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Abstract

This paper takes issue with what I have called the process of 'constitutional dismantling' that can be observed in the field of external migration policy through the tactical informalisation of readmission cooperation. It maps out the strategic use of soft law to secure expulsion agreements with third countries, mediating the tacit approval or active involvement of the EU institutions and the Member States. The strategy is perceived by its proponents to increase the efficacy of policy and improve its intended outcomes, but at the expense of foundational principles of EU law. The principles of conferral, institutional balance, and sincere/loyal cooperation impose key constraints on EU and Member State action that the choice for soft law mechanisms ignores. My main contention is that this is not an unintended consequence, but a deliberate result with noxious effects for the entire EU legal order. The disregard for core rule of law standards that this approach demonstrates amounts to a form of 'concerted dis-integration' pursued by the very actors supposed to guard the EU integration project and oversee its realisation in line with Treaty provisions. Rather than furthering the 'integration through law' model, at work since *van Gend & Loos*, the informalisation trend negates the force and function of legal norms as both the object and agent of Europeanisation. The soft law route denotes the instrumentalisation of legal mechanisms for the advancement of policy objectives, the fulfilment of which is elevated above and beyond constitutional rules (that apparently can be dispensed with at will), embracing instead a regulation-without-legitimation paradigm that unravels the EU's constitutional framework. The approach signals a perilous deviation towards the tactical weakening of key foundations of the EU system, de-naturalising the external dimension of EU integration for strategic gain in the migration field, eliminating democratic oversight, impeding judicial review, preventing human rights enforcement, and corroding competence attribution, institutional balance, sincere cooperation, and EU values overall. The most alarming is the reverse competence creep that this move involves, operated (by stealth) without Treaty amendment, and that it is orchestrated from *within* the Union. The intentional subversion of the Community method strays towards a new ends-driven kind of discretionary governance, where founding principles can be disregarded for policy convenience. The paper problematises this development against the background of the rule of law crisis unfolding in the Union, not only in the Member States, as others have documented, but crucially at the EU level as well. The ramifications of this phenomenon, although yet unknown in their full extent, are significant across the board for the EU regime as a whole.

Keywords

informalisation; readmission; external migration policy; concerted dis-integration; constitutional dismantling; rule of law crisis; institutional balance; loyalty; sincere cooperation; reverse competence creep.

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1. Introduction: Soft-Law, Constitutional Dismantling and Concerted Disintegration*

The Schengen borders have long been externalised far beyond the geographical confines of the EU Member States and Associate countries.[1] The impact of offshored and outsourced migration controls on the rights of third-country nationals has been much debated.[2] What is of more recent concern is the decrease in protection standards, the diminished options for enforcement, and the misapplication of the relevant norms that the informalisation of relations with non-EU partners entails.[3] It is not only the recruitment of third countries to act as deputy Schengen rules enforcers that is problematic, but also the instruments that have been adopted for this purpose.[4] These pose fundamental constitutional challenges that destabilise the foundations of the Schengen *acquis* and the EU legal order as a whole.

Different metaphors have been used to capture the transformation of the governance techniques of the external migration management regime, especially since the 2015 'refugee crisis'. From allegories of 'judicial passivism',[5] to illustrate the EU Courts' disengagement when they refused to pronounce themselves on the legality of the EU-Turkey Statement,[6] to representations of 'organised hypocrisy' to depict Frontex' approach in the Mediterranean.[7] What these conceptualisations share is that they conjure up an image of legal voids where EU standards do not apply, seen as too nebulous or unenforceable, and giving rise to defencelessness, violations by default, and irremediable rule of law lacunae.

With regards to informalisation specifically, Cassarino's early critique of recourse to soft-law as a means to reshape commitments and sideline the strictures of the Community method

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[1] For an early mapping of this evolution, Guild, *Moving the Borders of Europe*, Inaugural Lecture (Radboud University, 2001) <https://cmr.jur.ru.nl/cmr/docs/oratie.eg.pdf>.

[2] Gammeltoft-Hansen, *Access to Asylum* (CUP, 2011); Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017).

[3] *Cf*. Moreno-Lax et al., *The EU Approach on Migration in the Mediterranean*, PE 694.413 (European Parliament, 2021), ch 6 and refs <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf>.

[4] For an overview, Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament, 2020) <https://www.europarl.europa.eu/cmsdata/226387/EU_External_Migration_Policy_and_the_Protection_of_Human_Rights.pdf>.

[5] Goldner-Lang, *Towards 'Judicial Passivism' in EU Migration and Asylum Law?*, EU Migration Law Blog, 24.1.2018 <https://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/>.

[6] Orders of the General Court in T-192/16, T-193/16 & T-257/16 *NF, NG & NM v. European Council*, 28.2.2017; and Order of the CJEU in C-208/17 P to C-210/17 P *NF, NG & NM v. European Council* ECLI:EU:C:2018:705.

[7] Cusumano, 'Migrant rescue as organized hypocrisy' (2019) 54 *Cooperation & Conflict* 3.

remains valid.[8] The resulting 'de-legalisation' of policy and international relations has since perplexed observers.[9] Some now speak of a new breed of 'soft international agreements'.[10] Others have attempted a classification of the various modalities of informal 'deals' cut by the EU,[11] enlisting third countries in a project of 'consensual containment' of unwanted migration flows.[12] Still others opine that this constitutes a shift of paradigm towards a 'hybrid' mode of governance that combines hard and soft-law instruments for the more efficient advancement of EU objectives.[13]

Against this background, I propose to pay attention to the strategic institutionalisation of soft-law mechanisms as a tool to achieve the ultimate (if untold) goal of the EU's external migration policy — of keeping undesired third-country nationals away from the Schengen area.[14] Since the adoption of the EU Agenda on Migration,[15] there seems to be a synchronous (or perhaps a synchronised) response of the Member States (in their own capacity or as members of the (European) Council) alongside the Commission, the Parliament, and the Court of Justice (CJEU) — as the main institutional actors in charge of 'guarding the Treaties' and European integration at large — who are proactively choosing, facilitating, or allowing the soft-law approach. Although there does not seem to be a prior cooperative scheme as such, designed and pre-agreed by all institutions, the impetus provided by the Migration Partnership Framework (MPF),[16] along with the combined actions/omissions of each actor, has a cumulative effect comparable to a mutually coordinated plan. Each actor may well be acting individually, without directly or deliberately cooperating with one another, paying no heed to the aggregate impact of their conduct or how it contributes to undermining the constitutional foundations of external migration policy overall. Yet, as Sections 2 and 3 will show, the sequential (sometimes parallel) way of proceeding allows each actor to account for what the others (should) do and to either oppose or endorse the informalisation trend. Active pursuance or tacit adherence have equivalent effects; even in the absence of a calculated ploy, neither

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[8] Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42 *International Spectator* 179. See further, Cassarino, 'Informalizing EU Readmission Policy', in Ripoll Servent & Trauner (eds.), *Handbook of Justice and Home Affairs Research* (Routledge, 2018) 83.

[9] Fahey, 'Hyper-Legalisation and de-Legalisation in the AFSJ', in Carrera, Santos Vara & Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar [EE], 2019) 116.

[10] Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements' (2021) 44 *West European Politics [WEP]* 72.

[11] Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) 39 *YEL* 569.

[12] Moreno-Lax & Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in Juss (ed.), *Research Handbook on International Refugee Law* (EE, 2019) 81 <https://www.unhcr.org/5a056ca07.pdf>.

[13] Trubek, Cottrell & Nance '"Soft Law", "Hard Law", and European Integration: Toward a Theory of Hybridity' (2005) Legal Studies Research Paper No 1002: Wisconsin Law School <https://media.law.wisc.edu/s/c_8/zy5nj/hybriditypaperapril2005.pdf>.

[14] For an approximation to the notion of 'unwanted migration', see Moreno-Lax & Vavoula, 'The (Many) Rules and Roles of Law in the Regulation of "Unwanted Migration"', in Moreno-Lax & Vavoula (eds), *Regime Interaction and "Unwanted Migration": From Hostility to Emancipation*, (2022) 24 *ICLRev* 285.

[15] European Agenda on Migration, COM(2015) 240 final, 13.5.2015.

[16] A new [Migration] Partnership Framework ('MPF'), COM(2016) 385 final, 7.6.2016.

course is random. Their joint ramifications should be anticipated (and averted) to preserve the EU's constitutional integrity.

Despite the clear obligation on the EU legislator, introduced by the Lisbon Treaty, to establish 'partnerships with third countries',[17] specifically in the form of 'agreements … for … readmission' — part of a 'common immigration policy' framed in 'shall' terms,[18] EU actors seem to prefer the flexibility of informal arrangements, unencumbered by the requirements applying to the conclusion of formal accords.[19] The Parliament, excluded from these initiatives, rather than defend its competences and the role the Treaty reserves to it,[20] has looked the other way, tacitly aligning with the Commission and the Member States, thereby enabling the soft-law method. Consequently, no political control is exercised, nor any democratic oversight or other accountability channels. In the few instances where cases have reached the CJEU — through actions lodged by individuals — the Luxembourg judges have been complacent. Contrary to their mandate — to 'ensure that in the interpretation and application of the Treaties the law is observed',[21] they have denied their own powers to adjudicate on the nature and compatibility of informal arrangements with EU law, concluding that such acts fall outside the EU regime.[22] Judicial review (at EU level) is hence withheld, with concomitant rights (to asylum, *non-refoulement*, etc) negated and undone as a result. (Unenforceable) soft-law mechanisms are having the effect of denying hard-law entitlements their legal force.[23] There is, therefore, a sort of concerted dis-integration that is progressively taking hold, releasing the pursuit of policy objectives from the constraints imposed by the binding obligations that underlie all forms of EU intervention.[24]

Ultimately, what this entails is an erosion of the legal edifice on which EU governance structures rest. It undercuts key institutional principles (of conferral, loyalty, institutional balance) and constitutional values (of democracy, justice, fundamental rights), which bind the Union (its institutions and Member States) both in the internal sphere and externally as well,[25] feeding into the rule of law crisis at the heart of this Special Issue.

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[17] Art 21(1) TEU.

[18] Although Art 79(3) TFEU confers a specific external competence to the EU to conclude readmission agreements in 'may' terms, Art 79(2)(c) TFEU, in light of Art 79(1) TFEU, obliges the EU legislator (in 'shall' terms) to 'develop a common immigration policy', adopting measures regarding 'illegal immigration … including removal and repatriation'.

[19] Arts 216 and 218 TFEU.

[20] Via Art 263 TFEU.

[21] Art 19 TEU.

[22] *NF, NG & NM* (n 6).

[23] See further, Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law', in Tsourdi & De Bruycker (eds), *Research Handbook on EU Immigration & Asylum Law* (EE, 2022) 282.

[24] Arts 2 and 21 TEU; Art 51 CFR.

[25] Ibid.

While soft-law can be accepted when enacted as a complement or as a prelude to hard-law instruments,[26] its tactical use in replacement of, and to avoid the conditions applying to, hard-law is not compatible with the institutional and constitutional fabric of the legal order.[27] What is most disconcerting — and this is the main point I would like to highlight — is that it is the very institutions embodying the constitutional setup of the Union which are embarking in this process of strategic dis-integration, dismantling the (EU) rule of law foundations *from within*. Through this institutionalised recourse to soft-law,[28] the call is for *less*, rather than *more* Europe. Instead of 'ever closer', the achievement of EU goals in this way is distancing the Union from its core constitutional mission, through a process of 'undoing' basic rule of law standards.

This phenomenon, I suggest, should be seen as an instance of 'policy dismantling' of a constitutional character,[29] involving the 'cutting, diminution or removal' of fundamental norms of the EU legal system,[30] due to the politicization of migration control. Presumably, the *constitutional* dismantling that informalisation involves allows for credit-claiming through (perceived) gains in the efficacy and rapidity of removals that soft-law arrangements allow, (considered) unachievable through the (constitutionally compliant) ordinary, hard-law route. What informalisation obscures, presenting soft 'deals' as innocuous political or technical (practical or operational) measures, are their broader constitutional implications. The constitutional dis-integration dynamics underpinning informalisation implies a reversal of the 'integration-through-law' model in place since the beginning of the EU project.[31] The next sections will demonstrate this transformation of law, not only in the *form* it adopts but also in the *function* it assumes. The choice for informal arrangements denotes an instrumentalisation of (soft) law for the realisation of the EU's objectives, the fulfilment of which is elevated above and beyond (the observance and advancement of) constitutional standards, embracing a regulation-without-legitimation paradigm that unravels the EU's constitutional integrity.[32]

Problematising this 'constitutional mutation' is the main objective of this contribution.[33] Section 2 will thus map out the strategic use of soft-law in the readmission field, capturing the types,

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[26] Shelton, 'International Law and "Relative Normativity"', in Evans (ed.), *International Law* (4th edn, OUP, 2014) 137, 161-162.

[27] Another controversial use of soft-law can be seen in the ENP field, which may have influenced the shaping of external migration policy thereafter. Casolari, 'The Janus-Faced New ENP: Normative (Hard) Power vs. the Pragmatic (Soft) Approach', Documenti IAI No 1308(2013) <https://www.iai.it/it/pubblicazioni/janus-faced-new-european-neighbourhood-policy>.

[28] This is also a case of 'formal informality'. *Cf.* Cardwell & Dickson 'Formal Informality in EU External Migration Governance: The Case of Mobility Partnerships' (2023) 49 *JEMS* 3121.

[29] For an application of this paradigm in EU environmental policy, see Gravey & Jordan, 'Does the European Union have a Reverse Gear? Policy Dismantling in a Hyperconsensual Polity' (2016) 23 *JEPP* 1180.

[30] Jordan, Bauer & Green-Pedersen, 'Policy Dismantling' (2013) 20 *JEPP* 795, 795.

[31] Cappelletti, Seccombe & Weiler, *Integration Through Law* (De Gruyter, 1986); Weiler, *The Constitution of Europe* (CUP, 1999).

[32] Observing a similar phenomenon in the aftermath of the Eurozone crisis, see Scicluna, 'Integration through the Disintegration of Law? The ECB and EU Constitutionalism in the Crisis' (2018) 25 *JEPP* 1874. See also, regarding the EU-Turkey Statement, Editorial, 'Disintegration through Law?' (2016) 1 *European Papers* 3.

[33] De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation' (2015) 11 *EuConst* 434.

features, and effects of arrangements in this domain. The reaction of the EU institutions and Member States regarding this development will be scrutinized in Section 3, demonstrating how either through active involvement or tacit validation they are all complicit in allowing (or deliberately pursuing) informalisation. Section 4 will then review the normative input of key structural principles that (should) limit tactical (non-)uses of EU means and processes. The triad of conferral, institutional balance and sincere/loyal cooperation will be explored in their function as constitutional restrictions on Member States and EU powers. Section 5 will conclude, affirming that strategic recourse to soft-law, in order to or with the effect of bypassing Treaty provisions that impede or delimit possible action in the realm of external(ised) migration control, amounts to a form of concerted dis-integration that risks dismantling the core constitutional foundations of the Union. This has a profound impact on the meaning and function of the rule of law as a key principle and founding value of the EU.

