Reforming me softly – how soft law has changed EU return policy since the migration crisis

Peter Slominski & Florian Trauner

Routledge
Taylor & Francis Group

Reforming me softly – how soft law has changed EU return policy since the migration crisis

Peter Slominski[a] and Florian Trauner[b]

[a]Institute for Political Science/Centre for European Integration Research, University of Vienna, Vienna, Austria; [b]Institute for European Studies, Vrije Universiteit Brussel, Brussels, Belgium

ABSTRACT
In the wake of the 2015/2016 migration crisis, EU policy-makers have urged returning more irregular migrants. In order to achieve this, the EU has adopted a series of non-binding documents for European administrations (such as the EU Return Handbook) and agreed on informal return deals with countries of migrants' origin including Afghanistan. This article argues that the EU's shift towards soft law has not altered the EU's return policy in a profound way. Yet, it has managed to 'convert' EU return policy by emphasizing a particular interpretation of existing hard law (towards more restrictive practices and a stronger focus on 'efficiency'). The soft law approach has also allowed policy-makers to signal action in times of crisis at lower legislative and sovereignty costs.

Deporting third country nationals is regarded as the right of nation-states to control their territory and decide on the admittance and residence of foreigners. These features of the migration and citizenship regime are also constituent for the European Union's (EU) return regime. According to its Return Directive (2008/115/EC), third country nationals who do not fulfil the conditions for entry, to stay or for residence in a member state are obliged to leave. However, liberal states cannot return third country nationals at will but are obliged to act in accordance with human rights law including the respect of the principle of *non-refoulement*, the prohibition of mass-expulsion and the observation of due process requirements (Guiraudon and Lahav 2000). Moreover, EU states depend on third states to cooperate with forcible returns and rely on the willingness of returnees not to abscond and/or to cooperate during the return procedure.

CONTACT Peter Slominski ✉ peter.slominski@univie.ac.at

These political, legal and practical challenges are key factors for the modest enforcement of removal orders in the EU, which have rarely exceeded 40 percent (e.g. Cassarino 2010; Ellermann 2008; Slominski and Trauner 2018). Political actors have regularly called for higher return rates in the EU.[1] Since the migration crisis of late 2015 and early 2016, these calls have been voiced more often and more assertively, resulting in the adopting of numerous legally non-binding instruments entitled 'Statements', 'Joint Way Forward', 'Handbooks' or 'Action Plans'. They correspond to the criteria that Saurugger and Terpan (2020) have established for soft law (i.e. soft obligation and soft enforcement).

This article elaborates on why the EU has opted for such a soft law strategy and how it has changed the direction and content of EU return policy. The dynamics in the EU return field reflect the fact that soft law can become particularly relevant in times of crisis, when policy-makers are expected to address challenges in a swift and effective manner. Soft law bears lower legislative and sovereignty costs due to its non-binding character, which facilitate joint decision making. This has contributed to making soft law an important tool in many EU policies (see Snyder 1994; Senden 2004; Terpan 2015) and may play out particularly in times of a perceived crisis (Terpan and Saurugger 2020).[2] Theoretically, we combine functionalist approaches with insights of gradual institutional change. While functionalist accounts help us to understand why EU policy-makers have resorted to soft law in times of crisis, institutional change literature sheds light on how the use of soft law has affected the EU's institutional balance and the substance of the EU return policy. However, the case of soft law and EU return policy highlights that the various incremental modes of change, as developed by Mahoney and Thelen (2010), should not be treated as mutually exclusive. In most cases, soft law is not a new isolated 'layer' that is merely added to existing rules but rather closely interwoven with the hard law to which it is referring (Terpan 2015: 75). Although hard law cannot be replaced by soft law, the former is still being 'converted' by the latter. Soft law privileges a certain interpretation which not only becomes a powerful legal narrative but may even end up changing the direction of the whole policy. Adapting the framework of Mahoney and Thelen (2010), we therefore argue that 'conversion' and 'layering' should be combined to understand policy change in the EU return policy post-migration crisis.

Empirically, we look at EU policy dynamics since the 2015/2016 migration crisis. For a comprehensive understanding, we discuss the role of soft law both within the internal and external dimension of the EU's return policy post-migration crisis. Both aspects are key for the EU's effort to increase the effectiveness of its return policy. Internally, the EU aims at

strengthening its asylum and return procedures. Since it proved too diffi-cult to amend the Return Directive at short notice, the EU adopted a legally non-binding Return Handbook with the stated aim to improve the return system through a new interpretation of the existing Directive. It was framed as a key guide for national authorities on how to achieve higher return rates. Concerned about its impact on the fundamental rights of returnees, the Return Handbook has been heavily criticized not only by ninety civil society organisations but also by the Council of Europe (Statewatch 2017). Externally, the EU has also resorted to soft law to develop and deepen the cooperation with relevant third countries. We focus on the 'Joint Way Forward' (JWF) agreement between the EU and Afghanistan, which was probably the most discussed migration deal post-2015 (alongside the EU-Turkey Statement). Like the Return Handbook, the JWF has been hailed by EU policy-makers given the relevance of Afghanistan as a country of migrants' origin and criticized by human rights organisations (ECRE 2017). Our analysis draws on policy documents, legal texts as well as semi-structured research interviews with officials and politi-cians having senior positions in EU institutions or the administrations of partner countries such as the Afghan embassy in Brussels. The article first introduces the theoretical framework combining functional approaches with an adapted version of gradual institutional change. It subsequently illus-trates the EU's reliance on soft law within the internal and external dimen-sion of the EU's return policy post-migration crisis.

Soft law and gradual policy change

Soft law refers to 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but never-theless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects' (Snyder 1994). Soft law interacts with and complements hard law by offering interpretations that guide the behav-iour of law enforcement authorities (Terpan 2015: 75; see also Hartlapp and Hofmann 2020).

