



Logics of Decision-making on Community Asylum Policy

***A Case Study of the Evolvement
of the Dublin II Regulation***

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Abstract

This case study of the evolution of the so-called Dublin II Regulation on asylum demonstrates the role of Council-specific informal rules and procedures in facilitating intergovernmental agreement. The paper addresses a Rationalist “puzzle,” namely the question why the Justice and Home Affairs Council reached political agreement on Dublin II in spite of the Regulation’s likely redistributive effects on the number of asylum applications processed by individual Member States. The empirical material suggests that issue-linkage, informal decision-making procedures, and a strong reluctance on the part of Council members to exercise their right to veto are jointly sufficient conditions for reaching political agreement.

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1. Introduction: Dublin II as a Rationalist “Puzzle”

This paper addresses a Rationalist “puzzle,” namely the question why the Justice and Home Affairs (JHA) Council reached political agreement on the so-called Dublin II Regulation¹ in spite of the Regulation’s likely redistributive effects on the number of asylum applications processed by individual Member States. Given the expected consequences of this legislative act, intergovernmental negotiations conducted on the basis of calculated national interests alone would have ended in political deadlock.

The empirical material presented below suggests that the Dublin II Regulation was not adopted by purely self-interested, strategically calculating actors. Instead, intergovernmental political agreement on Dublin II was made possible by activating Council-specific informal rules and procedures. National delegations’s adherence to an informal supranational code of conduct explains why instances of “positive integration” do occur in spite of seemingly irreconcilable differences between Member States’ governments.

2. Images of the Council: Arena or Institution?

The principal legislative body of the European Community (EC), the Council of Ministers, is often portrayed as an *arena* where Member States’ governments gather, negotiate, and occasionally reach joint decisions on Community policy. The Council of the European Union: An unpretentious venue for purposive-rational actors bargaining over the substantive profile of Community Regulations, Directives, and Decisions?

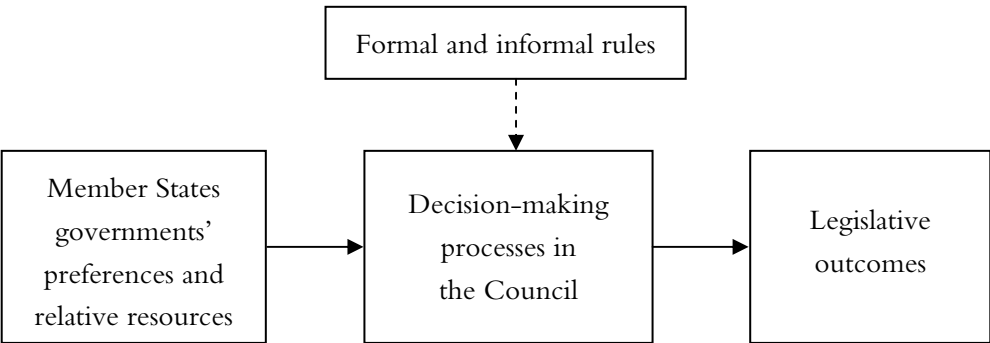
Empirically informed studies of decision-making processes in the Council are hardly reconcilable with this image. While drafting and ultimately deciding upon

¹ Council of the EU (2003a): “Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national,” in: *Official Journal of the European Union* of February 25, 2003, Vol. L 50, pp. 1-10 [[arena-web](#)].

secondary Community law, national civil servants and politicians frequently adhere to supranational principles, norms, and procedures. Compromising, accommodating difference, and reaching agreement along the lines proposed by the permanently involved Commission and rotating Council Presidency are dominant features of the Council’s political culture. National delegations’s behavior is apparently influenced by Council-specific “ways of doing things.” Viewed from a Rationalist perspective, this may result in rather puzzling policy outcomes.

How can we address such Rationalist puzzles? In line with an *Institutionalist perspective* on political institutions,² one may argue that the Council constrains and channels the behavior of its members in more or less predictable ways. National government representatives may not necessarily shift their primary allegiance to Brussels, yet they, in their secondary role as ordinary Council members, may nevertheless voluntarily comply with established rules and standard operating procedures. Over time, both formal and informal Community rules take on a life of their own. Once learned, internalized, and creatively applied by the actors, these rules become, methodologically speaking, intervening variables in the decision-making process. Figure 1. below illustrates this point.

Figure 1: Council-specific Rules as Intervening Variables



² Cf. March, J. G. / J. P. Olsen (1989): *Rediscovering Institutions. The Organizational Basis of Politics*, New York: The Free Press; and March, J. G. / J. P. Olsen (2005): *Elaborating the “New Institutionalism,”* University of Oslo: ARENA – Centre for European Studies, Working Paper No. 11/2005 [[arena-web](#)].

The basic idea is that decision-making processes and legislative outcomes in the European Community are, to a variable extent and under certain conditions, influenced by Council-specific “ways of doing things.” National preferences and the administrative resources at the disposal of Member States’ governments certainly matter. Yet intergovernmental negotiations are also affected by Council-specific rules and procedures for arriving at collectively binding decisions.

2.1 Informal Rules and Procedures in the Council

The main bulk of Council meetings are conducted behind closed doors and thus hidden from the public’s (and researcher’s) eye. Article 6 of the Council’s *Rules of Procedure* accordingly states that “[the] deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise.”³ As the habit of convening unofficial Council meetings in chateau-like surroundings amply demonstrates, members of this institution apparently value the intimacy of informal consultations.⁴

Beyond its relevance for the democratic accountability of supranational legislators, this organizational peculiarity has severe methodological implications. Certain types of official records accessible via the public register, for instance the Council’s voting records contained in the *Monthly Summary of Council Acts* issued by the Council Secretariat, tend to disclose more than they reveal. Why so? Since recourse to formal voting under qualified or double majority rule, and to formal vetoing under unanimity, respectively, is systematically avoided in intergovernmental practice.⁵ This informal rule appears to have originated in the mid-1960’s

³ Council of the EU (2004): “Council Decision of 22 March 2004 adopting the Council’s Rules of Procedure,” in: *Official Journal of the European Union*, Vol. L 106 of April 15, 2004, pp. 22-45 [[arena-web](#)], here: p. 26.

⁴ Cf. Puetter, Uwe (2003): “Informal Circles of Ministers: A Way Out of the EU’s Institutional Dilemmas?” in: *European Law Journal*, Vol. 9, No. 1, pp. 109-124.

⁵ In the year 2000, for example, 97% of all legislative acts adopted by the Council were passed by consensus; cf. Heisenberg, D. (2005): “The Institution of ‘Consensus’ in the European Union: Formal Versus Informal Decision-making in the Council,” in: *European Journal of Political Research*, Vol. 44, pp. 65-90, here: p. 72.

as an organizational response to a temporary unilateral blockade of Community decision-making. The so-called “empty chair crisis” (triggered by French President de Gaulle against the background of nonnegotiable demands over the financing of the Common Agricultural Policy) was followed up on Council level by the “Luxembourg compromise,”⁶ a political commitment reading as follows:

Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community....⁷

In other words, the “Luxembourg compromise” codified that the embarrassing practice of isolating and outvoting individual governments must be avoided under all circumstances. Even under qualified majority voting rules, unilateral attempts to “push for a vote” are considered as inappropriate behavior.

The *European Court of Justice* would later argue that “the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves” (Case 68/86, “UK vs. Council,” par. 38), but such legalistic reasoning was apparently not shared by everyone. A different and certainly more political rationale would determine the future style of decision-making in the Council. According to the *Council Guide* drawn up by the Council Secretariat, it is the duty of the Presidency to “postpone the vote if it observes that the conditions have not been met.”⁸ In this case, the members of the Council will typically settle for a face-saving “agreement not to agree” and delegate the rele-

⁶ Cf. Teasdale, A. L. (1993): “The Life and Death of the Luxembourg Compromise,” in: *Journal of Common Market Studies*, Vol. 31, No. 4, pp. 567-579.

⁷ Council of the EU (2000): *Council Guide, Vol. II: Comments on the Council's Rules of Procedure*, Council Secretariat: Directorate General F, 2nd edition, September 2000 [[arena-web](#)], p. 24.

⁸ Council (2000): *Council Guide, Vol. II* [[arena-web](#)], p. 21.

vant dossier back to the Permanent Representatives' Committee (COREPER). While this "consensus-reflex" among participants in supranational decision-making processes might surprise the outside observer and ordinary citizen alike, it nevertheless captures a core feature of the Council's negotiating culture. As Edwards reminds us with reference to Nuttall's work on the General Affairs Council, it is "the predisposition of diplomats to regard a failure to agree as the worst of outcomes."⁹ In a similar vein, Bostock, a former member of COREPER I, describes the "dominant objective" of the latter committee as "maximizing agreement at its level and maximizing the chances of agreement in meetings of the Council."¹⁰

For better or worse, a certain lack of appreciation for the informal institutional dynamics of the Council seems to be commonplace among so-called *national experts*, i.e. specialized national civil servants occasionally attending Council meetings on working group level or seconded to the Council Secretariat for a couple of years. National experts' political horizon rarely exceeds the more or less narrow confines of their respective national ministry and portfolio.¹¹ In regard to the JHA domain, for example, these "national experts" comprise of senior policemen and women, border control experts, prosecutors, etc. In case of an intra-executive conflict between national experts and "permanent reps," the Council's hierarchical administrative machinery, and COREPER's central role therein, facilitates a more conciliatory policy-style. One of the Brussels-based *attachés* interviewed by Fouilleux *et al.* described her (rather typical) approach towards national experts as follows: "When national experts are present, I never

⁹ Edwards, G. (1996): "National Sovereignty vs. Integration? The Council of Ministers," in: Richardson, J. J. (ed.), *European Union. Power and Policy-making*, London and New York: Routledge, pp. 127-147, here: p. 133.

