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JUDICIAL REVIEW OF THE EU'S INFORMAL MIGRATION INSTRUMENTS - ADMISSIBILITY IN THE CASE OF THE EU-TUNISIA MOU

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Abstract

The accountability of the EU in external migration management has become increasingly challenging due to the widespread use of informal instruments. Since the Amsterdam Treaty, the EU has exercised this competence mainly through readmission agreements. However, due to the urgency of the post-2015 migration crisis, coupled with the procedural and legal constraints of readmission agreements and the need for flexibility, soft law sources such as the EU-Turkey Statement (2016) have been favoured over hard law sources like readmission agreements. Judicial review of informal instruments has only been tested in the EU-Turkey Statement, where the CJEU dismissed the case at the admissibility stage. This article aims to assess the potential avenues for judicial review of the EU's informal migration instruments. It does so by examining the possible cases under EU law concerning the EU-Tunisia Memorandum of Understanding (2023) from a procedural perspective. It concludes that the current criteria regarding the status of applicants under action for annulment and the difficulty of initiating national proceedings under the preliminary ruling procedure complicate litigation before the CJEU. Therefore, there is an urgent need to reform the procedural rules of the CJEU in light of the ever-increasing use of informal migration instruments.

Keywords: *EU migration law, informalisation, soft law, accountability, actions for annulment*

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AB'nin İnformel Göç Araçlarının Hukukî Denetimi - AB-Tunus Mutabakatına İlişkin Davaların Kabul Edilebilirliği

Özet

Avrupa Birliği'nin (AB) dış göç yönetimi alanındaki hukuki sorumluluğu, informel araçların yaygın kullanımı nedeniyle giderek daha fazla sorgulanmaktadır. Amsterdam Antlaşması'ndan itibaren AB bu alandaki yetkisini geri kabul antlaşmaları ile kullanmaktaydı. Ancak, 2015 sonrası göç krizinin aciliyeti, geri kabul anlaşmalarının prosedürel ve hukuki kısıtları ile esneklik ihtiyacı sebepleriyle Türkiye ile AB arasındaki 18 Mart Mutabakatı (2016) gibi informel araçlar mevcut hukuki kaynaklar yerine tercih edilmektedir. Bu araçların yargısal denetimi sadece Türkiye örneğinde test edilmiştir ve ABAD kabul edilebilirlik aşamasında davayı reddetmiştir. Bu makale, AB'nin gayri resmi göç araçlarının yargısal denetiminin olası yollarını değerlendirmeyi amaçlamaktadır. Bu değerlendirme AB ile Tunus arasındaki Mutabakat Zaptı (2023)'na karşı gidilebilecek yargısal yolları usuli açıdan incelenerek yapılacaktır. İptal davası kapsamında davacıların statüsüne ve ön karar prosedürü kapsamında ulusal dava açmaya ilişkin mevcut kriterlerin bu araçları ABAD önünde getirmeyi zorlaştırdığı sonucuna varılmıştır. Dolayısıyla, informel araçların kullanımındaki artış nedeniyle, ABAD'ın usul kurallarını reform etme ihtiyacı bulunmaktadır.

Anahtar kelimeler: *AB göç hukuku, informelleşme, esnek hukuk, hukuki sorumluluk, iptal davası*

Introduction

The EU's competence in the external dimension of migration dates back to the Amsterdam Treaty. It divided and renamed the former third pillar of the Maastricht Treaty topics; the EU established the Area of Freedom Security and Justice (AFSJ).[1] Also, with Amsterdam, external border controls, asylum and immigration were taken from the third pillar and added to the EU law rules under the first pillar. This revision started the application of the first pillar of EU law rules to this field. Now, with the Lisbon Treaty, the objectives of both AFSJ and its subtopics are defined as internal EU objectives,[2] and cooperation with third countries is inevitable to achieve them. [3] The basic form of EU action in this area has been the EU's readmission agreements with third countries. Unlike most AFSJ topics, the EU has an explicit external

[1] Treaty on European Union ("TEU") (Amsterdam version), art. 2.

[2] Treaty on European Union (Consolidated version 2016) ("TEU"), OJ C 202, 7.6.2016, art. 3/2.

[3] Jörg Monar, "The External Dimension of the EU´s Area of Freedom, Security and Justice - Progress, potential and limitations after the Treaty of Lisbon*"*, SIEPS, 2012:1, p. 11.

competence to negotiate and conclude readmission agreements.[4] However, the unprecedented increase in the number of migrants attempting to cross the EU's borders after 2015 led to a significant shift in the use of informal instruments that could be classified as soft law[5] with third countries, instead of using legal instruments such as readmission agreements.[6] The EU-Turkey Statement of 18 March 2016 is a well-known example of this change.[7] Although a formal readmission agreement exists between the parties, an informal instrument like the Statement was still made. The most recent example of the informalisation of EU cooperation with a third country is the Memorandum of Understanding (MoU) with Tunisia in July 2023.[8]

The main difference between readmission agreements and the informal instruments mentioned above is their legal nature. The EU has the explicit external competence to negotiate and conclude readmission agreements with third parties.[9] These agreements follow the procedure laid down in the Founding Treaties[10], which is subject to the rules of EU law and the powers of the EU institutions. Informal instruments, on the other hand, are not subject to any specific rules or procedures and in most cases have no legally binding effect.

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4 Treaty on the Functioning of the European Union (Consolidated version 2016) ("TFEU"), OJ C 202, 7.6.2016, art. 79/3.

5 Soft law could be defined as the instruments that are not legally binding, but may have indirect legal effect or general practical effects. See Linda Senden, *Soft Law in European Community Law*, Hart Publishing, 2004.

6 On informalisation of EU's external migration law see: Paul James Cardwell / Rachel Dickson, "'Formal informality' in EU external migration governance: the case of mobility partnerships", Journal of Ethnic and Migration Studies, Vol. 49, No. 12, 2023, p. 3121–3139; Elsa Fernando-Gonzalo, "The EU's Informal Readmission Agreements with Third Countries on Migration: Effectiveness over Principles?", European Journal of Migration and Law, 25, 2023, p. 83–108; Peter Slominski / Florian Trauner, "Reforming me softly – how soft law has changed EU return policy since the migration crisis", West European Politics, vol. 44, no: 1, 2021, p. 93-113.

7 European Council, "EU-Türkiye statement, 18 March 2016", https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-Türkiye-statement/, (accessed November 28, 2023).

8 European Commission, "Memorandum of Understanding between the EU and Tunisia", 16 July 2023, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3887 (accessed November 28, 2023).

9 TFEU art. 79/3.

10 TFEU art. 218.

This legal loophole raises the question of accountability for these informal instruments. As they are negotiated by the EU institutions, mostly together with the Member States, they are subject to EU law as acts of the EU institutions. Within this context, the accountability of the EU for these agreements theoretically falls under the jurisdiction of the CJEU. However, the CJEU (General Court) ruled that the EU-Turkey Statement did not fall within its jurisdiction.[11] On appeal, CJEU (Court of Justice) upheld the decision of the General Court and declared the appeal inadmissible.[12] The question of who and to what extent is legally accountable for these deals still lingers. Building on this gap, the research question of this article is, "How does the informalisation of the agreements with third countries affect judicial oversight and the ability to hold the EU accountable for external actions related to migration?". Within this framework, the possibility of EU's legal liability arising from the MoU with Tunisia is discussed in the light of the Court's findings on admissibility criteria.

