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Edited by Ariadna Ripoll Servent and Florian Trauner

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INFORMALIZING EU READMISSION POLICY

Jean-Pierre Cassarino

Introduction

In 2002, when the General Secretariat of the Council (GSC) listed the various key criteria that needed to be taken into consideration in order to identify non-EU (or third) countries with which to negotiate EU readmission agreements, it underlined that EU readmission agreements 'should involve added value for member states in bilateral negotiations' (European Council 2002: 3) with a given third country (Cassarino 2010: 12; Carrera 2016: 37).

Since the 1999 entry into force of the Treaty of Amsterdam (ToA), which empowered the European Commission to negotiate and conclude EU readmission agreements with third countries, adding value has not only been a key criterion, as stated by the GSC; it has also been a growing concern for the EU.

Externally, negotiations with some third countries, especially with those located in the southern Mediterranean, have either been deferred (Algeria), extremely lengthy (Turkey) or thorny (Morocco). Internally, the European Commission has been confronted with growing criticisms on the part of those who mandated it to negotiate readmission agreements, namely EU member states. Of course, such criticisms are not new considering the history of EU institution-building. Invariably, since 1999, they have accompanied the creation and development of the Common European Asylum System, including the need to adopt common rules and procedures aimed at protecting the fundamental rights of asylum-seekers and people in need of protection. Member states' criticisms have been symptomatic of the resilient and unresolved tensions between bilateralism, intergovernmentalism and supranationalism.

Such tensions have ritually emerged following the arrival of large numbers of migrants in Europe, together with recurrent official calls for enhanced cooperation with third countries of origin and of transit in the 'fight against illegal migration'. Recently, the governments of the Visegrad Group (V4)[1] delivered a joint statement in September 2016 urging the EU institutions to 'restore common trust in the European project and its institutions and empower the voice of member states'. They also stated that 'migration policy should be based on the principles of "flexible solidarity" [...] [to] enable member states to decide on specific forms of contribution taking into account their experience and potential'.[2] In late August 2016, the Weimar Triangle[3] also delivered a joint statement where representatives of France, Germany and Poland expressed, among others, their desire to 'show that Europe is of use to its citizens' and to revitalize the European project in a post-Brexit context.

Arguably, the European Commission has been aware that providing an added value to member states' *modus operandi* and practices as applied to readmission constitutes a daunting challenge. This is all the more so in the realization that, since 1999, its action was already embedded in a context marked by the predominance of bilateral patterns of cooperation on readmission (Cassarino 2010). This study sets out to analyze the conditions under which the European Union has addressed this challenge. Having highlighted the *contingency gap*, which markedly distinguishes the drivers shaping the EU's approach to cooperation on readmission from those shaping member states' priorities in the field of readmission, this chapter examines the reasons why flexibility and informality have gradually gained momentum in the EU's readmission policy and in its external relations, especially since 2005. The various implications of this perceptible informalization process at EU level are detailed.

Unmet preconditions

Whereas the ToA established Union competence, the Treaty of Lisbon (TL) introduced several amendments that, to some extent, reaffirmed in a more explicit and unquestionable manner the shared competence of the Union in the field of readmission. Articles 3 and 4 of the Treaty on the Functioning of the European Union (TFEU) respectively list the areas of exclusive and shared competences. 'Freedom, Security and Justice' (FSJ) constitutes an area of shared competence in Article 4 (TFEU) and readmission belongs logically to this area.

Admittedly, the clear existence of a Union competence in the above areas is congruent with the reinforced integration of migration issues in the EU's external relations with third countries. In theory, the existence of a shared competence between the Union and the member states in the field of readmission should not be problematic. It is worth recalling that, in the scope of a EU readmission agreement concluded with a third country, member states have to comply with the general principles of EU law (legal certainty, legitimate expectations, effective remedies, proportionality and fundamental rights). In practice, however, this presupposes three preconditions which, to date, continue to be unmet.

First, member states would need to regularly notify the Commission, the Council and the European Parliament of their planned negotiations or talks on readmission with third countries. They would also have to notify them of their existing bilateral agreements linked to readmission. The notification procedure would necessarily address the variety of cooperative patterns linked to readmission (e.g., cfccfcf standard readmission agreements, exchanges of letters, intergovernmental arrangements, memoranda of understanding, framework agreements) that several member states have concluded over approximately the last three decades to ensure the operability of their cooperation with third countries.

Second, another precondition lies in establishing monitoring mechanisms aimed at understanding whether and how member states comply with their international obligations and the EU treaties when implementing EU readmission agreements. To be clear, each EU readmission agreement foresees the creation of a Joint Readmission Committee (JRC) comprising representatives of the European Commission (EC), assisted by experts from the member states and representatives of the third country. Actually, a JRC is in charge of promoting regular exchanges among the individual member states and the third country on issues regarding the application and interpretation of the EU agreement. Member states may conclude bilateral implementing protocols by listing the competent authorities that should receive and process readmission applications in accordance with the time limits set out in the agreement, the border crossing points, the role of escorting officers and the means of identification.