¹⁰ Bostock, D. (2002): "Coreper Revisited," in: *Journal of Common Market Studies*, Vol. 40, No. 2, pp. 215-234, here: p. 225.

¹¹ Cf. Egeberg, M. (1999): "Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-making," in: *Journal of European Public Policy*, Vol. 6, No. 3, pp. 456-474.

let them have the microphone. If I let the experts take the microphone, they would just say what we want from the negotiation and the meeting would be over.”¹² Likewise, the Member States’ ambassadors interviewed by Lewis referred to national experts as “spies” and “watchdogs.”¹³

As previously mentioned, Council-specific rules of appropriate behavior should be kept in mind while evaluating large-*N* studies of decision-making processes in the Council drawing on voting statistics compiled by the Council Secretariat.¹⁴ These studies are conceptually misleading insofar as they reproduce the arena or “hard bargaining” image of the Council on the basis of systematically biased data.¹⁵ The reader less familiar with the internal dynamics of the Council will effectively be drawn away from one of the most challenging research questions identified by case-oriented scholars, namely “the question of how far

¹² Fouilleux, E. / J. de Maillard / A. Smith (2002): “Council Working Groups: Their Role in the Production of European Problems and Policies,” in: Schaefer, G. F. (project coordinator), *Governance by Committee: The Role of Committees in European Policy-Making and Policy Implementation*, Maastricht: European Institute of Public Administration, Final Report, Part II, pp. 58-87, here: p. 67.

¹³ Lewis, J. (2005): “The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union,” in: *International Organization*, Vol. 59, pp. 937-971, here: p. 947.

¹⁴ See Matilla, M. (2004): “Contested Decisions: Empirical Analysis of Voting in the European Union Council of Ministers,” in: *European Journal of Political Research*, Vol. 43, pp. 29-50; Matilla, M. / J.-E. Lane (2001): “Why Unanimity in the Council? A Roll Call Analysis of Council Voting,” in: *European Union Politics*, Vol. 2, No. 1, pp. 31-52; cf. also Pajala, A. / M. Widgrén (2004): “A Priori versus Empirical Voting Power in the EU Council of Ministers,” in: *European Union Politics*, Vol. 5, No. 1, pp. 73-97.

¹⁵ Even though Mikko Mattila readily acknowledges that “actual voting in the Council is rather rare” (2004: 31) [cf. footnote 14], he nevertheless claims to have identified recurrent voting patterns among Council members *inter alia* along the left-right dimension. Helen Wallace and her collaborators, on the other hand, find “no evidence of traditional left/right cleavages in the patterns of explicit voting” and conclude that “the patterns we observe do *not* correspond to typical roll call behaviour....” Hayes-Renshaw, F. / W. van Aken / H. Wallace (2005): *When and Why the Council of Ministers of the EU Votes Explicitly*, European University Institute: Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS No. 25/2005, p. 7 and 9, respectively.

one can identify common norms, values or beliefs in the Council as a counterweight to specific and more egotistic preferences.”¹⁶

The Council’s *Code of Conduct* provides insights into an array of such common norms and standard operating procedures either ignored or systematically downplayed by variable-oriented researchers. Among them we find the convention that “delegations shall refrain from taking the floor when in agreement with a particular proposal; in this case silence will be taken as agreement.”¹⁷ How do we control for the embarrassment caused by being the single “hold-out” to an otherwise collectively endorsed solution? Perhaps even more remarkable is the routine of conducting bilateral “confessionals” between the Presidency and the Council Secretariat, on the one hand, and particularly reluctant delegations, on the other. The Council’s sense of appropriateness goes so far as to define its differentiated code of conduct as “legally binding.”¹⁸ Whether such instances of rule-driven behavior can find an adequate representation within a rational choice-based analytic framework is at least debatable.¹⁹

As students of decision-making processes in the EU, we are well advised to take indications of informal organizational rules and standard operating procedures seriously. For the time being, few scholars do. Jeffrey Lewis’s collected work on COREPER is a noteworthy exception.²⁰ Lewis’s studies provide a benchmark for

¹⁶ Hayes-Renshaw, F. / H. Wallace (1997): *The Council of Ministers*, Houndmills: Macmillan, p. 257.

¹⁷ Council of the EU (2003b): Council doc. 7105/03 POLGEN 13 [[arena-web](#)], p. 7.

¹⁸ Council (2004): “Decision adopting the Council’s Rules of Procedure” [[arena-web](#)], p. 22.

¹⁹ For an affirmative answer, see Tallberg, J. (2004): “The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations,” in: *Journal of Common Market Studies*, Vol. 42, No. 5, pp. 999-1022.

²⁰ Lewis (2005): “The Janus Face of Brussels” [cf. footnote 13]; Lewis, J. (2003): “Informal Integration and the Supranational Construction of the Council,” in: *Journal of European Public Policy*, Vol. 10, No. 6, pp. 996-1019; Lewis, J. (2000): “The Methods of Community in EU Decision-making and Administrative Rivalry in the Council’s Infrastructure,” in: *Journal of European Public Policy*, Vol. 7, No. 2, pp. 261-289; and Lewis, J. (1998): “Is the ‘Hard Bargaining’ Image of the Council Misleading? The Committee of Permanent Representatives

theoretically reflected and empirically informed scholarship. Other research efforts have not always achieved this level of conceptual refinement.²¹

2.2 Rational Choices in Zero-sum Games

A former practitioner once remarked that members of the Council in general and COREPER in particular have chosen “the Roman god Janus, facing in two directions, [as their] patron saint, mascot or role model.”²² Member States’ representatives in the Council perceive it as their *duty* to reach agreement. Membership in the supranational European Community apparently brings with it certain *obligations*, including to ensure the proper functioning of the Council as a collective decision-making body. Yet at the same time, national governments (in their own views quite legitimately) pursue *national interests*. The EU institution where Hungarians strategically calculate the interests of Hungary and Swedes try to maximize the utility of Sweden is clearly the Council. Against this background, decision-making processes within this political institution may usefully be analyzed not only from an Institutional, but also from a *Rationalist perspective*.

The game-theoretical variant of the latter perspective offers stylized representations of different kinds of policy interactions between self-interested,

and the Local Elections Directive,” in: *Journal of Common Market Studies*, Vol. 36, No. 4, pp. 479-504.

²¹ Note, however, the work of Beyers, J. (2005): “Multiple Embeddedness and Socialization in Europe: The Case of Council Officials,” in: *International Organization*, Vol. 59, pp. 899-936; Fouilleux, E. / J. de Maillard / A. Smith (2004): “Les groupes de travail du Conseil, nerf de la production des politiques européennes?” in: Lequesne, C. / Y. Surel (eds.), *L’intégration européenne. Entre émergence institutionnelle et recomposition de l’Etat*, Paris: Presses de Sciences Po, Collection “Académique,” pp. 143-183; and Beyers, J. / G. Dierickx (1998): “The Working Groups of the Council of the European Union: Supranational or Intergovernmental Negotiations?” in: *Journal of Common Market Studies*, Vol. 36, No. 3, pp. 289-317.

²² Bostock (2002): “Coreper Revisited” [cf. footnote 10], p. 217. The former German ambassador to the EU, Dietrich von Kyaw, serving his country in Brussels from 1993-1999, accordingly noted that he was known in Bonn not as the “ständiger Vertreter” (permanent representative), but as the “ständiger Verräter” (permanent traitor). He was only halfway joking.

strategically calculating actors.²³ When it comes to politically divisive issues like national contributions to the EU budget, for example, intergovernmental negotiations in the Council (and European Council) can be modeled as non-cooperative constant-sum or *zero-sum games*. Game theorists conceptualize this modus of interaction as a game of pure conflict: “In a constant-sum game there is a given total to be divided among the agents, so that a gain to one will necessarily mean losses for others.”²⁴

The intergovernmental negotiations leading up to the formal adoption of the Dublin II Regulation described in detail below can be modeled as a non-cooperative zero-sum game. From a Rationalist perspective, one could have expected that interstate negotiations over the substantive profile of a Community Regulation affecting the distribution of asylum applicants among the Member States would have ended in *deadlock*, with each Member State trying to shift the costly burden of refugee protection to other Member States. The underlying rationale for the deadlock hypothesis is that at least one national government would have preferred non-agreement over agreement.

Reaching international agreement becomes even more difficult if the benefits that Member State X can expect from a given legislative outcome entirely depend on the *implementation* of contractual obligations by Member State Y in administrative practice. In the *de facto* absence of own law enforcement capabilities by the European Community in the domain of Justice and Home Affairs, the national authorities in charge may simply ignore a given Council Regulation.²⁵

²³ Cf. Scharpf, F. W. (1997): *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research*, Boulder: Westview Press; Morrow, J. D. (1994): *Game Theory for Political Scientists*, Princeton University Press; and Zürn, M. (1992): *Interessen und Institutionen in der internationalen Politik*, Opladen: Leske und Budrich.

²⁴ Elster, J. (1986): “Introduction,” in: Elster (ed.), *Rational Choice*, Oxford: Basil Blackwell, pp. 1-33, here: p. 8. Cf. also Moravcsik, A. (1997): “Taking Preferences Seriously: A Liberal Theory of International Politics,” in: *International Organization*, Vol. 51, No. 4, pp. 513-553, here: p. 521.

²⁵ Cf. Scharpf (1997): *Games Real Actors Play* [cf. footnote 23], pp. 117-118. *De jure*, the principles of direct effect and precedence of Community law over national law imply that the administrative enforcement of a Council Regulation is completely decoupled from national

For the purpose of illustration, one may think of utility-maximizing Member State practices such as the non-transposition of Single Market Directives into national law.²⁶ With a view to inadequate refugee protection capacities in Central and Eastern Europe, one may alternatively point to the possibility of *involuntary defection* of Community rules.²⁷ Both options will trigger the same reaction among the agents: supplementary mechanisms for monitoring the effective enforcement of the agreement (a task that will typically be delegated to the European Commission which may ultimately refer the case to the European Court of Justice) must be incorporated into the agreement itself – which leads to more complex negotiations on Council level.²⁸

Drawing on Fritz Scharpf's reflections on (the lack of) industrial relations and social policy harmonization in the EU, one may specify the Rationalist hypothesis on *the limits of positive integration in EU Justice and Home Affairs* as follows: “European policy processes will often encounter constellations where no solution is available that would be preferred over the status quo by all, or most, member governments. In such constellations of conflicting interests, in which only win-

administrative discretion. In other words, national authorities faced with a Community Regulation would ideal-typically act faithfully on behalf of supranational institutions.

