

# ‘Soft’ International Agreements in EU External Relations: Pragmatism over Principles?

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## 1. Introduction

In the typology of instruments used to carry out EU external action, we usually distinguish between instruments that are adopted within the EU legal order (internal); and those that are adopted by the Union in the international order (international). These may be instruments adopted by the EU alone (autonomous), or these may be the result of agreements between the Union and a counterparty (conventional). These instruments can then be legally binding (hard law) or they may be committing in other ways (soft law). The present paper addresses the question of ‘transformation’ from hard to soft law (or ‘informalisation’) by focussing on situations in which the EU opts for conventional arrangements between the EU and third states or other international organisations that are not based on Article 216 TEU<sup>2</sup> or on another legal basis in the Treaties, or where (informal) internal decisions are used to clarify or modify international agreements. For *formal* agreements all kinds of procedural requirements are laid down in Article 218 TFEU to ensure the roles and prerogatives of the EU Institutions;<sup>3</sup> *informal* arrangements are less strictly regulated but – as we will see – may run the risk of circumventing rights of certain actors.

Soft law instruments may bear various labels, including Joint Communications, Joint Letters, Strategies, Arrangements, Progress Reports,

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<sup>1</sup> The author is indebted to Prof. Juan Santos Vara, for some suggestions and examples in the area of migration.

<sup>2</sup> Art. 261 TFEU reads: “1. The Union may conclude an agreement with one or more third countries or international organisations 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. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

<sup>3</sup> See further below.

Programmes or Memoranda of Understanding. Recent examples include the EU-Turkey ‘Statement’ on refugees or the EU-Libya ‘Memorandum of Understanding’ concerning the observation of the 2017 presidential and representatives’ elections, the 2016 ‘Decision’ of the European Council to clarify the objective and purpose of the EU-Ukraine Association Agreement, or the ‘Joint Way Forward’ on migration issues between Afghanistan and the EU of 2016.<sup>4</sup> Despite the frequent reference to these instruments as ‘non-legally binding’, questions arise as to the legal effects of the arrangements within the EU and the international legal order. To what extent does a shift from ‘hard’ agreements to ‘soft’ arrangements matter in that respect? And, to what extent does the Union have a choice to either opt for a formal international agreement or to choose an informal arrangement (thereby perhaps bypassing certain procedural rules and guarantees on for instance transparency and democracy)?

The use of soft law in the EU’s external relations is far from new.<sup>5</sup> It is estimated to account for 13 per cent of all EU law, and there are no reasons to assume that this percentage is lower in the field of external relations.<sup>6</sup> On the contrary, it has been argued that “Recourse to non-binding instruments in governing the relations of the European Union (EU) with the rest of the world is increasingly common,”<sup>7</sup> and “Compared to binding international agreements,

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<sup>4</sup> See specific references below.

<sup>5</sup> See recently for instance, A. Ott, ‘Soft Law in EU External Relations: Evading International Treaty Law and Undermining EU Constitutional Principles?’, *Yearbook of European Law* [forthcoming]; as well as F. Terpan, Soft Law in the European Union - The Changing Nature of EU Law’, *European Law Journal*, 2015, 21 (1), pp.68-96; S. Saurugger and F. Terpan, ‘Studying Resistance to EU Norms in Foreign and Security Policy’, *EFA Rev.*, Special Issue (2015): 1-20; B. Van Vooren, ‘A Case Study of “Soft Law” in EU External Relations: The European Neighbourhood Policy’, *European Law Review*, Vol. 34, No. 5, October 2009, 696-719; as well as his *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, Routledge, 2012.

<sup>6</sup> See Chalmers et al., *European Union Law*, Cambridge University Press, p. 101. See also B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge University Press, 2014 at 37.

<sup>7</sup> P. García Andrade, ‘The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments’, *European Papers*, Vol. 1, 2016, No 1, *European Forum, Insight* of 16 April 2016, pp. 115-125, at 115; as well as P. García Andrade, ‘The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries’, in J. Santos Vara and S.R. Sánchez-Tabernero (Eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, 2018 at 115 (forthcoming). See also Council position 12498/13 on the arrangements to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations, 18 July 2013 as well as position 5707/13 of the Council’s Legal Service, 1 February 2013 (also referred to by García Andrade).

at least two times more bilateral soft law tools are agreed between EU actors and international organisations or third countries.”<sup>8</sup>

In general, soft law has been defined as “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects”.<sup>9</sup> The absence of ‘legally binding force’ is indeed a common way of distinguishing soft law from hard law. As I have argued elsewhere, however, this characteristic is confusing and does not seem to do justice to the fact that these norms (as *law*) form part of the legal order and that they commit the actors involved.<sup>10</sup> The following description by Saurugger and Terpan is therefore more helpful:

“Soft law refers to those norms situated in-between hard law and non-legal norms [...]. Hard law corresponds to the situation where hard obligation (a binding norm) and hard enforcement (judicial control or at least some kind of control including the possibility of legal sanctions) are connected. Non-legal norms follow from those cases where no legal obligation and no enforcement mechanism can be identified (e.g., a declaration made by the High Representative on an international issue). In-between these two opposite types of norms lie different forms of soft law: either a legal obligation is not associated with a hard enforcement mechanism or a non-binding norm is combined with some kind of enforcement mechanism.”<sup>11</sup>

The absence of judicial control as well as, more generally, the absence of procedural rules, allegedly provides freedom to the actors to be more flexible as to what they agree on and how they arrange that. And, indeed, in principle international actors are free to choose their own means of committing themselves and in establishing the legal nature of an instrument; also the CJEU is of the opinion that the intention of the parties “must in principle be the decisive criterion”.<sup>12</sup> More in general, several reasons are mentioned in the literature that account for the use of soft arrangements in EU external relations, such as “the need to increase the efficiency of external action, to allow greater

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<sup>8</sup> Ott, *op.cit.*

<sup>9</sup> L. Senden, *Soft Law in European Community Law*, Portland, Oregon: Hart Publishing, 2004, at 112.

<sup>10</sup> See in particular on the use of institutional legal theory to define what belongs to a legal order also R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *European Foreign Affairs Review*, 2015, pp. 123-146. See for a description of other international arrangements also D. Shelton, ‘International Law and “Relative Normativity”’, pp.137 (at pp.161-162), in M.D. Evans, *International Law*, 4th edn. Oxford University Press 2014, at p.159: “any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour”.

<sup>11</sup> Saurugger and Terpan, *op.cit.*, at 5.

<sup>12</sup> Case C-233/02, *France v. Commission*, para. 42. See further on this case below.

smoothness in negotiation and conclusion of the instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments. In addition, non-binding agreements may be more suitable to the political sensitivity of the subject of the agreement or to its changing nature. In the case of the EU, it could further be argued that the signing of political instruments may forestall the complications inherent to the conclusion of mixed agreements.”<sup>13</sup>

The question, however, is to what extent a move from hard to soft law in relations between the EU and its partners can be seen as allowing the Union to ‘step outside’ the legal framework (if that indeed is what is happening) and disregard the rules and principles that define the way in which EU external relations are to be taking shape.

