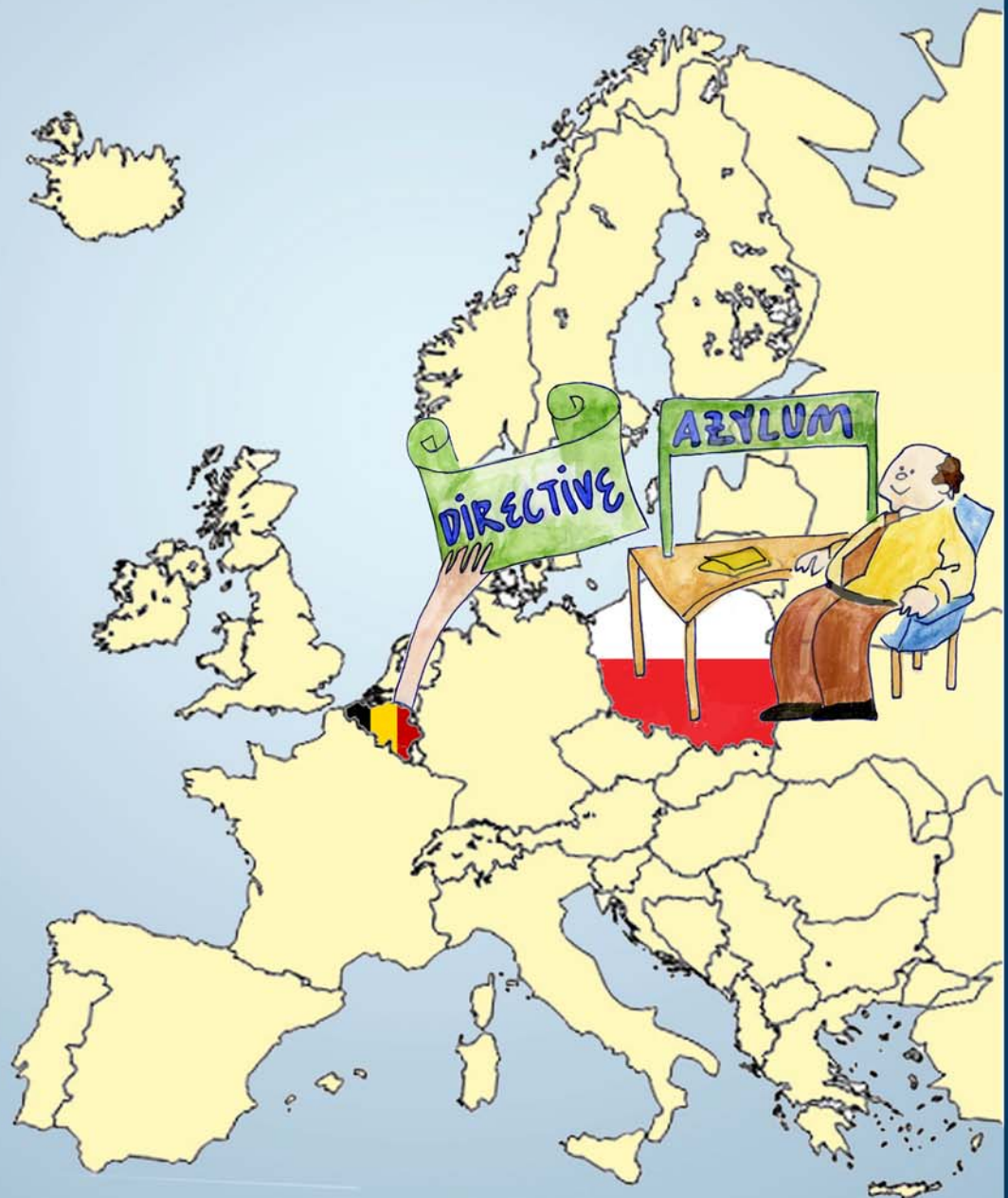


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# The Common European Asylum System in Poland; prospects for implementation and legitimacy



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# Abstract

My study; *The Common European Asylum System in Poland; prospects for implementation and legitimacy* is a case study of an EU member state, Poland, and its ability to implement lawfully and legitimately the second phase of the Common European Asylum System. The implementation prospects have been investigated through an empirical study on previous implementation performance, administrative capacity and a theoretical analysis employing Christoph Knill's theory on administrative reform capacity. The findings indicate that the prospects for implementation of the CEAS in Poland are favourable, since the political will to adjust to EU requirements clearly is strong.

Thereafter the legitimacy of the second phase of the Common European Asylum System in Poland has been investigated as a consequence analysis of the above results, together with a re-interpretation of Oliver Danjoux' concept of citizenship. I have found that the legitimacy of the reform is a dependent variable to the possibility of Poland to provide the refugees with the rights they are entitled to, and in order not to lower the living standard of the asylum seekers, I have argued that funding from the ERF should be granted. Beyond the above mentioned results, I also argue in my conclusions that these findings give rise for *conceptual expansion* on policy analysis on the area; the general evaluation of implementation through administrative reform capacity analysis *combined* with a legitimacy analysis.

*Keywords:* Poland, Common European Asylum System, implementation, administrative reform capacity, legitimacy

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# 1 Introduction

*A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. (Statement one, preface to Council Directive 2004/83/EC)*

Asylum policy is an issue that meet with great common interest in the European Union of today. One of the matters that are the most hotly debated and criticised is the creation and implementation of a common European asylum policy. The cooperation has the last 10 years grown gradually in importance, and since the Tampere and Hague European Council Summits in 1999 respective 2004 the goal is pronounced; a Common European Asylum System (CEAS) and a uniform EU status for those granted asylum is to be evolved and implemented until 2010. (Presidency Conclusions, Brussels European Council 2004, pp. 4 and 17f) There are two policy phases in the development towards the CEAS. Up until the Treaty of Amsterdam came into force in 1999, the national governments set their own policies on the area. Following the Amsterdam Treaty, policy shifted to a higher level for the first phase of the CEAS that between 1999 and 2004 implied a process of harmonisation where the adoption of EU minimum standards on the asylum process was the aim. Throughout the second phase of the CEAS, formally taken effect on the 1<sup>st</sup> of May 2004, legislation and policy on asylum is to be harmonised. (European Commission, 2004)

A functional asylum system is crucial for the future welfare of many people. All policy regimes, such as also for example trade policy regimes or agricultural policy regimes, have to function in a satisfactory way in order not to be counterproductive. This is the reason why I am interested in highlighting the prospects for correct implementation and legitimacy of EU policy reform on the asylum area.

## 1.1 Purpose, research question and limitations

### 1.1.1 Purpose

The implementation and possible future impacts of a reform such as the CEAS are naturally highly complex. My personal aim and hope is that the future asylum services in the EU will function in a lawful and legitimate way, respectful towards its clients. The fundamental ambition with this Bachelor Thesis is therefore to

contribute, by clarifying somewhat the prospects for legal security and legitimacy, to a lawful development on the EU asylum policy area.

The EU has recently been substantially enlarged, and this time the newcomers are newly established democracies that has up until just recently been under communist rule. The Common European Asylum System and all the obligations that come with it will be of course valid also for these countries. I want to focus on one of the newly entered EU member states, and have chosen Poland since it is the most influential country among the recently entered member states, and it also receives the most asylum applications (UNHCR 2005:10f).

The more state-centrist first phase of the CEAS has, as mentioned above, since the 1st of May 2004 shifted into the more union-centred second phase. Narrowing my perspective unto the specific Polish context I will attempt to evaluate the national prospects for the implementation of the second phase of the reform, considering the socioeconomic situation of Poland and the earlier implementation performances, both on the EU *acquis* and on the first phase of the CEAS.

With the results of that analysis as a starting point I will also discuss the legitimacy of the reform. The EU cooperation on the asylum policy area circumscribes already at present the freedom of choice of country of asylum for asylum seekers entering into the European Union, and an implemented CEAS will do it even more. Of course the thought of the European legislators and decision-makers is that the imposed limitations shall be just and legitimate, once the system functions as intended. As a complementary analysis I will therefore attempt to sort out if there are any main obstacles for the legitimacy of the reform in the Polish context.

The EU cooperation on the asylum area has received major criticism. Many people amongst NGO's, politicians and the public view the development towards the Common European Asylum System as cynical, that such a complicated reform will without a doubt imply a discrepancy between ambition and reality where human rights risk to be lost. However in this study I do not intend to evaluate the normative *to be or not to be* of the asylum regime. My only valuation is an establishment of the fact that we in Europe today find ourselves in a situation where the EU and the inner market are realities with growing importance, of which cooperation on the asylum area has become a necessary consequence. With the Common European Asylum System as a given future reality, my main focus is to analyse how to improve the present situation towards diligence of human rights and legal security.

