ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

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THE EU READMISSION POLICY TO THE TEST OF SUBSIDIARITY AND INSTITUTIONAL BALANCE: FRAMING THE EXERCISE OF A PECULIAR SHARED COMPETENCE

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ABSTRACT: Migration governance entails the enactment of a bordering process, drawing lines of inclusion and exclusion, through legal instruments, policy tools and funding decisions. The level of experimentalism through which this process is increasingly carried out by the EU demands constant reflection on its overall limits and constraints, on the part of those working on it from a constitutional perspective. The present *Article* aims at contributing to that reflection effort by analysing the EU's readmission policy from the standpoint of two principles governing its exercise as a shared competence: subsidiarity and institutional balance. Both principles require EU institutions to engage with the constitutional logic which underlies Treaty choices. On the one hand, subsidiarity reminds the institutions of the need to consider the input and output legitimacy of their intervention in areas of non-exclusive competences. On the other hand, institutional balance contributes to such a legitimacy, by maintaining institutional action and interaction within pre-defined boundaries. In the strongly politicised arena of the common readmission policy, characterised by a high degree of experimentalism, the flexible anchoring in the Treaty framework provided by these two principles would constitute a sound foundation for legitimate EU level action, including through soft law. So far, this potential has been underexploited.

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I. INTRODUCTION

Migration governance entails the enactment of a bordering process that draws lines of inclusion and exclusion[1] through legal instruments, policy tools and funding decisions. As it is enacted by public institutions, the bordering process conducted with the tools of the Union's migration policy is constrained by the fundamental principles of the legal order to which these institutions belong, namely the EU. These considerations hold true also for the common readmission policy, conducted since the entry into force of the Amsterdam Treaty[2] through forms of cooperation with third countries directed at pushing the legal and political borders of the Union outwards, creating borders beyond its borders.[3]

Over the years, the common readmission policy has gained political salience and has been pursued through a diversified strategy, involving different actors, various levels of interaction with the readmission policies of the different Member States, and a wealth of tools, ranging from traditional international treaties to soft arrangements of different nature and normative force.[4]

Considering that the border drawing function of the EU readmission policy has an immediate impact on fundamental rights of individuals – *i.e.* core domains protected and regulated through hard procedural and substantive law –, the level of experimentalism characterising its evolution demands constant reflection on its overall limits and constraints. The present *Article* aims at contributing to that reflection effort by analysing the EU's readmission policy from the standpoint of two principles governing its exercise as a shared competence: subsidiarity and institutional balance. The objective is verifying to what extent these principles have been capable of steering institutional conduct in the field so far, but also reflecting on how they could do so in the future, taking into account the main axes of development of this policy field. The choice of these two benchmarks is first and foremost dictated by practical considerations. It would have been impossible to assess the field against all "structural principles"[5] relevant to the Union's external action in the space of an

[1] D Newman, 'On Borders and Power: A Theoretical Framework' (2003) Journal of Borderlands Studies 13, 15; I Horga and M Brie, 'Europe between Exclusive Borders and Inclusive Frontiers' (2010) Studia Europaea 63.

[2] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997].

[3] On the concept of externalisation see, inter alia, T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) Journal of Refugee Studies 216.

[4] *Inter alia*, M Panizzon, 'The Global Migration Compact and the Limits of "Package Deals" for Migration Law and Policy' in E Guild and others, 'What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (RWI Working Paper 1-2017) 17, 21; C Molinari, 'The EU and Its Perilous Journey Through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) ELR 824, 825.

[5] M Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart 2018).

article. Hence, the decision was made to focus on the exercise of the readmission competence, rather than on its nature, and on the framing of EU-level action, as opposed to action by the Member States. The issues left out of this *Article* (in particular, the question of the exclusivity or non-exclusivity of the Union's readmission competence in different instances, as well as the implications of the principle of sincere cooperation for the parallel pursuit of EU and national readmission policies) are dealt with elsewhere by the present author.[6] While limiting the scope of the present analysis, the focus on subsidiarity and institutional balance allows it to encompass both the vertical and horizontal aspects of competence distribution in the EU legal order, providing an overview of the interplay between those national and supranational actors which shape this policy domain.

II. Subsidiarity

II.1. Subsidiarity and the exercise of the Union's external competences

According to the principle of subsidiarity, enshrined in art. 5(3) TEU, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". The principle is meant to determine the appropriate level of action in areas where both EU and Member States are competent to act.[7] Thus, it governs the exercise of EU competences, as preallocated along the "vertical axis".[8] Much as conferral, subsidiarity is relevant every time the Union decides to "act", internally or externally, through hard or soft law.[9] Nonetheless, its scope is limited to areas of non-exclusive Union competence. In these fields, it sets conditions upon which the Union's *exercise* of its competence should depend.

In its essence, subsidiarity operates by entailing a presumption in favour of Member States' action:[10] proximity of government to the citizens is assumed to make decisions more

[6] C Molinari, 'Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?' (2021) CYELS forthcoming.

[7] D Cass, 'The Word That Saves Maastricht: The Principle of Subsidiarity and the Division of Powers Within the European Community' (1992) CMLRev 1107, 1134.

[8] The expressions "vertical and horizontal axis" are used by G De Baere, *Constitutional Principles of EU External Relation* (Oxford University Press 2008) 229 to describe the two plans along which competences are divided in the EU: between Member States and supranational level (vertical) and between different actors at the supranational level (horizontal).

[9] *Inter alia*, I Bosse-Platière and M Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020) 48; M Klamert, 'Article 5 TEU: Commentary' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 70.