Why the EU is going for soft law

Functionalist scholars have developed several rationales why policy-makers may choose soft over hard law including easier negotiations, greater flexibil-ity, and lower sovereignty costs (e.g. Abbott and Snidal 2000; Shaffer and Pollack 2013; Trubek *et al.* 2005). The use of soft law can become an attract-ive option if a compulsory negotiation systems like the EU with its multiple veto players, interest diversity and an ever-growing *acquis communautaire*

struggles to adopt new policies or to reform existing ones (Scharpf 2006). To exit the EU's decision-trap, soft law may emerge as a useful instrument for the EU. While these advantages have already been observed in the context of 'normal' EU policy making (Cini 2001; Genschel 2011), the low legislative costs of soft law are considered particularly relevant in a situation of crisis or emergency when policy-makers are expected to act quickly and effectively. The crises-induced soft law approach can thus be understood as a 'distinct mode in which actions contravening established procedures and norms are defended – often exclusively – as a response to exceptional circumstances that pose some form of existential threat' (White 2015: 302-03).[3]

With regard to external agreements, soft law may also be an attractive instrument for EU policy-makers and third country governments. In particular, for the latter, formal EU readmission agreements are anything but popular as they tend to provoke domestic opposition and to be politically salient. They usually require formal transposition and implementation into domestic law. Opposition parties, the media and veto-players in third countries get an opportunity to criticise or even block these agreements. By contrast, non-binding agreements are usually less in the public spotlight and allow a more pragmatic and flexible approach. They do not set unwanted precedents. Overall, partner countries therefore maintain a higher level of flexibility and control in the context of non-binding international accords.

How soft law affects the EU's institutional balance

The literature on forum shopping argues that actors select those instruments that best suit their interests (Raustiala and Victor 2004: 299). In a situation of crisis and emergency, soft law allows policy-makers to act swiftly, as it does not require lengthy legislative procedures involving the European Parliament (EP) and is also exempted from the scrutiny of the Court of Justice of the European Union (CJEU). Both the EP and national parliaments are side-lined at the expense of executive decision making. An increasing reliance on soft law, justified by a rhetoric of emergency, represents a gradual shift from legislative to executive authorities. This is problematic from a normative point of view (Garben 2019; Kreuder-Sonnen 2016). It reduces not only parliamentary involvement as well as judicial review but also the transparency and accountability of decision making in general (Andrade 2018; Curtin 2014).

How soft law may bring about policy change

Institutionalist theories have had a strong record in explaining institutional stability as well as abrupt and significant change. They have struggled to explain change occurring in more subtle ways.

Mahoney and Thelen (2010) identified four patterns of gradual institutional change, namely 'displacement', 'drift', 'layering' and 'conversion'. We argue that both 'displacement', i.e. the replacement of existing rules by new ones, and 'drift', i.e. rule change due to external conditions, do not play much of a role when it comes to analyzing the EU's attempts to enhance the effectiveness of its return policy.[4] Instead, 'layering' refers to a situation of gradual change where new elements are added to existing institutions. While these new elements do not replace the existing ones, they may add up and incrementally change their existing structure. 'Conversion' implies that rules remain formally the same but are purposefully interpreted in new ways which, in turn, may also lead to institutional and policy change. While these modes of gradual change have been widely used by scholars, it has already been criticized that they are conceived as being mutually exclusive, which makes it difficult to explain empirical patterns shaped by various modes (van der Heijden and Kuhlmann 2017).

This criticism serves as a point of departure for assessing the role of soft law in changing the EU's return regime. To understand policy change through soft law, we draw attention to the fact that soft law usually interacts with hard law, in particular when it specifies some imprecise articles (see Saurugger and Terpan 2020). While this interaction is obvious in the context of the EU's internal return policy, it also occurs – albeit to a lesser degree – in the EU's external return policy. A legally non-binding agreement such as the JWF document between the EU and Afghanistan does not specify an existing formal EU readmission agreement. It is rather adopted as an alternative to such an agreement. Yet, the JWF contains similar elements as a formal EU readmission agreement and is closely interwoven with other relevant laws and concepts in the field, notably the 'safe country'-concept. Put differently, when EU actors return under the JWF provisions, they are also bound by the EU's Return Directive and international human rights law. In a formal legal sense, soft law *per se* is not allowed to contradict hard law or create new obligations. It can only complement existing hard law by offering – or 'recommending' – a certain interpretation of it. In practical terms, however, soft law is more than a mere exercise of discerning the meaning of the law. In principle, law is an incomplete contract that confronts implementing authorities with its 'open texture' (Hart 1997: 123; Stone Sweet 2004). Any interpretation of the law contributes to a specific legal meaning, which can also evolve over time (Merkl 1993). Yet some rules are particularly prone to interpretation and specification by (non-legislative) actors. The more generic a rule is, the more leeway for interpretation exists and the likelier it is that soft law drives policy change. The potential of policy change through a soft law measure therefore depends on the degree of precision of the

corresponding hard law. This is particularly relevant for EU laws in just-ice and home affairs proven to leave considerable leeway to national authorities (Trauner and Ripoll Servent 2015).

The level of precision of the corresponding hard law is hence a key scope condition. If the existing harmonisation through hard law has been incomplete and is characterised by in-built ambiguities, non-binding documents can affect the content of hard law and thus trigger gradual policy change. Interpreting incomplete contracts has mainly be seen as the task of courts (Shapiro 1999: 323). Yet, our research highlights that also policy-makers alter the interpretations of vague hard law through soft law measures. Soft law is an attractive option for policy-makers to act quickly and retain a decision-making capacity when confronted with a crisis. These documents are easier to negotiate and adopt in a context of inert institutional structures. Externally, they can signal that the EU is finally managing to engage third countries in return cooperation, regard-less of how effective this cooperation may turn out to be. Although soft law *per se* is not capable of changing the EU's return policy in a profound way, even less spectacular and incremental shifts may eventually add up to a policy's transformation. Translating this into the language of institu-tional change, we can conceive soft law as an additional institutional layer, which emphasises a particular or even adds a new meaning to the existing acquis (Guzman and Meyer 2010: 174).

