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To cite this article: Jan-Paul Brekke & Anne Staver (2018) The renationalisation of migration policies in times of crisis: the case of Norway, Journal of Ethnic and Migration Studies, 44:13, 2163-2181, DOI: [10.1080/1369183X.2018.1433026](https://doi.org/10.1080/1369183X.2018.1433026)

To link to this article: <https://doi.org/10.1080/1369183X.2018.1433026>



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Published online: 06 Feb 2018.



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The renationalisation of migration policies in times of crisis: the case of Norway*

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ABSTRACT

Securing collective action in the field of asylum regulation is high on the European political agenda. In this article, we look at one country's partial pullback from the regional cooperation during the high influx of asylum seekers in 2015. We use Norway as a case to analyse the challenges to common European asylum regulations and the drivers of a region-wide tendency of what we call renationalisation. Against this background, we seek to contribute to the discussion on the dynamics of Europeanisation and the future of the Common European Asylum System. While the Europeanisation of migration policies has been well covered in the literature, tendencies of renationalisation have been less so. To contribute to the knowledge base, we create a typology of the drivers of renationalisation. These drivers include necessary political and institutional preconditions, resource limitations, triggers, expectations and aspects of time.

ARTICLE HISTORY

Received 30 August 2017
Accepted 23 January 2018

KEYWORDS

Asylum; migration policies;
refugee crisis; migration
management;
Europeanisation

Introduction

It is by now well known that well over one million asylum applications were registered in Europe during 2015 and 2016,¹ and some scholars have already speculated that the response to the record arrivals may eventually lead to a paradigm shift in European migration management (Tan and Gammeltoft-Hansen 2017). What we will refer to as the refugee management crisis² came after a 20-year period of continuous harmonisation and development of a Common European Asylum System (CEAS). Despite its position as a non-member of the European Union (EU), Norwegian policy over the past 15 years has been to adapt to emerging European norms and regulations on immigration control through its participation in the Schengen and Dublin systems (Brekke 2011).

During 2015, the inability of national reception and registration systems, in particular, to keep up with the high numbers threw into question the sustainability of the existing asylum and border control regime. Several countries resorted to exceptionally reinstating controls at intra-European borders – among them, Norway, which saw a record 31,000

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asylum seekers in 2015, triple the number of the year before. As elsewhere in Europe, these arrivals occurred primarily during a few months in the autumn, further increasing the short-term burden systems.

The refugee management crisis put the tension between national and supranational interests and control at the top of the European agenda, and put into question – at least in the minds of some parts of the public – European states' ability to control their borders and the pace and form of migration. This article looks specifically at the case of Norway, which is in some ways unique, as it is not an EU Member State, but is still enmeshed in Europeanised asylum policies. It contributes to the knowledge of the dynamics of Europeanisation in the area of asylum, suggesting that Europeanisation can be reversed through what we call *renationalisation*, denoting the return to increased national control. Understanding the mechanisms of these processes will be key in securing feasible solutions for refugees, migrants, individual states and the region going forward.

Research questions

Two questions are addressed in this article: How did the tension between national and supranational migration control play out in the case of Norway, and what were the explanatory factors for a reassertion of national control? And: How can the Norway case inform the European process of developing the CEAS?

We consider Norway to be an extreme case given its position at the margins of the CEAS (further explained below), but we believe the developments described are representative of a broader trend. Addressing the shortcomings identified in 2015 and attendant government concerns will be key to securing continued cooperation and coordination and ensuring asylum systems which can handle applications in an adequate manner. We are primarily interested in the perspectives of governments and policymakers and in understanding their policy choices. Our goal is to move beyond the normative critique of the restrictive turn in immigration policies following the 2015 crisis, which was plentiful in Norway,³ and instead, contribute to understanding the dynamics of such policy changes and thereby the premises for supranational cooperation.

Approach and data

This article draws on two main data sources: documents and interviews with key informants. The written material was produced by the Norwegian Government, EU bodies, European stakeholders and commentators during the 2015–2016 refugee crisis. In particular, we examine successive proposals of restrictive measures in Norway and the following consultation period and legislative debate. Our analysis also draws on interviews with nine key informants (politicians and bureaucrats) conducted between May and November 2015. These interviews were undertaken as part of a broader research programme on multilevel governance and strains on European integration funded by the Research Council Norway. The interviews were face-to-face, semi-structured interviews, following a flexible interview guide, focusing on the relationship between the national and supranational levels of asylum regulation. The informants were themselves, or had been in close contact with, key Norwegian decision-makers leading up to the crisis. Some were actively involved in the response during the autumn of 2015.

Article structure

This article will proceed by examining the key literature in regard to the effects of Europe on national asylum and migration control policies and the Europeanisation of these policies – a central debate in the study of migration policies over the last two decades (Geddes and Scholten 2016). It will then go on to briefly outline key events in Europe during 2015 and look more in depth at the Norwegian policy response. It will end with a discussion on this response, outlining how the experiences from the Norwegian case can inform discussions on migration policy more broadly and on prerequisites for a reformed common approach to migration in Europe.

Studying migration policy and the quest for control

Migration policy – and the ability to control ‘who should be let in’ – is an area of politics closely associated with the exercise of state power and sovereignty, which is subject to international regulation only at the margins. The most important constraint is the 1951 Refugee Convention, which protects persons in fear of persecution from *refoulement*. In Europe, however, a denser layer of international rules and institutions has been put in place with the post-war signature of the European Convention on Human Rights and the more recent decision – in 1997 – to establish a Common ‘Area of Freedom, Security and Justice’ in the European Union and as part of that a CEAS.

