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Knowledge for INtegration Governance

When Multiple Levels Meet Migration: the specific challenges of a EU Immigration regime

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Desk Research Paper n. 3/July 2014

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The KING project's objective is to elaborate a report on the **state of play** of migrant integration in Europe through an interdisciplinary approach and to provide decision- and policy-makers with **evidence-based recommendations** on the design of migrant integration-related policies and on the way they should be articulated between different policy-making levels of governance.

Migrant integration is a truly multi-faceted process. The contribution of the insights offered by different disciplines is thus essential in order better to grasp the various aspects of the presence of migrants in European societies. This is why **multidisciplinarity** is at the core of the KING research project, whose Advisory Board comprises experts of seven different disciplines:
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When Multiple Levels Meet Migration: The specific challenges of a EU Immigration regime

1. INTRODUCTION: PRESSURE, RESPONSES, LIMITS OF EU MIGRATION POLICY[1]

This paper deals with the **specificities of policy instrumentation** the European Union (EU) has developed in the field of **migration, immigration and asylum policy** (subsumed in the following under the term *migration policy*). The paper aims at putting into perspective the particular instrument mix on the supranational level in order to evaluate the potential impact in supranationalisation trajectory in a multilevel policy-making system. On the basis of a systematic stocktaking of various migration related policies and their classification along categories of constituting instrument features, we apply the existing knowledge about functioning logics of multilevel policy-making in order to estimate the thrust of the policy approach. The ultimate **goal** of the paper is to offer an estimation of which available adaptations in the **EU policy toolbox** might support certain policy developments rather than others.

The relevance of this research grows out of the increasing pressure on the EU to deal with an ever more complex set of migration-related policy challenges. More than anything the repeated tragedies on European southern frontiers in stress the urgency of finding common solutions. The focus of this paper is not on the external reasons for migration pressure on the EU **but on the internal dynamics of the European integration process that generate the necessity to coordinate migration inside the EU**. The abolition of internal borders has created a single market with shared external borders. The guarantee of free movement of people, labour and services within the EU, as well as the EU's underlying principles of solidarity and shared responsibility create strong functional pressure for harmonised or at least coordinated rules on how to regulate migration among EU member states. Moreover, the integration of labour markets entailed competences of the EU in the field of labour migration. Responding to the inevitable functional pressure the liberalisation of the internal market set free, relevant policy competences in the field of migration policy have actually been conferred to the EU. However, this has not resulted in a full-fledged and consistent harmonisation of national policies. In other words: there is no genuine EU migration policy but a patchwork of more or less communitarised rules. The first question we raise in the following section is therefore: which policy instruments have been established and how can we systematically describe the steering approach the various measures amount to?

To answer the first question, we map EU instruments along different, theoretically explicated dimensions (policy scope, policy type, and dynamics of change over time). The picture drawn offers descriptive results that highlight the pattern of steering instruments and public framing of policy problems and solutions on the EU level. Taking these descriptive results a step further towards a causal model that captures the potential effect of certain measures, these results are linked to theoretical insights on EU policy instrumentation. In addition, the findings on the underlying functioning logic of the EU's instrument mix are confronted with recent academic accounts on the operating logic and dynamics of change in this policy field. On this basis, the specificities of the EU policy mix in migration policy and its potential impact, as well as its most likely integration dynamics are evaluated. Taking these conclusions a step further, the paper

[1] I owe great thanks to Martin Weweler who did indispensible work in gathering and structuring the empirical data and added valuable inputs to this study.

closes formulating some estimations about which changes are most likely to occur in the light of the existing toolbox the EU applies to realise its competences in migration policy.

2. MAPPING: THE EVOLUTION OF EU MIGRATION POLICY

This section serves to **map the policy instruments in the area of migration policy** since the inception of the Treaty of Maastricht in 1993. The Maastricht Treaty introduced the second pillar (common foreign and security) and third pillar (justice and home affairs) in addition to the first one (the European Community turning predominantly around the single market). Migration as an internal and external policy thus gained substantive relevance since it had a legal foundation in the Treaties as from 1993. Since the introduction of the initially intergovernmental cooperation, the toolbox to tackle migration issues has been expanded in various ways. Regarding the constituent rules that underpin EU migration policy, the former third pillar has been carried over into the so-called *Area of Freedom Security and Justice* (AFSP) when the Treaty of Amsterdam entered into force in 1999, which also transferred the area asylum, immigration, and judicial cooperation in civil matters into the first pillar and thus from intergovernmental to qualified majority voting in the Council and co-legislation between Council and European Parliament (EP). The Treaty of Lisbon abolished the pillar structure altogether. Since 2009, in principle all policies of the AFSP are incumbent on the ordinary decision-making procedure, which implies the full involvement of the EP and the Court of Justice of the European Union (CFEU). The incremental conferral of decision-making competences on migration issues from the national to the supranational level denotes the legal basis on which policy instruments to tackle pressing problems of policy coordination have been developed.

2.1. EU Policy Instrumentation in Migration Policy: How Much of What?

Our focus is on **policy instruments** in order to analyse the dominant characteristics and the potential impact of EU activities in the field of migration. While Treaty bases offer the very preconditions for EU legislation and allow us to estimate the potential for joint European policy-making, policy instruments represent the actual policy actions and mirror in which way and to which degree political decision-makers have actually exploit legal options. Moreover, following Lascoumes and Le Galès, we consider that "public policy instrumentation is a major issue in public policy, as it reveals a (fairly explicit) theorization of the relationship between the governing and the governed: every instrument constitutes a condensed form of knowledge about social control and ways of exercising it" (2007: 3). In other words, scrutinising policy instrumentation – and in the given case, which steering instruments the EU actually applies rather than the political mandate that the "Union shall" develop a common policies in immigration and asylum (Treaty on the Functioning of the EU, TFEU Chapter 2) – allows us to draw conclusions about the specific social control patterns and to reveal the direction in which the basic Treaty changes have been filled with policy tangible meaning.

The **mapping of instruments** is structured along **two dimensions** that determine the scope and direction of potential impact of EU migration policy. The dimensions are explicitly selected to capture the particular multilevel nature of EU policy-making rather than any kind of "general effectiveness" of the tools. This is relevant because the conclusions that can be drawn from such an analysis inform us about possible recalibrations of EU / member state instrumentation. In contrast, the study does neither aim to, nor could it offer ideal solutions for how to conduct migration policies as such.

According to the goal of this study, the first dimension regards the **allocation of authority**, i.e. the degree

of supranational competence a specific instrument implies (policy scope or coordination mode). Immigration and asylum policies, as part of the ASFJ, fall under the so-called shared competences between the EU and the member states (TFEU, Art. 4(j)). However, also in the context of the EU's external relations and foreign policies, migration aspects are being touched upon. In the multilevel system, shared competences mean that both the EU and the member states may legislate in the specified field, yet with different hierarchies between EU and national law. In the AFSJ the member states may only legislate in areas in which no EU legislation exists, if not specified explicitly differently in the Treaties. In contrast, in Common Foreign Security and Defence Policies (CFSP) the Union by default merely coordinates member state policies or implements supplemental measures to the member states' common policies.

The coordination mode and with it the scope of supranational authority varies hence substantially depending on the way sovereignty is conferred and national discretion is maintained respectively. We classify **three coordination modes**: primary legislation, secondary legislation and soft steering. This distinction serves to indicate the degree of discretion for independent national policy decision-making / binding harmonisation. Primary legislation does not establish concrete instruments by itself but the legal basis to create certain EU steering means altogether. Secondary legislation is the core of policy-making in the EU, with a strong bias towards regulation rather than redistribution (Majone 1996). Important for our context is that it creates binding rules for all member states and thus harmonisation and joint policy-making in the narrower sense. The third category, soft steering, is in contrast not binding but based on voluntary cooperation between the member states.

The second dimension regards the **type of policy** supranationally installed, in other words: the **direction,** or **content** that is being targeted by a specific instrument. Migration is a multi-facetted policy that can be treated from the angle of security, justice, human rights or labour – to give but a few thematic classifications recurrently invoked. The framing of migration issues determines the instruments available and the intended impact of an instrument. Most evidently in the EU, the coordination mode applied depends on the EU competence, which is always defined for a specific policy conferred to the EU, as captured by the first dimension. As political relationship, migration and asylum matters affect citizens directly (this differentiation takes reference from Lowi's policy typology 1964, 1972). They can do so by restricting or granting rights and privileges. We therefore d**ifferentiate the framing of policy issues** as either security (limitation of personal freedoms and privileges) or rights (guarantee of personal freedoms and privileges). Certain policy measures, hence coded as one instrument, cover both a security and rights dimension (third category "both/other").