### 1.1.2 Research questions

The objectives for this study are:

*What are the prospects of Poland to implement the second phase of the Common European Asylum System?*

*Considering these prospects, will the Common European Asylum System be legitimate in the Polish context?*

### 1.1.3 Limitations

When studying a vast subject such as this the limitations have to be important. Especially two important issues are excluded from this study; the special needs of unaccompanied minor asylum seekers and a gender-based analysis of the asylum- and reception systems. Hereby I do not reduce the importance of these two perspectives; on the contrary, I avoid bringing them in as I consider them too important to be discussed as lightly as would be the case in this limited study, where the focus is the reform capacity and legitimacy of the Polish asylum system.

## 1.2 Why analyse implementation and asylum policy?

There are two main reasons why I consider both asylum policy and implementation theory to be important study areas; a *human rights perspective* and a *popular trust perspective*. These are concepts evolved through personal reflection on my aims and my pre-understanding through practical experience of working with asylum seekers in the Swedish Migration Board.

### 1.2.1 Human rights perspective

The correct implementation of common EU asylum policy and practice will have a crucial impact on human lives, lives of people whose future life and safety might depend on a legally secure asylum procedure. As above mentioned the common asylum regulation includes already now, before the overall implementation of the common state practice in 2010, the limitation of choice of

country of asylum. The 1990 Dublin Convention<sup>1</sup> and the 2003 Council Regulation<sup>2</sup> stipulate the obligation of the asylum seeker to seek asylum in the first safe country she or he enters, and thereafter, put simply, no other country in the European Union will handle the matter. A decision in one member country after a completed asylum investigation therefore counts as valid in all EU member states.

Regarding these existing practices and others on the same area, a high degree of uniform implementation of the asylum state practice is required in order for these measures to be veritably legitimate. Thus it is of utmost importance from a human rights perspective to bring up and analyse the implementation prospects on the asylum area.

### 1.2.2 Popular trust perspective

“[E]ffective implementation is important because in the long run insufficient implementation will undermine the credibility and legitimacy of both the member states and the EU” (Bursens 2002:178). Asylum policy is at the heart of what I believe that politics mean to many people; the ability of a prosperous country to help and shelter human beings in need of protection. This is something that cannot be done at an individual level, nor at a local or municipal level – the state itself has to handle the refugee reception in such a way as that no person in need of protection is left without. The issue of asylum policy is of great interest to popular opinion, has been shown lately by the public debate on Swedish asylum policy, with far-reaching public and political demands for a general amnesty for asylum seekers residing illegally in Sweden. Therefore I mean that a failure in the implementation in the common European asylum directives could cause a serious public confidence deficit for the entire EU political sphere.

## 1.3 Key concepts

This thesis is concerned with the functioning of the asylum processes of the European Union. The concept *asylum process* could employ several meanings; visa policy, carrier sanctions, reception facilities, the process of determining refugee status or subsidiary protection, repatriation programmes as well as social

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<sup>1</sup> Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities. 97/C 254/01

<sup>2</sup> Improvements introduced into the "Dublin II" Council Regulation 343/2003 EC compared to the Dublin Convention of 1990, are shorter delays so as not to let asylum seekers in a state of uncertainty, and also new provisions making it easier to preserve the unity of family.

[http://europa.eu.int/comm/justice\\_home/news/intro/printer/news\\_191202\\_en.htm](http://europa.eu.int/comm/justice_home/news/intro/printer/news_191202_en.htm)  
(2005-11-02)



support and integration measures for those eventually granted a residence permit. However the focus for this study and the meaning of the term *asylum process* is foremost the practices of the process where the asylum claim is investigated and either granted or rejected.

The *reception facilities*, sheltering and supporting the asylum seekers with social and health services, are important factors for this study, as it measures the degree to which the country manages to have a supportive attitude towards the asylum seekers. In this study the concept of reception facilities available to asylum seekers is defined to involve housing, pocket money and medical care. The schooling issue is left out of the concept for this time due to the limited extent of the study. I have also considered it possible to exclude, as it is not immediately needed to fill the basic needs of the asylum seekers.

I would also like to clarify what I mean by the concept of a *functioning asylum system*. With respect to the present debate in the Swedish context where a functioning asylum system has been connoted in public claims with a general amnesty for asylum seekers living under ground after being denied protection in Sweden, it should be stressed that in this study a functioning asylum system refer to the situation where all applications for international protection are screened and investigated meticulously. Those in need of protection shall enjoy it, and those found not in need of protection shall be returned to their home countries on the behalf and expense of the state responsible for the asylum investigation.

*Implementation* is a broad concept. The focus here is on implementation at the EU arena, namely of directives regulating the asylum processes of the EU member states. (See further in the *Theory* chapter)

The *acquis* of the European Union is a term frequently referred to in this study. It is the full EU body of law constituting all membership obligations, where the comprehensive approach to asylum policy constitutes a part.

Lastly the concept of *administration patterns* that is frequently used in the analysis aims in my interpretation to which administrative organisational features, i.e. ways to work and to organise the activity of the authorities that exist in a state. The discussion that I bring forward later in the study will much concern how deeply rooted these administrative patterns are, and what it takes to change them.

## 2 Background – EU asylum policy

Refugee issues have reached a more important position in the European political life since the 1980's. This is due to two main reasons. The first is that the gradually increased internal free movement within the EU, with the free movement of persons as one of the cornerstones, has led to an augmented need to harmonise external border controls. The second is that the political importance of the asylum- and refugee matter has grown since the number of asylum seekers increased during the 1980's and the early 1990's. Even though the influx has diminished considerably in Europe since the late 1990's, the issue is still of great public and political interest in the EU today. (Ardittis *et al*, 2005:12f) In the following I will outline the background on EU asylum policy development. This is a vast subject however, and the overview will therefore omit issues not directly relevant for this study, such as the EU constitution, and the occurring proposals that many view as highly controversial for a joint processing of asylum applications outside EU territory. Also the Green Paper on Economic Migration with a plan of action and policy on this area is an issue that will be left out of this account.

### 2.1 Historical perspectives

In the 1980's, refugees came to Europe from conflict zones as the resistance movements against military regimes in Latin America, struggles against colonial rule in Africa and political and ethnic conflicts in the Middle East and in Asia. Refugee reception peaked in the 1990's with the wars in former Yugoslavia, and the increasing flow lead to measures undertaken in the European Union to restrict further unrestrained influx. Important parts of these restrictions were the change in interpretation of the 1951 Geneva Convention, where persecution from non state actors was excluded from the refugee status granting pursuits, the introduction of "Carrier Sanctions", where airlines were made responsible for ensuring that passengers transported held valid travel documents, and the declaration of Central European states as safe third countries, to which asylum seekers could be returned. (Castles and Miller 2003:102ff)

The measures undertaken during this period with most significance for this study were the initiating of the Schengen Agreement and the Dublin Convention. In 1985 the *Schengen Agreement* was signed by France, Germany, Belgium, Luxembourg and the Netherlands. The ambition was to further strengthen the development towards a genuine, borderless common market. This came into force

in 1995, and today the Schengen agreement comprises 15 countries<sup>3</sup>. The *Dublin Convention*<sup>4</sup> is stipulating which country is responsible for the handling of asylum seekers' applications. (Castles and Miller 2003:111)

The asylum applications lodged in Europe are at present unevenly distributed; 75 % of the applications are lodged in the UK, Germany, France, the Netherlands and Sweden. The ten new member states together account for less than 10% of the total number of lodged asylum applications in the EU. (Ardittis et al 2005:10)

## 2.2 The European Refugee Fund

An important feature in the establishment of the Common European Asylum System and the support of the asylum systems in the member states, is the European Refugee Fund. It was set up in September 2000 for the purpose of facilitating burden-sharing between the member states.<sup>5</sup> The first period of activity was 2000-2004, and as that first phase was drawing to a close the Council adopted on 2 December 2004 the decision<sup>6</sup> to extend the ERF for the period of 2005 to 2010. In the light of the recently adopted Community legislation in the field of asylum, and also of the four years of highly successful work on the reception, integration and voluntary return of refugees, the experiences gained are to be developed further as the European Union prepares for the second phase of Common European Asylum System and the harmonisation of asylum policy. (ECRE 2004)

Groups targeted by the ERF are third country nationals that are either recognised as refugees, enjoying another form of temporary or permanent protection in accordance with legislation or practice in an EU member state, or are asylum seekers in an EU member state. The aims of the ERF are to promote balance between the EU member states in the receiving asylum seekers and also to support the social and economic integration of refugees. With relation to conditions for reception, the ERF provides in particular services for accommodation, health care, social assistance or help with administrative and judicial formalities, including legal assistance. The central integration measures supported are to provide social assistance in areas such as housing, means of subsistence and health care or to enable beneficiaries to adjust to the society of the Member State. Concerning voluntary repatriation the ERF engages in information and advice about voluntary return programmes and the situation in the country of origin and help in resettlement<sup>7</sup>.

