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Informalisation in the EU's external migration policy: Ills and remedies

The EU and its Member States are increasingly using informal agreements with other countries to regulate and reduce migration. This approach can increase effectiveness but entails risks in a policy area that concerns fundamental rights.

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Innehåll

Summary

In their attempts to regulate and limit international migration, the European Union and its Member States increasingly rely on cooperation with non-EU countries in their neighbourhood and along the main migration routes to Europe. This cooperation often takes the form of informal, non-binding arrangements covering issues such as border management, prevention of irregular migration, and return and readmission of people who are not allowed to stay in the EU.

In this European Policy Analysis, Andrea Ott examines this trend of informalisation in the external dimension of the EU's migration and asylum policy. She shows that from the perspective of policymakers, informal deals offer advantages because they can help avoid cumbersome procedures and constitutional constraints, especially in times of crisis. But informalisation also carries risks, such as undermining the institutional balance in the EU, sidelining the European Parliament and escaping traditional forms of accountability.

The analysis finds that, since EU external migration cooperation affects sensitive areas, such as the fundamental rights of migrants, accountability gaps must be closed and risks minimised so that an acceptable balance between the advantages and disadvantages of informalisation can be achieved.

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The opinions expressed in this publication are those of the author.

1. Introduction

Informal or 'soft law' international instruments – that is, arrangements or cooperation tools that are nonbinding under international law – are important but contested instruments in the management of the external dimension of the European Union's (EU's) migration and asylum policy.[1] Yet, these instruments fulfil a central function within the common EU migration and asylum policy, a field that has been difficult to reform and adapt in crisis situations. With the help of soft law instruments, the EU and its Member States take refuge to unorthodox tools in the externalisation of border control and migration management. These third countries (either transit countries or countries of origins for migrants) are nudged to cooperate through different kinds of instruments outside the established framework for the conclusion of international agreements.[2]

'With the help of soft law instruments, the EU and its Member States take refuge to unorthodox tools in the externalisation of border control and migration management.'

What appears as an easy fix for constitutional constraints in the classical and complex EU treaty-making procedure comes with serious flaws.[3] The notorious examples of the 2016 EU-Turkey Statement,[4] the EU-Tunisia and Egypt cooperation of 2023 and 2024[5] provide famous examples of the discussion about the informalisation process. In avoiding existing procedures and processes, the EU enters a grey area where the secrecy or hybridity of informality can pose difficult questions about legality. How far should such informal instruments be allowed to circumvent existing procedures, institutional principles and safeguards?

This contribution seeks to explain the rise of informal instruments in their political and legal context. It does not assess the questions about their legality in light of human rights and international refugee law but, instead, focusses on the question of which institutional challenges arise from the trend towards informalisation in the externalisation of EU migration and asylum policy. It first explains the functions and main types or categories of bilateral informal instruments (section two), before analysing the informalisation process through the lens of experimentalist governance (section three). This contribution argues that these informal instruments lack the generally positive features of this governance process. Against this backdrop, sections four and five then explore the ills and possible remedies of informalisation in the EU's external migration policy.[6]

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1 Caterina Molinari, 'The EU and its perilous journey through the migration crisis: informalisation of the EU return policy and rule of law concerns', 44(6) (2019) *ELRev,* pp. 824–840, Narin Idriz and Eva Kassoti, 'The external dimension of EU migration and asylum policy, *VerfBlog*, 28 September 2020, https://verfassungsblog.de/the-external-dimension-of-eu-migration-and-asylum-policy/; Vincent Chetail, *International Migration Law* (OUP, 2019) p. 280; Peter Slominski and Florian Trauner, 'Reforming me softly – how soft law has changed EU return policy since the migration crisis', 44(1) (2021) *West European Politics*, pp. 93–113; Andrea Ott, 'Informalisation of EU bilateral instruments: categorization, contestation, and challenges', 39 (2020) *Yearbook of European Law*, pp. 569–601; Violeta Moreno-Lax, 'The informalisation of the external dimension of EU asylum policy: the hard implications of soft law', in Lilian Tsourdi and Philippe De Bruycker (eds.), *Research Handbook on Migration and Asylum* (Edgar Elgar Publishing, 2022) p. 282.

2 Emanuela Roman, 'The "burden" of being "safe" – how do informal migration agreements affect international responsibility sharing?', in Eva Kassoti and Narin Idriz (eds.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer, 2022) pp. 317–346.

3 Andrea Ott, 'The "contamination" of EU law by informalisation? International arrangements in EU migration law', *VerfBlog*, 29 September 2020, https://verfassungsblog.de/the-contamination-of-eu-law-by-informalisation/.

4 EU-Turkey Statement of 18 March 2016, http://www.consilium.europa.eu/en/press/pressreleases/2016/03/18-eu-turkey-statement.

5 Memorandum of Understanding between the EU and Tunisia (europa.eu), 16 July 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887; Joint Declaration on the Strategic and Comprehensive Partnership between the Arab Republic of Egypt and the European Union, 17 March 2024, https://enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en.

6 The author would like to thank Hannes Lenk and Bernd Parusel for their valuable comments. The usual disclaimer applies.

2. Informalisation in the EU's external migration and asylum policy

2.1 The evolution of the EU external migration and asylum policy

The 'spaghetti bowl'[7] of multilateral and bilateral cooperation tools (including both informal arrangements and international agreements) employed between the EU and third countries is rooted in the EU's 2005 Global Approach to Migration (GAM) policy. In this document, the European Commission stressed a 'comprehensive approach' to cooperation with third countries, consisting in a mix of commitments that combined actions aimed at combating irregular immigration and human trafficking with measures to facilitate legal migration.[8] The GAM was renewed in 2011 with the adoption of the Global Approach to Migration and Mobility (GAMM), where the European Commission explained that cooperation should focus on the field of mobility through a toolbox of legal and political instruments, but also through operational support and capacity-building with regional groups and key partners.[9] This mix of commitments consists in Mobility Partnerships for legal migration aiming to negotiate visa-facilitation schemes with third countries willing to sign EU readmission agreements.[10] In addition, the Common Migration and Mobility Agendas (CAMMs)[11] include political declarations between partner countries and the EU, to be used when both sides want to cooperate, but one of the parties is not willing to enter into a binding international agreement.

The 2015 'Refugee Crisis' and the inability of EU Member States to reach a consensus on how to ensure, internally, a fair burden-sharing of migration management and international protection responsibilities led the EU to direct its emphasis on strengthening the external dimension of the migration and asylum policy. This evolution has been characterised by the two trends of externalisation and securitisation – thus externalising border management to southern Mediterranean countries in particular[12] and focussing on security by treating migration as a security threat. [13] These trends were already visible before the 2015 migration crisis, but since 2015, EU and Member State efforts have intensified the search for more effective and flexible approaches and are also reflected in the EU's new pact on migration applicable from 2026 onwards.[14]

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7 The 'spaghetti bowl' analogy was famously coined by Jagdish Bhagwati to capture the proliferation of free trade agreements, but can also be borrowed for the governance of the external dimension of migration and asylum. Jagdish Bhagwati (with Anne O. Krueger), *The Dangerous Drift to Preferential Trade Agreements* (AEI Press, 1995).

8 European Commission, Communication from the Commission to the Council and the European Parliament – The global approach to migration one year on: towards a comprehensive European migration policy, COM(2006) 735 final.

9 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, COM(2011) 743 final.

10 Concluded with Cape Verde, Morocco, Tunisia, overview at: https://ec.europa.eu/home-affairs/policies/international-affairs/collaboration-countries/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en.

11 These joint declarations were signed with Ethiopia, India and Nigeria: https://ec.europa.eu/home-affairs/policies/international-affairs/mobility-partnership-facility-mpf_en.

12 Thomas Leroux, 'The EU's externalisation of border control policies', *Open Cultural Center*, 27 March 2024, https://openculturalcenter.org/the-eus-externalisation-of-border-control-policies/; on externalisation more generally, see also: Eleonora Frasca and Emanuela Roman, 'The informalisation of EU readmission policy: eclipsing human rights protection under the shadow of informality and conditionality', in Juan Santos Vara, Paula García Andrade and Tamás Molnár (eds.), *The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values* (European Papers, 2023) p. 931.

13 Yasmine Zarhloule, 'Migrants at the gate: Europe tries to curb undocumented migration', *Carnegie Endowment for International Peace*, 28 February 2025, https://carnegieendowment.org/research/2025/02/migrants-at-the-gate-europe-tries-to-curb-undocumented-migration; on the origins of securitisation in migration, see: Jef Huysmans, 'The European Union and the securitisation of migration', 38(5) (2000) *Journal of Common Market Studies*, pp. 751–77: Anne Hammerstad, 'The securitisation of forced migration', in Elena Fiddian-Qasmiyeh et al. (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (2014; online edn, Oxford Academic, 4 August 2014), https://doi.org/10.1093/oxfordhb/9780199652433.013.0033, accessed 15 October 2025.