[10] J Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' (2017) Yearbook of European Law 391, 404.

participatory[11] and *efficient*[12] in addressing collective needs. Specific justifications are needed to rebut this presumption and support action at the supranational level.[13] Hence, subsidiarity translates into an obligation to give reasons.[14] The required justification encompasses both a negative and a positive component, and it entails both qualitative and quantitative considerations.[15] The negative component of the subsidiarity test corresponds to a requirement of *necessity of supranational action*. The latter is only allowed when the national level would be ineffective, *i.e.* incapable of sufficiently reaching the envisaged objectives. The positive component of the subsidiarity test further requires verifying whether EU-level action would bear any *added value*, either in terms of scale of the proposed action or in terms of its effects. Conducting the comparative efficiency determination required to identify added value is no easy task. Crucially, this determination depends on the identified objectives of Union's action,[16] as well as on the embraced conception of subsidiarity.[17]

Codified in the EU Treaties in a restructuring attempt that values proximity of government as a way to facilitate and support the Union's deliberative processes,[18] subsidiarity values participation in decision making as a vehicle for more efficient outcomes.[19] Albeit limited in scope to draft legislative acts, the attribution of the *ex ante* subsidiarity control to national parliaments further shows that democratic legitimacy considerations are not extraneous to the subsidiarity equation, but rather part and parcel of the subsidiarity test.[20]

Justifying the EU's external action from a subsidiarity perspective seems *prima facie* easy. First, external action is always deployed on the international scale. Secondly, EU level intervention on the international sphere has the effect of increasing the negotiating weight behind EU citizens' interests in most instances. Thirdly, since the Lisbon reform of the EU Treaties, art. 218 TFEU attributes to the European Parliament (EP) a prominent

[11] *Ibid*.; D Cass, 'The Word That Saves Maastricht' cit. 1134.

[12] P Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) JComMarSt 72, 84; K Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (1993) FordhamIntlLJ 846, 877.

[13] R Schütze, *European Constitutional Law* (Cambridge University Press 2016) 260.

[14] K Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union' cit. 894.

[15] This is made explicit in art. 5 of Protocol n. 2 on the Application of the Principles of Subsidiarity and Proportionality [2008]. See also M Klamert, 'Article 5 TEU: Commentary' cit. 72.

[16] P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 73–75.

[17] It should be added that when both the negative and positive component of the subsidiarity test are fulfilled, EU action is permitted, but the supranational institutions remain free not to act. In this respect, see for example case T–310/18 *EPSU and Goudriaan v Commission* ECLI:EU:T:2019:757 paras 135-139.

[18] G De Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Papers 7-1999) 11-12; P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 73.

[19] NW Barber, 'The Limited Modesty of Subsidiarity' (2015) ELJ 308, 315 ff; C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019) 84. See also P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 73 on subsidiarity as a means to preserve pluralism.

[20] C Eckes, *EU Powers Under External Pressure* cit. 84. See also NW Barber, 'The Limited Modesty of Subsidiarity' cit. 318.

role in the negotiation and conclusion of international agreements, ensuring a high level of democratic participation in international decision-making. The Commission has recognised such a role and has committed to keeping the EP fully and timely informed on all the phases of the negotiating process, thereby allowing it to provide input.[21] At the national level, the extent to which parliamentary assemblies can obtain information on international negotiations and have their concerns taken into account vary from a Member State to the other. In addition, the link between parliamentary majority and government giving expression to that majority is likely to render scrutiny of executive action on the international stage less effective than it is at the level of the Union.[22]

These considerations notwithstanding, the practice of justifying the Union's external action explicitly as to its compliance with subsidiarity has remained exceptional.[23] While internal legislative proposals systematically include a subsidiarity justification in the relevant explanatory memorandum,[24] the same cannot be said of the decisions to negotiate and sign international agreements. There are several possible reasons for such a lack of justification.

A first reason is linked to the circumstance that the subsidiarity test and the reasoning behind the affirmation that an implied external competence exists partially overlap in certain instances: the finding of an *implied* external competence based on art. 216(1) TFEU can depend on the determination that EU external action is necessary for the achievement of an EU objective. This determination encompasses a finding that EU action bears added value in the given situation. Thus, a separate reasoning on the subsidiarity compliance of the exercise of implied competence might be redundant.[25] Nonetheless, this consideration is irrelevant for *explicit* external competences of a non-exclusive nature, such as readmission. These exist regardless of their necessity in any specific instance, but can only be *exercised* when their activation would respond to the subsidiarity logic. Considering the independent function that subsidiarity plays in determining their exercise by the Union, the lack of subsidiarity justification for explicit non-exclusive external competences – such as readmission – remains problematic.

A second argument used to explain the paucity of subsidiarity justifications for external action is related to mixity. Facultative mixity entails EU's and Member States' joint

[21] Framework Agreement on relations between the European Parliament and the European Commission [2010], points 23 and 24.

[22] D Thym, 'Parliamentary Involvement in European International Relations' in M Cremona and B De Witte (eds), *EU Foreign Relations Law*: *Constitutional Fundamentals* (Hart 2008) 201, 210 ff; P Bajtay, 'Democratic and Efficient Foreign Policy? Parliamentary Diplomacy and Oversight in the 21st Century and the Post-Lisbon Role of the European Parliament in Shaping and Controlling EU Foreign Policy' (EUI Working Papers 11-2015) 5.

[23] C Eckes, *EU Powers Under External Pressure* cit. 94; G De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in M Cremona (ed.), *Structural Principles* cit. 93, 113 ff.

[24] In compliance with a specific obligation resulting from art. 5 of Protocol n. 2.

[25] I Bosse-Platière and M Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' cit. 64; G De Baere, 'Subsidiarity as a Structural Principle' cit. 101 ff.

action in areas of non-exclusive external competence. This type of mixity is called "facultative" precisely because the Union possesses a shared competence in the area(s) covered by the agreement and would, as a consequence, be able to conclude it on its own.[26] In this scenario, the choice to nonetheless involve the Member States tends to obscure the question of subsidiarity precisely because, through mixity, the Member States are allowed to maintain their international presence and visibility. This renders the need for an explicit justification concerning the added value of the EU's external intervention less politically – albeit not legally – compelling. However, even this second argument tells us nothing on the lack of justification for EU action in fields such as that of readmission. In fact, international cooperation on readmission is almost invariably conducted by the Union alone, rather than through mixed agreements.

