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EU return policy

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EU institutions in denial: non-agreements, non-signatories, and (non-)effective judicial protection in the EU return policy

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Abstract: Acts of the European Union's institutions and agencies can only be declared invalid by the Court of Justice of the European Union ('Court'), who is also in charge of ensuring the uniform interpretation of EU law. For this reason, effective judicial protection against Union's acts depends largely on the scope of the Court's jurisdiction. The Court can only interpret acts attributable to the Union and it can only declare invalid those Union's acts that produce legal effects vis-à-vis third parties. How should these requirements be interpreted in light of the fundamental right to effective judicial protection? First, the paper answers this question based on the Court's case law. Then, it relates that answer to the most recent developments of the EU return policy. This policy field has seen a proliferation of purportedly non-binding arrangements with third countries, sometimes difficult to attribute to the Union – as opposed to its Member States – due to the *sui generis* and opaque nature of their negotiating process. The paper verifies whether the right to effective judicial protection requires that all or some of these arrangements be subject to judicial scrutiny as acts ultimately attributable to the Union and capable of producing legal effects.

Key Words: EU Return Policy – Soft law – Informalisation - Judicial Review of the European Union's external action - Effective Judicial Protection.

I Introduction

The possibility to contest the validity of acts of the institutions, bodies, and agencies of the European Union ('EU' or 'Union') before independent courts is one of the essential traits of the constitutional order of an EU that considers the rule of law as one of its fundamental values.¹ The role of judicial remedies in ensuring respect for the rule of law in the EU legal order has been explicitly recognised by the Court of Justice ('CJEU' or 'Court') since its landmark ruling in *Les Verts*, according to which the Treaties 'established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.²

Notwithstanding the strong stance taken by the Court in *Les Verts*, the completeness of the system of judicial remedies in the EU has been subject to criticism concerning two fundamental

¹ Theodore Konstantinides, *The Rule of Law in the European Union : The Internal Dimension* (Hart Publishing 2017) 105.

² Judgment of 23 April 1986, *Parti écologiste 'Les Vert' v European Parliament*, Case 294/83, EU:C:1985:483, para. 23.

and complementary aspects: the reviewable acts, as identified in the EU Treaties,³ and the standing requirements for individual applicants in direct actions.⁴ The first criticism was particularly vibrant in the early decades of the EU constitutional system, when the Treaties did not mention the European Parliament amongst the institutions whose acts could be subject to judicial review⁵ and when the European Council was not yet considered an EU institution.⁶ Already in the late 80s, the Court recognised that excluding the European Parliament's acts from judicial review *tout court* would create a gap in the EU system of legal remedies that would be incompatible with the rule of law.⁷

However, observers had to wait until the Lisbon reform of the EU Treaties to see the acts of the European Council also subject to the Court's scrutiny. By virtue of this development, the criticism concerning the limited nature of the list of reviewable acts adopted at the EU level somewhat faded.

The Court's strict stance on standing of individuals in direct actions, although subject to severe criticism,⁸ remained unchanged,⁹ and was only partially mitigated by the new provision granting standing to individual applicants against regulatory acts of direct concern to them that do not entail implementing measures.¹⁰ With the entry into force of the EU Charter of Fundamental Rights (the 'Charter'), the debate on the limited standing of individuals in direct actions broadened, to encompass the implications of the right to effective judicial protection as enshrined in its art. 47.

The right to effective judicial protection had already been identified as a general principle of Union law well before 2009.¹¹ Nonetheless, the newly binding nature of art. 47 of the Charter

³ Current Art. 263(1) TFEU.

⁴ Current Art. 263(4) TFEU.

⁵ Art. 173(1) of the 1957 Treaty establishing the European Economic Community read 'The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission.'

⁶ Judgment of 14 July 1994, *Roujansky v Council*, T-584/93, EU:T:1994:87, paras 12-16; and judgment of 14 July 1994, *Bonnamy v Council*, T-179/94, not reported.

⁷ Judgment of 23 April 1986, *Parti écologiste 'Les Vert' v European Parliament*, Case 294/83, EU:C:1985:483, para. 25.

⁸ Katharina Pabel, 'The Right to an Effective Remedy Pursuant to Article II - 107 Paragraph 1 of the Constitutional Treaty Special Issue - Unity of the European Constitution: Part II: Institutional Aspects of Constitution - Towards a New International Balance' (2005) 6 *German Law Journal* 1601, 1609; Mariolina Eliantonio and Betul Kas, 'Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?' (2010) 3 *Journal of Politics and Law* 121, 122-125.

⁹ Brian Libgober, 'Can the EU Be a Constitutional System Without Universal Access to Judicial Review?' (2015) 36 *Michigan Journal of International Law*; Ann Arbor 353, 359-367; Alexander Kornezov, 'Locus Standi of Private Parties in Actions for Annulment: Has the Gap Been Closed?' (2014) 73 *The Cambridge Law Journal*; Cambridge 25, 26; Eliantonio and Kas (n 8).

¹⁰ Christoph Werkmeister, Stephan Potters and Johannes Traut, 'Regulatory Acts within Article 263(4) TFEU - A Dissonant Extension of Locus Standi for Private Applicants' (2010) 13 *Cambridge Yearbook of European Legal Studies* 311; Kornezov (n 9).

¹¹ Judgment of 15 May 1986, Case 222/84, *Johnston*, EU:C:1986:206, paras 18-19.

brought that right under the spotlight, giving birth to a series of cases referring to the provision,¹² as well as to an abundant literature on its implications.¹³ In the current EU constitutional architecture, the right to effective judicial protection reflects, from an individual perspective, the need for a complete system of legal remedies, identified early on by the Court as a treaty imperative.¹⁴ Both case law and doctrine clearly indicate that the right to effective judicial protection encompasses a right of access to court, as well as due process guarantees that have access to court as their precondition.¹⁵

In light of recent developments of the state of play in key areas of EU law and policy, two critical issues concerning access to justice still need to be clarified by the Court. Those are (i) the meaning of the expression ‘acts intended to have legal effects’, upon which depends the availability of several remedies granted by EU law; and (ii) the threshold for the attributability of acts to Union’s institutions, bodies or agencies. In fact, EU institutions have increasingly had recourse to soft law instruments in sensitive political areas, conducting the bulk of entire policies - with substantial fundamental rights implications - through informal statements and arrangements. This phenomenon has become particularly evident in the context of the migration crisis¹⁶ and of the financial crisis,¹⁷ but the expansion of the use of soft law concerns other policy areas as well.¹⁸

In the policy areas characterised by extensive informalisation, effective judicial protection of one’s rights and freedoms increasingly depends on the room that the allegedly complete system

¹² Sacha Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in Christophe Paulussen and others (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press 2016). For a complete list of the cases expressly referring to Art. 47 Charter see <http://fra.europa.eu/en/charterpedia/article/47-right-effective-remedy-and-fair-trial>.

¹³ Sacha Prechal and Rob Widdershoven, ‘Redefining the Relationship between “Rewe-Effectiveness” and Effective Judicial Protection’ (2011) 4 *Review of European Administrative Law* 31; Marek Safjan and Dominik Dürsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-Level Challenge through the Lens of Article 47 CFREU’ (2014) 33 *Yearbook of European Law* 3; Anthony Arnall, ‘The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?’ (2011) 36 *European Law Review* 51.

