a 'repressive' migration policy in the region through: extension of control mechanisms (including border control and measures to combat illegal migration) and instruments to facilitate the return of illegal migrants and asylum-seekers (readmission agreements) (Boswell 2003: 622; see also Lavenex 1999, Grabbe 2002, van Selm 2002).

Poland's and other Central and Eastern European countries' (CEECs) involvement with Western European migration frameworks was contextualised within the 'safe third country' concept (Kjaergaard 1994; Collinson 1996; Lavenex 1999). The idea, introduced by EU states in the 1992 London Resolution, stipulated that the formal identification of a 'safe third country' (defined as the country of transit and potential destination where the applicants' life and freedom are not threatened within the meaning of the 1951 Refugee Convention) preceded asylum claim examination. Recognition of Poland and other CEECs as 'safe' states prompted the development of the system of readmission agreements that, as part of an emerging EU asylum regime, shifted an obligation to readmit asylum-seekers (that had previously crossed third states' territories) from Western to Eastern Europe (outside the EU) (Lavenex 1999), and centred EU migration policy around the means to control and diminish illegal inflow and return. Poland signed the readmission agreement with EU states in March 1991 and committed itself to readmit third-country nationals and stateless persons who had crossed a common external border and/or stayed in the country illegally. Since the treaty did not significantly reduce migration to the EU, specifically to Germany, in May 1993 the Polish and German governments signed its bilateral modification: Poland had to accept asylum-seekers whose applications were rejected in Germany as well as persons from other EU states (EP 1999: 47-8). Weinar (2005: 4) argues that Poland's accession to the pre-determined and non-negotiable EU migration regime was driven by Polish political elites' perception of readmission agreements as strengthening Poland's credibility in the EU arena, and their belief that the expected funding transfer following accession to these agreements would significantly contribute to the development of the country's border infrastructure.

The implementation of readmission provisions led to a considerable increase of asylum applications in Poland (EP 1999: 47-8). In 1995, 9,098 persons were returned to the country from Western states, of which 8,630 came from Germany, and a total of 4,064 third-country nationals, of whom 492 were asylum-seekers who had illegally crossed the Polish-German border (Danish Refugee Council 1998). Second, a financial compensation for signing the agreements (120 million Dm was transferred by Germany) precipitated Polish migration framework elaboration (Interview. History Meeting House, Warsaw, 2 January 2013). 49% of these funds were allocated to border security, 38% to the police, and 13% for the asylum system improvement<sup>36</sup>. Third, an obligation to take back all persons who illegally entered the EU via Poland resulted in EU states lifting visa requirements for Polish nationals. Finally, the agreement with Germany launched a chain reaction of readmission agreements between Poland and its neighbours and among other EU member states and CEE countries (Kicinger 2009: 82).

Simultaneous to cooperation on readmission, Poland became involved with multilateral migration and frameworks, including the Vienna Process (VP) and the Berlin-Budapest Process (BBP). Launched in 1991, the processes 'resulted from the international character of challenges and the common struggle to ensure security both in the Western and the Eastern parts of post-Cold War Europe' (Kicinger 2009: 81). The VP focused on harmonisation of asylum regulations, visa policy, and instruments to combat illegal immigration, and facilitated discussion on readmission and the CEECs' admission capacity. Within the BBP EU officials shared their knowledge experience on counter trafficking measures, deportation and border control regulations (Mol 1994b). The BBP recommendations, subsequently deliberated at an intergovernmental level, affected Polish asylum regulations on combating illegal immigration and unwanted immigrants' registry. The processes incentivised Polish government officials to elaborate institutional and research (efforts to identify the nature and the implications of flows) tools to control and deter transit migration. The fact that 'Poland became a transit country for migrants heading west determined future [migration] legislative models' (Weinar 2005: 5) (see section 4.3).

The externalisation of EU measures to Poland to tighten the borders, build the state capacity to admit rejected asylum-seekers from the West and to put in place the legal and

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<sup>36</sup> Bundestagsdrucksache 13/6030, 30 October 1996.

administrative migration infrastructure undoubtedly contributed to the restrictiveness of Polish migration policy. This, however, has to be coupled with domestic-level developments. For example, Shevel (2011: 240) associates the tightening of Polish migration and asylum policy with an increasing insulation of asylum matters from high-profile issues in domestic and foreign policy (resulting in the extension of asylum officials' autonomy to 'pursue policies they believed appropriate'), and with conservative attitudes of government civil servants towards asylum-seekers and the UNHCR.

This shaped the early 1990s' setting of the construction of transit. A unilateral incorporation of Poland into the EU restrictive migration regime transformed the former into a 'buffer zone' (Geddes 2003: 181) to absorb migrants heading west and those returning from the EU on the basis of readmission agreements. Within this dynamic Polish officials' perceptions of transit migrations were formed. The latter were seen as objects of indispensable measures to control and distribute the flows. The interpretations of transit were further informed by EU-induced learning that we now turn to.

### **3.3. Learning**

The early 1990s saw Polish government officials 'hunting' for successful European/EU norms and arrangements. At the time of the communist system's disintegration and the remote US model, this constituted a natural point of reference and an incentive for change (Weinar 2006: 49). As a MoI civil servant, directly involved in the early 1990s' cooperation put it: 'This [was] an accelerated course of everything, since we started from a position of persons who did not deal with this [migration and asylum] professionally nor did we have any experience in this respect. This was rather intuition and invention to engage with international cooperation and observe how it [migration policy] works elsewhere' (Interview. History Meeting House, Warsaw, 2 January 2013). Migration and asylum norms' incorporation was largely confined to those government institutions that steered migration policy-making and implementation: the MoI and the BG. Since the 1991 establishment of the Bureau of the Plenipotentiary of the Minister of Interior for Refugees, MoI officials were gradually taking over the international cooperation competences from the MFA, and giving shape to the country's action on migration (MoI 1994c, 1999b).

The process of learning occurred at three levels. First, collaboration with EU states and international networks, such as the VP and BBP processes, enabled the transfer of knowledge of how to build the institutional and legal foundations of the modern migration and asylum setting. Second, inter-state cooperation facilitated acquisition of information on specific legal and procedural arrangements. For example, Poland largely benefited from Germany's experience in the field of border management. German and Polish border guards developed close collaboration at the practical level, including joint operations and training. German influence considerably accelerated the process of developing mechanisms for migration control, ensuring that would-be migrants heading for Germany were stopped and held in Poland (Grabbe 2002: 96). As a BG officer explained:

A number of projects were implemented with the German border service at that time. Starting from projects for the management staff showing the structures, approaches and conceptions related to border control and combating illegal inflow, to very practical issues... We cooperated with Germany mainly because we had good tradition of previous collaboration. They are our neighbours. Neighbours are always near and mutual understanding is highest (Interview. Border Guard Headquarters, Warsaw, 1 August 2012).

Third, collaboration with international organisations enabled absorption of meanings of key asylum and migration institutions. The UNHCR, for instance, provided Polish civil servants with data and knowledge on asylum procedures, integration programmes and how to formulate reception policy (UNHCR 1999). A BG officer involved in asylum decision-making at that time drew a picture of asylum learning:

What was it [the Refugee Convention] all about? What kind of phenomenon were refugee movements? There were a couple of persons able to answer these questions... A Plenipotentiary of the Office [for Foreigners and Repatriation] [for refugees] told me once: "when the minister foisted this task [to establish the refugee system in Poland] on me ..., I had no idea what it was all about! Only when they sent me to the UNHCR headquarters in Geneva, showed how it worked, I latched on..." (Interview. Border Guard Headquarters, Warsaw, 14 July 2012).

This 'conceptual emptiness' within the Polish structures, incomplete knowledge of migration and asylum meanings, ideas and policy models, and a lack of practice hindered the formulation of responses to immediate as well as long-term migration challenges.

The policy learning occurred in a rapidly changing policy environment: migration actors were absorbing new ideas and concepts at times of the formation of the pillars of the migration system. Also, their action was constrained by several structural factors, including systemic and economic transformation, administrative deficiencies within the core executive, and the absence of experience with immigration and asylum-seekers. In this 'novel and uncertain' environment, Polish civil servants showed a higher propensity to incorporate EU legislative templates, ideas and conceptions, and to employ them in migration policy-making. The 'less politicized and more insulated' (Checkel 2005b) Polish migration setting, driven by a handful of Warsaw-based bureaucrats, intensified learning. The dynamic of the early 1990s' learning could be described as 'delegation' learning in the 'shadow of hierarchy' determined by the EU and EU states (Dunlop and Radaelli 2013): Polish learners were autonomous to set objectives of learning, though constrained as to the means and content of learning. The EU-steered transmission of norms and standards related to migration control and management, and the procedural aspects of asylum claim determination framed the early debates on transit migration and how to tackle it. EU states' objectives to extend migration governance to CEE to deter inflows took priority in these discussions.

In the early 1990s Poland faced rising cross-border movement and labour immigration from Eastern Europe, and asylum inflows that triggered the country's institutional and legal response. The latter was organised by European integration that prompted bureaucratic adaptation, reorganisation of border management structures and the immigration and asylum legal reform. However, these processes were characterised by 'a series of fragmented and frequently provisory regulations and actions... more or less *ad hoc* solutions were accepted to regulate the most critical matters' (Grzymała-Kazłowska and Okólski 2003: 33). This legal and bureaucratic milieu enabled formulation of ideas and concepts about transit that developed within the control and effective management paradigm produced and externalised by EU states. Transit migration became to be seen as an object of governance and transit migrants as persons that had to be counted (registered in the database), controlled, and if necessary, expelled. This included asylum-seekers



whose intentions to look for the most favourable reception conditions in the Union were perceived by EU and Polish civil servants as shattering the legal procedures of case examination and bringing uncertainty.

#### **4. Elaboration of the system (1997-2003)**

EU enlargement incentivised the Polish migration and asylum setting development: the conditionality for membership gave the EU a significant leverage to extend its principles, norms and rules to Poland as well as to induce bureaucratic change. This section first analyses the dynamics of EU enlargement policy. Second, it examines the Polish migration and asylum institutional framework, and how it altered as a result of EU adaptation. Third, it examines the EU-induced overhaul of asylum legislation. Finally, it investigates the process of Polish actors' learning of EU policies and concepts, what kind of implications it brought for policy-making, and how it formed the social environment in which ideas about transit were produced.

##### **4.1. EU enlargement**

EU conditionality for accession rested on the conditions set out by the Copenhagen European Council in 1993. Poland, as a country aspiring to be in the EU, was to build stable institutions guaranteeing democracy, rule of law, respect for human rights and minority rights; a fully functioning market economy; and to be capable of implementing the EU *acquis* (on the development of EU accession conditionality in CEE see Grabbe 1999). More detailed and specific tasks to fulfil these conditions were provided in documents called: 'Accession Partnerships', drafted for each state and adapted annually (Grabbe 2002: 93-4; Phuong 2005: 392).

EU Accession Partnership signed with Poland in March 1998<sup>37</sup> institutionalised the relations with the Union. First, it specified the framework for membership negotiations<sup>38</sup>: the Polish

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<sup>37</sup> Council Decision of 30 March 1998 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Poland (98/260/EC) (OJ L 121/6, 12.04.1998).

<sup>38</sup> EU membership negotiations with Poland and five other states (Cyprus, Czech Republic, Estonia, Hungary and Slovenia) were launched in March 1998, following the 1997 Amsterdam European Council's decision. To this purpose, the EU *acquis* was organised into 31 chapters, including justice

government was obligated to draw up yearly national programmes of the EU *acquis* adoption that set the timetables for meeting specific targets, and indicated the administrative and financial resources to carry out the reforms. Second, it introduced the supervision and evaluation mechanisms: the implementation of EU regulations was monitored by several institutions, including the Commission, which drafted Regular Reports on the progress of preparing for accession. The reports were subsequently deliberated in the EU Council that decided on the direction and pace of negotiations. The general conditions set out in EU documents included Poland's accession to relevant international institutions, application of the rule of law, and stability of administrative and judicial institutions. In the field of migration and asylum, Poland had to adopt restrictive measures to limit immigration and to ensure stringent border controls, through among others, concluding bilateral readmission treaties with other countries, improving control and surveillance of borders, and strengthening enforcement and deportation procedures (Grabbe 2002). The Poland and Hungary: Assistance for Restructuring their Economies (PHARE) programme<sup>39</sup> was offered to applicants to concentrate their energies on the adoption of EU policies, including in the area of Justice and Home Affairs.

EU accession negotiations started in November 1998. Negotiations on the Justice and Home Affairs section of the EU *acquis* commenced in May 2000. This influenced the development of Polish migration policy and provided an impulse to an overhaul of migration laws and institutions (Weinar 2006: 49). The harmonisation imperative has become 'a key driving factor of Polish refugee policies since 1998' (Shevel 2011: 253). The reform of the migration and asylum setting was organised by the 'one-way' EU-steered process of incorporation of EU norms and standards (see Grabbe 2002; Weinar 2006). As an OF official put it: 'In 1999, when we already received the *acquis* and the screening consultations took place, we had to adjust. We did not look at how other states had done this, as we were a direct recipient... There was no choice. This was how it was to be, and that was final!' (Interview. Office for Foreigners, Warsaw, 17 July 2012). In response to Europeanisation that, as discussed in Chapter 2, emerged as a 'political opportunity structure' offering additional resources to exert influence (Börzel and Risse 2003), Polish

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and home affairs (Chapter 24). The Council adopted a common negotiating position on each chapter and put it forward to each candidate state at bilateral intergovernmental conferences.

<sup>39</sup> Around 30% of PHARE funding was used for institution building (i.e. assisting applicants to improve their capacity to incorporate the EU *acquis*) and the remaining 70% was transferred to better the regulatory infrastructure needed to ensure compliance with the *acquis* (CEC 1999: 7). The programme allocated €2.5 billion to Poland during the period 1992–1999, €484 million in 2000, and €467 million in 2001 (CEC 2002b:13).

actors made compliance choices on the basis of cost/benefit calculations concerning most accurate and optimal adaptation. Let us now proceed to the specificities of the legal and bureaucratic aspects of this process.

## 4.2. Institutional developments

An institution that steered the implementation of EU migration *acquis* was the MoI. Following the completion of accession negotiations in the field of Justice and Home Affairs (July 2002), the MoI was granted full access to EU documents and obtained an observer status: Polish officials took part in the EU Council's and the Commission committees' meetings and had the right to take part in discussion<sup>40</sup>. This spurred the Ministry's closer cooperation with the Office of the Committee for European Integration (OCEI): a permanent secretariat of the Committee for European Integration (an inner cabinet with powers to make binding decisions in lieu of the full council of ministers in matters related to EU integration) (Zubek 2008: 52). The Office coordinated the overall process of Poland's preparations for EU membership<sup>41</sup>. Through a network of connections within the government (Figure 3.8), the OCEI oversaw the process of transposition of EU legislation undertaken by specific ministries (in the field of asylum – the Mo) through sanctions administered by the prime minister with operational support from the OCEI. Furthermore, the OCEI provided the ministries with professional support at all stages of the EU-induced legislative process to solve transposition problems at the lowest possible level and to avoid taking up issues in cabinet unless it was of utmost importance (Zubek 2005a: 612); and coordinated the participation of Polish government officials in training on EU decision-making (OCEI 2003b: 8-10).

The MoI played a key legislative role: it drafted regulations and put them forward through the parliament. It prepared, among others, the 1997 Foreigners' Act and its 2001

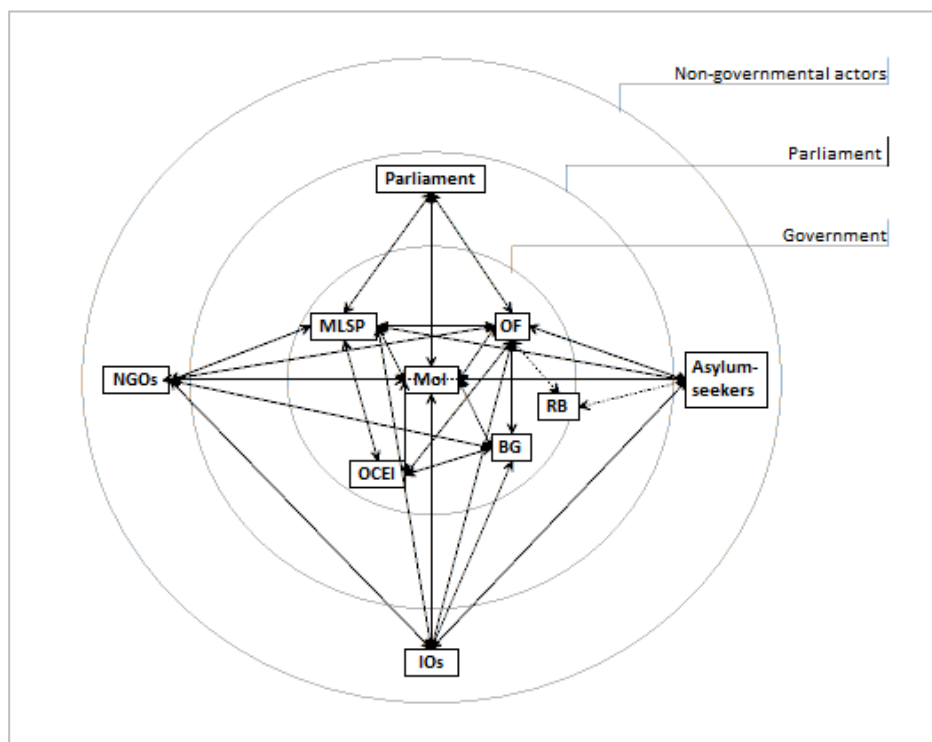
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<sup>40</sup> The rules of Poland's engagement with EU institutions were defined in the Council of Ministers' document of 4 March 2003: *System koordynacji polityki europejskiej w okresie poprzedzającym członkostwo Polski w UE – udział w procedurze informowania i konsultacji oraz status aktywnego obserwatora w procesie decyzyjnym UE [The System of Coordination of European Policy in the Period Preceding Poland's Membership in the EU – Participation in an Information and Consultation Procedure and an Active Observer Status in EU Decision-making Process]*.

<sup>41</sup> The OCEI, as a coordination and implementation institution, was politically responsible to/subordinated to the interministerial Committee of European Integration (Art. 8(1) Act of 8 August 1996 on the Committee of European Integration (Journal of Laws 1996, No. 106, item 494, and 2000, No. 154, item 1800)).

amendment that transposed much of the EU *acquis* (CEC 2002b) and laid the foundations for the post-EU accession migration and asylum framework (see section 4.3). The MoI's wide latitude in pushing through legislation illustrated its central position within the core executive (Figure 3.8), and a limited impact on migration law- and policy-making from outside. First, the government did not encounter substantial pressure from NGOs: due to meagre financial and human resources, they were relatively weak in the sense that they were unable to substantially alter the government's proposals (see section 4.3). Second, migration legislation did not arouse political discussions or tensions: an absence of clear political cleavages and an overall consensus to comply with EU standards became a distinctive feature of the migration debate in Poland (Rajkiewicz 2003; Weinar 2005, 2006).

**Figure 3.8 Polish migration and asylum actors, 2003**



Source: Author.

The Ministry steered developments at an operational level: the MoI Department of Migration and Refugees examined asylum applications, carried out asylum interviews and managed reception policy. However, an increment in asylum applications in the late 1990s (Figure 3.5, p. 62) caused significant backlogs: the Department employed only twelve asylum case workers that resulted in over 19 cases allocated monthly to one person (MoI 2000). In consequence, in 1998 over 1,000 applications (out of 4,197) remained

unexamined (Mol 1999a), and an average investigation time exceeded 6 months (Mol 2000). This, together with concentration of broad policy competences within an underfinanced and understaffed department hampered the EU adjustment process (Interview. Ministry of Interior, Warsaw, 3 and 24 August 2012).

In order to overcome these deficiencies and to accommodate the Commission's recommendations to accelerate migration decision-making, the bulk of Mol competences was transferred to the executive agency: the OF (established in July 2001)<sup>42</sup> that became the coordinating government body in the area of migration and asylum (Jagielski 2002: 153-4). The Office was vested with administrative (foreigners' stay legalisation), legislative (drafting migration and asylum provisions), and international cooperation powers. In the field of asylum, it considered asylum claims, carried out asylum interviews and administered reception centres<sup>43</sup>. Although directly subordinated to the Mol<sup>44</sup>, which formally coordinated state migration policy, in practice, the OF had a sizeable impact on law-making. For example, in 2003 the OF successfully passed through the parliament new migration and refugee protection laws (Sejm 2003a, 2003b, 2003c) (see section 4.3). The OF's increasing role in the system was caused by, among others, the dismantling of the Mol's administrative apparatus to oversee migration policy (dissolution of the Mol Department of Migration and Refugees (OCEI 2002: 376)), and the staff transfer to the Office. However, some elements required improvement. As the Commission reported in 2002: 'the staffing of the Office... has not significantly increased [in 2001 there were 242 employees (OCEI 2002: 377)]. This [was] both because of budgetary constraints and because at the time, when the 2002 budget was prepared, the government was seriously considering dismantling the then six-month-old office as one element in its broader restructuring of the Polish administrative system' (CEC 2002b: 115).

The second institution set up as a response to EU requirements to establish the two-instance administrative procedure was the RB<sup>45</sup>, which commenced work in early 1999 (CEC 1999: 73). Composed of twelve independent members appointed by the Prime Minister for a 5-year term, the Board has been the second instance institutions competent

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<sup>42</sup> In 2007 the Office for Foreigners and Repatriation was renamed 'the Office of Foreigners'. Since the Office's key competences, including those concerning asylum matters, remained unchanged, and to maintain coherence, this analysis uses the name 'the Office for Foreigners' (OF).

<sup>43</sup> Art. 68c(1) Act of 11 April 2001 on the change of the act on foreigners and other selected acts (Journal of Laws 2001, No. 42, item 475).

<sup>44</sup> Ibid., Art. 68a(2).

<sup>45</sup> Arts. 69-75 The 1997 Foreigners' Act (Journal of Laws 1997, No. 78, item 483).

to review asylum decisions issued by the MoI Department of Migration and Refugees (until 2001), and the Office for Foreigners (since 2001) in the first instance<sup>46</sup>. In 2001 its competences were extended to, among others, examination of judicature concerning asylum decisions and cooperation with national and international asylum institutions<sup>47</sup>. This disburdened the first-instance asylum institutions (the MoI and then the OF), and improved the quality of administrative decisions (MoI 2000).

The focus of EU-induced institutional change on the control and governance of the flows resulted in a one-sided approach to migration and marginalisation of other aspects, such as integration (Weinar 2005: 21). This led to *inertia* in the development of the core executive structures responsible for integration of already established refugees. The 1997 Act on Sectors of the Government Administration, which allocated the competences within the core executive, remained silent on integration policy and who should elaborate it<sup>48</sup>. Only in 2004 did the MLSP take full responsibility in this area<sup>49</sup> from regional authorities<sup>50</sup> (see section 3.1). The ambiguities in assigning competence in integration within the government were further intensified by vaguely defined regulations of the provision of integration support: the first directive specifying the conditions of assistance offered to refugees was issued only in 2001<sup>51</sup> (see Chapter 6.3.1). One can identify several causes of such a situation. First, although recommended by the Commission (CEC 2000b, 2001c, 2002b, 2003c), integration schemes were not regulated by EU law and did not spur adaptational pressure at the domestic level. Second, integration of refugees did not attract public and media attention and that did not prompt political pressure on the government to reformulate obsolete provisions (Weinar 2005: 23). Third, Poland simply could not afford well-developed integration facilities due to financial constraints (Weinar 2005: 22).

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<sup>46</sup> *Ibid.*, Art. 69.

<sup>47</sup> Art. 69(2) The 2001 Amendment to the 1997 Foreigners' Act (Journal of Laws 2001, No. 42, item 475).

<sup>48</sup> Act of 4 September 1997 on sectors of the government administration (Journal of Laws 1997, No. 141, item 943) [Announcement of the Prime Minister of 5 October 1999 on the publication of a uniform text of the act on sectors of the government administration (Journal of Laws 1999, No. 82, item 928)].

<sup>49</sup> Decision of the European Committee of the Council of Ministers of 3 September 2004. Confirmed by Decision of the Council of Ministers of 7 September 2004.

<sup>50</sup> Art. 12(1) (6); Art. 11a(1) (2) Act of 29 November 1990 on social assistance (Journal of Laws 1990, No. 87, item 506, with further amendments) [Announcement of the Minister of Labour and Social Policy of 26 February 1998 on the publication of a uniform text of the act on social assistance (Journal of Laws 1998, No. 64, item 414)].

<sup>51</sup> Order of the Minister of Labour and Social Policy of 1 December 2000 on the detailed rules of provision of assistance to refugees, amount of financial benefits, forms and the scope of assistance, a course of action in these matters, and conditions for assistance suspension or refusal (Journal of Laws 2000, No. 109, item 1160).

The BG's reform complemented the process of bureaucratic adaptation to the EU. The reform implied: i) expansion of competences; ii) organisational change; iii) infrastructural improvements, specifically on the Eastern border; and iv) personnel professionalisation. The extension of the BG's functions accommodated the Commission's recommendations to improve the efficiency of Polish border control and management (Lipski 2011). The 1997 Foreigners' Act empowered BG officers to take on asylum claims at the border<sup>52</sup>: they verified the applicant's identity, carried out medical tests<sup>53</sup>, and decided on whether to initiate proceedings<sup>54</sup>. Also, the BG's powers to combat crimes were significantly extended<sup>55</sup>: it was granted 'operation-reconnaissance' competences to, among others, carry out a controlled purchase or controlled delivery, wiretap, and to control correspondence.

In order to carry out new tasks and implement the EU *acquis*, in early 2000 the BG commenced an organisational overhaul that included the reorganisation of BG Headquarters and regional units. For example, the border inspection posts (to control the border) and border crossings (to control cross-border movement) were merged into the unified BG control units (OCEI 2003a: 6). This improved operational efficiency (CEC 2000b: 72) and accommodated the Commission's demand to integrate functions of threat assessment, crisis management and rapid reaction (CEC 1998: 45).

Along with functional and organisational deficiencies, the Commission identified a number of structural flaws emerging on Poland's Eastern border: border infrastructure remained underdeveloped and underinvested, cross-border procedures were obsolete, and no overall plan existed to quantify the key objectives and the budget to achieve them (CEC 1998, 1999). Between 2000 and 2002, as part of the process of tightening the border (and the future EU external border), several border patrol units and border crossings to Belarus and Ukraine were built, or modernised (CEC 2000b, 2003c; OCEI 2002, 2003a). Border officers were being gradually equipped with new means of transport (e.g. helicopters) and communication, and surveillance appliances (OCEI 1998, 2003a; CEC 2002b).

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<sup>52</sup> Art. 85(2) The 1997 Foreigners' Act (Journal of Laws 1997, No. 78, item 483).

<sup>53</sup> *Ibid.*, Art. 38(1).

<sup>54</sup> *Ibid.*, Art. 85(3). Amended by the 2003 Refugee Protection Act (Journal of Laws 2003, No. 128, item 1176).

<sup>55</sup> Journal of Laws 2001, No. 42, item 475.

The last component of the reform was the personnel professionalisation. It commenced in 1997 and had two objectives: to fill the staff gaps on the Eastern border, and to improve the border guards' competences and operational skills (Lipski 2011: 8). The overhaul, first, led to a recruitment shift from the Western to Eastern border: starting from 2003 over 1,300 new officers were being recruited annually, of which most were deployed in Eastern borderlands (Lipski 2011: 8), and the retiring staff from postings on the Western border was not replaced (CEC 2002b). Second, as a result of a new recruitment policy, the relationship between civilian staff and full-time officers changed. Whereas in 1998 the latter constituted only 68% of the personnel, it increased to 80% in 2010 (Lipski 2011: 17). Also, the conscript service (in 1998 there were around 3,000 conscripts (CEC 1999)) was phased out and in 2006 disbanded (Lipski 2011: 8).

The process of pre-EU accession bureaucratic adaptation to the EU implied the reform of government structures (the Mol, the OF, and the BG) responsible for the introduction of EU asylum procedures and laws, adoption of measures to govern transit migration, and control and surveillance of borders; and the *inertia* in the expansion of institutions (the MLSP) that organised the socio-economic aspects of asylum. A considerable misfit between EU and Polish migration institutional arrangements provided Polish actors with additional opportunities (e.g. the Commission administered sanctions and rewards to Polish institutions within the framework of technical assistance programmes (Zubek 2005a: 613)) and triggered an adaptational pressure that, in the environment of weak influence of veto points, resulted in bureaucratic transformation (Börzel and Risse 2003). EU rule was translated through the strategy of conditionality (Schimmelfennig and Sedelmeier 2004, 2005) that mobilised the strategically calculating Polish actors to mould the bureaucratic arena according to pre-arranged EU requirements.

The EU-determined institutional change had implications for the formation of the pre-EU accession framework in which ideas about transit were forged. First, the foregoing developments did not yield an institutional space to reflect on and evaluate EU control-based approaches to transit and to produce alternative instruments to address this phenomenon, such as less restrictive asylum case assessment or reformulation of the welfare system. Second, the development of the setting to deal with transit was embedded in Polish officials' belief in management tools as allowing to steer the flows and facilitate deportation.



### 4.3. Legal developments

Poland incorporated the EU asylum *acquis* through three major legislative amendments: the 1997 Foreigners' Act and its 2001 amendment, and the 2003 Refugee Protection Act.

The 1997 Foreigners' Act for the first time comprehensively regulated migration and asylum matters. There was widely recognised conviction across the MoI that Poland 'being located at a crossroads of the main European migration routes... had to enact legislation and accede to international agreements that would prevent [the country's] transformation into a waiting room for illegal migrants' (MoI 1995a: 2-3). The 1997 Act modified asylum law through, first, regulating asylum procedure<sup>56</sup>: it clarified general and imprecise provisions incorporated from the Refugee Convention and led the MoI and the OF (since 2001) to examine asylum claims. Second, it implemented the 'safe third country' and 'safe country of origin' concepts<sup>57</sup> that enabled a denial of access to asylum proceedings<sup>58</sup> for persons originating from countries recognised as 'safe' (Table 3.3). Third, new legislation introduced procedural standards, such as, the right of asylum-seekers to personal interview<sup>59</sup>, and the right to contact the UNHCR<sup>60</sup>. Finally, the Refugee Board, a new institution to examine asylum appeals, was established (see section above).

The provisions were drafted by MoI officials who passed them through the parliament in 1995 and enacted without substantial alterations two years later. One can identify several reasons for why, whilst acting in the conditions of a considerable misfit between EU and Polish norms and adaptational pressure, the MoI did not encounter veto points in the legislative process. First, understaffed and underfunded non-governmental organisations either did not participate in the debate or were relatively silent. The only organisations deeply involved in the process were the UNHCR and the Helsinki Foundation that criticised the draft provisions for not being compatible with several international protection instruments to which Poland was a party, and for their restrictive character. The UNHCR, through persistent engagement with the discussions in the parliament and with the government, and advocacy among MPs succeeded in liberalising several regulations. This included an introduction of safeguards against the implementation of the 'safe third

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<sup>56</sup> Chapter 5. Journal of Laws 1997, No. 78, item 483.

<sup>57</sup> Ibid., Art. 4(10), Art. 4(11).

<sup>58</sup> Ibid., Art. 35(3). Art. 35(4).

<sup>59</sup> Ibid., Art. 40.

<sup>60</sup> Ibid., Art. 49.

country' concept and 'manifestly unfounded claims' (Shevel 2011: 247-251). This, however, did not alter the prevailing logic of the 1997 law that, as Weinar (2005: 6) pointed out: 'concentrated on punishments that the state can impose on foreigners, and on the latter's obligations. The issue of foreigners' rights and privileges was marginalised'. Second, there was meagre involvement of parliamentarians, as the systemic transformation and economic reforms pushed back migration and asylum to the sidelines of political debate. Problems related to foreigners did not constitute points of potential conflict nor did they stir up controversies in society. Although the enactment of new provisions was recognised by the Commission as 'a significant progress' (CEC 1999: 51) on the way to alleviate illegal immigration and accelerate asylum procedures, many assessed the provisions as 'negative from the viewpoint of foreigners' (Łodziński 1998; Weinar 2005). Also, the implementation revealed several deficiencies. For instance, elaboration of asylum procedure increased an administrative burden on the then Mol Department of Migration and Refugees (Mol 1999a: 5), and led to substantial backlogs of cases (CEC 1999: 52).

**Table 3.3 Key pre-EU accession EU-induced asylum law amendments**

Polish legal act <sup>i)</sup>	Implemented EU instrument	Implementation outcome
<b>The 1997 Foreigners' Act</b> <sup>ii)</sup>	'Safe third country' and 'safe country of origin' concepts	The concepts' implementation laid the foundations for Poland – EU-states readmission agreements that enabled return of asylum-seekers who had previously crossed Poland's territory.
<b>The 2001 Amendment to the 1997 Foreigners' Act</b> <sup>iii)</sup>	Manifestly unfounded application	Simplification and acceleration of asylum proceedings.
	Temporary protection	Introduction of protection measures in cases of large and uncontrolled refugee inflows.
<b>The 2003 Refugee Protection Act</b> <sup>iv)</sup>	Tolerated stay permit	A new form of protection accorded to asylum-seekers who cannot be granted refugee status and whose deportation is, <i>inter alia</i> , effective only to a country where their right to life might be under threat.
	Asylum procedure unification	Asylum procedure is initiated by an application submission and completed by a decision granting international protection or obliging the applicant to leave Poland.
	Social assistance schemes [Reception Directive]	Elaboration of rules on granting and withdrawal of welfare assistance; provisions on asylum-seekers' accommodation.

*Notes:*

<sup>i)</sup> Act transposing EU law into Polish legislation.

<sup>ii)</sup> Journal of Laws 1997, No. 78, item 483.

<sup>iii)</sup> Journal of Laws 2001, No. 42, item 475.

<sup>iv)</sup> Journal of Laws 2003, No. 128, item 1176.

Source: Author.

In order to rectify these deficiencies, and to push forward EU adjustments (Mol 2001: 4-5), the 2001 amendment<sup>61</sup>, first, clarified accelerated procedures for manifestly unfounded asylum applications<sup>62</sup>, i.e. those who did not specify any ground of persecution under the Refugee Convention, or which were intentionally misleading (Table 3.3). Second, it introduced the criteria and procedures for granting temporary protection in cases of large and uncontrolled inflows<sup>63</sup>. Finally, following examples of several EU states (e.g. Belgium, Denmark, Sweden), the amendment set up the executive office (the Office for Foreigners and Repatriation (since 2007 the Office for Foreigners)) to reinforce the capacity of the migration and asylum framework (see the section above).

As in the case of the 1997 immigration law, the amendment was prepared by Mol experts. An indication of the key objective of new regulations to conform with EU norms (Mol 2001) eliminated any serious controversy (Iglička *et al.* 2005a), and diminished veto points in the system. This resulted in smooth enactment of legislation, and approximation to EU rules (CEC 2003c: 54) that were seen as rational and reflecting long member states' traditions in dealing with immigration (Weinar 2005: 16). However, the implementation revealed some shortcomings, including an unregulated status of applicants who did not qualify for refugee status and could not be expelled to their country of origin due to the risk of persecution (Mol 2003: 62).

The 2003 Refugee Protection Act<sup>64</sup> brought Polish legislation in line with EU provisions. First, it introduced a new form of protection, i.e. tolerated stay, granted to applicants that did not meet the Refugee Convention criteria and could not be deported, if exposed to torture and inhumane or degrading treatment or punishment<sup>65</sup>, to their home country. This incorporated EU legislation<sup>66</sup> and responded to the NGOs' plea to extend protection of failed asylum-seekers (Mol 2003: 78-9). Second, new laws rearranged the asylum

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<sup>61</sup> Journal of Laws 2001, No. 42, item 475.

<sup>62</sup> *Ibid.*, Art. 41a.

<sup>63</sup> Chapter 6a of the 2001 Amendment to the 1997 Foreigners' Act (Journal of Laws 2001, No. 42, item 475) adjusted Polish law to temporary protection norms stipulated in the 1995 Council Resolution on burden-sharing in cases of admission and temporary stay of resettled persons, and the 1996 Council Decision on proceedings in cases of urgency related to admission and temporary stay of resettled persons.

<sup>64</sup> Chapter 1. Journal of Laws 2003, No. 128, item 1176.

<sup>65</sup> *Ibid.*, Art. 97.

<sup>66</sup> CEC 2001b.

procedure<sup>67</sup> by specifying the criteria for bestowing and refusing international protection (including, due to an unfounded application submission<sup>68</sup>). Furthermore, asylum proceedings were simplified. The first- (application screening) and second-instance procedures (examination of the merits of the case) were unified. The final protection decision was issued by the OF (Table 3.3).

The 2003 asylum law was drafted and implemented by the OF, which took over asylum prerogatives from the Mol. The analysis of deliberations of the Administration and Internal Affairs parliamentary committee (Sejm 2003a, b, c) shows that, first, the OF dominated the discussion, and managed to pass the key provisions (e.g. on temporary protection) without much opposition. The key reservations were made by the UNHCR that, following intensive lobbying in the parliament, forced through several safeguards, including the replacement of systematic prescreening detention of asylum applicants with detention only in certain instances (Shevel 2011: 257). Second, the MPs' input was conceptually scarce and concerned minor, technical problems, such as the form of employment and remuneration of the Refugee Board members. Due to a strong institutional and expert position and an obligation to align the EU *acquis*, the OF closed a significant misfit between EU and Polish asylum norms, and mitigated veto points (MPs, the UNHCR, the Helsinki Foundation). The 2003 Act was seen as substantially elevating asylum protection standards and strengthening applicants' protection (Kicingier *et al.* 2007: 187-8). However, one could identify several deficiencies. For instance, persons given temporary protection were not entitled to integration support that led to their social marginalisation (Phuong 2005: 398).

To sum up, the EU drove the pre-EU accession reform of the Polish asylum law: the implementation of pre-arranged EU norms accelerated asylum proceedings and facilitated deportation, extended the protection grounds, and improved admission capacity (Table 3.3). The process was steered by the Mol and the OF that shaped the scope and the dynamics of legislative overhaul. Like institutional change, the legal reform constitutes a classic example of top-down Europeanisation induced by policy misfit between EU and Polish provisions (Green-Cowles *et al.* 2001; Börzel and Risse 2003). The misfit in the

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<sup>67</sup> The provisions drew upon several EU instruments, including: Council Resolution of 30 November 1992 on manifestly unfounded applications for asylum; Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures (OJ C 274, 19.09.1996); Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (OJ C 221, 19.07.1997); and CEC 2001a.

<sup>68</sup> Art. 14(1). Journal of Laws 2003, No. 128, item 1176.

migration and asylum sector, which meant that the Polish government had to establish the legislative framework from scratch, and a small number of veto points, mitigated by political consensus to enter the EU, prompted the transformation of Polish asylum regulations.

This structured the legal arena of the transit country construction. EU legal agenda that emphasised procedural efficiency and control dominated the discussion about the means to tackle transit. The main objectives of the government institutions became an effective and timely claim examination, management of inflows, and border control. This, rather than integration measures to encourage settlement, shaped Polish officials' interpretations of transit.

#### **4.4. Enlargement learning**

As well as legal and institutional change, EU enlargement prompted policy learning and incorporation of EU migration and asylum norms, and 'ways of doing things' (OCEI 1999: 174). This section identifies EU screening and twinning programmes, bilateral cooperation with EU states, and EU Council decision-making as the main venues through which Polish officials acquired EU asylum knowledge and experience.

Enlargement learning assumed a 'hetero-directed' dynamic: it occurred within exogenous objectives of learning (Dunlop and Radaelli 2013). Poland, as a candidate country, had to follow the agenda and guidelines set by the EU and EU states that determined the instruments, pace and time-frame of learning. In this sense, Polish actors were pressured by conditionality: they 'bargain[ed] to meet standards and targets and, in doing so, they informally encounter[ed] learning in the shape of know-how and possibly discover[ed] smarter policy-making procedures or instruments' (Dunlop and Radaelli 2013: 611; see also Checkel 2001b, 2005). The OF organised EU-induced learning and emerged as the main beneficiary of EU asylum ideas and concepts. Since 2001, OF bureaucrats took part in political and expert discussions with EU and member states' officials, whereas the role of the Mol was limited to formal supervision of the OF and coordination of communication and information exchange with Brussels (Interview. Ministry of Interior, Warsaw, 3 and 24 August 2012).

First, Polish actors participated in EU screening and twinning programmes: whereas the former involved OF bureaucrats in discussion with the Commission and EU states' officials on the scope and timetable of law and policy implementation, the latter took the form of short- and long-term staff exchanges between Poland and selected EU states. Polish migration experts were given an opportunity to visit member states and learn about their migration and asylum procedures, and reception standards and policies. On the other hand, EU officials disseminated their knowledge and experiences through seminars and workshops organised in Poland. An OF civil servant spoke about the screening programmes as a leverage for legal change: '[During the screening discussions with the Commission] we had to speak about our system and how we would achieve the Union's ideal. The consultations lasted over a week and we came back to convince our Minister [Minister of Interior] to alter the Foreigners' Act as soon as possible. Shortly after, we started to work on the amendment that was introduced in 2001' (Interview. Office for Foreigners, Warsaw, 17 July 2012). This illustrates a rather straightforward process of top-down transfer of EU ideas that not only spurred legislative change, but also moulded perceptions of EU action. What came from the Union was uncritically incorporated and put in practice (Weinar 2005: 14). In this sense, ideas came after interests, acting as 'focal points' for actors to choose among equally acceptable alternatives (Blyth 2002: 26). At the same time, EU twinings facilitated the transfer of EU expertise: 'These programmes plus various complementary training courses provided actual knowledge. Nobody was then afraid. Everyone who was to deal with these problems knew when the hour of trial would be, and how and why to implement EU regulations' (Interview. Office for Foreigners, Warsaw, 17 July 2012).

Second, MoI, OF and BG officers absorbed information through bilateral collaboration. Germany, for example, organised various kinds of meetings and expert visits to acquaint Poles with legal arrangements, organisation of central migration institutions, and border management. A BG officer valued hands-on aspects of cooperation with German partners: 'visits in Germany were salutary, as we were watching how their system functioned... This definitely gave me a lot, and I was indeed able to learn more through an active observation, when theory and images of how EU law functioned, or decision-making processes were put into practice' (Interview. Border Guard Headquarters, Warsaw, 1 August 2012). Consequently, EU learning, similar to the early 1990s' transfer of border management norms, contributed to externalisation of member states' objectives to govern and control immigration, and was seen by the learners as a 'source of change and

modernisation' within the Polish setting (Interview. Office for Foreigners, Warsaw, 17 July 2012).

Third, following the Accession Treaty enactment in April 2003 (and one year before EU accession), Polish civil servants were provided with access to the EU legislative process: they took part in EU Council and Commission discussions (though were not entitled to vote). The aim was to learn about EU procedural arrangements and cooperate more closely with EU and member states' bureaucrats (OCEI 2003b: 4-5). OF officials found participation in EU discussions instructive and enabling to get to know the ins and outs of EU decision-making: 'This was fantastic, as one could uneventfully watch everything. One could go and attend the group... and see what it was all about, see in a stress-free way who, why and what was being talked about, hear in the corridor who was plotting what... One could also collect the materials' (Interview. Office for Foreigners, Warsaw, 17 July 2012). On the other hand, Polish diplomats coordinating the then country's action in Brussels, identify weaknesses of this engagement:

There were no mechanisms of approval of government positions on EU legislative acts in place... As a result, we [Polish officials from Poland's Mission in Brussels] often acted rather irresponsibly in EU legislative processes. We were raising given problems after deadlines, when everyone in the Council acknowledged that something had already been discussed and agreed... There was little understanding [among Polish officials] for the fact that the European Union was a machine that functions on the basis of the objectivised and autonomised procedures, that there were certain deadlines, rules and no one waited for anybody. We weren't taught this (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012).

Coupled with efforts to transpose the *acquis* into national laws and practices, policy learning during enlargement was motivated by external imposition, a desire to join the EU, and by institutional mimicry to accord with the requirements of EU membership (see Geddes 2003). EU-induced learning assumed a 'simple' form in the sense that Polish migration actors acquired new information as a result of interaction and used this information to alter strategies but not preferences (Levy 1994). It contributed to the translation and incorporation of EU asylum rules, norms and practices into Polish

structures, and therefore, to domestic change prompted by Europeanisation seen as shaping actors' policy goals and structures of meaning (Börzel and Risse 2003: 66).

Enlargement learning shaped the setting in which pre-EU accession interpretations of transit emerged through fossilisation of the logics produced as a result of legal and institutional change: EU-level communication and deliberation enabled Polish civil servants to incorporate paradigms and approaches to transit envisaged in EU legislation. Interactions with the EU and EU states' officials in the shadow of pre-determined EU rule transfer aimed at facilitating the implementation of EU measures of border control and management to address transit. The interactions moulded Polish bureaucrats' perceptions of those measures as necessary for the Polish system to function and whose adoption constituted part of a broader process of alignment with the Union.

## **5. Understanding of transit**

The pre-EU accession Europeanisation of Polish migration and asylum policy prompted the formation of discursive frames of transit. The institutional context constituted the setting within which concepts had meanings and discourses had communicative force. Government civil servants as 'thinking and speaking' actors shared the ideas of transit through discursive interactions that led to collective action (Schmidt 2010, 2011).

The early interpretations of transit migration within the Polish migration framework emerged along the creation of post-communist institutions to respond to immigration, including asylum inflows. The statistics produced in the 1990s illustrated a significant number of absconding incidents and disappearances of asylum applicants following submission asylum claims at the Polish border (see section 2 in this Chapter). Government officials, who at that time were laying the foundations for the migration and asylum setting, contemplated immigration reality and transit migration across Poland. Transit was seen as an inherent feature of Poland's migratory landscape and associated with abusing asylum procedures to pass through the country on the way to affluent EU Western states. As a MoI official wrote in his 1994 study: '[t]he bulk of immigrants who decide to lodge an asylum claim in Poland do not conceal that their intention is a future trip to one of the Western European states, Canada, the United States or Australia' (Kozłowski 1994: 5).



The decision-makers situated the causes of this phenomenon both within the asylum system *per se* (that was incapable of providing asylum-seekers and already established refugees with sufficient social support) (Mol 1991) and poor socio-economic conditions (Mol 1992). To quote a Mol civil servant involved in the then migration policy-making:

If a foreigner, who is not a businessman... but comes to Europe to set himself up well, arrives in Poland, he looks for a place where this “setting up” brings him the highest benefits, and he looks for a place where he can get support. What kind of support can he get in Poland?... Rent prices in Warsaw were then ludicrous in relation to financial resources of these people. Labour market didn’t offer them jobs. Schools weren’t prepared to educate them (Interview. History Meeting House, Warsaw, 2 January 2013).

It was shown earlier in this chapter that European integration prior to Poland’s entering the EU was deemed to be the major driver of institutional and political change within the Polish migration system. Europeanisation organised the logics that shaped the formation of discursive frames of transit according to EU states’ perception of Poland as a country exposed to significant and uncontrolled migration inflows (Weinar 2005: 12). On the one hand, EU-induced evolution of the Polish framework narrowed down the space to reflect on transit migration to Mol, OF and BG structures, whose main responsibility was to control the borders, oversee asylum applicants, ensure alignment with EU law and coordinate readmission. On the other hand, the extension of EU restrictive migration and asylum laws and policies to Poland and other CEECs (Geddes 2003: 175) framed the discussion on transit within EU priorities to build the capacity of EU Eastern neighbours to admit asylum applicants, ensure that their rights were protected and to build the legal instruments to govern and expel them. This informed the discourse among migration civil servants and case workers involved in EU-steered policy adaptation:

There [in the BG] were always attempts to do something with these refugees, to limit them... People who dealt with this problem were aware that they [persons seeking international protection in Poland] were not [*bona fide*] refugees. These were persons who we sympathised with, but they were not refugees, but persons seeking a better life... [As BG officers were saying:] “How is it possible that asylum-

seekers come here and go west? They [EU states] turn them back, and why do we have to examine their claims and again pay for them?" So, this [understanding of transit among BG officers] was a mental and financial issue (Interview. Border Guard Headquarters, Warsaw, 14 July 2012).

The government's approach to decreasing the number of asylum-seekers was seen as an intentional policy to avoid possible complications that could result from migration settlement and to formulate the response to expected uncontrolled mass inflows from the former Soviet Union (Weinar 2006: 222).

The EU's emphasis on control and management measures as well as domestic perceptions of transit as a phenomenon that could be alleviated through institutional and administrative means translated into general reluctance to seek solutions that would keep immigrants in the country. Some government officials involved in the early 1990s' formation of migration institutions make arguments about the then immigrants' economic motivation and their general unwillingness to stay in Poland. To the Mol official, elaboration of integration measures was therefore futile: 'Throughout the 1990s, there were only a few cases of refugees willing to stay in Poland, and who treated Poland as a destination country... An attempt to devise and implement integration policy in a situation where we had thousands of evidence that foreigners were not interested in staying in Poland, was an internal contradiction' (Interview. History Meeting House, Warsaw, 2 January 2013).