In conclusion, and in particular for explicit and non-exclusive external competences, the lack of subsidiarity justification stands in contrast with the logic of subsidiarity, namely informing the Union's federal model and influencing institutional discourse and practice[27] by requiring constant and explicit reflection on the most appropriate level of action. Admittedly, the obligation to provide a subsidiarity justification might prove difficult to enforce judicially, in light of the traditional reluctance of the Court of Justice of the European Union (Court) to scrutinise compliance with this "procedural aspect" of the subsidiarity principle.[28] Such a reluctance has been attributed to the difficulty to disentangle the legal and political content of subsidiarity and to identify, as a consequence, the appropriate scope for judicial review. Albeit consistently reaffirming its competence to scrutinise subsidiarity compliance, the Court has long limited itself to a deferential assessment of the substantive aspects of the principle, namely compliance with the positive and negative criteria enshrined in art. 5(3) TEU. This approach is encapsulated in the frequent finding that "the EU legislature could legitimately take the view [that the relevant objectives] could be best achieved at EU level".[29] As noticed by Craig, at least pre-Lisbon, not only the Court, but also the parties rarely relied on subsidiarity to challenge EU action.[30] Be that as it may, since the entry into force of the Lisbon Treaty, the standard of judicial review of subsidiarity compliance seems to have evolved, by virtue of the enhanced procedural safeguards that Protocol n. 2 to the EU Treaties has attached to the principle in relation to draft legislative acts. The Protocol requires draft legislation to be accompanied by "a detailed statement making it possible to appraise compliance with the principle[..]

[26] As reaffirmed in case C-600/14 *Germany v Council* ECLI:EU:C:2017:935 (hereinafter *OTIF I)* paras 67-68.

[27] G De Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' cit. 8.

[28] J Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' cit. 405 ff.

[29] Case C-151/17 *Swedish Match* ECLI:EU:C:2018:938 para. 69. See also, among others, case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325 para. 222; case C-508/13 *Estonia v Parliament and Council* ECLI:EU:C:2015:403 para. 48; and case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321 paras 77-78.

[30] P Craig, 'Subsidiarity: A Political and Legal Analysis', cit. 80.

of subsidiarity"[31] and explicitly recognises the Court's jurisdiction to scrutinise subsidiarity breaches.[32] In light of this shift in the Treaty framework, several Court's judgment have affirmed that "the EU judicature [...] must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by [...] protocol [n. 2]".[33]This finding has often been accompanied by a (timid) enquiry into the statement of reasons and impact assessment accompanying the relevant piece of legislation.[34] It is submitted that judicial review concerning the existence and adequacy of subsidiarity justification should apply also to non-legislative acts. The Court has itself recognised that a solid subsidiarity justification is necessary to "enabl[e it] [...] to exercise its power of review".[35] This consideration holds true for international agreements as much as for internal legislation. In the future, it is hoped that the Court will feel entitled to annul any EU measure, including non-legislative acts, in case of a totally lacking or clearly insufficient subsidiarity justification.[36]

II.2. The Union's readmission policy to the test of subsidiarity

The Union's readmission competence is an explicit external competence of a shared nature. Thus, compliance with subsidiarity of EU action in the field must be determined on a case-by-case basis, when the competence is exercised. The reflection and justification requirements needed for such a determination are often circumvented: readmission agreements and arrangements proliferate at the two levels of EU governance regardless their comparative efficiency. The avoidance of the subsidiarity question is not only evident in institutional practice in the field of readmission, but also in the relevant doctrine.[37] The latter has often correctly acknowledged the lack of added value of the Union's intervention in the area of readmission. Nonetheless, it has used this observation to justify parallel bilateral action at the national level, rather than to question the subsidiarity-compliance of Union's action.[38] In other words, adopting a top-down approach, the doctrine has often asked whether the Union's competence in the field of readmission could be construed as exclusive, relying on the lack of sufficient added value in the negotiation

[31] Art. 5 Protocol n. 2.

[32] Art. 8 Protocol n. 2.

[33] *Philip Morris Brands and Others* cit. para. 217; case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324 para. 146; case C-358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323 para. 113.

[34] *Philip Morris Brands and Others* cit. paras 226-227 and *Poland v Parliament and Council* cit. paras 123-124.

[35] *Poland v Parliament and Council* cit. para. 124.

[36] P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 78.

[37] The question of subsidiarity in external action remains quite unexplored more broadly (see I Bosse-Platière and M Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' cit. 48).

[38] M Panizzon, 'Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?' (2012) Refugee Survey Quarterly 101, 132; N Coleman, *European Readmission Policy: Third Country Interests and Refugee Right* (Martinus Nijhoff 2009) 207.

with third countries to conclude in the negative. Conversely, it has rarely looked at the issue from the bottom-up perspective imposed by subsidiarity, questioning the extent to which this shared EU competence can legitimately be exercised when EU intervention bears no added value. In light of this gap, the present section will attempt to spell out the – often implicit – justification underlying Union's action in the field of readmission to assess its explanatory potential.

The first question to be asked in the context of a subsidiarity assessment of the Union's readmission policy concerns the nature of the relevant objectives, against which both the effectiveness of national action and the added value of EU-level intervention must be evaluated. As convincingly argued by Coleman, the Union was granted shared competence on readmission by virtue of its potential negotiating strength,[39] with a view to increase the chance of obtaining cooperation from difficult negotiating partners at bilateral level. Readmission agreements were aimed at facilitating the implementation of return orders. At the same time, they were conceived as conducive to the attainment of broader migration policy objectives, such as the creation of a "buffer zone"[40] of neighbouring states capable and willing to prevent transit of irregular migrants towards the EU. This means that the common readmission policy was intended to strengthen the Union's borders and help externalising migration governance without seeking to harmonise national readmission policies. National and supranational action on readmission were meant to concur in achieving the same objective: obtaining third countries' cooperation on readmission and migration control more broadly.[41]

With this in mind, a first observation to be made is that, in most cases, Member States have proven capable of achieving this objective on their own. Over the years, they have developed a broad and ever-expanding network of bilateral readmission agreements.[42] In this respect, and from a subsidiarity perspective, the Union's intervention was, from the beginning, intended to focus on those cases where bilateral negotiations were proving particularly difficult to conduct. This perspective was confirmed by the Council itself in the early phases of the development of the Union's readmission strategy.[43] According to Coleman "[t]he communitarisation of readmission agreements was masterminded in order to gain a more dominant negotiating position especially *vis-à-vis* [...] problematic countries" such as Russia, China and Morocco.[44] As a consequence, the first prong of the subsidiarity test seems to be satisfied with respect to this type of third countries only.

[39] N Coleman, *European Readmission Policy* cit. 56.

[40] G Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' (2013) European Journal of Migration and Law 283, 284.

[41] N Coleman, *European Readmission Policy* cit. 55.