The present paper first of all briefly revisits the competence of the EU to enter into international agreements as well as the rules binding the EU and its Member States in this activity. This will be followed by an investigation into the way EU law deals with ‘soft’ arrangements between the EU and third states (the term ‘agreement’ is deliberately omitted). The final section will be used to assess the legal consequences of using ‘soft’ (or informal<sup>14</sup>) rather than ‘hard’ (formal) instruments in EU external relations.

## **2. The Conclusion of ‘Hard’ International Agreements by the European Union**

Regulations, Directives and Decisions (Article 288 TFEU) all have their role to play in EU external relations. Regulations can be relevant for external relations in at least two ways: they may regulate specifically a matter purely of external relevance; or where they organize an internal policy aspect they may also have a degree of external relevance. Directives, by their nature as focusing on the result to be achieved but giving Member States a choice of form and method, will most often display the second quality that Regulations may also exhibit. Decisions mentioned in Article 288 TFEU may equally be relevant in external relations. Within the EU legal order, most Decisions are addressed to Member States, with fewer addressed to private parties and mostly in the area of competition law. In external relations, examples of such a general Decisions are cooperation between the EU and Member States in relation to energy

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<sup>13</sup> García Andrade (2016), *op.cit.*, at 116.

<sup>14</sup> See more in general on the turn from ‘formal’ to ‘informal’ arrangements in international law: J. Pauwelyn, R.A. Wessel and J. Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, *European Journal of International Law*, 2014, No. 3, pp. 733-763.

agreements or in anti-dumping and anti-subsidy proceedings.<sup>15</sup> Yet, the focus of the present paper is on one type of instrument only: the international agreement.

It is interesting to note that international agreements are not defined by the Treaties. As we have seen above, Article 216 TFEU merely provides that international agreements may be concluded with one or more third states or international organisations. Notwithstanding the absence of a definition (or perhaps exactly because of this), it is obvious that the term should be read in its international context and thus the international law definitions apply.<sup>16</sup> Although the concluding procedure is ‘governed by EU law’ (as the conclusion of treaties between states is usually regulated in domestic law), there is no doubt that the final agreement between the EU and a third state or international organization is governed by international law. The use of the term ‘international agreement’ rather than ‘treaty’ therefore has no specific legal meaning, but at least prevents confusion as in EU law the term ‘(the) Treaties’ is usually reserved for the TEU and the TFEU as well as for the accession Treaties. In other words, for primary EU law.

The fact that international agreements are part of Union law does result in a number of guarantees. First of all, international agreements are publicly available as they are published in the Official Journal of the European Union.<sup>17</sup> Secondly, Article 218 TFEU, describes the procedure to be followed to conclude an agreement, assigning specific roles to the EU Institutions and other actors to uphold the principle of institutional balance:<sup>18</sup>

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<sup>15</sup> See more extensively Van Vooren and Wessel, *op.cit.*, Chapter 2, on which parts of this section are based.

<sup>16</sup> In the context of the Vienna Convention on the Law of Treaties, “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (Art. 2(1)(a)). The fact that the 1969 Vienna Convention refers to states only is solved by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, which contains a similar definition, taking into account the fact that international organizations may also conclude treaties. See for an analysis: J. Klabbers, *The Concept of Treaty in International Law*, Leiden/Boston: Brill|Nijhoff, 1996; as well as C. Brölmann, *The Institutional Veil in Public International Law – International Organisations and the Law of Treaties*, Oxford: Hart Publishing, 2007.

<sup>17</sup> See Article 17 d) and e) of the Council Rules of Procedure, Council Decision of 1 December 2009 adopting the Council’s Rules of Procedure, OJ 2009 L 325/35–61.

<sup>18</sup> In the words of the Court: “[U]nder Article 13(2) TEU, 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 in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of

“The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them” (Article 218(2) TFEU)

“The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.” (Article 218(3) TFEU)

These two Institutions also have clear roles during the further negotiation process. In addition:

“The European Parliament shall be immediately and fully informed at all stages of the procedure.” (Article 218(10) TFEU).

Article 218(6) calls for the consent of the European Parliament in most cases. In other cases, the European Parliament shall at least be ‘consulted’.<sup>19</sup>

The actual conclusion of an international agreement takes place in two stages on the basis of a decision by the Council: signature and conclusion. Article 218 therefore continues:

“5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.  
6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. [...]”

This conclusion of an agreement has both an external and an internal dimension. *Externally*, it finalises the expression of the consent to be bound and the Union becomes a party to the agreement (the entry into force of which is dependent on

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the other institutions”. Case C-409/13 Council v Commission (*Macro-Financial Assistance (MFA)*), EU:C:2015:217, para 64. See also Case C-73/14 Council v Commission (*ITLOS*), EU:C:2015:663, par. 61; Case C-425/13 Commission v Council (*ETS*), EU:C:2015:483, par. 69; and Case C-660/13 Council v Commission (*Memorandum of Understanding*), EU:C:2016:616, par. 32.

<sup>19</sup> Cf. also the Framework Agreement on relations between the EP and the Commission, L 2010 L 304/47 and Interinstitutional Agreement on classified information regarding the CFSP, OJ 2014 C 95/1. More extensively R.A. Wessel, ‘Legal Aspects of Parliamentary Oversight in EU Foreign and Security Policy’, in Juan Santos Vara and Soledad R. Sánchez-Tabernero (Eds.), *The Democratisation of EU International Relations through EU Law*, London/New York: Routledge, 2018 (forthcoming). See also the Court’s clarification of Art. 218(10) TFEU in the cases C-658/11 Parliament v. Council (*Mauritius*), ECLI:EU:C:2014:2025; C-263/14 Parliament v. Council (*Tanzania*), ECLI:EU:C:2016:435.

what the parties agreed on). This is usually done by notifying the other parties or the depositary by way of an instrument of ratification (a letter in which the ratification is expressed). Prior to that, *internally*, a decision has to be taken upon a proposal by the negotiator (Article 218(5)). This decision is comparable to other decisions taken by the Council and lists the consideration leading to the decision, the legal basis as well as further procedural points. Finally, Article 218(9) also reveals quite strict rules on terminating or suspending an international agreement.

Apart from these procedural rules, it is important to underline the internal binding nature of formally concluded international agreements, as confirmed by Article 216(2) TFEU:

“Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

The first part of this sentence follows from the international law concept of *pacta sunt servanda*, which is codified in the Vienna Convention (Article 26). This principle holds that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” This also implies that the second part of Article 216(2) is in fact not a reflection of that principle, as the Member States are not (necessarily) parties to agreements concluded by the Union. Member States are therefore bound by EU international agreements on the basis of EU law, rather than on the basis of international law. And in many cases the implementation of these agreements calls for Member State action. In a way, international agreements are similar to secondary legislation enacted by the EU and as an ‘integral part’ of the EU legal order they cannot be ignored by the Member States.<sup>20</sup> And, as will be dealt with more extensively below, also the Institutions will have to the structural principles in EU law (such as the principle of distribution of powers in Article 13(2) TEU and the principle of institutional balance<sup>21</sup>), implying that the Commission, for instance, cannot simply ignore the prerogatives of the other Institutions.<sup>22</sup>

Yet, this does not automatically lead to supremacy and direct effect of all agreements concluded by the EU. While the status of international agreements within the EU legal order would perhaps lead to a *de facto* supremacy, the Court has not been willing to accept an automatic direct effect

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<sup>20</sup> See more extensively on the effects of international agreements in the EU legal order...