Both dimensions seize instruments that steer policy-making inside the EU. International agreements represent an additional coordination mode that cannot be grasped by the three categories introduced above because they are categorically distinct. We therefore treat **agreements with third countries** as a category in its own right. International agreements as instruments to steer migration flows have proliferated especially since the mid 2000s. **Two classes of international agreements** can be differentiated: bilateral treaties between the EU and single states or multilateral treaties between the EU and regional actors. For these two types of international coordination modes, we again coded the same framing categories security, rights and the mixed content.

Table 1 - Valid Cases for Coordination Mode

	Frequencies	Percentage
Primary Legislation	9	7.8
Secondary Legislation	69	59.5
Soft Steering	38	32.8
Total	**116**	100

Table 2 - Valid Cases for Framing

	Frequencies	Percentage
Security	70	60.3
Rights	18	15.5
Both/Other	28	24.1
Total	**116**	100.0

Table one and two summarise the total amount of cases coded for policy making inside the EU (for a full list of cases and coding, see Annex 1). We coded a **total of 116 different policy measures** starting from the introduction of the third pillar in the Maastricht Treaty in 1993 till today (2013). The collection of cases is based primarily on the Commission's definition of "free movement of persons, asylum and immigration".[2] Additionally, secondary literature cited in this article has been used to back up the data. Table 1 summarises the total **frequency of coordination modes**. While 7.8 per cent of all migration relevant policy decisions were Treaty changes or large framework decisions, the bulk of 59.5 per cent of all policy decisions falls under the category of secondary legislation. With 32.8 per cent, also soft steering makes for a substantive coordination mode. Table 2 summarises the **frequencies for the framing** of the same cases. Notably, security features strongest with 60.3 per cent of all measures across coordination modes. Purely rights oriented policy measures make for only 16.4 per cent of all cases. Policy decision that embrace both security and rights aspects make for 23.3 per cent.

Table 3 - Valid Cases International Treaties

	Frequencies	Percentage
Bilateral	22	81.5
Multilateral	5	18.5
Total	**27**	100

Table 4 - Framing International Agreements

	Frequencies	Percentage
Security	15	55,6
Rights	1	3,7
Both/Other	11	40,7
Total	27	100,0

Table 3 summarises the **total of international treaties** of which 81.5 per cent are bilateral agreements

[2] Since it is not possible to take into account the full acquis communautaire to scan all existing policies for their relevance for migration policies, we take the Commission's self-definition as a rough orientation, for an overview of what the Commission counts as part of the policy on "free movement of persons, asylum and immigration" see: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/ (last accessed 2 December 2013).

between the EU and single states while only 18.5 per cent are multilateral or regional agreements. Of the total of 26 treaties, purely security focused and mixed security and rights focused agreements make up 55.6 and 44.7 per cent while only one outlying agreement is purely rights-oriented (Table 4, see discussion below).

The next two sections will further illustrate the two dimensions that apply to EU-internal policy instruments. The sections depict the evolution of each dimension over time and back up the quantitative impression with a qualitative descriptive analysis in order to estimate the actual scope and type of the policy instruments the EU actually applies. Based on the in depth analysis of the single dimensions, the combination of the findings allows to categorise the EU approach more generally. This is followed by a similar discussion of the international treaties.

2.2. Dimension 1: The Policy Scope defined by Cooperation Mode

The first dimension focuses on the scope that is determined by the specific cooperation mode an instrument operates on in multilevel policy-making. Policy instruments are differentiated according to the degree of EU authority / member state discretion. The three categories introduced above, primary, secondary and soft legislation, stand for different decision-making procedures according to which policy decisions are taken. Following Börzel, we use her indicator for the “scope of integration” that distinguishes the degree of supranational power inherent in different steering instruments (Börzel 2005, she terms at the same time the number of conferred policies as "level of integration"). The first category regards essentially a meta-level of policy-making. In this category we gathered **primary law of the Treaties** but also **general policy guidelines**, especially Presidency Conclusions of the European Council and multiannual political programmes by the European Council. The latter are equally passed intergovernmentally by the heads of state and government. Decisions by the European Council establish no directly applicable legislation but general guidelines for subsequent policy formulation. The second category, **secondary law**, captures all legally binding policy instruments. These are primarily Regulations (directly applicably EU legislation, without need for national transposition) or Directives (obligation for national regulation in line with the framework of the Directive). As long as migration policies were dealt with in the intergovernmental third pillar, the main legal tool were Joint Actions, which we also coded as part of the secondary legislation category because they created hands-on applicable and binding instruments. **Soft steering** in the EU is most prominently discussed regarding the open method of coordination, a voluntary coordination mode based on peer pressure and learning mechanisms (Trubek and Trubek 2005). We use the soft law notion here more widely to code policy measures that have no binding legal effect. These include a great number of programmatic outputs (especially Commission Communications) but also Council Resolutions or Recommendations. In contrast to the second category, soft law is not backed up by sanctioning tools, the European Parliament is generally not involved into decision-making and the CFEU has no judicial review powers.