2. Strategic Use of Soft 'Arrangements' for Readmission Cooperation

States could apply alternative solutions — including the regularisation of unauthorised migration. However, expulsion has become the only politically palatable option, communitarised and prioritised at EU level since the 1990s,[34] even before the Tampere Conclusions.[35] Readmission agreements as a migration management tool were first proposed by the Commission in 1991.[36] Recommendations on standard readmission agreements and their implementation followed in 1994 and 1995.[37] It was the Amsterdam Treaty to first introduce a readmission competence of the Union,[38] which the Lisbon Treaty perfected by adding an explicit external power to conclude readmission agreements with third countries.[39]

Negotiations with key countries of origin and transit started in 2000. Hitherto, 18 EU Readmission Agreements (EURAs) have been concluded — some of which with countries having very poor human rights records and even producing refugee flows.[40] Characteristically, EURAs include readmission obligations (formally presented as reciprocal) not only of the citizens of the country concerned but also of third-country nationals that may have a link to it (including, controversially, merely prior transit). This makes EURAs particularly unattractive to partners, including when coupled with visa liberalisation or facilitation incentives.[41] This typically leads to negotiations stalling or taking very long to mature. The lack of flexibility and

[34] For an overview, Coleman, *European Readmission Policy* (Brill, 2009).

[35] EC Tampere Conclusions, 15-16.10.1999 <https://www.europarl.europa.eu/summits/tam_en.htm>.

[36] Communication on Immigration, SEC(91) 1855 final, 23.10.1991, para 54.

[37] Council Recommendation concerning a specimen bilateral readmission agreement, [1996] OJ C 274/20; Council Recommendation on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements, [1996] OJ C 274/25.

[38] Art 63(3)(b) EC Treaty.

[39] Art 79(3) TFEU.

[40] With (in chronological order) Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, North Macedonia, BiH, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde, and Belarus. For the full list and links to the legal instruments see <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en>.

[41] Roig & Huddleston, 'EC Readmission Agreements: A Re-evaluation of the Political Impasse' (2007) 8 *EJML* 363.

the securitised Euro-centric nature of commitments, exceedingly favouring EU interests, has equally been detrimental,[42] which is why informalisation entered the scene.[43]

First tolerated as a Member States' strategy pursued in parallel to EU efforts towards a formal EURA,[44] informal accords are progressively becoming the norm. In the aftermath of the 2015 'refugee crisis', the MPF made a decisive move in this direction, 'lay[ing] the foundations of an enhanced cooperation with [third] countries', taking the form of 'compacts', adopted explicitly with a view to '[i]ncreasing rates of return and readmission'.[45] Rather than 'formal international agreements', the Commission expected that 'the compacts approach [would serve to] avoid[] the risk that concrete delivery [of expulsions] is held up by technical negotiations for a fully-fledged formal agreement'.[46] The European Council, equally concerned with attaining 'specific and measurable results in terms of fast and operational returns', endorsed the approach and encouraged the application of 'temporary [and informal] arrangements' — presumably while 'pending the conclusion of fully-fledged readmission agreements', rather than in replacement thereof.[47] It entrusted the Commission with the responsibility to 'lead' in the implementation of this new approach, ensuring 'effective coordination' and 'complementarity' between EU and Member State action, instructing the 'Council and the Commission' (to the exclusion of the Parliament) to 'regularly monitor the process, assess its results and report to the European Council'.[48] Member State action in this regard was envisaged as complemental of (and compatible with) Union initiatives, national authorities being expressly encouraged to 'mobilise elements falling within [*their*] competence', with 'the EU', from its part, required to 'seek synergies with Member States' and mobilise '[a]ll relevant instruments and sources of funding' necessary to support the scheme.[49]

This parallelisation of EU and Member State action was (and still is) understood to be explicitly 'for the benefit of the EU'.[50] The New Pact on Migration and Asylum deepens this logic.[51] Putting the accent on 'support' and 'capacity building' to 'help partner countries manage irregular migration', it aims at strengthening migration governance by fostering cooperation on readmission through the activation of existing 'agreements and *arrangements*',[52] thus embracing the informalisation turn.

So far, the Commission website acknowledges the conclusion of six 'non-binding readmission arrangements' with Afghanistan, Bangladesh, Ethiopia, The Gambia, Guinea, and Ivory Coast — the texts of which are not provided.[53] However, there are similar initiatives with other

[42] Evaluation of EU readmission agreements, COM(2011) 76 final, 23.2.2011.

[43] Cassarino (n 8).

[44] PACE, Readmission agreements (Rapporteur: Tineke Strik), Document No. 12168, 17.3.2010, para 32.

[45] MPF (n 16), p 2 and 5-6.

[46] First Progress Report on the MPF, COM(2016) 700 final, 18.10.2016, p 3.

[47] EC Conclusions, 28.6.2016, EUCO 26/16, para 2.

[48] Ibid., paras 3 and 4.

[49] Ibid., para 2 and 4.

[50] MPF (n 16), p 8 and 17.

[51] New Pact on Migration and Asylum, COM(2020) 609 final, 23.9.2020.

[52] Ibid., p 21 (emphasis added).

[53] <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en>.

countries taking different names but pursuing similar objectives,[54] not least the EU-Turkey Statement,[55] which furnished the model to replicate.[56] The reasons motivating these 'arrangements' are not mentioned directly, besides vague references to some partners' purported preference for informal agreements due to political sensitivities, since the conclusion of EURAs 'can be a source of public hostility' in the countries concerned.[57]

Although partners' misgivings on the unpopularity of readmission, especially regarding the third-country nationals clause, cannot be addressed through informalisation, soft-law is presented as somewhat capable of overcoming resistance, bearing lower diplomatic and sovereignty costs, not requiring ratification, publication, or formal transposition.[58] But the real advantage these 'arrangements' imply is their circumvention of 'internal' (EU) hurdles concerning substantive and procedural requirements of constitutional relevance, allowing for action at the margins of (EU) legality. The competence bestowed on the Union by the Lisbon Treaty is purposively *not* exercised (at least not through the hard-law channels constitutionally foreseen), with the procedural steps contemplated in Article 218 TFEU bypassed. The active choice is to disapply the relevant rules, taking the Union *outside* the EU legal framework, in a sort of 'reverse Lisbonisation',[59] to realise the 'paramount priority' of increasing return rates and foster 'fast and operational' expulsions[60] — whatever the cost to the rule of law.

No specific process is indicated in the Treaties, the MPF or elsewhere for the conclusion of these 'arrangements',[61] which (seemingly) operate independently of hard-law conditions.[62] The lack of systematic publication impedes a detailed evaluation. However, the exclusion of the Parliament is a common feature in the negotiations of these instruments, which are conducted at executive level in an untransparent way, practically in secret, precluding access to even basic information and preventing any *ex ante* democratic and human rights scrutiny.[63]

According to the EU Ombudsman, this way of proceeding, in fact, contravenes the right to good administration,[64] which applies to *all* conduct of the EU institutions (and the Member

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[54] Carrera discusses additional arrangements with Ghana, Mali, Niger, and Nigeria in, 'On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes', in Carrera et al. (eds), *EU External Migration Policies in an Era of Global Mobilities* (Brill, 2019) 21.

[55] EU-Turkey Statement, 18.3.2016 <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

[56] MPF (n 16), p 3, stating that 'its elements can inspire cooperation with other key third countries'.

[57] Letter from European Commission Director General for Migration and Home Affairs, Matthias Ruete, to European Parliament LIBE Committee Chair, Jean-Claude Moraes, home.ddg1.c.1(2017)5906281 <https://www.statewatch.org/news/2017/nov/eucom-letter-to-ep-readmissions.pdf>. See also Eisele, 'The EU's Readmission Policy: Of Agreements and Arrangements', in Carrera, Santos Vara & Strik (n 9) 135, 148.

[58] See, generally, Guzman & Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 187; Boyle, 'Soft Law in International Law-making', in Evans (ed.) *International Law* (5th edn, OUP, 2018) 118.

[59] Carrera, den Hertog & Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation" in the EU Migration and Asylum Policies', in Carrera, Santos Vara & Strik (n 9) 155.

[60] MPF (n 16), p 7. Taking issue with 'legal efficiency' over 'legal validity' considerations, see Reviglio, 'The Shift to Soft Law at Europe Borders: Between Legal efficiency and Legal Validity' (2022) *Global Jurist* 1.

[61] Compare to the situation of 'internal' soft-law instruments per Arts 288 and 292 TFEU, as foreseen e.g. in Arts 121(2) and 165(4) TFEU.

[62] *Cf*. Art 2(6) TFEU.

[63] *Cf*. T-852/16 *Access Info Europe* ECLI:EU:T:2018:71.

[64] Art 41 EUCFR.

States when acting within the scope of EU law),[65] requiring, at minimum, an assessment of the human rights impacts of any means of international cooperation, whether formally binding or not, to be undertaken *before* it is pursued. Neither the 'political nature' nor the denominations given to the instruments concerned 'in any way diminish the responsibility' to ensure that the action envisaged is 'in compliance with the EU's fundamental rights commitments' — and presumably also with other equally essential constitutional provisions. Measures of prevention and mitigation are necessary 'at each stage of the project's life' and should be designed and incorporated 'before the agreement is entered into'[66] — so that, if the risks detected are unsurmountable, making alignment with EU law impossible, cooperation should not proceed.

Ex post, a related (and similarly worrying) effect of informality is the preclusion of CJEU jurisdiction. As further discussed below,[67] the Luxembourg judges can only review the legality of EU acts 'intended to produce legal effects vis-à-vis third parties'.[68] Soft-law arrangements typically take the form of political declarations, designed as technical documents that *explicitly* reject the creation of rights or obligations under international law.[69] Consequently, their provisions become *prima facie* unenforceable and their effects unchallengeable in EU courts, impeding judicial control of constitutional conformity. Although they tend to include *pro forma* adherence or compatibility clauses with human rights and are declared 'not [to] have an impact on the rights of irregular migrants',[70] without jurisdiction, there is no effective way to ensure compliance and safeguard the rights of those concerned (within the scope of EU law).

Although framed as 'non-legally binding', a *Joint Way Forward* (JWF) declaration was 'signed' with Afghanistan 'by [the] EU' in October 2016.[71] '[I]mplementation' (through a legally undefined procedure) has been praised for its effects not only in increasing returns, but also as 'substantially' reducing '[a]rrivals of irregular migrants', which dropped by 95% according to the Commission.[72] The objective, as formulated, is indeed twofold: 'addressing and *preventing* irregular migration', on one hand, and ensuring the 'return of irregular migrants', on the other.[73] This goes *beyond* normal readmission duties under a usual EURA, not only regulating returns but affecting arrivals as well, thereby impinging upon the right to leave any country and the right to asylum that international and EU law recognise.[74] Otherwise, the *JWF* operates as a formal EURA, identifying a 'series of actions' to be adopted 'as a matter of urgency' both 'by the EU and … Afghanistan' with a view to 'establishing a rapid, effective and manageable

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[65] Art 51(1) EUCFR.

[66] Decision of the European Ombudsman in the Joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, 18.1.2017 <https://www.ombudsman.europa.eu/en/decision/en/75160>.

[67] Section 4.4.

[68] Art 263 TFEU.

[69] 2017 Letter to LIBE Committee (n 57).

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] EEAS, Joint Way Forward on migration issues between Afghanistan and the EU ('JFW'), 4.10.2016, Introduction (emphasis added) <https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf>. The agreement has been renewed and slightly amended in a successor Joint Declaration on Migration Cooperation between Afghanistan and the EU, 26.4.2021 <https://www.eeas.europa.eu/sites/default/files/jmcd_-_english_version_signed_26apr2021.pdf>.

[74] Art 18 EUCFR, Art 2(2) Protocol 4 ECHR, and Arts 7 and 12(2) ICCPR. For analysis, Moreno-Lax, *Accessing Asylum in Europe* (n 2) ch 9.

process for a smooth, dignified and orderly return of Afghan nationals'[75] — the parties even contemplating the construction of a 'dedicated terminal for return in Kabul airport'.[76] The conclusion of an EURA was, in fact, foreseen in the Cooperation Agreement between the EU and Afghanistan,[77] but lack of interest on the Afghan side led to its replacement with the *JWF* — in exchange for humanitarian and development funds.[78]

Very detailed *SOPs for the identification and return of persons without an authorisation to stay* have been agreed with Bangladesh in September 2017,[79] and were negotiated with Mali, which, however, 'retracted from the foreseen signature'.[80] Mali's withdrawal is probably due to the very far-reaching character of the commitments foreseen — not dissimilar from those of a formal EURA, laying down expulsion procedures, evidentiary rules, transfer modalities, and implementation oversight provisions.[81]

Draft procedures for cooperation on return and readmission have been 'agreed' with Ethiopia,[82] while *Good Practices for the efficient operation of the return procedure*, including the establishment of a 'EU-Guinea technical working group to monitor … application', have been 'approved' by the Guinean Government, which the Council endorsed in July 2017,[83] although the arrangement is being 're-examined' in light of the coup d'état of 2021.[84] Similar *Good Practices* have been 'applied' with Ivory Coast since October 2018,[85] and, although they have also been adopted with The Gambia in November 2018, these have 'hardly been tested' due to lack of engagement from the Gambian authorities.[86] Negotiations with Ghana on

[75] JWF, Introduction.

[76] Ibid., para. 3.

[77] Art 28(4), EU-Afghanistan Cooperation Agreement, [2017] OJ L 67/3.

[78] Quie & Hakimi, 'The EU and the Politics of Migration Management in Afghanistan', Chatham House Research Paper (November 2020), critiquing EU conditionality, subordinating assistance to acceptance of readmission obligations, even if framed in soft-law terms <https://www.chathamhouse.org/sites/default/files/2020-11/2020-11-13-eu-migration-management-afghanistan-quie-et-al.pdf>.

[79] A draft version is public in Council doc. 11945/17, 6.9.2017. The final version is unofficially available <https://arts.unimelb.edu.au/__data/assets/pdf_file/0009/3409830/Bangladesh-1.pdf>. See also Commission Decision C(2017) 6137 of 8.9.2017 on the signature of the EU-Bangladesh SOPs.

[80] 2017 Letter to LIBE Committee (n 57).

[81] Draft SOPs between the EU and the Republic of Mali, Annex, Council doc. 15050/16, 6.12.2016.

[82] Draft Admission Procedures for the Return of Ethiopians from EU Member States, Annex, Council doc. 15762/17, 18.12.2017. The final version appears to have been approved on 5.2.2018, see Letter from European Commission Director General for Migration and Home Affairs, Monique Pariat, to European Parliament LIBE Committee Chair, Juan Fernando López Aguilar, Ref. Ares(2022)656813 - 28/01/2022, Annex 1, para 4 <https://www.statewatch.org/media/3155/eu-com-readmission-cooperation-overview-letter-to-libe-28-1-22.pdf>.