The informalisation of the EU's external migration instruments is a current and ongoing process. The lack of transparency and accountability of the EU's informal agreements with third parties is a highly controversial aspect. In particular, following the CJEU decision on the EU-Turkey Statement, it is still unclear whether and how these informal instruments could be subject to judicial review. It is therefore considered necessary to discuss the possible liability of the EU arising from the MoU with Tunisia for further informal external acts of the EU in this area.

The legal responsibility of the EU arising from the MoU with Tunisia will be discussed under two headings. First, the main features of informalisation in EU migration law are analysed. Second, the potential ways of judicial review of informal instruments in EU law will be discussed. Since the EU's informal migration instruments do not have a single formula, the EU-Tunisia MoU is chosen as a case study for this analysis. The MoU was chosen because it is the most recent instrument, as of May 2024, and has the potential to serve as an example for subsequent cooperation with third countries. Consequently, the possibility of judicial review of the MoU with Tunisia will be determined on the basis of criteria taken from existing case law.

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[11] CJEU (General Court), Case T-192/16 *NF v European Council*, ECLI:EU:T:2017:128; Case T-193/16 NG v European Council, ECLI:EU:T:2017:129; Case T-257/16 *NM v European Council*, ECLI:EU:T:2017:130. O

[12] CJEU Joined Cases C-208/17 P to C-210/17 P NF, *NG and NM v European Council*, ECLI:EU:C:2018:705.

I. Informalisation of the EU external migration law

This section assesses the main features of the informalisation of the EU's external migration law. In this section, the primary competence of the EU in external migration will first be defined as the default legal basis. The reasons for departing from this legal framework are then briefly discussed. Finally, the legal problems arising from such a move will be addressed and accountability will be assessed.

The EU can only act in a policy field only if and to the extent that it has competence for it.[13] Migration falls under the AFSJ,[14] an area of shared competence area between the EU and its Member States.[15] The conclusion of readmission agreements with third countries is the only explicit external competence within the AFSJ.[16] The category of EU competence to conclude readmission agreements could also be defined as shared competence, whereas the Treaty uses the expression "*the Union may conclude agreements*". Although shared competence means that both the EU and the Member States could adopt legally binding acts, the Member States exercise their competence to the extent that the EU has not exercised its competence.[17] In the case of readmission agreements, once the EU negotiates and concludes a readmission agreement, Member States cease to act with regard to the content of that agreement. In practice, since the early 2000s, the EU alone has used readmission agreements to control external migration.[18] More recently, EU Member States such as Italy and Germany have also started to cooperate with third countries on migration management.[19]

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13 TEU art. 5/1-2.

14 TFEU art. 67/2, 77-80.

15 TFEU art. 4/2(j).

16 TFEU art. 79/3. To evaluate EU's external competence in a field not regulated in the Founding Treaties, an evaluation according to TFEU art. 216 and related EU case law, namely *ERTA* doctrine, shall be made.

17 TFEU art. 2/2.

18 See the list of 18 readmission agreements concluded by the EU between 2004-2020: European Commission, "A humane and effective return and readmission policy", https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en (accessed 23 February 2024).

19 German Federal Ministry of the Interior and Community, "Federal Government and Morocco agree on migration cooperation", 24 January 2024, https://www.bmi.bund.de/SharedDocs/pressemitteilungen/EN/2024/01/marokko.html; Euractiv, "Erdogan promises Meloni to curb migrant flows", 22 January

Readmission agreements as a legal instrument to control irregular migration have their limits in practice. Firstly, counterparties are reluctant to accept these agreements.[20] Therefore, in most cases, the EU uses its visa policy together with financial assistance as leverage to convince third countries to accept readmission agreements. Secondly, the strict legal procedures make it difficult to adapt to the different needs of the third country.[21] This jeopardises a successful and timely negotiation, as readmission agreements are concluded according to the procedure set out in art. 218 TFEU. Hereunder, in a nutshell, the Council authorises the Commission to conduct negotiations. The Council concludes the agreement after obtaining the consent of the European Parliament and the CJEU has jurisdiction over the process. Thirdly, even if there is a readmission agreement between the EU and the third country, the agreement may not have an effective and full application in practice due various political, legal, administrative, and capacity-related challenges. This is the case with the EU-Turkey Readmission Agreement.[22] Fourthly and most importantly, migration towards the EU's southern borders after 2015 has increased the EU's interest in quick and flexible arrangements with third parties instead of readmission agreements.[23]

The use of informal instruments to strengthen border controls and facilitate returns raises serious legal concerns. These include the infringement of the principle of institutional balance,[24] the violation of the EU law[25] and

2024, https://www.euractiv.com/section/politics/news/erdogan-promises-meloni-to-curb-migrant-flows/ (accessed 23 February 2024).

[20] Among other reasons; domestic political considerations, asymmetry in the reciprocal obligations, costs and benefits of the readmissions could be stated here, Fernando-Gonzalo, p. 91.

[21] Slominski / Trauner, p. 98.

[22] See Türkiye 2023 Report, SWD(2023) 696 final, Brussels, 8.11.2023, p. 7, 44, 53-54; Zühal Ünalp-Çepel, "Critical Arguments About Readmission Practices and Policies Between EU and Turkey", Ankara Avrupa Çalışmaları Dergisi, Vol:19, No:2, Yıl: 2020, p. 508-512.

[23] Cardwell / Dickson, p. 3125; Fernando-Gonzalo, p. 95

[24] See Andrea Ott, "Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges", Yearbook of European Law, Vol. 39, No. 1, 2020, p. 586-592.

[25] Especially rules regarding the EU competence, while the topics included in deals with Tunisia and Türkiye are previously regulated with the international agreements of the EU and the acts within the EU. Through these acts of the EU, member states are forbidden to act on same topics. See: Mauro Gatti / Andrea Ott, "The EU-Turkey statement: legal nature and compatibility with EU institutional law" in Sergio Carrera / Juan Santos Vara / Tineke Strik (Ed.s), *Constitutionalising*

values, fundamental rights,[26] transparency,[27] EU's compliance with international law (on asylum)[28], and the dilution of the "safe third country" concept[29]. This article will focus on the problems arising from the lack of judicial control over these instruments.

The EU is founded on values including democracy, the rule of law, and respect for human rights.[30] One of the key prerequisites for upholding these values is the existence of an independent judiciary. The power to review the legality of EU acts lies exclusively with the CJEU.[31] There are three main legal paths available in the EU judicial system to review the EU acts. The first is the direct review of informal instruments through an action for annulment under art. 263 TFEU. [32] The second is the *ex-ante* review of these agreements by requesting an opinion from the CJEU under art. 218/11 TFEU. The third is

the External Dimensions of EU Migration Policies in Times of Crisis, Edward Elgar Publishing, 2019, p. 184-186. Granting Member States the option to engage with third countries on same topics will infringe the basics of the EU law, for instance the principle of sincere cooperation, TEU art. 4/3. It might also lead to reverse Lisbonification of the AFSJ. For a detailed overview see Sergio Carrera / Leonhard den Hertog / Marco Stefan, "The EU-Turkey deal: reversing 'Lisbonisation' in EU migration and asylum policies", in Sergio Carrera / Juan Santos Vara / Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*, Edward Elgar Publishing, 2019, p. 155-174. For a general criticism of the Statement from competence and sincere cooperation perspective see Narin Idriz, "The EU-Turkey statement or the 'refugee deal': the extra-legal deal of extraordinary times?", ASSER research paper 2017-06.

[26] Regarding art. 2 of the TEU (EU values, respect for human rights), art. 67/1 (AFSJ's compliance with fundamental rights) Art. 47 of the Charter of Fundamental Rights of the European Union (Right to an effective remedy and to a fair trial).