While soft law may be easier to adopt, it is less certain to what extent it is actually implemented. Given that soft law instruments are not legally binding, the European Commission may only nudge national or external actors to accept these documents. Yet it has few options to enforce them. Judges and national authorities such as the police may simply refrain from accepting EU soft law instruments as their main point of reference. External actors may ignore the obligations stemming from informal arrangements with the EU. The overall effectiveness of a soft-law-driven strategy therefore depends on what national stakeholders make of the EU's offer. If it turns out that soft law measures do not enhance the problem-solving capacity, the EU may face again pressure to reform the policy field through legislative means or the signing of binding international agreements.

It is therefore important to examine soft law, not necessarily as an alternative to hard law, but also as a 'precursor' or 'test-bed' for the hard law to come (Reinicke and Witte 2000; Slominski 2013). Saurugger and Terpan (2020) highlight the 'continuum running from non-legal positions to legally binding and judicially controlled commitments'. The normative process of change can result either in a 'hardening of law (legalization) or the softening of law (delegalization)'. Our analysis demonstrates that soft law may eventually transform into hard law thus contributing to

'legalization' processes of new practices or norms (see also Terpan and Saurugger 2020).

Towards gradual change in EU return policy

EU Justice and Home Affairs (JHA) has gradually moved from a loose intergovernmental cooperation to more supranational forms of governance and policy outputs (including hard law). However, JHA is a sensitive field for national sovereignty and security, resulting in some special features and characteristics such as its strong focus on the 'practical cooperation' of law enforcement authorities (Monar 2010; Parkes 2017). The advent of an 'EU return and readmission policy' coincided with the 1999 Treaty of Amsterdam. It provided the EU with significant legal competences in the field of migration (Article 79 TFEU). A main expression of hard law is the EU's Return Directive (2008/115/EC), which was adopted after lengthy and difficult negotiations between the Council and the EP.

Pre-migration crisis: going for hard law in EU return policy

The Return Directive harmonised the return procedures and standards of EU member states. It regulates aspects such as procedural rights for persons to be returned, re-entry bans, and coercive measures in the context of forcibly returns (Peers 2011).

The Directive was heavily criticized for its punitive approach. In Latin America, for instance, the law was publicly depicted as a symbol for a restrictive European migration policy (Acosta 2009). However, the EP managed to ensure some important human-rights safeguards. As a result, the Return Directive was often challenged in national and European courts, primarily in relation to its provisions on detention (Acosta and Geddes 2013). In several cases (e.g. C-357/09 [Kadzoev] and C 534-11 [Arslan]), the CJEU did not endorse the detention practices of member states and highlighted the 'protective elements of the detention-related articles of the Return Directive' (European Commission 2014: 14). This shows that both the ex-ante involvement of the EP as well as the ex-post review by the Court often produces a policy outcome that is less restrictive compared to the position of the Council (Thielemann and Zaun 2018).

Another 'hard law' tool – EU readmission agreements – has been at the centrepiece of the external dimension of the EU's return policy. Formal EU readmission agreements are negotiated by the Commission and adopted by the Council along with the EP (Articles 79 and 218 TFEU). Their negotiations have proven difficult and time-consuming (Martenczuk 2014: 98). Since these agreements are primarily in the

interest of the EU, it usually has to offer some incentives to make the conclusion of such an agreement attractive for third countries (Trauner and Kruse 2008). In addition, different approaches and turf wars among EU institutions have further complicated the negotiations of readmission agreements (Martenczuk 2014: 98). As of February 2020, the EU has adopted only 18 formal readmission agreements with third countries. What is more, most readmission agreements have been signed with eastern and south-eastern neighbours. There is not a single one with those countries from North Africa or the Middle East which are crucial for enhancing the effectiveness of return policy (Wolff 2014).

Post-migration crisis: the shift towards soft law within the EU

Returning irregular migrants has featured prominently in the 'European Agenda on Migration', the EU's strategy developed in the wake of the migration crisis (European Commission 2015c). Referring to the high number of negative asylum requests, the Commission has even believed that member states 'may have more than 1 million people to return once their asylum applications have been processed' (European Commission 2017c: 2). Although this objective has been widely shared by EU governments, EU policy-makers considered it unlikely to achieve this by legislative means. According to an involved Commission official, there was initially no political will to go for a change of the Return Directive. 'In the immediate crisis background, we thought we would lose time for [legislative] negotiations.' (interview 4). Against the background of a perceived emergency, both the Commission and the EU governments sought to toughen the rules without getting stuck in a 'painful and time-consuming' process of revising the Return Directive. The EP has gained the reputation – as proven in the context of the Return Directive – of focusing too much on the rights of returnees (interviews 3 and 4). In order to reduce the legislative costs of EU decision making, the Commission has become increasingly active in adopting a range of interpretative soft law documents aimed at exploiting the gaps and ambiguities of the directive. The development of a Return Handbook in 2015 and its subsequent reform in 2017 is a case in point here. Its aim is to assist national administrations in interpreting and thus implementing the legally-binding but all too often vague provisions of the EU Return Directive with the clear aim to increase the rate of effective returns.

The 2017 return handbook: exploiting legal gaps through soft law

In June 2015, the European Council invited the Commission 'to set up a dedicated European Return Programme'. Instead of using the EU's

ordinary legislative procedure, the EU opted for an 'executive' approach involving only the Commission and national governments to strengthen the EU return system (European Commission 2017a, 2017b). In September 2015, the Commission published an 'EU Action Plan on Return' defining immediate and mid-term measures to enhance the effectiveness of the EU return system (European Commission 2015b: 2). At the same time, the Commission adopted a 'Return Handbook' providing guidelines, best practices and recommendations for national authorities responsible for implementing return provisions. To understand this soft-law approach within the EU, we focus on the 2017 revised version of this Return Handbook.

