Journal of Health Politics, Policy and Law
Roos ▪ The EU as Determinant of National Health Policy

# The EU as Active and Passive Political Determinant of Forced Migrants' Health: Insights from the Case of Germany

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## Abstract

**Context**: This article examines the EU's function as political determinant of health (PDoH) in national-level regulation of forced migrants' access to health(care), with a focus on Germany. It sheds light on the role the EU has come to play – and been assigned – in national policymaking under the impression of different crises.

**Methods**: By applying the concepts of *claims* and *frames/framing*, the article examines in a document analysis how and to what end(s) 'the EU' as a polity as well as specific EU legislation were invoked in German draft legislation.

**Findings**: Increasing Europeanisation in the areas of health and migration has not only forced national legislators to adapt legislation in order to abide to EU rules and standards, but has also prompted governmental actors to shift responsibility for policy reforms to the EU – even in cases where not all of these reforms were legally required.

**Conclusions**: The EU's role as PDoH must be considered from two angles: the Union's *active* potential to determine public health through its policies and laws; and its *passive*, to some extent involuntary, potential to do so through the strategic invoking of EU norms, rules and (in)competences by actors across the EU multilevel-governance system.

**Keywords** Political determinants of health, framing, forced migrants, Germany, EU

There are a number of areas in which EU member states have shown steadfast reluctance to transferring political competences to the European level. Among them are two areas that have in recent years experienced a sharp increase in EU action in the guise of crisis management: namely, health policy in the context of the COVID-19 pandemic on the one hand, and asylum policy under the impression both of the so-called 'migration crisis'[1] and Russia's reinvasion of Ukraine on the other. Both areas have in themselves become venues of intensified political

[1] In this article, the term 'migration crisis' is put in inverted commas as it has significant potential to oversimplify and politicize the events and developments in the context and wake of sharply increased numbers of asylum seekers from 2014/2015. Indeed, the article adopts the view of Giudici (2020:44) that "what often has been labelled as a 'refugee [or migration] crisis' is, more precisely, a crisis of transnational politics on the one hand and the result of the (mis)management of arrivals and reception at the national level on the other". For lack of a more appropriate, yet equally short alternative, the term is used here nonetheless, yet always in inverted commas to express the author's distancing from and awareness of the problems inherent to it.

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instrumentalization and politicization within the EU multilevel system, with political actors at all levels pursuing strategies of blame-shifting and scapegoating, but also of standard-setting in their attempts to hammer out new rules and policy measures in the two areas, and to sell said rules and measures to their electorates. Providing political actors with the opportunity to be invoked both as scapegoat and role model (and anything in between), the EU has in itself become a political determinant shaping not only political discourses in the areas of asylum and health policy, but also political and regulatory outcomes.

Considering policy-making in crisis and under (perceived) strain as a lens of larger policy dynamics, this article examines the EU's functioning and attribution as political determinant at the intersection of the two above-mentioned policy areas. Namely, the article sheds light on the role the EU has come to play – or rather, has been assigned – in the political regulation of forced migrants'[2] access to health and healthcare in a crisis context. Seeking to untangle the complex interconnections of different policy areas and governance levels therein, the article focuses on the case of one specific member state: Germany. The Federal Republic is one of the member states particularly invested in EU discourses and policy-making in the areas of asylum and health policy, and not least in the carving out of recent intra- and cross-EU crisis responses in both areas (Reiners and Tekin 2019; Schelkle 2021). What is more, Germany is known as one of the EU member states referring most frequently to EU law in their own national-level legislation, not least because of its federal tradition of multilevel governance. Whereas this might suggest a limited degree of

[2] The term of 'forced migrants'/'forced migration' is used here despite the fact that, as discussed i.a. by Bivand Erdal and Oeppen (2018), the forced-voluntary distinction in migration studies should constitute a continuum rather than a dichotomy. However, since this article studies legislative texts (and hence the host state's perspective) rather than migrants' experiences, it adopts the term nonetheless, in want of an alternative comprising all groups of persons subsumed under this term – namely, persons seeking protection in a host country (both before and after formally applying for it), and persons who have received an official decision on their asylum application (e.g. persons granted refugee or subsidiary protection status, but also rejected asylum seekers, not all of whom, however, face deportation due to health reasons, the situation in their country of origin etc.). In so doing, the article tries to be as fair and inclusive terminologically as possible, whilst simultaneously upholding as high a degree of terminological concision as possible.



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generalisability of findings from the German case, increasing Europeanisation tendencies in both the areas of migration/asylum and health policy suggest that, over time, the frequency of references to the EU in national (draft and adopted) legislation in these areas are likely to increase across the Union. Especially when it comes to selling legislative change to electorates, governmental actors might look at how policy makers in other member states have made use (more or less 'successfully') of EU references. In this sense – in addition to the relevance of the German case because of the country's sheer size and resulting impact on EU politics and political as well as social discourses – this article produces insights on the study of national actors' usage of EU references that may be transferable to other member state cases.

