

EDITORIAL COMMENTS

Diplomacy by press release: Externalizing border control, forgetting EU values

It is hardly surprising that the EU's external action in relation to migration has increased considerably, especially given the combination of the first port of entry rules and greater migratory pressures caused by global instability. Amongst other more formal agreements,¹ we have witnessed also the use of less typical acts adopted by the EU and/or its Member States. Thus, for example, we have seen arrangements with third countries concluded through a collective act of the Member States in the EU–Turkey statement;² through a national act, but funded also from the EU budget, in the case of the Italian Memorandum of Understanding (MoU) with Libya;³ through an MoU in the case of Tunisia;⁴ through a combination of different instruments in the case of Egypt;⁵ through a joint declaration in the case of Mauritania.⁶ These instruments have some common features: they are additional to existing, more structured agreements (such as association agreements); they are typically

1. See eg the many readmissions agreements the EU has entered into with third countries. For a complete list see <home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en> (all websites visited 3 March 2025). For a critique see Caterina Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44 EL Rev 824.

2. European Council, 'EU–Turkey statement, 18 March 2016', <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

3. See MoU between Italy and Libya, 'Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana', <www.governo.it/sites/governo.it/files/Libia.pdf>.

4. The official version is only available in French, <ec.europa.eu/commission/presscorner/api/files/attachment/875834/Memorandum_d'entente.pdf>.

5. Joint Declaration on the Strategic and Comprehensive Partnership between the Arab Republic of Egypt and the European Union, 17 March 2024, <enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en>; Council Decision (EU) 2024/1144 of 12 April 2024 providing short-term macro-financial assistance to the Arab Republic of Egypt ST/8309/2024/INIT, [2024] OJ L 1144, also authorizing the Macro Financial Assistance to the Arab Republic of Egypt up to EUR 1 billion; Memorandum of Understanding between the EU as Lender and the Arab Republic of Egypt as Borrower, 24 June 2024, <economy-finance.ec.europa.eu/document/download/810b3527-c4e3-4902-b181-39bc0c685d93_en?filename=official%20signed%20version%20of%20MoU.pdf>. The European Parliament contested the use of the Art 213 TFEU procedure, which is an urgent procedure which excludes its role.

part of a wider set of ‘support’ measures; and, crucially, they provide funds and/or other benefits to the third country in exchange for some form of migration ‘control’ aimed at preventing asylum seekers from reaching the EU’s shores.⁷ There is then a marked transactional nature that underpins these deals: the EU pays to externalize its border control, glossing over the attractiveness of those with whom it decides to partner.

There is, of course, also another common feature of these migration management arrangements: they are not ‘international agreements’ for the purposes of Article 218 TFEU. As a policy choice, this might be due to the desire to give greater flexibility and recognize that this type of migration management cannot easily be the object of binding undertakings. But, as a result, there is also no Treaty-mandated instrument or procedure that must be followed when entering into these pacts. The risk is obvious: informal processes might well come at the expense of the institutional balance carefully carved in the Treaties – institutional balance which, as we always tell our students, is there to represent different interests, including that of democratic and open decision-making. It is therefore not surprising that the Court of Justice has clarified that the atypical nature of those arrangements does not mean that they can be entered into within a procedural vacuum. In the Swiss MoU case,⁸ the Court held that the principle of distribution of powers and institutional balance require that the signing of an MoU by the Commission *must* be preceded by a decision of the Council, even when the Commission has not departed from the position set out in prior Council conclusions. This is because the signing of a non-binding agreement requires the ‘assessment by the Union as to whether that agreement *still* reflects its interest’,⁹ as well as the verification of the actual content of the agreement as negotiated.¹⁰ Furthermore, and obviously, the Treaties and the Charter of Fundamental Rights are applicable also in relation to the decision to enter into an MoU and

6. Joint Declaration establishing a Migration Partnership between the Islamic Republic of Mauritania and the European Union, 8 March 2024. The signing of this non-binding instrument was authorized by the Council: see Agenda Justice and Home Affairs Meeting 4 and 5 March 2024, List of A items, Brussels, 1 March 2024 (OR. fr) 7056/24 PTS A 14. The actual record of the signing is available through Austrian Parliament Council document 7056/24, dated 7 March 2024, under item 4.

7. See generally Evangelia Tsourdi and Federica Zardo, ‘Migration Governance through Funding: Theoretical, Normative, and Empirical Perspectives, special issue’ (2025) *Journal of Immigrant & Refugee Studies*.