The 2017 Return Handbook was drafted by the Contact Group Return Directive (CGRD) in three sessions between May and July 2017, involving national and EU policy-makers under the chairmanship of DG Home. In November 2017, the Commission adopted the new Return Handbook in the form of a 'recommendation'. Like its previous version, the 2017 document provides common guidelines, definitions, best practice and recommendations including references to relevant CJEU rulings. While the Commission stressed striking a balance between maintaining fundamental rights and making the EU's return rate more effective, the document gradually tilted towards the latter. The Commission wanted to 'send a political signal' after the migration crisis, encouraging national authorities to apply the directive in a 'more repressive way' (interview 3). The Handbook therefore represents not only another layer in the existing return regime but serves as an interpretation tool which converts the existing return regime. Although the Commission upholds the formal-legalistic view that the handbook does not produce legally binding rights and obligations as such, it does not shy away from 'recommend[ing]' that the Return Handbook should serve as the 'main' interpretation tool for national authorities when executing return-related tasks (European Commission 2015a). Given the Commission's power to trigger infringement procedures against member states, this specific interpretation of the Return Directive is of relevance and can be regarded as a 'hardening' of soft law (see also Bérut 2020). It explicitly seeks to guide the behaviour of national administrations in a particular direction. Specifically, the watchdog function of the Commission makes it difficult for member states to ignore the Handbook's distinct spin, thereby restricting the discretion of implementing authorities (interview 3).

Examples where the Handbook aims to convert the EU's existing return regime are the acceleration of the asylum and return procedures, more limited opportunities for judicial review, and easier detentions. It also makes absconding more difficult to enforce removal decisions. To

streamline administrative processes, the Commission encourages member states to apply accelerated asylum procedures if these claims are considered to be unfounded, multiple or so-called 'last-minute' applications made to delay the enforcement of return decisions. This recommendation is problematic because it risks replacing ordinary procedures with accelerated ones solely based on the ad-hoc assessments of national authorities (European Commission 2017a: 38). Another example is the duration of the enforceability of return decisions. While the Directive itself remains silent on this issue (see Article 6 Return Directive), the Commission's Return Handbook uses its margin of discretion and recommends that a return decision should always have an unlimited duration. This will enable national authorities to enforce it without the need to re-open a return procedure after a period of non-enforcement (European Commission 2017a: 20). The Commission even seems to backpedal with regard to the primacy of voluntary returns. It recommends national authorities 'grant the shortest period for voluntary departures that is needed to organise and carry out the return' (European Commission 2017a: 32).

Considering legal review, the EU Return Directive obliges member states to guarantee legal remedies against a return decision. It does not outline details on how to do so. While member states could not agree on a deadline for lodging appeals against a return decision (CGRD 2017: 4), the Commission's Return Handbook recommends 'the shortest deadline' with regard to legal remedies in order to 'avoid possible misuse of rights and procedures' (European Commission 2017a: 63). Similarly, it is the right of the member states to decide whether an appeal against a return decision suspends its enforcement (Article 13(2) Return Directive). Again, the Commission takes a rather restrictive position, recommending that member states should grant such a suspension only to cases that have been prescribed by the European Court of Human Rights. In all other cases, member states are encouraged not to grant suspensive effects to appeals so that returns can be implemented more effectively (European Commission 2017a: 63–64).

With regard to detention, the Commission adopts a similarly restrictive approach when it comes to the detention of returnees including minors and families. Generally, the Return Directive is cautiously worded that the maximum time limit for detention should not exceed six months (in regular cases) or eighteen months (in qualified cases).[5] According to the Return Handbook, however, member states should 'use the margins […] of the Return Directive providing for a maximum initial period of detention of six months, and for the possibility to further prolong detention up to 18 months […] (European Commission 2017a: 75). Moreover, by

referring to pertinent CJEU case law, the Commission provides legal guidance or rules of conduct to national authorities, suggesting that under certain conditions detention may even exceed 18 months (ibid.: 75-76; Senden 2004: 144). The detention of minors and families is particularly delicate. Here, the Return Directive allows the detention of these people as a measure for last resort and for the shortest appropriate period of time (Article 17). The European Parliament has even advocated that minors should never be detained (European Parliament 2013). The Return Handbook departs from such a view and explicitly recommends that member states 'should not preclude the possibility to place minors in detention' when this is strictly necessary to ensure the execution of a final return decision and as long as certain safeguards apply (European Commission 2017a: 86).

Human rights groups have criticized the Commission saying that it has 'turned its back on the full implementation of human rights safeguards' and that it is 'actively pushing member states to lower the bar' (e.g. Euromed Rights 2017). They suggest that it has been an objective of the Commission to 'dismantle the key tenets of the EU Return Directive by encouraging member states to interpret the directive in a way that would allow for the lowest possible safeguards to be applied, abandoning positive advances made by a number of member states' (ibid).

The relationship of the handbook and the return directive

Adopting the Handbook allowed the EU to avoid the more time-consuming recast procedure and to signal quick action in the wake of the migration crisis. By adding a further layer of internal EU soft law to the existing return regime, the Commission's interpretations and recommendations found in the Return Handbook have gradually tightened the existing EU Directive. In substantive terms, the Return Handbook aims to make enforceable return decisions as quickly as possible and to increase the rate of effectuated returns. Although it is particularly worrying that executive soft law affects individual's fundamental rights (Cardwell 2018), its actual implementation is far from clear. While the Handbook has exploited gaps and ambiguities in existing hard law formulating rules of conduct, Commission officials still lack comprehensive evidence on how national administrations apply it during their return procedures (interview 3).