[27] See Caterina Molinari, "The General Court's Judgments in the Cases Access Info Europe v. Commission (T-851/16 and T-852/16): A Transparency Paradox?", European Papers, Vol. 3, 2018, No 2, p. 961-972.

[28] See Emanuela Roman, "The "Burden" of Being "Safe"—How Do Informal EU Migration Agreements Affect International Responsibility Sharing?", in Eva Kassoti / Narin Idriz (Ed.s), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer & T.M.C. Asser Press, The Hague, 2022, p. 317-346.

[29] See ibid and Berfin Nur Osso, "Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization", International Journal of Refugee Law, 35, 2023, p. 272–303.

[30] TEU art. 2. Case 294/83 - *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166, para. 23.

[31] TEU art. 19

[32] TFEU art. 263-264.

indirect review through the preliminary reference procedure under art. 267 TFEU. The CJEU is quite reluctant to share its jurisdiction with other courts/institutions.[33] The discussion on the extension of the CJEU's powers to the EU's informal migration instruments is crucial for the EU to defend the law and the values on which it is built. Accordingly, the next section will look at the most recent example of informalisation, the EU-Tunisia MoU, and its possible judicial review by the CJEU.

II. The Tunisia Deal and EU Accountability

The EU-Tunisia MoU is the most recent informal instrument dealing with migration with a neighbouring third country. Most of the criticisms made of the informalisation of the EU's external migration instruments also apply to this MoU. Because it is concluded outside the framework of the readmission agreements, it lacks the legal and judicial guarantees of the Founding Treaties. Under this heading, the possible judicial review of the EU-Tunisia MoU will be discussed by first defining the deal made with Tunisia and then the judicial remedies available within the EU.

A. The EU-Tunisia MoU

Similar to the deal with Türkiye in 2016, the MoU is also an urgent response to the increasing number of irregular migration. The central Mediterranean route including Tunisia accounts for half of the irregular crossings to the EU in 2023.[34] In response to this, and in order to enhance operational cooperation between the parties, the Commission and Tunisia expressed their "willingness to establish a stronger partnership" on migration on 27 April 2023.[35] Subsequently, on 11 June 2023, the Commission (DG

[33] See for instance CJEU's interpretation of its powers with regards to the European Court of Human Rights: Opinion 2/13, ECLI:EU:C:2014:2454; and a possible Patent Court: Opinion 1/09, ECLI:EU:C:2011:123.

[34] Frontex, "Central Mediterranean accounts for half of irregular border crossings in 2023", 14.09.2023, https://www.frontex.europa.eu/media-centre/news/news-release/central-mediterranean-accounts-for-half-of-irregular-border-crossings-in-2023-G6q5pF (accessed 28 April 2024).

[35] European Commission, " The European Commission and Tunisia have expressed the willingness to establish a stronger partnership on migration, anti-smuggling and the promotion of legal migration", 27.04.2023, https://neighbourhood-enlargement.ec.europa.eu/news/european-commission-and-tunisia-have-expressed-willingness-establish-stronger-partnership-migration-2023-04-27_en#:~:text=The%20two%20sides%20have%20agreed,human%20rights%20and%20human%20dignity.https://neighbourhood-

NEAR) and Tunisia announced that they had agreed to "work together on a comprehensive partnership package", including migration.[36] The conclusions of the European Council at the end of June 2023 state that "the European Council welcomes the work done (by the Commission) on a mutually beneficial partnership package with Tunisia.[37] The European Council also underlined the importance of developing similar partnerships with partners in the region.[38] As a final result of this process, the EU and Tunisia presented the MoU agreed between the parties on 16 July 2023.[39]

The EU-Tunisia MoU is presented as a non-binding "political agreement" between the parties.[40] At the public announcement of the deal, the EU side is represented by the President of the Commission and the Prime Ministers of Italy and the Netherlands, also known as "Team Europe".[41] The MoU covers a wide range of issues, from the economy and green energy to people-to-people contacts. The most controversial part, however, is the section on

enlargement.ec.europa.eu/news/european-commission-and-tunisia-have-expressed-willingness-establish-stronger-partnership-migration-2023-04-27_en (accessed 28 April 2024).

36 European Commission, "The European Union and Tunisia agreed to work together on a comprehensive partnership package", 11.06.2023, https://neighbourhood-enlargement.ec.europa.eu/news/european-union-and-tunisia-agreed-work-together-comprehensive-partnership-package-2023-06-11_en (accessed 28 April 2024).

37 European Council meeting (29 and 30 June 2023) – Conclusions, para. 37, Brussels, 30 June 2023, https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf (accessed 28 April 2024).

38 Ibid. Soon after Tunisia, European Commission announced similar partnership with Egypt in March 2024, European Commission, "Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic Of Egypt and the European Union", 17.03.2024, https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en (accessed 28 April 2024).

39 European Commission, "Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia", 16.07.2023, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3887 (accessed 28 April 2024).

40 European Commission, "EU comprehensive partnership package with Tunisia", 11.06.2023, Tunis, https://ec.europa.eu/commission/presscorner/detail/en/FS_23_3205 (accessed 24 January 2024).

41 See for instance Annick Pijnenburg, "Team Europe's Deal - What's Wrong with the EU-Tunisia Migration Agreement?", 21.08.2023, https://verfassungsblog.de/team-europes-deal/ (accessed 28 April 2024).

"migration and mobility". This is the part where Tunisia agreed to tighten its border controls and support returns, while the EU agreed to support Tunisia mainly financially. The financial details are set out in the "EU-Tunisia Comprehensive Partnership Package" announced in June 2023. The issues covered by the MoU are similar to those in the EU's Association Agreements. In the case of Tunisia, negotiations on these issues are not new, as the parties already have an association agreement dated 1995[42] and a mobility partnership dated 2014.[43] The MoU is seen as a recent EU act that shows the growth of informal, soft-law migration policies that seek to provide a quick and inadequate solution to a deeper problem[44]. The next section will focus on the judicial review side of the problems related to informal migration instruments such as the MoU.

B. Judicial Remedies

This section will discuss the possibilities for judicial review of informal migration instruments under EU law, by using the example of the EU-Tunisia MoU. The first part will focus on the authorship of the EU with regard to the MoU in the light of the relevant case law of the CJEU. This is a common criterion for all legal remedies available in the EU. If the author is the EU, the second part will further evaluate the procedural steps under the available EU case types.

1. Common Criterion: The EU Authorship

In order for an EU informal migration instrument such as the EU-Tunisia MoU to be reviewed by the CJEU, there must first be a relationship between the instrument and the EU. In other words, it must be established that the EU is the author of the instrument in question. This is because the Founding Treaties define the subject of EU law cases as acts of the EU, its

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[42] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part - OJ L 97, 30.3.1998, p. 2–183.

[43] European Commission, "EU and Tunisia establish their Mobility Partnership", 3 March 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_208 (accessed 24 January 2024).

[44] Katharina Natter, "Reinventing a Broken Wheel: What the EU-Tunisia Deal Reveals over Europe's Migration Cooperation", VerfBlog, 05.09.2023, https://verfassungsblog.de/reinventing-a-broken-wheel/, DOI: 10.17176/20230905-182925-0, (accessed 24 January 2024).

institutions/bodies/offices or agencies, as a common condition.[45] Therefore, the condition of EU authorship will be examined as a prerequisite for other cases.

