Routledge
Taylor & Francis Group

Journal of European Public Policy

ISSN: 1350-1763 (Print) 1466-4429 (Online) Journal homepage: https://www.tandfonline.com/loi/rjpp20

The development of the EU asylum policy: venue-shopping in perspective

Christian Kaunert & Sarah Léonard

To cite this article: Christian Kaunert & Sarah Léonard (2012) The development of the EU asylum policy: venue-shopping in perspective, Journal of European Public Policy, 19:9, 1396-1413, DOI: 10.1080/13501763.2012.677191

To link to this article: https://doi.org/10.1080/13501763.2012.677191

Published online: 16 Apr 2012.

Journal of European Public Policy 19:9 December 2012: 1396–1413

The development of the EU asylum policy: venue-shopping in perspective

Christian Kaunert and Sarah Léonard

ABSTRACT The development of the EU asylum and migration policy is often explained as the result of 'venue-shopping', that is, the move by policy-makers to an EU policy venue in order to avoid national constraints. This article demonstrates that, contrary to what would have been expected on the basis of this widespread view, EU co-operation on asylum matters has actually led to a rise in the legal standards applicable to asylum-seekers and refugees. This outcome can be mainly explained by broader changes that have gradually affected the EU 'system of venues' and have thereby decreased the likelihood of more restrictive measures being adopted in the EU asylum policy venue. This has important implications for the EU governance of asylum and migration in general.

KEY WORDS Communitarization; EU asylum policy; judicialization; Lisbon Treaty; system of venues; venue-shopping.

INTRODUCTION

European Union (EU) co-operation on asylum has significantly grown in recent years, making this policy area one of the most dynamic in the EU (Ferguson Sidorenko 2007; Kaunert 2009, 2010; Peers and Rogers 2006). Many scholars have argued that the 'EU asylum and migration policy' has been mostly restrictive and has generally aimed to reduce the numbers of migrants and asylum-seekers coming to Europe (Guild 2003, 2004, 2006a; Levy 2005). One of the main explanations for this increasing co-operation on asylum and migration at the EU level is that member states have decided to 'venue-shop'. According to this argument, first made by Guiraudon (2000, 2003), national policy-makers in the field of asylum and migration moved policy-making on these matters to a new EU 'policy venue', in a bid to circumvent the liberal pressures and obstacles that they faced at the domestic level.

This article aims to revisit this argument in relation to the EU asylum policy specifically. More than 10 years have elapsed since the publication of Guiraudon's (2000) seminal article, during which the EU asylum policy has significantly developed as various financial and legislative instruments have been adopted (Kaunert and Léonard 2011). What has happened to asylum policy since the venue-shopping to the EU level? It is necessary to address this question because of the prominence of 'venue-shopping' as an explanation for the

Journal of European Public Policy
http://dx.doi.org/10.1080/13501763.2012.677191

development of the EU asylum policy and the fact that there have been important changes since the argument was originally made by Guiraudon in 2000. Not only has EU co-operation on asylum considerably developed, but the EU itself has also considerably changed, as it has seen the adoption of new treaties amending its institutional framework and decision-making processes, the latest of which is the Lisbon Treaty that entered into force on 1 December 2009. This article therefore aims to answer the following twin questions: to what extent has 'venue-shopping' to the EU level led, or not, to the adoption of more restrictive asylum provisions, and how can one explain this outcome?

The article begins by presenting the concept of venue-shopping and its application to the development of EU co-operation on asylum and migration matters. It then revisits the venue-shopping framework and outlines four amendments to it in order to increase its explanatory power. The following section examines the key outputs of the EU asylum policy to date. It shows that, overall, the switch to an EU venue for asylum policy-making has not led to the adoption of more restrictive asylum provisions. The following section argues that this outcome has been mainly a result of the significant changes that have affected the EU 'system of venues' as a whole, and, in turn, the EU asylum policy venue by making it more liberal and therefore less prone to the adoption of more restrictive asylum measures.

VENUE-SHOPPING IN THE EU ASYLUM AND MIGRATION POLICY: TOWARDS A NEW VENUE-SHOPPING FRAMEWORK

Drawing upon the literature on 'policy venues' developed by Baumgartner and Jones (2009), Guiraudon (2000) has suggested that a 'venue-shopping' framework is the most adequate to account for the timing of the creation, the form and the content of EU co-operation on asylum and migration matters. 'Venue-shopping' refers to the idea that policy-makers, when encountering obstacles in their traditional policy venue, tend to seek new venues for policy-making that are more amenable to their preferences and goals. Thus, Guiraudon has argued that national officials began to co-operate on asylum and migration matters at the European level after encountering domestic obstacles when attempting to develop increased migration controls at the beginning of the 1980s (Guiraudon 2000: 252). These obstacles notably comprised judicial constraints, the activities of pro-migrant groups and the necessity for Interior ministries to compromise with other ministries (e.g., Labour, Social Affairs) when making national legislation (Guiraudon 2000; Lahav and Guiraudon 2006; see also Freeman 1995, 2006; Joppke 1998, 2001; Joppke and Marzal 2004). In particular, attempts to further increase migration controls in several European countries were stifled, Guiraudon argues, by the jurisprudence of higher courts – what has come to be known as the 'judicialization' of asylum and migration policies (Gibney 2001).