[83] 2017 Letter to LIBE Committee (n 57). EU-Guinea good practices for the efficient operation of the return procedure, Council doc. 11428/17, 24.7.2017. The text of the document, however, is not publicly accessible <https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?AllLanguagesSearch=False&OnlyPublicDocuments=False&DocumentLanguage=en&ImmcIdentifier=ST%2011428%202017%20INIT>.

[84] 2022 Letter to LIBE Committee (n 82), Annex 1, para 4.

[85] Ibid.

[86] Ibid.

comparable arrangements started in July 2017, but apparently have not come to fruition.[87] The costs regarding the implementation of all these arrangements are covered by the EU.[88]

These instruments have made it easier to expel irregular migrants, contain unwanted flows, and generate overall acceptability of practices that discount rights and contravene essential norms.[89] Although in the formal sense they cannot contradict or subvert legal provisions or constitutional requirements,[90] they have transformed their meaning in practice[91] — and may pave the way to wide-ranging legislative reforms.[92] Their mere existence contributes to a perception that procedural rules, allocation of power, and institutional balance provisions within the EU may be optional — and disposable whenever convenient or beneficial to the fulfilment of 'higher priority' policy objectives. They also produce (legal) effects at the substantive level, creating the impression that cooperation with the countries concerned is safe — that the countries *themselves* are safe in human rights terms — indirectly relaxing the 'safe third country' (STC) conditions codified in the asylum *acquis*.[93] After all, if the EU as a whole considers readmission to Afghanistan, for instance, as generally acceptable — and directly actionable through the *JWF*, why should deportations to that country not proceed? This is precisely what has happened. Although no EU country had yet declared Afghanistan a STC (considering it tops refugee-producing country lists worldwide[94]), several of them revised their domestic practice to facilitate expulsions upon conclusion of the *JWF*.[95] This creeping normative transformation is most problematic. The next section turns to explore the reactions of the main actors who, through their actions or omissions, have contributed to its validation.

3. Institutional Consensus as (Tacit) Validation

The reasons why a policy 'softens' vary from field to field, but they tend to relate to perceptions of policy failure, through stagnation or defection, generally forged during times of crisis. Soft-law takes over as a way of 'compensating' for the lack of hard-law successes.[96] The transformation of EU readmission policy fits this trajectory. The 2015 'refugee crisis' opened a window of opportunity for national executives to reclaim power as 'political entrepreneurs' and

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[87] 2017 Letter to LIBE Committee (n 57); 2022 Letter to LIBE Committee (n 82), Annex 1, para 4. Negotiations seem to still be ongoing, per Council doc. 7783/21, 5.5.2021.

[88] 2022 Letter to LIBE Committee (n 82), Annex 3.

[89] Ibid. See also Towards an operational strategy for more effective returns, COM(2023) 45 final, 24.1.2023.

[90] Wessel, 'Normative Transformations' (n 10).

[91] Tracing this 'conversion' towards a more 'efficiency-oriented' re-interpretation of the law, see Slominski & Trauner, 'Reforming Me Softly – How Soft Law has Changed EU Return Policy since the Migration Crisis' (2021) 44 *WEP* 93.

[92] Migration and Asylum Package, currently under negotiation, <https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en>.

[93] Asylum Procedures Directive 2013/32/EU (recast), [2013] OJ L 180/60, Arts 35 (first country of asylum), 36-37 (safe country of origin), and 38 (STC).

[94] UNHCR, Refugee Data Finder <https://www.unhcr.org/refugee-statistics/download/?url=F8Wzj7>.

[95] ECRE, EU Migration Policy and Returns: Case Study on Afghanistan (2017) <https://ecre.org/wp-content/uploads/2017/11/Returns-Case-Study-on-Afghanistan.pdf>.

[96] Terpan & Saurugger, 'Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity' (2021) 44 *WEP* 21, 33.

foster normative change, exerting control over the direction to take.[97] The Member States assumed a central shaping-and-steering role, inaugurating a period of intensified (re-)intergovernmentalisation.[98] They exploited (supposed) gaps in the system to elude the constraints of the applicable supranational framework, strategically combining their joint political leverage with the EU's financial and operational resources to achieve their objective of a more 'credible and effective policy' through informalisation[99] — without engaging in Treaty amendment. This selective approach to the use/non-use of Europe,[100] abandoning the normative strictures of the EU legal order, while utilizing the Union's technical and economic facilities, is representative of the process of constitutional dismantling with which I take issue.

The reaction to the Covid-19 crisis, in certain respects, followed a similar (though not identical) pattern, where the EU institutions and Member States embarked in 'legal engineering' for the delivery of an 'effective' recovery plan.[101] (Perceived) systemic flaws motivated several (unavowed) constitutional innovations. Nonetheless, the competence structure of health and readmission policy are not commensurate, recourse to 'ordinary' soft-law predominated during the pandemic, and an effort to codify (some of) the solutions arrived at into binding Regulations distinguishes the two fields.[102] Comparable developments have been witnessed during the sovereign debt crisis, which offers a closer match to the migration case. Interventions in this field have been categorized as an example of 'liminal legality', where multiple legal dimensions converged, conflicted, and unsystematically coalesced in the production of a suitable response, putting (soft) law at the service of (super-prioritised) policy objectives. Some elements of the bailout programmes existed 'in a contested border zone between law and non-law', whilst others 'in a zone between EU law and non-EU law', not fully inside but also not entirely outside the EU system, raising a fundamental challenge to their justifiability.[103] Several institutional anomalies, akin to those seen in the readmission domain, could be observed, including the retreat of the Parliament and the over-inflation of the Member States/European Council's position, without direct protestation or decisive opposition from the other institutions, which tacitly validated the subversion of Treaty provisions.

In an analogous way, the informalisation of readmission policy has been used to counter the structural difficulties facing existing arrangements and/or their dysfunctional implementation, culminating in a legal substitution tactic that first crystallised in the EU-Turkey Statement. Involving its own amount of liminal, engineered alterations, being the first of its kind, (unofficially) published, and providing inspiration to similar agreements that followed with other

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[97] Ibid., 24.

[98] Mapping this development, Smeets & Zaun, 'What is Intergovernmental about the EU's "(New) Intergovernmentalist" Turn? Evidence from the Eurozone and Asylum Crises' (2021) 44 *WEP* 852.

[99] MPF (n 16), p 2.

[100] Slominski & Trauner, 'How do Member States Return Unwanted Migrants? The Strategic (non-)use of "Europe" during the Migration Crisis' (2018) 56 *JCMS* 101.

[101] *Cf.* De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 *CMLRev* 635, for whom post-Covid recovery was not achieved in a constitutionally objectionable way, referring to 'legal engineering' in a positive sense, to highlight the activation of hitherto rarely used legal bases in innovative ways to deal with the crisis.

[102] See e.g. Regulation (EU) 2022/2371 on serious cross-border threats to health, [2022] OJ L 314/26; and Proposal for a Regulation establishing a Single Market emergency instrument, COM(2022) 459 final, 19.9.2022.

[103] Kilpatrick, 'The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality' (2017) 70 *Current Legal Problems* 337, 342 and 344.

countries,[104] it has generated an intense debate. It is also the only soft EURA litigated in the EU Courts, thus justifying detailed consideration as a test case.

3.1 The Member States / (European) Council

The initiative for the EU-Turkey Statement originated in Germany. Instead of working within the European Council in a structured manner, or mandating the Council, or allowing the policy-making process its normal course, the German government co-opted the Commission and built a coalition with The Netherlands and like-minded Member States to finalise the draft Statement.[105] The European Council was then used as a 'venue' to meet with Turkey and solemnise the (non)agreement. However, the core pillars had already been accorded between Turkey and Germany bilaterally, before it was presented to the other Member States.[106] The Presidents of the European Council and the Commission assisted in the preparation and coordination of the negotiations.[107] The final text was deliberately labelled a 'Statement', published as a Press Release of the European Council on its official website, and inscribed in the wider EU-Turkey cooperation, traceable back to the crisis-related Joint Action Plan of November 2015 and a string of interconnected meetings celebrated afterwards.[108]

The Statement is ostensibly concluded by 'the EU and Turkey'[109], though there are points in the text where reference is made instead to 'its Member States' or 'the members of the European Council'.[110] A set of detailed reciprocal commitments, 'dedicated to deepening Turkey-EU relations', are 'agreed' therein.[111] While Turkey commits to 'accept the rapid return of all migrants not in need of international protection crossing … into Greece and to take back all irregular migrants intercepted in Turkish waters',[112] the EU agrees to disburse EUR 6 billion to support asylum capacity in Turkey, to resettle Syrian refugees, to relaunch accession talks and upgrade the Customs Union, and to negotiate visa liberalisation for Turkish citizens.[113] Both parties concord for '[a]ll these elements [to] be taken forward in parallel and monitored jointly on a monthly basis'.[114]

3.2 The Commission

[104] MPF (n 16), p 3.

[105] Smeets & Zaun (n 98), 861.

[106] Slominski & Trauner (n 91), 109.

[107] *NF* (n 6), paras 67-68.

[108] EU-Turkey Statement (n 55), Preamble.

[109] Ibid., paras 7, 8 and closing sentence.

[110] Ibid., paras 2, 4, 5, and opening sentence.

[111] Ibid., Preamble.

[112] Ibid., Preamble and paras 1 and 3.

[113] Ibid., paras 2, 5, 6, 7 and 8.

[114] Ibid., penultimate sentence.

The Commission, besides assisting in the drafting of the Statement and facilitating the negotiations through its Vice-President,[115] played also a decisive role in managing post-adoption application, monitoring compliance and supporting implementation. An EU Special Coordinator was appointed to oversee the execution of the Statement.[116] Together with Greece, a Joint Action Plan was drawn up with a view to ensuring the effective roll out of the Statement on the EU side, focusing on shortening asylum claims' processing times, 'limiting appeal steps', and increasing 'detention capacities' to accelerate returns.[117]

Dedicated reports were issued on progress until September 2017, when they were replaced with a summary 'state of play' in the implementation reports of the European Agenda on Migration.[118] Throughout, the focus on the objectives of 'speeding up … the processing of asylum applications', 'ensuring … pre-removal capacity' and 'prevent[ing] new … routes for irregular migration' remained unchanged.[119]

At the operational level, the (very problematic[120]) 'hotspot approach' was introduced in the Greek islands to optimize results,[121] involving Member State officials, EU agencies and Commission personnel to 'swiftly identify, register and fingerprint incoming migrants'.[122] Several EU funding lines were approved,[123] the Dublin regime was *de facto* suspended,[124] and a mechanism of intra-EU relocation from Greece and extra-EU resettlement from Turkey was adopted by the Council to support the scheme.[125] Greece also changed its domestic law.[126] The asylum and return systems in the country (and the whole EU[127]) were thereby profoundly

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[115] This has been revealed by *Access Info* through a series of heavily redacted documents obtained from DG Home, which nonetheless discloses the Commission's input during the preparation of the Statement and its role in its immediate aftermath. See 'The documents in dispute: The European Commission's legal advice on the EU-Turkey deal' <https://www.access-info.org/2018-02-08/the-documents-in-dispute-the-european-commissions-legal-advice-on-the-eu-turkey-deal/>. Full access to the documents has been denied (n 63).

[116] European Commission Fact Sheet, Implementing the EU-Turkey Statement – Q&A, 28.9.2016 <http://europa.eu/rapid/press-release_MEMO-16-3204_en.htm>.

[117] Fourth report on the implementation of the EU-Turkey Statement, COM(2016) 792 final, 8.12.2016, Annex I.

[118] See, e.g., Progress report on the Implementation of the European Agenda on Migration, COM(2018) 250 final, 14.3.2018; and Progress report on the Implementation of the European Agenda on Migration, COM(2019) 126 final, 6.3.2019.

[119] Seventh Report on the implementation of the EU-Turkey Statement, COM(2017) 470 final, 6.9.2017, p 9-10.

[120] FRA, Update of the 2016 Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy (February 2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf>.

[121] Explanatory Note on the Hotspot Approach (July 2015), p 4-5 <https://www.statewatch.org/media/documents/news/2015/jul/eu-com-hotsposts.pdf>.

[122] EU Agenda on Migration (n 15), p 6.

[123] For an overview, ECRE et al., *The Implementation of the Hotspots in Italy and Greece: A Study* (October 2016) <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>.

[124] The Greek asylum system had long been considered flawed and unsafe for Dublin transfers. C-411/10 & C-493/10 *N.S. & M.E*. ECLI:EU:C:2011:865.

[125] Council Decision (EU) 2015/1601 establishing [relocation] measures for the benefit of Italy and Greece, [2015] OJ L 248/80; and Council Decision (EU) 2016/1754 amending Decision (EU) 2015/1601, [2016] OJ L 268/82. For a critical evaluation, Guild, Costello & Moreno-Lax, *Implementation of the 2015 [Relocation] Decisions*, PE 583.132 (European Parliament, 2017) <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf>.

[126] For an overview, ECRE, Asylum Information Database (AIDA), Country Report: Greece 2016 Update (March 2017) <https://asylumineurope.org/wp-content/uploads/2017/03/report-download_aida_gr_2016update.pdf>.

[127] See further Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (forthcoming).

transformed to service the Statement commitments under the direction of the Commission, with EU financing, support, and extraordinary legislative measures adopted to expedite results.

3.3 The European Parliament

Although some individual members of the Parliament have expressed misgivings about the legality and legitimacy of the Statement,[128] its Legal Service considered there was no scope for contestation. The Statement not being (framed as) an international agreement, the legislative powers of the Parliament were considered unaffected.[129] The text not being public, it is impossible to gauge the value of the reasoning on which the Opinion rests.

However, it is probably similar to the one obtained for the *JWF* with Afghanistan, to which I have had access. Indeed, like in relation to the EU-Turkey Statement, the LIBE Committee requested a legal opinion on the *JWF*, seeking clarity on the nature of the instrument and the requirements applicable to its conclusion to determine whether the Parliament's prerogatives had been infringed. As in the case of the EU-Turkey Statement, the Legal Service considered the *JWF* did not constitute an international agreement requiring the involvement of the Parliament for its approval. It constituted a soft-law 'non-conventional concerted act[] … which allow[ed] the interested parties to express a political commitment without entering into legally binding agreements'.[130] The document fell entirely within the 'soft-law' category, in relation to which the Parliament could exercise powers of budgetary control, in light of the 'financial commitment from the EU side', and (*post hoc*) political scrutiny through parliamentary questions, committees of enquiry or even motions of censure to obtain detailed information on the *JWF*'s implementation.[131] But, regarding its adoption, the Legal Service considered it was entirely a 'political choice' of the EU, not requiring the Parliament's input.

3.4 The Court of Justice

The Court consolidated the view that the Statement is valid — or, at least, incontestable from an EU legal perspective.[132] Attributing the paternity of the instrument to the Member States, rather than the European Council, has closed any avenues for judicial review under EU law. In its Orders of 2017, the General Court sided with the European Council and focused on purely circumstantial elements to conclude that it was the Member States acting in their own capacity who had met with Turkey and adopted the Statement.[133] The presence of the

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[128] Many have asked Parliamentary Questions on the Statement (also referring to it as 'deal' or 'agreement'), especially after its adoption and following the ruling by the CJEU (n 6). For the full list <https://www.europarl.europa.eu/plenary/en/parliamentary-questions.html#sidesForm>.

