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Controlling the executive in external migration policy?

A preliminary assessment of the role of the European Parliament in scrutinising and influencing EU informal readmission arrangements

Davide Gnes and Milka Sormunen

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1. Introduction

In the external dimension of European Union (EU) migration policy, researchers have observed an increasing reliance on a new type of non-binding arrangements.[1] Recourse to soft law in this policy area is nothing new, namely in the form of broad political or technical frameworks for long-term cooperation (e.g., mobility partnerships, regional dialogues, common agendas and funding programmes).[2] Since 2016, the EU has concluded soft law 'informal arrangements' in a field – readmission policy – where it had previously always opted for the conclusion of international agreements. EU competence and procedures on international readmission agreements are explicitly laid out in the Treaties and entail the involvement of the European Parliament under the consent procedure. As soft law is not subject to the same guarantees, the increased reliance on soft law raises important questions regarding the democratic role of the Parliament in controlling external action.

Previous research has detected two opposite trends regarding the Parliament's ability to exercise democratic control of the executive in the area of international relations. One the one hand, researchers have argued that, following the entry into force of the Treaty of Lisbon, we have witnessed a growing 'democratisation of EU international relations through EU law,'[3] which resulted in a general expansion of the Parliament's competences and prerogatives and improved both its abilities to scrutinise and influence the actions of the EU executive. Such Treaty changes were arguably introduced to overcome a democratic legitimacy vacuum in what used to be an overwhelmingly inter-governmental policy field.[4] Including the Parliament was therefore considered a sensible decision by Member States in the context of growing EU competences in areas such as trade and migration (both internal and external dimensions), and particularly in consideration of the strong implications for fundamental rights and liberties in the asylum and migration domain. In the above policy areas in international relations in terms of division of competences, while the Council continues to remain the main principal delegating

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[1] E. Collett and A. Ahad, 'EU Migration Partnerships. A Work in Progress' (Migration Policy Institute 2017); P. Slominski & F. Trauner, 'Reforming me softly – how soft law has changed EU return policy since the migration crisis' 44 *West European Politics* 2021, 93-113; R. Wessel, 'Normative transformations in EU external relations: the phenomenon of "soft" international agreements' 44 *West European Politics* 2021, 72-92.

[2] P. Garcia Andrade and I. Martin, 'EU cooperation with third countries in the field of migration.' Study for the LIBE Committee, European Parliament, PE536.469 (2015).

[3] J. Santos-Vara and Soledad R. Sanchez-Tabernero (eds.), *The Democratisation of EU International Relations Through EU Law* (New York: Routledge 2018).

[4] G. Rosen, 'The impact of norms on political decision-making: how to account for the European Parliament's empowerment in EU external trade policy', 10 *Journal of European Public Policy* 2017, 1450-1470; C. Eckes, *EU Powers under External Pressure: How the EU's External Action Alters its Internal Structures* (Oxford: Oxford University Press 2019).

executive powers to the European Commission, the Parliament has become in many respects an additional principal with varying influence.[5] In parallel, ever since the early 2000s, partly as a response to public criticism regarding the lack of democratic legitimacy of the EU executive, the Commission has also sought to promote a culture of transparency and openness in its dealings with the Parliament.[6]

On the other hand, recent developments in readmission policy challenge the narrative of the Parliament's increased influence in EU external action and may signal a roll back of the Parliament's powers of control. From the perspective of democratic legitimacy of EU policy-making, scholars have pointed out that one of the key 'political' institutions of the Union, the Parliament, is sidelined in both the creation and monitoring of informal arrangements,[7] with the result that both its power of consent and its powers of scrutiny and oversight are more and more curtailed in a policy area where its involvement via the consent procedure was the norm until 2014.[8] Gradual informalisation of a field that was previously formalised can thus have profound implications for the balance of power amongst institutions, as it upsets the formal divisions of roles and competences. To begin with, the Commission (or the Council) is under no obligation to inform the Parliament about informal readmission arrangements, with the result that access to information, one of the key preconditions for proper scrutiny and oversight over any policy, is – at least from a legal standpoint – dramatically curtailed. Moreover, the procedure associated with informal readmission arrangements, negotiated and approved without the Parliament's consent, removes an (if not the most) important source of Parliamentary lever-

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[5] E. Conceição-Heldt, '"Multiple Principals" Preferences, Types of Control Mechanisms and Agent's Discretion in Trade Negotiations', in T. Delreux and J. Adriaensen, *The Principal Agent Model and the European Union* (London: Palgrave Studies in European Union Politics 2017) and A. Ripoll Servent, 'The Role of the European Parliament in International Negotiations after Lisbon', 21 Journal of European Public Policy 2014, 568–586, as cited in M. Frennhoff Larsén, 'Parliamentary Influence Ten Years After Lisbon: EU Trade Negotiations with Japan', 58 *Journal of Common Market Studies* 2020, at 1542. More in general on the new role of the Parliament, see E. M. Poptcheva, 'Parliamentary Oversight: Challenges Facing Classic Scrutiny Instruments and the Emergence of New Forms of "Steering Scrutiny"', in O. Costa (ed.), *The European Parliament in times of EU crisis. Dynamics and Transformations* (Cham: Palgrave MacMillan 2019), 25-52; A. Héritier *et al.*, *European Parliament Ascendant* (Cham: Palgrave MacMillan 2019), 149-176.

[6] A. Wille, 'Political-Bureaucratic Accountability in the EU Commission: Modernising the Executive' 33 *West European Politics* 2010, 1093-1116.

[7] P. García Andrade, 'The role of the European Parliament in the adoption of non-legally binding agreements with third countries', in J. Santos Vara and S. R. Sánchez-Tabernero (eds.), *The Democratisation of EU International Relations Through EU Law* (New York, Routledge 2019).

[8] With the exception of the agreement with Belarus (2020), the last formal readmission agreement was with Azerbaijan (2014). See Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation, *OJ*[2014] L 128/17, 30.4.2014; Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation *OJ*[2020] L 181/3, 9.6.2020.

age to gain influence in both the negotiation and implementation stages of policy processes.

With this paper, we therefore aim to identify what kind of control relation, if any, exists *in practice* between the Parliament and the EU executive in relation to readmission arrangements. To do so, we focus on two main dimensions that have recently characterised the Parliament's behaviour in external action: access to information and scrutiny regarding negotiation, conclusion and implementation of informal readmission arrangements; and policy influence regarding negotiation and conclusion of informal readmission arrangements as well as the more general direction of readmission policy. Drawing on Parliamentary policy and legislative documents, we systematically mapped and categorised Parliamentary actions (and interactions with other relevant EU institutional actors) with respect to informal readmission arrangements.

Legal scholars have already touched on the role of the Parliament in the field of readmission policy, highlighting how the use of informal arrangements reduces the institution's margins of political manoeuvring.[9] Likewise, we recorded some preliminary attempts to map the substantive role of the Parliament in formal readmission agreements versus informal instruments (i.e. the EU-Turkey statement).[10] Nonetheless, to our knowledge, our paper is the first attempt to systematically and empirically map actions and strategies of democratic control by the Parliament in the field of informal readmission policy. Exploring practices of democratic control holds both theoretical and societal relevance as the use of soft law and ad hoc decision-making procedures (often excluding the Parliament), which have potential implications for fundamental rights and civil liberties, is on the rise in this policy field.

The structure of the paper is as follows. First, drawing on the literature on democratic control in external relations, we provide an overview of the legal framework regarding EU readmission agreements and Parliamentary prerogatives in this field. Secondly, we introduce the notion of informal readmission arrangements and how their increased use has formally affected Parliamentary control of the executive. Thirdly, we outline our methodology. Fourthly, we provide a description and analysis of our findings, by focusing on two dimensions: Parliamentary access to information and scrutiny on the one side and Parliamentary influence on the policy cycle on the other. Fifthly, we conclude by summarising our findings assessing their implications in light of the Parliament's formal prerogatives and by suggesting further avenues to research this topic.

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[9] García Andrade 2019; see also K. Eisele, 'The EUs readmission policy: of agreements and arrangements' in S. Carrera, J. Santos Vara and T. Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019), 135-154; S. Carrera, 'On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes,' in S. Carrera et al. (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Leiden: Brill Nijhoff 2019), 21-59.

[10] N. Reslow, 'Crisis, Change and Continuity: The Role of the European Parliament in EU External Migration Policy', available at <https://ecpr.eu/Filestore/PaperProposal/a66fbf1b-fd9e-45b0-a7fb-bc7763debbdb.pdf>.

2. Democratic control in the external action of the European Union: the role of the European Parliament in formal agreements

The changes introduced in the wake of the Lisbon Treaty have considerably strengthened the Parliament's influence in the field of external action; the Parliament 'has gained increasing powers that can even appear unparalleled to national or federal democracies, where the executive traditionally had a primary role in the course of foreign affairs.'[11] Those powers of democratic control in international relations may be divided along two dimensions: 1) the ability to scrutinise policy, from negotiation to implementation; 2) the ability to influence policy content during the policy cycle, which is arguably a by-product of the Parliament's growing involvement via the consultation and consent procedures. Before turning to the empirical analysis, we examine those two dimensions at the level of formal legal provisions (or absence thereof) in the context of formal readmission agreements (in this section) and informal arrangements (in the following section).

On a general level, the political accountability of the EU executive towards the Parliament manifests in different forms. According to Article 10 TEU, the EU's functioning is founded on representative democracy, with EU citizens being directly represented in the Parliament. The Parliament exercises 'functions of political control and consultation as laid down in the Treaties' (Article 14 Treaty on European Union, TEU). The European Commission is politically accountable to the Parliament: as Article 17(8) TEU provides, the Parliament can vote on a motion of censure of the Commission. If a two-thirds majority is reached (Article 234 of the Treaty on the Functioning of the European Union, TFEU), the Commission must resign. However, this power to dismiss the Commission is a rather stark measure and cannot be considered a tool to ensure the Parliament's influence over the Commission in day-to-day decision-making. This influence has increased lately, which means that the Commission is now more dependent on party politics.[12] It is important to note that the main executive actor legally accountable to the Parliament is the Commission. The other institutions exercising executive functions, the Council and the European Council, are accountable to the Parliament to a much lesser extent, as there are no direct Treaty provisions concerning their accountability similar to the ones concerning the Commission.

Readmission agreements may be defined as 'international treaties concluded between the EU and a third country which aim to guarantee the swift identification and return of migrants who reside without authorisation on the

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[11] J. Santos Vara and R. Sanchez-Tabernero, 'An Introduction', in J. Santos-Vara and Soledad R. Sanchez-Tabernero (eds), *The Democratisation of EU International Relations Through EU Law* (New York: Routledge 2019), at 6. The area of Common Foreign and Security Policy (CFSP) remains an exception, but CJEU case law has strengthened the Parliament's role in this field, too. See Case C-658/11, *European Parliament v. Council (Mauritius),* 24 June 2014, ECLI:EU:C:2014:2025; Case C-263/14, *European Parliament v. Council (Tanzania)*, 14 June 2016, ECLI:EU:C:2016:435.

[12] C. Eckes *et al.*, 'Conceptual Framework for the Project Separation of Powers for 21st Century Europe (SepaRope)', Amsterdam Centre for European Law and Governance Research Paper No. 2021-01, at 17.

territory of the other contracting party.'[13] Readmission agreements have been considered technical, on the one hand, as they 'set out the procedural rules on repatriation, as well as provisions concerning time limits, the burden of proof, transfer and transportation modalities, transit operations, transport costs, data protection, and implementation.'[14] As readmission agreements do not substitute the existing criteria[15] for deciding about a person's presence in an EU Member State or deciding whether the other party to the agreement is a safe third country or safe country of origin, they have been argued to be of purely administrative nature[16] and not per se incompatible with refugee and human rights law.[17] On the other hand, those agreements are generally used to facilitate *forced* returns of people falling within the scope of the agreement including, if a third country national clause is present, third country nationals. Situations in which a state expels persons to a third country based on a readmission agreement without considering the protection claims on their merits constitute a risk of violation of international obligations, non-refoulement in particular.[18] For these reasons, implementation of readmission agreements may have important fundamental rights implications in practice, particularly those agreements with countries with poor human rights records, and when foreseen post-readmission monitoring mechanisms are deficient.[19]

Readmission policy has been a cornerstone of EU migration and asylum policy since at least the 1990s, when the Commission first supported the adoption of EU agreements to repatriate migrants in irregular situations to their countries of origin.[20] The entry into force of the Treaty of Amsterdam in 1999 provided the EU with the competence to adopt measures in the field of irregular migration, including 'repatriation of illegal residents'.[21] While such competence was initially extended to the external dimension of the Union's action in

[13] Eisele 2019, at 137-38.

[14] Eisele 2019, at 138.

[15] See 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* [2013] L 180/60, 29.6.2013 (Procedures Directive); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ* [2008] L 348/98, 24.12.2008 (Return Directive).

[16] M. Giuffré, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal', 32 *Refugee Survey Quarterly* 2013, 79-111, at 85-88; N. Coleman, *European Readmission Policy. Third Country Interests and Refugee Rights* (Leiden: Brill 2009), at 303.

[17] Coleman 2009, at 310-316.

[18] Coleman 2009, at 225-227.

[19] F. Trauner *et al.*, 'Values versus security in the external dimension of EU migration policy: a case study on the readmission agreement with Russia', in G. Noutcheva *et al.* (eds), *The EU and its neighbours: values vs. security in European foreign policy* (Manchester: Manchester University Press 2013), at 201-217.

[20] See Eisele 2019, at 137.

[21] Eisele 2019, at 137.

line with the implied external powers doctrine developed in the *ERTA* case,[22] the ability to conclude readmission agreements has since the Treaty of Lisbon become the only explicitly conferred EU external competence in the field of migration,[23] in what is now Article 79(3) of the TFEU. Formal readmission agreements are currently negotiated in line with the procedure laid out in Articles 216 and 218 TFEU. The procedural legal basis for concluding international agreements, that is agreements with third countries or international organisations, is Article 218 TFEU, which assigns each institution a specific role in the process of concluding international agreements. Articles 79(3) and 216 TFEU list circumstances when international agreements may be concluded and provide that such agreements are binding upon the EU institutions and on the Member States.

