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Normative transformations in EU external relations: the phenomenon of 'soft' international agreements

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ABSTRACT

The European Union increasingly uses 'soft' international arrangements rather than formal international agreements in establishing relations with non-EU states. This contribution aims to raise the question of 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 take shape. Possible consequences include the risk that these instruments are not subject to appropriate safeguards, that parliamentary influence (by the European Parliament as well as by national parliaments) is by-passed and that transparency is affected. There are various reasons for the EU not to use formal procedures, but a turn to informality does come at a price.

KEYWORDS EU international agreements; soft law; normative change; informality; EU external relations; legitimacy

Within the context of this special issue, the present contribution aims to zoom in on one particular dimension of 'normative change' (Saurugger and Terpan 2020): the use of 'softer' forms of international arrangements between the European Union and non-EU states ('third states'). This development is believed to be part of the process whereby European states not only vary the ways in which they cooperate with each other, but also where the European Union as such engages with third states in different ways (Dyson and Sepos 2010, 4). At the same time, this development forms part of a global trend in which formal treaties make way for 'informal law'

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(Pauwelyn *et al.* 2014). So far, debates on soft law mainly related to the internal functioning of the EU (Senden 2004); the main contribution of the present paper is its focus on EU external relations. Given the background of the author, this contribution approaches the phenomenon of 'soft' international arrangements primarily from a legal perspective, although it is clear that the reasons for this transformation are often largely political.

Apart from addressing the reasons for normative transformations in EU external relations, this contribution also aims to raise the more normative question of 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 concept of 'legalisation' has been addressed in political science literature in particular (Abbott *et al.* 2001) and the choice for 'softer' arrangements rather than international agreements at first sight seems to form an example of what can perhaps be termed 'de-legalisation'. Yet, as this paper will attempt to underline, 'side-stepping' EU decision making, rule making or binding obligations does not really 'de-legalise' the norms as it is difficult, if not impossible, to ignore the existing legal context.

Possible consequences of a shift from hard to soft law have been described and include the risk that these instruments are not subject to appropriate safeguards, that parliamentary influence (by the European Parliament as well as by national parliaments) is by-passed and that transparency is affected. In that context, it has been argued that 'safeguards should be specifically designed to protect the rights of the individual. Soft law instruments should be sufficiently precise, to allow for judicial control on the use of these instruments' (Meijers Committee 2018). Indeed, it is the evasion of basic 'rule of law' principles that seems to lie behind many of the debates surrounding the transformation from hard to soft arrangements.

Soft law has traditionally been perceived to characterise the specific area of foreign and security policy as it was often seen as falling outside the scope of law (Wessel 1999; Cardwell 2016). Despite the fact that this statement has never been convincing (Wessel 2015), the use of soft law in the wider context of the EU's external relations has indeed always been part of the EU's toolbox (Ott 2018) and gained momentum in the various arrangements the European Union established with the countries in its European Neighbourhood Policy (Van Vooren 2009, 2012). Overall, soft law 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 (Chalmers et al. 2010, 101; Wessel and Larik 2020, 103). 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' (García Andrade 2016, 2018) and 'Compared to binding international agreements, at least two times more bilateral soft law tools are agreed between EU actors and international organisations or third countries' (Ott 2018). The latter author even hinted at a clear transformation: 'Soft law instruments replace binding bilateral or multilateral agreements, and, in general, supplement, interpret and prepare existing or future multi- or bilateral international treaties' (Ott 2018). At the same time, precise figures about the increase in the number of soft international arrangements are difficult to find as – in contrast to formal legal documents – informal arrangements are not published in any systematic manner.

While the literature thus points to a certain trend, it is important to underline that formal international agreements still form the (solid) basis for EU external relations. These agreements are concluded on the basis of the procedural requirements in the EU Treaties (Article 216 and 218 TFEU) and continue to be the main instruments to establish relations with non-EU states. The EU Treaty database currently lists well over 1200 international agreements between the EU and almost all states in the world (EEAS 2019). As we will see, the point is, that not using these instruments raises questions about the checks and balances that were deliberately included in the procedures.

A legal perspective on 'soft' international arrangements is helpful in this context as soft law is sometimes seen as encompassing 'norms in the twilight between law and politics' (Thürer 2009). It has abundantly been researched and famously described along the following lines: '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' (Senden 2004, 112). The absence of 'legally binding force' is indeed a common way of distinguishing soft law from hard law. As has been argued elsewhere, however, this characteristic is confusing and does not do justice to the fact that these norms (as *law*) form part of the legal order and that they commit the actors involved (Wessel 2015). The following description by Saurugger and Terpan (2015, 5) 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.