The pre-EU accession elaboration of Polish migration and asylum policy produced ideas about transit that were informed by the references to the EU as a source of modernisation, to governance and border management responses, and to the state's inability to initiate reflection on socio-economic incentives to encourage residence in Poland. This setting enabled the formation of discursive frames of transitness: the implementation of EU provisions to control and distribute transit asylum-seekers was perceived as a policy adequately responding to the then migration tendencies; the marginalisation of the debate on integration policy was driven by interpretations of transit as a phenomenon impossible to alleviate and/or deter.

## 6. Conclusion

The analysis shows that, first, the 1990s' immigration in Poland was characterised by a significant rise in economically driven temporary migration of Eastern Europeans and an inflow of asylum-seekers from North Africa and the Middle-East. Immigration of Chechens that this analysis takes as a case study grew stronger in the early 2000s, following two Chechen Wars. Second, European integration determined the evolution of the Polish migration and asylum setting: the EU transferred pre-arranged and non-negotiable regulations that formed asylum procedures, extended the scope of protection, and revamped the border management system. However, in the absence of EU pressure, the government marginalised social aspects of migration that resulted in *inertia* in the development of integration programmes and welfare assistance schemes. Third, the MoI and the OF steered the elaboration of the Polish migration policy. The MoI set the policy objectives, including the extension of capacity to timely and accurately incorporate EU legislation, and establishment of border control mechanisms. Since 2001 migration policy has been increasingly coordinated by the OF that develops its competences to draft migration and asylum legislation, and shape Poland's engagement with the EU. Finally, an important factor that influenced pre-EU accession migration and asylum setting formation was EU-induced policy learning. European integration provided Polish actors with various opportunities to learn and acquire EU and EU states' migration ideas and concepts. This included bilateral and regional cooperation within such frameworks as the VP and the BBP, and participation in EU decision-making. EU enlargement policy institutionalised venues of learning and exchange of information and practices, primarily within EU screening and twinning programmes. Learning occurred in the 'shadow of hierarchy': the EU created pressure to learn as well as defined the objectives of learning. Polish actors incorporated information and ideas related to readmission, border control and asylum determination procedures. Enlargement learning was framed by political conditionality: the EU used the material incentives (EU accession) to bring about a desired change in the behavior of migration officials (conformity with EU priorities concerning migration control and governance extension) and assumed a 'simple' form.

What do these developments show in terms of the theoretical argument of this thesis? First, pre-EU accession Europeanisation spurred domestic change: a significant policy misfit between EU and Polish structures and legal arrangements, weak veto points in the system,

and the provision to Polish actors of additional material and ideational opportunities prompted the translation of EU policy into the Polish migration and asylum governance system, and therefore promoted adjustment. Whereas the transformation of the legal and bureaucratic fields of migration policy was structured by cost/benefit calculations, accommodation of Europeanisation pressures to incorporate EU migration values, meanings and practices was informed by actions of 'sentient' policy actors choosing the legitimate course of action.

Second, in terms of interaction between rationalist and constructivist accounts, the former dominated the adaptation process. Whilst operating under conditions of EU intergovernmental reinforcement, rational Polish actors adjusted to the dynamic where the EU offered them positive incentives-reward (EU accession). An application of Checkel's (2001b, 2005b, 2006) scope conditions (grounded in a 'novel and uncertain environment' and 'less politicized and insulated' setting of learning) enabled to show that no internalisation of EU norms occurred: actors were viewed as instrumentally rational and adapting their behavior to the norms and rules favoured by the EU.

Taking the above into account, one is able to address the questions of the transit country construction introduced at the beginning of this Chapter. The pre-EU accession Polish migration and asylum governance system enabled the formulation of ideas and concepts about transit. The process of institutional adaptation to the EU delineated the administrative space within which these ideas were forged: a narrow circle of MoI, OF and BG civil servants structured deliberation over and incorporation of EU provisions to control and manage migration flows. Transit was therefore seen through adoption of EU instruments related to border management, efficient case examination, readmission and deportation. This ruled out from the policy debate the responses to transit issues of integration, welfare assistance and access to public services. Polish migration officials perceived EU regulations as appropriately addressing significant transit flows across Poland in the 1990s. To many an introduction of governance measures was necessary to control asylum-seekers seen as economically motivated immigrants treating Poland as a 'bus stop' on their way west.

The foregoing ideas and discursive frames about transit contribute to the post-EU accession construction of transitness in the sense that they confined the formation of

discursive strategies through which this construction occurs to EU paradigms and approaches to transit. The EU has become the key factor informing Polish responses to transit migration, and a major point of reference in the discussions on this phenomenon within the Polish government. Let us now move on to analyse how the post-EU accession emergence of bureaucratic and legal arenas of Polish migration and asylum policy produces transitness.

## Chapter 4: The Development of EU Asylum Law and Policy: Locked in Harmonisation?

### 1. Introduction

This chapter examines how EU asylum policy adoption across the procedural, distribution and socio-economic dimensions and across member states produces ideas and interpretations of transit/secondary movement and how this informs the construction of transit as a policy issue within the Polish multi-level migration governance system. In order to address this question, the analysis first identifies the deficiencies that emerge in the process of implementation of the Common European Asylum System (CEAS). Second, it examines how these deficiencies have been understood and addressed by EU decision-makers. Third, it investigates whether (and how) Poland, as a country of substantial transit migration, shapes EU asylum agenda and influences EU-level notions of transit.

The chapter, first, accounts for the EU institutional framework in dealing with asylum and maps key EU asylum actors. Second, it analyses the CEAS instruments: the qualification directive<sup>69</sup>, the procedures directive<sup>70</sup>, the reception directive<sup>71</sup>, and also the Dublin II regulation<sup>72</sup>, how their implementation produces policy deficiencies and how those deficiencies were rectified by the 2008-2013 CEAS reform. Finally, it examines Poland's engagement with the CEAS overhaul. The country's assent to the Commission proposals to address transit through approximation of legislation and marginalisation of integration instruments demonstrates Polish officials' conviction of the impossibility to address the socio-economic (root) causes of transit EU through EU institutions.

### 2. EU asylum setting

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<sup>69</sup> Directive 2004/83/EC.

<sup>70</sup> Directive 2005/85/EC.

<sup>71</sup> Directive 2003/9/EC.

<sup>72</sup> Regulation (EC) No 343/2003.

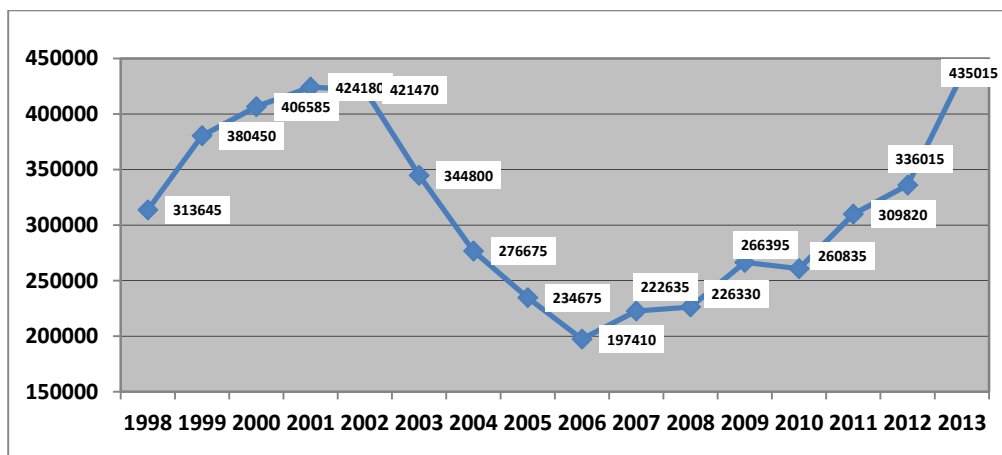
This section, first, investigates the emergence of the CEAS and how it has been shaped by the Commission and member states. Second, it looks into the deficiencies that characterise the adoption of the CEAS. Third, it examines EU measures to remedy these deficiencies: it focuses on legal amendments and elaboration of EU-level and knowledge- and practice-sharing frameworks.

The analysis identifies three sets of drivers of EU-level transit country construction. First, the interpretations of transit result from the policy deficiencies that inform the way in which EU asylum policy is created and adopted. Second, there are EU decision-makers' perceptions of transit phenomenon as marginal and adequately addressed by EU legislation. Third, dissemination of practices related to various aspects of EU asylum policy through EU deliberation platforms confines understandings about transit to legislative action.

## **2.1. The Common European Asylum System**

The recent debate on asylum in the EU has been characterised by a concern over increasing asylum applications and their unequal distribution between member states (Thielemann 2004: 47). The absolute number of asylum applicants in the EU declined from over 420,000 applications lodged in 2002 to nearly 200,000 in 2006 before rising again with over 250,000 and 400,000 applicants recorded in 2010 and 2013 respectively (EUROSTAT statistics 2014) (Figure 4.1). This was caused by, first, large numbers of claims from those fleeing North African states fuelled by 'the Arab Spring' (EASO 2012a). Second, there has been a sizeable inflow of Syrians generated by a bloody civil war in 2011 (EC 2013: 2-3, 13) as well as immigration from the Western Balkan states whose citizens used post-2009 visa-free travel to lodge asylum claims in the EU (EC 2012: 12-13; see also EC 2011b, e). The relative distribution of asylum-seekers across the EU has been quite volatile over the years. Although the key entry points to the Union have been Southern states, notably Greece, Italy, Malta and Spain, over 80% of applicants seek international protection in Northern states. In 2013 only Germany and France examined nearly 200,000 asylum claims, more than 40% of all applications submitted in that year in the EU. This reflects the secondary movement (transit) of asylum-seekers: applicants do not stay in the country of their first applications, but travel across the EU in search of the most favourable conditions.

**Figure 4.1 Asylum applications in the EU-27, 1998-2013<sup>ij</sup>**



*Notes:*

<sup>ij</sup>The figure illustrates a trend in asylum applications since the late 1990s (formulation of a common EU response to asylum (the 1998 Tampere Council Conclusions)) until 2013 (finalisation of the Common European Asylum System (an idea of which was put forward in Tampere in 1998)). For the purpose of maintaining coherence, the 1998-2013 period covers applications lodged in 27 EU states (EU-27), even if EU enlargements took place in 2004 (EU-25) and 2007 (EU-27). It does not include applications submitted in Croatia who joined the EU in July 2013.

*Source:* Adapted from EUROSTAT (2014).

In order to address this problem, and to achieve a more stable and equitable distribution of asylum burdens, policy makers in Europe turned to policy harmonisation at the European level (Thielemann 2004). The EU harmonisation was also to prevent a ‘slide toward the lowest common denominator in protection standards’ (Thielemann 2004: 47) resulting from the perception of asylum-seekers as abusers of generous European systems and adoption of increasingly restrictive measures at the national level (Geddes and Boswell 2011: 154).

The capacity to set policy at the EU level stemmed from the 1997 Treaty of Amsterdam and the meeting of the European Council of Ministers at Tampere in Finland in 1999 (Hatton 2005: 109). The former immigration and asylum policy was transferred from the intergovernmental Third Pillar to the community First Pillar, covering free movement of goods, services and persons. This provided the Commission with the exclusive right to propose legislation starting in 2002 in order to produce a set of asylum policies by 1 May 2004. The Tampere Agreement envisaged building the CEAS in two stages, this first being harmonisation of member states’ asylum policies, and the second being an integrated EU-wide asylum system.



The first-stage harmonisation was to introduce the common minimum standards on access to EU territory, status determination procedure, complementary forms of protection, reception conditions, and on the allocation of responsibility for asylum claim examination (CEC 2000a, 2001d, 2003b). The policy was translated into four legislative instruments: the qualification directive, the procedures directive, the reception directive, and the Dublin II regulation that laid the foundations for CEAS I (CEC 2008a: 2). The evaluation of CEAS I mechanisms marked the commencement of the second stage of CEAS (CEAS II). In 2004, the Hague Programme specified the priorities of the Union in order to strengthen the area of freedom, security and justice over a period of five years.

Among the actions to be carried out, the Commission was to establish an effective harmonised procedure in accordance with the Union's values and humanitarian tradition (CEU 2004), and to submit the 'second phase' instruments and measures, consisting of 'developing a common asylum policy, which will seek to establish a common procedure and uniform status for persons benefiting from asylum or subsidiary protection' (CEU 2004: 8). These priorities were elaborated by the EU Council in the Pact on Immigration and Asylum (2008) and the Stockholm Programme (2009). The 2007 Treaty of Lisbon (that came into force in 2009)<sup>73</sup> marked the full incorporation of migration and asylum within the Treaty framework and imposed on the Union (as a legal entity) an obligation to 'develop a common policy on asylum, subsidiary protection and temporary protection' (Art. 78(1)). The Treaty provided the legal basis for the CEAS I overhaul. First, the ambiguities in CEAS I instruments led to differing, and at times problematic, interpretations of member states' obligations and asylum seekers' entitlements. The legislation contained many provisions which allowed for derogations (Endres 2011). Second, the Commission noted the persistent differences in recognition rates resulting from 'a lack of common practice, different traditions and diverse country of origin information sources [were], among other reasons, producing divergent results' (CEC 2008a: 3). Finally, greater attention was given to the asylum-seekers' redistribution within the EU and solidarity between member states.

CEAS I deficiencies were addressed through, first, further legal approximation: the qualification, procedures and reception directives and the Dublin II regulation were

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<sup>73</sup> The Treaty of Lisbon amended two EU core treaties: the Treaty on European Union and the Treaty establishing the European Community. The latter was renamed into the Treaty on the Functioning of the European Union.

amended between 2011 and 2013<sup>74</sup>. Second, practical cooperation over asylum between member states has been enhanced and institutionalised: the European Asylum Support Office (EASO) was established in 2010 to ‘to help to improve the implementation of the Common European Asylum System, to strengthen practical cooperation among Member States on asylum and to provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems’<sup>75</sup> (see section 2.3.2).

EU migration and asylum policy has been shaped by a range of actors with often divergent priorities and interests. The Commission, the European Parliament, the European Council, and the Council of Ministers ‘have rather different goals and strategies in this policy area, which can mean that policy proceeds in a rather disjointed and inconsistent fashion’ (Geddes and Boswell 2011: 167). The key role in the legislative process has been played by the Commission that, whilst equipped with the right of legislative initiative, generally pushes towards integration and presents a ‘protection-minded approach’ (Byrne *et al.* 2004: 365). Geddes and Boswell (2011) argue that the Commission uses different types of tactics to bring EU states closer to the Community approach. This includes ‘laying the ground for harmonization through gathering data that expose apparent anomalies or inefficiencies in current national approaches’; and ‘introducing ideas about possible harmonization to member states in an incremental, non-threatening way, for example, through discussing ideas in less formal subcommittees of JHA Council’ (Geddes and Boswell 2011: 168). These tactics along with setting up timetables for action enable the Commission to push the pace of change/harmonisation, and shape member states’ incorporation of EU ideas, values and arguments (Cini 1996).

In many areas, however, the Commission faces substantial opposition and foot-dragging in the EU Council. A strong intergovernmental element in EU cooperation on asylum, grounded in national sovereignty and reactionist and control-centric approaches prevail over subtle steering and ‘softening-up’ by the Commission (Levy 2002). An increasing restrictiveness of EU states’ asylum regimes, which seems to be based on the need to

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<sup>74</sup> Whereas the amended Dublin II regulation is directly binding and applies as of January 2014, the directives should be transposed by December 2013 (the qualification directive) and July 2015 (the reception directive), (the procedures directive). The CEAS I reception and procedures directives remain thus biding time until July 2015.

<sup>75</sup> Art. 1 Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ L 132/11, 29.5.2010). The regulation entered into force in June 2010.

reassure electorates that the governments are acting in their interests (Geddes and Boswell 2011), has come to be regarded as one of the principal reasons for disparities in asylum burdens across the Union. According to Thielemann (2004: 47) ‘host countries with a high relative number of applications will try to make their asylum policies more restrictive and other host countries, will, as a result, become more attractive destination countries’. In consequence of the prevailing intergovernmental logic of action in EU asylum policy, driven by unanimity required across all member states for each of the key asylum decisions (until the Amsterdam Treaty entering into force (2004)), and the minimum standards set by EU legislation, the process has been one of coordinating on the least favourable treatment of asylum-seekers. Hatton (2005) notes that, when transposing EU legislation, member states take the opportunity to lower their standards (for fear of deflection effects), setting in a process of ‘levelling down’ (see the section below). The evolution of CEAS, being shaped by intergovernmental and supranational drivers, forms the bureaucratic and legal venues through which ideas about transit germinate. Let us now examine specific EU asylum instruments and how their adoption at the EU level enables production of such ideas.

## **2.2. Implementation gaps**

This section analyses the adoption of CEAS I instruments that regulate procedural and administrative aspects of asylum status determination (the qualification directive, and the procedural directive), reception conditions (the reception directive), and asylum-seekers’ distribution across the EU (the Dublin II regulation). The deficiencies that arise in this process inform the EU-level legal site for the construction of transit. The analysis focuses on those deficiencies that shape asylum applicants’ decisions about transit, and inform EU policy process.

### **2.2.1. The qualification directive**

The directive sets out the minimum standards for granting refugee or subsidiary protection and the content of protection. Any non-EU country national or stateless person who is located outside of his/her country of origin and is unwilling or unable to return to it, can apply for refugee status. If not qualified for refugee status, he/she can claim subsidiary protection. This form of protection is accorded if substantial grounds have been shown for

believing that the applicant, if returned to his/her country of origin would face a real risk of suffering serious harm (the death penalty or execution, torture or degrading treatment). In addition, the directive stipulates the assessment criteria (it defines actors of protection, and actors, acts and reasons for persecution) as well as the rights bestowed by virtue of refugee or subsidiary protection status, such as access to employment, education and social welfare (for a comprehensive analysis of the qualification directive see e.g. Peers and Rogers 2006: 323-40; Storey 2008). The evaluation of the directive's implementation (UNHCR 2007b; CEC 2009b, 2009c; EC 2010a) revealed several deficiencies. In order to demonstrate the emergence of ideas about transit, this section examines the divergences in the content of international protection and in recognition rates (i.e. the proportion of applicants granted international protection) across the EU.

### *Content of international protection*

The Commission research revealed that the standards of the directive regarding the rights bestowed on international protection bearers did not adequately address the problems of 'social cohesion and the integration of legally residing third-country nationals' (CEC 2009b: 11). First, based on the assumption that needs of subsidiary protection holders would be of a short duration 'since most of them would be persons fleeing armed conflicts in their country of origin who would thus be able to return once the conflicts were over' (CEC 2009c: 20), the directive allows restriction of their rights (Gross 2005). This led, for example, some member states to limit their access to employment (e.g. Germany) and/or reduce access to social welfare (EC 2010a: 14; see also ECRE 2004). Second, the scope of subsidiary protection holders' rights is too narrow. Studies of the directive's adoption exhibited several problems: the provisions, for example, do not take sufficiently into account the practical obstacles linked to the immigrants' situation. For instance, the member states' asylum authorities are not obliged to assist beneficiaries of subsidiary protection in proving their academic and/or professional qualifications and skills if they lack documentary evidence (CEC 2009c: 25). Also, the practice showed that although the rights were transposed into national legislation, they did not improve the international protection holders' position in the labour market. They remain either unemployed or work in low skilled, badly paid jobs (Caritas 2006; ECRE 2007b). Furthermore, the majority of member states use the broad implementation leeway to restrict subsidiary protection bearers' access to employment-related education opportunities, vocational training, and practical

workplace experience that lessens their chances for employment (CEC 2009c: 25; see also ECRE 2007a, EC 2010a). Finally, the directive's transposition has not ameliorated integration: integration programmes '[do] not take into account the different educational levels, professional backgrounds, family commitments or other particularities of the situation of beneficiaries of international protection' (CEC 2009c: 27). The discrepancies in the access to integration and social services across the EU contribute to the argument made in the previous section about increasing the restrictiveness of asylum policies that spurs the process of so-called 'levelling down' asylum standards (Hatton 2005).

#### *Divergent recognition rates*

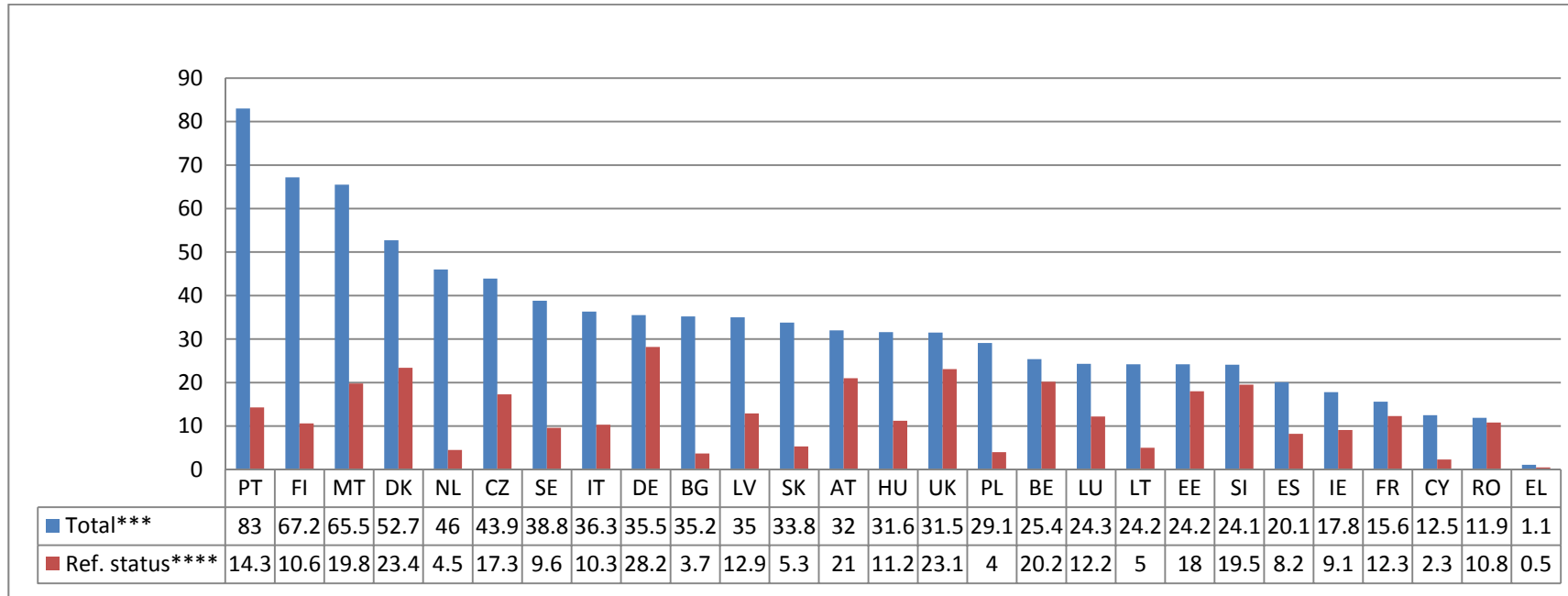
Substantial implementation leeway left by the directive enables the national authorities to produce different legal interpretations and practices leading to disparate procedural outcomes (UNHCR 2007b, 2011c). Divergent interpretations of, for example, 'internal protection'<sup>76</sup> (protection available in a part of the applicant's country of origin) result in variations in treatment of applicants from the same countries affected by the same conflict, insecurity, or violence. The treatment of Chechens highlights the problem: between October 2006 and April 2007 in France and Sweden the concept of 'internal protection' was not applied in Chechen cases. The German Federal Office for Migration and Refugees, on the other hand, considered most parts of the Russian Federation as possible international protection alternatives to where Chechens could be sent (Storey 2005: 46). The asylum determination procedure is also influenced by individual circumstances: even if member states have the same practices with regard to the same inflow, the recognition rate can still differ due to various interpretations of specific ethnic or religion problems, or a political and/or security situation in given states or regions (EASO 2013: 22). This has been corroborated by Neumayer's (2005) research on variations of recognition rates across Western European countries between 1980 and 1999 that has found that overall recognition rates (related to all types of protection) seem to be fairly sensitive to the likely merit of the asylum claim. However, at the same time, the recognition rate of full refugee protection status is somewhat more vulnerable to factors outside the merits of the case. His study shows that both the number of origin-specific past asylum-seekers and unemployment rates in destination states are negatively associated with this recognition rate.

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<sup>76</sup> Art. 8 Directive 2004/83/EC.

Recognition rates vary on various levels. First, there are discrepancies in recognising applicants of the same nationality. In the period 2005-2007 the recognition rate of asylum-seekers from Russia (Russian citizens of Chechen nationality) varied from 63% in Austria to 0% in Slovakia; 98% and 55% of Somali asylum-seekers were granted protection in Malta and the UK respectively, positive decisions for the same group were 0% in Greece and Spain (CEC 2008b). Second, recognition rates diverge on geographical lines. Between 2008 and 2012 the percentage of total positive decisions in the EU varied from 83% in Portugal to 1.1% in Greece (Figure 4.2). On the other hand, the comparison of refugee status decisions illustrates divergences across regions: whereas Western European states (traditional destination states) led the ranking (Germany: 28.2%, the UK: 23.1%), Eastern European countries were either around the EU-27 average (12.4%) (Hungary: 11.2%), or on the bottom of the list (Poland: 4%) (Figure 4.2). Third, there is an imbalance between refugee status and subsidiary protection decisions. Between 2008 and 2012 in most member states the percentage of subsidiary protection holders significantly exceeded refugees. The difference was most striking in Bulgaria, which accorded protection to 35.2% of all asylum-seekers, but only 3.7% were granted the 1951 Refugee Convention status. One can see a growing mismatch between the inflows and the Refugee Convention criteria because 'The drafters of the Convention had certain types of persecutions in mind, while today's refugees flee from newer forms of persecutions and conflicts not covered by the Convention' (CEC 2009b: 12). On the other hand, domestic asylum policies play a role: member states have developed subsidiary forms of protection to provide asylum-seekers with protection when not covered by the Convention (Geddes and Boswell 2011), but also to reduce costs (Neumayer 2005).

**Figure 4.2 Recognition rates in the EU-27\*, 2008-2012\*\* (percentage)**



**Notes:**

\*AT: Austria, BE: Belgium, BG: Bulgaria, CY: Cyprus, CZ: Czech Republic, DK: Denmark, EE - Estonia, FI: Finland, FR: France, DE: Germany, EL: Greece, HU: Hungary, IE: Ireland, IT: Italy, LV: Latvia, LT: Lithuania, LU: Luxembourg, MT: Malta, NL: The Netherlands, PL: Poland, PT: Portugal, RO - Romania, SK: Slovakia, SI: Slovenia, ES: Spain, SE: Sweden, UK: United Kingdom.

\*\*The time-frame ends in 2012 because UNHCR data for 2013 was not available at the time of writing this dissertation.

\*\*\*Total: all forms of protection granted, including refugee status and subsidiary protection (first-instance decisions), in relation to all applications submitted between 2008 and 2012.

\*\*\*\*Ref. status: = persons granted refugee status in accordance with the 1951 Refugee Convention (first-instance decisions) in relation to all applications submitted between 2008 and 2012.

Source: Adapted from the UNHCR (2008b, 2009, 2010b, 2011d, 2013b).

The view that recognition rates inform asylum movements has been expressed by EU and member states' officials. As a senior official from the Polish Permanent Representation to the EU stated:

In spite of appearances, asylum-seekers have information on what they can expect and so they are very much aware that, for example, an asylum application in Slovakia is pointless, as 100% of applications are rejected there, specifically applications submitted by Chechens. But if they manage to reach Belgium, their situation may be different as over 65% of applications lodged there result in a positive decision (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012).

Similar patterns of understanding develop across EU and member states' institutions involved in EU asylum decision-making that conceptualise transit as being driven by domestic policies that (due to flawed harmonisation at the EU level) contribute to the divergences in the content of protection, and therefore, inform intra-EU asylum flows and multiple asylum applications<sup>77</sup> (CEC 2009b, c; EC 2010a).

However, although there is some research that validates such explanations (see e.g. Joly 1992 *et al.*; Ramakers 1997; Böcker and Havinga 1998), the majority of migration experts tend to associate transit with a panoply of institutional, socio-economic and cultural factors that develop beyond the national asylum systems regulated by EU instruments. For example, Böcker and Havinga (1997, 1998) find that that single most important predictor of the country of destination for asylum-seekers is colonial links between the sending and receiving states. Koser's (1997) study on Iranian asylum-seekers in the Netherlands illuminates the role of perceptions of immigration rules as most influential in determining the migration destination. On the other hand, Thielemann's (2003) study, which examines asylum applications in 20 OECD countries between 1985 and 1999, shows that the key destination country variables are the unemployment rate, the existing stock of foreign nationals, and overseas development aid. However, my research argues that the above

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<sup>77</sup> According to the Commission report on the implementation of the qualification directive, multiple applications reached the level of 17% and 16% of all asylum claims submitted in the EU in 2006 and 2007 respectively. For instance, 'between January and December 2006, Belgium, Germany, France, Sweden and the United Kingdom received more than 3,000 multiple applications while countries such as Cyprus and Portugal had received less than 100 such applications and Estonia one' (CEC 2009b: 14).



structural issues were largely disregarded in EU documents on the qualification directive implementation, and passed over in policy debates among EU officials. What is more, an absence of discussion on socio-economic drivers of transit at the EU level co-occurs with tightening the restrictions on the provision of integration assistance and access to asylum procedure at the national level (Thielemann 2004). A great deal of latitude in which member states can regulate asylum provisions allow them to impose various mechanisms to deter inflows and lower the relative attractiveness for asylum-seekers.

The EU legal setting in the area of asylum qualification produces ideas about transit that hinge on: the flawed identification of the causes of transit that then informs EU legislation; and on the detachment of EU policy objectives and regulations from the migration dynamics at the national level.

### **2.2.2. The procedures directive**

The procedures directive establishes the common standards of asylum claim determination by harmonising the rules concerning asylum application submission and examination. It also confirms the basic procedural guarantees, such as the right to a personal interview, the right to receive information and to communicate with the UNHCR, the right to a lawyer, and the right to appeal (for the legal analysis see e.g. Peers and Rogers 2006: 367-411).

The implementation of the directive, although resulting in approximation of member states' asylum procedures (CEC 2009d: 9-10), has been undertaken at a minimum level and leaves the national authorities wide room for interpretation. According to the Commission, the discrepancies in the access to procedure, legal assistance, and effective remedy across the EU affect applicants' decisions about transit (CEC 2009d). Let us now look at these discrepancies.

#### *Access to procedure*

The directive regulates access to asylum procedure at the border and in transit zones<sup>78</sup>. It guarantees the right to make an application to every adult having legal capacity<sup>79</sup>. It also

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<sup>78</sup> Art. 3(1) Directive 2005/85/EC.

<sup>79</sup> Ibid., Art. 6(2).

requires the authorities likely to be addressed by a potential applicant to advise him/her on procedural arrangements<sup>80</sup>. Evaluation has revealed deficiencies in member states' asylum systems. The directive remains vague on procedures regulating the very first contact between an asylum-seeker and a border officer. In many states a lack of valid travel and entry documents is a decisive factor in border checks under the Schengen Border Code<sup>81</sup>. Asylum-seekers lacking documents, or who are unable to explain the reasons for their arrival, are frequently denied entry without a closer look at their case (see UNHCR 2007c). For instance, in France in 2006 only 80% and in 2007 - 55.6 % of asylum applicants were granted access to the territory (ANAFÉ 2008). Also, the directive is ambiguous on the initial stage of asylum proceedings. For example, it leaves room for interpretation of inadmissibility grounds to prevent case examination (the state's right to refuse to entertain the claim if, for example, the applicant comes from a country recognised as a 'safe country')<sup>82</sup> (see e.g. Byrne 2005). The Commission noted that 'All these procedures are very different in terms of cases being processed, level of procedural guarantees, time frames and access to effective remedy' (CEC 2009d: 17). Difference results in the speedy rejection of applications either on inadmissibility grounds or because they are considered as manifestly unfounded (CEC 2009d: 17).

#### *Access to legal assistance*

Problematic issues appear also in the adoption of procedural guarantees, such as access to legal aid. The right to consult a legal advisor<sup>83</sup> is formally recognised throughout the EU, but there are divergences in access to free legal assistance. Some member states (e.g. Germany, Romania) stick to the directive's wording and make it available only at the appeal stage; others grant either legal aid (e.g. Sweden, the UK) or free legal advice (Austria, Czech Republic) in the first instance proceedings (EC 2010b: 7). As the European Council on Refugees and Exiles (ECRE), a Brussels-based NGO, points out, the lack of obligation to provide free legal assistance in the first instance is counterproductive as many errors made in the first instance arise where applicants misunderstand procedures and processes, which are often difficult to correct at the appeal stage (ECRE 2006: 15). Consequently, member

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<sup>80</sup> Ibid., Art. 6(5).

<sup>81</sup> Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ L 105, 13.4.2006).

<sup>82</sup> Art. 25(2) Directive 2005/85/EC.

<sup>83</sup> Ibid., Art. 15(1).

states which make free legal assistance available to applicants in procedures in the first instance 'are above or close to an EU average as regards first instance positive decisions on asylum applications, whilst member states that do not follow this approach, with few exceptions, have lower rates' (CEC 2009d: 13).

#### *Access to effective remedy*

Accessibility to remedies can be limited as the directive offers no binding arrangements on the suspensive effect of appeals (suspension of expulsion by virtue of lodging an appeal against the asylum decision), and time limits for lodging appeals are left to member states. This does not properly ensure the compliance to the *non-refoulement* principle<sup>84</sup> and the right of the applicant to remain until a final decision is reached (ECRE 2006: 34). The scope and nature of a review by a court or tribunal<sup>85</sup> is contingent upon administrative arrangements in member states<sup>86</sup>. This leaves broad implementation leeway at the national level and exposes the applicant to the danger of his/her case being restrictively examined. For instance, whereas in most states the first tier appeal authority has jurisdiction to review both facts and points of law (e.g. Belgium, France, and Germany), several states have trimmed this. In Poland and Greece, for example, the court reviews only the legality of first instance decisions. In the Netherlands only limited scrutiny applies to the facts as established by the determining authority (EC 2010b: 15). Moreover, the courts and parties to procedures (e.g. legal assistants) may be denied access to materials on which the determining authority based its decision (CEC 2009d: 16). Data from statistical reports on Belgium, Denmark, France, Germany, Spain, and the UK for 2007 indicated that 77% of rejections were appealed with a success rate of 18.5%. 'This', the Commission noted, 'points to some 20,500 erroneous first instance decisions presumably corrected by appeal body in 2007. This estimation also indicates that some 20% of applicants do not appeal against negative decisions and therefore appears to be a subject of concern, expressed by the UNHCR, civil society and academics, with regard to the limited accessibility of remedies provided for in the directive' (CEC 2009d: 16).

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<sup>84</sup> *Non-refoulement* is a key facet of refugee law. The principle of *refoulement*, enshrined in the 1951 Convention Relating to the Status of Refugees (Art. 33(1)) and contained in the 1967 Protocol (Art. I (1)), forbids the return or expulsion of a refugee to places where his/her life or freedom would be threatened.

<sup>85</sup> Art. 39 Directive 2005/85/EC.

<sup>86</sup> *Ibid.*, Recital 27.

The procedural disparities lead some member states having higher standards and being more attractive than the others. As a result, according to the Commission, ‘asylum flows to and between member states continue to be distributed unequally... Asylum-seekers evidently try to seek protection in member states having more generous procedural and substantive standards<sup>87</sup>, whilst the introducing of restrictive policies, based on the directive’s lowest common denominator, in a member state, normally leads to redistribution of asylum applications between member states’ (CEC 2009d: 23). This policy has its origins in the preparatory work on the directive: the Commission proposal for the harmonisation of procedures and ‘levels of fairness within national systems’ was primarily seen as a mechanism that might have the potential to avoid ‘secondary movements’ (CEC 2002a). This approach underlines EU action on transit: through the process of harmonisation the Commission and member states attempt to establish EU legal and procedural mechanisms that would allow to target factors that affect the relationship between the protection seeker and a potential member state. However, as discussed in the previous section, this logic appears to be flawed due to detachment from a range of social and economic determinants of movement.

### **2.2.3. The Dublin II regulation**

The 2003 Dublin II regulation, on the basis of specific criteria (e.g. the place of the first application submission, or evidence of illegal border crossing), determines the member state responsible for processing an asylum claim. If the examination of these criteria, undertaken by a member state, permits allocation of responsibility for processing the claim to another member state, the former may request the latter to ‘take charge of’ an asylum-seeker. An actual transfer takes place if the requested state accepts the requesting state’s interpretation of the Dublin criteria (and so recognises its responsibility for that asylum-seeker). On the other hand, if a member state has already examined or is in the course of examining the application of an asylum-seeker found staying illegally in another member state, it can request to ‘take back’ that person in order to complete proceedings. In that

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<sup>87</sup> The procedural disparities are connected with the length of asylum procedure and time during which asylum-seekers are entitled to social benefits. According to the study on visa-free movement of citizens of Western Balkan countries to the EU, carried out by European Stability Initiative, a Berlin-based think-tank, member states having shorter procedures were less affected by flows, and those that managed to speed up the case examination, so that the benefit of social and/or financial support was shortened to a minimum level (ESI 2013).

case, the requested state has to return him/her to the requesting state (for the legal analysis see e.g. Peers and Rogers 2006: 221-35).

Built upon the principle that applications are examined in the state of first arrival, the Dublin regulation plays an important role in border states, such as Poland, through which asylum-seekers arrive in the EU. It permits returning to these states those who have been found in Western countries illegally (for the evaluation of the Dublin system see e.g. Moreno-Lax 2012). This section presents the shortcomings of Dublin transfers and of asylum-seekers' distribution across the EU, and links these problems with the development of the EU-level transit environment.

### *Transfers efficiency*

The regulation lays down the rules on intra-EU transfers of asylum applicants<sup>88</sup>. The transfers have to be undertaken as soon as practically possible<sup>89</sup>, following consultations between the states involved and within at most 6 months (which may be extended to 12 months in the case of imprisonment, and to 18 months if an asylum-seeker absconds) of the acceptance of the request<sup>90</sup> (CEC 2008f: 8). However, member states often encounter practical difficulties in implementing the accepted transfers that results in high numbers of their cancellations. The Commission evaluation report (CEC 2007a) found that between September 2003 and December 2005 more than 55,300 requests<sup>91</sup> for Dublin transfer were sent out (11.5% of the total asylum applications in all EU states<sup>92</sup> for the same period). In 40,180 (72%) cases another member state accepted to take responsibility for an asylum applicant. However, only 16,842 (30%) applicants were actually returned. This results from several deficiencies. First, in taking charge of procedures, the evidence required for accepting an asylum-seeker is often difficult to provide and is therefore considered by member states as an obstacle to the regulation's effective application (CEC 2007b: 26). In taking back procedures no time-limit for filling a transfer request is foreseen. Some member states, and the UNHCR, argue that this slows down the process (CEC 2007b: 26). Second, behaviour of asylum-seekers can be problematic. For example, there is a problem of applicants' absconding following the transfer decision. This reaction is linked to 'the

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<sup>88</sup> Art. 1; Arts. 5-14 Regulation (EC) No. 343/2003.

<sup>89</sup> Ibid., Art. 17(1).

<sup>90</sup> Ibid., Arts. 17-20.

<sup>91</sup> This concerns both 'take charge' (incoming) and 'take back' (outgoing) requests.

<sup>92</sup> The EU-15, prior to the 2004 EU enlargement.

existence of pull factors in the member states where they [asylum-seekers] are, such as positive perception of the asylum system in terms of reception conditions and recognition rates' (CEC 2008f: 10).

This illustrates that the Dublin system does not have the expected effect against secondary movements (see e.g. Thielemann 2004). Since the regulation entered into force and the Eurodac system<sup>93</sup> was established, the proportion of asylum applicants reported as previous applicants has grown. In 2003 it was 6.8% of all Eurodac/EU-14 states' asylum applications; in 2006 the percentage rose to 17.2%. In 2004 – 31,307 (13%) and in 2005 – 31,636 (16%) of all Eurodac/EU-14 states' asylum applications were 'multiple applications'<sup>94</sup>. By doing so, asylum-seekers try to 'obtain a favourable decision for their case' (CEC 2007a: 10).

#### *Distribution of asylum-seekers*

The Commission studies on the Dublin regulation adoption (CEC 2008a, f) also reveal its scant impact on amelioration of unequal distribution of asylum-seekers across the EU. Some member states 'can undeniably be considered to be "overburdened" when the flow of asylum-seekers they receive is compared to the size of their population' (CEC 2008f: 14). This is because of geography and/or the 'positive perception' of asylum-seekers of certain states (CEC 2009b: 15; see also 2009c). If we look at member states being affected due to

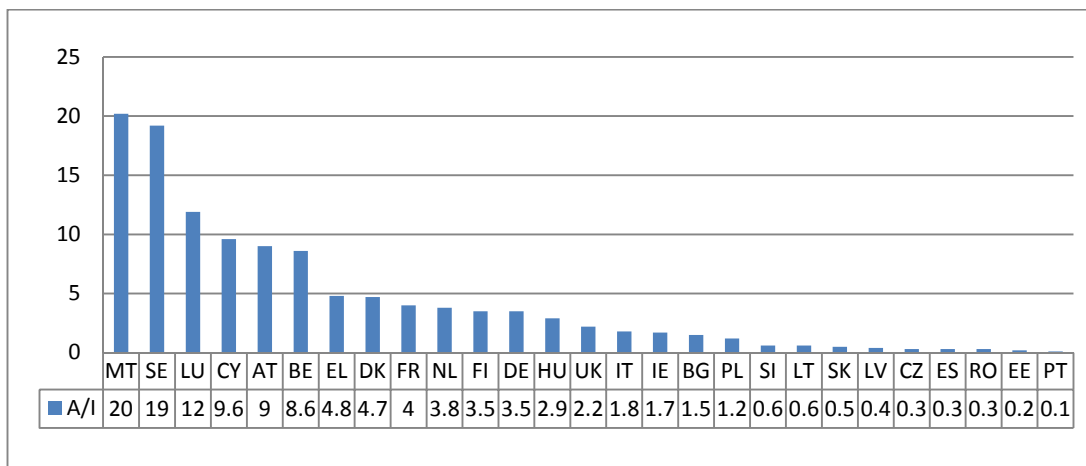
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<sup>93</sup> As a supportive instrument to the Dublin II regulation, the Eurodac regulation facilitates the transfers by enabling registering and comparing asylum-seekers' fingerprints. The regulation obliges member states' border/asylum authorities to fingerprint all persons seeking international protection aged above 14 years and send the information to the central Eurodac database available to all member states. Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 316, 15.12.2000). This regulation was amended by: Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ L 180, 29.6.2013). The new regulation will come into force on 20 July 2015. Until then the 2725/2000 regulation is binding.

<sup>94</sup> This means that '[s]ome asylum seekers reapply in the same member states after being taken back following a Dublin procedure. Others may be legitimately pursuing a claim after transfer to a second state following family reunification, or having successfully challenged transfer back to another Dublin state' (ECRE 2008: 11).

their geographical location, these are the states where asylum-seekers first arrive (CEC 2009b: 15). Between 2008 and 2013 20 asylum applications per 1,000 habitants were submitted in Malta, and 9.6 in Cyprus. This was well above the EU-27 average of 4.3 applications (Figure 4.3). As far as ‘positive perception’ is concerned, in the same period, Sweden, where the total recognition rate was 38.8% (the EU-27 average was 33.2%) (Figure 4.2) received 19 applications per 1,000 habitants (Figure 4.3).

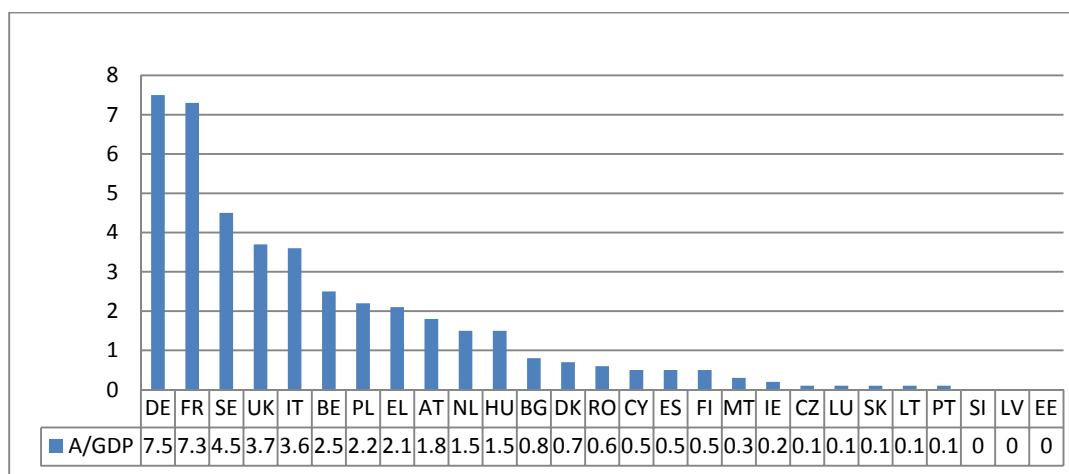
**Figure 4.3 Asylum applications per 1000 inhabitants, 2009-2013**



Source: Adapted from the UNHCR (2014).

The ratio of asylum applications to member states’ GDP per capita (2009-2013) illustrates the discrepancies between traditional destination states and the 2004 enlargement countries. Whereas Germany and France were taking a large number of refugees *vis-à-vis* GDP per capita (7.5 and 7.3 respectively), Central and Eastern European states were at the bottom in terms of share of burden of the CEAS. For example, the Czech Republic and Slovakia received only 0.1 applications each (Figure 4.4).

**Figure 4.4 Asylum applications per 1USD/GDP per capita, 2009-2013**



Source: Adapted from the UNHCR (2013a) statistics.

In consequence, the Dublin II, by its ‘redistributive’ nature and deficiencies does not represent an effective burden-sharing mechanism (Thielemann 2004). Since the regulation assigns responsibility primarily to ‘the country of first entry’, member states on EU external borders are far more affected by this rule (UNHCR 2006; ECRE 2008). The ‘physical reallocation’ (Neumayer 2004: 776), coupled with the demand that protection seekers who pass through EU external border states return there for assessment and reception, ‘exacerbates pressures on these states that already experience challenges in hosting asylum-seekers’<sup>95</sup> (ECRE 2008: 13). Furthermore, the Dublin rule clashes with the role that the previously analysed structural factors (e.g. links with migrant communities, or historical or language ties) play in asylum destination choice. As a result, Neumayer (2004: 176) asserts that it is likely that asylum-seekers will resent and resist reallocation to poorer destination countries and to countries with which they have no connection, and many try to reverse their deflection/transfer to undesired destinations, including by illegal means.

<sup>95</sup> The ECRE’s assessment was based upon two indicators. First, there was the relation of the number of outgoing (‘taking back’) transfers to the member states’ geographical location. The Commission data showed that whereas 7,040 persons were transferred from non-border states to border states (Cyprus, Estonia, Greece, Hungary, Italia, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia and Spain) in 2005, only 307 persons were sent back in an opposite direction. This gave a ratio of nearly 23:1. Second, Dublin transfers impacted on member states’ asylum caseloads. The comparison of net Dublin transfers (incoming minus outgoing) compared to the total number of asylum applications received in 2005 showed 13 border member states occupying top 11 positions. Net Dublin transfers represented a particularly significant proportion of asylum applications in Poland (19.2%) and Slovakia (12%) (ECRE 2008: 13).



The Dublin framework's frailty has been exposed, for example, in Greece. The country, which since the late 2000s has been facing significant inflows<sup>96</sup>, due to its migration and asylum system's collapse, has been unable to adequately deal with asylum-seekers (EASO 2012a; see also UNHCR 2006, 2008b). The system's deficiencies were identified in the European Court of Human Rights' (ECtHR) and the Court of Justice of the European Union's (CJEU) judgements, pointing out inhuman and degrading treatment of applicants by cause of poor reception conditions and procedural flaws<sup>97</sup>, and inability of Greek authorities to cope with the asylum situation on the ground<sup>98</sup>. This has led the bulk of asylum-seekers to leave Greece for Western states. Whereas those people cannot be transferred back to Greece due to the above flaws (the majority of member states suspended Dublin transfers to Greece following the ECtHR and CJEU rulings (EASO 2012a: 38)), the EU distribution system has turned out to be helpless in improving the standard of protection and softening the burden placed on the country's admission system. The EU's legal response to this problem has been the introduction of the early warning mechanism through the 2013 Dublin regulation amendment. Yet, its adoption requires time (see section 2.3.1).

The flaws that emerge in the implementation of the Dublin regulation shape the setting that enables the construction of ideas about transit in two ways. First, inefficient and protracted procedures hamper the allocation of applicants across the EU: problems concerning inter-state communication and applicants' disappearances before the transfer takes place expose the limits of the system and its inability to effectively tackle transit. Applicants continue to seek asylum again in different EU states. Second, the defective redistribution mechanisms that hinge on geographical criteria and that do not consider the socio-economic drivers of migration seem to be unable to effectively disburden transit states facing particular migration pressure. The EU system has been thus 'inimical to the principles of solidarity and fair sharing responsibility' (Moreno-Lax 2012: 29).