The EU side of informal migration instruments does not have a standard formula, but could change depending on the discussions with the other side. For example, in the EU-Turkey Statement, the European Council as an EU institution is mainly involved, together with the heads of the Member States. The EU-Afghanistan Joint Way Forward on Migration is launched by the European External Action Service (EEAS).[46] The EU-Tunisia MoU is mainly negotiated by the Commission and presented with the Commission and the heads of two Member States. As can be seen from the examples, there is no fixed EU institution/body/agency in charge of representing the EU in informal migration instruments.

The question of when the EU is the author of the informal migration instrument is only answered in the dispute regarding the EU-Turkey Statement. The EU-Turkey Statement was mainly the result of the non-full implementation of the hard-law instrument, the EU-Turkey Readmission Agreement,[47] along with the EU's political interest in finding an urgent solution.[48] The EU-Turkey Statement brought before the CJEU (General

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[45] TFEU art. 263/1, TFEU art. 267/1(b) and under TFEU art. 218 it is the international agreements between the EU and third countries or international agreements.

[46] EEAS, "Joint Way Forward on migration issues between Afghanistan and the EU", 02.10.2016, https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf (accessed 28 April 2024).

[47] Agreement between the European Union and the Republic of Türkiye on the readmission of persons residing without authorisation, OJ L 134, 7.5.2014, p. 3–27. Türkiye's obligations from this agreement to readmit Turkish citizens is in force since 1.10.2014. Implementation of the agreement to the stateless persons and nationals from the third countries is foreseen in October 2017. See Art. 24 of the Agreement. However due to disagreements between the parties in time, full implementation of the Agreement is still pending. See European Commission Türkiye 2023 Report, SWD (2023) 696 final, Brussels, 8.11.2023, p. 7. The bilateral Readmission Protocol Between Greece and Türkiye is suspended since 2018, Reuters, "Türkiye suspends migrant readmission deal with Greece", 7 June 2018, https://www.reuters.com/article/us-Türkiye-security-greece-idUSKCN1J31OO/ (accessed 8 December 2023). On this agreement also see İlke Göçmen, "Türkiye ile Avrupa Birliği Arasındaki Geri Kabul Anlaşmasının Hukuki Yönden Analizi", Ankara Avrupa Çalışmaları Dergisi, Vol:13, No:2, 2014, p. 21-86.

[48] See for instance Gloria Fernández Arribas, "The EU-Türkiye Agreement: A Controversial Attempt at Patching up a Major Problem", European Papers, Vol. 1, No 3, 2016, , p. 1097-1104; Eleonora Frasca, "More or less (Soft) Law? The Case

Court) with a request for annulment, and in this case the Court assessed the authorship of the EU.[49] The General Court initially evaluated the author of the Statement. It first checked whether the Statement is an act of an EU institution, the European Council, or the Member States.

In order to determine the author of the Statement on the internet site shared by the European Council and the Council, the Court claims to analyse the "content and all the circumstances" in which the Statement is adopted.[50] This analysis of authorship could be divided into three concepts: the background, the involvement of the European Council and the text of the published version. As regards the background, the Court grouped the meetings with Türkiye on 29 November 2015, 7 March 2016, and 18 March 2016, during which the representatives of the EU Member States acted in their national capacities, not as members of the European Council.[51] The Court considered the meeting of the representatives of the Member States on 17 March 2016 to be in the configuration of the European Council. The language of the invitations, the rules of protocol and the press releases of the previous meetings were used by the Court as evidence to support this grouping.[52] Building on this background, the inclusion of the European Council is also justified. The Court found that in the case of the meeting with Türkiye, the European Council was included only for practical reasons[53] and in order to quickly resolve "intervening migratory events"[54]. Lastly, the actual product of the EU-Turkey meeting, the published version of the Statement, its content, and the form were analysed. The form of the Statement was justified by the

of Third Country Migration Cooperation and the Long-Term Effects of EU Preference for Soft Law Instruments", Queen Mary Law Journal, vol. 2021, no. 1, 2021, s. 10; Burak Erdenir, "18 Mart Mutabakatı: Bir Hukuki Analiz", Ankara Avrupa Çalışmaları Dergisi Cilt: 20, No: 2, 2021, p.449-450.

49 T-192/16 - *NF v European Council*. The acts of the Greek authorities and the decisions of the Greek courts stemmed from the EU-Turkey Statement brought before the European Court of Human Rights (ECtHR) too. The ECtHR did not found infringement on an application concerning the conditions of detention in asylum hotspot facilities established under the EU-Turkey Statement, J.R. and Others v. Greece, App. No: 22696/16, Judgment 25.01.2018.

50 T-192/16 - *NF v European Council*, para. 45. This was first stated in the C-181/91 - *Parliament v Council*, ECLI:EU:C:1993:271, para. 14. This case was on whether a special aid promised to Bangladesh by the Member States at the European Council is an act of EU or the Member States.

51 T-192/16 - *NF v European Council*, para. 29.

52 T-192/16 - *NF v European Council*, para. 64, 65, 50-51.

53 Such as "costs, security, efficiency" T-192/16 - *NF v European Council*, para. 58.

54 T-192/16 - *NF v European Council*, para. 63.

fact that the pdf file is classified as an "international summit", which differed from the European Council's classification as "foreign affairs and international relations".[55] Consequently, the Court concluded that the author of the EU-Turkey Statement is the Member States acting in their national capacity and, that, irrespective of its legal effects, it was not within the Court's jurisdiction.[56]

This ruling is important because it is the only decision on the increasing number of informal migration instruments used by the EU post-2015. The ruling has been heavily criticised in the literature because the Statement is seen as a binding international agreement to which the EU is a party.[57] This case is critical because it sheds light on the EU's authorship and responsibility for these informal instruments.

Three criteria taken from this case could be applied to the EU-Tunisia MoU to determine its author. The first criterion was the background to the meetings between the parties. Tunisia already has an association agreement, a mixed agreement, with the EU and its Member States on one side. This agreement covers most of the issues dealt with in the MoU, with the exception of the new concepts in the EU's economic and social policy. These issues can be dealt within the existing dialogue structures of the Association Agreement. This includes the dialogue on migration and illegal migration.[58] Nevertheless, as in the case of Türkiye, a soft law instrument is chosen over an existing hard law instrument to express the intentions of the parties. The presence of two heads of government of Member States does not seem strong enough to challenge the authorship of this agreement, unlike in the previous case.

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55 T-192/16 - *NF v European Council*, para. 55, 59. However, it is visible from the decision itself that this legal justification is not adequate, and the language of the Statement is indeed "regrettably ambiguous". T-192/16 - *NF v European Council*, para. 66.

56 T-192/16 - *NF v European Council*, para. 71. In appeal, General Court's decision is upheld by the Court of Justice, C-208/17 P - *NF v European Council*, ECLI:EU:C:2018:705.

57 See Enzo Cannizzaro, "Denialism as the Supreme Expression of Realism - A Quick Comment on NF v. European Council", European Papers, Vol. 2, 2017, No 1, p. 251-257; Sergio Carrera / Leonhard den Hertog / Marco Stefan, "It wasn't me! The Luxembourg Court Orders on the EU-Türkiye Refugee Deal", CEPS Policy Insights, No 2017-15/April 2017; Eva Kassoti and Alina Carrozzini, "One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Türkiye Statement", in Eva Kassoti / Narin Idriz (Ed.s), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer & T.M.C. Asser Press, The Hague, 2022, p. 235-254.