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 (Abbott and Snidal 2001; Wessel and Kica 2016). 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 Court of Justice of the European Union (CJEU) is of the opinion that the intention of the parties 'must in principle be the decisive criterion' to decide on the nature of the instrument (CJEU 2004).

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 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' (García Andrade 2016, 116). Overall, the need for flexibility, the unwillingness of actors to run the risk of ending up in law suits, or simply the impossibility to agree on a more formal arrangement can be seen as key reasons to opt for informality.

Soft law instruments in EU external relations may bear various labels, including Joint Communications, Joint Letters, Strategies, Arrangements, Progress Reports, 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. 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 transformation 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)?

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 the Union's treaty-making competence in Article 216 TEU or on another legal basis in the Treaties, or where (informal) internal decisions are used to clarify or modify formal 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 and the rights of those affected by the agreement. In fact, as one observer notes: 'Article 218 TFEU contains the most complete procedural code governing the negotiation and conclusion of international agreements on behalf of the EU, as well as certain related matters, that have existed to date' (Dashwood 2018, 190). *Informal* arrangements, on the other hand, are less strictly regulated and – as we will see – may thus run the risk of circumventing rights of certain actors. The present paper first of all investigates the way EU law deals with 'soft' arrangements between the EU and third states (the term 'agreement' is deliberately omitted). This will be followed by an assessment of the consequences of using 'soft' (or informal) rather than 'hard' (formal) instruments in EU external relations (see on the terminology Pauwelyn *et al.* 2014).

'Soft' international arrangements in EU external action

Soft law instruments

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'. In legal reality, the distinction is less clear as the different instruments used to regulate a certain policy field are often connected. And, beyond the two 'non-binding' instruments mentioned in the Treaties, there are many other measures which are generically referred to as 'soft law'. As will be revealed further below, 'non-binding' does not *per sé* imply 'non-justiciable'.

The present paper largely leaves the internal instruments (such as 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) aside and focuses on the arrangements with third states. The European Commission in particular has been quite active in this area (Ott 2018), even if we exclude the administrative agreements that may be concluded by the Commission to bind itself and not the Union (Hofmann *et al.* 2011).

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 soft arrangements with third countries. Soft arrangements seem to escape the procedural rules and effects of Article 218 as they are believed not to be covered by the general definition of international agreements provided by the Court: 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation' (CJEU 1975; Dashwood, 2018). This is inherently problematic in view of the transformation to informality that is addressed by this paper. The procedural rules in the treaties were made for formal agreements while large parts of the EU's external relations are shaped on the basis of informal law. This is not to say that concluding soft international arrangements is by definition ruled out by the treaties. 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) (Verellen 2016).

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. While they are usually described as 'political commitments' rather than legal commitments, this may be confusing: as we will see, soft and hard law instruments can be both politically and legally important. Nevertheless, in international relations, the EU often underlines their non-legally binding nature by stating that they are of 'political nature only'.

Memoranda of understanding

A key example of such a 'political' commitment is a Memorandum of Understanding (MoU). MoU's reflect a political agreement between the

Union 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 treaty basis is not necessary to establish a competence for the institutions to enact political commitments, the Treaties are phrased in ways as to leave room for the Union to be active in this area. Notably, Article 17(1) TEU 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. It is also interesting to note that, 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 document, where the actual conclusion in the hands of the Council. Thus, the transformation may affect the norm, but not always the procedure.

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' (EU OJ L 27, 30.1.2014). Indeed, a clear trade-related issue, with very concrete agreements on percentages and quota. In this case, it is interesting to note that 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) (Council 2014). And, indeed, the MoU was published in the L (legislation) series of the Official Journal as opposed to the C series, in which it would have been published if it were a (mere) policy document. 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 (European Commission 2005). 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'. Here we see a clear political reason to move from hard to soft law. Internally, however, the Union followed the procedure for the conclusion of (hard) international agreements.

This is not the case with all MoUs. After all, the idea of transformation in this context typically is not only to *avoid* concluding a binding international agreement, but also to move away from the strict rules in

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 (Council 2007), 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 (EEAS 2015), or the MoU on a strategic partnership on energy between the European Union and Egypt (European Commission 2018). In these cases, formal legal procedures were not followed, despite the fact that the EU or its institutions were a party to the arrangement.