According to Guiraudon (2000), venue-shopping to the EU level enabled policy-makers aiming to increase migration controls to attain their objectives

by avoiding the aforementioned obstacles. First of all, venue-shopping allowed policy-makers to avoid judicial constraints, as the European Court of Justice (ECJ) had no competence to adjudicate on asylum and migration matters under the Maastricht Treaty and was only given limited competences in this policy area by the Amsterdam Treaty. In addition, venue-shopping allowed Interior ministries to largely exclude possible 'enemies' from the decision-making process by considerably restricting the roles of the European Commission, the European Parliament and the ECJ, which were seen as more 'migrant-friendly'. The creation of a separate Third Pillar, notably comprising asylum and migration, also led to a decoupling of these issues from other related issues such as employment and social affairs, which were dealt with by other parts of the European Commission. In addition, the switch to the EU policy venue made it more difficult for non-governmental organizations (NGOs) to monitor policy-making on asylum and migration, as they had been hitherto organized primarily at the national level.

To date, there have been two main attempts to build upon Guiraudon's 'venue-shopping' framework to understand the development of the EU asylum and migration policy. First of all, Lavenex (2006) has highlighted a new pattern of 'venue-shopping' by identifying an 'outward' shift – in contrast with the previous 'upward' shift – of policy-making on migration towards the realm of EU foreign policy. Maurer and Parkes also engaged with Guiraudon's framework to argue that the entry into force of the Amsterdam Treaty did not lead to any shift away from what they call the 'previous security- and control-orientation of asylum policy' (2007: 173). Thus, the literature on venue-shopping in the field of asylum and migration argues that national policy-makers have decided to 'venue-shop' to the EU level mainly as an attempt to avoid national obstacles to the development of more restrictive asylum and migration policies.

Revisiting the venue-shopping framework

It is argued here that four changes to the venue-shopping framework initially used by Guiraudon are necessary. First of all, it is suggested analytically breaking down the 'EU asylum and migration' policy venue considered by Guiraudon and Lavenex into three distinct venues that concern asylum, external borders and migration respectively. Albeit closely related, these are distinct policy issues with different legislative provisions and different policy goals attached. The EU defines the goal of its 'common policy on asylum, subsidiary protection and temporary protection' as 'offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*', whereas the goal of the EU's 'common immigration policy' is defined as 'ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in member states, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings' (Articles 78 and 79 of

the Treaty on the Functioning of the European Union [TFEU]). With regard to external borders, the EU aims to gradually introduce an integrated management system for external borders with a view to ensuring a high and uniform level of control of persons and surveillance at the external borders (Article 77 TFEU). Distinguishing between the three policy venues allows for a more precise analysis of their development, including the possibility of identifying the existence of different – and even potentially diametrically opposed – trends. It would then become possible to observe, for example, the co-existence of a liberal trend in the EU asylum policy venue, whereby higher standards are adopted for refugees and asylum-seekers, and restrictive tendencies in the EU migration and border policy venues, which have a negative impact on migrants and those who are *potential* (rather than *actual*) asylum-seekers. Secondly, this article suggests that an analytical framework based on policy venues can be enhanced by acknowledging that some policy venues partially depend on one another and can therefore be termed 'co-dependent' venues. In other words, there are some policy venues that have indirect effects on other, related venues ('co-dependency effects'), although it is possible and sometimes even beneficial to analytically distinguish between them. For example, in the EU, the asylum policy venue is partially dependent on the external borders venue, as the measures adopted in the latter have an impact on those developed in the former. However, space constraints prevent the full empirical application of this idea in the present article, which is pursued elsewhere.

Thirdly, this article argues that it is important to analyse any policy venue in the broader context of the 'system of policy venues' to which it belongs. This idea was already put forward by Baumgartner and Jones (2009: 216), who have developed their framework with reference to the United States federal system. Of particular interest to the present analysis is their observation that '[while] the various parts of the federal system differ from each other in a number of ways, they are also part of a whole. As parts of a single system, they can all simultaneously be affected by changes in the structure of the federal system itself.' Such institutional changes can, in turn, cause 'dramatic changes in the behaviors' of the actors concerned over time (Baumgartner and Jones 2009: 216). Adapted to the EU political system, this refers to the idea that policy venues, such as the EU asylum policy venue, may be affected by constitutional-level changes that remodel the whole EU institutional setting. As a consequence of treaty changes, such as the Lisbon Treaty, new political actors with their own preferences may have entered new venues (such as the EU asylum policy venue) and the preferences of the actors already present in these venues may have changed as a result of EU co-operation, as further explained below. Overall, such changes are likely to have had an impact on the policies subsequently adopted in the policy venue.

Finally, this article also suggests adopting another approach to member state preferences. Guiraudon's analysis in 2000 was premised on the idea that EU member states seek to pursue restrictive asylum and migration policies. This could be seen as an over-simplification to assume that all member states

(which now amount to 27, soon to be 28) would share the same preference for restrictive asylum and migration policies and that this would remain constant over time. The latter is particularly questionable given that EU member states are engaged in a process of increasingly closer co-operation on asylum and migration matters. In the international system, national interests are, already, partly the result of international co-operation (Katzenstein 1996). Thus, although some scholars such as Moravcsik (1998) have put forward a different view, it is argued here that, in line with the works of scholars such as Haas (1958) and Sandholz (1993), preference formation should be seen as endogenous of institutionalized co-operation, i.e., partly resulting from the co-operation itself. In practice, this means that the preferences of the member states over asylum may evolve at least partially over time as a result of co-operating in the EU institutional context. This highlights that, for any actor seeking to use venue-shopping strategically, there is actually a risk attached to venue-shopping, as it may have unanticipated consequences, such as changes in the preferences of the actors involved or the appearance of new actors in the new venue with different preferences.