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3 Austria, Denmark, Finland, Greece, Iceland, Italy, Norway, Portugal, Spain and Sweden have entered after the formation of the Treaty.

4 Convention 97/C 254/01; Determining the State responsible for examining applications lodged in one of the Member States of the European Communities, and also the 2003 Council Regulation on the same issue.

5 Council decision of 28 September 2000: Establishing a European Refugee Fund. 2000/596/EC

6 2004/904/EC: Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010.

7 [http://europa.eu.int/comm/justice\\_home/funding/refugee/wai/funding\\_refugee\\_en.htm](http://europa.eu.int/comm/justice_home/funding/refugee/wai/funding_refugee_en.htm), 2005-11-07

## 2.3 Milestones on the road to the Common European Asylum System

The thought of a Common European Asylum System has developed since the *1997 Treaty of Amsterdam*<sup>8</sup> came into force on the 1<sup>st</sup> of May 1999, and the thought of a framework for common legislative action on the asylum area emerged for the first time. The nature of the EU project with the borderless inner market has made asylum matters a necessary collaboration area for the member states. This section aims at clarifying the contents of the development of the Treaty of Amsterdam that has basically been brought up at the Tampere and Hague European Council Summits.

### 2.3.1 The European Council meeting in Tampere in 1999

In the presidency conclusions from the Council Summit in Tampere, the European leaders determined that a free Europe requires a “genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own” (introduction, the Tampere milestones, article five). Bearing this basic idea in mind common policies on the asylum area appear as natural continuation, as cooperation in a genuine common area of justice will have to cover all legal areas. At the Tampere meeting the cooperation on asylum issues was pronounced as an important policy area. A political strategy was identified and a five-year program initiated on common EU policy on asylum and migration, where the Common European Asylum System was one of the four key elements.

The meeting “agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention” (Statement two, preface of the Council Directive 2004/83/EC). The CEAS is to be implemented in two phases: the aim the first phase was that common standards for a fair and efficient asylum process should be implemented in the member states. The contents of the first phase of the CEAS are stipulated in the following documents: the Directive on minimum standards for the qualification of refugees<sup>9</sup>, the Reception Conditions Directive<sup>10</sup>, the Directive on Minimum Standards on Procedures in Member States<sup>11</sup> and the "Dublin II" Council Regulation of 2003<sup>12</sup>. The second phase of the CEAS was to lead to a common asylum procedure. (Presidency conclusions, Tampere European Council, section A. Ardittis et al, 2005:13ff) May 2004 was established as the deadline for

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<sup>8</sup> The treaty of Amsterdam of the 2<sup>nd</sup> of October 1997

<sup>9</sup> Council directive 2004/83/EC: 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

<sup>10</sup> Council Directive 2003/9/EC: Laying down minimum standards for the reception of asylum seekers

<sup>11</sup> 29th of April 2004; Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (8771/04)

<sup>12</sup> Council Regulation 343/2003 EC

the first phase measures stipulated at the Tampere meeting, and in 2010 the implementation of the second phase is supposed to be completed.

Another feature that was initiated at the Tampere Summit was the Eurodac registration system where the fingerprints of asylum seekers over the age of 16 is registered in order to limit secondary movement of asylum applicants between EU member states<sup>13</sup>. This was criticised by NGOs and the UNHCR who meant that the Dublin regulation in combination with Eurodac could have the effect of overload on member states at the EU external borders with less well-equipped asylum systems. (Nash and Kok 2005:13)

### 2.3.2 The European Council meeting in Brussels in 2004

Five years after the Tampere Summit, the European Council met in Brussels on the 4-5 of November 2004 and established a new agenda, the multi-annual Hague Programme, for the policy area of Justice and Home affairs (JHA), in which asylum policy is an important policy area. At the establishment of the Hague Programme, the development of the Common European Asylum System was already in its second phase. As above mentioned, further harmonisation between the national legislations and practical cooperation comprises this second phase. (Presidency Conclusions of the Brussels European Council meeting, p. 17) Evaluation of the first phase legal instruments will also be undertaken as a part of the second phase<sup>14</sup>.

In the *Council and Commission action plan implementing the Hague Programme* (9778/2/05) the plans for how the Common European Asylum System is to be evolved are further outlined. There are two studies on joint processing of asylum applications to be written in 2006, one concerning within the union, the other on processing outside EU territory. Cooperation is to be promoted between the national asylum services of the EU member states during 2005, a common European support office for the asylum system is to be established, and the European Refugee Fund (ERF) will as mentioned above assist the member states when needed for example in the reception of asylum seekers and in the processing of asylum applications.

## 2.4 The status of third country nationals granted protection in the EU

There is at present limited freedom of movement for third country nationals granted protection status in an EU state. In the 2003 directive concerning the

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<sup>13</sup> Council Regulation 2725/2000 concerning the establishment of 'Eurodac'

<sup>14</sup> <http://www.justice.org.uk/images/pdfs/hague.pdf>, 2005-10-28

status of third country nationals who are long-term residents<sup>15</sup>, that entered into force on the 2<sup>nd</sup> of December 2004, it is stated that the directive does not apply to third country nationals who “are authorised to reside in a member state *on the basis of a subsidiary form of protection* in accordance with international obligations, national legislation or the practice of the Member State [...] *are refugees or have applied for recognition as refugees*” (Article 3, Scope, 2C and D. Emphasis added). Thus refugees and those enjoying other forms of protection were excluded from this directive. The reason is said to be that the member states required some “further thinking” on this area of transfer of protection status. (Lassen *et al*, 2004:8) Thus the facilitating of movement of third country nationals enjoying protection in a member state of the European Union has not yet been brought about. However there are ways for refugees that are recognised under the 1951 Geneva Convention to transfer their status under the European Agreement on Transfer of Responsibility for Refugees<sup>16</sup>, but they are often complicated and many refugees wait to receive citizenship before attempting to move within the European Union. (Nash and Kok, 2005:35)

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<sup>15</sup> Council Directive 2003/109/EC of 25 November 2003. *Concerning the status of third-country nationals who are long-term residents.*

<sup>16</sup> Strasbourg, 16.X.1980

## 3 Methodology

### 3.1 Operationalising the research questions

I would as a first methodological step like to state how I have operationalised the research questions. The first reads:

*What are the prospects of Poland to implement the second phase of the Common European Asylum System?*

The second phase of the CEAS, which is developing right now, is as mentioned the phase where the common asylum procedure and the uniform status for those granted asylum is to be evolved and implemented (European Commission 2004:1). The way that the research question about the Polish implementation prospects will be answered to, is through an analysis of the previous Polish implementation performances, the present administrative conditions and the socioeconomic situation.

The second research question reads:

*Considering these prospects, are there any further requirements for the Common European Asylum System to be legitimate in the Polish context?*

Taking into account the results of the analysis regarding the CEAS second phase, I will discuss from a broader and more normative perspective the requirements in the Polish context for the Common European Asylum System to be entirely legitimate when limiting the choice of country of asylum and, during at least five years after the granting of protection in an EU member state, also the choice of future country of residence for the individual asylum seeker.

### 3.2 Choice of case study country

In order to make a thorough and complete analysis of the conditions under which the implementation of the future Common European Asylum System is likely to succeed, I would have to conduct a vast number of studies across all the EU member states. Both time and space are though limited in this study and I have therefore concentrated on one case: Poland. I will thus aim at drawing conclusions that are valid solely in the Polish context.

I chose Poland as I wanted my case to be one of the recently entered EU member states as I also wanted to examine whether a less developed economy affect the administrative capacity and legal security of the asylum system. The Polish living standard is inferior to for example the Swedish and French (two important countries in the reception of asylum seekers in the EU), and the Polish GNP measures less than the half of both the French and the Swedish ([www.scb.se](http://www.scb.se), 2005-10-03). Another reason for choosing to study a recently entered EU member state is that the aim of my study is to study implementation prerequisites where the prospects are inferior, which is more likely in a newly democratised state.

The reason why I chose Poland among the recently entered member states is that it has an important political position in that group of countries, and also a receives the highest number of asylum seekers (UNHCR 2005:10f).