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<sup>96</sup> Whereas the number of illegal immigrants exceeds 100,000 (in 2010 132,524 persons were arrested for 'illegal entry or stay') (Kasimis 2012), asylum applications oscillated between around 19,000 in 2008, and 10,000 in 2010 and 9,000 in 2012 (UNHCR 2013a).

<sup>97</sup> *Case M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011. For the examination of the case and its implications for the Dublin system see Moreno-Lax 2012.

<sup>98</sup> *Joined Cases C-411/10 N.S. v. Secretary of State for the Home Department (United Kingdom) and C-493/10 M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (Ireland)*, Court of Justice of the European Union, 21 December 2011.

#### 2.2.4. The reception directive

The directive aims to ensure ‘a dignified standard of living and comparable living conditions for asylum-seekers in all member states’<sup>99</sup>. Member states grant asylum-seekers a full set of rights, including provisions on residence and freedom of movement, family unity, material reception conditions, and access to education, employment and vocational training. The provisions apply to those who seek international protection under the 1951 Refugee Convention as long as they are allowed to legally stay (see e.g. Peers and Rogers 2006: 297-306).

Member states have been given wide room for transposing the provisions. The arrangements were the result of political bargaining in the Council leading to the establishment of minimum standards if the member states could find a consensus. Hence, the reception conditions established at a national level are, in many cases, of insufficient quality and vary across the EU (CEC 2008e). This section identifies the material reception conditions and access to the labour market as key factors influencing asylum-seekers’ standard of living and well-being and thus affecting transit.

##### *Material reception conditions*

The directive obliges member states to provide applicants with material reception conditions that include ‘housing, food and clothing provided in kind or as financial allowances or in vouchers, and a daily expenses allowance’<sup>100</sup>. In all cases the conditions should ensure ‘a standard of living adequate for the health of applicants and capable of ensuring their subsistence’<sup>101</sup>. If we look at the provisions’ implementation, no substantial deficiencies have been identified in terms of accommodation. Most member states provide collective housing (reception centres), only a few (e.g. Belgium, the UK) grant individual housing. In many cases the number of accommodation places has been assessed as satisfactory (CEC 2007d: 6). However, the evaluation studies revealed that some states do not have sufficient housing capacity. For instance, France, which in 2004 received over 58,000 asylum applications, had the resources to accommodate only 15,470 persons. Those not housed in reception centres received a cash allowance of €300 per month; however,

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<sup>99</sup> Recital 7 Directive 2003/9/EC.

<sup>100</sup> Ibid., Art. 2(j).

<sup>101</sup> Ibid., Art. 13(2).

the amount turned out to be highly insufficient, and the support was limited to one year (ECRE 2005b: 7). Furthermore, NGOs have reported considerable problems regarding the financial allowances for asylum-seekers. In the bulk of member states they are defined as inadequate to ensure health and/or subsistence of applicants (ECRE 2005b: 18) and only 'rarely commensurate with the minimum social support granted to nationals' (CEC 2007d: 15).

#### *Access to the labour market*

The directive recognises the asylum-seekers' right to work in the EU<sup>102</sup>. However, it grants access to the labour market only after a minimum of 12 months from the date of application submission (if a first-instance decision has not been rendered). This has led to divergences in the directive's implementation: whereas half of member states stick to the directive's wording, the other half (with the exception of Lithuania which does not provide asylum-seekers with access to the labour market at all) grant access to employment either immediately or within a 6-month-period following application submission (CEC 2008e: 16). Second, the enjoyment of the right to work may be subject to conditions laid down in national legislation that gives priority to EU/EEA nationals<sup>103</sup> (CEC 2007d: 8; see also ECRE 2005b, CEC 2008e). Thus, the asylum-seekers' ability to become self-sufficient and integrate into society is restricted (ECRE 2005b: 16; see also ECRE 2002, 2005a). Neumayer (2004) situates the divergences in welfare benefits and labour rights within a broader policy context. He maintains that if asylum-seekers are perceived merely as a burden by destination states, the powerful incentives emerge to pass the burden on to other countries. This shapes the 'free-riding logic' that 'sees countries caught in a "race to the bottom", where welfare provisions are decreasing and deterrent measures are increasing until the former hit rock bottom and the latter run into severe conflict with a country's obligations under international human rights treaties, such as the Geneva Convention' (Neumayer 2004: 165).

The differences in welfare provision have been recognised as one of the key factors that render a destination country more attractive and that shape the socio-economic context of migration (see section 2.2.1). Neumayer (2004) finds that the economic attractiveness of a destination country has been perceived by asylum-seekers in terms of its overall level of

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<sup>102</sup> Ibid., Art. 11(1).

<sup>103</sup> Ibid., Art. 11(4).

economic development: rich countries are more attractive than poor countries, quite independent of the prevailing unemployment and economic growth rates. This structural background of intra-EU movement seems not to be taken into account by the Commission, which narrows down action on transit to the harmonisation paradigm and concentrates on the deficiencies that arise from the implementation of the reception directive and 'jeopardise the realisation of the directive's goal to limit secondary movements between member states, as asylum-seekers might be inclined to move to a member state that allows quicker access to employment' (CEC 2008e: 16-17).

What does this tell us about the formation of EU-level meanings of transit? First, this exhibits the Commission's attachment to the convergence of member states' procedural and administrative instruments as most adequately responding to the flows. Second, this illuminates some inconsistency within the Commission in terms of identifying the determinants of transit. Whereas the documents produced in the course of negotiations on EU qualification and procedural instruments emphasise primarily the legal discrepancies as triggering transit, in the debate on the reception directive the Commission associates the phenomenon with economic drivers, whilst not providing any links to earlier discussions on its nature and implications or contextualising it within research on the structural factors of migration. This hampers the formulation of the Commission's comprehensive and long-term policies on transit movement of asylum-seekers within the Union.

The analysis has demonstrated so far that the adoption of EU asylum qualification, procedures, redistribution and reception instruments produces the underlying ideas about transit. The EU locates the determinants of transit migration within national regime systems that can be regulated and/or harmonised at the EU level. The focus on the legal drivers of transit, including procedural divergences, marginalises the structural variables, such as social assistance, integration schemes, or cultural or historical links that determine decisions about migration and that have been widely recognised in migration research (Byrne 2003; Neumayer 2003, 2004; Thielemann 2003, 2004). This, first, leads EU policy to selectively respond to transit migration that, therefore, evolves separately from the realities of asylum-seekers. Second, this affects EU migration policy that has been manifested, for example, in the flawed reallocation of asylum-seekers between member states and exacerbation of pressures on those states that are situated on the external borders of the EU.

## 2.3. Bridging the gaps

In order to see how EU ideas of transit evolve, we now examine the CEAS I overhaul at the legal (modification of asylum procedures, qualification, and the content of protection) and social (elaboration of EU channels of communication and exchange of knowledge on asylum between member states) levels.

### 2.3.1. Legal change

The revision of CEAS I was prompted by, first, low and vague common standards, attributable to the unanimity requirement for its adoption. Second were the implementation flaws pointed out by several NGOs and the UNHCR, who called for precise procedural rules, a broader scope for asylum-seekers' guarantees, and the enhancement of the quality and efficiency of case examination; third was the case-law of the ECtHR and the ECJ (CEC 2009d). This section investigates the recasts of CEAS instruments: the qualification directive<sup>104</sup>, the procedures directive<sup>105</sup>, the Dublin regulation<sup>106</sup> and the reception directive<sup>107</sup>.

#### *The qualification directive*

Let us begin with the analysis of the 2011 qualification directive. The improvements are, first, an approximation of rights granted to refugees and beneficiaries of subsidiary protection. With regard to the deficiencies mapped in the previous section, whereas the directive does not remove differences in validity of residence permits and social welfare benefits, it equals the rights of refugees and subsidiary protection holders with regard to

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<sup>104</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011).

<sup>105</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013).

<sup>106</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29.6.2013).

<sup>107</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013).

the access to employment<sup>108</sup> and integration facilities<sup>109</sup>. Second, the amendment addresses the specific social services problems immigrants face. It levels up standards on the availability of and access to vocational training and employment counselling services by providing for equivalent conditions as for nationals<sup>110</sup>. It provides for new regulations on access to procedures for recognition of qualifications<sup>111</sup>. Member states must facilitate access for beneficiaries of international protection who cannot provide documentary evidence of qualifications to appropriate schemes for the accreditation of prior learning<sup>112</sup>. Finally, the directive makes integration programmes more flexible and stipulates their adjustment to applicants' specific needs<sup>113</sup>.

However, the provisions have not substantially extended the scope of benefits: 'The asylum *acquis* doesn't provide any sort of precision in terms of what it means to emigrate, or what it means to give sufficient support. This is undefined. ...So, you don't have significant benchmarks and you don't have any significant leverage based on any treaty obligation to increase or improve the situation of the recognised refugees' (Interview. UNHCR, Brussels, 14 November 2012). The measures have been restricted to a harmonisation action and not to long-term solutions that could promote social, economic and cultural integration, and can hardly impact on asylum-seekers' decisions. A sense of helplessness in changing this trend has been discernable in the discourse in the Commission: 'it is clear that CEAS does not address what happens after you are recognised, if you are a refugee. So, people even if they are in a member state and even if that member state offers the best solutions for asylum-seekers, they will look forward after they are recognised as refugees, to stay and work in another country where there are better economic prospects' (European Commission, Brussels, 30 November 2012); and in the Council: 'it is all about harmonisation and increasing applicants' rights. The idea is to increase the minimum level so as to decrease possible reasons for people to move on. But, in practice, this is impossible because of social discrepancies' (Interview. Council of the European Union, Brussels, 31 October 2012).

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<sup>108</sup> Art. 26(1) Directive 2011/95/EU.

<sup>109</sup> *Ibid.*, Art. 34.

<sup>110</sup> *Ibid.*, Art. 26(2)(3).

<sup>111</sup> *Ibid.*, Art. 28(1).

<sup>112</sup> *Ibid.*, Art. 28(2).

<sup>113</sup> *Ibid.*, Art. 34.

The above statements demonstrate that the underlying logics of transit that emerged in the course of the negotiations on the 2004 qualification directive (see section 2.2.1) remain over time: EU officials' emphasis that procedural measures to address transit translated into a legislative action proved to be deficient. At the same time, EU bureaucrats' perceptions shape the disconnection between the declaratory and actual EU policy on transit: although EU decision-makers realise that transit requires multi-dimensional action, taking into account the structural factors shaping the movement (Thielemann 2003), they do not attempt to revise the prevailing EU harmonisation paradigm in tackling the phenomenon. EU policy actors act rationally in the sense that they maximise their interests related to an accurate and timely EU policy implementation. But they are also rational in a 'thinking manner' whilst reflecting upon their actions and the reality in which they operate, and saying what they are thinking of doing (Schmidt 2011: 17). The interpretations of transit and of the responses to it that they produce inform their actions in a way that they add to the preservation of the flawed EU asylum policy.

#### *The procedures directive*

The 2013 procedures directive is a response to an incomplete harmonisation, 'making procedures susceptible to administrative error and... leading to the proliferation of disparate procedural member states between member states' (CEC 2009d: 10; see also CEC 2009a). First, there are improvements in access to procedure. The directive provides for a time limit for completing formalities related to entertaining<sup>114</sup> and examining<sup>115</sup> an asylum application; it introduces guarantees, e.g. to enable *de facto* asylum-seekers to request protection at the border crossing points or pre-removal of detention facilities. Second, amendments on the legal aid provision insert an obligation to provide free of charge information on procedures<sup>116</sup>. It introduces obligatory (previously it was optional) free legal assistance and representation on request in the appeals procedures<sup>117</sup>. Yet, the free legal assistance and/or representation in the first instance decisions still remains optional<sup>118</sup>. Finally, new regulations envisage a full and *ex nunc* (from now on) review of first-instance decisions by a court/tribunal<sup>119</sup>, and remove the possibility of making the review

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<sup>114</sup> Art. 6(1) Directive 2013/32/EU.

<sup>115</sup> *Ibid.*, Art. 31.

<sup>116</sup> *Ibid.*, Art. 19(1)(2).

<sup>117</sup> *Ibid.*, Art. 20(1).

<sup>118</sup> *Ibid.*, Art. 20(2).

<sup>119</sup> *Ibid.*, Art. 46(1)(3).

conditional upon national administrative arrangements of asylum decisions; an effective remedy requires a review of both facts and points of law<sup>120</sup>. The extension of judicial scrutiny of asylum decisions imposes a reform of systems such as the Polish one, where the second-instance review of facts is undertaken by a quasi-judicial, administrative body (the Refugee Board) (see Chapter 6.2).

Whilst ameliorating access to asylum procedure and strengthening the right to effective remedy, the amendments have pushed harmonisation forward to a limited degree. They leave substantial room for derogation and the provisions setting up the minimum standards have been seen as not reducing existing procedural discrepancies between member states (Interview. European Commission, Brussels, 20 November 2012). This illustrates the negative implications of the attachment to legislative tools to deal with transit at the EU level.

### *The Dublin regulation*

The main objective of the 2013 Dublin regulation amendment is to ensure higher standards of protection under the responsibility determination procedure and to address particular migration pressure points (CEC 2008d). In order to accelerate and improve the procedural efficiency, the amendment altered several provisions. The new regulation stipulates, among others, deadlines for submitting take-back requests (3 months)<sup>121</sup> and a deadline for replying to requests for information (2 months)<sup>122</sup>. A deadline for replying to requests on humanitarian grounds was introduced and those requests can be made at any time<sup>123</sup>. Rules on transfers were added, and the regulation inserts provisions on a compulsory interview with the applicant to allow the authorities to gather all necessary information and to inform the applicant about his/her rights and obligations<sup>124</sup>.

Along with modifications on inter-EU states cooperation, ‘the early warning and preparedness mechanism’ has been instituted<sup>125</sup> to prevent Dublin transfers from overburdening member states experiencing particular migration pressure and from

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<sup>120</sup> Ibid., Art. 46(3).

<sup>121</sup> Art. 21 Regulation (EU) No. 604/2013.

<sup>122</sup> Ibid., Art. 22.

<sup>123</sup> Ibid., Art. 17(2).

<sup>124</sup> Ibid., Art. 5.

<sup>125</sup> Ibid., Art. 33.



exposing applicants to degrading treatment. The mechanism is triggered by a member state's difficulty in ensuring proper functioning of the asylum system. The Commission asks the state to draw up an action plan that specifies the steps to deal with the situation and address the deficiencies. Whilst overseeing the plan's implementation, the Commission issues recommendations and informs the Council on progress. The Council may request further information and provide political guidance, but the mechanism does not envisage any sanctions for non-compliance, nor leads to the suspension of transfers.

Though the amendments have clarified the responsibility allocation, the underlying principles of the Dublin system, i.e. physical burden-sharing, fiscal redistribution and policy harmonisation remain unaltered (Thielemann 2004: 56). EU states officials engaged in negotiations were uninterested in amending the system's redistributive logic and developing long-term instruments to improve the domestic capacity to integrate Dublin returnees, arguing that 'the existing regulation works well' (Interview. German Permanent Representation to the EU, Brussels, 8 November 2012) and that 'Dublin properly responds to secondary movement' (Interview. Office for Foreigners, Warsaw, 6 August 2012). This, however, stands in contradiction to arguments raised by EU migration policy scholars, who suggest paying far greater attention to the preferences of Dublin transferees (Neumayer 2004), and putting more effort to equalise the reception standards across the EU (Neumayer 2005), underestimating of which makes the current system ineffective. Furthermore, EU officials seem to disregard the alternative to Dublin burden-sharing mechanisms, which range from the instruments grounded in the precise indicators to measure the burden of hosting asylum-seekers<sup>126</sup> to determination of responsibility based on applicants' pre-existing ties to particular member states, or their preferences<sup>127</sup>. Consequently, the conceptions about transit that arise from the Dublin regulation adoption demonstrate the Commission and EU states' confinement to the management paradigm in reacting to this phenomenon: transit applicants are those who have to be appropriately dealt with, but not those whose needs and motivations are taken into account.

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<sup>126</sup> For example, Germany during its presidency in the second half of 1994 proposed a complex set of criteria ranging from population and territory size to GDP and the contribution of host countries to peace-building operations and other security measures (Thorburn 1995).

<sup>127</sup> ECRE argues that if the needs of refugees were appropriately addressed they would be more prone to acquiesce in responsibility decisions. This would reduce expenditures on agreeing transfers never being carried out. Moreover, living from the outset of the asylum procedure in states where various cultural/ethnic networks are available would decrease the strain placed on welfare systems and enable quicker integration (ECRE 2008: 29).

### *The reception directive*

The CEAS overhaul involved alterations within the asylum reception system. First, in order to improve the quality of material reception conditions, new provisions were imposed on national authorities that grant financial assistance to asylum-seekers, taking into account the support provided to nationals<sup>128</sup>. The directive altered regulations on accommodation: it obliges member states when allocating housing facilities to consider gender, age and the situation of persons with special needs<sup>129</sup>. Second, the directive facilitates access to the labour market by shortening the period from 12 to 9 months after which asylum-seekers can access employment following an application<sup>130</sup>. Finally, the directive obliges member states to ensure that this access is 'effective' and remove restrictions favouring specific groups of migrants over asylum-seekers<sup>131</sup>.

The scope of change and the member states' approach to it raise, however, some concerns. Primarily, new regulations have not substantially narrowed down the margin of interpretation in implementation. The states' restrictive approach does not allow further significant harmonisation. In the course of negotiations the Council decided not to include in the proposal to prohibit member states from regulating employment provisions 'without unduly restricting asylum-seekers' access to the labour market' (proposal for Article 15) (CEC 2008c: 24). A Commission official responsible for the directive's revision mentioned three reasons why the amendment did not go too far: first 'tremendous obstacles from member states... Every single member state had a hundred and fifty reservations. There was not a single thing acceptable, specifically that the directive does not have any tools for buy and sell for member states. It only binds them'; second, 'a very bad timing because of the economic crisis'; and third, 'the governments have become more far right-wing' (Interview. European Commission, Brussels, 20 November 2012). As a result, 'at this stage harmonisation ends, because it [the restrictive states' position] means that OK, everything will become even and will smoothly function but in 10, 20 or 50 years when the national income discrepancy between Luxembourg and Bulgaria will not amount to 350% [as it is today], but 20%' (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012).

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<sup>128</sup> 17(5) Directive 2013/33/EU.

<sup>129</sup> *Ibid.*, 18(5).

<sup>130</sup> *Ibid.*, 15(1).

<sup>131</sup> *Ibid.*, 15(2).

The deficiencies illuminate the separation of the directive's objectives that seek to mitigate transit through introduction of the minimum reception standards and equalisation of reception conditions between member states from EU and government officials' interpretations of the actual causes of intra-EU movement that are located within a broader socio-economic environment. This contributes to the broader problem of the detachment of EU asylum policy development from on-the-ground migration dynamics.

The reform of the CEAS shaped the development of ideas about transit. First, amendments of EU asylum qualification, procedural, reception and distribution instruments show the EU's attachment to the harmonisation paradigm in formulating the response to transit: EU policy has been grounded in the logic according to which transit should be tackled primarily through legal measures, including alleviation of divergences in national legislation and elaboration of mechanisms to distribute applicants between member states. Second, a significant impact of member states on the CEAS overhaul narrowed the latter down to procedural alterations and maintenance of the lowest common denominator in welfare policy, and enabled preservation of a great deal of latitude in transposing of EU provisions at the domestic level. This determines *inertia* in the provision of alternative measures to EU management logic to control and steer the flows. In consequence, EU policy evolves separately from actions of asylum-seekers traveling across the EU in search of the most favourable economic and social conditions. Let us now examine whether (and how) these procedural logics to address transit have been shaped through elaboration of EU-level migration information sharing and policy learning networks.

### **2.3.2. Elaboration of cooperation**

This section analyses the avenues of EU-level practical collaboration on asylum: the European Migration Network (EMN): the platform of knowledge and information sharing between supranational and national migration actors; and the European Asylum Support Office (EASO): the framework facilitating communication and cooperation between EU states' asylum practitioners to ascertain whether (and how) the ideas of transit that emerge through EU law-making have been moulded at an operational level.

### *The European Migration Network*

Since 2002 the Commission has been developing 'a systematic information basis for monitoring and analysing migration and asylum trends and identifying the root causes of migration' (CEC 2003a). The cooperation has been given a coherent framework through the establishment of the EMN in 2008<sup>132</sup>. Created as a result of EU states' decision to deepen knowledge on migration (European Council 2003), the EMN is coordinated by the Commission (DG Home Affairs) that is supported by two private sector contractors that assist with the exchange of information and with the development of technology to facilitate interchange. The work is supported by EMN national contact points in all member states (except Denmark) that consist of migration experts (Geddes 2014: 19).

The EMN performs several functions: it collects and updates migration data; undertakes research on specific migration problems and provides it in readily accessible forms; facilitates an exchange of information between member states and member states and the Commission; and creates and maintains an internet-based information exchange system to provide access to relevant documents. Networking within the EMN takes various forms, including EMN studies, drawing from information provided by member states; annual reports on cross-state migration problems or challenges; regular meetings of national contact points; and *ad hoc* queries that enable member states to exchange practical information on particular policy and/or legal issues. Boswell's (2009) analysis of the evolution of the EMN's structure and activities suggests the network plays different functions over time (for an explanation of different functions of knowledge see Chapter 2.3.2). In the early stages of the network's development, the Commission's predominant aim was to build a 'scientifically reputable and politically independent' framework. It was envisaged the network would play a legitimising function in the sense that 'the Commission felt obliged to meet European Council expectations about the importance of establishing such a network; and in meeting more general expectations from the community about the form such a research capacity should take' (Boswell 2009: 216). However, the Commission conceptualisation of the network underwent a shift between 2003 and 2005. The research and activities of the EMN undertaken by independent experts turned out to be too politically sensitive, implying a greater engagement of the Commission and the governments with selecting research topics and disseminating information. This

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<sup>132</sup> Council Decision of 14 May 2008 establishing a European Migration Network (2008/381/EC) (OJ L 131, 21.5.2008).

prompted the Commission reorientation towards the EMN's more instrumental function (Boswell 2009: 216). On the other hand, the involvement of national governments in designing and producing research could help normalise the debate on more controversial issues. In this sense the network plays an important role in justifying particular policy decisions at EU or national level, and in garnering support for undertaking action, including further harmonisation. Consequently, the EMN performs a substantiating function (Boswell 2009: 216-17).

The substantiating function of the research produced by the EMN contributes to the development of ideas about transit because it helps to justify the attachment of the Commission and national governments to the approach to transit envisaged in EU legislation. EMN studies and reports in the field of asylum primarily focus on the identification of EU policy deficiencies and the ways through which they might be rectified. The latter have been structured within the scope of EU law that, as shown above, addresses transit through approximation of practices, procedural efficiency, and allocation. The materials produced by the EMN, e.g. EMN studies on the provision of reception facilities across the EU (EMN 2013, 2014), rather than calling for the reform of the logic in dealing with transit applicants, suggest alterations at the level of the minimum reception standards delineated by the reception directive (deemed, however, ineffective in alleviating transit) (see section above). In this sense, whilst contributing to an 'exchange of ideas about asylum policies and the discussion on different EU states' practices' and facilitating 'access to information in a structured and timely manner' (Interview. Ministry of Interior, Warsaw, 12 July 2012), the EMN assists Polish government officials to 'choose among the available EU tools to improve asylum proceedings' (Interview. Office for Foreigners, Official G, Warsaw, 28 September 2012) and to 'show that our [Polish] system responds well to the [transit] movement' (Interview. Office for Foreigners, Warsaw, 6 August 2012). This substantiates the Polish government's policy preferences to tackle transit through EU-determined provisions and management mechanisms, and to abandon actions in the field of migrant integration (see Chapter 5.3).

*The European Asylum Support Office*

The impetus for deepening EU-level asylum knowledge and sharing experience came from the 2004 Hague Programme<sup>133</sup> that called for the establishment of ‘appropriate structures’, involving EU states asylum services, to ‘facilitate practical and collaborative cooperation’ towards three objectives: achieving EU wide single asylum procedure; the joint compilation, assessment and application of country of origin information (COI); and how member states can better address particular pressures on asylum systems (CEU 2009: 9). Building upon the Commission-managed structures to improve convergence in asylum policies and decisions (EURASIL), facilitate cooperation between the Commission and member states (Immigration and Asylum Committee), and to train national asylum officers (the European Asylum Curriculum (EAC)) (EASO 2012a: 9), EU states arranged the establishment of the EASO. It was envisaged that it would tie together the above activities in a coherent and systematic manner (ECCM 2009). Located in Malta, the Office began its work in 2010, coming into full operation in the second half of 2011 (EASO 2012a: 7). It is run by the Management Board of EU states’ and Commission representatives. The Board takes decisions by an absolute majority and so, the member states define the scope of the EASO’s action.

The EASO has three functions. First, it facilitates the CEAS instruments implementation to ‘improve convergence in asylum decision-making within the EU legislative framework’ (CEC 2008b: 6). It collects and analyses data on immigration trends within and outside the EU that are provided to member states’ asylum administrations. Second, the agency strengthens inter-EU states’ practical collaboration: it produces COI information, works on a common methodology to draft COI reports and disseminates information through a network of national units and the Commission (EASO 2013: 81). The Office develops asylum training schemes (e.g. on EU asylum *acquis*, interview techniques, material assessment, and COI material production) for national case officers, judges, and NGOs activists (EASO 2012a: 7; EASO 2013: 10). It therefore contributes to bringing closer the practices of different member states related to asylum proceedings, case examination, reception and distribution. Adler and Pouliot (2011: 6) unpack the notion of practice that is a *performance*: a process of doing something; it is *patterned* in that it generally exhibits certain regularities over time and space; and it is *competent* in a socially meaningful and recognisable way: groups of individuals tend to interpret its performance along similar

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<sup>133</sup> The Hague Programme builds upon the 2001 Laeken European Council that recognised the need to intensify the exchange of immigration and asylum information, as well as the Commission’s communication, calling for cooperation with civil society and local authorities (CEC 2001d).

standards. Third, the EASO is an instrument of EU-level structural solidarity with member states subject to a particular pressure<sup>134</sup>, from, for example, a sudden arrival of a large number of immigrants seeking international protection (EASO 2013). The EASO can provide expertise (COI information, interpreting services, knowledge of asylum case management), facilitate examination of asylum application, e.g. through deployment of asylum support teams (consisting of EU states' case officers), and contribute to the maintenance of appropriate reception facilities.

The EASO promotes convergence of asylum decisions made at the national level, ensures more consistency between national practices (Comte 2010: 395), and assists member states in remedying the deficiencies that emerge from the implementation of the CEAS. On the other hand, the Office deepens intra-EU cooperation: it engages national civil servants to deliberate over practical issues that could inform the debates within the Commission's or EU Council's committees by bringing valuable 'operational' insight. However, national asylum decision-makers argue that in reality the Office's impact on EU-level debates has been scarce and revolving around technical issues concerning EU law adoption of secondary importance (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012).

Although the EASO attempts to extend communication and cooperation with asylum policy stakeholders, it is a regulatory agency with a modest budget of €10 million (EASO 2012b). Moreover, it operates within the boundaries delineated by EU asylum law and policy paradigms: 'The Commission may say that the consultative forum already exists. After all the EASO is a form of open debate. But who takes part in it besides member states' representatives? Only NGOs. The EASO cannot do anything beyond already existing EU arrangements. What is more, officials who sit there hold views distant from a liberal approach. Controlling is too little' (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012). Comte (2010) notes that it was clear from the very beginning of inter-state negotiations on the EASO's institutional form and mandate that it would not perform the role of a 'decisional European Regulatory Agency'. Rather the Office was envisaged as a body subsidiary to member states' decisions. This has been

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<sup>134</sup> Art. 33 of the 2013 Dublin regulation (No. 604/2013) extends the EASO's competences to the early warning, preparedness and crisis mechanism. The Office, in cooperation with the Commission, assists member states experiencing significant migration pressure in addressing inflows, identifying system deficiencies and formulating a remedial action (see section 2.3.1).

complemented by a lack of political will within the Commission to extend the debate on EU asylum policy beyond the amendments to existing legal instruments. As a senior Polish Permanent Representation to the EU diplomat brought up: 'The Commission implements the policy of the Swedish political party that Ms Malmström [the former JHA Commissioner] represents, and she herself is unable to trigger a real EU immigration policy debate'. And at the same time: 'The Commission officials are not proactive, nor do they make an attempt to understand others [civil servants representing member states] or facilitate an exchange of information' (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012).

The above statements illustrate the EASO's structural inability to steer the debate that would transgress the boundaries delineated by EU law (that, as shown earlier in this chapter, reflects the intentions and interests of member states). Consequently, practical collaboration driven by the Office rather than spurring critical reflection on the current management and distribution of EU mechanisms, and to search for socio-economic tools to alleviate and deter transit migration, as suggested by the research indicated above, bolsters the prevailing approach that responds to the phenomenon through legal amendments. The practices that develop within the EASO and the knowledge produced by the EMN contribute to national asylum decision-making and inform policy debate that enables the translation of EU logics to tackle transit (see Chapter 6.4).

### **3. EU-level understanding of transit/secondary movement**

This section couples the logics to address transit that emerge from EU law and policy implementation with the discursive frames produced by EU and member states' officials shaping this process. Referring to the analytical framework introduced in Chapter 2, the context in which discourse about transit is moulded comprises simultaneously constraining structures and enabling constructs of meaning, which are internal to 'thinking and speaking' actors that create and maintain institutions as well as communicate critically about them (Schmidt 2010). Consequently, transit discourse emerges as a set of ideas and an interactive process (Schmidt and Radaelli 2004; Radaelli and Schmidt 2004).

There is no disagreement between EU states' and the Commission officials over the causes of transit migration in the EU. They speak about the whole range of factors within



intersecting administrative (the quality of asylum procedure, the recognition rates), economic (job prospects) (Interview. European Commission, Brussels, 22 November 2012) and cultural (migrants networks and diasporas, cultural ties) (Interview. European Commission, Brussels, 30 November 2012) levels. Simultaneously, they situate determinants of transit within (the reception conditions) (Interview. European Commission, Brussels, 20 November 2012) and/or outside (the overall economic standing of the country) (Interview. Council of the European Union, Brussels, 31 October 2012) the asylum system. The statements made by officials directly engaged with the revision of CEAS instruments exhibit an incongruity between their perceptions and the content of EU asylum provisions. The mechanisms to address transit stipulated in EU directives (and their amendments) develop in a way that is separate from decisions and actions of asylum-seekers who continue to submit multiple asylum applications within the EU.

The Commission follows the member states-driven approach to tackle transit migration through harmonisation, officially recognised as a major tool to mitigate inter-EU asylum movements, quick and efficient proceedings, and effective distribution and expulsion mechanisms. This approach, despite the divergences in locating the causes of transit, has been informed by the discourse within the Commission. To Commission officials an action means 'ensuring that there is harmonisation throughout the policies, because this is what a true Common European Asylum System requires. It requires equal standards.... We call it in EU jargon a level playing field. Whenever you end up submitting an asylum application, you should be treated more or less the same' (Interview. European Commission, Brussels, 20 November 2012). Those understandings translate into Commission policy documents. For example, the document accompanying the proposal for the amendment to the qualification directive states that: '[i]n a longer term, a level playing field, based on sufficient procedural and substantive standards, will lead to lesser impact of some structural pull factors such as community networks, since more equal access to protection will lead to more equal distribution of refugee communities between member states' (CEC 2009d: 23).

Despite the recognition of the detachment of this logic from the realities of asylum-seekers shaped by calculations concerning cultural, language and economic factors (see section 2.2.1), EU officials do not produce any incentives to remedy this problem. They explain their inaction by referring to the Commission's constrained research capacity: 'In order to

understand what causes secondary movements you have to do a study. So, basically, you would have to go and interview asylum-seekers and ask them: “What made you choose member state A, or member state B?”. But we don’t have this mandate, as the Commission. What we say in our legislation is in terms of not qualifying it, but just identifying the phenomenon’ (Interview. European Commission, Brussels, 20 November 2012); the effects of the Dublin regulation that ‘fully addresses the secondary movement phenomenon’ (Interview. European Commission, Brussels, 30 November 2012); or to EU states’ political will. As a Commission bureaucrat overtly admitted: ‘there is no political will among member states to discuss other than legal measures to diminish secondary movement’ (Interview. European Commission, Brussels, 28 November 2012).

‘Thinking and speaking’ EU actors produce ideas and values and put them into action (Schmidt 2006). The interpretations of transit, its causes and consequences, cultivated by Commission and member states’ officials structuralise the setting of the discursive construction of transit that is grounded in the divergences between interpretations of transit and an actual policy action, the detachment of EU policy from applicants’ actions, and the recognition of EU policy as properly responding to transit.

#### **4. Poland’s impact on EU asylum law and policy**

A country that has experienced significant asylum transit migration is Poland. Between 60-80% of asylum-seekers that arrive in Poland subsequently move west (see Chapters 3.2. and 7.4). The Polish government cooperates intensely with other member states on Dublin transfers, and each year the country receives over 1,500 Dublin transferees returned from Western countries. Around 60% of them are Chechens (see Chapter 6.3.3). Does the Polish government find the CEAS reform an opportunity to mitigate Poland’s transit status? How does it shape CEAS II procedural, reception and redistribution provisions?

The 2004 EU accession led Poland to become a full member of EU asylum policy. CEAS instruments negotiated in the Council between 2001 and 2004 structured the country’s asylum policy, even though Polish officials did not participate in drafting their objectives and provisions (Weinar 2005). The pre-determined EU *acquis* transposition laid the foundations for the current qualification, procedural and reception setting. Having the system built upon the CEAS I and asylum mechanisms already implemented according to

the Commission's guidelines, Poland did not report substantial problems in the debate on the CEAS reform.

In the 2008-13 EU Council negotiations regarding the reform, the Polish government showed passivity and followed the agenda driven by destination states. Poland's engagement revolved around a handful of points related to envisaged rearrangements of national structures as a result of EU provisions' transposition, including the provision of free legal assistance to asylum applicants. Poland's position was determined by, first, the government officials' perception of domestic asylum regulations as 'already Europeanised' (Interview. Office for Foreigners, Official G, Warsaw, 28 September 2012) and thus not requiring substantial alterations (see Chapter 5.3). Second, asylum was seen within the Polish government as an issue of low political significance (see Chapter 5.2.3). As a diplomat from the Polish Permanent Representation to the EU brought up:

Poland becomes involved [in EU migration decision-making] if, probably - I am taking a blind guess now - 80% of the dossier has a Polish context. If something is not vital to Poland, from here this 80%, we simply don't do anything... And migration is not a vital problem to us... so the minister [Mol] does not open room for debate... he doesn't want to commit himself... Rather things go on, but no one thinks about how we should provide a nice "delivery" (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012).

Finally, asylum officials, who were negotiating the CEAS overhaul in the EU Council, did not experience substantial pressure from political parties or NGOs in the country. The only debate at that time of the negotiations took place in the Polish parliament and concerned the Mol's information on the CEAS II mechanisms. It revealed MPs' sparse knowledge of the subject, and the Ministry's strong reluctance to discuss Poland's involvement in the CEAS reform (Sejm 2012).

Let us now see how Poland's position on asylum was translated into negotiations regarding specific CEAS II instruments. In the discussion on the revision of the procedures directive (CEC 2009a; EC 2011c), Poland took the position that new regulations would toughen the procedure and make it more complex (ECCM 2009b); and disagreed with the provisions whose implementation would require a budget increase (ECCM 2009b) and substantial

administrative rearrangements (CEA 2011a). Yet, the country did not find support within the Council to oppose an extension of remedy against the asylum decision to a full and *ex nunc* examination of facts and points of law undertaken by a court/tribunal (ECCM 2009b; CEA 2011a) that was to result in an overhaul of Polish second-instance institutions (the Refugee Board, and administrative courts); the extension of free legal assistance to the first-instance asylum proceedings (CEA 2011a); and an obligation to conduct an interview during accelerated procedures<sup>135</sup> (Interview. Office for Foreigners, Warsaw, 25 September 2012).

In the negotiations on the reception directive's modification, Poland solicited regulations leading to the improvement of the material conditions and a greater convergence of welfare and labour provisions. However, it made clear that the alterations must take into account a socio-economic situation of member states (ECCM 2007) and not increase the administrative burden (CEA 2011b). However, similar to the procedures directive, the country's effort to maintain provisions concerning appeals against decisions granting social benefits stipulated in the amended reception directive turned out to be unsuccessful (CEA 2011b). The 2013 reception directive amendment extended the scope of appeal, granting asylum-seekers the possibility of an appeal before 'a judicial authority' that has to review the case 'in fact and in law'<sup>136</sup>. Also, the free legal assistance has been made available to the applicants<sup>137</sup>. The implementation of these provisions (the directive has to be transposed by July 2015) will require an administrative revamp and additional funds allocation (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012).

Poland's opposition to any change in the appeals procedure was also manifested in the course of negotiations on the Dublin II regulation amendment. The country saw the current provisions as working well and argued that the alterations would lengthen the transfer and increase the cost of proceedings (ECCM 2008b). It was also raised that the proposed elevation of the procedural guarantees and a judicial review of transfer decisions would incur an additional administrative and financial burden (ECCM 2008b). Nevertheless, the

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<sup>135</sup> Art. 14(2) Directive 2013/32/EU.

<sup>136</sup> Art. 26(1) of Directive 2013/33/EU extends an obligation of member states to ensure that decisions relating to the granting, withdrawal or reduction of benefits, at least in the last instance, may be subject to an appeal before a judiciary authority in fact and in law.

<sup>137</sup> Art. 26(2) of Directive 2013/33/EU in cases of an appeal before a judicial authority introduces free legal assistance and representation in so far as such aid is necessary to ensure effective access to justice.

EU Council finally agreed to include into the regulation a new article on remedies: as of June 2013 (when the regulation came into force), a person (a third-country national) subject to the Dublin transfer to another member state has the right to appeal in fact and in law against the transfer decision before the court or tribunal<sup>138</sup>. However, the Polish government was passive in ‘uploading’ national preferences on other aspects of the Dublin regulation. As an OF bureaucrat involved in negotiations explained: ‘We didn’t have substantial problems with the Dublin provisions implementation... [and] in the amendment to the qualification directive the key problem was approximation of rights of refugees and beneficiaries of subsidiary protection, so something that we already had’ (Interview. Office for Foreigners, Warsaw, 25 September 2012). However, NGOs, which monitor asylum policy adoption at the grassroots, point out several deficiencies that hamper the application of Dublin provisions in Poland. This includes protracted transfer procedures and stigmatisation by Polish case workers of Dublin transferees returned to Poland from Western EU states and seeking protection in Poland again (HFHR 2011) (see Chapter 6.3.1 and 6.3.3). The Polish government’s inaction in Brussels to remedy some of these flaws illustrates its disinterest in shaping EU asylum agenda and consent to the solutions already drafted by the Commission and destination states.

The scope and the dynamics of Polish engagement with EU asylum policy have been shaped by a handful of MoI and OF bureaucrats, who act under the conditions of low public pressure and oversight (see Chapters 5.2.3, and 6.2). This Polish government undertakes a ‘fence-sitting strategy’ (Börzel 2002) in Brussels: it neither steers EU asylum debate, nor prevents the attempts of other EU states to do so. Consequently, Poland, by not ‘uploading’ national preferences on transit, or attempting to alter the existing EU mechanisms that address the phenomenon, *de facto* bolsters EU environment in which transit is understood and addressed through legal harmonisation, management and distribution.

## 5. Conclusion

This chapter shows that, first, the CEAS objectives have not been fully achieved. Nine years after the first-stage CEAS instruments completion, considerable pull-factors encouraging

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<sup>138</sup> Art. 27 Regulation (EU) No. 604/2013.

transit migration still exist. Recognition rates across the EU diverge, integration schemes for asylum-seekers remain underdeveloped in the East and South, and the levels of welfare have not been equalised. Second, the leading role of EU destination states results in the confinement of the CEAS reform to administrative and legal alterations. Due to member states' opposition, the amendment of EU reception provisions has not substantially levelled up reception and integration standards. Third, EU migration learning and practice-sharing frameworks: the EMN and the EASO contribute to the dissemination of policy logics and approaches envisaged in EU legislation. However, although the EASO seeks to facilitate EU asylum policy implementation and bring closer the practices of EU states, it does not attempt to transgress the space delineated by EU states, nor does it have the tools to initiate debate on cross-national and multi-dimensional migration challenges, including transit, and forge long-term solutions. Finally, Poland as a key EU transit state in Central and Eastern Europe, does not shape the debate on CEAS at the EU level. Whilst recognising Poland's status of a 'bus stop' for asylum-seekers passing through Poland on their way west, the Polish government chooses the most optimal and cost-effective option to contribute to EU-level *status quo* in the field of asylum, and allocates its resources to effectively implement the existing EU instruments to manage and control transit migrants.

How does EU asylum policy adoption across member states produce ideas and interpretations of transit? First, the analysis has demonstrated that EU asylum policy (CEAS I and CEAS II) has been primarily informed by EU destination states that emphasise governance, distribution and deterrence in addressing transit at the EU level. EU states, by preserving a wide latitude in transposing EU provisions, and constraining the Commission in putting forward proposals to elevate procedural and reception standards, delineate the EU institutional space within which ideas about transit germinate. This limits the discussion on transit to EU fora, such as EU Council committees, that produce EU legislation. Second, the Commission adapts to the above institutional dynamic. The Commission officials, although associate transit with a panoply of economic, social and institutional factors, develop policy action only on the latter. This incongruity between perceptions of transit and intentions that inform the policy process leads to marginalisation in EU debate on transit such problems as unequal reception standards, discrepancies in welfare assistance, or divergences in the scope of integration programmes that play a role in decisions about migration. Third, the Commission's attachment to legal and procedural harmonisation in the area of asylum informs the detachment of EU (legal) action on transit from the realities

of asylum-seekers that seem to undertake decisions about transit having reflected on the social, economic and cultural environment in different member states.

An understanding of the EU setting in which ideas about transit are produced contributes to the analysis of the construction of transit within Polish governance in three ways. First, the Polish migration governance system, which was established and grounded in EU asylum qualification, procedures, reception and distribution instruments (Chapter 3.3 and 3.4) shows high 'susceptibility' to EU legislation, policies and patterns of understanding. The next chapters will show that a faithful incorporation of EU instruments as developed at the EU level informs the Polish government officials' interpretations of transit and of the responses to it. This moulds the detachment of the government's action on asylum from the decisions of asylum-seekers traveling through Poland. Second, absorption of EU 'ways of dealing with transit' and emphasis on harmonisation and distribution informs the process of diminishing the role of integration in responding to applicants' needs and expectations. Finally, Poland's passivity in EU asylum law and policy-making illuminates the origins of the transit country construction in the sense that the legal and policy setting in which this construction occurs has been determined by the implementation of EU harmonisation and distribution mechanisms, previously negotiated in the EU Council and unaltered by Polish officials.

The development of the CEAS has been driven by the rationalist presumptions to achieve a common determination procedure and a uniform protection status throughout the EU, and to govern secondary movements in the most optimal and efficient way, and at the lowest possible cost. The intersecting national (the member states' objective to preserve implementation leeway, and *inertia* in the deepening integration in the field of reception and integration) and supranational (the Commission's emphasis on legal harmonisation and equalisation of protection standards) interests inform this dynamic. The legal and institutional setting of EU asylum policy-making has been also moulded by 'sentient' multi-level policy actors, who develop their understandings and interpretations about the reality through social interactions enabled by EU decision-making processes, learning, and communication. The discursive frames that emerge from those interactions inform the development of ideas about transit at the EU level.

This analysis seeks to reconcile the competing rationalist and constructivist accounts by developing the conditions and mechanisms of their interaction to analyse how EU-determined legal and institutional fields of the Polish migration and asylum system enable the construction of transitiness. It is thus to the national dimension that we turn in the next chapter.



## **Chapter 5: The Polish Core Executive Institutions: Giving Shape to EU Asylum Policy**

### **1. Introduction**

This chapter seeks to address the question of how EU asylum policies' and ideas' translation into the Polish core executive institutions provides the setting for the discursive construction of transitness informed by instrumental motives and the effects of socialisation. By the Polish core executive is meant the Ministry of Interior (Moi), the Office for Foreigners (OF), and the Ministry of Labour and Social Policy (MLSP) that produce asylum policy and give shape to EU law transposition, and then pass the norms and regulations to the grassroots. The key coordinating function within the bureaucracy has been performed by the OF that through sharing the core executive and 'street-level' competences shapes the instruments that are subsequently put into practice.

The analysis will demonstrate that the core executive setting that enables the transitness formation has been shaped by, first, an institutional confinement of the discussion and formulation of mechanisms on transit to EU-determined paradigm to address the phenomenon through governance; second, a literal incorporation of EU asylum laws and policies, which occurs in a way that is separate from the multi-dimensional determinants of the movement; and third, by fossilisation of a policy response to transit through Polish officials' engagement with EU-induced policy learning processes.

The core executive setting develops within the post-EU accession Europeanisation. First, with accession Poland's relationship with the EU lost an element of coercion: EU conditionality ('if you don't align with EU standards, you won't be allowed to join the EU'), which enabled a relatively smooth incorporation of EU asylum norms, evolved into bargaining and consultation. Second, in the post-EU accession period, Polish migration and asylum civil servants have been involved in a range of social interactions and communication with EU and member state actors. The evolution of the Polish asylum governance system has been driven by two intersecting dynamics: the strategic calculations to translate EU policies in an optimal way to ensure administrative efficiency;

and EU-triggered socialisation. In order to demonstrate the increasing role of the latter, this chapter draws on the conditions and mechanisms introduced in Chapter 2 under which actors are more prone to learning and persuasion/argumentation.

This chapter first examines the core executive institutions, how they evolve, and what are the relationships between them. Second, it analyses EU asylum law adoption that has structuralised the Polish asylum qualification, procedures, reception and distribution instruments. Third, it investigates Polish asylum core executive actors' learning. Finally it situates within the asylum legal and institutional setting the civil servants' interpretations of transit.

## **2. The core executive framework**

This section first maps out the Polish core executive asylum institutions. Second, it examines the main drivers of post-EU accession institutional change. Finally, it discusses depoliticisation of the Polish asylum system: the policy and legislation have been forged by a narrow circle of government bureaucrats that act with little scrutiny from outside (the parliament, NGOs). The analysis identifies the drivers of the bureaucratic arena of Polish asylum policy that enable the transit country construction: the government's structural incapacity to transgress the boundaries set by EU asylum law, and to formulate comprehensive, long-term strategies to mitigate and/or deflect transit.

### **2.1. Actors**

In order to comprehend the role of the national-level actors in the post-EU accession asylum policy-making, one has to refer to the communist time, when the Polish core executive system was established. Goetz and Zubek (2007: 598) argue that at that time the task of political and policy steering was routinely performed by the communist party's central administration. The prime minister had few formal coordination powers, the cabinet was marginalised, and the role of the Office of the Council of Ministers was reduced to organisational and administrative tasks (Rybicki 1985). Weak party discipline and incohesiveness of coalitions added to the fragmentation of the government: 'ministers tended to operate as personal or party fiefdoms, while close linkages to client industries

and state enterprises often pitted them against one another in policy or budgetary disputes' (Goetz and Zubek 2007: 518).

The 1990s' post-communist period saw the development of central capacities for steering within the government by imposing collective and hierarchical constraints on individual ministers. However, as Goetz and Zubek (2007: 519) note, the inter-ministerial consultations within the contemporary Polish government have still been dominated by ministers, with a largely reactive role for the centre of government. The cabinet and the prime minister lack capacity to correct structural, ministerial law-making strategies. We can identify two avenues for pursuing ministerial law-making strategies. First is provided by the configuration of content rules that establish limited scrutiny over legislative actions that a minister may propose within the framework of the cabinet plan. Second is provided by the content, temporal and information rules governing the opportunities for tabling the proposals outside the cabinet work plan. Work on such proposals may be undertaken at any time subject to notification of the prime minister (Goetz and Zubek 2007: 522). This is, of course, not to say that individual ministers do not face any procedural constraints in law-making. The prime minister can use, for example, the cabinet meetings to review the progress in the preparation of planned legislation (Goetz and Zubek 2007: 522).

The MoI wields a strong formal position within the government and 'coordinates actions concerning state migration [and asylum] policy'<sup>139</sup> (Table 5.1). Since the early 1990s (see Chapter 3.3), it has set the political agenda, initiated and monitored legislation, and framed cooperation with international organisations and the EU. The Ministry supervises<sup>140</sup> two executive bodies: the OF that examines asylum claims<sup>141</sup>, provides welfare assistance to asylum-seekers and manages reception centres<sup>142</sup>; and the Border Guard (BG) that entertains asylum applications at the border<sup>143</sup>, manages border control<sup>144</sup> and expels

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<sup>139</sup> Art. 29(1)(2) Act of 4 September 1997 on sectors of the government administration (Journal of Laws 1997, No. 141, item 943, with further amendments).