However, the negotiations on the Return Handbook also showed the Commission that there is a broad consensus among member states about how to make returns more effective. Using the Handbook as a 'source of inspiration', the Commission therefore considered it necessary and feasible to recast the Return Directive (interview 3). Another key reason for

publishing the proposal for a recast in September 2018 (European Commission 2018a) was that return issues have become increasingly inter-linked with border and asylum issues. According to the Commission's belief (or hope), member states who have been reluctant to agree on a reform of EU asylum laws (primarily the Visegrad countries) would be more cooperative if they saw that the EU was getting more restrictive on border control and return issues (interview 4). The Handbook provided a 'blueprint' for several of the changes proposed in the recast such as a new definition of the 'risk of absconding' which would make it easier for national authorities to refuse voluntary return and justify detention (Peers 2018). The proposal was also more closely inter-related with the asylum laws and included a new obligation for irregular migrants to cooperate. Overall, the handbook laid the basis for a 'punchier' and more legalized approach of the EU in the return field post-migration crisis (interview 4).

The shift towards soft law in EU external relations

The EU's pattern of cooperation vis-à-vis third countries has also altered post migration crisis. While the EU is still trying to conclude formal readmission agreements,[6] it seems unlikely that these negotiations will bear quick results. Being aware of the difficulties, the Commission (2016: 7) explicitly declared that it is of 'paramount priority […] to achieve fast and operational returns, and not necessarily formal readmission agreement'. The turn to soft law is reflected in the EU's official documents, where it has been increasingly talking about 'readmission commitments' (European Commission 2015b: 10) or simply of 'EU arrangements' (European Commission 2018b) in the field of return.

Similar to developments at the internal level, non-binding readmission arrangements exhibit lower legislative costs. As they do not require the (formal) involvement of the EP, they facilitate EU decision making. In addition, they also make it easier for the EU to reach an agreement with partner countries. As an involved Commission official puts it, 'readmission agreements were too frightening for [our negotiation partners]. They are legally binding and contain a "Third-Country Nationals" (TCN)-clause, which is very difficult for EU partner countries to accept' (interview 4). This clause obliges the signatories of EU readmission agreements to take back not only their own citizens but also migrants transiting their territories. Faced with opposition from partner countries, the Commission has already tried to water down the TCN-clause in previous negotiations but EU member states, concerned about setting legal precedents, insisted on its inclusion (interview 5). Being now able to move

away from a standardized legal template provides the Commission with more flexibility in its negotiations with partner countries.

Informal return deals not only avoid the involvement of the EP but also prevent the CJEU from legal scrutiny (on the lack of competences of the CJEU regarding the EU-Turkey Statement, see cases T-192/16, T-193/16, T-257/16; Wessel 2020; Carrera *et al.* 2017). Therefore, the soft law approach enables EU governments to negotiate flexible agreements with partner countries undisturbed by judicial review or Members of the EP who tend to be more concerned with human rights. However, the importance of sidelining the EP may not be overstated. According to a Commission official, 'we have 17 readmission agreements, all of which were endorsed by the EP. The arrangements are very pragmatic, there is no reason for Members of the EP to object' (interview 4).[7] Probably a more important factor has been that non-binding commitments are more discreet for third countries and receive less publicity both among human rights NGOs and in affected third countries.

The latter is particularly relevant as formal EU readmission agreements are highly unpopular in the countries of migrants' origin (interview 5). If they have to cooperate (or are pushed into cooperation), third countries will prefer informal agreements over legally binding ones, in order to avoid domestic criticism or resistance (European Commission 2017d, Carrera 2016: 46, Cassarino 2018). Informal deals are also regarded as better suited to finding the 'soft spot' in third countries, i.e. the authority or actor which is the most willing to cooperate on return matters (Carrera 2016: 45). In the next section, we will discuss the EU-Afghanistan cooperation on return, a flagship initiative for the EU and a key illustration for the EU's shift towards soft law.

The case of the EU-Afghanistan return deal

Signed in October 2016, the JWF document between the EU and Afghanistan did not initiate the member states' return cooperation with the country. They have already done so on the basis of bilateral readmission agreements or arrangements, yet on a very modest scale. In 2015, for instance, the EU return rate with Afghanistan was at 3.9 percent, whereas the EU's average stood at (already modest) 36.8 percent (European Commission 2018b: 10). As a matter of fact, Afghanistan featured prominently in the EU's plans to increase the number of effectuated returns post-migration crisis.

The JWF document aims at 'establish[ing] a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals' who do fulfil the conditions to enter or stay in the EU

(European External Action Service 2016). While the JWF has a function comparable to a formal readmission agreement, the signing parties explicitly declare that the document is 'not intended to create legal rights or obligations under international law' but only 'paves the way for a structural dialogue and cooperation on migration issues' (European External Action Service 2016). However, the JWF creates far-reaching commitments. It identifies a 'series of actions to be taken as a matter of urgency by the EU and the Government of Afghanistan with the objective of establishing a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals' (European External Action Service 2016).

Like the EU Return Handbook, the JWF document has not only added a new institutional layer to the existing return regime, it has also aimed at reinterpreting and tightening it. In an answer to a parliamentary question, the Commission even used the terms 'implementation' and 'application' of the JWF to stress the relevance of this soft law instrument in terms of increasing joint return flights to Afghanistan (European Commission 2018c). Specifically, the JWF converts existing rules when it sets a time limit of four weeks in which the Afghan authorities are expected to identify Afghan nationals and issue documentation – a relatively tight timeframe comparable to traditional readmission agreements.