8. Case C-660/13, *Council v Commission* (MoU with Swiss Federation), EU:C:2016:616 noted in this journal by Merijn Chamon and Valerie Demedts ‘The Commission Back on the Leash: No Autonomy to Sign Non-Binding Agreements on Behalf of the EU: Council v. Commission’ (2017) 54 CML Rev 245.

9. *ibid* para 42 (emphasis added).

10. *ibid* para 43 (emphasis added).

the Commission has an active duty to ensure that the MoU does not clash with EU law or potentially risk incurring non-contractual liability.¹¹ Finally, MoUs can also be the object of a preliminary ruling request, since the binding nature of an instrument is not relevant for that procedure.¹²

So, whereas sadly the Court has accepted that an agreement which is formally entered into by the Member States, even though it de facto engages EU funding, is not technically subject to the rules of the Treaties,¹³ the same is not true when the EU negotiates MoUs, within or outside the Treaty structure. Here, pursuant to the case law, there are some constraints upon the Commission which are aimed at ensuring both procedural and substantive propriety. Yet, the MoU between Tunisia and the EU seems to be lacking on both counts.¹⁴

The curious case of the EU–Tunisia agreement

It might be recalled that the agreement with Tunisia was first announced in a joint press conference of the Commission's President, Ursula von der Leyen, the Italian Prime Minister, Giorgia Meloni, the Dutch Prime Minister, Mark Rutte and the Tunisian President, Kais Saied.¹⁵ Just over a month later, the MoU was signed by Commissioner Olivér Várhelyi.¹⁶ The MoU provides for support in relation to macroeconomic stability, contributions towards which were to be paid in full within the following 6 months; development of trade in goods and services, support towards the green energy transition and a strategic energy partnership; people to people contacts; and a 'holistic' approach to migration. Similarly to the MoU between Italy and Libya, this part includes the intention to combat irregular migration, migrant smuggling and human

11. Case C-8 to 10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:290.

12. Case C-258/14, *Florescu and Others*, EU:C:2016:995.

13. Joined Cases C-208/17 P to C-210/17 P, *NF and Others v European Council*, EU:C:2018:705.

14. On these points see also Paola Garcia Andrade and Eleonora Frasca, 'The Memorandum of Understanding between the EU and Tunisia: Issues of Procedure and Substance on the Informalisation of Migration Cooperation' (*EU Migration Law blog*, 26 Jan 2024) <eumigrationlawblog.eu/the-memorandum-of-understanding-between-the-eu-and-tunisia-issues-of-procedure-and-substance-on-the-informalisation-of-migration-cooperation/>.

15. Press statement by President von der Leyen with Italian Prime Minister Meloni, Dutch Prime Minister Rutte and Tunisian President Saied, 11 June 2023, <enlargement.ec.europa.eu/news/press-statement-president-von-der-leyen-italian-prime-minister-meloni-dutch-prime-minister-rutte-and-2023-06-11_en>.

16. In the leaked legal opinion of the European Parliament of 19 December 2023, SJ-083 9/23 on the legal status of the MoU signed in Tunis on 16 July 2023, it is stated (at para 9) that it has 'not been possible to identify any Commission decision authorising the signature of the MoU', which raises further questions about transparency and accountability: <www.statewatch.org/media/4203/eu-ep-legal-service-opinion-tunisia-mou-19-12-23.pdf>.

trafficking and it provides for financial help for the provision of equipment, training and technical support to improve ‘the management of Tunisia’s border’.¹⁷ It is clear then that the MoU is not a mere technical arrangement, but rather it sets out policy choices in the field of external relations, as well as providing financial commitments for the EU.

And yet, there appears to be no publicly available Council mandate authorizing negotiations,¹⁸ or a Council decision authorizing ratification which, as mentioned above, is a condition for legality of the MoU.¹⁹ To be clear, this is not to say that the agreement was entered into surreptitiously:²⁰ it is in line with the broad priorities highlighted in the Special European Council meeting of February 2023, and it was hinted at in a leaked letter by Ms Von der Leyen to the European Council.²¹ As mentioned above, the deal was publicly announced in the diplomacy by press release mode, and the work done on the partnership with Tunisia was welcomed by the June 2023 European Council meeting.²² Yet, despite the Foreign Affairs Council referring to the need for Council approval on the agreement,²³ no such decision can be traced in openly accessible documents. This is highly unusual: for instance, the authorization to enter into negotiation with Tunisia on a MoU on energy is openly available,

17. In relation to migration, the press statement noted that EUR 100 million will be allocated for border management. The MoU does not, however, specify the financial commitment for the chapter on migration.