<sup>21</sup> See on the value of these principles in external relations M. Cremona (ed.), *Structural Principles in EU External Relations Law*, Oxford: Hart, 2018.

<sup>22</sup> See Case C-660/13, Council v. Commission, ECLI:EU:C:2016:616; and further below.

for all agreements.<sup>23</sup> At the same time, the Court has made clear that as long as parties agree that they enter into a legal commitment, the EU Treaty procedures apply. This has been confirmed by the Court when it described an international agreement as any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.<sup>24</sup> This, indeed, may form a key reason for the EU and its partners to turn to ‘soft’ international arrangements.

### 3. ‘Soft’ International Arrangements in EU External Action

As alluded to above, ‘soft law’ instruments form an important part of the EU’s governance machinery. Whereas ‘regulations’, ‘directives’, and ‘decisions’ are presented as “binding”, Article 288 TFEU states that recommendations and opinions “shall have no binding force”. Beyond these two ‘non-binding’ instruments mentioned in the Treaties, there are many other measures which are generically referred to as ‘soft law’. A non-exhaustive summary of soft law includes: European Council Conclusions, Council Conclusions, Commission Communications, Joint Communications, Green Papers, White Papers, Non-Papers, Joint Papers, Joint Letters, Resolutions, Strategies, Arrangements, Working Arrangements, Inter-Institutional Arrangements, Declarations, Resolutions, Action Plans, Reports, Interim Reports, Progress Reports, Programmes, Memoranda, and so on. While the (European) Council may also be active in concluding these types of arrangements, the European Commission in particular has been quite active in this area,<sup>25</sup> even if we exclude the administrative agreements that may be concluded by the Commission to bind itself and not the Union.<sup>26</sup>

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<sup>23</sup> See for instance M. Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford University Press, 2013; B.I. Bonafé, ‘Direct Effect of International Agreements in the EU Legal Order: Does It Depend on the Existence of an International Settlement Mechanism?’, in E. Cannizzaro, P. Palchetti and R.A. Wessel (Eds.), *International Law as Law of the European Union*, Nijhoff Publishers, 2012, pp.229-248; F. Martines, ‘Direct Effect of International Agreements of the European Union’, *EJIL* (2014), Vol. 25 No. 1, 129–147.

<sup>24</sup> See Opinion 1/75 *Re Understanding on a Local Cost Standard* [1975] ECR 1355. See also Case C-327/91 *France v Commission* [1994] ECR I-3641, para 27.

<sup>25</sup> See further Ott, *op.cit.*, as well as... Ott also points out that: “Such Commission bilateral instruments address, for instance, the EU’s representation in international organisations and regular cooperation with them, commitments in strategic cooperation in energy or migration issues with third countries.”

<sup>26</sup> Cf. Art. 355 TFEU. See more extensively on administrative agreements H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press, 2011, Chapter 19 (Administrative Agreements). See also the Opinion of Advocate General Tesauo in Case C-327/91, *France v. Commission*, paras 33-34, para. 22, qualifying these arrangements as “concerted practices between authorities which act in the



Again, we largely leave the internal instruments aside (irrespective of their possible external effects) and focus on the arrangements with third states. While, as we have seen, the conclusion of international agreements is quite extensively regulated in Article 218 TFEU, the Treaties do not provide for the conclusion of non-binding arrangements with third countries. In practice, however, the Union enters into international soft legal commitments such as Codes of Conduct, Declarations, or Joint Statements. Article 16(1) TEU (for the Council) and Article 17(1) TEU (for the Commission) are often mentioned as allowing these Institutions to engage in these activities (without these provisions being used as legal bases for the actual instruments).<sup>27</sup> The impact of these instruments should not be underestimated. Ott even argued that “Soft law instruments replace binding bilateral or multilateral agreements, and, in general, supplement, interpret and prepare existing or future multi- or bilateral international treaties”.<sup>28</sup> Despite their presumed ‘non-legal’ nature, such international soft legal agreements thus cannot be ignored in the EU legal order. They may form the interpretative context for legal agreements and may even commit the Union through the development of customary law or as unilateral declarations. They are usually described as ‘political commitments’, rather than legal commitments. However, this may be confusing: soft and hard law instruments may both be politically important. Nevertheless, in international instruments, the EU often underlines their non-legally binding nature by stating that they are of ‘political nature only’.

A key example of a ‘political’ commitment is a Memorandum of Understanding (MoU). MoU’s reflect a political agreement between the Union

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exercise of their discretion and which are therefore acts that are clearly not governed by international law.”

<sup>27</sup> Cf. T. Verellen, ‘On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case’, *European Papers*, Vol. 1, 2016, No 3, European Forum, Insight of 10 October 2016, pp. 1225-1233. For the Council, the reference to Art. 16(1) TEU may not be that convincing as this provision refers back to the Treaties: “The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.” For the Commission, Art. 17(1) TEU is a bit more helpful as it is phrased in more general terms: “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements.”

<sup>28</sup> Ott, *op.cit.*

and one or more third states or international organizations, with the express intention not to become bound in a legal sense. While legally speaking a legal basis is not necessary to establish a competence for the Institutions to enact political commitments, the Treaties do seem to have been phrased in ways that leave room for the Union to be active in this area. Notably, Article 17(1) calls upon the Commission “to ensure the Union’s external representation”, which leaves ample room for that Institution to choose the means through which to do so. In practice, the conclusion of political commitments does not differ too much from the conclusion of international agreements: the Commission (or in the case of CFSP MoUs’ the High Representative) will negotiate and sign the agreement, where the actual conclusion is in the hands of the Council.

Also, in terms of content, an MoU does not necessarily deal with mere marginal issues, but may cover key (economic or trade) issues. An example is formed by the ‘Revised Memorandum of Understanding with the United States of America Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union’.<sup>29</sup> Indeed, a clear trade-related issue, with very concrete agreements on percentages and quota.<sup>30</sup> In this case, indeed, the MoU was concluded following the regular procedures for the conclusion of international agreements (reference was made to Article 207(4), in conjunction with Article 218(6)(a)(v) TFEU).<sup>31</sup> And, indeed, the MoU was published in the L (legislation) series of the Official Journal. Another example, showing that there may be ‘external’ reasons to conclude an MoU is the MoU between the European Community and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union.<sup>32</sup> The Council Decision states the reason for an MoU rather than an international agreement: “The conclusion of a binding agreement with the European Community proved to be impossible as it would not have been accepted in the Swiss ratification process.” Internally, however, the Union followed the procedure for the conclusion of international agreements.