### 3.3 Specification; *Fulfilment* of Minimum Standards

Different actors on the arena of debate on the asylum system have expressed concerns regarding the EU Minimum Standards for granting of asylum; that the minimum levels indicated will become the norm and that an imminent race to the bottom is at hand. Yet the EU member states are not required to use the minimum standards as their own level of decision. Instead all EU member states are free and welcome to have more generous guidelines concerning the granting of refugee status or other subsidiary protection. (Statement 8, preface of the Minimum Standards Directive 2004/83/EC)

This gives rise for two main alternative ways in which differences in asylum state practice could occur between EU member states, and I would like to make a conceptual distinction between them.

The first alternative is the different ability of the EU member states in to *fulfil* the common standards issued by the EU, whereas the second alternative means eventual differences in generosity *above* the EU demands. I find the *fulfilment* of the minimum norms considerably more important to start with. Differing state practices, due to that some EU member states do not meet the EU minimum standards, could mean that asylum seekers according to the Dublin Regulation of 2003, be denied an asylum investigation in an EU member state that meets the minimum requirements, back to an EU country where the minimum requirements are not met. Therefore I will concentrate on analysing the prerequisites for the fulfilment of these minimum norms.

### 3.4 A prospect investigating case study

The methodology is a case study aiming at discussing the prospects for implementation and legitimacy of the CEAS second phase, against the empirical



background of the indications about the Polish reform capacity given by the present practice status and the implementation results of the CEAS' first phase. We are thus talking about a single-case study. Landman (2004:166f) states that a single-country study shall have well-defined empirical, analytical and methodological components in order to make statements about the development in question. In this study the empirical focus is the administrative capacity of the Polish asylum systems. The analytical component is Christoph Knill's implementation theory and a re-interpretation of Danjoux definition of citizenship, and the methodology is what I want to name a prospect investigating case study.

Landman writes further that "a single-country study is considered comparative if it uses concepts applicable to other countries, develops concepts applicable to other countries, and/or seeks to make larger inferences [...] [b]ut single case studies that provide with new classification are useful for comparison" (2004:34). In this respect, the results from this analysis of the Polish implementation capacity and legitimacy of the CEAS could be taken into consideration when studying others of the recently joined EU member states, which along with Poland are relatively newly democratised. However the main aim of the study is to scrutinise on a low abstraction level the specific Polish conditions, and therefore I will not put much energy in developing concepts applicable to the neighbouring countries.

Knill states the following; "[T]he reliability of studies focusing on a small number of cases can be improved by increasing the number of cases [...] with respect to the 'input side', i.e., the number of European Measures under investigation" (2001:54). He chooses five cases of European environmental legislation to broaden his study. This is a good methodological remark, and in a study like mine other legislations in the area of migration could be incorporated, labour migration, carrier sanctions etc. This could broaden the analysis of the implementation capacity and legitimacy of the Polish asylum system, however this study is too narrow to include such an extension and I will conduct the analysis of the common asylum legislation conscious of this limitation in variables studied.

### 3.5 Empirical material and evaluation of the sources

The empirical material consulted in this study is a large quantity of secondary material on the Polish asylum administration, both in a historical perspective and today, and of previous implementation records on the asylum policy area. Some of the material that is used in this study is issued by NGO's and their expert staff. I am aware of the risk for bias incorporated in this choice of material, however the reports that I use is written by professionals and experts on the area, often bearers of advanced academic degrees. The NGO material covers thoroughly the area that I will study and provides me with newly produced material that is hard to find elsewhere, and I consider that they have the competence needed to make important contributions, both politically and academically relevant on the area. Another important reason to use NGO material in a study evaluating the

implementation prospects of an EU reform, is that it is analytically interesting to use material that is not issue of the EU itself.

Other important contributions to the empirical material of this study have come from think tanks such as the Migration Policy Group in London, and from publications of the UNHCR in Warsaw.

The material I have used on Poland and the Polish asylum system is solely the material found available in English. This might imply limitations to the scope of the material used, but was a necessity due to the limited extent of the study and the fact that the use of documents in Polish would require translation.

### 3.6 Reflecting on the administrative approach

I look upon the concept of legal security in asylum investigations as made up of two major components. One is the administrative part where rules and regulations have to be respected correctly (i.e. the focus in this essay). The second part consists of the culture in the national asylum services, of how the demands are treated by the asylum investigators. A claim often stated is that there is a “culture of disbelief” among the officials conducting asylum interviews and determining refugee status (for further reading, see for example the dissertation of Eva Norström, 2004). This is of course an important issue to address when striving for a lawful asylum process. However as this essay has the character of an administrative analysis with the implementation of EU directives in focus, I will not explore this issue further.

## 4 Theoretical framework

### 4.1 Focus of the implementation analysis

As an initial theoretical remark I would like to underline the difference between the two concepts of *implementation* and *transposition* in the EU context. Implementation is the overarching term for the whole process. “An extensive definition considers implementation to be the whole of the actions exercised by the various relevant authorities of the member state in order to effect European legislation within that member state.” (Bursens, 2002:175). Transposition on the other hand aims at the process where the EU directives are transposed into the member states’ legislation, i.e. either the creation of new laws or the adaptation of the existing. Transposition will only occur in the cases of directives, as the regulations are directly valid in the member states.

Bursens specifies four consecutive stages in the implementation of European regulation. The first of the four stages is the *formal transposition*, which occurs only in the case of directives and not regulations (as they are directly applicable in the respective national legislations). The second stage is the *practical application/final application* where “[o]rganisations, individuals or authorities to whom the legislation is addressed have to demonstrate behaviour that conforms to the legislation” (ibid). The third, *enforcement*, stage comprises the control of eventual infringements of the stipulated EU legislation, and last of the four is the *outcome/results* stage where the results of the European legislation in the member states are evaluated. (Bursens 2002:175)

My purpose focuses on the practical application and outcome parts of the implementation process and thus this study will concern neither the enforcement stage nor the formal transposition stage. The possibilities of the *practical application* of the second phase of the CEAS and the *outcome* of former practical application conducted on similar and related directives, are what I will conduct this study upon.

### 4.2 Christoph Knill; implementation and administrative reform capacity

The research of the German Professor Christoph Knill is centred on the different impact that the EU directives have in different countries. The focus is mainly on administrative convergence and adaptation. Knill’s theories on challenges of

various kinds to the implementation of EU directives in what I am mostly interested in using in this study. The main issue in Knill's analysis of implementation patterns is "how national administrative systems respond to similar challenges" (2001:51).

Knill distinguishes between *core reforms* and *within core reforms*. The *core* comprises the legal system, state tradition and shaping of the constitution, i.e. looking closely at the state, and Knill's point is that the core is not easily reformed. The concept of *within core reforms* aims at the sector specific reforms of administrative conditions that are not as deeply rooted as the legal- and state traditions, and therefore are more easily carried out.

Effective implementation in Knill's view depends on the degree of fit between national arrangements and what the European policies in question require in terms of organisation. The concept of "fit" aims both both at core reforms and within core reforms.

Another key concept in Knill's analytical framework is that of *adaptation pressure*, that will differ as the national administrative conditions differ between the EU member states, although all the countries face the same newly initiated EU regulations or directives. "Depending on the level of adaptation pressure, we are able to develop expectations about the extent to which domestic adaptations will be resisted. [...] [T]o account fully for the degree of European adaptation pressure we have to proceed in three steps." (2001:42.)

The first step of the three that constitute adaptation pressure, is the *sectoral dimension*, where the 'sectoral fit', i.e. the compatibility between EU requirements and the domestic administrative styles are in focus.

The second step is the *institutional dimension*, where the extent to which the administrative arrangements to be changed are ideologically rooted to the core, is examined. In this step Knill utilises the concept of *institutional embeddedness*, which defines the degree of connection between the institutional arrangements and the core features of the state.

The third step is the *dynamic dimension* where the reform capacity is investigated. The macro-institutional arrangements that will affect the potential for substantial changes in the national administrative traditions are analysed in this step; the number of institutional veto points disposed by administrative actors, the capacity for executive administrative leadership and the influence of the bureaucracy on the policy-making process.

There are three degrees of adaptation pressure; high (when the institutional features, the core and within the core of the member states, completely oppose to the requirements of the policy to be implemented), moderate (when there are no particular misfit between the core and the EU policy-the implementation is passed if there are agents in the administrative or political context that have interest in adopting the reform) and lastly the adaptation pressure is low if the core and/or within core features of the member state coincide with the requirements of the EU policy and the reform is passed lightly. (Knill 2001:47ff)

## 4.3 Theoretical considerations on legitimacy

The definition of legitimacy that I apply in this discussion is that of *Political Science Reference Book* (1997) (issue in Swedish; Statsvetenskapligt Lexikon): “[L]egitimacy is achieved through adjustment of the goals [...] of the person/organisation to established values in society” (p. 145, my translation). I consider democracy, rule of law and respect for human rights to be firmly established values of society, and these values are central in my definition of legitimacy.