A key debate in the migration policy literature from the 1980s onwards concerns the so-called *control gap*, stemming from the observation that despite the recognition of the state’s sovereign right to control immigration, it continued to occur through multiple streams (asylum, family, labour). Different sources of so-called liberal constraints on the state’s ability and willingness to exercise this control were successively identified, most notably domestic interest groups (Freeman 1995), courts and liberal norms (Joppke 1998).

In the context of this debate, some scholars sought to explain *why* states would agree to relinquish control over a sensitive policy area to the supranational level and develop European rules and norms such as those in the CEAS. An influential early argument held that policymakers strategically shifted immigration control policies to the supranational level as this allowed for the development of stricter control policies in a more closed policymaking venue insulated from the domestic liberalising constraints (Guiraudon 2000). Alternative or complementary explanations have held that the development of common external controls through the Schengen cooperation was a ‘logical response’ to the removal of internal borders and the creation of the internal market (see discussion in Zaiotti [2011, 8]). Thirdly, regional cooperation on and harmonisation of asylum policies can be seen as an effort to responsibility-share or responsibility-shift (Thielemann and Dewan 2006). This might theoretically happen through the removal of ‘pull factors’ in one country compared to another, leading to a more even distribution.⁴ One might also see it as a *responsibility-shifting* strategy since Dublin generally places the obligation to register, process and house new arrivals on the country of first entry. All these explanations suggest that the initial move was to varying degrees strategic on the part of (northern) states to *enhance* control, going against the initial intuition that they were giving it up.

The process of the development of European asylum policies is often termed the ‘Europeanisation’ of this policy area. The term is used in (at least) two ways: on a more basic

level, it is used to refer to the shift of decision-making power to the European level, which we just described. However, it can also refer to a process of ‘change in national institutional and policy practices that can be attributed to European integration’ (Hix and Goetz 2000, 27). While the first round of Asylum Directives in the early 2000s can be seen as a partial Europeanisation in its simple form, CEAS was recast after the Lisbon Treaty, which introduced full communitarisation of this policy area and the switch from unanimity to qualified majority voting in decision-making. It led to a further harmonisation than in the first round of directives and somewhat more liberal policy outcomes (for a comparison, see Ripoll Servent and Trauner [2014]).

What later studies suggested, then, is that a more complex picture emerged after an initial empowerment of control capacity, which some thought would lead to a race to the bottom through regulatory competition (see, e.g. Barbou des Places [2004]). Toshkov and de Haan (2013) identify several possible dynamics, of which one is exactly the opposite: the creation of minimum standards in order to *stop* a race to the bottom. Zaun (2016) has argued in the same vein that there was no race to the bottom but rather that the stronger (northern) European states – which actually had higher standards than their southern counterparts – were able to impose their preferred policies during negotiations.

Other researchers have also found that Europeanisation created new policymaking dynamics. Bonjour and Vink (2013) found that the Europeanisation of family immigration rules, which was initially viewed as highly restrictive (see, e.g. Cholewinski [2002]), subsequently ‘backfired’ and prevented the Netherlands from implementing subsequent restrictive changes – notably because of the issue coming in under Court of Justice of the European Union (CJEU) jurisdiction and experiencing spill-over from the existing, liberal EU free movement regime (Staver 2013).

Turning Guiraudon’s argument completely on its head, some have even argued that with the Europeanisation of asylum policymaking, human rights and interest organisations have increasingly reorganised their activism at a European level and have exercised more influence here than they did in individual states, leading to more liberal policy outcomes (Kaunert, Léonard, and Hoffmann 2013).

This may have been a temporary shift, however. If we look beyond the migration policy realm, very recent Europeanisation studies have grappled with the different dimensions of crisis in the EU and have identified a stronger role for Member States under certain conditions (Saurugger 2016; Dinan, Nugent, and Paterson 2017). Very recent research on the 2015 refugee management crisis also suggests that the crisis gave national governments an opportunity to increase national resources or their own margin of manoeuvre, for example through what Slominski and Trauner call the ‘deliberate non-usage’ of Europe (2017). This article contributes in particular to this latter strand of analysis, highlighting the stronger role of states.

Norway’s position in the CEAS

We can briefly outline Norway’s peculiar position in Europe and at the same time illustrate certain concepts introduced above. A passport union has facilitated cross-border travel in the Nordic region since 1950, and Norway had no choice but to join the Schengen cooperation in order to maintain this system of open borders with its neighbours. As such, Norway, as a non-EU MS, upholds the Union’s external borders. Schengen

participation comes with a legal obligation to implement ‘Schengen relevant’ elements of European law, such as the Returns Directive.⁵ As a corollary to its Schengen membership, Norway also has an agreement to apply the Dublin and Eurodac Regulations⁶ – even though it is not bound by the other Asylum Directives.⁷ We might, then, partly interpret Norway’s entry into the Schengen and Dublin systems as a form of functional spill-over effect. In light of Norway’s geographic position at the northern end of Europe, it could also be seen as a burden-shifting exercise: Italy has been the most important destination for forced returns from Norway for several years (both Dublin returns and other forced returns of third-country nationals), and our interviews suggest that Norwegian politicians at least before 2015 saw access to Dublin as a net positive from a restrictive control perspective: ‘unlike for Italy’ (INT8).