58 See EU-Tunisia Association Agreement, art. 69.

The second criterion is the dominance of the EU institution and the involvement of the Member States in the actual negotiation and finalisation of the text. The agreement is negotiated between the Commission and Tunisia. The Italian and Dutch Prime Ministers accompany the President of the Commission on her trips to convince the Tunisian President to sign the negotiated text.[59] The MoU is signed by the Commissioner for Neighbourhood and Enlargement and the Tunisian Foreign Minister. The Italian and Dutch Prime Ministers did not sign the MoU. The signing ceremony might give the MoU a more international agreement outlook, which could be a perfect example of the "formal informality" of the EU external migration governance.[60] Therefore, it could be said that the EU played the dominant role in the negotiation and conclusion of the MoU.

Finally, the content of the MoU is analysed in terms of authorship. The official text of the MoU is published in the press section of the Commission's website.[61] The text refers to the EU, represented by the Commission, and Tunisia as the parties to the MoU. Therefore, there is no need to evaluate the language of the MoU. In the case of Tunisia, it is more obvious that the EU is the author of the informal instrument. However, the EU-Tunisia MoU has its own legal complications with regard to other admissibility criteria for certain types of cases. These will be examined in more detail in the following sections.

2. Pre-ratification Judicial Review

In terms of time, the first possible way to bring informal migration instruments before the CJEU could be the opinion procedure under art. 218/11 TFEU. According to this article, Member States, the Parliament, the Council and the Commission may request the opinion of the CJEU (Court of Justice) on the compatibility of an envisaged international agreement with the Founding Treaties. The aim of this article is to ensure that the roles and

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[59] Gregorio Sorgi, "Meloni, Rutte and von der Leyen head to Tunisia to unlock migrant deal", Politico, 14.07.2023, https://www.politico.eu/article/eu-commission-chief-ursula-von-der-leyen-italian-giorgia-meloni-dutch-mark-rutte-travel-tunisia-on-sunday/ (accessed 24 January 2024).

[60] Basically, the informal instruments used in the EU external migration governance that look like formal acts but deprived of the legal and procedural rules related to them, see Cardwell / Dickson, p. 3122.

[61] European Commission, "Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia", 16.07.2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887 (accessed 24 January 2024).

prerogatives of the EU institutions and the rights of those affected by the agreement are safeguarded by the procedural rules in art. 218 TFEU.[62] This article provides for *ex-ante* scrutiny of international agreements negotiated by the EU. The rationale behind is that an agreement is negotiated correctly[63] and in case of non-compliance with the Founding Treaties it would not be concluded.[64]

From a procedural perspective, two things can be said about pre-ratification judicial review. First, it is open to a limited number of applicants. Only the institutions referred to in art. 218/11 and the Member States may apply to the Court. Secondly, and more importantly, it concerns a draft international agreement negotiated between the EU and a third party. The article refers to international agreements as "envisaged". The CJEU does not respond to requests for an opinion on international agreements that have entered into force.[65]

Pre-ratification judicial review may not be possible for the informal migration instrument due to its procedural limitations. There are two main reasons for this. First, in almost all cases, informal migration instruments are negotiated as non-international agreements. Therefore, the EU institution/body/agency conducting the talks with the third party avoids the terminology of an international agreement and the procedure under art. 218 TFEU. The relevant documents of the discussions are not published in the Official Journal of the EU or are not even transparent. Therefore, the subject matter of art. 218 TFEU is missing in informal migration instruments.[66] Secondly, similar to the action for annulment, this procedure is only open to a

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[62] Ramses A. Wessel, "Normative transformations in EU external relations: the phenomenon of 'soft' international agreements", West European Politics, Vol. 44, No. 1, 2021, p. 76.

[63] Opinion 1/75, ECLI:EU:C:1975:145, p. 1361.

[64] Graham Butler, "Pre-Ratification Judicial Review of International Agreements to be Concluded by the European Union", in Mattias Derlén / Johan Lindholm / Björn Lundqvist (Ed.s), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Hart Publishing, 2018, p. 59.

[65] See Opinion 3/94, ECLI:EU:C:1995:436.

[66] See also Juan Santos Vara and Laura Pascual Matellán, "The Informalization of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?", in Eva Kassoti / Narin Idriz (Ed.s), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer & T.M.C. Asser Press, The Hague, 2022, p. 48.

limited number of applicants. Natural/legal persons affected by these instruments cannot make use of this possibility.

The limitations of this procedure also seem to apply to the EU-Tunisia MoU. As the MoU is concluded through informal meetings between the Commission and Tunisia, without recourse to art. 218 TFEU, it does not fall within the scope of this article. As a result, this option, like actions for annulment, is subject to procedural limitations that close the way to effective judicial protection in the EU.

3. Action for Annulment

The aim of judicial review of the EU's informal instruments is to ensure that they comply with EU law and, if they do not, to annul them. This could be done by means of the legal remedies provided for in the Founding Treaties. The first *ex-post* legality review is the "action for annulment".[67] The admissibility requirements for this case could be divided into two parts: the subject matter of the case (*ratione materiae*) and the parties to the case (*ratione personae*).

a. Legal Effects

The preliminary condition of the action for annulment is the legal effect of the EU's act. According to the Treaties, this act shall intend to produce legal effects *vis-à-vis* third parties.[68] The "legal effect" on individuals shall be "binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position".[69] According to the settled case law on TFEU art. 263; independent from their nature or form, all measures of the EU bodies which are intended to produce legal effects fall within the

[67] TFEU art. 263. For a detailed review of the admissibility in the action for annulment see Paul Craig / Gráinne de Búrca, *EU Law - Text, Cases, and Materials*, Oxford University Press, Seventh Edition, 2020, p. 560-583; Sanem Baykal / İlke Göçmen, *Avrupa Birliği Kurumsal Hukuku*, Seçkin Yayıncılık, 2016, p. 427-446.

[68] TFEU art. 264/1.

[69] Case 60/81 - *International Business Machines Corporation v Commission of the European Communities*, ECLI:EU:C:1981:264, para. 9; Case C-362/08 P. - *Internationaler Hilfsfonds eV v European Commission*, ECLI:EU:C:2010:40, para. 51.

material scope of the action for annulment.[70] Legal effect means that the act confers rights, imposes obligations or alters legal situations. [71]

This criterion is difficult to ensure in the case of soft law sources such as the informal migration instruments. This is because it is usually the national law implementing these soft law sources that directly affects the legal situation of individuals. Advocate General *Bobek* suggested that this criterion for the review of EU acts should be adapted to the increasing use of soft law instruments.[72] Advocate General *Bobek* argued that soft law instruments, in that case a Commission Recommendation, could have a normative effect beyond the Court's classification of binding/non-binding legal rules. Therefore, the soft law instruments setting "rules" of behaviour shall also be subject to judicial review, irrespective of their classification. However, the opinion of the Advocate General is not followed by the Court.[73] The "legal effect" criterion therefore remains unchanged.

The form of the EU-Tunisia MoU is irrelevant, but it must have binding legal effect in order to be a "challengeable act" under art. 263 TFEU.[74] The question would be whether the objectives of the MoU, as defined in the text, could be defined as simply expressing or recognising voluntary coordination, or whether they are intended to define a course of action binding on the EU institutions and/or Member States.[75] The content of the migration part of the MoU uses a language similar to an international agreement, with words such as "shall" or "parties agree". Like a framework agreement, the MoU sets out the basics for cooperation between the EU and Tunisia on migration.

On the other hand, according to the case law of the CJEU, the intention of the parties is the decisive criterion for determining the binding nature of an

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[70] C-22/70 - *Commission v Council*, ECLI:EU:C:1971:32, para. 42; C-114/12 - *Commission v Council*, ECLI:EU:C:2014:2151, para. 38 and 39; C-28/12 - *Commission v Council*, ECLI:EU:C:2015:282, para. 14-15.

