LLM EUROPEAN LAW THESIS

Union loyalty and the conclusion of third-country migration deals by EU Member States

The Italy-Albania Protocol in context

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Chapter 1: Introduction

1.1 Context

The European Union's (EU) approach to managing immigration and asylum has an internal and an external dimension. Under Article 78 TFEU, the EU's is under the obligation to develop a common policy on asylum and protection in line with the Geneva Convention on refugees and 'other relevant treaties', such as the ECHR.[1] The current Common European Asylum System (CEAS) lays down common rules for the procedures for applying for asylum and granting and withdrawing protection,[2] on the definition and rights accorded to asylum seekers,[3] and the reception standards relating to, for instance, housing, schooling, health care and employment.[4]

In tandem with the progression of the internal dimension of the migration and asylum field, since the early 2000s, an external dimension has developed. The EU's – and Member States' – activity in this area has led to the conclusion of readmission agreements facilitating the return of migrants under Article 79(3) TFEU, as well as to the externalisation of migration controls, effectively shifting borders to third countries by exporting traditional migration control measures to transit and origin countries.[5]

In addition, since the early 2010s, a second trend can be identified, the informalisation of the external dimension of EU migration policy.[6] This means that the EU has increasingly turned to informal arrangements with third countries in this area. An example is the EU-Turkey Statement.[7] The Statement includes a mechanism for returning irregular Syrian migrants that arrive on the Greek islands to Turkey and for every migrant returned, the EU would take in another Syrian migrant residing in Turkey.[8] More recent examples are the conclusion of agreements with Tunisia,[9] and Egypt,[10] through which these third states have agreed to

[1] Matthias Rossi and Aqilah Sandhu, 'Article 78 TFEU and the Way to a Common European Policy in the Field of Asylum' in Javier Cremades and Cristina Hermida (eds), *Encyclopaedia of Contemporary Constitutionalism* (Springer: Cham 2022) 8.
[2] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180.
[3] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.
[4] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180.
[5] Christina Boswell. 'The external dimension of EU immigration and asylum policy' (2003) 79(3) International Affairs 619.
[6] 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* (T.M.C. Asser Press: The Hague 2022) 150-151.
[7] European Council. 'EU-Turkey Statement' <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed on 22 May 2024.
[8] Ibid.
[9] European Commission. 'Memorandum of Understanding on a strategic and global partnership between the EU and Tunisia' <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887> accessed May 23, 2024
[10] European Commission. 'Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic Of Egypt and the European Union' <https://neighbourhood-enlargement.ec.europa.eu/news/joint-

cooperate with the EU in the field of migration, for instance by strengthening border management and cutting off migrants' travel options, to ensure lower flows of migrants.[11]

It is, however, not only the EU itself that engages in these types of deals. Notably, Italy concluded a Memorandum of Understanding (MoU) with Libya in 2017, under which Italy provides support to the Libyan coast guard to return people on the move at sea to Libya.[12] More recently, Italy concluded a Protocol with Albania on the disembarkation and processing of migrants picked up at sea by Italian authorities in refugee centres located on Albanian territory.[13] Under the agreement, the Italian government is building two facilities that may host up to three thousand individuals.[14] According to the text of the Protocol, the facilities are managed by Italian authorities under exclusive Italian jurisdiction and in line with applicable Italian and European legislation.[15]

The Protocol has attracted heavy critique. The Council of Europe's Human Rights Commissioner has identified several fundamental rights concerns caused by the agreement, as well as the continuation of 'a worrying European trend towards the externalisation of asylum responsibilities'.[16] Beyond that, Amnesty International criticised Italy for trying to use the deal to 'circumvent national, international and EU law', as well as for breaching the principle of non-refoulement.[17] A pressing issue with all these instruments is their failure to protect the fundamental rights of migrants.[18] These fundamental rights concerns relate to migrants' living conditions, their right to effective judicial protection and violation of the principle of non-

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declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en> accessed May 23, 2024.

[11] EU-Tunisia Memorandum of Understanding (n 9); EU-Egypt Strategic and Comprehensive Partnership (n 10).

[12] Pijnenburg (n 6) 153.

[13] Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania for the Strengthening of Collaboration in Migration Matters, signed 7 November 2023 (English Translation) < https://odysseus-network.eu/wp-content/uploads/2023/11/Protocol-between-the-Government-of-the-Italian-Republic-and-the-Council-of-Minister-of-the-Albanian-Republic-1-1.pdf>

[14] Italy-Albania Protocol (n 13) Article 3(2) and 4(1).

[15] Italy-Albania Protocol (n 13) Article 4(2).

[16] Council of Europe Commissioner for Human Rights. 'Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures' <https://www.coe.int/en/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures> accessed May 23, 2024.

[17] Amnesty International. 'Italy: Deal to detain refugees and migrants offshore in Albania 'illegal and unworkable'' <https://www.amnesty.org/en/latest/news/2023/11/italy-plan-to-offshore-refugees-and-migrants-in-albania-illegal-and-unworkable/> accessed 23 May 2024.

[18] Eleonora Frasca. 'More or less (Soft) Law? The Case of Third Country Migration Cooperation and the Long-Term Effects of EU Preference for Soft Law Instruments' (2021) 1 Queen Mary Law Journal 14; Pijnenburg (n 6) 152; European Ombudsman. 'Ombudsman asks Commission about respect for fundamental rights in EU agreement with Tunisia' <https://www.ombudsman.europa.eu/en/news-document/en/175203> accessed May 23, 2024; Council of Europe Commissioner for Human Rights. 'European states' migration co-operation with Tunisia should be subject to clear human rights safeguards' <https://www.coe.int/en/web/commissioner/-/european-states-migration-co-operation-with-tunisia-should-be-subject-to-clear-human-rights-safeguards> accessed May 23, 2024; Human Rights Watch. 'Letter to the EU on Human Rights Conditions for Strategic Partnership and Enhanced Cooperation with Egypt' <https://www.hrw.org/news/2023/12/06/letter-eu-human-rights-conditions-strategic-partnership-and-enhanced-cooperation> accessed 23 May 2024; Human Rights Watch. 'Joint Statement: Respect International Law in EU-Lebanon Migration Deal' <https://www.hrw.org/news/2024/05/02/lebanon-joint-statement-respect-international-law-eu-lebanon-migration-deal> accessed 20 June 2024.

refoulement.[19] This leads to tensions with primary EU law – Articles 67 and 78 TFEU and Articles 18, 19 and 47 of the EU Charter of Fundamental Rights – and the secondary EU asylum acquis.[20]

With bilateral agreements, another – constitutional – tension with EU law arises, namely with the principle of Union loyalty. The principle, enshrined in Article 4(3) TEU has been described as producing some of 'the strongest ties that bind the Member States'.[21] It requires Member States to ensure compliance with the EU Treaties, facilitate the achievement of the Union's tasks and to abstain from measures that might jeopardise these objectives.[22] These objectives include the requirement of unity and coherence of the EU's external representation and the preservation of the effectiveness of EU law.[23] However, in relation to the Italy-Albania Protocol, the European Commission foresaw no problem with EU law, with Commissioner for the Interior Johansson effectively placing the procedure outside the scope of Union law. Further, Commission President Von der Leyen wrote that the Protocol 'serves as an example of out-of-the-box thinking, based on fair sharing of responsibilities with third countries in line with obligations under EU and international law'.[24]

Bilateral agreements, like the Italy-Albania Protocol, pose challenges for the beforementioned objectives under Union loyalty because they operate within a policy field heavily regulated by the EU, as well as within the context of external action, a historically sensitive area.[25] Profound questions arise as to whether Italy could negotiate and conclude the Protocol without having informed or consulted with the Commission or whether Italy should have abstained from concluding the Protocol altogether. Further, it is questionable whether the Protocol will comply with the EU's asylum acquis and sufficiently guarantee migrants' fundamental rights enshrined in the Charter.