While Norway is not directly bound by the other components of the CEAS, throughout the reforms of Norwegian immigration legislation in the early- to mid-2000s it was a stated objective to harmonise with European standards. A key motivation for such harmonisation has been to avoid ‘pull factors’ in the Norwegian system, which might make it relatively more attractive to asylum seekers compared to other possible destinations. Furthermore, as a condition for joining the Dublin system, it is set out in the association agreement that Norway’s legislation had to stay basically compliant with European rules. More proactively, Norway was involved with the institutional build-up of the European Asylum Support Office (EASO) from the beginning.⁸ Arguably, the case of Norway illustrates both *horizontal* and *vertical* Europeanisation. The vertical process involves the legal obligation to transpose directives, whereas horizontal Europeanisation is a process more akin to policy diffusion, where policies are adopted due to processes of competition, cooperation or learning between different countries. It also illustrates Guiraudon’s thesis that policymakers shopped venues in order to gain control capacity, especially through the accession to Dublin. Norway has, however, been more insulated from the European-level liberalising constraints identified by later studies, and the debate over asylum standards has had a more national focus. One interviewee suggested that many Norwegian NGOs have been sceptical of the EU – in the context of a long Norwegian political debate over EU membership – and have therefore often failed to engage with policy ideas from the EU or strategically use the EU level in the ways identified by Kaunert, Léonard, and Hoffmann (2013; INT6).

The 2015 refugee management crisis

In this section, we will outline the broad strokes of the events of 2015 and the European and Norwegian policy responses. In the Norwegian case, we look more closely at two specific issues: (1) the reintroduction of border controls in the autumn of 2015 and the new border control powers subsequently proposed in law and (2) the amendments to the Norwegian Immigration Act concerning the so-called internal flight alternative.

The European level

Shortly after the formal completion of the CEAS, it was put to its first serious test. Italy had been facing a high inflow of asylum seekers and migrants across the Central Mediterranean as early as 2014, which continued into 2015 and resulted in a number of deadly

shipwrecks in the Central Mediterranean in April 2015. The broader crisis of European refugee management, however, came after unprecedented numbers of asylum seekers – a high proportion among them refugees from Syria – began crossing the Eastern Mediterranean into Greece and then moving through the Western Balkans. For many of them, the destination was Germany or Sweden, but most countries in Western and Northern Europe saw sharp increases in arrivals.⁹ Germany briefly announced that it would not apply the Dublin rules, but that announcement aside, the Dublin rules had not been applied with regard to Greece since 2011 due to identified weaknesses in the Greek asylum system.¹⁰ These circumstances arguably further incentivised asylum seekers to go north rather than apply for asylum at an earlier point (on this point, see Brekke and Brochmann [2015], which examines decision-making concerning onward movement among asylum seekers in Italy).

The strong demand from high numbers of asylum seekers already in Turkey, coupled with the dynamics of the smuggling market leading to higher supply and lowering prices (Tinti and Reitano 2017), further fuelled the inflow. By October 2015, several European states were overwhelmed, particularly in the areas of reception and registration (for the Swedish experience, see Fratzke [2017]).

Norway faced the added challenge during this period of high numbers of arrivals at the northern border with Russia, at a single border crossing point which was not equipped to handle large numbers of arrivals. Whereas only a handful of asylum seekers came this way in 2014, once the route became known in the second half of 2015, approximately 5000 persons over the course of a few weeks. The event received extensive media coverage, perhaps owing to a peculiar requirement prohibiting crossing by foot, which led asylum seekers to use bicycles for the last leg of the journey.

The EU response in brief

The 2015–2016 crisis engendered a flurry of policymaking at the European level, which cannot be done justice in this article (see, e.g. Chetail [2016]; Niemann and Zaun [2018]), but it became clear relatively quickly that the CEAS failed the test. This is why Niemann and Zaun argue that 2015 was not so much a refugee crisis as a crisis of the CEAS (2018, 1).¹¹

A new *Agenda for Migration* was proposed in May 2015 following the shipwrecks in the early spring, which already included key reforms such as the *hotspot approach*, whereby asylum seekers would be registered at designated integrated centres in Greece and Italy, and the *mandatory relocation scheme*, through which a planned 160,000 asylum seekers would be moved from hotspots for further asylum processing in other European countries (nationalities would be relocated based on their likelihood of gaining international protection). Hotspots and relocation were, to some extent, new policies rather than a form of doubling down on existing ones. However, these new ideas were in some ways taken over by events, and throughout the autumn migrants travelled en masse across the Western Balkans rather than registering at the embryonic hotspots. The Greek asylum system, in any event, did not have the capacity to handle the influx, as the inflow from a few days in October 2015 surpassed previous years' annual total asylum claims. Countries along the route, and further north in Europe, reinstated border controls during the autumn of 2015. Arrivals to Greece continued but started to taper off and

had already dropped significantly by the announcement of the so-called EU–Turkey Statement in March 2016. The deal¹² entailed that Turkey would take greater steps to prevent departures and take back asylum seekers and irregular migrants from Greece. For every Syrian returned to Turkey, another Syrian would be resettled to Europe (the one-for-one deal). The deal also included significant financial aid to refugees in Turkey and a promise visa liberalisation for Turkish citizens.