[42] See data stored in the online inventory kept by JP Cassarino, *An Expanding Readmission System* www.jeanpierrecassarino.com.

[43] Council Proposal of 14 June 2002 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, para. 76.

[44] N Coleman, *European Readmission Policy* cit. 56.

In addition, even when Member States are incapable of achieving the objectives of the readmission policy with respect to specific third countries, the Union is still required to demonstrate the added value of its intervention, before being allowed to exercise its readmission competence. Added value is to be declined as *i*) higher comparative efficiency in obtaining third countries' cooperation, by reason of the Union's purportedly more significant negotiating weight; and *ii*) enhancement of the participatory rationale of subsidiarity. As to the first element, EU institutions were forced to admit early on that the supranational level lacked the right set of incentives to obtain third countries' cooperation on readmission.[45] For those countries interested in a *quid pro quo* involving labour migration, the Union's intervention bore no advantage, as only "Member States [can] determine volume of admission of third-country nationals coming from third countries to their territory in order to seek work".[46] Notwithstanding the attempts to increase the Union's negotiating toolbox through the linking of readmission and visa facilitation negotiations,[47] as well as through positive[48] and negative conditionality applied to the Union's development funds,[49] the conclusion of EU readmission agreements has remained a challenge, so much so that the institutions have increasingly focussed on flexible cooperation on readmission based on non-binding instruments, rather than international treaties.[50] As a consequence of this tendency towards informalisation, the Union's readmission policy has threaded further away from the participatory logic of subsidiarity. In fact, after the Lisbon reform of the EU Treaties and the prominent role granted to the EP in the negotiation of international treaties,[51] EU institutions could have justified their intervention in the field of readmission invoking the arguably sounder democratic legitimacy of EU external action, when compared to international cooperation conducted at the national level. Nonetheless, the participatory rationale

[45] According to the Commission "As readmission agreements work mainly in the interest of the Community, third-countries are naturally very reluctant to accept such agreements. Their successful conclusion, therefore, depends very much on the positive incentives ("leverage") at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return. In particular visa concessions or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not" (Communication COM(2002) 564 final of 14 October 2002 from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents).

[46] Art. 79(5) TFEU. See A Roig and T Huddleston, 'EC Readmission Agreements: A Re-Evaluation of the Political Impasse' (2007) European Journal of Migration and Law 363, 376.

[47] Communication COM(2006) 735 final of 30 January 2006 from the Commission to the Council and. the European Parliament on The Global Approach to Migration One Year on: Towards a Comprehensive European Migration Policy.

[48] Communication COM(2002) 703 final of 3 December 2002 from the Commission to the Council and the European Parliament on Integrating Migration Issues in the European Union's Relations with Third Countries.

[49] Communication COM(2016) 385 final of 7 June 2016 from the Commission on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration.

[50] *Ibid*.

[51] R Corbett, 'The Evolving Roles of the European Parliament and of National Parliaments' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012) 249–250.

embedded in the subsidiarity logic offers no support to the informal tools increasingly used by the Union to obtain cooperation on readmission.

From a subsidiarity standpoint, the above seems to suggest that Union action in the field of readmission should be limited: Member States are often capable of achieving the objective of concluding readmission deals on their own. Moreover, EU added value in the absence of competence on labour migration remains doubtful in most cases. The negotiating weight of the Union has been unable to substantially facilitate negotiations with most of those third countries which had shown resistance in the context of bilateral cooperation: Morocco and China, for example, never accepted to conclude readmission agreements with the EU.[52] Finally, considerations linked to the participatory nature of decision-making might provide an argument in favour of Union's action through readmission agreements. Nonetheless, the democratic advantage of having the deals scrutinized by the EP throughout the relevant negotiating process cannot be invoked to justify the increasing number of informal arrangements concluded without following the procedure envisaged in art. 218 TFEU.

In light of the above, and instead of relying blindly on the multiplication of the calls to step up the Union's common readmission policy through differentiated tools and actors,[53] a more explicit and thorough reflection on the added value of supranational action in this area would be politically and legally desirable. It would contribute to bringing the practice of the EU readmission policy more in line with the constitutional architecture envisaged in the Treaties and reverse the current bias towards EU action at any cost, accompanied by the persistent need for parallel national action. An explicit subsidiarity justification would also increase the transparency of the Union's decision-making process, much as it does for internal legislative acts, allowing for more meaningful judicial and democratic scrutiny on external action.

III. Institutional balance

III.1. Institutional balance in the area of readmission according to the Treaties

The previous section has questioned the compliance of the EU readmission policy with subsidiarity, which steers the exercise of competences along the vertical axis. This section

[52] Notwithstanding the circumstance that the relevant negotiating mandate had been issued in the very early day of the common readmission policy: September 2000 for Morocco and November 2002 for China (Readmission Agreements MEMO/05/351 from the Commission of 5 October 2005).

[53] As reiterated most recently in Communication COM(2020) 609 final of 23 September 2020 from the Commission on a New Pact on Migration and Asylum.

will be dedicated to a principle[54] governing the exercise of the Union's readmission competence along the horizontal axis: institutional balance.

Institutional balance is reflected, at the level of EU primary law, in art. 13(2) TEU,[55] according to which "each institution shall 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". In its essence, it requires each institution to perform the core functions attributed to it by the Treaties without encroaching on the prerogatives of other institutions. Thereby, it ensures that the allocation of powers to different governing bodies be respected in its rationale and prevents it from being subverted by institutional practice.[56] The principle finds its origin in the case-law of the Court[57] that has been willing to engage with it on several occasions[58] and even, exceptionally, to use it as a ground to annul specific measures.[59] The relevant case-law reiterates that "[t]he Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions".[60]

The role that each institution has to perform in the Union's constitutional architecture is defined primarily with reference to the general institutional provisions contained in arts 14 to 19 TEU.[61] These articles allow the Court to extrapolate the intention of the

[54] Institutional balance has been qualified as a "principle" by the Court on several occasions (see, for example, case C-660/13 *Council v Commission* ECLI:EU:C:2016:616 (hereinafter *Swiss MoU*) para. 32; case C-409/13 *Council v Commission* ECLI:EU:C:2015:217 (hereinafter *MFA*) para. 64; case C-73/14 *Council v Commission* ECLI:EU:C:2015:663 (hereinafter *ITLOS*) para. 61).