18. There is a note from the Council Presidency to the Working Party on External Aspects of Asylum and Migration (EMWP) on ‘Operationalisation of the Pact – Follow-up on the implementation of the action plans related to the Central Mediterranean Route: Tunisia, Niger, Egypt and Libya’, 24 March 2023, Document 6862/23, LIMITE JAI 230 MIGR 79 RELEX 278 ASIM 42 COAFR 121, which could be interpreted as a form of mandate; no other document could be traced in publicly available records.

19. See also Council information note, ‘Follow up to Judgment in Case C-660/13 – Arrangements between Secretaries General on non-binding instruments’ (4 December 2017) 15367/17 LIMITE JUR 582 CRS CRP 42 MERTENS 7 CORLX 573, which provides for more detailed procedural rules.

20. In a written response to a Parliamentary question the Commission held that it ‘had intensive consultations with the Council throughout the process’: E-002799/2023, Answer given by Mr Várhelyi on behalf of the European Commission, 27 November 2023. This might well be true, but it does not transpire from publicly available documents, and publicity is what ensures accountability.

21. Special European Council 9 February 2023, EUCO 1/2023; see then the letter from Ms von der Leyen to the European Council (20 March 2023) <www.statewatch.org/media/3785/eu-com-von-der-leyen-letter-migration-borders-progress-20-3-23.pdf>.

22. European Council, Conclusions 29–30 June 2023, EUCO 7/23.

23. Foreign Affairs Council, 26 June 2023, ‘... the EU will continue to help address the difficult social and economic situation that the country is facing. In order to ensure the stability of Tunisia, the EU offered a comprehensive package of cooperation that will *now need to be approved* by the Council’.

and the document authorizing the signature, whilst in itself not publicly available, is recorded in the Council's register.²⁴

There are two possible – and equally unpalatable – explanations for the lack of publicity of the Council decision. First, there *is* a Council decision authorizing the conclusion of the MoU, which however has not been publicized, not even as an agenda item. This would be contrary to transparency rules,²⁵ and given the wide publicity that has been given to the MoU, it is difficult to imagine that it would fall within one of the exceptions provided for in the access to documents Regulation.²⁶ The other possible explanation is that there is in fact *no* Council decision authorizing the signing of the MoU, which would mean that the Commission has acted unlawfully.

Furthermore, if indeed there is no Council decision authorizing the signing of the MoU, why was it not challenged by Council,²⁷ when a challenge was brought against the comparatively much less important, and surely less controversial, MoU with the Swiss Federation? Again, we can only speculate as to the reasons for this omission: it is possible that whereas there was broad agreement (or at least there was no strong disagreement) on the MoU, some governments felt that an explicit consent might be problematic because of domestic politics and/or constitutional rules. The lack of a formal decision, then, *de facto* sheltered national governments from domestic political contestation, since the decision was adopted by the Commission but was not approved by the governments in Council. It is also possible, albeit perhaps more unlikely, that whereas there was no sufficient majority (ie short of qualified majority voting) for adopting a decision, there was also no simple majority to back a challenge. If this were the case, then *de facto* there would be an alteration in the sufficient majority in Council – something we have seen already happening, formally, in economic governance in relation to the use of the so-called reverse qualified majority, where a Commission proposal is

24. See Strategic partnership on energy between the European Union and Tunisia – Authorisation to negotiate a non-binding instrument, I/A Item Note from the General Secretariat of the Council to Permanent Representatives Committee (Part 2) /Council, Brussels, 26 October 2023 (OR. en) 12661/23 LIMITE MAMA 131 ENER 472 TU 4; and the (non public) authorization ST 10504 2024 REV 1 – 'I' ITEM NOTE 06/06/2024 Memorandum of Understanding on Strategic partnership on energy between the European Union and Tunisia – Authorisation to sign a non-binding instrument – Decision to use the written procedure (TU, ENER, MAMA, General Secretariat of the Council; Permanent Representatives Committee (Part 2)). In relation to Egypt see n 5, and for Mauritania see n 6.

25. See Council's rules of procedure, as well as *Comments on the Council's Rules of Procedure* (Publications Office of the European Union, 2022), <op.europa.eu/en/publication-detail/-/publication/bd2df212-cddb-11ed-a05c-01aa75ed71a1/>.