Moreover, the JWF operates under the basic assumption that EU member states may regard Afghanistan as a safe country (Warin and Zhekova 2017: 155). Considering a country such as Afghanistan as 'safe' has important consequences for individuals. It is a precondition for allowing return operations. Formally, no EU member state has yet declared Afghanistan a 'safe country' given its chronic instability and the widespread violence. However, in the wake of the JWF, a range of EU member states tightened their rules on the 'safe country' principle to facilitate returns to Afghanistan (ECRE 2017: 16-20). German authorities used the JWF document to declare some areas of Afghanistan as 'sufficiently safe' for return operations (Deutsche Welle 2016; ECRE 2017: 17). Similar assessments have been made by the Finnish Immigration Service (Hangartner and Sarvimäki 2017: 10). Norway encouraged its administrations to use more the 'internal protection alternative' for Afghanistan, implying that Afghans should be returned if they may be safe in other parts of the country (Brekke and Staver 2018: 10).

Germany was particularly interested in making extensive use of the JWF document. Its forcible returns to Afghanistan went up from 375 in 2015 to 3,440 in 2016. However, political and public concerns on the security situation in Afghanistan as well as national courts set new limits. As of mid-2017, the German government backtracked from its extensive

use of the JWF deal and suggested only deporting three categories of Afghan citizens: criminals, migrants who pose a threat to public security or refuse to reveal their identity (interviews 3 and 4). Political and judicial contestations of return decisions to Afghanistan have also become more frequent in other Schengen states such as France and Norway (Brekke and Staver 2018).

Overall, therefore, the JWF has served as a convenient alternative to a formal readmission agreement in times of (perceived) crisis. The JWF document has added a layer of soft law that has reinterpreted the return scheme with Afghanistan with the view to increasing the number of returnees. However, it has not fundamentally changed the core of the return cooperation between the EU and Afghanistan.

Conclusions

This paper has elaborated on institutional and policy change in the field of EU return policy since the migration crisis.

Drawing on functionalist approaches as well as on the insights from gradual institutional change, the article explains why EU policy-makers resorted to soft law and to what extent it has impacted on the content of the EU's return policy. Within the EU, this shift has materialized in the form of a new 'Return Handbook', 'Recommendations' and other non-binding instruments. In doing so, EU policy-makers managed to avoid the legislative costs associated with the legislative process while signaling a problem-solving capacity to EU citizens. The 2017 adopted Return Handbook (re-)interpreted legal gaps and uncertainties of the Return Directive in order to achieve a higher return rate. Nudging member states into accepting stricter rules and practices, the Handbook added not only a new legal layer to the existing return regime but has also converted it. Specifically, it has led to a more restrictive reading of the existing return regime with the aim of achieving a higher return rate. Other considerations focusing more on the rights of returnees have been de-emphasized. However, given its limited capacity to change the existing law, the Handbook has also been a 'test bed' for recasting the Return Directive. In the EU's external migration cooperation, a similar shift has taken place. The conclusion of informal return deals has not only allowed for quicker EU-internal decision making but it has also lowered the costs of cooperation for partner countries. Informal return deals tend to provide more flexibility and cause less controversy both within the EU and in third countries. As illustrated with the case of the JWF document signed between the EU and Afghanistan, this soft-law strategy has made the Afghan government accept a deepening of the return cooperation with

the EU in return for development aid. The JWF document enhanced the EU's room to manoeuvre and triggered several member states to tighten their legislative rules and administrative practices regarding the return of Afghan nationals. In particular, the legally non-binding JWF has nudged national authorities to reinterpret the 'safe country'-principle. Several member states portrayed Afghanistan as a country to which irregular migrants could be returned without jeopardizing their safety. Yet, legal challenges and persistent intra-EU controversies about Afghanistan as a safe country have kept on setting limits to the EU return cooperation.

Therefore, the case of EU return policy highlights the potential and the limits of the EU's soft law approach. The adding of a new policy layer consisting of 'soft law'-instruments remains – from the Commission's and member states' perspective – the most promising way to act quickly in a perceived crisis and to overcome the multiple veto players within the EU and in third countries. Yet, the soft law instruments have not led to mass expulsion from the EU, which some political actors had been hoping for. In other words, soft law has not managed to trigger profound changes in terms of content and practices. It has however 'converted' the field, as it offers a more restrictive and 'efficiency-oriented' interpretation of (ambiguous) hard law.

Notes

1. The return rate is the ratio between return decisions and effectuated returns.
2. For other examples of soft law as a crisis response mechanism, see Fahey (2019) or Cardwell (2018).
3. For the purpose of this article, it is not important whether the migration crisis has been 'real' or 'socially constructed' but that it has been *perceived* as an emergency that has to be dealt with (e.g. Boin, Ekengren and Rhinard 2013).
4. *Displacement* has not played much of a role in reforming the EU return regime because of the EU's inability to adopt new hard law, recasting the existing legally-binding return law. *Drift* is also not apt to capture the soft-law approach of the current return regime reform because of the prolific activity of EU policy-makers to respond to the perceived migration crisis. EU policy-makers were anything but inactive. They adopted a range of policy documents and soft law instruments thereby complementing and changing the existing return regime.
5. A detention can be extended up to 18 months if returnees refuse to cooperate or in cases of delays in obtaining the necessary documents from third countries.
6. Currently, the Commission has a mandate to negotiate with Morocco, Algeria, Tunisia, China, Nigeria and Belarus.
7. The 18th EU readmission agreement (with Belarus) was concluded after we conducted this interview.

Acknowledgements

Disclosure statement

Notes on contributors

Peter Slominski is Assistant Professor at the Department of Political Science/Centre for European Integration Research, University of Vienna. [peter.slominski@univie.ac.at]

Florian Trauner is Research Professor at the Institute for European Studies, Vrije Universiteit Brussel. [florian.trauner@vub.be]

ORCID

Peter Slominski http://orcid.org/0000-0001-6403-5833
Florian Trauner http://orcid.org/0000-0001-5044-6818

References

Abbott, Kenneth W., and Duncan Snidal (2000). 'Hard and Soft Law in International Governance', *International Organization*, 54:3, 421–56.