[71] Joined cases 8 to 11/66, *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission of the European Economic Community*, ECLI:EU:C:1967:7, s. 91. Also see Napoleon Xanthoulis, "Administrative Factual Conduct: Legal Effects and Judicial Control in EU Law", Review of European Administrative Law, Vol. 12, Nr. 1, 2019, p. 39-73.

[72] Opinion of Advocate General Bobek in Case C-16/16 P. - *Belgium v Commission*, ECLI:EU:C:2017:959, para. 4.

[73] C-16/16 P - *Belgium v Commission*, ECLI:EU:C:2018:79.

[74] C-22/70 - *Commission v Council*, para. 39-42; C-599/15 *P* - *Romania v Commission*, ECLI:EU:C:2017:801, para. 47.

[75] C-22/70 - *Commission v Council*, para. 53.

EU act.[76] The name chosen for the document refers to a non-binding legal instrument. The MoU does not set out the specific obligations of the parties. Most of the text contains rather vague commitments by the EU and Tunisia to means rather than results.[77] The parties explicitly refrain from making legally binding commitments. Unlike the EU-Turkey Statement, the MoU does not include a commitment on readmission. The text contains no provisions on application, interpretation or dispute settlement.[78] From this perspective, it seems difficult to classify the MoU as a challengeable EU act.

The only part of the EU-Tunisia MoU that could be considered legally binding is the financial provisions. The most concrete statements on parties' commitments concern the EU's financial support to Tunisia. The text of the MoU specifies the EU funds to be transferred to Tunisia under certain policy areas, with specific amounts, projects and timetables. In particular, under "macroeconomic stability", the EU "undertakes" to help Tunisia boost its economy. According to the text of the MoU, the EU "shall" support Tunisia's budget through a plan to be discussed in the third quarter of 2023 and "shall" be paid in full for 2023. As a result, in September 2023, the Commission announced 127 million Euros in budget support to Tunisia for migration. The announcement states that this support is part of the implementation of the MoU.[79] In December 2023, the EU and Tunisia agreed on a 150 million Euros programme to support Tunisia's economic recovery as part of the MoU.[80] These two announcements could be interpreted as the MoU being an act of the Commission with legal effects. The reason for this would be that the Commission carries out financial activities on the basis of the MoU. This application could be interpreted as the EU's intention to apply the MoU as a legally binding act.

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76 C-233/02 - *France v Commission*, ECLI:EU:C:2004:173, para. 42.

77 García Andrade / Frasca.

78 Ibid.

79 European Commission, "Commission announces almost €127 million in support of the implementation of the Memorandum of Understanding with Tunisia and in line with the 10-point plan for Lampedusa", 22.09.2023, https://neighbourhood-enlargement.ec.europa.eu/news/commission-announces-almost-eu127-million-support-implementation-memorandum-understanding-tunisia-2023-09-22_en (accessed 24 January 2024).

80 European Commission, "The European Union and Tunisia agree on a 150 million euro program", 20.12.2023, https://neighbourhood-enlargement.ec.europa.eu/news/lunion-europeenne-et-la-tunisie-conviennent-dun-programme-de-150-millions-deuros-2023-12-20_en (accessed 24 January 2024).

The definition of the MoU as an act of the Commission with legal effects is essential for the jurisdiction of the CJEU. Once this preliminary issue has been resolved, the Court can move on to the second part of the admissibility test, namely the status of the applicants.

b. The Status of the Applicants

The second condition for reviewing the legality of the MoU through an action for annulment is to qualify as an applicant. The Member States, the European Parliament, the Council and the Commission are privileged applicants for this action.[81] The Court of Auditors, the European Central Bank and the Committee of the Regions can only bring this action as semi-privileged applicants in order to protect their prerogatives.[82] As the EU institutions do not have to prove their status as applicants at the admissibility stage of the case, it is not difficult for them to bring the case.

The EU institutions and Member States, unlike natural/legal persons, can file cases without having to prove their legitimate interests.[83] The EU deals with Türkiye and Tunisia could be considered to infringe the Treaty rules on the negotiation and conclusion of international agreements and the principle of institutional balance.[84] According to the principle of balance, each EU institution shall act within the limits of the powers conferred on it by the Treaties and in accordance with the procedures, conditions and objectives laid down therein.[85] The institutions shall also respect the division of powers and the institutional balance when adopting non-binding acts.[86]

The CJEU ruling on the EU-Turkey Statement showed that EU institutions like Parliament, Council and the Commission, whose prerogatives could be infringed by that Statement,[87] could stand behind it. The Parliament could be regarded as the strongest opponent of informal measures, while its competencies derive from art. 218 TFEU infringed in most cases.[88] The

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81 TFEU art. 263/2.
82 TFEU art. 263/3.
83 TFEU art. 263/2-3.
84 See Fernando-Gonzalo, p. 97-101.
85 C-409/13 - *Council v Commission*, ECLI:EU:C:2015:217, para. 64.
86 C-233/02 - *France v Commission,* para. 40.
87 For instance CJEU previously found Commission concluding an Addendum to an international agreement infringing the principle of distribution of powers in TEU art. 13/2 and the principle of institutional balance, C-660/13 - *Council v Commission*, ECLI:EU:C:2016:616, para. 46.
88 See Gatti / Ott, p. 175-200; Juan Santos Vara, "Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial

consequences of Member States deciding whether or not to act as a European Council, and thus excluding their non-European Council action from judicial scrutiny, constitute a precedent detrimental to the EU's established constitutional structure.[89] Therefore, this could also be a subject of infringement of institutional balance under action for annulment filed by the EU institutions.

In the EU-Tunisia MoU, the European Council appears to be informed of the Commission's work with Tunisia. The conclusions of the European Council meeting in June 2023 indicate the positive opinion of the European Council. The Parliament seems to question the legal basis and the content of the Commission's deal with Tunisia through individual parliamentary questions.[90] On 14 March 2024, the Parliament adopted a resolution asking the Commission for further clarification on the release of 150 million Euros to Tunisia.[91] There seems to be a growing sensitivity in the Parliament towards the EU-Tunisia MoU. It is difficult to predict whether this sensitivity will turn into an action for annulment or not. In any case, the Parliament could bring this action without further admissibility criteria on status of applicants.

On the other hand, natural/legal persons, as non-privileged applicants, have to prove their stand before the Court.[92] Unlike the EU institutions, it is difficult for natural/legal persons to prove their capacity to bring an action for annulment before the CJEU. Natural/legal persons could file a case if the act is addressed to them, if the act is of direct and individual concern to them, or if a regulatory act is of direct concern to them and does not entail implementing measures. Informal migration instruments do not address the individuals. Therefore, natural/legal persons can only file a lawsuit when they

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controls in the EU", in Carrera / Santos Vara / Strik (Ed.s) (2019), p. 29-33. On the importance of Parliament's right to be informed on negotiation of an internal agreement and democratic control C-263/14 - *Parliament v Council*, ECLI:EU:C:2016:435, para. 78.

89 Cannizzaro, p. 256. Carrera / den Hertog / Stefan (2017) argues that by choosing to act in their national capacities in Türkiye deal, the Member States acted in *mala fide* and infringed the principle of sincere cooperation, TEU art. 4/3.

90 See European Parliament, "Parliamentary question - E-002799/2023", 25.09.2023, https://www.europarl.europa.eu/doceo/document/E-9-2023-002799_EN.html; "Parliamentary question - E-000433/2024", 09.02.2024, https://www.europarl.europa.eu/doceo/document/E-9-2024-000433_EN.html (accessed 24 April 2024).