¹⁴ See Pabel (n 8) 1508; Koen Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *Common Market Law Review* 1625, 1626; Safjan and Dürsterhaus (n 13).

¹⁵ Prechal (n 12) 140; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP Oxford 2014) 111–113. See also judgment of 17 April 2018, C-414/16, *Egenberger*, EU:C:2018:257, para. 49.

¹⁶ See Jacopo Alberti, ‘Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts’ (2018) 37 *Yearbook of European Law* 626; Menelaos Markakis and Paul Dermine, ‘Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: *Florescu*’ (2018) 55 *Common Market Law Review* 643.

¹⁷ See Marion Panizzon, ‘The Global Migration Compact and the Limits of “Package Deals” for Migration Law and Policy’, *What is a Compact? Migrants’ Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration* (RWI Working Paper 2017/1) 21; Caterina Molinari, ‘The EU and Its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns’ [Forthcoming] *European Law Review*.

¹⁸ See Mariolina Eliantonio and Oana Stefan, ‘Soft Law Before the European Courts: Discovering a “Common Pattern”?’ (2018) 37 *Yearbook of European Law*, 457.

of legal remedies of the EU leaves for judicial scrutiny of these informal instruments.¹⁹ Looking more narrowly at the EU return policy, which constitutes the focus of this paper, we can see that access to justice in this field rests more and more on the reviewability of soft law instruments by national or EU courts. EU institutions have been conducting the EU return policy not only through formal international agreements, but also through administrative arrangements, statements, and purportedly non-binding deals, blurring the lines between the EU's and Member State's action by remaining vague on the paternity of those soft law tools. The direct review of acts by EU institutions hinges on the production of legal effects, and the review of such acts at EU level more generally depends on the adjudicator's take on their attributability to the Union. Thus, the development of a more informal EU return policy raises concerns with respect to access to justice as a fundamental component of the individual right of an effective remedy. These concerns are particularly relevant if we consider that the return and readmission policy of the Union has the potential of affecting a broad range of fundamental rights, including the right to asylum, the principle of non-refoulement, and the right to family life of returnees.

In light of the above, it becomes necessary to identify how an act attributable to the EU and intended to have legal effects should be defined, in the current stage of the EU return policy, for the right to effective judicial protection to be respected. To answer the research question, we will first define the principle of effective judicial protection, focusing on one of its components, namely the right to an effective remedy. Secondly, we will identify a definition of acts having legal effects and a threshold of attributability of acts to EU institutions in light of the principle of effective judicial protection. Thirdly, we will map out the soft law instruments that have become so prominent in the field of the EU return policy. Finally we will reach a conclusion on the judicial reviewability of the categorised instruments.

II The right to effective judicial protection

The right to effective judicial protection within the Union's legal order has been first uncovered by the Court in the form of a general principle of EU law, necessary in a Union founded upon the rule of law. The first landmark judgment making explicit reference to such a general principle immediately established a connection between the right of effective judicial protection in the Union, on the one hand, and arts 6 and 13 of the European Convention on Human Rights ('ECHR') (providing for the right to a fair trial and to an effective remedy,

¹⁹ On this, see Opinion of AG Bobek of 12 December 2017 in *Belgium v Commission*, C-16/16 P, EU:C:2017:959, paras 4, and 81-86, essentially inviting the Court to adopt a broad reading of its jurisdiction in the context of direct action in order to be able to review soft law, the proliferation of which would otherwise raise issues of circumvention of judicial scrutiny.

respectively), on the other.²⁰ Already in the pre-Lisbon case-law, the right to effective judicial protection was used as a tool to broaden access to justice and expand procedural guarantees, especially at Member States level.²¹

Although the litigation before the CJEU has mostly addressed alleged violations of the principle at the national level, it has always been clear that the right to effective judicial protection is a common feature of both the national and the EU level of adjudication, binding upon the EU as well as upon Member States.²² The latter have been more frequently called into question than the former simply because they bear the primary responsibility for ensuring the availability of judicial remedies in the multilevel legal order of the Union.

With the entry into force of the Lisbon Treaty, the Charter has become legally binding. Its art. 47 has codified at the level of primary EU law the fundamental right to effective judicial protection. The Charter did not sever the link, identified in *Johnston*, between the fundamental right to effective judicial protection under EU law and its ECHR's counterparts, as clarified by the Explanations on art. 47 of the Charter.²³

In accordance with the requirement imposed by its art. 52(3),²⁴ the Charter encompasses all of the guarantees enshrined in arts 6 and 13, as interpreted by the European Court of Human Rights ('ECtHR'), and goes further in several respects.²⁵

On the one hand, in line with art. 13 ECHR, art. 47 protects the right to an effective judicial remedy, namely the right of access to a court empowered to take the measures necessary to redress violations of Union law or even prevent them. On the other hand, going beyond art. 6 ECHR, it imposes due process guarantees, not only in the spheres of civil and criminal law, but also in that of administrative law. Between the two main components of the right to effective judicial protection, access to a court empowered to examine 'all the questions of fact and law that are relevant to the case before it'²⁶ and to effectively redress or prevent breaches of one's right is arguably the most fundamental. In its absence, the due process requirements become immaterial: if individuals cannot challenge acts affecting their situation before a judge competent to provide relief, questions concerning the availability of legal aid and legal counselling or the impartiality of an eventual judge do not even arise. The foundational nature

²⁰ Judgment of 15 May 1986, Case 222/84, *Johnston*, EU:C:1986:206, para.18.

²¹ Arnull (n 13).

²² Safjan and Düsterhaus (n 13).

²³ Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35, 29-30.

²⁴ Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35, 29-30.

²⁵ Prechal and Widdershoven (n 13).

²⁶ Judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, para. 49.

of the right to an effective remedy for the whole building of the right to effective judicial protection warrants a further reflection on its meaning, as identified by the case-law of the CJEU.

The right to an effective remedy requires, first and foremost, access to a court with jurisdiction to decide on the alleged violation of the applicant's rights. The competent court must not only have jurisdiction to hear a case of alleged rights violations, but also be entitled to effectively address such violations, by guaranteeing interim relief²⁷ or granting sufficient compensation, depending on the case. For asylum seekers fearing torture or inhuman and degrading treatment upon deportation, for example, an effective remedy must encompass the power of the competent court to suspend deportation pending a final decision on the application.²⁸

The right to effective judicial protection is not an absolute right, and it can be made subject to limitations, provided that its essence is not infringed upon and that the limitations comply with the principle of proportionality.²⁹ The Court has already held that the inexistence of a court with relevant jurisdiction on fundamental rights violations would infringe upon the very essence of the right to access justice.³⁰

III The concept of reviewable acts of EU institutions, bodies or agencies

The EU's system of judicial remedies, as envisaged by art. 19 of the Treaty on the European Union ('TEU'), includes remedies available before national courts as well as before the CJEU. In fact, national courts are the primary judges of EU law, leaving to the CJEU only some essential tasks, namely ensuring that EU law be uniformly interpreted and correctly applied throughout the Union and scrutinising the validity of Union's action. The latter function is performed, first and foremost, in the context of direct actions, governed by art. 263 of the Treaty on the Functioning of the European Union ('TFEU'). Those actions are available against acts attributable to EU institutions, bodies or agencies 'intended to produce legal effects vis-à-vis third parties'. When the validity of a Union's act is doubtful, according to a national court confronted with a dispute for which the act would be relevant, the national judge must refer a

²⁷ Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163.