[55] M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' (2015) EPL 371, 375; C Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in M Cremona (ed.), *Structural Principles* cit. 117, 118; C Eckes, *EU Powers Under External Pressure* cit. 149.

[56] See O Moskalenko, 'The Institutional Balance: A Janus-Faced Concept of EU Constitutional Law', (2016) Politeja 125, 125.

[57] The Court has referred to the "balance of powers [characterising] the institutional structure of the Community" as early as in case 9/56 *Meroni v High Authority* ECLI:EU:C:1958:7 para. 152.

[58] *MFA* cit. paras 63-95; case C-70/88 *Parliament v Council* ECLI:EU:C:1990:217 (hereinafter *Chernobyl*) paras 20-27; case C-133/06 *Parliament v Council* ECLI:EU:C:2008:257 para. 57; case C-425/13 *Commission v Council* ECLI:EU:C:2015:483 (hereinafter *ETS*) para. 57; *ITLOS* cit. para. 61; case C-233/02 *France v Commission* ECLI:EU:C:2004:173 para. 40.

[59] *Swiss MoU* cit. paras 46-48.

[60] *Chernobyl* cit. paras 21-22. See also *MFA* cit. para. 64; and *ITLOS* cit. para. 61.

[61] C Eckes, *EU Powers Under External Pressure* cit. 127.

Treaties drafters as to the core aspects of the horizontal allocation of powers, to be respected, both internally and externally,[62] in all policy areas, including when EU institutions act as "borrowed" actors, outside the framework of the EU Treaties.[63] According to the general institutional provisions, the EP "shall exercise functions of political control and consultation as laid down in the Treaties";[64] the European Council "shall define the general political directions and priorities"[65] of the Union; and the Council "shall carry out policy-making and coordinating functions as laid down in the Treaties".[66] As to the Commission, it is the bearer of numerous functions, including "tak[ing] appropriate initiatives" to "promote the general interest of the Union" and "ensur[ing] the Union's external representation". Finally, observance of the law "in the interpretation and application of the Treaties" is the task of the Court, which is therefore both subject to the principle of institutional balance and in charge of ensuring its respect by the other institutions.[67]

These overarching provisions must be read together with the procedural indications contained in the legal basis of the policy field at stake.[68] In fact, legal bases are associated with specific procedural arrangements detailing the balance between, for example, democratic accountability, flexibility and speed of action.[69] These arrangements are particularly important to determine the respective weight of the EP's democratic control function, on the one hand, and the Council's policy-making role, on the other, as both these functions have to be performed "as laid down in the Treaties".[70]

With respect to the field of readmission, the procedural arrangements that indicate the desired institutional balance are enshrined in art. 79 TFEU, belonging to Title V on the Area of Freedom Security and Justice (AFSJ), and art. 218 TFEU, dealing with the Union's external action. Art. 79(3) TFEU constitutes the explicit legal basis for external action in a field internally covered by art. 79(2)(c), namely irregular migration. The decision-making procedure envisaged in art. 79 gives us indications on the specific weight that each institution should

[62] The Court's reasoning on institutional balance invariably departs from these general institutional provisions, when dealing with both internal (e.g., *MFA* cit. 68-74) and external EU action (e.g. *Swiss MoU* cit.; *ITLOS* cit. paras 68-77).

[63] Case C-370/12 *Pringle* ECLI:EU:C:2012:756 paras 162-163.

[64] Art. 14(1) TEU.

[65] *Ibid*. art. 15(1).

[66] *Ibid*. art. 16(1).

[67] Discussing the role of the Court for the EU's legal order more generally is beyond the scope of the present *Article*. The inclusion of the Court in this reconstruction of the Treaty allocation of powers is, nonetheless, needed in order to respect the Treaty structure, which does list the Court among other institutions and attributes to it a specific role. In addition, it is useful in order to remind the reader of the uneasy and twofold role of the court – subject and guardian - in the context of the Union's institutional balance.

[68] LAJ Senden, 'Soft Law and Its Implications for Institutional Balance in the EC' (2005) Utrecht Law Review 79, 85 ff.

[69] See C Hillion, 'Conferral, Cooperation and Balance' cit. 130 on the complexities of the relation between the general institutional provisions, on the one hand, and more specific procedural arrangements.

[70] Arts 14(1) and 16(1) TEU.

bear in this policy area. When looking at external action, these indications must be complemented by those coming from art. 218(6)(a)(v) TFEU, which details the procedure to be followed in order to conclude international agreements. A combined reading of arts 79 and 218 TFEU tells us that both the adoption of internal legislation and the conclusion of formal international agreements in the area of irregular migration require a conspicuous involvement of the EP. The latter is co-legislator with the same weight as the Council, internally, and must consent to the conclusion of international treaties, externally. In other words, in all the procedures explicitly detailed in the EU Treaties in the area of irregular migration, the EP is attributed the broadest possible function among the different configurations foreseen in EU primary law. In my view, this must be taken to reflect the institutional balance characterising the field more broadly.[71] Thus, I would argue that, even when no specific procedure is detailed in EU primary law for the conclusion of certain types of instruments, the institutional balance envisaged in the Treaties for both internal and external action in the area of irregular migration requires the EP's political control and consultation prerogatives to be interpreted broadly.

With respect to the conclusion of formal readmission agreements, this consideration remains in the background, as the way in which each institution is to perform its role is detailed in the specific procedural arrangements enshrined in art. 218 TFEU.

Conversely, they become essential with respect to soft deals whose conclusion is procedurally unregulated in EU primary law. In conjunction with the principle of inter-institutional sincere cooperation, institutional balance allows the Court to fill this gap and identify procedural rules of conduct unwritten in the Treaties, but needed to allow institutions to fully exercise their prerogatives without impinging upon each other's functions.[72]

Admittedly, in the absence of inter-institutional agreements[73] or other forms of guidance,[74] fleshing out the manner in which institutional balance is to translate procedurally in the context of the negotiation of soft deals is difficult. It will be for the Court to identify

[71] In relation to the Common Foreign and Security Policy (hereinafter CFSP), Hillion talks about the existence of a field-specific institutional balance, "encapsulated in related legal bases" and "interpreted [by the Court] in consideration of the general provisions of Title III TEU" (C Hillion, 'Conferral, Cooperation and Balance' cit. 129). I identify a similar relation between specific procedural arrangements, broader institutional balance in the AFSJ and respect for the essential role of each institution based on the general institutional provisions. The possibility to extrapolate an overarching institutional balance for the policy field at stake, which takes into account – but is not limited to – specific procedural arrangements, also constitutes the logical assumption underlying the idea of using institutional balance as a "gap-filling principle" (*inter alia*, M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?', cit. 385).