THE DEVELOPMENT OF THE EU ASYLUM POLICY

This section aims to analyse whether the switch to the EU asylum policy venue has indeed led to the adoption of more restrictive legal provisions on asylum, as one would expect on the basis of the venue-shopping framework. In line with the amendments to the framework previously proposed, this section focuses on the EU asylum policy venue by separating it from the borders and migration venues. However, a few definitions and clarifications are required before proceeding to the empirical analysis of the main policy developments in the EU asylum venue. 'More restrictive provisions on asylum' are defined in this article as 'provisions that decrease the rights and entitlements of asylum-seekers, the range of grounds on which asylum can be claimed, or the equity of asylum procedures'. In contrast, provisions that increase the rights of actual asylum-seekers are termed 'liberal' provisions (Hansen and King 2000; Lavenex 2001). In that respect, it is important to also underline that, as we are only concerned with the asylum policy venue in this article, we do not assess whether more or less potential asylum-seekers have been able to physically reach the EU and then apply for asylum. According to our analytical framework, this would amount to an assessment of the co-dependency effects of the EU borders policy venue on the EU asylum policy venue. This is an important topic, but it falls outside the scope of this article because of space restrictions.

As for 'policy venues', they are understood by Baumgartner and Jones (2009: 31) as the 'institutions or groups in society [that] have the authority to make decisions concerning [an] issue'. Adapted to the EU, where legal rules are of paramount importance, a policy venue is defined for the purpose of this article as the 'institutional and legal arrangements governing the pursuit of a given policy goal'. As mentioned before, the EU defines the goal of its

'common policy on asylum, subsidiary protection and temporary protection' as 'offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*' (Article 78 TFEU). Thus, the 'EU asylum policy venue' refers to the institutional and legal arrangements governing the pursuit of the aforementioned goal. The inclusion of 'legal arrangements' in the definition is necessary to highlight that, in the EU, it is not only the question of '*who* decides' that matters, but also *how* decisions are made (i.e., according to which legal arrangements regarding the decision-making process).

This section examines the main asylum instruments adopted by the EU in order to assess whether upward venue-shopping, that is, the development of co-operation amongst member states in the EU institutional setting, has led to the adoption of more restrictive asylum provisions as one would expect on the basis of Guiraudon's (2000) seminal article. All the legal instruments considered here were adopted after 1999, once the EU was allowed the use of more effective instruments than the 'soft law' measures and conventions of the Maastricht era, which, overall, had only a limited impact (Geddes 2008).

To date, the EU's main achievements in the area of asylum comprise the adoption of four key directives – the so-called 'Temporary Protection', 'Qualification', 'Procedures', and 'Reception Conditions' Directives – and the 'Dublin II Regulation', as well as the decision to establish a European Asylum Support Office in 2010. These four directives establish common minimum standards with regard to various aspects of national asylum systems, whilst the 'Dublin II Regulation' establishes the criteria and mechanisms for determining the member state responsible for examining a given asylum application lodged in one of the member states by a third-country national (see Kaunert and Léonard 2011). The Temporary Protection Directive lays down provisions on temporary protection for displaced persons in the context of a mass influx of persons seeking protection. The Reception Conditions Directive sets minimum standards for various aspects of the reception of asylum-seekers in the EU member states, including information, residence and freedom of movement, employment, education and vocational training, material reception conditions, and health care. The Qualification Directive lays down minimum standards for the qualification of third-country nationals or stateless persons as refugees or as subsidiary protection beneficiaries and elaborates upon the status associated with each of these categories. The Asylum Procedures Directive provides for several minimum procedural standards regarding issues such as access to the asylum procedure, the right to remain in the member state pending the examination of the application, guarantees and obligations for asylum-seekers, personal interviews, legal assistance and representation, detention, and appeals. Although some aspects of each of these instruments may be – and have been – criticized, it cannot be argued that, overall, they have enacted more restrictive asylum legal standards. On the contrary, EU co-operation on asylum matters has actually led, overall, to

an increase in legal protection standards across the EU. This is demonstrated in the remainder of this section.

First of all, it is important to emphasize that the four asylum directives only lay down *minimum* standards, which can be exceeded by individual member states. They do not oblige member states to decrease more generous standards in any way. However, they do curtail any potential 'race to the bottom' amongst member states to a significant extent by setting minimum standards from which they cannot derogate. Secondly, contrary to some predictions, there has not been any evidence that member states have generally used the adoption of the four directives as an opportunity to lower their asylum standards to the level of the minimum standards. Some observers had initially expressed the concern that member states having more generous provisions would naturally feel compelled to make them more restrictive in order to render themselves 'less attractive' to asylum-seekers (see, for example, Garlick 2006: 47). However, there is no conclusive evidence that this predicted degradation of the asylum standards has taken place in practice (El-Enany and Thielemann 2011; Hailbronner 2008). This prediction appears to have been based on the assumption that member states with more generous provisions were only waiting for a 'good excuse' to decrease their protection standards. However, different national asylum standards reflect 'different experiences, traditions and social and geographical conditions' (Hailbronner 2009: 2). It is therefore unlikely that those EU member states that have over time adopted relatively more generous asylum provisions for various reasons would necessarily be driven to drastically alter them by the EU's setting of common minimum standards. Far from using EU instruments as an excuse to decrease their asylum standards, EU member states have generally proved reluctant to alter their domestic asylum provisions, in line with the argument by Börzel (2003) that member states tend to favour the adoption of EU provisions that are most akin to those already in place at the national level.