However, experience has shown that member states may implement the concluded EU readmission agreements with some third countries without necessarily having a bilateral implementing protocol. Adding value to the action of the member states would logically require the knowledge and understanding of existing bilateral patterns of cooperation on readmission.

Undoubtedly, monitoring mechanisms are essential to understanding how the terms of a EU readmission agreement have been concretely translated, if not reinterpreted, in the course of the implementation. This refers not only to procedures per se, but also to the respect of the fundamental rights of the persons to be readmitted with which each member state must comply, especially since the Charter of Fundamental Rights of the European Union has become part of the core legislation of the EU following the entry into force of the Treaty of Lisbon. Moreover, monitoring mechanisms are necessary to ensure the full and independent exercise of the European Parliament's legislative and budgetary functions, which logically and invariably depend on the extent to which the European Parliament will have access to information relating to the implementing phase of EU readmission agreements and to their compatibility with the treaties.

To date, the need for regular notification procedures and the establishment of monitoring mechanisms constitute two unmet preconditions. This becomes clear if one realizes member states' poor level of communication on their various patterns of cooperation on readmission with third countries, including their reluctance to disclose their scope and content.

The contingency gap

There exists, however, a third precondition. It refers to the convergence of contingencies and priorities between member states on the one hand, and the Union on the other. Contingencies pertain to the factors and conditions shaping patterns of cooperation on readmission (namely, how the cooperation on readmission has developed), whereas priorities refer to the drivers of cooperation (namely, which factors motivated the contracting parties). When convergence is optimal, member states would entrust or be fully supportive of the Union in the field of readmission while recognizing the added value and effectiveness of its action.

However, in practice, this optimal degree of convergence has never been reached, leading to a contingency gap. Convergence of contingencies and priorities is essential to capturing the difficulty with which the European Commission tackled the added-value criterion since it was mandated to negotiate and conclude EU readmission agreements. When this occurred, various EU member states had already concluded a substantial number of bilateral agreements linked to readmission, be they standard or non-standard,[4] with third countries worldwide. Moreover, the conclusion of bilateral agreements does not necessarily mean that the contracting parties implement them consistently and fully. Readmission inevitably implies unequal costs and benefits for the contracting parties, as well as unbalanced reciprocities (Cassarino 2010), even if the terms of the agreement are framed in a reciprocal context. These aspects have been amply addressed elsewhere (Cassarino 2007; Roig and Huddleston 2007; Trauner and Kruse 2008; El Qadim 2015). As a result of their long and varied experiences in the field, various EU member states have learned that exerting pressure on uncooperative third countries needs to be cautiously evaluated lest other issues of high politics be jeopardized. As already shown in previous works (Cassarino 2010), readmission cannot be isolated from a broader framework of interactions, including other strategic if not more crucial issue areas such as police cooperation in the fight against international terrorism, energy security, border control, and other diplomatic and geopolitical concerns. Exerting pressure on uncooperative third countries may even turn out to be a risky or counterproductive endeavor, especially when the latter can capitalize on their

empowered position in other strategic issue areas (Cassarino 2005; El Qadim 2015). Nor can bilateral cooperation on readmission be viewed as an end in and of itself, since it has often been grafted onto the aforementioned broader framework of interactions.

Taking into consideration these past lessons is important in understanding the complex reasons for which the existence of an agreement does not automatically lead to its full implementation. This is because the latter is contingent upon an array of factors that codify the bilateral interactions between two contracting parties. Using an oxymoron, it is possible to argue that, over the past decades, various EU member states have learned that bilateral cooperation on readmission constitutes a central priority in their external relations, which at the same time remains peripheral to other strategic issue areas.

This paradox has characterized the contingencies faced by various member states. In a similar vein, factors motivating the conclusion of various bilateral agreements linked to readmission have been informed by the above-mentioned contingencies.

How has the EU tackled such contingencies, including the above-mentioned paradox, in its attempt to add value to member states' bilateral negotiations? As of 2000, when the European Commission received its first mandates to negotiate EU readmission agreements, more than 100 bilateral agreements had already been concluded by the member states with non-EU countries (see Figure 7.1). Bilateralism was strongly and deeply rooted in their external relations. Three key aspects played in favor of a harmonized approach to readmission at the EU level. The first was that speaking with one voice at the EU level would strengthen the leverage of individual member states in their negotiations with non-EU countries. The second pertained to the need for common procedures aimed at removing irregular migrants, in line with the EU treaties and in accordance with international law. The third aspect, closely linked with the second, referred to the respect of human rights standards and international obligations on removal, especially those contained in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union, which were both proclaimed in December 2000.