²⁶ See *inter alia* Falkner, G. / M. Hartlapp / S. Leiber / O. Treib (2005): *Complying with Europe. EU Harmonisation and Soft Law in the Member States*, Cambridge University Press; and Sverdrup, U. (2005): *Implementation and European Integration: A Review Essay*, ARENA – Centre for European Studies, Working Paper No. 25/2005 [[arena-web](#)].

²⁷ Cf. Zürn, M. (1997): “‘Positives Regieren’ jenseits des Nationalstaates. Zur Implementation internationaler Umweltregime,” in: *Zeitschrift für Internationale Beziehungen*, Vol. 4, No. 1, pp. 41-68, here: p. 56. Byrne describes the challenge of refugee protection in Central and Eastern Europe as follows: “These [challenges] include, *inter alia*, inexperience in dealing with prior waves of both forced and voluntary migration and multi-ethnic integration, less developed traditions in judicial and administrative law and the requisite institutional and administrative infrastructure, fragile economies, an underdeveloped role of civil society as a monitoring safeguard and advocacy voice, as well as geographic proximity to countries generating migration flows.” Byrne, R. (2003): “Harmonization and Burden Redistribution in the Two Europes,” in: *Journal of Refugee Studies*, Vol. 16, No. 3, pp. 336-358, here: p. 343.

²⁸ Cf. Gehring, T. (1994): “Der Beitrag von Institutionen zur Förderung der internationalen Zusammenarbeit. Lehren aus der institutionellen Struktur der Europäischen Gemeinschaft,” in: *Zeitschrift für Internationale Beziehungen*, Vol. 1, No. 2, pp. 211-242, here: pp. 231-235.

lose solutions are possible, ... negotiating systems and systems depending on qualified majorities requiring a high level of consensus will ... be blocked.”²⁹ The following analysis documents to what extent this Rationalist hypothesis empirically holds in regard to the negotiation of the Dublin II Regulation.

2.3 Methodological Notes

Like any other modern bureaucracy, the *General Secretariat of the Council* keeps written records of any given procedure it administers – even if it was an oral exchange. If the Council acts as a *supranational legislative body*, as in case of Council Regulations like Dublin II, these records must be made available to the public once the legislative act has been adopted.³⁰ This is good news for researchers, since it allows for identifying *national delegations’s negotiating positions* with the help of “hard” primary sources. Sources of this kind provide direct and reliable evidence of national governments’ volitions while drafting supranational legislation. The following account is first and foremost based on primary sources, supplemented, where necessary or deemed useful for the purpose of empirical triangulation, by expert interviews and “soft” sources like newspaper reports.³¹

²⁹ Scharpf, F. W. (1999): *Governing in Europe: Effective and Democratic?* Oxford University Press, p. 76. In regard to the prospect of striking package deals within particular Council formations, Fritz Scharpf advances the skeptical view that “if package deals can be reached at all, they will typically have to involve two or more distinct policy areas with complementary asymmetries in their interest constellations.” Scharpf (1997): *Games Real Actors Play* [cf. footnote 23], p. 129.

³⁰ Cf. Council of the EU (2001a): “Council Decision of 9 April 2001 on making certain categories of Council documents available to the public (2001/320/EC),” in: *Official Journal of the European Communities* of April 20, 2001, Vol. L 111, pp. 29–30 [[arena-web](#)]. The Council’s *Public Register*, containing documents issued as of January 1, 1999, is located at the following address: <http://register.consilium.eu.int>.

³¹ My heavy reliance on “hard” primary sources, all of which I have made electronically available to would-be critics, is in line with the approach suggested by Moravcsik, A. (1998): *The Choice for Europe*, Cornell University Press, pp. 80–85. In section 3.2 below, I draw on the transcript of a focused, semi-structured interview with a key informant from the General Secretariat of the Council conducted in May of 2004 in Brussels. On the design and use of expert interviews in qualitative political research, see Peabody, R. L. *et al.* (1990): “Interviewing Political Elites,” in: *PS: Political Science and Politics*, Vol. 23, No. 3, pp. 451–455.

In sum, this provides an adequate empirical basis for the qualitative purposes of this study.

The majority of official records I will refer to were drawn up by an EU civil servant in the General Secretariat of the Council (Directorate-General H, Directorate I) temporarily assigned to the *Asylum Working Party*. The subsequently declassified reports compiled by this *fonctionnaire* can be qualified as the observations of a neutral participant – of a participant, that is, who has professionally been trained for monitoring decision-making processes in the Council and has no interest in the political substance of the negotiations other than assisting the rotating Presidency in pursuing its respective work program. The principal negotiations of Dublin II were held under the Spanish and Danish Presidencies of the Council (first and second half of 2002, respectively). Political agreement on the draft Regulation was reached in early December of 2002, i.e. well ahead of the incoming Greek Presidency.

Council Secretariat personnel assisted at least the following organizational units of the JHA Council in drafting the Dublin II Regulation: the *Asylum Working Party*, the *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)*, the informal group of *JHA Counsellors* (the so-called “mini-COREPER”), the *Committee of Permanent Representatives (COREPER), Part Two*, and, last but not least, the *Justice and Home Affairs Council* itself. In order to help the reader in tracing the negotiations, the working structures of the JHA Council during the so-called transitional period (1999–2004) are presented in Annex 1. The symbols indicate whether a given organizational unit of the Council primarily dealt with Schengen-related issues, whether legislative acts could be based on the EC Treaty, and how this affected the position of Denmark, Ireland, the United Kingdom, Norway, and Iceland, respectively.³² Denmark, for example,

³² For a more comprehensive organigram of the JHA Council including “Third Pillar” working groups drawn up by the Head of Division on judicial cooperation at the Council Secretariat, see Nilsson, H. G. (2004): “The Justice and Home Affairs Council,” in: Westlake, M. / D. Galloway, *The Council of the European Union*, London: John Harper Publishing, 3rd edition, pp. 113–142, here: p. 133.

cannot formally participate in asylum-specific measures like Dublin II due to its categorical “opt-out” of Title IV of the EC Treaty. As we shall see in due course, this did not prevent the Danish government from presiding over the JHA Council during the second half of 2002 and to lead the Dublin II negotiations to a successful conclusion.

3. The Negotiation of the Dublin II Regulation in the JHA Council

3.1 *The Commission’s Proposal*

On July 26, 2001, the Commission formally presented its legislative proposal on Dublin II to the Council.³³ In addition to consultations with the United Nations High Commissioner for Refugees (UNHCR) and international non-governmental organizations (INGOs), the European Commission held discussions with national experts in order to weigh the chances of getting its draft Regulation through the Council. Fulfilling a request by the Council, the Commission’s services also studied the malfunctioning Dublin Convention or “Dublin I” mechanism,³⁴ negotiated on an intergovernmental basis between the Member States of the former European Economic Community (EEC) during the late 1980’s parallel to the Schengen Implementation Agreement (“Schengen II”). With its entry into

³³ European Commission (2001a): *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Brussels, July 26, 2001, COM (2001) 447 final [[arena-web](#)]. In regard to the Commission’s preparatory work, see European Commission (2000): *Revisiting the Dublin Convention: Developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, Commission staff working paper, Commission doc. SEC (2000) 522 [[arena-web](#)].

³⁴ See European Commission (2001b): *Evaluation of the Dublin Convention*, Commission staff working paper, Commission doc. SEC (2001) 756 [[arena-web](#)]. According to this study, merely 1.7% of all asylum applicants throughout the EU 15 were actually “transferred” from one Member State to another during the first two years of the Convention’s application (cf. p. 2).

force on September 1, 1997, the Dublin Convention replaced Schengen's asylum chapter (articles 28-38 Schengen II).³⁵

As regards the hierarchy of criteria laid out in the draft Regulation, the Commission did not deviate significantly from the Dublin Convention.³⁶ The Commission thus actively promoted the *authorization principle* and the *principle of first contact*, respectively, as the procedural core of the emerging *Common European Asylum System*. In other words, the Commission *inter alia* proposed that Member States with external borders, rather than Member States surrounded by other EU countries, shall bear the processing burden. For the purpose of illustration, let us assume that an asylum seeker has managed to cross the external Schengen border in Italy in an irregular fashion and subsequently travels on to Germany via Austria where he or she lodges his or her asylum application. According to the *principle of first contact*, then, Germany is definitely not responsible for considering the claim. Neither is Austria. Instead, the applicant will be physically "transferred" to Italy where his or her asylum application will ideal-typically be processed. If applied

³⁵ Schengen II entered into force on March 26, 1995, i.e. more than two years earlier than the Dublin Convention. Against this historical and legal background, Jörg Monar rightly noted that "the Dublin Convention was largely constructed on the basis of the work done in the Schengen context and not vice-versa." Monar, J. (2000): "The Impact of Schengen on Justice and Home Affairs in the European Union: An Assessment on the Threshold to its Incorporation," in: Den Boer, M. (ed.), *Schengen Still Going Strong. Evaluation and Update*, Maastricht: European Institute of Public Administration, pp. 21-35, here: p. 22. Cf. Hailbronner, K. / C. Thiery (1997): "Schengen II and Dublin: Responsibility for Asylum Applications in Europe," in: *Common Market Law Review*, Vol. 34, pp. 957-989.