At the level of institutions, the European Commission proposed an expanded Frontex – called the European Border and Coast Guard – in December 2015. It would still be largely reliant on Member State resources for its operations. Between April and July 2016, legislative proposals for further reform of CEAS were tabled (see, e.g. Chetail [2016]). This included a reform of the Dublin system with a ‘corrective fairness mechanism’ and revisions of the Asylum Procedures and Qualification Directives, which would turn them into regulations (a stronger form of EU legislation which has a direct effect and therefore ensures complete harmonisation). The proposed regulations contained, most notably, strict measures to prevent asylum seekers from undertaking secondary movements within Europe. The Commission also proposed a significant expansion of the EASO mandate (with which Norway is formally associated), which would be turned into a full-fledged EU Agency for Asylum. During 2016, as the hotspots became fully operational, EASO significantly expanded its operational activities especially in Greece, thereby operating at the very edges of its mandate.

Norway, as a non-Member State, is not part of the negotiations on future European arrangements. As the government tersely noted in a published memo from December 2016 on negotiations on the expanded EASO mandate, ‘Norway has not been invited to take part in these negotiations. Norway has not been informed of the timeframe of negotiations’ (Ministry of Justice and Public Security 2016b).

The national level

Faced with rapidly increasing numbers of asylum seekers at both the northern external Schengen border and the southern border with Sweden, Norway’s first responses to the inflows were practical, with the establishment of new reception and registration procedures and involving new actors (most notably the Civil Protection Agency/DSB). New reception and registration centres were established at the northern border and south of Oslo, and reception capacity was rapidly expanded. An evident lack of registration capacity elicited a strong mobilisation from civil society, which organised to distribute food and clothing to newly arrived asylum seekers.

In late September, the Ministry of Justice announced increased territorial controls in areas along the Swedish border at the same time as they pointed to the necessity for the re-established controls of the external Schengen borders coupled with support for affected countries. They announced that Norway supported the hotspot strategy and would voluntarily partake in the new relocation programme, committing to a quota of 1500 asylum seekers. Two months later, upon the introduction of border and identity controls in Sweden, Norway introduced time-limited border controls at seaports and a further increase in territorial controls. Any focus on the EU dimension was absent from the announcement of these later measures. The inability of other European countries to police the outer Schengen border, in combination with influx

across the border with Russia, legitimised the government's decisions to reinforce national border controls.

To cope with the high number of arrivals, the government sought further cooperation from municipalities on reception and settlement. They also amended housing regulations to allow for the quicker establishment of reception centres through exemptions from standard requirements. Additional funding was released for affected agencies, in particular the Police, as well as municipalities shouldering the burden of reception and settlement, through a special budgetary amendment (9.5 billion NOK).

The government initiated cross-party consultations on possible restrictive measures. The Ministry of Justice and Public Security quickly began examining possible legal changes to address the inflow, looking for restrictive measures across all areas of migration policy (with the exception of labour migration). These measures were gathered into a package simply called *Restrictive measures*, presented in November 2015. The government also entered into diplomatic talks with Russia to address the flow across the northern border, as passage to the Norwegian border crossing point was only possible as long as controls on the Russian side maintained a laissez-faire attitude (as the route passes through militarised areas with restricted access).

Politically, the government was dependent on opposition support to pass legislation and sought to achieve a cross-party consensus. Following unprecedented arrivals during the month of October, there was broad political backing of the extensive list of restrictive measures, with the exception of the Socialist party and the Greens. This allowed for certain changes to be implemented over the course of just two weeks: the temporary border controls, a new regulation on accelerated procedures for persons arriving through Russia, the restriction of legal aid to persons arriving through a designated 'safe country' and the possibility to give the Immigration Appeals Board instructions guiding their practice. Some of these measures have a 'sunset clause' and would lapse in 2018.¹³

With the exception of diplomatic overtures to Russia and the co-hosting of a donor conference for Syria, it is notable that the immediate measures from late autumn 2015 are 'inward-looking', tending to the national context and the immediate situation in Norway. At this time – during the peak of arrivals – there was high uncertainty about whether the inflow would continue at the same rate, and the immigration agencies operated with scenarios of up to 100,000 asylum seekers arriving in 2016. Shortly after, however (due to the imposition of border controls not just in Norway but in other countries along the route), numbers fell and remained low throughout 2016. Almost no asylum seekers have arrived from Russia since the end of November 2015, and the 2016 and 2017 totals ended up being the lowest since the mid-1990s.

In a December 2015 cabinet reshuffle, Sylvi Listhaug of the Progress Party was made Minister of Immigration and Integration, which was the first time the entire migration policy area was centralised in one portfolio (under the Ministry of Justice).¹⁴ One of her first acts as Minister was to present the new package of restrictions, *Restrictions II*, which was out for consultations from December 2015 to February 2016. The proposal was met with criticism from public bodies, NGOs and research institutions. Certain measures were met with particular criticism: an increased use of temporary permits, in particular for unaccompanied minors; longer qualification periods for permanent residence; restrictions on refugees' access to family reunification and increased use of the internal protection alternative. The full legislative proposal, which retained most of the

original proposals in spite of the widespread criticisms, was published in April and debated in Parliament in June. By this time the cross-party consensus had eroded, and not all measures were passed. Two important legislative changes relating to refugee status determination were passed, however: a new threshold for use of internal protection alternative and a restrictive practice for unaccompanied minors with use of temporary permits until age 18.