1.2 Research outline

My research question is therefore the following: *To what extent is the conclusion of bilateral international agreements by EU Member States in the field of EU migration law compatible with the principle of Union loyalty?*

By answering this question, the role of Union loyalty in the external dimension of EU migration law and, more specifically, when Member States resort to bilateral agreements in the

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[19] Pijnenburg (n 6) 152.

[20] Article 67 TFEU lays down that the AFSJ is an area with respect for fundamental rights. Similarly, Article 78 TFEU refers to the Geneva Convention for Refugees and other relevant treaties. The articles of the Charter refer to the right to asylum, the principle of non-refoulement and the right to effective judicial protection.

[21] Marcus Klamert, *The Principle of Union Loyalty* (1st edn OUP: Oxford 2014) 1.

[22] Ibid.

[23] Eleftheria Neframi. 'The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations' (2010) 47 Common Market Law Review 323.

[24] AP News. 'Top EU official lauds Italy-Albania migration deal but a court and a rights commissioner have doubts' <https://apnews.com/article/eu-italy-albania-migration-asylum-rescue-court-91a92ebe5a0ea0e4273609a7ad0eed47> accessed 23 May 2024.

[25] Piet Eeckhout, *EU External Relations Law* (2nd edn OUP: Oxford 2011) 5.

externalisation of migration management, will become clear. Given the recent conclusion of the Italy-Albania Protocol, I will use this instrument as a topical example of bilateral agreements by EU Member States for drawing more generalised conclusions about the functioning of the principle of Union loyalty in this context. Chapter 2 will go into externalisation and informalisation in the external dimension of the migration policy conducted by the EU and Italy. Subsequently, chapter 3 will develop a theoretical legal framework of the principle of Union loyalty in the sphere of external action and provide the obligations that are imposed on Member States by the principle. Chapter 4 will turn to the Italy-Albania Protocol and assess to what extent the Protocol can be understood as externalisation and informalisation and whether the consequences thereof will materialise in this context as well. Finally, chapter 5 will answer the question to what extent the Protocol is compatible with Italy's obligations under the principle of Union loyalty and draw more general conclusions as to the compatibility of bilateral migration agreements with Union loyalty.

This thesis adds to the existing academic knowledge in several ways. Firstly, the Italy-Albania Protocol represents a new development in the externalisation of migration management within the EU by departing from more traditional approaches to shifting asylum processes to a non-EU country under the exclusive jurisdiction of a Member State. The arrangement raises a manifold of legal questions, ranging from whether Italy has the competence to conclude the Protocol under EU law to whether the Protocol is compatible with Italy's obligations under international maritime law. This thesis will centre around the compatibility of such bilateral agreements with the principle of Union loyalty. The Protocol's unique nature – in the context of European migration management – involving the construction and management of facilities outside EU territory shows the need to explore its implications within the framework of EU law.

Secondly, while the principle of Union loyalty has been extensively discussed in various contexts, its application in the context of autonomous Member State action in the external dimension of EU migration policy remains under-explored. This thesis aims to fill this gap by examining how bilateral agreements like the Italy-Albania Protocol interact with obligations under Union loyalty in the context of migration management, thereby contributing to a broader understanding of EU constitutional law and its application within this context. By analysing the tensions between Member State action and EU objectives, the thesis will clarify the legal boundaries of Member States' autonomy when employing external migration management instruments.

1.3 Methodology

To answer the research question, chapter 2 will tackle the phenomena of externalisation and informalisation in the external dimension of migration policy. It will answer the question how externalisation and informalisation in the EU context must be understood and what their consequences are. First, the chapter will set out the internal and external dimension of the EU's asylum policy field. Then, externalisation and informalisation will be explained through a discussion of instruments used by the EU and the Member States that lead to externalisation

and informalisation of migration management. In this context, I will review three EU-instruments: the EU-Turkey Statement,[26] the EU-Tunisia Memorandum of Understanding,[27] and the EU-Egypt Strategic and Comprehensive Partnership,[28] as well as the Italy-Libya Memorandum of Understanding.[29] These instruments operate in the context of migration management by the EU and a Member State, Italy. The criteria that will be extracted from this chapter will be used in chapter 4 to assess the nature of and problems following from the Italy-Albania Protocol.

In chapter 3, I will lay down the theoretical legal framework of the principle of Union loyalty in the sphere of external action. This chapter will answer the question what the obligations under the principle of Union loyalty are for Member States when undertaking autonomous external action. The analysis will start from the relevant Treaty text and subsequently set out the relevant CJEU case law. The Court has developed a sliding scale of obligations dependent on the effects of autonomous Member State action for the unity of the EU's external representation and the effectiveness of EU law. By tracing the case law, the different obligations imposed on Member States under the principle of Union loyalty are identified. The scale will be used in chapter 5 to assess under which duties Italy was when negotiating and concluding the Protocol.

Chapter 4 will evaluate the Italy-Albania Protocol and, after laying out its context, objectives and provisions, follow a two-step approach. First, it will discuss to what extent the Protocol fits the picture of externalisation and informalisation as drawn in chapter 2. Second, the chapter will deal with the question to what extent the negative consequences of externalisation and informalisation identified in chapter 2 are likely to materialise as a consequence of the Protocol as well.

In chapter 5, I will answer the question to what extent the Protocol is compatible with Italy's obligations under Union loyalty, as identified in chapter 3. This will further include the findings from Chapter 4 on the consequences of the Protocol. The chapter will finally draw from the findings in the Italo-Albanian context to provide a more general overview of the compatibility of bilateral agreements by Member States with third countries with Union loyalty.

Finally, the conclusion will summarise the main findings of the thesis and provide an outlook towards the future, as well as recommendations for how conflicts with EU law can be avoided. These findings can prove helpful for the assessment of similar future agreements by Member States, which is particularly relevant given the novel nature of the Italy-Albania Protocol.

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[26] EU-Turkey Statement (n 7).

[27] EU-Tunisia MoU (n 9).

[28] EU-Egypt Strategic Partnership (n 10).

[29] 'Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic (English Translation)' <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 23 May 2024.

Chapter 2: Externalisation and informalisation

In this chapter, the focus will be on the external dimension of the EU's – and Member States' – migration policy and two trends that can be identified. Over the last ten to fifteen years, the external dimension of migration policy is increasingly characterised by externalisation and informalisation. By discussing specific instruments employed by the EU and Italy in their relationships with neighbouring countries in the Mediterranean, the problems that arise as a consequence of externalisation and informalisation will become clear. In that way, the context in which the Italy-Albania Protocol operates can be identified.