Parliament's scrutiny powers are associated with the capacity to oversee and assess the conduct of the executive. Scrutiny, particularly when described in political terms, generally entails a principal-agent relationship whereas a forum – the Parliament – takes a number of actions directed towards an actor – the EU executive – for the purpose of controlling and influencing its conduct.[24] If Parliamentary actions are intended to probe the executive's conduct, actions aimed at explaining and justifying conduct are likewise expected from executive actors.[25] Access to reliable and timely information is generally viewed as a key precondition for effective Parliamentary scrutiny.[26] While a distinction is commonly made in Parliamentary democracies between legislative functions on the one side and scrutiny and oversight functions on the other,[27] those may be seen as mutually reinforcing and partially overlapping when applied to the

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[22] According to the *ERTA* doctrine expressed in Case C-22/70, *Commission v Council,* 31 March 1971, ECLI:EU:C:1971:32, the EU may have exclusive power to conclude international agreements in matters on which it has acted internally. See eg M. Chamon, 'Implied exclusive powers in the ECJ'S post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine' 55 *Common Market Law Review* 2018, 1101-1141.

[23] E. Fahey, 'Hyper-legalisation and de-legalisation in the AFSJ: on contradictions in EU external migration law' in S. Carrera *et al.* (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Cheltenham: Edward Elgar Publishing 2019), at 121-22.

[24] M. Bovens *et al.*, 'The Quest for Legitimacy and Accountability in EU Governance,' in M. Bovens *et al.* (eds.), *The Real World of EU Accountability* (Oxford: Oxford University Press 2010), at 35, 39; J. Müller Gómez *et al.*, 'The European Parliament and the European Council: A Shift in the Balance of Power?' in O. Costa (ed.), *The European Parliament in times of EU crisis. Dynamics and Transformations* (Cham: Palgrave MacMillan 2019), at 56-58; Poptcheva 2019, at 26-30.

[25] Bovens *et al.* 2010, at 38.

[26] G. J. Brandsma, 'The effect of information on oversight: the European Parliament's response to increasing information on comitology decision-making' 78 *International Review of Administrative Sciences* 2012*,* 74–92; N. Font and I. Pérez-Durán, 'The information phase of accountability: The role of management boards in European Union agencies', *International Review of Administrative Sciences* 2020, 1-17.

[27] Poptcheva 2019, at 26.

European Parliament's role in external action. If scrutiny instruments are prevalently used to refer to the implementation phase of law and policy,[28] as an external check on executive discretion, the role of the Parliament in international agreements – which includes a right to information and a right to consent but no formally recognised role in the negotiations – de facto implies an extension of Parliamentary scrutiny activities to the whole (or at least most of the) policy cycle.[29]

The Parliament has an explicit prerogative to be informed about formal international agreements; according to Article 218(10), it 'shall be immediately and fully informed at all stages of the procedure'.[30] The Court of Justice of the EU (CJEU) has clarified that the obligation to inform the Parliament is broad and extends to all stages of the procedure, including (but not limited to) 'the authorization to open negotiations, the definition of the negotiating directives, the nomination of the Union negotiator and, in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, where necessary, the decision on the provisional application of the agreement before its entry into force and the conclusion of the agreement.'[31] The obligation is general and not associated with a particular executive institution.[32] In practice, the obligation is more relevant in the relations between the Parliament and Commission because of the Commission's prominent role in negotiating international agreements. Furthermore, a publication requirement applies to formal agreements: according to Art 297 TFEU, legislative and non-legislative acts shall be published in the Official Journal of the European Union. Although the extent to which transparency really increases accountability can be debated, publication can be seen to contribute to transparency and to allow public debate. In readmission, during the negotiations of the first readmission agreement under the new consent procedure, the Commission 'committed to regularly inform the European Parliament about all the concluded EU readmission agreements... [and i]n particular, ...[to] report every 6 months to the Parlia-

[28] Poptcheva 2019; Brandsma 2012; Font and Pérez-Durán 2020.

[29] J. Santos Vara and R. Sancez-Tabernero 2019, 'An Introduction'.

[30] More extensively on Article 218 TFEU, see García Andrade 2019, at 117-119. See also Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), *OJ* [2013] L 274, 15.10.2013, which lays down the basic principles and minimum standards of security for protecting EU classified information (EUCI). Article 12 mentions interinstitutional agreements as creating a framework to share EU classified information. See Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, *OJ* [2014] C 95, 1.4.2014.

[31] Case C-263/14, *European Parliament v. Council of the European Union,* 14 June 2016, EU:C:2016:435, para 76; see also Case C-658/11, *Parliament v Council*, 24 June 2014, EU:C:2014:2025.

[32] See the Interinstitutional Agreement of 12 March 2014 between the Parliament and the Council, which specifically determines that it concerns international agreements which are concluded in accordance with Article 218 TFEU.

ment about the implementation of the EU readmission agreements, with particular reference to the ongoing work of the Joint Readmission Committees.'[33] When read together with Article 218(10) regulating access to information during the negotiations, the outcome is that the Parliament should be informed at both the negotiation and implementation stages of formal EU readmission agreements.[34] The Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) is the committee responsible for receiving information from the Commission on readmission policy.[35]

In readmission policy, the obligation to inform has translated in regular meetings and written correspondence between the Commission, represented by the Directorate-General for Migration and Home Affairs (DG HOME), and the Parliament, represented by the LIBE Committee. While it is difficult to judge the Parliament's actual level of access, scholars have noted that the Commission routinely informed the LIBE Committee regarding the state of affairs with all readmission agreements, as well as specific issues related to individual third countries and obstacles to implementation.[36] At the same time, as the Commission acknowledged itself in 2011, EU authorities are not able to provide information regarding what happens to third country nationals once they are returned, since there is no mechanism to monitor the post-readmission phase.[37]

The second element, Parliamentary prerogative to give its consent to the final agreement, implies that the Parliament is not only kept informed of a

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[33] Commission Declaration annexed to the Parliament's Recommendation on the proposal for a Council decision on the conclusion of the Agreement between the EU and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, P7_TA(2010)0323. Joint Readmission Committees (JRC) are bodies foreseen by readmission agreements that are tasked with overseeing the implementation of the agreement and promoting regular exchange amongst the EU, its Member States and the third country involved. The JRC comprises of European Commission officials, supported by Member States experts, as well as officials of the third country. While the EU concludes (EU) readmission agreements on behalf of the Union and its Member States, the actual implementation is carried out at the level of each Member State and the concerned third country. For more information, see J. P. Cassarino, 'Readmission Policy in the European Union', Study for the LIBE Committee, European Parliament (2010), PE 425.632, at 18-19.

[34] Cassarino 2010, at 18-19.

[35] As determined in Annex VI of the Rules of Procedure of the Parliament concerning the powers and responsibilities of standing committees, the LIBE Committee is responsible for legislation and democratic oversight related to the area of freedom, security and justice, which includes asylum and migration issues. The Committee also has responsibilities to look after the protection of human rights.

[36] Carrera recorded that, on 16 February 2016, the Commission discussed ongoing implementation of readmission cooperation with Pakistan quite in detail, moreover alluding to the fact that the JRC had 'agreed operational arrangements with Pakistan, including a number of concrete actions to deal with current obstacles.' At the same time, Carrera remarked that said operational arrangements remained confidential. See S. Carrera, 'Implementation of EU Readmission Agreements. Identity Determination, Dilemmas and the Blurring of Rights', Springer Briefs in Law (Springer Open 2016), at 17-18.

[37] Carrera 2016, at 55.

particular agreement negotiation but also has the opportunity to present its position and has the means to ensure such position is taken into account by the other institutions. Agreements are signed and concluded by Council Decisions in accordance with Articles 218(5) and (6) TFEU. The Parliament's consent must be obtained in instances listed in Article 218(6)(a), including 'agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.' Consequently,[38] the Parliament's consent must always be obtained when concluding formal readmission agreements since Article 79(2)(c) TFEU provides that the ordinary legislative procedure applies to measures concerning 'illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation.' At the same time, these formal prerogatives, and particularly the need for the Commission and the Council to secure the Parliament's consent, provide the former with significant leverage when it comes to ensuring Parliamentary priorities are duly considered.

The Parliament may also ask for an ex ante review by the CJEU concerning readmission agreements. According to Article 218(11) TFEU, Member States and EU institutions, including the Parliament, 'may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.' For formal readmission agreements, it is easy to determine which institution an agreement can be attributed to. Furthermore, the Parliament can ask the CJEU to review a readmission agreement afterwards. Article 263 TFEU, which regulates the ex-post review of acts intended to produce legal effects, provides that the CJEU has 'jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.'

In trade, in practice, the Parliament's formal right of ratification has increasingly translated into influence on the content of international agreements.[39] In readmission policy, more than half (11) of the 18 formal readmission agreements so far concluded by the EU were negotiated under the pre-Lisbon procedure (consultation). At the same time, the Parliament's role in shaping the content of the agreements seem to have been less affected by the change in procedure. On the one hand, the Parliament was able to exercise some influence on the text of readmission agreements even before it acquired its right of ratification. For example, Trauner and Kruse found that the Parliament, with the support of civil society, was instrumental in the gradual development of non-affection clauses towards a more specific formulation that explicitly refers to several

[38] The other option in Article 218 is consultation, but it is not applicable for formal readmission agreements, as explained here.

[39] Héritier *et al.* 2019, at 151-155; 163-164.

refugee law and human rights law instruments.[40] On the other hand, perhaps because migration has since become more politicised within the Parliament itself,[41] it appears that the Parliament has not been nearly as influential in readmission as in trade.[42]

Overall, this section highlighted two important aspects. First, as a result of the process of constitutionalisation and legalisation between the late 1990s and the Lisbon Treaty, readmission policy has been firmly brought in the realm of EU (shared) competences and conducted by means of formal international agreements. Although Member States continue to pursue their own readmission policy, including via non-binding arrangements, this process of harmonisation and legal codification should be seen as a positive development, particularly from a rule of law perspective. Secondly, the gradual empowerment of the European Parliament in this field has arguably increased the transparency, accountability and democratic legitimacy of EU institutions in readmission policy.[43] Involving the Parliament is arguably all the more important in what remains a sensitive policy area with important fundamental rights implications. The next section focuses on how the development of readmission arrangements has upset this balance.

3. Parliamentary scrutiny and influence in informal readmission arrangements

EU external migration policy does not consist of formal readmission agreements only. Researchers have in fact observed an increasing reliance on non-binding readmission arrangements. Between 2016 and 2021, the EU has concluded arrangements with the following countries: the *Joint Way Forward with Afghanistan* (2016, renewed in 2021 as the *Joint Declaration on Migration Cooperation*), the *Standard Operating Procedures* with Mali (2016, then retracted) and with Bangladesh (2017), as well as *Admission Procedures* with Ethiopia (2018), the *Good Practices* with Gambia (2018) and Guinea (2017) and the *Joint Document on Identification Procedures* with Ivory Coast (2018).[44] Such

[40] F. Trauner and I. Kruse, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?' 10 *European Journal of Migration and Law* 2008, 411-438, at 430; Eisele 2019, at 138.

[41] T. Strik, 'The European Parliament: From a Human Rights Watchdog to a Responsible Decision Maker?' in P. E. Minderhoud et al. (eds.), *Caught In Between Borders: Citizens, Migrants and Humans. Liber Amicorum in honour of prof. dr. Elspeth Guild* (Tilburg: Wolf Legal Publishers 2019), 279-290, at 287.

[42] We could not find literature referring to the post-Lisbon period specifically discussing the role of the Parliament in influencing the texts of readmission agreements.

[43] J. Santos Vara and R. Sanchez-Tabernero, 'An Introduction' (2019), at 2-6.

[44] The full names of the readmission arrangements, including (some of) the corresponding documents in the register of the Council of the European Union (where we could locate them), are the following: Joint Way Forward with Afghanistan on migration issues (JFW); Joint Declaration on Migration Cooperation between Afghanistan and the EU (ST 5223/21 ADD 1) (Joint EU-Afghanistan Declaration); Draft Standard Oper-

arrangements share the objective of readmission agreements and include several similar provisions, particularly regarding readmission procedures (commitments of the parties regarding issuance of travel documents, means of evidence related to nationality, transfer modalities and costs, implementation and monitoring mechanisms).[45] At the same time, there are some remarkable differences.[46] First, readmission agreements are reciprocal and establish

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ating Procedures between the EU and the Republic of Mali for the identification and return of persons without an authorisation to stay (ST 15050 2016 INIT; since retracted) (EU-Mali SOP); Good practices for the efficient operation of the return procedure, concluded between the European Union and Guinea (ST 11428 2017 INIT) (EU-Guinea Good Practices); EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, concluded between the European Union and Bangladesh (ST 11951 2017 INIT) (EU-Bangladesh SOP); Admission procedures for the return of Ethiopians from European Union Member States, concluded between the European Union and Ethiopia (ST 15762 2017 REV 2) (EU-Ethiopia Admission Procedures); Good practices between the Government of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorisation to stay (ST 8570 2018 INIT) (EU-Gambia Good Practices); Joint document of the Government of Côte d'Ivoire and the European Union on the procedures for identification and readmission of migrants presumed to be Ivorian nationals staying irregularly in the European Union, concluded between the European Union and Ivory Coast (ST 10600 2018 INIT) (EU-Ivory Coast Joint Document).

[45] This obligation is part of all readmission agreements concluded since 2010. See for example: Articles 3, 7-9, 11-12, 16, 19-20, Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorization OJ L [2020] 181, 9.6.2020 (EU-Belarus Agreement)*;* compare with the provisions included in the EU-Bangladesh SOP, at 2-5.