Figure1 - Policy Measures by Coordination Mode over Time

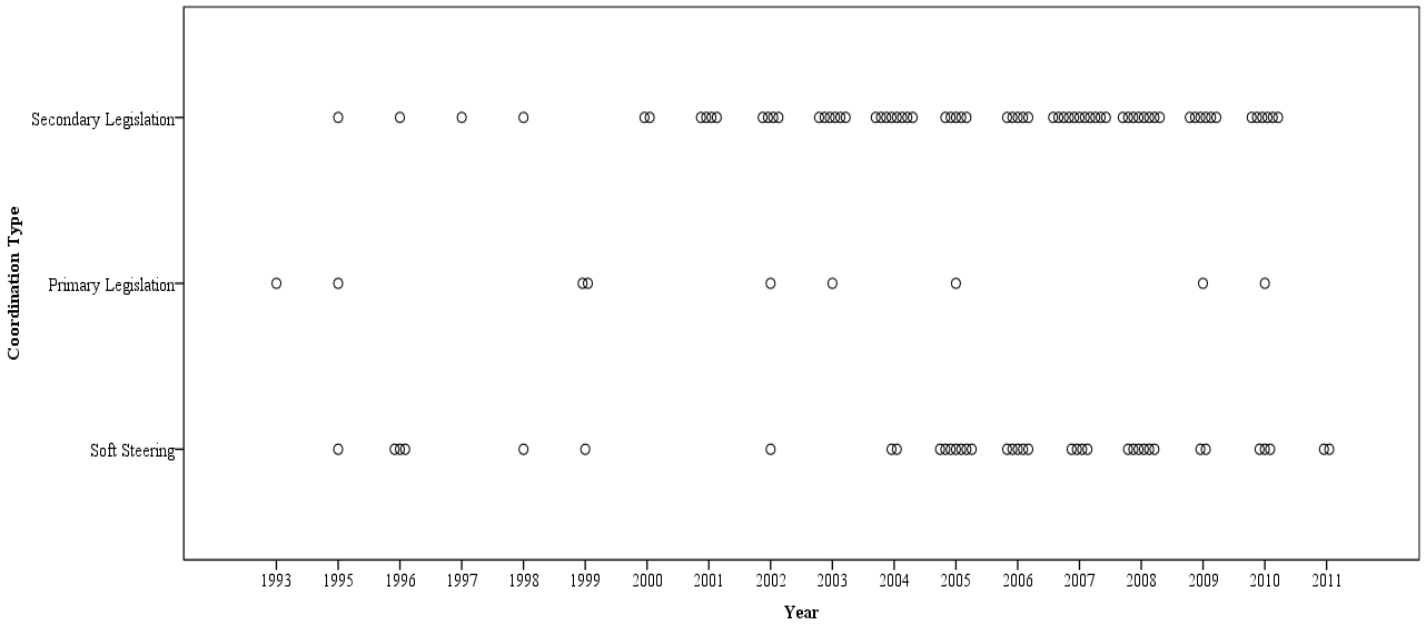


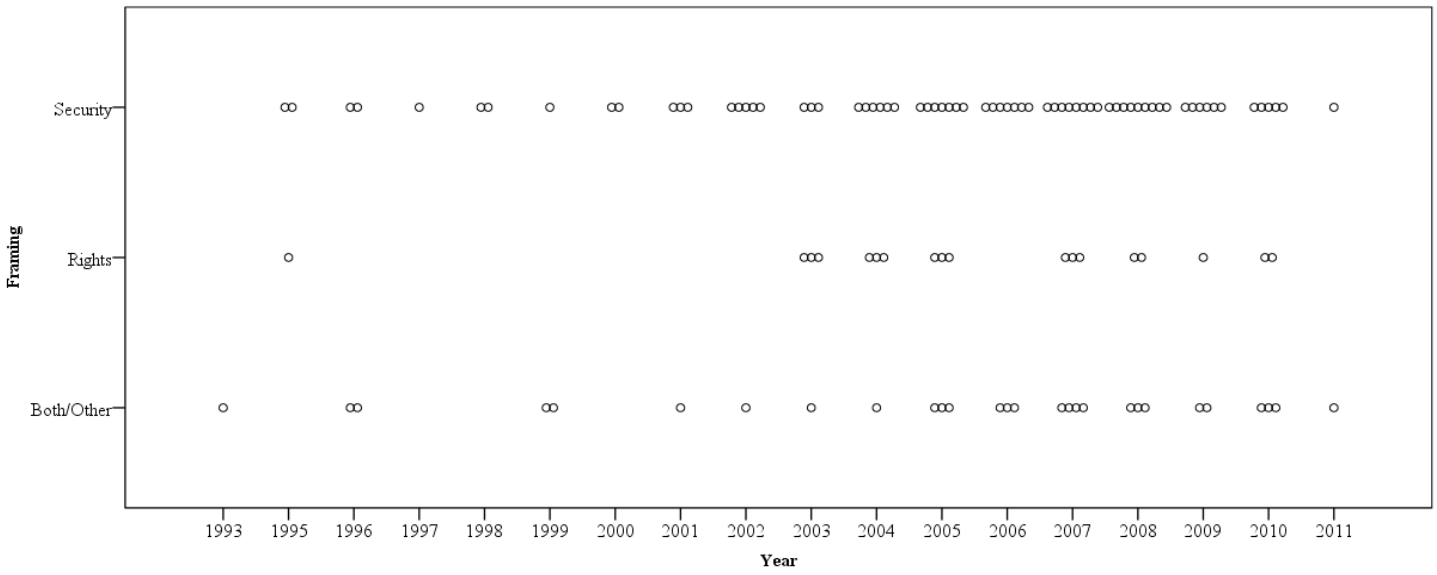
Figure 1 depicts the **frequency of the three modes over time**. We see a strong increase of secondary legislation enforced after 2001 as well as a peak of soft law creation between 2004 and 2010. Primary law revisions that create the preconditions for EU policy measures should in principle be linked to increases in policy programming (especially Commission Communications as part of the soft steering category) and subsequently secondary legislation. For the period till 1999, the picture fits this expectation. The two acts with primary law status are the Treaty of Maastricht (1993) and the Schengen Agreement (1995) are intergovernmental agreements. Accordingly, the secondary legislation passed is limited to Council Resolutions and Joint Actions while soft steering is restricted to Council Recommendations. The inception of the third pillar with Maastricht led to a limited number of binding and non-binding decisions being passed intergovernmentally. With the Treaty of Amsterdam being enforced in 1999, we should expect a stark increase in legislative activity. A real accumulation of secondary legislation is, however, only evident after 2004. Also, between 2005 and 2008 soft instruments, above all Commission Communications, have been published in great numbers. Notably, especially 2005 around the Hague Programme many such programmatic documents were issued. No similar effect can be seen at the time the Council passed the Stockholm Programme in 2010. Conversely, even though the European Council issued the *European Pact on Immigration and Asylum* in 2008 as a soft steering instrument (i.e. without official publication and binding value for all member states), it coincides with the a number of relevant Commissions Communications on an integrated approach on asylum and on strengthening a global approach to migration and was followed up in 2009 by a Commission Report, a Staff Working Document and a Communication on the implementation of the Pact. It may still be too early to really see whether the enforcement of the Lisbon Treaty and the Stockholm Programme will lead to much more secondary legislation. Unlike the Council's decision of the Hague Programme, neither Stockholm nor Lisbon coincide with apparent strong Commission activity in form of Communications that serve as preparatory programmatic documents for legislative initiatives. To grasp the status of the primary, secondary and soft policy measures passed, it is important to stress the general scope of the instruments that can be installed. Even though the Lisbon Treaty switched all remaining migration issues to the ordinary decision-making procedure, the Treaty stresses red lines for EU competences: member states maintain the explicit right to determine the numbers of foreign residents on their territory and EU cooperation in the integration of third country nationals remains only supplementary to national policies, which means that harmonisation of national laws is ruled out. This leads over to the second dimension, namely the types of policies migration issues are framed into

in these policy measures.

2.3. Dimension 2: The Policy Type defined by Content and Policy Frame

The second dimension regards the way in which migration issues are **framed as one or another policy type**. The policy measures under scrutiny are of regulatory nature. Yet, the instruments selected to regulate migration may differ substantially. The EU deals with migration issues above all under the heading of free movement. For the content of this paper, measures under the headings of immigration and asylum have been selected (including measures against illegal or irregular migration), leaving out the migration policies that run under the label of labour migration. To classify these policy measures, we differentiate between instruments that restrict individuals' ability to move into our around the EU and instruments that grant individuals rights and opportunities to do so. The former category is strongly linked to the EU's security agenda, in particular border management and control, whilst the latter is connected to special relationships with certain third countries as well as the introduction of general standards on the provision of visas, asylum and the treatment of refugees and ad asylum seekers. Single legal acts or policy measures that cover both aspects are coded accordingly.

Figure 2 - Policy Measures by Policy Type over Time



The first observation that sticks out is the strong concentration on restrictive (security) measures overall. While 2002 sees a first accumulation of measures, as from 2004 six to ten measures are passed each year. There is hence a continuously strong EU policy making on migration dealt with as security issue for almost a decade. More than the inception of the Amsterdam Treaty, the 9/11 terrorists attacks match the sequencing of the measures framed as security issues. In contrast, purely rights oriented measures account to a maximum of three measures a year in 2003, 2004, 2005 and 2007. Notably, only as from 2005 there is also an increase of measures that deal with both restrictions and rights. To make sense of these observations, the next section discusses how scope and type coincide, i.e. which coordination modes were used to promote rights or restrictions over time.

2.4. EU Policy Instrumentation: Scope and Type of EU Policy Measures

The single dimensions provide only limited information. Combining the scope and type of EU measures in the migration policy allows us to grasp which kinds of instruments shape EU migration policy-making practically. Table 5 summarises the results. As pointed out before, in total restrictive measures prevail, most of which as legally binding secondary legislation. As the table shows, nearly half of all EU measures on migration are security-oriented legal acts. Secondary legislation is also the most frequently applied coordination mode (69 cases), with soft steering following with 38 measures. Not very surprisingly, much less primary law than secondary legislation has been passed. Notably, most of the primary acts (i.e. Treaty provisions or policy guidelines from the European Council) deal with both restrictive and rights-granting measures (6 cases), while three of the primary acts deal dominantly with security only. No primary acts focus exclusively on rights. The distribution is more balanced for the soft steering measures. Security and mixed measures feature equally with 14 cases while 10 are only concerned with rights.

In a nutshell: security sticks as most frequent and most frequently dealt with binding regulation. Purely rights-oriented measures occur least and mostly in form of soft steering. Yet, also some binding legislation has been passed. Rights are more frequently dealt with in combined acts that provide for rights and restrictions. Still, even if adding up the rights and mixed categories, only 46 compared to 70 purely restrictive and mostly legally binding measures have been recorded.