Other types of soft arrangements

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 (European Council 2016). 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 official procedures of Article 218 TFEU. Many have criticised the way the Union by-passed regular procedures ('an abusive use of soft law' (García Andrade 2018, 121), 'a treaty that violates democracy' (Gatti 2016)) by concluding an informal 'Deal' which clearly used committing language: e.g. 'Turkey and the European Union reconfirmed their commitment', 'Turkey and the EU also agreed', etc. (Spijkerboer 2016; Fernández Arribas 2016; Poon 2016; Cannizzaro 2017, 2018; Peers 2016). The General Court of the EU held that it had no jurisdiction as, in its view, the 'deal' was concluded by the EU Member States and not by the EU; and the CJEU dismissed the appeal as 'manifestly inadmissible' (CJEU 2017). This is unfortunate, as it leaves a number of questions unanswered, for instance whether the European Council (or the Members 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 (Idriz 2017; Hailbronner 2016). Indeed, it has been held that in this situation '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 […]' (Butler 2018, 73; Spijkerboer 2016). 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.

Apart from the 'Turkey Deal', EU immigration policy proves to be an area in which soft international arrangements have become particularly popular (Slominski and Trauner 2020; Terpan and Saurugger, 2020; Fahey 2018). A recent example is formed by the 'Joint Way Forward on migration issues between Afghanistan and the EU' of 2016 (EEAS 2016). 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 form additional examples of informalisation in the area of migration (Council 2016), and again particularly reveal the impact on individuals. Mobility partnerships are adopted to implement the so-called Global Approach to Migration and Mobility (GAMM) (Cassarino 2018). Mobility partnerships have been concluded with Moldova, Cape Verde (2008), Georgia (2009), Armenia (2011), Morocco, Azerbaijan, Tunisia (2013), Jordan (2014) and Belarus (2016) (García Andrade 2018). 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 (European Commission 2017; Council 2007). 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) 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 (European Commission 2016). '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' (European Commission 2016b). 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 agreements' (European Commission 2017).

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 (see for examples García Andrade 2016, 2018).

The political reasons for expediency and pragmatism are understandable, but as will be analysed below, they do come at a price.

Consequences of a transformation from hard to soft instruments

Procedural checks and balances

In international law, the potential problems caused by a move from hard to soft law have been highlighted (Peters 2011), 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) (Pauwelyn *et al.* 2014).

The question is to what extent the guarantees that apply to hard law instruments are to be applied in the case of soft law instruments. Perhaps one of the main advantages of hard 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]' (CJEU 2008). 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, and 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 some instruments are accessible in the Commission register upon request (Ott 2018). 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') (Ott 2018).

As to the application of the EU's 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) (CJEU 2004), and simply arguing that an act has no legally binding force does not allow for EU bodies to completely side-line EU principles. In other words: *any transformation from hard to soft international arrangements cannot lead to a complete disregard of the fundamental principles that underlie the relationship between the EU and its members and between the EU institutions*. Case law on soft arrangements is rare (García Andrade 2016), but in *France v Commission*, that Member State sought annulment of the decision by which the Commission adopted non-legally binding 'Guidelines on Regulatory Cooperation and Transparency' between the Commission and the US Trade Representative (USTR) (CJEU 2004). The Court ruled that *even if a given instrument is non-binding, this does not automatically give an institution the power to adopt it*. The principles of conferral and institutional balance continue to apply and must be respected (CJEU 2014 and 2015a). In any case, as rightfully argued by Ott (2018), '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'. 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 (CJEU 2016b). 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 (CJEU 2016b). Given the absence of an authorisation to conclude the non-binding agreement, the Court held that 'the Commission cannot be regarded as having the right, by 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' (par 38). The Court thus underlined the importance of the principles of conferral and institutional balance even in the case of soft external arrangements. In fact – and this is essential for the point made by the present paper – *the 'soft' nature of the*

agreement does not transform it being part of the overall EU external relation regime.

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' (García Andrade 2018, 120). 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 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 from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts' (CJEU 2016c).

Side-stepping values and principles?

Despite these perhaps reassuring starting points, it is clear that there are consequences for many of the Union's values. For example, a transformation from hard to soft law makes it more difficult for the European Parliament to exercise its democratic role and may thus affect the legitimacy of the arrangement (Passos 2016). As rightfully stated by Verellen (2016): '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'. The author argues that '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'. 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' (García Andrade 2018, 121). In other words: *in the choice for hard or soft 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).