1999 to 2005: the drive for normative readmission

When the Area of Justice Freedom and Security was established following the 1999 Treaty of Amsterdam, the European Commission adopted a strictly technical-legal approach to readmission based on the oft-cited reference to states' obligations 'under customary international law'[5] to take back their own nationals (Hailbronner 1997; Roig and Huddleston 2007; Coleman 2009). This reference was clearly mentioned in the Conclusions of the European Council in Tampere in October 1999.

The 1999 European Council of Tampere is remembered as an event that marked a watershed in the intensification of the cooperation of JHA and migration management with third countries. It is also remembered because it conferred powers upon the Commission to negotiate and conclude EU readmission agreements with third countries.

Logically, these policy developments underlined the importance of collecting and analyzing systematic data and information as well as the need to have a commonly agreed statistical framework with a view to monitoring the impact and implementation of EU legislation and policy (European Commission 2003). However, attempts to collect data on member states' bilateral patterns of cooperation on readmission and on their concrete effects proved extremely difficult. This was not only because of the existence of significant statistical mismatches, but also because data remained either incomplete or reinterpreted locally or was simply not communicated by the member states. The establishment of an Area of Freedom, Security and Justice implied

the recognition of shared principles and common standards at EU level without, however, 'challenging the legal and judicial traditions of the member states' (European Commission 2004: 10).

Readmission became a pivotal element of the joint management of migration flows, especially with reference to the 'fight against illegal migration', as well as a major cross-over issue in various internal and external policy domains. Their detailed analysis would go beyond the scope of this study. It is, however, important to stress that such developments, driven by an extraordinary sense of normative and bureaucratic rationality, contributed to the growing visibility of readmission in migration talks, especially in the external relations of the EU and its member states. Readmission became a key component of the action plans that the EU negotiated with third countries located in its eastern and southern regions, in the framework of the European Neighborhood Policy. These developments were also conducive to stronger expectations on the part of some EU member states who, on various occasions, criticized the slow progress in the negotiations undertaken by the European Commission in the field of readmission. The European Commission was called to deliver promptly and the European Council proposed to nominate a 'special representative on a common readmission policy'[6] (Papagiani 2006: 157; Coleman 2009: 194).

The years 2005 to 2009: prelude to the EU drive for flexibility

Member states have demonstrated their concerns in numerous ways regarding the capacity of the EU institutions to deal effectively with irregular migration, including readmission. Groups of EU member states proliferated. Officially, they were presented as intergovernmental fora aimed at opening and sustaining state-to-state informal consultations on border controls, asylum, human trafficking, border surveillance and the 'fight against illegal migration'. However, these groupings went much further than the mere promotion of intergovernmental consultations and dialogues while acquiring a certain degree of authoritativeness. Indeed, some of them were explicitly meant to influence EU policy-making at a time when the management of the post-2004 eastward enlargement of the EU and the rejection of Europe's Constitutional Treaty were stirring populist and protectionist discourses in Europe. For example, the May 2005 Prüm Convention[7] and the Group of 6 (or G6) epitomized the desire of some EU member states to collectively exert their leverage on the EU institutions, especially the European Commission, in the field of justice and home affairs. In September 2006, an open letter was sent to the then Finnish Presidency of the Council of the European Union calling for reinforced common concrete actions to counter 'mass arrivals of migrants' in Southern Europe. The letter came from the heads of state of Cyprus, France, Greece, Italy, Malta, Portugal, Slovenia and Spain. Later, a document was sent to the then Czech Presidency of the Council of the European Union pressing for the conclusion and effective implementation of EU readmission agreements. This document, dated January 13, 2009, came from Cyprus, Greece, Italy and Malta. These four countries formed the *Quadro Group* during the French EU Presidency (July to December 2008) to keep illegal immigration on the EU agenda.

These internal policy challenges, including the proliferation of informal regional groups within the EU, shed a clear light on the tricky conditions under which the European Commission was operating. In an attempt to respond to such internal challenges and to safeguard its credibility in dealing with irregular migration, the Commission expressed its intention to 'broker a deal'[8] with a view to facilitating the conclusion of EU readmission agreements with third countries while learning from the bilateral experiences of the EU member states. This statement did mark a watershed in the EU approach to negotiations on readmission, as it revealed the

growing awareness on the part of the European Commission that its role as leader in the establishment of a EU-wide readmission policy could be jeopardized lest no new compromise be found.

