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Knowledge for INtegration Governance

Multilevel Elements of EU Migration Policy
- A Research Note -

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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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The present paper belongs to the series of contributions produced by the researchers of the "Political Science" team directed by Alberto Martinelli.

The project is coordinated by the **ISMU Foundation.**

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1. WHAT IS MULTILEVEL GOVERNANCE?

To figure out which impact the multilevel nature of policymaking in the European Union (EU) has on the wider field of migration policy, it is due to first define multilevel governance in general terms. Based on a distinct definition, we can identify the division of authority among actors on different levels in a given policy filed. A good starting point is the prominent distinction between type one and type two multilevel governance by Hooghe and Marks (Hooghe and Marks 2003). Governance is here understood as a framework to steer public policies, which may involve public and private actors. A type one governance system is defined as general-purpose jurisdiction. It is marked by non-intersecting membership, which means that authority is clearly attributed to a particular level in the framework of a systemwide institutional architecture. A federal state with a catalogue that assigns competences to different levels is an example of such a system. Type two governance is, in contrast, defined as a system of task-specific jurisdictions that have intersecting memberships. This means that authority can be shifted if the context changes and that the different units can be members of various jurisdictional levels or parallel entities. These two ideal types help us to understand how multilevel governance works in the EU, which shows both type one and type two traits. The EU has, on the one hand, a systemwide institutional architecture and acts as a general-purpose jurisdiction especially in the economic realm linked to the single market. At the same time, within the EU framework also type two overlapping competences exist, most prominently in the still primarily intergovernmental field of foreign and security policy (for a useful synthesis that takes these defintions a step further see Leuffen, Rittberger *et al.* 2013).

In the area of migration policy, the mix of type one and type two multilevel governance is particularly obvious because different policy concerns are tackled with different approaches. Looking at how the larger area of immigration and asylum developed from initially informal cooperation among member states to ordinary joint EU decision-making on many issues, we can actually trace how on certain issues type two (i.e. intersecting but formally autonomous legislation of the member states or other international organisations) evolved into more type one-like governance (i.e. a singular harmonised EU-law derived from competences generally conferred to the EU-level). To grasp the nature of multilevel policymaking in migration policy, it is therefore central to distinguish which particular rules apply. The variance is not by broad policy fields but is mostly bound to policy issues. For example: in asylum policy, binding EU law has harmonised certain standards while setting the bar for recognition rates stays in the firm hands of the single member state. It follows that depending on the issue “multilevel” has actually very different implications for day-to-day policymaking. This holds definitely for the formal spread of authority and competences across different levels and units in the EU and its member states. It becomes, however, even more complex if we recognise that besides the formal rules, much policy practice is de facto shaped by informal practices. In our example: even if there are regulations on standards, enforcement and even monitoring has surely not been achieved and is ultimately only possible if the member states who as main carriers of policy implementations have some true incentive in doing so.

In sum: the very definition of multilevel governance implies that it is multi-facetted. The way it takes shape is always case-dependent. Hence, we cannot come up with general statements about multilevel governance in a multifaceted policy such as migration policy. Yet, the categories enshrined in the concept of multilevel governance offer terms to describe different interaction logics that have different implications for policy design, implementation and eventual outputs and outcomes.

2. WHO HAS AUTHORITY OVER WHAT IN EU MIGRATION POLICY?

Having defined multilevel policymaking in general, this section examines more specifically how authority is divided between the different layers and territorial units that, together, compose the EU. The division of authority and thus of competences on migration-related issues differs depending on the actual policy problem considered.