[129] 'EU-Turkey deal not binding, says EP legal chief', *EU Observer*, 10.5.2016 <https://euobserver.com/justice/133385>.

[130] European Parliament, Legal Service, Legal Opinion: Joint Way Forward with Afghanistan, 17.3.2017 (on file).

[131] Ibid.

[132] Orders of the General Court (n 6).

[133] *NF* (n 6), para 49.

Presidents of the European Council and the Commission — apparently 'not formally invited' but somehow 'conferred [the] task of representation and coordination of negotiations with … Turkey',[134] the fact that the meeting took place on the same day and the same premises of an EC meeting,[135] or that the public ('online') version of the Statement (rather than an unpublished 'PDF' produced during the litigation) indicates 'Foreign affairs and international relations' and features in a 'European Council' press release,[136] was not accorded defining value.[137]

The Court instead embarked in a weird justification of why the 'EU' was explicitly mentioned, making the 18 March 2016 Statement 'differ[] in its presentation in comparison with … previous statements'.[138] Such expression, the Court conceded, 'could, admittedly, imply that the representatives of the Member States … had acted … in their capacity as members of the "European Council" … notwithstanding that institution's lack of legislative competence'.[139] At pains to provide any cogent explanation, the Court backed the Member States and suggested that the words were not used in their plain ordinary meaning, but as 'journalistic' flourish, as a shorthand intended 'for the general public', serving 'only an informative purpose' and having 'no legal value' — not even as a unilateral act.[140] Reliance on 'the press office of … the Council', which offers communication support to the Council and the European Council (rather than the Member States), the office being 'shared by those two institutions', is not accorded significance either.[141] In the Court's view, 'the inappropriate use of the expression', unfortunate as it may be, 'cannot *in any way* affect the legal status and the role in which the representatives of the Member States [according solely to themselves[142]] met with their Turkish counterpart'.[143] The fact that, outside the specific proceedings, EU authorities have routinely referred to the Statement as 'our agreement' was also disregarded by the Court.[144]

Fixated on the paternity issue, the Court failed to provide a meaningful evaluation of the substance of the Statement, discarding the possibility beforehand that the 'intentionally … simplified wording' used (as declared by the Member States, albeit without considering Turkey's understanding or the subsequent claims and actions of EU officials) could 'alter the content or the legal nature of the procedure to which it relates, namely, an international

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[134] Ibid., paras 67-68.

[135] Ibid., paras 62-63.

[136] Ibid., para 55.

[137] *Cf.* approach in C-62/14 *Gauweiler* ECLI:EU:C:2015:400, where a Press Release of the ECB is considered a legal measure in light of its substance and effects.

[138] *NF* (n 6), para 53.

[139] Ibid., para 56.

[140] Ibid., paras 57-58. On the effects of unilateral acts under international law, Kassoti, 'Interpretation of Unilateral Acts in International Law' (2022) 69 *NILRev* 295 and refs.

[141] *NF* (n 6), para 58.

[142] Turkey has consistently presented the Statement as a source of (binding) commitments vis-à-vis the EU until its suspension in March 2020. See, e.g., Ministry of Foreign Affairs of the Republic of Turkey, 'Article by H.E. Mr. Mevlüt Çavuşoğlu titled "Turkey-EU Relations: Investing in our common future", Bled Strategic Times, 4.9.2017' <https://www.mfa.gov.tr/foreign-minister-cavusoglu_s-article-on-turkey-eu-relations-punlished-at-bled-strategic-times-of-bled-strategic-forum.en.mfa>.

[143] *NF* (n 6), para 60 (emphasis added).

[144] See, e.g., European Commission President Jean-Claude Juncker, State of the Union Address 2017, 13.9.2017 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165>.

summit'.[145] For the Court, the Statement constitutes a list of 'operational measures [agreed] *with a view to restoring public order*'[146] — a competence that, unlike migration management or readmission, belongs to the domain of reserved national powers the Member States retain under the Treaties.[147] The fact that the Member States promised benefits that only the EU can grant went unheeded by the Court, for whom 'it is clear' — without evidence or elaboration — that no decision was adopted 'in the name of the European Union'; the Statement simply 'did not commit the European Union'.[148] How exactly could the Member States alone, without EU involvement, deliver on their pledges (all falling within EU competence) to utilize EU budget funding, re-energise accession negotiations or grant visa liberalisation within the Schengen regime was not explained.

Although the Court alerted at the outset that 'it does not suffice … that a measure is classified, by … the defendant … as a "decision of the Member States" … to escape the review of legality', this is precisely what happened.[149] The 'overall context' to which the Court alluded to buttress its conclusion was, in truth, very limited.[150] The surgical circumscription of its evaluation to the events of 18 March 2016 and a few preceding 'summits', instead of considering the wider EU-Turkey relations and, in particular, the potential impact of the Statement on the existing formal EURA of 2014,[151] supposed to enter into force from 1st June 2016[152] — a date the Statement *de facto* modified — is most astounding. Indeed, Article 4 of the official EURA made the third-country national readmission clause applicable only from 1st October 2017, which the Statement advanced to 20 March 2016.[153] The EU-Turkey Joint Readmission Committee established by the EURA adopted a decision for the *a posteriori* alignment with the Statement, deciding 'for the Agreement to become fully applicable from June 2016' (thereby adjusting the date foreseen in the Statement) in light of 'the political agreement reached by the two parties'.[154]

The nearly exclusive attention paid to the professed intention of (only one of) the parties (namely the Member States rather than the EU) overrode any other consideration and led the Court to conclude that it lacked jurisdiction to assess the validity of the Statement.[155] The Court fell into an interpretative loop whereby it could not assess a non-act qualified as such by its

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[145] Ibid., para 59. *Cf*. approach in *France v. Commission* (n 193), where a similar Guidelines document negotiated between the EU and the US is perused in detail, paying attention to its content and effect, rather than its denomination or the setting within which it is adopted, in paras 29 ff. On close inspection, the Guidelines are considered by the Court as 'complete and operational in nature, setting out very precisely the objectives pursued, the field of application, and the measures to be taken in order to achieve the objectives set' – in a manner comparable to the EU-Turkey Statement – concluding that '[a]s a result, they amount to a legal instrument' (para. 29). For the Court, '[a]mong the indicia which determine classification as an international agreement, considerations relating to the content of the agreement [rather than the intention of the parties] must prevail' (para. 30). The fact that all partners involved 'were convinced' that the Guidelines 'did not constitute such an international agreement', in light of the specific provisions, 'cannot be decisive' (para. 30), the Court concludes.

[146] *NF* (n 6), para 69 (emphasis added).

[147] Art 4(2) TEU and Art 72 TFEU.

[148] *NF* (n 6), para 70 and 71-72.

[149] Ibid., para 45.

[150] Ibid., para 70.

[151] EU-Turkey Readmission Agreement, [2014] OJ L 134/3.

[152] This is noted by the Court in *NF* (n 6), para 6, but not elaborated upon.

[153] EU-Turkey Statement (n 55), para 1.

[154] Decision 2/2016 of the EU-Turkey Joint Readmission Committee, [2016] OJ L 95/11.

[155] *NF* (n 6), para 73. See also Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on *NF v. European Council*' (2017) 2 *European Papers* 251, 253.

supposed authors — and trapped in that loop, it could not determine whether the non-act constituted an *ultra vires* transgression. The practical consequence (taking into account the dismissal of the appeal against the decision by the CJEU[156]) has since been the tacit validation and normalisation of the Statement. The ruling did not merely accommodate it, but incorporated the unconstitutional structures on which it rests as part of the EU *acquis*.[157]

A consensus, therefore, whether fully coordinated or not, has formed around the acceptability of the Statement (and similar soft-law arrangements adopted thereafter). The emerging institutional equilibrium defies, however, Treaty logics. The new balance is characterised by the pre-eminence of the (raw) governmental authority of the Member States (acting on their own behalf or via the European Council) with the connivence of the Commission and the relegation of the Parliament, with the CJEU approving or, at least, tolerating the distortion. Rather than respecting the Treaty-based competence distribution and the checks and balances that guarantee the EU's stability and legitimacy, Member States have (collectively) infringed on powers belonging to the other institutional actors, usurping EU competences. They not only deliver strategic guidelines (as is formally the role of the European Council[158]), but also assume a pseudo-legislative function, submitting detailed proposals, 'borrowing' EU organs and budget for their application, overseeing implementation, and policing compliance.[159] Their growing influence marks a shift towards autocratic government and executive dominance, underpinned by an instrumentalist view of the EU institutions, rules and resources that undermines and de-legitimises the integration process overall.[160]

4. The Reversal of 'Integration Through Law'?

In a self-sustaining, authoritative legal order such as that of the EU, where for years law has played a prime role as both the object and agent of European integration,[161] soft-law represents a categorical challenge. Signalling 'a move *away* from law',[162] it can pose a threat to core constitutional principles, antithetical to the 'integration-through-law' paradigm, undermining the Union as a law-mediated and law-constituted system. However, soft-law mechanisms have long been part of EU governance.[163] In between hard-law and non-legal norms,[164] they

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156 *NF, NG & NM* (n 6).

157 See further, Moreno-Lax, 'Crisis as (Asylum) Governance' (n 127); Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border', in Cope, Burch Elias & Goldenizel (eds), *Oxford Handbook of Comparative Immigration Law* (OUP, forthcoming).

158 Art 15 TEU.

159 Problematising the trend towards a 'presidentialisation' of EU politics, Van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda Publishing, 2019), especially 178-183.

160 In this line, Dawson & De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *MLR* 817.

161 Dehousse & Weiler, 'The Legal Dimension', in Wallace (ed.), *The Dynamics of European Integration* (Pinter, 1990) 242.

162 Dawson, 'Soft Law and the Rule of Law in the European Union: Revision or Redundancy?', EUI Working Papers (RSCAS) 2009/24, p 2 <https://cadmus.eui.eu/handle/1814/11416> (emphasis in original).

163 White Paper on European Governance, COM(2001) 428 final, 25.7.2021. For an early account, Snyder, 'Soft Law and Institutional Practice in the European Community', Working Paper, EUI LAW, 1993/05 <https://cadmus.eui.eu/handle/1814/101>; Christiansen & Piattoni (eds), *Informal Governance in the EU* (EE, 2004).

164 Saurugger & Terpan, 'Normative Transformations in the European Union: On Hardening and Softening Law' (2021) 44 *WEP* 1.

establish 'rules of conduct … laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects',[165] which have permeated multiple regulatory sectors.[166]

There are different types of informal instruments, whether they fulfil preparatory, informative, interpretative, or implementing functions, preluding or succeeding hard-law. In their *pre*-law and *post*-law roles, these measures, in so far as they supplement or accompany legal rules, are usually acceptable. It is when they replace formal norms, in *para*-legal fashion, that they become problematic,[167] as they risk substituting the rule of law with a 'rule of rules' of sorts,[168] overriding due process and related safeguards. A main function of the principle is indeed to secure government action that is bound by law, guaranteeing not only government on the basis and *within* the boundaries of law, but also government *through* law, honouring the principle of legality and safeguarding legal certainty.[169] Governing *sub lege* and *per lege* is necessary to ensure compliance with constitutional arrangements and avoid abuses of power.[170]

In light of the marginalisation of the Parliament that soft-law governance entails, a Resolution was adopted in pre-Lisbon times, in opposition to the Open Method of Coordination and informal legal instruments generally, alerting to their 'pernicious' impact, particularly when their (real) nature and effects remain 'ambiguous'.[171] According to the Parliament, soft-law 'is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law' and upset the institutional balance designed by the Treaties, resulting in *ultra vires* action.[172] It is also 'legally dubious, as it operates without sufficient parliamentary participation and judicial review'.[173] And, politically, it 'tends to create a public perception of a "super-bureaucracy" without democratic legitimacy, not just remote from citizens, but actually hostile to them'.[174]

So, when considering informalisation, the question emerges as to the extent to which the choice for soft-law is justifiable. Only instruments with a genuinely exhortatory nature are, in principle, tolerable. Hard-law acts in disguise, engaging in an 'operation of camouflaging' of legally-binding measures,[175] adopted in disregard of the provisions regarding competence allocation, institutional balance, and sincere cooperation, and incapable of ensuring compliance with substantive constitutional requirements, including fundamental rights, contravene Treaty rules. Are these rules at the disposal of the EU actors? Can the institutions

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[165] Senden, Soft Law in European Community Law (Hart, 2004), 112.

[166] For a critical overview, Stefan 'The Future of European Union Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19' (2021) 7 *Journal of International and Comparative Law* 329.

[167] On this classification, Senden, 'Soft Law and its Implications for Institutional Balance in the EC' (2005) 1 *Utrecht Law Review* 79, 81-82.

[168] Scicluna & Auer, 'From the Rule of Law to the Rule of Rules: Technocracy and the Crisis of the EU Governance' (2019) 42 *WEP* 1420.

[169] Palombella, 'The Rule of Law as an Institutional Ideal', in Morlino & Palombella (eds), *Rule of Law and Democracy* (Brill, 2010) 3; Palombella, 'The Rule of Law at its Core', in Palombella & Walker (eds), *Relocating the Rule of Law* (Hart, 2009) 17; Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-level System', in Closa & Kochenov (eds), *Reinforcing EU Rule of Law Oversight* (CUP, 2016) 36.

[170] Senden (n 167), 83.

[171] Resolution on institutional and legal implications of "soft law" (2007/2028(INI)), para A.

[172] Ibid., para. X.

[173] Ibid., para. 4.

[174] Ibid., para. Y.

[175] Opinion of AG Tesauro in C-57/95 *France v. Commission* ECLI:EU:C:1997:15, para 17.

or the Member States bend them and (re-)interpret them at will, especially in moments of crisis, when engaging with non-EU partners, or to advance particularly salient policy goals? Can the informalisation trend continue in a constitutional vacuum,[176] escaping rule of law abidance?

4.1 Conferral and Competence Distribution

The EU, as an international organisation, although having established a 'new legal order',[177] still lacks sovereignty. Unlike States, it is not a plenipotentiary under international law.[178] Its competences are based on conferral,[179] and their exercise requires an appropriate legal basis in the founding Treaties granting the power to act. Against this backdrop, 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties', with '[c]ompetences not conferred upon the Union … remain[ing] with the Member States'.[180] So, there is no general presumption that the Union or its institutions have unfettered discretion to act or to select the capacity in which to do so in disregard of Treaty dispositions.[181]

The reverse is also true. Once competences have been allocated to the EU, the Member States can no longer dispose of them and need to respect the limits established by the Treaties.[182] It is 'by reason of their membership of the European Union' that they have accepted that 'the matters covered by the transfer of powers … are [thereafter] governed by EU law'.[183]

In the external sphere, it is paramount to ensure the unity of the international representation of the EU and the integrity and autonomy of the legal order,[184] preserving its 'essential characteristics'.[185] In this connection, 'Member States shall facilitate the achievement of the Union's tasks and … objectives'.[186] Accordingly, when the effect of their action (individual or collective) is to impinge upon existing EU norms (whether legislation or a previous international agreement), Member States lose their prerogative to act in their own capacity (outside the EU

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[176] *Cf*. Gatti & Manzini, 'External Representation of the EU in the Conclusion of International Agreements' (2012) 49 *CMLRev* 1703, 1732; Peters, 'Soft Law as a New Mode of Governance', in Diedrichs, Reiners & Wessels (eds), *The Dynamics of Change in EU Governance* (EE, 2011) 28, 39.