Table 5 - Scope and Type of Policy Measures – EU Internal Policy Instruments

	Primary Legislation	**Secondary Legislation**	**Soft Steering**	**Total**
Security	3	53	14	**70**
Rights	0	8	10	**18**
Both/Other	6	8	14	**28**
Total	**9**	**69**	**38**	**116**

Figure 3 provides a picture over time. First, the strong security focus in secondary legislation in particular since 2001 shows clearly. These measures deal above all with the management and control of external borders, the expulsion of illegal immigrants, visa regulations, and security issues linked to the Schengen Regime, especially around the exchange of data and information between member states. A key decision was the Dublin II Regulation.[3] In 2002 a first measure dealing with restrictions and rights was passed,[4] while as from 2004 some rights-oriented secondary legislation was enforced.[5] As pointed out before, most

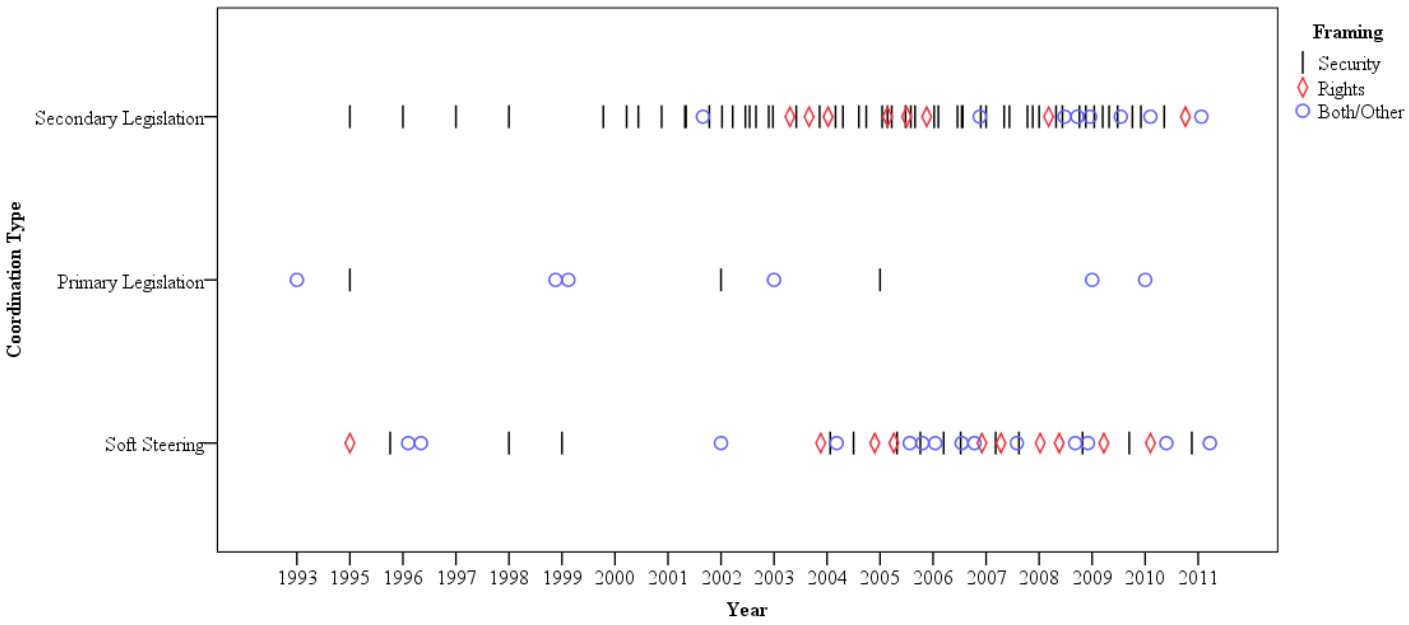
[3] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

[4] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[5] 2003: Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; 2004: Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;

primary law and policy guidelines deal with both restrictions and rights while some focus purely on security with respect to third country nationals (these are especially the political guidelines or intergovernmental treaties passed by the European Council such as the Schengen Agreement or the Hague Programme but not EU Treaty reforms). Soft steering instruments focus regularly on security issues (these included Council decisions without legally binding effect), but predominantly on either combined restrictive/rights-granting or purely rights-oriented measures (mainly Commission Communications). The latter two increase in number after 2004 while there is, interestingly with the exception of 2002,[6] a gap of such policy documents between 1997-2004 – despite the fact that the Amsterdam and the Nice Treaty were enforced in this period.

Figure 3 - Scope and Type of Policy Measures over Time



In sum, EU the instruments that make for the EU's migration policy can be characterised as follows. First, till 2000 the intergovernmental nature of cooperation shows in just a limited number of measures taken, both as secondary legislation and soft steering instruments. Already in this early stage, almost twice as many initiatives concentrate on restrictive measures that frame migration as a security issue. Yet, even though to a lesser extent, rights-based initiatives accompanied also the intergovernmental stage. Second, the enforcement of major Treaty innovation (most markedly the Amsterdam and Lisbon Treaties) has not led to an immediate increase in legislative activity. After the enforcement of Amsterdam in 1999, not even more soft or policy planning documents were passed. Only after 2001 and after the Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (security-framed primary legislation), we observe a decisive increase of restrictive secondary legislation that abates only after 2009. During this period, however, also a number of important rights-based legislative acts were passed. The secondary law development is hence not purely focusing on a restrictive approach. This notwithstanding, the bulk of measures dealing with migrants' rights emerged as from 2004, that is some two to three years later than

2005: Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; 2011: Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

[6] Commission Communication of 3.12.2002 to the Council and European Parliament: Integrating migration issues in the European Union's relations with third countries COM (2002) 703 final.

the accelerated secondary law development, as soft steering instruments. These are mostly Commission Communications that should serve as templates for later secondary law. Such a direct causal link cannot be read out univocally form the figures but would necessitate an in depth qualitative analysis. In any case, in quantitative numbers we see no immediate effect in legislative activities after certain Treaty changes. The *Pact on Immigration and Asylum*, passed by the European Council as soft law in 2008, sticks out as a key measure to organise legal immigration, control illegal immigration, and to render border controls more effective. Also for this voluntary instrument actual policy outputs have been put into question. As from 2009/10 we see less soft steering instruments being put forward which may be due to the limited legal follow-up to the soft instruments proposed between 2004 and 2009.

2.5 The External Dimension: Intergovernmental Agreements with Third States

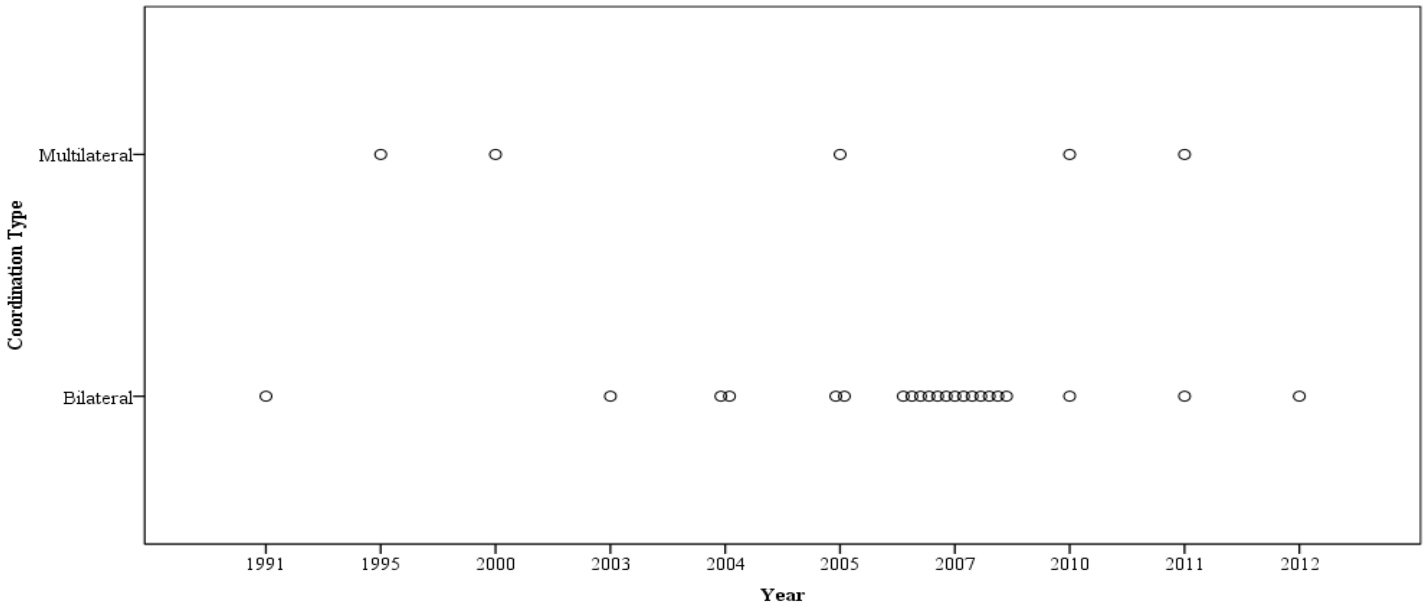
In parallel to the internal policy evolution in the EU, the Union has developed a **far-reaching network** on migration matters **with third countries**.