Table 1 - Competences of the EU and migration related policy examples (own table)

Exclusive Competence	**Shared Competence**	**Supporting Competence**
The Union has exclusive competence to make directives and conclude international agreements when provided for in a Union legislative act • customs union (linked: visa regime)	***EU Primacy*** *Member States cannot exercise competence in areas where the Union has done so* • social policy (where in Treaty) • area freedom, security, justice • standards and procedures in asylum policy ***EU / MS Equal*** *Union exercises of competence shall not result in MS being prevented from exercising theirs in* • develop. coop., human. Aid ***MS Primacy*** *Union coordinates MS policies or implements supplemental to theirs common policies, not covered elsewhere* • coordination econ., employ. social policies • foreign, security, defence	*The Union can carry out actions to support, coordinate or supplement Member States' action*

In consequence, speaking of a "EU migration policy" means in real fact to speak about a mix of supranational, national and sub-national policy measures and competences. Different competence mixes within a larger policy field have existed from the start of EU integration. With the formal introduction of the second and third pillars in the Treaty of Maastricht, intergovernmental policymaking was formalised. In

addition, the Lisbon strategy (2001) introduced the so-called "open method of coordination", an even looser form of cooperation. The Treaty of Lisbon (2009), for the first time, offers a categorisation of EU competences, which is reproduced in Table 1. Most issues concerning migration policy fall under the category of shared competences, especially in the areas in which Treaty reforms have established a formal community competence (visa, border control, asylum, immigration, labour migration). The formal Treaty competence allows for more concrete secondary legislation to be passed. As a rule of thumb: where the EU legislation exists, member states have to subdue to it. Where no EU legislation has been established, the member states can independently legislate as long as national legislation does not conflict with existing EU law. This has two essential implications for multilevel policy practice. First, the amount of authority conferred to the EU level determines how much independent authority the member states still have. As the Treaty of Lisbon has further manifested EU competences in migration policy, we can sustain an increasing system of systemwide, type one governance system here in which national bodies have to implement EU law. Second, however, even if there is a general conferral of competences, this does not by itself establish working policies. Only where followed up with secondary legislation, which has to be agreed on according the EU rules, formal EU competences are filled with concrete meaning. In the existing secondary legislation, important islands of national autonomy persist both formally (e.g. quota for the admission of immigrants) and informally (through incomplete or lax enforcement of EU law). It is therefore of extreme relevance that the changes of the Treaty of Lisbon have also strengthened the role of the Court of Justice, which has now more competences in ruling on the correct application of EU standards and rules in the member states.

The categorisation of competences is interlinked with the policy instruments that can be applied. Notably, only where the EU has been conferred exclusive of shared competence, EU legislation can be passed. The legislative action can be complemented by other, so-called soft-law measures. The most prominent soft-law instrument is the open method of coordination (OMC). In face of the inherent tensions between a push for more supranational competences and the member states strong preference to sustain their independent authority in immigration policy, the Commission in 2001 proposed legislation for an open method of coordination in immigration policy (cf. Caviedes 2004). Although the open method of coordination has in many policy fields been successfully introduced to find a compromise for joint action while preserving national autonomy (Schäfer 2004), the Commission's proposal for coordination under the open method model was never embraced by the member states and thus not realised (see the record on EuroLex http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=166319 , accessed 1 September 2014). We therefore do not have any meaningful OMC initiative in the migration policy. In consequence, coordination is indeed limited to the fields of shared competences outlined here. All other areas remain in the hands of national administrations.

The split and scattered responsibilities for different elements of migration policy can lead to inconsistencies and additional coordination challenges. At the same time, centralising all tasks is neither normatively desired nor would it be efficiency enhancing if the principle of subsidiarity would be neglected. Subsidiarity in migration policy matters not only because certain tasks are best served at a particular (not necessarily the highest) level of governance; also the has to correspond with very different political and cultural traditions in the 28 member states. The countries migrants come from, the actual networks they have in the receiving country, simple matters of geography which lead to different influxes of (im)migrants – all these factors imply that the different member states have very different policy demands in many respects while they have lost some control options due to the creation of the single market.

