

SJ-0086/17 - GEDA D/10660
[REDACTED]

17 March 2017

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LEGAL OPINION

Re: LIBE – Joint Way Forward with Afghanistan - legal nature - international agreements - readmission - role of the European Parliament

I. Introduction

1. On 30 January 2017, the Legal Service received a request from Mr Claude MORAES, Chairman of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) for a legal opinion relating to the conclusion of the “*Joint Way Forward on migration issues between Afghanistan and the EU*”. The Chairman asked the following questions:

“1. As several key provisions of the ‘Joint Way Forward’ are similar to standard clauses in readmission agreements (see Annexes), could any measures or actions taken by the EU Institutions, agencies or an EU Member State on the basis of or in the framework of any provisions of the ‘Joint Way Forward’ produce effects similar or equivalent to those of a readmission agreement? In such a case, what would be possible legal remedies?”

2. Can the ‘Joint Way Forward’ be considered an international agreement as referred to in Part Five, Title V of the TFEU? What is the legal value of the statement ‘The ‘Joint Way Forward’ is not intended to create legal rights or obligations under international law’? May any of its detailed provisions contradict this statement?”

a) In case the ‘Joint Way Forward’ would be considered as an international agreement, have Parliament’s prerogatives, among which Article 218 paragraph 10, been respected?”

b) In case the ‘Joint Way Forward’ would not be considered as an international agreement, what would be the prerogatives of the European Parliament, including as regards its information? What additional elements would be necessary for the Joint Way Forward to be considered an international agreement?”

a) Context

2. On 2 October 2016, the European Union and the Islamic Republic of Afghanistan approved a document named “*Joint Way Forward on migration issues between Afghanistan and the EU*” (hereinafter the “JWF”), in the form of a declaration reflecting their “*joint commitment [...] to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants*”.
3. The JWF was published on the EEAS website.¹ It contains the date and the place of adoption (“*Kabul, 2 October 2016*”), but it does not contain any signatures. According to press information, this document was signed by the representatives of the Afghan Government and of the EU Delegation to Afghanistan.²
4. As regards the EU, on 18 July 2016 the Council adopted its Conclusions on Afghanistan, in which it urged the “*Afghan Government to cooperate on the return and readmission of its nationals, in full respect of their human rights and in accordance with international obligations and commitments. This is the central and essential element of the Joint Way Forward, which addresses the growing pressure of irregular migration in parallel to Member States’ initiatives and agreements [...]*”.³ The JWF was negotiated by the Commission. Following the conclusion of the negotiations, the JWF was endorsed by the delegations at the JHA Counsellors meeting of 22 September 2016 and it was confirmed by the Council on the same day.⁴
5. In its conclusions of 20 and 21 October 2016, the European Council welcomed “*the signing of the EU-Afghanistan Joint Way Forward on Migration Issues*”.⁵
6. After the JWF was signed, a group of MEPs asked the Commission an oral question on the procedure leading to the adoption of the JWF and on the lack of consultation of the Parliament.⁶ On 26 October 2016 the Parliament debated this issue at the plenary sitting with the participation of Commissioner AVRAMOPOULOS.

¹ The document is available here:

https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf.

² Allegedly it was signed by Deputy Minister of Refugees of Afghanistan Dr Alema Alema and Mr George Cunningham, Deputy Head of the EU Delegation, see more at :

<https://www.afghanistan-analysts.org/eu-and-afghanistan-get-deal-on-migrants-disagreements-pressure-and-last-minute-politics/>.

³ Document of the Council 11245/16.

⁴ See Council document 12191/16 of 22 September 2016 (limite).

⁵ Document EUCO 31/16.