### 4.3.1 Interpreting the concept of citizenship

Danjoux (2002) defines that citizenship “determines to a large extent what you have the right to do. It links you to a state, and grants you a set of rights and duties by virtue of that linking” (p. 18). I would like to re-interpret this basic but appropriate definition to make it suit the actual situation of the asylum seeker in the EU. I will apply the method that is used in law study; law interpretation by analogy. Simply put; a law prohibiting dogs could be interpreted by analogy and be applicable also to cats. However in my case I will not interpret a law, I will reconsider a concept. Therefore I call this method *conceptual interpretation by analogy*.

Danjoux points out the essential in the concept of citizenship; you have duties towards your state, and therefore you also enjoy rights. The relation between you and the state in which you are a citizen is regulated by national, and in some cases also inter- and supranational, legislation. Let us now consider the situation of asylum seekers. The Geneva Convention of 1951<sup>17</sup> is the main international agreement ensuring every person the inviolable right to seek asylum. When the asylum seeker enters the territory of the European Union, the EU imposes duties on the asylum seeker; she must adjust to the Dublin regulation of 2003 (343/2003 EC) and seek asylum in the first country she enters. A relation between the EU as a state and the asylum seeker as a citizen is thus established and the Geneva Convention is the legislation regulating this relation: the asylum seeker has the *right* to seek asylum, and the EU imposes on the asylum seeker the *duty* to seek asylum in the first EU member state in which she enters. The EU ensures the legitimacy of this limitation by virtue of the fact that the asylum determination processes in all of the EU member states are supposed to be equivalent.

If we assume that this is correct and that all asylum applications are treated uniformly all over the European Union – so far the EU has done a legitimate limitation of the choice of asylum. But then, at the moment of protection granted, another question is raised. Reconnecting to the above definition of citizenship, the EU has determined what the asylum seeker *had the right to do*; in which country

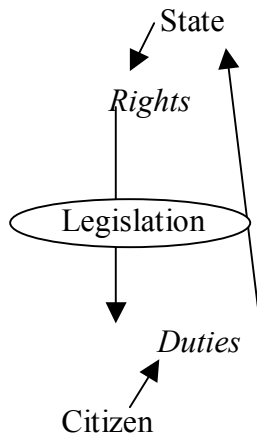
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<sup>17</sup> Convention relating to the Status of Refugees, adopted on 28 July 1951. In UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, 2001.

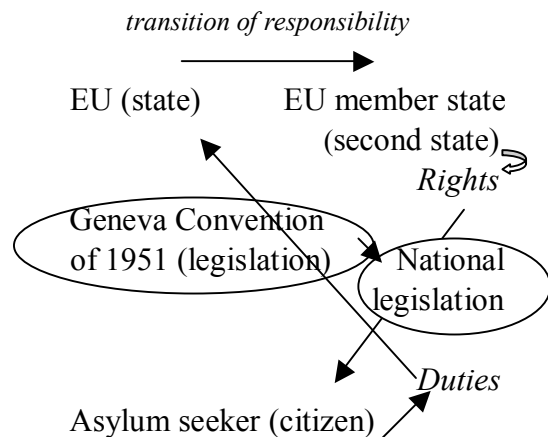
the asylum seeker had the right to lodge the asylum claim. But if we look at the concept again, there are not only limitations involved in the concept of citizenship, but also *rights* for the individual. This is not actualised as a problem if the asylum claim is rejected; the legitimacy relation between the asylum seeker and the EU was then of temporary nature.

However if protection is granted in one of the member states, then it is proved that the individual cannot return to her country of origin, and therefore the EU in question is the only state that she can receive rights from and have duties towards. So far the EU has solely imposed *duties* on the asylum seeker, and the time comes for the EU to provide the asylum seeker, now recognised as a refugee legitimately residing on EU territory, with *rights*, then the responsibility is entirely handed over to the Member State where protection was granted. This particular action when the EU hands over the responsibility of legitimacy to the member state, is the *transition of responsibility*. The legitimacy of this transition of responsibility for providing the rights of the individual asylum seeker will in be determined by the ability of the new responsible state to fulfil the rights that the refugee has.

**The original concept of citizenship illustrated:**



**The concept of citizenship re-interpreted:**



## 5 Poland

Poland is a country that has undergone substantial changes over the last 25 years. Up until 1989 the country was a communist dictatorship where freedom of movement and organisation was a distant dream, a country that has supplied with labour migrants for many countries in Western Europe and North America, and also produced a vast number of political refugees, not least in the 1980's. (Castles and Miller 2003:118) The distance that has been bridged in the transition into the Poland of today is important. At present Poland is an EU member with faith in the future and rapidly growing big city areas, and that has also turned into an immigration country. This chapter has three parts; at first the societal and economic situation of Poland is briefly rendered. Thereafter the present status of the asylum systems, i.e. the results of the implementation of the first phase of the CEAS, is outlined and lastly a picture is provided of the previous Polish implementation performance, mostly on the asylum area, but also in general terms.

### 5.1 Socio-economic situation

The Polish economic situation can be described as *growing unevenly*. In the 1980's when Poland was under Communist rule, the planned economy system was regressing and extensive loans was being taken from the west. The transition to democracy and market economy after the first democratic elections in 1989 caused uneven growth and economic cleavages. The GNP of today is low, less than half of for example the Swedish and French<sup>18</sup>. Rural areas are generally poorer whereas the big city areas such as Krakow and Warsaw have a rapidly growing economic structure and somewhat higher living standards. The general unemployment rates are 19 % and the labour market contains a large informal economy. All in all, the economic situation is rather harsh. (CIA World Factbook 2005)

Poland can since the Second World War rightfully be labelled a homogenous nation. After the Second World War the Polish society had changed face, and what used to be a multicultural society had turned homogenous. Jews and Roma were murdered during the war in incomprehensible numbers in the Holocaust, and after the war there were the Stalin forced population movements during which ethnic groups such as Germans or Russians were forcibly to their countries of origin. To this day the homogenous composition of the population remains with

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<sup>18</sup> [http://www.scb.se/templates/tableOrChart\\_75449.asp](http://www.scb.se/templates/tableOrChart_75449.asp), 2005-10-03.

over 90 % ethnically Polish. (Ferry 2003:1106) Other ethnic groups in Poland are Germans, Ukrainians, Belarusian, Armenians, Vietnamese and Chechens. “[T]he presence of foreigners in Poland is still a relatively new social phenomenon, and constituting just a small fraction of the population, foreigners are not perceived as a burning social issue.” (Niessen et al, 2005:10) As a consequence of that it targets a rather limited group of people the Polish integration debate is limited. Neither the immigration debate has been too intensively debated – social and economic policy has not been connected in public mind to the asylum issue, and the focus of the debate for the government is elsewhere, for example in the reduction of unemployment. (Iglicka, 2005)

## 5.2 Asylum process and reception conditions

The following record has been put together bearing the requirements of the documents that constitute the main framework of the CEAS’ first phase in mind; the Directive on minimum standards for the qualification of refugees<sup>19</sup>, the Reception Conditions Directive<sup>20</sup>, the Directive on Minimum Standards on Procedures in Member States<sup>21</sup> and the "Dublin II" Council Regulation of 2003<sup>22</sup>. However the space is too limited in this study to further specify the method I have used when reading the Directives and deciding which features to bring up in this account.

The first instance in the Polish asylum process is the Central Office for Repatriation and Aliens, where the Refugee and Asylum Procedures Department handles the asylum claims, both in the regular and accelerated procedure. In 2002, the average time for initial decisions was about eight months. (World Refugee Survey, 2003:211) The appeal stage instance is the Refugee Board that was established under the Aliens Act of 1997, and appeal claims in Poland have a suspensive effect. (World Refugee Survey, 2003:211) The Board is an appeal body independent of administrative and political factors, and consists of 12 members with particular knowledge and experience in refugee problems. They are appointed for a five-year term by the Prime Minister. (Chlebny and Trojan, 2000:224) Independence and internal pluralism of this institution allows for confrontation of various points of view. Since the establishment the UNHCR has also assisted the board in its development. (Bernatowicz, 2004) A subsequent cassation claim can be made at the High Administrative Court. (UNHCR 2004:1)

Concerning staff training, the UNHCR in Poland is involved a vast part of the occurring training activities. One of them is the training of judges with the aim of

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19 Council directive 2004/83/EC: 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

20 Council Directive 2003/9/EC: Laying down minimum standards for the reception of asylum seekers

21 29th of April 2004; Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (8771/04)

22 Council Regulation 343/2003 EC



improving the quality of the Polish Refugee Status Determination Procedure. (UNHCR 2004:2) For a few years UNHCR in Poland has also been cooperating with the Police Training Centre, which has resulted in the introduction of refugee-related aspect in the police training program. The UNHCR also cooperates with the Border Guard on training programs. (UNHCR, 2002) It could be stated as remarkable that a part of the training of asylum personnel in an EU member state is conducted by NGO's, however considering the short history of Polish democratic administration it can be viewed, at least at this point in time, as a temporary transition solution.