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<sup>29</sup> OJ L 27, 30.1.2014, p. 2-6.

<sup>30</sup> The MoU was part of a dispute settlement procedure within the WTO context.

<sup>31</sup> Council Decision of 28 January 2014 (2014/44/EU), OJ L 27, 30.1.2014, p. 1.

<sup>32</sup> See Proposal for a Council Decision authorizing the conclusion, on behalf of the European Community, of a Memorandum of Understanding between the European Community and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union, and authorizing certain Member States to conclude individually agreements with the Swiss Confederation on the implementation of the Memorandum (COM/2005/0468 final).

This is not the case with all MoUs. After all, one of the reasons is to avoid concluding a binding international agreement as well as complex internal procedures. Thus, EU Institutions and other actors have concluded numerous MoUs on different topics, including an MoU between the President of the Council of the European Union and the Swiss Federal Council to the Swiss financial contribution to the 2004 EU enlargement,<sup>33</sup> an MoU between the EEAS (and signed by the High Representative for Union for Foreign Affairs and Security Policy) and the General Secretariat of the League of Arab States,<sup>34</sup> or the MoU on Strategic Partnership on Energy between the European Union and the Arab Republic of Egypt.<sup>35</sup>

As we have seen, other labels may also be used and one that attracted particular attention was the EU-Turkey ‘Statement’ of 18 March 2016 in the framework of the migration crisis.<sup>36</sup> Indeed, the question was – and to a certain extent still is – whether this Statement was in fact an international agreement, that should not have been adopted by the ‘Members of the European Council’ and issued through a Press Release on the website, but which should have followed the procedures of Article 218 TFEU. Many have criticised the way the Union by-passed regular procedures (“an abusive use of soft law”<sup>37</sup>) by concluding a ‘Deal’ which clearly used committing language: e.g. “Turkey and the European Union reconfirmed their commitment”, “Turkey and the EU also agreed”, etc..<sup>38</sup> The General Court held that it had no jurisdiction as the ‘deal’ was concluded by the EU Member States and not by the EU.<sup>39</sup> This is

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<sup>33</sup> [https://www.eda.admin.ch/dam/dea/en/documents/abkommen/MoU-erweiterungsbeitrag-2007\\_en.pdf](https://www.eda.admin.ch/dam/dea/en/documents/abkommen/MoU-erweiterungsbeitrag-2007_en.pdf) (the MoU does not seem to be available through the EU websites).

<sup>34</sup> 19.1.2015, HR (2015)14

<sup>35</sup> 2 December 2008, [eeas.europa.eu/egypt/index\\_en.htm](http://eeas.europa.eu/egypt/index_en.htm).

<sup>36</sup> EU-Turkey Statement, 18 March 2016; in European Council Press Release 144/16 of 18 March 2016 (<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>).

<sup>37</sup> García Andrade (2018) at 121-122.

<sup>38</sup> See for the debate for instance: T. Spijkerboer, ‘Minimalist Reflections on Europe, Refugees and Law’, in *European Papers*, 2016, Vol. 1, No 2, p. 533 et seq.; G. Fernández Arribas, ‘The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem’, in *European Papers*, 2016, Vol. 1, No 3, p. 1097 et seq.; J. Poon, ‘EU-Turkey Deal: Violation of, or Consistency with, International Law?’, in *European Papers*, 2016, Vol. 1, No 3, p. 1195 et seq.; E. Cannizzaro, ‘Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*’, in *European Papers – European Forum*, Insight of 15 March 2017, p. 1 et seq.; S. Peers, ‘The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?’, in *EU Law Analysis*, 16 March 2016; E. Cannizzaro, ‘Disintegration Through Law?’, in *European Papers*, Vol. 1, No 1, 2016, p. 3 et seq.

<sup>39</sup> Order of the General Court of 28 February 2017, Case T-192/16, *NF v. European Council*; see also the (similar) orders of the General Court in Case T-193/16, *NG v. European Council*; and Case T-257/16, *NM v. European Council*, of the same date. The orders are currently under

unfortunate, as it leaves a number of questions unanswered, for instance whether the European Council (or the Member States) is free to conclude international arrangements that are not only circumventing procedural guarantees, but which are also in the realm of existing EU competences.<sup>40</sup> Indeed, it has been held that “If the Court of Justice endorses the General Court’s view, the detriment to the EU legal order would be that the EU Treaties and their effective means of democratic and judicial control would be undermined [...]”.<sup>41</sup> After all, a solution needs to be found for the irony that because of their nature soft arrangements cannot be scrutinised before the Court because of the Court’s lack of jurisdiction, while they may at the same time affect the principles the same Court is held to protect and guarantee.

EU immigration policy proves to be an area in which soft international arrangements have become particularly popular.<sup>42</sup> A recent example is formed by the ‘Joint Way Forward on migration issues between Afghanistan and the EU’ of 2016.<sup>43</sup> This JWF indicates that we are dealing with a “joint commitment of the EU and the Government of Afghanistan to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants [...]”, while at the same time it is “not intended to create legal rights or obligations under international law”. The agreed rules are quite precise and concrete and their implementation is monitored (“facilitated”) by “a joint working group.” In all practical respects, the Declaration reflects the type of commitments that would fit an international (readmission) agreement.

The adoption of mobility partnerships and common agendas on migration and mobility in the external dimension of EU immigration policy

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appeal at the CJEU: Case C-208/17, *NF v. European Council*; Case C-209/17 P, *NG v. European Council*; Case C-210/17 P, *NM v. European Council*, pending (appeal lodged 21 April 2017).

<sup>40</sup> These questions have frequently been raised in analyses of the Court’s orders. See for instance Narin Idriz, ‘Taking the EU-Turkey Deal to Court?’, *Verfassungsblog*, 20 December 2017. See on the same blog also the debate between Hathaway and Hailbronner (2016).

<sup>41</sup> G. Butler, ‘EU Foreign Policy and Other EU External Relations in Times of Crisis: Forcing the Law to Overlap?’, in Elżbieta Kuźelewska, Amy Weatherburn, and Dariusz Kloza (Eds.), *Irregular Migration as a Challenge for Democracy*, Cambridge: Intersentia, 2018, pp. 51-81, at 73; see also Spijkerboer, *op.cit.*, at 552.

<sup>42</sup> See on the proliferation of different instruments in that area also E. Fahey, ‘Hyper-Legalisation and Delegalisation in the AFSJ: On Contradictions in the External Management of EU Migration’, in Santos Vara, Carrera and Strik (Eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar, 2018 (forthcoming).