This new compromise found its expression in the Global Approach to Migration (GAM), which was described as 'a comprehensive approach [combining] measures aimed at facilitating legal migration opportunities with those reducing illegal migration' (European Council 2007: 3). Key mechanisms for strategic cooperation with selected third countries were introduced within the framework of the GAM, including mobility partnerships (Parkes 2009; Reslow 2012). Mobility partnerships and their rationale form an integral part of the GAM. They are 'not designed to create legal rights or obligations under international law'. They encompass a broad range of issues ranging from development aid to temporary entry visa facilitation, circular (or temporary) migration schemes and the fight against illegal migration, including cooperation on readmission. They are also selective in that they are addressed to those third countries meeting certain conditions, such as cooperation in the fight against irregular migration and the existence of 'effective mechanisms for readmission'.[9]

The EU's attempt to conditionally link MPs with cooperation on readmission reflects how this issue has become a central component of its migration management policy. However, despite its official claim to draw upon bilateral experiences, the conditionality enshrined in MPs was at variance with the rationale for the EU member states' patterns of cooperation on readmission.

Actually, EU member states have often used material and non-material incentives, not conditionalities, in order to ensure the cooperation of third countries on migration management issues, including reinforced border controls and readmission. Material incentives include the conclusion of financial protocols to support foreign direct investments and job-creating activities in third countries' labor markets. In addition, technical equipment and capacity-building programs aimed at upgrading their law enforcement bodies were part of the incentives. Non-material incentives refer to strategic alliances aimed at reinforcing the international recognition of the political leadership of a cooperative third country or at defending its voice in the international community.

Moreover, the use of incentives (not coercive conditionalities) has been motivated by the perceptible empowerment of some third countries as a result of their pro-active involvement in the reinforced control of the EU external borders. For example, some member states have experienced in their bilateral interactions with third countries located in the Mediterranean that the latter were prone to capitalize upon crucial issue areas (fight against international terrorism, intelligence cooperation, energy security, border controls, to name but a few) to defend their own views and priorities. In other words, not only have some Mediterranean third countries been empowered, but they also have a capacity to exert a form of reverse leverage on their European counterparts (Cassarino 2007; Paoletti 2011; El Qadim 2015). As mentioned earlier, bilateral cooperation on readmission cannot be viewed as an end in itself, especially when dealing with strategic and empowered third countries. Moreover, member states know that the costs and benefits of bilateral cooperation on readmission are too asymmetric to ensure its durable implementation in the long run, just as they learned that readmission cannot be isolated from other geopolitical questions of high politics that no EU member state can afford to place in jeopardy.

Arguably, the above considerations may account for the reasons why MPs have been introduced with a view to *enabling* a non-legally binding framework of informal interactions on an array of joint actions ranging from visa facilitation to readmission, the promotion of assisted voluntary return (AVR) programs, migration and asylum, economic development, and border

controls, among many others.[10] More importantly, the main issue at stake is not only about laying the groundwork for cooperation on migration and border management issues. Rather, through repetition and regular exchanges among stakeholders, MPs also contribute to consolidating a *system* whereby the cooperation on readmission, be it based on standard EU readmission agreements or on atypical arrangements, would become more predictable and unproblematic.

The year 2010 to the present: the EU drive for flexibility

It is worth recognizing that when the Treaty of Lisbon entered into force in December 2009, the above-mentioned system was already well developed. On the one hand, the EU member states had concluded more than 240 bilateral agreements linked to readmission with non-EU countries. On the other hand, around thirty bilateral implementing protocols were signed by the member states following the entry into force of eleven EU readmission agreements (see Figure 7.1). To date, this European readmission system has been in full expansion across all continents while encompassing highly diverse countries: rich, poor, aid-dependent, signatories of the 1951 Refugee Convention, conflict-ridden, peaceful, safe, unsafe, democratically organized and authoritarian. There is no question that the European readmission system has become powerfully inclusive.

The historical predominance of bilateralism (see Figure 7.1) has never been contested or challenged by the Union, above all when considering its shared competence in the field of readmission with the member states and as long as the latter's bilateral agreements are not incompatible with the obligations and international standards contained in a EURA. As explained earlier, this aspect is contingent upon notification procedures and effective monitoring mechanisms. True, the Union has been adamant about protecting its exclusive mandate once it was granted by the Council. It is also true that it has called upon member states to make sure that the terms of the EURAs be respected in their implementation phase and in line with the procedural guarantees enshrined in the 'return directive'.[11]