Whilst Germany's role in EU politics and policy-making in the context of the different above-mentioned crises has been studied, the role assigned to the EU and its policies in German national-level policymaking and its consequences within the same context have received less – if any – scholarly attention. Seeking to remedy this research lacuna, this article pursues to answer the following research question: *How and with what purpose was the EU used as point of reference in German draft legislation on forced migrants' access to health(care) under the impression of recent crises in the areas of migration and health?*

To this end, the article conceptually approaches the EU as political determinant of health (PDoH) both in a polity and a policy sense. Namely, it examines (1) how and in pursuit of what purpose(s) 'the EU' as a polity was invoked; and (2) how concrete EU legislation figures in German draft legislation in the area, and with what purpose it was invoked. Methodologically, the study is based on an analysis of *claims* (following Ruedin 2017) and *frames/framing* (following Sainsbury 2012) regarding the EU in governmental policy documents. Whilst a more extensive analysis could dive into a broad bandwidth of such documents – such as governmental decisions and declarations, governmental and

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ministerial statements, and speeches by members of government in parliament – this article focuses on the arguably most impactful type of governmental policy documents: namely, draft acts. The analysis of these law proposals shows that, although the legal regulation of forced migrants' health(care) access remains largely a national competence, increasing integration processes in the areas of health and asylum policy have not only forced national legislators to adapt policies and laws in order to abide to EU standards and legislation, but that they have also prompted governmental actors to shift the responsibility for policy reforms to the EU – even in cases where not all aspects of such a reform would have been required based on EU legislation. Through these intertwined processes, the EU has become a – to some extent involuntary – political determinant of forced migrants' health.

The article is structured as follows: the following section outlines the conceptual basis of the analysis, with the first sub-section discussing the understanding of 'political determinants of health' applied in this article, whereas the second sub-section presents the methodological framework with the two above-mentioned pillars of *claims* and *frames/framing* on which the analysis is built. Thereafter, the main section of the article will trace framing and claim-making processes in the German government's discursive behaviour in the regulation of forced migrants' health(care) access within the temporal context of the above-mentioned crises. It will do so in two steps, as indicated above, starting with an examination of instances in which the EU as a polity is invoked, followed by a sub-section focusing on references to concrete EU legislation. The article closes with a concluding section discussing the results of the analysis and their broader relevance in studying to what extent the EU has become a political determinant of health in the context of national-level policymaking processes.

## Conceptual Approach

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This article builds on a bipartite conceptual basis in its examination of the EU as political determinant of health. In so doing, it seeks to contribute to this special issue's pursuit of sharpening and substantiating our understanding of political determinants of health in the EU multi-level governance system through a clearer definition and more systematic operationalisation of the term of PDoH. To this end, this section is divided in two sub-sections focusing precisely on these two steps: the first sub-section offers a *definition* of PDoH in the EU context, whereas the second sub-section focuses on the *operationalisation* of the terminology thus defined by means of the methodological toolbox of a frames/framing and claims analysis.

It might be noted that parts of the conceptual approach outlined below show some parallels to Europeanisation concepts, not least as regards the EU's role as norm-setter in national politics and legislation via European hard and soft law, or processes of so-called downloading, i.e., of adjusting national-level (or below) policies and politics to standards determined at the EU level (Dosenrode 2020). While the processes examined below can indeed be fruitfully analysed through both approaches – the EU as PDoH, and the Europeanisation of/'downloading' processes shaping national policies – this article seeks to contribute first and foremost to the larger aim of this special issue, namely, to establish a much-needed focus on the European level in the wider field of analysis of political determinants of health, in which the conceptual approach to the analysis below is thus primarily embedded.

*Political Determinants of Health*

Examining the function of the EU (and EU policies/legislation) as a political determinant of health for the specific group of forced migrants might, at first view, seem like a rather



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marginal approach to the larger quest of studying the EU's impact on public health. However, when looking at the existing literature on PDoH, the examination of policy-making processes focusing on this specific target group seems almost an intuitive choice: namely, much of the literature on PDoH looks explicitly at health inequalities, and on the impact of increasing politicisation of the area of health on particularly vulnerable groups (for a discussion and literature overview, see Dawes et al. 2022). Forced migrants are in a twofold sense subject to such politicisation processes, given that their healthcare access figures in – increasingly charged – political debates not merely under the impression of intensifying politicisation of the area of health, but at the intersection of health policy and another, at least as (if not more) politicised and politically instrumentalised area: namely, the area of migration and asylum policy (Roos 2022). In consequence, the EU's function as political determinant of forced migrants' health has been extended at any moment the EU acquired new competences not just in the area of health, but similarly of migration and asylum policy. These competences comprise options for legislative as well as non-binding measures, in short: any EU action which exerts some form of impact on member states' healthcare and incorporation systems (national systems because neither of the two has been institutionally/structurally Europeanised).

This article demonstrates, however, that the conceptualisation of the EU as political determinant of forced migrants' health needs to apply an even broader approach to EU influence: namely, beyond the EU's *active* role in shaping policies and their implementation, we need to consider its *passive* role in national-level policymaking and implementation processes. More specifically, the EU influences – if at times in unintended ways – this group of persons' health through the way in which its laws, rules and norms are understood and invoked by political actors at national (as well as regional and communal) levels, whenever these actors' interpretation of EU laws, rules and norms impacts their actions vis-à-vis forced

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migrants' health(care) access and, more broadly, living situation as regards any health-related aspect. In that sense, the EU has become a PDoH in a primary (through *its own* laws, rules and norms) and a secondary sense (through sub-EU level actors' *interpretation and instrumentalisation* of EU laws, rules and norms).

In order to analytically apply these two dimensions, we not only need a methodological toolbox for the empirical study of related policy-making processes, but first and foremost a sound understanding of the term 'political determinant of health' in itself. Ottersen et al. (2014: 633) provide a helpful starting point with their definition of global political determinants of health as the "norms, policies, and practices that arise from political interaction across all sectors that affect health". This rather broad approach can be usefully advanced through the conceptualisation by Dawes et al. (2020: 44), who define PDoH as

> the systematic process of structuring relationships, distributing resources, and administering power, operating simultaneously in ways that mutually reinforce or influence one another to shape opportunities that either advance health equity or exacerbate health inequities.