Apart from practical problems in relation to the availability of and access to information, 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 to soft arrangements, 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 (CJEU 2016a). 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. 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. In the words of García Andrade (2018, 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'.

An additional problem is that – in the case of soft arrangements – 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, this provision can simply not be used if the Union actors opt for soft agreements. As Butler (2018) 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', 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 (although the Court seemed to see more possibilities for *ex post* review; CJEU 1994).

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*. Provisions of formal international agreements can – under certain conditions – be invoked to the benefit of EU citizens and third country nationals. Any transformation towards soft arrangements deprives these individuals from exercising their rights, which makes it far more difficult to assess possible violations of fundamental rights. This is particularly worrisome in relation to the sensitive migration issues dealt with in readmission agreements. As rightfully observed by Carrera (2016): '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'.

Overall, the above analysis first of all reveals that the *presentation* of a legal act in terms of 'soft law' does not automatically deprive the Court of its powers. This is in line with the Court's approach in relation to *internal* 'soft law' instruments. Thus, in a recent case, Belgium argued that a 'Recommendation' issued by the Commission in fact constituted a 'hidden Directive' (CJEU 2015b). While the General Court held that the starting point remains the choice of the instrument, it also noted that an act entitled a 'Recommendation' which was intended to have binding legal effects would not constitute 'a genuine recommendation' and would be open to review under Article 263 and Article 267 TFEU on preliminary rulings. Secondly, the analysis reveals an underlying problem with the application of Article 13(2) TEU on the interinstitutional principle of cooperation. Indeed, the institutional balance is clearly disturbed when the European Parliament is side-lined when the Commission opts not to use the formal procedures, or if the Member States choose to use the European Council as a mere 'meeting place' rather than as an institution which actions are subject to procedural rules.

Conclusion: creating a parallel universe?

A transformation from hard to soft international arrangements runs the risk that key EU principles and constitutional guarantees are by-passed. As held by Butler (2018, 72), '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'. Indeed, we may be witnessing 'disintegration through law' (Cannizzaro, 2018), or perhaps disintegration by evading existing law. Moreover, in bypassing legal formalities, the EU may violate its own key values, which underline the importance of the rule of law (Article 2 TEU), 'the strict observance and the development of international law' (Article 3(5) TEU) and a judicial system to guarantee legal protection (Article 19 TEU). These values are to be upheld and promoted also in dealings between the EU and other states (Articles 3(5) and 21 TEU).

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 (Verellen 2016). 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 legal order and a well-balanced role of the institutions, arrangements not following the procedural rules of 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' Court proceedings (Butler 2018), which is not uncommon in international law (Guzman 2005). 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 concluded by the EU, 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. Thirdly, in some cases procedural elements of Article 218 TFEU were applied even for the conclusion of MoUs. 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 (Verellen 2016). 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 transforming hard to soft law and using different labels (Cassarino 2018, 90). The institutional balance (which is at the basis of Article 218 TFEU) is to be respected irrespective of the nature of the international arrangement. The fact that the Court is not always sensitive to arguments that certain arrangements are 'non-binding' is to be applauded. Allowing Member States to use EU institutions and treaty terminology while by-passing procedures – as we have seen in the case of the 'Turkey Statement' – is something that is less helpful from a legal perspective. At the same time, we may perhaps view this as being part of a development in which the Court aims to find a balance between upholding EU rules and principles and being accused of judicial activism.

Despite all this, it would be good to consolidate the various rules for the various institutions and situations in a comprehensive document regulating the conclusion and the effects of soft law instruments in line with Article 218 TFEU and clarifying the possible role of the Court (AG Bobek in CJEU 2015b). 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). 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. 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. Yet, 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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References

Abbott, K. W., and D. Snidal (2001). 'Hard and Soft Law in International Governance', in Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds.), *Legalization and World Politics*. Cambridge, Massachusetts: MIT Press, 37–72.

Abbott, K. W., Keohane, R. O. A. Moravscik, A.-M. Slaughter, D. Snidal (2001). 'The Concept of Legalization', in Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds.), *Legalization and World Politics*. Cambridge, Massachusetts: MIT Press, 17–35 at 17.

Butler, G. (2018). 'EU Foreign Policy and Other EU External Relations in Times of Crisis: Forcing the Law to Overlap?', in Elżbieta Kużelewska, Amy Weatherburn, and Dariusz Kloza (eds.), *Irregular Migration as a Challenge for Democracy*. Cambridge: Intersentia, 51–81.