²⁸ Judgment of 17 December 2015, *Tall*, C-239/14, EU:C:2015:824, 51-60; ECtHR, *Gebremedhin v. France*, no. 25389/05, para. 67; judgment of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paras 45-53; judgment in App. No. 27765/09 - *Hirsi Jamaa and Others v Italy*, European Court of Human Rights, February 2012, para. 200. The right to an effective remedy, however, does not imply an obligation to grant automatic suspensory effect to further appeals, following a first instance judicial decision, even when a risk of non-refoulement is argued (see judgment of 26 September 2018, *X and Y v Staatssecretaris van Veiligheid en Justitie*, C-180/17, EU:C:2018:775, para 32, citing judgment in App. No. 29094/09 - *A.M. v the Netherlands*, European Court of Human Rights, July 2016, para. 70. See also judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, para. 58).

²⁹ T-19/06 *Mindo*; Judgment of 15 September 2016, *Star Storage*, Joined Cases C-439/14 and C-488/14, EU:C:2016:688, para. 49; judgment of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, para. 51.

³⁰ Judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, para. 95.

question for preliminary ruling on validity before the CJEU under art. 267 TFEU. In the context of preliminary ruling proceedings, the jurisdiction of the Court is not limited to acts having legal effects, but encompasses all acts attributable to the Union's institutions, bodies or agencies 'without exception'.³¹ A similar requirement of attributability – related to an unlawful conduct, rather than an act - is a precondition for the engagement of the Union's non-contractual liability under arts 268 and 340 TFEU.

This overview shows the existence of two requirements that potentially stand in the way of judicial review of Union's act: attributability to EU institutions and, for direct actions, the intention to produce legal effects vis-à-vis third parties.

We will examine the content of both, based on the Court's case law.

III.1 Acts intended to produce legal effects vis-à-vis third parties

The question whether an act has legal effects cannot be answered simply by looking at the form of the act and the procedure followed for its adoption.³² Acts produce legal effects towards individuals when they 'bring about a distinct change in their legal position'.³³ Similarly, they produce legal effects vis-à-vis other institutions or vis-à-vis Member States when they affect their legal situation. In other words, qualifying an act as non-binding, political or administrative, cannot in and of itself subtract it from judicial review. The context surrounding the adoption of an act, the powers of the institutions that have adopted it, as well as its content, are all elements to be taken into account when assessing an act's reviewability under art. 263 TFEU.³⁴ When called to establish whether a measure is intended to produce legal effects, the Court's case-law seems to have given preference to a substantive approach in most cases. In fact, whilst consistently denying the reviewability of provisional measures intended to pave the way for final decisions, the Court has nonetheless reviewed the validity of internal instructions of the Commission, when they *de facto* resulted in the self-attribution of a new power by the Commission itself.³⁵ In addition, the Court affirmed the reviewability of an act adopted by an institution not competent to sign it, regardless of its non-binding nature under international law, because of its impact on the legal situation of the competent institution and the EU institutional

³¹ Judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, para. 44, quoting judgment of 13 December 1989, *Grimaldi*, C 322/88, EU:C:1989:646, para. 8, and judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 30.

³² Judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, para 31.

³³ Judgment of 11 November 1981, *IBM v Commission*, Case 60/81, EU:C:1981:264, para. 9, and judgment of 14 February 1989, *Bossi v Commission*, Case 346/87, EU:C:1989:59, para. 23

³⁴ Judgment of 13 February 2014, *Hungary v Commission*, C 31/13 P, EU:C:2014:70, para. 55 and the case-law cited, and judgment of 25 October 2017, *Slovakia v Commission*, C 593/15 P and C 594/15 P, EU:C:2017:800, para. 47.

³⁵ Judgment of 9 October 1990, *France v Commission*, C-366/88, EU:C:1990:348, paras 23-25.

balance more generally.³⁶ On a similar vein, in the area of external relations, the Court concluded that a decision of the Council authorising the opening of negotiations with a third state ‘produces legal effects as regards relations between the European Union and its Member States and between the EU institutions’.³⁷ Moreover, according to the Court, even acts qualified as a recommendation, and thus explicitly excluded from the realm of art. 263 TFEU, are not completely immune to an assessment of their effects and can exceptionally be considered as reviewable, if the issuing institution intended to adopt binding commitments or produce clear consequences on the legal sphere of third parties.³⁸

Based on the above case law, we can conclude that an individualised analysis is always necessary in order to assess whether an informal deal on return of irregular migrants produces legal effects. Such an analysis has to be mindful of the context surrounding the adoption of the deal, as well as of the powers of its authors and their intention, as expressed by its wording and content. The simple incompetence of an institution to adopt a binding measure is not in itself sufficient to exclude that the measure be intended to produce legal effect,³⁹ not least on the institutional balance of the EU.⁴⁰

Notwithstanding the above, it has to be noticed that the criteria to determine the reviewability of so-called soft law remain often unclear.⁴¹ For example, the CJEU has not yet had the opportunity to clarify the General Court’s contradictory case law on the role of external perceptions in determining the reviewability of an act. In fact, in *Clearing Houses*, the General Court accepted the reviewability of a non-binding policy framework adopted by the European Central Bank, because regulatory authorities in EU Member States might have perceived it as binding.⁴² Conversely, in the *E-control* judgment, it affirmed the irrelevance of the perceived binding nature of an opinion, in a circumstance where the legal basis justifying its adoption specified its non-binding character.⁴³

In conclusion, the institutions’ standard claim that informal deals are not intended to produce rights and obligations cannot be taken at face value by judges, whose fundamental constitutional function is, *inter alia*, that of preventing the arbitrary use of executive and legal powers.

³⁶ Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paras 40-46. See also opinion of Advocate General Sharpston of 26 November 2015 in case *Council v Commission*, C-660/13, EU:C:2015:787.

³⁷ Judgment of 16 July 2016, *Commission v Council*, C-425/13, EU:C:2015:483, para. 28, quoting judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, para. 40.

³⁸ Judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, para. 29.

³⁹ Judgment of 25 October 2017, *Slovakia v Commission*, Joined Cases C-593/15 P and C-594/15 P, EU:C:2017:800, paras 53-54.

⁴⁰ Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paras 40-46.

⁴¹ Eliantonio and Stefan (n 18).

⁴² Judgment of 4 March 2015, *UK v ECB (Clearing Houses)*, T-496/11, EU:T:2015:133, paras 40-48.

⁴³ Judgment of 19 October 2016, *E-Control v ACER*, T-671/15, EU:T:2016:626, para. 83.

However, the weight that circumstances, such as the perceived binding nature of the measure, should bear in the assessment is unclear.