Table 6: Scope and Type of Policy Measures – International Policy Instruments

	Bilateral	**Multilateral**	**Total**
Security	15	0	**15**
Rights	1	0	**1**
Both / Other	7	4	**11**
Total	**23**	**4**	**27**

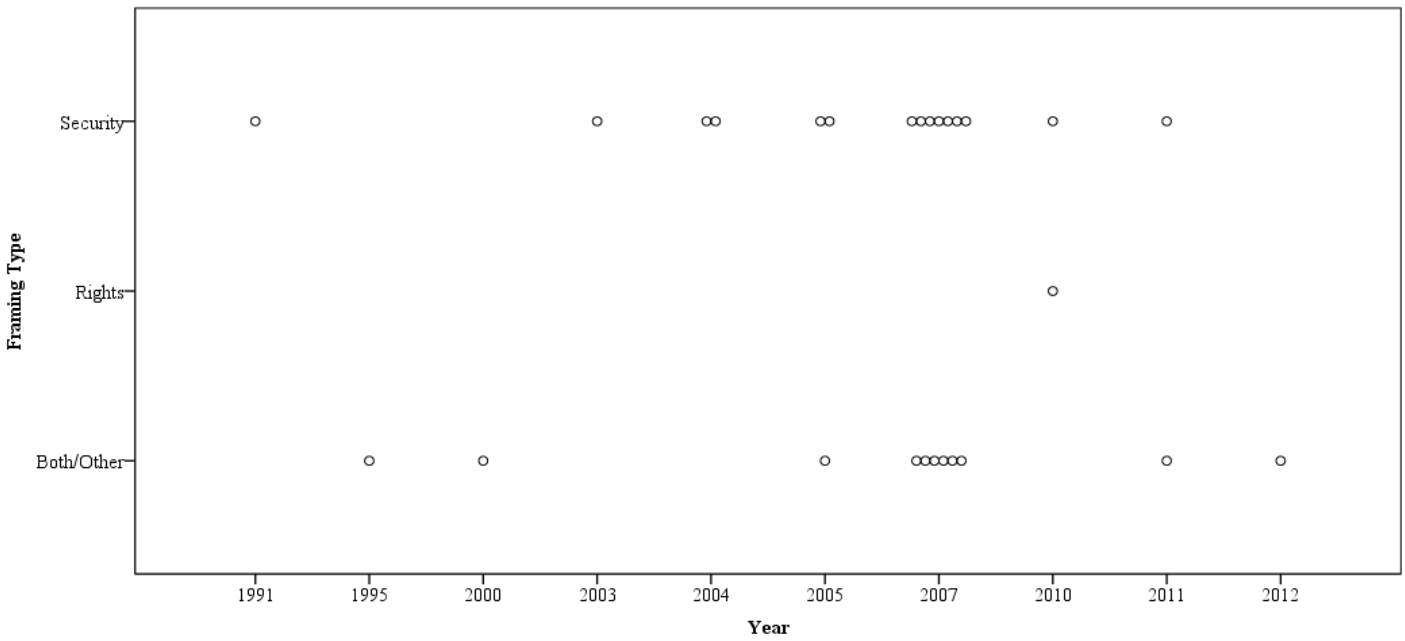
The international agreements are either **bilateral or multilateral contracts** with single states or regional groupings of states and the EU. Table 6 offers an overview on the scope and type of measures of the total of 27 agreements identified. The first notable observation is that – in contrast to the often-acclaimed multilateral approach of the EU – **bilateral agreements clearly prevail** over multilateral agreements when it comes to migration matters (23 compared to 4). When dealing with security aspects of migration, the EU concluded only bilateral agreements, meaning that multilateral agreements cover restrictive and rights-based migration concerns. The majority of these agreements regulates the **readmission of illegal immigrants** to the country of origin. In reverse, multilateral agreements mostly combine visa to the EU with readmission or preventive matters. The single case in which purely rights were granted is a clear outlier, namely the 2010 EU-Libya cooperation agreement on fighting illegal immigration and strengthening the rights of refugees which allocated 50 million € from the EU to Libya for this purpose.

Figure 4: International Instruments over Time



Scrutinising these figures again in Figure 4 (bi- and multilateral instruments) and Figure 5 (policy type) over time shows most agreements were enforced in 2007. The large number of bilateral agreements passed in this year (Figure 4) is explained by the fact that the EU passed agreements with the predecessor countries of Yugoslavia, most of which with an official candidate status for accession at the time. As Figure 5 indicates, these agreements are bilateral agreements with mixed content granting rights (especially visa) and demanding restrictions. When looking into the details of the cases depicted, it shows that the purely security oriented agreements passed in 2007 are readmission agreements with the EU neighbourhood states. This may be explained with the completion of the eastern enlargement round with Romania and Bulgaria entering in 2007.

Figure 5: Policy Type in International Agreements over Time



Notably, the international agreements grant rights primarily to the candidate states or states participating in the EU Neighbourhood Policy (even to a lesser extent) but not to other third states. With these, migration related bilateral agreements focus almost exclusively on the readmission of irregular migrants (including states such as China, Hong Kong, Sri Lanka or Russia). The split between the security / rights and restrictions clusters of cases in 2007 can hence explained by the different treatment of states according to proximity to the EU (Figure 5, note that the single "rights" case is the above-mentioned Libya agreement).

In brief, the figures show a differentiated treatment of states depending on proximity of third states to the EU. Most privileged are states with a formal accession option. Also states participating in the EU's neighbourhood policy may profit from special visa agreements – yet, coupled with readmission clauses. Most relevant is the observation that the EU shows a clear pattern to treat readmission issues as a main objective of bilateral agreements.

3. PATTERNS OF EU MIGRATION POLICY INSTRUMENTATION: CAUSAL EFFECTS AND INTEGRATION DYNAMICS

In order to interpret the data on the scope and type of the EU's migration policy instruments, this part of the paper will embed the findings in the **wider research** on **policy instrumentation** and on **EU migration policy**. The first question tackled is, which policy output can be expected from the particular instrument mix the EU has developed in the field of migration policy. To this end, insights on policy instruments will be applied to the case under perspective. The second question raised is, which integration dynamics this instrumentation pattern suggests. To answer this question, we confront the empirical findings with recent scholarly accounts of EU migration policy. The questions of causal effects and larger policy developments and integration dynamics are closely interlinked. Therefore, they are dealt with in connection with each other.

3.1. EU Policy Instrumentation: Functioning Logics of Multilevel Policy-Making

Policy instruments as "tools of government" have been an important **focus of public policy research** for quite some time (Hood 1986, 2006; Hood and Margetts 2007). Key questions tackled in by scholars of policy instruments take up some of the major claims about EU migration policy. Above all the investigation into reasons of policy failure and how steering beyond traditional hierarchical coercion is possible after all help to understand the potential impact of multilevel policy-making (Pressman and Wildavsky 1973; Mayntz 2003). Considering the multilevel nature of the EU, in which hierarchical steering is limited to the powers conferred to the supranational level and which is always mitigated through national implementation, the focus on instruments offers a decisive methodological advantage because it allows investigating into steering effects beyond hierarchical state structures.

Criticising the functionalist bias of standard instrumentation research, Lascoumes and Le Galès propose a **sociological approach** (Lascoumes and Le Galès 2007, 2004) that has received considerable attention and which will be referred to in the following. Whilst sustaining the focus on mechanisms of rule and government/governed relationships, the approach integrates more strongly the notion of power as the basis for instrument choices. Moreover, the approach "re-conceptualises instruments as institutions that may need to be brought into existence, constructed or composed rather than readily available objects. It

also takes the view that effectiveness is not the only or even the main criterion that governs instrument selection, and holds that the extent to which an instrument is effective is only one among several potentially significant aspects of instrument use and often not the most important" (Kassim and Les Galès 2010: 4). Accordingly, instruments embody "particular policy frames and represent the issue in a particular way" and are "also a form of power" (Kassim and Les Galès 2010: 5). These **frames** (as types) and **power** (as coordination mode, i.e. the exercise of split authority in a multilevel system) are referred to as the basic conceptual categories underlying the above-analysed empirical dimensions. To make sense of the empirical findings, we can hence relate them back to framing and policy ideas, and the use and structuration of power in multilevel policy-making.

Based on these definitions, it is argued that "[i]nstruments structure public policy according to their own logic. Indeed, policy changes can often be explained by instruments, disconnected from their goals. This suggests understanding public policy as a sedimentation of instruments" (Kassim and Les Galès 2010: 5). In line with this approach, we will now turn to the specific structure and change dynamics of EU migration policy. This will be done by discussing the **specific instrument-related findings against the background of current research** on the policy field.