91 European Parliament resolution of 14 March 2024 on the adoption of the special measure in favour of Tunisia for 2023 (2024/2573(RSP)).

92 TFEU art. 263/4.

meet the conditions of direct and individual interest. As it is stated in art. 263/4 TFEU, the act shall affect the "interests of the applicant by bringing about a distinct change in his legal position overlaps with the conditions".[93]

Within this context, "individual concern" means the individuals are affected by the act due to certain attributes that are peculiar to them or by the reasons that individually differentiate them from all other persons.[94] Starting with the *Plaumann* case, the Court developed a closed group test to define eligible applicants. Accordingly, a fixed number of persons identified as affected by the contested measure in a particular period could be an applicant against the contested EU act.[95] This is already a heavy burden for natural/legal persons. In the case of informal migration instruments such as the MoU, the affected group consists mainly of migrants who enter the EU Member States illegally. However, according to current case law, it seems difficult to prove that they are affected by such EU actions as if they were the addressees of the relevant document. The expression of the political agreement between the EU and the third country seems to be the more dominant subject of these acts. The acts affecting the status of migrants are usually the legal acts adopted by the Member States or third countries in accordance with the informal instruments. The Court may interpret this as a transfer that cuts off the individual concern. The interpretation of "individual concern" further complicates the chances of migrants, who are already in a difficult situation, to have access to the Court. Thus, proving "individual concern" adds another difficulty to migrants' right to a remedy.

The second criterion is the "direct concern". According to the settled case law of the Court, direct concern means that the EU measure directly affects the individual's legal situation and leaves no discretion to the authorities implementing it.[96] This means that the implementation of the EU measure is purely automatic and follows from the EU rules without the application of other intermediate rules. If this criterion is to be applied to the informal instruments in question, they could have a legal effect on the relations between

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93 C-463/10 P - *Deutsche Post and Germany v Commission*, ECLI:EU:C:2011:656, para. 38.

94 Case 25-62 - *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17, p. 107; C-463/10 *P - Deutsche Post and Germany v Commission*, para. 71.

95 Case 100-74 - *Société CAM SA v Council and Commission of the European Communities*, ECLI:EU:C:1975:57, para. 18.

96 Case C-125/06 P. - *Commission of the European Communities v Infront WM AG*, ECLI:EU:C:2008:159, para. 47

the EU and its Member States and between the EU institutions and do not directly affect the legal situation of the applicants.[97] While they govern the partnership between the EU and the third country, they are usually implemented by national authorities. The MoU does not contain provisions that are specific enough to be implemented without national measures. Similarly, the discretion left to the national authorities in the implementation of it is quite wide. The deal with Tunisia tends to use general and ambiguous terms to set out the obligations of the parties. The MoU with Tunisia, which is linked to the EU-Tunisia Association Agreement and the Comprehensive Partnership Package, is implemented by the Tunisian law enforcement authorities and the Commission's financial programmes. Consequently, it is not clear enough to be implemented automatically without further implementing rules.

The last category of EU acts that could be challenged are the "regulatory acts of direct concern that do not entail implementing measures". This category was introduced by the Lisbon Treaty. The "regulatory act" in this category, as interpreted by the Court so far, is limited to non-legislative acts of the EU.[98] These are regulations or directives adopted after delegation (delegated acts) or to implement a legislative act (implementing acts).[99] Even if the informal instruments are included in this definition, the applicants still have to prove "direct concern". As mentioned in the previous paragraphs, proving this element in relation to the acts concerned is very complex.

Once these preliminary issues have been resolved, the Court can turn to the merits of the case. If, at this stage, the MoU is described as having the

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[97] T-458/17 - *Shindler and Others v Council*, ECLI:EU:T:2018:838, para. 39-41; C-755/18 P - *Shindler and Others v Council*, ECLI:EU:C:2019:221, para. 36-37. Also see Melanie Fink / Narin Idriz, "Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?" in Eva Kassoti / Narin Idriz (Ed.s), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer & T.M.C. Asser Press, The Hague, 2022, p. 137.

[98] T-18/10 - *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:T:2011:419, para. 42, 47-48, 50, 56 and T-262/10 - *Microban International and Microban (Europe) v Commission*, ECLI:EU:T:2011:623, para. 20-25. See also Steve Peers and Marios Costa, "Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission", European Constitutional Law Review, 8(1), p. 82-104.

[99] TFEU art. 290-291.

effects of an international agreement, compliance with the negotiation and conclusion procedures of the EU's international agreement would be examined.[100] The EU institutions, such as the European Parliament and the Council, could refer this case to the CJEU as a question "concerning the institutional structure of the [EU]" [101], depending on their powers under art. 218 TFEU. [102] However, the EU institutions may be reluctant to bring this case in order to protect their privileges or even to join the defendant side. At least this is what happened in the case of the EU-Turkey Statement. In the next part, other important procedural issues will be discussed.

4. Plea of Illegality

Another legal remedy available against informal migration instruments could be the plea of illegality. This is the incidental review of the EU acts according to art. 277 TFEU. The applicants could request the inapplicability of an EU act after the expiry of the time limits of the action for annulment. Such a review is subject to the same requirements as an action for annulment, except for the time limit[103] and could be used within another case. The plea of illegality is therefore also subject to the same procedural limitations as the annulment action.

5. Preliminary Ruling Procedure

The preliminary ruling procedure is another way of bringing informal migration instruments before the CJEU.[104] The preliminary ruling procedure has existed since the beginning of EU integration.[105] This procedure is designed as judicial cooperation between national courts and the CJEU on the validity and interpretation of EU law sources relevant to the case before the national court. Despite its original purpose, this procedure is mostly used as a "citizens' infringement procedure"[106] to challenge the validity of EU and

[100] C-22/70 - *Commission v Council*, para. 54.
[101] See C-22/70 - *Commission v Council*, para. 63.
[102] See C-114/12 - *Commission v Council*, para. 40.
[103] TFEU art. 277.
[104] TFEU art. 264.
[105] Treaty establishing the European Economic Community (Treaty of Rome), art. 177.
[106] Virginia Passalacqua / Francesco Costamagna, "The law and facts of the preliminary reference procedure: a critical assessment of the EU Court of Justice's source of knowledge", European Law Open, 2, 2023, p. 323.

Member State acts. Individuals could ask the national courts of the Member States to refer the case to the CJEU in order to obtain its legally binding opinion on the validity and interpretation of the acts of the EU institutions.

As regards the judicial review of the EU's informal migration instruments, three positive procedural features could be identified. First, this procedure could be used for validity review. It could therefore be a substitute for actions for annulment. While actions for annulment are reserved for EU acts with legal effect, preliminary rulings on validity cover all types of EU acts without exception.[107] In this context, there are decisions of the Court on the validity of EU soft law sources such as recommendations[108] or guidelines[109] of EU institutions/bodies under this procedure. Second, there is no procedural limitation with regard to the applicants. Natural/legal persons could bring a case before the national courts and claim the invalidity of the EU measure as part of that dispute. Thus, the applicants are not subject to the limitations of actions for annulment. Third, there is no time limit for the applicants to follow this procedure. This is another of the difficult procedural conditions to be met in the context of an action for annulment.