³⁶ The Dublin Convention and its underlying principles have been analyzed in depth by numerous legal scholars and policy practitioners. See *inter alia* Noll, G. (2001): "Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law," in: *Nordic Journal of International Law*, Vol. 70, pp. 161-182; Blake, N. (2001): "The Dublin Convention and Rights of Asylum Seekers in the European Union," in: Guild, E. / C. Harlow (eds.), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Oxford and Portland, OR: Hart, pp. 95-120; Marinho, C. (2000) (ed.): *The Dublin Convention on Asylum. Its Essence, Implementation and Prospects*, Maastricht: European Institute of Public Administration; Hurwitz, A. (2000): "The 1990 Dublin Convention: A Comprehensive Assessment," in: *International Journal of Refugee Law*, Vol. 11, No. 4, pp. 464-477; and Löper, F. (2000): "Das Dubliner Übereinkommen über die Zuständigkeit für Asylverfahren," in: *ZAR – Zeitschrift für Ausländerrecht und Ausländerpolitik*, No. 1/2000, pp. 16-23.

effectively, this scheme leads to a redistribution of asylum seekers “by default.”³⁷ The Commission justified its proposition by arguing that “the Member States are responsible to all the others for their actions regarding control of the entry and residence of third-country nationals.”³⁸

The Commission’s staff knew that its legislative proposal would need to find the *unanimous* approval of twelve to fourteen Member States’ governments (EU 15 minus Denmark and *possibly* minus Ireland and the United Kingdom). They would ultimately need to subscribe to the supranationalist slogan “All for one and one for all!” – the latter part of which would be particularly hard to sell to external border countries such as Spain. The Commission’s services were also aware of the fact that “discussions [within the JHA Council] on physical burden sharing according to factors such as each state’s population, population density or GDP have not produced any concrete results.”³⁹ This outcome had been sharply criticized by principal receiving countries like Germany and the Netherlands for quite some time, the former unsuccessfully attempting to introduce an effective burden-sharing regime in the EU since 1994.⁴⁰ The initial absence of common European rules and the subsequent ineffectiveness of Schengen II and Dublin I, respectively, resulted in a highly unequal distribution of asylum applications between the Member States. The relative share of each Member State during the ten-year period preceding the negotiation of the Dublin II Regulation is reproduced in Annex 2.

Beyond the search for a text acceptable to at least the majority of Member States’ governments, one may point to the Commission’s *institutional self-interest* in

³⁷ Lavenex, S. (2001): “The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies,” in: *Journal of Common Market Studies*, Vol. 39, No. 5, pp. 851-871, here: p. 863.

³⁸ Commission (2001a): *Proposal for a Council Regulation* [[arena-web](#)], p. 14.

³⁹ Commission (2000): *Revisiting the Dublin Convention* [[arena-web](#)], no. 49.

⁴⁰ Cf. Thielemann, E. R. (2005): “Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund,” in: *Journal of Common Market Studies*, Vol. 43, No. 4, pp. 807-824.

any kind of legal instrument consolidating and deepening the Community's involvement in the JHA domain.⁴¹ In fact, the Commission was only one step short of gaining the sole power of proposing Community legislation on asylum, subject to qualified majority voting in the Council and co-decision with the European Parliament, provided that the Council had unanimously adopted "first stage" Community legislation on asylum. On December 1, 2005, the Commission had, in spite of a considerable delay not foreseen by the Treaty of Amsterdam, met its integrationist objective of applying the "Community method" to the governance of asylum in Europe.⁴²

3.2 Intergovernmental Negotiations in the Council, October 2001 – December 2002

3.2.1 Initial Scrutiny under the Belgian Presidency

Selected southern Member States' governments, first and foremost the Italian administration, supported the institutionalization of an alternative hierarchy of criteria for processing asylum applications in the European Community. The Italian representative to the Council's *Asylum Working Party* expressed its discontent with the Commission's proposal at the very first reading of the draft Regulation on October 2, 2001. Both Italy and Greece entered formal reservations (read: objection or veto) on article 10 of the draft Council Regulation. The Italian delegation justified its position as follows: "Member States' duty to guard their borders should not be confused with determining the Member State responsible for examining an asylum application."⁴³

In voicing its opposition to the Commission's legislative proposal, the Italian government found a weak ally in *UNHCR*, recommending an allegedly simple

⁴¹ For a general discussion along these lines, see Brückner, U. (1997): *Kompetenzerweiterung partout – Die Europäische Kommission im Prozeß der Europäischen Integration*, Free University of Berlin: Department of Political Science, Ph.D. thesis [[arena-web](#)].

⁴² Cf. European Commission (2005): *Vice President Frattini welcomes 'major milestone' on asylum in the EU*, Brussels, December 1, 2005, Press Release IP/05/1520 [[arena-web](#)].

⁴³ Council of the EU (2001b): Council doc. 12501/01 ASILE 48 [[arena-web](#)], p. 13.

and more humane solution according to which “the responsibility for considering an asylum claim [shall lie] with the Member State with which and in whose jurisdiction the claim is lodged.”⁴⁴ The same position was promoted by INGOs such as *Amnesty International* and the multifaceted NGO community represented on EU level by the *European Council on Refugees and Exiles (ECRE)*.⁴⁵

Occupied with coordinating the EU’s response to the terrorist attacks in America, the Belgian Presidency could not resolve these substantive issues. However, it managed to arrange for the formal “opt-in” of both Ireland and the United Kingdom.⁴⁶

3.2.2 Intergovernmental Deadlock and Issue-linkage under the Spanish Presidency

Precisely at a time when the politically marginalized *European Parliament* and its *Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs* had in principle approved of the Commission’s draft “not least because of the absence of viable alternatives,”⁴⁷ the incoming *Spanish Presidency* (first half of 2002) broke with the Commission’s approach. Framed as a “compromise text,” the Spanish Presidency suggested that the responsibility for processing asylum applications from third country nationals not subject to visa requirements should lie with the Member

⁴⁴ UNHCR (2001): “Note from UNHCR to the Asylum Working Party, Subject: Position on Commission working paper on revisiting the Dublin Convention (7122/00 ASILE 14),” Council doc. 5532/01 ASILE 8 [[arena-web](#)], p. 7.

⁴⁵ See Amnesty International (2002): *Amnesty International’s Comments on the Commission’s Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Brussels: Amnesty International EU Office, June 2002 [[arena-web](#)]; and ECRE (2001): *The Promise of Protection: Progress towards a European Asylum Policy since the Tampere Summit 1999*, Brussels: ECRE EU Office, November 2001 [[arena-web](#)].

⁴⁶ Ireland and the United Kingdom formally notified their “opt-in” on October 30, 2001. See Council of the EU (2001c): Council doc. 13428/01 ASILE 51 [[arena-web](#)], and Council of the EU (2001d): Council doc. 13427/01 ASILE 50 [[arena-web](#)], respectively.

⁴⁷ European Parliament (2002): “Report on the proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national,” March 20, 2002, EP doc. A5-0081/2002 [[arena-web](#)], p. 15.

State in which the application is lodged.⁴⁸ As mentioned above, this had also been the preferred solution of UNHCR and the NGO community. Whereas the Spanish Presidency's new draft received a warm welcome from the Greek and Italian delegations, it triggered a negative response *inter alia* from Germany, the Netherlands, Sweden, and the United Kingdom. During the *Asylum Working Party's* meeting on April 16, 2002, for example, the latter countries called on the Spanish Presidency to "put the criteria back in the order proposed by the Commission."⁴⁹

Since intergovernmental negotiations on *Asylum Working Party* level had so far resulted in deadlock, the Spanish Presidency referred the entire dossier to a higher and politically more sensitive level, i.e. to the *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)*. Instead of moving closer towards agreement, however, discussions on *SCIFA* level merely made the conflict of interest between the Member States more visible. In fact, the Greek and Italian delegates to the *SCIFA* meeting on May 23-24, 2002 supported the Spanish Presidency's position by arguing that the EU should "avoid penalising Member States due to their geographical situation."⁵⁰ On the other hand, the German and Austrian delegations called for the introduction of data transmission equipment compatible with the biometric database *Eurodac* in order to enforce the *principle of first contact* in administrative practice.⁵¹ The gap between the promoters and opponents of the Commission's initial draft was increasing.

⁴⁸ See Council of the EU (2002a): Council doc. 5623/02 ASILE 4 [[arena-web](#)], p. 12.

⁴⁹ Council of the EU (2002b): Council doc. 8207/02 ASILE 22 [[arena-web](#)], p. 15.

⁵⁰ Council of the EU (2002c): Council doc. 9305/02 ASILE 29 [[arena-web](#)], p. 13.

⁵¹ This ultimately resulted in the establishment of the so-called *DubliNET* system for the secure electronic transmission of encrypted data between national authorities. *DubliNET* became operational on September 1, 2003, and is technically compatible with the fingerprint database *Eurodac*. Both *DubliNET* and *Eurodac* are managed by the Commission and are also employed by Norwegian and Icelandic authorities. Cf. European Commission (2003a): *Transmission of asylum applications between member states – DubliNet now operational*, Brussels, September 19, 2003, Press Release IP/03/1271 [[arena-web](#)].