<sup>43</sup> [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf)

form additional examples of informalisation in the area of migration.<sup>44</sup> Mobility partnerships are adopted to implement the so-called Global Approach to Migration and Mobility (GAMM).<sup>45</sup> Mobility partnerships have been concluded with Moldova, Cape Verde (2008), Georgia (2009), Armenia (2011), Morocco, Azerbaijan, Tunisia (2013), Jordan (2014) and Belarus (2016).<sup>46</sup> They deal with various issues, including visa facilitation, projects and actions on mobility, legal migration and development in exchange for commitments on border control and readmission.<sup>47</sup> All of them clearly state that “the provisions of this joint declaration and its Annex are not designed to create legal rights or obligations under international law”. More recent developments only underline the further informalisation of agreements in the area of migration. The new 2016 Migration Partnership Framework (MPF)<sup>48</sup> was openly presented as to avoid “the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement” in the field of readmission.<sup>49</sup> ‘EU Compacts’ (in some cases also known as ‘Partnership Framework *Agreements*’) are used as informal – ‘non legally binding’ – tailor-made arrangements to accommodate the specific wishes and needs of the third states involved, but “designed to deliver clear targets and joint commitments”.<sup>50</sup> While the conclusion of formal readmission agreements may have been the objective of the mobility partnerships, the MPF aims at pragmatic speedy arrangements: “the paramount priority is to achieve fast and operational returns and not necessarily formal readmission

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<sup>44</sup> See for instance ‘Joint Declaration on a Mobility Partnership between the Republic of Belarus and the European Union and its Participating Member States’ (Council doc no 9393/1/15 REV 1, Luxembourg, 13 October 2016).

<sup>45</sup> The original Approach is from 2006 (European Commission, ‘The Global Approach to Migration one year on: Towards a comprehensive European migration policy’, COM (2006) 735 final, 31.11.2006); but it was updated by the Commission in 2011 to include mobility: ‘The Global Approach to Migration and Mobility’ COM (2011) 743. See also J.P. Cassarino, ‘Informalizing EU Readmission Policy’, in A. Ripoll Servent and F. Trauner (Eds.), *Routledge Handbook of Justice and Home Affairs Research*, Routledge, 2018, p. 88.

<sup>46</sup> P. García Andrade, ‘EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally’, 55 (2018) CMLRev.

<sup>47</sup> Communication on ‘Circular migration and mobility partnerships between the European Union and third countries’, COM (2007) 248, 16.5.2007 and JHA Council Conclusions of 12-13 June 2007 and 6-7 December 2007.

<sup>48</sup> Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM (2016) 385 final, 7 June 2016 (endorsed by the European Council in June 2016).

<sup>49</sup> COM(2016) 700 final, 18.10.2016.

<sup>50</sup> <http://www.consilium.europa.eu/en/policies/migratory-pressures/countries-origin-transit/migration-partnership-framework/>

agreements.”<sup>51</sup> The political reasons for expediency and pragmatism are understandable, but as will be analysed below, they do come at a price.

Finally, soft international instruments are for instance used in the European Neighbourhood Policy (in action plans and association agendas) as well as in policies such as environment or energy.<sup>52</sup>

#### **4. Consequences of a Shift from Hard to Soft Instruments**

In international law, the potential problems caused by a move from hard to soft law have been highlighted,<sup>53</sup> while it has at the same time been pointed out that a ‘turn to informality’, should not *per sé* have negative consequences for, for instance, the legitimacy of norms when ‘thin state consent’ (the traditional basis for international agreements) is being replaced by ‘thick stakeholder consensus’ (resulting from the participation of not just governmental actors).<sup>54</sup>

The question comes up to what extent general (constitutional) principles of EU law are affected by a turn to informality in EU external relations. Defining these ‘principles’ is notoriously difficult, as no generally accepted definition exists.<sup>55</sup> For the purpose of the present paper, however, we focus on the principles that are established by the EU treaties themselves or are developed in

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<sup>51</sup> European Commission, ‘Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration’, COM(2017) 471 final, 6.9.2017, at 7.

<sup>52</sup> See respectively for instance Joint Declaration 10055/3/14 establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States, 9 September 2014; Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States, 12 March 2015; EU-Georgia Action Plan of 2006 and the Association Agenda of 2014 replacing it (eeas.europa.eu); Joint Declaration between the European Union and the Republic of India on a Clean Energy and Climate Partnership, 30 March 2016; or the ‘Memorandum of Understanding on a Strategic Energy Partnership Between the European Union Together with the European Atomic Energy Community and Ukraine’ (Brussels, 24 November 2016) <[https://ec.europa.eu/energy/sites/ener/files/documents/mou\\_strategic\\_energy\\_partnership\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/mou_strategic_energy_partnership_en.pdf)> and other instruments available at europa.eu/rapid. See García Andrade (2016), *op.cit.*, at 116; as well as García Andrade (2018) at 115.

<sup>53</sup> See for instance A. Peters, ‘Soft Law as a New Mode of Governance’, in U. Diedrichs, W. Reiners and W. Wessels (eds.), *The Dynamics of Change in EU Governance*, Edgar Elgar Publishing, 2011.

<sup>54</sup> Pauwelyn, Wouters, and Wessel, *op.cit.*

<sup>55</sup> Cf. C. Semmelmann, ‘General Principles in EU Law between a Compensatory Role and an Intrinsic Value’, *European Law Journal*, Vol. 19, No. 4, July 2013, pp. 457–487, at 460: “Although it appears to be a term of art, there is no generally accepted definition of what is meant by a principle, by its generality and what exactly denotes a general principle of EU law. A generic provision on the category of principles or even general principles within the sense of a legal basis for their recognition or for their mention as a source of EU law does not exist, let alone an authoritative definition of their concept.”

the case law of the Court of Justice of the European Union (CJEU).<sup>56</sup> In that sense we closely follow Cremona's description of 'structural principles' as "principles which have been drawn from the Treaties and elaborated by the Court to establish [the] institutional space" [...] "within which policy may be formed, in which the different actors understand and work within their respective roles."<sup>57</sup> According to Cremona, principles under this heading would include the duty of sincere (and close) cooperation, the principles of conferral and institutional balance, mutual solidarity, subsidiarity, and the principle of autonomy. In short, "structural principles are [...] not concerned with the *substantive content* of policy, but rather with *process* and the *relationships* between actors in those processes, and their normative content reflects this."<sup>58</sup> This would, *inter alia*, largely exclude the general principles (read 'foundations') of EU law listed under the heading 'Principles' as Part One of the TFEU. While some other principles – such as the 'principles' of primacy and direct effect – are also relevant in the case of international agreements, the scope of this paper does not allow for a detailed effect of these principles. While this is a very helpful categorisation, the substantive content of policies is usually what non-legal outsiders would see as the most important aspect of a principles discussion. Here, however, it becomes more difficult to clearly demarcate principles from values, as 'general principles' are generally believed to reflect the values inherent to *the rule of law* (such as legal certainty, legal protection, equality before the law or transparency).<sup>59</sup>

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<sup>56</sup> This implies that we do not see principles as necessarily 'unwritten'. Cf. Semmelman (*op.cit.*, at 461): "general principles in EU law denote unwritten, judicially driven norms that may subsequently be codified." On the contrary, we closely follow the principles are presented in the Treaty.