⁶ The text of the OQ is available here : <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bOQ%2bO-2016-000123%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

7. At the time of writing this opinion, the JWF has already started to be implemented. The first meeting of the joint working group (set up on the basis of the JWF) was held on 30 November.⁷ According to the information provided by the Commission at the LIBE meeting of 31 January 2017, four return operations to Afghanistan have taken place since the signature of the JWF, although three of them were organised under bilateral Memoranda of Understanding that some Member States have concluded with Afghanistan.
8. In the context of EU-Afghanistan relations in particular, it has to be added that on 18 February 2017, the two parties signed a Cooperation Agreement on Partnership and Development (hereinafter “CAPD”). This agreement, covering a wide range of economic and political areas, also envisages cooperation on migration (Article 28, see further details below). The CAPD will be applied on a provisional basis,⁸ pending ratification by the EU and the Member States (since it is a mixed agreement).
9. It is also worth mentioning, in the general context of the readmission agreements with third countries, that the EU has so far concluded 17 readmission agreements.⁹ Moreover, in relation to the African, Caribbean and Pacific (ACP) countries, this obligation is further stipulated in Article 13 of the Cotonou Agreement.¹⁰ In addition to the formal readmission agreements, High-Level Political Dialogues were launched with some priority third countries in order to improve the effectiveness of return and readmission of irregular migrants. In the EU Plan on return,¹¹ Afghanistan was mentioned as one of such priority countries.¹² The JWF seems also to be connected with the current policy of promoting Partnership Frameworks with third countries (migration compacts), launched by the Commission in 2016. The aim of these Partnership Frameworks is to create “*coherent and tailored engagement where the Union and its Member States act in a coordinated manner putting together instruments, tools and leverage to reach comprehensive partnerships*”

⁷ According to the Communication from the Commission to the European Parliament, the European Council and the Council “*Second Progress Report - First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration*”, COM(2016)960 final.

⁸ Provisional application will concern issues falling within EU competence, including political dialogue, human rights, gender equality, development cooperation, cooperation on trade and investment matters, cooperation on migration, and regional cooperation.

⁹ The EU has readmission agreements with Russia, Ukraine, Moldova, Georgia, Armenia, Azerbaijan, Turkey, the Western Balkan countries and also with Hong-Kong, Macao, Sri Lanka, Pakistan and Cape-Verde. Moreover, the EU has launched negotiations to conclude readmission agreements with Belarus, Nigeria, Tunisia, Jordan, Morocco and Algeria.

¹⁰ Under Article 13 of the Cotonou Agreement, the ACP countries have committed to accept the return of and readmission of their nationals who are illegally present on the territory of a Member State of the EU, at that Member State's request and without further formalities.

¹¹ Communication from the Commission to the European Parliament and to the Council - “*EU Action Plan on Return*” COM(2015) 453 final.

¹² *Ibid.* p.12.

*(compacts) with third countries to better manage migration in full respect of our humanitarian and human rights obligations”.*¹³

b) Content

10. The JWF is presented as a joint EU-Afghanistan declaration containing the following elements :

- Introduction, which sets out the objective of this document, which is “*the joint commitment of the EU and the Government of Afghanistan to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants [...]*”, and which contains a statement on the non-binding nature of this document: “*The JWF is not intended to create legal rights or obligations under international law. It paves the way for a structural dialogue and cooperation on migration issues, based on a commitment to identify effective ways to address the needs of both sides. It comes in support of the EU Member States bilateral relations with Afghanistan and cannot be interpreted as superseding the existing or preventing the conclusion of future bilateral agreements between the EU Member States and Afghanistan.*”
- nine Parts, which can be regrouped under the following topics: 1) the facilitation of the process of return as regards the return to Afghanistan of Afghan citizens illegally staying in the EU (in particular, in relation to recognition of travel documents, organisation of flights, the situation of unaccompanied persons and other vulnerable persons); 2) accompanying measures and the EU’s assistance, such as information and awareness-raising campaigns and return programmes to facilitate the reintegration of Afghan nationals returning back to their country, as well as the EU’s assistance to the Afghan Government for stepping up the fight against smuggling and trafficking in human beings; 3) institutional elements (a joint working group, exchange of documents, start of cooperation).
- Annex entitled “Proposed reintegration package” which is supposed to be funded by the EU, aiming to support the reintegration of Afghan nationals returning to Afghanistan.

II. Analysis

11. In order to reply to the questions raised by the LIBE Committee, the present opinion will first examine the question of whether the JWF should or should not be considered as an international agreement as referred to in Part Five, Title V of the TFEU before analysing the issue of the Parliament’s prerogatives.

¹³ Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank “*on establishing a new partnership framework with third countries under the European Agenda on Migration*” COM(2016) 385 final.