By June 2002, the Spanish Presidency had to report to the *Permanent Representatives Committee (COREPER)* and the *JHA Council*, respectively, that “the proposal ... has been discussed in depth in the Council Working Parties, without any agreement being reached.” Furthermore, the Spanish government openly questioned whether “irregular border crossing and unlawful presence in the territory [should] be maintained as criteria for defining the Member State responsible for examining the asylum application.”⁵² The most straightforward answer to this question was again provided by Italy, still vehemently opposed to any Community Regulation that would create a substantive link between external border control and Member States’ responsibilities for processing asylum applications. In a formal letter dated June 17, 2002, the Italian government argued as follows:

If the criterion is maintained whereby responsibility rests with the country of first entry, we will find ourselves in the plainly absurd situation where, on the one hand, there is integrated management of border controls by all Member States and, on the other hand, border States alone are responsible for any avoidance of the controls, which, it should be noted, are not usually carried out at crossing points in the Schengen area. ... We are thus convinced that the responsibility criterion relating to unlawful border crossing should not be included among the criteria or, failing that, should be of an entirely residual nature, insofar as there has been a clear failure to comply with the Common provisions.⁵³

The letter by the Italian delegation was drawn up in response to the *JHA Council’s* failure to reach an agreement on Dublin II at its meeting on June 13, 2002 in Luxembourg. During this Council meeting, however, the ministers of the interior and justice had, assisted by Commissioner Vitorino, cleared the way for a new framing of the issue at hand. In what one might describe as an effort to

⁵² Council of the EU (2002d): Council doc. 9563/1/02 REV 1 ASILE 30 [[arena-web](#)], pp. 2-3.

⁵³ Council of the EU (2002e): Council doc. 10102/02 ASILE 32 [[arena-web](#)], p. 2.

transcend the conflict by means of *issue-linkage*, the ministers “emphasised the close link between this question [the Dublin II Regulation] and the issue of combating illegal immigration, both of which will be discussed by the European Council meeting in Seville....”⁵⁴

As the JHA Council and Commissioner had envisioned, both issues *were* discussed by the heads of state or government during their meeting in Seville, Spain. In conclusion, the *European Council* asked the JHA Council and the Commission to attach top priority to implementing practical measures for curbing illegal immigration. In an unusual display of political power, the EU leaders even threatened to sanction third countries that would not comply with EU demands.⁵⁵ Furthermore and “in parallel with closer cooperation in combating illegal immigration,” the European Council urged the JHA Council “to adopt, by December 2002, the Dublin II Regulation.”⁵⁶ From now on, the draft Dublin II Regulation on asylum, *legally* solemnly based on article 63 (1) (a) of the EC Treaty, was *politically* associated with EU efforts at preventing irregular migration flows.

In the run-up to Seville, the Spanish Prime Minister, acting European Council President, and leader of the Conservative *Partido Popular*, José María Aznar, had time and again underlined that “illegal immigration is a challenge to the stability of our countries and of the European Union.”⁵⁷ Shortly after the European Council meeting in Seville, the former Council Presidency was engaged in a military confrontation with neighboring Morocco that appeared like “a badly

⁵⁴ Council of the EU (2002f): *2436th Council meeting – Justice, Internal Affairs and Civil Protection – Luxembourg, 13 June 2002*, Press Release 9620/02 [[arena-web](#)], p. 13.

⁵⁵ The heads of state or government did not spell out particular means of sanctioning non-cooperative third countries, but confined themselves to indicate “measures or positions under the Common Foreign and Security Policy and other European Union policies.” European Council (2002): *Seville European Council, 21 and 22 June 2002 – Presidency Conclusions* [[arena-web](#)], p. 11.

⁵⁶ European Council (2002): *Seville European Council* [[arena-web](#)], p. 12.

⁵⁷ Aznar, J. M. (2002): *Speech by the President of the Spanish Government, José María Aznar, at St Anthony’s College, University of Oxford, May 20, 2002*. Cf. Barbé, E. (2003): “The Spanish Presidency: Catalysing a New Axis in the EU?” in: *Journal of Common Market Studies*, Vol. 41, Annual Review, pp. 45-48.

played re-enactment of a 19th century colonial land grabbing conflict.”⁵⁸ Against the background of intensified EU pressure on the immigration front in combination with Spain’s refusal to hand over its North African enclaves (such as Melilla conquered by Spain in 1497), the Moroccan government propagated that its spectacular military occupation of the uninhabited Parsley Island (subsequently reoccupied by Spain with overwhelming military force) was necessary for fighting illegal immigration into the EU via the Strait of Gibraltar.

3.2.3 *Continued Stalemate under the Danish Presidency*

Reaching an “early agreement” on Dublin II would presumably not have been possible if Greece would have presided over the relevant meetings of the Justice and Home Affairs Council during the second half of 2002. The main reason why Denmark, the only EU country with a categorical “opt-out” of Title IV of the EC Treaty (covering *inter alia* “First Pillar” measures on asylum), presided instead was not so much a lack of political will, but rather a lack of *resources* on the part of the Greek administration. One of my interviewees recalled the deliberations on this subject matter as follows: “There was some talk before [the start of the Danish Presidency in July 2002] whether they will chair or not. Should they not chair, it would have meant a whole year for the Greek, as it happened with the [informal] Euro 12 [or Eurogroup] for the Euro. But the Greek officials were terrified to have to check for ideas on all these things on JHA.”⁵⁹

Immediately before taking over the Presidency of the JHA Council on July 1, 2002, Mr. Bertel Haarder, Danish Minister for Refugees, Immigration and Integration and Minister without Portfolio for European Affairs, had paved the

⁵⁸ Monar, J. (2002): “The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership,” in: *European Foreign Affairs Review*, Vol. 7, pp. 251-255, here: p. 251.

⁵⁹ Author’s interview, May 11, 2004. Cf. Puetter, U. (2004): “Governing Informally: The Role of the Eurogroup in EMU and the Stability and Growth Pact,” in: *Journal of European Public Policy*, Vol. 11, No. 5, pp. 854-870; and Friis, L. (2003): “The Danish Presidency: ‘Wonderful Copenhagen’”, in: *Journal of Common Market Studies*, Vol. 41, Annual Review, pp. 49-51.

way for the adoption of highly restrictive asylum and immigration policies in Denmark – with the noteworthy parliamentary support of the right-wing *Dansk Folkeparti*.⁶⁰ Haarder's superior, Mr. Anders Fogh Rasmussen, had been elected as leader of the Danish government in November 2001 following an election campaign focused on bogus asylum seekers and the alleged abuse of the Danish welfare state by unwanted immigrants.

Even though various European governments sensed that there was “something rotten in the state of Denmark,” they had apparently learnt their lessons from the diplomatic disaster of “sanctioning” Austria due to the participation of the right-wing *Freiheitliche Partei Österreichs* in the Austrian federal government.⁶¹ By mid-2002, EU governments had gotten used to political phenomena such as the participation of the *Lijst Fortuyn* in the short-lived Dutch coalition government (May – October 2002) under Prime Minister Jan Peter Balkenende. In fact, the first efforts of the Danish Presidency to reach an agreement on Dublin II coincided with the passage of the so-called *Bossi-Fini* law of July 30, 2002 in Italy, introducing *inter alia* detention centers for illegal immigrants, the systematic fingerprinting of third country nationals, and prison sentences for repeated illegal entry. The law was named after Umberto Bossi, Minister without Portfolio for

⁶⁰ Danish asylum policies have not only been harshly criticized by UNHCR. They have also triggered unusual political tensions between Denmark and Sweden. Against the background of a steep decline in asylum applications lodged in Denmark and an equivalent increase in Sweden, the leader of the *Dansk Folkeparti*, Mrs. Pia Kjærsgaard, commented on the more liberal asylum and immigration policies of the Swedish government as follows: “If they [the Swedes] want to turn Stockholm, Gothenburg, or Malmö into a Scandinavian Beirut with clan wars, honor killings, and gang rapes, let them do it. We can always put a barrier on the Öresund bridge.” *The Copenhagen Post Online* of October 24, 2002, www.cphpost.dk.

⁶¹ Under the leadership of Jörg Haider, the *FPÖ* won 26,9% of the votes in Austrian general elections and subsequently formed a center-right coalition government with the *Österreichische Volkspartei (ÖVP)*. Whereas the new Austrian government headed by Chancellor Wolfgang Schüssel was sworn in on February 4, 2000, the bilateral “sanctions” which the 14 EU governments had imposed against Austria remained in force until September 12, 2000. Two months later, the U.S. government followed suit. For further reading, see Merlingen, M. / C. Mudde / U. Sedelmeier (2001): “The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria,” in: *Journal of Common Market Studies*, Vol. 39, No. 1, pp. 59-77; and Wodak, R. / A. Pelinka (2002) (eds.): *The Haider Phenomenon in Austria*, New Brunswick: Transaction Publishers.

Institutional Reform and leader of *Lega Nord*, and Gianfranco Fini, deputy Prime Minister and leader of the post-fascist *Alleanza Nazionale*.⁶²

Having a strong national interest in the adoption of a Community Regulation which, subject to a parallel agreement between the European Community and Denmark, would allow the center-right government in Copenhagen to “remove” as many asylum seekers to neighboring Germany as possible,⁶³ the incoming Danish Presidency (July – December 2002) declared that it would “make a special effort to reach agreement on the Commission’s proposal.”⁶⁴ Before returning to the Commission’s initial draft and doing away with the Spanish Presidency’s amendments, however, the Danish government proposed inserting a *safety clause* into the Regulation. This typically Danish “opt-out” idea was presented to the *SCIFA* members on July 22-23, 2002, and found the following legal expression:

A Member State can request for suspension of the relevant provisions of this regulation relating to the obligation for it to take back or take charge of asylum seekers if this Member State during the preceding 3 years has received more asylum seekers than what is equivalent to its share of the total number of asylum seekers received in the EU during the same period, with an addition of

⁶² Cf. Calavita, K. (2005): *Immigrants at the Margins: Law, Race, and Exclusion in Southern Europe*, Cambridge University Press; and Zaslove, A. (2004): “Closing the Door? The Ideology and Impact of Radical Right Populism on Immigration Policy in Austria and Italy,” in: *Journal of Political Ideologies*, Vol. 9, No. 1, pp. 99-118.