Tracing which **kind of supranationalisation the instrument mix stands for**, we will confront our findings with the most relevant academic accounts on EU migration policy. Boswell and Geddes divide the literature on EU migration policy into two main approaches. One approach focuses on the member states' inability to achieve stated migration goals ('policy failure'). The other approach argues that member states actually well achieve their underlying objectives as they "seek to justify draconian control measures through high-lightening the security threats associated with migration. This can be called the 'securization' approach". Criticising that both these approaches focus too strongly "on the rhetorical construction of migration", the authors argue "that it is important to factor the decision-making process into the analysis" (Boswell and Geddes 2011: 39). Sharing the authors' general point that de facto policy measures rather then declared goals have to be taken under scrutiny to understand the character and integration dynamic underlying EU migration policy, the decision-making perspective has been discussed above as element of the scope of policy measures. In multilevel policy-making, the decision-making mode distinguishes the particular allocation of authority. In contrast to Boswell and Geddes, the present study does not understand decision-making processes as separate approach but conceptualises it as a distinguishing dimension of each instrument choice and integral to the definition of EU migration policy as 'policy failure' or 'securisation' dynamic. Accordingly, we ask: does the kind of supranationalisation – consisting of scope and type of instrument selection – suggest a dynamic towards one or another model of supranationalisation of EU migration policy?

3.2. Discourse 1: Supranationalisation as Securisation Process?

We will revisit the **securisation** argument first. As Léonard points out, "it is generally believed that asylum and migration have been securitised in the EU and that this evolution has had a negative impact on the status of asylum-seekers and migrants, including the protection of their human rights" (Léonard 2010: 232). While the first generation of securisation theory (Wæver 1995; Buzan and Wæver 1998) focused on discourse, the second generation puts attention on practices and techniques applied (Bigo and Guild 2005; Bigo 2002; Huysmans 1995, 2000), which is more in line with the focus on policy instruments and actual policy-making. From this angle, Schain stresses that "the only Commission proposals that managed to be adopted by the Council between 1999 and 2002 were those that were restrictive in content" (Schain 2009: 104). The cumulative data on the type of policy measures above matches this perspective. The data presents itself more ambiguous for the subsequent period. It does not show any clear causal links for the strong increase of security-related initiatives as from 2001.

One explanation is that the EU strengthened its securisation approach as **reaction to the 9/11** attacks on New York and the subsequent terrorist attacks in Madrid and London (Boswell 2007; Léonard 2010: 234; Vaughan-Williams 2008: 66). It is argued that this general decision-making context also created a "specific context of securitisation of asylum and migration that EU Member States decided to establish the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, which is better known under its acronym FRONTEX" (Léonard 2010: 232). However, whilst a strengthening of restrictive policy-making objectives in the measures passed is evident, a number of qualitative analyses challenge that this dynamic was triggered rather than accelerated by the external shocks the terrorist attacks caused. Accordingly, it has been argued that the securisation of EU policy has rather been perpetuated than triggered by the external events. This interpretation is well supported by the present analysis that indicates continuities in the instrumentation rather than major breaks in connection with primary law changes.

The **foundation of FRONTEX** plays a key role in this process in "that all the main activities of FRONTEX can be considered to be securitising practices and have therefore significantly contributed to the ongoing securitisation of asylum and migration in the EU" (Léonard 2010: 246). However, taking a closer look at the coordination mode underpinning FRONTEX as policy tool, it basically remains mainly a **coordinator of national policies** and should, so Léonard, therefore not be seen as the main EU institutional actor on migration. In our terminology: it does not create harmonised EU law but is based on intergovernmental coordination mode that rests on the voluntary cooperation between the member states. This position is supported by Neal who vividly challenges a mere securisation explanation: "FRONTEX must also be considered in the context of the numerous other institutional, technical and legal tools being developed by the EU for the management of migration, security and indeed many other areas of policy. Given that this complexity far exceeds that of the political theatre of securitization, we should be less concerned with a spectacular dialectic of norm/exception and more concerned with an ongoing process of incremental normalization that is not quite spectacular or controversial enough to draw attention to itself" (Neal 2009: 353).

The **notion of a "normalisation"** adds another significant dynamic argument to the analysis. It shows that certain instruments are further developed by stretching their original mandate. Over the years, the actual resources of FRONTEX have been increased substantially "as part of a wider 'intelligence-based' approach to the management of border control activities (which sees it, amongst other things, working in close cooperation with the i-map strategy of the International Centre for Migration Policy Development). For these tasks its operating budget has grown from 6 million euros in 2005 to 87 million in 2010 with the organisation today employing 230 full-time staff engaged in analysis and operational organisation at its glass-clad HQ in Warsaw" (Reid-Henry 2013: 199-200). In this way, "Frontex has in fact become important as a border control actor precisely because of the pervasive effect that its seemingly mundane, administrative approach to the border has had upon European border control practices" (Reid-Henry 2013: 201). In terms of instrumentation, FRONTEX as key tool to control illegal immigration can thus best be understood as a case of policy experimentation (Wolff and Schout 2013). Instead of sustaining a consistent securisation approach, FRONTEX, on the one hand, highlights the continuities of applying security frames in EU migration policy. On the other hand, it shows that instruments themselves are extended over time. This happens within the (in this case intergovernmental) coordination mode and sustaining the security scope of the instrument. This rendered FRONTEX into an agency "which has sufficient financial resources at hand, disposes of the necessary flexibility but depends entirely on the goodwill of the member states to fit it with operational tools. This contributes to the impression that many of Frontex's activities are of an ad hoc nature rather than following a comprehensive plan, which will hamper systematic collective learning and the rapprochement between member states in the field of IBM [internal border management, EGH]" (Pollak and Slominski 2009: 920). In terms of instrumentation, we observe "oftentimes rather experimental approaches that have been developed in and through Frontex operations at the border. Such an approach

sets geopolitics and geo-economics together, not through a mapping of its 'geo-strategies' so much as through what might be termed, following Foucault, its geopolitical rationalities" (Reid-Henry 2013: 201).

This reading matches very well also the migration policy approach the EU has developed in **external relations**, mapped above as bilateral and multilateral agreements with third states that frame migration as security issues. Notably, "[t]he introduction of new instruments in a sector like security and in an institution like the EU is a complex, messy and often unpredictable business" (Menon and Sedelmeier 2010: 90). Unlike national foreign and security policies, which are in tendency less partisan than other policies, in the EU "foreign policy – and particularly its security-related aspects – depends on unanimous agreement between 27 member states with greatly differing conceptions of 'security'. Trade-offs and log-rolling – the stuff of 'humdrum' rather than 'heroic' politics – are consequently commonplace" (Menon and Sedelmeier 2010: 77). The actually messy and partially contiguous process of instrument development stands in contrast to the Commission's intended issue linkages to establish a consistent "global approach" to migration that links security, migration, development and human rights issues. It becomes evident in particular in the linkages between migration and development policy objectives. Analysing these since 2005 Reslow points to various initiatives that have been launched to realise this issue linkage, such as the Commission Communication on Mobility Partnerships (2007) that proposes legislation on the admission of highly-skilled workers and which highlights the desirability and necessity for immigration. "Ultimately, however, they still emphasise the 'fight' against illegal immigration, leaving this policy dilemma unresolved. In addition, 'legal migration' in these policy initiatives more often than not refers to projects such as capacity-building activities to improve partner countries' abilities to deal with migration flows or disseminating information amongst the citizens of partner countries about the legal migration channels to the EU; 'legal migration' does therefore not refer to increasing the number of opportunities for legal migration to the EU or fostering such movements" (Reslow 2010: 18). Thus, also in areas in which EU migration policy has become more supranational, it has by and large been **in line with national preferences** (Reslow 2010). This is supported by other findings on bottom-up Europeanisation dynamics in EU migration policy more generally (Reslow 2012).

These result echo that whilst "instruments of immigration control and exclusion, as well as instruments for regulating asylum, continue to be developed at the EU level, any plan for the admission of immigrants continues to be stalled in the Council" (Wunderlich 2012: 1415). These findings in the literature match the above data on the **extensive use of bilateral agreements** on readmission of third country nationals. It also supports the finding that **initial intergovernmental trajectories still dominate** even those areas in which supranationalisaiton aiming at actual harmonisation of the treatment of migrants can be observed. This trend is also supported by findings on EU external governance more generally that show external governance to be "shaped by issue-specific modes of governance and patterns of power and interdependence, which contribute to a strong differentiation of its forms and effects" (Lavenex and Schimmelfennig 2009: 807). Besides the agreements between the EU and single states, single member states have increasingly finalised bilateral migration agreements. Adepoju et al. therefore conclude that "European interests such as migration control and readmission still dominate in the multilateral and bilateral migration agreements that are signed with migrant-sending countries in the South, while southern interests such as labour migration opportunities and development aid are often peripheral or even nonexistent. At the same time, however, there are a number of positive developments which could potentially result in 'fair multilateralism' and creating win-win situations between poorer Southern partners and richer EU-countries, optimizing the development impact of migration" (Adepoju, Van Noorloos *et al.* 2010: 65). As will be developed below, the trajectory of initial instrument choices however rather suggests that major changes should be expected from new rather than incrementally adapted instruments that pre-determine particular frames and types of policy-making. The Lisbon treaty further strengthened the Commission's legal standing to negotiate readmission agreements with countries of origin which suggests a further continuation on this track of instrument mix with a bias towards security. Most analysts agree that the security-biased instruments "reflect the agenda of the EU and that they serve mainly to control and

preferably limit migration" (Adepoju, Van Noorloos *et al.* 2010: 67). A more multilateral approach in which the Southern partners pool their interests could actually bend towards their advantage.