14 EU Pact on Migration and Asylum: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.

In the 2016 Commission Communication establishing a new Partnership Framework with third countries, the Commission emphasised that it cannot rely on its existing migration toolkit alone. It stressed that innovative instruments need to be accompanied by financial support.[15] Ultimately, the Commission focussed on the initiation of political dialogues with priority countries of origin and transit (Mali, Nigeria, Niger, Senegal and Ethiopia).[16] For this reason, a Joint declaration with Mali was signed in 2017 to address root causes of migration and strengthen cooperation on the return of irregular migrants who did not receive refugee status in the EU. The Nigeria EU joint declaration on a common agenda on migration and mobility of 2015 can also be highlighted.[17] So-called compacts were agreed with Jordan and Lebanon within the already existing political dialogue. The EU also negotiated informal readmission arrangements with certain key states – namely, Gambia, Bangladesh, Turkey, Ethiopia, Afghanistan, Guinea and Ivory Coast.

'... these instruments sought to fortify EU borders by increasing the rates of return and readmission, as well as channelling migration, using the leverage from other EU policy areas, notably development financial aid.'

In the short-term, these instruments sought to fortify EU borders by increasing the rates of return and readmission, as well as channelling migration, using the leverage from other EU policy areas, notably development financial aid. Since the adoption of the 2015 Agenda on Migration,[18] which was hailed as a new European approach in the effective management of migration, EU policy documents have increasingly referred to the use of political dialogues and informal arrangements as new tools to enhance cooperation with third countries on readmission.[19] This reflects the importance of these new types of flexible and creative instruments, which go beyond formal readmission agreements.[20] As the EU itself explains, its policy aims for a 'coordinated and coherent EU and Member States coordination of readmission ... to achieve fast and operational returns, and not necessarily formal readmission agreements'.[21]

Over time, two trends can be recognised – namely, informal instruments have replaced formal readmission agreements, thus placing a focus on the cooperation in the readmission of migrants to third country. In this regard, visa facilitation has been used as an incentive for third countries. However, these readmission deals remained ineffective, and over time, the EU has moved towards more comprehensive arrangements where incentives are broader including trade advantages, financial benefits and development aid, practices which form the second trend.[22] These migration arrangements are mainly concluded with countries which play a role in the transit of migrants or host refugees. At the same time, comprehensive partnerships instruments have recently come up (EU-Tunisia and EU-Egypt) where migration is a main component and linked to financial support to aid the third country in ensuring border management and housing refugees (EU-Egypt).

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15 Communication from the Commission on establishing a new Partnership Framework with Third Countries under the European Agenda on Migration, COM(2016) 385 final.

16 Joint Declaration on a Common Agenda on Migration and Mobility, between the Federal Democratic Republic of Ethiopia, and the European Union and its Member States, MDB-K6071-20151117072854.

17 Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States, MDB-K2009-20150313184955: GEN.

18 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

19 For an overview, see: Emanuela Roman, 'The burden of being "safe" How do informal EU migration agreements affect international responsibility sharing?', *VerfBlog*, 1 October 2020, https://verfassungsblog.de/the-burden-of-being-safe/.

20 Communication from the European Commission to the European Parliament, the European 383 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, Strasbourg, 7 June 2016, p. 6. Eva Kassoti and Narid Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer, 2022) p. 2.

21 See Migration Partnership Framework, COM (2016) 385 final, p. 7.

22 By Niels Ike, Elaine Lebon-McGregor, Maria Gabrielsen Jumbert and Ayşe Bala Akal, 'Should the EU give up on readmission agreements as a foreign policy tool?', *MIGNEX*, 31 January 2024, https://www.mignex.org/d095a.

In December 2024, the Council of the European Union laid out Strategic Guidelines for legislative and operational planning within the area of freedom, security and justice – namely, that the EU's goal is 'to continue developing ambitious and durable comprehensive partnerships with countries of origin and transit in a mutually beneficial way, including border and security partnerships, the fight against migrant smuggling and the creation of legal pathways.'[23]

'Aiming for more flexibility and more leverage to achieve concrete and feasible solutions, informal instruments have become a key component ...'

In essence, the EU's approach depends on whether the third country has an interest in cooperating with the EU, what legal framework already exists with the third country, and whether it forms a transit or a state of origins of migrants arriving in the European Union. Aiming for more flexibility and more leverage to achieve concrete and feasible solutions, informal instruments have become a key component in this strategy but are now embedded in other policy tools and enforced with financial support instruments.

2.2 A plethora of actors and informal instruments: an attempt to categorise

The advantage of informal instruments over binding international agreements is that they evade legal and procedural constraints. The EU normally agrees on international agreements in a procedure laid out in full detail in Article 218 TFEU. The European Commission (or the High Representative if it concerns the Common Foreign and Security Policy) negotiates and the Council, with the consent of the European Parliament (EP), concludes the international agreement. Potentially, in case of Member States and EU shared competences, so-called mixed agreements need to be negotiated as well, which the EU and the Member States then have to ratify through a long process. In comparison, informal arrangements operate in a no man's land[24] or at least in a grey area where the framework of action is more contentious. These instruments can unite different forms of action of financial, political and technical nature. Informal instruments can also involve different actors: for example, the EU can act together with Member States, as the reference to the Team Europe approach in recent cooperation with Tunisia demonstrates. However, this reference is misleading. Team Europe is not an institutional set-up but a governance approach which originated in the response to the COVID-19 pandemic, where it bundled financial contributions from the EU, the Member States and other partners.[25] It has strong geopolitical connotations, as it aims to increase the visibility and joint engagement of the EU and its Member States in a strategic manner, thereby demonstrating EU global leadership.[26] In the migration context, the reference to Team Europe remains misleading, as it only concerns making use of the different levels of leverage held by the EU and its Member States. Commission President von der Leyen referred to a Team Europe spirit when presenting the strategic partnership with Tunisia with the participation of the Italian and Dutch heads of state.[27] This led to resentment from other Member States present and the EU institutions that had not been involved. The reference to a Team Europe spirit was not repeated a year later when von der Leyen initiated

[23] Council, Operationalisation of the External Dimension of Migration: Tasks for MOCADEM and Ways to Improve its Working Methods, Brussels, 10 January 2025, 5175/25, eu-council-mocadem-working-methods-tasks-5175-25.pdf.

[24] On this, see: Mauro Gatti and Paolo Manzini, 'External representation of the European Union in the conclusion of international agreements', 49 (2012) *CML Rev*, p. 1732.

[25] Council Conclusions on Team Europe Global Response to COVID-19, 8 June 2020, https://www.consilium.europa.eu/media/44347/team-europe-ccs-200608.pdf; European Commission, Joint Communication to the EP, Council, ECOSOV and CoR, Communication on the Global EU response to COVID-19, Brussels, 8 April 2020 JOIN(2020) 11 final.

[26] See Council conclusions dated 23 April 2021 on Team Europe, para. 1 and 10, at: https://data.consilium.europa.eu/doc/document/ST-7894-2021-INIT/en/pdf.

[27] Press statement by President von der Leyen with Italian Prime Minister Meloni, Dutch Prime Minister Rutte and Tunisian President Saied, 11 June 2023; Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia, 16 July 2023, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_3887/IP_23_3887_FR.pdf.

a similar Strategic Partnership with Egypt.[28] This practice, however, demonstrates another practical advantage for EU actors outside the existing EU procedures: Member States can be involved in informal instruments in a flexible way.

'Practice is based on a form of unorthodox experimentalist governance, characterised by problem-solving in complex conditions that is adapted due its constant evaluation.'

Overall, the wide range of instruments with diverse objectives and structures evades predictable categorisations. Practice is based on a form of unorthodox experimentalist governance (see section three), characterised by problem-solving in complex conditions that is adapted due its constant evaluation. It is unorthodox compared when applied in other EU policies because it is not based on no open-ended and participatory way but can be more secretive and amorphous – lacking the typical characteristics of legal instruments. The 2024 Joint Declaration on a strategic and comprehensive partnership between the EU and Egypt is an umbrella instrument covering political commitments in the field of political relations, macroeconomic stability, sustainable investment and trade, including energy, water, food security and climate change, migration, security and human capital development. The migration pillar mentions financial support for legal migration but also tackling the root causes of illegal migration and border management. This is in contrast to the concrete readmission commitments agreed upon in the 2016 Joint Way Forward (JWF) on migration with Afghanistan or the Standard Operating Procedure (SOP) agreed with Bangladesh in 2017.