According to Dawes et al., PDoH "disproportionately influence and impact all the determinants of health" by erecting or abolishing "systemic barriers to health-enhancing opportunities" (ibid.: 45). In a more general conceptualization of PDoH, Dawes et al.'s focus merely on factors shaping the manifestation of health in-/equities is not strictly necessary and can indeed be broadened to comprise any aspect influencing the examined group(s) of persons' health.

For the analysis of the characteristics and impact of political determinants of health, Dawes et al. suggest to examine "structures, processes, and outputs" (ibid.) within the respective political system. Kickbusch (2015: h81) calls for an even broader research agenda

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> Looking at health through the lens of political determinants means analysing how different power constellations, institutions, processes, interests, and ideological positions affect health within different political systems and cultures and at different levels of governance.

This article suggests a combination of both approaches: whilst Dawes et al.'s triad leaves out the analytically somewhat more difficult to grasp, yet highly impactful dimensions of power constellations, interests, ideological positions, and cultures, it includes the crucial dimension of outputs, which is not explicitly covered in Kickbusch's definition. All of these deserve consideration in a comprehensive approach to the study of PDoH. Figure 1 merges the two approaches into one overarching conceptual framework that can guide the study of political determinants of health.

[Figure 1 about here]

*Frames/Framing and Claims as Methodological Tools to Analyse PDoH*

This analysis starts from the assumption that in a context that is emotionally and normatively charged – such as the context of crisis analysed here – processes of justification and responsibilisation play a particularly significant role in policymaking. The factors political actors perceive, or (strategically) declare, to determine political outcomes constitute part of the frame that defines and delimits their political scope of action. Understanding these factors helps thus, in turn, to understand their behaviour, as well as the thereby influenced political outcomes which determine different groups of persons' (access to) health. To trace a specific set of such factors – namely, governmental actors' references to the EU in policies impacting forced migrants' health(care) access – this article draws on two methodological concepts:

First, it resorts to the concept of frames and framing by Sainsbury (2012: 139), which is useful in tracing actors' "problem construction and justification". More specifically,

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framing "establishes who should have jurisdiction over an issue and formulate solutions. […] Framing and the politics of justification can influence the scope of support for policies, mobilizing both backers and opponents, and thus have an impact on alliance building and policy coalitions" (ibid.). It can thus be considered a crucial element in governments' pursuit of legislative, but also electoral success. Both dimensions of success are vital for governmental actors in their pursuit of majorities for their policy initiatives in the present (not only in parliament, but to some extent also in the public – for too vivid protest might induce individual or even groups of parliamentarians to refrain from backing a governmental initiative in fear of losing electoral support) as well as the future (i.e., in the sense of vote gain maximisation in upcoming elections). Successfully justifying political initiatives through certain frames thus bears much weight in governmental actors' behaviour.

Second, for a more fine-grained analysis of governmental actors' discursive behaviour, the article builds on the concept of claims as defined by Ruedin (2017: 11), who says that "a claim exists when a political actor […] makes a statement that suggests some aspect of policy is to be changed. Each claim can be positive or negative – its tone –, and uses a certain justification – its frame". Beyond Sainsbury's framing conceptualisation, the following analysis thus also examines the *tone* of governmental actors' EU references in policy-making processes on forced migrants' access to healthcare.[3] In so doing, it seeks to establish an even more detailed understanding of the extent to which the EU as an entity, and EU legislation, have become political determinants of forced migrants' health. To this end, this article slightly extends Ruedin's conceptualisation: he states that *target groups* of certain policies "do not simply exist in legal terms but they are constructed, questioned and

[3] It should be noted that this distinction of a positive vs. negative tone (understood importantly as a continuum rather than a dichotomy) is unrelated from the distinction of positive vs. negative integration (see Scharpf 1995). After all, Ruedin's conceptual approach to the analysis of claims is applicable not only to research objects within the wider scope of European integration; rather, the examination of claims' distinct tone forms here part of the establishment of the respectively analysed text's meta information.



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maintained within political debates in general, and claims-making processes in particular" (ibid.: 8). This article assumes that the same is true also for *target entities* of policy actors' claims, such as – here – the European Union, its corpus of laws and policies, and its Court's case-law.

**Analysis**

Situating the research object of this article in the larger conceptual framing of a PDoH analysis presented above (see Figure 1), forced migrants' access to health(care) in Germany is regulated within the normative and systemic setting a) of a restrictive incorporation regime, and b) of a social insurance-based healthcare system within a conservative-corporatist welfare state. The main law regulating forced migrants' health(care) access is the Asylum Seeker Benefits Act, adopted first in 1992 against the background of sharply increased numbers of asylum seekers in the context of the Yugoslav Wars, with the aim to reduce these numbers i.a. by abolishing 'incentives' (in the form of social benefits) and by deterring potential asylum seekers. This context produced a framework of rules largely applying (with minor revisions) until today: asylum seekers are granted access to healthcare only in case of acute illness or pain, with the exception of pregnancy and birth. Only after 18 months – or after being granted a protection status – do forced migrants receive full legal access to the German healthcare system (Roos 2023; Kuhn-Zuber 2018).