3.3. Discourse 2: Supranaitonalisation as Process of Policy Failure?

The debate about **policy failure** is linked to the rights dimension because it is argued that the EU remains structurally behind its self-stated goals to promote migrants' rights and establish harmonised policies to integrate migrations in the member states. As pointed out, despite the persistent bias towards controlling illegal immigration and the persistent power relationships the initial instrumentation set up between the member states and the supranational level, also the rights dimension has been strengthened. "The Commission has made considerable progress in developing a common approach to standards of integration. A list of 'Common Basic Principles for Immigrant Integration Policy in the European Union' was agreed to in the Hague Programme in 2004 as part of a common programme for integration. [...] However, both the development and the content of civic integration policy have been quite different from those of anti-discrimination policy. The new trend tends to emphasize civic integration policies which create an obligation for immigrants who wish to attain the rights of citizens individually to demonstrate that they have earned those rights" (Schain 2009: 105). The specific kind of instruments the EU has developed to better protect migrants' basic rights deserve some further elaboration.

It has been argued that the Court of Justice of the European Union (CJEU) has indeed constrained national policies in a number of cases concerning family reunion (Acosta Arcarazo and Geddes 2013). Notably, this dynamic is in line of what Keleman terms the shift to an US-model of "adversarial legalism" (2011). The author argues that the model of regulatory law, which had dominated the European Community, was based on tight cooperative networks between regulators, lawyers, courts and policy implementing bodies. He observes that since the inception of the EU this model has increasingly lost momentum. Instead, acting within the fragmented institutional EU system policymakers enact more detailed, transparent and judicially enforceable rules. These are often framed as individual rights that are backed by public enforcement litigation and opportunities for private, individual litigation rather than the previously dominant informal cooperative approach. Following Kelemen, the CJEU judgements may hence be an indicator for *weaker* rather than *stronger* EU regulation as far as general migrants' rights are concerned. Rather than indicating the emergence of collective rights based on harmonised EU law formally and informally supported by a large network of public and private actors, rights are defended punctually by individual litigation. This interpretation suggests increased Court activity and an underlying dynamic that points towards insulated individual rights rather than a comprehensive harmonised rights (for a very sharp analysis of the mechanism by which the installation of individual rights in the EU hollows out collective rights in the member states see Höppner and Schäfer 2010). In line with this, it has been shown that since co-deciding on EU legislation, also the EP has been shifting away from the rights towards the Council's more restrictive approach to irregular migration and asylum (Lopatin 2013). We therefore need to evaluate the increase of substantive rights-based law from a specific angle. First, "[r]ights and protections for immigrant populations have been developed primarily by domestic courts and institutions, and national NGOs have used these instruments to constrain the actions and behaviour of European states which have attempted to control and restrict immigration" (Schain 2009: 109). The rights established on the EU level fall into the category of instruments that strengthen the adversarial legalism approach rather than harmonised collective human and migration rights. In additions, migrants have access to these rights only after having passed the conditions of being accepted as legal migrants – the procedures for which have been streamlined by EU cooperation. Therefore, "all in all, the suggestion that more expansive rights imposed by international accords, courts, and institutions, which would severely limit the ability of the state to control immigration and which would change citizenship, have proven to be mostly wrong" (Schain 2009: 109). Instead, also in the rights dimension member states sustain their dominance whilst rights that have been created are

located on individual, judicial level.

If, then, the nature of the specific rights that have been established are of this individualised kind, how can we evaluate the remaining common initiatives? The initiative that sticks out is the *Immigration Pact*, introduced by the European Council as soft tool to promote harmonisation (see above discussion). "The development of a policy of civic integration was moved to the EU (intergovernmental) level at the initiative of Nicolas Sarkozy, (then) French Minister of the Interior. In March 2006, the interior ministers of the six largest EU countries (the G6) agreed to pursue the idea of an 'integration contract', using the French model as a starting point. [...] Thus, the European context, rather than constraining states in Europe, has enhanced their abilities both to control immigrant entry and to develop more forceful policies on integration, essentially defined at the Member State level" (Schain 2009: 105). In terms of instrument selection, this initiative is particularly interesting. As harmonisation attempts in form of binding EU-legislation had so-far failed, the informal Pact fits another mechanism in policy instrumentation. "When agreement on substantive issues of institutional power is impossible, EU leaders turn to procedures (or meta-instruments). [...] A meta-instrument enables policy-makers to govern a set of instruments" (Radaelli and Meuwese 2010: 138). Turing to soft procedures and rules about procedures is thus a common attempt to achieve what could else not be achieved in EU policy-making that lacks hierarchical steering power. However, this instrument choice creates a paradox: where the EU is not able to legislate, it turns to soft steering (Börzel 2009). Yet, all impact studies show that in absence of potential legislation, soft steering modes do not produce tangible behavioural change (Héritier 2002). In the absence of a "shadow of hierarchy" the paradox thus leads to policy failure: only where the EU can credibly threaten to enforce hard legislation, soft steering works as intended – yet, for the lack of hard steering powers, the EU refers to soft steering as residual to act at all (Börzel 2010). These combined insights on steering in the EU shed a rather dim light on the possible impact in promoting collective rights and national harmonisation of migration integration in the EU. The policy failure argument hence deserves a differentiated answer.
As supported by the descriptive analysis above, rights have been strengthened also by legally binding acts. The underlying logic of these instruments is, however, of an individual basis. Collective rights and cross-EU policy harmonisation, on the contrary remain in the realm of soft steering. As for the above analysed security-oriented measures, also the provision of migration rights remain firmly under member state control with low likeliness for this to change with the existing toolbox of instruments.

3.4. Conclusions form an Instruments Perspective: Supranationalising Mirgration Policy

Before drawing some conclusions on the kind of migration policy the particular EU instrument mix establishes, it is worthwhile to briefly review **why these instruments** have been established at all. The latter question is of relevance because it further specifies the particular power relations enshrined in the instruments. A strong explanation for the extension of EU migration policy is "**venue shopping**" (Guiraudon 2000). It is argued that member states realise certain policy objectives – that is: more restrictive migration control policies – by opting for cooperation in transgovernmental working groups to circumvent national constraints and the creation of judiciable binding EU legislation.

Looking at the eventual outcomes, however, this argument has been challenged as asylum policies in the EU member states have not become straightforwardly more restrictive. In short, **liberal standards** have been upheld which "can be explained by considering the broader 'system of venues' in which the EU asylum policy venue is embedded. This system of venues has seen important changes following the adoption of various EU treaties. Those have led to an increased communitarization of asylum matters and a growing judicialization of the EU asylum policy venue, which have rendered this policy venue less amenable to the fulfilment of restrictive asylum preferences. In effect, member states are now locked into a more liberal system of policy venues following the ratification of the various EU treaties" (Kaunert and Léonard

2012: 1409-10). In contrast to this evaluation, Menz supports Guiraudon's venue shopping argument. "Governments attempt to maximize room for national manoeuvre and defend national regulation, delaying EU regulation or suggesting their own regulation ideas as blueprints. In the migration and asylum policy domain, these efforts are remarkably successful. Governments play two-level games. At the national level, non-state actors engage interior ministries, attempting to shape the national negotiation position. However, unless such actors can build successful coalitions, [...] their influence appears limited" (Menz 2011: 458).

Our analysis of instrument scope and type can help to resolve the apparent contradiction between more liberal elements in national migration policies and the successful two-level game of national governments. On the one hand, some liberal norms have been strengthened indeed. Yet they remain limited to individual rights. On the other hand, member state governments have indeed been successful in strengthening the initial security track of EU instrumentation since 1993. The introduction of the Immigration pact is indicative for this two-level game since the very selection of soft instruments can ensure that "although the European Council might theoretically have played a useful role here, in practice its efforts will add little to the achievement of a truly common policy" (Angenendt and Parkes 2009: 77). In brief, the instrument perspective shows that answering to functional pressures for a common EU migration policy by selecting a particular instrument mix can achieve two national goals at the same time: an increasingly common approach that, instead of harmonising national policies, in the end strengthens the states' migration policies (on this in particular Schain 2009). Essential to the instrument choice is that there are venues to pick from. The political will of the Council that decides on the reallocation of authority in the first place, is therefore of key importance. The mere existence of various venues without decision-makers who wish to and have the power to use these, is not sufficient for actual instrumentation.