[46] For this analysis we analysed the following formal readmission agreements: Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, *OJ* [2010] L 287, 4.11.2010 (EU-Pakistan Agreement); Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, *OJ* [2011] L 52, 25.2.2011 (EU-Georgia Agreement); Agreement between the European Union and the Republic of Cape Verde on the readmission of persons residing without authorisation, *OJ* [2013] L 282, 24.10.2013 (EU-Cape Verde Agreement)*;* Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation, *OJ* [2013] L 289, 31.10.2013 (EU-Armenia Agreement); Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation, *OJ* [2014] L 128, 30.4.2014; Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation *OJ* [2014] L 134, 7.5.2014 (EU-Turkey Agreement); EU-Belarus Agreement. While readmission agreements are easily accessible, readmission arrangements are generally confidential and – with the exception of the JFW and EU-Bangladesh SOP – have not been publicly released. For this reason, we draw on those two arrangements as well as on other that were leaked to third parties (and consequently have been at some point in time publicly available). Those include: the EU-Mali SOP, the EU-Ethiopia Admission Procedures, the EU-Guinea Good Practices and the EU-Ivory Coast Joint Document. The EU-Gambia Good Practices were not included since we were not able to find any existing copy.

procedures for readmission which apply to both parties to the agreement.[47] In contrast, readmission arrangements are non-reciprocal and entail readmission commitments only for the third countries but not for the Union.[48] Secondly, readmission agreements generally include a clause which obliges parties to readmit third country nationals who have entered the territory of the other party via their own territory.[49] Readmission arrangements either focus exclusively on readmission of own nationals or leave the issue of admitting third country nationals unspecified.[50] Thirdly, while readmission agreements take precedence over any other bilateral agreement or arrangement concluded by Member States with the same third country, (EU) arrangements do not prevent efforts at Member State level.[51] Fourthly, unlike readmission agreements, the parties explicitly signal the non-binding character of arrangements and acknowledge that they do not produce additional rights, responsibilities or legal obligations.[52] Fifthly, partly as a result of the latter, arrangements do not include similar commitments to respect international law as formal agreements.[53]

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[47] See the Preamble of the EU-Turkey Agreement, which states the desire 'to establish, by means of this Agreement and on the basis of reciprocity, effective and swift procedures for the identification and safe and orderly return of persons,' at 1. Article 3 of the same text regulates readmission obligations of own nationals of Turkey while Article 5 regulates readmission obligations by the European Union.

[48] For example, the EU-Ethiopia arrangement is entitled 'Admission procedures for the return of *Ethiopians* from European Union Member States' [italics added].

[49] See for example the EU-Pakistan Agreement, Article 3.

[50] The EU-Ivory Coast Joint Document in its first lines reads: 'The purpose of this document is to establish procedures to confirm the nationality of irregular migrants presumed to be Ivorian nationals (not holding a valid passport) and facilitate their return within a reasonable period of time.' The EU-Bangladesh SOP concern 'the return of persons who have no legal basis stay in the territory of the requesting country,' at 2.

[51] See the EU-Pakistan Agreement, Article 18, for an example of a superseding clause. The JFW with Afghanistan instead explicitly states that the document 'cannot be interpreted as superseding the existing or preventing the conclusion of future bilateral agreements between the EU Member States or Afghanistan,' at 1.

[52] For example, the EU-Ivory Coast Joint Document states: 'these best practices will not create new legal obligations under international law,' at 1; the EU-Ethiopia Admission Procedures, in its section I, indicate that the 'Admission procedure is not an international agreement and is not intended to create legal rights or obligations under domestic or international law,' at 1.

[53] All readmission agreements concluded since 2010 include reference in their Preambles to the parties' obligations under international law as well as an article on consistency of the agreement with other international obligations, including data protection. See for example Article 18(1) of the EU-Armenia Agreement, which lists 'the international conventions determining the State responsible for examining applications for asylum lodged, international conventions on extradition and transit, multilateral international conventions and agreements on the readmission of foreign nationals;' see also Article 17 of the same agreement regarding safeguards on data protection. The agreements with Armenia, Azerbaijan and Belarus also include a 'fundamental principles' article, which lists several specific conventions and international law instruments the parties commit to observe in the implementation of the agreement, such as the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights and

While these omissions may be considered unproblematic in light of the non-binding character of these arrangements, the lack of explicit safeguards regarding the rights of returnees and data protection are worrisome particularly as some of these arrangements were concluded with countries with a sketchy track record of respecting human rights. Moreover, while the EU has traditionally struggled to make third countries respect formal readmission agreements, some non-binding arrangements may potentially achieve a higher rate of compliance as they are accompanied by support packages that include return and reintegration programs, technical assistance and funding, and development aid.[54] Finally, the non-binding character of those arrangements in practice may also be questioned as readmission cooperation is now directly linked to conditions governing the issuance of EU visa to nationals of third countries under Article 25(a) of the revised Visa Code of June 2019.[55] Accordingly, the Com-

Fundamental Freedoms and its protocols, the 1966 International Covenant on Civil and Political Rights, the 1984 UN Convention Against Torture, the 1951 Geneva Convention relating to the Status of Refugees and its Protocol of 1967 – for an example, see Article 2 of the EU-Azerbaijan Agreement. Readmission arrangements do not include any reference to international law obligations with the exception of the JFW with Afghanistan (and its successor, the EU-Afghanistan Joint Declaration); the JFW states in the introduction that 'in their cooperation under this declaration, the EU and Afghanistan remain committed to all their international obligations,' thereby referencing the 1951 Refugee Convention and 1967 Protocol, the International Covenant on Civil and Political rights and the EU Charter on Fundamental Rights and the Universal Declaration of Human Rights, and committing to 'respecting the safety, dignity and human rights of irregular migrants subject to a return and readmission procedure,' at 1. The only other reference to similar commitments is present in the EU-Ethiopia Admission Procedures, where the parties state in the introduction that 'this Procedure will be applied to voluntary and non-voluntary returns in full compliance with the human rights of Ethiopian nationals provided under relevant international instruments,' at 1. No arrangements include any provisions regarding data protection.

[54] This the case, in varied forms, for the arrangements with Afghanistan, Bangladesh, Ethiopia and Guinea, which mention EU technical assistance and financial support regarding return and re-integration of returnees. Arrangements are also often linked to broader support packages or trade agreements, which include chapters on migration cooperation. More in general, regardless of the legal status of the agreement negotiated, the EU has used a growing range of incentives and penalties (development funding, visa facilitation, humanitarian aid, etc.) to reward compliance or punish non-compliance on readmission cooperation by third countries. See T. Strik, 'Migration deals and responsibility sharing: can the two go together?' in S. Carrera *et al.* (eds.), *Constitutionalizing the External Dimensions of EU Migration Policies in Times of Crisis* (Cheltenham: Edward Elgar Publishing 2019) 57-76; V. Moreno-Lax, 'The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process?' in T. Gammeltoft-Hansen *et al.*, *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration* Raoul Wallenberg Institute of Human Rights and Humanitarian Law Working Paper 2017, at 17-26.

[55] Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), *OJ* [2019] L 188/25, 12.7.2019.

mission may now propose the application of more restrictive visa rules (documents required, visa fees exemptions, time limits, type of visa and visa time duration) for third countries who, according to the Commission's assessment, do not cooperate on readmission in a satisfactory manner. Since 2019, this mechanism has already been proposed and implemented against countries who concluded readmission arrangements with the EU.[56] It can therefore be argued that, considering the growing relevance of informal arrangements as a tool of EU external policy, having explicit safeguards in place would be all the more important.

The reliance on international soft law[57] in external migration policy is not a completely new phenomenon as it has been widely used by Member States and predates the Europeanisation of the field.[58] However, informalisation of readmission cooperation with third countries at EU level is a rather recent development. Between 2015 and 2016, the Commission first emphasised the need to reconsider its approach on readmission[59] and then suggested prioritising readmission cooperation with main countries of origin of irregular migrants including, among others, Afghanistan, Bangladesh and Sub-Saharan African countries.[60] In 2016, in its proposal for the establishment of a Migration Partnership Framework (MPF), the Commission suggested that the MPF could be used as a (political) framework for readmission cooperation with several Sub-Saharan countries, even in the absence of a formal readmission agreement.[61] The existence of 'practical cooperation [with third countries] through operational tools and instruments such as standard operational procedures' was acknowledged by the Commission in its 2017 action plan on returns,[62] with

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[56] For example, the Commission proposed in July 2021 to trigger this mechanism with respect to Bangladesh. See Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Bangladesh, COM/2021/412 final. In October 2021, the Council approved the use of this mechanism against Gambia, once again for failure to comply with readmitting its own nationals in a satisfactory manner. See Council Implementing Decision (EU) 2021/1781 of 7 October 2021 on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia.

[57] On soft law in international law and EU external relations, see eg A. Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' 1 *Yearbook of European Law* 2020, 569-601.

[58] J. P. Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' 42 *The International Spectator* 2007, 179-196.

[59] Commission, 'Communication on a European Agenda on Migration', COM (2015) 240 final, at 10; see also Commission, 'Communication on an EU action plan on return', COM (2015) 453 final.

[60] Commission, 'Communication on the state of play of implementation of the priority actions under the European Agenda on Migration', COM (2016) 85 final, at 17-19.

[61] Commission, 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration', COM (2016) 385 final, at 2.

[62] Commission, 'Communication on a more effective return policy in the European Union – a renewed action plan', COM (2017) 200 final, at 12.

progress reports on the implementation of the MPF providing regular updates on the evolution of country-by-country cooperation.[63] More recent proposals by the Commission, linked to the New Pact on Migration and Asylum unveiled in September 2020,[64] suggest that informal readmission arrangements are likely to remain in the Union's policy toolbox, as the Commission considers that readmission cooperation with third countries 'may be done through the use of different instruments.'[65]

This trend is all the more worrying since those arrangements have not been concluded to either prepare or implement formal agreements but rather to replace them as instruments governing readmission cooperation.[66] This paper does not focus on the reasons for relying on soft law in external migration policy, but previous research has suggested that while informal arrangements may appear attractive because of reasons such as flexibility and low cost, informalisation has also provided the EU executive with means to escape Treaty constraints and weaken the role of the Parliament and the Court.[67]

As informal readmission arrangements are not considered formal agreements, Article 218 TFEU does not apply to them, as discussed in previous research.[68] Although internal soft law acts and the procedure leading to their adoption are addressed in Article 288 TFEU, there is no reference to international soft law in the EU treaties. CJEU case law has provided some guidance on the role of institutions in concluding non-binding international agreements, including that the Commission cannot alone sign them without the Council's

[63] See four Reports from the Commission to the European Parliament, the European Council and the Council – progress report on the Partnership Framework with third countries under the European Agenda on Migration: COM(2016) 700 final (18.10.2016); COM(2016) 960 final (14.12.2016); COM(2017) 205 final (2.3.2017); COM(2017) 350 final (13.6.2017).

[64] Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity', press release (23 September 2020), available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706>.

[65] Commission, 'Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy', COM(2021) 56 final, at 7.

[66] Ott 2020.

[67] This is not to say that readmission arrangements *literally* replaced formal agreements, since in all situations analysed in this paper (i.e. cooperation with Afghanistan, Bangladesh, Ethiopia, the Gambia, Guinea Conakry, Ivory Coast, Mali) no readmission agreement had been previously signed. At the same time, in those cases, readmission arrangements replaced formal agreement as the instrument of choice of the EU. This policy choice was not justified as a temporary measure. Already in 2016, when presenting new policy tools designed to increase readmission cooperation with Sub-Saharan countries, the Commission stated that 'the paramount priority…[should be] to achieve fast and operational returns and not necessarily formal readmission agreements.' Commission, 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration', COM (2016) 385 final, at 2. On the categorisation of soft law as a tool to prepare, implement or replace hard law, see Ott 2020.

[68] See eg Wessel 2021, at 84.

approval and that the principle of institutional balance has to be respected.[69] In addition to the principle of institutional balance, constitutional principles of conferral, transparency and rule of law should equally be respected.[70] However, the Court has so far not applied a similar reasoning to the participation of the European Parliament in the negotiation and conclusion of soft law agreements – from which it remains formally excluded. There is therefore a tension between the Parliament's prerogatives enhanced by the Lisbon Treaty and the practice of concluding informal arrangements without the Parliament's participation.[71]

The Parliament's weak position is also reflected in the area of access to information concerning informal arrangements, which are often not even published. As Wessel and Ott have noted, informal international arrangements fall outside the scope of the interinstitutional agreements (IIAs) which regulate the cooperation between institutions and include provisions on access to information.[72] The exclusion is reflected, for instance, in Article 1(b) of the Interinstitutional Agreement of 12 March 2014 concerning the scope of the agreement, which includes 'international agreements on which the European Parliament is to be consulted or is required to give its consent pursuant to Article 218(6) TFEU.' The Parliament and the Commission have concluded a Framework Agreement which also contains provisions on the flow of information between the two institutions, but this agreement, too, concerns formal international agreements and excludes international soft law.[73] Concerning informal arrangements, the Commission acknowledged in its 2011 Vademecum that '[w]hile there is no legal obligation to inform the European Parliament, it is to be examined on a case-by-case level whether this is appropriate.'[74] Ott has argued that the Parliament's information prerogative should be recognised by a new IIA.[75] However, even if there was an applicable IIA, the IIAs framework has been criticised for granting access to a very limited group of MEPs who can have a look at the documents but without a possibility to obtain copies or discuss them afterwards. Abazi has argued that the system cannot be thought of as granting access to the Parliament as an institution. It is rather a 'closed oversight' which lacks essential elements of parliamentary scrutiny, most importantly public delibera-

[69] See García Andrade 2019, at 119-121; for case law, see Case C-233/02, *France v. Commission*, 23 March 2004, ECLI:EU:C:2004:173, para 40; Case C-660/13, *Council v. Commission (Swiss MoU)*, 28 July 2016, ECLI:EU:C:2016:616. According to the principle of institutional balance enshrined in Article 13(2) TEU, each institution must 'act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.

[70] Ott 2020, at 12.

[71] García Andrade 2019.

[72] Wessel 2021, at 84; Ott 2020, at 17-18.

[73] Framework Agreement on relations between the European Parliament and the European Commission, *OJ* [2010] L 304/47, 20.11.2010.