<sup>57</sup> M. Cremona, *Structural Principles in EU External Relations Law*, *op.cit.*, at 5. Cf. also Von Bogdandy, who sees the "*founding* principles or *structuring* principles as *constitutional* principles"; arguing that "A principle is a norm (understood in a broad sense) that shows a certain degree of inherent structural generality in the sense of an indeterminate, abstract, programmatic, non-conclusive or orientative character." (at 460).

<sup>58</sup> Cremona, at 12. Cremona further distinguishes between two types of structural principle: relational and systemic. "Relational principles govern the relationship between actors or legal subjects (not norms)" (at 17). Relational principles cover relations between Member States, between Member States and Institutions and between Institutions. "Systemic principles are concerned with the operation of the system as a whole, with building the EU's identity as a coherent, effective and autonomous actor in the world" (at 18). They work in close cooperation to the relational principles.

<sup>59</sup> See also the reference to the rule of law in the list of *values* in Art. 2 TEU and the list of *principles* in Art. 21 TEU (see further below). The examples of structural principles listed by Azoulay (*op.cit.* at 36) also seem to combine procedural and substantive principles: "principles of non-discrimination, free movement, primacy, *effet utile*, judicial review, institutional balance and loyal cooperation". See also I Vianello, 'The Rule of Law as a Relational Principle

The question then is to what extent the guarantees that we described in relation to hard law instruments are to be applied in the case of soft law instruments. Perhaps one of the main advantages of formal international agreements is that it is absolutely clear that they are to be concluded within the procedural and substantive boundaries of EU law. In the words of the Court in a seminal case: “an international agreement cannot have the effect of prejudicing the constitutional principles of the [treaties]”.<sup>60</sup> Indeed, both the treaty provisions and case law underline the need for formal international agreements to be concluded and function within the boundaries of EU law and principles, including the principles on for instance conferral, institutional balance, sincere cooperation; but also the more substantive ones related to democracy and the rule of law. The treaties are silent on other international engagements.

A first problem is that informal (‘soft’) arrangements are not always easy to find as the publication requirement does not apply, although the instruments are accessible in the Commission register upon request.<sup>61</sup> In any case, the Commission seems more open and these days the instruments at least indicate when there is no intention to be legally bound under international law (through phrases like “Does not establish binding obligations under international law” or “not intended to create, any binding, legal or financial rights or obligations on either side under domestic or international law”).<sup>62</sup>

As to the application of the structural principles, at least it is clear that soft law may not be utilized to avoid the principle of conferred powers (Article 5 TFEU) or institutional balance (Article 13 TFEU),<sup>63</sup> and simply arguing that an act has no legally binding force does not allow for EU bodies to completely side-line EU principles. Case law on soft arrangements is rare,<sup>64</sup> but in *France v Commission*, that Member State sought annulment of the decision by which the Commission adopted non-legally binding ‘Guidelines on Regulatory

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Structuring the Union’s Action Towards its External Partners’, in Cremona, *op.cit.*, pp. 225-240.

<sup>60</sup> Joined Cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, para 285.

<sup>61</sup> Ott, *op.cit.*

<sup>62</sup> Ott, *op.cit.*, referring to respectively the MoU on Partnership between the EU and the European Broadcasting Union of 2012; and the MoU between the EU and the USA for reducing energy poverty and increasing energy access in Sub-Saharan Africa, Commission decision on the signing of 13.7.2015, C(2015) 4717 final.

<sup>63</sup> C-233/02 *France v Commission* [2004] ECR I-2759.

<sup>64</sup> García Andrade (2016, *op.cit.*, at 116) found that “The Court of Justice (ECJ) has not encountered any cases related to the specific question of the power to conclude non-binding agreements with third parties since its well-known 2004 judgment in *France v. Commission*.”



Cooperation and Transparency’ between the Commission and the US Trade Representative (USTR). France argued that the prerogatives of the Council had been infringed under current Article 218 TFEU, insofar as it constituted a binding agreement which the Council should adopt. The Commission stated that the institutional balance could not be affected since the guidelines were to be applied on a voluntary basis, and lacked legal binding force.<sup>65</sup> The Court thus ruled that even if a given instrument is non-binding, this does not give an Institution the power to adopt it. The principles of conferral and institutional balance continue to apply and must be respected.<sup>66</sup> In any case, as rightfully argued by Ott, “The use of soft law instruments by the Commission in the field of external relations seems therefore to have been implicitly legitimized by the Court, provided that the general principles of EU law are respected”.<sup>67</sup> Indeed, the latter condition is important and could form a criterion to assess the legality, or at least the legitimacy, of soft international arrangements.

More recently (and post-Lisbon), on 28 July 2016, the Court had an opportunity to revisit the issue in a case on a Decision by the Commission on the signature of an addendum to the Memorandum of Understanding of 27 February 2006, regarding a Swiss financial contribution to the new Member States of the EU (*Swiss MoU* case).<sup>68</sup> This addendum contains ‘non-legally binding commitments’ between the EU and Switzerland and was *signed* by the Commission, despite the fact that it merely had an authorisation by the Council (and the Member States in the framework of the Council) to *negotiate* it. In the Commission’s view “the signature of a non-binding agreement constitutes an act of external representation of the Union for the purpose of Article 17(1) TEU if such a non-binding agreement reflects a Union position or policy already established by the Council. In those circumstances, the signature of such a non-binding instrument does not call for the Council’s prior approval.”<sup>69</sup> Given the absence of an authorisation to conclude the non-binding agreement, the Court, however, held that “the Commission cannot be regarded as having the right, by

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<sup>65</sup> C-233/02 *France v Commission* [2004] ECR I-2759, para 33.

<sup>66</sup> Cf. also cases *Germany v Council*, C-399/12 (*OIV*), EU:C:2014:2258, paras. 63 and 64; and *Commission v Council (Australian Greenhouse Gas Emissions)*, C-425/13, EU:C:2015:483, para. 29.

<sup>67</sup> Ott, *op.cit.*

<sup>68</sup> Decision C(2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. The MoU of 2006 served as a compromise in exchange for the Swiss access to the enlarged internal market within the framework of the negotiations between the EU and Switzerland on the second series of bilateral agreements known as “Bilaterals II”, which were signed in 2004.

<sup>69</sup> Case C-660/13, *Council v. Commission*, para. 35; ECLI:EU:C:2016:616.

virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country.”<sup>70</sup> The Court thus underlined the importance of the principles of conferral and institutional balance even in the case of soft external arrangements. In fact, the ‘binding nature’ of the agreement does not seem to change that fact that it is part of the overall EU external relation regime.

“The decision concerning the signing of an agreement with a third country 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 Art. 21(1) and (2) TEU, of the Union’s interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled.”<sup>71</sup>

As one observer held, “international soft law measures, as any other legal act, need to find, broadly speaking, a legal foundation in the Treaties in order to be correctly adopted.”<sup>72</sup> It has furthermore been established that the Commission, in concluding MoUs should remain aware of its general role on the basis of Article 17(1) TEU, which – as we have seen above – includes a provision that

“The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union [...]”.