<sup>140</sup> Ibid., Art. 29(4).

<sup>141</sup> Art. 143(1) (1) (a) Act of 13 June 2003 on foreigners (Journal of Laws 2003, No. 128, item 1175, with further amendments). Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws 2003, No. 128, item 1176, with further amendments).

<sup>142</sup> Ibid., Art. 143(1)(3).

<sup>143</sup> Chapter 2 The 2003 Refugee Protection Act (Journal of Laws 2003, No. 128, item 1176, with further amendments).

<sup>144</sup> Chapter 2 The 2003 Foreigners' Act (Journal of Laws 2003, No. 128, item 1175, with further amendments). Act of 12 October 1990 on the Border Guard (Journal of Laws 1990, No. 78, item. 462, with further amendments).

(unwanted) foreigners<sup>145</sup>. The Ministry also frames ‘downloading’ and ‘uploading’ of EU norms and standards: in cooperation with the OF it gives shape to EU law transposition, and its delegates take part in EU Council political-level meetings and carry out negotiations with the Commission. The second key ministry is the MLSP that determines foreigners’ integration policy<sup>146</sup>, manages integration programmes for international protection holders, and regulates their access to social services and the labour market<sup>147</sup>. It also cooperates with grassroots-level centres for family assistance, allocating funding and taking care of already established refugees (Table. 5.1).

**Table 5.1 The core executive and grassroots implementation levels, 2013<sup>j</sup>**

Level	Objectives	Institution	Policy/area of competence
Core executive	<ul style="list-style-type: none"> <li>• Setting migration and asylum policy objectives and legislation</li> <li>• ‘Downloading’ and ‘uploading’ of EU norms and standards</li> <li>• Coordination of EU and international cooperation</li> </ul>	Ministry of Interior	Creation and coordination of state migration and asylum policy; initiation of legislation; coordination of action in the EU.
		Ministry of Labour and Social Policy	Creation and management of integration programmes for beneficiaries of international protection (refugees and subsidiary protection holders); elaboration of labour policy.
		<b>Office for Foreigners</b>	<b>Adoption and modification of asylum law; transposition of EU legislation; negotiation over EU legal instruments.</b>
Grassroots	<ul style="list-style-type: none"> <li>• Putting laws and policies into practice: asylum case examination, provision of integration and social assistance</li> <li>• Communication with asylum-seekers in the course of asylum proceedings and assistance provision</li> </ul>	<b>Office for Foreigners</b>	<b>Asylum cases examination; management of social support schemes for asylum-seekers.</b>
		County Centres of Family Assistance (managed by the local authorities)	Management of integration programmes for international protection holders.
		Border Guard	Border control and entertainment of asylum applications.
		NGOs and civil society organisations	Cooperation with the government on asylum law and policy application; provision of advice and assistance to asylum-seekers and international protection holders.

Notes:

<sup>j</sup>) The table presents the government asylum actors. NGOs and civil society organisations are listed as grassroots institutions because they provide services (e.g. organise language training in reception centres) to the government and/or closely cooperate with it in implementing policy.

Source: Author.

<sup>145</sup> Ibid., Chapters 8, 8b, 9, and 10.

<sup>146</sup> Chapter 5 Act of 12 March 2004 on social assistance (Journal of Laws 2004, No. 64, item 593, with further amendments).

<sup>147</sup> Act of 20 April 2004 on employment promotion and labour market institutions (Journal of Laws 2004, No. 99, item 1001, with further amendments).

The core executive institutions interact in several dimensions. First, there is MoI-OF cooperation: the Ministry, whilst initiating legislative processes, framing the government and public consultations and presenting draft regulations in the parliament, is assisted by the OF. The Office provides the Ministry with expertise and knowledge of how regulations are produced at the EU level (Interview. Ministry of Interior, Warsaw, 18 October 2012). Second, there is MoI-MLSP collaboration over integration policy and legislation; for example, the MLSP drafted chapters on integration that were subsequently inserted into the 2012 Polish Migration Policy (the key document that delineates the state migration and asylum policy objectives), prepared by the MoI. Third, the OF and the MLSP exchange data and good practices on social aspects of asylum policy. On the one hand, MSLP officials regularly take part in discussions on the OF-managed reception system; on the other, OF case workers contribute to elaboration of foreigners' integration policy (Interview. Ministry of Labour and Social Policy, Warsaw, 20 August 2012). Finally, the government consults with NGOs and IOs on policy and legislation. They contributed, for instance, to two government's strategies: the Polish Migration Policy and the Policy on Foreigners' Integration (2014). However, due to limited administrative and financial resources, NGOs' action assumes an *ad hoc* and reactive character (see section 2.3).

The position of the core executive within the political system has been determined by interactions with the president and parliament. The presidency imposes several limitations. First, the president has the right to veto and can block the enactment of legislation approved by the parliament. Second, the president has the power of legislative initiative. Yet, Polish presidents have exercised this right only occasionally (Zubek 2001: 916). On the other hand, the core executive's capacity to shape policy is constrained by the parliament's involvement in law-making. The core executive's legislative proposals must compete for parliamentary time and resources (Zubek 2001: 917-18). At the same time, the core executive institutions enjoy only limited privileges in the legislative process. Parliament, for example, can table bills in areas where government bills already exist (Zubek 2001). However, as we will see in section 3, the parliament's engagement with government-structured asylum policy-making has been scarce.

The core executive structure has been altered by practice. It has several deficiencies that mould an institutional setting of the transit country construction. First and foremost, the

OF assumes a far greater role in asylum decision-making than policy execution <sup>148</sup> (see Chapters 3.4.2 and 6.2). One of the key drivers of the OF competences' extension has been an unclear division of competences between the Office and the MoI: 'the document on the division of functions between the [MoI] Department of Migration Policy [and the Office [OF] has never come into force, which means that in practice we don't know what is the Department's responsibility and what is the Office's responsibility and these competences may well overlap. I know the reason why this happened, but I would prefer to leave it as these are very political issues' (Interview. Office for Foreigners, Warsaw, 17 July 2012). One of the factors that determined this institutional incoherence was a political affiliation of the then deputy Minister of Interior responsible for the migration and asylum portfolio, who was nominated for this position following the change of the government in 2005, and whose political preferences differed from those of the Head of the Office, appointed earlier, in 2001 by the centre-right government. However, although leaving the OF-MoI relationships in the migration sector undefined helped to avoid possible political tensions, over time, an extension of the Office's legislative competences has *de facto* strengthened the position *vis-à-vis* the Ministry. The above statement of the OF senior official and his reluctance to comment on cross-institutional issues that go beyond the remit of the Office also tells us something about the nature of migration and asylum policy-making. Although aware that the administrative shortcomings might hamper decision-making (the position of the MoI has been undermined as a result of the development of the OF), he did not undertake any steps to remedy them. This contributes to the argument, which this chapter will discuss later, about an inability of national-level decision-makers to address migration challenges that require long-term inter-institutional responses.

The expansion of administrative resources and expertise has led the OF to influence the drafting and implementation of asylum policy. For example, the Office prepared the sections on asylum in the MoI Polish Migration Policy (MoI 2012). As an OF civil servant explained: 'Our contribution to this document was such that we passed on information on the current state of affairs, trends and how they might look in the future, and this was incorporated by the MoI... without any alterations' (Interview. Office for Foreigners, Warsaw, 25 September 2012). Moreover, asylum legislation has been *de facto* framed by a handful of OF bureaucrats: 'to be perfectly frank, we [the OF] work out everything and they [the MoI Department of Migration Policy] just want to have a general view about it and

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<sup>148</sup> Journal of Laws 2003, No. 128, item 1175, with further amendments.

that's it... I deal with EU instruments transposition because I took part in EU Council negotiations... [the subsequent legislation] amendments are always prepared by a few persons' (Interview. Office for Foreigners, Warsaw, 25 September 2012). Also, the OF shapes asylum policy 'uploading' in Brussels: its experts participate in EU Council working groups and provide MoI senior officials, with expertise and information. In effect, the Office shares the core executive (Poland's action on asylum in Brussels, steering EU law transposition) and grassroots (implementation of asylum law, and organising asylum determination procedure) implementation functions (see Chapter 6.2). The OF Department of Refugee Proceedings (OF DRP), in fact, determines asylum policy elaboration (Table 5.2). This results in asylum policy assuming a technocratic dynamic: asylum matters have been addressed through effective management, reallocation of resources and/or introduction of new regulations, rather than through formulation of comprehensive policy instruments. In this sense, transit migration emerges as an object of control and management, and not as an object of fully-fledged policy responses.

**Table 5.2 The Office for Foreigners' policy implementation functions, 2013**

Level	Administrative entity	Functions
Core executive	Department of Refugee Proceedings	<ul style="list-style-type: none"> <li>• Preparation of asylum law amendments<sup>i)</sup>.</li> <li>• Transposition of EU asylum regulations into Polish legislation<sup>i)</sup>.</li> <li>• Negotiation of EU asylum policy and legal documents in the EU Council<sup>ii)</sup>.</li> </ul>
	Department of Social Assistance	<ul style="list-style-type: none"> <li>• Preparation of asylum law amendments in the field of reception and social assistance<sup>i)</sup>.</li> </ul>
	Legal Bureau	<ul style="list-style-type: none"> <li>• Supervision over legislative proposals and EU regulations transposition undertaken by OF departments.</li> </ul>
	International Cooperation Bureau <sup>iv)</sup>	<ul style="list-style-type: none"> <li>• Coordination of OF action in the EU and cooperation with international migration and asylum institutions<sup>iii)</sup>.</li> </ul>
Grassroots	Department of Refugee Proceedings	<ul style="list-style-type: none"> <li>• Examination of asylum applications and rendering international protection decisions.</li> <li>• Implementation of the Dublin II regulation.</li> <li>• Collection and analysis of COI.</li> </ul>
	Department of Social Assistance	<ul style="list-style-type: none"> <li>• Management of social assistance schemes for asylum-seekers.</li> <li>• Administration of OF reception centres.</li> </ul>

*Notes:*

<sup>i)</sup>Legal amendments, including those transposing EU law, are prepared by experts from the Department of Refugee Proceedings (procedural and administrative aspects) and the Department of Social Assistance (reception conditions). Formally, although the legal amendments process is coordinated by the Ministry of Interior, the Office for Foreigners has been given wide implementation leeway.

<sup>ii)</sup>The Office's organisational rules do not comprehensively regulate the participation of OF experts in EU Council's and Commission's expert groups and committees. According to practice, OF experts represent Poland in lower-level technical committees and provide expertise to the officials from the Ministry of Interior and the Polish Permanent Representation to the EU who attend political-level meetings, such as JHA Counsellors meetings.

<sup>iii)</sup>The practice has restricted the role of the International Cooperation Bureau in coordinating OF external action to logistics, e.g. organisation OF bureaucrats' trips to Brussels. The Bureau does not have sufficient administrative and human resources to fulfil the functions stipulated in the organisational rules.

<sup>iv)</sup>Order No. 1 of the Head of the Office for Foreigners of 8 August 2013 on establishing the organisational rules of the Office for Foreigners renamed the 'International Cooperation Bureau' into the 'Bureau of the Head of Office'. Yet, its functions have not been substantially altered. Since at the time of writing this dissertation the Bureau of the Head of Office was at the stage of building its organisational structure and developing resources, and to maintain coherence with the interview data (some interviews were undertaken with respondents working in the then International Cooperation Bureau (2012)), this analysis uses the name introduced by Order No. 2 of the Head of the Office for Foreigners of 27 September 2010 (see below).

*Source:* Order No. 2 of the Head of the Office for Foreigners of 27 September 2010 on establishing the Organisational rules of the Office for Foreigners. Annex No. 1: Organisational rules of the Office for Foreigners; and interview data (2012).

Furthermore, different aspects of asylum policy develop at different speeds: the Mol-/OF-led transformation of asylum procedures and institutions as a result of EU law implementation; and *inertia* in elaboration of MLSP-shaped integration and labour policy, which remains outside the EU's competence. It is because of, first, the 'weakness of certain structures of the Ministry of Labour, dealing with migration [and asylum], which are small and inefficient' (Interview. Ministry of Interior, Warsaw, 12 July 2012). As a result, 'the Ministry isn't proactive. I would rather say that it acts conservatively, as we call for various things, but unless it turns out that something has to be done, it isn't done' (Interview. Ministry of Labour and Social Policy, Warsaw, 20 August 2012). Second is the MLSP's lack of



political interest in immigration and asylum: 'we don't have such a minister in the Ministry of Labour, who would be so involved in migration matters, as the Minister of Interior... this is the factor that impacts on how these matters are treated [here]' (Interview. Ministry of Labour and Social Policy, Warsaw, 7 September 2012). Those mid-level civil servants, although critically assessing the environment in which they operate, are deemed to be helpless in the face of decisions undertaken at the high political level. However, their disagreement to the MLSP staying in the 'back seat' of migration and asylum policy-making does not translate into a broader reflection upon the causes and implications of migration in Poland. Rather, the recent efforts to reformulate integration policy by the MLSP have been spurred by the MoI (see section 3).

Finally, one can discern flaws in communication between the MoI and the MLSP manifested in, for example, formulation of divergent policy objectives and preparation of incoherent government documents. For instance, whereas in the course of the debate on the Polish Migration Policy document, the MLSP, whilst presenting a cautious approach, advocated preserving the current integration programmes for international protection holders, the MoI advocated reconsideration of existing mechanisms and the development of institutions supporting refugees in the labour market (MoI 2009a). Also, MoI and MSLP positions diverge as far as institutionalisation of integration policy is concerned: the MLSP Foreigners' Integration Policy calls for the establishment of a new executive agency to deal with integration (MLSP 2013: 7); the MoI Migration Policy recommends an extension of OF integration competences (MoI 2012: 100-1). This exhibits an incapability of the highly managerial setting of migration and asylum policy to yield a bureaucratic stimulus to forge a more inclusionary approach to migration, and therefore, to encourage potential transit asylum-seekers to settle and integrate in Polish society.

## **2.2. Institutional evolution**

European integration drives the Polish asylum system evolution. EU law transposition and alignment with EU standards impose strengthening of the administrative and functional capacity and organisational rearrangements. As a former adviser to the Polish Prime Minister pointed out: 'we internally tell ourselves how, within our institutional environment, we will be able to effectively implement EU decisions or policies. Frequently, these [institutional] decisions are undertaken *ad hoc*, because something has to be done'

(Interview. University of Warsaw, 25 September 2012). The 2008 implementation of the qualification directive (which envisaged a new form of protection: subsidiary protection, and specified protection grounds) and the procedures directive (which introduced common asylum determination standards) (see section 3.1) led to modification of asylum procedure, organisational rearrangements in the OF Department of Refugee Proceedings, and recruitment of new staff (Moi 2007b: 42-3). The Dublin II regulation adoption resulted in the establishment of the OF unit to deal with asylum-seekers' transfers from and to Poland and the mechanisms of information exchange with other member states.

EU adjustments intersect with domestically-driven rearrangements. An overhaul of the Polish asylum and migration framework took place between 2005 and 2007, resulting from a decision of the then newly appointed deputy Minister of Interior. As he pointed out with hindsight:

my predecessor, who at the same time was the Head of Office for Repatriation and Foreigners... shaped all aspects of migration and asylum policy... Once I became the Secretary of State and had to deal with these matters, I did not have any instrument in the Ministry to oversee the Office [the former Moi Secretary of State maintained the position of Head of Office for Repatriation and Foreigners]... the aim was then to introduce such instrument (Interview. Ministry of Foreign Affairs, Warsaw, 2 January 2013).

An enactment of new immigration law (2007)<sup>149</sup> curbed the role of the Office for Foreigners<sup>150</sup> to the 'executive institution implementing Moi policies' (Interview. Ministry of Foreign Affairs, Warsaw, 2 January 2013). Several functions of the Office were dismantled, including coordination of government institutions on migration and international cooperation. The Minister of Interior reinforced its formal position as the key government coordinator of migration policy, and was supported by the Moi Department of Migration Policy (DMP) that filled the gap in the Ministry's administrative structure. The department drafts migration policy objectives, takes part in legislative processes, and conducts research on migration. However, as indicated in the previous section, it has not

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<sup>149</sup> Chapter 13 Act of 24 May 2007 on the change of the act on foreigners and other selected acts (Journal of Laws 2007, No. 120, item 818).

<sup>150</sup> Between 2001 and 2007: the Office for Repatriation and Foreigners; since 2007: the Office for Foreigners.

been precisely stipulated through what kind of mechanisms, and in which areas the MoI DMP holds scrutiny over the OF. This problem acquires significance in the field of asylum, as the DMP 'does not have any experts dealing with asylum matters' (Interview. Ministry of Interior, Warsaw, 18 October 2012). Consequently, in practice, despite the shift of competences from the OF to the MoI, the former has retained a strong standing in the system (see section above).

The foregoing determinants of institutional change have been summarised by the RB's member, who described the Polish asylum setting as 'a constant search for a technical way of managing asylum matters and the division of competences' (Interview. Refugee Board, Warsaw, 6 September 2012). The orientation of the system towards undisturbed absorption of EU rules and allocation of resources to avoid political tensions has produced several deficiencies that structure the bureaucratic arena and enable the construction of transitness. First, the national-level migration framework incorporates EU-level patterns of institutional evolution. The EU, as the key driver of the Polish asylum framework, prompts institutional adaptation that occurs primarily within the structures that coordinate cooperation with the EU (the MoI) and incorporate EU legislation (the OF). This enables the translation of an instrumental logic to solve the transit problem: to calculate strategically to govern the effects of transit and redistribute transit migrants using the most optimal and cost-effective mechanisms.

Second, the 2005-2007 EU-induced reform of migration and asylum setting revealed a reactive dynamic of migration policy-making. The reform was devised by a deputy Minister of Interior, who, having consulted his ideas with his closest advisors, and being given free rein by his supervisor, moulded the framework according to his own preferences. To quote his former advisor:

this person did not have any idea of what he was managing, what were his competences. He had a linguistic background and was a German specialist. He was moving up a career ladder in the Ministry of Foreign Affairs and he hadn't had any contact with immigration before taking office in the Ministry of Interior... This was from where these readjustments [within the MoI] emerged... repatriation was within the responsibility of the Office for Foreigners, so he transferred it to the Ministry of Interior, as it seemed to him that it would be better. There was the

Office for Repatriation and Foreigners, so he renamed it the Office for Foreigners... There was no department dealing with migration policy [within the MoI], so he established it (Interview. Refugee Board, Warsaw, 6 September 2012).

The Minister acted therefore as a 'competitive agenda-setter' (Zubek 2005: 595) and a central authority in the area of migration and asylum within the core executive. Also, the MoI did not explain how the modifications arising from the reform would influence policy implementation and/or improve Poland's capacity to deal with inflows.

At the same time, however, the above statement illuminates mistrust that the newly-appointed Minister encountered within the system that he attempted to reformulate. The Minister's then advisor, who used to call him a 'revolutionary', as a representative of that system (he previously worked as an asylum case worker in the BG and the OF) neither agreed with the actions of his principal nor had respect for him. The latter was most probably the result of a significant lack of expertise in asylum within the core executive: the Minister had to seek advice among officials representing regulatory agencies and not among officials working in the Ministry. A migration expert from the University of Warsaw described the then dynamic within the MoI as 'rationality arising from an actual assessment [of the current situation] by the government bodies, and not as a result of profound reflection or arguments put on the line... [This was rationality] suggesting that this would probably be the best [way of doing things]' (Interview. University of Warsaw, 25 September 2012). This rather chaotic decision-making and institution-building within the MoI significantly constrain the mobilisation of administrative resources to formulate a multi-faceted response to a complex and constantly evolving transit migration. The latter has been, therefore, perceived through 'governance lenses' and managerial concerns over overseeing and steering the flows.

### **2.3. Depoliticisation**

An important facet of the Polish migration and asylum governance setting is depoliticisation. Flinders and Buller (2006: 295-6) define it as 'the range of tools, mechanisms and institutions through which politicians can attempt to move an indirect governing relationship and/or seek to persuade the demos that they can no longer be reasonably held responsible for a certain issue, policy field or specific decision'.

Depoliticisation alters the arena or process through which policy decisions are taken (i.e. the form of politics changes or the issue is subject to an altered governance structure) (Flinders and Buller 2006: 296). The selection of functions to be 'depoliticised' and subsequent policy tactics and tools has been determined by politicians. According to Flinders and Buller (2006: 298) the most frequent tactic for employing the objective of depoliticisation is 'institutional depoliticisation' where '[a] formalised principal-agent relationship is established in which the former (elected politician) sets broad policy parameters while the latter (appointed administrator or governing board) enjoys day-to-day managerial and specialist freedom within the broad framework set by ministers'. In the case of the depoliticised Polish asylum setting, the agent (and its sphere of responsibility), released from political considerations and policy pressures (to which elected politicians are subject), has been the OF that, as demonstrated above, gains the leading role in shaping asylum legislation and practices.

The depoliticised environment of Polish asylum policy-making has also been moulded by several factors that develop outside the government and that decrease public and political pressure on asylum officials. This includes a low inflow in the country, scarce scrutiny from the side of the parliament and NGOs, and scant interest of public opinion and media in immigration. First, the statistical data examined in Chapter 3.2 show that the foreigners' share in the Polish population remains sparse (less than 2%). Consequently, immigrants do not place a substantial burden on the budget: whereas in 2012 44 million zlotys were allocated to support asylum-seekers<sup>151</sup> (OF 2013) and 2.5 million zlotys to facilitate integration of international protection holders<sup>152</sup> (MLSP statistics 2013), unemployment benefits offered to Polish nationals went over 2.6 billion zlotys (CSO 2013). Also, foreigners do not pose a threat to the labour market: in 2012 nearly 40,000 foreigners (mostly from Eastern Europe) were granted permission to work in Poland<sup>153</sup> (MLSP statistics 2013), whereas the total number of registered employees in the country came to 14 million (CSO 2013). Moreover, Eastern European newcomers fill in labour shortages in several sectors of

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<sup>151</sup> Assistance provided to asylum-seekers accommodated in reception centres: 44.362.390.31 zlotys. This includes a financial equivalent for food, funds to purchase clothing and shoes and personal-hygiene products, and pocket money for minor expenses (OF 2013).

<sup>152</sup> In 2012 expenses for Individual Integration Programmes (*Indywidualne Programy Integracji*) for refugees and beneficiaries of subsidiary protection amounted to 1.796.784 zlotys. The amount includes a maintenance support (see in detail Chapter 6.3.1). Additionally, welfare benefits for international protection bearers and other EU and non-EU immigrants totalled 1.059.264.68 zlotys.

<sup>153</sup> This excludes EU nationals.

the economy, including construction and agriculture, and thus their presence in the country has been seen as clearly positive (Grzymała-Kazłowska and Okólski 2003).

Second, the parliament's action in the field of migration and asylum has been confined to formal relationships with the government grounded in legal and constitutional checks and balances. The parliament's passivity (that has its origins in the early 1990s, see Chapter 3.3 and 3.4) stems from meagre resources to conceptually contribute to complex and highly technical asylum debate. This was exhibited, for example, in the OF's withdrawal from annual reporting of its activity before the parliamentary Internal Affairs Committee, and went almost unnoticed by politicians. Gutkowska (2007) notes that the OF's justification of the withdrawal by recalling previous positive parliamentary assessments of the Office's actions cannot be seen as sufficient. On the other hand, the discussion on the fundamental amendment to the Refugee Protection Act (2008)<sup>154</sup> that transposed into Polish law the qualification directive and the procedures directive (see next section) illuminated how the Minister of Interior's request for 'a quick enactment of the bill due to a delay in transposition of EU directives' (Sejm 2007) eliminated any opposition and led the parliamentary committees to approve new legislation without almost any reservations (Sejm 2007, 2008). This contributes to the argument that the process of the EU *acquis* implementation gives the core executive a clear edge over the parliament (Lippert *et al.* 2001) and feeds into a wider expectation that European integration strengthens the government (Moravcsik 1994).

Third, the government's action has been scarcely influenced by NGOs and migrant organisations. Biernath (2007: 153; see also Klaus 2011) links NGOs' low policy input with the transformation of Polish civil society that, following a long period under totalitarian rule, has not yet been able to institutionalise its policy influences and actions; and with low immigration that does not mobilise the grassroots organisations to advocate for migrants' rights. On the other hand, structural factors play a role. Klorek (2011), who conducted research on the post-EU accession development of the Polish third sector, emphasises NGOs' difficulties with securing funding that translate into their low research capacity and focus on short-term actions. Therefore, a number of NGOs in the migration sector turn to the EU for financial assistance. This includes application for grants within such schemes as the European Refugee Fund that enables Polish organisations to operate and to provide

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<sup>154</sup> Journal of Laws 2008, No. 70, item 416.

different kinds of administrative, legal and social support to immigrants and asylum-seekers.

Mahoney and Beckstrand (2009: 7) identify the Commission's two-fold incentive to support civil society organisations in member states: input legitimacy in the policy making process, and the creation of a social space for social cohesion and policy entrepreneurship. The Commission hopes that NGOs can form a transnational society, and in doing so, enhance the legitimacy and salience of the EU within the European public, as is evidenced by the following: 'by encouraging national NGOs to work together to achieve common goals, the European NGO networks are making a vital contribution to the formation of a "European public opinion" usually seen as pre-requisite to the establishment of a true European political entity' (CEC 2000c: 5). Similarly, the White Paper notes that: 'civil society organisations... have a very important role to play in raising public awareness of European issues and public debates, and in encouraging people to take an active part in those debates' and that role 'could be strengthened through targeted cooperation projects' (CEC 2002c). The Commission fosters EU civil society organisations by directly funding them (Mahoney 2004).

The post-EU accession EU funding transfer has contributed to the rise of migration NGOs in Poland. For instance, whereas in the early 1990s the number of NGOs involved in consultations over migration legislation could be counted on the fingers of one hand (Mol 1995a), the debate on Poland's Migration Policy document in 2012 attracted over 50 organisations (Mol 2011). As a representative of a Warsaw-based NGO concluded: 'I think that without EU funds around 90% of the currently functioning organisations would lose one's *raison d'être*' (Interview. Polish Migration Forum, Warsaw, 24 July 2012). However, practice shows that in many cases, EU grants rather than enhancing NGOs' capacity to shape the government's agenda, narrow their actions to the sponsor's priorities, timetables and results (Klorek 2011). As a result, migration and asylum NGOs allocate their resources to implement EU-tailored projects that focus on direct assistance and advice to asylum-seekers (Biernath 2007: 154) and entices the former away from undertaking more conceptual work, including research and policy evaluation. This draws NGOs away from keeping an eye on the government's legislative and policy action on transit migration, including elaboration of EU-induced tools to control the movements.

This depoliticised core executive setting determines asylum policy formulation. First, it bolsters the government's position in relation to NGOs. A Refugee Board member assessed the role of the latter in asylum policy-making:

They formulate postulates that do not have any chances to be implemented... The problem is that they are not aware that this is unrealistic... This is due to the fact that a person's way to NGOs starts during the studies, and there is a group of people who later stay in these NGOs. These are the people who didn't work in the system and have a student mentality and they so think (Interview. Refugee Board, Warsaw, 6 September 2012).

This reveals not only a disparaging attitude towards NGOs but also indiscernibility of those institutions' struggles to build the resources to engage on an equal-footing with the government. Also, by dismissing NGOs, this official seems to disregard their role in EU funding absorption and promoting civil society and building intercultural relationships between Poles and foreigners.

Second, meagre NGO pressure on the government fossilises officials' conviction of the needlessness of change of the current technocratic course of action, and allows to push forward their preferences and policies at a preferred pace. The former deputy Minister of Interior pointed out that 'If something is not a political issue, or there is no interference of politics into legislation, it runs its administrative course... problems are being solved calmly' (Interview. Ministry of Foreign Affairs, Warsaw, 2 January 2013). Such statements, of course, do not incentivise the government migration structures to develop an overactive approach, reshape paradigms, or create new ideas or programmes. Rather, the message sent from the superiors down is to 'do what is required by EU law and nothing more, nothing beyond this' (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012). Hence, whereas EU asylum qualification, procedures and reception mechanisms have been put in place in accordance with EU recommendations (see next section), the government marginalises the socio-economic aspects of asylum policy. This resulted in, for example, delays in preparing the Foreigners' Integration Policy: whereas the initial attempts to prepare the document were undertaken in 2007, its first draft was produced only in early 2013 (Interview. IOM, Warsaw, 15 August 2012).



Third, a paternalistic approach of government officials to NGOs and their role in Polish migration policy-making affects the relationships between these actors. The government, which preserves the leading role in the policy process, strengthens its advantage by determining consultations on legal or policy documents: ‘a representative of the Office [the OF], whilst presenting the provisions of the new Foreigners’ Act, which nobody had seen before, said something like: “we are introducing changes that you, ladies and gentlemen, will be content with”. We [NGOs’ activists] burst out laughing, because we didn’t want to be content but to have our position taken into account’ (Interview. Polish Migration Forum, Warsaw, 24 July 2012); and by showing its superiority in day-to-day contacts: ‘when we say that our clients [asylum-seekers] have this or that problem, we hear from the government that they lie. When we say that there are stateless persons and there are no regulations that could protect them, we hear that they all have passports and keep them in divans...’ (Interview. Helsinki Foundation, Representative C, Warsaw, 13 July 2012).

The depoliticisation of the Polish asylum setting contributes to the formation of transitness because it, first, shapes the institutional conditions under which government officials’ perceptions of their environment and of the interactions with non-governmental actors are forged. The government has been seen by civil servants as the leader of the debate on transit that decides on incorporation or rejection of alternative visions to deal with the phenomenon put forward by various stakeholders outside the policy core. Second, the depoliticised and technocratic framework enables decision-makers to maintain the *status quo* and not to involve into policy debate non-governmental actors. This institutionally hinders NGOs’ input into reformulation of EU-determined (and incorporated into the Polish system) approaches to transit based on legal harmonisation and control.

To summarise the discussion on institutional evolution, the post-EU accession asylum policy implementation at the core executive level has been steered by the MoI and the OF, and their understanding of EU policy. The development of this setting has been shaped by rearrangements to improve administrative efficiency and the capacity to incorporate EU legislation that occur under the conditions of scarce influence of non-governmental actors and meagre public policy and media scrutiny. This strengthens the government-led policies that address transit through management, and mitigates the production of incentives to elaborate socio-economic aspects of asylum policy and build the capacity to assimilate asylum applicants. The dynamic of bureaucratic evolution moulds interpretations of transit

as a phenomenon that can effectively be regulated by a handful of government civil servants, and without initiating policy debates and/or involving NGOs.

The evolution of the national-level administrative arena has been informed by instrumental and social motives. The allocation of resources to asylum governance and to incorporate EU legislation structuralises the debate on asylum and transit and imprisons it within the technocratic considerations of asylum admission and determination procedures, distribution and expulsion. These considerations are premised on calculations to establish the asylum system that meets international standards and accommodates EU recommendations, and enables an effective and timely asylum case examination, and control of the flows. The core executive officials also generate perceptions of asylum institutions as efficiently addressing migration pressures, share them, and seek to preserve the depoliticisation of the setting in which they act. In this way, ideas are dynamic and frame interpretations of transit as an object of governance.

### **3. EU asylum law and policy implementation**

This section sets the legal arena of the core executive asylum setting. It first discusses the adoption of EU asylum qualification, procedures, reception and distribution instruments, and how they have reformulated Polish legislation. Second, it analyses the dynamics of asylum law and policy adoption and engagement of government actors with this process. This section argues that the legal milieu in which ideas about transit germinate has been shaped by a faithful incorporation of EU asylum law; and policy actors' internalisation of a technocratic absorption of EU norms and concepts as a most convenient and resource-efficient way to manage migration and to respond to transit.

#### **3.1. What has changed?**

The Polish asylum framework has been grounded in EU legislation. Prior to EU accession, as a condition of EU membership, Poland was obliged to introduce complementary protection, procedural standards and the reception framework. This prompted bureaucratic adaptation (the establishment of the Office for Repatriation and Foreigners) and improved the admission capacity (employment of asylum officers, building new

reception centres) (see Chapter 3.4). The post-EU accession evolution of asylum legislation has been driven by the implementation<sup>155</sup> of four EU instruments: the 2004 qualification directive<sup>156</sup>, the 2005 procedures directive<sup>157</sup>, the 2003 reception directive<sup>158</sup>, and the 2003 Dublin II regulation<sup>159</sup>.

The qualification directive implementation, first, introduced a new form of protection: subsidiary protection. It can be granted if expulsion of an asylum-seeker to his/her country of origin would expose him/her to the death penalty or execution, torture or degrading treatment. This extended the protection criteria (refugee status and tolerated stay were complemented by subsidiary protection) (for an overview of the types of protection in Poland see Foryś and Ostaszewska 2010: 35-44) and restructured asylum procedures that consist now of three instead of two stages (Dąbrowski 2008: 25-8) (see Chapter 6.2 and 6.3). The procedure commences with examination of the Refugee Convention criteria. If refugee status cannot be granted, grounds for subsidiary protection are considered. If no protection is accorded, the expulsion procedure is launched. However, if expulsion is effective only to a country where the applicant's life might be under threat or it would violate his/her right to family life<sup>160</sup>, tolerated stay may be bestowed. Second, the key asylum concepts, including the definition, reasons and actors of persecution, were specified more precisely (Dąbrowski 2008: 15-25, 29-30) that ameliorated the quality of procedure (Interview. Office for Foreigners, Warsaw, 20 August 2012) (Table 5.3). Finally, the implementation extended integration programmes (providing welfare assistance and facilitating access to vocational training and employment), previously restricted to already established refugees, to beneficiaries of subsidiary protection<sup>161</sup>.

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<sup>155</sup> The qualification directive and the procedures directive were transposed into Polish law through the Act of 18 March 2008 on the change of the act on granting protection to foreigners within the territory of the Republic of Poland and other selected acts (Journal of Laws 2008, No. 70, item 416). The reception directive was transposed through the Act of 22 April 2005 on the change of the act on foreigners, act on granting protection to foreigners within the territory of the Republic of Poland and other selected acts (Journal of Laws 2005, No. 94, item 788). The Dublin II regulation came into force with Poland's accession to the EU and is binding in its entirety and directly applicable.

<sup>156</sup> Directive 2004/83/EC.

<sup>157</sup> Directive 2005/85/EC.

<sup>158</sup> Directive 2003/9/EC.

<sup>159</sup> Regulation (EC) No. 343/2003.

<sup>160</sup> Within the meaning of the 1950 Convention for Human Rights and Fundamental Freedoms.

<sup>161</sup> Journal of Laws 2008, No. 70, item 416.

**Table 5.3 Key post-EU accession EU-induced asylum law amendments**

Polish legal act <sup>i)</sup>	Implemented EU instrument	Implementation outcome
<b>The 2005 Amendment to the 2003 Refugee Protection Act<sup>ii)</sup></b>	The right to work [Reception Directive]	Access to Polish labour market granted after at least 6 months to a year following the asylum application submission (if the first-instance decision has not been rendered within this period).
<b>The 2008 Amendment to the 2003 Refugee Protection Act<sup>iii)</sup></b>	Subsidiary protection [Qualification Directive]	A new form of protection granted if expulsion to the country of origin would expose the applicant to, <i>inter alia</i> , the death penalty, torture or degrading treatment (expansion of the scope of protection and greater safeguarding from expulsion).
	International protection criteria [Qualification Directive]	Clarification of key terms for asylum application assessment, including non-state actors of persecution or serious harm, actors of protection and what constitutes protection in countries of origin, and internal protection.
	Inadmissible and manifestly unfounded applications (elaboration of existing provisions) [Procedures Directive]	Quicker case examination and rejection or discontinuation if at the outset of the procedure the asylum application is recognised as inadmissible (under certain conditions the applicant does not qualify for protection) or unfounded (if the applicant, <i>inter alia</i> , has misled the authorities by presenting false personal information and/or documents).
	Applicant's procedural guarantees [Procedures Directive]	The authorities ensure that the applicant is informed of the procedure, his/her rights and obligations, and the right to appeal; has the right to seek legal advice of the UNHCR or a refugee NGO; and is able to communicate freely during an interview.

*Notes:*

<sup>i)</sup> Act transposing EU law into Polish legislation.

<sup>ii)</sup> Journal of Laws 2005, No. 94, item 788.

<sup>iii)</sup> Journal of Laws 2008, No. 70, item 416.

Source: Author.

The adoption of the procedures directive clarified various aspects of the asylum determination procedure, and modified regulations on minors seeking protection (application submission, procedural guarantees, and personal screening) (Mol 2007b). Second, it reshaped the institutions of inadmissible and manifestly unfounded claims (Mol 2007b). A claim may be considered as inadmissible if the applicant, among others, has been granted refugee status in another EU state. On the other hand, a claim is manifestly unfounded, if the applicant has, for example, misled the authorities by presenting false information or documents, or filed the application stating false personal data. This, along with the improvement of the OF's administrative capacity and elaboration of training schemes for case workers (see Chapter 6.4) led to a considerable acceleration of procedures (Information from civil servants from the OF Department of Refugee Proceedings, August-September 2012). Third, new provisions elaborated procedural guarantees. The authorities have been obliged to, among others, inform the applicant about the procedure and his/her rights and obligations, and to ensure the right to seek

legal advice of the UNHCR or a refugee NGO (Table 5.3). The provision of legal assistance has, however, neither been obligatory nor state-funded and does not constitute effective protection from unfounded expulsion of those cases recognised as manifestly unfounded (Gutkowska 2007: 7). The systematisation of procedural rights and guarantees and the development of the OF mechanism to monitor asylum proceedings (see Chapter 6.4) contributed to acceleration of proceedings and improved the quality of decisions (Interview. Office for Foreigners, Official I, Warsaw, 28 September 2012).

An incorporation of the reception directive shaped the Polish social support system for asylum-seekers. The directive, first, determines the conditions for granting and withdrawing assistance. Second, it defines the scope of access to employment and public services. This includes the provision of primary and secondary education to minor children of applicants and applicants who are minors under similar conditions as own nationals, which has been seen as a major achievement of this directive (Mikołajczyk 2007). Third, it identifies different forms of material reception (e.g. accommodation). Finally, the directive regulates reception of persons with special needs: minors and victims of torture and violence. Most of these provisions were transposed into Polish law through the 2003 Refugee Protection Act<sup>162</sup> (see Chapter 3.4.3), and the key novelty introduced after EU accession was the right to work granted to the applicant being in procedure for over 6 months<sup>163</sup> (Table 5.3).

As discussed in Chapter 4.2.2.3, the Dublin regulation allocates responsibility for the asylum claim determination: the member state in which a person seeks international protection establishes the member state responsible for examining the application. If it is found that the applicant had previously applied for protection or crossed the territory of another member state, that member state is requested to take charge of the applicant and continue his/her case examination. The regulation entered into force with Poland's EU accession and is directly applicable. Since Poland is an external EU border state, it deals specifically with EU states' requests to take charge of asylum-seekers who had previously transited Poland or applied for international protection there on their way west (see Chapter 6.3.3).

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<sup>162</sup> Journal of Laws 2003, No. 128, item 1176.

<sup>163</sup> Journal of Laws 2005, No. 94, item 788.

EU asylum instruments' transposition has structuralised Polish legislation along the principles of fair case examination, efficient asylum procedures, provision of rudimentary social assistance, and distribution, and delineated the boundaries within which the ideas about transit are produced and developed. Let us now turn to the dynamics of this transposition and what they mean to the creation of ideas about transit.

### **3.2. The dynamics of implementation**

As discussed earlier in this chapter, whereas formally the MoI oversees EU asylum law and policy implementation, in practice, the latter has been determined by experts from the OF Department of Refugee Proceedings. In the case of the 2005 amendment (that transposed the reception directive) and the 2008 amendment (that transposed the qualification directive and the procedures directive) the interactions between the two institutions were informed by the issue of capacity: whereas the OF DRP built a strong competence in EU and Polish asylum instruments, the MoI was at the stage of redeveloping its resources: between 2001 (the establishment of the OF) and the 2006/2007 (the administrative reform and creation of the MoI Department of Migration Policy) the Ministry lacked structures to carry out migration policy.

The 2004-2008 transposition of EU qualification, procedures, reception and distribution instruments at the core executive level was shaped by Polish officials' perception of EU legislation as a modernising force in the system and the most effective way to modify domestic arrangements (Interview. Refugee Board, Warsaw, 6 September 2012). Asylum actors have been guided by schemes, forms and cognitive filters that they learned and/or internalised through interactions with the EU (see section 4): 'programmes of the European Union impose a way of looking at migration. As member states, we now don't see migration as a phenomenon, but as a set of phenomena, looking through the lenses of the European Union... We don't see what it is, but what the European Union allows us to see' (Interview. Office for Foreigners, Warsaw, 17 July 2012). In this sense, EU rule translation has been shaped by incorporation of EU values and practices that then inform policy goals and induce domestic change (Börzel and Risse 2003).

However, EU asylum directives' adoption has been largely confined to the faithful transfer of EU provisions and replication of EU narratives. The entire effort of Polish asylum

bureaucrats has been put into an accurate and timely incorporation of EU legislation in compliance with Commission recommendations. As an RB official pointed out:

All of this [the amendment to the 2003 Refugee Protection Act] took place under the banner of Europeanisation. An institution of subsidiary protection, conditions [for granting it]... , the reception directive as regards reception centres – this was all implemented in full. By and large, we copied almost everything from these directives... This is such an obvious deduction that I am not even able to elaborate this thought further (Interview. Refugee Board, Warsaw, 6 September 2012).

Yet, Polish officials, whilst perceiving EU directives as efficient instruments to tackle asylum flows, struggle to explain how the latter reverberate within the domestic setting. The Head of the Office for Foreigners narrowed the Europeanisation of asylum policy to ‘downloading’ of EU norms:

We were passively copying: every directive resulted in [amendments to] acts or orders. This was the model we adopted. This model is continued today. The MFA [Ministry of Foreign Affairs that oversees a technical side of EU law transposition] *de facto* accepts this form of action and it is... more transparent, but at the same time more time-consuming. That being said, we don’t try to be particularly original’ (Interview. Office for Foreigners, Warsaw, 6 August 2012).

The above statements exhibit an interplay between two logics of Europeanisation introduced in Chapter 2. As well as being guided by EU identities and values to choose the most appropriate course of action, core executive decision-makers make compliance choices on the basis of instrumental calculation. Operating in a depoliticised setting and under the conditions of scarce public and political pressure, OF and MoI bureaucrats adapt to ‘Europe’ at the lowest possible administrative and financial cost.

This results in replication of EU logic confining the asylum policy development to elaboration of procedures as the most convenient and resource-efficient way to manage the system— and to maintain entry restrictions. A respondent from the Polish Permanent Representation to the EU admitted that:

we [the Polish government] certainly transpose all these institutions and standards, but we don't want to open ourselves to immigrants and asylum-seekers too much. Say, this is some kind of choice... God forbid, we don't violate those persons' rights or the conventions on these [immigration and asylum] matters, but [at the same time], we don't try to be a country that has a reputation for being attractive to immigrants or asylum-seekers. Therefore, these people prefer to seek protection elsewhere (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012).

A literal incorporation of EU asylum instruments and interpretations of these instruments implies the replication of the EU approach to transit. Polish officials' attachment to EU procedural harmonisation (legal convergence, approximation of procedures seen as the ways to decrease incentives to submit 'multiple applications' across the EU, and distribution seen as the most efficient tool to manage transit flows); and reluctance to extend the policy debate to structural factors, such as social support, or economic attractiveness (defined in Chapter 4 as one of the key determinants of transit within the EU) helps to maintain restrictive policy on transit asylum-seekers (see Chapter 6.3). Furthermore, the Polish government has not been pressured to lean on integration policy: how to integrate asylum-seekers and refugees, and what kind of impact they have on society. A member of the Refugee Board (the second-instance institution that examines appeals against OF asylum decisions) argued that:

Never has anyone treated these refugees, asylum-seekers in a social or administrative category, so no one has considered what kind of influence the presence of a Chechen would have on the labour market, or what kind of social problem a Chechen involves, or how to use Chechens for [the good of] Polish society... Despite that there is an approved and enacted [migration and asylum] strategy [the 2012 Polish Migration Policy document]... Many people doubt whether this is really a strategy, and whether we [the government] have a clear idea of how to develop this [the asylum system] (Interview. Refugee Board, Warsaw, 6 September 2012).

A vestigial reflection of integration has institutional implications. The MoI and the OF, being given leeway to regulate pre-integration of asylum-seekers (MoI 2012: 62), do not take



substantial steps to remedy existing deficiencies and elevate standards (see Chapter 6.3). In 2011 the UNHCR formulated several recommendations in this area for the Polish government, including ‘arrangements... to minimize isolation and separation from the receiving community and to provide opportunities to asylum-seekers to develop their human potential, including key elements such as language and cultural orientation learning. Furthermore, connections should be made with broader social policy areas and programs that are of relevance to refugee integration’ (UNHCR 2011e: 7). However, in practice, the burden to take care of asylum applicants has been shifted to NGOs. As representatives of a Warsaw-based migration organisation explained:

This pre-integration programme should be introduced at the level of asylum procedure that would better prepare an asylum-seeker, help him to understand the Polish reality and explain various elements of the system... This, in my opinion, would decrease the number of those leaving Poland at the time of asylum procedure. At the same time, they don’t understand the system... [However], the Polish authorities’ argument is that these pre-integration elements can be introduced only once a person is accorded international protection... (Interview. Helsinki Foundation, Representative A, Warsaw, 13 July 2012).

I think that they [the government officials] assume that a certain number of persons will transit Poland anyway and only a small percentage of them will stay here, will be granted a positive [international protection] decision... so it seems to me that it is not profitable for them [the government] to undertake pre-integration actions (Interview. Helsinki Foundation, Representative B, Warsaw, 13 July 2012).

Similarly, not much has been done in the field of integration of beneficiaries of international protection. Unlike in the legal and procedural area discussed in section 3.1 EU law does not impose obligations on the national authorities to develop integration facilities. Hiromitsu Mori, the former Head of UNHCR office in Warsaw put it bluntly: ‘in Poland there is a lack of an effective integration programme for foreigners. This is partly due to the fact that a number of persons applying for refugee status still treat Poland as a transit country. Sooner or later Poland has to become the country of integration. Only then will she fulfil an international obligation, and thanks to this, the society will benefit from the presence of refugees as its full members’ (quote in Kosowicz 2007: 122-3).

The implementation process has also been characterised by a low degree of contextualisation of EU asylum law and policy transposition within the domestic-level developments and how EU objectives resonate within the Polish framework. For instance, the Polish Migration Policy (Moi 2012), although outlines of the forms of protection available in Poland, asylum procedures and reception (largely shaped by EU legislation), lacks the analysis of the policy and socio-economic implications of adapted EU instruments, their deficiencies and how they might be rectified. The document remains silent about what Europeanisation means to the government priorities and the situation of asylum-seekers. A Refugee Board member argued that:

this is an official document, describing a certain set of government legislative intentions and defining what is now... If we talk about migration and asylum policy [in this document], this is the politics of law. This politics is shaped by those who implement law. And I don't agree with putting the matters this way. I think that it is not possible to create such a migration law that would implement, for example, the objectives of the labour market... It is better to write law in a more general manner and give discretion to those who adopt it, so as to ensure flexibility (Interview. Refugee Board, Warsaw, 6 September 2012).

An absence of strategic planning in migration and asylum policy-making has also been echoed in the parliament. As one MP, who follows the migration agenda, put it:

What worries me is that no changes occur that would have the form of durable, long-term actions on drafting uniform strategies and presenting these strategies as the programme of the state, taking into account the specific geopolitical situation of Poland and its position in the EU forum. I don't see such activity. We rather await the Commission to decide something. We don't attempt to present our Polish point of view that arises from our specificity and from what we expect (Interview. Sejm, Warsaw, 27 September 2012).

Furthermore, the Polish Migration Policy does not define how and when the very general recommendations for asylum policy stipulated in the document are to be implemented, nor does it provide any sources of funding: 'In my opinion it's just a load of crap, roughly speaking, that is... this document was introduced under the condition that the Finance

Minister will not give [to its implementation] a penny. So, we are talking about a cock and bull story, because it is not possible to do it [implement this document]. One cannot approve any state document or strategy without money' (Interview. Polish Migration Forum, Warsaw, 24 July 2012). In consequence, this key state document does not contribute to drafting long-term and far-sighted programmes on complex, multi-dimensional asylum issues, such as transit. Recognition of transit as an asylum problem across levels of governance (see section 5) has not therefore been coupled with policy measures to alleviate and/or deflect the phenomenon. EU-induced legal mechanisms already in place, such as the Dublin regulation, which help control the flows, have been seen by the government officials as responding well to the migration situation.

EU law and policy has given shape to Polish asylum legislation: the transposition of EU provisions has extended the scope of protection, developed asylum procedures, formed the minimum reception standards, and established mechanisms to transfer responsibility for case examination. The process of the literal implementation of EU directives coexists, however, with *inertia* in the provision of social assistance and integration, and the government's inability to couple EU regulations with domestic policy objectives. The core executive legal arena enables the formation of ideas about transit. First, faithful adoption of EU asylum mechanisms implies the translation of the EU approach to transit, meaning efficient governance of applicants (through provision of equal procedural standards and fair and lawful treatment), similar qualification criteria (to equalise recognition rates across the EU), and distribution (to diminish 'multiple applications'). Second, an absorption of the EU approach to transit occurs in a certain political (transit has not been recognised as a politically salient issue) and socio-economic (transit has not been perceived through integration/economic lenses) insulation.