⁶³ In regard to the follow-up agreement with Denmark, see European Commission (2004): “Proposal for Council Decision on the Signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the Provisions of Council Regulation (EC) No 343/2003 ...,” Brussels, September 17, 2004, *COM (2004) 594 final* [[arena-web](#)]. The agreement, negotiated on behalf of the EC by the Commission, was signed on March 10, 2005, and is currently awaiting ratification in both jurisdictions. Similar provisions have been negotiated with Norway, Iceland, and Switzerland.

⁶⁴ Danish Presidency (2002): *One Europe – Programme of the Danish Presidency of the EU* [[arena-web](#)], p. 13. The Danish Presidency attached a great deal of importance to Justice and Home Affairs, resulting in an increased workload for the Council’s working groups. According to Hans Nilsson, 78% of all items on the agenda of COREPER II during the Danish Presidency related to the establishment of an *Area of Freedom, Security and Justice*. Nilsson (2004): “The Justice and Home Affairs Council” [cf. footnote 32], p. 139.

35%. ... A Member State's share of asylum seekers is equivalent to its share in percent of the total Gross Domestic Product of all Member States.⁶⁵

The Danish Presidency also used this *SCIFA* meeting to set up an *Informal Drafting Group* - presided over by Denmark and comprising national officials, a Commission representative, and a member of the Council Secretariat. However, the informalization of the decision-making process did not yield any concrete results. After having met twice on September 11 and 19, 2002, the *Informal Drafting Group* merely decided to *delete* the rather complicated and potentially dysfunctional safety clause proposed by the Danish government.⁶⁶

A few days later, the Danish Presidency tabled yet another innovative amendment to the Commission's draft. On September 20, 2002, the Presidency proposed "to merge Articles 10, 12 and 13 into one single provision thereby not giving precedence to any of the three responsibility criteria set out in these articles."⁶⁷ Yet this did not satisfy Member States' governments either. After all, the whole point about adopting a new Community Regulation was to establish clear criteria for determining Member State responsibility. At the *SCIFA* meeting of September 25-26, 2002, the French delegation thus dryly noted that "the new drafting blurs the hierarchy of criteria, irregular entry should take precedence," whereas Greece, Italy, Finland, Ireland, the Netherlands, and the United Kingdom entered general scrutiny reservations.⁶⁸

In spite of all confusion, the Danish Presidency delegated the unfinished dossier to *COREPER* in light of the forthcoming *JHA Council* meeting on October 14-15, 2002.⁶⁹ The JHA ministers, presided over by Mr. Bertel Haarder and Ms. Lene Espersen (Justice), therefore ended up holding a fruitless "debate focused on the hierarchy of criteria.... Following the discussion, the Council

⁶⁵ Council of the EU (2002g): Council doc. 11139/02 ASILE 39 [[arena-web](#)].

⁶⁶ Council of the EU (2002h): Council doc. 12154/02 ASILE 44 [[arena-web](#)].

⁶⁷ Council (2002h): 12154/02 ASILE 44 [[arena-web](#)], p. 2.

⁶⁸ Council of the EU (2002i): Council doc. 12381/02 ASILE 46 [[arena-web](#)].

⁶⁹ See Council of the EU (2002j): Council doc. 12616/02 ASILE 50 [[arena-web](#)].

charged the Permanent Representatives Committee to pursue work in order to allow an agreement at the next JHA Council on 28/29 November.”⁷⁰ With approximately six weeks left for the Danish Presidency to hammer out an agreement as requested by the European Council, the subject matter had been delegated back to the Council’s working parties.

3.2.4 The End Game or The Art of Reaching Political Agreement in the Council

Refusing to give in to strong political pressure, the Greek and Italian delegations upheld their general reservations on the envisioned hierarchy of criteria. They would maintain this position until the decisive Council meeting.

The informal group of *JHA Counsellors* was well aware of these unresolved problems. Nevertheless, the “mini-COREPER” of the JHA domain tried to revitalize the negotiations by drawing up a supplementary *political declaration*. This declaration, agreed upon by October 29th and formulated in the spirit of the Seville European Council conclusions, would later appear as an attachment to the JHA Council’s minutes. According to the draft declaration, the Council was supposed to state that it would “[take] into account the concerns of certain Member States, whose geographical position exposes them to illegal immigration, that an effective application of the Dublin II Regulation, in particular Article 10 of the Regulation, may lead to an overburdening of their asylum systems.” This, of course, was precisely the outcome that peripheral countries like Greece and Italy (not to speak of future “guardians of the gate” like Poland) were trying to avoid. Against this background, the *JHA Counsellors* suggested that the JHA Council should “express its solidarity with Member States particularly exposed to irregular crossing of the external borders.” How precisely the concept of interstate solidarity could manifest itself in financial terms remained unclear, however. The draft declaration merely promised that a number of *pilot projects* aimed at

⁷⁰ Council of the EU (2002k): 2455th Council meeting – Justice, Home Affairs and Civil Protection – Luxembourg, 14/15 October 2002, Press Release 12894/02 [[arena-web](#)].

“combating and deterring illegal immigration” would be launched in the near future “in addition to the adoption of the Dublin II Regulation.”⁷¹

Much to the chagrin of the Danish Presidency, the Greek and Italian delegations remained unconvinced. They would simply not “buy” the Dublin II Regulation in its current form in exchange for a legally non-binding declaration on interstate solidarity attached to the Council minutes. After all, every single national delegation knew that the Member States, rather than the EU as such, were spending a total of approximately € 3 billion annually on border control measures – a lot of money in comparison with the “structural inadequacy of the resources currently available for immigration and asylum policies in the Community budget.”⁷² The Greek and Italian representatives consequently *upheld* their general reservations on the hierarchy of criteria at the *SCIFA* meeting of November 5, and at the *COREPER II* meetings of November 7, 14, and 21, 2002, respectively.⁷³ Just days before the last Council meeting on ministerial level under the Danish Presidency, the JHA Council’s working structures had failed to produce a common draft.

In spite of the prolonged deadlock among national delegations, the Danish Presidency decided to present both the disputed draft Dublin II Regulation and the supplementary political declaration to the JHA Council at its meeting on November 28, 2002.⁷⁴ The minutes of this meeting reveal that the Danish Presidency activated a rather unusual procedure, namely that “the Presidency decided to

⁷¹ Council of the EU (2002l): Council doc. 13596/02 ASILE 58 [[arena-web](#)], pp. 34–36.

⁷² European Commission (2003b): “Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents,” Brussels, June 3, 2003, COM (2003) 323 final [[arena-web](#)], p. 18. The relatively modest resources at the disposal of the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, established by Council Regulation in 2004 [[arena-web](#)], do not compensate for this enduring financial imbalance.

⁷³ See Council of the EU (2002m/2002n/2002o): Council doc. 13915/02 ASILE 62 [[arena-web](#)], 14330/02 ASILE 66 [[arena-web](#)], and 14651/02 ASILE 69 [[arena-web](#)], respectively.

⁷⁴ Council of the EU (2002p): Council doc. 14990/02 ASILE 75 [[arena-web](#)].

launch a silent procedure in order to reach a political agreement on its compromise proposal....”⁷⁵ The *silent procedure*, a variant of the *written procedure*, originated in the domain of foreign and security policy.⁷⁶ The official records document that the *silent procedure* ended on December 6, 2002, resulting in the administrative recognition of a political agreement among Member States’ governments.⁷⁷

A participant of the Council meeting on November 28th recalls: “With the help of the [Council] Legal Service, and also the Danish ambassador, someone asked at one moment: ‘Can we not do a written procedure?’ And the answer was: ‘Well, no, because the written procedure is a *formal* thing for adoption. But we can do a parallel thing: an *informal* one – the same thing, but *informally*, for a political agreement, that can always be done!’, and that’s what we did.”

One day after the Council meeting, the Council Secretariat, upon instruction of the Danish Presidency, sent out a FAX to all Permanent Representations. It *inter alia* contained the following passage:

Following the report from the Presidency on the JHA Council of 28 November 2002, the text of the above mentioned proposal for a Council Regulation and the draft minutes to the Council minutes ... shall be deemed agreed in the absence of comments by delegations by noon, Friday, 6 December 2002.

The interviewee explains the political purpose of this FAX: “So we gave them a week, but it was a silent procedure. Politically, if someone opposed, he had to say

⁷⁵ Council of the EU (2002q): Council doc. 14931/02 JAI 278 [[arena-web](#)], p. 5. A similar wording is employed in the Council Secretariat’s press release; cf. Council of the EU (2002r): 2469th Council meeting – Justice and Home Affairs, Brussels, 28–29 November 2002, Press Release 14817/02 [[arena-web](#)], p. 7.

⁷⁶ The *Council Guide* describes the main feature of the *silent procedure* as follows: “In this case, a decision is deemed to be adopted at the end of the period laid down by the Presidency depending on the urgency of the matter, except where a member of the Council objects.” Council (2000): *Council Guide* [[arena-web](#)], p. 28. One may note in passing that the *silent procedure* is also part of the procedural repertoire of the *North Atlantic Treaty Organisation* (NATO).

⁷⁷ Cf. Council of the EU (2003c): Council doc. 5440/03 ASILE 4 [[arena-web](#)], p. 2.

so. That was the key! If we would have had a formal written procedure, the outcome would have been to the contrary! First of all, it would have been for [formal] adoption, and [in this case] they are obliged to answer Yes, No, or Abstention. But here, being *informal*, because it was used to *confirm a political agreement*, the genius thing was to say: ‘If you oppose, say so!’”⁷⁸ As the Danish Presidency had intended, no one ever replied to this FAX.

The aftermath of this successfully concluded *informal silent procedure* is of merely legal significance and provides no further insights into the politics of Dublin II. Having confirmed the political agreement, COREPER advised the Council *as such* to adopt the Dublin II Regulation as a so-called I/A item, i.e. as a supranational legislative act to be approved of without further debate. The Regulation was *formally* adopted by the *Economic and Financial Affairs (ECOFIN) Council* on February 18, 2003.⁷⁹ Following its publication in the *Official Journal* and in line with article 29 Dublin II, the Regulation entered into force in March of 2003 and has applied to asylum applications lodged in the European Community as of September of 2003.