Thirdly, not only have the EU asylum provisions *not* caused an overall drop in legal protection standards across the EU, but they have actually raised legal standards in several respects (Kaunert 2009, 2010; Levy 2010). In particular, the Qualification Directive has significantly increased protection standards in the EU (Ferguson Sidorenko 2007: 217). It has codified a 'subsidiary protection' status, which is an improvement on the often *ad hoc* and discretionary character of complementary protection measures that were in existence in several EU member states (McAdam 2005), in addition to extending the scope of 'actors of persecution or serious harm' to non-state actors. These important provisions have had a profound impact on the legislation and practices in several EU member states, including France and Germany, which have been required to introduce new grounds for protection in their national legislation (El-Enany and Thielemann 2011: 106–7). The Temporary Protection Directive has also been seen as facilitating the provision of international protection to persons requiring it in situations of 'mass influx' (Garlick 2006). It is true that the other EU asylum instruments have not been so favourably received

(Guild 2004, 2006a). The Asylum Procedures Directive has been particularly criticized (Costello 2005). However, it is important to note that its minimum procedural standards have actually required several EU member states to raise their protection standards (Ackers 2005: 32; Fullerton 2005;), whilst some of its most controversial provisions were annulled by the ECJ in 2008 (Kaunert and Léonard 2011: 87). This assessment is also shared by El-Enany (2008: 334) who argues that '[in] a number of ways, the European refugee is better treated than ever before; guaranteed broader and more equitable protection in each Member State'.

Fourthly, it is important to emphasize that these higher asylum standards do not 'only exist on paper', but have had a significant impact in reality. Although it is true that some member states, notably Greece, have had difficulties so far to meet the EU's new asylum minimum standards, those are increasingly being implemented in practice as a result of both assistance and pressure from the EU. Since 2000, the efforts of EU member states to develop and improve their asylum systems have been supported by a financial solidarity mechanism, the European Refugee Fund (ERF). This has steadily grown to reach €628 million in its third phase (2008–2013). In addition, it was decided in 2010 to establish the European Asylum Support Office (EASO), which aims to provide further expertise and technical assistance to EU member states in the field of asylum (Comte 2010). Pressure on non-compliant member states has also been exercised by the European Commission, which, since 2004, has launched infringement proceedings against several states for not fully implementing the various EU asylum directives and regulations (Peers 2007: 91). As a result, these member states have had to amend their national asylum policies in order to comply with the EU standards. Thus, the analysis of the main legal instruments adopted by the EU in the asylum venue has shown that, overall, the switch to the EU policy venue has not led to the adoption of more restrictive, but rather more generous, legal standards for asylum-seekers and refugees.

EXPLAINING THE EU ASYLUM POLICY THROUGH CHANGES TO THE EU 'SYSTEM OF POLICY VENUES'

As the previous analysis has shown that the switch to the EU policy venue has not led to an increase, as one would have expected on the basis of Guiraudon's (2000) analysis, but rather to a decrease in restrictiveness in asylum legal standards, it is important to explain this outcome. In line with the amended venue-shopping framework developed earlier, this article argues that a key-factor explaining this surprising outcome is the changes that have affected the 'system of policy venues' to which the EU asylum policy venue belongs. As previously argued, any policy venue may be altered as a result of changes that affect the broader system of venues in which it is located. New political actors with their own preferences may enter the venue and the preferences of the actors already present in the venue may evolve as a consequence, which would

significantly affect the policies subsequently adopted in the venue. It is therefore crucial to investigate the changes that have affected the EU system of venues since Guiraudon's seminal article of 2000.

Recent years have seen significant changes made to the EU system of policy venues through the entry into force of various treaties, namely the Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty. Whilst they affected the whole EU system of policy venues, these changes have had two important effects on the EU asylum policy: (1) the strengthening of the role of the EU institutions (European Commission, European Parliament and ECJ) *vis-à-vis* that of the member states in the EU asylum policy venue compared to the initial intergovernmental institutional setting established by the Maastricht Treaty ('communitarization' of asylum); and (2) a significant increase in the importance of judicial actors and texts ('judicialization') in the EU asylum policy venue. These two developments are inter-related and partially overlapping through the growing role of the ECJ. Indeed, the increasing communitarization of asylum has led to the reinforcement of the role of the ECJ, which, in turn, has contributed to the increasing judicialization of the EU asylum policy venue. Nevertheless, these two trends are analytically separated in the following analysis for more clarity.

Changes to the institutional framework: the increasing communitarization of asylum

There have been significant changes gradually affecting the EU institutional framework in recent years and some of those have had an important impact on the EU asylum policy (see notably Niemann 2008). The asylum policy venue examined by Guiraudon in 2000 had been strongly intergovernmental for the most part, as the few changes introduced by the Amsterdam Treaty only came into force in 1999. Indeed, the Maastricht Treaty had established two new 'intergovernmental pillars', one for the Common Foreign and Security Policy (CFSP) and the other for Justice and Home Affairs (JHA) matters, which included asylum issues. With regard to asylum matters (see Article K of the Maastricht Treaty), member states were largely dominant in the policy-making process. The European Commission was only 'fully associated with the work' in the area of asylum, whilst the role of the European Parliament was limited to being informed and consulted on the initiatives of the member states. As for the ECJ, it was not given any role with respect to EU asylum provisions.

This institutional architecture was significantly changed by the Amsterdam Treaty, which entered into force in 1999. Several of these institutional changes had an important impact on the EU asylum venue, leading to an increased 'communitarization' of asylum. The role of the European Commission was reinforced as it received the competence to draft proposals on various aspects of the EU asylum policy, as has been illustrated in the previous section. However, during a transitional period of five years, the European Commission was to share its right of initiative with the member states, before

acquiring the sole right of initiative (Article 73o of the Amsterdam Treaty). Although this institutional arrangement was aimed as a 'brake' on the powers of the Commission in the legislative process, in practice, the European Commission managed to push for its more inclusive asylum agenda. It was successful in significantly influencing the EU asylum provisions adopted during the transitional period by playing the normative role of 'supranational policy entrepreneur', as demonstrated by Kaunert (2009, 2010). This was notably shown by the way it managed to largely remain in control of the asylum policy agenda in the medium term in the face of the British government's (unsuccessful) attempt at setting the agenda with its proposal on the extra-territorial processing of asylum claims (Léonard 2007). During the transitional five-year period, the Council took decisions unanimously after consulting the European Parliament. The Amsterdam Treaty also contained a provision granting the Council the possibility of deciding, after the five-year transition period, that the co-decision procedure was to apply to various policy issues, including asylum.