III.2 Attributability of an act to the Union

In general, the attributability of an act to the Union is rather straightforward, as acts having legal effects vis-à-vis third parties commonly bear the signature of their author(s). However, the Court has held that in certain cases the formal signatory of the act might not correspond to the institution, body or agency responsible for that act. This is the case when the formal signatory has very limited practical powers, while remaining under the control of another institution in all significant respects.⁴⁴ The Court further held that a hybrid act, providing for the conclusion and provisional application of an international agreement by the EU and adopted by both the Council and the Member States, is entirely attributable to the Council for the purpose of art. 263 TFEU. This is so even if the annulment is requested with respect to the participation of the Member States in such an act. In other words, the Council ‘participated in the decision making’ of all aspects of the acts, including the Member States decision to sign it, thus the act is reviewable as a whole.⁴⁵ In the same case, the Court also underlined that the duty of sincere cooperation between Council and Member States in the context of the conclusion of a mixed agreement cannot lead to the avoidance of the procedural rules set by Art 218 TFEU, as well as of the substantive rules on division of competences between Union and Member States.⁴⁶ The substantive approach adopted by the Court in these rulings seems to be coherent with the fundamental right to effective judicial protection, in that it shields potential applicants from elusive conducts of institutions, bodies or agencies of the Union which might invoke a formalistic approach to avoid responsibility for acts *de facto* attributable to them.

One last observation in this respect can be based on the landmark ERTA judgment.⁴⁷ There, the Court examined the Council’s plea related to admissibility of the Commission’s action for annulment concerning the conclusion by Member States of an international agreements. The Council contended that its function in the process of conclusion of the agreement had been merely one of coordination. According to it, the agreement had been concluded by Member States, so it did not constitute an act of an EU institution subject to review.⁴⁸ However, the Court read the issue of attributability in light of the Treaties, specifying that the conclusion of the international agreement at issue would have been outside the scope of the Member States’

⁴⁴ Judgment of 12 November 2015, *Elitaliana v Eulex Kosovo*, Case C-439/13 P, EU:C:2015:753, paras 54-67.

⁴⁵ Judgment of 18 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, paras 14-19.

⁴⁶ Judgment of 18 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, paras 38-57.

⁴⁷ Judgment of 31 March 1971, *Commission v Council (ERTA)*, Case 22/70.

⁴⁸ Judgment of 31 March 1971, *Commission v Council (ERTA)*, Case 22/70, paras 34-39.

powers and, thus, that the Council had to be considered the author of the contested measure. The Court's choice to read the factual situation in light of the Treaty provisions on competences prevented the creation of gaps in the judicial accountability of Union's institutions, in a case when the latter had disregarded the procedures established by the Treaty for their decision making. It should be added that the need to look at the substance of the act, beyond the name given to it by the parties, can also lead to the attributability of such an act to the Member States, instead of a Union institution. In *Parliament v Council*, for example, the Court reached the conclusion that a measure included within 'Council Conclusions' was in fact to be considered as attributable to the Member States, thus non-reviewable in the context of a direct action, based on the minutes of the relevant meeting and other substantive elements.⁴⁹

In conclusion, in case of delegation of limited powers from an EU institution or body to another, the delegating authority is to be considered the author of an act of uncertain attributability. When the doubt concerns more fundamentally the attributability of an act to either the EU or its Member States, not only the context of the particular act, but also the repartition of competences as envisaged by the Treaties must be taken into account.

IV The EU return policy: State of Play

The Union became competent to develop a supranational return policy with the Amsterdam Treaty, entered into force in 1999. Immediately, the Council conferred upon the Commission four negotiating mandates, in order to conclude international treaties on readmission with Morocco, Sri Lanka, Russia and Pakistan.⁵⁰ Several more mandates with a view to sign readmission agreements were conferred upon the Commission in the following years. However, the results were disappointing, in terms of speed of the negotiation, number of agreements effectively signed, and practical implementation. The reasons, ranging from the lack of credible incentives to induce third countries to cooperate to the practical difficulty of determining the identity and nationality of irregular migrants, have been explored by several commentators.⁵¹

⁴⁹ Judgment of 30 June 1993, *Parliament v Council and Commission*, Joint Cases C-181/91 and C-248/91, EU:C:1993:271, paras 16-25.

⁵⁰ Jean-Pierre Cassarino, 'Readmission Policy in the European Union' (Committee on Civil Liberties, Justice and Home Affairs, European Parliament 2010) Study for the European Parliament 14–15.

⁵¹ Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 209; Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer International Publishing 2016).

In light of the above difficulties and following the example of some of its Member States,⁵² the Union started seeking alternative avenues to achieve the goals of its return policy.⁵³ This tendency manifested itself early on in the short history of the Union's readmission policy, but evolved into a prominent feature of this field of the Union's action over time. As a result, the EU return policy is now conducted through a series of different tools, both formal and informal, with varied nature and legal status. In the remaining part of this section, we will attempt to exhaustively categorise the Union's instruments of cooperation, without dwelling on the extremely vast net of bilateral return deals at the level of the Member States.

IV.1 Formal Readmission Agreements

Between 2004 and 2014, the EU concluded 17 formal readmission agreements. No more formal readmission agreements were concluded in the last four years.

Readmission agreements are international treaties, negotiated by the Commission upon Council mandate, according to the procedure now set out in art. 218 TFEU. During the negotiation phase, it is possible for institutions and Member States to request an opinion of the ECJ on the compatibility of the envisaged agreement with the Treaties. Upon conclusion, such agreements are binding and capable of producing legal effects.

Readmission agreements between the EU and its partners are quite similar in content. The Council's negotiating directives, in fact, reflect the Union's priorities with respect to third countries and the EU party approaches the negotiation based on a standard draft agreement prepared immediately after the acquisition from the Union of its new readmission competence.⁵⁴ Formal readmission agreements generally set out the obligation for their signatories to readmit own nationals that irregularly entered or remained within the respective territories (arguably, a customary international law obligation, simply restated in readmission agreements), as well a further obligation to readmit non-nationals who transited through their territories. They then describe in detail which elements and documents can be regarded as sufficient to determine that an irregular migrant is a national of the contracting state or has transited through it. These rules have the express aim of facilitating identification and speeding up return, in situations where determining the identity and nationality of persons might prove difficult. The agreements generally establish a joint committee to supervise their application, and contain two conflict rules: the first one establishes the predominance of certain international obligations (notably the

⁵² Jean-Pierre Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42 *The International Spectator* 179.

⁵³ Cassarino, 'Readmission Policy in the European Union' (n 50) 22–38; see also Peter Slominski and Florian Trauner, 'How Do Member States Return Unwanted Migrants? The Strategic (Non-)Use of "Europe" during the Migration Crisis' (2018) 56 *JCMS: Journal of Common Market Studies* 101.

⁵⁴ Coleman (n 51) 87.

Geneva Convention on the status of refugees⁵⁵) over the agreements themselves, and the second allows for the maintenance at national level of bilateral agreements or informal arrangements on readmission, provided that they do not conflict with the EU-level readmission agreement.

There is no doubt that the decision to conclude a formal readmission agreement is reviewable by the Court. Formal international agreements are binding, and, in the case of agreements signed by the EU, they become part of the EU legal order and prevail over secondary law, while remaining subject to the Treaties and the Charter. Thus, they are certainly reviewable in the context of direct actions and preliminary rulings.

As they are negotiated following the procedure set out in the Treaties, formal readmission agreements are clearly attributable to the Union.

In conclusion, formal readmission agreements do not *per se* present problems of accountability.