1) The legal nature of the JWF

a) Is the JWF an international agreement?

12. According to the case-law of the Court of Justice, the expression “agreement”, as it is used in Article 218 TFEU, indicates any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.¹⁴ The decisive criterion to determine whether or not an undertaking is binding is the intention of the parties.¹⁵ In other words, the binding effect of an agreement mainly depends on the parties’ intention to be bound by it as a matter of international law.
13. That intention is to be established on the basis of, in particular, the actual terms of the agreement and also the circumstances in which it was drawn up.¹⁶
14. As regards the JWF, the intention of the parties is clearly expressed in the terms of this document. The act explicitly states that it “*is not intended to create legal rights or obligations under international law*” (see the Introduction).
15. This, alone, is sufficient, in the light of the case-law quoted,¹⁷ to conclude that the JWF does not constitute a binding agreement.
16. Moreover, without it being a decisive factor,¹⁸ the absence of the term “*shall*”, which, both in international treaties and in internal EU law, characterises binding obligations, also emphasises the non-binding nature of the JWF. The use of the verbs in the English present tense¹⁹, in the future tense²⁰, or, on some occasions, of the term “*should*”²¹, also suggests the non-binding character of this act. Furthermore, the expressions used in the JWF, such as e.g. “*...intend to cooperate...*”,²² “*...reaffirms its commitment...*”,²³ “*...will make every*

¹⁴ Opinion of the Court 1/75, ECLI:EU:C:1975:145; C-327/91 France v Commission, ECLI:EU:C:1994:305, paragraph 27.

¹⁵ C-233/02 France v Commission ECLI:EU:C:2004:173, paragraph 42.

¹⁶ *Ibid.* paragraphs 43 and 44

¹⁷ *Ibid.* paragraphs 43 and 45.

¹⁸ *Ibid.* paragraph 43.

¹⁹ “*...intend to cooperate...*”, “*reaffirms its commitment...*” (Part I.1-2), “*...cooperate closely...*”(Part III.1), “*...the EU is launching...*” (Part IV.4), “*...declare their intention...*” (Part VII) etc.

²⁰ “*...will be returned...*” (Part I.3), “*...will ensure...*” (Part II.1-2), “*...will make every effort...*” (Part II.2), “*...will enhance its efforts...*”(Part V.1) etc.

²¹ “*...should include...*” (Part V.1), “*...should be found...*”(Part IX).

²² Part I.1.

²³ Part I.2.

effort...”,²⁴ “...*will enhance...*”²⁵ clearly reflect the intention of both parties not to be bound in law.

17. Another important aspect to be considered is related to the circumstances in which this document was drawn up. The document does not contain any signatures, although it is certain that it was signed, since this fact is mentioned expressly in the text (see Part VIII “*Cooperation will begin on the day this declaration is signed.*”). According to press information, the JWF was signed by the representatives of the Afghan Government and of the EU Delegation to Afghanistan. The persons who signed this document do not seem to be considered, under international law, as having the “full powers” to either represent the EU or Afghanistan for the purposes of expressing the consent of the respective parties to be bound by a treaty.²⁶
18. Moreover, the history of the negotiations of the JWF²⁷ also militates in favour of the non-binding character of the JWF. It can be deduced from the documents of the Commission, the Council and the European Council that throughout the process of negotiation, these institutions considered the JWF as a non-binding commitment and not as an international agreement, as referred to in Article 218 TFEU. It also emanates from these documents that the intention of the Government of Afghanistan was not to be bound by a legally binding international treaty.²⁸
19. It is also stated in the JWF that it “*comes in support of the EU Member States bilateral relations with Afghanistan and cannot be interpreted as superseding the existing or preventing the conclusion of future bilateral agreements between the EU Member States and Afghanistan*” (see the Introduction). If the JWF was an agreement concluded by the EU, it would have to take precedence over the provisions of any bilateral readmission agreements concluded between the Member States and Afghanistan.²⁹ In this regard, it is to be mentioned that a number of bilateral readmission agreements are currently in force between Afghanistan and individual Member States.³⁰

²⁴ Part II.2.

²⁵ Part V.1.

²⁶ Articles 7, 10, 11, 12 of the Vienna Convention on the Law of Treaties.