Acosta, Diego (2009). 'Latin American Reactions to the Adoption of the Returns Directive', Research Paper, November 2009. Brussels: Centre for European Policy Studies.

Acosta, Diego, and Andrew Geddes (2013). 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy', *Journal of Common Market Studies*, 51:2, 179–93.

Andrade, Paula G (2018). 'EU External Competences in the Field of Migration: how to Act Externally When Thinking Internally', *Common Market Law Review*, 55:1, 157–200.

Bérut, Chloé (2020). 'The European Union as an Opportunity: Structure and Uses of European Soft Law in French, Austrian and Irish eHealth Policies', *West European Politics.* doi:10.1080/01402382.2020.1739881

Boin, Arjen, Magnus Ekengren, and Mark Rhinard (2013). *The European Union as Crisis Manager: Patterns and Prospects*. Cambridge: Cambridge University Press.

Brekke, Jan-Paul, and Anne Staver (2018). 'The Renationalisation of Migration Policies in Times of Crisis: The Case of Norway', *Journal of Ethnic and Migration Studies*, 44:13, 2163–81.

Cardwell, Paul James (2018). 'Tackling Europe's Migration 'Crisis' through Law and 'New Governance', *Global Policy*, 9:1, 67–75.

Carrera, Sergio, Leonhard den Hertog, and Marco Stefan (2017). 'It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal', CEPS Policy Insights No 2017/15, Brussels.

Carrera, Sergio (2016). *Implementation of EU Readmission Agreements*. Ebook: Springer.

Cassarino, Jean-Pierre (2010). *Readmission Policy in the European Union*. Brussels: European Parliament.

Cassarino, Jean-Pierre (2018). 'Informalising EU Readmission Policy', in Ariadna Ripoll Servent and Florian Trauner (eds.), *Routledge Handbook of Justice and Home Affairs Research*. London: Routledge, 83–98.

Cini, Michelle (2001). 'The Soft Law Approach: Commission Rulemaking in the EU's State Aid Regime', *Journal of European Public Policy*, 8:2, 192–207.

Curtin, Deirdre (2014). 'Overseeing Secrets in the EU: A Democratic Perspective', *Journal of Common Market Studies*, 52:3, 684–700.

ECRE (2017). *EU Migration Policy and Returns: Case Study on Afghanistan*, European Council on Refugees and Exiles.

Ellermann, Antje (2008). 'The Limits of Unilateral Migration Control: Deportation and Inter-State Cooperation', *Government and Opposition*, 43:2, 168–89.

Euromed Rights (2017). *Civil Society Organisations: New EU Commission Plans on Returns and Detention will Create more Harm and Suffering*, available at https://euromedrights.org/publication/civil-society-organisations-new-eu-commission-plans-returns-detention-will-create-harm-suffering/ (accessed 9 May 2019).

European Commission (2014). Communication on EU Return Policy, COM(2014) 199 final, Brussels (28.3.2014).

European Commission (2015a). Commission Recommendation of 1.10.2015 establishing a common 'Return Handbook' to be used by member states competent authorities when carrying out return related tasks, Brussels, C(2015)6250.

European Commission (2015b). EU Action Plan on Return, COM(2015) 453 final, Brussels.

European Commission (2015c). A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

European Commission (2016). Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Thrid Countries under the European Agenda on Migration, COM(2016)385 final, 7.6.2016.

European Commission (2017a). Commission Recommendation of 16.11.2017 Establishing a Common 'Return Handbook' to be Used by Member States' Competent Authorities When Carrying Out Return-Related Tasks, Brussels, C(2017) 6505.

European Commission (2017b). Commission Recommendation on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and of the Council, Brussels, C(2017)1600.

European Commission (2017c). Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union - A Renewed Action Plan, COM(2017) 200 final, Brussels.

European Commission (2017d). EU Readmission Developments - State of play October 2017, Letter to Mr. Claude Moraes, MEP, Chair of the Committee on Civil Liberties, Justice and Home Affairs.

European Commission (2018a). Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (recast)' COM(2018)634 final, 12 September 2018.

European Commission (2018b). Subject: EU Readmission Agreements and Other 'EU Arrangements' - state of play June 2018, Ref. Ares(2018)3181808, Brussels.

European Commission (2018c). Answer of Commissioner Avramopoulos to the European Parliament, 13 February 2018, E-007189/2017(ASW), available at: https://www.europarl.europa.eu/doceo/document/E-8-2017-007189-ASW_EN.html.

European External Action Service (2016). *Joint Way Forward on Migration Issues between Afghanistan and the EU*, Brussels.

European Parliament (2013). REPORT on the Situation of Unaccompanied Minors in the EU, Brussels, 2012/2263(INI).

Fahey, Elaine (2019). 'Hyper-Legalisation and de-Legalisation in the AFSJ: On Contradictions in EU External Migration Law', in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*. Cheltenham: Edward Elgar, 116–33.

Garben, Sacha (2019). 'Competence Creep Revisited', *Journal of Common Market Studies*, 57:2, 205–22.

Genschel, Philipp (2011). 'One Trap, Many Exits, But No Free Lunch: How the Joint-Decision Trap Shapes EU Tax Policy', in Gerda Falkner (ed.), *The EU's Decision Traps: Comparing Policies*. Oxford: Oxford University Press, 54–72.

Guiraudon, Virginie, and Gallya Lahav (2000). 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control', *Comparative Political Studies*, 33:2, 163–95.

Guzman, Andrew T., and Timothy L. Meyer (2010). 'International Soft Law', *Journal of Legal Analysis*, 2:1, 171–225.

Hangartner, Dominik, and Matti Sarvimäki (2017). Dealing with the Refugee Crisis: Policy Lessons from Economics and Political Science. Commissioned Report of the Aalto University.

Hart, H. L. A. (1997). *The Concept of Law*. 2nd ed. Oxford: Oxford University Press.