[74] Commission, 'Vademecum on the External Action of the European Union', SEC(2011)881/3, at 53.

[75] Ott 2020, at 17-18 and 23-24.

tion and lack of disclosing outcomes of the oversight process.[76] Overall, it is clear that the current legal framework does not provide the Parliament with effective tools to argue that it has a right to be informed and to access documents concerning informal international agreements. The Parliament is then left with Regulation 1049/01 (the Transparency Regulation)[77] concerning public access to Parliament, Council and Commission documents, the only legislative act regarding access to classified information,[78] which does not provide the Parliament an elevated access to documents compared to the general public.

Regarding readmission arrangements, there are therefore no formal obligations on the side of the executive (namely the Commission) to report to the Parliament regarding progress on negotiation and implementation of informal readmission arrangements. The Parliament's scrutiny powers are therefore much more limited under readmission soft law. Similarly, Parliamentary influence on the content of readmission arrangements is expected to be limited given that no consent or even a consultation procedure is foreseen for the adoption of such acts. García Andrade has suggested with reference to CJEU case law that (at least) the obligation to inform the Parliament of Article 218(10) TFEU should be understood broadly so that it would cover soft law, too.[79] However, whether the actors seem to reflect such an understanding with their behaviour is an empirical question that we will explore based on our data, together with the broader questions of Parliamentary scrutiny and influence.

4. **Methodology**

For this paper, we defined an EU informal readmission arrangement as an agreement on readmission negotiated and ultimately agreed upon by the EU and a third country but outside of the procedure laid out in the Treaties for formal readmission agreements (see previous section). We thus considered the informal readmission arrangements fitting this definition that were concluded between the EU and the following countries and whose content was already examined in the previous section: Ethiopia, Mali (later retracted), Ivory Coast, Gambia, Guinea, Bangladesh and Afghanistan.

In our data collection, we excluded the EU-Turkey statement as well as other types of 'informal' EU-third country cooperation on migration such as Mobility Partnerships (MPs), Common Agendas on Migration and Mobility (CAMMs), funding programs (e.g. EU Emergency Trust Fund for Africa, EUTF) or joint declarations not explicitly linked to readmission. We consider the EU-Turkey statement to be a *sui generis* case of informal arrangement because

[76] V. Abazi, 'European Parliamentary Oversight Behind Closed Doors' 31 *Cambridge Journal of International and Comparative Law* 2016, 31-49, at 43-44.

[77] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* [2001] L 145/43, 31.5.2001.

[78] Abazi 2016, at 35.

[79] García Andrade 2019, at 123.

of the institutional actors allegedly involved (heads of government of EU Member States but not the EU per se), its visibility in the public debate as well as the existence of case law by the Court of Justice which upheld the legitimacy of the decision-making process.[80] What moreover sets the Turkey case apart is that the informal arrangement was concluded after a formal readmission agreement was already in place. Regarding the other arrangements excluded, we consider them as more general policy frameworks for cooperation on migration issues and not specifically about readmission, and which do not necessarily have a formal legal counterpart.

The present paper draws on a preliminary data set of 149 policy and legal documents collected via the European Parliament document registry. Considering that the first readmission arrangement – the Joint Way Forward with Afghanistan (JWF) – dates back to 2016, we selected a time period wide enough to capture potential previous discussions (1 July 2014-31 March 2021). Besides using the full names of the agreements, we employed a combination of keywords that included various proxies for such arrangements.[81] Where searches led to agendas of Parliamentary meetings, we included the recordings in our analysis where available. When collecting data of Parliamentary actions, we included (where relevant and/or available) the following information: title of document, file name, type of action, main subject, specific reference to readmission arrangements, Parliamentary actor involved (including role, political group, etc.), characteristics of documents (draft, amendment, final, internal/external), and existence of any follow-up or effect recorded in other documents.

While we believe we were able to capture a significant amount of official Parliamentary activity on this topic, a few caveats are in order: our search relied exclusively on the Parliament registry and availability of documents in the public repository; internal or confidential documents and correspondence may be missing, as well as informal meetings and exchanges; likewise, minutes or records of 'in-camera' meetings, if they exist, did not appear in our search. In some cases, we learned of the existence of certain documents via their cross-reference in other documents that matched our search.[82] While we could still not locate such documents in the Parliament registry, we were able to retrieve some of them on websites to which they had been leaked, such as *Statewatch*. Finally, this paper reflects a focus on Parliamentary (formal) activity and consid-

[80] Joined Cases C-208/17 P to C-210/17 P, *NF and Others v European Council,* Order of the Court (First Chamber) of 12 September 2018.

[81] For example, 'readmission arrangements,' 'non-legally binding arrangements,' 'operational arrangements on readmission,' as well as more general selected keywords, including 'readmission agreements,' 'informalisation', 'soft law instruments' and others.

[82] This was the case, for example, of a legal opinion about informal arrangements commissioned to the Parliament legal service by the LIBE Committee, which was discussed in a committee debate and appeared in the meeting agenda, or of a correspondence between the LIBE Committee and the Commission's DG HOME on the state of play regarding formal and informal readmission agreements, which was referenced in several hearings included in our database.

ers the interaction with executive actors, primarily the Commission, only when the former was recorded by Parliamentary documents. More research would certainly be needed to complement Parliament's viewpoint with that of executive institutions.

5. Mapping the role of the European Parliament in readmission arrangements

Our data show that Parliament engaged on the issue of readmission arrangements by using a variety of actions and tools. The main actions recorded are the following: 1) questions for written answer; 2) commissioned research; 3) plenary debates and specialised exchanges of views and information; 4) request for a legal opinion; 5) non-legislative resolutions, including drafts, amendments and opinions; 6) legislative resolutions under the ordinary legislative procedure, including drafts, amendments and opinions; 7) legislative recommendations under the consent procedure, including drafts, amendments and opinions. Drawing on this typology of actions, we analysed their content and trajectory in order to assess the degree of Parliamentary scrutiny and policy influence in the realm of informal readmission policy.

5.1. *Access to information and scrutiny*

This section concerns the extent to which the Parliament was informed and/or able to gather information regarding the negotiation, conclusion and implementation of informal readmission arrangements. As the Parliament has not been an official party to the negotiation and conclusion of informal readmission arrangements, the information flow from the executive branch to the Parliament is expected to be limited.

As far as we could ascertain via our data, the Parliament was not systematically and proactively informed by EU executive actors of the negotiation, conclusion and implementation of the readmission arrangements examined in this paper. Several (publicly available) Council conclusions and Commission documents have, since at least 2016, touched upon plans for and progress over informal readmission arrangements with third countries. However, with the exception of the EU-Turkey Statement (not examined in this paper), of the JFW and the EU-Bangladesh SOP, the other readmission arrangements have not been made available to the public upon conclusion (see also section 3). Non-disclosure has been justified with respect to the highly sensitive nature of those arrangements, the consequences that publicity may have for the governments of third countries involved, and by the need for the EU institutions to protect their negotiating strategy for future negotiations.[83] Our data seem to indicate that the Parliament did not enjoy a wider access to information than

[83] We have submitted an access request to the Council for each of the readmission arrangements in question. All requests, some of which have already reached the confirmatory stage, have so far been denied on the above-mentioned grounds.

the general public did, particularly as MEPs admitted to learning about the negotiation, if not the actual conclusion of readmission arrangements with Ethiopia or Mali not from the Commission or the Council but via a publicly available leak[84] or an institutional press release.[85] Compared to the level of access of information enjoyed by the Parliament in the case of international agreements in other policy areas such as trade,[86] this seems a particular low level. At the same time, as discussed in previous sections, it is unclear to what extent the Parliament had access to confidential documents during the negotiations of readmission agreements.

This does not mean that the Parliament had no means to access information, including from executive actors, and to scrutinise the latter's actions. Our data show that the Parliament employed three main avenues: it relied on information provided by civil society as well as on internal and commissioned research; it submitted written questions to institutions of the EU executive, primarily the Commission; and exchanged views with the Commission, via written correspondence or during official hearings. While the depth and timeliness of the information provided may be questioned, as later discussed, the responses from the Commission signal the existence of an information exchange between the Parliament and at least one branch of the executive. This exchange will be discussed particularly in the context of specialised hearings. Moreover, when compared with the type and volume of information shared in the context of formal readmission agreements, the information flows appear similar. Those exchanges, where the Commission is required to justify its conduct, moreover signal that, notwithstanding the limitations, the Parliament has been able to de facto engage in partial scrutiny of informal arrangements.

5.1.1. *Information collected from third parties and research*

The Parliament does not exclusively rely on the executive for information on readmission arrangements, including their implementation. Information exchanges with interest groups and civil society are well-documented in the literature on the Parliament.[87] In our research we found instances where MEPs, in their written questions, explicitly referred to research reports produced by non-governmental organisations (NGOs) detailing potential human rights violations in the implementation of EU's readmission policy.[88] In another instance,

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[84] See P8_RE(2018)000956, Question for written answer E-000956/18 to the Commission by MEP Judith Sargentini (Verts/ALE), submitted on 15 February 2018.

[85] See P8_RE(2017)000151, Question for written answer E-000151/17 to the Commission (Vice-President/High Representative) by MEP Mario Borghezio (ENF), submitted on 12 January 2017.

[86] Héritier *et al.* 2019, at 164 and 166-167; Frennhoff Larsén 2020, at 1549-50.

[87] A. Crespy and L. Parks, 'The European Parliament and Civil Society,' in O. Costa (ed.), *The European Parliament in times of EU crisis. Dynamics and Transformations* (Cham: Palgrave MacMillan 2019), 203-223.

[88] MEP in 't Veld asked the Commission whether a monitoring mechanism had been set up to monitor return and reintegration of children returnees in Afghanistan. The question referenced a report by Save the Children, stating that 'their research

as mentioned above, an MEP explicitly referred to having accessed a leaked copy of the EU-Ethiopia informal readmission arrangement via the website Statewatch.[89] Likewise, media reports or publicly available statistics are routinely used by MEPs when preparing written questions.[90] Such reliance on external knowledge and expertise is also evident in the context of (public) Parliamentary events on readmission. Not only are NGO reports quoted and cited by MEPs during their interventions in public hearings, but NGO staff also collaborate with Parliamentarians to amplify the voice of civil society through joint events.[91] This knowledge, while certainly situated and of varying quality, provides the Parliament with insights and information that would have otherwise been more almost impossible to gather (information from the ground on the implementation of readmission policy) or more difficult to access via institutional channels (texts of the readmission arrangements).

Producing internal research is another important means at the disposal of the Parliament – and particularly its committees – to gather information regarding informal readmission arrangements. Briefings and analytical documents are regularly produced by the European Parliamentary Research Service (EPRS) for several purposes, including to keep track of legislative progress and monitor the activity of other EU institutions.[92] Between 2017 and 2021, readmission arrangements thus featured in several publications, usually in the

found that most of the children did not feel safe during the return process and that many of them returned alone or accompanied by the police ...[that] [a]lmost all children received little or no support on arrival and had no specific reintegration plan... [and that] [s]everal children even reported attempts to recruit them to commit violent acts.' P9_RE(2020)000585, Priority question for written answer P-000585/20 to the Commission by MEP Sophia in 't Veld (Renew), submitted on 31 January 2020.

[89] See P8_RE(2018)000956, Question for written answer E-000956/18 to the Commission by MEP Judith Sargentini (Verts/ALE), submitted on 15 February 2018; see also two additional questions submitted by MEP Sargentini on the same day, another one to the Commission (P8_RE(2018)000957) and one to the Council (P8_RE(2018)000958).

[90] Among others, see P8_RE(2019)000873, Question for written answer E-000873/19 to the Commission by MEPs Sergio Gaetano Cofferati (S&D) and Soraya Post (S&D), submitted on 15 February, 2019; P8_RE(2019)000340, Question for written answer E-000340/19 to the Commission by MEP Geoffroy Didier (PPE), submitted on 23 January, 2019; P8_RE(2018)001626, Question for written answer E-001626/18 to the Commission by MEP Nadine Morano (PPE), submitted on 19 March, 2018; P9_RE(2020)003222, Question for written answer E-003222/20 to the Commission by MEP Dominique Bilde (ID), submitted on 27 May, 2020.

[91] A recent example, though not included in our database, is the online event organised by the European Council on Refugees and Exiles (ECRE) and co-hosted by MEP Clare Daly, GUE/NGL and MEP Erik Marquardt, Greens/EFA, which took place on September 28, 2020. See 'Online-meeting: The prolongation of the Joint Way Forward on migration issues between the EU and Afghanistan,' available at <https://www.ecre.org/online-meeting-the-prolongation-of-the-joint-way-forward-on-migration-issues-between-the-eu-and-afghanistan/>.

[92] Eg EPRS_ATA(2019)635555, Briefing on EU-Afghanistan Cooperation Agreement, 2019; EPRS_BRI(2019)635542, EU policies – Delivering for citizens: The

context of external action and cooperation with (select) third countries, migration policy in general, or return and readmission policy. Research and studies, whether commissioned to the EPRS or to external experts, tend to provide in-depth analysis and new evidence to inform Parliamentary action on particular policy issues. Those studies are usually prepared at the explicit request of a Parliamentary Committee – in this case, the LIBE Committee and the Subcommittee on Human Rights (DROI). Examples of relevant EPRS studies include the *European Implementation Assessment of the Return Directive* 2008/115/EC,[93] or *Substitute Impact Assessment of the proposed Return Directive (recast).*[94] Those studies link implementation of the current Return Directive and its ongoing recast procedure to the evolution of readmission policy, signalling, for example, the human rights implications or the challenges of democratic scrutiny with respect to readmission arrangements.