Asylum seekers have the right to be housed in government-run refugee housing centres, where financial assistance and medical care is also provided for. At present the government is working to improve the conditions in these centres. In general, the standards of assistance provided by Poland are said to be reasonable, but overcrowding are becoming issues as the number of asylum seekers is increasing. The UNHCR in Poland has been critical to inadequate staffing and health care. (UNHCR 2004:3) UNCHR in Warsaw has reported that sometimes the only social worker at the centre also plays the role of the administrative manager, which reduces the time spent at the centre among the asylum seekers. Also the level of qualification of the staff has been considered inferior. (Kosowicz, 2004) Polish law gives asylum seekers access to basic health care in theory, but not always in practice. For the asylum seekers that arrive in Poland seriously sick the "basic health care" is simply not sufficient. (Kosowicz, 2005)

Border applicants were up until 2001 required to remain at the border for up to seven days while the border police undertook identification procedures. (Human Rights First, 2002:1) However the only procedures undertaken by Polish border guards are to check whether the applicant has committed criminal acts related to the Article 1F in the Geneva Convention (UNHCR 2001:68), i.e. war crimes or crimes against humanity. The Polish border guards do not involve in decisions as to whether an application is well-founded or not, and interpreters are available at this border procedure, and a medical examination is carried out. (Kurz 2004)

At the border the reception conditions seem to be improved over time. New border terminals are built is now under construction where there will be three times as much space and the ensuring of adequate conditions for asylum seekers will be facilitated. (Klaus, 2005)

Major deficits mentioned in the Polish detention centres concern insufficient information for aliens with regard to their rights, in particular, the court process rights. Most detention centres are considered to lack sufficient budgetary means and adequately prepared personnel with regard to knowledge of foreign languages, and sometimes the hygiene standard is inferior. However the detainees in general has satisfactorily possibility to contact NGOs and diplomatic posts. (Zdybska, 2004)

Asylum seekers are not entitled to free legal assistance during the determination procedure. Free legal representation is instead provided by NGO's such as the Helsinki Foundation Poland, by legal clinics in Warsaw and Krakow and by a few individual lawyers on a private basis. (ECRE 2001:231) This is

probably the most blatant deficit, since it is an absolute requirement in the Minimum Procedures Directive that free legal assistance be provided with in the event of a negative decision (article 13:2).

### 5.3 Previous implementation performance

The Polish asylum process and policy shaping on the area has a shorter history than the many of the Western EU member states. The country has been a sending, not a receiving country up until just recently. As the contemporary history of democracy and freedom in the country is rather short there is no long-term Polish experience of stable democratic conditions. During the Soviet Union and communist rule, NGOs not authorised by the state were not able to work openly. Freedom of organisation was not allowed until after 1989 when the first public democratic elections had been held. Thus the Polish position as a country that defends the human rights of asylum seekers is much a new phenomenon. (Iglicka 2005)

When the negotiations for an EU accession started in 1998, the shift from an emigration to an immigration country was already a fact in Poland. After 1993 Poland started to receive large numbers of immigrants, many of these were Ukrainians. During the 1990's border crossings in Poland increased largely. There was both migration with Poland as the aim, but also the transit migration heading for Western Europe. At this time there were three major streams of migration through Central and Eastern Europe; the first comprised citizens from the former Warsaw Pact that could enter Poland without a Visa and thereafter migrate illegally into the EU. The second stream were refugees from the war in former Yugoslavia, and the third refugees from more distant countries that now, the USSR being gone, easier could pass through Poland and its neighbouring countries when trying to reach Western Europe. (Castles & Miller, 2003:86ff)

Regulation of migration was one of the most important issues in which the EU imposed reforms by the candidate countries before an accession could come into question. This development in migratory patterns being a fact, the EU put substantial pressure on the Polish public administration – vast changes had to be made in order to strengthen the external borders. (Castles & Miller, 2003a:88f)

Thus the EU accession was an important driving force when Poland accepted in full the *acquis* of Justice and Home affairs, where asylum policy is included. At the time of the accession negotiations the Polish legislation and institutional capacity on the area was still in progress. In the first half of the 1990's focus had been put on strengthening border controls and establish a rudimentary legal asylum framework as this had previously been a non-issue in Polish political life. Adaptation to the Schengen procedures had also been a priority in order to render cooperation with the Schengen countries possible. (Iglicka, 2005)

“The EU made it clear that any international agreements, which were incompatible with the membership obligations, should be terminated. The latter

was particularly relevant for Poland in the case of visa-free travel arrangements with its eastern neighbours” (Iglicka *et al*, 2005:3)

As long as ever possible Poland left the Schengen visa requirement for the Belarusian, Russians and Ukrainians out of the policy adaptation picture. Such requirements would change the conditions and lower growth and welfare in the poor eastern border communities where shuttle traders since long had been an important feature. Worried voices were also raised that these seemingly innocent technical measures when implemented could have a deteriorating effect on the Polish possibility to support the process of democratisation in the Eastern neighbouring countries. Today as a consequence of the Polish EU accession transit Visas have been reintroduced for citizens of Belarus, Russia and Ukraine. However citizens of Ukraine do not have to pay a visa fee, since a bilateral agreement has been reached on the issue<sup>23</sup>.

To implement the legislative changes that was required by the *acquis*, a single responsible institution was established; the Office for Repatriation and Foreigners. The creation of a broader concept of state migration policy became more important. The looming EU accession made the government proposals easily defensible as the ambition was strong to harmonise the Polish legislation to the *acquis communautaire*. Therefore all amendments being made on the Polish Act on Aliens since the late 1990’s until the accession were made in order to harmonise the Aliens Act with the EU *acquis*. No particular questioning or debates occurred concerning the amendments on the Polish Aliens Act, and these were not met with any counteroffers considering the delay for the EU accession that this might cause. Two other factors were important as well; the absence of tradition and experience on the field of migration policy and the lack of experience and tradition of a public discourse on the area. The refugee issue is in much still considered a question for the future. (Iglicka *et al*, 2005:4ff)

### 5.3.1 The Polish state – still a strong actor

Martin Ferry states, when investigating the impact of Polish regional reforms at the time of the EU accession negotiations, that the central state still is a strong actor in Polish political life, since regional and local government along with civil society were not pivotal during communist rule: “Central administrative control was an entrenched feature of Poland’s regional policy framework before, during and after the communist period. [...] Regional administrative units were agents of central power, not servants of their community.” (Ferry 2003:1100) Ferry describes the EU influence of regional reforms as significant in 1998-99, since applications for regional aid had been rejected which increased the Commission’s influence over the further reform preparation. “It was only in the latest round of reforms, when EU recommendations became more influential, that the concept started to be put into practice.” (Ferry 2003:1104) From this point of view it is clear that when EU demands something, the Polish politicians act. The emphasis

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<sup>23</sup> <http://www.poland.gov.pl/?document=1617>, 2005-11-04

on developing the type of institutional structure of the regional organisation requested by Commission “can also be related to the Polish government’s commitment to preparing for EU membership.” (Ferry 2003:1105) It also seems that the EU funding of the regional development has strengthened the Polish central state, as all outflows from the EU are channelled through the state budget and also the negotiations concerning EU funding are carried out between the European Commission and the Polish central government. (Ferry 2003:1110) The coordination of EU funding also require the strengthening of the administrative capacity of the central government. (Ferry 2003:1111) Even though Ferry’s study particularly concern reforms of the regionalisation in Poland, his line of argument on the importance of the central state is of universal validity. Thus we can summarise that the Polish central state is still a strong actor, even though important regional reforms have been initiated since the fall of communist rule.

## 6 Analysis

### 6.1 The Polish prospects for implementing the CEAS' second phase

In this analysis chapter the empirical observations on previous implementation performances and the socioeconomic situation of Poland are connected with Christoph Knill's theory on administrative change and implementation to see which of his concepts are applicable and what the theory implies in this particular situation.