²⁷ See C-233/02, cited above, paragraph 44.

²⁸ See in particular, the joint Commission-EEAS non-paper, of 2 March 2016, on enhancing cooperation on migration, mobility and readmission with Afghanistan, p.4-6. See also the press information at: <https://www.afghanistan-analysts.org/eu-and-afghanistan-get-deal-on-migrants-disagreements-pressure-and-last-minute-politics/>.

²⁹ See e.g. Article 21 of the Readmission Agreement with Turkey.

³⁰ Several Member States (Denmark, Finland, France, the Netherlands, Sweden, the UK) as well as Norway have concluded a Memorandum of Understanding with Afghanistan on readmission. It has been reported in the press that on the same day as the JWF was signed, the bilateral German–Afghan agreement on readmission was signed and two other bilateral agreements on readmission, with Finland and Sweden, were initialled.

20. Finally, it is worth mentioning that there is no obligation on the side of the EU to conclude an international agreement regarding the readmission of third country nationals. In the light of Article 79(3) TFEU, the Union “*may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States*”. It has been assumed that the EU competence to conclude a readmission agreement is not exclusive, so the Member States remain entitled to sign bilateral agreements. For the EU (as well as for individual Member States in the case of bilateral agreements), it is a political choice to either engage in a legally binding agreement or to only adopt a political commitment. The same is true for the other party. A third country may either be willing to enter into a binding agreement or it may prefer to cooperate with the EU (or a Member State) within a non-binding framework.³¹
21. In the context of EU-Afghan relations, it is also important to mention Article 28 of the recently signed CAPD, even if this agreement is yet to be concluded. Article 28(4) of the CAPD refers to a conclusion, “*upon request by either Party*”, of “*an agreement regulating specific obligations for readmission*”.³² This provision refers to the possible conclusion of a readmission agreement between the EU and Afghanistan in the future, proving, additionally, that at the time of the CAPD’s signing, both the EU and Afghanistan were not considering the JWF - which is prior to the CAPD - as being equivalent to such a readmission agreement. Moreover, paragraphs 1 to 3 of Article 28 of the CAPD also refer to less formalised methods of cooperation between the EU and Afghanistan, that is, in particular, “*a comprehensive dialogue and cooperation on migration-related issues*”, which “*shall cover issues affecting asylum, [...] regular and irregular immigration, return, readmission, [...] and the fight against trafficking in human beings and migrant smuggling*”. As a result, the CAPD provides for both the possibility of a legally binding readmission agreement and other types of cooperation in the field of readmission and return.

³¹ See also the Communication from the Commission to the European Parliament and the Council “*on a more effective return policy in the European Union - a renewed Action Plan*”, COM(2017)200, p. 12 : “*With countries with which a formal readmission agreement could not be pursued, the Commission focused on improving practical cooperation through operational tools and instruments such as standard operational procedures.*”

³² “*1. The Parties agree to cooperate with the aim of preventing irregular migration flows from their territory to the territory of the other Party.*

2. The Parties reaffirm the importance of joint management of migration flows between Afghanistan and the Union and undertake to engage in a comprehensive dialogue and cooperation on migration-related issues, in line with the Union’s Global Approach to Migration and Mobility and relevant international conventions. This dialogue and cooperation shall cover issues affecting asylum, relations between migration and development, regular and irregular immigration, return, readmission, visas, border management, document security, and the fight against trafficking in human beings and migrant smuggling.

3. Cooperation in the areas mentioned under this Article may also include capacity-building measures.

4. The Parties agree to conclude, upon request by either Party, an agreement regulating specific obligations for readmission, including provisions regarding nationals of other countries and stateless persons.”

22. To conclude, the JWF can be considered as a non-legally binding political commitment, undertaken jointly by the EU and Afghanistan. It falls into a category of “*soft law*” instruments, that is, non-conventional concerted acts, widely used in international relations, which allow the interested parties to express a political commitment without entering into legally binding agreements.³³ Such “*soft law*” instruments have also been recognised in the case-law of the Court of Justice.³⁴

b) What are the effects of the JWF?