Border control

Norway reintroduced national border controls in November 2015 as an immediate reaction to the high influx and to the actions of its neighbours, Sweden and Denmark. It has been argued that the introduction of border controls in quick succession was an attempt to avoid becoming a ‘dead end’ (Pastore and Henry 2016). It is just as likely that Norway followed its neighbours in a ‘copycat’ sense as Norway has continually been concerned that its policies should not be any more liberal than its neighbours (INT3). In addition, the proposals passed in June 2016 included amendments to articles in the Immigration Act regulating the handling of asylum arrivals at internal Schengen borders. These latter changes may have long-term effects.

The reintroduction of national border controls in Norway in November 2015 invoked Article 24 of the Schengen Borders Code (EU Regulation 2016/399). It presupposes the presence of a ‘serious threat to public policy or internal security’ and is to be reverted to only ‘as a last resort’ (Article 25.2). The maximum period for being allowed to reinstate internal border controls is six months, renewable for up to two years (Article 25.4).

Norway’s exemption was initiated in November 2015, citing ‘unexpected migratory flows’; it was renewed for six months in February 2016, pointing to a ‘continuous threat of big influx of persons seeking international protection’, and then again for a further period of six months in June 2016 (European Commission n.d.). Norway has, in several instances, joined in with neighbouring countries which are in the EU, to collectively ask of the Commission that border controls be extended beyond the time frames originally allowed in the Schengen Borders Code.¹⁵

The amendments to the Norwegian Immigration Act proposed in April 2016 included an exception clause that would temporarily (for two to six weeks) allow police to reject asylum seekers at the border in times of crisis with exceptionally a high number of asylum arrivals (Immigration Act § 9 [6,7]). In practice, this could prevent asylum seekers from making an application for international protection in Norway, referring them instead to a neighbouring country. In the preparatory works, it is specified that this would allow Norway to handle hypothetical future situations ‘where the Dublin system effectively ceases to function’ (Ministry of Justice and Public Security 2016a, 25).

Internal protection alternative (IPA)

The second example is a narrower point of legal interpretation. International protection for refugees is widely understood to be subsidiary to the protection of an asylum seeker’s own state, and states may, therefore, refer asylum seekers to other parts of their home country if they determine that protection could be found there. Under the recast EU Qualification Directive, there is a three-part test for an IPA which was previously

mirrored in Norwegian legislation: it must provide effective protection, it must be accessible and it must be reasonable to refer the claimant to it.¹⁶ However, as part of the spring 2016 restrictions, the requirement that an internal protection alternative be *reasonable* was removed. This can be seen, primarily, in the context of high numbers of arrivals from Afghanistan.

During 2016, Norwegian immigration authorities pushed heavily for returns to Afghanistan. Afghan nationals were the second largest group of asylum seekers (7000) in 2015, while their recognition rate was relatively low (31%).¹⁷ Combined with a high number of unaccompanied Afghan minors (3540 in 2015), this led the government to prioritise returns of rejected Afghan applicants in 2016.¹⁸

Not having to consider whether it was reasonable to refer Afghan nationals to seek protection in other parts of the country opened for a larger number of returns (although not of unaccompanied minors in the absence of identified caregivers). At the end of 2016, the Norwegian Police had registered 410 forced returns to Afghanistan.¹⁹ The increase in returns, in particular of Afghan families with children from Norway to Kabul, drew criticism from the political opposition as well as from international media (Nordland 2016). In December 2016, the Afghan ambassador to Norway publicly asked the Norwegian Government to stop mass deportations to Afghanistan (Kabul Monitor 2016).

During the consultations leading up to the removal of the reasonableness requirement, NGOs as well as the Immigration Appeals Board raised the question as to whether the removal would be in violation of international norms (Ministry of Justice and Public Security 2016a, 50). They were joined by the United Nations High Commissioner for Refugees (UNHCR), which pointed to their own guidelines with reference to the 1951 Convention's Article 1, case law from the European Court of Human Rights (ECHR) and the EU Qualification Directive (Art. 8). Compared to the practice under the EU Directives, the removal of the criteria of reasonableness constituted a clear departure. The Norwegian Ministry of Justice argued that UNHCR's guidelines are just that, guidelines, and as in the case of the Qualification Directive, are not legally binding for Norway. The Ministry also pointed out that it did not see the criteria as founded in consistent international jurisprudence (Ministry of Justice and Public Security 2016a, 51). It came to the attention of the Norwegian media in April 2017 that a French court had halted a Dublin return of a failed Afghan asylum seeker to Norway (NRK 2017), indicating that this court had doubts about whether the Norwegian regulations were in line with European minimum standards.

Lessons from 2015: explaining renationalisation

Two questions animate this article: How did the tension between national and supranational control over asylum policy play itself out in the case of Norway, and what explanatory factors can be identified? And: How can the Norwegian case inform the European process of developing the CEAS?

At the EU level, one could argue that a key logic of the response to the inadequate implementation of EU legislation has been to make more EU legislation, summarised as a quest for 'more Europe'. This includes the development of the hotspots, relocation and the transformation of EASO into an EU Agency for Asylum. Scipioni (2017) has considered whether this could be conceptualised as a form of 'failing forward', in line with the

past crisis-engendered progress of European integration. Given the division of competences he argued that this development had its limits; however, another trend that scholars have observed which pushes in this direction, examining the hotspots, is a kind of bottom-up Europeanisation and agencification where European implementation structures are supplementing or to some extent substituting for national implementation (Tsourdi 2016).