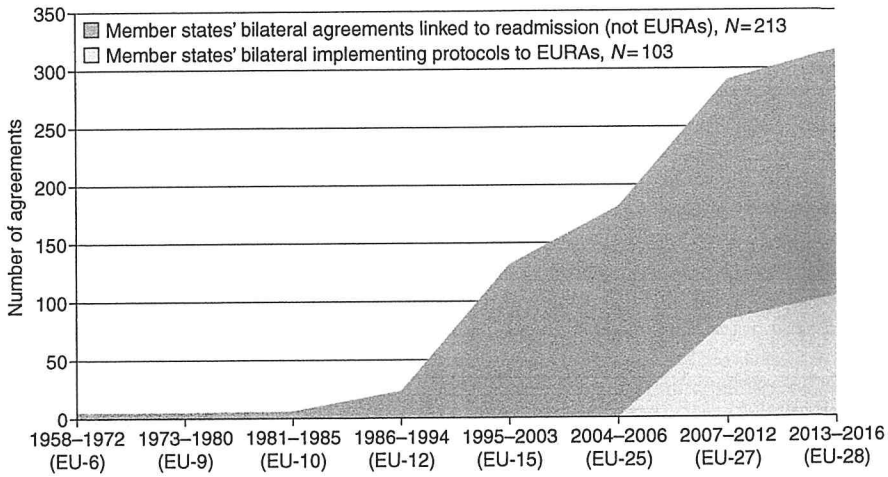

Figure 7.1 Number of bilateral readmission agreements concluded with non-EU countries: from the EU-6 to the EU-28

However, one is entitled to wonder how the above-mentioned monitoring mechanisms and notification procedures can be effective when the inflow of data and information allowing infringements to be detected exclusively comes from the member states or when the latter turn out to be reluctant to disclose to their European counterparts, let alone the public, the terms and rationale for the numerous bilateral agreements and secret arrangements they have concluded with third countries. If readmission is rhetorically presented by the member states as a priority in domestic policy-making, they know it cannot be presented as *the* compelling priority in their bilateral interactions with third countries, especially when the latter are strategic and empowered partners capable of defending their own vested interests and views. Some member states have acquired long experience in dealing with the centrality/periphery paradox (see Part I, this volume), which often characterizes their cooperation on readmission. Many have learned that laying too much emphasis on readmission in their external relations may turn out to be counterproductive as applied to other strategic issue areas. Arguably, this consideration is important in understanding why the negotiations of EURAs have been extremely lengthy and difficult.[12] Incidentally, more than ten years following its mandate to negotiate EURAs, the European Commission called on the member states to 'support its readmission negotiating efforts more wholeheartedly and not lose sight of the overall interest that a concluded EURA represents for the entire EU' (European Commission 2011: 8).

In an attempt to 'avoid the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal [readmission] agreement' (European Commission 2016a: 3), the EU started to design a new Partnership Framework which would foster 'mutual understanding' on migration management issues as well as their operationalization into 'compacts'. Similar to mobility partnerships (MPs), compacts are tailor-made informal arrangements. However, unlike MPs, 'effective mechanisms on readmission' are not conditionally linked with the implementation of the new Partnership Framework. Nonetheless, they are highly prioritized. Arguably, the new Partnership Framework introduced in 2015 took stock of the misconception of MPs. It is aimed at moving progressively towards the attainment of specific 'migration management' objectives, which 'reconcile the interests and priorities of the parties' with reference to 'shared and common principles'. Dialogues, mutual understandings and informal arrangements are at the heart of the Partnership Framework. The latter cannot be coined 'readmission agreements'. However, whether these arrangements take the form of a 'joint declaration', 'statement', 'common agenda' or 'joint way forward', they are no less EU-wide deals based on reciprocal commitments between the EU and its member states on the one hand, and a third country on the other. More importantly, patterns of cooperation stemming from a partnership framework are aimed at dealing with, among others, readmission and readmission-related issues in the short to long term.

The new Partnership Framework draws upon the political declaration of the Valletta Summit (November 11–12, 2015) which identified in its action plan five priority domains on migration management with African countries including, among others, the need for 'mutually agreed arrangements on return and readmission'. Since then, various types of arrangements have been agreed upon or are being negotiated under the umbrella Partnership Framework (PF) with third countries (see Table 7.1). In 2016, the EU started to negotiate two EU-wide Standard Operating Procedures (SOPs) with Mali and Bangladesh for the identification and return of persons without an authorization to stay. SOPs are aimed at swiftly improving cooperation between national consulates in order to accelerate procedures for identification, redocumentation and readmission.

Two Joint Migration Declarations (JMDs) on migration management, including the issue of readmission, have been signed with Niger and Ghana. JMDs deal with, among others, readmission and enhanced cooperation on the 'timely delivery of travel documents'.

Three Common Agendas on Migration and Mobility (CAMMs) have been signed with India, Nigeria and Ethiopia. CAMMs existed before the adoption of Partnership Frameworks. They are described as non-exhaustive flexible frameworks for cooperation of mutual interest based on the principle of voluntary participation of the EU member states.

One Joint Way Forward (JWF) has been concluded with Afghanistan. JWFs are not legally binding in the sense that, formally, they do not create legal rights or obligations for the contracting parties which cooperate on migration issues, especially on readmission. In practice, however, they define mutual commitments whose application and potential readjustments are closely monitored by a joint working group.

The new PF and its various compacts have been presented as a 'new comprehensive cooperation with third countries on migration' (European Commission 2016b: 5) where effective cooperation on readmission and the 'sustainability of return' remain key priorities.