23. Being a soft law instrument, the JWF may nevertheless produce some effects. In this context, it is necessary to further examine the question of whether the JWF would produce similar effects to readmission agreements and whether there would be any legal remedies available against possible actions taken by the EU Institutions, agencies or Member States on the basis of or in the framework of the JWF.

24. As regards a comparison between the JWF and a standard EU readmission agreement, it is to be noted that some of the elements of both types of acts partially overlap, as the request for this legal opinion has carefully documented (see the annex to the request). These provisions concern the commitment to international obligations,³⁵ the readmission of own nationals,³⁶ transfer modalities,³⁷ readmission in error³⁸ and the joint readmission committee/joint working group.³⁹

25. However, there are important differences between the JWF and the readmission agreements.

26. Firstly, as mentioned above, the JWF was adopted as a political commitment which is non-binding under international law, as expressly stated therein.

27. Secondly, the JWF is drafted using a non-binding language, so it is not intended to produce legally binding effects, contrary to readmission agreements.

³³There is, in the international law, a growing trend of concluding “*soft law*” instruments, covering, in particular, resolutions of international organisations and non-binding agreements, such as e.g. the Helsinki Final Act of 1975, the Rio Declaration on Environment and Development and the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest.

³⁴ See the recent order of the General Court of 28 February 2017 in relation to the EU-Turkey Statement: T-192/16, *NF v European Council*, ECLI:EU:T:2017:128. See also cases C-233/02, cited above, and C-660/13 *Council v Commission*, ECLI:EU:C:2016:616.

³⁵ See e.g. Article 2 of the EU-Armenia Readmission Agreement and the “Introduction” of the JWF.

³⁶ See e.g. Article 3 of the EU-Armenia Readmission Agreement and Part I of the JWF.

³⁷ See e.g. Article 12 of the EU-Armenia Readmission Agreement and Part II of the JWF.

³⁸ See e.g. Article 13 of the EU-Armenia Readmission Agreement and Part II.6. of the JWF.

³⁹ See e.g. Article 19 of the EU-Armenia Readmission Agreement and Part VI of the JWF.

28. Thirdly, while the JWF outlines some general principles of cooperation relating to the return of Afghan citizens back to their country, the readmission agreements are more comprehensive in the way they lay down detailed and mandatory procedures, such as, a readmission application,⁴⁰ means of evidence regarding nationality,⁴¹ time-limits,⁴² data protection.⁴³ Such elements are missing in the JWF. As a result, the readmission procedures outlined therein are less structured than those laid down in a readmission agreement.
29. Fourthly, there are more differences as regards the content. Some of the standard clauses of the readmission agreements are missing in the JWF, such as: readmission of third-country nationals and stateless persons,⁴⁴ readmission obligations by the Union,⁴⁵ transit operations.⁴⁶ Likewise, the JWF contains some elements which are not included in standard readmission agreements, and which go beyond the readmission itself, such as: information and awareness-raising,⁴⁷ return programmes and reintegration assistance with the proposed reintegration package,⁴⁸ fight against smuggling and trafficking in human beings.⁴⁹
30. As regards the effects of the JWF, the EU and Afghanistan are not, contrary to the readmission agreements, legally bound to follow the terms of cooperation set out in the JWF. The JWF is thus not intended to produce any legally binding effects. As a result, this instrument does not affect the EU's internal legislation, neither does it add any new obligations or rights for the individuals concerned.
31. The JWF may nevertheless produce practical effects leading to the facilitation of readmission of Afghan nationals, which may be similar to those of a readmission agreement, but only on the condition that the two parties (EU and Afghanistan) respect the terms of cooperation described in the JWF. However, since the JWF is only based on a political commitment, there is less certainty than in the readmission agreements, that the terms of cooperation will indeed be respected.
32. As to the question of whether any legal remedies are available against possible actions taken by the EU Institutions, agencies or Member States, it is important to clarify, first of all, whether any actions or acts affecting individuals can be adopted on the basis of or in the framework of the JWF.

⁴⁰ See e.g. Article 8 and Annex 5 of the EU-Armenia Readmission Agreement.

⁴¹ See e.g. Article 9 and Annexes 1 and 2 of the EU-Armenia Readmission Agreement.

⁴² See e.g. Article 11 of the EU-Armenia Readmission Agreement.