Such studies are therefore relevant for at least two reasons. On the one hand, they provide factual information and signal to MEPs potentially problematic issues and policy areas that need further scrutiny. While readmission policy effectiveness is often highlighted as an important factor, so are safeguarding and respecting fundamental rights and preserving Parliament's competences and prerogatives in the given field. On the other hand, as shown above, those studies provide the basis for further Parliamentary (non)legislative action, with a view to influencing readmission policy content.[95]

5.1.2. *Written questions*

A question for written answer is one of the most common instruments MEPs use to gather information from other EU institutions and scrutinise the latter's actions. According to the Rules of Procedure of the Parliament, MEPs, political groups and committees of the Parliament can present questions for written answer to the President of the European Council, the Council, the Commission or the Vice-President of the Commission/ High Representative of the Union for Foreign Affairs and Security Policy (rule 138).[96] Overall, we recorded 39 written

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migration issue (2019); EPRS_BRI(2019)637907 BRIEFING. Data on returns of irregular migrants (2019).

[93] EPRS_STU(2020)642840, STUDY. European Implementation Assessment. The Return Directive 2008/115/EC (2020).

[94] EPRS_STU(2019)631727, STUDY. Substitute impact assessment. The proposed Return Directive (recast) (2019).

[95] The study on the return directive was translated into P9_TA(2020)0362, European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)), while the study on EU external migration policy and protection of human rights constituted the basis for a resolution drafted by the AFET Committee and approved as recently as March 17, 2021, see AFET_OJ(2021)03-17_1.

[96] There are no requirements regarding the content of the questions, but they must clearly specify their addressee and 'fall exclusively within the limits of the competences of the addressee, as laid down in the relevant Treaties or in legal acts of the Union, or within its sphere of activity'. They also have to 'be of general interest' (see Annex III of the Rules of Procedure of the Parliament).

questions by MEPs touching upon readmission arrangements and readmission cooperation. The vast majority were addressed to the Commission – in the person of the Commissioner for Migration, Home Affairs – and (to a lesser extent) to the High Representative of the Union for Foreign Affairs and Security Policy (HR). In a few cases, questions were also addressed to the Council.[97]

We found three typologies of questions. The first type included questions touching upon policy measures undertaken by the EU to cooperate with third countries on readmission. Some questions linked readmission to management of irregular migration and border controls, disbursement of development funding or humanitarian assistance.[98] Other questions asked for a more 'technical' overview of the state of progress of readmission policy, including number of agreements signed, progress on ongoing negotiations, cooperation in place with specific countries, and so forth.[99] A second type expresses human rights concerns about conclusion and implementation of readmission arrangements.[100] A third type of question focuses on specific aspects of given readmission arrangements and particularly on the lack of involvement of the Parliament in concluding and monitoring them.[101] In early 2018, MEP Sargentini explicitly asked why the Parliament was not informed of the conclusion of certain arrangements and why the arrangements were concluded outside of the Treaty

[97] P8_RE(2018)000958, Question for written answer E-000958/18 to the Council by Judith Sargentini (Verts/ALE), 15 February 2018.

[98] Questions from the right-wing political spectrum – the European People's Party (EPP), Europe of Nations and Freedom Group (ENF), the European Conservatives and Reformists (ECR), Identity and Democracy (ID) – often referred to readmission policy in the context of enhancing migration control (e.g. low return rates, failure to properly implement existing readmission agreements, need for the Commission to expand readmission cooperation no matter the form). For some examples: P8_RE(2017)000629, Question for written answer E-000629/17 to the Commission by Stanislav Polčák (PPE): Readmission agreements, 31 January 2017; P8_RE(2017)000151, Question for written answer E-000151/17 to the Commission (Vice-President/High Representative) by Mario Borghezio (ENF): EU-Mali agreement, 12 January 2017; P8_RE(2017)004360, Question for written answer E-004360/17 to the Commission by Lorenzo Fontana (ENF): State of play as regards the readmission and relocation of migrants, 29 June 2017; P9_RE(2020)003222, Question for written answer E-003222/20 to the Commission Dominique Bilde (ID): Repatriation of Afghan migrants from the European Union, 29 May 2020.

[99] P8_RE(2016)004210, Question for written answer E-004210/16 to the Commission by Rachida Dati (PPE): New mandates for conclusion of readmission agreements, 25 May 2016; P8_RE(2016)001497, Question for written answer E-001497/16 to the Commission Mariya Gabriel (PPE): State of play of readmission agreements, 25 May 2016.

[100] P9_RE(2020)000585, Priority question for written answer P-000585/20 to the Commission by Sophia in 't Veld (Renew): Joint Way Forward with Afghanistan, 31 January 2020. See also P8_RE(2017)006551, Question for written answer E-006551/17 to the Commission João Ferreira (GUE/NGL): Afghans deported from EU countries, 18 October 2017.

[101] P8_RE(2016)009623, Question for written answer by MEP Dalli (S&D): Afghan migration, 9 December 2016.

framework.[102] While some questions seem well informed about the readmission policy, others are vague and general in scope and therefore not conducive to receiving informative answers. Perhaps because of the broader publicity of the negotiations and the visibility of the agreement – which was also published by the European External Action Service (EEAS) after its conclusion – questions about the JWF appear better informed.

The level of specificity of the Commission's replies likewise varies a lot.[103] Several replies are very broad and general, providing information that can be easily found on the Commission's website. In other cases, following specific inquiries from MEPs on the implementation of the JWF, the Commission responded with detailed figures regarding number of repatriation flights, Member States of origin of returnees, airports of departure of charter flights and demographic characteristics of returnees.[104] In other cases, the HR volunteered information on readmission arrangements without explicit prior request, such as acknowledging the conclusion of an arrangement with Bangladesh in response to a broader question.[105] However, it is difficult to argue that the Commission or the EEAS has disclosed new information via this process. Responses reference information already included in Commission communications, European Council conclusions or action plans.[106]

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[102] See three questions for written answer E-000956/18 to the Commission by Judith Sargentini (Verts/ALE): P8_RE(2018)000956, Agreement between the EU and Ethiopia on return procedures (I), 15 February 2018; P8_RE(2018)000957, Agreement between the EU and Ethiopia on return procedures (II); P8_RE(2018)000958, Agreement between the EU and Ethiopia on return procedures III.

[103] P8_RE(2017)007189, Question for written answer E-007189/17 by MEP Sargentini (Verts/ALE) and others: Status of implementation of the EU Joint Way Forward on migration between Afghanistan and the EU: returns to Afghanistan, 22 November 2017, which received a detailed answer; P9_RE(2019)002577, Question for written answer by MEP Guillaume (S&D): Joint Way Forward with Afghanistan, 29 August 2019. The Commission referred the latter question to Frontex, but it is unclear whether Frontex eventually answered it.

[104] P8_RE(2017)007189, Question for written answer E-007189/17 by MEP Sargentini and others: Status of implementation of the EU Joint Way Forward on migration between Afghanistan and the EU: returns to Afghanistan, 22 November 2017.

[105] P8_RE(2017)005287, Question for written answer E-005287/17 to the Commission (Vice-President/High Representative) by MEP Henkel (ECR): The rapid increase in the number of Bangladeshi immigrants, 28 August 2017.

[106] For example, on 17 October 2017, in response to a question about returning irregular migrants from Italy to countries of origin, Commissioner Avramopoulos already noted that, 'as reiterated in the action plan launched on 4 July 2017 to support Italy the Commission is now striving to agree with its partners well-functioning readmission *arrangements* [emphasis added] for returns from the EU'. P8_RE(2017)004360, Question for written answer E-004360/17 to the Commission by MEP Fontana (ENF): State of play as regards the readmission and relocation of migrants, 29 June 2017. In a more recent response (March 2021), the Commission stated that, in the context of the New Pact on Migration and Asylum, it 'will examine possibilities for new Readmission Agreements and Arrangements with key countries of origin or transit, and stands ready to mobilise relevant policies, tools and instruments to make readmission effective.' See

Where questions are more specific and arguably politically more sensitive, responses sometimes seem deliberately evasive. The Commission rebuked arguments presented in questions for written and oral answer that informal arrangements would fall under the framework set by Articles 79(3) and 218 TFEU for obtaining the Parliament's consent and informing it when international agreements are concluded.[107] When asked about why the Parliament was excluded from the negotiations of certain international arrangements, the Commission replied that the procedure of Article 218 TFEU only applies to legally binding international agreements, but without explaining why such arrangement was chosen in the first place.[108] Elsewhere, asked on readmission cooperation with Mali, the Commission responded that it has 'no signed document with Mali' – a peculiar statement given that the EU-Mali SOP had already been agreed at the time of the answer.[109] Adding to the confusion, the HR elsewhere stated that, while no formal agreement had been signed, 'the Dutch Minister for Foreign Affairs [on behalf of the EU] and the Malian authorities adopted a Communiqué reflecting our joint commitment to work together to ensure that migration is managed in a coordinated, sustainable and responsible manner.'[110]

Written questions, therefore, appear to hold limited value in terms of accessing new and or valuable information, especially when it comes to disclosing aspects of the policy cycle relating to negotiation and conclusion of the arrangements. Questions related to implementation, including those alleging breach of fundamental rights, are treated more extensively and less evasively by the Commission. Nonetheless, written questions oblige the Commission, as well as other EU institutions to justify their current conduct on readmission policy.

5.1.3. *Specialised hearings in standing committees and correspondence*

Specialised hearings in standing committees (and sometimes plenary debates) are a very visible avenue for MEPs to gather information about readmission

P9_RE(2020)006922, Question for written answer E-006922/2020 to the Commission by MEP Lagos (NI), Answer given by Ms Johansson on behalf of the European Commission: Somalis 'land' at EU borders with Turkey's blessing.

[107] Eg P8_QO(2016)000123, Question for oral answer O-000123/2016 to the Commission: EU-Afghanistan Joint Way Forward on migration issues: Role and consultation of the European Parliament, 13 October 2016; P8_RE(2018)000956, Question for written answer E-000956/18 to the Commission by MEP Sargentini (Verts/ALE): Agreement between the EU and Ethiopia on return procedures (I), 15 February 2018.

[108] P8_RE(2016)009623, Question for written answer P-009623/16 to the Commission by MEP Dalli (S&D): Afghan migration, 19 December 2016; Answer given by Vice-President Mogherini on behalf of the Commission, 15 February 2017.

[109] P8_RE(2017)000739, Question for written answer E-000739/17 by MEP Guzmán, 1 February 2017: Informal agreements and voluntary returns; Answer given by Mr Avramopoulos on behalf of the Commission, 21 April 2017.

[110] P8_RE(2017)000151, Question for written answer E-000151/17 to the Commission (Vice-President/High Representative) by MEP Borghezio (ENF): EU-Mali agreement, 12 January 2017; Answer given by Vice-President Mogherini on behalf of the Commission, 8 March 2017.

arrangements and to scrutinise other EU institutions, particularly the European Commission. As already mentioned, the Commission is under a general obligation to inform Parliament regarding the conclusion of formal readmission agreements and to regularly report on their implementation, particularly with respect to the work of Joint Readmission Committees (JRC). The Commission is therefore the primary executive actor that reports to Parliament on readmission policy. On the Parliament's side, the primary responsibility lies in the hands of the LIBE Committee, charged with migration and asylum affairs. While not strictly under the legal obligation of providing information regarding informal arrangements, the Commission itself in mid-2018 stressed that it 'regularly provides updates on readmission agreements and *arrangements* [emphasis added]' to the LIBE Committee.'[111]

Our data indicate that, in fact, the Commission began to inform the Parliament on readmission arrangements as early as December 2016, when the JWF was discussed in a joint debate organised by LIBE.[112] Because of the strong human rights implications given the safety situation in Afghanistan, and as the first arrangement of this kind (if we exclude the *sui generis* EU-Turkey statement), the JWF was the object of several hearings and events organised by the Parliament, including a workshop event,[113] which appears to have been an important catalyst in prompting the LIBE Committee to increase its scrutiny of readmission arrangements.[114] Since then, the Commission has been providing information to the LIBE Committee on both negotiation and conclusion of readmission arrangements.[115] As the LIBE Committee grew more vocal in its

[111] P8_RE(2018)000956, Question for written answer E-000956/18 to the Commission by MEP Sargentini (Verts/ALE): Agreement between the EU and Ethiopia on return procedures (I), 15 February 2018; Answer given by Mr Avramopoulos on behalf of the Commission, 31 May 2018.

[112] LIBE_PV(2016)12-05-1, Meeting of LIBE of Monday, 5 December 2016.

[113] EXPO_STU(2017)578033, Workshop: Afghanistan: Challenges and Perspectives until 2020, organised by the Parliament's DG for External Policies of the Union for the Committee on Foreign Affairs, Committee on Development and for the Delegation for relations with Afghanistan.

[114] The LIBE Committee first publicly raised the issue during its meeting on December 2016 (LIBE_PV(2017)01-30-1), where the Commission was specifically asked to refer to the JFW during the debate on readmission agreements (but as a separate agenda point). Several MEPs questioned Mr. Ruete, DG HOME director general, on the legality of the JWF and on the exclusion of the Parliament from the conclusion of such agreement. On that occasion, LIBE Chair Claude Moraes also stated that the issue with the JFW was 'complex and serious' and that the Parliament was seeking the advice of its legal service. Similar criticisms were echoed in another heated session of the LIBE Committee, on January 2017, by Moraes, as well as MEP Sargentini (Verts/ALE) and MEP Gomes (S&D), among others, this time at the presence of Mr. Mordue, deputy-director of DG HOME. See LIBE_PV(2017)01-30-1.