Finally, in evaluating the strengths and pitfalls of multilevel policymaking in a particular policy area, the way we analytically capture the policy problem at stake matters. A common juxtaposition is a security versus a basic rights frame. This research note uses the notion of "migration policy" as overall heading. Legal or irregular immigration from third states, mobility of EU citizens within the EU, but in a more encompassing way also the integration of third-country nationals can be subsumed under this heading. Specific treaty and

secondary law provisions can be hierarchies according to this perspective (see Heidbreder 2014). Due to the complexity of the larger policy area and the multiple levels and actors involved, the evaluation of "a policy" is connected to the specific categories applied. This in mind, this note applies "migration policy" as the most encompassing term (see Table 2). The narrower focus is on the movement of non-EU citizens into the EU. Since it is a special interest of the KING research group, responsibilities in integrating third country nationals are also touched upon, yet in very general terms of division of authority.

In essence, who has authority over what? First, due negative integration (Scharpf 2008), there are pockets of apparently lost authority. The creation of the single market and liberalisation implies that states can no longer control the movement and influx of people as they used to. The immigration and asylum policy established on the EU-level is strongly owed to the functional pressure to re-regulate and better manage migration. That shifting power to the EU-level would re-establish some different form of authority is, however, challenged openly by politicians who see the loss of national sovereignty due to EU-harmonisation as not only too high a price to pay but also as an additional element in undermining national action capacity. Following this logic, the UK and Ireland have opted out of the whole area of freedom security and justice (justice and home affairs) and the Schengen area, which – since the Treaty of Lisbon formally – also excludes them from all follow-up legislation in the wider policy area. Second, the EU has no comprehensive blueprint that would provide a full-fledged programme for all parts of a comprehensive migration policy. The type of competence the EU has in certain policies linked to migration have rather emerged in an incremental and patchy way. Third, the constant struggle between a functional pressure for harmonisation and the attempt to retain national powers leads to the de facto result that policies remain in practice still highly incomplete. Even where more comprehensive solutions – such as a common asylum policy – have been formally been added to the treaties, the actual EU-law creation has been hampered by lack of agreement among the member states. Interesting enough, these tensions have not led the national governments to involve in the OMC to coordinate national immigration policies and pre-empt EU harmonisation.

3. HOW DOES MULTILEVEL POLICY-MAKING IN THE FIELD OF MIGRATION PLAY OUT?

This section reviews how, under the Treaty of Lisbon, the levels of the EU-systems interact in the most relevant migration policies. Notably, the specific division of authority is the outcome of competing interests on two dimensions: "The EU's involvement in this field of law must not only address these diverse aspects of migration in a coherent way, but also has to manage two distinct but related conflicts: the balance between EU competence in this field and national sovereignty, and the tension between immigration control and the protection of human rights" (Peers 2014: 777). Research that deconstructs the evolution of different specific measures can illustrate for single cases how the power struggle between the levels of governance and between the competing normative goals lead to a particular outcome. Across the cases, we can roughly attribute different roles in EU law-making to the actors on the different levels. On the dimension of EU competences versus national sovereignty, the member state governments – trying to preserve as much sovereignty as possible – have initially been the most relevant actors. The Treaty of Lisbon has further extended the ordinary decision-making procedure and hence strengthened the role of the European Parliament (EP) as real co-legislator. Even more than the Commission, the EP can be seen as a promoter of EU competences so that the Treaty of Lisbon has indeed further strengthened the options for more harmonisation. On the second dimension, EU migration policy is regularly accused of a bias towards immigration control (for an analysis see Heidbreder 2014). In more recent years, especially the Court of Justice has substantially strengthened the human rights dimension. As the Court's influence has been

strengthened, too, in the Lisbon Treaty, we may expect more EU-level influence on re-balancing immigration policy and human rights concerns in future.