IV.2 Frontex: Working Arrangements and Operational Plans

Art. 54 of the Regulation establishing a European Border and Coast Guard (Frontex),⁵⁶ similarly to its predecessors, attributes to Frontex the possibility to conclude working arrangements with third countries in order to cooperate with them within the scope of its functions, broadly related to border control.

This possibility has led to the signature of 18 so-called working arrangements between Frontex and third countries.⁵⁷ Working arrangements are generally signed, for the non-EU party, by administrative or executive authorities. They mainly deal with information exchanges between border control authorities, training of border guards, and practicalities of return cooperation. They contain very broad and vague language, preferring the modal ‘may’ to the stronger ‘will’. With specific respect to the area of return of migrants, certain arrangements (such as that with Turkey)⁵⁸ envisage the possibility of the participation of third country authorities in return operations coordinated by Frontex. Even in these cases, the language is vague and consistently refers to the need for further specifications and operational

⁵⁵ Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

⁵⁶ Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016 2016.

⁵⁷ For a list of working arrangements concluded between Frontex and third countries see <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries> [accessed 22 May 2019].

⁵⁸ Memorandum of Understanding on establishing cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the Ministry of Foreign Affairs of the Republic of Turkey, 28 May 2012, https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Turkey.pdf.

coordination.⁵⁹ Moreover, the arrangements specifically indicate that they are not international agreements and that they do not create international law rights and obligations. The wording of the working arrangements and their context, as well as the difficulty to identify precise commitments in their text, seem to indicate that the latter are not, in and of themselves, capable of producing legal effects. For this reason, they are not reviewable in the context of direct actions.

The conclusion is different with respect to the legal effects of measures taken by EU authorities to implement such arrangements and design specific operations, as these potentially affect the division of competences between Member States and the Union, as well as the relationship of the EU with third countries and the fundamental rights of returned migrants.

For example, according to art. 16 of the Regulation establishing a European Border and Coast Guard, Frontex's executive director is responsible for the design of operational plans for each joint operation. The Court has confirmed that this kind of plans are binding and reviewable Union acts.⁶⁰ It should be added that the reviewability of operational plans does not in itself ensure access to justice to redress violations of fundamental rights that might occur when such plans are implemented on the ground, with the involvement of civil and military authorities of different Member States, Frontex's personnel and, in certain cases, third countries.

IV.3 Political Statements, Dialogues and Memoranda

Mobility Partnerships and Migration Declarations

Next to formal readmission agreements and Frontex's working arrangements, a wealth of different instruments dealing with return that may be broadly classified as political has been concluded in recent years. Those instruments are very diversified in terms of procedure for their conclusion, EU authorities and Member States involved in their negotiations, and content.

Some, namely Mobility Partnerships and Migration Declarations, constitute the general political framework within which the EU and the relevant third country intend to develop more punctual and advanced cooperation, through the negotiation of further deals or simply the rebranding and repurposing of funds.

They are conceived as informal political declarations coming jointly from the EU and the partner country and covering several issues, including return cooperation.⁶¹ Their content is,

⁵⁹ For example, Point 10 of the Working Arrangement between Frontex and Turkey reads: 'Frontex and the competent Turkish authorities may explore possibilities to develop cooperation in the field of Frontex coordinated joint return activities in accordance with their respective legislation as well as promote the active facilitation and participation of the competent Turkish authorities in such activities'.

⁶⁰ Judgment of 5 September 2012, *Parliament v Council*, C-355/10, EU:C:2012:516.

⁶¹ Jean-Pierre Cassarino, 'A Reappraisal of the EU's Expanding Readmission System' (2014) 49 *The International Spectator* 130, 138.

thus, very vague. The language is not that of binding international instruments and the initiatives envisaged lack precision and immediate repercussions on the legal sphere of individuals. A relevant example is the Mobility Partnership between the Republic of Azerbaijan and the European Union and its Participating Member States. It indicates that the signatories ‘endeavour ... to enhance [their] efforts ... to strengthen the security of travel documents, identity documents and residence permits, and to fully cooperate on return and readmission; ... to enhance operational cooperation on return, including through the conclusion and effective implementation of the EU-Azerbaijan Readmission Agreement and implementing joint programmes on these issues’.⁶² Similar language can be found in other analogous declarations.⁶³

The expressed intention of the parties, the wording, and the context of these deals warrant the conclusion that they are not capable of producing legal effects *per se*, thus they are not subject to judicial review. However, as it is the case for the operational plans of Frontex, more detailed measures eventually taken by EU authorities to better define or implement the vague content of these deals, transforming them in real commitments, should be directly reviewable.

Other informal deals

Besides Mobility Partnerships and Migration Declarations, other instruments have been adopted on a more case-by-case basis, through individualised negotiation processes fine-tuned based on the specific relations between the EU and the third country in question. Examples of this type of deals are the EU-Turkey Statement,⁶⁴ the Standard Operating Procedures concluded

⁶² Joint Declaration on a Mobility Partnership between the Republic of Azerbaijan and the European Union and its Participating Member States, 5 December 2013, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/international-affairs/global-approach-to-migration/specific-tools/docs/mobility_partnership_of_azerbaijan_en.pdf

⁶³ See, for example, Joint Declaration on a Mobility Partnership between the European Union and Armenia, available as Addendum 1 to Council Item Note 14963/11 of 6 October 2011, Joint Declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States, available as Addendum 1, Rev. 3, to Council Item Note 6139/13 of 3 June 2013; Joint Declaration on a Mobility Partnership between the European Union and Cape Verde, available as Addendum 2 to Council Item note 9460/08 of 21 May 2008; and Joint Declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its Participating Member States of 9 October 2014, http://www.europarl.europa.eu/cmsdata/124061/20141009_joint_declaration_establishing_the_eu-jordan_mobility_partnership_en.pdf.

⁶⁴ ‘EU-Turkey Statement of 18 March 2016, European Council and Council Press Release 144/16’ <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

with Bangladesh⁶⁵ and negotiated with Mali,⁶⁶ and the Joint Way Forward on Migration Issues concluded with Afghanistan.⁶⁷

These documents are purportedly non-binding, but they differ greatly from the political declarations described above. They all contain expressions modelled on the language of formal international agreements, with an insistent use of the modal ‘will’, that generally accompanies the undertaking of obligations.⁶⁸ They provide for joint working groups to monitor their respective implementation⁶⁹ and list very detailed commitments on the issuance or acceptance of certain travel documents,⁷⁰ as well as on the maximum number of return flights or returnees allowed within a certain time period.⁷¹ They even contain provisions related to the date of start of the cooperation, modification, renewal, and withdrawal within established time limits.⁷²

Because of the detailed nature of their content, which mirrors that of formal readmission agreements⁷³ (see section IV.I) rather than that of political declarations, those deals affect the division of competences between the EU and its Member States and produce effects on the legal sphere of individuals, affecting, among others, their rights to non-refoulement, to effective

⁶⁵ Commission, ‘Annex I to Decision C(2017) 6137 Final on the Signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay’.

⁶⁶ General Secretariat of the Council, ‘Item Note to Permanent Representatives Committee No. 15050/16, 6 December 2016, Draft Standard Operating Procedures between the EU and the Republic of Mali for the Identification and Return of Persons without an Authorisation to Stay’ <<https://www.statewatch.org/news/2016/dec/eu-council-standard-operating-procedures-mali-return-15050-16.pdf>> accessed 16 May 2019.