Therefore, this chapter will first briefly sketch the internal dimension of EU migration policy in section 2.1. Then, the phenomena of externalisation (section 2.2) and informalisation (section 2.3) of migration management will be discussed on the basis of the EU-Turkey Statement,[30] the EU-Tunisia Memorandum of Understanding,[31] and the EU-Egypt Strategic Partnership.[32] Finally, section 2.4 will turn to externalisation and informalisation at the Member State level as a consequence of the cooperation between Italy and Libya.

2.1 The internal dimension of EU migration policy

The internal dimension relates to the EU legislation that is applicable to third-country nationals who come within the jurisdiction of the EU's Member States, for instance to apply for asylum. Migration policy falls within the scope of the Area of Freedom, Security and Justice (AFSJ) and is therefore part of the EU's shared competences.[33] Article 67(1) TFEU lays down that the AFSJ is an area with respect for fundamental rights. Further, Articles 77 through 80 TFEU provide the primary legal bases for the EU's migration policy. Article 79 TFEU is concerned with immigration policy and aimed at migration management and the prevention of irregular migration. Article 78 provides the legal basis for the CEAS, that must be in accordance with the principle of non-refoulement, the Geneva Convention and other relevant treaties, such as the ECHR.[34] Together, Articles 67 and 78 TFEU therefore identify respect for fundamental rights as an important objective of the CEAS.

Under the beforementioned legal bases, the EU institutions have adopted several pieces of legislation. The secondary asylum acquis consists of the Qualifications Directive, laying down the standards for qualifying individuals as requiring protection;[35] the Asylum Procedures Directive, which introduces common asylum application procedures,[36] and the Reception Conditions Directive, establishing standards for *inter alia* detention, education, housing and

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[30] EU-Turkey Statement (n 7).
[31] EU-Tunisia MoU (n 9).
[32] EU-Egypt Strategic Partnership (n 10).
[33] Article 4(2)(j) TFEU.
[34] European Union Agency for Fundamental Rights, European Court of Human Rights, Council of Europe, '*Handbook on European law relating to asylum, borders, and immigration*' (Publications Office of the European Union, Luxembourg 2020) 105.
[35] Directive 2011/95 (n 3).
[36] Directive 2013/32 (n 2).

employment.[37] Further legislation relates to the responsibility for processing asylum requests,[38] the return of 'illegal' third-country nationals and the establishment of a fingerprint base.[39] Most secondary regulation, with the exception of the Qualifications Directive, has a territorial scope that is limited to the territory of the Member States and border and transit zones.[40]

Finally, the EU Charter applies where Member States are acting within the scope of EU law.[41] The EU Charter lays down the right to apply for asylum in Article 18 and the principle of non-refoulement in Article 19(2). Non-refoulement entails that no one may be removed, expelled, and extradited to a state where they would be subject to death, torture or inhumane treatment.[42] In Article 47, the right to effective judicial protection is enshrined, which includes the right to an effective remedy before a court, the right to a fair trial, and the right to legal assistance.[43]

2.2 Externalisation

Cooperation with third countries by the EU under a common external migration agenda started with the adoption of the Global Agenda on Migration by the European Council in 2005.[44] Under the Lisbon Treaty, there are two explicit legal bases for cooperation with third countries: Article 78(2)(g) TFEU allows the Parliament and the Council to engage in partnerships and cooperation for the purpose of migration management and Article 79(3) TFEU provides for the conclusion of readmission agreements with third countries. Both legal bases provide for a formal treaty-making procedure under Article 218 TFEU.

The external dimension of EU migration policy originally consisted of two main components: first, measures promoting the return of asylum seekers and irregular migrants to third countries through readmission agreements.[45] These measures are not at issue in this thesis. Second, the

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[37] Directive 2013/33 (n 4)
[38] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180.
[39] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) [2013] OJ L 180.
[40] Directive 2013/32 (n 2) Article 3, Directive 2013/33 (n 4) Article 3, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348 Article 2, and Regulation 604/2013 (n 38) Article 1.
[41] Rossi and Sandhu (n 1) 8; CJEU 26 February 2013, Case C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*) 21 clarifies that the phrase "implementing EU law" in Article 51(1) of the Charter of Fundamental Rights must be interpreted as acting within the scope of EU law.
[42] European Union Agency for Fundamental Rights (n 34) 105-106.
[43] Ibid. 146-147, 163-164.
[44] European Council, Conclusions by the European Council (17 December 2005) (2005) 15914/05.
Tineke Strik and Ruben Robbesom. 'Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control' (2024) Netherlands International Law Review 2.
[45] Frasca (n 18) 11-12.

exportation of classic migration control instruments to transit countries or countries of origin.[46] This has led to a phenomenon called externalisation, which has been defined as 'the range of processes (…) whereby states complement policies to control migration across their territorial boundaries with initiatives that realise such control extraterritorially and through other countries and organs than their own'.[47] From this definition, two interconnected elements can be distilled.

First, there is the aspect of control. By externalisation, control is shifted towards a third state, its organs or even a private party. At first, cooperation with third parties mainly consisted of visa regimes and carrier sanctions.[48] Since the early 2010s, and especially since 2015-2016, the focus of cooperation with third states has shifted towards reinforcing border control and migration management by third states themselves. In Libya, for instance, through several missions, the EU provides financial aid and supports the Libyan authorities by providing training to the country's coast guard with the aim of strengthening border management.[49] We will see in the next section that this is only one example of how the EU and certain Member States shift control towards third countries.

Second, and related to the issue of control, externalisation has the effect of 'moving the border outward' and creating a metaphorical border in a third state.[50] The exportation of classic migration control instruments includes visa control carrier sanctions, maritime interdiction operations, pushbacks and the establishment of offshore migrant processing centres.[51] All of these instruments are used by Member States to prevent migrants from reaching their territory.[52] It has therefore been argued that the EU and its Member States have played an important role in developing 'shifting borders' by creating a 'complex, inter-agency, multi-tiered' system of migration control that ranges from 'pre-entry controls in countries of origin and transit to the removal of irregular migrants after they have reached EU territory'.[53] The objective of shifting the border outwards is to prevent migrants from reaching the territory of EU Member States to avoid having to grant protection.[54]

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[46] Boswell (n 5) 622.
[47] Violeta Moreno-Lax and Martin Lemberg-Pedersen. 'Border-induced displacement: The ethical and legal implications of distance-creation through externalization' (2019) 56 Questions of International Law 33.
[48] Juan Santos Vara and Laura Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in Wybe Douma and others (ed), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press: The Hague 2021) 316.
[49] Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) OJ L 138; Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) OJ L 122.
[50] Frank McNamara. 'Member State Responsibility for Migration Control within Third States – Externalisation Revisited' (2013) 15(3) European Journal of Migration Law 327.
[51] Salvatore Fabio Nicolosi. 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) Netherlands International Law Review 2; Juan Santos Vara and Laura Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in Wybe Douma and others (ed), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press: The Hague 2021) 316.
[52] Nicolosi (n 51) 2.
[53] Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (1st edn MUP: 2020) 7.
[54] Santos Vara and Pascual Matellán (n 51) 317.

It follows that these two aspects of externalisation are closely linked to one another. The desire to prevent migrants from reaching EU territory is realised by creating a legal fiction of a border in a third state, thereby oftentimes shifting the responsibility for the control of that border to a third state, as can be seen by the transfer of control to the Libyan coast guard. In the following section, the nature and consequences of externalisation will be discussed further, as externalisation in the EU context is often the consequence of informal arrangements with third countries.