Hartlapp, Miriam, and Andreas Hofmann (2020). 'The Use of Soft Law by National Courts and Bureaucrats: How Relation to Hard Law and Policy Maturity Matter', *West European Politics*. doi:10.1080/01402382.2020.1738095

Kreuder-Sonnen, Christian (2016). 'Beyond Integration Theory: The (anti-)Constitutional Dimension of European Crisis Governance', *Journal of Common Market Studies*, 54:6, 1350–66.

Mahoney, James, and Kathleen Thelen (2010). 'A Theory of Gradual Institutional Change', in James Mahoney and Kathleen Thelen (eds.), *Explaining Institutional Change: Ambiguity, Agency and Power*. Cambridge: Cambridge University Press, 1–38.

Martenczuk, Bernd (2014). 'Migration Policy and EU External Relations', in Loic Azoulai and Karin de Vries (eds.), *EU Migration Law: Legal Complexities and Political Rationales*. Oxford: Oxford University Press, 65–105.

Merkl, Adolf J (1993). 'Das doppelte Rechtsantlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechtes', in Adolf J. Merkl (ed.), *Gesammelte Schriften.* Berlin: Duncker and Humblot, 227–52.

Monar, Jörg (2010). 'Experimentalist Governance in Justice and Home Affairs', in Charles F. Sabel and Jonathan Zeitlin (eds.), *Experimentalist Governance in the European Union.* Oxford: Oxford University Press, 237–60.

Parkes, Roderick (2017). *Nobody Move! Myths of the EU Migration Crisis.* Chaillot Paper No 143, European Union Institute for Security Studies, Paris.

Peers, Steve (2011). *EU Justice and Home Affairs Law.* 3rd ed. Oxford: Oxford University Press.

Peers, Steve (2018). *Lock 'em up: the proposal to amend the EU's Returns Directive.* EU Law Analysis. Expert insights into EU law developments, available at: http://eulawanalysis.blogspot.com/2018/09/lock-em-up-proposal-to-amend-eus.html (accessed 9 May 2019).

Raustiala, Kal, and David G. Victor (2004). 'The Regime Complex for Plant Genetic Resources', *International Organization*, 58:2, 277–309.

Reincke, Wolfgang, and Jan Martin Witte (2000). 'Interdependence, Globalization and Sovereignty: The Role of Non-binding International Legal Accords', in Dinah Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System.* Oxford: Oxford University Press, 75–100.

Saurugger, Sabine, and Fabien Terpan (2020). 'Normative Transformations in the European Union: On Hardening and Softening Law', *West European Politics.*

Scharpf, Fritz (2006). 'The Joint-Decision Trap Revisited', *Journal of Common Market Studies*, 44:4, 845–64.

Senden, Linda (2004). *Soft Law in European Community Law*, Oxford and Portland: Hart Publishing.

Shaffer, Gregory, and Mark A. Pollack (2013). 'Hard and Soft Law', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations.* Cambridge: Cambridge University Press, 197–222.

Shapiro, Martin (1999). 'The European Court of Justice', in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law.* Oxford: Oxford University Press, 321–47.

Slominski, Peter (2013). 'The Power of Legal Norms in the EU's External Border Control', *International Migration*, 51:6, 41–53.

Slominski, Peter, and Florian Trauner (2018). 'How Do Member States Return Unwanted Migrants? The Strategic (Non-)Use of 'Europe' during the Migration Crisis', *Journal of Common Market Studies*, 56:1, 101–18.

Snyder, F. (1994). 'Soft Law and Institutional Practice in the European Community', in Marten, S. (ed.), *The Construction of Europe: Essays in Honour of Emile Noel.* Dordrecht: Kluwer Academic Publishers, 197–226.

Statewatch (2017) Civil Society Organisations: New EU Commission Plans on Returns and Detention Will Create More Harm and Suffering. Brussels.

Stone Sweet, Alec (2004). *The Judicial Construction of Europe.* Oxford: Oxford University Press.

Terpan, Fabien (2015). 'Soft Law in the European Union. The Changing Nature of EU Law', *European Law Journal*, 21:1, 68–96.

Terpan, Fabien, and Sabine Saurugger (2020). 'Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity', *West European Politics*. doi:10.1080/01402382.2020.1738096

Thielemann, Eiko, and Natascha Zaun (2018). 'Escaping Populism – Safeguarding Minority Rights: Non-Majoritarian Dynamics in European Policy-Making', *Journal of Common Market Studies*, 56:4, 906–922.

Trauner, Florian, and Ariadna Ripoll Servent, eds. (2015). *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter*. London: Routledge.

Trauner, Florian, and Imke Kruse (2008). 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?', *European Journal of Migration and Law*, 10:4, 411–38.

Trubek, David M., Patrick Cottrell, and Mark Nance (2005). "Soft Law", "Hard Law", and European Integration: Toward a Theory of Hybridity, Legal Studies Research Paper Series No 1002: University of Wisconsin Law School.

van der Heijden, Jeroen, and Johanna Kuhlmann (2017). 'Studying Incremental Institutional Change: A Systematic and Critical Meta-Review of the Literature from 2005-2015', *Policy Studies Journal*, 45:3, 535–54.

Warin, Catherine, and Zheni Zhekova (2017). 'The Joint Way Forward on Migration Issues between Afghanistan and the EU: EU External Policy and the Reourse to Non-Binding Law', *Cambridge International Law Journal*, 6:2, 143–58.

Welle, Deutsche (2016). De Maiziere defends deporting planeload of rejected Afghan asylum-seekers, 15 December 2016.

Wessel, Ramses A. (2020). 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements', *West European Politics*. doi:10.1080/01402382.2020.1738094

White, Jonathan (2015). 'Emergency Europe', *Political Studies*, 63:2, 300–18.

Wolff, Sarah (2014). 'The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey', *European Journal of Migration and Law*, 16:1, 69–95.