[115] Readmission is a policy domain that clearly falls in the remit of this committee; as determined in Annex VI of the Rules of Procedure of the Parliament concerning the powers and responsibilities of standing committees, the LIBE Committee is responsible for legislation and democratic oversight related to the area of freedom, security and

dissent towards the practice of concluding readmission arrangements,[116] it also began to demand more and more detailed written and oral description of the Commission's work in this area. Overall, we identified 13 instances where Commission staff, namely a very high-ranking official of DG-HOME (either the director or deputy director), participated in a session of the LIBE Committee to discuss readmission policy – 12 of these meetings included explicit reference to readmission arrangements, and sometimes focused on specific cases (e.g. Afghanistan, Mali). Those sessions were preceded, as noted by both LIBE Committee members and Commission staff, by a letter sent by the Commission with varying level of detail providing the 'state of play' on the matter concerning, for example, return and readmission rates, progress on implementation of existing agreements, progress on negotiation of new agreements, and 'non-cooperative' countries.[117]

Similarly to written questions, interventions by Members of the LIBE Committee touched upon a wide range of topics. Whereas left-leaning MEPs raised issues more related to Parliamentary prerogatives in the overall policy cycle and potential human rights violations in the implementation phase, right-leaning rather focused on policy effectiveness in ensuring more returns. Responses by Commission officials, while not necessarily very technical, generally included some level of detail and information and were always preceded and concluded by remarks stating the Commission's availability to answer questions and provide additional evidence and information to the Committee upon request. In all the hearings we analysed, the Commission official present displayed a willingness to engage with the Committee members and answer their questions in detail. This was particularly true, as in the case of written questions, for interventions touching upon 'bottlenecks' in the negotiation process regarding third countries, and particularly effectiveness in policy implementation. In one instance, Mr. Mordue, deputy director of DG HOME, referred to a document provided to the Committee beforehand detailing the state of play on readmission policy, and mentioned the Commission's willingness to disclose confidential documents, including the text of certain readmission arrangements in an in-camera meeting.[118] The LIBE chair at the time, Claude Moraes, as well

justice, which includes asylum and migration issues. The Committee also has responsibilities to look after the protection of human rights.

[116] P8_QO(2016)000123, Question for oral answer O-000123/2016 to the Commission: 'EU-Afghanistan Joint Way Forward on migration issues': Role and consultation of the European Parliament, 13 October 2016.

[117] For an example of such correspondence, which remains confidential, see the letter sent by Mr. Ruete to Mr. Moraes (LIBE Chair), which was leaked to Statewatch, available at <https://www.statewatch.org/news/2017/november/statewatch-news-online-returns-and-readmissions-highlight-reluctance-of-african-states-to-comply-with-eu-demands/>.

[118] LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017, presentation by Simon Mordue. See also LIBE_PV(2018)10-10-1, Meeting of LIBE from Wednesday, 10 October 2018 to Thursday, 11 October 2018, comment by MEP Sargentini; the arrangements in question were Guinea, Bangladesh, Ethiopia and Gambia.

as other LIBE members, while expressing frustration with the undermined Parlimentary prerogative, also acknowledged the Commission officials for their willingness to engage with the Committee and for the level of the information provided.[119]

We were not able to conclusively establish whether actions by the Parliament were responsible for starting this practice. On the one hand, a pre-established exchange venue (regular Parliamentary hearings on negotiations and implementation of readmission agreements) and a pre-existing working relationship between the Committee and DG HOME officials were instrumental in making this possible. The Parliament exploited this opportunity, such as when it decided, in October 2016, to include a specific agenda point to discuss the JFW with the Commission, immediately after the reporting on readmission agreements.[120] On the other hand, it appears that the constant pressure exerted by the LIBE Committee to provide more detailed and accurate documentation[121] have led to a gradual improvement of the quality of the information provided, both in writing and in person. On the side of the Commission, we may also speculate that the Commission adopted such stance driven by two interrelated concerns: the fear that withholding information may further question the legitimacy of the Commission's conduct in external relations; the calculation that disclosure of information may help preserve a good working relationship with the LIBE Committee and the Parliament more in general, whose support is more generally needed in other legislative policy files on migration and home affairs. This reading seems to be supported by a speech made in October 2016 by Mr. Avramopoulos, Migration and Home Affairs Commissioner. Intervening at a Parliamentary plenary debate, discussing the process leading to the conclusion of the readmission arrangement with Afghanistan, Commissioner Avramopoulos set the pace for future relations with the Parliament as he

[119] These potentially contradictory statements reflect in fact the difficult balance the LIBE Committee has tried to strike in its relation with the Commission. During one session in September 2017, MEP Sargentini stated that she appreciated 'the form and the content' of the letter sent in advance by the Commission, including 'more factual information' and 'data and figures by country,' but also encouraged the Commission to continue in this direction. Comment by MEP Sargentini, LIBE_PV(2017)09-07-1, Meeting of LIBE of Thursday, 7 September 2017. During the same meeting, LIBE Chair Moraes explicitly stated the Committee could easily extend the debate and probe further into readmission arrangements, but also acknowledged that 'there is no question that Mr. Mordue is more than willing to be and answer the questions in depth, so I thank him and his team for that.' However, two months after, Moraes concluded the hearing with the Commission by stating that such exchange could not replace the Parliament's 'correct scrutiny position' in this area. LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017.

[120] LIBE_PV(2016)12-05-1. Video recording of the meeting of LIBE of Monday, 5 December 2016, comment by MEP and LIBE Chair, Claude Moraes.

[121] LIBE_PV(2017)09-07-1, Meeting of LIBE of Thursday, 7 September 2017, comments by Moraes, comment by Sargentini and others; LIBE_OJ(2017)11-20_1, Meeting of LIBE of Thursday, 7 September 2017, comments by Moraes, Sargentini and others.

'strongly regret[ted] the lack of transparency in closing the deal ...and the fact that Parliament was not involved in its drafting at an earlier stage... Thus [sic], ...call[ing] on the High Representative and the Commission from [then] onwards to at least keep this House informed on progress regarding the agreement's implementation.'[122]

The Commission's openness towards the Parliament should not be overstated either. When responding to MEP queries, Commission officials appeared to be rather responsive to questions touching upon the implementation and effectiveness of arrangements as well as upon alleged related human rights violations. At the same time, they were much more evasive when asked about Parliament's prerogatives and the rationale behind the adoption of soft law, once again justifying this conduct because of third country preferences and downplaying the legal significance of the arrangements.[123] Crucially, moreover, the Commission ignored requests to grant public access to the arrangements themselves.[124] In their interventions, MEPs noted that the information provided does not allow the Committee to understand, for example, the more specific reasons for the Commission's claim that third countries do not want to conclude formal readmission agreements, and strongly questioned the argument that the EU would not have sufficient leverage to draw third countries into concluding a formal agreement.[125]

Overall, the Commission therefore provided regular information on readmission arrangements to the LIBE Committee in hearings and via correspondence, even in the absence of explicit legal provisions requiring the Commission to do so; the depth and quality of such information was however partly questioned by certain MEPs. Scrutiny actions of the MEPs focused on several aspects of readmission arrangements, including the (neglected) role and prerogatives of the Parliament in the policy process but also potential human rights violations or effective implementation. Whereas the Commission justified its conduct with respect to all these areas, it primarily responded to considerations of human rights violations or implementation effectiveness.

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[122] P8_CRE-REV(2016)10-26, Minutes of the sitting of Wednesday 26 October 2016, comment by Mr. Avramopoulos.

[123] See eg LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017, comments by Mr. Mordue.

[124] The Commission has repeatedly stated that 'readmission arrangements could only be published with the agreement of third countries and with due regard to the possible risks to the EU's position in international negotiations,' see eg P8_RE(2019)001881, Question for written answer E-001881/19 to the Commission by MEP Lamberts (Verts/ALE): Readmission arrangements, 16 April 2019; Answer given by Mr Avramopoulos on behalf of the European Commission, 8 July 2019. During a hearing, deputy director of DG HOME Mordue responded that MEPs would be able to officially access such documents (i.e. the undisclosed readmission procedures with Ethiopia) as long as the appropriate procedure (unspecified) would be followed. LIBE_PV(2018)06-21-1, Meeting of LIBE from Wednesday, 20 June 2018 to Thursday, 21 June 2018.

[125] LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017, comments by MEP in 't Veld (Renew) and Sargentini (Verts/ALE).

5.2. *Assessing Parliament's actual influence in readmission policy*

This section assesses the extent to which the Parliament has been able to shape and/or influence EU readmission policy in practice, within the limits of its lacking prerogatives on readmission arrangements (i.e., no power of consent). We therefore begin with a discussion of the main issues identified by the Parliament, as well as potential counter-measures (legal opinion), and then move on to examine how the Parliament attempted to concretely influence readmission policy. While our data seem to indicate that Parliamentarians had no direct influence on the negotiation of the informal arrangements under review – as discussed in the previous section, in some cases MEPs were not even aware of their existence – such arrangements have also prompted a flurry of Parliamentary activity. Beyond hearings and questions, geared more towards the scrutiny of executive (Commission) conduct, activities included both non-legislative and legislative resolutions in several interrelated policy fields. While the actual influence of such actions has so far been very limited, they may nonetheless provide a blueprint for future action.

First of all, it should be noted that the Parliament has not tried to challenge readmission arrangements by referring them to the CJEU. At the same time, our data show that the LIBE Committee asked for an opinion on the JWF from the Parliament's legal service, whose tasks include providing legal assistance for Parliament's political bodies and helping the committees with their legislative work. The legal service was asked about three issues: first, whether the JWF can be considered an international agreement, secondly, what effects it produces – and, in case any effects are similar to the effects of a readmission agreement, what the possible legal remedies would be – and, third, if the JWF was considered as an international agreement, what would the Parliament's prerogatives be. In its reply, the legal service considered the intention of the parties to be decisive; as the parties did not intend to be bound by the JWF, it cannot be considered binding. Concerning the second question, the legal service replied that JWF may produce practical effects which may be similar to those of a readmission agreement, but only on the condition that both the EU and Afghanistan respect the terms of cooperation. Thirdly, legal remedies remain unaffected by the JWF.[126] Interestingly, the legal service also noted that even if the procedures under Article 218 TFEU do not apply given that the JWF is not an international agreement, the Parliament is 'entitled to use any other powers at its disposal and take political rather legal actions' if it disapproves of the Commission's policy of concluding soft law instruments with third countries.

Our data reveal that the Parliament, besides direct scrutiny, employed other avenues to influence the discussion on readmission policy. Those include, in particular, non-legislative resolutions and legislative positions under the ordinary legislative procedure. Non-legislative resolutions are adopted in various forms depending on context and are non-binding on the addressee (usually

[126] LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, presentation by Ms Padowska, EP Legal Service.

the Commission or the Council). Resolutions may be drafted by members of political groups in the context of Parliamentary plenary debates, for example to conclude after an exchange with the Commission or the High Representative for Foreign and Security Policy (Rule of Procedure 123),[127] while other resolutions are triggered by own-initiative reports prepared by relevant Parliamentary committees (Rule of Procedure 52).[128] Legislative resolutions are instead drafted in the context of the ordinary legislative procedure. In the case of internal competences, where the Parliament is formally involved in the shaping of legislation, resolutions include amendments to the text proposed by the Commission and being negotiated together with the Council. In external relations, where the Parliament formally has only power of consent, resolutions only contain declaratory statements ('recommendations') stating whether the Parliament approves or rejects the agreement. In the coming two sections, we will explore how the Parliament tried to influence readmission policy on procedural aspects (exclusion of the Parliament) as well as on substantive aspects of the policy (human rights safeguards, monitoring of implementation). Both aspects, combined, reveal the extent to which the Parliament is able to have a say over readmission policy.

5.2.1. *Parliament's position and influence on procedural aspects of negotiating and concluding readmission arrangements*

Procedurally speaking, the Parliament has repeatedly criticised the fact that informal arrangements are concluded without due parliamentary scrutiny and democratic oversight that is required when concluding formal readmission agreements. It also argued that the lack of democratic scrutiny by national parliaments of third countries arguably enhances the importance of the European Parliament.[129] In addition to the diminished role of the Parliament, MEPs have also paid attention to the diminished role of courts.[130] A central reason for the Parliament's liberal viewpoint on readmission is that resolutions are often

[127] Examples include P8_TA(2016)0020, the Parliament resolution on the EU's priorities for the UNHCR sessions in 2016; P8_RC(2017)0678, joint motion of a resolution on the situation in Afghanistan; P8_B(2017)0679, motion for a resolution on the situation in Afghanistan to wind up the debate on the statement by the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy. For the final resolution, see P8_TA(2017)0499, European Parliament resolution of 14 December 2017 on the situation in Afghanistan.

[128] Examples include Parliamentary resolutions P8_TA(2015)0470 on the Annual Report on Human Rights and Democracy in the World; P8_TA(2016)010 on the situation in the Mediterranean and the need for a holistic EU approach to migration; and P8_TA(2017)0124, the resolution on addressing refugee and migrant movements: the role of EU External Action.

[129] LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017, comment by MEP Sargentini (Verts/ALE).

[130] AFET_PR(2020)660103, Draft report on human rights protection and the EU external migration policy (2020/2116(INI)); LIBE_PV(2020)01-27-1, Meeting of LIBE from Monday, 27 January 2020 to Tuesday, 28 January 2020, comment by MEP in 't Veld (Verts/ALE).

initiated by the LIBE Committee, which has a long-standing history of engaging on fundamental rights issues and has been recently chaired by vocal left-wing politicians from the S&D group. However, the European Parliament's Committee on Foreign Affairs (AFET) and especially the Committee on Development (DEVE) can take rather liberal views on those issues as well, often influenced by LIBE.[131]

Hearings in the LIBE Committee, besides their scrutiny function, also provided MEPs with the opportunity to express their views to the Commission and the general public about their diminished role in readmission policy. For example, the LIBE Committee chair Moraes sent a letter to the Commission expressing the Committee's concerns about the increase of non-legislative return instruments with third countries.[132] In another discussion concerning the JWF, Moraes expressed quite directly that informal readmission agreements take away prerogatives of the Parliament.[133] Between 2016 and 2018, Moraes made this point repeatedly, usually reinforced by similar interventions by several MEPs.[134] Such concerns have also resurfaced in the LIBE Committee in the current term, under the chairmanship of MEP Juan Fernando López Aguilar.[135] As already mentioned, Commission officials were non-committal on this issue, rather expressing the Commission's general preference for formal readmission agreements where third countries would allow it. When pressed on Parliament's prerogatives, Commission officials avoided taking a stance. Whereas one referred to his status as 'civil servant' and not as a 'politician',[136] another claimed he should stay within the boundaries of his role as 'non-political' member of the Commission.[137] As a matter of fact, no Commissioner appeared in front of

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[131] Arguably, the opinion prepared by LIBE with MEP Vergiat (GUE/NGL) as rapporteur included even stronger language and wording, see LIBE_AD(2016)589456, Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs and the Committee on Development on addressing refugee and migrant movements: the role of EU external action. For amendments, see LIBE_AM(2016)592374, Amendments 1-143 Draft opinion Marie-Christine Vergiat (PE589.456v01-00), Addressing Refugee and Migrant Movements: the Role of EU External Action (2015/2342(INI)).