The Amsterdam Treaty also gave the ECJ a more prominent role in the EU asylum policy venue. With regard to asylum matters, the ECJ was granted the competence to rule, when asked by a national court or tribunal, on two types of questions: those on the interpretation of the Treaty provisions on asylum and those on the validity or interpretation of acts of the institutions of the Community based on the Treaty provisions on asylum, but only in cases 'pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' (Article 73(p) of the Amsterdam Treaty). Although the limitations to the role of the ECJ have often been criticized (Peers 2005), this was nevertheless a significant change, since it led to several cases on asylum being brought before the Court, as will be further discussed in the next section on judicialization.

The Lisbon Treaty, which entered into force on 1 December 2009, has further strengthened the role of the ECJ and the European Parliament respectively. This has in turn reinforced the liberal character of the EU asylum venue, which renders the adoption of more restrictive asylum provisions less likely. The Lisbon Treaty has amended and reorganized existing treaties into two separate treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The EU legal competences in the Area of Freedom, Security and Justice (AFSJ), which comprises asylum matters, have been clarified, as Article 4 (2j) TFEU has categorized this policy area as one of shared competences. The Treaty of Lisbon has also significantly altered the institutional arrangements presiding over the development of the EU asylum policy. Indeed, it foresees that all asylum legal instruments should be adopted in accordance with the ordinary legislative procedure, which is laid down in Article 294 TFEU. This means that the European Parliament has now acquired joint decision-making powers on asylum, which represents a significant increase in power for this institution compared to previous institutional arrangements, whilst the Council takes decisions by qualified majority voting. In addition, judicial control has been expanded, as the

Court's role has been strengthened with respect to the AFSJ, including the EU asylum policy. In particular, the Court's preliminary jurisdiction, which used to be limited, has been expanded and generalized to all AFSJ matters by the Treaty of Lisbon, with respect to both primary and secondary law. This reform already resulted in the first preliminary ruling request from a lower court, in Luxembourg, to the Court in March 2010 (Garlick 2010: 60).

Thus, the role of the EU institutions has been greatly strengthened in the asylum policy area. This analysis of the development of the EU 'system of policy venues' has shown that it has led to an increasing communitarization of asylum, with growing roles for the European Commission, the European Parliament and the ECJ. More 'refugee-friendly' than Interior ministers, the growing presence of these institutions in the EU asylum policy venue has represented an increasingly important obstacle for those national policy-makers that are willing to develop more restrictive asylum provisions in the EU. This strongly contributes to explaining why the main asylum instruments that have been adopted by the EU have not entailed any lowering of existing asylum legal standards, but rather their improvement overall.

The increasing judicialization of the EU asylum policy venue

In addition to these institutional changes, another important factor explaining why the asylum legal standards adopted at the EU level have not turned out to be as restrictive as anticipated by Guiraudon (2000) is a series of changes that amount to the increasing 'judicialization' of the EU asylum policy venue. This can be broadly defined as the increasing influence of juridical texts and actors on asylum policy-making. Amongst those, one can highlight the gradual strengthening of the role of the ECJ with respect to asylum, which comes in addition to the indirect, but significant, influence of the European Court of Human Rights (ECtHR)[1] (Guild 2006b), as well as the inscription of the Geneva Convention and the EU Charter of Fundamental Rights in the EU treaties.

As previously explained, the ECJ has been given an increasing amount of competences towards asylum matters, which have led to several cases in recent years, already before the entry into force of the Lisbon Treaty.[2] In that respect, case C-465/07 (*Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*) – which followed a referral by the Dutch *Raad van State* and was related to the Qualification Directive of 2004 – is particularly important. By clarifying some of the ambiguous provisions contained in the Qualification Directive regarding the scope of its Article 15(c), it has demonstrated the important role that the ECJ has begun and will continue to play in offering less restrictive and more generous interpretations of EU legislation than those of some member states. Subsequent rulings, such as those in case C-31/09 (*Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*) and joined cases C-57/09 and C-101/09 (*Germany v. B* and *Germany v. D*), have confirmed this general trend. In addition to the other cases on which the ECJ is expected to

rule in the near future, the role of the ECJ in the EU asylum policy venue has been reinforced by the introduction in 2008 of a new high-speed preliminary ruling procedure for references in the AFSJ for cases where an urgent response is required because of issues of personal freedom (Millett 2008). It can notably be applied to provisions concerning asylum. As for the ECtHR, it has also increasingly contributed to the judicialization of the EU asylum policy venue, as it has ruled more than 45 times on cases concerning asylum since 2005. In his systematic analysis of the rulings on asylum of the ECtHR (until 2009), Bossuyt (2010) has demonstrated that the Court has become increasingly critical of the actions of governments and, concomitantly, more favourably disposed towards asylum-seekers, especially since 2005 (see also Garlick 2010). The influence of the ECtHR on the EU asylum policy venue has been indirect, as it is not an EU institution and the EU is not party to the European Convention on Human Rights (ECHR) either. However, all member states of the EU are party to the Court, whilst ECJ rulings also make references to the ECHR. The ECHR and the ECtHR have therefore indirectly contributed to the judicialization of the EU asylum policy venue. The rulings of both these Courts on asylum have been particularly important because they have also fed into the EU legislative process. In particular, the European Commission has drawn upon them to advance its more inclusive agenda in the field of asylum. This is demonstrated by the fact that all the proposals of the European Commission for recast instruments on asylum, which are currently under negotiation, include references to the importance of complying with the case law of the ECtHR, whilst the proposal for a recast Qualification Directive and those for a recast Reception Conditions Directive also refer to the jurisprudence of the ECJ. Finally, it is important to highlight that the ECHR and the ECtHR are set to exercise an even stronger influence on the EU asylum policy in the future, as the Lisbon Treaty lays down the obligation for the EU to accede to the ECHR (Article 6 TEU). The EU's accession to the ECHR, which has been negotiated since July 2010, will significantly contribute to strengthening further the judicialization of the EU asylum policy venue.