For various member states, however, this type of informal broad arrangement or atypical agreement is far from being new. Over the past two decades, various EU member states (e.g., the United Kingdom, France, Italy and Spain) have excelled in these informal deals based on memoranda of understanding, administrative arrangements and bilateral police cooperation agreements, including a detailed clause on readmission (Cassarino 2007). For member states, grafting readmission onto a broader framework of interactions is not uncommon. However, as already underlined, readmission has been viewed by the latter as one of the many means of consolidating a bilateral cooperative framework, but not as an end in itself, depending on how they codified their bilateral relations with a given third country. By contrast, for the European Commission and the European External Action Service (EEAS), readmission continues to be presented as *the* compelling priority, which progressively determines a whole framework of cooperation with a given third country. Admittedly, the same contingency gap between the EU and some member states continues to exist.

Member states' bilateral arrangements on readmission on the one hand, and the new compacts resulting from the new EU-wide Partnership Framework on the other, share three common denominators. First, they both reify the capacity of law enforcement authorities and decision-makers to control legal and irregular migration while showing constituencies that policy measures aimed at stemming irregular migration are or may be taken. Second, their rationale lies in making cooperation upon readmission more flexible while avoiding lengthy ratification procedures and, consequently, parliamentary oversight. Third, they tend to respond to emergencies and external shocks (e.g., arrivals of large numbers of irregular migrants and asylum-seekers), whether or not their response is adequate.

These common attributes are useful in capturing the urgency with which the aforementioned bilateral PF arrangements have been agreed. Apart from the resilient criticisms coming from some European political leaders regarding the ability of the EU to deal with irregular migration and inflows of asylum-seekers, especially since social unrest which took place in various Arab countries in 2011, unprecedented disputes on internal border controls and the reintroduction of intra-Schengen controls emerged among various EU member states (Moreno-Lax 2015), putting the Common European Asylum System under stress. Rising populism and Euroskepticism, added to the ascent of anti-immigrant political parties in the West by way of growing economic insecurity as a result of a resilient financial crisis, created a sense of emergency to which both the EU and its member states had to respond.

While these unprecedented events may call for urgent provisions and policy action – in accordance with the fundamental rights principles that the Union seeks to advance in its external action – the adoption of EU-wide flexible, swift and atypical arrangements on migration issues with third countries of origin and of transit raises a host of challenges and serious concerns.

Table 7.1 EU readmission agreements and arrangements linked to readmission, October 2016

Country	*Formal EU readmission agreements (EURAs)*		*Non-standard non-legally binding EU-wide deals linked to readmission*					
	EURA entered into force	*Negotiating mandate*	*MP*	*CAMM*	*JWF*	*JS*	*SOP*	*JMD*
Afghanistan					October 2, 2016			
Albania	May 1, 2006	November 2002						
Algeria		November 2002						
Armenia	January 1, 2014	December 2011	October 27, 2011					
Azerbaijan	September 1, 2014	December 2011	December 5, 2013					
Bangladesh							N/A	
Belarus		March 2011	October 13, 2016					
Bosnia Herzegovina	January 1, 2008	November 2006						
Cape Verde	December 1, 2014	June 2009	June 5, 2008					
China		November 2002						
Ethiopia				November 11, 2015				
FYROM	January 1, 2008	November 2006						
Ghana								June 6, 2016
Georgia	March 1, 2011	November 2008	November 30, 2009					
Hong Kong	March 1, 2004	April 2001						
India				March 29, 2016				
Jordan		March 2016	October 9, 2014					
Macao	June 1, 2004	April 2001					N	
Mali								
Moldova	January 1, 2008	December 2006	June 5, 2008					
Mongolia								
Montenegro	January 1, 2008	November 2006						
Morocco		September 2000	June 7, 2013					May 3, 2016
Niger								
Nigeria		September 2016		March 12, 2015				
Pakistan	December 1, 2010	September 2000						
Russia	June 1, 2007	September 2000						
Serbia	January 1, 2008	November 2006						
Sri Lanka	May 1, 2005	September 2000						
Tunisia		December 2014	March 3, 2014					
Turkey	October 1, 2014	November 2002				March 7, 2016		
Ukraine	January 1, 2008	June 2002						

Source: EU documentation. Author's own elaboration. MP = Mobility Partnership; CAMM = Common Agenda on Migration and Mobility; JWF = Joint Way Forward; JS = Joint Statement; SOP = Standard Operating Procedure; JMD = Joint Migration Declaration; N = Negotiations.