2.3 Informalisation

Especially since the early 2010s, the EU has increasingly turned towards informal cooperation with third states in the context of migration management.[55] This can be explained by the flexibility that soft law can provide compared to formal treaty-making procedures.[56] Further benefits for policy makers are the speed of negotiation and implementation of informal arrangements, because parliamentary ratification is not required, and their reduced publicity and visibility, since informal arrangements are not necessarily published.[57]

The phenomenon has been characterised as 'the flight from law',[58] since informal arrangements, in principle, do not contain legally binding commitments under international law.[59] To better understand the functioning and consequences of informalisation – and externalisation, this section will discuss three examples of informal instruments employed by the EU: the EU-Turkey Statement,[60] the EU-Tunisia Memorandum of Understanding,[61] and the EU-Egypt Strategic Comprehensive Partnership.[62] The section will highlight the problems that arise as a consequence of informalisation. These issues relate to the lack of democratic and judicial controls, as well as the protection of fundamental rights.[63]

2.3.1 The EU-Turkey Statement

The EU-Turkey Statement was delivered on 18 March 2016 as a press release on the European Council website.[64] It provided for a resettlement mechanism that was, according to the release, 'in full compliance with EU and international law' under which EU Member States would take in one irregular migrant present in Turkey for every irregular Syrian migrant returned to Turkey

[55] Frasca (n 18) 3, 6-7; Emanuela Roman, 'The "Burden" of Being "Safe"—How Do Informal EU 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* (T.M.C. Asser Press: The Hague 2022) 324.
[56] Andrea Ott. 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) 39 Yearbook of European Law 573-574.
[57] Roman (n 55) 322-323.
[58] Evangelina (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP: Oxford 2021) 820.
[59] Ott (n 56) 572.
[60] EU-Turkey Statement (n 7).
[61] EU-Tunisia MoU (n 9).
[62] EU-Egypt Strategic Partnership (n 10).
[63] Strik and Robbesom (n 44) 4; Santos Vara and Pascual Matellán (n 51) 315.
[64] EU-Turkey Statement (n 7).

from the Greek islands.[65] The Statement further included six billion euros in financial support to Turkey and a restart for the visa liberalisation and accession processes.[66]

A pressing issue with the Statement is its disputed authorship. The General Court dealt with this question in the *NF, NG* and *NM v European Council* cases*,* actions for annulment brought by asylum seekers against the EU-Turkey Statement.[67] Here, the General Court ruled that the Statement cannot not be seen as a decision by the European Council to conclude an informal international agreement between the European Union and Turkey.[68] It added that, even if an informal international agreement had been concluded, it would have been an agreement concluded by the Member States and not the EU.[69]

These decisions have been criticised for misconceiving the nature of the Statement, thereby causing legal uncertainty and circumventing democratic control by the European Parliament (EP) and judicial control by the Court of Justice.[70] The classification of the Statement as a Member State agreement – if an agreement at all – means that the Parliament has not been able to exercise parliamentary scrutiny over the agreement, for instance by being fully informed and having a right to consent to the agreement.[71]

Further, as a consequence of the Statement, severe fundamental rights violations have been identified, such as arbitrary detention and violations of the right to asylum and effective judicial protection, as well as the principle of non-refoulement.[72] By excluding its jurisdiction over the EU-Turkey Statement, the General Court – and subsequently, the Court of Justice – failed to protect migrants whose fundamental rights have been affected by the Statement.[73]

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[65] Ibid.
[66] Ibid.
[67] EU General Court 15 October 2018, Case T-192/16, ECLI:EU:T:2018:682 (*NF v European Council*); EU General Court 15 October 2018, Case T-193/16, ECLI:EU:T:2018:681 (*NG v European Council*); EU General Court 15 October 2018, Case T-257/16, ECLI:EU:T:2018:680 (*NM v European Council*); CJEU 25 July 2018, C-208/17 P, ECLI:EU:C:2018:705 (*NF and others v European Council*).
[68] Case T-192/16 (n 67) 70-72.
[69] Ibid. 72.
[70] For an extensive discussion of authorship and legal nature of the EU-Turkey Statement, see Ott (n 55) 596-597 and Mauro Gatti and Andrea Ott, 'The EU-Turkey statement: legal nature and compatibility with EU institutional law' 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: Cheltenham 2019) 175.
[71] 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: Cheltenham 2019) 29-33.
[72] Moreno Lax, Violeta, Jennifer Allsopp, Evangelia (Lilian) Tsourdi, Philippe de Bruycker and Andreina de Leo, *The EU Approach to Migration in the Mediterranean* (2021) EPRS PE 694.413 124-129; Pijnenburg (n 6) 152.
[73] Santos Vara (n 71) 33-35.

2.3.2 The EU-Tunisia Memorandum of Understanding

The EU-Tunisia MoU was concluded in the summer of 2023 by the European Commission and Tunisia.[74] In terms of content, it is mainly concerned with strengthening cooperation and increased funding by the EU in the fields of economy, trade, people-to-people contacts and the green transition.[75] The final section of the MoU deals with migration and speaks of 'a holistic approach to migration' that is 'based on respect for human rights'.[76] The EU has committed itself to providing financial support, equipment, training and technical support to strengthen Tunisian border management.[77] On the basis of leaked documents, it seems that only five percent of the funds committed under the MoU has been used for the protection of migrants in Tunisia.[78] At the same time, over sixty percent has been allocated to the police, search and rescue, returns and border management equipment.[79]

Similar to the EU-Turkey Statement, the EU-Tunisia MoU circumvents control by the EP because it has not been negotiated as a legally binding international agreement.[80] There was therefore no obligation to fully inform the Parliament and neither did the EP have to consent to the MoU. It also raises issues relating to judicial controls, since the CJEU cannot adjudicate on soft law measures and it is doubtable whether the Court would consider the MoU to be a binding – and thus reviewable – agreement.[81]

This has consequences for the protection of migrants' fundamental rights, since it is unclear how the EU and Tunisia aim to execute their human rights-based approach to migration. There is no monitoring mechanism in place, which makes it very difficult for the European Commission to assess whether fundamental rights are respected.[82] The facts suggest that the MoU has done little to improve the situation for migrants, as arbitrary detention, violence against migrants and collective expulsions – leading to the deaths of at least 27 migrants – have taken place after the conclusion of the MoU.[83]

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[74] EU-Tunisia MoU (n 9).
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Strik and Robbesom (n 44) 12.
[79] Ibid.
[80] EU-Tunisia MoU (n 9); Strik and Robbesom (n 44) 15.
[81] Strik and Robbesom (n 44) 19: Whether the Court would classify the MoU as a binding agreement depends on content and context of the MoU and the intentions of the parties. The neutral language of the text of the MoU and the lack of explicit conditionality and the nature of the performances under the MoU could stand in the way of classifying the MoU as a binding agreement.
[82] Ibid. 13; Council of Europe Commissioner for Human Rights. 'European states' migration co-operation with Tunisia should be subject to clear human rights safeguards' <https://www.coe.int/en/web/commissioner/-/european-states-migration-co-operation-with-tunisia-should-be-subject-to-clear-human-rights-safeguards> accessed May 23, 2024.
[83] Human Rights Watch. 'Tunisia: No Safe Haven for Black African Migrants, Refugees' <https://www.hrw.org/news/2023/07/19/tunisia-no-safe-haven-black-african-migrants-refugees> accessed 23 May 2024; AP News. 'Tunisian minister concedes 'small groups' of migrants were pushed back into desert no man's land' <https://apnews.com/article/tunisia-migrants-desert-interior-minister-pushback-81455ce286edc87d3da4ebd9438a2609> accessed 23 May 2024; AP News. 'At least 27 migrants found dead in the desert near Tunisian border, Libyan government says' <https://apnews.com/article/libya-migrants-deaths-desert-tunisia-d1030c82521aa6c32095f9098c0f9f35> accessed 23 May 2024.