Informal instruments cover both political and financial commitments as well as technical implementation matters. The instruments are heterogenic regarding their objectives, forms and structure. An attempt at categorisation could differentiate between their function to prepare, implement or exceptionally replace international agreements.[29] For instance, EU Mobility Partnerships with third countries form general policy instruments that manage the legal movement of third country nationals and aim to 'strengthen dialogue and cooperation on migration and mobility between Member States and priority partner countries outside the EU'.[30] These partnerships lay the groundwork for future EU visa facilitation or liberalisation legislation – that is, binding international agreements – and are conditional on the conclusion of a readmission agreement between the EU and the third country.

A more recent example is the Memorandum of Understanding (MoU) between the EU and Tunisia from June 2023. This instrument incorporates a migration arrangement in a comprehensive partnership package. In addition to migration, the MoU also includes a pillar on macro-economic stability, trade and investment, green energy transition and people-to people contacts. It is therefore categorised here as a political instrument, reinforced by financial support promised to Tunisia.[31] The same exercise was repeated with Egypt one year later.[32] Described by observers as 'cash for migration control' deals,[33] it is mainly perceived as a migration arrangement which then focusses on the readmission of third-country national while also supporting third-county border fortification to prevent or limit migrants'

[28] Joint Declaration between the Arab Republic of Egypt and the European Union, (n. 5).
[29] See Ott, 'Informalisation of EU bilateral instruments' (n. 1).
[30] Commission Decision of 4 December 2013 on the Mobility Partnership between Tunisia, the European Union and its participating Member States, Brussels, 4 December 2013 C(2013) 8581 final.
[31] Memorandum of Understanding between the EU and Tunisia (europa.eu), 16 July 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887. See further Andreina De Leo, 'The EU-Tunisia memorandum: a blueprint for cooperation on migration?', *Tahrir Institute*, 19 October 2023, https://timep.org/2023/10/19/the-eu-tunisia-memorandum-of-understanding-a-blueprint-for-cooperation-on-migration/.
[32] Joint Declaration between the Arab Republic of Egypt and the European Union (n. 5).
[33] EU External Partners: Another EU 'Cash for Migrant Control' Deal Sealed with Egypt – Civil Society Organisations Call on EU to Review Association Agreement with Israel Amidst Forced Famine – EU-Tunisia Deal Outlines Different Measures Addressing Migration by Tunisians & Non-Tunisian Nationals – EU-Funded Libyan Coast Guard Endangers Lives of Survivors, 22 March2024, https://ecre.org/eu-external-partners-another-eu-cash-for-migrant-control-deal-sealed-with-egypt-%e2%80%95-civil-society-organisations-call-on-eu-to-review-association-agreement-with-israel-amidst-f/.

movements.[34] Other previous informal tools focus on technical procedures to implement the readmission of third country nationals by the country of origin (i.e. the Standard Operating Procedure (SOP) with Bangladesh) or form, exceptionally, a tool to replace binding international agreements (i.e. the JWF with Afghanistan). The EU-Turkey Statement falls into all three categories mentioned above and can therefore be categorised as a fourth category of hybrid instrument that embodies another, rather unique, example of informalisation.

Broader policy and financial cooperation instruments with migration embedded	**Policy and financial migration instruments**	**Readmission arrangements**	**Readmission arrangement embedded other policy objectives**
EU-Tunisia Memorandum of Understanding (2023)	Mobility Partnerships on the legal movement of individuals	Joint Way Forward with Afghanistan (2016) and Joint Declaration on Migration Cooperation between Afghanistan and the EU (2021 update)	EU-Turkey Statement (2016)
EU-Egypt Joint Declaration on the Strategic and Comprehensive Partnership (2024)	Joint declaration on a common agenda on migration and mobility between Nigeria and the EU and the Member States	Standard operating procedures for the identification and return of persons without the authorisation to stay with Bangladesh (2017)	
	Joint Declaration on migration partnership with Mauritania (2024)	Admission Procedure for return with Ethiopia (2018)	

What all of these instruments have in common is they cannot be categorised as classical international agreements between states or states and international organisations, not least because the actors involved lack the authority to act under international law. The most notorious examples of such informal migration deals are the mentioned 2016 EU-Turkey Statement[35] and the 2016 JWF with Afghanistan (renewed in 2021 as the Joint Declaration on Migration Cooperation between Afghanistan and the EU). The latter example with Afghanistan also demonstrates that Member States have concluded their own readmission arrangements, and we can see parallel activities by the EU and Member States.[36] These informal arrangements include readmission deals, the texts of which are published and often publicly negotiated. Many more of these readmission arrangements concluded by both the EU and its Member States are clandestine and the public knows little about them. To make matters worse, parliaments – national and EU – struggle to keep pace and follow developments. Since 2023, we have seen a new wave of informal arrangements with neighbouring countries in the Mediterranean.

[34] Annick Pijnenburg, 'Team Europe's deal: what's wrong with the EU-Tunisia migration agreement?', *VerfBlog*, 21 August 2023, https://verfassungsblog.de/team-europes-deal/; Nora Milch, *The next in line: reflections on the EU-Lebanon migration deal*, https://www.jus.uio.no/ikrs/english/people/aca/noramj/.

[35] EU-Turkey Statement of 18 March 2016, http://www.consilium.europa.eu/en/press/pressreleases/2016/03/18-eu-turkey-statement/.

[36] E.g. Memorandum of Understanding between the Government of Sweden and the Government of the Islamic Republic of Afghanistan on Cooperation in the Field of Migration (hereafter the MoU), signed on 5 October 2016, SÖ 2016:9; Joint Declaration of Intent on Cooperation in the Field of Migration between the Government of the Federal Republic of Germany and the Government of the Islamic Republic of Afghanistan, 2 October 2016, 2017-01-18-Rücknahmeabkommen-Deutschland-Afghanistan.pdf.

Informal arrangements can, in some respect, remedy the ills of the intricate negotiations of international agreements that result from the overall complexity of the EU's structure of external representation. In avoiding the procedures and rules applicable for EU international agreements, these informal instruments have the advantage that they can adapt quickly to new realities and allow for immediate implementation without requiring parliamentary ratification or authorisation procedures.[37] However, informalisation operates outside the existing constitutional framework and therefore suffers from uncertainties regarding its legal nature, legal basis, and the division of competences between the EU and its Member States, as well as procedural and institutional safeguards. Informal arrangements could contribute to changing institutional practice and therefore form a pandora's box – setting wrong premises and creating the danger of undermining the Treaty framework and evading accountability and legal scrutiny.

'... informalisation operates outside the existing constitutional framework and therefore suffers from uncertainties regarding its legal nature, legal basis, and the division of competences ...'

The 2023 negotiations with Tunisia on an MoU covering, among other policy fields, migration symbolises these ills and remedies. It echoes the Commission policy, since 2016, focussing on partnerships with key third countries having 'a 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 (compacts) with third countries to better manage migration in full respect of our humanitarian and human rights obligations'.[38] Formal readmission agreements have proven ineffective, and comprehensive international agreements addressing migration policies present difficulties regarding their negotiation and ratification by the EU and its Member States. The post-Cotonou agreement, the Samoa Agreement for instance, requires ratification by both the EU and its 27 Member States. While part of the agreement can be applied provisionally by the Union, this interim solution, too, was delayed by Hungary and Poland for political reasons.[39]

Overcoming these legal and political hurdles, the comprehensive partnership with Tunisia is instead implemented by an informal MoU. It is this approach that is seen by the Commission as a blueprint for future deals. It could be finalised quickly – namely, by the President of Commission and the Prime Ministers of the Netherlands and Italy – and implemented within days. This approach was repeated with the Joint Declaration with Egypt and has taken inspiration from the Team Europe approach discussed above.[40] However, it was not until after the conclusion of the joint declaration that the European Parliament was invited to ask important questions regarding its form, legal basis and procedure, as well as the contents, goals and likely consequences of the deal. EU Member States were also critical of the procedure, as most of the Member States, the European External Action Service (EEAS) and the European Council were bypassed.[41] This practice highlights the changing (informal) institutional configurations under which the EU and its Member States agree with third countries on informal instruments.

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[37] Joint Way Forward on Migration Issues between Afghanistan and the EU, adopted by Commission Decision on the signature on behalf of the European Union, C(2016)6023/F1. Joint Declaration on Migration Cooperation Between Afghanistan and the EU, C(2021)172. See also Ott, 'The "contamination" of EU law' (n. 3).

[38] European Commission, Communication from the Commission to the European Parliament, the European Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, Strasbourg, 7 June 2016 COM(2016) 385 final, p. 6.

[39] See further European Parliament, Legislative Train Schedule, Samoa agreement (' post-Cotonou ') between the EU and the Organisation of African, Caribbean and Pacific States (OACPS), https://www.europarl.europa.eu/legislative-train/theme-development-deve/file-signature-of-the-new-eu-acp-agreement-(%E2%80%98-post-cotonou-%E2%80%98).