[72] A Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) Yearbook of European Law 569, 590 and C Hillion, 'Conferral, Cooperation and Balance' cit. 136.

[73] Of the kind that EP, Council and Commission are explicitly authorised to conclude in order to determine procedures for their cooperation "in compliance with the Treaties" under art. 295 TFEU.

[74] O Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' European Papers (European Forum Insight of 3 June 2020) www.europeanpapers.eu 663, 669.

the detailed practical consequences of the applicability of institutional balance to soft external deals on a case-by-case basis.[75] In doing so, the Court will not be able to apply art. 218 TFEU directly. However, it will likely take this Treaty article into account as a reflection of institutional balance in the field of external relations,[76]as it has already done in the *Swiss MoU* case. There, the Court explicitly departed from the general institutional provision concerning the Council and Commission, namely arts 16 and 17 TEU, to conclude that "the Commission cannot be regarded as having the right [...] to sign a non-binding agreement resulting from negotiations conducted with a third country".[77] However, it – implicitly but unmistakably – based itself on art 218(2) TFEU in order to determine the procedural consequence of this premise.[78] In fact, the judgment *de facto* recognised that it is for the Council to "authorise the opening of negotiations, adopt negotiating directives [and] authorise the signing of [the non-binding] agreement[...]",[79] exactly as would be the case in the context of the negotiation of a binding international treaty. According to the Court,

> "[t]he decision concerning the signing of an agreement with a third country [...] – *irrespective of whether or not that agreement is binding* – requires an assessment to be made [...] of the Union's interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled. Therefore, [...] [it] is one of the measures by which the Union's policy is made and its external action planned for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU".[80]

In other words, the non-binding nature of an international agreement does not allow the Commission to bypass the Council's policy-making function. It is reasonable to deduce from this that non-binding agreements must be respectful of institutional balance more broadly, including the EP's political control and consultation prerogatives.[81] In practice, the level of procedural symmetry between art. 218 TFEU and the negotiation of non-binding deals will depend on the nature of such deals in any given case. In the *Swiss MoU* judgment, the Court did not develop an explicit reasoning on the existence of different kinds of non-binding EU measures, with different levels of normative force. Nonetheless,

[75] As stated by Hillion, "The Court [...] enjoys a degree of discretion in articulating the interface between Title III TEU and specific TEU and TFEU- based procedures, and in turn in refining the functioning of the EU institutional system" (C Hillion, 'Conferral, Cooperation and Balance' cit. 130).

[76] See T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case' European Papers (European Forum Insight of 10 October 2016) www.europeanpapers.eu 1225, 1233 on the need "for a parliamentary consent-requirement on the basis of Art. 14 TEU that runs parallel with Art. 218, para. 6, TFEU".

[77] *Swiss MoU* cit. para. 38.

[78] P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) ICLQ 1, 12.

[79] Art. 218(2) TFEU.

[80] *Swiss MoU* cit. paras 39-40 (emphasis added).

[81] T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements' cit. 1233.

the literature has underlined that different types of (internal and external) soft law exist and that the distinction between soft and hard law is not a dichotomy, but rather a matter of degree.[82] Non-binding and binding measures can be placed on a "continuum"[83] that ranges from purely political declarations, to commitments with a certain normative strength, to enforceable legal acts adopted in conformity with pre-defined procedures. The closer the content and potential effects of soft law measures are to those of their hard law alternatives, the more justified it is to require from the institutions the granting of a level of transparency, democratic and judicial accountability comparable to that provided for in the Treaties for hard law. The opposite would expose the EU's Treaty system to elusive conduct on the part of its institutions.[84] The Court has indirectly endorsed this reasoning when adjudicating on the validity of soft law measures. In *FBF*, it reaffirmed that the non-binding nature of a certain measure does not exempt the adopting authority from the obligation to remain within the boundaries of its conferred powers.[85] In *Belgium v Commission*, it accepted that even recommendations might exceptionally be able to produce legal effects, if the issuing institution intended to adopt binding commitments or produce clear consequences on the legal sphere of third parties.[86] Finally, in *France v Commission*, it annulled non-binding internal instructions of the Commission, as they *de facto* resulted in the self-attribution of a new power by the Commission.[87]

In conclusion, the institutional balance that the Treaties delineate for the field of readmission – and that is *reflected* in arts 79 and 218 TFEU – points to a high level of democratic scrutiny.[88] Thus, a significant role of the EP should be guaranteed even with respect to the negotiation of non-binding commitments, which are not directly procedurally regulated in the Treaties. This is the case at least when such deals *de facto* replace binding measures.[89] The opposite would open the gate for institutional elusion of the Treaty framework through soft law labelling. The next sub-section will go over the array of instruments used to pursue the Union's readmission policy to verify whether informal EU deals in the area of readmission are negotiated and concluded in conformity with these standards.

[82] KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) International Organization 421, 422.

[83] F Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2015) 21 ELJ 68, 70.

[84] C Molinari, 'EU Readmission Deals and Constitutional Allocation of Powers: Parallel Paths That Need to Cross?' (29 September 2020) Verfassungsblog verfassungsblog.de.

[85] Case C-911/19 *FBF* ECLI:EU:C:2021:599 paras 67-68

[86] Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2018:79 para. 29.

[87] Case C-366/88 *France v Commission* ECLI:EU:C:1990:348 paras 23-25.

[88] The Court has already grounded a broad interpretation of the EP's rights of information in the CFSP context on the circumstance that "participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly" (case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435 and case C-658/11 *Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025).

[89] On the need to distinguish between various types of soft law when assessing the role that each institution is required to play, see A Ott, 'Informalization of EU Bilateral Instruments' cit. 591.