[132] LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017, comment by MEP Moraes.

[133] LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, comment by MEP Moraes.

[134] LIBE_PV(2017)09-07-1, Meeting of LIBE of Thursday, 7 September 2017, comments by MEP Moraes, MEP Gomes and MEP Sargentini; LIBE_PV(2018)06-21-1, Meeting of LIBE from Wednesday, 20 June 2018 to Thursday, 21 June 2018, comments by MEP Moraes and MEP Sargentini.

[135] LIBE_PV(2020)0127_1, Meeting of LIBE from Monday, 27 January 2020 to Tuesday, 28 January 2020, comments by MEP Strik, MEP Vitanov.

[136] LIBE_PV(2017)01-30-1, Meeting of LIBE from Monday, 30 January 2017 to Tuesday, 31 January 2017, comment by Simon Mordue, Deputy Director General DG HOME.

[137] LIBE_PV(2018)10-10-1, Meeting of LIBE from Wednesday, 10 October 2018 to Thursday, 11 October 2018, comment by Ioan-Dragos Tudorache, Head of Unit DG HOME.

the LIBE Committee to discuss readmission arrangements, therefore raising the question of whether Commission *fonctionnaires* represent indeed the most appropriate level to discuss matters of inter-institutional prerogatives with the Parliament. Over the whole period under review, the Commissioner for Home Affairs appeared only once in front of the Parliament to discuss readmission arrangements, in the already mentioned plenary debate on the JWF. While regretting the non-involvement of the Parliament, he only offered more information exchange in return.[138]

Besides hearings and plenaries, the Parliament also employed non-legislative resolutions. In the resolution *on addressing refugee and migrant movements: the role of EU External Action*[139] prepared jointly by the AFET and DEVE Committees with specific reference to the return arrangement with Afghanistan, the Parliament not only regretted 'the lack of consultation and transparency in the formulation of' the JWF but more broadly lamented that 'in the EU migration policy framework and refugee movements response, the EU and its Member States have opted for the conclusion of [informal] agreements with third countries, which avoid the parliamentary scrutiny attached to the Community method.' In the resolution containing a report on the implementation of the Return directive, promoted by the LIBE Committee and eventually voted as Parliament resolution,[140] the Parliament called 'on the Member States to urge and enable the Commission to conclude formal EU readmission agreements coupled with EU parliamentary scrutiny and judicial oversight.'[141]

Diminished democratic oversight was also raised through non-legislative motions in the context of the consent procedure for international agreements of which readmission is not the main subject. Non-legislative motions allow the Parliament to express its (non-binding) position and views in a procedure where, formally, it can only give or withdraw its consent to the signature of a given international agreement but may not propose amendments. For example, in the context of the European Parliament resolution on the conclusion of a partnership agreement between the EU and Afghanistan, the Parliament's non-legislative motion condemned the use of informal arrangements and regretted the lack of oversight and democratic control in the conclusion of the JWF.[142]

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[138] P8_CRE-REV(2016)10-26, Minutes of the sitting of Wednesday 26 October 2016, comment by Mr. Avramopoulos.

[139] P8_TA(2017)0124, European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), paras 69-70.

[140] LIBE_AM(2020)655606, Amendments 1-240 – Draft report, Implementation report on the Return Directive; LIBE_PR(2020)653716, Draft report on the implementation of the Return Directive.

[141] P9_TA(2020)0362, European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)).

[142] See DEVE opinion on the conclusion of the agreement on partnership and development between the EU, its Member States and Afghanistan: P8_AMRC(2017)0434, Amendments. Joint motion for a resolution PPE, ECR, ALDE to Commission Work Programme 2018; DEVE_AD(2018)623970, Opinion on the draft Council decision on the conclusion, on behalf of the Union, of the Cooperation Agreement on Partnership

Rapporteurs have likewise used explanatory statements in the preparation of the recommendation on the signature of an international agreement and in the context of draft legislative reports. For example, the rapporteur of a formal readmission agreement with Belarus included in the draft recommendation a paragraph – also included in the final Parliament resolution – noting that the Parliament should be involved in and informed about negotiations of both formal and informal readmission agreements and expressing a preference for formal agreements.[143] In the draft report concerning the recast of the Return Directive, the rapporteur's explanatory statement regretted 'that such informal deals are concluded in the complete absence of a duly parliamentary scrutiny and democratic oversight that the conclusion of formal readmission agreements with third countries would warrant, in accordance with the Treaties.'[144]

Under the impulse of the LIBE Committee, readmission arrangements were also mentioned in several migration-related legislative files under the ordinary legislative procedure. Whereas in legislation's articles MEPs referred to readmission arrangements to either include or exclude them from the scope of particular provisions, they sometimes used recitals to express more articulate views.[145] In the discussions on the recast of the Return Directive (still in progress), amendments to the original text (mainly in the recital section) pointed at the importance of ensuring that return and readmission policy would be based exclusively on 'formal readmission agreements.'[146]

The Parliament has also tackled readmission arrangements in discussions on the Union's budget. Especially in the current Parliamentary term, budgetary

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and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part. The part on readmission arrangements was included on the initiative of the DEVE Committee.

[143] LIBE_PR(2020)646765, Draft recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation. The Parliament resolution stated its consent to the readmission agreement but also included a critical minority opinion by the Greens/EFA political group. See P9_A(2020)0097, Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation.

[144] LIBE_PR(2019)632950, Draft report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), at 86.

[145] Eg proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action No 98/700/JHA, Regulation (EU) No 1052/2013 of the European Parliament and of the Council and Regulation (EU) No 2016/1624 of the European Parliament and of the Council; Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection (COM(2018)0307–C8-0182/2018–2018/0154(COD)) – P8_A(2018)0395.

[146] LIBE_AM(2020)658738, Draft report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), at 23.

powers have been used as a ground to question the Parliament's non-involvement in the conclusion and monitoring of informal arrangements.[147] Nevertheless, the attempts to steer readmission policy through budget-related arguments have not been successful so far. We found two instances where readmission arrangements were raised in the context of budget legislation. The first relates to the preparation of the Parliament's position on the MFF, where the AFET Committee unsuccessfully tried to introduce to the responsible Budget Committee's (BUDG) non-legislative resolution a suggestion according to which the JWF and other 'ad hoc instruments outside the EU budget should only be resorted to if the Commission can provide clear proof that requirements in terms of EU added value and additionality are met.'[148] The second is the negotiation of the regulation on the establishment of the Asylum and Migration Fund (AMF) in the context of new MFF 2021-2027, where reference to 'other arrangements' on readmission was repeatedly deleted from the recitals.[149] The DEVE Committee, in its role overseeing the Union's development policy and disbursement of related funding, drafted an opinion which suggested to delete 'implementation of readmission agreements and arrangements' from the list of actions eligible for funding under AMF.[150] Eventually, since the Council insisted on retaining the original formulation,[151] reference to both formal and informal readmission instruments was deleted in the compromise text proposed by the

[147] See eg LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, comment by MEP Schlein. The Parliament exercises budgetary functions jointly with the Council (Article 14 TEU), and it has several crucial roles in the budgetary process by virtue of its powers of consent in establishing the MFF and position as a co-legislator concerning budget-related legislation.

[148] AFET_AD(2018)610546, Opinion of the Committee on Foreign Affairs for the Committee on Budgets on the next MFF: Preparing the Parliament's position on the MFF post-2020; for the final resolution, see P8_A(2018)0048, Draft report on the next MFF: Preparing the Parliament's position on the MFF post-2020 (2017/2052(INI)).

[149] LIBE_AM(2018)632027, Amendments 157-292 – Draft report Establishing the Asylum and Migration Fund; LIBE_PR(2018)629652, Draft report on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund; EP-PE_TC1-COD(2018)0248, Position of the European Parliament adopted at first reading on 13 March 2019 with a view to the adoption of Regulation (EU) 2019/… of the European Parliament and of the Council establishing the Asylum, and Migration and Integration Fund; P8_TA(2019)0175, European Parliament legislative resolution of 13 March 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund (COM(2018)0471 – C8-0271/2018 –2018/0248(COD)).

[150] DEVE_AD(2018)628531, Opinion on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund; this position was taken into account by the LIBE Committee, see NEGO_CT(2018)0248, Trilogue – 29/09/2020 post-technical meeting – Regulation establishing the Asylum and Migration Fund 2021–2027 – 2018/0248(COD).

[151] NEGO_CT(2018)0248, Trilogue – 29/09/2020 post-technical meeting – Regulation establishing the Asylum and Migration Fund 2021–2027 – 2018/0248(COD). See first and second trilogue negotiations.

Commission in the context of trilogue negotiations, resulting (at best) in a partial victory of the Parliament.[152]

Parliamentarians have regularly used non-legislative resolutions as an opportunity to voice their concerns. However, the broad and general scope of these resolutions and their limited anchoring in specific legislative files, policy domains or procedures make them relatively ineffective in shaping the behaviour of other institutional actors – or complicate tracing any meaningful effect on specific policy outcomes. When taken literally, Parliamentary requests to stop concluding informal readmission arrangements and to reinstate the Parliament in its prerogatives regarding readmission appear to have been simply ignored. Another strategy pursued by the Parliament is to raise the issue of readmission arrangements in other policy areas where it has stronger prerogatives. In external action, we have shown that the Parliament raised the topic in the context of the conclusion of a partnership agreement with Afghanistan, as well as prior to giving its consent to the readmission agreement with Belarus; yet, it did not go as far as to reject those agreements on those grounds (such a decision might have been rather peculiar, especially in the context of a *formal* readmission agreement).[153] The politicised nature of readmission may also encourage political grandstanding, that is, the engagement of political groups in symbolic actions with the primary aim of reassuring their own political constituencies. In that vein, several resolutions appear designed to make a principled stand and ensure the Parliament's visibility on the issue, rather than to directly influence policy.

5.2.2. *Parliament's position and influence over content and implementation of readmission arrangements*

A second recurring point of criticism concerns human rights implications of readmission arrangements in implementation. Incompatibility with obligations of international law and refugee law is often raised, and violations of specific human rights obligations – for example CFREU safeguards[154] – are a frequent concern. The position of children has often surfaced, for example, in the form of concerns about forced repatriation of unaccompanied minors.[155] Other recur-

[152] LIBE_LA(2021)689775, European Parliament legislative resolution of 13 March 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund (COM(2018)0471 – C8-0271/2018 – 2018/0248(COD)). Letter from parliamentary committee chair confirming agreement.

[153] P8_AMRC(2017)0434, Amendments. Joint motion for a resolution PPE, ECR, ALDE to Commission Work Programme 2018; P8_B(2017)0455, Motion for a resolution to wind up the debate on the statement by the Commission pursuant to Rule 37(3) of the Rules of Procedure and the Framework Agreement on relations between the European Parliament and the Commission on Parliament's priorities for the Commission Work Programme 2018.

[154] LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, comment by MEP Schlein.

[155] LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, comment by MEP Spinelli; see also LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday,

ring human rights issues include the prohibition of refoulement and prohibition of mass repatriations.[156] Comments regarding human rights are usually informed by a lack of information about the exact content or impact of the agreements.

At times, MEPs have unsuccessfully attempted to make the Parliament acknowledge that informal agreements are already governed by the fundamental rights commitments of the EU. In the context of a draft deport concerning the implementation of the CFREU in the EU institutional framework, for instance, a proposed amendment suggested that informal readmission arrangements 'must be guided by those same principles and standards which are intended to inform all of the decisions of the EU institutions and that such political nature does not absolve them of the responsibility to ensure that all their actions are in compliance with the EU's fundamental rights commitments.'[157] The proposed amendment did not make it into the draft report of the Committee for Constitutional Affairs (AFCO).[158]

A related concern is the lack of monitoring: who is accountable for what happens after people have been returned, and are returns followed up?[159] MEPs have often expressed concerns that if human rights are breached, informal arrangements do not contain sufficient guarantees to contest the claims.[160] The standard reply of the Commission is that as informal arrangements are non-binding and do not create legal rights or obligations, the guarantees contained in existing legislation, for example the return directive, are applicable. While the latter statement is true in light of international law, MEPs have however stressed that returns are not monitored in practice by the EU nor by third countries. Both human rights violations and the need for a monitoring mechanism have been highlighted in Parliamentary non-legislative resolutions. In the context of the JWF, the 2017 resolution *on addressing refugee and migrant movements: the role of EU External Action,*[161] jointly prepared by the AFET and DEVE Committees, expressed such concerns. The resolution pointed at the potential consequences of JWF implementation for Afghan asylum-seekers in terms of access to protection and respect of fundamental rights, called 'on the Commission to include at least a biannual evaluation mechanism

20 November 2017 to Tuesday, 21 November 2017, comment by MEP Björk.

[156] LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, comment by MEP Spinelli.

[157] AFCO_AM(2018)631886, Amendments 1-100 – Draft report. The implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework, amendment by MEPs Spinelli and Ward.

[158] AFCO_PR(2018)629691, Draft report on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework (2017/2089(INI)).

[159] LIBE_OJ(2017)11-20_1, Meeting of LIBE from Monday, 20 November 2017 to Tuesday, 21 November 2017, comment by MEP Kyenge.

[160] This issue, however, as already discussed, applies to formal readmission agreements as well.

[161] P8_TA(2017)0124, European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), paras 69-70.

for any political declaration signed with third countries in order to assess the continuation or conclusion of these agreements,' and finally stressed 'the need for the inclusion of human rights safeguards in any agreements concluded within the framework of migration and refugee policies.'