⁴³ See e.g. Article 17 of the EU-Armenia Readmission Agreement.

⁴⁴ See e.g. Article 4 of the EU-Armenia Readmission Agreement.

⁴⁵ See e.g. Article 5 - 6 of the EU-Armenia Readmission Agreement.

⁴⁶ See e.g. Article 14 - 15 of the EU-Armenia Readmission Agreement.

⁴⁷ Part III of the JWF.

⁴⁸ Part IV and Annex of the JWF.

⁴⁹ Part V of the JWF.

33. The JWF aims to facilitate the return process of any Afghan citizens illegally staying in the EU. However, the return decisions concerning those Afghan citizens illegally staying in the EU are adopted on the basis of the Return Directive⁵⁰ or of the relevant provisions of national law,⁵¹ independently from the JWF. The aim of the JWF is to facilitate the return process to Afghanistan, but this instrument does not affect the adoption of a return decision as such, since it comes into play only after a decision to return an Afghan citizen illegally staying in the EU is taken.⁵²
34. The mechanism of legal remedies also remains unaffected by the JWF. Afghan citizens - like any other third country nationals in this situation - have the right to an effective remedy against a return decision concerning them, pursuant to Article 13 of the Return Directive or in accordance with national law.⁵³
35. Moreover, the existence of the JWF does not mean that returns should automatically be executed to the third country concerned. A return decision, adopted on the basis of the Return Directive or of the relevant provisions of national law, must take due consideration of each individual case and of the situation in the third country of return. Even if a return decision is adopted, but there are reasons to believe that the return of immigrants to a particular third country would violate the principle of *non-refoulement*, the return must be suspended.⁵⁴

2) The prerogatives of the European Parliament in the case of the JWF

36. If the EU concluded a legally binding readmission agreement with Afghanistan, the European Parliament would have to give its consent pursuant to Article 218(6)(a)(v) TFEU

⁵⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p.98.

⁵¹ As regards the illegally staying third country nationals to whom only national law applies, in accordance with Article 2(2) of the Return Directive.

⁵² This is confirmed by the JWF, Part I.3.: “*Afghan nationals who are found to have no legal basis to remain in an EU Member State, whose protection needs or compelling humanitarian reasons, if any, have been considered in accordance with the applicable legislation and who have received an enforceable decision to leave that Member State, can choose to return voluntarily. Afghan nationals who choose not to comply with such a decision on a voluntary basis will be returned to Afghanistan, once administrative and judicial procedures with suspensive effects have been exhausted* (emphasis added).”

⁵³ From this perspective, a possible conclusion of a legally binding EU readmission agreement with Afghanistan would not change anything, since such an agreement would also be applied to the execution of a return decision and it would not grant any additional legal remedies.

⁵⁴ See Article 9 of the Return Directive. As regards Afghanistan in particular, it has been reported in the press that, as the situation in this country worsens, six of Germany’s 16 *Bundesländer* have suspended deportations of failed asylum seekers back to Afghanistan (see more at : <http://www.euractiv.com/section/global-europe/news/german-regions-stop-sending-rejected-asylum-seekers-back-to-afghanistan/>).

and it would have to be immediately and fully informed at all stages of the procedure, in accordance with Article 218(10) TFEU and the case-law of the Court of Justice⁵⁵.

37. However, given that the JWF is not an international agreement, the procedures provided for in Article 218 TFEU do not apply, and consequently the Parliament is not involved. Nevertheless, the Parliament is entitled to use any other powers at its disposal, if it disapproves of the Commission's policy of concluding soft law instruments with third countries in the field of migration. In such a case, it is possible for the Parliament to take the following actions on the basis of its budgetary and supervisory powers.
38. The supervisory powers of the Parliament, which are to make effective the Commission's accountability to the Parliament, include the right to ask questions⁵⁶ and to establish the committees of inquiry⁵⁷ and may culminate with a motion of censure of the Commission.⁵⁸ In the present case, before taking any action, the Parliament can start by requesting the Commission to provide it with detailed information on the implementation of the Return Directive, in particular in relation to Afghanistan, and on the impact of the JWF in that context.
39. The budgetary powers of the Parliament include the power to adopt the budget⁵⁹ and to give a discharge to the Commission.⁶⁰ These are noteworthy powers in the context of the JWF and of all similar forms of cooperation concluded with the third countries as part of Partnership Frameworks,⁶¹ since, together with a commitment related to irregular migration, there is often a financial commitment from the EU side in relation to a particular third country.⁶²

⁵⁵ See C-658/11 *Parliament v Council* ECLI:EU:C:2014:2025 paragraph 86.