First, 'the paramount priority set by the EU to achieve fast and operational returns, and not necessarily formal readmission agreements' (European Commission 2016b: 7) starkly reflects a reconsideration of the EU's approach to a 'common readmission policy' which has veered from a normative to a flexible approach. As Sergio Carrera (2016: 47) rightly noted, while the EU claims to build common and harmonized procedures, such a reconsideration may 'increase the inconsistencies and, arguably, further undermine the credibility of the EU's readmission policy'. Moreover, when realizing that the drive for flexibility turns the EU into a facilitator (not a supervisor) who lays the groundwork for reinforced and variegated bilateral cooperative patterns (Favilli 2016: 422), especially when it comes to dealing with rules of identification and redocumentation of migrants, interagency cooperation, the effective protection of personal data, exchange of information between each member state and a cooperative third country, and, last but not least, with fair and legal remedy procedures. Perhaps never before has bilateralism been so intertwined with supranationalism.

The issue at stake is to understand whether the various types of non-legally binding arrangements, beyond their official designation, constitute mere international arrangements or turn out to have a binding force on the contracting parties once their implementation takes place. Recently, as a result of the controversial EU–Turkey statement on refugees concluded on March 7, 2016,[13] the French Independent Constitutional Authority for the Defense of Rights, a kind of ombudsman, submitted a report to the Senate in July 2016 stressing that the case law of the Court of Justice of the European Union (CJEU) does not limit itself to the form of bilateral undertakings, but also considers the intentions[14] of the contracting parties and the legal effects of their acts. The same considerations apply to the numerous deals that have been concluded to date as part of the new Partnership Framework.

To date, beyond the growing controversy and contradictory academic debates on whether or not these arrangements constitute international agreements, there seems to be concordance between EU lawyers and scholars that such EU-wide 'arrangements' tend to avoid parliamentary oversight at EU and national levels (Carrera 2016; Favilli 2016; Gatti 2016). Technically, they do not fall within the scope of Article 218 of the TFEU, which regulates the adoption of international agreements in accordance with the ordinary legislative procedure (or co-decision procedure shared between the European Parliament and the Council), and which allows the European Parliament to 'obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties'. Practically, however, it seems that the commitments and intentions of the contracting parties explicitly mentioned in the various texts of these EU-wide arrangements call for a fair and honest assessment of their concrete implications for migrants' fundamental rights and for states' international obligations.

Conclusion

The drive for flexibility was already a *fait accompli* at a bilateral level long before the entry into force of the 1999 Treaty of Amsterdam, which empowered the Union to negotiate and conclude formal EU readmission agreements with third countries (Cassarino 2007). This study has set out to demonstrate that the drive for flexibility has also become a *fait accompli* at the EU level, seven years after the 2009 entry into force of the Treaty of Lisbon.

Yet today, making an inventory based exclusively on the number of formal EURAs the Union has concluded with third countries would never suffice to illustrate the scope and rationale for its 'common readmission policy'. An array of informal arrangements need to be taken into consideration to capture the emergence of new patterns of cooperation on readmission driven by the prioritization of operable means of implementation and flexibility (see Table 7.1).

However, this perceptible prioritization process, including its wide acceptance at EU level, may dilute international norms and standards that had been viewed as being sound and secure (Hathaway 2016). This is because it rests on a subtle denial whereby the enforceability of universal norms and standards on human rights is weakened or 'disregarded' (Basilien-Gainche 2016: 339–344) without necessarily ignoring or denying their existence.

A clear illustration of this subtle denial lies in the way in which the 'more for more' principle gradually veered from a conditionality based on effective political and democratic reforms in third countries to a conditionality based on enhanced cooperation on border and migration controls, including readmission. As a result of the Arab Spring, the 'more for more' principle was initially aimed at promoting human rights observance as well as democratic and political reforms in third countries (European Commission and European External Action Service 2012: 3–4).

As of February 2014, the 'more for more' principle became equated with a conditionality (Carrera *et al.* 2016) aimed at incentivizing the cooperation of third countries on migration-related issues, including readmission. Today, the Commission is intent upon using 'trade policy and development aid to gain more leverage in the area of readmission, building on the "more for more" principle which was applied in relation with countries in the EU's neighborhood' (Avramopoulos 2015: 8). This intention was made explicit in the June 2015 European Council's conclusions calling for wider efforts to 'contain the growing flows of illegal migration' (2015: 1).

Making trade policy and development aid conditional upon the cooperation on border surveillance and readmission (including the swift delivery of travel documents) may be at variance with Article 208 of the TFEU, and with the mutual commitments taken in the various dialogues, declarations and ministerial conferences on migration and development organized since 2004 between the EU and non-EU countries. Incidentally, it is worth recalling that during the oft-cited July 2004 Rabat Process – which has been presented as a template for subsequent dialogues and exchanges on migration matters between European and African representatives – some strategic third countries explicitly relayed their claims to France and Spain (Wolff 2012: 140) in order to place at the center of discussions the need for economic development, conflict prevention and poverty eradication in countries of origin and of transit when dealing with the management of international migration. Such claims were clearly reiterated by African leaders at the November 2015 Valletta meeting on migration. The extent to which the Commission will reconcile its altered vision of the 'more for more' principle with the above-mentioned mutual commitments remains unclear.