In addition to the reinforced role of the ECJ with regard to asylum matters and the indirect influence of the ECtHR, the judicialization of the EU asylum policy venue is also the result of the growing importance of legal texts that increasingly constrain policy-makers when adopting EU asylum provisions. The most important of them are the Geneva Convention and the Charter of Fundamental Rights. Article K.2 of the Maastricht Treaty already established that EU provisions on asylum were to comply with the Geneva Convention of 28 July 1951, as well as the European Convention on Human Rights. Subsequent EU treaties have emphasized that asylum measures should be adopted 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties'. This is an important development because it has strengthened the legal value of the provisions of the Geneva Convention by introducing them into the EU's legal order. A good illustration for this argument is found in the United

Kingdom, where calls for a British withdrawal from the Geneva Convention were notably made by the then Home Secretary David Blunkett in 2003 and the then leader of the opposition Michael Howard in 2005 (Kaunert 2009: 151). While this might have previously been legally possible under international law, the proponents of such a move had to rapidly acknowledge that this was no longer the case. The main reason was that, at the time, the United Kingdom had been 'opting-in' to all EU asylum directives (Fletcher 2009), which had been adopted in accordance with the Geneva Convention. It therefore appeared that, short of leaving the EU altogether, the United Kingdom would not be able to withdraw from the Geneva Convention. This case highlights how the development of EU co-operation on asylum has led to the direct introduction of the Geneva Convention within the EU legal order, which has strengthened the legal standing of the Geneva Convention in the EU. In turn, this has significantly constrained those policy-makers who are interested in adopting more restrictive asylum provisions, as Article 33 of the Geneva Convention lays down a *non-refoulement* obligation with regard to refugees and asylum-seekers. Moreover, this trend is set to be further reinforced in the future, as the recent Stockholm programme (2009) indicates that the EU's direct accession to the Geneva Convention and its 1967 Protocol is being considered (Council of the European Union 2009: 69).

Another important change to the EU political system that has affected the asylum policy venue – also by making it less restrictive – has been the incorporation of the Charter of Fundamental Rights into the EU's legal order following the entry into force of the Lisbon Treaty on 1 December 2009. Article 6(1) TEU provides a cross-reference to the Charter on Fundamental Rights that renders the latter directly legally binding for the European institutions, Union bodies, offices and agencies, as well as member states when they adopt and implement Union law, including in the field of asylum (except those that have exceptions to various degrees, such as the UK, Poland, and in principle, soon the Czech Republic and Ireland). Amongst these fundamental rights, the 'right to asylum' is enshrined in Article 18 of the Charter, 'which is wider even than the Universal Declaration of Human Rights' (Peers 2001: 161). According to Gil-Bazo (2008), this provision concerns all individuals falling under EU legislation, whose international protection grounds are established by international human rights law, including the Refugee Convention and the European Convention on Human Rights. Article 19 of the Charter also forbids collective expulsions and states that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. The fact that the Charter of Fundamental Rights has now become legally binding is an important development for the EU political system as a whole, as it 'create[s] or expand[s] rights protection in certain important fields' and recognizes 'a number of migration-related "rights" that have not in the past been recognized as human rights in international instruments, most notably the right to asylum' (Peers 2001: 166–7). This development has

therefore made the EU asylum policy venue more liberal. The impact of the Charter on the EU asylum policy venue can already be seen in the fact that all the proposals of the European Commission for recast instruments on asylum, which have been negotiated since 2008, include numerous references to the importance of complying with the Charter – not only its Articles 18 and 19, but also other articles that are highly relevant to asylum processes, such as the rights to liberty and to an effective remedy before a court or a tribunal. Thus, the European Commission is now able to use the text of the Charter as further ammunition to push for its more inclusive agenda, which aims to achieve higher legal standards in the field of asylum.

In sum, both the judicialization and the increasing communitarization of the EU asylum policy venue have rendered it increasingly liberal and less amenable to the adoption of the restrictive asylum provisions that one would have expected to observe on the basis of Guiraudon's (2000) analysis.

CONCLUSION

This article aimed to revisit the influential 'venue-shopping' argument originally made by Guiraudon in 2000. In her article, she had convincingly argued that national policy-makers had decided to move to the EU asylum policy venue in order to free themselves from the liberal constraints present in domestic political contexts and thereby enable themselves to develop more restrictive policies. On the basis of this argument, one would have therefore expected to see the subsequent adoption of more restrictive EU asylum measures. This article has examined the development of the EU asylum policy and has shown that, actually, the main EU asylum legal instruments have overall rendered asylum standards more liberal, rather than more restrictive, in the EU. Moreover, this liberal trend is arguably set to continue, as the European Commission, which has been steadily pushing for more integration and higher legal standards in the asylum area (Kaunert 2009, 2010), has tabled 'recast' versions of the various instruments concerning asylum. Those aim to further raise asylum standards in the EU and have increased legitimacy through the numerous references that they contain to the Charter of Fundamental Rights and the jurisprudences of the ECJ and the ECtHR. It is important to emphasize again that this conclusion is limited to the policy developments within the EU asylum policy venue, since potential co-dependency effects have not been investigated owing to space restrictions. Such co-dependency effects from the EU borders policy venue could have restrictive effects – but only with regard to potential asylum-seekers, not actual asylum-seekers, who have already applied for asylum.