2.3.3 The EU-Egypt Strategic and Comprehensive Partnership

The EU-Egypt Partnership was announced in March 2024 and sealed at a meeting of Commission President Von der Leyen with Egyptian President Sisi and presented in the form of a Joint Declaration on the European Commission website.[84] The Partnership covers a wide array of economic issues, climate change, security and migration.[85] In the context of migration management, the EU provides funding to combat migrant smuggling and human trafficking, strengthening border management and for 'ensuring dignified and sustainable return and reintegration'.[86] It stipulates that Egypt and the EU will work on the promotion of human rights in its political relations but it makes no reference of respect for fundamental rights in the context of migration.[87] Through the Partnership, the EU will distribute approximately €7 billion to Egypt.[88] Of these funds, €200 million will be reserved for 'fighting smuggling and trafficking' and 'strengthening border management' by Egypt.[89]

By opting for an informal agreement and thereby circumventing the formal treaty-making procedure, the European Parliament is once again excluded from exercising scrutiny over the conclusion of the Partnership. In this way, the jurisdiction of the Court of Justice over the Partnership and the commitments thereunder is excluded as well. This is problematic in light of the human rights situation in Egypt, with Human Rights Watch reporting arbitrary detention, detention of children, violation of the principle of non-refoulement and violence against asylum seekers in a letter to the European Commission.[90]

2.3.4 Conclusion

What follows from the discussion of these three instruments is that they exemplify the aspects of externalisation described in section 2.2. Especially in the cooperation with Tunisia and Egypt, it can be seen that responsibility for border management and the reception of migrants is shifted towards these states, which is supported and sponsored by the EU. In the case of Turkey, we can see that funds have been provided to Turkey to take house asylum seekers. In all three cases, the objective has been to prevent migrants coming from or passing through these countries from travelling to Europe and requesting asylum by creating an external border beyond the territorial borders of EU Member States.

Above that, we have seen that informal arrangements have significant downsides in terms of democratic control by the European Parliament and judicial controls by the Court of Justice and that they are lacking in the protection of migrants' fundamental rights. For the EU-Turkey

[84] EU-Egypt Strategic Partnership (n 10).
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] European Commission, 'Proposal for a Council Decision on providing short-term macro-financial assistance to the Arab Republic of Egypt', COM(2024) 460 final.
[89] EU Neighbours South. 'EU-Egypt Strategic and Comprehensive Partnership' <https://south.euneighbours.eu/wp-content/uploads/2024/03/STR_EU-EG_partnership.pdf.pdf> accessed 20 June 2024.
[90] Human Rights Watch (n 18).

Statement, this firstly relates to the disputed authorship of the instrument but even if it would have been conceived as an – informal – agreement by the European Council, it would still have eluded democratic and judicial controls. For the EU-Tunisia MoU and the EU-Egypt Partnership, the authorship is undisputed but democratic and judicial controls are circumvented as well because of the informal nature of the instruments. The documented fundamental rights violations that have taken place as a consequence of migration arrangements stand at odds with the EU's commitment to create an asylum policy that respects fundamental rights, specifically those enshrined in the Geneva Convention and the ECHR.[91]

2.4 Externalisation and informalisation at the Member State level

This section will turn to externalisation and informalisation carried out at the Member State level to see whether the issues that exist at the EU level arise on the bilateral plane as well. The cooperation between Italy and Libya will serve as an example.

The cooperation between Italy and Libya in the field of migration management started at the beginning of the century and was formalised through the 2008 Treaty on Friendship, Partnership, and Cooperation.[92] The migration paragraph provided for control of the Libyan coast by mixed crews on boats provided by Italy, as well as for land border control with the help of a satellite detection system funded by Italy and the EU.[93] The agreement was suspended in 2011 due to civil unrest in Libya.[94] In 2017, the cooperation was revitalised through the conclusion of an MoU.[95] Through the MoU, the border management commitments made in the 2008 Treaty were renewed and temporary reception facilities, funded by Italy but under Libyan jurisdiction were established.[96] Further, Italy and Libya committed themselves to interpreting and applying the MoU in line with their (human rights) obligations under international law.[97] Interestingly, the MoU seems to equate all types of migrants by referring to the 'clandestine immigration phenomenon' and illegal (im)migration, thereby ignoring the dissimilarity of the legal status of migrants.[98] The MoU has been endorsed by the EU in the 2017 Malta Declaration and renewed in 2020.[99]

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[91] Alfredo Dos Santos Soares and Sophie Beck-Mannagetta, 'EU Cooperation with Third Countries on Migration and Asylum: The Case of Libya Revisited' in Wybe Douma and others (ed), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press: The Hague 2021) 370-371.
[92] Pijnenburg (n 6) 153.
[93] Natalino Ronzitti. 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2010) 1(1) Bulletin of Italian Politics 129-130.
[94] Pijnenburg (n 6) 153.
[95] Italy-Libya MoU (n 29).
[96] Italy-Libya MoU (n 29) Article 2, Article 4.
[97] Italy-Libya MoU (n 29) Article 5.
[98] Anja Palm. 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe' (2017) EU Immigration and Asylum Law and Policy 1.
[99] Council of Europe Commissioner for Human Rights. 'Commissioner calls on the Italian government to suspend the co-operation activities in place with the Libyan Coast Guard that impact on the return of persons intercepted at sea to Libya' <https://www.coe.int/es/web/commissioner/-/ommissioner-calls-on-the-italian-government-to-suspend-the-co-operation-activities-in-place-with-the-libyan-coast-guard-that-impact-on-the-return-of-p> accessed May 23, 2024; Pijnenburg (n 6) 153; Council of the European Union. 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central

In spite of the reference to the protection of fundamental rights, violations still occur. The most recent Report on the UN Support Mission in Libya describes multiple instances of expulsions and pushbacks by the Libyan authorities and calls the human rights situation in Libya of 'serious concern'.[100] Similar practices have also been described by NGOs and the CoE Commissioner for Human Rights.[101] Transferring responsibility for migration management to the Libyan authorities thus entails serious fundamental rights risks, such as the risk of arbitrary detention, inhumane treatment and infringement of the principle of non-refoulement.[102]

Similar to EU-Turkey, EU-Tunisia and EU-Egypt instruments, the aspects of externalisation are present here. Italy wants to prevent migrants coming from Libya from entering its territorial waters, which would trigger Italian jurisdiction. Therefore, Italy funds the Libyan coast guard and supports land border control forces to whom the responsibility for intercepting migrants is transferred. The responsibility for housing migrants is also transferred to Libya by funding reception facilities under Libyan jurisdiction.