How can these recent political developments, including the EU drive for flexible cooperation upon readmission, be addressed? When considering that the drive for flexibility at the EU level has been responsive to internal and external factors, one is entitled to wonder whether the recurrent reference to the securitization of migration policies in the West continues to adequately address the scope of these policy developments. Moreover, don't their policy and societal implications call for a much-needed reflection on the ways in which the relationships between European states and their own constituencies have been reconfigured over the past decades? For now, these questions constitute further avenues for research across disciplines.

Notes

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2 See Joint Statement of the Heads of Government of the V4 Countries, 16 September 2016. Available at www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919.

3 A trilateral group of EU member states, including France, Germany and Poland.

4 Standard bilateral agreements refer to fully fledged readmission agreements defining the reciprocal obligations of the contracting parties. Under certain circumstances, however, two states may agree to conclude a bilateral agreement without necessarily formalizing their cooperation upon readmission. Governments may decide to graft readmission onto a broader framework of bilateral cooperation (e.g., police cooperation agreements with a clause on readmission, administrative arrangements and partnership agreements) or through other channels (e.g., by using exchanges of letters and memoranda of understanding). This dual approach explains why it is important to talk about agreements *linked* to readmission (Cassarino 2007), since it encompasses agreements that may be standard and non-standard.

5 Sergio Carrera notes, however, that there is no 'consensus as regards the actual scope of that obligation, and the extent to which it relates to the right to leave and return by individuals of these same states as enshrined in international human rights instruments' (Carrera 2016: 48); see also Giuffré 2015.

6 On October 24, 2005, the Commission appointed Karel Kovanda, Deputy Director-General of DG External Relations, as Special Representative for a common readmission policy.

7 The Prüm Treaty or Convention was initially signed by seven EU member states: Austria, Belgium, France, Germany, Luxembourg, The Netherlands and Spain. The Convention is aimed at stepping up cross-border police cooperation and exchanges between members' law enforcement agencies with a view to combating organized crime, terrorism and illegal migration more effectively. Provisions of the Prüm Treaty dealing with police cooperation and information exchange on DNA-profiles and fingerprints were transposed in the legal framework of the European Union following a Council Decision dated June 23, 2008.

8 > Experiences have demonstrated that to broker a deal the EU needs to offer something in return. In their bilateral readmission negotiations member states are increasingly offering other forms of support and assistance to third countries to facilitate the conclusion of such agreements, and the possibilities of applying this wider approach at EU level should be explored.
>
> *(European Commission 2006: 9)*

9 Mobility partnerships 'would be agreed with those third countries committed to fighting illegal immigration and that have effective mechanisms for readmission' (European Commission 2007: 19).

10 Since their introduction in 2006, nine MPs have been concluded with non-EU countries, namely with Armenia (2011), Azerbaijan (2013), Belarus (2016), Cape Verde (2008), Georgia (2009), Jordan (2014), Moldova (2008), Morocco (2013) and Tunisia (2014).

11 The 'Return Directive' (Directive 2008/115/EC of the European Parliament and of the Council of December 16, 2008 on common standards and procedures in member states for returning illegally staying third-country nationals) was adopted in December 2008 with a transposition deadline into national law on December 24, 2010. It establishes common rules for the removal of third-country nationals who do not, or no longer, fulfil the conditions for entry, stay or residence in a member state, and in accordance with the principle of *non-refoulement* which applies to all illegally staying third-country nationals, be they asylum-seekers or not. Among many others, the Directive deals with the issuance of return decisions, effective remedy to appeal and review return decisions as well as with conditions of detention.

12 As of October 2016, seventeen EURAs entered into force with Albania (2006), Armenia (2014), Azerbaijan (2014), Bosnia and Herzegovina (2008), Cape Verde (2014), FYROM (2008), Georgia (2011), Hong Kong (2004), Macao (2004), Moldova (2008), Montenegro (2008), Pakistan (2010), Russia (2007), Serbia (2008), Sri Lanka (2005), Turkey (2014) and Ukraine (2008). Put together, the total time elapsing between the negotiating mandates conferred upon the European Commission and the entry into force of all the seventeen EURAs amounts to 67.2 years: an average of 3.9 years per EURA.

13 The March 2016 Joint Statement (JS) between Turkey and the EU delimits the framework of a broad cooperation aimed, among others, at 'returning all migrants not in need of international protection' from Greece to Turkey. This JS facilitates the bilateral cooperation between Greece and Turkey on the removal of irregular migrants.

14 Original text: 'Notons que la jurisprudence de la CJUE ne s'arrête pas à l'aspect formel de l'acte mais s'intéresse à l'intention des parties et aux actions concrètes mises en œuvre pour parvenir aux objectifs' (Défenseur des Droits 2016: 4).

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