Finally, MEPs have also deplored the increasing use of European (development and humanitarian aid) funding as a tool to pressure third countries in cooperating on readmission and return.[162] In a resolution on the role of EU external action in addressing refugee and migrant movements, the Parliament took the stance that '(...) EU assistance and cooperation must be tailored to achieving development and growth in third countries – thereby also fostering growth within the EU – and to reducing and eventually eradicating poverty in line with Article 208 of the TFEU, and not to incentivizing third countries to cooperate on readmission of irregular migrants.'[163] More recently, AFET asked the Commission to strengthen financial and operative oversight over implementation of readmission policy, namely to 'establish an independent, transparent and effective monitoring mechanism, which entails periodic reports on the implementation of formal, informal and financial agreements.'[164]

As in the case of its prerogatives, the Parliament also attempted to use the ordinary legislative procedure in related policy fields to strengthen human rights safeguards and transparency in the implementation of readmission policy. While the ordinary legislative procedure only applies to the internal dimension of EU migration and asylum policy, we found instances where readmission arrangements were part of legislative discussions. For example, during the negotiations for the new FRONTEX regulation, MEPs suggested to remove in an article the mention of FRONTEX implementing 'non-legally binding arrangements on return' and to include reference to the fact that 'The Agency shall contribute to the implementation of international agreements and of formal readmission agreements concluded by the Union with third countries within the framework of the external action policy of the Union.'[165] Such amendment would have arguably restricted the margins of discretion of FRONTEX in cooperating with

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[162] P8_CRE-REV(2016)10-26, Minutes of the sitting of Wednesday 26 October 2016, comment by MEP Sargentini, in the context of a plenary debate concerning the JWF. See also LIBE_PV(2017)05-08-1, Minutes of LIBE meeting of 8 May 2017, comment by MEP Schlein.

[163] P8_TA(2017)0124, European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), para 59.

[164] AFET_PR(2020)660103, Draft report on human rights protection and the EU external migration policy (2020/2116(INI)). See also opinion of the LIBE Committee referring to similar concerns: LIBE_AD(2021)658862, Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs on human rights protection and the EU external migration policy.

[165] LIBE_AM(2018)631968, Amendments. Draft report on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action No 98/700/JHA, Regulation (EU) No 1052/2013 of the European Parliament and of the Council and Regulation (EU) No 2016/1624 of the European Parliament and of the Council, at 153.

third countries with whom the EU does not have a formal readmission agreement. This point, while approved in the Parliament position, proved controversial in trilogue negotiations with the Council and the Commission, eventually resulting in a rewording that simply included reference to readmission policy without distinguishing between formal and informal arrangements.[166] The attempt cannot therefore be considered very successful. In the process of revising the regulation on statistics on migration and international protection,[167] MEPs in LIBE instead proposed information about third country nationals leaving the EU (i.e. being returned) to be disaggregated by both formal and informal readmission arrangements. Such amendment would have likely promoted greater transparency over implementation of readmission arrangements, providing the institutions with better data to assess the effectiveness of such collaborations versus those based on formal readmission agreements. This proposal was included in the final act but only in the more limited context of pilot studies.[168]

This section assessed the Parliament's role in shaping and influencing EU readmission policy in practice. It demonstrated that the Parliament has tried to question informal readmission arrangements by criticising both the absence of democratic scrutiny and substantive aspects of the policy though raising concerns about implementation of readmission arrangements, with particular attention to human rights implications, lack of effective implementation monitoring and funding conditionalities. Our data show that the Parliament has mainly attempted to criticise informal readmission arrangements in non-legislative and legislative resolutions in related policy fields. Against the backdrop of the current state of play of readmission policy – see the very recent Commission Action Plan on Return[169] – Parliamentary influence appears to have

[166] NEGO_CT(2018)0330, Negotiation table (first trilogue), Proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action no 98/700/JHA, Regulation (EU) no 1052/2013 of the European Parliament and of the Council and Regulation (EU) no 2016/1624 of the European Parliament and of the Council Articles 050-120- 27/02/2019.

[167] P8_A(2018)0395, Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection (COM(2018)0307–C8-0182/2018–2018/0154(COD)).

[168] This amendment became part of the Parliament's final position at first reading on the revised regulation on 16 April 2019, P8_A(2018)0395. For the final act, see Regulation (EU) 2020/851 of the European Parliament and of the Council of 18 June 2020 amending Regulation (EC) No 862/2007 on Community statistics on migration and international protection (Text with EEA relevance), *OJ* [2020] L 198/1, 22.6.2020.

[169] Communication from the Commission to the European Parliament and the Council, Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, COM(2021) 56 final. At 6-7, the Commission notes that the 'EU has so far concluded 18 readmission agreements and six arrangements.. [w]here agreements or arrangements are already in place, engagement with third countries will continue in the context of existing frameworks... to ensure that the cooperation instruments deliver actual results...[i]n this vein, the factual assessment

been very limited, as it is very likely that readmission arrangements will continue to feature as part of the EU's toolbox. It should be noted, however, that so far the Parliament has not resorted to all the actions at its disposal. For example, it would be possible for the Parliament to rely more on its budgetary powers and legally challenge the current readmission policy before the CJEU. Whether the Parliament will be willing to take either one of those actions in the near future, and potentially escalate the conflict with the Commission and/or the Council on issues of competence or institutional balance, remains however an open question.

6. **Conclusion**

In this paper, we presented our preliminary findings concerning the role of the European Parliament in the field of informal readmission arrangements between the EU and third countries. The analysis was set in the context of an informal turn in EU external migration policy and the diminished Parliamentary scrutiny and participation prerogatives that informal readmission arrangements entail. Through an analysis of 149 documents collected via the Parliament's public document registry, we examined the Parliament's scrutiny practices and influence in the field of informal readmission policy and analysed the extent to which the Parliament has been able to control the EU executive, both via scrutiny and influence.

The empirical section demonstrates that the Parliament has, unsurprisingly, a limited power of scrutiny on readmission informal arrangements. As MEPs are usually not able to access the drafts and the final texts of the arrangements, they are virtually excluded from properly scrutinizing such agreements at a time when they may still influence the process. Likewise, the lack of appropriate mechanisms impacts the ability of the Parliament to effectively monitor the implementation of such arrangements – something that appears to be an issue also in formal agreements in the post-readmission phase[170] – inasmuch as it depends either on information provided by third parties (e.g. NGOs) or on what the Commission is capable of gathering and voluntarily decides to disclose. Exclusion from the process of negotiating and concluding informal arrangements appears to leave the Parliament with no immediate leverage to directly influence this process. This exclusion, to its turn, can reduce incentives for the Commission to keep the Parliament regularly and duly informed, since the Parliament has no immediate means to exert pressure on the Commission beside political grandstanding. This vicious circle may ultimately make real scrutiny impossible and impede the establishment of any meaningful account-

produced by the Commission should inform a discussion with Member States to identify countries with which new readmission agreements *or arrangements* [italics added] could be pursued.'

[170] Carrera 2016, at 55.

ability relation. To paraphrase Bovens,[171] the Parliament may 'pose questions and pass judgement', but in this situation the Commission has no real 'obligation to explain and to justify [its] conduct,' and ultimately faces (limited) consequences for its conduct.

Yet, this argument needs some nuancing. Our data show that Commission officials have indeed accepted to regularly inform the LIBE Committee on the state of affairs on readmission arrangements, both in writing and during specialised hearings, and to submit to Parliamentary scrutiny. Moreover, hearings and written correspondence show that, in spite of several limitations, the communication channel between the Parliament and the Commission, namely between the LIBE Committee and DG HOME, was open. When compared with the type of information publicly disclosed by the Commission regarding negotiation and implementation of formal agreements, it may be argued that the difference in depth and volume of information – pending the issue of access to the actual texts of the agreements – was overall less significant than expected. If the reasons for such development warrant further research, it is hard to dismiss the role played by Parliament's political pressure in institutionalising what is now an informal reporting duty on the side of the Commission, although the quality of the process may be questioned. Formally speaking, such conduct is entirely voluntary; nonetheless, walking back on such commitment would likely expose the Commission to considerable political costs. It is also important to note that effective information-gathering and scrutiny depend on the conduct of the scrutinised actor as much as on the scrutiniser's. Our data show that Parliamentary questions and interventions were often vague, sometimes misinformed or formulated in ways that allowed the Commission to easily deflect allegations. In many instances where MEPs were able to question the conduct of the Commission in a precise and substantiated manner, such as when concrete allegations of human rights violations were raised, the quality of the exchange considerably improved.

The Parliament's exclusion from the process of concluding readmission arrangements seems to have had a stronger impact on its ability to influence readmission policy, both at procedural and substantive levels. We found no clear instances where the Parliament was able to shape the content of informal readmission arrangement in a way that mirrors its (already limited) influence in formal readmission agreements. At the procedural level, the Parliament's discontent with its diminished prerogatives has been voiced in several instances by individual MEPs, at committee level (LIBE, AFET and DEVE) and in plenary resolutions – all calling for favouring formal agreements over informal ones. Likewise, primarily under the influence of LIBE, the Parliament has tried to promote this policy agenda in a few legislative files where it has stronger prerogatives, including in the area of budget. Similar considerations apply to the substantive level of readmission arrangements, where the Parliament attempted to assert influence both via non-legislative and legislative resolutions.

[171] M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', 13 *European Law Journal* 2007, 447-468.

In both cases, however, this strategy seems to have yielded only very limited returns. Where the Parliament has directly confronted the Commission on its diminished prerogatives, namely in the hearings of the LIBE Committee, MEPs had to acknowledge the fact that Commissioners themselves – the 'political' level of the Commission – have so far refused to engage on the merit of the issue, rather downplaying the discussion to a technical matter to be discussed by the civil service (technocratic) level of the Commission. Whether Parliament's public positions or informal lobbying activities have influenced the Commission's or the Council's conduct in more subtle ways needs to be assessed through additional research, including via interviews.

Parliament's strategy of using its prerogatives in areas where it is stronger – to protect its influence in other where is weaker – may well prove more fruitful in the future if applied more consistently. At the same time, it is important to recognise that such strategy is only likely to work only as long as the Parliament and the relevant Committees are able to act unified in reasserting their prerogatives. We did not examine this aspect in detail for this paper; yet our data seem to indicate that there is considerable disagreement amongst political groups regarding 'what is wrong' with readmission arrangements. Certain political parties, particularly on the right-wing spectrum, expressed no judgement (or rather praised) the Commission's decision to conclude readmission arrangements, as long as they contribute to increasing return and readmission rates.[172] While the general thrust of the committees (as well as of the Parliament)[173] has so far been critical of readmission arrangements when it comes to Parliamentary prerogatives, it is not to be excluded that this stance may change in the future.

From an inter-institutional perspective, it is also important to ask whether the Parliament should attempt to extend its reach to other actors of the EU executive. Our data showed that the Parliament overwhelmingly targeted the Commission in its requests for information but very rarely the Council. This approach, of course, reflects the existence of a relation of political accountability between the two institutions in a (quasi-)principal-agent relation, as already argued at the beginning of this paper. At the same time, from the perspective of institutional balance for the conclusion of binding international agreements, the Council can be expected to be the primary addressee. Targeting the Commission appears a reasonable enough strategy to collect information and scrutinise policy implementation, particularly as the Commission is the actor most closely involved in all aspects of the policy cycle. At the same time, focusing exclusively on the Commission is likely to have a little effect in changing the course of readmission policy, particularly as the broader turn to informality appears grounded in and legitimised by a series of political decisions taken

[172] LIBE_PV(2017)09-07-1, Meeting of LIBE of Thursday, 7 September 2017, comment by MEP Halla-aho (ECR).

[173] Such a view has also been voiced in the context of a plenary debate concerning the JWF on 26 October 2016, which saw the presence of Commissioner Avramopoulous, see P8_CRE-REV(2016)10-26, Minutes of the sitting of Wednesday 26 October 2016.

at the higher political level of the European Council and supported by the Council.[174] From a supranational (or even inter-institutional) perspective, others have already noted the accountability vacuum of the European Council.[175] Considering the latter's growing role in steering EU policy in areas such as asylum and migration, this issue is only likely to exacerbate.

After more than a decade since the entry into force of the Lisbon Treaty, conceiving the Parliament as a second 'principal' controlling the Commission in external action remains heavily contested and resisted. From a separation of powers perspective, our data seem to show that in informal readmission policy, Parliamentary control of the EU executive is indeed reduced.[176] If the Parliament is still able to retain partial powers of scrutiny towards the Commission, it appears incapable of both effectively controlling the actions of the EU executive and steering readmission policy in a way that protects and reasserts its existing prerogatives. The co-existence of several executive actors in in shaping external migration policy, and the growing influence of the European Council in particular, pose considerable challenges to the ability of the Parliament to ensure effective democratic control of this policy field. This does not mean, however, that Parliamentary actions have no value. From the perspective of the public interest and democratic deliberation, attempts to draw attention to the problematic nature of informal readmission arrangements may be considered to have intrinsic value even if they do not always result in concrete policy changes; they contribute to shedding light on issues that would otherwise go unnoticed, sanctioning conduct of the executive actors at the political level, but may also prompt the Member State institutions (including national Parliaments) and publics to mobilise in the respective context. Whether Parliament's sanctions on executive actors are 'strong' enough or whether its awareness-raising role is effectively capable of shaping European public debate are empirical questions that demand further research.

[174] European Council meeting (20 and 21 October 2016) – Conclusions (EUCO 31/16); European Council meeting (22 and 23 June 2017) – Conclusions (EUCO 8/17); European Council meeting (19 October 2017) – Conclusions (EUCO 14/17).

[175] M. van de Steeg, 'The European Council's Evolving Political Accountability', in M. Bovens *et al.* (eds.), *The Real World of EU Accountability. What Deficit? (*Oxford: Oxford University Press 2010), 117-149.

[176] Paradoxically, if we consider that informal readmission arrangements moreover may not prevent Member States from concluding and using their own agreements or arrangements with the same countries, the prerogatives of EU institutions as a whole appear to be weakened by this development.

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- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

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