At the domestic level in Norway, however, the trend has not been 'more Europe'. We argue that the answer to the first question is that we witnessed a process we call a one of *renationalisation*, which we define as the reassertion of national control both within and beyond the framework suggested by negotiated European legislation. The reintroduction of national border controls is the most tangible and visible example of this dynamic. At first, it occurred *within* the existing legal framework. But as it has been continuously extended in time, it has gone *beyond* what was initially permitted in the Schengen Borders Code, as a coalition of states have pushed for continued extensions. Here, Norway's actions are arguably representative of a broader range of European states, which have together pushed for the maintenance of border controls. But more interestingly, the changes introduced in Norway to bypass the Dublin system in the future, and to expand the use of the internal protection alternative, arguably go beyond the European standards in place.

As we have explained, the *Restrictions II* proposals included a 'back-up plan' for future failures of the Dublin system, allowing for rejection at Nordic borders. As a recent CJEU ruling established, the Dublin system continues to apply in emergency situations (Khadija Jafari and Zainab Jafari v Bundesamt für Fremdenwesen und Asyl 2017) – even though the Advocate-General had argued that it should not (Advocate-General of the European Union 2017). The Dublin rules have indeed always contained a 'sovereignty clause' whereby states can take the decision to overrule the Dublin regulation. However, exercising sovereignty in that scenario entails the decision to *process* the asylum application instead of initiating a Dublin transfer. This was, essentially, what Angela Merkel, in a controversial decision, announced in September 2015 she would do with Syrians. The new Norwegian back-up plan, however, follows an opposite logic – Norway would refuse entry in the first place to persons who could, logically, be returned through the Dublin mechanism and thereby bypass it. As the Ministry put it:

The Dublin cooperation was under strong pressure and was in danger of collapsing. In light of this the Ministry considers that it is crucial that Norwegian regulations allow the government to handle a possible situation where the Dublin system effectively ceases to function. (Justis-og beredskapsdepartementet 2016, 25)

Finally, the legal change related to the internal protection alternative quite clearly means that the standard which must be met in order to obtain asylum in Norway is stricter than the standard enshrined in the Qualification Directive. One might question whether this is in line with Norwegian obligations under its Dublin Association Agreement.

Looking at the case of Norway, we want to go beyond the observation of the reassertion of national control and examine some explanatory factors in regard to this development. Some of these factors are applicable specifically to Norway, while others are more general. We see some of them as contextual, while others are more like functional imperatives (see Table 1).

Table 1. Factors contributing to renationalisation.

	Contextual factors	Functional factors
General	Breakdown of trust Political and popular pressure Lack of predictability Opportunity structure	Capacity Temporal pressures
Norway-specific	Legal position inside/outside EU. Cooperation and trust with Russia	(Capacity at the northern border with Russia)

Breakdown of trust

Norway's geographical position meant that until 2015 it could rely on southern parts of Europe as a 'buffer' for Norway against asylum arrivals. As other countries in Europe became overwhelmed, the Norwegian Government no longer *trusted* that the European system would be able to handle the arrivals in the short term – as we saw, the focus shifted from European to national solutions between September and November 2015. In addition, the direct arrivals across the Russian border added to the pressure on Norwegian authorities to regain control. Since the asylum flows through Russia were also, in effect, within the ability of Russia to control (they had not let significant numbers of people pass this way in the past), this new situation was also dependent on international cooperation in a fraught geopolitical environment.

Political and popular pressure

At the time of the crisis, Norwegian politicians faced competing political pressures to act swiftly. Especially during the early autumn, there was political pressure to 'do more' for asylum seekers, with significant volunteer efforts focused on the registration of asylum seekers. The death of Aylan Kurdi was a galvanising event in Norway as well. But with rapidly increasing arrivals, an overall willingness to help refugees in need swiftly turned into an increasing pressure to 'regain control' of the situation. This was reflected across the political spectrum.

Lack of predictability

Politicians sought to respond to these competing pressures in a context of extreme uncertainty. Even if control had been quickly restored in the Mediterranean, there were already high numbers of asylum seekers already within Europe, and it remained unclear how many of them might travel north. This depended on a range of factors which were beyond the control of policymakers, such as the possibility to travel through Europe (that is, controls at the internal borders further south), registration capacity in countries such as Sweden and Germany, smuggling networks, family links and even randomness. Previous research has shown that destination choices are often shaped en route (Brekke and Aarset 2009). However, in previous years, asylum arrivals in Norway had hewed fairly close to the numbers that authorities had prognosticated.

Additionally, there was high uncertainty surrounding arrivals from Russia. There had never been significant asylum arrivals this way, and authorities had limited information available to attempt to gauge how this flow would develop. This led to a shift away

from prognoses to the development of different scenarios, including ‘worst-case scenarios’, in order for authorities to try to prepare for much higher arrival numbers than before. It was extremely difficult to say, however, what the most likely scenarios would be.

Opportunity structure – at the edge of the European Union

European integration is not deeply anchored in Norwegian party politics, and following *no* votes in two referenda on EU membership (in 1972 and 1994), the question of Norwegian entry into the EU has rarely seemed more moot than in the past decade of concurrent European crises. During 2014–2016, Norwegian attitudes to EU membership were more negative than ever before, with more than 70% of the population against it (Gullestad 2016).

Even though Norway is thoroughly enmeshed in the European project, in particular through the EEA and Schengen agreements, European cooperation in the area of asylum remains a relatively technocratic exercise, cushioned within the general idea that Norway should not stray from the European norm. As we noted participation in the Dublin system has been seen as politically beneficial because Norway, until 2015, would not often be the first country of registration or passage for geographical reasons.