26. See Art 4 of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

27. It is not obvious that the European Parliament would be able to bring a challenge.

deemed adopted unless there is a qualified majority in Council opposing it. In that instance a blocking minority is sufficient to adopt a decision for which the Treaty prescribes a qualified majority. Be that as it may, a crucial foreign policy decision has been adopted with little regard to procedures which are there to guarantee not only institutional balance,²⁸ but also democratic scrutiny,²⁹ which ultimately also means fundamental rights protection.

Extra-institutionality at the expense of fundamental rights protection

It is no surprise then that the MoU, like the other border management arrangements, has had consequences for the most fundamental rights of migrants, with widespread reports of torture and mistreatment by border officials. Just recently, an investigation by *The Guardian* on the systematic abuses by Tunisian guards (may have) led the Commission to stop EU funding directed at strengthening Tunisian border control, and hence potentially indirectly contributing to the abuses.³⁰ All this, notwithstanding the fact that the Council stressed the ‘urgency of addressing the issue of the *rule of law* and respect for *human rights*’ in Tunisia, a statement which is also in stark contrast to deciding to provide financial support to the same country to prevent migrants from reaching EU shores.³¹ Similar allegations of mistreatment of

28. This might be the case also at national level; see eg *Ordinanza* 163/2018 (ECLI:IT:COST:2018:163), where four Italian MPs challenged in front of the Italian Constitutional Court the absence of ratification of the Italy – Libya MoU for violation of the parliamentary prerogatives. The case was declared inadmissible as it was brought by single parliamentarians.

29. See also the European Parliament criticism of the means by which funding was channelled to Tunisia: European Parliament Resolution of 14 March 2024 on the adoption of the special measure in favour of Tunisia for 2023 (2024/2573(RSP)) P9_TA(2024)0175, [2024] OJ C/6563; and the response by the European Commission, ‘Follow-up to the European Parliament non-legislative resolution on the adoption of the special measure in favour of Tunisia for 2023’; and see n 4 above in relation to Egypt.

30. See ‘Europe overhauls funding to Tunisia after Guardian exposes migrant abuse’ *The Guardian*, online edition (24 January 2025) <www.theguardian.com/global-development/2025/jan/24/eu-human-rights-tunisia-migrant-security-forces-migration>. We were unable to find any public document relating to this Commission decision. It is also interesting to juxtapose what is contained in the report by the Ombudsman, where it is stated that the Commission held that in the area of migration ‘no funding is going to the Tunisian authorities directly’ (see para 18 of the Ombudsman Decision); however, *The Guardian* uncovered (through Statewatch) an alleged internal Council document which indicates direct payment to some Tunisian authorities: see <www.statewatch.org/media/4205/eu-council-mocadem-action-file-16821-23.pdf>, esp p 4. Several human rights organizations have raised the alarm as to human rights abuses in Tunisia: see eg <www.hrw.org/middle-east/north-africa/tunisia>, <www.amnesty.org/en/location/middle-east-and-north-africa/north-africa/tunisia/>.

31. Foreign Affairs Council, 20 March 2023.

migrants have been made against Turkey,³² another key partner in migration management, Egypt³³ and of course Libya.³⁴

Because of these very high human costs, the externalization strategy is not necessarily very successful: when the brutality against asylum seekers and other migrants increases significantly, there is a change in the country of departure so that the ‘problem’ is simply shifted from one country to another, whilst in the meantime the EU has contributed to the coffers of questionable leaders. Furthermore, externalization creates an incentive for third countries to use migration control as a tool to attempt to unduly influence EU action.³⁵

Questions therefore abound, ranging from effectiveness of the EU’s approach to externalization to the Commission’s duties, especially in relation to Charter compliance, when negotiating these agreements. After all, the Ombudsman had held already in 2015³⁶ – and more recently last year³⁷ – that the Commission’s failure to carry out a human rights impact assessment when deciding on international agreements might amount to maladministration; that the Commission should publish the human rights impact assessment as well as its risk management exercise; and that it must ensure transparency on its fundamental rights monitoring exercise. These suggestions for

32. See eg Euromed Rights, ‘How EU Funds in Türkiye Fuel Human Rights Violations & Forced Deportations’ (6 November 2024), <euromedrights.org/publication/how-eu-funds-in-turkiye-fuel-human-rights-violations-forced-deportations/#:~:text=The%20grave%20human%20rights%20violations,fatal%20consequences%20for%20some%20deportees>.

33. See eg ‘Joint Report on the Human Rights Situation in Egypt’ (January 2025), <www.cffjustice.org/egypt-joint-report-on-mounting-human-rights-crisis/>.