The legal field of the Polish asylum setting has been determined by an interaction between rational choice institutions: implementation of EU law and policy has been grounded in a unilateral calculation to achieve administrative and functional efficiency, and discursive institutions: simultaneously constraining structures and enabling constructs of meaning, which are internal to 'sentient' actors. As argued in Chapter 2, Poland's accession to the EU extended the number and content of social interactions across policy levels, and therefore, contributed to the emergence of conditions facilitating persuasion and socialisation. Let us now turn to the analysis of these conditions at the core executive level.

## 4. Learning

This section examines post-EU accession policy learning, and knowledge and information sharing at the national level of the Polish migration and asylum governance system. Learning as a process of updating of beliefs through social interactions (Dunlop and Radaelli 2013) occurs in the ‘shadow of hierarchy’ as a result of the powerful effects of EU policy. The character and dynamic of learning has evolved from its ‘hetero-directed’ form in the pre-EU accession period into post-EU accession ‘autonomy’, where civil servants, although operating within the EU’s shadow, can decide autonomously what they want to learn and how (Dunlop and Radaelli 2013: 613). In order to see how the above processes trigger Polish asylum actors’ socialisation, the analysis employs the scope conditions and mechanisms of social interaction introduced in Chapter 2. The analysis will then show how Polish civil servants’ engagement with EU social interactions informs the setting that enables the transit country construction.

EU accession created a ‘novel and uncertain’ policy-making milieu (Checkel 2001b). It was ‘novel’ because in the first years following Poland entering the EU, migration and asylum civil servants became involved in new kinds of institutional interaction: the accession provided Poles with new opportunities to take part in EU decision-making (i.e. in drafting, negotiating and evaluating EU asylum instruments); and enabled them to establish formal and informal relationships with EU and EU states’ officials. The environment that arose after EU accession was also ‘uncertain’ because Polish decision-makers had to learn EU practices, habits, and to understand how EU policy is made: ‘Truth be told, there was significant uncertainty as to whether we properly understood the implications of EU legislation... and whether we could analyse various aspects of these implications: legal, administrative, financial etc.’ (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012).

The EU-induced expansion of social interactions within the EU prompted reformulation of channels of communication within the government: between the key migration institutions (the MoI, the OF, and the BG), and between experts in Warsaw and those presenting the country’s position and bargaining in Brussels. Polish civil servants had to adjust to multi-level cooperation within the EU and alter their style of work. As a MoI official explained: ‘the management of the Ministry thought that the Union functioned in the same way as

the Polish system, where decisions were undertaken at a political level and did not necessarily have to meet practical needs... [At that time] the impact of [Mol] civil servants on policy was often illusory. It was said: "do what I told you to do", even if this was irrational' (Interview. Ministry of Interior, Warsaw, 3 and 24 August 2012). However, Checkel argues that 'uncertainty or noviceness are by themselves not sufficient for social learning to occur. Rather, they make it more likely that an agent will be convinced and thus learn through processes of communication and persuasion that occur during the interaction between a persuader and persuadee' (Checkel 2001b: 564).

The case of the Polish asylum system evolution illuminates an intensification of communication and cooperation between national and EU policy actors along with the deepening of European integration. Over time, Polish officials' wandering in complex EU decision-making networks has developed into a well-thought-out strategy of making use of EU platforms to discuss and share information and experience with EU and member state decision-makers (Chapter 4.4 provides a deeper insight into Poland's action in Brussels).

The bureaucrats' uncertainty gave way to the perception of EU action as 'a window of opportunity': 'Our European colleagues, who deal with the same or similar topic meet regularly. There are huge advantages to this. These are different kinds of contact, sometimes even friendships. These persons cease to be anonymous. What's more, this is also an exchange of ideas. This is something we [OF officials] make use of asking others of how they perceive this or that, or how they have implemented something' (Interview. Office for Foreigners, Warsaw, 17 July 2012). An official from Poland's Permanent Representation to the EU, who assists Mol and OF migration experts coming to Brussels by providing practical advice on EU procedures, confirmed Poles' greater dynamism and administrative astuteness acquired as a result of policy learning: 'At present... we are secured from this side, in the sense that our migration and asylum administration very skillfully, efficiently and at a good pace responds to all questionnaires or presentations of the Commission, and participates in circulation of information' (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012). Yet, at the same time, he mentioned several deficiencies that have not been remedied since entering the EU and that hamper the learning process: 'We are considerably backward in the administrative culture. We still have problems with... a sacred attachment to a letter, a stamp on this letter... There is also no proactivity, forecasting that [certain] problems may

appear... These people [MoI and OF officers] act on a reactive basis' (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012). An increment in interactions between Polish and EU officials has occurred under the conditions where 'the persuader [EU officials] is an authoritative member of the in-group [the EU] to which the persuadee [Polish civil servants] belongs' (Checkel 2001b: 563). Consequently, long, sustained, and intense contact and communication (Checkel 2005) with the EU has led Polish actors to settle into cooperation and to be more prone to EU recommendations, opinions and advice.

The evolution of relationships with the EU into interactions based on 'principles of serious deliberative argument' (Checkel 2001b: 563) has contributed to the elaboration of domestic frameworks to deliberate over migration and asylum trends and policy processes. Polish officials were given an opportunity to apply their knowledge of how migration and asylum matters are regulated elsewhere and how EU instruments inform domestic arrangements. This along with increasing migration inflows spurred reflection on how to better organise the system, and how to improve the existing regulations (Interview. Ministry of Interior, Warsaw, 19 July 2012). As a result, in 2008 MoI officials set up the Working Group for Preparation of Poland's Migration Strategy. For over a year the Group constituted the key government platform to share information and good practices among decision-makers (the MoI, the OF, and other ministries and agencies liable for specific aspects of migration and asylum such as access to education (the Ministry of Education)), NGOs, and migrant organisations. A MoI official, who administered the Group, explained:

When organising a meeting on a particular subject, we [the MoI Department of Migration Policy officials] were distributing the material concerning specific problems or challenges. In order to check whether they [invited experts] have read it, they were asked to respond to the attached questionnaires... the director of our department was contacting other directors [of departments in ministries or executive agencies] so as to ensure that an expert has addressed the questions concerning this material (Interview. Ministry of Interior, Warsaw, 19 July 2012).

Ideas, comments and suggestions articulated during the meetings fed into drafting the Polish Migration Policy (MoI 2012). The discussions over asylum revolved around EU asylum procedures and practices, welfare benefits and pre-integration for asylum-seekers

(Mol 2009a, b). The deliberations extended an understanding of various aspects of reception policy and its implementation at the local level. However, those conclusions that went beyond the scope of EU law were hardly translated into the Policy. The latter marginalises the social dimension of asylum (that requires substantial government funding allocation) and focuses on what is absolutely necessary for the system to function, i.e. on EU asylum instruments and their incorporation into the Polish setting. The draft chapters of the Policy were consulted with government representatives and NGO experts. Although the Mol-led Group was active for only a short period of time, it played an important educational and informational role:

If we compare the first meeting with the third or the fourth one, the quality of discussion increased, specifically that the meetings were attended by experts that were answering the questions [included in the questionnaires provided to them beforehand]... Secondly, they [experts invited to the meetings] became aware that their specialist knowledge... had to be put in a certain [migration] context... [Thirdly], almost two years of work on this document [Polish Migration Policy] created a network of experts who perfectly know each other... who have met a dozen times and have consulted a dozen issues (Interview. Ministry of Interior, Warsaw, 19 July 2012).

Building upon Mol experience, in 2011 the MLSP launched an inter-ministerial Working Group on Foreigners' Integration: 'Recent years have led integration issues to crop up in a public discourse. More people started to comment on this subject... On the other hand, there has been the Mol's pressure. [In consequence,] the issues related to immigrants' integration gained MLSP attention' (Interview. IOM, Warsaw, 15 August 2012). This incentivised the Ministry, previously reluctant to undertake any actions that would introduce a breath of fresh air to the existing regulations and the regime of bureaucratic daily work. The MLSP group's objective was to draft, through a series of consultation meetings between the government, local authorities, and NGOs, a fully-fledged Strategy for Foreigners' Integration (MLSP 2013: 4). The meetings were organised along specific integration problems/challenges, such as integration schemes for international protection holders, access to work, availability of accommodation, or foreigners' education.

Several issues discussed during the meetings referred to the ideas and concepts already disseminated at the EU level, which MLSP civil servants ‘downloaded’ through various Commission-managed frameworks, including the National Contact Points on Integration network, and day-to-day communication with other member states (Babis 2012). For instance, the Group analysed the possible ways to extend the pre-integration programmes for asylum-seekers already in place in several EU states. A considerable complexity of these problems led ‘persons coming to the meetings to have a chat quickly dropping out... Those who remained were experts who wanted to change something, had knowledge and experience. Specifically, various organisations contributed a lot to the discussion on foreigners’ access to education... [They were] presenting conceptions, solutions that I had no idea about. I didn’t know what worked or what didn’t work [in practice]’ (Interview. Ministry of Labour and Social Policy, Warsaw, 20 August 2012). As a result, the MLSP produced the first version of Foreigners’ Integration Policy at the beginning of 2013 (MLSP 2013).

The process of migration and asylum knowledge production at the core executive level as a result of Europeanisation illustrates that the former assumes not only substantive (the description of the legal and policy migration reality and how the government responds to it) but also a symbolic value: it enhances the credibility of the government’s structures and/or policies. The MoI and MLSP policy documents can be considered as knowledge because they have been produced by migration experts of recognised qualifications and experience, and meet standards of theoretical, methodological and conceptual coherence (Boswell 2009). Boswell’s (2009) indicators, introduced in Chapter 2, help to signal the existence of the legitimising function of MoI- and MLSP-produced research. First, the ministries as ‘political organisations’ (see Chapter 2.3.2), in order to demonstrate their leading role in the system and competence in migration, produce research to underpin decision-making. Second, the MoI and MLSP policy documents have been structured along the priorities of the ministries’ in-house research units that sought to demonstrate the government’s broad scope of action on migration and asylum. Third, the documents have been widely disseminated within the government and beyond, through networks of contacts built in the course of discussions within ministerial working groups to show that the MoI and the MLSP research resources actively shape the migration and asylum agenda.



The production of migration and asylum knowledge also demonstrates that 'sentient' government actors not only actively absorb EU ideas but also internalise them. Under the conditions delineated above, Polish officials, whilst operating in a 'less politicised and more insulated setting' (Checkel 2001b: 563), interact with the EU, acquire EU migration and asylum ideas, learn how to deliberate over these ideas with domestic partners, and eventually translate the outcomes of these discussions into policy documents, which guide the government's action. The asylum parts of the MoI Migration Policy emerge as a reflection of EU asylum priorities and objectives. This illuminates the effects of EU-induced socialisation and a gradual shift towards 'normative suasion' (Chapter 2.3.2), where actors actively and reflectively internalise new roles and standards that then inform policy action.

The evolution of the content and the dynamics of social interaction at the core executive level of the Polish migration governance system has had implications for the construction of transitiveness. First, the post-EU accession relationships with the EU and member states extended the opportunities to incorporate concepts and policy solutions grounded in the EU paradigm to deal with transit through equalisation of recognition rates, bringing together asylum practices and distribution. Communication, learning and sharing of information and experience complement the process of implementation of EU legislative measures and enable actors to reflect on and internalise EU means as most efficiently addressing the phenomenon. Second, MoI- and MLSP-steered deliberative platforms not only inform the debate on migration and asylum, but also, through production of documents confined to adoption of EU priorities, strengthen the perceptions of transit as one amongst many problems that does not deserve special attention and that has to be managed by already existing (EU-determined) legal mechanisms.

## **5. Understanding of transit**

This section couples the ideas and logics about transit that develop within the legal and institutional fields of the core executive setting with policy actors' understandings of the phenomenon. This reveals the formation of discursive frames through which the construction of transitiveness occurs. Discourse is therefore understood in an institutional context (Schmidt and Radaelli 2004) that is constituted by various formal and informal rules, regulations as well as social and political norms that constitute actors' common

frame of reference and help shape actors' perceptions and preferences, and their modes of interaction (see Scharpf 1997).

First, in the bureaucratic environment that adapts to the EU and does not leave much policy space to contemplate the socio-economic aspects of migration, interpretations of transit emerge. The research shows that the phenomenon at the core executive level has been seen as driven by factors that lay outside the asylum system *per se*, including the country's lower standard of living than in Western Europe (Interview. Office for Foreigners, Warsaw, 17 July 2012; Interview. Ministry of Labour and Social Policy, Warsaw, 20 August 2012), small immigrants' diasporas unable to attract their fellow countrymen (Interview. Office for Foreigners, Warsaw, 17 July 2012; Interview. Border Guard Headquarters, Warsaw, 28 August 2012), and Poland's location on the edges of the EU (Interview. Ministry of Interior, Warsaw, 12 July 2012; Interview. Border Guard Headquarters, Warsaw, 28 August 2012). An identification of transit as developing outside the (deficient) asylum system feeds into the process of increasing separation of EU-driven instruments to tackle transit implemented across policy levels from policy actors' actual assessment of the migration situation on the ground, including the causes and consequences of transit.

Second, the confinement of the government's action on transit to harmonisation of asylum qualification criteria, procedures, and efficient management of transfers of asylum-seekers has been bolstered by civil servants' perceptions of asylum-seekers as economically motivated immigrants seeking an opportunity to reach Western Europe through Poland. As a respondent from the BG Headquarters explained: 'asylum-seekers don't distinguish an issue of persecution from economic issues. They want to live better, educate their children etc. And, whatever happens, there will always be a group of people transiting Poland... and thinking that they are *bona fide* refugees' (Interview. Border Guard Headquarters, Warsaw, 14 July 2012). The director of the MoI Department of Migration Policy went one step further and spoke about intentional abusing of procedures to enter Poland and travel freely across the EU: 'these people [asylum-seekers] use different forms and opportunities to legalise their stay in Poland or cross the [Polish Eastern] border so as to get to the territory of other [Western] states. Of course, depending on a legal status of such a person, EU mechanisms permit or don't permit to continue such [transit] migration' (Interview. Ministry of Interior, Warsaw, 12 July 2012). Transit asylum-seekers have therefore been seen as persons who have to be controlled, and if necessary expelled from the country.

As shown earlier in this chapter, Polish officials' attachment to management as the most effective means to alleviate transit develop along with underestimation of the reception and integration tools that remain underdeveloped. Since the early 1990s integration policy has been seen as structurally unable to attract immigrants to settle in the country, and therefore to alleviate transit (see Chapter 3.3 and 3.4). EU accession has not altered these perceptions. According to the former deputy Interior Minister transit occurs irrespective of measures that the state undertakes:

It is obvious that in the case of a considerable difference in the standard of living between Poland and Germany that has GDP per capita a few times higher, you simply have an effect of vacuum cleaner sucking... these people will simply go where they think their future will be easier... What can Poland do in this case?... In order to impact on Poland's transit status, you would need to put a gendarme next to each person. If you have open borders, this is unfeasible (Interview. Ministry of Foreign Affairs, Warsaw, 2 January 2013).

Finally, social interactions with the EU that have flourished after EU accession not only enable dissemination and exchange of habits and practices related to EU law implementation, but also forge civil servants' perceptions of this implementation: 'we are aware of the effects of Dublin... For example, the problem of taking back immigrants... We know that this [tacking back phenomenon] is of a given scale and that we have to have well-developed procedures to effectively manage it' (Interview. Ministry of Interior, Warsaw, 19 July 2012). On the other hand, EU norms influence the government's action on transit: 'Poland cannot act independently here. It appears that EU law provides opportunities for action... [that] takes place under the banner of the Dublin system and the interlinked regulations, such as the Eurodac regulation, that are to eliminate the so-called "secondary movements"' (Interview. Ministry of Interior, Warsaw, 12 July 2012). EU mechanisms have been thus discursively constructed as central in responding to the flows that feeds into the detachment of tools grounded in a justified asylum-seekers' distribution from the motivations and actions of those being distributed.

The discursive frames of transitness that emerge at the core executive level are thus dynamic and develop through a process of interaction that focuses on policy formulation

and communication (Schmidt and Radaelli 2004). The relationship between the legal and bureaucratic venues, which locks the response to transit in EU approaches and discursive strategies enabled by those venues, constructs transit as the process that cannot be mitigated through more inclusionary migration policy, and whose effects have to be governed through EU means.

## **6. Conclusion**

The analysis demonstrates that, first, the core executive framework has been structured by the MoI and the OF: whilst acting in a depoliticised setting of scarce parliamentary scrutiny and a tenuous public interest, they produce a bureaucratic logic of action in the asylum system, driven by short-term considerations and alignment with the EU. Second, Polish asylum legislation has been organised by EU instruments' adoption that extended the scope of protection (introduction of subsidiary protection), clarified key asylum definitions, and introduced of the (Dublin) responsibility allocation system. A literal adoption of these mechanisms and the government's inability to contextualise them within long-term policy strategies results in the prevalence of EU logic to deal with asylum through administrative procedures, control and distribution. Third, EU accession brought an intensification of policy learning: deepening of cooperation with the EU and EU states has led Polish asylum officials to increasingly absorb EU asylum conceptions, become acquainted with EU decision-making, and to develop domestic platforms of knowledge and practice sharing.

Referring to the question posed at the beginning of this chapter, it has been found that the bureaucratic and legal sites of the Polish asylum framework generate ideas about transit and logics to address it. First, the institutional space within which transit is discussed at the core executive level has been confined to the MoI and the OF that, having a great latitude in undertaking institutional rearrangements and creating asylum policy, allocate the bulk of the resources to ensure adequate EU asylum law implementation, and therefore selectively elaborate structures that address transit through efficient asylum proceedings and redistribution. Second, asylum policy implementation shows that the transit problem has been addressed within the Polish government through incorporation of EU asylum qualification, procedures, reception and distribution mechanisms implying unification asylum procedures and the introduction of common qualification criteria, and the establishment of control and intra-EU transfer mechanisms to deal with the effects of

transit. However, the replication of EU logic, whilst not alleviating the movement, occurs in a way that is separate from actual asylum-seekers' decisions. Finally, Polish migration and asylum officials' engagement with EU decision-making and policy learning platforms bolsters the perceptions of transit that develop through the transposition process. In the absence of domestic incentives, communication with EU officials, familiarisation with EU practices, and deliberation over EU asylum instruments, strengthens the attachment to harmonisation as most accurately responding to intra-EU flows, and pushes off the discussion on the alternative means to deflect the phenomenon. The foregoing logics enable the construction of transitness. The discursive frames produced by the core executive actors feed into an understanding of transitness as a 'bundle of' milieu that develops in a way that is detached from the on-the-ground migration dynamics and that remains indifferent to the strategies and decisions of asylum-seekers.

The Polish asylum system has been shaped by rationalist and constructivist dynamics. The cost/benefit calculations to ensure that the system functions at an optimal and cost-effective level drive transposition of EU asylum instruments and bureaucratic adaptation. An administrative and procedural efficiency and meeting EU and international refugee protection standards emerge as the key objectives for the core executive officials that do not encounter substantial veto points within and outside the government. Europeanisation emerges here as a 'political opportunity structure' that provides Polish decision-makers with legal, financial and institutional resources to align with EU norms and regulations. A moderate level of misfit between EU and Polish asylum structures (as a result of a high degree of compliance achieved prior to EU accession) spurs adaptation to existing EU processes and policies. On the other hand, the post-EU accession extension of social interactions forms the milieu that increases actors' propensity for EU-induced socialisation and incorporation of EU ideas, meanings and styles of work. The application of the scope conditions outlined in Chapter 2 has allowed the effects of internalisation of EU norms to be measured.

The instrumental and social motives of decision-making also intersect at the grassroots. The next chapter will examine how this interaction shapes EU asylum policy adoption and how the legal and institutional setting that develops on the ground enables the construction of transitness.

## Chapter 6: The Grassroots: Putting Asylum Law and Policy into Practice

### 1. Introduction

This chapter analyses the evolution of the on-the-ground legal and institutional venues of the Polish asylum setting, how they shape the ways in which idea and practice of transitness are constructed at the grassroots, and how this process has been informed by European integration. The grassroots (local) level interacts with the core executive (national) institutions in three dimensions. First, there is a conceptual dimension: EU law adaptation at the grassroots occurs within the political and legal boundaries crafted by the national-level actors. Second, there is an institutional dimension: the key role within the Polish government in asylum policy-making is played by the Office for Foreigners that binds the core executive and grassroots functions together. Third, there is a policy environment: the local-level experts act within similar depoliticised and managerial settings.

This analysis will show that transitness has been moulded by, first, the nature of the asylum bureaucratic framework: highly managerial and of low discretion from the core executive system produces interpretations of transit as an object of management that does not require a comprehensive socio-economic state response. Second, the asylum policy adoption extends the gap between policy and institutional developments and migrants' realities on the ground. Third, the flourishing EU fora of policy learning and practices sharing lock the discussion on transit in the EU paradigm of effective asylum law and policy adoption.

This chapter investigates the evolution of legal and institutional arenas that enable the construction of transitness by examining the adoption of four EU asylum instruments: the qualification directive<sup>164</sup>, the procedures directive<sup>165</sup>, the reception directive<sup>166</sup>, and the

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<sup>164</sup> Directive 2004/83/EC.

<sup>165</sup> Directive 2005/85/EC.

<sup>166</sup> Directive 2003/9/EC.

Dublin II regulation<sup>167</sup>, and what kind of change they have brought at the grassroots. The analysis draws on the case of Chechen asylum-seekers in Poland to illustrate an on-the-ground asylum policy dynamic, and how their understandings and experiences of migration feed into policy responses. As indicated in Chapter 3.2.3, Chechens have been the major asylum group in Poland, whilst showing a high propensity to transit to Western EU states.

This chapter argues that although EU adjustments at the local level have been grounded in the optimality assumption, where Europeanisation offers additional resources to exert influence, European integration has spurred social interactions with the EU that contribute to Polish actors' socialisation that then influences asylum decision-making. The 'street-level' decision-makers exhibit greater inclination than their national-level colleagues to use EU platforms of policy learning and knowledge and practices sharing to enhance instrumental logic of action focusing on the achievement of performance targets.

This chapter first maps out the grassroots asylum institutions. Second, it identifies the deficiencies of EU qualification, procedures, distribution and reception instruments adoption. Third, it examines asylum learning, and how it facilitates EU law implementation. Finally, it shows an interplay between the Europeanised asylum setting and the discursive frames of transit produced at the local level.

## **2. The implementation framework at the grassroots**

This section identifies asylum institutions at the grassroots and how they function in the process of asylum claim examination. Second, it analyses how this framework has been altered by practice, and what it means to the underlying logics of the transit country construction.

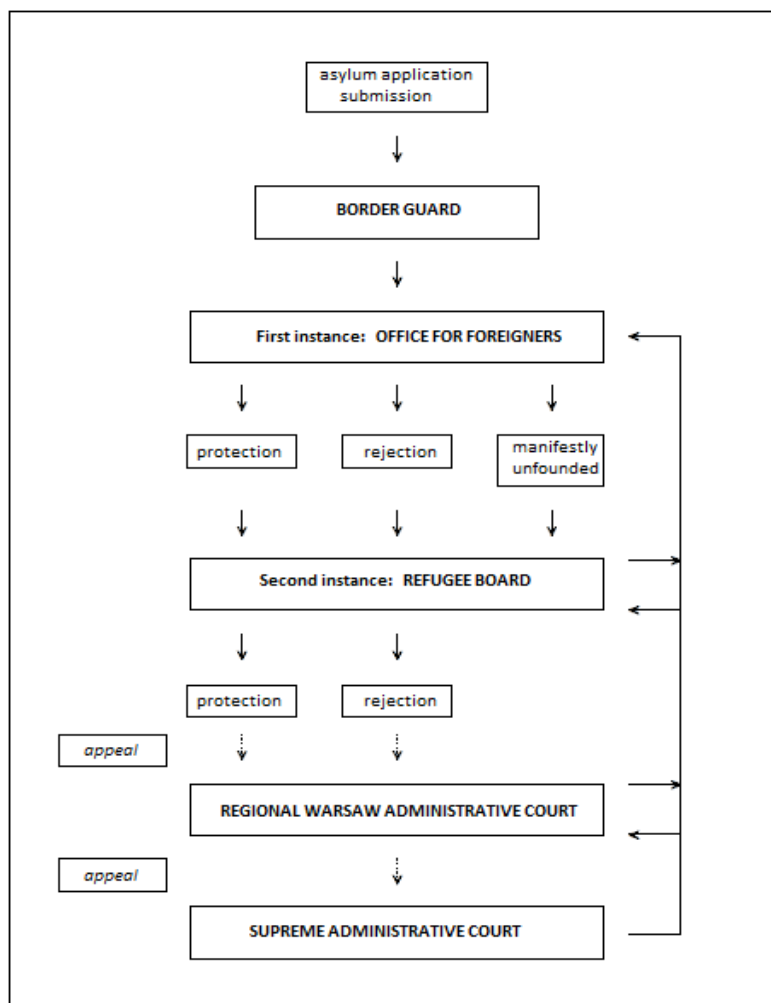
The setting to carry out asylum proceedings has been instituted as a result of pre-EU accession adjustments to the EU (see Chapter 3.4.2 and 3.4.3). Its post-EU accession evolution has been shaped by the implementation of the qualification directive, the procedures directive, and the Dublin II regulation. First, there is the Border Guard (BG) that entertains asylum applications at the border: the BG officers interview applicants and make

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<sup>167</sup> Regulation (EC) No. 343/2003.

necessary arrangements, including fingerprinting, medical check-up and the provision of information on reception (Figure 6.1). The application is subsequently forwarded to the Office for Foreigners (OF). Since the vast majority of asylum-seekers (mainly Chechens entering Poland from Belarus) seek protection at the Terespol border crossing (at the Polish-Belarusian border), they are transferred to the OF branch in Biała Podlaska (at a distance of around 30 kilometres from Terespol).

**Figure 6.1 The asylum determination procedure, 2013**



Source: Adapted from the 2003 Refugee Protection Act (Journal of Laws 2003, No. 128, item 1176, with further amendments).

Second, OF (the first-instance institution) case workers determine the case and examine the grounds for international protection (refugee can be bestowed status or complementary protection (see Chapter 5.3.1)). If there is any form of protection, the applicant is ordered to leave the country. The officers from the OF Department of Refugee Proceedings (DRP) interview applicants, collect evidence and issue the final decision. On the other hand, the OF Department of Social Assistance (DSA) distributes welfare



assistance (that is provided to applicants in the course of procedure), manages reception centres and ensures the quality of accommodation (see Table 5.2, p. 148). Also, the OF implements the Dublin regulation. The DRP Dublin proceedings unit requests other member states to take back applicants who had lodged their claims elsewhere prior to applying in Poland, and processes member states' requests to take charge of those applicants who had first applied in Poland and subsequently sought protection in another member state (on the Dublin regulation see Chapter 5.3.1 and section 3.3. in this Chapter).

Third, the applicant unsatisfied with the OF's decision (granting international protection, recognising an application as inadmissible or manifestly unfounded, or rejecting the claim and ordering expulsion) may appeal to the Refugee Board (RB), the second-instance institution (Chapter 3.4.2). The Board has the competence to re-examine the case with regard to the procedural correctness and the merits, and can revoke the first-instance (OF) decision (Figure 6.1).

Finally, applicants who identify the legal flaws of the OF's or RB's decisions may file a complaint to the Warsaw Regional Administrative Court (WRAC). The court examines the case only with regard to the decision's quality and/or correctness of administrative procedure (not with regard to the merits of the case). It can either uphold or quash the RB's decision. Furthermore, if the applicant is not satisfied with the WRAC's judgement, he/she can lodge a complaint to the Supreme Administrative Court (SAC) that may return the case for WRAC reconsideration (Figure 6.1).

Following EU accession, the grassroots institutions have improved their organisational and functional capacity to deal with asylum claims. In order to align with EU/Schengen standards and due to the fact that Poland became 'a guardian of EU external border' and has to effectively steer inflows (Kosowicz 2007: 112), the BG developed the resources to deal with asylum-seekers. First, the Eastern border crossings have been reconstructed or modernised. For example, the Terespol railway border crossing, which processes the bulk of asylum claims lodged in Poland, expanded. Funded by the government and the Norwegian Finance Mechanism, new, spacious buildings and electronic equipment improved the conditions to examine applications, carry out interviews, and perform administrative work.

Second, BG officers serving at the Eastern border have been provided with UNHCR- and/or NGO-led and EU-funded training:

During many of these courses we simply quarrel: the lecturer is pestered with questions and border officers vent their anger or stress on him... There is also a positive aspect... We [NGOs and the BG] better know each other and keep in touch. I think that [as opposed to what was in the past] there is now mutual respect and understanding of the other side's work... [BG officers] understand that NGOs have a certain mission and this is not the mission to the detriment of the Polish state..., but in the interest of human rights (Interview. Halina Nieć Legal Aid Centre, Cracow, 20 July 2012).

The courses seek to develop knowledge of asylum procedures, disseminate practices related to entertaining asylum applications, and ensure that asylum-seekers are provided with comprehensive information about the proceedings. The training has been part of a rapidly expanding process of post-EU accession policy learning and data and practices exchange to improve the quality of EU law implementation. Practices, as 'socially meaningful patterns of action' (Adler and Pouliot 2011: 4-5), shape BG officers' understandings of asylum processes in which they are involved, and of the motivations of asylum-seekers. This, in effect, affects decisions concerning entrance to Poland, and therefore, has implications on transit across Poland (see also sections 3.1 and 3.3).

Third, in order to adjust to the EU and accelerate administrative proceedings, the OF has developed its capacity. In 2009 the Office opened its first branch outside Warsaw: the centre in Biała Podlaska (OF 2009), financed by the ERF, improved the communication and exchange of data between the Terespol border crossing and the OF. With the support of EU funds, in 2010 a new Warsaw-based office was built that extended the physical space of the OF DRP and developed the services provided to applicants (Prus 2011). Also, the country of origin information (COI) unit within the DRP has expanded (employment of new officers, the development of COI library, and the launch of missions to countries of origin (OF 2008, 2009, 2010a, 2011a, 2012a)) that increased the quality of information put forward to asylum officers considering the cases (Interview. Refugee Board, Warsaw, 6 September 2012).

However, the institutional evolution reveals several shortcomings. First, despite infrastructural improvements, the DRP capacity remains low: at the end of 2012 there were only 35 case workers (including those in Biała Podlaska branch) involved in case examination (of whom only 9 dealt with Russian/Chechen caseload). In 2012 they handled over 10,000 cases. If we add to this frequent personal rotations (due to, among others, low remuneration) (Interview. Office for Foreigners, Warsaw, 20 August 2012), the result we see is considerable backlogs of cases (in 2010 each DRP unit had over 60 cases to examine each week) (OF 2010f) and delays in processing the claims.

Second, the RB, due to recent funding cuts, grapples with significant administrative difficulties (RB 2011, 2012). Training schemes offered to RB members have been curtailed and the Board's financial resources to analyse the material passed on from the OF have been cut (Interview. Refugee Board, Warsaw, 6 September 2012). An obsolete computer programme (eRdU) to organise the evidence and generate statistics is at the end of its life (RB 2011, 2012). Furthermore, the procedures of nomination of RB members reveal some flaws:

Who becomes a member of the Board? This is largely determined by coincidence... Prime Minister, Minister of Justice and Minister of Foreign Affairs each chooses four members. These are three institutions that do not have any relation with administrative procedure or with foreigners' issues... As a result, a person who joins the Board usually doesn't know anything about it. There were even some cases where the nominated persons found out the competences of this body [only] during its first plenary session (Interview. Refugee Board, Warsaw, 6 September 2012).

In consequence, though the RB formally oversees OF decisions, in practice, it itself 'requires change, or even a shake-up, because the appeal procedure is very feeble. The second-instance proceedings are based on what has been made in the OF [systematisation of evidence, provision of COI, legal argumentation]. If we compare what is being done in the Office for Foreigners with what is being done by the Board, the work of the Office turns out to be of far higher quality' (Interview. Refugee Board, Warsaw, 6 September 2012). Here, practice allows us to see the logics that underline the formal arrangements: the

constrained capacity of the RB and its political marginalisation (reflected in e.g. funding cuts) widens the OF's leeway to devise asylum procedures and decision-making.

The flawed RB's scrutiny over OF asylum decisions impacts on the proceedings and the formulation of the response to transit. First, a great deal of bureaucratic latitude enables the OF to relatively independently examine asylum cases, assess evidence and bestow or deny international protection (see next section). This allows the formulation of the response to transit through administrative decisions that determine applicants' presence in, or expulsion from Poland. Second, this bureaucratic environment, likewise the core executive institutions, does not create the conditions to produce ideas about durable solutions to transit: whereas the OF has been inundated with daily administrative work, the RB, which requires a substantial institutional reorganisation, struggles to formulate questions on the relationship between recognition rates and transit, and to reflect on the causes, nature, and the consequences of transitness.

'Street-level' bureaucrats instrumentally align with EU standards, whilst most effectively governing asylum flows. Europeanisation provides them with additional opportunities (access to EU expertise, legislation and funds) and enables institutional adjustments under the conditions of a moderate policy misfit (Börzel and Risse 2003).

### **3. EU asylum law and policy implementation**

This section examines the adoption of EU asylum provisions at the grassroots. It first analyses the procedural aspects of asylum claim determination: the implementation of the qualification directive, and the procedures directive. Second, it analyses the Dublin II mechanisms and how they impact on persons seeking international protection. Third, it investigates how the reception directive and EU funding have shaped the Polish socio-economic framework for asylum-seekers. This section will demonstrate that the legal milieu, which emerges from an intersection of asylum qualification, procedures and reception flaws, produces the logics and ideas that inform the construction of transit. First, EU-driven asylum policy develops separately from actions of asylum-seekers; and second government officials' and asylum applicants' perceptions of the causes and implications of transit develop in separate ways that decreases policy efficiency. The analysis refers to

Chechen applicants to show how their motivations and decisions about migration intersect with state policy responses, and how this then organises transitiveness.

### **3.1. The qualification directive**

As discussed in Chapter 5.3.1, the implementation of the qualification directive<sup>168</sup> expanded the grounds of international protection: it introduced a new form of protection (subsidiary protection). Second, it specified more precisely the terms referring to the assessment of application (actors of persecution, actors of protection) and the qualification for protection (acts of persecution, reasons for persecution). Finally, it set out the minimum standards for integration of international protection holders. This section analyses how the flaws that arise from the adoption of the directive: low recognition rates, high number of case discontinuations and modest integration asylum programmes generate factors that shape an on-the-ground transit milieu.

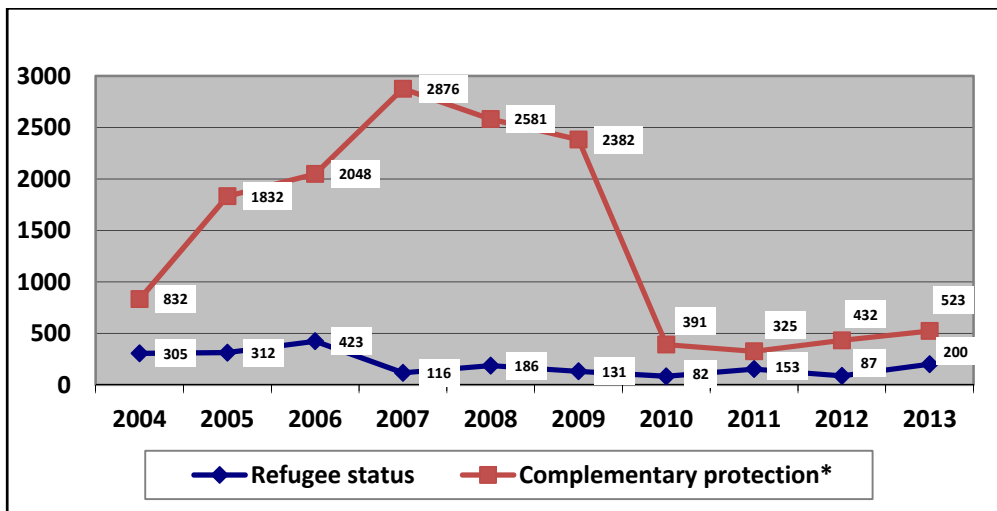
#### *Low recognition rate*

Despite EU-induced extension of the protection grounds and elevation of procedural standards, the recognition rate in Poland remains low and is gradually declining. Recently, only 5% of applicants are bestowed refugee status annually (Table 6.1, p. 188). On the other hand, whereas prior the implementation of the qualification directive (2006-2009) over 2,000 applicants were being accorded complementary protection (subsidiary protection or tolerated stay) each year, in 2010 the number fell sharply to nearly 400 and oscillated around that level until 2013 (Figure 6.2) (Chapter 3.2.3 offers an in-depth analysis of asylum immigration in Poland).

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<sup>168</sup> Journal of Laws 2008, No. 70, item 416.

**Figure 6.2 Persons granted international protection, 2004-2013**



Notes:

\*Complementary protection: 2004-2008: tolerated stay; 2008-2013: tolerated stay and subsidiary protection.

Source: Adapted from Office for Foreigners statistics (2014).

Foryś and Ostaszewska (2010) associate low recognition rates with Polish officials' restrictive interpretation of the definition of refugee (Art. 1 of the 1951 Refugee Convention) that emphasises individualised fear of persecution, and with assessment of evidence brought by Chechen asylum applicants as unreliable. Therefore, the argument presented nowadays by the majority of Chechens that they assisted anti-government militants or that they were members of militants' families has not been considered by the Polish authorities as sufficient to grant international protection within the meaning of the Refugee Convention. This argumentation has been corroborated by OF and RB respondents, who explained dwindling recognition rates by pointing out the recent change of 'the profile of asylum-seekers arriving in Poland' (Interview. Refugee Board, Warsaw, 6 September 2012).

Since 2000/2001 (the end of the second Chechen War), the majority of persons seeking protection in Poland have been Chechens (Russian citizens of Chechen nationality). Between 2010 and 2012 Chechen applications constituted 60% of all submitted claims (Office for Foreigners statistics 2013). In 2009, following a series of IO and NGO reports indicating a gradual political and socio-economic stabilisation in Chechnya and in other parts of North Caucasus (see Chapter 3.2.3), the OF altered its adjudication path with regard to Chechen applicants: '[the decision was undertaken that] except for certain

groups, we don't bestow protection on Chechens for the sole reason of proving Chechen nationality and residence in Chechnya' (Interview. Refugee Board, Warsaw, 6 September 2012). The Chechen Republic started to be recognised as a territory free of military conflict (understood as hostilities between armed forces under an organised command structure exercising effective control over parts of the country). Moreover, the number of militants in Chechnya has been assessed by the OF as low and their activities as not affecting the majority of the population (Information from OF officials, July-September 2012). This resulted in a significant decrease in overall recognition rates. The decision, as argued by OF and RB civil servants, was undertaken independently of requirements arising from EU law adoption: 'The change of OF adjudication line occurred entirely outside the dynamic of European integration... It was determined by actual circumstances: an assessment of the situation in Chechnya, and the position of the UNHCR on this matter' (Interview. Refugee Board, Warsaw, 6 September 2012).

However, off the record, several OF officers speak about the pressure of their superiors to follow a more restrictive approach to Chechens following the 2009 decision (Information from OF officials, July-September 2012). This co-occurs with the perception of Chechens as economically-motivated migrants. To quote the Head of the Office for Foreigners: 'Today, in fact, on the basis of the international protection path that should lead to secure and peaceful life, one built a migration channel... this asylum mechanism is used for economic, highly mercenary purposes, simply to be able to move further west... Poland is a transit country because it doesn't provide emoluments for certain groups of Chechen immigrants' (Interview. Office for Foreigners, Warsaw, 6 August 2012).

This lends credence to the discrepancy between officials' declarations concerning the situation in Chechnya and interpretations of Chechen transit formulated behind closed doors. This divergence translates into administrative decisions and recognition rates that, if compared with other EU states admitting considerable numbers of Chechens, seem to be very low. Whereas in Poland in 2012 only 4.8% of applicants were secured refugee status, in Western states: Austria, Belgium and Germany, the rates came to 22.3%, 16.9%, and 18.7% respectively (Table 6.1). Furthermore, a correlation of total recognition rates (refugees and complementary protection bearers) in Poland and the above states across time indicates divergent tendencies: whereas in Poland the rate dropped from 65.6% in 2008 to 12.1% in 2012, in Slovakia it rose from 17.4% in 2008 to 40.4 in 2012. Austria,

Belgium and Germany, though recorded a slight decrease, still (2012) recognise over two times more asylum-seekers than Poland (Table 6.1). This illustrates that the adoption of EU common qualification instruments has not substantially contributed to equalisation of case assessment criteria that would help to achieve similar procedural outcomes across the EU.

**Table 6.1 Recognition rates in Poland and selected EU states, 2008-2012<sup>j)</sup> (percentage)**

Year/Country <sup>iv)</sup>	2008		2009		2010		2011		2012	
	RS <sup>ii)</sup>	Total <sup>iii)</sup>	RS	Total	RS	Total	RS	Total	RS	Total
Austria	28.1	40.3	17.7	26.1	16.5	26.2	20.8	32.6	22.3	34.8
Belgium	27.4	31.7	22.4	26.9	17.0	22.0	17.6	23.4	16.9	23.4
Germany	46.0	48.7	36.5	42.9	19.2	25.9	20.7	28.1	18.7	31.9
Poland	4.4	65.6	2.0	38.3	4.3	14.6	4.8	14.9	4.8	12.1
Slovakia	4.4	17.4	3.2	25.2	6.5	30.3	3.2	55.7	9.5	40.4

*Notes:*

<sup>i)</sup>The time-frame ends in 2012 because UNHCR data for 2013 was not available at the time of writing this dissertation.

<sup>ii)</sup>RS: Refugee Status (Recognised) (first instance decisions).

<sup>iii)</sup>Total: Total recognition rate: Recognised plus Complementary protection divided by total of Recognised, Complementary Protection and Rejected \* 100% (first instance decisions).

<sup>iv)</sup>Countries experiencing a significant Chechen inflow.

Source: Adapted from UNHCR (2009, 2010b, 2011d, 2013b).

What do these arrangements tell us about the underlying logics of transitness? First, we see the implications of low discretion of the grassroots institutions. The central role of the OF in asylum decision-making and meagre opposition in the system (see previous section) enables smooth translation of policies and guidelines from the national level into the behaviour of ‘street-level’ bureaucrats. This includes the implementation of a restrictive approach towards asylum-seekers to discourage them from seeking protection in Poland. Second, OF and RB civil servants form their perceptions of Chechen asylum-seekers as transit migrants abusing the Polish asylum system in isolation of the implementation of the qualification directive that aims to tackle transit through convergence of asylum qualification criteria and assessment practices between EU states. Polish officials’ interpretations of transit, as being driven by economic motivations of asylum-seekers, extend the gap between the migration reality and anticipated policy outcomes (similar recognition rates with regard to the same caseloads within the EU) (see Chapter 4.2.2.1).

*Discontinued cases*

The extension of the scope of protection as a result of the qualification directive implementation has not alleviated the phenomenon of asylum claims’ discontinuation (for



the analysis of the statistics since 1992 see Chapter 3.2.3). The majority of asylum-seekers, specifically Chechens, lodge an application at the Polish border and disappear. Upon the claim submission, applicants are informed about various types of protection available to them in the country and of the consequences of moving to other EU states (Interview. Border Guard, Terespol, 18 September 2012). However, asylum-seekers' calculations seem to play a decisive role: many are informed about dropping recognition rates and difficulties in obtaining refugee status in Poland (Interview. Asylum-seeker B, Warsaw, 7 August 2012) as well as consider factors that lay outside the asylum system *per se* (Interview. Asylum-seeker A, Warsaw, 19 July 2012). An interesting light was shed on the problem of transit by a BG officer who dealt with Chechen asylum applications at the Terespol border crossing:

Many often arrive here for family reasons and say this at the border... [On the other hand,] those [asylum-seekers] who are returned through Dublin and submit an asylum application again overtly admit that [they move west as] there are better living conditions... Not once or twice we [border officers] have been enquired by those lodging the claims about family members who seek international protection in Poland and abroad: in Austria, Germany, France or Scandinavian countries (Interview. Border Guard, Terespol, 18 September 2012).

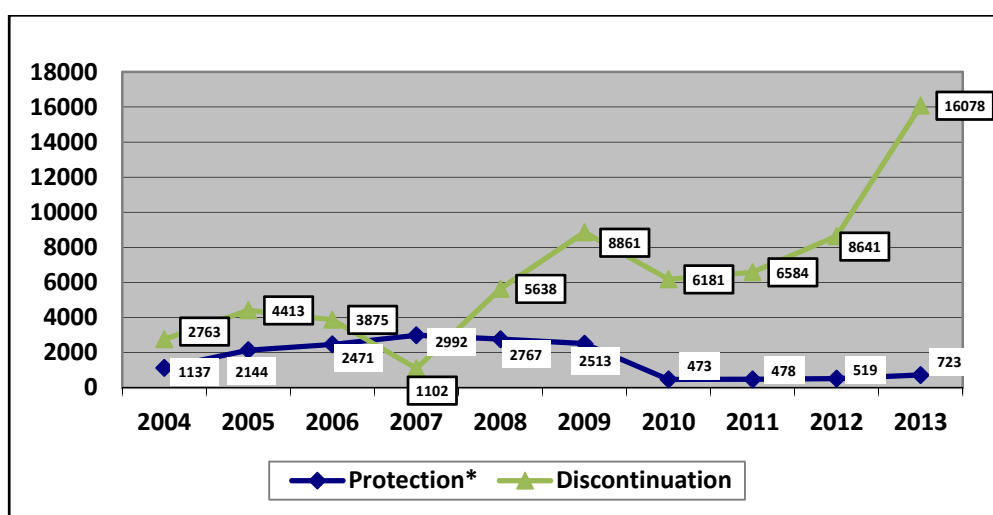
This statement, formulated in a particular reality of Chechens arriving and having to be dealt with, contributes to the argument about incongruity between an institutional and legal setting in which asylum officers operate and their assessments of the on-the-ground migration reality. It also shows the role of reflective policy actors and how the ideas that they produce enable them to reconceptualise the world (Schmidt 2006, 2010, 2011) and serve as determinants of how EU provisions actually (do not) respond to transit.

One can identify the three most common situations that result in asylum case discontinuation. The first situation is when asylum-seekers do not reach the reception centre following application submission. The research undertaken by the OF Department of Social Assistance has shown that between 2009 and 2012 between 20% - 60% of foreigners applying for international protection, mostly Chechens, at the Polish Eastern Border (the Terespol border crossing) never arrived at the nearby OF Biła Podlaska reception centre. Second, the cases are discontinued if asylum-seekers leave the reception centre without notice in the course of asylum proceedings. The third situation is when Polish asylum case

workers are informed by their EU colleagues that persons being in procedure in Poland either apply for refugee status or stay illegally in other member states (Interview. Office for Foreigners, Official L, Warsaw, 28 September 2012).

The number of discontinued cases has increased since 2008. Whereas prior to the 2008 qualification directive transposition the number oscillated between 2,700-3,800 (a significant decline in 2007 was caused by the majority of asylum-seekers staying in Poland in anticipation of developments resulting from the country entering the Schengen Zone), it rose from over 5,500 discontinuations in 2008 to almost 9,000 in 2009 and over 16,000 in 2013 (Figure 6.3). This was most probably the result of rising immigration of Chechens travelling through Poland to Western Europe.

**Figure 6.3 International protection decisions, 2004-2013**



Notes:

\*Protection: refugee status and complementary protection (2004-2008: tolerated stay; 2008-2013: tolerated stay and subsidiary protection).

Source: Adapted from Office for Foreigners statistics (2014).

A considerable volume of discontinued cases constitutes a burden for the state. Those applicants who enter the asylum procedure and disappear create work for a number of BG and OF case officers. Also, by virtue of applying for international protection, asylum-seekers are entitled to social assistance that cannot be effectively channelled to pre-integration or vocational training as migrants massively leave the country. Furthermore, many transit asylum-seekers, whose cases have been dismissed, are returned to Poland on the basis of the Dublin II regulation and seek protection again. This incurs additional costs and administrative work (see Chapter 7.4).

The analysis of the case discontinuation phenomenon adds to the argument that asylum policy (driven by EU harmonisation and institutionalisation) develops separately from actions of (transit) asylum-seekers: despite elevation of procedural standards and personal guarantees, Chechens leave Poland in large numbers. Asylum decisions at the grassroots are made by a handful of OF civil servants who, whilst not encountering opposition in the system, focus on what is absolutely necessary, i.e. on fulfilment of obligations arising from EU and domestic legislation. This orients the policy towards technocratic considerations, feebly linked to what is happening on the ground. This environment has been bolstered by incongruities between officials' perceptions of the causes of transit and of the actual response to it.