Butler, G. (2018). '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, 53–77.

Cannizzaro, E. (2017). 'Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council', *European Papers – European Forum,* Insight of 15 March 2017, 1.

Cannizzaro, E. (2018). 'Disintegration through Law?', *European Papers*, 1:3, 3.

Cardwell, P. J. (2016). 'Rethinking Law and New Governance in the European Union: The Case of Migration Management', *European Law Review*, 41:3, 362–78.

Carrera, S. (2016). *Implementation of EU Readmission Agreements: Identity, Determination, Dilemmas and the Blurring of Rights*. Berlin: Springer Open.

Cassarino, J. P. (2018). 'Informalizing EU Readmission Policy', in A. Ripoll Servent and F. Trauner (eds.), *Routledge Handbook of Justice and Home Affairs Research*. New York: Routledge.

Chalmers, D., G. Gadbiues, G. Monti (2010). *European Union Law*. Cambridge: Cambridge University Press.

CJEU (1975). Opinion 1/75, Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty, ECLI:EU:C:1975:145.
CJEU (1994). Case C-327/91, *French Republic v Commission of the European Communities*, ECLI:EU:C:1994:305.
CJEU (2004). Case C-233/02, *France v. Commission*, 23 March 2004, ECLI:EU:C:2004:173.
CJEU (2008). 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.
CJEU (2014). Case C-399/12, *Germany v Council, (OIV),* ECLI:EU:C:2014:2258.
CJEU (2015a). Case C-425/13, *Commission v Council* (*Australian Greenhouse Gas Emissions*), ECLI:EU:C:2015:483.
CJEU (2015b). Case T-721/14, *Kingdom of Belgium* v *European Commission*, 27 October 2015, ECLI:EU:T:2015:829; See for the Appeal: Case C-16/16 P, *Kingdom of Belgium* v *European Commission*, 20 February 2018, ECLI:EU:C:2018:79,
CJEU (2016a). Case C-263/14, *Parliament v Council*, 14 June 2016, ECLI:EU:C:2016:435.
CJEU (2016b). Case C-660/13, *Council v. Commission*, para. 35; ECLI:EU:C:2016:616.
CJEU (2016c). 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.
CJEU (2017). Opinion of AG Bobek in Case C-16/16 P, 12 December 2017, ECLI:EU:C:2017:959.
CJEU (2017). Order of the General Court of 28 February 2017, Case T-192/16, *NF v. European Council*, ECLI:EU:T:2017:128.
Council (2007a). JHA Council Conclusions of 12-13 June 2007 and 6-7 December 2007.
Council (2007b). Memorandum of Understanding between the President of the Council of the European Union, and The Swiss Federal Council; https://www.eda.admin.ch/dam/dea/en/documents/abkommen/MoU-erweiterungsbeitrag-2007_en.pdf
Council (2014). Council Decision of 28 January 2014 (2014/44/EU), OJ L 27, 30.1.2014, p. 1.
Council (2016). '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).
Dashwood, A. (2018). 'EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements' in M. Cremona and C. Kilpatrick (eds.), *EU Legal Acts: Challenges and Transformations*. Oxford: Oxford University Press, 189, at 210.
Dyson, K., and A. Sepos (2010). 'Differentiation as Design Principle and as Tool in the Political Management of European Integration', in K. Dyson and A. Sepos (eds.), *Which Europe? The Politics of Differentiated Integration*. Basingstoke: Palgrave Macmillan, 3–23.
EEAS (2015). Memorandum of Understanding furthering cooperation between the EEAS and the League of Arab States, (20 January 2015). https://eeas.europa.eu/headquarters/headquarters-Homepage/1662/node/1662_sl
EEAS (2016). Joint Way Forward on migration issues between Afghanistan and the EU.

EEAS (2019). Treaties Office Database, http://ec.europa.eu/world/agreements/default.home.do.

European Commission (2005). 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).

European Commission (2007). Communication on 'Circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248, 16.5.2007

European Commission (2016a). First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration COM(2016). 700 final, 18.10.2016.

European Commission (2016b). Migration Partnership Framework; https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf

European Commission (2017). '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.

European Commission (2018). MoU on a strategic partnership on energy between the European Union and Egypt; https://ec.europa.eu/energy/sites/ener/files/documents/eu-egypt_mou.pdf

European Council (2016). 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.