The German government's references to the EU in legislative proposals concerning forced migrants' health(care) in recent years of (perceived) crisis reveal a number of patterns in the respective framing of required legal change in times of strain. As indicated above, the following analysis focuses on the appearance of references to the EU as a *polity* on the one hand, and to specific EU *legislation* on the other. Before diving deeper into the analysis, it should be noted that, for reasons of limited space, this article cannot provide a full-fledged

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and comprehensive analysis of all draft legislation concerning forced migrants' healthcare access proposed by the German government within the examined timeframe. Indeed, this section seeks merely to provide exemplary evidence that the conceptual approach to PDoH outlined above merits further examination and application, not least in (but certainly not limited to) the study of policymaking with an impact on the health of vulnerable groups of persons. To this end, the following sheds light on EU-related frames and claims used by the German government in a selection of draft bills which were (and are) particularly relevant in the regulation of forced migrants' access to health(care), and which were systematically examined, coded and interpreted for this article within a document analysis. Namely, this study examines references to the EU and EU legislation in the following five draft bills, all of which are openly accessible via the websites of the German *Bundestag*, the Federal Ministry of the Interior, or the Federal Ministry of Labour and Social Affairs[4]:

- Draft act on the acceleration of asylum procedures, 29 September 2015 (DA1),[5]
- Draft act on the introduction of accelerated asylum procedures, 1 February 2016 (DA2),[6]
- Draft third act amending the asylum seeker benefit law, 11 April 2019 (DA3),[7]
- Draft second act on better implementation of the obligation to leave, 16 April 2019 (DA4),[8]

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[4] This selection does not comprise a draft bill stemming from the 'hot' phase of the COVID-19 pandemic for the simple reason that between spring 2019 and autumn 2022, the government did not propose any legislation significantly altering forced migrants' health(care) access.
[5] Accessible online: https://dserver.bundestag.de/btd/18/061/1806185.pdf [06.04.2023].
[6] Accessible online: https://www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/Downloads/referentenentwuerfe/160201-g-e-einfuehrung-beschleunigte-asylverfahren.pdf;jsessionid=0BF949029A0DB274072A9D3375B518C3.2_cid364?__blob=publicationFile&v=2 [06.04.2023].
[7] Accessible online: https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Referentenentwuerfe/ref-drittes-gesetz-zur-aenderung-des-asylbewerberleistungsgesetzes.pdf?__blob=publicationFile&v=2 [06.04.2023].
[8] Accessible online: https://www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/Downloads/kabinettsfassung/geordnete-rueckkehr-ges-2019-

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- Draft act on the acceleration of asylum court proceedings and asylum procedures, 8 November 2022 (DA5).[9]

*The EU Polity as Frame of Governmental Proposals*

Throughout the EU's and its predecessors' (i.e., the European Communities') history, there has been no German government with an ideological position or agenda that could be described as even remotely Eurosceptic. Indeed, European integration has been an inherent element of Germany's post-war economic, political and diplomatic recovery; and albeit the German government's attempts at taking a leading role in furthering the European project have evidently been in pursuit of specific national interests, they have always been embedded in a pro-European framing (for an up-to-date discussion of Germany's role in European integration and scholarship thereon, see Freudlsperger & Jachtenfuchs 2021). This fundamentally positive attitude towards European integration, and Germany's role as promoter thereof, might lead to the expectation that references by the German government to the EU as a whole in its policy proposals would bear a dominantly positive tone, including in proposals touching upon the issue of forced migrants' health(care) access. This hypothesis might be reinforced by the fact that the German government has in recent years repeatedly called for closer integration and more EU competence in both asylum and health policy – although, again, driven largely by national interests (Zaun & Ripoll Servent 2021; Brooks et al. 2021).

kabinettsfassung.pdf;jsessionid=516B57FC15B574130B0A9F552C7AD907.2_cid364?__blob=publicationFile&v=5 [06.04.2023].

[9] Accessible online: https://www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/Downloads/kabinettsfassung/gesetzentwurf-beschleunigung-asylverfahren.pdf;jsessionid=6D62AD79CF43F0361487D11AA58EB209.1_cid364?__blob=publicationFile&v=1 [06.04.2023].



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Such a positive framing of the EU polity, however, appears but rarely in the draft legislation analysed here. Instead, general references to the EU are largely negative in tone, in that they point out – sometimes more, sometimes less explicitly – a lack of solidarity within the EU and among its member states as major problem justifying the introduction of more restrictive national-level regulations in Germany as "far disproportionately burdened" (DA1: 1) member state in cross-EU comparison. One consequence of this perceived solidarity and openness disequilibrium was the German government's decision from September 2015 onwards to further limit the level of resources the Federal Republic would (have to) invest in forced migrants. This applied particularly to those forced migrants the responsibility for whom lay with another EU member state, be it because they first entered EU territory/were registered as asylum seekers there, or because another member state had already granted them a protection status. Justifications of consequently restricted access to benefits and health(care) in the draft legislation analysed here partly referred to specific EU law as legal framework (see below), but partly also pointed out that other member states' responsibility made more liberal rights and claims granted to the concerned persons by Germany redundant (see e.g. DA4: 3).