Consequently – as the Court held in a case in which the Commission was involved in the conclusion of an MoU in the framework of the financial European Stability Mechanism (ESM) – the Commission, “retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting

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<sup>70</sup> Para. 38.

<sup>71</sup> Para. 39. Emphasis added. The ‘bindingness’ as such was addressed by AG Sharpston in her Opinion: AG Sharpston argued that “the fact that the 2013 addendum is not an international agreement within the meaning of Article 218 TFEU does not automatically imply that the contested decision is not intended to produce legal effects”. Opinion of Advocate General Sharpston, Case C-660/13, para. 69.

<sup>72</sup> García Andrade (2018), at 120.

from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts.”<sup>73</sup>

At the same time, it is clear that there are consequences for many of the Union’s values. For example, a turn to informal instruments makes it more difficult for the European Parliament to exercise its democratic role.<sup>74</sup> As rightfully stated by Verellen: “ensuring political accountability also in the increasingly important area of ‘non-binding’ political agreements requires not only accountability vis-à-vis the Member States, but also vis-à-vis the EU citizenry, as represented in the European Parliament.”<sup>75</sup> The author argues that – because of a link between Article 14 TEU (on the general oversight function of the EP) and Article 218(6) TFEU (on the consent of the EP in certain cases), “parliamentary consent is to be obtained whenever the Council wishes to conclude a non-binding agreement that involves a degree of policy-making in a field in which parliamentary consent is required for the adoption of domestic legislation.”<sup>76</sup> Article 14 TEU indeed provides that “The European Parliament shall [...] exercise functions of political control and consultation”, but again it adds “as laid down in the Treaties”, indicating that it is not self-evident that this provision does indeed extend to ‘soft’ arrangements. At the same time, Article 296(1) TFEU provides that where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, *in compliance with the applicable procedures* and with the principle of proportionality. It has rightfully been pointed out that “this provision could be said to reduce the freedom of the EU institutions in the choice of the form of Union action, binding thus the Commission and the Council to opt for international treaties instead of non-legally binding agreements in those fields in which the EP should give its consent according to Article 218 TFEU and the instrument is to regulate and affect individuals’ rights.”<sup>77</sup> In other words: in the choice for formal or informal agreements, the possible role of the European Parliament should be taken into account, in particular when individual rights are at stake (which is usually the case in, for instance, the area of migration).

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<sup>73</sup> Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, par. 59; ECLI:EU:C:2016:701.

<sup>74</sup> This role is equally important in the EU’s external relations. See for instance R Passos, ‘The External Powers of the European Parliament’ in P. Eeckhout and M. López-Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart Publishing 2016), pp. 85–128.

<sup>75</sup> Verellen, *op.cit.*

<sup>76</sup> *Ibid.*

<sup>77</sup> García Andrade (2018), at 121.

Apart from practical problems in relation to the availability of and access to information,<sup>78</sup> it is clear that, for instance, the requirement in Article 218(10) TFEU stipulating that “The European Parliament shall be immediately and fully informed at all stages of the procedure” does not formally apply, making it hard for this Institution to exercise one of its key functions. As held by the Court in *Tanzania*, “the information requirement ensures that the Parliament is in a position to exercise democratic control over the European Union’s external action”. And, as the Court argued, this has an effect on the EP’s role in checking whether principles of institutional balance and consistency are taken into account.<sup>79</sup> The role of the Parliament in the negotiation and conclusion of international agreements is further specified in specific rules laid down in interinstitutional agreements, but again informal international arrangements are not covered by these rules.<sup>80</sup> The – admittedly rhetorical – question, however, is whether the role of the EP is not meant to be more general and the information obligation is not to be upheld irrespective of the legal nature of the chosen instrument.<sup>81</sup>

An additional problem is that consistency with EU law and principles can also not be checked prior to ratification. Whereas Article 218(11) TFEU allows for the possibility of this check for international agreements,<sup>82</sup> this provision can simply not be used if the Union actors opt for soft agreements. As

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<sup>78</sup> Access to information for the EP is somewhat better regulated in the case of the external activities of regulatory agencies in the field of the area of freedom, security and justice. In the Europol Regulation, the European Border and Coast Guard Agency (Frontex) Regulation, and the proposal on the revised EU agency on asylum (EASO) an information right of the European Parliament for the soft law arrangements, in form of working arrangements agreed with third countries and international organisations, is stipulated. See Ott, *op.cit.*

<sup>79</sup> *Tanzania* case, paras 68 to 77.

<sup>80</sup> The 2010 Framework Agreement between Commission and EP only refers to ‘internal’ soft law. The 2016 Interinstitutional Agreements on Better Law-making merely refers to international agreements. See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123/1-14, para. 40. See also P. García Andrade, ‘The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries’, in J. Santos Vara and S.R. Sánchez-Taberner (Eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, 2018 (forthcoming).

<sup>81</sup> Cf. García Andrade (2018) at 123: “At the very least, it could be upheld that the obligation to inform the EP in all stages of the procedure for concluding international agreements according to Article 218(10) TFEU should be extended to non-legally binding agreements”. This could also be derived from the Court’s arguments in *Mauritius* and *Tanzania* when it confirmed the fundamental nature of the information obligation.

<sup>82</sup> “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”

Butler argued, “Article 218(11) TFEU’s entire *raison d’être* was to ensure an international agreement would not be concluded that would go against what is contained within the treaties”,<sup>83</sup> but this is exactly the risk that occurs when formal international agreements are avoided. While generally there is always the *ex post* judicial review possibility in the case an Opinion of the Court has not been sought before the conclusion of an agreement, this is far more difficult in the case of informal arrangements.<sup>84</sup>

Furthermore, while one could perhaps construct the argument that any interference of the Court in what are essentially executive actions could lead to a violation of the principle of institutional balance, the counter-argument is that presenting arrangements as non-legal documents deprives individuals from enforcing their rights before domestic courts or before the CJEU. As indicated above, provisions of formal international agreements can – under certain conditions – be invoked to the benefit of EU citizens and third country nationals. The turn to informal arrangements deprives these individuals from exercising their rights, which makes it far more difficult to assess possible violations of fundamental rights. This may be particularly worrisome in relation to the sensitive migration issues dealt with in readmission agreements. As rightfully observed by Carrera: “informal patterns of cooperation and non-legally binding instruments including a readmission angle enhance the legal uncertainty and the lack of sufficient procedural guarantees designing inter-state challenges.”<sup>85</sup>

The scope of the present paper does not allow for an extensive analysis of consequences under *international* law of a shift to soft law arrangements. Generally, however, it is well-accepted in international law that even ‘non-binding’ arrangements may produce legal effects in the international legal order, for instance based on expectations parties may have in good faith.<sup>86</sup>

## 5. Conclusion

The above analysis points to the existence of two separate forms of international arrangements that are not ‘international agreements’ in the sense of the Treaties.