As a consequence of never having fully joined the CEAS, Norway was also legally in a position to more easily pull back from it. We have noted that Guiraudon’s venue-shopping thesis (2000) was most useful for explaining the shift to European-level policymaking during the early phase and that political scientists have considered it to have limited purchase on later developments – largely because of the changing dynamics of European decision-making with the entry of new actors and with the shift to qualified majority voting. It might, however, yield some insights into Norway’s response during the autumn of 2015.

Norway participates in asylum-related EU summits and meetings at the mercy of the other MS and did not enjoy full access to the EU venues where decisions were being made in the autumn of 2015. As it was noted in the memo cited earlier in this piece, Norway was not even informed of the timeframe for the negotiations of all the new asylum regulations.

Norway ran a low risk of direct European sanctions, such as possible infringement procedures, from the EU by taking certain kinds of unilateral measures since it was only indirectly bound by relevant minimum standards. This was particularly true of the legal changes concerning the internal protection alternative.

It could thus be argued that Norway faced a somewhat different *opportunity structure* than MS when it came to renationalising its asylum policies, stemming from its inside–outside position. At the same time, the actions taken by the Norwegian Government were in line with the overall trend in key Member States that exhausted the national room to manoeuvre. However, while these countries were restricted by the full set of CEAS norms, Norway was not and did not run the same risk of being sanctioned.

Capacity limitations

The high number of arrivals pushed the budgetary and practical *capacity* of the Norwegian asylum reception system to its limits in 2015. In addition to record additional budgets for

reception centres, the prognosis of future costs and needs for direct assistance as well as long-term integration costs increased the pressure on the government to regain control.

Temporality and pressure to act quickly

Besides having limited formal access to the EU policymaking venue, there were also other, more general reasons for Norway to look closer to home for practical and policy solutions, which would apply in any country. The national policymaking venue has different characteristics than the supranational one. It is smaller, with fewer players, and there is a much shorter route from decisions to implementation in several senses of the word. Furthermore, actors would be likely to be relatively unified in their interests, whereas European states might be more likely to be tempted by free-riding strategies (e.g. waving migrants through rather than registering them). At the European level, solutions had to be negotiated between actors with opposing interests, whereas at the national level there was both more unity of interest and more direct decision-making powers.

There was no time to wait for common solutions – which would take time to negotiate – in order to address the situation on the ground: the existing reception capacity was under strain and urgent measures were needed. The temporal element and the need to take immediate national measures *in the meantime* while waiting for supranational solutions were explicit in the *Restrictions II* package, presented at the end of December:

The implementation of common responses looks like it will take time, and the measures so far do not appear to have the intended effect. This has led several European countries, including Norway, to propose and implement measures nationally. (Justis-og beredskapsdepartementet 2016, 11)

Conclusions

We would like to first make one general point based on our findings in this article, which is that European integration is not a one-way street. The reintroduction of border controls and their continual extension may equally well signal the death of Schengen as an ‘ever-closer union’ – a trend not just exemplified by what we have called the renationalisation of asylum policy like that in Norway but reflected in the strong resistance of Eastern European states in the discussion on relocation and burden-sharing (and, perhaps ultimately, by Brexit). This contributes to, and confirms, the recent research on Europeanisation both in the migration field and elsewhere.

A second finding of this article, which speaks to the literature on the so-called control gap and various efforts to understand liberalising constraints in asylum policy, is also that some such constraints can be overcome in times of crisis. Policymakers might have previously and under different circumstances listened to domestic pressure groups, or might have taken on board the recommendations of the UNHCR, or might have sought to align their policies with neighbouring countries. In 2016, none of these things happened, and Norway implemented changes to their asylum legislation which they might have never previously considered – and which were arguably in some instances below the established EU-wide standards to which Norway was (indirectly) committed.

A somewhat self-serving point we would also like to make is that the situation in 2015 was made much more difficult by the high levels of unpredictability and uncertainty. This

speaks to the need for high-quality and timely migration data and analysis, and indeed a response to the 2015 situation has been to instigate a number of projects on migration modelling and forecasting. While we are unlikely to be able to accurately model migration flows, given the multitude of factors determining them, we may achieve a better capacity to predict and prepare for future challenges.

A revised common European regulation of the asylum field, overcoming the challenges of collective action, will need to account for the shortcomings displayed on the European and national levels during the 2015 crisis. Norway is not part of those negotiations – and it remains to be seen how it will align its policies with future EU regulations and relate to the new EU Agency for Asylum. Certain lessons may perhaps be drawn from the Norwegian experience, however.

As we have argued, we witnessed a breakdown of trust in the EU as well as in other countries, which according to CEAS and Schengen rules, were supposed to do the job of policing the external border. As the 2015 situation made clear, many of the front-line states, which were supposed to do the job of reception and registration, did not have the administrative capacity to do so. Norway sought to resolve this by introducing into law its own domestic back-up solution to bypass the Dublin system in the case of future failures. If states are to place their trust again in each other in this sensitive field, one approach might be to codify clear and comprehensive back-up solutions in the way that the Schengen system already allows for temporary returns to border controls. Proposals on the table with regard to interventions from the EU Asylum Agency in countries under high pressure as well as the corrective fairness mechanism might provide assistance to overburdened frontline states. These mechanisms, if they are implemented, are less likely to be applied to the strong regulatory states like Norway, which have a more national capacity, but unless regulated they may continue to use that capacity unilaterally and undermine the idea of cooperation, which further lessens trust.