The government's problem construction underlying the notion of insufficient solidarity within the EU also includes general references to the unpredictability of other member states' measures in reaction to the crisis situation, and of the effectiveness thereof in easing the 'burden' of sheer numbers of asylum seekers arriving in Germany (DA1: 3, 29). Given this lack of control over the situation in the larger European context, the German government – notably during the 'grand coalition' of Christian Democrats and Social Democrats (i.e., until December 2021, when the coalition government of Social Democrats, Greens and Liberals under Chancellor Olaf Scholz took over) – considered it necessary to reduce 'incentives' for asylum seekers to choose Germany as destination country in times of

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crisis, and of strained incorporation and healthcare systems. Since generous access to healthcare and benefits was framed by the government to constitute such an incentive, restricting said access was presented as logical reaction. This framing was strongly influenced by a context of increasing public support for right-wing populist and far-right parties – in the case of Germany: notably for the Alternative for Germany (*Alternative für Deutschland*, or AfD) – that managed to shape public and political discourses on migration and incorporation to a significant extent. Seeking to react to this competitive threat, both the centre-right Christian Democrats and the centre-left Social Democrats adapted elements of right-wing migration-related rhetoric, culminating in tangible political and legal change (Roos 2022).

One notable step towards more access restrictions in the wake of increased numbers of asylum seekers in 2015, and against the backdrop of rising right-wing populist and far-right political voices, was the German government's fast-track initiative to extend the number of 'safe countries of origin' by adding Albania, Kosovo and Montenegro to the list, and by further limiting the rights and claims of asylum seekers coming from these countries (DA1). More specifically, asylum seekers from countries of origin within this legal category were to receive benefits – not least in the area of healthcare – as in-kind rather than cash benefits. DA1 furthermore introduced a prohibition of employment for this group of forced migrants, constituting a significant (additional) hurdle to full access to the German healthcare system, which as an insurance system is based first and foremost on membership through employment. In its argumentation justifying the extension of the list of 'safe countries of origin', and the introduction of restrictions in their citizens' access to benefits and healthcare (amongst others), the German government claimed explicitly to act in line with "the vast majority of EU member states" (DA1: 39, 42, 43), turning its legal proposal into an act of

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implicit harmonisation at the EU level – one of the few instances in the draft acts examined here in which a general EU reference is positively framed.

Parts of DA4 on a better implementation of the obligation to leave for rejected asylum seekers, criminal and certain other groups of forced migrants bear a similar, equally positive tone in its framing of proposed measures through references to the EU polity, although using as point of reference the normative fundaments of the EU rather than the community of its member states. DA4, revising the regulation of rights, claims and living conditions of an especially vulnerable group of societal *outsiders*, seemingly stood under particular pressure to normatively justify the proposed measures. It refers specifically to the Charter of Fundamental Rights of the EU, as well as the European Convention on Human Rights (which is, of course, no EU legal act, but which all EU member states have ratified; moreover, with Art. 59 of the Treaty of Lisbon, the EU's accession to the Convention has become a legal obligation), and emphasises the draft bill's compliance with both (DA4: 27). Whilst not referring to any concrete articles of either of the two human rights documents, the authors of DA4 thus seem to have been eager to point out that all newly introduced measures, despite their vastly restrictive character, would not violate the concerned persons' human rights – i.e., that Germany would uphold its legal and moral duties deriving from the two international legal documents. In the same vein, DA4 emphasises elsewhere that the "thresholds of protection from expulsion for persons entitled to asylum and recognised refugees are rooted in the core of European and international legal obligations" (DA4: 35). These are concretised a few lines later as being defined by art. 33 par. 2 of the UN Refugee Convention, by art. 14 par. 4 letter b of Directive 2011/95/EU, and by the jurisprudence on art. 3 of the European Convention on Human Rights, which leads us to the analysis of references to *specific* EU laws in the German government's justification of its policy proposals regarding forced migrants' health(care) access. Before diving into this second part of the analysis, it is worth

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pointing out that the only piece of draft legislation from the Scholz government analysed here contains no generic reference to the EU polity, beyond the standard formulation (included in all draft acts) that the act would be "compatible with the law of the European Union and international legal treaties" (DA5: 17). In contrast, it contains a comparatively high number of references to concrete EU legislation (although not all of them are relevant for this article's study of forced migrants' health(care) access, so that not all these references are addressed in the sub-section below).

*EU Legislation as Point of Reference for National-Level Legal Change*

In comparison to broader references to the EU polity, the analysis of references to concrete EU legal output produces a more nuanced and heterogenous landscape of EU-related framing and claims in the German government's justification of proposed measures. One tendency comes with a rather positive tone: namely, the analysed draft acts referred to a number of EU legal acts (notably directives 2013/32/EU, 2013/33/EU, and also directive (EC) 2008/115) as providing the national legislator with the necessary legal leeway to adopt the restrictions of forced migrants' health(care) access envisioned by the German government, e.g. when it comes to the stipulation of living standards and support schemes for asylum seekers in comparison to those of/for German citizens (DA2: 14, 19; DA4: 3, 27; DA5: 14). In other words, the draft acts framed in their justification sections the EU legal context as expressly allowing for the intended political measures. The chosen rhetoric hence implicated that the government's legal proposals were in compliance with the spirit (albeit not demanded by the letter) of EU law.

A more neutral tone in the government's claims regarding the EU legal frame can be traced in DA1's and DA4's provisions for restricted access to benefits and healthcare for those forced migrants for whose welfare and living conditions the Federal Republic assumes

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no responsibility (see above), e.g. because they have been given a protection status by another EU member state already, or because they are to be moved to another EU member state under an EU relocation scheme. With reference to Council Decisions (EU) 2015/1523 and (EU) 2015/0209/NLE, DA1 makes implicitly clear that it considers Germany to hold no responsibility for the concerned migrants' health and welfare – beyond basic support – once EU legislation provides for their move to another member state (see DA1: 44). DA4 states the same for persons with protection status from another EU member state, though referring to Regulation 2013/604/EU as European-level legal basis (DA4: 56).