[40] Niels Keijzer, Aline Burni, Benedikt Erforth and Ina Friesen, *The Rise of the Team Europe Approach in EU Development Cooperation Assessing a Moving Target*, Discussion Paper 22/2021/ Deutsches Institut für Entwicklungspolitik, https://www.idos-research.de/uploads/media/DP_22.2021.pdf.

[41] Lisa O'Carroll, 'EU states expressed "incomprehension" at Tunisia migration pact, says Borrell', *The Guardian*, 18 September 2023, https://www.theguardian.com/world/2023/sep/18/eu-states-expressed-incomprehension-at-tunisia-migration-pact-says-borrell.

3. Informalisation and experimentalist governance

All of the informal arrangements discussed above address border and migration management, and the return of illegal migrants in a broader sense, in addition to technical details regarding the readmission of third country nationals to their home countries.[42] In some cases, EU and third countries have started political dialogues accompanied by some form of political arrangements, but these have not necessarily resulted in the adoption of more detailed informal or formal cooperation instruments on migration. Concrete examples involving readmission arrangements[43] are the EU-Turkey Statement[44] and the JWF on Migration Issues between Afghanistan and the EU,[45] which the EU renewed with Afghanistan in 2021 as the Joint Declaration on Migration Cooperation.[46] Other examples of informal arrangements in the field of readmission are the SOPs with Bangladesh,[47] and Mali[48] for the Identification and Return of Persons without an Authorisation to Stay and Good Practices for the Efficient Operation of the Return Procedure that the EU concluded with Ethiopia,[49] Gambia,[50] Guinea[51] and Ivory Coast.[52]

The diversity of tools and approaches applied towards countries represents a form of experimentalist governance 'based on a recursive process of framework goal-setting and revision through comparative review of implementation experience in diverse local contexts'.[53] Similar approaches have previously been applied in the context of the EU enlargement and European Neighbourhood policies, and they have now spilled over to areas such as the external dimension of migration and asylum policy.[54] In this respect, soft law tools form an important instrument in the EU's experimentalist governance's toolbox[55] that have allowed both the EU and its Member States to effectively engage in this 'deliberately provisional framework' for years.[56] Although certain informal tools such as the EU-Turkey Statement and the MoU with Tunisia have seemingly emerged as blueprints for future cooperations, it is not unlikely that other forms of cooperation adapted to individual circumstances will ultimately spring up.

The proposal for a new EU 'Pact on Migration and Asylum' (2020) relied on the existing 'toolbox for third country cooperation'. In the new Pact on Migration and Asylum and in the Regulation on Asylum and Migration Management applied from 1 July 2026, the Union

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[42] Molinari, 'The EU and its perilous journey' (n. 1); Slominski and Trauner, 'Reforming me softly' (n. 1).
[43] In the words of the Commission, 'operational tools and instruments', Renewed action plan 2017, p. 12.
[44] European Council, EU-Turkey statement, 18 March 2016, Press Release: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/
[45] Joint Way Forward on Migration Issues between Afghanistan and the EU, 6 October 2016, ' eu_afghanistan_joint_way_forward_on_migration_issues.pdf
[46] EU-Afghanistan Joint Declaration on Migration Cooperation: https://www.eeas.europa.eu/eeas/eu-afghanistan-joint-declaration-migration-cooperation_en?s=234.
[47] Commission Decision on the Signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, Brussels, 8 September 2017 C(2017) 6137 final.
[48] Draft Standard Operating Procedures between the EU and the Republic of Mali for the Identification and Return of Persons without the Authorisation to Stay, Brussels, 6 December 2016, 15050/16.
[49] Draft EU-Ethiopia Good Practices for Readmission Procedure Doc. 12090/17 MIGR 179 COAFR 239.
[50] Draft EU-Gambia Good Practices for the Efficient Operation of the Return Procedure Doc. 11907/17 MIGR 158 COAFR 233.
[51] https://www.statewatch.org/media/2272/eu-com-readmission-annex-1-guinea.pdf.
[52] See further Roman, 'The "burden" of being "safe"' (n. 2).
[53] Jonathan Zeitlin, 'EU experimentalist governance in times of crisis', 39(5) (2016), *West European Politics*, pp. 1073–1094.
[54] Bart Van Vooren, 'A case study of "soft law" in EU external relations: the European Neighbourhood Policy', 34(5) (2009) *ELRev*, pp. 696–719; Andrea Ott, 'Enlargement policy', in Herwig Hofmann, Gerard Rowe, and Alexander Türk (eds.), *Specialized Administrative Law of the European Union - A Sectoral Review* (Oxford University Press, 2019) pp. 13–39.
[55] See further Ott, 'Informalisation of bilateral instruments' (n. 1); Ott, 'The "contamination" of EU law' (n. 3).
[56] Charles F. Sabek, 'Experimentalist governance', in David Levi-Faur (ed.), *The Oxford Handbook of Governance* (Oxford University Press, 2011).

speaks of broad tailor-made and mutually beneficial partnerships with third countries.[57] Few new instruments were added, however; instead, the focus rested on improving its implementation.[58] Those soft law tools that were added – be they financial and political, multilateral,[59] bilateral and unilateral – were complemented by binding instruments such as the former ACP (now the OACPS), association agreement (Cotonou and its draft successor agreement) and parallel actions by EU Member States (in the form of international agreements or, more commonly, soft law tools).[60]

When turning to concrete examples, more general policy instruments such as the EU-Lebanon compact[61] can be highlighted or the Joint Declaration between Ghana and the EU on Cooperation on Migration,[62] which frame very generally common aims and objectives between the EU and its partners. In terms of the policy tools mentioned in section two, not all were necessarily implemented. The cooperation between the EU and key partners remains, therefore, at different stages. Here, instead of compacts, cooperation is built on CAMM, including agreements with, for example, Nigeria[63] and Ethiopia.[64] At the same time, the EU started regional initiatives with the Khartoum process targeting the Horn of Africa countries[65] and the Rabat process focussed on West- and North African states.[66] This was followed by the Joint Valletta Action Plan and the Joint Valletta Political Declaration, and it was financially supported by the European Emergency Trust Fund. The Joint Valletta Action Plan lays down priorities aiming at supporting Valletta Partners with enhanced migration governance between Europe and Africa. Finally, reference to these policy tools is made in the bilateral international agreement between the ACP countries and the EU, the Samoa Agreement. The EU also seems to be moving from migration management aimed at improving 'the efficiency of the EU's return system'[67] to outsourcing migration management (and asylum procedures) to third countries.

In the past, the emphasis of these agreements was on informal readmission instruments[68] that substitute formal readmission agreements, as with the JWF with Afghanistan.[69] Other examples include the Good Practices for Readmission and SOPs with Bangladesh[70] and

[57] Regulation (EU) 2024/1351 of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L 2024/1351, 22 May 2024.
[58] On this, see: Paula Garcia Andrade, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?', *EU Immigration and Asylum Law and Policy*, 8 December 2020, http://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/.
[59] See also the International Organization on Migration, UN Global Compact on Migration, (A/RES/73/195), 11 January 2019: https://www.iom.int/resources/global-compact-safe-orderly-and-regular-migration/res/73/195.
[60] One well-documented example is the MoU between Libya and Italy, but all other Member States which are destinations for migrants are engaged in informal arrangements which have remained unpublished.
[61] EU-Lebanon Compact, OJ 2016 L 350/120.
[62] Dated 16 April 2016: https://eeas.europa.eu/headquarters/headquarters-homepage/5249/joint-declaration-ghana-eu-cooperation-migration_en.
[63] Joint Declaration between Nigeria and the EU, 16 March 2015 (n. 17).
[64] Joint Declaration between Ethiopia and the EU, 23 September 2015 (n. 16).
[65] The Khartoum process was established in 2014 to address challenges of migrant smuggling and trafficking in human beings, is an established regional dialogue for enhanced cooperation on migration and mobility and regional collaboration between countries of origin, transit and destination on the migration routes between the Horn of Africa and the European Unio between the concerned countries on At the Valletta Summit on Migration on 11–12 November 2015, https://www.consilium.europa.eu/en/press/press-releases/2015/11/12/valletta-final-docs/; see further International Organization for Migration, *EU-Horn of Africa Migration Route Initiative (Khartoum Process)*, https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process.
[66] The Euro-African Dialogue on Migration and Development (Rabat Process) is a regional migration dialogue. Since 2006, the Dialogue has offered a framework for consultation, bringing together countries of origin, transit and destination of the migration routes linking Central, West and Northern Africa with Europe, https://www.rabat-process.org/en/about.
[67] Renewed action plan on a more effective return policy in the European Union, COM (2017) 200final, p. 2.
[68] In the words of the Commission 'operational tools and instruments', Renewed action plan 2017, p. 12.
[69] JWF with Afghanistan, 6 October 2016 (n. 45).
[70] JWF with Afghanistan, 6 October 2016; EU-Bangladesh SOP (n. 47).