Furthermore, this article has demonstrated that the development of the EU asylum policy, and in particular the fact that it has not led to a decrease in asylum legal standards, can be explained by considering the broader 'system of venues' in which the EU asylum policy venue is embedded. This system of venues has seen important changes following the adoption of various EU

treaties. Those have led to an increased communitarization of asylum matters and a growing judicialization of the EU asylum policy venue, which have rendered this policy venue less amenable to the fulfilment of restrictive asylum preferences. In effect, member states are now locked into a more liberal system of policy venues following the ratification of the various EU treaties, including the Lisbon Treaty most recently. This confirms that there are indeed, as suggested earlier, some dangers inherent to venue-shopping, which are notably the result of unanticipated consequences. When those in favour of more restrictive asylum policies began to co-operate on asylum at the EU level, they could not have anticipated all the treaty changes that would subsequently affect the EU – and which would be decided by other actors, such as Heads of State or Government and Foreign Affairs ministers – and the considerable impact that these changes would have on the policy venue to which they had just relocated.

Biographical notes: Christian Kaunert is Senior Lecturer in European Politics and International Relations at the University of Salford, Greater Manchester, and Marie Curie Research Fellow at the Robert Schuman Centre for Advanced Studies, European University Institute, Florence. Sarah Léonard is Lecturer in International Security at the University of Salford, Greater Manchester, and Marie Curie Research Fellow at the Centre for European Studies, Sciences Po, Paris.

Addresses for correspondence: Christian Kaunert, University of Salford, School of Humanities, Languages and Social Sciences, Crescent House, Salford, M5 4WT, United Kingdom. email: c.kaunert@salford.ac.uk/Sarah Léonard, University of Salford, School of Humanities, Languages and Social Sciences, Crescent House, Salford, M5 4WT, United Kingdom. email: s.leonard@salford.ac.uk

ACKNOWLEDGMENTS

The authors would like to thank all colleagues who kindly offered feedback on earlier versions of this article, as well as three anonymous referees. Research for this article was supported by Marie Curie Intra-European Fellowships within the 7th European Community Framework Programme.

NOTES

1 Located in Strasbourg, the Court rules on applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.
2 Case C-133/06 (*European Parliament v. Council*) concerned an action for annulment brought by the European Parliament against the Procedure Directive. Case C-19/08 (*Migrationsverket v. Petrosian*) followed a referral by a Swedish Court and concerned the implementation of two specific provisions of the 'Dublin II' Regulation.

REFERENCES

Ackers, D. (2005) 'The negotiations on the Asylum Procedures Directive', *European Journal of Migration and Law* 7: 1–33.

Baumgartner, F.R. and Jones, B.D. (2009) *Agendas and Instability in American Politics,* , 2nd edn, Chicago, IL: University of Chicago Press.

Börzel, T. (2003) *Environmental Leaders and Laggards in Europe: Why There is (not) a Southern Problem*, Aldershot: Ashgate.

Bossuyt, M. (2010) *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant*, Brussels: Bruylant.

Comte, F. (2010) 'A new agency is born in the European Union: The European Asylum Support Office', *European Journal of Migration and Law* 12: 373–405.

Costello, C. (2005) 'The Asylum Procedures Directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection?' *European Journal of Migration and Law* 7(2): 35–69.

Council of the European Union (2009) The Stockholm Programme – an open and secure Europe serving and protecting the citizens, 17024/09, 2 December 2009.

El-Enany, N. (2008) 'Who is the new European refugee?,' *European Law Review* 33(3): 313–35.

El-Enany, N. and Thielemann, E. (2011) 'The impact of EU asylum policy on national asylum regimes', in S. Wolff *et al.* (eds), *Freedom, Security and Justice after Lisbon and Stockholm*, The Hague: T.M.C. Asser Press.

Ferguson Sidorenko, O. (2007) *The Common European Asylum System*, The Hague: T.M.C. Asser Press.

Fletcher, M. (2009) 'Schengen, the European Court of Justice and flexibility under the Lisbon Treaty: balancing the United Kingdom's "ins" and "outs"', *European Constitutional Law Review* 5: 71–98.

Freeman, G. (1995) 'Modes of immigration politics in liberal democratic states', *International Migration Review* 29(4): 881–902.

Freeman, G. (2006) 'National models, policy types and the politics of immigration in liberal democracies', *West European Politics* 29(2): 227–47.

Fullerton, M. (2005) 'Inadmissible in Iberia: the fate of asylum seekers in Spain and Portugal', *International Journal of Refugee Law* 17(4): 659–87.

Garlick, M. (2006) 'Asylum legislation in the European Community and the 1951 Convention', in T. Balzacq and S. Carrera (eds), *Security Versus Freedom? A Challenge for Europe's Future*, Aldershot: Ashgate.

Garlick, M.V. (2010) 'The Common European Asylum System and the European Court of Justice: new jurisdiction and new challenges', in E. Guild, S. Carrera and A. Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme*, Brussels: Centre for European Policy Studies.

Geddes, A. (2008) *Immigration and European Integration: Towards Fortress Europe*, 2nd edn, Manchester: Manchester University Press.