A further similarity is that democratic control at the national level is weaker than under a formal treaty-making procedure. The conclusion of the MoU, nor its renewal, have been formally approved by the national parliaments.[103] Neither has litigation at the national level, partly based on the MoU's failure to comply with fundamental rights, been successful in challenging the MoU.[104] At the international level, actions by the Libyan coast guard, that were allegedly enabled by funding and assistance as a part of the MoU, are currently challenged before the European Court of Human Rights in *S.S. and Others v. Italy*.[105] Suffice it to say here that, in this case, it is not the MoU itself that is challenged but a concrete action – a pullback – that might be considered a consequence of the MoU.[106] It can therefore not truly be seen as judicial control over the MoU itself, neither is it judicial control within the context of EU law.

Mediterranean route' <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/pdf> accessed 23 May 2023 point 6(i).

[100] United Nations Security Council, 'United Nations Support Mission in Libya - Report of the Secretary General' 51-54.

[101] 'Third party intervention before the European Court of Human Rights by the Council of Europe Commissioner for Human Rights in Application No. 21660/18 (*S.S. and Others v. Italy*)' <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d>.

[102] Santos Vara and Pascual Matellán (n 51) 320; Pijnenburg (n 6) 153.

[103] Yasha Maccanico. 'Analysis: Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces' <https://www.statewatch.org/media/documents/analyses/no-357-renewal-italy-libya-memorandum.pdf> accessed 23 May 2024.

[104] Majd Achour and Thomas Spijkerboer. 'The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya' <https://eumigrationlawblog.eu/the-libyan-litigation-about-the-2017-memorandum-of-understanding-between-italy-and-libya/?print=print> accessed May 23, 2024.

[105] 'Application No. 21660/18 (*S.S. and Others v. Italy*) before the European Court of Human Rights' <https://hudoc.echr.coe.int/eng?i=001-194748>.

[106] Andreina De Leo. 'S.S and Others v. Italy: Sharing Responsibility for Migrants Abuses in Libya' <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya> accessed May 23, 2024.

2.5 Conclusion

After briefly sketching the relevant internal legal framework, this chapter has first dealt with the question what must be understood by externalisation. In sum, externalisation takes place when the EU or Member States cooperate with third countries by transferring control to third countries or their organs with the consequence of shifting borders. The aim of such cooperation is to prevent migrants from reaching the EU's territory. Shifting borders can be understood as creating a legal fiction of a border where there is, in practice, none and by extending a state's migration management beyond its territorial borders. This includes transferring control to third countries and their organs, as can be seen in the cases of Libya and Tunisia, where the responsibility for border control has been transferred to the Libyan and Tunisian coast guards. In recent years, externalisation in the EU context, as exemplified by the types of cooperation discussed in this chapter, has therefore taken the form of externalising border control.

Second, informalisation has been defined as a process whereby the EU and, in this case, Italy, have turned away from 'proper' international agreements and increasingly turned to cooperation with third countries on the basis of soft law instruments, such as Statements, MoU's and Strategic Partnerships. We have also seen that these types of informal cooperation, apart from leading to externalisation, have eluded democratic and judicial controls by bypassing the European and national parliaments and being exempted from scrutiny by the CJEU and national courts. Further, these informal instruments have had a negative impact or have at the least done little to improve the protection of migrants' fundamental rights. Because of – or in spite of – all the instruments discussed in this chapter, the right to asylum and the right to effective judicial protection have been violated, as well as the principle of non-refoulement. Further, in Tunisia, violence against migrants and collective expulsions to Libya have taken place and, in Libya, inhumane treatment of migrants has been reported.

Chapter 3: Union loyalty

In this chapter, I will lay down a theoretical framework on the principle of sincere cooperation in the external dimension of EU law. Since there is no case law by the CJEU specifically on the compatibility of migration agreements with the principle of Union loyalty, the focus of this chapter will be on the more 'general' functioning of the principle of Union loyalty. From the case law, the obligations under Union loyalty will follow.

The principle, laid down in Article 4(3) TEU, is of general application, which means that the duty applies regardless of the nature of the EU's competence.[107] It requires Member States to ensure compliance with the EU Treaties, facilitate the achievement of the Union's tasks and to abstain from measures that might jeopardise these objectives.[108] Neframi conceives it as 'an obligation incumbent on Member States to act in the interest of the Union' and Eckes identifies 'a comprehensive duty of EU loyalty' that reflects the 'distinctive meaning of EU membership'.[109] Similarly, Molinari views sincere cooperation as an obligation of good faith, which entails the respect of Treaty obligations.[110]

In different fields of EU law, different aspects of Union loyalty come to the fore depending on the particular Union interest at stake.[111] Neframi identifies four, two of which are particularly relevant in the present context: first, the requirement of unity of the external representation of the EU and the Member States, and, second, the preservation of the effectiveness of EU law.[112] In this chapter, I will flesh out what the principle of Union loyalty requires from Member States for promoting these objectives. Section 3.1 will discuss the duty to inform and consult. The duty of abstention will be the topic of section 3.2. Section 3.3 will provide an overview of the obligations imposed on Member States under the principle. Section 3.4 will conclude the chapter by concisely laying down the criteria distilled in this chapter for application to the Italy-Albania Protocol.

3.1 Duty to consult and inform

In its case law regarding the obligations for Member States under the principle of Union loyalty, the CJEU has developed duties of action and abstention. The duty of action entails a duty to consult and inform and will be discussed in this section. The duty of abstention is the subject of the next section. Given that these duties are often discussed together by the Court, there is some degree of overlap between the two sections but to be able to clearly lay down the different obligations, it is best to discuss the duties separately.

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[107] CJEU 18 July 2007, Case C-266/03, ECLI:EU:C:2007:518 (*Commission v Luxembourg)* 58; CJEU 14 October 2004, Case C-433/03, ECLI:EU:C:2004:586 (*Commission v Germany*) 64

[108] Klamert (n 21) 1.

[109] Neframi (n 23) 324-325; Christina Eckes. 'Disciplining Member States: EU Loyalty in External Relations' (2020) 22 Cambridge Yearbook of European Legal Studies 85.

[110] Caterina Molinari. 'Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?' (2021) 269-270.

[111] Neframi (n 23) 325.

[112] Ibid.