In effect, this framing approach complements the above-mentioned claim of insufficient intra-EU solidarity as reason justifying a more restrictive approach by the German incorporation system to the provision of access to health(care) for forced migrants. The rationale underlying notably the Merkel government's reaction to this perceived solidarity disequilibrium in the context of crisis analysed here seemingly consisted in adjusting German incorporation standards to the most restrictive level possible under EU law in a number of specific areas deemed to impact (potential)[10] migrants' decision where – and whether – to go and apply for asylum. Whereas the German government did not expressly formulate this aim – contrary to other EU member states, such as Sweden[11] – its references to EU legislation in its draft bills, and the framing and argumentative embedding of these references, point in the same direction. They do so beyond the phase of perceived acute pressure on/overburdening of the German incorporation, welfare and healthcare system in the years 2015-16, as DA4 demonstrates. Alongside the above-mentioned EU references, this draft act bases a new provision for facilitated deportation of persons with subsidiary

[10] Including migrants deemed by the German government to be undeserving of asylum/protection, because they would merely be seeking better living and working conditions – a group of persons the government wanted to deter through its legal bills proposed in reaction to the 'migration crisis', as well as thereafter (see Roos 2022).
[11] See press release by the Swedish Prime Minister's Office: 'Government proposes measures to create respite for Swedish refugee reception', 24 November 2015 (https://www.government.se/articles/2015/11/government-proposes-measures-to-create-respite-for-swedish-refugee-reception/ [16 January 2022].



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protection status on the legal stipulations of Directive (EU) 2011/95. In its justification – which also bears a neutral to somewhat negative tone, in the sense that it suggests limited room of manoeuvre for the national legislator in the implementation of EU legislation – the draft act argues that said directive would provide for an overall lower level of protection for persons with subsidiary protection status as compared to those with refugee status. This difference in protection levels would be implemented through DA4's proposal for a lower threshold for the termination of the subsidiary protection status for persons who have "committed a serious crime", or who constitute "a danger to the community or to the security of the Member State in which he or she is present" (Directive 2011/95/EU, art. 17 par. 1, cited in DA4: 36). Whilst not directly changing the concerned persons' claims and rights when it comes to healthcare access, this provision is relevant in that it weakens the subsidiary protection status, making the rights, claims and perspectives coming with it less reliable for its holders. Both this factual weakening of the status, and the concomitant message that administrative staff in the German incorporation system are now given the legal basis to question the concerned persons' right to stay in Germany more easily, are relevant (if indirect) determinants of forced migrants' health: on the one hand, insecurity about the own legal status can have detrimental effects especially on forced migrants' mental, but (partly in consequence) also physical health (Krämer & Fischer 2019). On the other hand, access to healthcare in Germany is in some *Bundesländer* still formalised through certificates entitling forced migrants to obtain medical treatment, which are handed out in some *Länder* for a quarterly period, and in others still on a case-to-case basis for each individual treatment, depending on the concerned forced migrant's ability to demonstrate their individual need for treatment – not to a medical practitioner, but to the incorporation administration responsible for handing out the certificates (Kuhn-Zuber 2018). Research has shown that administrative staff's decisions on the issuance of these certificates is at times influenced by the respective

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forced migrants' legal status and prospect of staying when determining their need for access to a specific medical treatment (Menke & Rumpel 2022). A weakening and/or questioning of status and prospect of staying may in consequence have tangible consequences for forced migrants' access to health(care).

The previous sub-section has already addressed noteworthy differences between references to the EU in draft acts produced by the government under Chancellor Merkel and those by the government under Chancellor Scholz. Whilst the analysis of merely one draft act cannot, of course, produce generalisable findings on the latter government's framing of legal change through EU references, the examination of references in DA5 to concrete EU legislation does point in a direction that differs quite significantly from the findings on DAs 1-4. Namely, while the tone of the bulk of these references is rather neutral – just like in several cases within the other draft acts – the way in which DA5's authors weave these references into the justification of the proposal differs quite significantly from the government's discoursive behaviour in the draft acts from the era Merkel. More specifically, EU references appear in these earlier draft bills almost exclusively in the context of justification for further restrictions of forced migrants' health-related (and other) rights and claims, whether in the sense of allowing or demanding such restrictions. DA5, in contrast, contains a broader bandwidth of contexts in which EU legislation is invoked. Among them is the regulation of forced migrants' rights and obligations when it comes to their participation in – or (now facilitated) health-problem induced waiver of – hearings in the course of their asylum procedures, which DA5 explicitly aims to align with asylum directive 2013/32/EU (DA5: 35). This directive, together with asylum directive 2013/33/EU, is also invoked in the context of ensuring that requirements as regards special procedural safeguards or personal (i.a. health-related) needs of individual forced migrants are adequately met. DA5 includes furthermore references to the data protection regulation (EU) 2016/679, to which the

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administrative actors responsible to answer the above-mentioned special needs are called to abide, i.a. when it comes to the transfer of forced migrants' health data (DA5: 34). More broadly, DA5 is rather positively framed as seeking to embed German asylum policy/legislation more firmly in the EU legal framework, and bring it in line with EU norms and regulations that either (neutrally) stipulate or even (positively) safeguard/extend forced migrants' rights and claims as compared to previously adopted German legislation.