III.2. The Union's readmission policy to the test of institutional balance

From the perspective of institutional balance, formal readmission agreements are the least problematic of the different tools used to pursue readmission objectives. As they are negotiated following the detailed procedure described in art. 218(6)(a)(v) TFEU, their procedural design necessarily respects institutional balance. Any deviation from the procedural requirements set out for their conclusion can easily be brought to the attention of the Court and sanctioned. However, the importance of readmission agreements in the overall economy of the EU's readmission policy has been steadily declining over time. The difficulties linked to their negotiation, as well as the perceived urgency resulting from the migration crisis erupted in 2015,[90] have led the Union to focus on the speed and flexibility of international cooperation on readmission, rather than on the type of tools chosen to formalise it.[91] The decline in the use of formal readmission agreements has been accompanied by a parallel multiplication of informal tools of cooperation.[92]

A first example of this trend towards informalisation is constituted by Mobility Partnerships. These are non-binding statements which cover all four pillars of the Union's agenda on migration,[93] although their focus lies in the fight against illegal migration and cooperation on readmission.[94] They have been presented by the Commission as the standard tools to encase migration cooperation with third countries since 2007,[95] and include not only areas belonging to the Union's competence, but also fields, such as legal migration and integration, for which the bulk of the competences still lies with the Member States.[96] Thus, they are concluded by the EU together with a number of Member States, at the issue of negotiations conducted by the Commission for both the national and supranational level. Before negotiations are opened, the Commission performs an

[90] On the crisis narrative and its effects on the patterns of institutional action in the area of migration see S Carrera, J Santos Vara and T Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crises' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis: legality, rule of law and fundamental rights reconsidered* (Edward Elgar 2019) 1.

[91] In Communication COM(2016) 385 final cit., the Commission affirms that "coordinated and coherent EU and Member State coordination on readmission where *the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements*" (emphasis added).

[92] C Molinari, 'The EU and Its Perilous Journey through the Migration Crisis' cit. 831.

[93] The four pillars are the fight against irregular migration; border control; the common asylum system; and legal migration (Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee. and. the Committee of the Regions of 13 May 2015 on a European Agenda on Migration).

[94] N Reslow, 'Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships' (2012) Journal of European Integration 223, 232.

[95] Communication COM(2007) 248 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee. and. the Committee of the Regions of 16 May 2007 on circular migration and mobility partnership between the European Union and third countries.

[96] On the relation between need to bring to the table the incentives related to legal migration and EU added value in the field of readmission see section II.2 above.

active role in identifying potential partners and assessing their interests and priorities through exploratory talks, while coordinating with interested Member States.[97] Ultimately, it is for the Council to give its approval to the final choice of partner countries and to mandate the Commission to start negotiations.[98] The Commission is also required to report back on the status and, eventually, conclusion of the negotiations.[99] In terms of nature, Mobility Partnerships are not akin to formal readmission treaties, not only because of their broader scope, which includes legal migration, integration and development issues, but also because of their wording. The parties to such instruments undertake to "negotiate a readmission agreement"[100] and they endeavour, for example, to "pursue cooperation [...] on simplifying the procedures for entry and legal stays"[101] or "[t]o enhance information exchange, administrative capacity and operational and technical cooperation with regard to border management".[102] In the *crescendo* that goes from pure political declarations to hard law, Mobility Partnerships remain on the soft side of commitments, paving the way for hard law rather than substituting it. Thus, it could be argued that political control on their content be less pressing than it is for legally binding commitments. In other words, the extent to which the exclusion of the EP from the relevant negotiating procedure is questionable, as well as the determination of its desired level of involvement in the conclusion of this type of instruments, remain debatable.[103]

The legally problematic nature of a complete sidestepping of the EP is much clearer with respect to *ad hoc* informal readmission deals such as the EU-Afghanistan Joint Way Forward on migration issues[104] and its successor, the Joint Declaration on Migration Cooperation between Afghanistan and the EU,[105] as well as the EU-Bangladesh standard operating procedures[106] and the admission procedures concluded with Ethiopia.[107] As discussed above, to avoid elusive conduct on the part of EU institutions, soft deals whose content and effects are analogous to those of binding international agreements should be adopted based on procedures capable of ensuring that each institution, including the EP, can exercise its Treaty-

[97] N Reslow, 'Deciding on EU External Migration Policy' cit. 229.

[98] Communication COM(2007) 248 final cit.

[99] N Reslow, 'Deciding on EU External Migration Policy', cit. 230.

[100] Joint Declaration Establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and Its Participating Member States of 9 October 2014, point 9.

[101] *Ibid*. point 2.

[102] *Ibid*. point 13.

[103] On the distinction between different types of soft law with respect to the need for EP involvement see A Ott, 'Informalization of EU Bilateral Instruments' cit. 591.

[104] Joint Way Forward between Afghanistan and the EU on Migration Issues of 4 October 2016.

[105] Joint Declaration between Afghanistan and the EU on Migration Cooperation of 26 April 2021.

[106] Decision C(2017) 6137 of the Commission of 8 September 2017 on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay.

[107] Admission Procedures for the Return of Ethiopians from European Union Member States, in Item Note to Permanent Representatives Committee No. 15762/17 of General Secretariat of the Council of 18 December 2017.

based prerogatives. If this is the case, the gap between the role of the EP according to art. 218 TFEU and its function in the negotiation of these soft deals should be very narrow, as the content of these soft law instruments reproduces that of formal readmission agreements,[108] so much that the choice to explicitly qualify them as non-binding does not appear motivated by their content, but purely by political considerations. Nonetheless, these deals were all negotiated by the Commission under the political supervision of the Council, with no political control and consultation role left to play for the EP.[109] In other words, the EP was totally side-lined, in clear disregard of institutional balance.

The Commission's explicit support for the use of informal readmission tools[110] was expressed in the immediate aftermath of the conclusion of the EU-Turkey Statement,[111] hailed as an example to follow for its flexible nature and immediate results.[112] Unsurprisingly, the Statement had itself been adopted in clear violation of institutional balance, at least if considered as an EU's (as opposed to a Member States') deal.[113] Its conclusion by the European Council, after a negotiation conducted by the European Council's President,[114] inflates the role of this institution to the detriment not only of the EP, but also of the Council and the Commission. The institutional balance envisaged in the Treaties attributes a general power of external representation of the Union to the Commission[115] and

[108] As described in C Molinari, 'EU Institutions in Denial: Non-Agreements, Non-Signatories, and (Non-)Effective Judicial Protection in the EU Return Policy' (Maastricht Faculty of Law Working Paper 2-2019) 15.