The first reference to a duty of action can be found in the *Kramer* case, that took place in the context of the participation of the Netherlands in the North-East Atlantic Fisheries Convention.[113] In this case, the question of the obligations imposed on Member States when acting outside the framework of the Community arose.[114] The Court, after citing Article 4(3) TEU, concluded that the Member States participating in the convention were under the obligation to proceed by common action within the bodies of the convention.[115] Without further clarification as to the meaning of proceeding by common action in the specific context, this amounts to little more than a duty to cooperate closely. Not much later, in 1981, the Court introduced the term 'special duties of action and abstention' to refer to the obligations imposed on Member States and this is the context in which the duty to inform and consult must be seen.[116]

The CJEU reintroduced the duties of action – and abstention – in the *Inland Waterways* cases, which concerned infringement procedures brought by the Commission against Luxembourg and Germany.[117] The two Member States had negotiated, concluded, ratified and implemented bilateral agreements with several Central European countries on inland waterways transport.[118] The Commission argued that Luxembourg and Germany had violated Article 4(3) TEU because the Council had already granted the Commission a mandate to negotiate an agreement on behalf of the Community.[119] According to the Court, this marked the start of a common concerted strategy.[120]

In its assessment, the Court connected the Council mandate given to the Commission to the duty of close cooperation between the Member States and the institutions to ensure the coherence and consistency of the Community's external action.[121] Regarding the duty of action, this means that Luxembourg and Germany should have informed and consulted with the Commission to avoid interference with the Commission's actions.[122] Interestingly, the Court took a principled approach by not discussing the question whether the Member States' actions had actually interfered with the Commission's negotiations.[123] It was at this point still unclear whether the breach of Article 4(3) TEU was the consequence of the failure to consult and inform the Commission, meaning that the bilateral agreements would have been compliant with EU law if they had been notified to the Commission.[124] The ambiguity remained because the

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[113] CJEU 14 July 1976, Joined Cases 3, 4, and 6/76, ECLI:EU:C:1976:114 (*Cornelis Kramer and others*).
[114] Ibid. 9.
[115] Ibid. 44-45
[116] CJEU 5 May 1981, Case 804/79, ECLI:EU:C:1981:93 (*Commission v United Kingdom*) 28.
[117] Case C-266/03 (n 107) 16-21; Case C-433/03 (n 107) 16-24.
[118] Ibid.
[119] Case C-266/03 (n 107) 53; Case C-433/03 (n 107) 55.
[120] Case C-266/03 (n 107) 60; Case C-433/03 (n 107) 66.
[121] Case C-266/03 (n 107) 59-61; Case C-433/03 (n 107) 65-70.
[122] Case C-266/03 (n 107) 60; Case C-433/03 (n 107) 66.
[123] Eeckhout (n 25) 248.
[124] Andrés Delgado Casteleiro and Joris Larik. 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 European Law Review 522.

judgment denounced Luxembourg and Germany for proceeding with the bilateral agreements 'without having cooperated or consulted with the Commission'.[125]

Some clarity was provided in *MOX Plant,* which concerned an infringement procedure brought by the Commission against Ireland for not referring a dispute with the United Kingdom regarding the construction of a nuclear fuel production plant to the CJEU.[126] Instead, Ireland had referred the dispute to an Arbitral Tribunal established under the Convention for the Protection of the Marine Environment of the North-East Atlantic.[127] In the view of the Commission, Ireland had violated Article 4(3) TEU by bringing arbitral procedures without informing or consulting with the European institutions.[128] After repeating its standard paragraph on the obligation of close cooperation, the Court turned to the legal context in which the dispute arose, the protection of the marine environment, a shared competence.[129] The Court considered that the duty to cooperate closely was particularly relevant in areas in which the "respective areas of competence of the Community and the Member States are liable to be closely interrelated".[130] In that context, Ireland should have consulted with the Commission before turning to the Arbitral Tribunal.[131] Similar to the *Inland Waterways* cases*,* it seems that Ireland's procedure before the Arbitral Tribunal would not have violated the principle of sincere cooperation if it had consulted with the Commission before initiating the procedure.

From these cases, it follows that the duty to consult and inform serves as a specification of a more generic duty of close cooperation. The case law, beginning with *Kramer*, illustrates that Member States must align their external action with the interests of the EU, especially when operating outside the EU framework. The *Inland Waterways* cases further clarify the duty of action by demonstrating that Member States must inform and consult with the Commission to ensure the unity of the EU's external representation and mitigate the risk of interference with action by the EU itself. Similarly, *MOX Plant* emphasises the importance of the duty to inform and consult in areas of shared competences, where the actions of Member States and the EU are closely intertwined. Ireland's decision to bypass the CJEU and refer the dispute to an Arbitral Tribunal without informing and consulting with the Commission thus constituted a breach of the principle of Union loyalty. Since Ireland had circumvented the jurisdiction of the CJEU, the effective application of EU law was jeopardised.

3.2 Duty of abstention

In the previous section, we have seen that Member States can be required to communicate with the Commission before undertaking autonomous external action. This can be necessary to ensure that the unity of the EU's external representation or the effectiveness of EU law is guaranteed. In the *Inland Waterways* and *MOX Plant* cases, it could already be seen that a duty

[125] Case C-266/03 (n 107) 66; Case C-433/03 (n 107) 73.
[126] CJEU 30 May 2006, Case C-459/03, ECLI:EU:C:2006:345 (*Commission v Ireland / MOX Plant*).
[127] Ibid. 30, 49-59.
[128] Ibid. 172.
[129] Ibid. 174-176.
[130] Ibid.176.
[131] Ibid. 179-182.

to inform and consult is not always sufficient to protect the objectives of unity and effectiveness. The question then arises when the principle of Union loyalty imposes a duty of abstention on Member States.

A framework for this has been developed in *Commission/Austria (BIT)*, concerning bilateral investment treaties concluded by Austria with third countries, which the Commission deemed incompatible with the provisions on the free movement of capital.[132] The BITs guaranteed reciprocal free transfer of payments related to capital investments.[133] At the same time, Articles 64-66 TFEU give the Council several opportunities to adopt restrictions on capital movements, with which Austria would have to comply.[134] The BITs however did not allow for the possibility to swiftly adopt these restrictions vis a vis the third partner countries.[135] The case therefore revolved around the question whether Austria was under an obligation under Article 351 TFEU to eliminate these incompatibilities.[136]

In his Opinion, AG Maduro argued that that obligation in Article 351 TFEU was a specific expression of 'the duty of loyal cooperation'.[137] Under that duty, he continued, Member States are not allowed to frustrate any form of action by the Union, even if the EU has not yet exercised that competence.[138] Even a 'potential' objective may not be jeopardised by Member State action.[139] He then mitigates this potentially far-reaching pre-emption of Member State action by arguing that this is only necessary when the international obligations of Member States are liable to jeopardise the effectiveness of (possible future) EU legislation.[140] Whether this is the case depends on the nature the international obligations and the affected EU competences.[141] For instance, international obligations are liable to seriously compromise the effectiveness of EU law when the EU is hindered in exercising its competence or when the objectives of EU legislation are jeopardised.[142] By taking this into account, a balance can be struck between the importance of the effective application of EU law and Member States autonomous interests. Pre-empting all Member State action in an area where the EU does not have exclusive competence without having regard for the possible consequences for Member States would be overly restrictive. This could amount to an all-encompassing competence for the EU, which would disregard the principle of conferral.

The somewhat ambiguous judgment of the CJEU in *Inland Waterways* can be explained through this framework. From the judgment itself, it is not entirely clear whether Germany and

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[132] CJEU 8 April 2008, Case C-205/06, ECLI:EU:C:2008:180 (*Commission v Austria / BIT*). Part of a series of cases referred to as the *BIT-cases*.
[133] Ibid. 3.
[134] Ibid. 16-17.
[135] Ibid. 32.
[136] Ibid. 17.
[137] CJEU 8 April 2008, Case C-205/06, ECLI:EU:C:2008:180 (*Commission v Austria / BIT*), Opinion of Advocate General Maduro 33.
[138] Ibid. 38-39.
[139] Ibid. 39.
[140] Ibid. 40
[141] Ibid.
[142] Ibid. 49-54.