34. On the Libyan coastguard, see eg ‘Europe is Bankrolling a Force that Routinely Abuses African Migrants’ *The Economist*, online edition (15 January 2022) <www.economist.com/middle-east-and-africa/an-eu-funded-horror-story/21807126>; and Human Rights Council, ‘Report of the Independent Fact-Finding Mission on Libya’ (3 March 2023) A/HRC/52/83.

35. See eg Kelly M Greenhill, ‘Open Arms behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis’ (2016) 22 *ELJ* 279; see also the case of Morocco, which reacted to the first Front Polisario case (Case C-104/16 P, *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro* (Front Polisario), EU:C:2016:677) by ‘relaxing’ its immigration control: see Guy Hedgcock, ‘Migrant Arrivals in Spanish Cities Draws Claim of Moroccan “Blackmail”’ *Irish Times*, online edition (3 March 2017) <www.irishtimes.com/news/world/europe/migrant-arrivals-in-spanish-cities-draws-claim-of-moroccan-blackmail-1.2995910>. And see Hugh Lovatt, ‘Still Free to Choose: What Polisario’s Legal Win Means for EU Ties with Morocco and Western Sahara’ *European Council on Foreign Relations* (10 October 2024) <ecfr.eu/article/still-free-to-choose-what-polisarios-legal-win-means-for-eu-ties-with-morocco-and-western-sahara/>.

36. See Ombudsman Decision, ‘Decision in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the envisaged EU-Vietnam free trade agreement’ para 2.

37. See Ombudsman Decision, ‘Decision on how the European Commission intends to guarantee respect for human rights in the context of the EU–Tunisia Memorandum of Understanding (OI/2/2024/MHZ)’.

improvement from the Ombudsman seem not to have been taken on board by the Commission. And, it could also be argued that the case of *Ledra Advertising*, where the Court held that the Commission should not sign agreements when it doubts their consistency with EU law, as well as the interinstitutional agreement on impact assessment and the Commission's own guidance on fundamental rights assessment, point towards a legal duty for the Commission to consider carefully and openly the fundamental rights implications of the EU's external action.³⁸

Of course, the use of informal arrangements, outside the procedure provided for by the Treaties, with a lesser involvement of the European Parliament, contribute to this casual approach to fundamental rights protection. Nor should the MoU with Tunisia be considered an isolated example of the instrumental use of procedures to minimize democratic control: here, it is sufficient to recall the use of the emergency procedure which excludes the European Parliament – to approve a very sizeable facility for Egypt – in another deal which also provides for border control.³⁹ And things do not seem to be getting better: the Commission's President has recently endorsed the creation of extra-judicial return hubs based on the Italy–Albania model,⁴⁰ with no consideration of the legal problems and fundamental rights risk that are inherent in such deals.⁴¹ Overall, we should then question whether the externalization of border control is morally, legally and strategically acceptable.

The EU, however we want to define it, is a *legal* order: its legitimacy stems from its legality; its clout in the international sphere rests on the acceptance of a rule-based order, an acceptance that is increasingly under attack. It is therefore crucial that we do not play rough and ready with the Treaties and the

38. See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123, para 13; and also Commission Staff Working Paper, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments', Brussels, 6.5.2011 SEC(2011) 567 final.

39. See n 4 above.

40. See the letter from Ms von der Layen to the European Council, Ares(2024)7288990, 14 October 2024. And see the Fundamental Rights Agency Position Paper 1/2025, 'Planned Return Hubs in Third Countries' (6 February 2025), which raises concerns over return hubs.

41. Protocollo Italia-Albania in materia migratoria <temi.camera.it/leg19/provvedimento/protocollo-italia-albania-in-materia-migratoria.html>. At the time of writing, there is an open clash between the judiciary and the Italian Government as to whether the transfer of asylum seekers to facilities in Albania is compatible with domestic and European law; see also pending Case C-758/24, *Alace*, on the notion of safe country of origin. See generally Stefano Montaldo, 'Not in My Backyard! Outsourcing EU Asylum Procedures to Third Countries: A Challenge for the Common European Asylum System' (2025) 62 CML Rev 1, 327–372.

Charter – our common values are what must continue to define the EU; they must be the compass that governs our action.⁴²

42. See eg Case C-72/15, *Rosneft*, EU:C:2017:236; Case C-872/19 P *Venezuela v Council*, EU:C:2021: 37; Case C-156/21, *Hungary v European Parliament and Council* (Conditionality Regulation), EU:C:2022:97.