The scrutiny of EU migration policy, by analysing the scope and type of instruments actually applied, provides the following set of conclusions. First, an underlying **bias towards security-related legislation** can be traced throughout the EU's involvement into migration policies. It can be causally related to intergovernmental objectives for the period between 1993-1999. Since the introduction of the Treaty of Amsterdam, the links are less directly evident but as from 2002 in particular, security-related legislation has increased substantially. Second, the increase in security related, restrictive measures should rather be seen as **continuation of this initial instrument choice** than a sudden turn in EU decision-making. The academic literature fits the above presented data well in this respect. External shocks, most prominently the terrorist attacks on New York, Madrid and London, therefore feed into an already pre-existing dynamic of security-oriented EU migration policy. Third, instrument choice, especially in EU in security policy, is **complex and often contentious**. A simplifying functional logic suggesting a straightforward link between intended outcome and instrument selection is misleading. The evolution of FRONTEX is a case in point. The agency has seen far-reaching increases in resources and means in response to political pressure to react to migration flows from third countries. Rather than a comprehensive security agenda, these responses have been incremental and ad hoc, yet, within the limits of the initial intergovernmental logic. Reasons to extend FRONTEX have thus been not simply functional as the instruments it is equipped with are strengthened in material terms but not when it comes to actual independent authority.

Fourth, the stocktaking of EU instrumentation tells us quite a lot about forms of power and underlying policy ideas in EU migration policy. Regarding **forms of power**, it shows throughout that coordination modes remain strongly member state dominated – decisive exceptions being the strengthening of individual rights and soft collective instruments. Both these exceptions remain, however, limited in their potential impact, especially in creating harmonised EU migration polices and rights. With respect to **policy ideas**, the analysis of frames showed that the security / restrictive frame remains dominant throughout. Yet, granting migrants also rights that are of legally binding nature adds another decisive frame. Interpreting EU migration policy as pure securisation process is therefore utterly misleading. In the same vein, overestimating the rights-based dimension as the dawn of a full-fledged harmonisation trend in EU

migration policy, is equally misgiven. Rather, it appears that rights back up the security-dominated policy ideas as to flank these in a way that sustains national independence as far as possible. Five, concrete **member state initiatives** based on a shared will are more powerful than other large-scale constituent changes in EU law. Strikingly, neither the Amsterdam nor the Lisbon Treaty, which created decisive new powers for the EU to legislate in migration policy, set off immediate effects. Instead, policy programmes by the European Council have apparently a more tangible impact. Finally, **soft steering** is applied especially to promote rights-oriented policy measures. But for all that we know about EU policy instrumentation, we should be sceptical about the impact these instruments might produce. The decrease in Commission planning documents after the Lisbon Treaty has been enforced may either be due to a time delay – or due to the fact that there is a considerable backlash of Communications to harmonise EU migration policy and to create binding standards and quotas. These have never been agreed on by the member states in the absence of a shadow of hierarchy that could credibly constrain the competing member state prerogatives. For as long as migration is framed as predominantly a security or charity task and hence a burden rather than a gain for the receiving countries, these positions will remain competing and agreements on instruments that would reallocate authority to provide for instruments beyond granting security and minimum individual rights standards seem unlikely to be achieved.

4. EVALUATION AND OUTLOOK: LESSONS FOR A MULTILEVEL MIGRATION POLICY APPROACH

Concluding on the multilevel nature of EU migration policy, Boswell and Geddes hold that "[m]igration does not fit with the usual multilevel trope – not least because policy areas such as cohesion and regional development are redistributive types where resources are reallocated, while migration is a regulatory policy type governing access to those recourses. That said, multilevel politics has a clear reference to the territorial basis of politics and migration policy is also fundamentally associated with issues around territory, territoriality and borders" (Boswell and Geddes 2011: 227). The present analysis challenges this view in part. Applying an instrument-focused approach that scrutinises the coordination mode and type that make for a specific instrument, shows that it is very well possible to tickle out the multilevel-specific characteristics of regulatory policies. This includes initial instrument selection that constrains the allocation of powers across the different levels of governance and the trajectory of policy development that is determined essentially by the original instrumentation choices.

The initial instrument choice in the EU framework has more far-reaching consequences than in a classic democratic state stetting. If initially framed as security issue, the policy competences are embedded in this particular area of EU competence with specific decision-making modes and actors. Actually, the intergovernmental method which first applied is still exercised in particularly salient areas for which the Lisbon Treaty still explicitly rules out harmonisation. If conferred as a competence of the AFSJ, it will be the national Ministers of Interior who decide upon all relevant issues and moving an issue into another portfolio demands hard to achieve basic decisions about power allocations (Scharpf 1988). In addition, the specific sectorial logics are reinforced in the Council of the EU where not a government cabinet composed of different line ministries, but 28 ministers with the same portfolio take decisions. Compromises impossible to reach at the national level can this way be circumvented by imposing decisions through EU legislation. Keeping this general dynamic in multilevel policy-making in mind, it comes at no surprise when Schain concludes that "the emphasis on exclusion and restriction – the 'securitization' of immigration policy at the EU level – is no accident, and directly reflects the preferences of the ministries that control the process and their ability to dominate institutional space" (Schain 2009). Although the empowerment of the EP in the Lisbon Treaty might change this balance, the above cited finding that the EP actually took on the security policy ideas as it gained more decision-making power, seems to suggest that rather than large

Treaty changes the pre-existing policy-instruments shape future decisions.

Which, then, are options for the future? One definite answer is that merely adding more soft-steering, voluntary or supportive competences to promote harmonisation of standards and the strengthening of individual migrants' rights will not change the trajectory the present instruments imply. Much more likely, the instruments "in action" will create path-dependencies that become ever harder to break. The reasons for this are two-fold. First, instruments create particular policy outcomes and functional pressures to improve these and strengthen the already existing tools within the limits of their mandate. The way FRONTEX has been strengthened in its material resources but not its mandate is a case in point. Again, this dynamic in instrument expansion is particularly dominant in the EU multilevel system because, as the migration area well illustrates, instruments are only created after lengthy joint decision-making processes that are even harder to undo by a renewed decisions (Scharpf 2006). Second, the way an instrument is defined on the EU level also determines the scope and type of EU authority. Therefore, the creation of a new EU-policy instrument always implies the institutionalisation of multilevel power structures and the empowerment of certain decision-making actors. Again, the log-in effects this creates are not unique to policy-making in the EU but the impetus of log-in effects is decisively stronger in the complex multilevel system. The most likely future development is hence that the security bias of EU migration policy will not be diminished and that this may threaten to undermine other attempts for more encompassing rights-based harmonisation.

What this analysis has brought forth is that for an increase in actual policy decisions (binding secondary law), framework guidelines backed by a the political will of the European Council seem to have had a stronger effect than fundamental Treaty changes – such as the move of asylum and immigration into the first pillar in the Treaty of Amsterdam and most recently the abolition of the pillar structure in the Lisbon Treaty. It might be simply too early to see the peak of legislative activity the new powers created by Lisbon Treaty might produce. The results of the stocktaking of existing EU migration policy measures and the attempts to explain their specific nature suggest however otherwise. Taking institutionalist theory seriously, revising certain aspects of the Stockholm programme may adapt details of the strongly security-oriented course of EU migration policy. It is very unlikely to change its general trajectory. Should more deep-cutting changes be desired, layering (Thelen 1999; Streeck and Thelen 2005; van der Heijden 2011), for instance by strengthening a challenging approach to migration on the single market and labour demands venue, is more likely to set free dynamics that could eventually lead to a more comprehensive EU migration policy or even a harmonisation of national approaches beyond restrictive measures and minimum individual rights. Conversely, continued measures on the present instrumentation trajectory promises a particular kind of rights-creation, namely individual rights fought for in single cases brought before the CJEU rather than harmonised collective migration legislation based on shared administrative standards across all member states. These dynamics for further integration in EU migration policy should hold especially due to the fragmented multilevel nature of the EU policy-making that needs to balance the joint problem definitions of the single market against the territorially defined rights and duties of migrants in 28 state entities.

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