4. Conclusion: Strategic Calculation and Rule-following in the Council

What are the *social mechanisms* underlying national delegations’s negotiating behavior? Does the history of the evolvement of the Dublin II Regulation shed light on the conditions under which *strategic calculation* and *rule-following* come to the fore? And what, if anything, does this case tell us about the *interaction* between logics of consequentiality and appropriateness in the Council? By means of interpreting the empirical material presented above from both a Rationalist and Institutional perspective, this section seeks answers to these questions.

⁷⁸ Author’s interview, May 11, 2004.

⁷⁹ Council of the EU (2003d): 2485th Council meeting – *Economic and Financial Affairs* – Brussels, 18 February 2003, Press Release 5936/03 [[arena-web](#)], p. 36.

4.1 *Dublin II and the Logic of Consequentiality*

Until the informal *silent procedure* was launched by the Danish Presidency, at least one delegation preferred non-agreement over agreement. Numerous delegations entered “general reservations” on different versions of the draft Regulation, especially in regard to the hierarchy of criteria contained in article 10 Dublin II, in accordance with their mutually exclusive strategic interests. Given the unanimity requirement in the Council and in light of the “win or lose” character of the negotiations, this resulted in prolonged legislative deadlock. The course of intergovernmental negotiations from October 2001 through November 2002 thus largely meets Rationalist expectations.

The Rationalist “deadlock hypothesis” presented in section 2.2 above was based on the assumption that the negotiation of secondary Community law within particular Council formations generally does *not* allow for *trading concessions across issue-areas*. Whereas this assumption must not be entirely discarded, it nevertheless needs to be *relaxed*. In the end, reaching intergovernmental agreement on Dublin II, an integral part of the emerging *Common European Asylum System*, was made possible by reaching simultaneous agreement on future EU measures concerning illegal immigration and the *Coordinated, Integrated Management of External Borders*. The wide range of items on the agenda of the JHA Council allowed certain delegations to employ their initial “reservations” on Dublin II as bargaining chips in a complex game involving current and future Community measures on asylum, immigration, and external border control.

Alternatively, the outcome of the informal *silent procedure* may, from a Rationalist perspective, be interpreted in light of the concept of *strategic non-compliance*. The latter involves formally subscribing to a given set of supranational rules and procedures while planning to ignore or circumvent them in administrative practice. Within a “strategic non-compliance game,” actors agree to things they will never carry out in order to appease their partners on the other side of the negotiating table. One’s benefits of premeditated non-compliance must be

weighed, however, against the costs of losing one's reputation for being a reliable contracting party.⁸⁰ In effect, deliberate cheating is a more reasonable course of action for *homo oeconomicus* in one-off encounters than in repeated games.

Lending empirical support to the notion of *strategic non-compliance*, one can observe that certain national authorities are apparently not applying the Dublin II Regulation in “good faith.”⁸¹ It may raise some eyebrows that those authorities who were once vehemently opposed to the draft Dublin II Regulation are now the slowest throughout Europe when it comes to sending the fingerprints of asylum seekers and illegal border-crossers to the *Eurodac* central unit – a practice that, in the eyes of the Commission, “may lead to results contrary to the underlying principles of the [Dublin II] Regulation.”⁸² The Commission, well aware of the unfavorable Dublin Convention legacy, has tried to quell such “opposition through the backdoor” *inter alia* by issuing the Dublin III Regulation.⁸³ The main aim of this Commission Regulation is to facilitate the effective enforcement of “transferring” asylum seekers across the Member States of the European Union and associated third countries. Only time can tell whether or not the Dublin II Regulation and subsequent Commission Regulations will be remembered in history books as “supranational legal science fiction.”

⁸⁰ Cf. Chayes, A. / A. H. Chayes (1993): “On Compliance,” in: *International Organization*, Vol. 47, No. 2, pp. 175–205, here: p. 177.

⁸¹ Cf. Papadimitriou, P. N. / I. F. Papageorgiou (2005): “The New ‘Dubliners’: Implementation of European *[sic!]* Council Regulation 343/2003 (Dublin-II) by the Greek Authorities,” in: *Journal of Refugee Studies*, Vol. 18, No. 3, pp. 299–318.

⁸² European Commission (2005): *Second Annual Report to the Council and the European Parliament on the Activities of the EURODAC Central Unit*, Commission Staff Working Paper, Brussels, June 6, 2005, Commission doc. SEC (2005) 839 [[arena-web](#)], p. 11. Cf. Aus, J. P. (2003): *Supranational Governance in an “Area of Freedom, Security and Justice”: Eurodac and the Politics of Biometric Control*, University of Sussex: Sussex European Institute, Working Paper No. 72.

⁸³ European Commission (2003c): “Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national,” in: *Official Journal of the European Union* of September 5, 2003, Vol. L 222, pp. 3–23 [[arena-web](#)].

4.2 *Dublin II and the Logic of Appropriateness*

Not unlike other political institutions, the Council has, over time, developed its own rules of procedure and code of conduct. The Council Secretariat functions as the institutional memory of these rules and routines. Yet the Council as such, dedicated as it is to facilitating intergovernmental agreement, does not *determine* specific policy outcomes.⁸⁴

In accordance with the *logic of appropriateness*, however, the initial opponents of Dublin II exercised an institutionally expected degree of self-restraint during the *silent procedure*. They did not “rock the boat” – even though they did not applaud the “compromise proposal” presented by the Danish Presidency either. Nevertheless, both the proponents and increasingly isolated critics of Dublin II were, to borrow a term coined by Ernst B. Haas half a century ago, fully “engaged” with the Council and adhered to its informal code of conduct.⁸⁵ Speaking up during the *silent procedure* would have been perceived as inappropriate behavior. The appropriate thing to do, on the other hand, was to gracefully accept the unavoidable and to silently drop all remaining reservations.⁸⁶

Complementing this Institutionalist account, one may argue that the way particular Council formations are *organized* renders certain substantive outcomes

⁸⁴ In a similar vein, March and Olsen note that “the causal relation between institutional arrangements and substantive policy is complex” and contingent. March and Olsen (2005): *Elaborating the “New Institutionalism”* [cf. footnote 2], p. 8.

⁸⁵ Cf. Haas, E. B. (1958): *The Uniting of Europe. Political, Social, and Economic Forces, 1950–1957*, Stanford University Press, p. 522.

⁸⁶ In regard to shaming, backpatting, and other forms of social influence in international affairs, see Johnston, A. I. (2001): “Treating International Institutions as Social Environments,” in: *International Studies Quarterly*, Vol. 45, pp. 487–515, here: p. 499. Jeff Checkel prefers the concept of “conscious role playing” over social influence for making sense of behavior “in accordance with expectations – irrespective of whether [the agents] like the role or agree with it.” Checkel, J. T. (2005): “International Institutions and Socialization in Europe: Introduction and Framework,” in: *International Organization*, Vol. 59, pp. 801–826, here: p. 804.

more likely than others.⁸⁷ Where you stand on an issue like Dublin II is largely dependent on where you sit within the JHA Council's administrative and political machinery. Different organizational units attend to different things, and "understanding the ways in which attention is allocated is critical to understanding decisions."⁸⁸ In contrast to the relatively narrow focus of the "technicians" in the *Asylum Working Party*, for example, the members of the *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)* routinely coordinate different dossiers covered by Title IV of the EC Treaty. In the case at hand, the informal group of *JHA Counsellors*, the "mini-COREPER" of the JHA domain, managed to revitalize the stalled negotiations on Dublin II by drawing up a supplementary political declaration on "combating and deterring illegal immigration." Paving the way for creative compromise solutions acceptable both in Brussels and "back home" is why the *JHA Counsellors* were set up in the first place. Last but not least, the unusually strong influence of the *European Council* on JHA manifested itself in fixing a specific deadline for the adoption of Dublin II – alongside calling for the *Coordinated, Integrated Management of External Borders*, negotiating EU enlargement, and dealing with a variety of other items. Whether or not the heads of state or government associated Dublin II with anything else than the capital of Ireland, however, remains an open question.

4.3 *The Janus Face of the Council Revisited*

Helen Wallace once described the Council as a "complex and chameleon-like beast."⁸⁹ In this article, I have argued that the complexity of Council proceedings

⁸⁷ Cf. Egeberg, M. (2004): "An Organisational Approach to European Integration: Outline of a Complementary Perspective," in: *European Journal of Political Research*, Vol. 43, pp. 199-219, here: p. 202.

⁸⁸ March, J. G. / H. A. Simon (1993): "Introduction to the Second Edition," in: *Organizations*, 2nd edition, Cambridge, MA: Blackwell, pp. 1-19, here: p. 4. Cf. also March, J. G. / J. P. Olsen (1976): "Attention and the Ambiguity of Self-interest," in: March and Olsen, *Ambiguity and Choice in Organizations*, Scandinavian University Press (2nd edition, 4th printing 1994), pp. 38-53.