⁶⁷ ‘Joint Way Forward on Migration Issues between Afghanistan and the EU, 4 October 2016, https://Eeas.Europa.Eu/Headquarters/Headquarters-Homepage/11107/Joint-Way-Forward-on-Migration-Issues-between-Afghanistan-and-the-Eu_en’ <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 11 May 2019.

⁶⁸ As the Commission itself seems to recognise in its ‘Vademecum on the EU external action’.

⁶⁹ Pt IV of EU-Afghanistan Joint Way Forward on Migration Issues (‘Joint Way Forward on Migration Issues between Afghanistan and the EU, 4 October 2016, https://Eeas.Europa.Eu/Headquarters/Headquarters-Homepage/11107/Joint-Way-Forward-on-Migration-Issues-between-Afghanistan-and-the-Eu_en’ <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 11 May 2019); point 6 of EU-Bangladesh Standard Operating Procedures on Return (Commission, ‘Annex I to Decision C(2017) 6137 Final on the Signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay’); and second to last paragraph of EU-Turkey statement (‘EU-Turkey Statement of 18 March 2016, European Council and Council Press Release 144/16’ <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>).

⁷⁰ Pt II of EU-Afghanistan Joint Way Forward on Migration Issues and points 1 to 4 of EU-Bangladesh Standard Operating Procedures on Return.

⁷¹ Pt III of EU-Afghanistan Joint Way Forward on Migration Issues; point 6 of EU-Bangladesh Standard Operating Procedures on Return; and action point 2) of the EU-Turkey statement.

⁷² Pts VI, VIII and IX of EU-Afghanistan Joint Way Forward on Migration Issues; point 6 of EU-Bangladesh Standard Operating Procedures on Return; and action points 1) and 6) EU-Turkey statement. Provisions of these kind are typical of those international agreements that are intended to provide legal effects. See, in this respect, Opinion of AG Sharpston of 26 November 2015 in *Council v Commission* (C-660/13) EU:C:2015:787, at [67]; and Commission ‘Vademecum on the EU external action’.

⁷³ As noticed, with respect to the Joint Way Forward, by Ramses A Wessel, ‘“Soft” International Agreements in EU External Relations’, Draft paper, presented at the ECPR SGEU Conference, Panel Hard and Soft Law in the European Union, Paris 13-15 June 2018, 12 <<https://www.utwente.nl/en/bms/pa/research/wessel/wesselconf17.pdf>> accessed 18 July 2019.

judicial protection, and to request asylum.⁷⁴ These soft-law deals, capable of producing hard legal effects, must necessarily be reviewable at EU level, as long as they are attributable to the Union. In this respect, the fact that they might have been concluded by institutions that would not have had the power to conclude binding international agreements is not sufficient to exclude their reviewable nature, as shown by the case-law examined above (see section II.I). The bypassing of essential procedural requirements is not only incapable of shielding these deals from scrutiny, but it is also likely to render their conclusion invalid. In fact, if confronted with a question of validity, the Court might annul the decision to sign these *ad hoc* deals, after qualifying them as international agreements⁷⁵ concluded in violation of art. 218 TFEU. Even if the Court considered it acceptable to adopt international commitments without following the procedure described in art. 218 TFEU, it might still rule that the European Parliament must consent to the signature of soft international agreements falling within the material scope of art. 218(6)(a) TFEU.⁷⁶ This reasoning too would lead to the annulment of the decision to conclude the soft law deals in question for violation of an essential procedural requirement. The same outcome might result from the finding that some provisions of the *ad hoc* deals examined in the present paper breach one or more Charter articles. For example, the provisions of the EU-Afghanistan Joint Way Forward that might entail, as explicitly envisaged in the deal,⁷⁷ the erroneous return of non-Afghan nationals to Afghanistan⁷⁸ might be found in breach of several

⁷⁴ Violeta Moreno-Lax, 'The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process?', *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration* (RWI Working Paper 2017/1) 29; Maybritt Jill Alpes, Sevda Tunaboylu and Ilse van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum' Policy Brief 2017/29, Florence: European University Institute; Panizzon (n 17); Jean-Pierre Cassarino, 'Infomalising EU Readmission Policy' in Ariadna Ripoll Servent and Florian Trauner (eds), *Routledge Handbook of Justice and Home Affairs Research* (Routledge 2017) 94.

⁷⁵ As argued by several authors. Inter alia, Olivier Corten, 'Accord Politique Ou Juridique : Quelle Est La Nature Du "Machin" Conclu Entre l'UE et La Turquie En Matière d'asile?' (*EU Immigration and Asylum Law and Policy*, 10 June 2016) <<https://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>> accessed 25 July 2019; Enzo Cannizzaro, 'Disintegration Through Law?' (2016) 1 *European Papers* 3; Steve Peers, 'EU Law Analysis: Lock 'Em up: The Proposal to Amend the EU's Returns Directive' (*EU Law Analysis*, 12 September 2018) <<http://eulawanalysis.blogspot.com/2018/09/lock-em-up-proposal-to-amend-eus.html>> accessed 21 September 2018.

⁷⁶ For an interpretation of arts 14 TEU and 218 TFEU as requiring the consent of the European Parliament for the conclusion of soft international deals falling within the material scope of art. 218(6)(a) TFEU see Thomas Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case' (2016) 1 *European Papers* 1225, 1233.

⁷⁷ Part II, point 6 of the Joint Way Forward explicitly envisages the possibility that Afghanistan might readmit persons 'who, it later emerges, [are] not of Afghan nationality'.

⁷⁸ In particular the erroneous return of non-Afghan nationals to Afghanistan might result from the strict deadline of two weeks for the Afghan government to verify existing evidence of nationality and issue a travel document, at the expiry of which the Union is entitled to issue an EU standard travel document for return (Part II, point 2 of the Joint Way Forward).

articles of the Charter,⁷⁹ especially when coupled with the absence of clear procedures to protect the fundamental rights of non-Afghan nationals erroneously returned to Afghanistan.⁸⁰ Similarly, likely breaches of fundamental rights might lead to the partial invalidation of the decision to conclude the EU-Turkey Statement. In particular, the Statement's opening sentence, claiming that '[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey', is *prima facie* incompatible with both the ECHR and the Charter.⁸¹ Moreover, the Statement presumes that Turkey can, in principle, be considered a safe third country where non-EU nationals can obtain international protection 'in accordance with the Geneva Convention', as required by Article 38 of the Asylum procedures Directive.⁸² This conclusion, however, is doubtful, because Turkey has ratified the Geneva Convention with a geographical limitation, so that it is bound to it only with respect to European protection seekers.⁸³ According to part of the doctrine, this rules out the possibility to qualify Turkey as a safe third country under the Asylum Procedures Directive.⁸⁴

Of course, the Court could only invalidate the decision to conclude *ad hoc* deals on readmission after having established their attributability to the Union. As they are published in the form of press releases, or not published at all, informal deals generally do not bear signatures, so that it might be difficult to determine whether the entity undertaking the relevant obligations is the EU or its Member States. Relying on the Court's case law on attributability (see above

⁷⁹ The approximate determination of nationality in order to speed up procedure would inevitably lead to an incorrect appraisal of the risk of direct and indirect refoulement.