#### 6.1.1 Core confirming reforms

There has been no Polish constraint to implement the asylum policy as such. The rights of asylum seekers to a fair asylum process and decent reception facilities coincide greatly with the general human rights that all EU member states, including Poland, have agreed to. Hence the basic constitutional requirements, the core features for this are already there. Thus there are no substantial core challenges when implementing the common asylum directives. Instead, the concept of *within core reforms* will be central.

#### 6.1.2 Within-core reforms and the importance of agency

I consider the adaptation pressure in the case of the implementation of the Common European Asylum System in the Polish asylum systems to be moderate, as the "EU requirements remain within the core of the national administrative traditions" (Knill 2001:47). The adaptation pressure is not low – the situation where "the EU requirements are in line with existing administrative styles and structures at the sectoral level" (Knill 2001:47) could probably not occur in Poland, since the existing administrative styles and structures are not, due to historical reasons, so firmly established. For the same reason it can be stated that the adaptation pressure is not high either, since the administrative structures are not established enough for the situation where the "EU requirements exceed the core of the national administrative traditions" (Knill 2001:47) to occur.

Thus, I argue that the adaptation pressure is moderate in the case of the Polish asylum system. The actual process can therefore be considered to be what Knill labels *change within a changing core* (Knill 2001:48). Knill states further:

“Hence, in constellations of moderate adaptation pressure, the extent to which administration change takes place [...] cannot be completely captured by institution-based *ex ante* hypothesising; such hypothesising has to be supplemented by an agency-based approach” (Knill 2001:48). Thus the room for action of agents to form and alter the process is considerable and important for the outcome of the process of administrative *change within a changing core*. If there are agents that promote change, then administrative adaptation might occur, and if there are agents that resist change, the administrative structures might persist.

The first-mentioned is also what has been the case in Poland. Since 1998 when the accession negotiations were started, vast changes have been made in Polish asylum administration. The Polish politicians could with neither extensive parliamentary nor public debate implement the whole of the EU *acquis*, including the Dublin Convention and the other common legal instruments for the regulation on the asylum area. This moderate adaptation pressure implies also that such future within-core changes with room for agency will be carried through if the actors, here the politicians, have the will to do it. This implies that the implementation of the second stage of the CEAS could be done if there is a political will. The question now is; is there such a will in this case? Will the agents promote change in the case of the implementation of the second stage of the CEAS?

My estimation is that there is such a will. If the asylum issue does not constitute much of an issue on the Polish political agenda, the membership in the EU does, and the requirements on the second phase of the CEAS comes from the EU. Considering the previous swift and good results of the implementation of the *acquis*, it could be plausible that the politicians give priority to the issue. Not out of public demands on the asylum issue itself, but on public demands on the conformity to EU demands. And if they do act, there is significant power to be exerted regarding the discussion on Ferry’s account above, where we stated that the central state still has great influence in Poland.

### 6.1.3 Inferior reception performance when the agency resists change

There are two ways of viewing the implications of the Polish situation after the implementation of the first phase is supposed to be finished; either in absolute or in relative terms.

In absolute terms it is clear that the Polish implementation records of the first phase of the CEAS are not excellent. The deadline for the conformity to the minimum standards for reception conditions, asylum procedures and the determination of status was passed on the 1<sup>st</sup> of May 2004 – one and a half years ago. There are still deficits in the reception system. Housing is not always adequate, the personnel is not always educated for the sensitive work with persons in such an exposed life situation. Seen from that perspective, the implementation prospects for the second phase to be effectuated before 2010 seem inferior.

In relative terms the picture is more encouraging. From this point of view I would like to argue that the failure concerning the reception conditions observed

is due to one particular reason, except of course from the inferior economic situation and the scarcity of resources of the country in general that is reflected also in the means allocated for the refugee reception. This reason is the absence of public debate and interest in the asylum issue. As mentioned the fact of being an immigrant country, a safe haven for asylum seekers, is very new in Poland, and the number of non-ethnic Poles are low due to historical reasons. There is no self-image of a humanitarian safe haven to be fulfilled by the politicians in order to gain votes for the public. This could effectively be compared to the Swedish situation of late where the debate about humanity versus efficiency has been important lately, and where the question is very much an issue on the political agenda. (Hyberg and Jansson, 2004) Fact in Poland is that the reception of asylum seekers and the processing of their claims is a political non-issue (Iglicka *et al*, 2005:10). Therefore the politicians can be content with the establishing of an asylum system and reception facilities without being forced by the debate and voter claims to further follow it up.

Thus this is an example of a situation of *change within a changing core* and moderate adaptation pressure where the agents involved resists change, and then the implementation is slowed down. I thus argue, considering the earlier swift action by the Polish politicians, that if the political actors themselves wanted to give priority to and accelerate the implementation of the Reception Conditions Directive<sup>24</sup>, i.e. the issue of the inferior reception conditions, it could be done.

An interesting additional feature in this discussion is that considering that civil society, broadly defined as interest groups, businesses and citizen initiatives, was absent during communist rule and neither existed in early post-communist Poland (Ferry 2003:1106) it is remarkable the high number of NGO's active in Poland of today. In the NGO's the asylum seekers also has someone that will examine (already does today) the performance of the Polish asylum system. If the public do not put pressure on the politicians on the behalf of the asylum seekers, there is however a possibility that Polish NGO's will, maybe not in the immediate future but certainly further on as the organisations grow stronger in time.

#### 6.1.4 Summarising

Regarding the analysis above I consider the prospects for the implementation of the second phase of the CEAS to be favourable. Obviously, as shown above, the political *will* for the implementation of EU reforms is there, and with the political will comes also the means to adopt new regulation. Thus regarding the asylum process in itself, the main obstacle might be lack of resources as for example when refraining from providing legal assistance. However, as the remarkable development in the later years of the asylum system in the country indicates, the lack of resources in some areas hopefully could be remedied in the following years to come. It is thus not certain that the Polish asylum determination differs

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24 Council Directive 2003/9/EC: Laying down minimum standards for the reception of asylum seekers

too much from that of the more prosperous EU member states. Of course the differences in the implementation of the first phase of the CEAS and the Treaty of Amsterdam are serious and problematic. However the point in this argumentation is that I consider the prerequisites for implementation of the technical aspects of the asylum process to be there in Poland, perhaps that the implementation will be slightly slower than in the Western European member states.

An important contributing fact to my relatively strong conviction in the matter is again the many present and hard working NGO's in Poland who complement the Polish state through for example staff training in the RSD-procedure. Also legal clinics of different universities will help to the development of the asylum systems. (Ruiz de Santiago, 2004) This will be of great help in cases where the Polish administrative capacity is not sufficient in itself.

## 6.2 The requirements for legitimacy of the CEAS in Poland

Above I have argued that the implementation prerequisites for the second phase of the CEAS are favourable. Let us then move to the normatively influenced question; will this be enough? What about the legitimacy of the reform in the Polish context? Many asylum seekers still view Poland as a transit country. The reception conditions are not considered sufficient, and as discussed in the empirical study above many asylum seekers would prefer to move on to seek asylum in Western Europe (with the "Dublin II" regulation this becomes more of a hope than a preference) with the main motive that Poland is a less prosperous country. Poor, even, compared to many of the EU countries. Is a correct asylum determination process, corresponding with the process offered in the EU member states, all it takes for a system such as the Common European Asylum System to be legally secure and legitimate for these people? Below I will argue that the credibility is somewhat undermined for socioeconomic reasons, and present measures that could counterbalance this.

To start with, for those who are not granted asylum in Poland and are repatriated to their countries of origin, presuming of course that a lawful asylum process with all the necessary prerequisites – access to a suspensive appeal, legal assistance and a certified interpreter – has taken place, the answer is – yes, the system is legitimate.