## Conclusion: The EU in National Health Policymaking—Powerful Norm-Setter or Instrumental(ised) Expedient?

To what extent has the EU become a political determinant of health? This article contributes to this broader discussion by shedding light on the extent to which the EU forces and/or induces national-level policymakers to adapt legislation to standards adopted at the EU level. By focusing on a specifically vulnerable group – forced migrants – and the intersection of two policy areas that have been particularly politicised in recent years – asylum/incorporation and health policy – the article seeks to add a new dimension to this discussion. Namely, it demonstrates that the EU's role as PDoH must be considered from two angles: the Union's *active* potential to determine public, and specific groups of persons', health through its policies and laws; and its *passive*, to some extent involuntary, potential to do so through the strategic invoking of EU norms, rules, resources and (in)competences by actors across the EU multilevel governance system. This article's focus on a particularly controversial issue allows for pertinent insights on both these dimensions. For reasons of restricted space, these insights stem from merely one member state – Germany – and more research is required to corroborate the article's findings on a broader scale. Nevertheless, the article provides tangible evidence for the added value of tracing both above-mentioned dimensions of EU influence on health and health-related policies in a national-level policymaking context.

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To this end, the analysis in this article applied the conceptual framework for the study of PDoH depicted in Figure 1. Namely, the regulation of forced migrants' health(care) access in Germany is framed by the systemic and normative context of a restrictive incorporation regime and a conservative-corporatist, social insurance-based welfare and healthcare system, but is also increasingly shaped by EU intervention/activity in the areas of migration/asylum and health policy. The analysis above demonstrates that ideological positions and political as well as economic interests shaped the German government's references to the EU, as did questions of resource distribution both among member states (i.e., at the EU level), and among members (and constructed non-members) of the German society (i.e., at the national level). Although this article could not provide an all-encompassing analysis covering each of the conceptual elements included in Figure 1, it sought to prove through its case study the added value of applying this conceptual framework.

More concretely, the analysis shows that the EU has indeed become a powerful norm-setter in the specific area examined here. In its draft acts, the German government repeatedly points out the rules set by EU law as framework for the proposed national-level legislation. Interestingly, in their references to the EU – both generally to the EU polity, and to specific EU legislation – the draft acts never explicitly state that given EU rules would *demand* a certain national-level response. A necessity to act is only claimed in the national draft acts as rooted in EU inactivity or insufficient EU-level rules and harmonised crisis responses. The proposed measures with reference to specific EU legislation, in contrast, are framed dominantly as seeking to align German policies with EU law, or even merely as complying/being compatible with EU legal provisions. On the one hand, the framing function of these EU references in the determination of national-level policy change underline the EU's power to determine (at least) minimum standards in the national-level regulation and implementation of forced migrants' access to health(care). At the same time, these findings

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also demonstrate the EU's potential of being instrumentalised by national policymakers as expedient in justifying potentially unpopular or normatively questionable action, especially in times of crisis – including in cases where EU legislation does not, or not explicitly, provide for the measures adopted/proposed. Especially in a country like Germany, the positioning of which vis-à-vis asylum seekers (albeit not necessarily its actual incorporation rules) temporarily surpassed the bulk of fellow member states, the EU polity and legal framework offered thus a welcome basis for justifying the adoption of a minimum level of protection and incorporation within the scope of EU provisions once public and political attitudes on forced migrants took a turn.

Whilst providing first insights into the added value of studying how the framing of draft legislation through EU references enables or restricts national policymakers' options in the regulation of health(care) access, this article leaves much space for further research. The necessity of conducting comparable studies on the framing of the EU (as polity, and of concrete EU legislation and policies) by other member states – or, more generally, other policymakers in the EU multilevel governance system – has been mentioned above. In the same vein, studies on other cases from the wide spectrum of issues falling within the remit of health policy are likely to produce important insights regarding the EU's role as PDoH.

In addition, an extension of the diachronic axis of the analysis would produce valuable additional insights, notably when it comes to comparing differences in the behaviour of different governments (which this article could address only to a limited extent, given word limitations), and consequently the impact of factors such as coalition composition, party background, impactful events and developments shaping the respective political, social and economic context etc. Such an approach might build on and add to this article's indicative findings that the German government under Chancellor Angela Merkel showed a tendency to interpret EU legislation as restrictively as possible, whereas the following government under

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Chancellor Olaf Scholz adopted an overall more positive tone of seeking to complete, correct or align German legislation with/in reference to EU legislation.

Finally, a worthwhile avenue for further research might be an analysis of *non-references* to the EU: it might be interesting to juxtapose the draft measures that were given an EU framing with draft measures equally having an impact on health(care) access of forced migrants – or other groups of persons – yet which were not embedded in an EU frame by the respective draft act's authors, possibly despite existing EU norms and rules that are relevant for the measures at hand. Such a juxtaposition would allow for a further deepened understanding of the balance between the EU's active and passive role as PDoH.

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**References**

Bivand Erdal, Marta, and Ceri Oeppen. 2018. "Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary". *Journal of Ethnic and Migration Studies* 44, no. 6: 981-998.

Brooks, Eleanor, Anniek de Ruijter, and Scott L. Greer. 2021. "Covid-19 and European Union Health Policy: From Crisis to Collective Action." In *Social policy in the European Union: state of play 2020. Facing the pandemic*, edited by Bart Vanhercke, Slavina Spasova, and Boris Fronteddu, 33-52. Brussels: European Trade Union Institute (ETUI) & European Social Observatory (OSE).

Dawes, Daniel. E., Christian M. Amador, and Nelson J. Dunlap. 2022. "The Political Determinants of Health: A Global Panacea for Health Inequities." *Oxford Research Encyclopedia of Global Public Health*. https://doi.org/10.1093/acrefore/9780190632366.013.466 [28.02.2023].