⁸⁰ Part II, point 6 of the Joint Way Forward provides that such persons should be taken back by the EU Member State which returned them, but does not provide for any specific procedure, leaving the details to be define later by the Working Group set up for the monitoring of the implementation of the deal.

⁸¹ This sentence is clearly incompatible with the prohibition of collective expulsion enshrined in art. 19(1) of the Charter, as well as in art. 4 ECHR. However, the rest of Point 1 of the EU-Turkey Statement, that excludes 'any kind of collective expulsion, contradicts the opening sentence, the blunt formulation of which remains nonetheless extremely problematic.

⁸² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, 60–95.

⁸³ United Nations High Commissioner for Refugees, 'Reservations and Declarations to the 1951 Refugee Convention' <<https://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention>> accessed 26 July 2019.

⁸⁴ Steve Peers and Emanuela Roman, 'EU Law Analysis: The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?' (*EU Law Analysis*, 5 February 2016) <<http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html>> accessed 26 July 2019. The UNHCR has suggested that an interpretation of art. 38 of the Asylum Procedures Directive should be requested to the CJEU (UNHCR, 'Legal Considerations on the Return of Asylum-Seekers and Refugees from Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept' (2016) <<https://www.unhcr.org/56f3ec5a9.pdf>> accessed 26 July 2019) and this was also the opinion of a slight minority (12 out of 25 judges) of the Greek Council of State that ultimately decided, in September 2017, not to request a preliminary ruling on this issue in relation to the application of the EU-Turkey Statement (see Angeliki Tsiliou, 'When Greek Judges Decide Whether Turkey Is a Safe Third Country without Caring Too Much for EU Law – EU Immigration and Asylum Law and Policy' (*EU Immigration and Asylum Law and Policy*) <<http://eumigrationlawblog.eu/when-greek-judges-decide-whether-turkey-is-a-safe-third-country-without-caring-too-much-for-eu-law/>> accessed 22 May 2019)

III.2), it seems correct to conclude that even deals negotiated outside the framework of clear Treaty procedures can, in several cases, be attributed to EU institutions.

When informal deals are negotiated by EU institutions or bodies where the governments of Member States are not individually represented, such as the Commission, their attributability to the Union might be difficult to contest: nothing in the EU-Afghanistan Joint Way Forward or in the EU-Bangladesh Standard Operating Procedures seems to cast doubts on the fact that they were negotiated by the EU, as opposed to its Member States.⁸⁵

The situation is more complex for unsigned deals negotiated in the context of the Council or the European Council, which might be attributable to the relevant institutions or to the Member States reunited in those institutions. The case-law analysis developed above seems to entail that such deals should be attributed to EU institutions, rather than Member States, if the latter would not have been competent to conclude them.⁸⁶ This is the case of the EU-Turkey Statement.⁸⁷ In fact, the EU had already concluded a formal readmission agreement with Turkey two years before the signing of the Statement. The Statement altered the material and temporal scope of the obligations imposed by this formal readmission agreement.⁸⁸ As a direct consequence of the principle of sincere cooperation,⁸⁹ Member States are not competent to act externally in a way capable of affecting pre-existing Union's measures.⁹⁰ Thus, the Statement cannot but be a Union deal.

The language of the Statement corroborates this interpretation: the text states that 'Turkey and *the European Union* reconfirmed their commitment to the implementation of their joint action plan ... Turkey and *the EU* also agreed to continue stepping up measures against migrant smugglers' (emphasis added) and, even more indicatively, that '*the EU* and Turkey today

⁸⁵ The EU-Afghanistan Joint Way Forward was negotiated by the Commission following the Council's negotiating directive. When forwarding the draft version of the deal to the COREPER, the Secretariat of the Council discusses the 'EU position', never referring to Member States as possible authors or co-authors (see General Secretariat of the Council, 'Item Note to Permanent Representatives Committee No. 12191/1 6, 22 September 2016, Draft Joint Way Forward on Migration Issues between Afghanistan and the EU-Adoption' <<https://www.statewatch.org/news/2016/sep/eu-council-afghanistan-12191-16.pdf>> accessed 1 June 2019). Moreover, according to its introduction, the EU-Afghanistan Joint Way Forward 'reflects the joint commitment of *the EU* and the government of Afghanistan', and Member States are mentioned in its text seemingly as beneficiaries of the relevant advantages in terms of return effectiveness, rather than as parties to the deal. As to the EU-Bangladesh Standard Operating Procedures, they were explicitly concluded by the Commission on behalf of the EU.

⁸⁶ See above section III.2 on judgment of 31 March 1971, *Commission v Council (ERTA)*, Case 22/70.

⁸⁷ 'EU-Turkey Statement of 18 March 2016, European Council and Council Press Release 144/16' (n 64) 3–27.

⁸⁸ For example, the EU-Turkey statement of March 2016 modified anticipated the entry into force of the obligation for Turkey to readmit third country nationals.

⁸⁹ Art. 4(3) TEU

⁹⁰ Art. 3(2) TFEU

decided to end the irregular migration from Turkey to *the EU*. In order to achieve this goal, *they* agreed on the following additional action points’ (emphasis added).⁹¹

In conclusion, the EU-Turkey Statement and similar informal deals should be reviewable by EU courts, in the context of both direct and indirect actions. However, this conclusion is at odds with the General Court’s judgment in *NF v Council*,⁹² according to which the authors of the Statement are the Member States, and not the Union.

This judgment shows how the lack of clarity concerning the paternity of a deal can substantively reduce judicial accountability.⁹³ The lack of precision as to the paternity of informal deals offers the judge a tempting technical escape route from politically sensitive cases. If coupled with the judge’s unwillingness to stand up for the rule of law in delicate areas, such as that of migration,⁹⁴ the difficulties in establishing whether a deal is attributable to the EU constitute obstacles not only to direct actions under art. 263 TFEU, but also to preliminary rulings under art. 267 TFEU and actions for damages under art. 268 TFEU. In fact, direct actions and preliminary rulings are available only when the contested act is attributable to the Union,⁹⁵ and actions for damages still require an identifiable unlawful conduct of an EU institution. In *Ledra*, the Court affirmed that the Commission could in principle have been held liable for the damages caused by its signing of a memorandum of understanding on behalf of the European Stability Mechanism (‘ESM’), even though the memorandum itself was not attributable to the Commission.⁹⁶ However, in case of deals negotiated without transparency and reported only in the form of unsigned press releases, even establishing the existence of an unlawful conduct attributable to an EU institution is problematic.⁹⁷

It should be added that leaving the possibility to review the validity of an act such as the EU-Turkey Statement to national courts is not satisfactory from the perspective of effective judicial

⁹¹ ‘EU-Turkey Statement of 18 March 2016, European Council and Council Press Release 144/16’ (n 64).

⁹² *NF v Council* (T-192/16) EU:T:2017:128.

⁹³ It should be noticed that the judgment was appealed by the applicants, but that the appeal was dismissed as manifestly inadmissible by the order of 12 September 2018, *NF v Council*, C-208/17 P, EU:C:2018:705.