Nevertheless, the preliminary ruling procedure has its procedural and practical limits. From a procedural point of view, national courts have a certain degree of discretion as to whether or not to refer the case to the CJEU. However, when the validity of an EU measure is at stake, the discretion of the courts of last instance is at its most limited.[110] In practice, in most cases it is irregular migrants who wish to challenge the EU's informal migration instruments. Given that these people have limited opportunities to bring a case before the courts of the Member States and to request a preliminary ruling, this may also not provide effective judicial protection.[111]

The validity of the EU-Tunisia MoU could be tested by a preliminary ruling procedure. As a procedural requirement, there must first be a case

[107] Case C-322/88 Grimaldi, ECLI:EU:C:1989:646, para.8; C-16/16 P - *Belgium v Commission,* para. 44.
[108] C-16/16 P - *Belgium v Commission* and C-501/18 - *Balgarska Narodna Banka*, ECLI:EU:C:2021:249, para. 82.
[109] C-911/19 – *FBF*, ECLI:EU:C:2021:599, para. 55.
[110] TFEU art. 267/1(b)/3. The discretion given to the national courts with *CILFIT* decision does not extend to the question on validity of the EU acts. C-461/03 - *Gaston Schul Douane-expediteur*, ECLI:EU:C:2005:742, para. 17-25; C-283/81 - *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335, para. 10-14.
[111] Fink/Idriz, p. 128.

before the courts of the Member States raising the question of the validity of the MoU. However, the content of the MoU mainly refers to cooperation between the EU and Tunisia in vague terms. The MoU does not contain any explicit provisions with regard to the Member States. The lack of self-executing provisions could make it difficult to bring a case before national courts. One possible way of bringing the MoU before the CJEU would be to bring a national case against the EU's financial assistance to Tunisia on the basis of the MoU. However, this would be a difficult and weak link between a national dispute and the MoU. Therefore, although it is possible to use the preliminary ruling procedure against the MoU, the subject matter of the MoU and the practical limitations of the applicants would reduce the chances of this path.

6. Non-Contractual Liability

The last possible route is the non-contractual liability of the EU.[112] This allows individuals who have suffered as a result of an unlawful EU act to seek compensation. The applicants need to prove the infringement of a rule of law intended to confer rights on individuals and a serious breach and direct causal link between the breach and the damage.[113] For soft law sources, these are difficult for claimants to prove, and the CJEU does not usually rule on compensation.[114] Conflicts involving soft law instruments in the area of migration are even more complicated.[115] As a result, it is almost impossible to get past the admissibility stage before the courts. This limitation also applies to the EU-Tunisia MoU. Therefore, it could be said that the alternatives to action for annulment are not efficient either.[116]

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[112] TFEU art. 268/2, 340. On this case type see Sanem Baykal, *Avrupa Birliği Hukukunda Tazminat Davası*, Yetkin Yayınları, Ankara, 2006.

[113] Joined cases C-46/93 and C-48/93 - *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI:EU:C:1996:79, para. 51; C-123/18 *P - HTTS v Council*, ECLI:EU:C:2019:694, para. 32

[114] See for example C-221/10 *P - Artegodan v Commission*, ECLI:EU:C:2012:216, para. 81; C-615/19 *P - Dalli v Commission*, ECLI:EU:C:2021:133, para. 56-63.

[115] See Luis Arroyo Jiménez, "Beyond bindingness", in Petra Lea Láncos / Pázmány Péter / Napoleon Xanthoulis / Luis Arroyo Jiménez, *The Legal Effects of EU Soft Law - Theory, Language and Sectoral Insights*, Edward Elgar Publishing, 2023, p. 26-28.

[116] Fink/Idriz, p. 127.

Conclusion

The AFSJ, which was fully brought under the EU framework with the Lisbon Treaty, is the newest and most ambitious policy area of EU integration. The increased use of informal instruments in migration management and readmission in the AFSJ after 2015 poses serious legal challenges for integration in this area. This study examines these challenges from the perspective of EU accountability. In this context, the procedural conditions for bringing an annulment action against the Tunisia deal were examined.

From a procedural point of view, the MoU could be brought before the CJEU. The MoU with Tunisia could be considered reviewable through action for annulment and preliminary ruling procedure. However, it has been difficult to find natural/legal persons who meet the requirements to be a party to the actions for annulment. Therefore, an action for annulment could be stopped at the admissibility stage on the basis of the status of the applicants. In the context of the preliminary ruling procedure, it is considered difficult to create a national case related to the MoU. The procedural requirements of other types of cases are also found inapplicable to the MoU.

The potential failure of the lack of judicial review has other consequences for EU law. The difficulty of judicial review of informal instruments also affects the EU's compliance with international law and fundamental rights. Fundamental rights form the very foundations of the EU legal order[117] and include the judicial review of EU measures.[118] After 2015, these instruments were mainly used to control migration at the EU's borders. The impact can be seen on migrants' right to asylum and the principle of non-refoulement, which is regulated by international law, the Geneva Convention and EU law. Although both deals with Türkiye and Tunisia commit to respecting these rights and principles, they do not provide for an effective monitoring mechanism. Recently, UN agencies questioned the EU about its Memorandum of Understanding with Tunisia and Tunisia's alleged human rights violations against migrants in a very detailed way.[119] The EU's response to these

[117] Case 4-73 - *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51, para. 13.

[118] C-402/05 P - *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, para. 304.

[119] Office of the United Nations High Commissioner for Human Rights, "Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary

allegations was brief and general.[120] Moreover, the procedural rules on admissibility and their application made it almost impossible for the judicial review to move on to the substance of the fundamental rights case.

Apart from the legal debate on the procedural limits of the Court's jurisdiction, the Court has also chosen to interpret its jurisdiction restrictively. The decision on the Türkiye Statement proves this. The involvement of EU agencies in operational cooperation with national authorities and third countries at the EU's borders is also treated by the Court in a similar way to informal instruments.[121] The CJEU is criticised for its restrictive interpretation in the other subfields of the AFSJ, such as visas, refugee settlement and border controls.[122] This judicial preference could raise questions about the legitimacy of EU action in the AFSJ.[123] The increasing use and diversification of these

executions; the Special Rapporteur on the human rights of internally displaced persons; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women and girls, its causes and consequences and the Working Group on discrimination against women and girls", Ref.: AL OTH 98/2023, 17 August 2023, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28292 (accessed 24 January 2024).

[120] European External Action Service, "Reply to Joint Communication from Special Procedures", Brussels, 13 October 2023, https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=37750 (accessed 24 January 2024).

[121] See for a recent decision on Frontex's (non) responsibility T-600/21 - *WS and Others v Frontex*, ECLI:EU:T:2023:492, for a similar case on Europol T-528/20 - *Kočner v EUROPOL*, ECLI:EU:T:2021:631 (as of January 2024 both cases are on appeal before Court of Justice). For review of the Frontex decision, Melanie Fink and Jorrit J. Rijpma, "Responsibility in Joint Returns after WS and Others v Frontex: Letting the Active By-Stander Off the Hook", EU Law Analysis, 22 September 2023, https://eulawanalysis.blogspot.com/2023/09/responsibility-in-joint-returns-after.html (accessed 8 December 2023).

[122] See Jorrit J. Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory", European Papers, Vol. 2, No 2, 2017, p. 571-596.

[123] On EU and legitimacy see Sanem Baykal, "Avrupa Birliği'nin geleceği: meşruiyet sorunu, anayasallaşma süreci ve bütünleşmenin nihai hedefi üzerine", Uluslararası İlişkiler Dergisi, Volume: ,1 Issue: 1, 2004, p. 119-153.

informal instruments and their impact on the fundamental law and principles of the EU have created a need to reconsider the admissibility criteria for judicial protection in the EU. Failure to do so will further call into question the objectives and legitimacy of this new stage of EU integration.

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