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Dosenrode, Søren. 2020. "Europeanization". *The Oxford Research Encyclopedia of European Union Politics*. https://doi.org/10.1093/acrefore/9780190228637.013.1477 [07.09.2023].

Freudlsperger, Christian, and Markus Jachtenfuchs. 2021. "A Member State Like Any Other? Germany and the European Integration of Core State Powers." *Journal of European Integration* 43, no. 2: 117-135.

Kickbusch, Ilona. 2015. "The Political Determinants of Health—10 Years On." *BMJ*, 350: h81. https://www.bmj.com/content/350/bmj.h81 [28.04.2023].

Krämer, Alexander, and Florian Fischer. 2019. "Refugee Health: Public Health Theory and Disease Dynamics." In *Refugee Migration and Health. Challenges for Germany and Europe*, edited by Alexander Krämer and Florian Fischer, 3-18. Cham: Springer Nature Switzerland.

Kuhn-Zuber, Gabriele. 2018. *Sozialleistungsansprüche für Flüchtlinge und Unionsbürger. Beratungsleitfaden.* Baden-Baden: Nomos.

Menke, Katrin, and Andrea Rumpel. 2022. "Who Belongs, and How Far? Refugees and Bureaucrats Within the German Active Welfare State." *Social Inclusion* 10, no. 1. https://doi.org/10.17645/si.v10i1.4646 [27.04.2023].

Ottersen, Ole Petter, Jashodhara Dasgupta, Chantal Blouin, Paulo Buss, Virasakdi Chongsuvivatwong, Julio Frenk, Sakiko Fukuda-Parr et al. 2014. "The Lancet – University of Oslo Commission on Global Governance for Health: The Political Origins of Health Inequity: Prospects For Change." *The Lancet*, 383: 630-667.

Reiners, Wulf, and Funda Tekin. 2019. "Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015-2016)." *German Politics* 29, no. 1: 115-130.

Roos, Mechthild. 2022. "Inequality by Design: The Politics Behind Forced Migrants' Access to Healthcare." *Medical Law Review* 30, no. 4: 658-679.

Roos, Mechthild. 2023. "Regimewandel oder -beständigkeit in Krisenzeiten? Die politische Regulierung des Gesundheitszustands Geflüchteter in Deutschland während der Migrations[management]krise". *Sozialer Fortschritt* 72: 635-652.

Ruedin, Didier. 2017. "Citizenship Regimes and the Politicization of Immigrant Groups." *OZP – Austrian Journal of Political Science* 46, no. 1: 7-19.

Sainsbury, Diane. 2012. *Welfare States and Immigrant Rights. The Politics of Inclusion and Exclusion.* Oxford: Oxford University Press.

Scharpf, Fritz W. 1995. *Negative and Positive Integration in the Political Economy of European Welfare States. Jean Monnet Chair Papers 28.* San Domenico: European University Institute.

Schelkle, Waltraud. 2021. "Fiscal Integration in an Experimental Union: How Path-Breaking Was the EU's Response to the COVID-19 Pandemic?" *Journal of Common Market Studies* 59, Annual Review: 44-55.

Zaun, Natascha, and Ariadna Ripoll Servent. 2021. "One Step Forward, Two Steps Back: The Ambiguous Role of Germany in EU Asylum Policies." *Journal of European Integration* 43, no. 2: 157-174.

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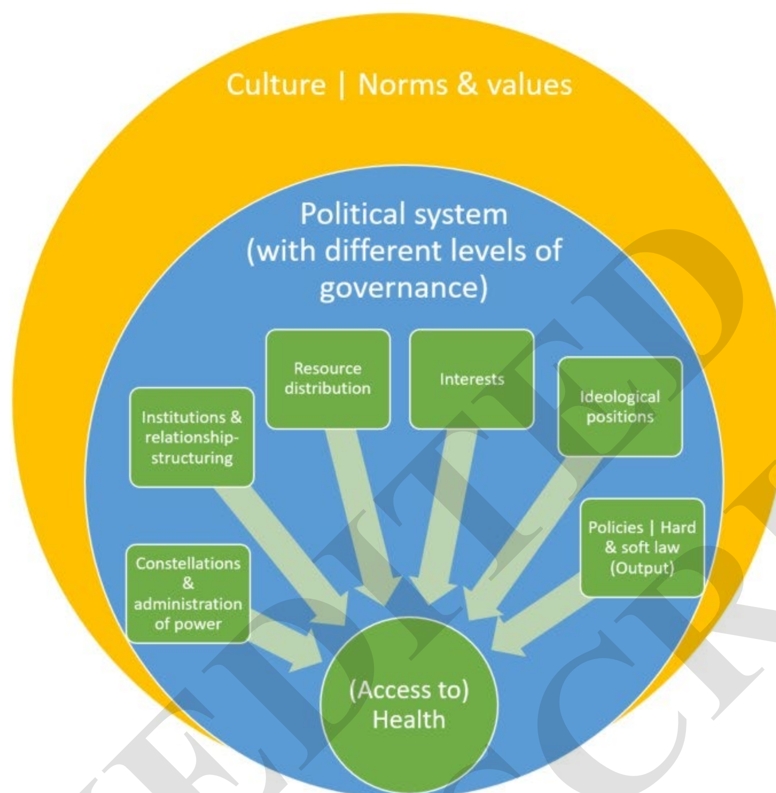
**Figure 1** Conceptual framework for the analysis of political determinants of health (based on Dawes et al. 2020 and Kickbusch 2015).

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