⁹⁴ See Iris Goldner Lang, ‘Towards “Judicial Passivism” in EU Migration and Asylum Law?’ (*EU Immigration and Asylum Law and Policy*) <<http://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/>> accessed 22 May 2019. On the formalistic approach taken by the General Court in *NF v Council* see also Moreno-Lax (n 62) 31; and Enzo Cannizzaro, ‘Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*’ (2017) 2 *European Papers* 251.

⁹⁵ Arts 267(1)(b) and 340(2) TFEU.

⁹⁶ Judgment of 20 September 2016, *Ledra Advertising v Commission and ECB*, Joined Cases C-8/15 P to C-10/15 P, EU:C:2016:701, para. 60.

⁹⁷ On the secrecy of the negotiations, it should be noticed that the General Court has upheld the Commission’s refusal to grant access to the relevant documents in the two judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, and T-852/16, EU:T:2018:71 (see Caterina Molinari, ‘The General Court’s Judgments in the Cases *Access Info Europe v. Commission* (T-851/16 and T-852/16): A Transparency Paradox?’ [2018] Vol. 3 *European Papers* 961).

protection. In fact, informal statements are applied on the ground as if they were legally binding – the EU-Turkey Statement has explicitly been qualified as legally binding by a Greek Appeals Committee.⁹⁸ National courts can check the validity of actions on the ground against national or European law, but they are aware that invalidating implementing measures will result in the non-implementation of international commitments of their governments. Moreover, even if the implementing measures and actions taken at national level can be reviewed by national courts, their rationale, contained in the supranational informal deal, cannot. This ties the hands of national courts, pressured by the EU not to hinder the implementations of commitments *de facto* taken at EU level, but non-reviewable by EU Courts. Such a situation clearly creates accountability gaps, as shown by the example of Greece. There, the number of return decisions of Syrian asylum seekers towards Turkey increased rapidly as a consequence of the EU-Turkey Statement, however, in 2016, the committees in charge of deciding on the appeals on these return decisions quashed most of them due to the consideration that Turkey was not a safe third country for the asylum seekers in question.⁹⁹ As this hindered the implementation of the EU-Turkey Statement, with potential consequences on the whole Dublin system, both the Council and the Commission reportedly put pressure on Greece to modify the composition of those committees in order to ensure the implementation of the Statement, which the Greek government promptly did.¹⁰⁰ In this situation, it cannot be said that review of return decisions by national courts is sufficient to ensure effective judicial protection, as national courts to which asylum seekers have access are not empowered to examine all the questions of facts and law relevant to decide the dispute. More particularly, the upstream measure justifying the adoption of return decisions *de facto* binds national authorities whilst being shielded from scrutiny at national level, for its supranational legal character, as well as at EU level, for its purportedly non-EU character. An analogous argument has convincingly been made with respect the accountability gap created by the legal configuration of the bail-out measures adopted during the financial crisis.¹⁰¹

⁹⁸ Asylum Information Database, ‘Greece: the Ruling of the Council of State on the Asylum Procedure post EU-Turkey Deal’, 4.10.17, <https://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal>.

⁹⁹ Angeliki Tsiliou, ‘When Greek Judges Decide Whether Turkey Is a Safe Third Country without Caring Too Much for EU Law – EU Immigration and Asylum Law and Policy’ (*EU Immigration and Asylum Law and Policy*) <<http://eumigrationlawblog.eu/when-greek-judges-decide-whether-turkey-is-a-safe-third-country-without-caring-too-much-for-eu-law/>> accessed 22 May 2019.

¹⁰⁰ Eszter Zalan, ‘EU Pushes Greece to Set up New Asylum Committees’ (*EU Observer*, 15 June 2016) <<https://euobserver.com/migration/133841>> accessed 22 May 2019.

¹⁰¹ René Repasi, ‘Judicial Protection against Austerity Measures in the Euro Area: Ledra and Mallis’ (2017) 54 *Common Market Law Review* 1123.

V Conclusion: the broader picture

The present paper has dealt with the judicial accountability of EU measures in the field of the EU return policy, examining the reviewability of the different types of instruments through which the policy is pursued. It reached the conclusion that direct reviewability is necessarily excluded for the current Frontex's working arrangements, as well as for Mobility Partnership and Migration Declarations whose vague nature and broad language do not permit to classify them as acts having legal effects. However, it argued the opposite with respect to other types of informal deals which, although purportedly non-binding, in reality contain precise commitments and monitoring mechanisms, so that their legal effects are more akin to those of formal readmission agreements than to those of other informal statements. The paper also examined the attributability of informal deals to the Union in light of the case-law of the Court on paternity of measures, reaching the conclusion that all those deals are Union's deals, reviewable as such under art. 263 TFEU. Affirming the contrary would be in breach of the principle of effective judicial protection.

This analysis only partially addresses the broader question of the judicial accountability of the EU return policy, and especially of its compatibility with the right to effective judicial protection enshrined in art. 47 of the Charter. In fact, the latter depends not only on the reviewability of Union's measures, but also on two further aspects, related to but distinct from the one examined in the present paper.

First, accountability requires the possibility to hold EU actors responsible for their actions in operational situations, especially when fundamental rights violations are at issue. The return policy is conducted by Member States' officials belonging to different ministries, as well as civil and military bodies, together with EU agencies such as Frontex and, in certain cases, third countries. Thus, identifying the responsible body in case of fundamental rights violations might be extremely difficult. The multiplication of actors in this case runs the risk of translating into *de facto* freedom from judicial scrutiny for both EU institutions and bodies and Member States' organs acting within the scope of EU law.¹⁰²

Secondly, accountability requires the possibility to hold the EU responsible, at least to a certain extent, for the consequences of its funding decisions on the rights of individuals. As the EU budget finances return operations and even, in certain instances, bilateral cooperation of its Member States with third countries, it should be established whether the use of EU funds to

¹⁰² Sergio Carrera and Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?* (Centre for European Policy Studies 2018).

support a certain non-EU measures entails the Union's responsibility for the measure or its consequences. If so, a competent court must be able to identify such a responsibility and grant redress if needed. One recent and prominent example of Union's action backing a bilateral informal deal is the Memorandum of Understanding concluded between Italy and Libya in 2016,¹⁰³ endorsed by EU institutions in terms of both political support and funding.¹⁰⁴

The last two aspects were not examined in the present paper, but will form the object of further research, within the context of a broader project aiming at analysing the constitutionality of the entire EU return policy against three benchmarks: (i) the provisions defining the Union's competence in the field of return; (ii) the principles governing the Union's external action in general; and (iii) the Charter.

¹⁰³ 'Memorandum d'intesa Sulla Cooperazione Nel Campo Dello Sviluppo, Del Contrasto All'immigrazione Illegale, al Traffico Di Esseri Umani, al Contrabbando e Sul Rafforzamento Della Sicurezza Delle Frontiere Tra Lo Stato Della Libia e La Repubblica Italiana' (2017) <<http://www.governo.it/sites/governo.it/files/Libia.pdf>> accessed 3 October 2018.

¹⁰⁴ See Council, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route' (2017) <<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>> accessed 5 October 2018; Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) 2016 933; Commission, 'Decision C(2015) 7293 Final on the Establishment of a European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa'.