[109] See Draft Joint Way Forward on migration issues between Afghanistan and the EU, in Item Note to Permanent Representatives Committee No. 12191/16 of the General Secretariat of the Council of 22 September 2016; Decision C(2017) 6137 cit.; Admission Procedures for the Return of Ethiopians (2017) cit. See also European Parliament Resolution P8_TA(2017)0499 of 14 December 2017 on the Situation in Afghanistan (2017/2932/(RSP)).

[110] Communication COM(2016) 385 final cit. 7. See also S Poli, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems' (2020) European Papers www.europeanpapers.eu 71, 75-76.

[111] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

[112] Communication COM(2016) 385 final cit.

[113] In this sense, M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* cit. 177; E Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*' European Papers (European Forum Insight of 15 March 2017) www.europeanpapers.eu 251 ff; S Carrera, L Den Hertogh and M Stefan, 'It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal' (CEPS Policy Insights 15/2017). This interpretation is in contradiction with the findings of the General Court in case T-192/16 *NF v European Council* ECLI:EU:T:2017:128, according to which the Statement was concluded by the Member States collectively, rather than by the European Council.

[114] As announced in Communication COM(2016) 166 final from the Commission to the European Parliament, the European Council and the Council of 16 March 2016 on the Next Operational Steps in EU-Turkey Cooperation in the Field of Migration.

[115] Except for the CFSP "and other cases provided for in the Treaties", art. 17 TEU. See A Ott, 'Informalization of EU Bilateral Instruments' cit. 578.

policy-making functions – including in the area of external relations – to the Council,[116] as made clear in the Court's case-law.[117] The European Council's task to provide high level guidance cannot impinge upon these Council's and Commission's prerogatives.[118]

The above examples show that the institutions often act as if institutional balance placed no normative constraints upon their action through soft tools. Nevertheless, this interpretation is at odds with the text of the Treaties and the case-law of the Court, which has already annulled a soft deal by virtue of its disregard of institutional balance (and, in particular, of the prerogatives of the Council under art. 16 TEU) in the context of the *Swiss MoU* case.

It is worth noting that ample recourse to soft law has the potential of marginalising not only the EP, but also the Court itself. According to art. 263 TFEU, in the context of direct actions, the Court can only review "acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties". Admittedly, the Court has been willing to recognise that even non-binding deals produce legal effects in the context of inter-institutional disputes brought by privileged applicants, as the exclusion of judicial review from entire areas of EU law would upset institutional balance by completely dispossessing the Court of its control function.[119] Nonetheless, to ensure full judicial accountability of EU action, the Court should go further, and recognise that soft law can go as far as affecting individual rights, often of a fundamental character, especially when its content is virtually undistinguishable from hard law. In scrutinising the content of soft law, including soft international deals that aim at producing effects analogous to hard law, the Court would safeguard its own role (*i.e.* "ensur[ing] that in the interpretation and application of the Treaties the law is observed")[120] within the institutional balance envisaged by the Treaties. Moreover, it would disincentives strategic behaviour, aimed at eluding the procedural rules envisaged in the Treaties, on the part of the other institutions.

IV. Conclusion

The present *Article* has looked at the EU readmission policy through the lens of two constitutional principles governing the exercise of EU competences: subsidiarity and institutional balance.

[116] Art. 16(1) TEU.

[117] *Swiss MoU* cit. paras 33-34, but also *ITLOS* cit. paras 62-77.

[118] For a different perspective on this issue, see M Gatti and A Ott, 'The EU-Turkey Statement' cit. 194. It should be noticed that the fact that both Council and European Council are composed of Member States' representatives – at ministerial level, for the Council, and at the level of heads of Member States and Governments, for the European Council – does not make the two institutions interchangeable, especially in light of the different voting rules.

[119] M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' cit. 276.

[120] Art. 19(1) TEU.

As flexible principles[121] which do not predetermine an outcome, but rather indicate the rationale that should guide the deployment of competences in the EU's constitutional architecture, subsidiarity and institutional balance share a common trait: they both require constant reflection on the constitutional logic which underlies Treaty choices.

On the one hand, subsidiarity reminds the institutions of the need to consider the input and output legitimacy of their intervention in areas of non-exclusive competences. On the other hand, institutional balance contributes to such a legitimacy, by maintaining institutional action and interaction within pre-defined boundaries.

In the strongly politicised arena of the common readmission policy, characterised by a high degree of experimentalism, the flexible anchoring in the Treaty framework provided by these two principles would constitute a sound foundation for legitimate EU level action in a field where agreements and arrangements can create and reinforce borders, preventing individuals from accessing not only physical territories, but also legal systems endowing them with rights and safeguards.

As shown above, the full potential of subsidiarity and institutional balance as steering tools has not been deployed so far in the area of readmission. EU institutions have multiplied the calls for more decisive EU intervention without asking the questions which would be imposed by the relevant constitutional framework: does EU intervention ensure a more efficient representation of the interests of EU citizens, when compared to national level action? What should the level of judicial[122] and democratic accountability[123] of the EU readmission policy be, in light of the principle of institutional balance?

It is submitted that the avoidance of these questions in response to the political salience of irregular migration results in a less legitimate and ultimately less efficient border drawing process, contributing to weakening the foundations of the EU legal system.

[121] *Inter alia*, W Van de Donk, 'Subsidiarity as an Experience and Inspiration: The Case for Regionomics in North Brabant' (2019) European View 45, 47; GA Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) ColumLRev 331, 341; S Platon, 'The Principle of Institutional Balance: Rise, Eclipse and Revival of a General Principle of EU Constitutional Law' in K Ziegler, P Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Press forthcoming).

[122] Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, opinion of AG Bobek, paras 4 and 81-86, case C-911/19 *FBF* ECLI:EU:C:2021:294, opinion of AG Bobek, paras 84-93.

[123] T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements' cit. 1233; RA Wessel, '"Soft" International Agreements in EU External Relations' (draft paper presented at the *ECPR SGEU Conference, Panel Hard and Soft Law in the European Union*, Paris 13-15 June 2018) ecpr.eu 19.