Gibney, M.J. (2001) 'The state of asylum: democratization, judicialization and evolution of refugee policy in Europe', *New Issues in Refugee Research Working Paper, no. 50*.

Gil-Bazo, M.-T. (2008) 'The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union's law', *Refugee Survey Quarterly* 27(3): 33–52.

Guild, E. (2003) 'International terrorism and EU immigration, asylum and borders policy: the unexpected victims of 11 September 2001', *European Foreign Affairs Review* 8(3): 331–46.

Guild, E. (2004) 'Seeking asylum: stormy clouds between international commitments and EU legislative measures', *European Law Review* 29(2): 198–218.
Guild, E. (2006a) 'The bitter fruits of a common asylum policy', in T. Balzacq and S. Carrera (eds), *Security Versus Freedom? A Challenge for Europe's Future*, Aldershot: Ashgate.
Guild, E. (2006b) 'The Europeanisation of Europe's asylum policy', *International Journal of Refugee Law* 18(3–4): 630–51.
Guiraudon, V. (2000) 'European integration and migration policy: vertical policy-making as venue shopping', *Journal of Common Market Studies* 38(2): 251–71.
Guiraudon, V. (2003) 'The constitution of a European immigration policy domain: a political sociology approach', *Journal of European Public Policy* 10(2): 263–82.
Haas, E. (1958) *The Uniting of Europe*, London: Stevens.
Hailbronner, K. (2008) Minimum standards relating to the eligibility for refugee status or international protection and content of these status – assessment (summary) of the implementation of the 2004 Directive and proposals for a common European regime of asylum, *European Parliament briefing note, no. PE 393.293*.
Hailbronner, K. (2009) Towards a common European asylum system – assessments and proposals, *European Parliament Briefing Paper*.
Hansen, R. and King, D. (2000) 'Illiberalism and the new politics of asylum: liberalism's dark side', *The Political Quarterly* 71(4): 396–403.
Joppke, C. (1998) 'Why liberal states accept unwanted immigration', *World Politics* 50(2): 266–93.
Joppke, C. (2001) 'The legal-domestic sources of immigrant rights: the United States, Germany and the European Union', *Comparative Political Studies* 34(4): 339–66.
Joppke, C. and Marzal, E. (2004) 'Courts, the new constitutionalism and immigrant rights: the case of the French *Conseil Constitutionnel*', *European Journal of Political Research* 43: 823–44.
Katzenstein, P. (1996) *The Culture of National Security: Norms and Identity in World Politics*, New York: Columbia University Press.
Kaunert, C. (2009) 'Liberty versus security? EU asylum policy and the European Commission', *Journal of Contemporary European Research* 5(2): 148–70.
Kaunert, C. (2010) *European Internal Security: Towards Supranational Governance in the Area of Freedom, Security and Justice*, Manchester: Manchester University Press.
Kaunert, C. and Léonard, S. (2011) 'The EU asylum policy: towards a common area of protection and solidarity?', in S. Wolff *et al.* (eds) *Freedom, Security and Justice after Lisbon and Stockholm*, The Hague: T.M.C. Asser Press.
Lahav, G. and Guiraudon, V. (2006) 'Actors and venues in immigration control: closing the gap between policy demands and policy outcomes', *West European Politics* 29(2): 201–23.
Lavenex, S. (2001) 'Migration and the EU's new eastern border: between realism and liberalism', *Journal of European Public Policy* 8(1): 24–42.
Lavenex, S. (2006) 'Shifting up and out: the foreign policy of European immigration control', *West European Politics* 29(2): 329–50.
Léonard, S. (2007) 'The European Union and the "securitization" of asylum and migration: beyond the Copenhagen School's framework', Ph.D. dissertation, Department of International Politics, University of Wales, Aberystwyth.
Levy, C. (2005) 'The European Union after 9/11: the demise of a liberal democratic asylum regime?', *Government and Opposition* 40(1): 26–59.
Levy, C. (2010) 'Refugees, Europe, camps/state of exception', *Refugee Survey Quarterly* 29(1): 92–119.

Maurer, A. and Parkes, R. (2007) 'The prospect for policy-change in EU asylum policy: venue and image at the European level', *European Journal of Migration and Law* 9: 173–205.
McAdam, J. (2005) 'The European Union qualification directive: the creation of a subsidiary protection regime', *International Journal of Refugee Law* 17(3): 461–516.
Millett, T. (2008) 'A marked improvement: the EU's high-speed reference procedure', *New Law Journal* 158(7321): 694–95.
Moravcsik, A. (1998) *The Choice for Europe: Social Purpose & State Power from Messina to Maastricht*, Ithaca, NY: Cornell University Press.
Niemann, A. (2008) 'Dynamics and countervailing pressures of visa, asylum and immigration policy treaty revision: explaining change and stagnation from the Amsterdam IGC to the IGC of 2003–04', *Journal of Common Market Studies* 46(3): 559–91.
Peers, S. (2001) 'Immigration, asylum and the European Union Charter of Fundamental Rights', *European Journal of Migration and Law* 3: 141–69.
Peers, S. (2005) 'The future of the EU judicial system and EC immigration and asylum law', *European Journal of Migration and Law* 7(3): 263–74.
Peers, S. (2007) 'The jurisdiction of the Court of Justice over EC immigration and asylum law: time for a change?', in A. Baldaccini *et al.* (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart.
Peers, S. and Rogers, N. (eds) (2006) *EU Asylum and Migration Law: Text and Commentary*, Leiden: Martinus Nijhoff.
Sandholz, W. (1993) 'Choosing union: monetary politics and Maastricht', *International Organization* 47(1): 1–39.