Mali,[71] the admission procedure for the return with Ethiopia,[72] and the EU-Gambia and EU-Guinea good practices.[73] In recent years, financial tools have been concluded which are embedded in a comprehensive political framework. The blueprint was the EU-Tunisia MoU of 2023, which was based on five pillars – macroeconomic stability, trade and investment, green energy transition, people-to-people contacts, and migration and mobility. A similar MoU was signed with Egypt a year later in 2024. As these informal instruments have been called migration or cash for migrant control deals, this connotation emphasises the importance of the financial support for these third countries to limit migration in the countries of origin or transit. Finally, the Italy-Albania Protocol, which is binding under international law, on Strengthening Cooperation in Migration Matters creates the newest example of out-of-the-box thinking[74] and adds to the EU's and Member States' toolbox by processing asylum applications outside the EU's territory.[75]

The complexity in the form and nature of acts and actors that results from involving various EU institutions and individual Member States can be well-documented with one of the target states: Afghanistan. Between 2008 and 2017 over 545,000 Afghan nationals arrived in the European Union, and in this period, Afghanistan became the second most important country of origin among asylum seekers in the EU after Syria. These figures are in stark contrast to their recognition of asylum, where only half of Afghan asylum seekers are recognised in the EU.[76] Put bluntly, the likelihood that protection needs are adequately recognised by the receiving state varies drastically across EU Member States. For example, the protection rate has increased overall in EU Member States between 2019 to 2021 but ranges still varied in EU Member States, especially for Afghan, Iraqi and Turkish applicants.[77]

In November 2016, the EU concluded a cooperation agreement (CAPD) with Afghanistan, which has provisionally applied between the parties since the end of 2017.[78] Article 28 of that agreement commits both parties to a comprehensive dialogue and cooperation in migration matters. More importantly, the EU and Afghanistan agree to conclude an 'agreement regulating specific obligations for readmission, including provisions regarding nationals of other countries and stateless persons', but the Afghan government showed no clear interest to conclude such a formal agreement. With the JWF, the EU instead set the aim to conclude an informal readmission instrument to ensure cooperation on return and readmission, complementing actions adopted in certain Member States – namely, Denmark, France, Finland, Sweden,[79] the Netherlands[80] and Germany[81] – in concluded MoUs with

[71] Draft SOP Between the EU and the Republic of Mali, 15050/16 (n. 48).
[72] See reference to this document in the Outcome of Council meeting, 3,593rd Council meeting, Brussels, 29 January 2018.
[73] Draft EU-Gambia Good Practices, Doc 11907/17.
[74] Beatrice Pirri, 'Italy's migration gamble: the uncertain future of the agreement with Albania', *European Policy Centre*, 5 May 2025, https://cep.org.rs/en/blog/italys-migration-gamble-the-uncertain-future-of-the-agreement-with-albania/.
[75] For greater detail, see: Andreina De Leo and Eleonora Celoria, 'The Italy–Albania Protocol: a new model of border-shifting within the EU and its compatibility with Union law', 31(5) (2005) *Maastricht Journal of European and Comparative Law*, pp. 595–618, https://doi.org/10.1177/1023263X241309601.
[76] Bernd Parusel, 'Afghan asylum seekers and the Common European asylum system', *BPB*, 17 October 2018, https://www.bpb.de/themen/migration-integration/laenderprofile/english-version-country-profiles/277716/afghan-asylum-seekers-and-the-common-european-asylum-system/.
[77] Afghan nationals seeking international protection in the EU+, Fact Sheet European Union Agency for asylum, August 2022; Fact sheet EUAA/IAS/2023/19 August 2023, https://euaa.europa.eu/sites/default/files/publications/2023-08/AR2023_factsheet19_recognition_rates_EN.pdf.
[78] CAPD, OJ 2017 L67/1.
[79] Sweden signed an MoU with Afghanistan on 5 October 2016 (n. 35).
[80] With the Netherlands, this concerns a gentlemen's agreement since 2012.
[81] Joint Declaration between Germany and Afghanistan, 2 October 2016 (n. 36).

Afghanistan.[82] To nudge Afghanistan into the deal, the EU and its Member States pledged a broader engagement with the country at the time, aiming for the potential conclusion of a CAMM and the commitment to provide substantial development aid, which was eventually signed at the Afghanistan donor conference on 4–5 October 2016.[83] It was updated in 2021, but, with the current political situation in Afghanistan, is no longer operational.[84]

Ethiopia, another example, is both a country of transit for African refugees and a country of origin. It is part of the multilateral Khartoum process involving the EU Member States and the African states around the Horn of Africa.[85] It is also part of the post-Cotonou process for OACPS countries which will receive, in its post-Cotonou regional African protocol, a focus on migration and mobility.[86] In 2015, a Joint Declaration on a Common Agenda on Migration and Mobility Between Ethiopia and the EU and its Member States was signed, focussing more generally on cooperation in the field of legal and illegal migration and also speaking about – in line with Article 13 of the Cotonou Agreement – 'exploring possibilities for engaging in close coordination and cooperation on the return of irregular migrants in a safe and secure environment'. This is complemented and specified by the admission procedures for the return of Ethiopians from EU Member States, agreed on 18 December 2017, which determined the required travel documents.[87] Viewed externally, these practices come across as experimentalist governance and thus a form of steering based on peer review, monitoring and benchmarks which allows for policy changes.

When comparing the content of these instruments, it is striking that they all regulate the return of third countries' citizens to their country of origin or home countries and specify the required documents for transport, but they differ in their form and wording. The JWF with Afghanistan is much closer in its content and set-up to an international agreement; it includes a form of preamble and titles with scope of cooperation, framework of commitment, and the start of the cooperation and dispute. In contrast, the good practices and SOPs are reduced to the bare necessities of the technical part of a cooperation. Finally, the EU-Turkey Statement falls completely outside the box, as it goes beyond a readmission component, forms a byzantine mix of financial commitments, commitments under conditions and simple rhetoric regarding the Turkish accession perspective, visa liberalisation for Turkish citizens and financial support for refugees hosted by Turkey.[88]

The evolution of these instruments shows certain features recognised as experimentalist governance – namely, public decision-making and problem-solving within complex conditions that also involve peer review and monitoring. It tries to resolve problems in an open-ended and participatory way involving peer review, monitoring and benchmarks, and

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[82] On this, see: Joint Commission-EEAS non-paper on Enhancing Cooperation on Migration, Mobility and Readmission with Afghanistan, Brussels, 3 March 2016.

[83] See also the Joint letter by Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Finland, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Norway, Polen, Slowakia, and Sweden to the High Representative Kallas on increased effort to return Afghan refugees, 18 October 2025.

[84] Silk route countries - European Commission.

[85] See also Heaven Crawley and Brad K. Blitz, 'Common agenda or Europe's agenda? International protection, human rights and migration from the Horn of Africa', 45(12) (2019) *Journal of Ethnic and Migration Studies*, pp. 2258–2274.

[86] Council Conclusions, 30 June 2020, 9265/20.

[87] Draft admission procedures for the return of Ethiopians form the EU, the final version C(2017)8422 is not a publicly available, and the text was not disclosed to the authors with the argument that the Commission considers that disclosing such documents would have a negative impact on the current and future relations with the concerned third county, letter to the author sent via email on 25 January 2021.

[88] Andrea Ott, 'EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?', in Francesca Ippolito, Gianluca Borzoni, and Federico Casolari (eds.), *Bilateral Relations in the Mediterranean* (Edward Elgar Publishing, 2020) pp. 184–213, https://doi.org/10.4337/9781786432254.00020.

public policies are regularly revised based on these evaluations. However, the emphasis rests more on the 'experimentalist' than on 'governance' in external migration management overall. Decision-making and the assessment of these experiences often remain a black box and lack the necessary transparency or the process of critical and open assessment normally applied in the area of other EU policies. Often these informal instruments have not been published in an adopted and accessible way but only as drafts or leaked documents. Moreover, once an extensive public discussion on such informal instruments takes place – as happened with the EU-Turkey Statement, in the case of the JWF with Afghanistan or the MoU between Italy and Libya – it can be recognised that further cooperation and discussion of extensions and new negotiations are conducted in an even more secretive climate.

4. The ills of informalisation

Informal instruments have been discussed by both national parliaments and the European Parliament, which feel sidelined in this process. In literature and civil society, too, these informal instruments have been analysed in light of their overall legality and legitimacy, and especially whether these tools live up to the standards of human rights protection.[89] Soft law tools can flexibly adapt to changing circumstances; they can be revised and changed to suit the interests of countries of origin that may resist binding international agreements. The downside to these flexible approaches is that they remain opaque arrangements in the external area of freedom, security and justice, an area in which the protection of human rights and the rights of vulnerable groups such as refugees and children are a key component.