However for those who are granted refugee status or subsidiary protection in Poland, and thus are free and welcome to live their lives in this new EU member state – is the Common European Asylum System fair and lawful towards them? This question is not as simple to answer, and now I return to my re-interpreted concept of citizenship (for further definition, please see the *Theory* chapter). I have stated that the legitimacy of the transition of responsibility for the asylum seeker from the EU to the individual member state will depend on the ability of member state to provide the refugee with the adequate rights. If we now consider



the Polish case, there are clearly rights that could have been possible, or at least easier, to claim in one of the more prosperous EU member states than in Poland. Particularly regarding the claiming of rights in terms of future socioeconomic prospects. Of course the Polish economy will hopefully advance in the future with good help of the EU accession, and a better economy will improve the future prospects for refugees to settle and make a living in Poland as a country of asylum. But as the situation is today Poland has considerably less resources to invest in the refugees than many Western European EU member states, and therefore I consider the transition of responsibility from the EU to Poland to be a somewhat a weak link in the legitimacy chain. I would therefore like to propose, in the light of the understanding that we now have of the Polish context, an important measures that I consider could be undertaken in order to make up for the deficit in legitimacy that I have shown that the Common European Asylum System presently suffers from. Namely I believe that the European Refugee Fund could provide the economically weaker member states with sufficient means to support the refugees. This is done by the ERF to a certain degree at present (please see further in the *Background* chapter), but it could be done more since this is a question of justice and equality for all refugees in the European Union, and it will determine whether the *transition of responsibility* is legitimate or not. On the one hand this concerns funding during the waiting time when the asylum seekers await their decision in the asylum process since they cannot move to another EU country before their claim has been accepted. The reception conditions must therefore be assured at a decent level, equivalent with the asylum systems in Western EU countries. On the other hand the waiting time after the granting of protection, before moving to another EU member state is possible, is at present at least 5 years (more for those granted subsidiary- or other forms of protection, please read more in the *Background* chapter). Therefore an additional point of view can here be that the ERF should support and compensate refugees up until the day that they are free to move within the European Union. My suggestion represents thus an extension of the burden-sharing mechanism that already is carried out through the ERF.

In addition I would like to state that besides the gain in legitimacy if these measures were assured realities, also the trust of the asylum seekers in the asylum systems of Poland and the other Central and Eastern European Countries (CEEC) probably would increase with these reforms. This could in the long run diminish the feeling that some asylum seekers have of being deprived of living conditions by being “forced” by the Dublin regulation to seek asylum in Poland or another CEEC, which could reduce the incentives to move westwards illegally.

## 7 Conclusions

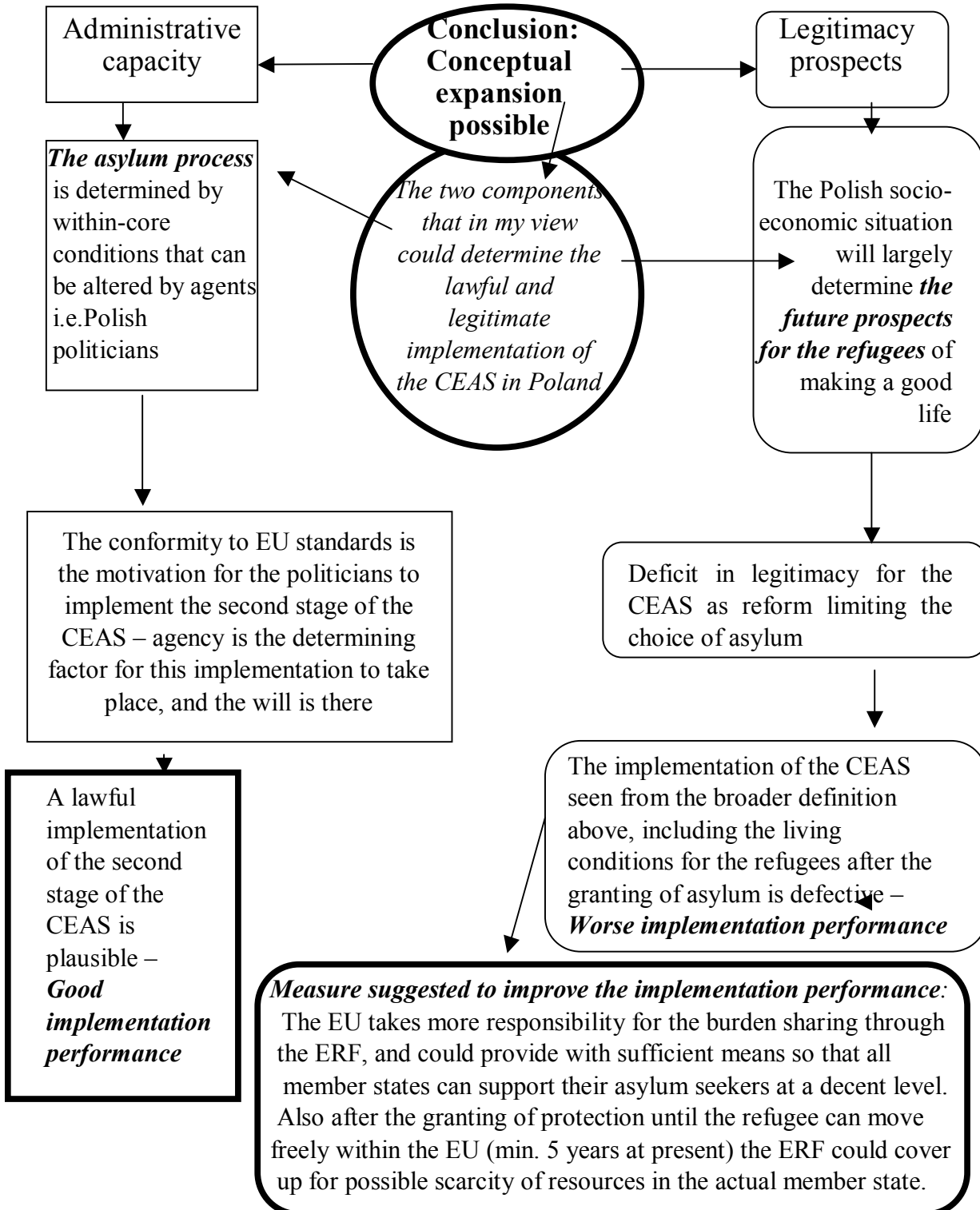
It is now time to summarise the results of this study on the prospects for implementation and legitimacy of the second phase of the Common European Asylum System in Poland.

If we start by reconsidering the first research question; *What are the prospects of Poland to implement the second phase of the Common European Asylum System?* My conclusion is that the implementation prospects are good. The administrative patterns of the Polish asylum system are not yet deeply rooted, and the adaptation pressure is only moderate. This leaves opportunity for action of the politicians to implement the reform if they have the will to do it. I have concluded that there is such a will, even if the Polish asylum system at present has its deficits, since all the implementation of EU requirements in the run-up to the EU accession have been swift. I believe that the Polish public and the Polish politicians have the will to implement the Common European Asylum System since it is issue of the EU, and EU is high on the Polish political agenda.

The second research question reads; *Considering these prospects, is the Common European Asylum System legitimate in the Polish context?* This issue has been investigated from a citizenship perspective with the asylum seeker on the theoretical position of the citizen, and both the EU and subsequently the member state responsible for the asylum claim (i.e. Poland) in the role of the state. I have concluded that the legitimacy of the reform is a dependent variable to the possibility of Poland to provide the refugees with the rights they are entitled to. In the particular Polish case in the present situation there are one measure that could be undertaken in order to increase the legitimacy of the reform; compensational funding from the European Refugee Fund to cover up for the sometimes scarce resources that Poland can spare for the asylum- and reception systems. Also the social support for individuals granted protection before they, after at least five years of waiting, achieve the possibility to move to another EU member state if they so desire, could be increasingly funded by the EU through the ERF. My main point with this discussion is that EU actually could take more of the responsibility for asylum seekers in less prosperous countries than today, as it is the EU that has stipulated the present rules with the limitation in the choice of country of asylum.

Finally, when reflecting over both the analyses above, I would like to argue that their respective conclusions in combination gives rise to an analytically improving measure; the possible need for *conceptual expansion* regarding the implementation concept when investigating the area of the Common European Asylum System. An analysis of administrative capacity and the functioning of the technical arrangements *combined* with an analysis of the legitimacy of the system seen from a citizenship perspective, can together identify important measures that need to be undertaken on this particular asylum policy area.

Illustrating the findings, conclusions and recommendations of this study:



## 8 Epilogue

There are of course many issues that I have not addressed in this attempt to grasp and analyse the giant project that the Common European Asylum System is. My hope is that I with this study can contribute in some way to the development towards a fair, just and legitimate asylum regime in the EU, since this is a policy area that in my view will have important impact on people's lives to a particular extent since all the concerned are displaced persons in vulnerable situations. As I mentioned in the beginning, my conviction is that the asylum systems of the European Union must be well resourced and just. Humanitarian considerations shall not be ignored, whether it implies swift repatriation support after a negative asylum decision or a residence permit issued on humanitarian grounds. Therefore the just implementation of such a policy regime concerning these questions must not fail.

Further interesting research on the area is naturally an inexhaustible source. Investigation on the implementation performance and -prospects of Central and Eastern European countries besides Poland could be interesting, where similar investigations such as this could make useful comparisons possible.

A study following up the Polish case could also be interesting to carry out in a few years time. Meanwhile, I hope for the successful implementation of the second phase of the Common European Asylum System all over the European Union.

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