### *Flawed integration*

The qualification directive provides the bearers of international protection with access to the labour market and vocational training, accommodation, integration facilities and social welfare. However, member states preserve wide transposition leeway that allows them to, for example, restrict access to social benefits. As a result, though Poland satisfactorily implemented the directive (Interview. UNHCR, Brussels, 14 November 2012), in reality, the quality of public services offered to immigrants is deemed to be unsatisfactory.

The Ministry of Labour and Social Policy (MLSP) that devises integration policy and ensures access to integration schemes and public services for refugees, due to the scarce resources and lack of political interest (see Chapter 5.2.3 and 5.3.2), struggles to encourage them to remain in the country. The vast majority of international protection holders agree that the existing integration framework does not adequately accommodate their needs (Interview. 'Ocalenie' Foundation, Warsaw, 19 July 2012). First, there is flawed access to the labour market. Although persons granted international protection are entitled to undertake legal employment, in practice, employers tend to offer short-term and illegal occupations (UNHCR 2010a, 2011a). A Warsaw-based Chechen refugee shared her experience in the job market: 'when I asked a woman who wanted to employ me at the hotel... as a cleaning lady... they paid 20 zlotys per hour which was very good for me... She said that I would have a regular job, but when I told her that I am Chechen, she changed her mind and said that she couldn't give me this job. She said that she could employ me without a contract'

(Interview. Refugee A, Warsaw, 30 July 2012). Firlit-Fesnak (2008: 98) associates Chechens' unemployment with their low qualifications, the structure of the Polish labour market that adapts to the demand for illegal work, and Polish employers' prejudices against Chechens. At the same time, employment agencies do not incentivise refugees: they neither create opportunities to undertake vocational training or participate in labour fairs, nor are they proactive in providing refugees with job offers (Firlit-Fesnak 2008: 127).

Second, persons accorded protection experience difficulties in securing accommodation. The local authorities, which manage social accommodation, do not have the resources to provide housing to foreigners nor do local regulations envisage such a possibility (MLSP 2013). The only city council in the country that offers flats to refugees (five each year) is Warsaw (Moi 2012: 63). On the other hand, rent in big cities, such as Warsaw, is high and non-affordable for refugees (UNHCR 2010a, 2011a). To quote an already established refugee assisting Chechens in settling in the Polish capital: 'For us, people in a foreign country, stability is extremely important... Persons who leave reception centres don't have such stability... The key problem is a roof over their heads. There are no council flats even for Poles. The only city that offers flats to refugees is Warsaw. However, this is the local authorities' and not the country's policy' (Interview. 'Ocalenie' Foundation, Warsaw, 19 July 2012).

Third, there are shortcomings in integration programmes for international protection holders (Individual Integration Programmes (IIP))<sup>169</sup> (on the introduction of IIPs see Chapter 3.3 and 3.4). Although extended (as a result of the qualification directive transposition) to persons securing subsidiary protection, the level of IIP welfare assistance remains modest. An individual in the first half of the 12-month programme is given 1175 zlotys per month<sup>170</sup> and in the second half: 1057 zlotys per month. On the other hand, a four-member family receives 587 zlotys and 528 zlotys per person per month<sup>171</sup> respectively. For how low these amounts are, one needs to compare them to the state's minimum wage that totals 1181

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<sup>169</sup> Individual Integration Programmes comprise financial assistance, language training, social support and counselling. Art 92(1) (Journal of Laws 2004, No. 64, item 593, with further amendments).

<sup>170</sup> 1 Polish Zloty = 0.2 Euro. Exchange rate calculated on the basis of the Polish National Bank's conversion rate (December 2013).

<sup>171</sup> Order of the Minister of Labour and Social Policy of 9 March 2009 on the provision of assistance to persons granted refugee status or subsidiary protection in the Republic of Poland (Journal of Laws 2009, No. 45, item 366).

zlotys after deductions<sup>172</sup>, and a monthly one-room flat rent in Warsaw that comes to around 1300-1600 zlotys. Refugees point out that IIPs are insufficient to cover accommodation and rudimentary living costs and that their short duration does not allow learning the language and finding a job. As a result, IIPs do not meet the primary objective to streamline settlement and 'large numbers of refugees [including Chechens] decide to discontinue the programmes (over 40%) and leave our country' (Frelak and Klaus 2007: 247).

The flaws that characterise integration policy (influenced by the qualification directive adoption), along with low recognition rates and case discontinuations, lend support to the argument about asylum instruments failing to address the real needs of asylum-seekers and refugees. The MLSP, due to among others, feeble administrative and functional capacity has been helpless in providing a comparative insight into migration and how to alter the current arrangement to create durable incentives to keep migrants in the country (see Chapter 5.2). This co-evolves with structural inability of grassroots institutions, organised by the perceptions of asylum-seekers as economic migrants, to effectively deter transit. In consequence, the transit environment has been shaped by an interplay between the shortcomings of the integration policy developing at the national level and the local authorities' inability to accommodate integration-related concerns of (transit) asylum-seekers.

### **3.2. The procedures directive**

The procedures directive specified the stages of the asylum procedure. Second, it reformulated institutions of inadmissible and manifestly unfounded claims. The introduction of specific conditions under which the application can be recognised as inadmissible or unfounded, enabled quicker case consideration and rejection. Third, the directive extended the applicant's procedural guarantees, including the obligation to inform the applicant about the procedure and his/her rights and obligations. However, one can identify various deficiencies of which two are explored in this section: the flawed access to procedure and a lack of state-sponsored legal assistance to asylum-seekers.

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<sup>172</sup> Order of the Council of Ministers of 14 September 2012 on the amount of the minimum wage for work in 2013 (Journal of Laws 2012, item 1026).

### *Access to procedure*

An asylum-seeker enters the Polish asylum system through lodging an application for granting international protection, in most of the cases, at the border (see Figure 6.1, p. 180). BG officers undertake a preliminary screening and enquire about the reasons for seeking protection in Poland, and how his/her life is in danger in the country of origin. Although the initial proceedings have been systematically evaluated<sup>173</sup>, and elaborated through, among others, an extension of applicants' rights and guarantees, one can identify several shortcomings. As revealed by the 2010 UNHCR report on the access to asylum proceedings, a number of persons in need of international protection have been denied entry to Poland: 'For the Border Guard the use of the words "bieżeniec" (Russian word, in English: "refugee"), "asylum" or any statement made to the effect of "I was persecuted in my country of origin" is not enough of a declaration to be accepted into the territory of Poland and to apply for refugee status' (2012: 73). The research on Chechen migration in Poland conducted by Firlit-Fesnak and colleagues (2008) corroborates UNHCR findings: 'Chechens experience shows that some of them underwent the Border Guard's screening procedure [at the border] several times. They were frequently returned to Brześć [Belarusian border town at the Belarusian-Polish border], and no one knows what determined the next time they were allowed to enter to Poland' (Firlit-Fesnak 2008: 92-3). On the other hand, the practice of NGOs providing legal assistance to Chechens shows a relatively high frequency of such entry denials. An NGO expert confirmed this when speaking about her own experience: 'Sometimes over a week there are five different persons saying that they cannot submit their asylum claim because they are told [by BG officers] that they didn't express their will to apply for asylum. So, the same person calls us again and again and says that he tried but wasn't permitted to enter the country' (Interview. Halina Nieć Legal Aid Centre, Cracow, 20 July 2012).

In response BG officers argue that the only reasons why the supposed asylum-seekers are not permitted entry is their unclear intention to lodge the claim. In the course of

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<sup>173</sup> On the basis of the 2009 agreement with the BG, the UNHCR and a Cracow-based NGO (Halina Nieć Legal Aid Centre (HNLAC)) monitor access of persons seeking international protection to determination procedure. The monitoring includes visits in border crossings and detention centres, and regular meetings with BG officers. See: Agreement concluded between the United Nations High Commissioner for Refugees Regional Representative for Central Europe and the Commander in Chief of the Border Guard on modalities of mutual cooperation and coordination of activities with respect to access of persons to the procedure for granting international protection on the territory of the Republic of Poland. Done in Warsaw, on 21.10.2009.

preliminary interviews applicants often declare that they want to improve their financial status: 'In the majority of cases these are economic motivations... They write in asylum applications that they don't have a job because they are persecuted because they are Chechens... or [they write] that during the day the local police and at night the fighters come and want something... As far as female asylum-seekers are concerned, the majority of them want to provide well and peace for their children and [want them] to receive good education' (Interview. Border Guard, Terespol, 18 September 2012).

The phenomenon of associating asylum-seekers' decisions with economic motivations characterises the Polish asylum reality. The previous sections illustrated the formulation of similar views by OF officers and core executive civil servants (Chapter 5.5). The opinions expressed by BG officers born out of a specific institutional setting: they operate at a very end of the implementation chain that determines the conditions of the first contact with a protection seeker and allows to get to know his/her understandings of migration. This setting is therefore not only the structure to which actors mechanically respond as unthinking agents but it also produces the meaning context within which they develop their ideas for action (Schmidt 2010, 2011). This analysis argues that BG officers' perceptions of asylum applicants translate into entry refusals and more cautious decisions on access to asylum procedure in Poland.

#### *Lack of state-funded legal assistance to asylum-seekers*

The Achilles' heel of the Polish asylum framework since the 1990s has been the system of legal assistance for asylum applicants. The Polish government has not yet transposed the procedures directive as regards the obligation to ensure free legal aid at least at the appeal stage, despite the deadline for transposition passing in December 2008 (Foryś and Ostaszewska 2010: 35). This opens the possibility for the Commission to bring the case against Poland before the European Court of Justice (Interview. Refugee Board, Warsaw, 6 September 2012). The provisions have not been transposed due to an anticipated overhaul of the state legal aid framework and the necessary allocation of additional administrative and financial resources. At present, in the course of the first- (the OF) and second-instance (the RB) asylum proceedings (see Figure 6.1, p. 180), an applicant is only given the right to contact (and consult his/her case with) the UNHCR or a refugee NGO, and to arrange for a legal representative at his/her own cost. Polish law does not envisage any obligation as

regards the representative's legal education or official license. In practice, legal assistance has been provided by NGOs and university clinics, whose, however, human and financial capacity has to be assessed as low (HNLAC 2011: 4). Moreover, the bulk of NGOs' actions tend to be short-term and contingent on precarious and changeable EU funds (Interview. Halina Nieć Legal Aid Centre, Cracow, 20 July 2012). This has implications for the quality of service and shapes perceptions of asylum-seekers. For instance, Chechens interviewed as part of Firlit-Fesnak's (2008) research project pointed out the scant experience and incompetence in the Russian language of young legal advisors employed by NGOs.

A lack of state-funded legal aid available to asylum-seekers places an additional burden on the OF that remains their only source of information. The OF case workers are frequently enquired about given decisions, procedures and legislation that involves their time and often disrupts their work (Information from civil servants from the OF Department of Refugee Proceedings, August-September 2012). Second, the applicants often misunderstand regulations that hampers their participation in the proceedings. To quote a Warsaw-based asylum-seeker:

At Koszykowa or Taborowa [the streets where the Office for Foreigners is located] they issue a decision and say: "Good bye: this is your decision". If the decision is negative, nobody helps us and simply says: "Make an appeal and everything will be fine"... We then submit an appeal and receive a rejection... and so on. There is no assistance either legal or on everyday matters... We simply receive a rejection and [the Office for Foreigners' officials say:] "Do with it what you want" (Interview. Asylum-seeker A, Warsaw, 19 July 2012).

The government officials' and Chechen asylum-seekers' understandings of the procedures directive implementation feed into legal responses to asylum that deficiently address the deficiencies that emerge on the ground. Flawed interpretations of protection seekers' motivations result in frequent entry denials and deportations. On the other hand, the shortcomings of the legal support system lead Chechens to be inadequately informed about the asylum procedure, and in many cases do not allow them to fully participate in the proceedings. This forms the 'bundle off' milieu that discourages asylum-seekers from coming to and/or staying Poland, and therefore, adds to the setting that enables the transit country construction.



### **3.3. The Dublin II regulation**

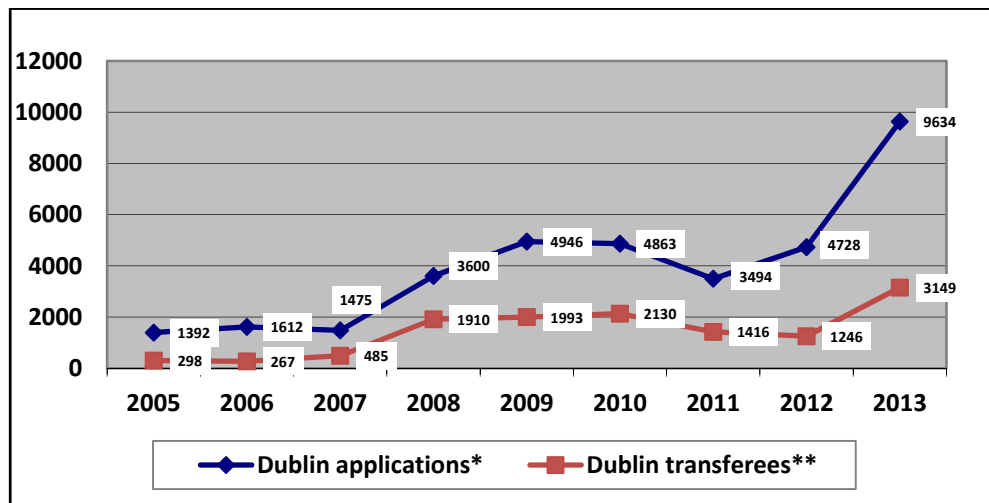
The Dublin II regulation establishes criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in the EU by a third-country national. The system is grounded in the presumption that member states may be considered as 'safe countries' for asylum-seekers, for which reason transfers from one member state to another are supposed not to violate the principle of *non-refoulement* (see Chapter 5.3.1). The Dublin II plays an important role in countries of first asylum application, including Poland, which face significant transit migration. Asylum-seekers, predominantly Chechens, use Poland as a 'bus stop' on their travel west and many of them are subsequently returned on the basis of this regulation. This section examines how the implementation of the regulation affects an on-the-ground action on transit, and how this then contributes to the construction of transit.

#### *EU-induced changes*

The Dublin regulation came into force in Poland with the 2004 EU accession. The institution that manages the Dublin transfers (entertainment of member states' requests to take charge of applicants, and formulation of requests to other states to take back applicants) is the OF Department of Refugee Proceedings. Upon the agreement between the OF and the BG, the decisions on transfers to and from Poland are then implemented by the BG.

Poland's application of the Dublin regulation enables EU states to return asylum-seekers to Poland in a quicker and more effective manner. In most of the cases, EU states requesting the transfers are those of Chechen destination: Austria, France and Germany. In 2013 requests from these states constituted over 80% of all Dublin claims sent to Poland (Office for Foreigners statistics 2014). The 'take charge' requests are proportional to the number of discontinued cases (see section 3.1 and Chapter 3.2.3), and have both risen since 2007 (Figures 6.3 and 6.4). This shows that many of those who disappear at the time of procedure (and whose cases are then discontinued) are subsequently found in Western Europe, and sent back to Poland. In 2013 85% of discontinued claims, and 76% of Dublin transfers concerned Chechen migrants (Office for Foreigners statistics 2014).

**Figure 6.4 Dublin transferees, 2005-2013**



Notes:

\*Dublin applications: EU member states' applications/requests sent to Poland to take charge of asylum-seekers.

\*\*Dublin transferees: Persons transferred (back)/returned from EU member states to Poland on the basis of the Dublin Regulation.

Source: Adapted from Office for Foreigners statistics (2014).

Most returnees either attempt to reach Western Europe again, stay in Poland (if they are not accorded protection, their stay is illegal), or return to their country of origin. (Interview. 'Ocalenie' Foundation, Warsaw, 19 July 2012). The number of Chechens who have recently benefited from the IOM assisted voluntary return programme totalled over 850 persons (75%) in 2010 and over 1,100 (69%) in 2011 (IOM 2012).

### *Implementation deficiencies*

The implementation of the Dublin regulation has revealed several flaws. We now focus on those that emerge within the process of taking charge of asylum-seekers as the vast majority are sent back to Poland (as the country of their first application) from other EU states. First, there is the problem with subsequent applications submitted by the returnees. A number of them resume their case, or if the previous decision was negative, lodge another application upon their transfer back. OF DRP officers point out, the returnees' repeated applications not only increase the OF's workload, but also constitute a considerable financial burden for the state (Information from civil servants from the OF Department of Refugee Proceedings, August-September 2012).

Second, there are OF case workers' prejudices against Dublin transferees seeking protection again. NGO activists argue that many of these asylum-seekers are not being accorded international protection: '[t]he main argument raised in negative [international protection] decisions is that asylum-seekers tried to improve their economic status instead of being satisfied by the protection guaranteed by the first country they entered [i.e. Poland]' (HFHR 2011: 80). This has been confirmed by the UNHCR: 'In 2010 the majority of Dublin returnees who benefited from legal assistance provided by HNLAC [an NGO cooperating with the UNHCR, see above] lawyers received negative decisions, where the Head of the Office for Foreigners raised the fact that because the alien[s] left Poland illegally during the asylum procedure, they did not need protection from the first safe country, and that [they] were in fact economic migrants and not asylum seekers' (UNHCR 2012: 74). Dublin procedures have been thus another manifestation (along with low recognition rates and entry denials analysed earlier) of translation of asylum officers' interpretations and perceptions into tangible decisions that influence asylum applicants' actions. Ideas are therefore dynamic and serve as a resource to promote change (Schmidt 2006, 2010, 2011).

Finally, there are practical obstacles in cooperation between EU states requesting transfers and Poland (agreeing upon or refusing the transfers). Sometimes, prior to the transfer being made, the requesting states do not provide the Polish authorities with necessary documents to verify personal data, such as dactyloscopic cards or photographs, or the materials are of poor quality. This prolongs the procedure. Also, at times the documents sent to Poland to prove transit across the country are of low weight which makes the files' authentication very difficult (Interview. Office for Foreigners, Official H, Warsaw, 28 September 2012). Furthermore, once the transfer is carried out, the sending states often do not pass the transferees' documents, such as passports or medical records, which extends the period of his/her stay in reception centres and prevents Polish officials from arranging those persons' voluntary return to the country of origin (HFHR 2011). The procedural flaws result in a considerably low number of persons returned to Poland in relation to EU states' applications for these transfers. Whereas in 2008 a half of transfers were actually undertaken, the gap broadened over time, and in 2013 amounted to only one third of applications that resulted in transfer (Figure 6.4). However, as we saw in Chapter 4.4, the Polish government does not bring these problems to the EU level. Polish officials did not attempt to remedy the implementation deficiencies in the course of

negotiations over the Dublin regulation amendment. This contributes to the broader institutional problem related to the transfer of information and data between the grassroots and core executive institutions. One of the key reasons why decision-makers in Warsaw have not been provided with feedback by 'street-level' officers on the on-the-ground developments has been the constrained capacity of the latter to undertake comprehensive research on the shortcomings and formulate policy recommendations.

How do the deficiencies that emerge from the Dublin II implementation inform the legal setting that enables the transit country construction? First, the application of the regulation implies an incorporation of EU management logic to deal with (transit) asylum-seekers: the resources allocation and action of asylum institutions have been determined by considerations over effective handling and distribution of applicants. Second, this logic has been disseminated by BG and OF officers, who put Dublin provisions in practice, and whose decisions have been organised by stigmatisation of Dublin returnees as transit economic immigrants seeking better life in the west. To BG officers the governance of Dublin transferees becomes crucial as it enables reallocation for 'abusers' of the Polish asylum system. In this sense, the arena within which ideas about transit arise is informed by an intersection between the instrumental motives of adequate EU provisions implementation and the perceptions of what these provisions mean in practice and how they influence asylum migration.

### **3.4. The reception directive**

The reception directive regulates asylum-seekers' access to education, health care, labour market, and the provision of material support (accommodation, food, clothing, and financial support) (see Chapter 5.3.1). It gives, however, wide latitude to transpose the provisions. For example, although the directive envisages applicants' access to employment, member states set the period after which such access can be granted and can give precedence to EU nationals. Also, the level of material reception has been vaguely defined (see also Chapter 4.2.2.4). Article 13(2) stipulates that: '[m]ember states shall make provisions on material reception conditions to ensure *a standard of living adequate for the health of applicants and capable of ensuring their subsistence*' (emphasis added). As a result, the local-level Polish authorities, whilst acting under the conditions of manageable inflow and scant public oversight, can pay less attention to the social aspects of asylum

policy. As analysed in Chapter 5.2 and 5.3, the government, not being pressured by the EU to elevate reception conditions, does not mobilise additional resources to the system and sets only minimum standards. This section will demonstrate how the flaws that characterise the adoption of the reception directive (deficient access to employment, poor accommodation, and low welfare benefits) and the dynamics of EU funding absorption produce the underlying logics that inform the policy response, and then the transitness milieu.

### *Implementation deficiencies*

Let us start by identifying the flaws in accessing the labour market. Though EU provisions have been appropriately transposed: Poland ensures the right to work after six, not twelve months (as envisaged in the directive) following asylum application submission, asylum-seekers struggle to find employment. A low quality of vocational training (most of the courses are organised by NGOs on an *ad hoc* basis) and poor information about Polish labour regulations offered to asylum applicants in the course of procedure weaken their position in the labour market. On the other hand, very rigid and inflexible labour regulations have not been adjusted to new challenges brought by rising immigration in the country. This implies, among others, meagre knowledge of the possibilities of employment of asylum-seekers among Polish employers. The latter have been also generally reluctant to hire foreigners (Nikiel 2011). Therefore, Chechen asylum-seekers' concerns over earning money in Poland seem to be justified: 'the Polish labour market is very difficult, and there is high unemployment. Even Poles cannot find employment. Nobody employs Chechens legally, so even if you manage to find a job, they [employers] cheat and don't pay... The [labour] market is unfair and hostile towards foreigners' (Interview. Asylum-seeker D, Podkowa Leśna, 8 August 2012).

Closer exploration of the labour market opportunities has also been hampered by Chechens' low competence in Polish. An OF official examining Chechen asylum claims explained: 'the problem is that the majority of Chechens don't integrate well [in society]... They speak Chechen language that is similar to Turkish, and they are not a Slavic nation. This creates a certain difficulty for them. However, the majority of them know the Russian language. So, they should be able to learn Polish easily. Sadly, I've noticed that Chechens who live in Poland, for example, for four years, know only a few Polish words' (Interview.

Office for Foreigners, Warsaw, 20 August 2012). This has been validated by research. Firlit-Fesnak (2008: 62-3), who analysed the reception conditions of Chechens in Poland between 2006 and 2008, identified several reasons for their language problems, including a low quality of language classes provided in reception centres and their maladjustment to the needs of beginners, Chechens' low motivation to learn Polish, and their perception of Poland as a 'train station' in their journey west.

Second, the quality of accommodation provided to protection seekers raises some concerns. Only four (Białystok, Dębak, Lublin, and Targówek (Warsaw)) out of twelve reception centres (December 2013) are located in/near the cities that offer employment opportunities, access to education and legal and medical services. The rest are situated in low-populated regions, where asylum-seekers feel isolated and are entirely dependent upon welfare assistance (Moi 2009b). Moreover, the investments and renovations have been largely restricted to three OF-owned centres (Czerwony Bór, Dębak and Linin) (OF 2012b, 2013). In centres run by private administrators, refurbishments are cursory and do not improve the overall poor access to sanitary facilities (Firlit-Fesnak 2008). Also, residents complain about overpopulation (UNHCR 2007a, 2008a) that often causes conflicts (Interview. Asylum-seeker B, Warsaw, 7 August 2012; Interview. Asylum-seeker C, Warsaw, 7 August 2012).

Finally, there is a low level of welfare support for asylum-seekers. The assistance is allocated to those staying in reception centres, and to those living on their own. The first group is provided with shelter, food, pocket money and support on a one-off basis to purchase clothing and footwear. The forms and levels of assistance were set in 2003<sup>174</sup> and have not changed since (December 2013). The support has been highly insufficient:

We came to Poland and sought asylum here not to live from hand to mouth, but to live as normal people. Chechens live everywhere [across the EU] and are sprucely dressed... And here? The point is that we want to keep our dignity... and in this sense nothing has changed... Why does an asylum-seeker receive only 70 zlotys and lives on the brink of poverty and has to mull over whether to buy a hygienic product, a juice for a child, or clothes? (Interview. Asylum-seeker B, Warsaw, 7 August 2012)

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<sup>174</sup> Order of the Minister of Interior and Administration of 14 August 2003 on the level of assistance for asylum-seekers (Journal of Laws 2003, No. 146, items 1427 and 1428).

The second group is offered the welfare package that covers expenses of living outside the reception centre (rent, food and cleaning supplies). The support has been calculated at the level of 750 zlotys for a single applicant and 375 zlotys per person in a four-person family<sup>175</sup>, and is highly unsatisfactory (Interview. Asylum-seeker A, Warsaw, 19 July 2012; Interview. Refugee B, Warsaw, 25 September 2012). To see how insufficient these funds are, one can compare them to, for example, the state-defined minimum level of existence<sup>176</sup> that in 2012 was estimated at 521 zlotys for a person (one-man household) and 442 zlotys for a person in a four-person household (ILSS 2013). Also, if we compare the monthly assistance for a four-member family granted in Poland (€330<sup>177</sup>) and in Germany (one of the key Chechen destination states) (€1057)<sup>178</sup> (BMAS 2013), the amount offered in the former seems to be considerably low. The social discrepancies between EU states constitute one of the key factors that drives transit across the EU (see Chapter 4.2) and generates an incentive for Chechens to leave Poland.

The analysis of EU reception instruments' incorporation at the local level and of Chechens' understandings of this process corroborate the argument that Polish asylum policy has been detached from real-life problems of asylum-seekers. The local authorities have been unable to anchor the newcomers in Polish socio-economic reality and to build the conditions that would encourage those people to stay in the country. This co-evolves with straightforward adoption of the approach to transit forged at the national level that implies marginalisation of welfare and integration programmes and the government's deafness to the demands of migrant organisations (see Chapter 5.3). Therefore, the milieu that emerges at the grassroots has been characterised by hostility and indifference to the lot of asylum applicants.

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<sup>175</sup> Currently (December 2013) in force: Order of the Minister of Interior and Administration of 11 November 2011 on the level of assistance for asylum-seekers (Journal of Laws 2011, No. 261, item 1564).

<sup>176</sup> The minimum level of existence indicates 'the lowest living standard beyond of which there is a biological threat to life and a psychophysical development. Fulfilment of needs at the minimum existence level allows only survival' (ILSS 2013: 1).

<sup>177</sup> 330 Euros = 1500 Polish Zlotys. Exchange rate: 1 Euro = 4 Polish Zlotys. It was calculated on the basis of the Polish National Bank's conversion rate (December 2013).

<sup>178</sup> This does not include benefits to cover housing costs (e.g. rent, heating). German immigration law diversifies the level of support allocated to the head of household, other grown-up household members, and children (as household members) of different age. The foregoing amount has been calculated for a family consisting of adult parents and two children up to the age of seven (BMAS 2013).

### *EU funding absorption*

The post-2004 adjustments to EU asylum standards co-occur with EU funding absorption: between 2004 and 2011 Poland spent over 9 million zlotys (over €2 million) of EU money (specifically from the ERF) to ameliorate the reception conditions (OF 2012d). First, a new OF service point for applicants was built in Biała Podlaska, and three OF centres (Czerwony Bór, Dębak, and Linin) were modernised (OF 2012d). Second, the funds allowed for improving the reception centres' education (nursery schools, teaching and computer rooms), sport (football grounds), and leisure (playgrounds) facilitates. Finally, drawing on EU support, NGOs in cooperation with the OF provide legal assistance, and organise language and vocational training and Polish culture classes for asylum-seekers (OF 2010a, 2011a).

However, the process of EU funds' allocation has had some shortcomings. First of all, EU assistance has diminished the pressure on the government to reformulate the flawed reception policy, and led to maintaining low annual expenditure for infrastructural improvements<sup>179</sup>. Second, one can identify some deficiencies in the implementation of EU-funded integration measures (e.g. language and vocational courses). Most of them have been managed by NGOs on an *ad hoc* basis (the time and scope of NGO-led programmes have been determined by the availability of EU funding and Commission recommendations) and loosely coupled with government reception priorities (the OF has not attempted to explain the relationship between various NGOs' initiatives and government policy). This does not constitute a comprehensive response to asylum-seekers' needs. A Chechen refugee provided a picture of NGO vocational training:

Some non-governmental organisations undertake actions that are a total flop, as Chechens are simply not interested in them... There were, for example, self-esteem courses. They [the organisers] drew a picture of a tree and showed how to climb the ladder and so on... Chechen women quit... I think the money [for these courses] was thrown down the drain... This was totally abstract for us... We rather expected something that would help us to manage real-life problems' (Interview. Refugee A, Warsaw, 30 July 2012).

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<sup>179</sup> In 2011 and 2012 the government spent for renovations and building and equipment maintenance only 1.5 and 1.8 million zlotys respectively (OF 2013).



Short-term and reactive EU funding, whilst uncoupled from the government integration policy and programmes, leave asylum-seekers on their own, and underestimate their expectations. The latter have been pushed to the sidelines of procedural and administrative responses to the flows, organised by the logic to control and govern the movement, and not to assimilate immigrants.

An incorporation of EU asylum legislation has organised asylum proceedings, qualification criteria, reception and distribution of asylum-seekers at the grassroots. The process has been characterised by several flaws, including low recognition rates, feeble protection against expulsion, inconsistent procedures and meagre welfare and integration assistance. This environment generates the legal and social logics that inform transitness. First, the adoption of EU asylum policy, specifically in the field of reception and integration, develop separately from decisions of asylum-seekers. The legal instruments either focus on purely procedural issues, or the social standards that they introduce do not provide sufficient incentives to deter transit. Second, the dynamics of EU asylum law and policy adoption at the 'street-level' illuminates the translation of restrictive approaches to alleviate transit, forged at the core executive level. This, along with a technocratic design of grassroots institutions (the dominant position of the OF) helps maintain high levels of protection rejections and returns. Third, both those who implement policy and those who are subject to it inform policy responses to migration and transit: whereas OF and BG officers perceive asylum applicants as transit migrants that translates into policy entry restrictions, assessments of asylum proceedings formulated by Chechens expose the ineffectiveness of local authorities' action, and contribute to decisions about transit. The construction of transitness on the ground emerges as an environment of restrictive admission and recognition that discourages settlement and that governs but does not integrate immigrants.

The arenas that enable the transitness construction, whilst evolving within Europeanisation, have been informed by two intersecting dynamics: an optimality assumption to put EU legislation into practice drawing upon limited administrative and financial resources; and interpretations of the transit reality institutionalised into decision-making. The next section brings forward this rationalist-constructivist interaction and investigates the conditions and mechanisms under which the local-level policy setting enables learning, exchange of knowledge and practices and what it means for transitness.

## 4. Learning

This section investigates the post-EU accession development of policy learning, practices and information sharing, and avenues of knowledge production on the ground. It analyses how EU networks of collaboration over asylum and UNHCR-led projects on the quality of asylum proceedings inform asylum decision-making on the ground and how this setting contributes to the formation of logics and ideas of transit.

### *EU networks*

Asylum policy learning at the grassroots occurs primarily through venues structured by the EU. First is the European Asylum Curriculum (EAC)<sup>180</sup>: the platform of practical cooperation between EU asylum officials that seeks to ameliorate the quality of asylum proceedings and the administrative capacity of domestic asylum services (CEC 2010). A series of workshops, organised by the EAC between 2009 and 2010, provided an opportunity for OF case officers to learn about asylum interview techniques, evidence assessment and decision drafting. As an OF participant of the workshops stated: 'This was important because during the training we could see different member states' approaches and see how they work in real life situations, and to compare them with our procedures' (Interview. Office for Foreigners, Official K, Warsaw, 28 September 2012). This enabled OF civil servants to acquire EU and EU states' practices related to asylum procedure, styles of communication and to apply them in their work (Interview. Office for Foreigners, Official G, Warsaw, 28 September 2012). In this sense, practices frame actors, who, thanks to this framing, know who they are and how to act in an adequate and socially recognisable way (Rasche and Chia 2009:719; see also Goffman 1977). Practices therefore emerge as intimately related to subjects who are not passive performers of discursive scripts or texts, but are active agents of change (Adler and Pouilot 2011).

Second, ERF projects enable fact-finding missions of member states' officials to countries that generate asylum flows to the EU. OF civil servants participated in missions to former Soviet Union states, including Georgia (2009) (OF 2010b) Belarus (2010) (OF 2010c) and

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<sup>180</sup> The platform was established in 2005 under auspices of the European Commission and the General Directors' Immigration Services Conference (the association of representatives of asylum services from over 30 states aiming to enhance practical cooperation on migration and asylum). In January 2012 the EAC merged into the European Asylum Support Office (see Chapter 4.2.3.2).

Armenia (2011) (OF 2011b), where they had an opportunity to collect information on political and socio-economic developments, enquire about specific issues emerging from asylum case examination and share knowledge. Also, ERF contributed to the OF's study visits in EU (destination) states, such as Belgium (OF 2010f) and France (OF 2010e), where Poles learned of how more advanced asylum frameworks in the EU were organised and worked. This included collection of data on procedures and day-to-day work of asylum institutions, and development of skills in evidence organisation and analysis.

Third, OF civil servants take part in the European Network of Asylum Reception Organisations (ENARO)<sup>181</sup>. Through regular ENARO meetings and study visits, they gather information and share experience with their European colleagues on reception and social assistance policy. They also learn about reception administration and integration instruments in other member states. Poland's engagement with the ENARO brought, for example, the idea of launching a special reception centre for single mothers with children that was established in Warsaw (Targówek) in 2010. Observations of the Danish system translated into provision of selected reception centres with additional furniture adjusted to applicants' special needs and household articles (Interview. Office for Foreigners, Warsaw, 5 September 2012).

The grassroots learning, focused on substantive policy improvement (Gilardi 2010), assumes an 'instrumental' character. According to Dunlop and Radaelli (2013: 612-13) in this type of learning learners operate within exogenous objectives of learning, but they control the means and content of learning. The EU exerts pressure to learn as EU learning frameworks facilitate EU asylum law implementation, yet Polish officials' freedom of discovery facilitates improvement of domestic asylum procedures and reception standards. Learning is 'simple' because actors acquire new information as a result of transnational interaction, and use this information to alter strategies, but not preferences (Checkel 2001b: 561).

#### *UNHCR projects on the quality of asylum procedure*

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<sup>181</sup> This is an inter-institutional cooperation platform between reception services from 20 European states (EU-17, Norway, Serbia and Switzerland) that facilitates exchange of asylum and migration knowledge and good practices.

The asylum learning environment structuralised by EU programmes and platforms of cooperation has been enriched by UNHCR initiatives to improve the quality of asylum determination proceedings: the Asylum Quality Assurance and Evaluation Mechanism (ASQAEM) (2008-2010) and the Further Developing Asylum Quality in the European Union (FDQ) (2010-2011). The projects were co-financed by the European Commission and determined by UNHCR that, as a 'guardian' of the Refugee Convention oversees asylum procedures and reception conditions in Poland.

The ASQAEM project was built upon three pillars: the evaluation of case examination procedure and how it aligns with international (the 1951 Refugee Convention) and EU (the procedures directive and the qualification directive) standards, the provision of training for asylum case workers, and the introduction of mechanisms to monitor administrative proceedings. It constituted a venue for OF asylum officers to exchange experience related to various aspects of asylum case examination (e.g. interpretation of legal provisions and how to apply them in asylum decisions) (OF 2012c), and share knowledge of different asylum caseloads with partners from Austria, Bulgaria, Germany, Hungary, Romania, Slovenia and Slovakia. The FDQ project developed some ASQAEM mechanisms, including the development of channels of knowledge sharing between asylum officials from destination states (Austria, Germany and the UK) and CEECs, including Poland, and elaboration of the system to monitor the asylum determination process (UNHCR 2011b).

UNHCR projects created international and national platforms of identification of asylum system deficiencies and data and practices exchange. They also helped the Polish authorities to forge instruments to evaluate asylum proceedings, grounded in UNHCR benchmarks on evidence assessment, carrying out interviews and drafting asylum decisions. Let us now turn to the evaluation mechanisms introduced in the OF.

#### *OF Quality Assessment Mechanism*

Building upon ASQAEM and FDQ recommendations, in July 2009 the OF DRP established an internal mechanism to monitor OF asylum proceedings<sup>182</sup>. Every month OF evaluators

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<sup>182</sup> Order No. 27 of the Director General of the Office for Foreigners of 7 July 2009 on the analysis of the quality of asylum claim determination proceedings undertaken in the Department of Refugee Proceedings of the Office for Foreigners. Amended by: Order No. 37 of the Director General of the Office for Foreigners of 5 November 2009 amending the order on the analysis of the quality of

examine a sample of OF asylum decisions, whilst focusing on the accuracy of evidence analysis and the quality of decisions' justification. The evaluation report identifies shortcomings and formulates recommendations, which are later disseminated across the DRP and discussed. This enables the grassroots officers to deliberate over specific procedural problems, reflect on possible solutions, and to improve practices (Information from OF DRP case officers, September 2012). An identification of deficiencies has been strengthened by UNHCR quality audit. Introduced through the 2011 UNHCR-OF agreement<sup>183</sup>, it allows UNHCR representatives to oversee asylum proceedings parallel to OF evaluations. The outcomes of UNHCR audits are subsequently discussed with UNHCR experts and OF bureaucrats, and compared with outcomes of internal evaluations (Interview. Office for Foreigners, Official J, Warsaw, 28 September 2012).

OF officials identify several advantages of monitoring mechanisms. The latter, first, introduced the common criteria for drafting asylum decisions. Second, they improved coherence of asylum provisions' interpretation, and consistency of the OF adjudication line. Third, they bettered the quality and efficiency of the asylum determination procedure: the number of appeals lodged against OF decisions to the RB dropped from 50% in 2008 to 25% in 2009, and OF decisions revoked by the RB declined from 18% in 2010 to 5% in 2011 (Interview. Office for Foreigners, Official J, Warsaw, 28 September 2012). This has been recognised by the UNHCR: 'No system is perfect but I think that the sincere efforts are recognised by not only the UNHCR but also NGOs and others that Polish authorities have put into place the essential mechanisms for fair determination of international protection needs' (Interview. UNHCR, Brussels, 14 November 2012).

Concerned with the quality of policy output, the OF uses migration and asylum knowledge instrumentally (Boswell 2008, 2009). The attempts of the Office to improve the efficiency of asylum proceedings exhibit the process of drawing on additional resources and external standards and norms to improve performance. The research commissioned by the UNHCR to evaluate the procedural and administrative deficiencies in the Polish system involved close monitoring on the basis of rigorously prepared design and methodology. This later

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asylum claim determination proceedings undertaken in the Department of Refugee Proceedings of the Office for Foreigners.

<sup>183</sup> Cooperation Agreement between the Head of the Office for Foreigners and the United Nations High Commissioner for Refugees Regional Representative for Central Europe regarding the implementation of quality audit of refugee status determination proceedings conducted by the Head of the Office for Foreigners. Done in Budapest, 9 November 2011.

enabled the OF to continue performance measurement drawing on their own research resources. The choice of topics (determined by UNHCR and the Commission) corresponded closely with perceived gaps in organisational knowledge. Knowledge produced as a result of UNHCR-steered cooperation and by OF DRP research units contributes to the improvement of effectiveness, fairness and quality of asylum determination processes, and therefore, to policy adjustments in line with desired policy goals.

The post-EU accession European integration has altered the conditions under which Polish asylum actors acquire EU ideas, meanings and policy recommendations. First, the number of interactions has increased: Poles exchange data and practices with their EU colleagues and cooperate regularly to improve EU law implementation and institutional efficiency. Second, intra-EU communications and contacts result in the establishment of new procedural and administrative habits as well as in the improvement of administrative efficiency. Third, EU-induced learning has been steered by a narrow circle of OF and BG officers that apply EU concepts, norms and standards in policy-making. This contributes to Checkel's argument (2001b, 2005), delineated in Chapter 2 about the features of the environment that facilitate persuasion.

However, the content of EU-induced interactions (highly complex and technical problems related to legal and procedural aspects of asylum-seeking) and the nature of the OF institutional setting within which learning takes place (a technocratic environment concerned with the quality of output) make it difficult for 'normative suasion' to occur (see Chapter 5.4). Rather than reflectively internalise new understandings, local-level decision-makers take on roles because it is easier socially. They comply with group norms, but in a non-reflective manner. That is 'if asked about the source of compliance they – after conscious thought – might answer, "Well, I don't know whether it's right or wrong, it's simply what is done and, I guess, it's a habit of mine by now"' (Checkel 2005: 811-12). The 'role playing' mechanism of socialisation also indicates that civil servants on the ground do not always act strategically and instrumentally. The testing of Checkel's scope conditions helps to identify how the organisational and group environments that provide the simplifying shortcuts and buffers lead to the enactment of particular role conceptions and how the latter govern individual behaviour. This informs an interaction of instrumental and social motives of policy at a practical and operational level (see Chapter 2.3).

The milieu that emerges from the development of EU-spurred social interactions informs the transit country construction. The institutional patterns and procedural templates and recommendations produced as a result of these interactions, whilst aiming to elevate the admission conditions and standards related to asylum procedures, strengthen EU procedural and management paradigm in thinking about transit developed through the process of EU law implementation. They also bolster the flawed perception of transit as the phenomenon that can be regulated through administrative means detached from the on-the-ground migration dynamics.

## 5. Understanding of transit

This section frames the discussion on the emergence of the local-level framework that generates the underlying logics of the transit country construction with understandings and discourses about transit produced by asylum decision-makers and Chechen asylum-seekers. Here, discourse is understood in an institutional context: it is considered not only in terms of other mediating factors that affect policy change, but also in terms of rules that frame the ideas and discourse in policy settings (Schmidt and Radaelli 2004: 197).

First, similar to the core executive level (see Chapter 5.5), the central role of the OF in the system, reflected in allocation of resources at the grassroots according to the Office's preferences of effective asylum governance and distribution, and in wide latitude in implementing EU provisions, informs discourse about the formulation of policy responses to transit. For instance, *inertia* in the provision of pre-integration programmes for asylum-seekers as a result of orientation of policy towards EU asylum law implementation, has been explained by government officials as 'pointless as applicants will transit through Poland anyway' (Interview. Office for Foreigners, Warsaw, 20 August 2012). A MoI civil servant admitted with disarming frankness that 'investing in pre-integration in a situation where less than 50% of asylum-seekers are accorded protection doesn't make sense' (Interview. Ministry of Interior, Warsaw, 12 July 2012). NGOs' activists, on the other hand, whilst criticising this policy, speak about transit as 'a good excuse for the government to not undertake any action in the field of integration... This is a form of a self-winding spiral in which we don't do much for these asylum-seekers because they leave. They leave and

strengthen our conviction that it is not worth doing anything. This is a vicious circle' (Interview. Polish Migration Forum, Warsaw, 24 July 2012).

Second, the discourses about transit that develop within the government contribute to the argument about separation of EU-determined asylum law and policy adoption from actions of asylum-seekers. Decision-makers speak about the causes of transit that they do not address through policy. BG officers believe that the majority of applicants are well aware of a flagrant discrepancy in social assistance offered in Poland and other EU states and treat Poland as an entry point to the Schengen Zone. A BG officer serving at the Polish Eastern border spoke about 'numerous cases' where Chechens 'at the time of asylum application submission admitted that there were better living standards offered in the west' (Interview. Border Guard, Terespol, 18 September 2012). In the same vein, MLSP civil servants mention Chechens' disinterest in staying in the country, which offers low living standards and social support below the EU average. According to an MLSP official: 'Chechens are not interested in staying in Poland regardless of what is offered to them. They simply have in mind a plan to go west. First and foremost, they have three, four, or five times higher welfare assistance there than in this country' (Interview. Ministry of Labour and Social Policy, Warsaw, 20 August 2012).

On the other hand, Chechen asylum-seekers' understandings of the Polish migration reality feed into the above policy responses to transit. The government's (in)action to support their integration in Poland constitutes an important factor in their decisions about migration. To quote a Warsaw-based asylum-seeker: 'in Western Europe you get a flat right away, they pay you the rent, help in finding a job and take care of your children... they also help you with the school and language issues. Here [on the other hand] we rent the flat for which we receive around 1,500 zlotys per month from the Office for Foreigners. We pay 1,300 zlotys rent and have only 200 zlotys left for a family of five' (Interview. Asylum-seeker A, Warsaw, 19 July 2012).

Finally, Poland's embeddedness in the EU asylum framework: an incorporation of EU legislation and engagement with social interactions with the EU enables the dissemination of ideas and perceptions about EU mechanisms as effectively addressing transit. For example, to OF case workers Dublin regulation constitutes an inherent element of asylum procedure and an indispensable tool to distribute migrants: 'in the situation of a transit



country, where Dublin automatically lands in and the majority of these foreigners are returned to Poland and later detained... a number of mechanisms function... [and those people] come back to the asylum procedure here [in Poland]' (Interview. Office for Foreigners, Official G, Warsaw, 28 September 2012). The discourse about EU asylum instruments also resonates outside the government, among policy-recipients. The Dublin regulation appears as a crucial mechanism determining Chechens' transit decisions and shaping their migration strategies. As a Chechen asylum applicant pointed out:

If we receive the final negative decision, we will probably move to Germany because it is the closest option... we can go there even by taxi... First of all, I will be able to continue the treatment of my leg there as I don't want to be crippled for life... There is a good level of health care... Also we've heard through the grapevine that there is a chance to stay in Germany for good if we survive a half a year [the period after which the asylum authorities can withdraw from the Dublin transfer] and avoid Dublin... They allow Chechens to stay (Interview. Asylum-seeker A, Warsaw, 19 July 2012).

The discursive frames produced by on-the-ground actors, articulating their interpretations in exchanges (Schmidt 2010, 2011), structuralise the logics to approach transit that emerge as a result of legal and bureaucratic adaptation to the EU, and therefore, construct transitness as a policy issue (for a detailed discussion see Chapter 7.3.3). Here, discourse is fundamental 'both in giving shape to new institutional structures, as a set of ideas about new rules values and practices, and as a resource used by entrepreneurial actors to produce and legitimate those ideas, as a process of interaction focused on policy formulation and communication' (Schmidt and Radaelli 2004: 192).

## **6. Conclusion**

The analysis demonstrates that, first, the BG, which entertains asylum applications, and the OF, which examines the claims and provides social assistance, emerge as central institutions that drive the bureaucratic adaptation at the grassroots. Second, the implementation of EU asylum instruments (the qualification directive, the procedures directive, the reception directive, and the Dublin regulation) has informed 'street-level' actors' action: it defined the protection grounds, modified asylum procedures, introduced

reception standards, enabled an intra-EU transfer of asylum-seekers, and provided the opportunities for knowledge and good practices exchange. Third, the adoption of EU asylum legislation revealed several deficiencies: EU-led extension of the scope of protection has not increased the number of positive asylum decisions; despite the elevation of procedural standards, many asylum-seekers have not been allowed to enter the country, and/or have been stigmatised as economic migrants if returned through the Dublin procedure; and welfare assistance does not allow an effective integration of asylum-seekers and refugees in society.

How does this legal and institutional setting shape the underlying logics/ideas of transit? First, the grassroots bureaucratic framework evolves in a way that it does not build an institutional space to reflect on and deliberate over alternative measures to address transit across Poland. The confinement of action to administrative improvements and meeting performance targets in examining asylum claims and distributing (transit) asylum-seekers marginalises elaboration of reception standards that could streamline assimilation. This logic has been enhanced by OF and MoI decision-makers indicating the pointlessness of developing social incentives in the situation where migrants' decisions about transit have been driven by their economic calculations. Second, the deficiencies that arise from the implementation of EU asylum mechanisms exhibit the detachment of restrictive asylum policy from the realities of newcomers whose understandings of Poland's transit environment emerge from the contestation of the legal and social arrangements within the Polish asylum system. The focus experiences of Chechen immigrants enabled an understanding of their actions, how policy failed to meet their expectations, and how this contributes to the formation of Poland's transit milieu. Finally, the gap between asylum policy targets and the needs of asylum-seekers has been bolstered through an expansion of social interactions with the EU. EU-induced policy learning and knowledge production, whilst aiming to elevate the quality of EU law implementation and administrative efficiency, confines the discussion on transit within governance and performance targets. The construction of transitness that emerges at the grassroots, enabled by EU-determined legal and bureaucratic arenas, means restrictive milieu that discourages settlement and exposes a high degree of indifference to the lot of asylum applicants. Transitness has been constructed as an environment minimising immigration and responding to it through control and deportation.

The on-the-ground setting that informs the construction of transitness at the local level has been organised by European integration. Europeanisation has determined asylum qualification and distribution regulations and prompted domestic adaptation. As a result of a moderate level of policy misfit, asylum structures accommodate Europeanisation pressures by adapting to EU processes without altering their key parameters. The adjustment process has been driven by rationalist assumptions of institutional efficiency and fairness, whilst ensuring low expenditure and meeting EU and international refugee norms and standards. The effects of post-EU accession learning and knowledge production identified under the scope conditions defined in Chapter 2, as opposed to the core executive dynamics, lend support to the instrumental logic of action in the sense that they enhance the quality of policy output and institutional efficiency. As a result, (EU-induced) social interactions develop along with strategic calculations concerning determination of asylum criteria and procedures to steer asylum inflows.