Examining which policy issues fall under the larger field of migration policy, we can crudely subdivide policies that deal with legal immigration and irregular immigration. The legal sources for both are different. While the free movement of persons and labour inside (the core of legal migration) are two essential elements of the basic freedoms the EU rests on, policies dealing with the immigration from third countries formally entered the EU agenda only with the Treaty of Maastricht and the establishment of the second and third pillars. The most prominent policies are: internal market freedoms (fully established rules on EU-level for EU citizens), visa and border control (strongest EU-level role in dealing with third-country nationals), and immigration and asylum (formal EU competences but not fully developed legislation and implementation). Table 2 summarises these policies, termed policy issues to indicate that different aspects of the wider migration policy are tackled. The table also provides some crude information about which levels are involved, what the main objectives of the policies are and which tools are being applied. The notions of legal and irregular immigration have been put in as labels, too. They overlap with the different policy issues: immigration and asylum policy deal with both legal and irregular migrants. These policies are hence placed under both / in between the labels. I will briefly outline the content of the policy issues and their multilevel implications.

Visa and Border control is the most developed EU competence in migration policy. As the EU member states share common external borders, the strong role of the EU in this field appears a logical consequence. There are, however, no exclusive EU competences in this field. Quite on the contrary, FRONTEX, the border control agency, rests on purely national implementing forces. The goal to control for irregular migration has been the prime objective in the EU's visa and border re-regulation. "On the whole, the EU has gradually stepped up the degree of harmonization of visa and border control policies and increased control of entry to EU territory, in particular by means of technical measures (the SIS and VIS) and the enhanced operational role of FRONTEX. […] As regards human rights, EU legislation in this field sets out general rules on this issue, but does not specify concretely how such rights are to be protected in the context of visas and border controls" (Peers 2014: 783). Regarding multilevel action: in visa policy, member states are bound by EU legislation but keep their independent implementation systems but need to comply with information and exchange mechanisms between member states for which electronic systems (SIS, VIS) have become relevant tools. In border control, FRONTEX has taken on important coordination and operational tasks. The formal control over border forces stays, however, in the hands of the member states. The Treaty of Lisbon has rendered legally binding the Fundamental Rights Charter when EU law is being applied. This strengthens further the human rights protection in the EU, which has been pushed for mainly by the Court of Justice. The growing relevance of Court jurisdiction, border control and visas regimes were re-regulated with a strong emphasis on blocking off irregular migration. "As the growing corpus of legislation indicates, the EU has been gradually harmonizing national law as regards control of irregular migration, and moreover it has continually been increasing the degree of control of irregular entry. But as with the EU's visas and borders legislation, there are countervailing tendencies towards human rights protection in this case due to the role of the Court of Justice" (Peers 2014: 786).

In asylum and immigration policy, the member states have step-by-step increased the EU's competences (see Acosta Arcarazo 2014 and Heidbreder 2014). This means, that EU law has to be transposed by national bodies – where it has been passed to indeed enact the general competences created in the Treaties. The Common European Asylum Policy has been planned by the Commission in two phases of legislation, the second is currently being implemented. A serious limitation remains that the member states exempted certain issues from harmonisation, most relevantly the actual acceptance rates for migrants by each state and with it an actual EU-wide burden sharing system. "As in other areas, it can be seen that the EU's role in this area is steadily increasing, and indeed is governed by a political and legal objective of establishing a

‘common’ policy, which a view both to reducing divergences in national policy and increasing standards of human rights protection. The second-phase legislation [passed in 2013, EGH] and the case law of the Court of Justice to date both point clearly in the direction of and increasing level of both protection and harmonization, but the EU will still clearly fall short of establishing a ‘uniform’ concept of asylum law, even following the implementation of the second-phase legislation” (Peers 2014: 797). How far this new legislation that preserves still key issues for independent national authority will be effective, is to be seen.