[177] 26/62 *van Gend & Loos* ECLI:EU:C:1963:1, 12.

[178] Akande, 'International Organisations', in Evans (ed.), *International Law* (4th edn, OUP, 2014) 248. *Cf*. Brownlie, *Principles of Public International Law* (7th edn, OUP, 2008) 106.

[179] Sarooshi, International Organisations and Their Exercise of Sovereign Powers (OUP, 2005).

[180] Art 5(2) TEU. See also Art 4(1) TEU and Art 13(2) TEU.

[181] C-327/91 *France v. Commission* ECLI:EU:C:1994:305.

[182] 68/86 *UK v. Council*, EU:C:1988:85, para 38; C-643/15 & C-647/15 *Slovak Republic & Hungary v. Council* ECLI:EU:C:2017:631, para 149; C-28/12 *Commission v. Council* EU:C:2015:282, para 42; C-133/06 *Commission & Parliament v. Council*, EU:C:2008:257, para 54. *Cf*. Platon, 'The Principle of Institutional Balance: Rise, Eclipse, and Revival of a General Principle of EU Constitutional Law', in Ziegler, Neuvonen & Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (EE, 2022) 136.

[183] C-28/12 *Commission v. Council* ('Air Transport Agreement [ATA]') ECLI:EU:C:2015:282, para 40; and Art 2 TFEU.

[184] Opinion 2/91 *ILO* ECLI:EU:C:1993:106; Opinion 1/94 *WTO* ECLI:EU:C:1994:384.

[185] Opinion 1/17 *CETA* ECLI:EU:C:2019:341.

[186] Art 4(3) TEU.

framework).[187] Both the Treaties and the *ERTA* doctrine pre-empt Member State action in areas of EU competence under certain conditions.[188] Member States must refrain from acting externally, if their action may (actually or potentially) interfere with *exclusive* Union competences,[189] but also if they risk encroaching upon *shared* competences[190] the EU has already exercised through the adoption of 'common rules' whose scope may be altered as a result.[191] The opposite would upset the uniformity and coherence of EU law.[192]

One may think the adoption of non-binding instruments escapes the strictures of competence allocation and Treaty procedures. However, the CJEU has denied, in *France v. Commission*, that the 'the fact that a measure … is not binding [be in itself] sufficient to confer on that institution the competence to adopt it'.[193] Also in regard of soft-law instruments does the Court require that 'the division of powers and the institutional balance established in the Treaty … be duly taken into account'.[194] To be sure, the EU, as an international organisation, lacks the power to act as/when it pleases; '[t]he scope of and arrangements for exercising [its] competences [are] determined by the provisions of the Treaties'.[195] Accordingly, the power of external representation conferred on the Commission by Article 17 TEU is not, on its own, enough to allow it to sign (allegedly) non-binding instruments — like the *JWF* with Afghanistan, the return SOPs with Bangladesh, the *Cooperation Procedures* with Ethiopia, or the *Good Practices* document with Guinea, The Gambia, or Ivory Coast.

The decision-making power to conclude international agreements belongs to the Council and the Parliament,[196] '[n]o competence is granted to the Member States' or the European Council in this regard.[197] According to Articles 14 and 16 TEU, it is for the Council 'to elaborate the Union's external action' and 'jointly with the European Parliament, exercise legislative and … policy-making … functions'.[198] The European Council, from its part, 'shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof', but it can 'not exercise legislative functions', including on the external plane.[199] In turn, the Member States have no power to represent or commit the Union as such[200] — which is why the EU-Turkey Statement should have been considered invalid[201] —

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[187] Cannizzaro (n 155) 253-254, relying on C-181/91 and C-248/91 *Parliament v. Council & Commission* ECLI:EU:C:1993:271. *Cf. Pringle* (n 265) discussed below.

[188] 22/70 *Council v. Commission* ('ERTA') ECLI:EU:C:1971:32.

[189] Art 2(1) TFEU.

[190] Like the AFSJ per Art 4(2)(j) TFEU.

[191] Art 3(2) TFEU; Opinion 1/13 *Hague Convention* ECLI:EU:C:2014:2303, para 71.

[192] *Cf.* Art 7 TFEU and Art 21(3) TEU.

[193] C-233/02 *France v. Commission* ECLI:EU:C:2004:173, para 40.

[194] Ibid.

[195] Arts 2(6) and 1(1) TFEU.

[196] In this regard, Council Position 12498/13 on the arrangements to be followed for the conclusion by the EU of MoUs, Joint Statements and other texts containing policy commitments with third countries and international organisations, 18.7.2013.

[197] *ATA* (n 183), para 44.

[198] Art 16(1) and (6) TEU. See also Art 14(1) TEU.

[199] Art 15(1) TEU.

[200] *ATA* (n 183), paras 44 and 50.

[201] A majority of authors indeed consider the Statement an international treaty 'in disguise'. See Gatti & Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law', in Carrera, Santos Vara & Strik (n 9) 175, 176 and refs therein, relying on ICJ, *Maritime delimitation and territorial questions between Qatar & Bahrain*

nor are they authorised to undertake an international commitment on their own behalf that covers the same ground as a pre-existing EU agreement — like the EU-Turkey EURA in respect of the 2016 Statement. This is because areas of *concurrent* competence, such as readmission policy, become 'exclusive by exercise' vis-à-vis a particular country once the EU has concluded an EURA with it.[202] In such situations, by virtue of the principle of pre-emption, Member States lose their power to undertake independent action.

Lisbon has codified this principle, limiting Member States to 'exercise their competence to the extent that the Union has not exercised its competence' already.[203] But the principle had explicitly been recognised by the Council back in 1999, when discussing the consequences of the entry into force of the Amsterdam Treaty. In dedicated conclusions on readmission agreements, it acknowledged that '[a] Member State can continue to conclude readmission agreements with third States provided that the Community has not concluded an agreement with the third State concerned' and so long as the EU 'has not concluded a mandate for negotiating such an agreement'.[204] Only implementation protocols, as often provided for in the EURA concerned,[205] can be agreed thereafter 'for instance where the Community agreement … contains only general statements … but [the] Member States require more detailed arrangements on the matter'.[206] However, such arrangements cannot, in any event, 'be detrimental to existing Community agreements'.[207]

While it is true that the EU-Turkey EURA contains a so-called non-affectation clause in Article 18(7) stating that 'nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements', Article 21 thereof establishes that the formal EURA takes precedence over other such arrangements in case of conflict. On a superficial level (if one ignores the competence usurpation issue pointed out above), the EU-Turkey Statement may seem compatible with the EURA. At face value, both instruments aim to regulate readmission and ensure returns and the Statement helps to accelerate results. However, from a constitutional perspective, the compatibility assessment requires an evaluation of the substantive and procedural conditions, competence distribution, institutional balance, and rule of law requirements inscribed in the Treaties. Whereas soft-law instruments that seek to implement the EURA while maintaining its integrity may be allowed, a collective arrangement, such as the EU-Turkey Statement, that overwrites the terms accorded in disregard of the procedure foreseen for its amendment cannot be accepted.

(Qatar v. Bahrain), [2001] ICJ Rep 40; and *Aegean Sea continental shelf case (Greece v. Turkey)*, [1978] ICJ Rep 3, respectively declaring a joint *communiqué* and the minutes of a meeting as international agreements producing binding effects in international law.

[202] García Andrade, 'EU External Competences on Migration: Which Role for Mixed Agreements', in Carrera, Santos Vara & Strik (n 9) 39, 41-42; García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *CMLRev* 170, 171.

[203] Art 2(2) TFEU.

[204] JHA Council, 27-28.5.1999, Council doc. 8654/99 <https://ec.europa.eu/commission/presscorner/detail/en/PRES_99_168>. For the judicial recognition of 'the mandate doctrine', relying on the principle of loyalty discussed below, see *Inland Waterways* (n 275), paras 60-61, and C-433/03 *Commission v. Germany* ECLI:EU:C:2005:462, paras 68-69.

[205] See, e.g., Art 20 EU-Turkey EURA (n 151).

[206] JHA Council (n 204).

[207] Ibid. See further, García Andrade, 'The Duty of Cooperation in the External Dimension of the EU Migration Policy', in Carrera et al. (n 54) 299.

Pursuant to its own provisions, the EURA can be amended by agreement of both parties based on a recommendation of the Joint Readmission Committee.[208] But, to be valid, amendments must be adopted 'following any necessary internal procedures required by the law of the Contracting Parties',[209] which calls for compliance with the relevant EU norms. In so far as the Statement creates new commitments that *de jure* or *de facto* bind the Union, impacting on pre-existing common rules, the formal amendment process, following appropriate competential and procedural requirements, should have been used to revise the EURA.

Generally, decisions to conclude international agreements on the EU's behalf require both a procedural and a substantive legal basis linked to a material competence provided in the Treaties.[210] This then defines the decision-making process to follow and the role each institution is to play within it. There needs to be a power (explicitly) conferred (or necessarily 'implied'[211]) in the specific policy field and a procedure that respects the allocation of competence contained in the Treaties. In the areas where 'the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope', the Union is authorised to conclude agreements (of a binding nature), according to Article 216 TFEU — which is particularly relevant in cases like the Cooperation Agreement with Afghanistan that explicitly provide for '[t]he Parties … to conclude … an agreement regulating specific obligations for readmission …'.[212] The pertinent procedure is indicated in Article 218 TFEU.

Even if the provision does not directly address soft-law arrangements, its dispositions apply by analogy.[213] This was concluded by the Court in the *Swiss MoU* case, concerning the adoption of a MoU with Switzerland regarding its revised financial contribution to ensure continued access to the internal market upon Croatia's accession to the EU.[214] The MoU was signed independently by the Commission, without the Council's explicit authorisation, considering itself empowered to do so on account of its powers of 'external representation' and to exercise 'executive and management functions'.[215] Although the final MoU did not depart from the Council's position when it mandated the Commission to open negotiations, the question arose as for whether a procedural legal basis or any specific procedural steps were required for the conclusion of 'political' agreements. The Council considered Article 218 TFEU, albeit not directly applicable, 'nonetheless relevant in so far as it reflects the general distribution of powers among the institutions, as established in Articles 16 and 17 TEU'.[216]

The Court sided with the Council and observed that 'the mere fact that the Commission enjoys a power of external representation … is not sufficient to address the issue … of whether the principle of conferral … required [it] to obtain the Council's approval before signing [the

[208] Art 19(1)(d) EU-Turkey EURA (n 151).

[209] Art 19(2) EU-Turkey EURA (n 151).

[210] García Andrade, 'The Distribution of Powers between EU Institutions for Conducting External Affairs through Non-binding Instruments' (2016) 1 *European Papers* 115, 120.

[211] *ERTA* (n 188) and Art 216 TFEU.

[212] Art 28(4) EU-Afghanistan Cooperation Agreement (n 77).

[213] *Cf.* Schütze, 'European Law and Member States Agreements', in Schütze, *Foreign Affairs and the EU Constitution* (CUP, 2014) 120.

[214] C-660/13 *Council v. Commission* ECLI:EU:C:2016:616 ('Swiss MoU'), paras 1-16.

[215] Ibid., paras 26 and 28; Arts 17 TEU and 220 TFEU.

[216] Ibid., para 22.

MoU]'.[217] The Luxembourg judges considered that the decision to sign an external agreement 'covering an area for which the Union is competent — *irrespective of whether or not that agreement is binding* — requires an assessment to be made, in compliance with strategic guidelines laid down by the European Council and the principles and objectives of the Union's external action laid down in Article 21 TEU'.[218] Because such an assessment requires 'verification of the actual content', which 'cannot be determined in advance', the mere fact that the substance of the MoU corresponded with the negotiation mandate, hence reflecting the (initial) position of the Council, was not enough.[219] The opportunity had to be given for the Council to corroborate that *at the time of conclusion* 'the agreement still reflect[ed] its interest'.[220] So, 'in order to sign', the Commission needed the explicit 'prior approval' of the Council; without it, 'the Commission infringed the principle of distribution of powers'.[221] In this way, the Court applied the substance of Article 218 TFEU to the MoU's conclusion.

The same approach should be adopted vis-a-vis informal arrangements on readmission. Although the Treaty fails to indicate a specific process for their conclusion, the underlying division of competence and power balance underpinning the EU legal system must be respected. Article 218 TFEU should be considered 'the procedural code' for treaty-making,[222] reflecting the basic constitutional setup of the Union as framed by its founders. It constitutes 'an autonomous and general provision of constitutional scope'.[223] In particular, it determines the role for each of the institutions when entering into agreements with third countries (whether formally binding or not), specifying that these are to be 'negotiated by the Commission, in compliance with the negotiating directives drawn up by the Council, and then concluded by the Council, either after obtaining the consent of the Parliament or after consulting it'.[224] The provision, thus, encapsulates the institutional implications in the realm of the EU's external relations of the principle of conferral, determining *how* EU competences may be exercised in this regard 'for the accomplishment of the tasks entrusted to the Community'.[225] The attribution of roles it enshrines has foundational character.[226] It is consubstantial with the Union's architecture and cannot be modified without Treaty amendment. Both the EU institutions and '[t]he Member States … are bound by all the provisions of that article'.[227]

4.2 Institutional Balance and Democratic Legitimation

[217] Ibid., para 36.

[218] Ibid., para 39 (emphasis added).

[219] Ibid., para 43.

[220] Ibid., para 42.

[221] Ibid., para 46.

[222] Dashwood et al., *Wyatt & Dashwood's European Union Law* (6th edn, Hart, 2011) 936.

[223] C-425/13 *Commission v. Parliament* ECLI:EU:C:2015:483, para 62.

[224] Ibid.

[225] C-70/88 *Parliament v. Council* ('Chernobyl') ECLI:EU:C:1990:217, para 21.

[226] 9/56 *Meroni* ECLI:EU:C:1958:7.

[227] *ATA* (n 183), para 43.