The conceptualisation of the rationalist-constructivist dialogue frames the analysis of the discursive construction of transitness that emerges across levels of governance and across time, and helps to identify the causal role of discourse. The next section provides an in-depth insight into this process.

## Chapter 7: Poland – a ‘Transit’ Country?

### 1. Introduction

This chapter is a synthetic analysis of Chapters 3-6. It binds together the instrumental and social logics that develop across three levels of governance (the EU, the core executive and the grassroots), and that inform the construction of transit migration as an issue in Poland. This chapter returns to the four questions outlined in Chapter 1: first, what is transitness? Second, how does it develop? Third, what implications does it entail? Fourth, how does the EU, by introducing a common asylum policy, shape Poland’s transitness?

The analysis focuses on the ideas, practices and discourses that reflect the intentions to define transitness identified earlier in the thesis, and that emerged in the process of EU asylum qualification, procedures, reception and distribution instruments’ translation into Polish governance and through social interactions, which emphasise policy learning and the role of knowledge. The setting that shapes the construction of transitness has been grounded in an interaction between the incentive structures (institutions and laws), networks and social interactions, and how interpretations of transit are brought by asylum actors to policy-making. In order to understand an intersection between rationalist and constructivist drivers of policy change that inform the transit milieu, this chapter employs a meta-theoretical method that attempts to reconcile the competing positions.

This chapter begins with conceptualisation of the bureaucratic and social migration and asylum setting within Europeanisation. It then proceeds to analyse the multi-level legal and institutional fields of migration and asylum policy-making, and the processes of socialisation and persuasion and how they yield factors that inform transitness. Next, taking all the ideas and concepts together provides examples of the discursive construction of transitness. Finally, the chapter investigates the implications of transitness for the Polish migration framework and for asylum-seekers.

## 2. The Europeanisation of Polish asylum policy

In order to study the legal and bureaucratic arenas to see how transit is constructed as an issue, one has to comprehend the dynamics of Polish migration and asylum policy evolution. The empirical analysis has demonstrated that the key factor driving this policy has been European integration. This section recapitulates Europeanisation mechanisms and how they prompt domestic adaptation at the national level, and, in effect, contribute to the formation of transitiness.

The pre-EU accession period saw two dynamics of EU rule transfer: EU external governance (1990-1997) and enlargement (1998-2003). In the early 1990s the EU externalised migration and asylum rules to Poland and other CEECs through conditionality (Schimmelfennig and Sedelmeier 2004) that provided the Polish government with incentives to comply with EU requirements (see Chapter 3.3). Domestic adaptation to the EU was informed by the logic of modernisation and was largely produced through ‘a mimetic transplantation of selected EU and/or member states’ policy models into the Polish legal system’ (Zubek 2008: 30). As a condition for deepening European integration (Lavenex 1999) and the introduction of non-visa movement to the EU, Poland acceded to bilateral readmission treaties with EU states (that enabled the latter to return immigrants who had previously crossed Poland) as well as established migration control systems and extended the capacity to admit asylum-seekers and refugees in accordance with EU recommendations (MoI 1993a, 1993d, 1995b).

In order to account for Europeanisation during enlargement, the analysis has drawn on the concept of ‘policy misfit’ between EU and Polish institutions that challenges domestic rules, procedures and the collective understandings attached to them, and prompted adaptation (Green-Cowles *et al.* 2001; Börzel and Risse 2003) (see Chapter 2.2.2). The misfit in the asylum sector meant a significant discrepancy between EU and Polish standards related to asylum proceedings and the scope of international protection. A strong adaptational pressure mobilised domestic actors (that were operating under the conditions of weak opposition in the framework due to, among others, a widely recognised political consensus to join the EU) and spurred transformation of asylum legislation and bureaucratic adaptation according to EU preferences (see Chapter 3.4).

The pre-EU accession response to Europeanisation was characterised by the conservative orientation of the bureaucracy that sought to meet the policy obligations whilst minimising its institutional adaptational costs (Knill and Lenschow 1998). The central focus underlying this response was the formal and timely compliance with EU requirements, not on explicitly valuing the search for the most effective paths towards solving given asylum or migration policy problems. The adoption of EU rules emerged as 'an explicit condition for membership, and full compliance had to be achieved before accession' (Zubek 2008: 1). The pre-EU accession adjustment was, therefore, dominated by the logic of consequences: Europeanisation emerged as 'a political opportunity structure, which offer[ed] actors additional resources to exert influence' (Börzel and Risse 2003: 63).

The pre-EU accession migration and asylum policy development shaped the legal and structural sites of the construction of transitness. First, the confinement of the legal overhaul to incorporation of EU pre-arranged provisions limited the discussion on the means to address transit to border control and management of flows. Second, the main objective for the Polish asylum institutions became to implement EU recommendations on the extension of structures responsible for asylum determination and expulsion. Third, EU enlargement led to institutionalisation of the 'safe third country' concept, introduced in the early 1990s, which framed the perceptions of Poland as a 'vestibule' to Western Europe (see Chapter 3.4).

The analysis of the post-EU accession evolution of migration setting has been framed within the dialogue between the rationalist and constructivist policy dynamics across levels of governance. Polish government officials calculate within the environment of strategic interaction (Checkel 2001b), and at the same time acquire EU values and meanings and make sense of the reality in which they operate (Schmidt 2010). The focus on elaboration of social interactions with the EU enabled to investigate the changing dynamics of EU-induced policy learning (that evolved from simple to social learning, where actors alter their preferences (Levy 1994)), production of knowledge (that performs instrumental and legitimising functions (Boswell 2008, 2009)), and practices (as 'competent performance' (Adler and Pouliot 2011)). An application of a mid-range approach (Jupille *et al.* 2003; Checkel 2005a, b) and specification of the conditions under which actors are more prone to socialisation and concrete mechanisms through which the process of choosing policies and

defining norms occurs (Moravcsik 1999), has structured an investigation of the ways through which EU asylum ideas and discourses inform the Polish asylum policy.

The rationalist and constructivist variants of institutional analysis account for the legal and bureaucratic fields that develop within Europeanisation and that enable discursive strategies through which the construction of transit occurs. First, a depoliticised and technocratic Polish institutional setting reflects a high responsiveness to EU objectives to manage (and not to integrate) transit migrants and a low responsiveness to the implementation flaws emerging on the ground. Second, Polish asylum legislation has been characterised by considerable conformity to EU laws and procedures and the logic to address transit. Third, policy learning and exchange of information and knowledge became the avenues for incorporation of EU meanings and practices related to governance of transit. The analysis now moves on to explain the instrumental and social logics that inform Poland's transit milieu.

### **3. Poland's transitness**

This section organises the ideas and practices produced through EU asylum policy adoption to illustrate how transit is structured as a policy issue. This section is structured as follows. First, it examines the legal and institutional venues of the Polish multi-level migration governance system, and how they enable social interactions that emphasise policy learning, information and practices sharing, and knowledge production. Second, it analyses the instrumental and social motives that provide the setting of the discursive construction of transitness. To demonstrate this, the analysis draws on insights from the empirical analysis (Chapters 3-6) and supplementary interview material.

#### **3.1. Institutional arena**

The first site for the construction of transitness is migration and asylum institutions. In order to grasp the logics that inform this construction, this section investigates the dynamics of EU asylum policy formulation within the EU Council and the Commission, and how they reverberate within the Polish government and organise the bureaucratic and social response to transit.

As discussed in Chapter 4.2, EU member states drive EU asylum policy, structure the scope and content of EU legislation, and determine the Commission's leeway of action. Destination states, specifically France and Germany, play the leading role in this policy. Their engagement was reflected, for example, during negotiations over the CEAS reform (2008-2013) shaped by intense political bargaining. EU states lobbied for significant latitude in transposing EU qualification, procedures and reception instruments (Interview. Polish Permanent Representation to the EU, Brussels, 13 and 19 November 2012) and put attention on mechanisms to control and redistribute asylum-seekers across the EU (the Dublin II regulation). This marginalised the Commission who, although having initiated the legislative process, had to revise its priorities and adjust them to what was politically feasible. As an UNHCR representative involved in the negotiations over the qualification directive amendment pointed out:

The colleagues in the Commission are generally like-minded with the UNHCR and their perceptions and understandings of how the things should be are similar to ours, but it is the Council of Ministers that has a significant impact on this *acquis* and legislation. That's why, despite the presidencies' attempts, the asylum procedures directive is still pending. So that's the dynamic... You may even have eventually the proposals from the Commission on this, but as to whether it will be work, I doubt it. Look, how it works already, getting back to the Iraqis and the Chechens... You have the qualification directive, it's agreed, it's been implemented, it's been transcribed, all of this... and still you have just differences in the recognition rates in the same caseloads. So, there is no uniform asylum system and never will be (Interview. UNHCR, Brussels, 14 November 2012).

Consequently, the Commission did not succeed in elevating integration standards for already established refugees (the qualification directive) and improving asylum-seekers' access to the labour market and public services (the reception directive). An extension of these socio-economic measures would increase financial and administrative costs that states, as argued in Chapter 4.2.1, were unwilling to incur. Moreover, the amended CEAS directives allow member states to maintain broad discretion in adopting EU provisions at the national level.



Some, however, link the Commission's passivity in these negotiations with its meagre administrative and functional capacity and a flawed logic of action. As an interviewee from the Polish Permanent Representation to the EU brought up:

There is no boss, a great name, an ideologist in the European Commission...For the Commission it is simply easier to say something balanced and see how the Council and the Parliament will fight with each other. There is no leader who would say: "Okay, let's do it another way. Let's devise the system differently", as no one knows how the system should look like... Also, there is a lack of a mega-strong Presidency, which recently was Poland. This means that certain things [in the Commission] simply don't go forward and won't go forward... [As a result], those states become policy creators that are active. And you see the way in which migration policy goes: slowdown, repulse, nationalisation... At the moment these directives are passed through [as part of the CEAS reform] because member states succeeded in [forcing through] a number of mere trifles enabling to spend less money per asylum-seeker (Interview. Polish Permanent Representation to the EU, Brussels, 19 and 23 October 2012).

This confines the Commission's focus to harmonisation of asylum provisions, procedures and practices so as to provide 'more equal access to protection [across the EU that] will lead to more equal distribution of refugee communities between member states' (CEC 2009c: 23). As a Commission official pointed out:

Our job [in the Commission] is to ensure that there is a level playing field in terms of quality of procedure among member states. Supposing that economic determinants could be the major factor [that shapes secondary movement in the EU], that we discover somehow that people move mainly for economic reasons-what could the Commission then do? It's a fact of life. This is not important for us. However, what still needs to be ensured is that those people have rights, that their rights are harmonised up to a certain level to make sure that their fundamental rights are respected. We can't control economic factors, and therefore you will never have a policy that will focus on that. Also, politically, it was never an aim (Interview. European Commission, Brussels, 28 November 2012).

This EU setting yields the logics to approach transit. First, an intergovernmental dynamic of EU asylum policy-making, when channelling member states' resources to distribute and deter transit asylum-seekers, limits the bureaucratic space to deliberate over socio-economic measures and mitigates the pressure on member states to ameliorate the social conditions to encourage transit migrants to stay in the country of first asylum application. This has been even more evident in the legal field that forms the focus of the next section. Second, the interpretations of Commission officials feed into the foregoing institutional dynamic: despite the Commission's professed attachment to norms of human rights and international refugee law (Boswell 2009: 199), in reality, it incorporates the EU states-led approach that frames the discussion on transit within the control and harmonisation paradigm.

An EU logic to deal with transit generated within EU institutions has been translated to the Polish governance system. First, Poland does not attempt to alter the EU approach to transit at the EU level. The financial and organisational constraints limit the government's role in framing EU asylum debate and addressing EU asylum challenges. Furthermore, Polish government officials, who take part in the discussion on CEAS mechanisms, while presenting a technocratic and cautious approach, almost exclusively concentrate on those EU proposals that might result in administrative reform at the national level. Second, Poland's passivity in Brussels co-occurs with zealous incorporation of EU measures into domestic legislation (see next section). The OF, which determines this process, has been the only institution in the Polish asylum framework with sufficient knowledge and expertise to carry out legislative amendments (see Chapter 5.2). A vestigial involvement of NGOs and migrant organisations in policy-making, due to an absence of alternatives to the EU sources of funding extends the government's freedom of action.

European integration strengthens the role of the OF and organises the capacity allocation within the Polish government to tackle migration and transit. It was demonstrated earlier in the thesis that OF officials, who perceive EU legislation as adequately addressing transit migration (see Chapters 5 and 6), use the resources to ensure the quality of EU-structured asylum qualification criteria, procedures and allocation of asylum-seekers. This policy, though grounded in rationalist calculations to choose optimal solutions to maximise benefits (Elster and Hylland 1986; Ostrom 1990; March and Olsen 1998), and find an effective way of managing transit flows, does not leave much room for reflection over

policies to evaluate integration facilities and how asylum-seekers could contribute to society, economy or education. This, as argued in Chapter 5.2, results in marginalisation of the MLSP that administers integration programmes for beneficiaries of international protection.

In this sense, Europeanisation facilitates the replication of bureaucratic patterns of compliance that developed before EU enlargement as a result of externalisation of structures to mitigate illegal immigration, ensure security and govern the flows of failed asylum-seekers returning from Western Europe (see Chapter 3.3). On the other hand, closer post-EU accession integration with the Union has intensified social interactions between EU and Polish government officials. At the core executive level this means frequent communication on policy evaluation and implementation, exchange of data and information, and daily collaboration over EU legislation. This complements the process of EU asylum policy adoption and enables Polish decision-makers to learn about various kinds of mechanisms related to management, control and distribution of transit migrants. To refer back to the conditions under which actors are more likely to learn and acquire values and meanings, delineated in Chapter 2, the EU acts here as ‘an authoritative member of the in-group to which the persuadee [Polish officials] belongs’ (Checkel 2001b: 563). Furthermore, in the first years following Poland entering to the EU, the dynamic of learning, which developed within a novel and uncertain policy environment, enhanced incorporation of new information and communication with EU decision-makers. The next section discusses the evolution of the content of post-EU accession policy learning.

The core executive policy dynamics inform the transit country construction. First, the asylum system has been structurally unable to produce any alternatives to EU measures incentives to steer transit migration and enable transit migrants to put down roots in Poland. Second, social relationships that flourished following EU accession, whilst organised around the principles that stem from EU legislation, strengthen the translation of EU logic to control transit, rather than responding to domestic concerns over this phenomenon.

The final layer of the Polish asylum institutional framework is the grassroots institutions. BG and OF bureaucrats, whilst acting under the conditions of low discretion, channel the bulk of administrative and financial resources to asylum management. As the Head of the

Office of Foreigners memorably explained, when referring to a significant rise in asylum applications in 2009:

When the whole of Europe was thundering at huge inflows... Italians had 20 thousand [asylum] applications and we had 10 thousand applications. Italians with their sound and developed migration system, specifically if compared to our system, were shouting in every European forum that they needed money. We [the Office for Foreigners] did it with our own hands. We were able to issue decisions for over 15 thousand people in one year! When I speak about this in European fora, they [other EU officials] fall silent because this makes an impression... These are the numbers and this was done by only 29 [Office for Foreigners'] officers... So you know, we have actually built a good system (Interview. Office for Foreigners, Warsaw, 6 August 2012).

Interpretations of an on-the-ground system as primarily managing the flows add to the broader institutional dynamic presented above. Ideas are thus central to policy-making: decision-makers operate within a framework of ideas and standards that specify not only policy goals and the kind of instruments that can be applied to attain them, but also the nature of the problems they are to address (Hall 1993: 279).

Close relationships between the core executive and grassroots institutions enable a smooth transmission of administrative logic to deal with applicants (who, if not granted protection, should be expelled) into the BG and the OF. However, this approach does not motivate 'street-level' bureaucrats to consider the questions of the causes of transit, including why despite the implementation of international and EU protection standards and conceptions, asylum-seekers still pass through Poland in large numbers. Furthermore, BG and OF civil servants do not encounter opposition within and outside the government. The administrative (an insufficient number of officers collecting information and assisting RB members in preparing legal argumentation), financial, and structural constraints hamper the RB's oversight of OF protection decisions (see Chapter 6.2). On the other hand, NGOs have been inept in shaping local-level officers' understandings of transit, as well as in mitigating stigmatisation of asylum-seekers as economic immigrants (see Chapter 6.3.3).

European integration organises the ‘street-level’ bureaucratic dynamics and therefore shapes the underlying logics of transit. First, the way in which EU asylum policies and norms are incorporated by the core executive instrumental action translates into an accurate alignment with EU principles at the grassroots. In consequence, the Polish asylum system emerges almost as an ‘institutional conductor’ for EU rules that respond to transit exclusively through management. Second, like the core executive institutions, the grassroots setting tighten links with European partners over EU asylum policy adoption. Engagement of Polish civil servants with such cooperation platforms as the EAC (now part of the EASO) or the ENARO (see Chapter 6.4) facilitates elaboration of practices related to examination of asylum claims, intra- and inter-institutional communication, and asylum reception. They inform the transit country construction through extension of deliberation over EU measures that address transit only selectively, through approximation of asylum legislation and convergence of practices across the EU.

The institutional arena of the Polish asylum policy has been shaped by two intersecting dynamics: the calculation-based assumptions to organise asylum proceedings as most optimal and performing the necessary tasks required by EU law; and social interactions developing through policy actors’ interpretations of their environments, learning enabled by European integration, and cross-institutional communication over problems related to EU policy implementation. This section referred to two conditions (a ‘novel and uncertain’ policy environment and an increase in post-EU accession interactions) introduced earlier in Chapter 2, under which EU-induced socialisation is more likely to occur. The next section will complement this framework by saying more about the outcomes of socialisation.

This multi-level institutional milieu produces the logics that inform transit. First, member states steer EU-level mobilisation of capacity to address transit through harmonisation and control. Second, the Polish government replicates EU institutional dynamics: it concentrates on EU asylum policy implementation. Third, the venues of social interaction and communication, which blossom within Europeanisation at EU, national and local levels strengthen the EU legal convergence paradigm to tackle transit migration.

### **3.2. Legal arena**

This section discusses the underlying logics that arise in the process of EU asylum law and policy adoption and that shape the transit environment. It first analyses the EU approach to transit developing within EU asylum qualification, procedures, reception and distribution instruments. Second, it probes the translation of this approach into Polish legislation and practices. Finally, it examines the role of learning and knowledge in this process and what it means to the formulation of policy on transit.

EU instruments to deal with transit have been formulated within the paradigm of EU asylum norms' harmonisation. This means that, first, 'the approximation of rules on the recognition and content of refugee and subsidiary protection status... should help to limit the secondary movements of applicants for asylum between member states, where such movement is purely caused by differences in legal frameworks'<sup>184</sup>. Second, EU tools mitigate divergences in national practices and 'different levels of procedural fairness provided in different member states' to 'drastically reduce asylum-seekers' incentive for movements' (CEC 2009c: 23). Third, the EU burden-sharing mechanism (the Dublin regulation) 'allocates responsibility for the examination of an asylum claim within the EU... in order to avoid the phenomena of "asylum shopping" and the "refugee in orbit"' (CEC 2007c: 11).

However, this approach upon which the Commission and EU states formulate the response to transit has been seen by some migration scholars as flawed and underestimating a plethora of factors that develop outside legislation and that have equal or even higher impact on decisions about migration. For example, Böcker and Havinga (1997, 1998) argue that the key determinant of asylum movement within the EU has been colonial links between sending and receiving states. On the other hand, Thielemann (2003) associates factors shaping migrants' strategies with socio-economic factors, such as an unemployment rate that diverges across the EU (for a detailed discussion see Chapter 4.2.2). The Commission policy on transit has also been criticised by the UNHCR and several NGOs, which argue that EU policy does not sufficiently take into account socio-economic and cultural factors influencing secondary movement. As indicated in the European Council on Refugees and Exiles' (ECRE) report on the Dublin regulation: 'Most research done to date

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<sup>184</sup> Recital 7 Directive 2004/83/EC. Similar links between harmonisation and secondary movement have been included in the 2005 procedures directive (Recital 6) and the 2003 reception directive (Recital 8); and elaborated in the amended 2011 qualification directive (Recital 13), the 2013 procedures directive (Recital 13) and the 2013 reception directive (Recital 13).

agrees that the relative restrictiveness of asylum regimes is not the predominant factor determining where asylum seekers arrive. Statistical analysis, literature reviews, and interviews have suggested that factors such as former colonial ties, language, proximity to the country of origin and the availability of community networks influence destination choices. The presence of communities of similar origin appears to be the most significant factor' (ECRE 2008: 28). NGO activists point out that 'EU arbitrary administrative focus' and confinement of action on transit to equalisation of qualification criteria and procedures 'ignore substantial connections between asylum-seekers and member states, impedes the integration of refugees and tends to encourage irregular secondary movement... [T]he underlying presumption of Europe-wide common protection standards is demonstrably inaccurate' (ECRE 2009: 3). The EU response to intra-EU movement of asylum-seekers shapes the environment that informs Poland's transitness, as it confines the legislative agenda and understandings of transit to legal approximation and convergence. The empirical analysis has shown that in a country such as Poland, where migration and asylum policy-making has been left to technocrats, the templates and guidelines produced in Brussels often constitute the major point of reference in policy implementation.

The EU's harmonisation approach to transit has been translated into CEAS qualification, procedures, reception and redistribution instruments (see Chapter 4.2.2). However, the implementation in member states has revealed several deficiencies. First, despite the introduction of the common asylum qualification criteria, the scope of subsidiary protection differs across the EU. Second, divergences between EU states in terms of access to procedure have not been alleviated, and asylum-seekers are often denied entry to the EU. Third, EU mechanisms to distribute asylum-seekers grounded in 'physical reallocation' (Neumayer 2004) do not fulfil their role: the Dublin regulation has not unburdened the states that due to 'positive perception of their asylum systems by applicants' or geographical location experience significant inflows.

The implementation shortcomings were addressed by the CEAS reform (2008-2013) that led to an approximation of rights of subsidiary protection holders and refugees, higher protection and reception standards, and to the improvement of Dublin transfers in situations of particular migration pressure. Nevertheless, as discussed in Chapter 4.2.3.1, the amended regulations do not go beyond the procedural concerns that organise EU policy on transit: an extension of asylum-seekers' rights and elaboration of procedures

have not been accompanied with reformulation of reception and integration policies. EU legislation still does not produce substantial incentives for transit member states to elevate assistance or immigrants' access to employment or public services. This contributes to the logic underlying transit formation: asylum-seekers claim asylum in EU transit states, including Poland, to get access to more affluent countries that offer higher social benefits (Neumayer 2004), host migrant communities, and have established historical ties with countries of origin. Also, transit migration is still informed by discrepancies in entry restrictions and recognition rates between member states (Thielemann 2004) resulting in applicants attempting to 'seek protection in member states having more generous procedural and substantive standards' (CEC 2009b: 23).

The CEAS reform has not been, however, limited to legal action and has spurred elaboration of EU learning and exchange of information and practices platforms (see Chapter 4.2.3.2). This includes the establishment of the EASO that facilitates collaboration between member states' 'street-level' bureaucrats to improve convergence of asylum decision-making. The EMN, on the other hand, through collection, exchange and revision of migration and asylum data, not only contributes to member states' asylum decision-making but also legitimises institutional roles (e.g. publication of research to secure support for the framework among EU policy-makers) and substantiates existing policy decisions (e.g. production of comparative analyses highlighting divergences in national policies and identifying possible new areas of harmonisation) (Boswell 2009). EU and member states' civil servants learn and communicate within the paradigm, defined at the EU level, to reinforce efforts to improve EU asylum adoption on the ground. Asylum practitioners thus focus on the most accurate replication of EU approaches, including those concerning transit migration, and at the same time on formulation of alternative concepts that could address determinants of transit that lay beyond the remit of EU legislation.

European integration has framed Polish asylum law and policy-making. CEAS instruments, perceived by Poles as the necessary tools to improve procedural efficiency, form the pillars of the national system. The qualification pillar regulates the criteria for granting international protection. The procedures pillar clarifies the stages of asylum procedure and asylum-seekers' procedural guarantees. The reception pillar establishes the conditions for granting social assistance. The distribution (Dublin) pillar involves Poland in EU mechanisms allocating responsibility for the claim examination.



As demonstrated earlier in the thesis, close alignment with EU norms involves literal adoption of EU measures on transit. This forms the logic that underlines the transit country construction within the legislative field: the Polish government addresses transit migration through EU-induced harmonisation (approximation of asylum legislation and procedures, and convergence of practices) and management (governance of transfers of transit migrants through Dublin and intra-EU allocation). As a RB member pointed out:

Asylum issues have been left to technocrats... Let's say that the level of secretary of state or deputy minister is the highest decision-making level in those issues... In effect, asylum policy has been shaped in the way we [asylum technocrats] don't overdo in any way so we won't provoke any political affair against a Chechen background or won't be pilloried. In short, we go a middle course: neither do we expel them [asylum-seekers] as this is a controversial issue nor do we grant protection to all of them as this might have repercussions or wrangles with Russia. Some are bestowed [refugee] status, some are expelled... If a number of statuses are too small, a signal from above goes that they are too small. At least that was the case when I worked [2002-2005] in the Office for Foreigners (Interview. Refugee Board, Warsaw, 6 September 2012).

The prevalence of the management paradigm envisaged in legislation and informed by an institutional framework has thus been strengthened by Polish civil servants' recognition of conservative policy as most appropriate in the current migration situation. The above bold statement of the RB bureaucrat reflects the considerable role of individuals in decision-making: they assess the reality in which they act, criticise their colleagues, and communicate their assessments or doubts (Schmidt 2006, 2010).

The translation of EU legal measures to govern transit migration co-occurs with an inability of Polish structures to couple these measures with state political or social solutions. A member of the RB gives an example of Chechen transit migrants that this analysis takes as a case study:

No one [in the Polish government] has ever treated refugees and asylum-seekers in the category of social policy or administrative policy. So, no one has ever

considered what kind of impact on the labour market the presence of a Chechen would have, or what kind of social problem a Chechen brings. Or, no one has thought about how to use Chechens for the benefit of Polish society... Despite the fact that there is some strategy [the Polish Migration Policy document] passed and approved... a number of people doubt whether this is really a strategy or whether we [the government] have a clear view and conviction of how we want to elaborate it... For example, at present, we don't have any transparent policy on coordination of immigration to Poland from given [geographic] directions. This has still been done spontaneously. There are no well thought out and organised actions of the Polish state on, for instance, encouraging citizens of other countries to come and settle in Poland (Interview. Refugee Board, Warsaw, 6 September 2012).

Hence, the transit of Chechens develops as a phenomenon detached from broader socio-economic reflection within the government about the causes of this movement and the objectives of asylum decision-making. This implies the marginalisation of integration policy: though some government documents, including the Polish Strategy for Migrants' Integration, call for reinforcement of current integration tools (MLSP 2013: 65), they do not provide implementation details. Moreover, one can hardly find in these materials delineation of long-term objectives and how they might be achieved, taking into account evolving migration dynamics in Poland (see Chapter 5.3.2).

The detachment of the legal action from a socio-economic context of transit has been shaped on the one hand by the ramifications of pre-EU accession institution-building that downgraded the role of social instruments to attract immigrants in the country (see Chapter 3.3), and on the other, by European integration that increasingly involves Polish civil servants into migration policy-making, but does not produce legal incentives to assist transit states to rectify their feeble integration programmes. At the same time, core executive migration institutions deepen ties with the EU and EU states 'out of principles of serious deliberative argument' (Checkel 2005a, b, 2006). For instance, Europeanisation spurred institutionalisation of discussion on asylum and migration issues: the MoI- and MLSP-led platforms of decision-makers, NGO activists, and academics prompted the debate on, among others, welfare benefits, pre-integration schemes for applicants awaiting international protection decision.

The evolution of social interaction with the EU and the creation of conditions facilitating socialisation and persuasion, as theorised in Chapter 2, have altered the dynamic of learning that assumes elements of 'autonomy' in the 'shadow of hierarchy' of the powerful framing effects of EU policy (Dunlop and Radaelli 2013). Core executive officials increasingly decide on the means and content of learning that assumes 'social' dynamics and implies reflective internalisation of EU norms and roles. This frames the context transits formation in the way that it bolsters the prevailing paradigms embedded in EU asylum legislation.

The dynamic of EU asylum policy adoption and how it informs the logics that organise the transit country construction has been replicated at the grassroots. First, the leading role of the OF within the bureaucracy, which combines the core executive and grassroots functions (see Chapter 5.2) and puts EU norms and policies into practice, allows transmission of EU restrictive policy on asylum: OF case workers design implementation, procedures and practices on the ground. At the same time, however, technocratic decision-making generates policy gaps that affect applicants. For instance, EU regulations do not place sufficient pressure on the government to introduce free legal assistance for asylum-seekers. As a result, Poland did not transpose the directive's provisions until December 2013 and legal aid has been provided by NGO representatives— in many cases young law students funded on a short-term basis. This creates an uncertain environment in which asylum-seekers find themselves and leads to disorientation and misunderstandings of asylum proceedings.

Second, the literal application of EU asylum instruments occurs separately from actions of asylum-seekers. The reception and integration tools, when verified against the practice of Chechen immigration, turn out to be insufficient and not facilitating settlement. On the other hand, practices related to issuing international protection decisions show shortcomings. For example, the government restrictive policy towards Chechens, often perceived by BG and OF civil servants as economic migrants, results in considerably low recognition rates (below 5%) since 2009 that hinders integration (Chapter 6.3.1).

The factor that complements the on-the-ground legal venues through which transit is constructed as a policy issue (see next section) has been EU-induced social interactions that emphasise policy learning and information and knowledge sharing. The empirical

investigation demonstrated that under the conditions delineated in Chapter 2 (an intensification of interaction and communication between the EU and Polish officials, change in the content of these interactions grounded in ‘principles of serious deliberative argument’, and a depoliticised setting in which learning occurs) the grassroots actors have been more prone to acquire new information, data and practices concerning asylum proceedings and reception. However, unlike the core executive institutions, learning at the grassroots assumes an ‘instrumental’ dynamic (Dunlop and Radaelli 2013), and takes simple form: actors acquire information and strategies, but not preferences. Similarly, the mechanisms, such as EU-funded and UNHCR-steered projects or the OF Quality Assessment Mechanism, whilst aiming to ameliorate the quality and efficiency of asylum proceedings, produce research that is used instrumentally (Boswell 2008, 2009). The production of analyses seeks to improve the quality of OF’s outputs. This contributes to institutionalisation of ideas and concepts about the means to tackle transit, including equalisation of legislative standards, approximation of asylum practices, and the development of Dublin mechanisms to distribute asylum-seekers.

To conclude, the legal arena of the Polish multi-level migration governance system constitutes the site for the construction of transitness. First is the literal adoption of EU instruments to tackle transit grounded in legal harmonisation, management and distribution. Second is the decoupling of EU asylum policy (and EU tools to manage transit) implementation from domestic socio-economic objectives. Third is the detachment of EU policy from the on-the-ground migration dynamics. Fourth is the formation of decision-makers’ understandings and interpretations of transit within the EU harmonisation and paradigm that evolves through EU-steered communication and deliberation frameworks.

The logics developed within the post-EU accession Europeanisation that, as discussed in Chapter 2.2, emerges on the one hand as ‘a political opportunity structure’ that provides Polish actors with additional resources (these include legislative instruments and new rules, norms and practices) to exert influence, and on the other, as sets of norms and values that are incorporated into actors’ understandings through social interaction (Börzel and Risse 2003) between EU and the Polish civil servants. The legal arena of the Polish asylum setting becomes, therefore, a venue of rationalist-constructivist interactions (see Chapter 2.3). Delineating specific conditions under which socialisation and persuasion are more likely to

be effective enables to trace acquisition of EU asylum ideas and practices, and the formation of preferences related to the responses to transit.

Comprehension of complex dynamics informed within the interweaved legal and bureaucratic sites of Polish migration and asylum policy permits an investigation of discourses and ideas about transit that develop within this milieu, how Chechen understandings about migration shape these ideas, and how, in effect, transit is constructed as a policy issue over time. This forms the focus of the next section.

### **3.3. Discursive construction of transitness**

This section binds together instrumental and social logics developing within the Polish migration and asylum system to address the questions introduced in Chapter 1 of the nature and the emergence of the construction of transitness. The analysis is informed by the dialogue between rationalist and constructivist insights to account for asylum policy evolution. RCI posits rational actors for whom institutions represent the incentive structures that reduce uncertainty arising from multiplicity of individual preferences and issues (March and Olsen 1998). In order to comprehend how policy change occurs endogenously, one has to explain how actors contextualise meanings, construct understandings and responses to critical moments and/or come up with new ideas (Schmidt 2006, 2010). Therefore, material reality constitutes the setting in which, or in response to which actors may conceive their interests. 'Sentient' actors develop their ideas for action that they convey through discourse (Schmidt 2010, 2011). This section, first, analyses how the legal and bureaucratic venues of Polish migration and asylum policy enable perceptions of transit and of responses to this phenomenon. Second, it provides examples of the discursive construction of transitness. Finally, it investigates a causal role of discourse and how the construction of transitness translates into decision-making.

The empirical analysis has demonstrated that the process of deliberation and negotiation over EU asylum instruments at the EU level has been largely driven by member states aiming to preserve broad latitude in transposing EU provisions, and to mobilise the institutional resources to develop those sectors of asylum policy that have been seen as crucial to ensuring security and maintaining procedural efficiency. As far as responses to

transit are concerned, the above EU states' policy implies elaboration of mechanisms to approximate legislation and practices to manage and control intra-EU asylum flows.

Curiously, Commission officials interviewed for this research seem to applaud this intergovernmental policy dynamic. They contextualise transit, or 'secondary movement', as they call it in EU jargon, within procedural concerns. As a Commission official, responsible for negotiations on the reception directive amendment (2008-2013) explained:

We don't have any instrument, or mandate, as the Commission, to identify secondary movements. But what we are saying is that in terms of ensuring equal treatment between asylum-seekers, what we call in EU jargon a 'level playing field': whenever you end up submitting an asylum application, you should be treated more or less the same. It is our objective. So, the most important thing is to ensure that there is harmonisation throughout the policies, because this is what a true Common European Asylum System requires. It requires equal standards. So, if I am an asylum-seeker and I end up in Germany or in France, I should be given the same procedural and reception conditions. Of course, as a result of this, the phenomenon of secondary movements will also be addressed, but the main objective of this whole exercise is to create a true Common European Asylum System, which, of course, also means equal burden (Interview. European Commission, Brussels, 20 November 2012).

This approach to transit, as indicated in Chapter 4, translates into EU legislation and Commission policy documents. For example, EU Policy Plan on Asylum identifies transit as a result of 'a lack of a common practice, different traditions and diverse country of origin information sources... producing divergent results [across the EU]' (CEC 2008a: 3). Whereas the foregoing logic to address transit dominated the discourse across the Commission, there is some understanding of transit migration being shaped by social and cultural factors:

The reasons for secondary movements are essentially related to a) the presence of migrants' networks and diasporas; b) cultural ties... all these cultural elements for sure play a role, and then, somehow to a lesser extent, c) different reception conditions in member states. It is clear that the caseload we see now coming from

the Western Balkans is strictly related to EU visa liberalisation policy and the abuse of the European asylum system. That is to say, that some people come to the EU from the visa liberalised countries and really go where there is more reception conditions. In other cases, for sure, cultural factors play a more relevant role. So, let's say there is a mix (Interview. European Commission, Brussels, 30 November 2012).

However, such interpretations are deemed politically insignificant and marginalised in EU asylum debate (Interview. European Commission, Brussels, 20 November 2012).

The analysis of EU-level legal developments in the field of asylum has explained EU states' and Commission's attachment to the harmonisation paradigm and how this produces the logics that inform transit. The previous section has shown that the mitigation of procedural divergences in granting international protection and in procedural arrangements between member states constitutes one of the key drivers of EU policy on transit. This has been reflected in the discussions within the Commission:

[O]ne of the reasons why we are doing this harmonisation is the differences between member states when it comes to the actual procedure and reception conditions. So, the idea is, of course, to move the standards higher and harmonise. Ideally, it will lead to better distribution of asylum-seekers in general. That is why, for instance, everyone is going through Greece, but no one settles there. So, I would say that the actual asylum process, how people are treated, and recognition rates are most important for people [asylum-seekers] going to one or another member state. So, [the problem of jobs or education] is sort of a second stage in thinking of staying in one or another country (Interview. European Commission, Brussels, 22 November 2012).

The sources of recognition of transit as primarily caused by procedural incoherencies across the EU lay both in the incentives structure and in the 'meaning context' (Schmidt 2011). As far as the former is concerned, one can identify the constraints of the Commission's policy mandate that has been structured by EU law and member states: the Commission needs agreement between member states to push forward its proposals. It also has limited organisational and administrative capacity to undertake comprehensive

research other than that arising from EU law implementation causes of transit (see Chapter 4.2). On the other hand, EU decision-makers' internalisation of ideas influencing EU asylum policy plays a role. The empirical analysis has illuminated a strong conviction among Commission officials that an appropriate adoption of EU standards and mechanisms, including harmonisation of asylum qualification criteria and institution of asylum distribution system at the national level constitutes an adequate response to transit:

If EU asylum system did not have a solution [to transit], of course, we could talk about 'asylum shopping' and how to deal with it. But we know how to deal with it. We have an answer to that and member states just have to apply the law. It is incredibly difficult to escape the Dublin system all together. There might be means to escape it... For example, you enter irregularly... you don't show up for some reason at a border crossing point, nobody sees you, and then you move on and establish yourself in a member state where you want... And it is impossible for them [the member state authorities] to find you since there are no records of your previous travel. They cannot establish how you got into that country. But that is rather rare. Normally, as soon as you apply for asylum, you are fingerprinted, what means that wherever you go, your fingerprints are there. The database is valid for 10 years for each set of fingerprints and you can be easily detected (Interview. European Commission, Brussels, 28 November 2012).

The recognition of tools envisaged in EU legislation as most effectively tackling transit has been shaped by a complex network of social interactions developing in EU policy-making and through engagement with EU platforms facilitating learning and exchange of ideas between EU and member states officials. This includes the EASO that brings together asylum practitioners to deliberate over specificities of EU law implementation and to improve practical skills to carry out administrative proceedings. The discourse about deterrence and deflection of transit at the EU level has been contextualised within the logic of adequate EU policy adoption. The discursive construction of transitness has been, therefore, understood as emerging through an exchange of ideas (Schmidt 2010). Actors' 'background and foreground discursive abilities' allow them to create and change (or maintain) institutions following a logic of communication: actors think and talk about the institutions in which they act, but also communicate and deliberate about them (Schmidt 2008, 2010).



Europeanisation organises the translation of EU asylum legislation and institutional patterns to address transit into the Polish core executive institutions. The prevailing logic of adaptation of Polish asylum arrangements to the EU has been the logic of consequences: actors calculate strategically to confront action problems. As a result of misfit between EU and domestic institutions, Europeanisation leads to redistribution of resources and spurs domestic change. As indicated earlier, an institutional adjustment to the EU (allocation of resources to control and manage the flows and carry out asylum proceedings) co-occurs with the incorporation of EU asylum legislation. The previous section has summarised the discussion on literal adoption of EU mechanisms to govern and deter transit envisaged in EU qualification, procedural, reception and distribution instruments. This includes harmonisation of asylum provisions, convergence of practices related to case examination, and governance of Dublin to equalise recognition rates between EU states, and improve the allocation of responsibility for examining asylum claims.

However, the analysis has revealed the detachment of the foregoing policy on transit from national-level migration officials' interpretations of transit migration, its causes and implications. Within the MoI, transit has been seen as being driven by a range of socio-economic structural factors, including Poland's low standard of living and vestigial migrant diasporas. A MoI civil servant, coordinating Poland's action on asylum in the EU Council, formulated a bold statement:

Even if I myself was a migrant, I wouldn't come to Poland because of: a) a difficult language, b) an economic status of the country that offers little social support... even if the European Commission urges to undertake certain actions at a national level. And the third issue, there are no support groups: there is no minority representing my nationality, it is difficult to put down roots in such society... These are the determinants indicating that those legal actions [CEAS directives], even if making every effort to meet migrants' needs, won't be sufficient (Interview. Ministry of Interior, Warsaw, 3 and 24 August 2012).

On the other hand, OF bureaucrats, who shape asylum legislation and transpose EU provisions, stress economic motivations of asylum-seekers arriving in Poland. To quote the Head of the Office:

Poland is still a transit country. However, I think that the motivations of people arriving in Poland are different. Some of those persons treat Poland as a vestibule to Western Europe without actually knowing where they go, just knowing that they have to reach Poland to migrate further west. Secondly, these are the persons who once arriving in Poland decide on the next stage of their journey, which is well thought out from the very beginning. So, their destination is Western European countries where there is a diaspora of a given community, or persons who might be useful in [assisting the newly arrived immigrants in] settling permanently in that country (Interview. Office for Foreigners, Warsaw, 6 August 2012).

Incongruity between discourse and policy has two implications. First, it contributes to the argument developed in the previous section about the divergent dynamics of the Polish migration and asylum system development: the transformation of institutions implementing EU qualification and procedural provisions and *inertia* in the provision of integration policies. The latter were marginalised in the absence of external pressure and political interest in keeping migrants in the country. Transit migrants have not been seen by government officials as those who Polish society and/or economy could benefit from and whose settlement in the country should be encouraged. Second, these discrepancies have been communicated to 'street-level' bureaucrats and inform the latter's interpretations of motivations of those transiting Poland. In this sense, ideas are central to policy-making and whilst communicated via discourse, they enable actors to reconceptualise the institutional reality and produce change. This shows an interaction between strategic-driven behaviour that informs EU asylum policy implementation and communicative action and discursive argument.

As well as prompting structural change of the Polish migration and asylum setting, Europeanisation has, as we have seen, provided core executive civil servants with opportunities to learn and acquire new EU ideas and meanings. It has been shown that the post-EU accession increment in policy interactions with the EU, extension of the scope of those interactions, and an insulation of learning environment have brought about socialisation and the production of knowledge related to asylum and integration matters. This bolsters the adoption of EU-determined legal measures to alleviate transit migration, and provides the setting of deliberation over transit, and how it should be addressed by the

EU. A respondent from the OF, involved in negotiations regarding the CEAS reform, provided an example of such discussions:

The notion of transit comes out quite frequently in informal talks [during EU Council asylum working groups meetings]. It comes out with reference to countries from our region: Poland, Slovakia, Czech Republic, Hungary, and the Baltic states. These are simply the states where asylum applications are submitted just to enter the Union. This problem comes out in discussions concerning our [the above states'] migration profile. For example, as far as an issue of detention is concerned, due to the fact that we are transit countries, some delegations [representing CEECs] will say that the conditions for detention should be as wide as possible. In the interest of all is to have these conditions as wide as possible so they [failed asylum-seekers and illegal immigrants] stop here [in Central and Eastern Europe]... [Then] we have to carry out the asylum procedure and, if necessary, expel them... And the Commission says that... this will lead to the situation where everyone will move from Poland to Germany, for example. We say one thing, and they [Commission officials] say something else. (Interview. Office for Foreigners, Warsaw, 25 September 2012).

Transit migration has, thus, been seen through the management paradigm that has been translated into national policy-making along with EU legal instruments.

Similar conditions of social interaction emerge on the ground. The production of practices and knowledge through platforms such as the EMN and the EASO (see Chapter 6.4) have two implications for the construction of transitness. First, they enable the transmission of EU implementation guidelines and recommendations that lock deliberation over the instruments to tackle transit in the boundaries of EU legislation. Second, they create the social space to think and talk about various aspects of transit migration *per se*. The research has shown that engagement with such spaces shapes Polish bureaucrats' understandings of EU tools to allocate transit migrants. A RB member spoke about the role of the Dublin regulation:

As far as a viewpoint of migrants is concerned... the Dublin regulation forces them to give up a dream about free migration somewhere west what was possible

before 2004. At present, they are turning back to Poland in large numbers. The same persons are now transferred on the basis of the Dublin regulation three or four times. However, a question of consequences [of this phenomenon] arises: there are three scenarios: either an applicant goes west endlessly and hopes that he will be able to stay there one time; or he realises that it won't be possible [that staying in Western Europe is not possible due to the Dublin regulation] and stays in Poland; and the third scenario – he comes back to his country of origin. And the third scenario is becoming more common in Poland. If you contact the IOM that organises voluntary returns from Poland, you will see that the bulk of beneficiaries of this programme have been Chechens that return from Poland [to Chechnya] (Interview. Refugee Board, Warsaw, 6 September 2012).

Alongside the process of deepening knowledge of EU asylum law and the provisions that regulate transit, Polish 'street-level' bureaucrats replicate the cognitive frames and interpretations of the nature and ramifications of transit in the country, developed by their core executive colleagues. The research shows that the grassroots officials, who act under the conditions of low discretion (the key role within the system performed by the OF, see previous sections) and draw on EU recommendations, contribute to the detachment of interpretations of the actual causes of transit migration from the EU-determined policy that they implement. BG officers, who entertain asylum applications at the border and direct asylum-seekers to appropriate reception centres, are convinced that the majority of Chechens transit Poland because they seek to improve their standard of living:

Asylum-seekers who decided to migrate to Poland didn't know that once they lodged an asylum claim in Poland, they would have to stay in this country. As it turned out, having read about all the dangers [mentioned in the asylum application form], they [asylum-seekers] were disappointed, I'd say. This happened because they were indeed planning to stop in Poland, but not to stay. It was evident that for the majority of them the country of final destination was Germany... Also, some had families in France or Belgium that had previously migrated there and they wanted to get there at any cost. For example, a husband was applying for refugee status in Poland and his wife or sister was already in Western Europe (Interview. Border Guard, Medyka, 21 September 2012).

However, border guards do not reflect on the divergences between what they think and what they do in the area of transit, and on the ramifications of these divergences for decision-making 'because there is no need and time to do such things'. Also, no comprehensive assessment of what is going on in relation to transit asylum-seekers and how their needs are (not) met by the system is therefore passed on to their supervisors in Warsaw, as 'nobody is interested in these issues' (Information from BG officers working at the Polish Eastern border, September 2012). EU asylum instruments, put into practice by civil servants, have been unable to alter the flawed policy that develops separately from the realities of asylum applicants. This adds to the insulation of policy from the on-the-ground migration dynamics. For instance, the welfare system for asylum-seekers and integration facilities for already established refugees remain feeble and unchanged since the early 2000s (see Chapter 6.3).

#### *Chechen immigrants and the formation of transitness*

Let us now look at how NGO representatives' and Chechen asylum-seekers' understandings of migration, as the case study of this analysis, feed into the foregoing institutional and policy responses, and inform the transit country formation (Chapter 6 provides greater detail). First, one can see disparities in identifying the drivers of transit. As opposed to government officials, those who work in an NGO sector associate transit across Poland with deficiencies that arise in the policy implementation process, including low welfare benefits and the flawed access to the labour market that hinders integration in Polish society. To quote the director of the Polish Migration Forum:

Asylum-seekers come to Poland not being aware of how Poland functions... I don't criticise them because they are not obliged to know this... I don't accuse them of anything. Nevertheless, the reality is that they come to Poland thinking that as refugees they will be taken care of. However, they are not taken care of. Our welfare system does not take care of anyone... This system supports some but it is not so one can live at the expense of the Polish state. The welfare benefits are too small, specifically for families with children... Someone in Poland who has a family of five children and doesn't have a flat is unable to support himself... [So] this isn't strange at all that this person transits to another country where he will support himself. I think that accusing him of transit doesn't make sense as he fights for his

family's survival and there is nothing wrong with that (Interview. Polish Migration Forum, Warsaw, 24 July 2012).

Also, Chechen asylum-seekers emphasise economic difficulties that they tackle in Poland. Thus, 'I would really like to stay in Poland, but I am aware that even in the case of being granted subsidiary protection, if I am not cured and don't have a job, I won't be able to stay here... My wife's health is falling apart and she won't be able to carry on a five-member family, even if we receive everything [all welfare benefits]... [In this situation] we will move as we won't be able to cope financially here' (Interview. Asylum-seeker A, Warsaw, 19 July 2012).

Second, according to a widely recognised view among NGO activists, the government's directing all the resources to facilitate EU law implementation at the expense of integration policy exhibits disinterest in keeping immigrants in the country. As an interviewee working in a Warsaw-based migration foundation put it: 'I discern the conviction among asylum case workers that Poland is transited, but I also think that this is cynically exploited [by the government] to abandon various actions... that with the naked eye are indispensable... And now one can say that this is not needed as people will leave. And they will indeed leave if we don't help them' (Interview. Polish Migration Forum, Warsaw, 24 July 2012).