In brief, we believe that this article showcases the necessity to anchor future cooperation in a clear understanding of the national political imperatives of control, which all policy-makers must grapple with. If they are to successfully recommit to cooperation, states may wish to have clear contingency plans which they can rely on if their partners are unable to carry out their part of the bargain – but these should be regulated, and not unilateral. On the other hand, the Norwegian experience offers relatively little hope for activists seeking to counter restrictive policy trends, at least when operating in times of crisis and high uncertainty. They may have an easier path with low arrival numbers in trying to undo some of the restrictions in place. For governments, a period with low numbers opens for re-establishing trust among Member States and re-calibrating a common policy platform. In this endeavour, we believe that the experiences from 2015 must play a key role, including the factors that lead to renationalisation following the crisis. These include making the variations in arrivals more predictable, securing trust between Member States, being open about capacity challenges and the impact of national political pressures.

List of interviews

1. Interview informant from political party A leadership, October 2015 (INT1)
2. Interview informant from political party B leadership, September 2015 (INT2)

3. Informant Directorate of Immigration, September 2015 (INT3)
4. Civil servant I Ministry A, August 2015 (INT4)
5. Civil servant II Ministry A, August 2015 (INT5)
6. Expert informant, previous key position in Directorate of Immigration, November 2015 (INT6)
7. Expert informant, previous key position in Ministry A, June 2015 (INT7)
8. Expert informant, previous key position in Ministry B, May 2015 (INT8)
9. Expert informant, previous key position in Ministry A, November 2015 (INT9)

Notes

1. According to Eurostat data (migr_asyappctza dataset), approximately 1.3 million applications were registered in 2015 and 1.2 million in 2016. In 2015, the top countries were Germany, Hungary, Sweden and Austria. In 2016, the top countries were Germany, Italy, France and Greece. Many of the German applications registered in 2016 were part of a backlog from 2015.
2. We refer to the 2015 response as a crisis of management rather than a refugee or migration crisis, as the refugee crisis properly speaking is not occurring in Europe. One might debate whether the term ‘crisis’ is appropriate (see, e.g. Chetail [2016]), but there was a sense of ‘crisis’ within governments attempting to deal with the increasing numbers (see also Niemann and Zaun [2018]).
3. The list of suggested restrictions from the government in December 2015 received critical comments from more than 150 organisations, academic institutions and individuals. These include UNHCR (in English), UNICEF, the Norwegian Helsinki Committee, the Norwegian Ombudsman for Children and others; see <https://www.regjeringen.no/no/dokumenter/horing--endringer-i-utlendingslovgivningen-innstramminger-ii/id2469054/>.
4. However, this does not take into account other pull factors, such as the labour market or diasporic ties.
5. Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.
6. The Dublin Regulation is now in its third iteration (Regulation 604/2013), and it allocates responsibility an asylum application lodged in the European Economic Area (EU with additional agreements with Norway, Switzerland and Iceland as well as Denmark, which has opted out of Justice and Home Affairs-related EU matters). Eurodac is the fingerprinting database used for the identification of applicants.
7. The remaining Directives making up the CEAS are the Asylum Procedures Directive (2013/32/EU), the Qualification Directive (2011/95/EU), the Reception Conditions Directive (2013/33/EU) and the Temporary Protection Directive (2001/55/EC).
8. One policymaker from the left interviewed for this study suggested that EASO had been seen at that end of the political spectrum as a possible coordinator of minimum asylum standards in the absence of forceful intervention from UNHCR (INT1).
9. While the highest numbers of asylum applications were registered in 2015 in Germany, Hungary, Sweden and Austria, Hungary also saw particularly high numbers of withdrawn applications (Eurostat mig_asywitha dataset).
10. The European Court of Human Rights found both Belgium and Greece to be in violation of Art. 3 in relation to the detention and deficient asylum procedure of an asylum claimant returned from Belgium through the Dublin procedure (*M.S.S v Belgium and Greece*, ECtHR, 2011).
11. Tan and Gammeltoft-Hansen (2017) see a crisis in what they label the deterrence paradigm of international protection.
12. Which, officially, is not an agreement between the EU and Turkey but an announcement made by heads of state, as confirmed by the Court of Justice of the European Union on 28

February 2017 in the linked cases NF, NG and NM v European Council (T-192/16, T-193/16 and T-257/16).

13. In January 2017, the government proposed to make some of these measures permanent. This was still being discussed at the end of that year (Ministry of Justice and Public Security 2017).
14. With the little-noted exception of labour migration policy, which remains within the remit of the Department of Labour and Social Affairs.
15. For the moment, controls are in place until May 2018, upon recommendation of the European Council. The Commission proposed in autumn 2017 to amend the Schengen Borders Code to allow for extended controls (European Commission 2017).
16. Directive 2011/95/EU Art. 8.
17. Asylum statistics were obtained from the Directorate of Immigration at <https://www.udi.no/statistikk-og-analyse/statistikk/>.
18. In other words, half of the Afghan asylum seekers to Norway in 2015 were registered as unaccompanied minors. Two out of three unaccompanied minors arriving that year were from Afghanistan.
19. Up from 89 returns from Norway to Afghanistan in 2015 according to the National Police Immigration Service statistics at https://www.politi.no/politiets_utlendingsenhet/statistikk/.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

This study was conducted as part of the project *European Strains*, sponsored by the Research Council of Norway [grant number 227072/F10].

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