'Treaty soft law',[228] as some call supposedly non-binding agreements that entail so strong political commitments and application/enforcement tools that they become indistinguishable from hard-law accords, typically evade EU treaty-making rules. This is problematic, especially in light of the 'trend of democratisation of foreign policy' inaugurated by the Lisbon Treaty,[229] where the role of the Parliament has been reinforced — Lisbon, as its opening provision declares, 'marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are [to be] taken as openly as possible and as closely as possible to the citizen'.[230] In this vein, not only is the Parliament supposed to give its consent regarding 'agreements covering fields to which … the ordinary legislative procedure applies',[231] such as 'removal and repatriation' policy,[232] but it has also been granted an enhanced right of information that covers 'all stages of the procedure' towards an agreement.[233]

Continuing the discussion of the previous section, the principle of institutional balance requires that each institution exercises its own powers, 'in conformity with the procedures, conditions and objectives' set out in the Treaties, with due regard for the prerogatives of the other institutions and without encroaching on each other's authority, 'practic[ing] mutual sincere cooperation' in good faith.[234] It constitutes an essential feature of the EU legal order,[235] determining that 'the practice of [an institution] cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves'.[236] This prohibits the conclusion by the Commission of international agreements of its own accord (whether of a hard- or soft-law nature) — as in the case of the *JWF* with Afghanistan and similar arrangements — and forbids the Member States/European Council from usurping powers and acting in lieu of the other institutions — banning EU-Turkey Statement-like actions. Arguably, the principle also calls into question the Parliament's exclusion from the negotiation and conclusion of informal arrangements that impedes its 'political control'.[237]

Just like the choice of the appropriate legal basis 'has constitutional significance', since it determines the procedure to be applied and the powers each institution should be accorded therein, the selection between hard-law or soft-law is of equal importance, not least because the use of informal arrangements 'is liable to undermine the rights of the European

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[228] Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *ICLQ* 850, 851; Pauwelyn, Wessel & Wouters (eds), *Informal International Lawmaking* (OUP, 2012).

[229] Kuijper, 'Recent Tendencies in the Separation of Powers in EU Foreign Relations: An Essay', in Neframi & Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos, 2018) 201, 209.

[230] Art 1 TEU.

[231] Art 218(6)(a)(v) TFEU.

[232] Art 79(2)(c) TFEU.

[233] Art 218(10) TFEU.

[234] Art 13(2) TEU. See also C-409/13 *Council v. Commission* ECLI:EU:C:2015:217, para 64; and *Swiss MoU* (n 214), paras 31-32. For the historical evolution of the principle, see Craig, 'Institutions, Power, and Institutional Balance', in Craig & de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP, 2021) 46.

[235] Opinion 2/13 *ECHR II* ECLI:EU:C:2014:2454, paras 158 and 164-167.

[236] 149/85 *Wybot* EU:C:1986:310, para 23. See also *Chernobyl* (n 225), paras 21-22; 138/79 *Roquette Frères* EU:C:1980:249, para 33; 139/79 *Maizena* EU:C:1980:250, para 34; 25/70 *Köster* EU:C:1970:115, paras 4, 8-9.

[237] Art 14(1) TEU. Concurring: García Andrade, 'The Role of the European Parliament in the Adoption of Non-legally Binding Agreements with Third Countries', in Santos Vara & Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations Through EU Law* (Routledge, 2018) 115.

Parliament'.[238] Existing inter-institutional agreements,[239] however, fail to even grant access to information concerning international soft-law instruments to the Parliament. The 2010 Framework Agreement between the Commission and the Parliament does mention soft-law, but only that adopted *internally* in preparation of EU legislation.[240] From its part, the 2016 Interinstitutional Agreement on Better Law-making, between the Commission, the Council and the Parliament, makes provision for 'practical arrangements for cooperation and information-sharing' in the exercise of external competence, but solely with regard to 'the negotiation and conclusion of [legally-binding] international agreements'.[241]

The CJEU has been critical of similar marginalisation tactics that inhibit democratic accountability in the CFSP area, establishing a correlation between internal law-making and external treaty conclusion in its *Mauritius* and *Tanzania* judgments.[242] The rulings considered parliamentary involvement crucial for the democratic legitimation of decisions adopted by the EU across policy fields, even within the CFSP. The Court acknowledged that, '[w]hile, admittedly, the role conferred on the Parliament in relation to the CFSP remains limited, since [it] is excluded from the procedure for negotiating and concluding [CFSP] agreements', it still considered that 'the fact remains that the Parliament is not deprived of any right of scrutiny in respect of that European Union policy'.[243] The Court reasoned that 'participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly'.[244] This is an essential value that translates a constitutional rule-of-law constraint into all areas of EU law.

'As regards the procedure for negotiating and concluding international agreements' specifically, the Court established that 'the information requirement laid down in Article 218(10) TFEU is the expression of that democratic principle, on which the European Union is founded'.[245] The objective of that requirement is 'to ensure that the Parliament is in a position to exercise democratic control over the European Union's external action' and to allow it 'to verify that … the conclusion of an agreement was made with due regard to the powers of the Parliament'.[246] If the Parliament were not '*immediately and fully* informed *at all stages* of the procedure', it would be prevented from exercising 'the *right of scrutiny* which the Treaties have conferred on it in relation to the CFSP'.[247] While the right of information is not deemed to go as far as to enable the Parliament to participate in the negotiations or the conclusion of CFSP agreements — given the special rules governing the field, it is still necessary to guarantee that it can exercise its powers 'with full knowledge of the European Union's external action *as a*

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[238] *Mutatis mutandis*, C-178/03 *Commission v. Parliament & Council* ECLI:EU:C:2006:4, para 57; C-300/89 *Titanium dioxide* ECLI:EU:C:1991:244, paras 17-21; C-94/03 *Commission v. Council* ECLI:EU:C:2006:2, para 52; C-155/07 *Parliament v. Council* EU:C:2008:605, para 37.

[239] Post-Lisbon these have become legally binding, per Art 295 TFEU, and enforced as such by the CJEU, e.g., in C-40/10 *Commission v. Council* ECLI:EU:C:2010:713.

[240] Framework Agreement on relations between the Parliament and the Commission, [2010] OJ L 304/47.

[241] Interinstitutional Agreement on Better Law-Making, [2016] OJ L 123/1, para 40.

[242] C-263/14 *Parliament v. Council* ('Tanzania') ECLI:EU:C:2016:435; and C-658/11 *Parliament v. Council* ('Mauritius') ECLI:EU:C:2014:2025.

[243] *Tanzania* (n 242), para 69.

[244] Ibid., para 70.

[245] Ibid. See also *Mauritius* (n 242), para 81.

[246] *Tanzania* (n 242), para 71.

[247] *Mauritius* (n 242), para 86 (emphasis added).

whole'.[248] This is why, in the Court's view, '[t]he infringement of that information requirement impinges … on the Parliament's performance of its duties' and, therefore, it 'constitutes an infringement of an *essential procedural requirement*'.[249]

Transposing this reasoning to informal readmission arrangements, it becomes very difficult to justify the complete relegation the Parliament has been subjected to so far. At the very minimum, it shall be informed 'of the progress of the negotiations', of the decision of adoption, and of the 'final text' of the envisaged agreement,[250] so it can exercise its role. Political control is essential to ensure coherence of EU action and to certify that it 'respect[s] the principles and pursue[s] the objectives' intended by the Treaties. Pursuant to Article 21(3) TEU, the Union must guarantee 'consistency between the different areas of its external action and between these and its other policies'.[251] Within this scheme, 'the duty to inform which the other institutions owe to the Parliament' contributes to that goal.[252]

Considering the differences between readmission policy (pertaining to external migration policy, formerly in the first pillar of the EU) and the CFSP (formerly in the second pillar), respect for the Parliament's prerogatives in relation to informal deportation deals arguably requires more than merely honouring its right of information. To my mind, it also entails the application of Article 218(6) TFEU by analogy, on account of the co-legislator role it usually plays in the AFSJ.

The *Swiss MoU* reasoning supports this proposition.[253] Therein the Court established a symmetry with Article 13(2) TEU, which 'reflects the principle of institutional balance', and proffered that also when acting externally 'each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein'.[254] It is precisely in the absence of a codified procedure where the requirements of institutional balance become crucial to prevent arbitrary conduct by the EU institutions; the principle requires them to act within the boundaries of their own powers and functions within the general design of the Union.[255] As noted above, the Council agreed and explicitly suggested that Article 218 TFEU, although not directly applicable to the conclusion of 'a political commitment', should 'nonetheless [be] relevant', since it captures the power distribution established in the Treaties.[256] The Court concurred and analysed the case from that perspective, denying that the Commission could consider itself empowered to conclude an international (non-binding) agreement without Council approval.[257] Had the Court decided otherwise, it would have elevated the status of the Commission and vested a power in it with

[248] *Tanzania* (n 242), para 70 (emphasis added).

[249] *Mauritius* (n 242), para 86 (emphasis added).

[250] *Tanzania* (n 242), paras 74-77.

[251] See also Art 7 TFEU.

[252] *Tanzania* (n 242), para 72.

[253] *Swiss MoU* (n 214).

[254] Ibid., para 32.

[255] Molinari, 'Parallel Paths that Need to Cross? EU Readmission Deals and Constitutional Allocation of Powers', *Verfassungsblog*, 29.9.2020 <https://verfassungsblog.de/parallel-paths-that-need-to-cross/>.

[256] *Swiss MoU* (n 214), para 22.

[257] Ibid., para 31ff.

no basis in the Treaties, contravening the institutional configuration that shapes the EU's external action.[258]

The Parliament not intervening in the case, its prerogatives were not considered specifically. But there is no principled reason why the same logic should not be applied in its regard.[259] Coherence, legitimacy, and uniformity considerations demand a parliamentary consent requirement in areas of policy where it would be necessary for the adoption of (internal) legislation — reflecting the parallel configuration of Articles 14 TEU and 218(6) TFEU and their common concern with the democratic legitimacy and political control of EU acts. The argument is all the more compelling in situations where an explicit external competence has already been conferred on the Union (as with readmission agreements) that requires the Parliament's approval for the conclusion of binding instruments.[260] The duty on the Union to abide by 'the principles which have inspired its own creation' when engaging in external action, which include democracy and the rule of law, favours this interpretation.[261] Otherwise, mere 'soft-law labelling' could divest the Parliament of its powers after Lisbon.[262]

This logic — of subordinating EU external action to compliance with founding principles, functioning as constitutionality benchmarks — was applied by the Court in relation to the bailout programme dealing with the sovereign debt crisis developed by the Member States, with Commission participation, but taking place *outside* the Treaty framework and through soft-law means. In *Ledra*, the Grand Chamber reached two important conclusions. It considered that the Commission retained 'its role of guardian of the Treaties' and remained bound by EU law — even when not formally acting within its scope. In consequence, it was obliged to 'refrain from signing a [MoU] whose consistency with EU law it doubts', including when designated as non-binding.[263] In particular, the Commission had to 'ensure that such a [MoU] is consistent with the fundamental rights guaranteed by the Charter'.[264] The judgment thus confirmed that key constitutional provisions continue to bind the EU institutions even when they act as 'borrowed' organs and/or through informal means in a system separate from and operating beyond the EU Treaties.[265] There being no proper justification to treat other policy areas differently, the same should apply to informal readmission cooperation — in case it be accepted that this can take place through means that not only replicate but also supplant formal EURAs in disregard of Treaty commands.

4.3 Loyalty and Sincere Cooperation

[258] Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) 68 *ICLQ* 1, 13.

[259] Concurring: Verellen, 'On Conferral, Institutional Balance and Non-binding International Agreements: The *Swiss MoU* Case' (2016) 1 *European Papers* 1225, 1232-1233; and García Andrade (n 237).

[260] Arts 79(3) and 218(6)(a)(v) TFEU.

[261] Art 21(1) TEU.

[262] Molinari, 'EU Readmission Policy to the Test of Subsidiarity and Institutional Balance: Framing the Exercise of a Peculiar Shared Competence' (2022) 7 *European Papers* 151, 165.

[263] C-8/15 P to C-10/15 P *Ledra* ECLI:EU:C:2016:701, para 59.

[264] Ibid., para 67.

[265] *Cf*. C-370/12 *Pringle* ECLI:EU:C:2012:756, para 158, discussed below.

The principles of conferral, institutional balance and sincere cooperation remain notionally separate, although they have become progressively interdependent — with some authors suggesting that they constitute a 'meta-principle' to be appraised holistically.[266] Their joint observance on the part of the EU institutions and Member States is essential for preserving the constitutional integrity of the Union. They, together, introduce a cooperative logic, obliging all actors to bear the common (EU) interest in mind, acting within the limits of their powers and paying due regard to their respective prerogatives and functions within the system — even when there is no immediately discernible benefit for the individual actors, the concern is with the long-haul viability and continuity of the EU project at large.

The principle of sincere cooperation specifically is considered 'inherent in the Community legal order',[267] a 'master key for the proper functioning of the EU',[268] sustaining the integration project as a whole.[269] It is configured as an enhanced duty of loyalty towards the Union, favouring its constitutionalisation.[270] In its Lisbon version, it requires both 'the Union and the Member States … in full mutual respect [to] assist each other in carrying out tasks which flow from the Treaties'.[271] Although formulated as a reciprocal duty, the emphasis has traditionally been on the 'vertical' dimension, that is, the Member States' obligation to 'take any appropriate measure … to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.[272] It is for them to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.[273] This is why it has been considered to impose 'a quasi-federal discipline'.[274] The obligation is 'of general application' and, indeed, far-reaching.[275]

In the area of external relations, it can involve a 'duty to remain silent' and to inhibit themselves in favour of the EU,[276] refraining from exercising their retained competences in situations where this could (potentially) 'compromise the principle of unity in the international representation of the Union … and weaken [its] negotiating power'.[277] The duty to abstain is widely framed and extends not only to the pursuance of unilateral action,[278] but also to the conclusion of agreements (and presumably also *arrangements*) that may affect existing EU law.[279] The opposite would threaten the EU's position and impede the *effect utile* of its undertakings, detracting from its credibility and capacity to intervene on its own behalf on the international stage — whether now or in the future. The idea is for the Member States (individually and

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[266] Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of the EU External Action', in Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart, 2018) 117.

[267] C-46/93 & C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79, para 39.

[268] Casolari, 'EU Loyalty After Lisbon: An Expectation Gap to be Filled?', in Rossi & Casolari (eds), *The EU After Lisbon* (Springer, 2014) 93, 105.

[269] C-105/03 *Pupino* ECLI:EU:C:2005:386 para 42, recognising cross-pillar application.

[270] See e.g. De Baere & Roes, 'EU Loyalty as Good Faith' (2015) *64 ICLQ* 829.

[271] Art 4(3) TEU.

[272] Ibid. and C-231/06 to 233/06 *Jonkman* ECLI:EU:C:2007:373, para 38.

[273] Art 4(3) TEU.

[274] Eckes, 'Disciplining the Member States: EU Loyalty in External Relations' (2020) 22 *CYELS* 85, 85.

[275] C-266/03 *Commission v. Luxembourg* ('Inland Waterways') ECLI:EU:C:2005:341, para. 58.

[276] Delgado Casteleiro & Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *ELRev* 524.

[277] C-246/07 *Commission v. Sweden* ('PFOS') ECLI:EU:C:2010:203, para 104.

[278] Ibid.