Legal immigration, finally, is the key area of EU activity. For reasons of comprehensiveness, it is mentioned here even if it is not the main focal point of KING. Legal migration of persons, labour and services in the EU market is not only the most protected element of EU legislation, it is also one of the major objectives of the single market. Interestingly, the issue of immigration policy is not framed in these terms (even if given the demographic changes in most EU states and the growing lack of qualified workers would invite to include also third country migration into this policy frame). Legal migration is hence one of the key dynamics the Commission aims to promote among EU citizens. A huge body of law, based mainly on shared competences, regulates legal migration in the EU. Here, the member states have given up substantive sovereignty, in other words, the EU-level is the most relevant player to whom citizens can also turn in case a state does not duly enable him or her to move freely. Part of the legal migration is also a growing body of EU citizens’ rights that include anti-discrimination and social rights. Once a formal status has been achieved, migrants have therefore a dynamically expanding set of rights. “It can be seen, in light of both the continued adoption of legislation in this field and the dynamic interpretation of that legislation by the Court of Justice, that the EU’s role as regards legal immigration is becoming steadily more significant. […] Taken this as a whole, the case law of the Court of Justice has reduced the Member States’ power to restrict the benefits of EU legislation on legal migration only to relatively well-off migrants” (Peers 2014: 792).

In a nutshell, in migration policy most policy issues are governed by shared competences that leave the national level different degrees of freedom. While in legal migration based on the basic freedoms of the single market, the member states have basically given up their autonomy to regulate or block migration, when it comes to irregular migration the growing body of shared EU immigration and asylum policy excludes certain key issues from EU legislation, which might hamper the policies’ effectiveness in the end. While EU and national legislation has had a bias towards controlling irregular migration, in particular the Court rulings have constrained national implementers and EU legislators to respect human rights more prominently. In consequence, since the integration of migrants into the member states societies is still under the full control of the member states and only, no EU law is being applied here and the Court of Justice of the EU has no powers of these actions (only the European Court of Human Rights in Strasbourg has). The procedural standards established under the Common Asylum Policy offer, however, an entry point for EU-level intervention here.

4. CONCLUSION

In the field of migration policy, there is no single multilevel mode of interaction. The incremental evolution of central regulation that deals with visas, border control, legal and irregular migration in the EU implies a multitude of interaction modes. If we try to see a pattern, we can very crudely conclude that (a) in restrictive entrance control, the EU has most powers and strongest tools which it shares with central governments, (b) the actual basic services for migrants remain by-and-large in the hands of regional or local actors, and (c) the establishment of harmonised standards for procedures, as well as social and individual rights, is mainly established by the Courts which have actually strengthened important human rights in more recent years. This means, in turn, that we might expect also more binding harmonised rights norms to

occur in future – which will, however, be mainly based on individual cases brought up to the courts and thus create a more individual-rights based law than a genuine EU approach on how to promote migrants collective rights.

Table 2 – Snapshot overview (as under Treaty of Lisbon): Migration Policy Issues, Competences and Instruments (own table cf. Peers 2014)

	Migration Policy					
Competences / objective	*Shared: EU + MS / harmonisation + approximation nat. law + autonomous (sub)state action*					
	Irregular Migration *(EU competence to establish efficient management of migration flows, combat illegal immigration & trafficking of human beings)*					
Policy Issue	**Visa**	**Border Control**				
Competences / objective	*EU + MS: Single EU regime*	*MS + EU, after 2011 partial re-nationalisation: Secure borders*				
Tools	*Visa code Visa-Information-System (VIS)*	*Frontex Re-establishment limited inner-EU border controls*			**Legal Migration** (EU-role more limited than immig. / asylum)	
Policy Issue			**Asylum**	**Immigration**	**Non-economic**	**Labour Mobility**
Competences / objective	*EU + MS: Generally Treaty competence, in policy-making tension between EU competence / nat. sovereignty*		*EU + MS, (EU Court overview): CEAS*	*EU + MS: establishment common policy, fair treatment*	*EU + MS: General rights in Treaties and sec. legislation + case law*	*EU + MS: primacy of single market rights*
Actors and Tools	*Schengen information System (SIS) EDAC Returns Directive and bilateral agreements with 3rd states, mutual recognition expulsion orders …*		*EU-level: to establish uniform standards and procedures in MS; MS: yet to adopt 2nd phase CEAS*	*EU-level: to establish standards for fair treatment; MS: sole right to define quota*	Social rights, human rights (esp. case law)	
Policy Issue						"Integration" of Migrants
Competence Actors and Tools						*(sub)state authorities Certain EU standards, autonomous MS*

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