Fahey, E. (2018). 'Hyper-Legalisation and Delegalisation in the AFSJ: On Contradictions in the External Management of EU Migration', in S. Carrera, J. Santos Vara and T. Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*. Cheltenham, Northampton: Edward Elgar.

Fernández Arribas, G. (2016). 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem', *European Papers*, 1:3, 1097.

García Andrade, P. (2016). 'The Distribution of Powers between EU Institutions for Conducting External Affairs through Non-Binding Instruments', European Papers, 1:1, *European Forum*, Insight of 16 April 2016, 115-125.

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

García Andrade, P. (2018). '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*. New York: Routledge.

Gatti, M. (2016). 'The EU-Turkey Statement: A Treaty That Violates Democracy', *EJIL Talk* https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/.

Guzman, A. T. (2005). 'The Design of International Agreements', *European Journal of International Law*, 16:4, 579–612.

Hailbronner, K. (2016). 'Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway', *Verfassungsblog*, 11 March 2016.
Hofmann, H. C. H., G. C. Rowe, and A. H. Türk (2011). *Administrative Law and Policy of the European Union*. Oxford: Oxford University Press, Chapter 19 (Administrative Agreements).
Idriz, N. (2017). 'Taking the EU-Turkey Deal to Court?', *Verfassungsblog*, 20 December 2017.
Meijers Committee (2018). Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law, Meijers Committee – standing committee of experts on international immigration, refugee and criminal law, 9 April 2018. https://www.commissie-meijers.nl/nl/comments/523.
Ott, A. (2018). 'Soft Law in EU External Relations: Evading International Treaty Law and Undermining EU Constitutional Principles?' Unpublished Paper on File With the Author.
Passos, R. (2016). '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*. Oxford: Hart Publishing, 85–128.
Pauwelyn, J., R. A. Wessel, and J. Wouters (2014). 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', *European Journal of International Law*, 25:3, 733–63.
Peers, S. (2016). 'The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?', in EU Law Analysis, 16 March 2016.
Peters, A. (2011). 'Soft Law as a New Mode of Governance', in U. Diedrichs, W. Reiners and W. Wessels (eds.), *The Dynamics of Change in EU Governance*. Cheltenham: Edgar Elgar.
Poon, J. (2016). 'EU-Turkey Deal: Violation of, or Consistency with, International Law?', *European Papers*, 1, 31195.
Saurugger, S., and F. Terpan (2015). 'Studying Resistance to EU Norms in Foreign and Security Policy', *EFA Review, Special Issue*, 20:2/1, 1–20.
Saurugger, S., and F. Terpan (2020). 'Normative Transformations in the European Union: On Hardening and Softening Law', *West European Politics*.
Senden, L. (2004). *Soft Law in European Community Law*. Portland, Oregon: Hart Publishing.
Slominski, P., and F. Trauner (2020). 'Reforming me softly – How Soft Law has Changed EU Return Policy since the Migration Crisis', *West European Politics*. doi:10.1080/01402382.2020.1745500
Spijkerboer, T. (2016). 'Minimalist Reflections on Europe, Refugees and Law', *European Papers*, 1:2, 533.
Terpan, F. (2015). 'Soft Law in the European Union – The Changing Nature of EU Law', *European Law Journal*, 21:1, 68–96.
Terpan, F., and S. Saurugger (2020). 'Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity, *West European Politics*.
Thürer, D. (2009). '*Soft Law*'. Max Planck Encyclopedia of Public International Law [MPEPIL]. Oxford: Oxford University Press.
Van Vooren, B. (2009). 'A Case Study of "Soft Law" in EU External Relations: The European Neighbourhood Policy', *European Law Review*, 34:5, 696–719.
Van Vooren, B. (2012). *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*. New York: Routledge.

Wessel, R. A., and J. Larik (2020). *EU External Relations Law: Text, Cases and Materials*. Oxford: Hart Publishing.
Verellen, T. (2016). 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case', *European Papers*, 1:3, European Forum, Insight of 10 October, 1225–33.
Wessel, R. A. (1999). *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*. The Hague: Kluwer Law International.
Wessel, R. A. (2015). 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?', *European Foreign Affairs Review, Special Issue*, 20:2/1, 123–46.
Wessel, R. A., and E. Kica (2016). 'Political Economy and the Decisions of International Organizations: Choosing Governance Arrangements through Informality', in A. Fabbricotti (ed.), *The Political Economy of International Law: A European Perspective*. Cheltenham: Edward Elgar Publishing, 127–158.