[279] *Inland Waterways* (n 275).

collectively) to act as 'trustees of the Union interest',[280] avoiding a detriment to the effectiveness of EU law and EU external action, which can neither be altered nor precluded from evolving over time by disloyal conduct. A duty of information, consultation, coordination, and cooperation thus emerges early on, precisely to avoid any negative impact, whenever a common EU position exists — which does not need to take any specific form. It suffices that 'the content of that position can be established to the requisite legal standard'.[281] So, possible prospective conflicts with Union principles, objectives, and constitutional values constrain Member State action on a constant basis.[282]

The duty of sincere cooperation can stretch even beyond the realm of EU competences, reaching there where Member States act completely externally to the EU framework.[283] Even in those situations, although it cannot impede relations forged outside the Treaties — as seen during the financial crisis or the Covid-19 pandemic — the principle prohibits Member States from undermining the instruments of EU cooperation.

It is true that in *Pringle*, concerning the European Stability Mechanism (ESM), the Court concluded that the Treaty provisions regarding enhanced cooperation had not been unduly circumvented, but this is because — wrongly for many — the Union was said to lack competence in the area concerned.[284] Had the ESM been deemed to impinge upon a power conferred on the EU, the principle of loyalty would have precluded the purposive bypassing of the Treaties. (Collective) action by (all) Member States outside Treaty remit was seemingly allowed only because the Union itself was *not* competent to undertake it. '[T]he provisions of the … Treaties [did] not confer any specific power on the Union to establish a stability mechanism of the kind envisaged' by the ESM, '*consequently* … the Member States … [were] entitled to conclude [the ESM] agreement'.[285] It was against this background that the Court considered the Member States free to pursue cooperation, and even 'entrust tasks to the institutions, outside the framework of the Union',[286] but still subjected to a loyalty obligation — requiring them to perform their tasks in line with the structural principles of EU law.[287] They

[280] Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on behalf of the EU', in Arnull et al. (eds), *Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart, 2011) 435.

[281] *PFOS* (n 277), para 77.

[282] Opinion 1/13 (n 191). Eckes (n 274) develops this further by reference to the BIT cases and subsequent caselaw in 92ff, affirming that EU loyalty imposes restrictions on the Member States that are triggered '*before* a formal legal instrument is adopted' by the Union and '*beyond* any actual conflict' with it, at 105 (emphasis added).

[283] 208/80 *Lord Bruce of Donington* EU:C:1981:194, para 14; C-333/88 *Tither* EU:C:1990:131, para 16 (regarding tax measures on MEPs within national competence); 44/84 *Hurd* EU:C:1986:2, para 48 (on the Statute of the European School); 235/87 *Matteucci* EU:C:1988:460, para 21 (on a bilateral cultural agreement between Member States).

[284] *Pringle* (n 265), para 64. Critically, e.g., Fabbrini, 'A Principle in Need of Renewal? The Euro-crisis and the Principle of Institutional Balance' (2016) 52 *Cahiers de droit européen* 285 and refs therein; Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) *GLJ* 169; Joerges & Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Hart, 2014).

[285] *Pringle* (n 265), paras 64 and 68 (emphasis added).

[286] Ibid., para 158.

[287] Ibid., para 69, 121 and 151.

were authorised to do so 'provided that those tasks d[id] not alter the essential character of the powers conferred on those institutions by the EU … Treaties'.[288]

On this reading, the Court appeared to impose a hierarchy between intra-EU cooperation and cooperation outside the EU framework. Loyalty seems to justify a priority rule, according to which cooperation *within* EU law (if and when the competence has been conferred on the Union in the field concerned) takes precedence over other forms of cooperation[289] — the '*consequently*' formulation in the judgment supports this interpretation.[290] The ruling thus appears to confirm that the duty of sincere cooperation should be understood to prevent extra-EU cooperation tools from eroding the unity and authority of EU law.[291] The presence of Article 2 of the ESM Treaty warrants this construction. It explicitly refers to the principle of sincere cooperation, subordinating its functioning to a loyalty obligation, establishing that it 'shall be applied and interpreted by the Contracting Parties in conformity with the [EU] Treaties … in particular Article 4(3) [TEU]'.[292] This is logical. The reverse would permit Member States going extra-Treaty any time they wished, thereby dismantling the constitutional dispositions of the Union at will.

If this is correct, in the area of readmission the same criterion should pre-empt Member States from extra-Treaty cooperation, including via soft-law, in disregard of the formal agreement-based route enabled (and preferred) by the Treaties. Escaping the EU channel should be considered all the more inappropriate in light of the competences and power allocation discussed earlier. Since the duty of loyalty also binds the institutions, which must observe reciprocal sincere cooperation *inter se* and towards the Member States,[293] neither the European Council nor the Commission (as its most active proponents) should continue to foment the informal cooperation formula in this field. Loyalty imposes a measure of restrain, to avoid 'a risk of undermining the uniform and consistent application' of EU norms.[294] The principle does not sanction the diversion from the procedures laid down in the Treaties that informalisation involves.

This is also clear from the prohibition of hybrid acts the Court has now pronounced, whereby the Member States adopt decisions as members of the Council and as themselves in a single procedure. In the *Air Transport Agreement* case, the Court asserted that 'the rules regarding the manner in which the EU institutions [are to] arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves'.[295] As the Commission had pointed out, neither of them can 'unilaterally derogate from the procedure set out in Article 218 TFEU' or otherwise 'break free from the rules laid down by the Treaties and have recourse to alternative procedures' of their own accord.[296] The involvement of the Member States 'on behalf of the Union', when the act in question was for 'the Council

[288] Ibid., para 158.

[289] Klamert, 'Loyalty and Solidarity in the Euro-Crisis' (2017) 72 *ZöR* 699, 712-713.

[290] *Pringle* (n 265), paras 64 and 68 (emphasis added).

[291] Concurring: Casolari (n 268), 128.

[292] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2.3.2012 <https://www.consilium.europa.eu/media/20399/st00tscg26_en12.pdf>. See also *Pringle* (n 265) paras 111-113.

[293] Art 13(2) TEU and C-600/14 *Germany v. Council* ('OTIF') ECLI:EU:C:2017:935, paras 104-107. See also C-65/93 *Parliament v. Council* ('GSP') ECLI:EU:C:1995:91, para 23; 204/86 *Greece v. Council* ECLI:EU:C:1988:450, para 16.

[294] Opinion 1/13 (n 191), para 89.

[295] *ATA* (n 183), para 42.

[296] Ibid., paras 21 and 23.

alone' to adopt, breached Article 218 TFEU and was 'not compatible' with the structural principles of the EU.[297] The modality employed made it '[im]possible to discern which act reflect[ed] the will of the Council and which the will of the Member States',[298] thereby breaching the unity of international representation of the Union. As remarked by the Commission, '[b]y permitting involvement of the Member States in the competences of the Union', such course of action 'fostered confusion as to [its] personality … in international relations and the powers which it has'.[299] The mix of different procedures led to a breach of the principles of conferral, institutional balance, and loyalty. Given the division of powers designed in the Treaties, it is paramount that '[t]he areas of activity of the Union … be clearly distinguished from the areas in which the Member States can still exercise their competence' and that this is done in conformity with EU constitutional norms.[300]

The Council's argument that the anomalous manner in which the decision had been adopted was the 'very embodiment' of the duty of cooperation was firmly rejected by the Court.[301] Sincere cooperation does not award powers that the Treaty itself does not bestow; it is not a source of new prerogatives were none have been conferred.[302] The loyalty principle, the Court concluded, 'cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU'.[303] And, if this is correct in the field of air transportation, it must also be valid within the remit of readmission cooperation — both areas of shared competence under the Treaties.[304] In so far as soft-law amounts to 'hav[ing] recourse to [an] alternative procedure[]',[305] in disregard of power distribution arrangements, it should be banned by the loyalty principle. Under Article 79(3) TFEU, the EU is allowed to conclude 'agreements' with third countries for readmission. But it has no power to choose soft *arrangements* in lieu of hard-law instruments.

The decisive criterion, however, is not the type of competence at stake, since 'the duty of genuine cooperation is of general application'.[306] What matters is the impact of (constitutionally subversive) action on the EU regime.[307] Such an impact is presumed in areas largely covered by EU rules,[308] or where the EU's external power has already been exercised (like in the readmission field — at least vis-à-vis third countries with which the Union has concluded an EURA).[309] In these situations there does not need to be a conflict or proof of a negative effect. Even Member State initiatives perfectly aligned with the EU *acquis* would be banned, to

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[297] Ibid., paras 50 and 53.

[298] Ibid., para 49.

[299] Ibid., para 34.

[300] Ibid., para 22.

[301] Ibid., para 36.

[302] C-48/14 *Parliament v. Council* ECLI:EU:C:2015:91, para 58.

[303] *ATA* (n 183), para 55.

[304] See Art 4(2)(g) and 4(2)(j) TFEU, respectively on transport and AFSJ.

[305] *ATA* (n 183), para 23.

[306] *PFOS* (n 277), para 71.

[307] *Inland Waterways* (n 275), para 60.

[308] On whether the Return Directive 2008/115/EC, [2008] OJ L 348/98, means that the area of readmission policy has already been fully covered by EU law, see (in favour) Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration – An Assessment after Ten Years of Practice' (2010) 12 *EJML* 45, 62-63, and (nuancing this understanding) Molinari, 'Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?' (2021) 23 *CYELS* 269, 277-281.

[309] *ERTA* (n 188) and Art 2(2) TFEU.

preserve the capacity of EU legislation and the EU external cooperation framework to evolve unimpeded in the future. Where no common position or common norms exist yet, constitutionally deviant conduct is still precluded if it is liable to impinge on the common (EU) interest,[310] as defined in Article 21 TEU — which includes the rule of law and human rights. In both cases, the integrity of the system needs to be preserved; the Union's constitutional principles apply throughout the legal order and prevail over the interests of the Member States and of any individual EU institutions that may choose to service them in contravention of Treaty provisions. The constitutional order does not allow for the elevation of policy objectives, however paramount, above the basic principles that sustain the legal regime at large.

Alongside a procedural reading of loyalty, substantive factors also plead against informalisation. The term 'agreement' has an autonomous (and uniform) meaning under EU law; the one used in the general provisions on the treaty-making powers of the EU under Articles 216 and 218 TFEU. *Opinion 1/75* specified the concept as 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation',[311] embracing a material definition. The same understanding should, therefore, be retained for the term when employed in the readmission domain.

The soft-law route, involving non-public arrangements that evade political scrutiny and judicial control, also neglects legal certainty and legal protection considerations — thus modifying the intended effect of (hard-law) 'agreements' as defined by the Court. Indeed, readmission arrangements typically have a decisive impact on fundamental rights (to asylum, *non-refoulement*, etc), which, according to the EU Charter, can only be legitimately interfered with 'by law',[312] to offer sufficient, legally enforceable guarantees to those concerned — in line with the rights to good administration and effective legal and judicial protection.[313] This makes recourse to soft-law categorically inappropriate for readmission purposes and against a holistic and constitutionally complete understanding of the loyalty obligation. Even if informal instruments were procedurally aligned with Article 218 TFEU, they would still substantively fail to comply with rule of law standards. The principles of legality and effectiveness governing fundamental rights require limitations to their exercise to be provided for in a legal text (sanctioned as such) that is published, accessible, legally ascertainable, and subject to an effective remedy[314] — safeguards that soft-law mechanisms, by definition, cannot provide.

4.4 Judicial Control and Structural Principles

The Court of Justice, which so far has been complacent with the constitutional deviation from fundamental principles that the informalisation of readmission cooperation entails, as an institutional actor, remains subordinate to the principles of conferral, institutional balance, and loyal cooperation. The constitutionality and legitimacy yardsticks that these principles embody are fully applicable to the Court. The duality of its position, as both an institution and the last

[310] Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations', in Varju (ed.), *Between Compliance and Particularism* (Springer, 2019) 283, 292, relying on *PFOS* (n 277).

[311] Opinion 1/75, ECLI:EU:C:1975:145.

[312] Art 52(1) EUCFR.

[313] Arts 41 and 47 EUCFR.

[314] See further, Moreno-Lax, *Accessing Asylum in Europe* (n 2) ch 10.

arbiter of EU law, is no obstacle. As part of the single institutional framework of the EU, it remains duty-bound to 'promote [the Union's] values, advance its objectives, serve its interests … and ensure the consistency, effectiveness and continuity of its policies and actions' in a spirit of and actually practicing 'mutual sincere cooperation'.[315] In so doing, like any of the other institutions, the Court must 'act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them' of which it cannot dispose at leisure.[316]

The Treaties entrust specific tasks to the Court, including the adjudication on the validity of EU acts and the competence to authoritatively interpret (the whole of) EU law.[317] In discharging these tasks, as the ultimate guarantor of the rule of law within the Union, the Court must 'ensure that in the interpretation and application of the Treaties the law is observed'.[318] And, just like the other institutions, it must exercise its functions in good faith, without shying away from (perceived) difficult questions or giving in to external pressures. This is directly required by Article 19 TEU, which 'gives concrete expression to the value of the rule of law stated in Article 2 TEU'.[319]

That it remains bound by the constitutional framework of the Union has been explicitly acknowledged in the competition law area, with conclusions that should apply across policy fields. In *Gascogne* and *Guardian Europe*, the two undertakings concerned, faced with considerable fines, challenged them in proceedings at the General Court,[320] which was said to have disregarded fundamental constitutional protections. The Court of Justice, on appeal, considered the applicability of the EU Charter to the EU judicature alongside the principle of effective legal and judicial protection.[321] Although it dismissed the claim in *Gascogne* and it only partly granted it in *Guardian Europe*, the reasoning in both instances ascertains the subjection of the judicial organs of the Union to constitutional principles and primary law.

This being the case, the Court should have made sure in its ruling on the EU-Turkey Statement (and in any similar proceedings that may come to the fore on the validity of informal readmission arrangements and the legality of their effects) that its analysis was grounded in the full normative breadth of rule of law considerations. Its (scarce) caselaw on external migration policy — counting a handful of cases, very few on the merits, none of which an infringement action — diverges significantly from its jurisprudential lines in the AFSJ and EU external relations at large.[322] While the Court has generally shown deference to the policy choices of the political institutions in both fields, it has nonetheless overseen the competence divide between the different EU actors and vis-à-vis the Member States.[323] This is why its

[315] Art 13(1) and (2) TEU.

[316] Art 13(2) TEU.

[317] Arts 263, 269 and 267 TFEU.

[318] Art 19(1) TEU.

[319] C-64/16 *Juízes Portugueses* ECLI:EU:C:2018:117, para 32; C-619/18 *Commission v. Poland* ECLI:EU:C:2019:531, para 47.

[320] T-577/14 *Gascogne* ECLI:EU:T:2011:674; and T-673/15 *Guardian Europe* ECLI:EU:T:2012:494.

[321] C-40/12 P *Gascogne* ECLI:EU:C:2013:768; and C-580/12 P *Guardian Europe* ECLI:EU:C:2014:2363.

[322] See, in detail, García Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' (2022) 7 *European Papers* 109.