⁵⁶ Article 230 TFEU.

⁵⁷ Article 226 TFEU.

⁵⁸ Article 234 TFEU.

⁵⁹ Article 314 TFEU.

⁶⁰ Article 319 TFEU.

⁶¹ See above, Communication from the Commission "*on establishing a new partnership framework with third countries under the European Agenda on Migration*", p.9-11.

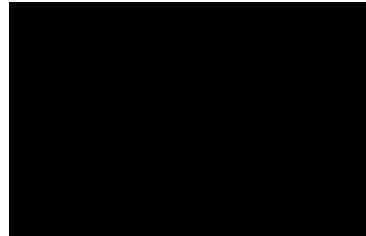
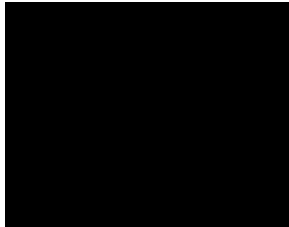
⁶² In the case of the JWF, the EU has offered a reintegration package to support the sustainable reintegration of Afghan nationals returning to Afghanistan (see Annex to the JWF). This reintegration package was adopted in the form of the Commission's implementing act of 16 December 2016 on the Special Measure on "*Improving Reintegration of Returnees in Afghanistan, Bangladesh and Pakistan*" to be financed from the general budget of the European Union, C(2016)8433, on the basis of Article 2(1) of Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, OJ L 77, 15.3.2014, p. 95.

III. Conclusions

The Legal Service reaches the following conclusions:

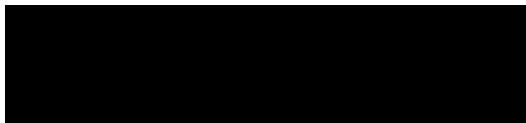
1. According to the case-law of the Court of Justice, the intention of the parties is a decisive criterion for the purpose of determining whether or not a particular undertaking is a legally binding international agreement. That intention is to be established on the basis of, in particular, the actual terms of the agreement and also the circumstances in which it was drawn up.
2. The JWF explicitly states that it is not intended to create legal rights or obligations under international law. Moreover, it is drafted using a non-binding language. Similarly the circumstances in which this document was drawn up prove that the intention of the parties was to conclude a non-legally binding commitment. As a result, despite some similarities with the readmission agreements, the JWF is to be considered as a non-legally binding political commitment, undertaken jointly by the EU and Afghanistan.
3. As regards the effects of the JWF, the EU and Afghanistan are not, contrary to the readmission agreements, legally bound to follow the terms of cooperation set out in the JWF. The JWF is thus not intended to produce any legally binding effects. As a result, this instrument does not affect the EU's internal legislation, neither does it add any new obligations or rights for the individuals concerned.
4. The JWF may produce practical effects leading to the facilitation of readmission of Afghan nationals, but only on the condition that the two parties (EU and Afghanistan) respect the terms of cooperation described in the JWF. However, since the JWF is only based on a political commitment, there is less certainty that the terms of cooperation will indeed be respected.
5. The mechanism of legal remedies available against possible actions taken by the EU Institutions, agencies or Member States remains unaffected by the JWF. Afghan citizens - like any other third country nationals in this situation - have the right to an effective remedy against a return decision concerning them, pursuant to Article 13 of the Return Directive or in accordance with national law.
6. Given that the JWF is not an international agreement, the procedures for the conclusion of international agreements provided for in Article 218 TFEU do not apply and consequently the European Parliament is not involved. Nevertheless, the Parliament is entitled to use any other powers at its disposal - in particular its budgetary and supervisory

powers - if it disapproves of the Commission's policy of concluding soft law instruments with third countries in the field of migration.



Visa: [By delegation of the Jurisconsult,]

(Signed)



Annex: Request for a legal opinion