Third, 'street-level' bureaucrats' stigmatisation of asylum-seekers as economic migrants, which results in, among others, a low recognition rate (see Chapter 6.3.1), has been understood by Chechens as a signal to go back home. To quote a Warsaw-based asylum-seeker:

[I]f Poland doesn't want Chechens why doesn't it announce: "We don't want you". If Poland doesn't announce that, why are there only refusals [to grant international protection]?... No one's application has been positively examined and there are only rejections, rejections and rejections. The [asylum] procedure is so tiresome that finally people are fed up with it and either go west or go back home, as Zula [an interviewee's friend of Chechen nationality], who has just said is leaving (Interview. Asylum-seeker B, Warsaw, 7 August 2012).

A similar view was presented by a Chechen based in a different (Podkowa Leśna) reception centre: 'We think that we are unwanted in Poland because other immigrants have some

support from the governments in Western Europe.... And here we always hear: “Everything is fine in your home country, there is no war anymore, everything is nice there... Why did you come here? Go back home!” ’ (Interview. Asylum-seeker E, Podkowa Leśna, 8 August 2012). As an already established Chechen refugee living in Warsaw said: ‘Poland should declare itself a transit country... and let immigrants pass through... Because it simply doesn’t have money to provide care... Poland should say [to immigrants]: “pass through our territory but not stay here because we are unable to admit you” ’ (Interview. Refugee A, Warsaw, 30 July 2012).

Finally, policy recipients’ interpretations of Poland’s asylum environment have been influenced by European integration. The Dublin regulation, which assigns responsibility for claim examination to the first country of asylum, has been perceived by NGO experts working with Chechens as an inherent part of the Polish asylum setting and ‘a real threat’ for those wishing to go west. Despite this, many protection seekers apply for asylum again in Western Europe:

In principle... [if an asylum-seeker has submitted his first asylum application in Poland]... only here his application can be examined. Also, the applicant obtains the right to stay in Poland, so in this situation it isn’t possible to settle in France, Belgium or wherever else, and function in that country, search for a job, or seek social support. This is not accepted by foreigners, so a number of them come to Poland with an intention to transit, and if they leave, they are subsequently returned to Poland on the basis of Dublin II [regulation]. And there are asylum applicants... who are returned and go west again and are returned again and so seven or eight times. This is the group that from our perspective is the most difficult to work with because their centre of gravity and interests are not located in Poland. And in this situation encouraging somebody to look for work, learn the language and the Polish culture, establish relationships, and build friendships... is practically a miracle (Interview. Polish Migration Forum, Warsaw, 24 July 2012).

The above statements of addressees of Polish asylum policy seem to validate the logics that develop within the government and that inform transitness. Chechens’ and NGO actors’ interpretations of state response to transit feed into the detachment of policy from an on-the-ground migration reality. The actual determinants of Chechen transit migration relate to the quality of reception and the degree of social security that are not appropriately

addressed in legislation and practice. Furthermore, the Chechen case corroborates the key role of EU regulations within the Polish migration governance system that frame the EU management approach to transit and treat migrants purely as an object of governance.

#### *Examples of the discursive construction of transitness*

So far, I have demonstrated how instrumental and social logics, which arise in the process of EU policy adoption across levels of governance, enable discursive strategies through which the construction of transit occurs. It is therefore necessary to provide examples of this construction that emerges as the context in which actors' ideas have meaning, their discourses have communicative force, and their collective actions make a difference (Schmidt 2011: 119). That said, the construction of transit country as a policy issue in Poland can be understood as, first, a discursively composed 'conductor' of EU asylum norms, policies and ideas about transit that develop at various levels of governance through civil servants' perceptions of European integration as a major modernising force within the Polish system that properly responds to intra-EU asylum movement. Second, the transit country develops as a conceptually feeble state unable and/or unwilling to formulate alternative policies to governance and control approaches to transit. Third, transitness is associated with certain governmental helplessness in effectively alleviating transit movement and generating social incentives to encourage settlement. Fourth, the transit country emerges as a 'state indifferent' to the lot of asylum-seekers: civil servants' awareness of the causes of transit that develop outside the asylum system does not translate into policy actions. Finally, the transit state is seen as a 'state aware of' its transit status: policy producers' and policy recipients' understandings and assessments of transit migration structuralise deficient policies detached from on-the-ground obstacles and challenges that migrants face.

The construction of transitness arises therefore as a 'fallout' of Europeanisation processes. The EU determines Polish migration and asylum policy evolution and bureaucratic adaptation. The EU-induced transit concept formation has been somehow facilitated by the weakness of alternative to the EU philosophies of migration that have not taken hold in the system (see Chapter 1). The traditions of thinking about migration other than the EU that germinated in the 1990s, such as the post-Solidarity emphasis on the extension of immigrants' substantive and procedural rights, did not find representatives strong enough



to put those conceptions on the agenda and arouse interest of Polish public opinion. Moreover, parliamentarians of a dissident background, who represented this 'humanitarian approach', whilst referring to their experiences in the communist Poland, persecution and violations of fundamental freedoms, quickly formed the pro-European integration camp and advocated for Poland's EU accession. As a result, EU adjustments led MPs to conform their views on migration to recommendations produced in Brussels.

#### *Causal role of the construction of transitness*

The question that arises is of a causal influence of the discursive construction of transitness: when does it matter? When does it serve to reconceptualise interests rather than just reflect them? This analysis identifies three dimensions within which we can discern a causal role of discourse. First, is law and policy-making. Mikołajczyk (2007) argues that Polish asylum law evolution has been informed by the motives of asylum-seekers passing through Poland. She writes that 'in many cases persons applying for refugee status in Poland would prefer to apply for this status somewhere else, in some Western European country, and they land in our country only because Poland is the first EU country on their way west, or because they have been returned to Poland on the basis of the Dublin mechanism' (Mikołajczyk 2007: 24). A more concrete example of how perceptions of Poland as a transit state translate into legislation provides Dąbrowski (2008: 57), who associates an introduction of 'case discontinuation' mechanisms (that enable discontinuation of asylum cases of persons who disappear during proceedings) in Polish law in 2008<sup>185</sup> with 'the negative experiences of instrumental abuses of asylum procedure'. This provision was a direct reaction to the phenomenon of the disappearance of the majority of asylum applicants following claim submission at the Polish border. This phenomenon has been interpreted by Polish asylum decision-makers as the result of asylum-seekers' transit motivations and their treatment of Poland as a natural 'train station' on the way west.

Second is policy implementation. It has been demonstrated above that the construction of Poland as a 'stop' for economically-motivated asylum applicants seeking a better life in Western EU states has been articulated by both BG and OF officers working on the ground and facing transit migrants on a daily basis. Their interpretations frame their actions: stigmatisation of asylum-seekers as economic migrants in many cases leads to entry denials

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<sup>185</sup> Art. 42. Journal of Laws 2008, No. 70, item 416.

(for a detailed analysis see Chapter 6.3). Internalisation of Poland as a transit country translates into asylum decisions. In about 4% of justifications of over 130 international protection decisions brought before the administrative court (an appeal stage, see Figure 6.1 p. 180) between 2007 and 2011, references to the intentional abuse of procedures by asylum applicants intending to transit through Poland were made and affected the administrative outcome. For example, the Warsaw Regional Administrative Court when revoking a RB asylum decision pointed out that:

The Board in the justification of the challenged decision did not refer to any facts that would confirm the validity of the decision. The only thesis presented by the Board and, at the same time, not supported by any evidence is the presumption that the complainant's submission of subsequent [asylum] application "is aimed solely at using the [social] support system for asylum-seekers and not at seeking genuine protection". This presumption, rather than thorough examination of the case based on the presented evidence, including facts related to the situation in Chechnya at the time of the decision, undoubtedly represents a violation of the principle of legal validity.<sup>186</sup>

Third is social assistance provision. Jasiakiewicz and Klaus (2006) discern that the amendment of provisions regulating social support allocation to applicants staying in reception centres in the course of asylum proceedings (the 2005 amendment to the Refugee Protection Act<sup>187</sup>) aimed to adjust the system to frequent absconding during procedure. As of 2005 an applicant who stays outside the centre for more than three days is deprived of social assistance. Transit through Poland has been seen as the primary cause of these disappearances. On the other hand, discontinuations of integration programmes offered to beneficiaries of international protection constitute a source of concern for MLSP officials. A high degree of their discouragement when dealing with immigrants who sooner or later leave Poland co-occurs with internalisation of perceptions about transitness of the Polish migration setting. As a representative of a Cracow-based NGO pointed out:

For sure there is certain frustration that flows from the grassroots. Persons who implement Individual Integration Programmes [for beneficiaries of international

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<sup>186</sup> *Judgment of 14 October 2009*. File No. VIII SA/Wa 226/09, Regional Administrative Court, Warsaw.

<sup>187</sup> *Journal of Laws 2005*, No. 94, item 788.

protection] are often frustrated by the fact that those persons do not achieve any success, that is that an integration programme is used only if there are welfare benefits... In fact, a very small proportion of refugees stay in Poland. Be it an official or an NGO representative, everyone likes to see the success of his work. So, if we transfer money, or monitor a situation of a given family, we would like to see after a couple of years that children go to school and that their parents work, and that they somehow function in Polish society. No one likes to see a failure [of integration programmes] as then he has an impression that the money was thrown down the drain. And, of course, this is the taxpayers' money. So, there is an impression of certain frustration [among government officials], of being cheated by these people [refugees who use integration benefits and leave Poland]. This, of course, translates into a distrust of other persons that use these integration programmes... At the same time, there is a lack of conception of what to do so that those people integrate [in society] more effectively (Interview. Halina Nieć Legal Aid Centre, Cracow, 20 July 2012).

To conclude, the construction of transit as a policy issue emerges and develops within the legal and institutional arenas of the Polish migration and asylum system. The understandings of transit: its causes, nature and implications develop across levels of governance and across time within the process of Europeanisation that provides the 'meaning context' in which ideas and discourse are made sense of. The Chechens' perceptions of the system as inefficient in meeting their needs and decisions about transit feed into this social milieu. The construction of transit, characterised by interconnectedness with the EU, indifference to the lot of asylum applicants, and helplessness in yielding durable solutions for settlement translates via logic of communication (Schmidt 2010) into administrative decisions that affect immigration. Let us now look at the implications of transitness.

#### **4. Implications of transitness**

This section discusses the social and political ramifications of transitness at different levels within the Polish migration governance system. It focuses particularly on the implications for the functioning of the asylum framework, integration policy, and for asylum-seekers themselves. It also identifies possible ways to rectify the deficiencies.

### *Implications for the asylum system's management*

Transit migration involves financial and administrative costs. As the Commission Policy Plan on Asylum states: 'it is clear that it [transit] is inefficient and resource consuming. Asylum procedures will be initiated, incurring human and other resources, only to be abandoned some time later if, for instance, the asylum-seeker fails to appear for an interview because he/she has moved on to another member state, where a new procedure has started... Irregular secondary flows by refugees who don't apply again for asylum may pose a problem of overburdening public services' (CEC 2008b: 9). The movement incurs, first, the cost of asylum proceedings and welfare assistance offered to asylum applicants and their families. A working document prepared by the OF DRP on the Dublin regulation implementation indicates that the average cost of an asylum-seeker transiting through Poland and being returned on the basis of the Dublin regulation, and deported home amounts to over 8,000 zlotys (OF 2012b)<sup>188</sup>. If we assume that in 2011 over 1,400 Dublin transferees were returned to Poland and more than 1,100 voluntarily returned to the country of origin (IOM 2012) (Figure 7.1), an estimated annual cost of transit migration for the state budget in that year oscillated around 9 million zlotys (almost €2 million). This equals the EU asylum funds transferred to Poland between 2004 and 2011 (OF 2012d).

Second, transit increases an administrative and organisational burden: it prompts an expansion of institutions responsible for governance of flows (entertainment and examination of applications, and adoption of Dublin provisions) (BG units at the border and the OF DRP). Moreover, as indicated earlier in the thesis, whereas the BG and the OF, due to an increment in asylum and Dublin applications (see Chapter 3.2, and Chapter 6.3.3), undergo structural transformation and involve higher expenses and more case workers, the bodies that shape integration policy (the MLSP), which distribute social welfare and administer accommodation (the OF DSA), remain understaffed and underfinanced (see Chapter 5.2).

### *Implications for integration policy*

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<sup>188</sup> 1 Polish Zloty = 0.2 Euro. Exchange rate calculated on the basis of the Polish National Bank's conversion rate (December 2013).

An expansion of technocratic asylum setting aiming at harmonisation of legislation and instruments to manage transit migration, first, pushes welfare and integration policy into the margin of immigration debate. This hampers the development of the government's resources to prepare conceptions and/or long-term programmes addressing transit through asylum-seekers' social inclusion and facilitation of their access to the labour market, education and accommodation. Second, obsolete integration instruments lead the system to inappropriately meet asylum-seekers' demands to e.g. increase social benefits and elaborate integration facilities. The deficient MLSP capacity confines the government action to policy communication and identification of the record of differences. Third, the officials' perception of policy as adequately responding to transit migration and unable to mitigate this movement due to structural factors laying outside the remit of government institutions (the country's poor economic standing and migrants' economic motivations) fossilises an image of Poland as a state intentionally 'getting rid of' asylum-seekers. This discourages them from settling in the country, and from taking part in discussion on integration policy and contributing to the dialogue with the government.

#### *Implications for asylum-seekers*

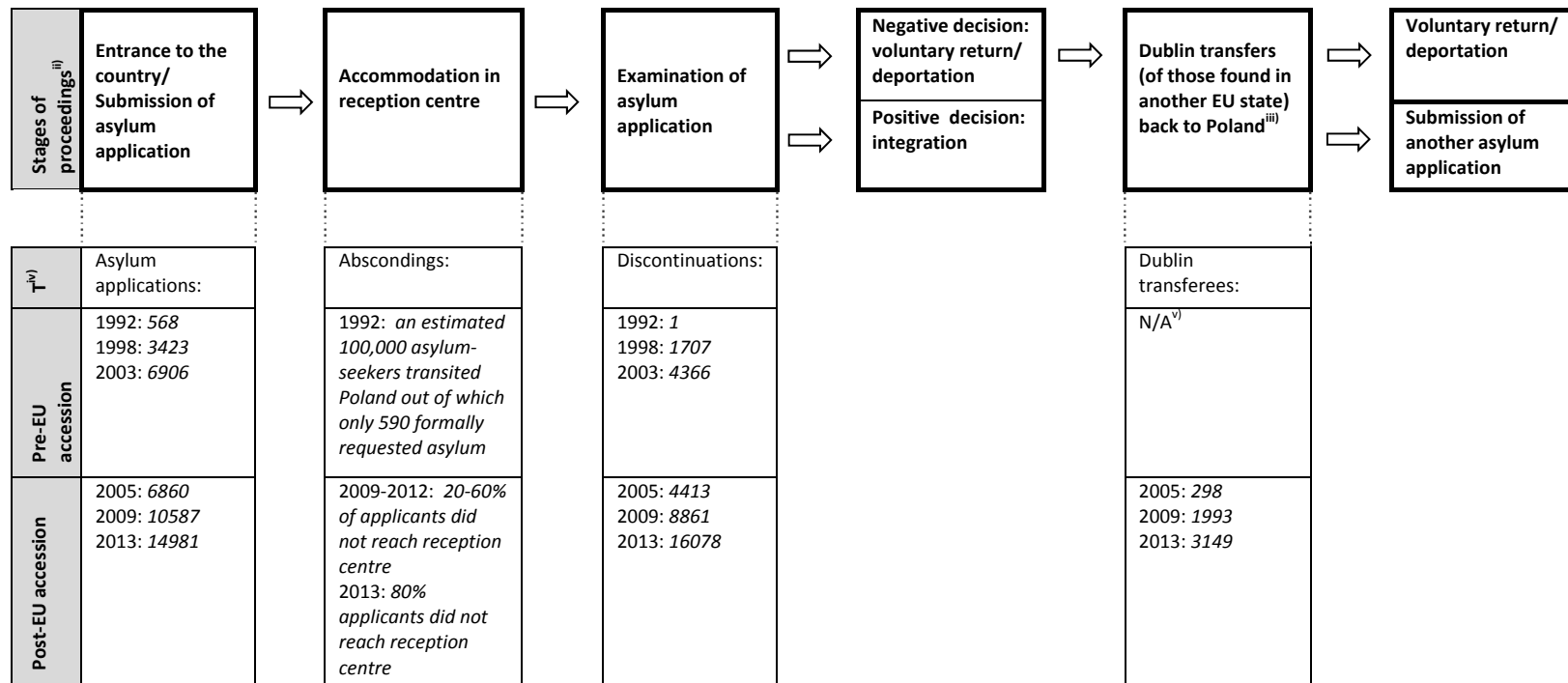
Asylum-seekers, whilst communicating with asylum institutions, see the change in the latter: a growing emphasis on harmonisation and marginalisation of welfare policy. They talk with each other, exchange information and experiences related to procedure, recognition rates and social benefits, and calculate. BG officers and OF bureaucrats encounter asylum-seekers openly expressing their economic motivations and perceiving Poland as a safe, though economically backward state (see previous section; and Chapter 6.3.1 and 6.3.2). As a result, the bulk of asylum-seekers, having submitted the claim at the border, either do not appear in reception centres or leave them without notice. As an interviewee working at the Terespol border crossing pointed out:

Yesterday 69 persons applied for international protection of which 32 appeared in the reception centre [in Biała Podlaska]. The rest did not reach it. This included Chechens and Georgians... As far as I know, it is around 70-80% of applicants that reach the reception centre in the first week following the claim submission. According to law, they have 2 days [after the claim submission] to report to the centre. After a week a half [of those who arrived in the first week] leave.

Eventually, around 20% [of all asylum applicants] stay (Interview. Border Guard, Terespol, 18 September 2012).

Also, discontinued cases exhibit transit: the files of asylum-seekers are discontinued, as a result of, among others, disappearance during procedure. As analysed in Chapters 3.2 and 6.3.1, the number of discontinuations increases proportionally to asylum applications: whereas in 2004 there were over 2,700 cases discontinued in relation to more than 8,000 asylum applications, in 2013 the numbers were 16,000 and nearly 15,000 respectively (Figure 7.1). Some of those whose cases were discontinued as a result of transit migration have been found in Western European states and returned on the basis of Dublin provisions. In 2013 there were around 3,000 such persons (Figure 7.1).

Figure 7.1 Scale of transit migration in Poland, 1992-2013<sup>j)</sup>



Notes:

<sup>j)</sup>The figure depicts transit of a particular group of migrants, i.e. asylum-seekers who await international protection decision.

<sup>ii)</sup>Stages of administrative proceedings initiated by the asylum claim submission at the Polish border.

<sup>iii)</sup>Dublin transfers take place either in the course of asylum procedure (an asylum-seeker moves to another EU state and his/her case becomes discontinued) or following the asylum decision (e.g. an asylum-seeker, having being refused protection in Poland and obliged to return to his/her country of origin, moves illegally to another EU state).

<sup>iv)</sup>T: factors reflecting transit across Poland.

<sup>v)</sup>The Dublin regulation entered into force with Poland's accession to the EU (2004).

Source: Adaptation from Office for Foreigners statistics (2014) and IOM (1994d).

### *How might the deficiencies be rectified?*

In order to remedy the flaws, the government should consider taking several actions. First, asylum-seekers who find themselves in a new institutional and social reality should be provided with detailed information on asylum proceedings and how their case will be dealt with. Though Poland has satisfactorily transposed EU regulations obliging the asylum authorities to inform asylum-seekers about their rights and obligations (see Chapter 6.3.2), in many cases these communiqués become patchy and vague (Interview. Asylum-seeker A, Warsaw, 19 July 2012). Asylum applicants should be aware of the consequences of submitting the claim and of transit to Western Europe. In addition, they should be familiarised with the specificities of life in Poland and how to access public services. This would allow confronting immigrants' expectations with the realities on the ground.

The development of information procedures should be accompanied by measures improving legal awareness of applicants, such as the provision of free legal assistance. Following EU accession the Polish government has attempted to introduce free legal advisory services for Polish citizens and immigrants; however, the plans, due to financial constraints, misfired (see Chapter 6.3.2). There is a danger that if Poland, obliged to institute the legal assistance system, continues to put off transposition of EU provisions, it will be brought by the Commission before the European Court of Justice. If the legal aid framework cannot be established in the foreseeable future, the government should elaborate existing networks of NGO experts that provide, in most cases, service at a lower cost. This would broaden the protection seekers' knowledge of their rights and obligations, give them an opportunity to learn about the labour market, education system and accommodation, and how to deal with administrative obstacles.

Second, a short-term action focusing on practicalities would need to be complemented by the government-led deliberation of asylum policy objectives and implementation. Although such efforts have been already made by the MoI, which drafted the Polish Migration Policy (see Chapter 5.3.2), the document remains cautious and largely confined to the EU agenda and lacking an action timetable. The proposed action would need to focus specifically on transit migration and address the questions of the scale of the phenomenon and its implications, why it should be tackled, and how asylum-seekers who stay in Poland could contribute to local communities and society. The discussion should reconsider the existing



integration and social support mechanisms, and engage a broad range of governmental actors dealing with various aspects of migration and asylum policy, such as education or health care. An action plan (indicating the budget and instruments enabling involvement of NGOs and migrant organisations as service providers) that could be produced as a result of this debate would show the will within the government to push the transit agenda forward.

Third, the conceptual reflection and policy setting would have to be grounded in the development of integration institutions. The MLSP (notably the Department of Social Assistance and Integration) responsible for integration policy should be strengthened in terms of research and analytical capabilities to enable an identification of complex problems, preparation of possible scenarios and policy evaluation. This would close the gap between the robust structures implementing the EU *acquis* (the MoI, the OF) and deepen cross-ministerial cooperation on asylum.

Finally, an elevation of the MLSP capacity should include elaboration of platforms of dialogue with asylum-seekers, migrant organisations and NGOs on specific integration issues. This would encourage the translation of NGOs activists' knowledge and experience into the Polish asylum policy and provide alternatives to the existing EU-funded deliberation networks focusing exclusively on the EU agenda. This will also mobilise a dispersed NGO community and encourage it to contribute to daily law-making processes. The government-NGOs discussion should focus more on the questions posed above and concern policy and practical integration problems. This would lay the foundations for a common on-the-ground action to rectify the key deficiencies prompting transit. Today, the most urgent issues are, among others, the flawed access to the labour market and accommodation (see Chapter 6.3.1 and 6.3.4).

To recapitulate, transitness burdens the institutions responsible for examining and managing asylum claims with more administration, and broadens the policy gap between the EU-led transformation of asylum procedures and passive integration policy inappropriately responding to asylum-seekers' actions, and therefore, fosters the transit movement across Poland. The government should address these deficiencies by, first, ameliorating information policy to make applicants more aware of the system; and second, by undertaking more decisive conceptual and institutional steps to reformulate the reception instruments. This would mitigate transit resulting from misunderstandings and

misinterpretations of asylum proceedings, foster immigrants-government relationships, and prepare the ground for more participatory and inclusive migration governance.

## 5. Conclusion

This chapter has synthesised the empirical investigation into Polish migration and asylum policy evolution and the formation of transitness. The analysis shows that the construction of transit as an issue in Poland has been informed by instrumental and social motives enabled by legal and bureaucratic intersecting arenas of the multi-level migration governance system: first, the dynamics of EU policy-making confine EU action on transit to legal approximation and convergence, and mobilise member states' resources to control and deter transit asylum-seekers; second, Polish migration and institutions, which, due to, meagre public scrutiny and a technocratic policy steering faithfully adopt EU legislation and policies to formulate the response to transit; third, Polish national- and local-level bureaucrats, enabled by an intensification of cooperation with the EU over asylum, the change of the content and scope of this cooperation, and a depoliticised policy setting, increasingly incorporate EU asylum information, exchange experiences, and produce knowledge. This collaboration not only moulds their policy strategies but also perceptions of migration and preferences to address transit in accordance with EU objectives; and fourth, replication of the EU approach to transit through management occurs in insulation from the state's long-term migration strategies and detached from migration dynamics and the realities of asylum-seekers.

Second, this legal and institutional milieu shapes policy actors' perceptions and assessments of transit migration and of policy responses to it. One can identify the divergences in understanding the causes of transit. Whereas government (MoI, BG, OF) officials locate them outside the asylum system and refer to a low standard of living and/or incomers' economic motivations, the policy recipients (asylum-seekers and NGOs) speak about deficient integration measures and flawed access to the labour market. Those discursive incongruities intersect with the bureaucratic environment analysed in this Chapter and affect government action: MoI and OF bureaucrats, whilst perceiving existing arrangements as properly responding to transit, focus on improving its efficiency and manageability (largely according to EU recommendations). This, however, fails to meet asylum-seekers' needs. The analysis of Chechen immigration and how their motivations

feed into state responses, and therefore, inform the idea of transitness, has shown that the expectations concerning longer integration programmes or better access to employment fall on stony ground.

The construction of transitness that emerges from an intersection of instrumental logics and the effects of socialisation can be characterised as the state that is embedded in EU migration and asylum policies; conceptually feeble and unable to transcend EU paradigms and approaches; helpless in formulating durable responses to transit; and aware of its transit status (that emerges as an immanent feature of the Polish asylum policy). This discursive construction of Poland as a transit state translates into decision-making: civil servants' perceptions affect legislation, asylum proceedings and the social support allocation setting.

In order to comprehend this complex policy reality in which ideas, concepts and practices related to transit emerge and develop, this analysis has drawn on Europeanisation, informed by the interacting calculative and social motives. It has been found that the Polish asylum policy has been driven by rationalist presumptions of optimal EU policy implementation, and social relationships that emphasise policy learning, knowledge and information exchange. The role of those interactions has increased over time across levels of governance under specific conditions that characterise relationships with the EU. Polish actors at the core executive level reflectively incorporate EU asylum rules, norms and practices. This includes absorption of EU patterns of legislative compliance as well as interpretations of transit institutional and policy environment. This reflects the switch from calculative behaviour to a logic of persuasion (Checkel 2005b).

Finally, transitness has multidimensional implications. It involves governance of high numbers of applicants travelling to and through the country, and increases financial and administrative costs. Also, the development of structures to manage migration diverts government attention from addressing the root causes of transit and leads to underestimation of socio-economic measures that could encourage migrants' assimilation in Polish society. This fosters the image of the state as a 'train station' that should 'declare itself a transit country and let migrants move west' and therefore, solidifies transit reaching the high numbers it has since the 1990s (Figure 7.1, p. 251).

## Chapter 8: Conclusions

This study explored the concept of transitness by asking four research questions: What is it? Second, how (and why) does it emerge and evolve? Third, what implications does it bring about? Fourth, how does the EU shape Poland's transit country construction? The questions were addressed by investigating the creation and development of the Polish migration and asylum system. The origins of transitness were analysed through an exploration of the post-1989 establishment of Polish migration institutions and their interpretations by policy actors. The concept's evolution was probed through an examination of post-EU accession adoption of EU asylum qualification, procedures, reception, and distribution instruments at three policy levels: the EU, the national, and the local. Each of these levels generates deficiencies that characterise the policy implementation process.

In order to analyse the legal and bureaucratic venues within the Polish migration governance system, how they change, and how they enable the discursive construction of transitness, the study drew on new institutionalist approaches – rational choice institutionalism (RCI) and constructivist institutionalism (CI), and provided the mechanisms of their reconciliation. This enabled a nuanced understanding of how asylum policy works on the ground and what it means to those who implement it and those who are subject to it. In this sense, the empirical analysis has led to three sets of findings: on the nature of transitness; on the institutional change within the context of EU impact; and on the dialogue between the rationalist and constructivist accounts.

This study has portrayed the key migration and asylum trends following the demise of the communist system after 1989. The early 1990s saw a tenfold increase in foreign entries to Poland: from 6.2 million in 1989 to 60.9 in 1994, driven by short-term visits of Germans and arrivals from the former Soviet Union. In the 2000s this movement evolved into temporary migration that constituted the main source of contemporary inflow in the country. The bulk of temporary migrants come to Poland from Belarus, Russia and Ukraine to undertake employment, primarily in the construction industry and agriculture. Along with rising legal/labour migration one can see a notable change in the asylum inflow in Poland. The number of asylum applications rose from around 500 in 1992 to nearly 15,000 in 2013, out

of which between 60% - 80% were claims lodged by Chechens. A favourable geographical location makes Poland the country of their first asylum application and has enabled them to attain the status of the dominant asylum group since the early 2000s. However, only 2% are granted refugee status, and the majority move west. This study took Chechens as a case study to depict how their interpretations, motivations and experiences feed into state responses to migration, and therefore, how they inform the construction of transitness.

In the early 1990s, the Polish government established an institutional framework to deal with rising immigration. This framework was established within the Ministry of Interior (MoI) and aimed at curbing illegal inflow, manage legal asylum migration, and to improve the country's admission capacity. The government lacked, however, a clear understanding of the problem and the necessary funding to formulate a comprehensive integration policy. In the absence of substantial opposition from public opinion and NGOs, the MoI played the leading role in forging immigration policy and establishing relations with international organisations and the EU. Poland's pre-EU accession cooperation with the Union over migration and asylum had two phases: the first (1990-1997) was driven by intergovernmental collaboration with the Commission and EU member states and was structured by EU priorities, including border management and readmission. This provided Polish officials with an opportunity to absorb EU asylum ideas, including the 'safe country of origin' and the 'safe third country' concepts, and advice on how to construct effective and responsive asylum institutions. The second phase (1997-2003) was EU enlargement, framed by conditionality, and resulting in the implementation of EU asylum provisions (e.g. regulations on unification of asylum procedure and subsidiary protection), bureaucratic adjustments (e.g. the establishment of the Office for Foreigners (OF)), and learning of EU decision-making and techniques to adopt EU law.

The early understandings of transit, developing in the process of institutional creation were moulded by government (MoI) officials, who saw the movement across Poland as driven by structural factors: harsh economic conditions and a deplorable welfare support system were unable to attract immigrants heading to Western Europe. The phenomenon of transit migration began to be perceived as an immanent feature of the country's migration landscape that could be dealt with only through effective management, including EU-structured readmission agreements.

An illustration of migration trends and the origins of the migration framework provided the necessary context for investigation of post-EU accession asylum policy evolution and the development of the idea of transit. The study has analysed the adoption of four main EU asylum instruments: the qualification directive<sup>189</sup>, the procedures directive<sup>190</sup>, the Dublin regulation<sup>191</sup>, and the reception directive<sup>192</sup> across three levels of governance: the EU, the Polish core executive, and the grassroots. The process of putting EU provisions into practice drives the developments within the levels: actors interpret EU norms, make sense of them, and shape their institutional environment. They also communicate with each other within and across the levels so as to ensure policy coherence.

The EU level has been shaped by member states (the EU Council) and the European Commission that in 2004 was allocated the powers to initiate legislation and set priorities of EU migration and asylum policy. Their key objective has been to implement the instruments that form the Common European Asylum System (CEAS). The reform of CEAS legislation (the amended provisions will come into effect in 2015) aims to approximate asylum practices, narrow implementation latitude at a national level, and improve the responsibility allocation (Dublin) system. Western European states steered EU Council negotiations on the amendments (2008-2013). The Polish government, whilst perceiving EU mechanisms already in force as well-functioning and appropriately responding to transit, followed the agenda driven by destination countries.

The Polish core executive institutions (the MoI, the OF, and the MLSP) structure EU asylum law adoption and institutional adaptation, design policies and transfer them to the grassroots. Whilst operating in a depoliticised and technocratic setting of scarce scrutiny from outside (as a result of the low interest of public opinion on immigration, and limited resources of NGOs to influence the government-led migration agenda), they give shape to CEAS provisions' incorporation. This has led to an extension of the scope of protection (introduction of subsidiary protection) and asylum-seekers' rights, clarification of the stages of asylum proceedings, and establishment of Dublin mechanisms to transfer asylum applicants. An EU-induced revamp of Polish asylum principles, procedures and practices

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<sup>189</sup> Directive 2004/83/EC.

<sup>190</sup> Directive 2005/85/EC.

<sup>191</sup> Regulation (EC) No. 343/2003.

<sup>192</sup> Directive 2003/9/EC.

was expedited by an intensification of Polish actors' learning of EU rules, ideas and practices through EU-level and domestic networks of communication and cooperation.

The grassroots institutions implement asylum law and policy on the ground. The key role at this level is played by the OF that examines asylum claims, issues international protection decisions, and manages the reception system. The Office is also a 'coordinator' within the bureaucracy: its experts negotiate EU proposals in Brussels; it provides the MoI with knowledge and expertise to formulate legislative and political objectives and adopts EU migration and asylum policy. This allows OF bureaucrats to modify asylum proceedings, rearrange the reception framework, and elaborate the mechanisms to intensify EU-level deliberation and learning within such networks as the European Asylum Support Office (EASO). The networks enable absorption of information and data related to asylum procedures, exchange of practices and communication about EU implementation rules in various countries and in various contexts.

The legal and bureaucratic arenas that develop within these levels of governance yield instrumental and social logics that enable the construction of transitness. The bureaucratic arena has been grounded in EU-level agreements between member states and the Commission to channel the resources to deter and deflect transit through elaboration of management and control mechanisms. The Polish core executive adapted to this policy, and in uninterrupted transfer of this policy to the grassroots institutions, which, while operating in the conditions of low discretion and flawed supervision of NGOs, elaborated only those provisions that deal with case examination and asylum distribution. The legal arena at the EU level has been characterised by confining EU asylum instruments (CEAS) to addressing intra-EU movement to legal approximation and convergence of asylum practices. The implementation of EU law enables the translation of these instruments into the Polish setting, whilst marginalising socio-economic tools (that are not regulated by EU law) that could encourage integration in Poland. Adaptation of this logic to deal with transit at the local level results in detachment of EU-steered asylum policy (primarily focusing on harmonisation and governance of flows) and the means to tackle transit from actions and decisions of asylum-seekers.

The legal and institutional arenas obviously intersect and evolve over time. One of the main drivers of this evolution has been the expansion in the scale and scope of social

interactions and change of their content as a result of post-EU accession Europeanisation. Closer integration with the EU has provided new opportunities for Polish asylum national- and local-level civil servants to acquire and internalise EU asylum ideas, meanings and cognitive frames. This occurs through engagement with EU decision-making (negotiation and implementation of EU provisions and policies), the development of domestic platforms of cooperation with NGOs oriented towards application of EU asylum standards, and through an exchange of information, data and experiences.

The empirical analysis in the dissertation has demonstrated the gradual socialisation of Polish asylum civil servants within the core executive institutions, who progressively incorporated and reflected on EU asylum policies and 'ways of doing things', translating them into the domestic context through, for example, preparation and dissemination of government documents grounded upon EU norms. This reflects the production of knowledge that is used by national-level government institutions to demonstrate their capacity to mobilise resources and produce research. On the other hand, knowledge produced as a result of communication and exchange of data and practises with EU and EU states' officials at the grassroots performs an instrumental function (Boswell 2008, 2009) and is applied to enhance the quality of OF and BG output.

This milieu provides the setting of discursive interactions in which multi-level policy actors develop perceptions of the nature of transit migration, and understandings and assessments of policy responses to this phenomenon. The empirical investigation demonstrated that, when perceiving transit as primarily driven by inconsistencies between EU states' regulations and practices, EU officials find approximation of domestic laws and elaboration of Dublin mechanisms effectively tackling asylum flows. At the same time, however, they reluctantly transgress the boundaries delineated by EU legislation and avoid discussions on the reformulation of national socio-economic measures to encourage settlement in the first country of asylum. Polish government officials absorb and internalise EU responses to transit through the policy venues mapped out above. Whereas core executive officials tend to emphasise legal harmonisation and equalisation of asylum criteria and procedure across the EU, 'street-level' bureaucrats pay more attention to governance of transit flows, specifically drawing on Dublin mechanisms.



Interpretations of the policy responses coevolve with reflection on the drivers of transit. The research has shown that Polish government officials locate these drivers outside the asylum system, and therefore, outside the institutional reality in which they act. The majority see transit as generated by Poland's low standard of living and modest welfare assistance, and by the economic motivations of asylum-seekers seeking to get to Western Europe. This, however, is at odds with asylum-seekers' recognition of the asylum system as inappropriately meeting their needs. The analysis of the Chechen case has illuminated the separation of EU-determined state policy addressing transit from the on-the ground migration developments. Chechens, a majority of whom pass through Poland, associate their decisions about migration westwards with Poland's meagre social support, inefficient mechanisms to facilitate access to the labour market and obsolete integration programmes available. Their perceptions of migration feed into policy responses and thereby mould the construction of transitness as an issue in Poland.

As a result, transitness emerges as a discursively constructed migration environment that occurs through strategies enabled by an interaction of particular legal and bureaucratic arenas. This construction, which evolved over time is an example of Europeanisation, and forms the social reality of passive implementation of external migration norms. This reality is composed of indifference to the lot of protection seekers who are 'filtered' through that reality, an inability to address on-the-ground immigration dynamics, and a sense of powerlessness in the face of continuous transit movement. This reality generates pressure on asylum-seekers to leave Poland.

The emergence of Poland's transitness implies, first, an increase of the administrative and financial burden on asylum institutions. In order to enter Poland (and the EU) (transit) asylum-seekers submit asylum applications at the border and stay in reception centres or privately-rented accommodation awaiting their case examination. This involves administrative proceedings and allocation of welfare support. Second, it bolsters an imbalance in the development of asylum structures. Whereas institutions responsible for managing the flows (the OF, and the BG) significantly expand the capacity to control the borders and carry out asylum procedures, the MLSP's limited administrative and human resources make integration policy short-sighted and inappropriately addressing the realities of immigrants. Third, transitness hinders the process of migrants' adaptation in Polish society. Although admitting asylum-seekers (the entry procedures have been

designed according to EU recommendations) and ensuring that their claims are appropriately examined, the asylum framework does not produce durable incentives to facilitate assimilation in Polish society. The reception conditions remain modest and integration programmes do not provide an opportunity to maintain a family and find well-paid employment. We now move on to consider the wider contribution of this research.

This study, first, contributes to the understanding of the transit institutional and social milieu emerging between the country of origin and the country of destination, by filling the gap in migration studies that approach transit from the perspective of agency and focus on strategies and motivations of migrants and neglect the state-level developments. In this sense, this project broadens our knowledge of a complex multi-level policy space through which migrants/asylum-seekers are 'filtered'. An institutional environment is not a freeze-frame, the background for the analysis of transit flows (Düvell 2008a, b), but an evolving structure of social order, being moulded by interactions of reflexive actors, that categorises migrants and differentially regulates their admission and residence, and therefore, shapes their behaviour. This extends the research on transit to public policy and gives a new twist to the debate on the policy-related questions, including the role of concerns over transit in formulating migration policy: How do migrants understand the policy environment and how does it influence their decisions? What kind of policy implications does the construction of transit as an issue bring about and how might they be addressed?

The second contribution of this research project is conceptualisation of transitiveness as a 'fallout' of institutional evolution driven by European integration. The emergence of the transit country concept occurs through discourses produced within legal and bureaucratic venues of the migration system. The institutional motives and the effects of socialisation that develop within these venues are framed by EU policy adoption that spurs legal and institutional adaptation. This process takes place through practice that encompasses the actual doing of social change and the conscious and discursive dimension. The construction of transitiveness is thus about an interaction between the incentives structures and ideas and meanings that policy designers and policy recipients bring to decision-making.

This study conceptualised the evolution of practice within the changing dynamics of European integration. The pre-EU accession Europeanisation led to the incorporation of pre-arranged and non-negotiable EU rules into the Polish asylum framework. A strong

adaptational pressure, spurred by a significant misfit between EU and domestic policies, prompted the reform of asylum legislation, facilitated by a low number of veto points in the system (NGOs incapable of influencing government action, and a scant public interest in immigration). EU-induced legal and institutional rearrangements discussed above laid the ground for formulating the instruments to tackle transit. This included the development of border control infrastructure and procedures enabling readmission of illegal migrants and failed asylum-seekers returned from Western European states, and deportation mechanisms. Poland's post-EU accession engagement with the EU altered the dynamic of institutional change, which has now been driven by bargaining, coordination and implementation of the agreed EU laws and policies. The analysis has revealed that, although the adoption of EU legislation prompts significant domestic rearrangements, a participatory character of EU decision-making, an intensification of social interactions with EU and EU states' officials, and new learning opportunities have increased the ideational impact of the EU on Polish asylum decision-making. This has facilitated an incorporation of the EU harmonisation and management approach to transit.

By elaborating the Europeanisation approach to transit and providing insight into the adoption of EU instruments to tackle migration, this study contributes to the discussion of the EU impact on migration regulations and border control systems in transit states. By investigating the pre- and post-EU accession policy developments, the project draws a dynamic picture of the transit country milieu informed by the EU-induced legal overhaul (reformulation of asylum qualification criteria, and procedures) and institutional adaptation (the development of institutions to govern the flows). Second, the meticulous analysis of EU asylum policy translation into the multi-level Polish setting and how it is interpreted by policy actors demonstrates how EU regulations work on the ground. This extends an understanding of an interaction between the rationalist and constructivist logics within Europeanisation. Third, an investigation of the deficiencies that characterise the implementation process, and how they produce the setting of the construction of transitness widens our knowledge about the differential impact of the EU, notably about the negative effects of European integration and what it means to the domestic change.

The third contribution of this analysis is a reconciliation of the rationalist and constructivist dynamics of institutional evolution. The development of the mid-range approach, which builds the dialogue between RCI and CI accounts permits going beyond the question of

ontological incongruity by orienting the analysis towards an investigation of practice and accepting that different approaches can provide alternative understandings of social phenomena and let several perspectives come together and create one comprehensive explanation.

The formulation of the RCI – CI conversation from a constructivist angle enabled an exploration of the role of value and learning in Polish asylum policy-making. The analysis illuminates that Polish actors have been more prone to incorporate and internalise EU asylum policies under specific conditions. First, the novel environment that emerged in the course of the 1990s systemic transformation incentivised government civil servants to search for the definitions and models of migration and asylum policies in EU states, and to absorb the instruments of readmission and border control and management. On the other hand, the conditions of uncertainty that developed following Poland's EU accession prompted intensive learning of EU policy formulation, legislative processes and bureaucratic procedures, and how to shape EU asylum debate. Second, the post-EU accession interaction with the EU involved the core executive civil servants in drafting, negotiating and implementing EU rules on asylum qualification, determination procedure, reception standards, and asylum-seekers' distribution. Third, EU membership developed the relationships based on coordination and deliberation over asylum. Grassroots officers have, for example, been provided with opportunities to learn how to interpret CEAS provisions and conform to Commission guidelines. Through EU frameworks, such as the EASO, Polish bureaucrats share information and practices with their colleagues from other member states to improve knowledge of and skills in adopting EU norms on the ground. Fourth, a depoliticised Polish migration and asylum setting intensifies EU policy adoption across levels of governance. Thus, a handful of MoI and OF officials, acting in a managerial setting and in the conditions of a scant non-governmental pressure are given wide room to decide on whether and how to implement the newly acquired EU asylum ideas, concepts, or 'ways of doing things'.

The theorisation of social mechanisms of preference change revealed fine-grained connections between the foregoing conditions and an increasing role of identities and norms that emerge within Europeanisation. This study conceptualised the process of EU decision-making and policy learning to trace an incorporation of EU logic to deal with transit, as well as how this added to the transit country formation.

It has been established that asylum officials increasingly absorb EU legislative templates, definitions, guidelines and interpretations. At the national level this has been reflected in policy production in accordance with EU rules and meanings. At the local level, civil servants introduce EU practices to improve the quality of EU policy implementation. These processes also inform interpretations of transit migration and the mechanisms to manage and deter the phenomenon. This reflects the evolution towards 'normative suasion' where actors reflectively internalise new roles and standards. In this sense, this study elevates the analysis of the causal role of social mechanisms of learning and persuasion from micro- (Checkel 2005a, b; 2006) to macro-level, whilst seeing the EU as a highly likely place for socialisation to occur (Weber 1994; Zürn and Checkel 2005). This contributes to academic debates over the extent to which European institutions promote shifts in preferences and identities (Laffan 1998; Wessels 1998) as well as responds to Moravcsik's (1999) plea to investigate the role of discourse in the policy process by specifying the ideas that shape instruments under specific conditions. Consequently, the empirical investigation has shown how RCI and CI explanations are linear and additive in explaining EU policy adoption that, whilst steering Polish legal and structural arrangements and generating the logics that inform transitness, has been driven by policy actors that make sense of policy instruments, mould an institutional context, and produce discourse. This couples policy-making with policy-makers' interpretations to meet the complexity of situations in which they find themselves.

The particular strengths of this thesis are, first, multi-levelness (investigation across policy levels) and multi-dimensionality (examination of strategic-choice and social motives developing within policy levels) of policy analysis. This enables the provision of a comprehensive picture of a particular migration phenomenon, the construction of transit, and to explain why the latter emerges in various policy settings, how those settings intersect, and how those interactions permit the findings of the evolution of that construction. Second, transit is traced within both the material and ideational contexts. Transitness develops not only through strategic interaction premised on a unilateral calculation, but also through the environment within which 'sentient' actors develop their ideas for action that they convey through discourse. This milieu, moreover, constitutes both that which structures actors' concepts, discourse, and actions and that which is informed by actors' concepts, discourse and actions. The analysis of how Polish core

executive and grassroots officials reflect about their actions, yields meanings of events and processes and deliberate over asylum instruments within and outside their institutions, informed by the Europeanisation dynamics, enables an illustration of the policy reality and how migration and asylum policy actually happens, and what kind of consequences this brings to the formation of transitness. Finally, an empirical insight into the complex policy and discursive dynamics has been derived from a wide range of primary and secondary sources. An examination of governmental and non-governmental documents produced by various institutions across levels of governance over time builds solid knowledge of the legal and institutional fields of the Polish governance system which inform the transit construction. Substantiation of the analysis with an extensive number of interviews with EU and Polish government civil servants, NGO representatives, academics and Chechen migrants not only allows cross-validation of the analytical result but also strengthens the reliability of the project.

On the side of the weaknesses of this research, one may find, first, the confinement of the analysis to a specific type of asylum caseload: Chechen asylum-seekers, and a particular policy dynamic (EU asylum policy implementation) as simplifying the transit country problem. It could be argued that transitness is a far broader phenomenon that involves different types of flows, including legal and illegal immigration, and develops also beyond the boundaries delineated by EU legislation, for example, within the practice of integration and social assistance allocation, or the labour market conditions. In addition, a potential criticism is that too much attention is paid to the patterns of institutional evolution and policy-making thus narrowing down an investigation of the role of migrants in shaping the construction of transitness to their interpretations of state policy responses. Second, some may raise the question of the generalisability of the findings. A one-country study does not allow capturing the wider dynamics of transit through the EU, as Chechens travel through different Central and Eastern European countries, and EU external border transit states deal with different caseloads. Finally, one may question of the analytical approach to reconcile rationalist and constructivist positions. The specification of conditions under which policy actors are more prone to socialisation and persuasion and the mechanisms through which these processes occur may require elaboration of more lucid theoretical links with calculative-based action within the post-EU accession Europeanisation. On the other hand, questions about the effects of socialisation may be brought to the fore:

shouldn't the measurement of influences of internalisation of EU values and concepts, and how this informs policy and the creation of transit, be strengthened?

Future research could usefully go in two directions: empirical and conceptual-theoretical. Empirically, the meta-theoretical method, which seeks to bridge rationalist and constructivist variants of institutional analysis to account for the construction of transit migration as a policy issue, allows cross-case research. This method could be applied to extend the empirical context of transit formation. Future studies could investigate the institutional and discursive settings of migration governance systems developing in Central and Eastern European states that assume similar policy dynamics (the establishment of migration and asylum institutions according to EU norms) and that deal with similar inflows. The countries that face transit migration to Western Europe include Czech Republic, Slovakia and Hungary. One could also focus on the comparative analysis of states passed through by Chechens. The statistics show that the majority of them, apart from Poland, transit Slovakia, where they represent the largest group of asylum-seekers. More attention in these studies could be paid to the evolution of reception and integration settings: how do they develop in the absence of EU external pressure? How do their creation and change provide the space for formulation of decisions about transit? How do asylum-seekers interact with these structures, and how do the latter mould the former's images of the realities of transit state? This sort of travelling across the countries should lead to more robust explanation of interactions between the EU-steered institutional evolution and the formation of perceptions of transit migration and of responses to it. Furthermore, there is room for investigating a causal impact of the creation of transit on policy-making and migration. The questions of future research could concern: the process of how ideas and discourses about transit are used to substantiate policy choices; the differences in the application of ideas about transit across policy levels and policy contexts; and the translation of understandings of transit into decision-making informed by a wider set of variables, including factors emerging from Europeanisation.

Theoretically, there is the option of shedding more light on the connections between rationalist and social logics to account for the EU-induced policy change. This research has emphasised the scope conditions under which socialisation and persuasion are more likely to occur. However, the foregoing logics can be also fitted together over time to more fully explain a particular outcome. Alternatively, empirical contribution could be reconstructed

and reinterpreted from the point of view of both rationalism and constructivism. An inclusion of these approaches to bridge building into the explanation of the processes of Europeanisation could contribute to the development of analytical tools to examine evolution of national- and local-level policy processes informed by European integration as well as to measure the effects of EU influence.



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