The critical discussion on the informalisation process also highlights that negotiations are secretive, the adoption is not traceable in legal documents, and no routine mechanisms exist to inform the European Parliament.[90] At the same time, it appears that most of these readmission arrangements will be published or at least information about them will be, because there are political advantages in doing so and demonstrating to the public that actions are being taken. In times of crisis, informal instruments circumvent complex EU-decision making processes and reduce the reluctance of third countries to politically commit to cooperation with the EU on the return of third-country nationals.[91]

To assess the ills of informalisation, this contribution focusses on two characteristics which flow from the experimentalist action detected in this field. First, the panoply of acts and actors involved in informalisation result in institutional practices that challenge the constitutional framework under EU law and, second, parliaments are marginalised in the process. At the same time, this section also sheds light on existing safeguards or remedies to address these ills of informalisation – namely, by the trend to formalise informalisation and attempts to increase accountability.

4.1 The panoply of acts and actors engaging in informalisation

From the discussion of informal instruments thus far, it is clear that their process of adoption involves a flexible configuration of actors, including both Member States and various EU institutions. Either the Member States and the EU act jointly in EU informal instruments

[89] Annick Pijnenburg, 'The informalisation of migration deals and human rights of people on the move: does it matter?', in Eva Kassoti and Narin Idriz (eds.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer, 2022) pp. 147–168.

[90] However, see e.g. the letter sent to the EP from the Commission on the EU readmission developments – State of play October 2017, which was leaked: https://www.statewatch.org/media/documents/news/2017/nov/eu-com-letter-to-ep-readmissions.pdf.

[91] Juan Santos Vara and Laura Pascual Matellán, 'The informalisation of EU return policy: a change of paradigm in migration cooperation with third countries?', in Eva Kassoti and Narin Idriz (eds.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer, 2022) p. 39, https://doi.org/10.1007/978-94-6265-487-7_3.

(Mobility Partnerships) or through the European Council (EU-Turkey Statement) or consecutively with Member States adopting parallel arrangements (JWF with Afghanistan). More recently, in the case of the MoU with Tunisia, only two Member States – in the so-called Team Europe approach – engaged together with the EU Commission with Tunisia on behalf of the Union. Hence, EU Member States appear in three different configurations: they conclude informal arrangements in their own right, as Member States within the EU institutions or the EU's institutional actors conclude political commitments on the behalf of the Union and Member States.

This differs significantly from the established international treaty-making practice, where only the Council – and, very exceptionally, the Commission – concludes international agreements. All EU actors charged with tasks of external representation can, however, engage in non-binding arrangements, which has opened the door for the adoption of informal instruments in the field of migration. These actors include EU agencies (especially Europol and Frontex in the field of migration), the EEAS, the High Representative, the Commission, the Council of the EU and the European Council. These acts can take a variety of forms, with the resulting documents being labelled as compacts, exchanges of letters, codes of conduct, letters of intent, joint declarations, statements or MoUs.

These chameleonic practices[92] by several EU external actors – with the participation of Member States – make it difficult to monitor such informal activities by other institutional actors and the public. Informalisation further raises overall questions of legality. The Court of Justice of the European Union (CJEU) stressed early on that non-binding measures agreed with third states have to respect the EU's division of power and competence division.[93] While the Court confirmed that Member States are allowed to evade the EU institutional framework, this may not conflict with the exercise of EU exclusive competences or undermine essential EU institutional tasks.[94] In a more recent case concerning the MoU with Switzerland, the Court stressed that informal instruments that, in effect, replace international agreements cannot be concluded by the EU Commission of its own right. It does not, in other words, form part of the Commission's competence for external representation, derived from Article 17 TEU, but falls instead under the policy-making mandate of the Council as per Article 16 TEU, and such acts require the endorsement of the Council beforehand.[95] A role of the EP is excluded, and it is rather unlikely that the Council would accept a practice of borrowing the procedure established for binding international agreements under Article 218 (11) TFEU. However, the decisive limit is set 'as laid down in the Treaties'.

The bottom line is that the trend of informalisation is not allowed to violate the constitutional structure of the European Union, but to circumvent the Treaty procedures for binding international agreement is not per se illegal. It could be argued that the information right of the EP is violated when the procedural rights under Article 218 TFEU could be applied by analogy, but without any Court practice this is difficult to argue. To highlight some of these fundamental or constitutional parameters in more detail, the following sections focus on the role of competences and the legal basis.

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[92] See Bruno de Witte, 'Chameleonic member states: differentiation by means of partial and parallel agreements', in Bruno de Witte, Dominik Hanf and Ellen Vos (eds.), *The Many Faces of Differentiation* (Intersentia, 2001) p. 254.
[93] Case C-233/02 *France* v *Commission* ECLI:EU:C:2004:173, para. 40.
[94] Joined cases C-181/91 and C-248/1 *Parliament* v. *Council and Commission* (Bangladesh Aid), ECLI:EU:C:1993:271, paras. 16, 20 and 22.
[95] C660/13, *Council* v. *Commission* (MoU Switzerland) ECLI:EU:C:2015:787.

Competences

The external dimension of migration is a field covered by shared competence – that is, while both the EU and the Member States have a right to act, Member States are pre-empted from doing so when and to the extent that the Union has already exercised its competence. Practice, however, shows that EU and Member States treat the external dimension of migration and asylum as a field of parallel competence, similar to what the EU Treaties foresee for development policy (Art.4(4) TFEU). In the field of readmission, Member States and the EU recognise that their actions need to complement each other. Hence, the EU and Member States have coordinated their actions to achieve unity of international representation and respect for the primacy of EU law.

The informal bilateral arrangements discussed above reflect these characteristics. For instance, the mobility partnerships on legal migration refer in their concluding text to both the EU and Member States. The joint declaration on a common agenda on migration and mobility with Nigeria, for example, explicitly mentions the EU and its Member States as the signatories. In the Joint Declaration with Ghana, the role of the Dutch minister of foreign affairs is recognised as visiting Ghana on behalf of the High Representative. The SOP between the EU and Bangladesh states that the instrument comes in support of the EU Member States bilateral relations with Bangladesh.[96] The JWF with Afghanistan from October 2016 is complemented by parallel action from Member States. The JWF was signed on 3 October 2016, while Germany concluded its joint declaration in the field of migration with Afghanistan one day later and Sweden its MoU with Afghanistan two days later. This interconnection between the informal arrangements by the EU and by the Member States is also acknowledged by the JWF and a link is created with the Member States in the form of issuing an EU standard travel document and coordinating return flights to Afghanistan. Although the procedural aspects surrounding the adoption of instruments appears to violate constitutional rules on the allocation of institutional powers within the EU, they are in practice accepted for pragmatic reasons and because they cater to the entangled interests of EU institutions and Member States.

Legal basis

'All institutions struggle to define the form and mandate for these acts clearly.'

All institutions struggle to define the form and mandate for these acts clearly.[97] Rather than referencing a concrete legal basis, most of the acts adopted by the Commission refer to their general legal mandate to represent the EU externally under Articles 17 TEU and 220 TFEU. The principle of conferral (Art.5 TEU) requires the Union to identify a concrete legal basis for binding instruments, and this legal basis also explains the respective procedure to be applied. The detailed procedure for the negotiation and conclusion of international agreements, for instance, is laid out in Article 218 TFEU. However, the Treaties lack any detailed procedural rule to be followed when it comes to the conclusion of soft law tools without a specific legal basis. These instruments are instead concluded through *ad hoc* procedures with often uncertain authorship. The silence of the Treaties in this regard has led to a diverse practice, which has significant institutional implications. When the EU-Turkey Statement was published as a press release by the European Council, the members of the European Council, the European Commission, the European Union and its Member States were all mentioned as relevant actors. However, the General Court concluded that the instrument in question was not concluded by the EU, but instead constitutes an agreement

[96] Commission decision on the signature of the EU-Bangladesh SOP, C(2017) 6137 final.

[97] This, however, is only done exceptionally; in case of the Mobility Partnerships with ENP countries, a reference to Art. 79 TFEU is made.

– regardless of its binding or non-binding nature – between the EU Member States and Turkey.[98] Legal scholars have expressed serious doubts concerning this legal assessment.[99] Mobility partnerships, such as the one with Jordan, refer instead to both the EU and the EU Member States as concluding parties, and SOPs, such as the one with Bangladesh, are concluded by the Commission after their endorsement by the Council.