[323] See, e.g., Lenaerts 'The Contribution of the European Court of Justice to the AFSJ' (2010) *ICLQ* 255; and Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice', in Cremona & Thies (eds), *The European Court of Justice and External Relations Law* (Hart, 2014) 15.

inattention to power balance implications in *NF, NG & NM* is so bizarre.[324] By declaring these actions inadmissible on form and authorship matters, negating its own jurisdiction, the Court not only precluded the annulment of the Statement via Article 263 TFEU, but also impeded any future preliminary ruling requests.[325] Such refusal to perform its constitutional role belies its mandate under the Treaties, decreasing its own legitimacy and that of external(ised) instruments of migration control.[326]

Yet, the Court has long considered that 'the [Union] is based on the rule of law'.[327] Even the CSFP has now been deemed liable to the observance of EU constitutional norms, requiring respect of founding values, including the rule of law.[328] As declared in *H* and *Rosneft*, the rule of law foundation runs through the entire edifice of EU law, 'as is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the [EU]'s external action'.[329] A direct manifestation of this rule of law foundation is that 'neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [Treaties]'.[330] And such review must be *effective*. The link between *effective* judicial review, the rule of law, fundamental rights, and the core mission of the Court has been clearly established in *Juízes Portugueses*, framing '[t]he principle of the effective judicial protection of individuals' rights under EU law referred to in … Article 19(1) TEU' as 'a general principle of EU law … now reaffirmed by Article 47 of the Charter',[331] the observance of which the Court must guarantee.

In pursuance of this review, the Court has acknowledged, including in 'difficult' areas regarding decisions in connection with the financial crisis or in domains of reserved Member State competence, that it 'must … make sure that … the institutions do not ignore the rules of law and do not exercise their discretionary power in a manifestly wrong or arbitrary way'.[332] This is how the boundary between Union and Member State powers has been policed, even in relation to 'crisis'-related interventions. In *Pringle*, for instance, although the ESM was judged to fall outside the remit of the Union, the Court resisted allegations that it lacked jurisdiction to adjudicate on the competence divide. The argument was rebuffed on account of the imbrication of the ESM with EU law and its possible impact on the *acquis*.[333]

The nature of the legal instruments concerned, whether in the shape of hard- or soft-law, has been no obstacle for the Court to exercise its functions. Although the debate on 'legal effects' for the purposes of direct actions is not settled yet, the justiciability of informal acts has been

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[324] Section 3.4.

[325] García Andrade (n 322) fn 45.

[326] *Cf*. Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) *JRS* 216.

[327] C-402/05 P & C-415/05, P *Kadi* EU:C:2008:461, para 282; 294/83 *Les Verts* EU:C:1986:166, para 23; Opinion 2/13 (n 235), para 163; C-50/00 P *UPA* ECLI:EU:C:2002:462, para 38.

[328] Poli, 'The Common Foreign Security Policy after *Rosneft*: Still Imperfect but Gradually Subject to the Rule of Law' (2017) 54 *CMLRev* 1799; Spielmann, 'The rule of law principle in the jurisprudence of the CJEU', in Elósegui, Miron & Motoc (eds), *The Rule of Law in Europe* (Springer, 2021) 3, 14ff.

[329] C-455/14 P *H v. Council & Commission* EU:C:2016:569, para 41; C-72/15 *Rosneft* ECLI:EU:C:2017:236, paras 72-73.

[330] *Kadi* (n 327) para 282; *Les Verts* (n 327) para 23; Opinion 2/13 (n 235) para 163; *UPA* (n 327) para. 38.

[331] *Juízes Portugueses* (n 319), para 35.

[332] *Greece v. Council* (n 293) para 17.

[333] *Pringle* (n 265) paras 78-81.

acknowledged on several occasions.[334] Recent restrictive developments have led the Court to rely on the intention of the author,[335] the form of the act,[336] and the (lack of) power of the actor concerned to adopt the measure in question[337] to preclude the review of legality via Article 263 TFEU.[338] However, aware of the legal effects EU soft-law can have, especially on individuals, the Court has accepted that it can be invoked and assessed through the preliminary ruling procedure. Recalling, in *BT* and *FBF*,[339] that the Court has the power to determine the validity of all EU acts 'without any exception',[340] it went on to determine that '[i]ndividuals harmed by the breach of Union law established by [a soft-law measure], even if they are not the[ir] [direct] addressees … must be able to rely on it' in proceedings regarding their (EU) rights.[341] The opposite would diminish the individuals' position within the 'new legal order' of the Union and allow for the consolidation of *ultra vires* acts. Although a clearer stance on the reviewability of soft-law under Article 263 TFEU would be welcome, considering the limitations of preliminary rulings — which cannot afford full judicial protection[342] — openness to (some) judicial scrutiny via Article 267 TFEU is more than the accountability vacuum facing the external migration management field. Incomplete judicial scrutiny is better than no scrutiny at all — particularly in view of the impact of informal instruments on the normative setup, constitutional position, and rights/prerogatives of individuals and institutional actors.

In the past, the Court has gone as far as to infer a right of action from primary law for the Parliament to safeguard its prerogatives, where the Treaties did not yet explicitly make such provision. This was considered the only viable means to preserve the effectiveness of the balance of power designed in the Treaties. 'The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment', the Court considered, 'may constitute a procedural gap' — an oversight of the drafters. Such a 'gap', however, in the Court's view, 'cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties'.[343] This same 'fundamental interest' should have led the Court to assess the legality of informal readmission arrangements concluded in disregard of the power division and loyalty rules of the EU regime.

What this brief overview reveals is that the constitutional integrity of the EU legal order is of such significance that the Court has provided the necessary tools for its preservation whenever necessary, withstanding accusations of judicial 'activism'.[344] 'The very existence of effective judicial review designed to ensure compliance with … EU law' and the provision of a remedy,

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[334] For an overview, Eliantonio, Korea-aho & Stefan (eds), *EU Soft Law in the Member States* (Hart, 2021).

[335] *NF* (n 6).

[336] Ibid. and C-16/16 P *Belgium v. Commission* ECLI:EU:C:2018:79.

[337] C-105/15 P to C-109/15 P *Mallis* ECLI:EU:C:2016:702; C-575/18 P *Czech Republic v. Commission* ECLI:EU:C:2020:530.

[338] Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts' (2020) 16 *EuConst* 466.

[339] C-501/18 *BT* ECLI:EU:C:2021:249; and C-911/19 *Fédération bancaire française* ('FBF') ECLI:EU:C:2021:599. See also Gentile, 'To Be or Not to Be (Legally Binding)? Judicial Review of EU Soft Law after *BT* and *Fédération Bancaire Française*' (2021) 70 *Revista de Derecho Comunitario Europeo* 981.

[340] *BT* (n 339), para 82; *FBF* (n 339), paras 36-38, referring to C-16/16 P *Belgium v. Commission* EU:C:2018:79.

[341] *BT* (n 339), para 81; *FBF* (n 339), paras 58-65.

[342] See further, Gentile (n 338) 483ff.

[343] *Chernobyl* (n 225), para 26.

[344] Among others, Dawson, De Witte & Muir (eds), *Judicial Activism at the European Court of Justice* (EE, 2013); Neill, *The European Court of Justice: A Study in Judicial Activism* (European Policy Forum, 1995).

be it for individuals to defend their rights or for the EU institutions to safeguard their own prerogatives, has been seen as 'inherent in the existence of the rule of law'.[345] It has been deemed 'the *essence* of the rule of law'.[346] This is why the Court's 'passivism' with regard to the informalisation of readmission cooperation is so anomalous. Silence enables constitutional dismantling and the progressive concerted dis-integration of the EU foundations in this field. Deciding not to decide is already a decision. It is not value-neutral and conveys a message that the soft-law, extra-EU formula may well proceed. Only time will tell the extend of the damage and whether there is any dismantling creep into other areas. Hitherto, the utter disregard for core procedural and substantive rule of law foundations in this domain is cause for concern.

5. Conclusion: A Case of (Selective) Rule of Law Undoing (by Stealth)

The manner in which soft-law is being (mis)used in the external migration domain to enhance readmission rates, with all institutional actors abetting, undoes key pillars of EU law. The dangers of constitutional dismantling may have only begun to be charted in this specific area. But spill-over effects cannot be excluded. As the contributions to this Special Issue unveil, the Union is currently in the grip of a rule of law crisis, not only within the Member States,[347] but crucially at EU level as well, with ramifications yet unknown but significant for the entire legal order. This crisis, manifested in different ways, including in the informalisation of relations with third countries for strategic gain, signals a perilous deviation towards the systematic weakening of the common regime, de-naturalising the external dimension of EU integration, eliminating democratic oversight, side-lining parliamentary control, impeding judicial review, preventing human rights enforcement, enabling abuses of power, and breaching institutional balance, sincere cooperation, and EU values overall. The erosion may be selective and, for now, may only be affecting external(ised) migration cooperation — as a (supposedly) crisis-ridden part of the system, but, if unimpeded, the tendency can well consolidate, expand, and normalise, altering the legality and legitimacy bases on which the integration process stands.[348]

As I have shown in the previous sections, the fact that this process is not accidental and enlists contributions from the Member States and the EU institutions themselves eliminates essential checks on power meant to ensure government *within* and *through* law. The active disregard for the Union's competence distribution, decision-making rules, and loyalty requirements corrodes central preconditions for its sustainability as a legitimate constitutional project. The instrumentalist exploitation of the legal and material resources of the Union that is being made compounds the situation. The integration-through-law paradigm is being replaced with a new model of raw executive fiat, moulded on a (supposedly) extra-EU/non-legal grounding,

[345] *H* (n 329), para 41.

[346] *Rosneft* (n 329), para 73 (emphasis added); *Juízes Portugueses* (n 319), para 36.

[347] Generally, Pech & Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *CYELS* 3; Müller, 'Should the EU Protect Democracy and the Rule of Law Within the Member States?' (2015) 21 *ELJ* 141.

[348] Disregarding the competence allocation in the Treaties, the 'Team Europe' approach, emerged to address the Covid-19 emergency, has now been utilised to justify the presence of the Italian and Dutch Heads of State/Government alongside the Commission to negotiate and conclude a comprehensive MoU with Tunisia, covering, *inter alia*, readmission. 'The European Union and Tunisia: political agreement on a comprehensive partnership package', 16.7.2023 <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3881> and 'The European Union and Tunisia agreed to work together on a comprehensive partnership package', 11.6.2023 <https://neighbourhood-enlargement.ec.europa.eu/news/european-union-and-tunisia-agreed-work-together-comprehensive-partnership-package-2023-06-11_en>.

developed through quasi-autocratic means,[349] that is altering the EU's constitutional foundations surreptitiously, without Treaty reform. In a sort of reverse 'competence creep'[350] — that needs further investigation to map the full extent of its repercussions — the EU is embarking (*from within*) in a process of concerted dis-integration, negating its own powers, values, and principles, for the sake of (unconfirmed) policy effectiveness.[351]

The institutionalisation of the soft-law route to (purportedly) improve expulsion rates and demonstrate increased efficacy in readmission efforts represents a process of de-constitutionalisation by stealth, engaging the very institutions tasked with guarding the Treaties. It informalises institutional and external relations, 'softifies' legal commitments, eliminates remedies, impedes political and judicial accountability, all in defiance of core constitutional standards. The values of democracy and the rule of law, which the Lisbon Treaty intended to reinforce, suffer as a result, risking complete (if unavowed) derogation in this field. The high sensitivity and politicization of migration policy, in general, and the readmission field, in particular, provides fertile ground for governance experiments that defile the legitimacy of the EU as a whole.

The Court's contribution to the integration project, as the motor and maker of the 'integration-through-law' paradigm, has long been recognised.[352] Confronted with the fundamental contestation of its authority that informalisation represents and the constitutional unravelling that it triggers in this domain, it should revitalise its role, rejecting pressure to succumb to the Member States' political impulses. Silence and passivity are productive. They normalise the exceptional/unconstitutional ways of informalisation, displacing the central principles of the EU's (legally-founded and legally-conducted) means of integration. The Parliament, too, rather than acquiesce to its own disempowerment, should embrace its post-Lisbon competences, reclaim its prerogatives, and exercise its political control functions.[353] Its diminished capacity (or intended in-capacitation), its relegation to mere observer of informalised deportation cooperation, needs to be forcefully contested. Also the Commission needs to (re)espouse its position as 'guardian of the Treaties' and oversee compliance with Treaty provisions, launching infringement procedures whenever necessary, rather than abetting defiant Member States. The opposite amounts to a dereliction of duty with incalculable cost to both the rights of migrants and the constitutional structure of the Union, contributing to the abolition of law for the realization of policy objectives.[354]

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[349] Kreuder-Sonnen, 'Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance' (2016) 54 *JCMS* 1350.

[350] *Cf.* Garben, 'Competence Creep Revisited' (2019) 57 *JCMS* 205 and refs.

[351] The increased efficacy of returns intended by informal arrangements has not been corroborated in the evaluations conducted by the Commission, partly due to the political situation in partner countries — some of which actively persecuting or forcibly displacing their own populations — or because of so-called 'constraints within the EU Member States', including asylum procedures and appeals lodged against *refoulement*. See, e.g., Second Progress Report: First Deliverables on the MPF, COM(2016) 960 final, 14.12.2016, p 8 and 12; Fourth Progress Report on the MPF, COM(2017) 350 final, 13.6.2017, p 14; Fifth Progress Report on the MPF, COM(2017) 471 final, 6.9.2017, p 7. For a recent overview, Towards an operational strategy (n 89).

[352] Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1; Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004); Rosas, Levits & Bot (eds.), *The Court of Justice and the Construction of Europe* (T.M.C. Asser Press, 2013). *Cf*. Horsley, *The CJEU as an Institutional Actor* (CUP, 2018).

[353] Art 10 TEU.

[354] For a similar take, Kochenov & Ganty, 'EU Lawlessness Law', Jean Monnet Working Paper No 2/2022 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4316584>.

From their part, the Member States, whether acting of their own accord or through the intermediation of the (European) Council, must be contained. The legal framework is not there to satisfy their whims and meet their (untrammelled) expectations. Treaty reform, through the processes established to that effect, is always a possibility. But this should be done in the open, transparently, and in line with the relevant provisions. Strategic recourse to alternative (unsanctioned) procedures, utilizing soft-law for the purpose (or with the effect) of avoiding the applicable constitutional requirements, is illegal and illegitimate. The deliberate subversion of the Community method undoes the project of integration-through-law, straying towards a new ends-driven style of 'discretionary governance',[355] which is efficiency-based but unmoored from 'the principles which have inspired [the EU's] own creation … and which it [must] seek[] to advance in the wider world'.[356] Integration through the dis-integration of law — through the purposive non-adherence to the relevant rules and the constitutional dismantling that ensues — undercuts the validity of the EU project.

[355] Joerges & Kreuder-Sonnen, 'Europe and European Studies in Crisis: Inter-disciplinary and Intra-disciplinary Schisms in Legal and Political Science', *WZB Discussion Paper SP.IV.2016–109* (September 2016), 4 <https://www.econstor.eu/bitstream/10419/149984/1/878200185.pdf>.

[356] Art 21(1) TEU.