⁸⁹ Wallace, H. (2002): "The Council: An Institutional Chameleon?" in: *Governance*, Vol. 15, No. 3, pp. 325-344, here: p. 342.

can be reduced by resorting to two stylized images, *arena* and *institution*, suggesting that political behavior in the Council is driven by *strategic calculation* and *rule-following*, respectively. Each image helps us to describe particular facets of this chameleon-like creature, but only Rationalist and Institutionalist perspectives combined can grasp the true “nature of the beast.” Unfortunately, we are not yet in a position to study decision-making processes in the Council within an integrated framework. For the time being, the best we can arguably do is to provide a “double interpretation” of the empirical material, to delineate the domain of application under which the two perspectives empirically hold, and to highlight the causal conjunctures we observe.⁹⁰

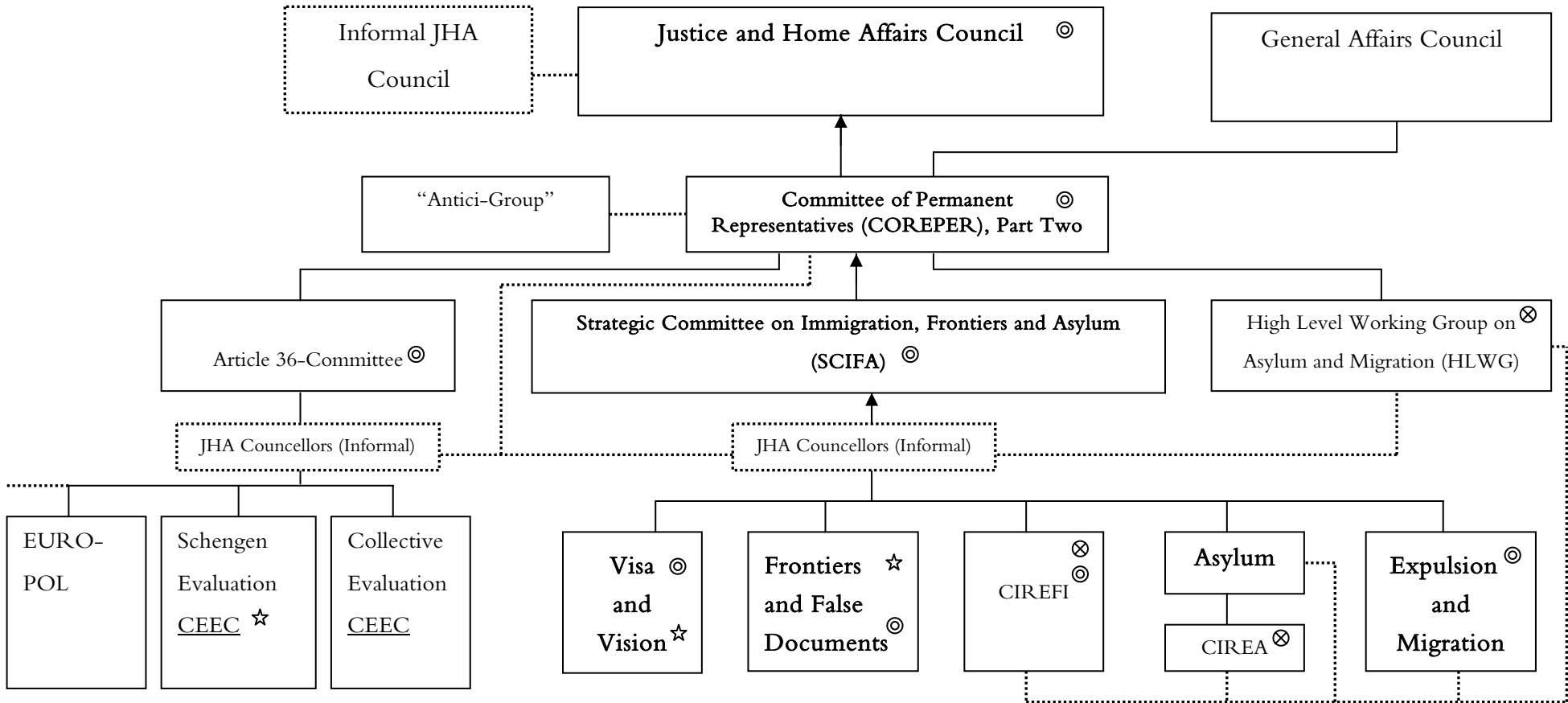
The in-depth analysis of the negotiation of the Dublin II Regulation suggests a typical choreography of decision-making processes in the Justice and Home Affairs Council. Supranational legislative dossiers relating to the establishment of an “Area of Freedom, Security and Justice” in the European Union apparently go through a phase of purposive-rational intergovernmental exchange followed by a phase of value-rational adherence to institutionalized rules. From a theoretical point of view, this signals the *sequential ordering* of different logics of action. If we could generate more knowledge about this form of interaction between logics of consequentiality and appropriateness, it would allow us to provide an empirical foundation for March and Olsen’s conjecture that “different phases follow different logics and the basis of action changes over time in a predictable way.”⁹¹ More comparative case studies are needed to validate such claims.

⁹⁰ Cf. Zürn, M. / J. T. Checkel (2005): “Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State,” in: *International Organization*, Vol. 59, pp. 1045-1079; and Aus, J. P. (2005): *Conjunctural Causation in Comparative Case-Oriented Research. Exploring the Scope Conditions of Rationalist and Institutionalist Causal Mechanisms*, University of Oslo: ARENA – Centre for European Studies, Working Paper No. 28/2005 [[arena-web](#)].

⁹¹ March, J. G. / J. P. Olsen (2004): *The Logic of Appropriateness*, University of Oslo: ARENA – Centre for European Studies, Working Paper No. 9/2004 [[arena-web](#)], p. 22.

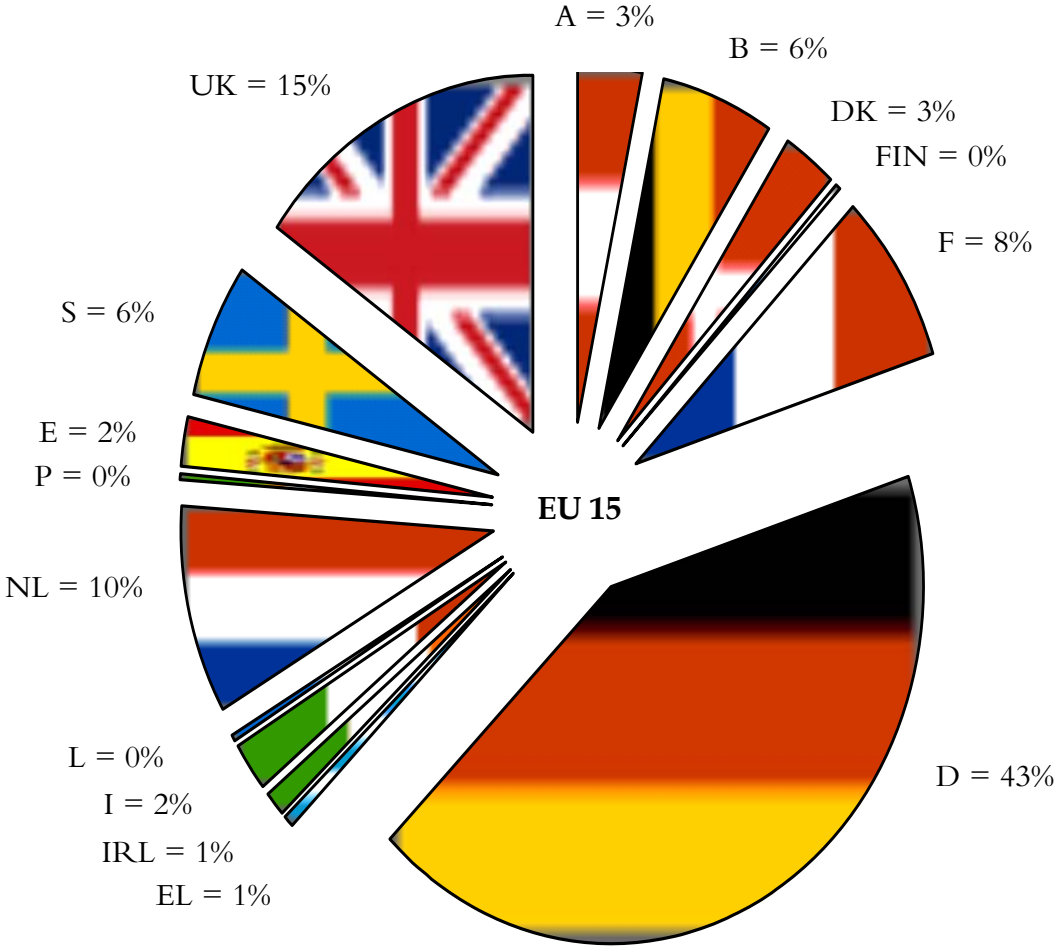
Annex 1: Working Structures of the JHA Council, 1999-2004

☆	Always related to the development of the Schengen-acquis →	<u>United Kingdom</u> and <u>Ireland</u> may “opt-in,” <u>Denmark</u> needs legal transformation, Working Party <i>must</i> also meet as “Mixed Committee” with <u>Iceland</u> and <u>Norway</u>	<div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;"> Formal Working Party </div> <div style="border: 1px solid black; padding: 2px; margin-bottom: 2px;"> Formal Communication </div> <hr style="border-top: 1px dashed black;"/> <div style="border: 1px dotted black; padding: 2px; margin-bottom: 2px;"> Informal Working Party </div> <div style="border: 1px dotted black; padding: 2px;"> Informal Communication </div>
⊙	Sometimes related to the development of the Schengen-acquis →	Positions of <u>United Kingdom</u> , <u>Ireland</u> and <u>Denmark</u> dependent on legal basis, Working Party <i>may</i> also meet as “Mixed Committee” with <u>Iceland</u> and <u>Norway</u>	
⊗	Working Party may hold joint meetings with the <u>Candidate Countries</u> and/or with the <u>U.S.A.</u> and <u>Canada</u>		
BOLD	Legislation under Title IV EC: Council acts on the basis of a Commission proposal or on a Member State’s initiative; unanimity in the Council and EP consultation (exception: visa policy) → <u>Denmark</u> : categorical “opt-out,” <u>United Kingdom</u> and <u>Ireland</u> : possible “opt-in”		



Annex 2:

Distribution of Asylum Applications Between the Member States, 1992-2001*



* This figure is based on data collected by the United Nations High Commissioner for Refugees (2002): *Number of Asylum Applications Submitted in 30 Industrialized Countries, 1992-2001*, Geneva: UNHCR, Population Data Unit [[arena-web](#)].