4.2 The marginalisation of the EP and national parliaments

The EP has been recognised over the course of time as a key actor in the external relations of the EU. It executes an important role in agreeing to international agreements and gaining more impact in the constitutional practice. In its *Tanzania* judgement, the CJEU stressed the constitutional role of the EP in Common Foreign and Security Policy (CFSP) agreements, while underlining that it is a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly. Accordingly, the EU has a role to play in verifying that the choice of legal basis for a decision on the conclusion of an agreement was made with due regard to the powers of the EP.[100] When the EU concludes international agreements, as it would be competent to do in the field of readmission policy, in accordance with Article 79(3) TFEU, these agreements have to follow the treaty-making procedure under Article 218(6)(a) TFEU, and the EU has to act under the attributed competences in accordance with Article 216 TFEU and a concrete legal basis. EU international agreements are published and are acts reviewable under the EU system of remedies and, most notably, the action for annulment via Article 263 TFEU.[101] In addition, the EP has a constitutional right to be informed throughout the process (Art.218 (10) TFEU)[102] and must give its consent to the agreement before it is adopted. Article 218 TFEU contains a detailed procedural norm on the institutional balance arising between Commission, High Representative, Council and European Parliament.

'The EP has been recognised over the course of time as a key actor in the external relations of the EU.'

However, because these dynamics cannot be extended to the adoption of informal instruments, parliaments – national and EP – have no systematic access to these informal arrangements. Some literature sources advocate, with a reference to Article 14(1) TEU, that the EP exercise functions of political control and consultation and therefore also needs to exercise these control functions over informal arrangements.[103] However, the decisive limit is set by the norm itself as 'as laid down in the Treaties', so, again, formally this role cannot go beyond what is foreseen in the Treaties.

For political reasons, the EP has so far not attempted to challenge the conclusion of such arrangements in litigation. In contrast, members of the German parliament have challenged different unpublished measures adopted in the EU's crisis management of migration – including the EU-Turkey Statement – as breaching Article 23 (2) of the German constitution. In this provision, the participation of the German parliament is confirmed as such: '(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall notify the Bundestag of such matters

[98] T-257/16, *NM* v. *European Council*, ECLI:EU:T:2017:130.
[99] See Ott, 'EU-Turkey cooperation' (n. 88).
[100] Case C-263/14 *Parliament* v *Council* (Tanzania) ECLI:EU:C:2016:435 (para. 42).
[101] This is, however, a right mainly for privileged parties and institutional actors, such as EU institutions and Member States, and not for individuals.
[102] Case C-263/14 (n. 100).
[103] Juan Santos Vara, 'Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU', in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing, 2019) pp. 21–38; Santos Vara and Pascual Matellán, 'The informalisation of EU return policy' (n. 91).

comprehensively and as early as possible'. The German constitutional judges confirmed that the government is entrusted with conducting foreign affairs, but the parliament is installed with powers to scrutinise actions. The broad reading of foreign affairs matters requires that the German parliament is given an opportunity for forming an opinion, including about informal actions in the field of migration. If access is denied for reasons of confidentiality or other overriding reasons, the government has to give a plausible explanation why it was not obliged to give notification.[104]

'National parliaments and the EP are struggling to keep pace with consecutive actions by Member States and the EU in this area.'

National parliaments and the EP are struggling to keep pace with consecutive actions by Member States and the EU in this area. In principle, Member States are not prohibited from concluding international agreements outside the EU framework but have to respect the EU's exclusive competences and the primacy of EU law.[105] These findings also extend to non-binding arrangements that replace or implement international agreements. However, when readmission deals take the form of soft law instruments, Article 218 TFEU does not apply, which creates risks and uncertainties regarding the application of procedures and principles but also regarding how far the EP is able to take up its role. The inapplicability of Article 218 TFEU also implies that the EP, the only directly elected institution in the EU, is neither involved nor kept informed during the negotiation and conclusion of soft law arrangements with third countries. Indeed, because the Treaties do not regulate the procedure to be followed, the EP does not retain any specific role, which is in stark contrast with its reinforced institutional position in the EU external action after the Lisbon Treaty, which raises issues in terms of democratic legitimacy and public accountability.[106] It therefore transpires that the EP is indeed sidelined for informal readmission arrangements and no adequate procedure has yet been found to counter this imbalance.

5. The remedies against informalisation

Not all the ills of informalisation can be cured, but some of its deficiencies could be addressed. This section focusses on two aspects – namely the trend of formalising the practice of informalisation and the attempts to reduce the gaps in accountability.

5.1 The formalisation of informalisation

With the trend of informalisation becoming publicly recognised, a trend to formalise and structure action in this grey area is emerging. It started with the aim of the European Commission to structure non-binding bilateral tools into administrative arrangements, which are to be distinguished from political commitments. Political commitments on behalf of the Union are concluded as MoUs. The Commission and Council were, in the past, at odds over how far the Commission can negotiate these types of international arrangements in its own right on the basis of its mandate under Article 17 TEU to represent the Union externally. Both sides tried to clarify their position regarding the procedure to follow in different documents.[107] The Court had the opportunity to clarify the constitutional framework in its judgement on the MoU with Switzerland. In response to this recent case law, the Secretary Generals of the Council, Commission and the EEAS agreed – in an inter-institutional arrangement – on a procedure to be followed for international bilateral and

[104] BVerfG, Judgement of the Second Senate of 26 October 2022, 2 BvE 3/15 - 2 BvE 7/15 - EUNAVFOR MED, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/10/es20221026_2bve000315en.html.
[105] C-370/12 *Pringle* v. *Ireland* ECLI:EU:C:2012:756, para. 158, joined cases C-181/91 and C-248/1 *Parliament v Council and Commission* (Bangladesh Aid), ECLI:EU:C:1993:271, paras. 16, 20 and 22.
[106] Santos Vara, 'Soft international agreements' (n. 103) pp. 29–30.
[107] Vademecum of the Commission on the external action of the European Union, SEC(2011) 881/3; Contribution of the legal service, procedure to be followed for the conclusion by the EU of Memorandum of Understanding, Joint Statement and other text containing policy commitment with third countries and international organisations, Brussels, 1 February 2013, 5707/13.

multilateral non-binding instruments (NBIs).[108] Accordingly, the process is divided into a preparatory and agreement phase, requiring that either the Commission or the HR as the negotiator inform the Council about the intention to conclude an NBI, and the Council has to be given sufficient time to assess whether to authorise the signature of that instrument on behalf of the Union.

It is striking that this interinstitutional arrangement does not reserve any role for the EP, because political commitments by the EU in the sphere of external relations usually pertain within the EU's constitutional framework. Indeed, this issue was raised by the CJEU in its *Tanzania* case, as highlighted above – namely, that the EP has the role of executing its democratic control over the EU's external action and verifying the choice of the legal basis. At the same time, a balance needs to be found that provides the EP with systematic access, perhaps by means of a register system, without formally involving the EP in the adoption of all informal acts, as such a practice would go beyond the wording of the existing Treaty norms.

5.2 Reducing accountability and transparency gaps

Accountability remains an elusive concept that is difficult to define in a few words. In principle, it comprises various obligations placed on public actors to explain and justify their actions. In its broadest definition, it also covers aspects of transparency of action, democracy and integrity.[109] Informalisation indubitably challenges these ideas of accountability, because it intentionally allows public actors to avoid regular procedural safeguards and to evade or at least reduce their accountability. In the context of this paper, the focus rests on political, administrative and legal accountability.

Political accountability

Political accountability requires that the parliament, as the representative of the citizens, is able to scrutinise governmental and executive actions. This scrutiny comes under pressure through the marginalisation of the EP and national parliaments.[110] Attempts by judges can be made to strengthen the role of parliament, but these attempts either have to find their basis in national constitutions, as in the case of Germany, or need to be recognised on the EU level, which has not yet happened. In its 2021 Report on Human Rights Protection and the EU Migration Policy, the EP has suggested that the Commission should establish a general framework for the effective monitoring and evaluation of the implementation of all present and future EU readmission agreements.[111] Other regular attempts have been made by parliamentarians to assess the practice of employing readmission deals, especially in case of the EU-Turkey Statement, the JWF with Afghanistan, or the EU-Tunisia and EU-Egypt deals.[112] It becomes clear that this scrutiny is insufficient and can only scratch the surface. The Commission is not always the driving force behind the process, and as highlighted above, the EP cannot scrutinise actions by Member States, Council and European Council in the same way as it can in relation to the Commission. Therefore, an EU register of activities or a general framework would only cover EU actions and would still leave gaps when it comes to actions adopted by Member States.

[108] General Secretariat of the Council, Follow-up to the Judgement in case C-660/13 – Arrangements Between Secretaries General on Non-binding Arrangements, 4 December 2017, 15367/17.
[109] See Marc Bovens, 'Analysing and assessing accountability: a conceptual framework', 13(4) (2007) *European Law Journal*, pp. 447–468.
[110] On accountability in this context, see: Lilian Tsourdi, Andrea Ott and Zvesda Vankova, 'The EU's shifting borders reconsidered: externalisation, constitutionalisation, and administrative integration', 7(1) (2022) *European Papers*, pp. 87–108, https://doi.org/10.15166/2499-8249/549.
[111] European Parliament, Human rights protection and the EU external migration policy 2020/2116(INI) 19/05/2021/x
[112] Parliamentary question, EU-Tunisia migration agreement, E-000975/2024, https://www.europarl.europa.eu/doceo/document/E-9-2024-000975_EN.html; Parliamentary question, Partnership agreement between the EU and Egypt, E-000869/2024, https://www.europarl.europa.eu/doceo/document/E-9-2024-000869_EN.html.