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<sup>83</sup> G. Butler, ‘Pre-Ratification Judicial Review of International Agreements to Be Concluded by the European Union’, in Mattias Derlén and Johan Lindholm (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Oxford: Hart Publishing, 2018, pp. 53-77, at 59.

<sup>84</sup> Although the Court seemed to see more possibilities for *ex post* review; cf. Case C-327/91, *French Republic v Commission of the European Communities*, ECLI:EU:C:1994:305 .

<sup>85</sup> S. Carrera, ‘Implementation of EU Readmission Agreements: Identity, Determination, Dilemmas and the Blurring of Rights’, Springer Open, 2016 at 47.

<sup>86</sup> See more extensively Klabbers, *op.cit.*; and in this context also García Andrade (2016), *op.cit.* at 119.

The first form is when Member States and/or Institutions decide to act outside the EU legal order. This may then lead to (intended) soft arrangements (the ‘Turkey deal’ being a prime example) or to actual international agreements with third states or *inter se* (think of ‘Schengen’ or the ESM). In these cases, both ‘hard’ and ‘soft’ arrangements run the risk of bypassing EU principles and constitutional guarantees. As held by Butler, “proceeding with European integration outside the EU’s legal framework creates problems for institutional balance, and the legitimacy of the EU from a democratic perspective.”<sup>87</sup> Indeed, we may be witnessing ‘disintegration through law’,<sup>88</sup> or perhaps disintegration by evading existing law.

The key focus of the present paper, however, was on the second form: actors stay within the EU legal order, but rather than using formal international agreements they opt for more informal arrangements. Rules on the legal basis or the procedure to conclude these arrangements are absent in the Treaties. In general, this implies that, for instance, decisions are not public or difficult to access, judicial review is not obvious, and the European Parliament may be sidelined as the structural principles and rules are not automatically applied. Informalisation may thus not only lead to problems of legitimacy, but also of legality.<sup>89</sup>

As we have seen, there may be different reasons to opt for soft arrangements rather than for formal international agreements, ranging from enhanced flexibility, to internal or external legal or political obstacles. In general, however, this comes at a price as the legislator is by-passed in favour of the executive.<sup>90</sup> The use of the many forms of soft law in EU external relations runs the risk of creating a parallel universe, inside the EU legal order, with the potential of violating basic EU principles. Hence, while both the procedures to conclude international agreements and the Court’s abundant case law on these procedures are meant to guarantee consistency within the Union’s

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<sup>87</sup> Butler, *op.cit.* at 72. See also A. Łazowski and S. Blockmans, ‘Constitutional Foundations and EU Institutional Framework: Seven Years of Working with Lisbon Reform’ in A. Łazowski and S. Blockmans (Eds.), *Research Handbook on EU Institutional Law*, Cheltenham: Edward Elgar, 2016, at 45.

<sup>88</sup> See Cannizzaro, *op.cit.*

<sup>89</sup> Cf. P. García Andrade, ‘The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries’, in J. Santos Vara and S.R. Sánchez-Tabernero (Eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, 2018 (forthcoming), at 121: “the absolute absence of involvement of the EP in the adoption of soft law instruments could be arguably against the Treaties, in particular the principle of institutional balance enshrined in Article 13(2) TEU and also the duty of sincere cooperation between the EU institutions.”

<sup>90</sup> Cf. Verellen, *op.cit.*

legal order and a well-balanced role of the Institutions, arrangements not following Article 218 TFEU may seriously disturb this system of checks and balances and possibilities for legal review.

At the same time, this paper also revealed that the difference between ‘hard’ and ‘soft’ international arrangements should not be overestimated. First of all, it has rightfully been observed that even formal international agreements may seek to ‘avoid’ the Court.<sup>91</sup> Not in all cases the *ex ante* check by the Court is asked for and conflicts between international and EU law may only become visible *ex post* (with judicial review being subject to strict conditions). Secondly, in the scarce case law on informal arrangements, the Court had no difficulty in deciding positively on the admissibility and in fact underlined the value of the EU principles, both in a procedural and a substantive sense. The claim that an arrangement is not meant to “create legal rights or obligations under international law” does not always imply that falls completely outside EU law.<sup>92</sup> Thirdly, in some cases procedural elements of Article 218 TFEU were applied even for the conclusion of MuOs. And, finally, the question has been posed whether the lack of binding character does, in fact, not ensure that the balance of power is not disturbed. After all – and perhaps ironically – not using EU procedures at least leaves the Union’s legal order intact.<sup>93</sup> If there is one thing our analysis has shown, however, is that it is difficult, if not impossible (or even illegal) to by-pass certain competences and procedures simply by using different labels.<sup>94</sup> The institutional balance (which is at the basis of Article 218 TFEU) is to be respected irrespective of the nature of the international arrangement.<sup>95</sup>

Despite all this, it would be good to consolidate the various rules for the various Institutions and situations in a comprehensive document regulating the

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<sup>91</sup> G. Butler, ‘Pre-Ratification Judicial Review of International Agreements to Be Concluded by the European Union’, *op.cit.*

<sup>92</sup> Cf. the case *France v Commission*, C-327/91, EU:C:1994:305, para.15, discussed above.

<sup>93</sup> See on this argument Verellen, *op.cit.*

<sup>94</sup> Cf. J. P. Cassarino, ‘Informalizing EU Readmission Policy’, in A. Ripoll Servent and F. Trauner and (Eds.), *Routledge Handbook of Justice and Home Affairs Research*, Routledge, 2018, at 90: “whether these arrangements take the form of a ‘joint declaration’, ‘statement’, ‘common agenda’ or ‘joint forward’, they are no less EU-wide deals based on reciprocal commitments between the EU and its members states on the one hand, and a third country on the other”.

<sup>95</sup> Cf. also García Andrada (2018), at 121, who argues that this not only holds for the Commission and the Council, but also for the European Parliament; despite the absence of express case law on this point: “A systematic reading of EU primary law may lead to an argument that the democratic principle of Article 10(3) TEU, as well as the rule of law, constitute the corollary of the need of EP’s involvement in international soft law instruments in which the EU participates.”

conclusion and the effects of soft law instruments in line with Article 218 TFEU. This will ensure the application of EU rules and principles for all Union external actions, and enhance the overall internal and external consistency in that area (which is a clear requirement laid down in the Treaties<sup>96</sup>). However, this will most probably be unacceptable to the institutional actors, as the current regime provides them with a large extent of flexibility. In many cases, soft law international instruments are used by the EU (and its partners) to avoid being bound by enforceable acts. Regulating this area might limit the EU's possibilities to act externally. It may also clarify to what extent the actors indeed have a choice and in which situations 'informalisation' would lead to violations of treaty provisions. It remains peculiar that an extensive area of EU external action has not at all been regulated, thus allowing for the emergence of a parallel reality which favours pragmatism over some of the basic structural principles the same institutional actors cannot refrain from invoking in other situations.

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<sup>96</sup> See Art. 13(1) TEU, as well as other provisions, including Art. 21(3) TEU.