Legal accountability

The 'soft' nature of informal arrangements could call into question whether the CJEU can review such non-binding measures. However, we have to differentiate here between privileged and non-privileged actors. Privileged applicants – primarily Member States, the Commission and the Council – have challenged the practice of soft law acts adopted by the EU institutions. In this regard, the Court has accepted, since the ERTA ruling, that privileged actors such as EU institutions can attack soft law measures and their legality, as they might not be legally binding in a formal sense but may nonetheless have a legal impact on the interinstitutional relationship and, more concretely, on the division of powers and institutional balance. The EP could also have valid reasons to question the practice but would probably struggle in arguing that its substantial rights or its institutional position and therefore the institutional balance is violated. Let us recall that the EP has no specific role assigned in the adoption of informal acts. However, with its *Tanzania* and *Mauritius* judgments, the Court strengthened the EP's right to information in cases of CFSP agreements, because 'the participation in the legislative process is the reflection of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of representative assembly.' The *Tanzania* judgement stressed in particular that 'the information requirement ensures that the Parliament is in a position to exercise democratic control over the European Union's external action and, more specifically, to verify the choice of the legal basis for a decision on the conclusion of an agreement was made in due regard to the powers of the European Parliament.'[113] In sum, the Court stressed that the information right is fundamental because it contributes to the 'coherence and consistency' of EU external relations.[114] These arguments also hold true for informal acts, especially when they replace or implement binding agreements. This right to information cannot be inferred directly from Article 218 (10) TFEU, which does not apply to soft law tools. However, informing the EP as a way to ensure democratic control and enhance transparency has an 'inherent value' that is not necessarily linked to the possibility of exercising a formal right of consent.[115] It can therefore be argued that the EP should be kept informed even when informal instruments are concluded.

Non-privileged applicants – individuals or legal persons – are per se excluded from reviewing the acts of EU institutions because of the long-standing conditions under the *Plaumann* doctrine, which requires that an act directly and individually concerns the individual applicant. In the situation of the EU-Turkey Statement, the act was not even associated with the Union in the findings of the General Court.[116] This argument also prevented any reviews by national courts and, as such, the referral to the CJEU by way of a preliminary ruling (Art. 267 TFEU), although the action taken clearly fell within the scope of EU competences and involved EU institutions. In sum, the attempts of the Court to review informal action are laudable but only touch the outer layer of informalisation.

Administrative accountability

There have been attempts by the Ombudsman and Court of Auditors to come to terms with informalisation. In a special report in 2021, the Court of Auditors critically assessed the EU readmission practices and cooperations with third countries.[117] The Ombudsman has

[113] Case C-263/14, *Parliament* v *Council* (Tanzania) ECLI:EU:C:2016:435.
[114] See above n.113, para. 72.
[115] Opinion of AG Kokott, Case C-263/14, European Parliament v Council of the European Union, para. 78.
[116] For instance: General Court, NF v European Council, Case T-192/16, ECLI:EU:T:2017:128.
[117] Special report 17/2021: EU readmission cooperation with third countries: relevant actions yielded limited results, https://op.europa.eu/webpub/eca/special-reports/readmission-cooperation-17-2021/en/.

regularly been confronted by complaints from individuals involving these informal tools and accusations of maladministration. For instance, there has been a lingering focus on the lack of human rights assessment conducted regarding the EU-Turkey statement or the EU-Tunisia MoU.[118] This lack was earlier criticised in the case of the EU-Vietnam free trade agreement.[119] Admittedly, for informal instruments, this also remains more an informal assessment when budgetary support is involved, but information remains incomplete.[120]

The Ombudsman also assessed the Commission decision to refuse public access to informal arrangements in 2022. Individuals asked for access to these documents under the Transparency Regulation 1049/2001. A few of these arrangements are part of the public domain – as explained above – but, for some of these documents, the Council denied access in the name of public interest and the protection of international relations.[121]The Council argued in its defence that the disclosure would reveal the EU's strategic objectives and its different approaches with different countries. This, furthermore, could weaken the EU's negotiating position now and in the future.[122] Individuals have limited access to documents due to the public interest and international relations reading to limit access according to the Transparency Regulation 1049/2001. This broad limits are aided by a light-touch review of the European Courts of an EU institution's reliance on this international relations exception.[123]

New forms of accountability?

As has already been highlighted, the informalisation witnessed in this area can be characterised as a form of experimentalist governance. This novel form of public governance is based on mutual monitoring and peer review,[124] which does not fit into the classical accountability established under the Treaties. Employing informal arrangements remains a black box and sidelines important institutions such as the parliament to assess the practicability and legality of these tools. The gaps and limits showcase that only coordinated action to improve the gaps in political, legal and administrative accountability can have true impact. A more structured and systematic way to assess and control such arrangements also needs to acknowledge and address the entangled engagement of EU and Member States in this area.

6. Some concluding remarks

This European Policy Analysis has addressed the persistent trend of informalisation and securitisation in the external management of EU migration and asylum policy. It has shown that soft law tools employed by the EU and its Member States appear in different forms and shapes. Informal readmission deals replacing readmission agreements are

[118] Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, Case 506/2016/MHZ, decision of 18 January 2017.

[119] Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, decision on 26 February 2016.

[120] European Ombudsman criticises Commission failure to inform public how it assessed human rights risks in EU-Tunisia agreement, Case OI/2/2024/MHZ, decision on 21 October 2024.

[121] The refusal by the Council of the EU to grant public access to documents concerning informal arrangements with non-EU countries about returning migrants (readmission agreements), decision of 1 September 2022, https://www.ombudsman.europa.eu/en/case/en/61589.

[122] Decision on the refusal by the Council of the EU to grant public access to documents concerning informal arrangements with non-EU countries about returning migrants (readmission agreements) (case 815/2022/MIG), decision of 1 September 2022.

[123] See critically on this Jesse Peters and Laurens Ankersmit, (2024). Public access to documents in EU external relations. *Maastricht Journal of European and Comparative Law*, *31*(1), pp. 53-81, https://doi.org/10.1177/1023263X241233101.

[124] Graine de Búrca, Robert O. Keohane and Charles Sabel, 'Global experimentalist governance', 44 (2014) *British Journal of Political Science*, pp. 477–486, https://doi.org/10.1017/S0007123414000076.

not the only examples. The EU and its Member States also employ broader policy and financial cooperation instruments with embedded migration aims. The EU's toolbox can be categorised as unorthodox experimentalist governance, a way of problem-solving that takes place in complex conditions and is frequently adapted. However, the emphasis rests more on 'experimentalist' than on 'governance' in external migration management overall. Decision-making and the assessment of the EU's external migration policies often remain a black box and lack the necessary transparency and a process of critical and open assessment that normally applies to other areas of EU policies.

Informalisation allows for flexibility and hybridity in times of crisis, but this analysis has identified two main ills of the informalisation process. Firstly, employing more flexible soft law tools between the EU and third states may appear as an easy fix but evades constitutional structures established by EU primary law. The flexible configuration of actors, including both Member States and various EU institutions, represents a challenge for the existing constitutional structures, the division of competences, and institutional balance in the EU system, which should be based on binding legal acts and international agreements. Secondly, the sidelining of national and the European Parliaments as places of political accountability is still insufficiently addressed.

This analysis does not argue that it is per se illegal for the EU or the Member States to employ soft law tools, but trade-offs are rather delicate in an area that goes beyond technical cooperation and touches upon fundamental rights of migrants – most notably the prohibition of refoulement, the right of asylum and the right to an effective judicial protection. Experts, civil society and parliaments ask the right questions concerning the legality of informal tools invented by governments and administration, but they cannot provide immediate answers – either the state actors escape into the twilight of legality or they avoid further scrutiny with even more inventive or clandestine follow-up measures.[125] It is therefore clear that, to date, the ills discussed in this contribution cannot be yet remedied.

The paper flags two trends to address these deficiencies, one is the formalisation of informalisation and the second is the strengthening of different forms of accountability. Regarding the first, a trend to formalise and structure action in this grey area is emerging. But again, as too many actors and too many different forms of actions are involved, this will remain a challenge. The formalisation of informal instruments has so far only served the main administrative actors.

Secondly, accountability gaps need to be addressed more systematically, but the existing forms of political, legal and administrative accountability highlight that new forms of accountability need to be developed. The existing gaps and limits show that more structured, systematic and coordinated action by the different forces of legal, political and administrative accountability is needed to bring informalisation under greater scrutiny and curtail its ills.

[125] Tsourdi, Ott and Vankova, 'The EU's shifting borders' (n. 110).