Luxembourg were only under a duty to consult and inform or whether the agreements would have been compatible with Union loyalty if the Member States would have communicated with the Commission. However, given the subject matter of the agreements, namely the same as covered by the Commission's negotiations, tensions were likely to occur. Germany and Luxembourg had assumed international obligations that were liable to contradict the EU's agreements once the latter would have been concluded, thereby jeopardising the effectiveness of future EU legislation. At the same time, the unity of the EU's external representation was jeopardised because of the two Member States undertaking autonomous action outside the framework of the Commission's negotiations.

In *MOX Plant*, there was some ambiguity given that the phrasing was similar to *Inland Waterways* because the Court highlighted Ireland's decision to refer the case to the Arbitral Tribunal without informing and consulting.[143] Was there only a duty to consult and inform or was Ireland under a more stringent duty of abstention? Since Ireland had also violated the exclusive jurisdiction of the CJEU, it is highly doubtful that it would have passed the test merely by informing the Commission.[144] This is because the violation of the CJEU's jurisdiction in favour of a tribunal established under international law leads to a circumvention of EU rules, meaning that Ireland's actions were liable to adversely affect the effectiveness of EU law.

3.3 The sliding scale of Member States' obligations

In the previous sections, we have seen that the principle of Union loyalty plays an important role in the external sphere, as Member States can be required to cooperate closely with the Union's institutions, for instance by informing and consulting them, as well as by refraining from taking certain external action. This section will collect the insights from the previous sections and show the sliding scale of obligations imposed on Member States by the principle of Union loyalty. This will provide for a framework by which Member States' obligations under Union loyalty can be assessed. By sliding scale, I mean that the extent to which Union loyalty limits autonomous Member State action is dependent on the degree to which the objectives of effectiveness and unity are affected by Member State action.

First is the duty to consult and inform. An example is provided by *MOX Plant*, where Ireland violated the duty of cooperation by starting a dispute settlement procedure without informing or consulting with the Commission.[145] It was also here where the Court linked the stringency of the obligations under Union loyalty to the interrelatedness of the competences of the EU and the Member States, which seems to hint that the duty to cooperate is more intense where areas of competence overlap. Therefore, we can say that duties of action – by informing and consulting – are preventive rules that give the EU institutions the possibility to assess whether autonomous Member State action could jeopardise the unity of the EU's external representation

[143] Case C-459/03 (n 125) 179-182.
[144] Delgado Casteleiro and Larik (n 124) 522, 530.
[145] Case C-459/03 (n 125).

or the effectiveness of EU law.[146] In terms of stringency, these duties of action are relatively modest since they are merely procedural and they do not yet require Member States to abstain from undertaking certain external action.

A duty to consult and inform, however, is often insufficient to guarantee these two objectives and that is where duties of abstention come into play. This can be seen in the *Inland Waterways* cases where Germany and Luxembourg were under the obligation to refrain from concluding the agreements. The start of the common concerted strategy meant that autonomous action could jeopardise the unity of the EU's external representation and the effectiveness of EU law.[147] If Germany and Luxembourg had assumed international obligations in an area in which the EU itself was negotiating an agreement, incompatibilities could arise. In such a case, Member State action can interfere with the EU's objectives and should therefore be considered prohibited.[148] This is the most stringent duty imposed on Member States and it is in any case applicable when there is a common concerted strategy, for instance once a negotiating mandate has been given to the Commission.

In other cases where the unity of the EU's representation or the effectiveness of EU law is potentially jeopardised but there is no common concerted strategy, such a far-reaching obligation must be mitigated. Pre-empting all Member State action in an area where the EU has not undertaken any form of action seems at odds with the division of competences within the Union. Whether Member States are under a duty of abstention should depend on the nature of the international obligations of the Member State and the affected competences,[149] as well as effects on the effectiveness of EU law or the unity of the EU's external representation. To this, we can also add the extent to which the EU has laid down a legislative framework, since an extensive legal framework is more likely to be affected if other obligations are assumed by a Member State. If autonomous Member State action, given these criteria, would indeed negatively affect the EU's tasks and objectives, the duty of loyalty can entail an obligation of result.[150]

3.4 Conclusion

The room for autonomous Member State action is dependent on the risk that it poses for the unity of the EU's external representation and the effectiveness of EU law. Member States' obligations under the principle of Union loyalty are therefore best represented by a sliding scale. This means that the obligations imposed on Member States are more stringent when the risk of affecting the unity of the EU's external representation or the effectiveness of EU law is greater.

[146] Peter van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in Varju, Marton (ed), *Between Compliance and Particularism* (Springer, Cham 2019) 293.
[147] Case C-266/03 (n 107), Case C-433/03 (n 107).
[148] Ibid.
[149] Case C-205/06, Opinion of AG Maduro (n 136) 40.
[150] Van Elsuwege (n 146) 293.

When acting externally, Member States are required to cooperate with one another and the EU institutions. This amounts to a duty to inform and consult with the Commission when there is a possibility that the unity or the effectiveness are adversely affected. The risk thereof is, for instance, present, when there is a degree of overlap in areas of shared competence where both the EU and Member States act. One step further on the scale is the duty of abstention to refrain from concluding an international agreement altogether. Such a duty exists when there is a common concerted strategy or when the nature of the international obligations and the affected competences have the effect of adversely affecting unity or effectiveness.

The risk of adversely affecting the unity of the EU's external representation is present especially when there is a common concerted strategy within the EU from which individual Member States diverge. The consequences of autonomous Member State action for the effectiveness of EU law are in particular dependent on the extent to which there is an internal legislative framework under EU law. When a Member State assumes international obligations vis a vis a third country in a field extensively regulated by EU law, there is an increased risk that these international obligations conflict with the obligations of the Member State under EU law.

Chapter 4: Characterising the Italy-Albania Protocol

In the previous chapters, we have seen what externalisation and informalisation in the EU context and their consequences are. We have also seen that the principle of Union loyalty lays down a sliding scale of obligations for Member States to comply with to ensure the unity of the EU's external representation and the effective application of EU law. These concepts form the framework for the analysis of the Italy-Albania Protocol in chapter 5. Before that, the Protocol must be characterised. This chapter will first lay out its context, objectives and provisions. Then, the chapter will follow a two-step approach. First, section 4.2 will assess whether the Protocol can be seen as a form of externalisation and informalisation as discussed in chapter 2. Then, section 4.3 will answer the question whether the concerns that arose as a consequence of the arrangements discussed in chapter 2 arise as a consequence of the Protocol as well.

4.1 The context, objectives and provisions of the Protocol

Cooperation on migration management and border control between Italy and Albania dates back to the early 1990s as a reaction to increasing flows of irregular migrants to the EU from Albania.[151] Through two military operations and joint border control arrangements, Italian border controls expanded into Albanian territorial waters and Albanian territory.[152] Further, in 1995, Italy and Albania concluded the Treaty on Friendship and Cooperation, which covered, economic, scientific, cultural and migratory aspects.[153] Since the early 2000s, following increased capacity of Albania's own boarder guard, Italian presence has diminished but not disappeared completely, as Italy still has several naval bases and an operational police mission in Albania.[154] More recently, in 2019, Frontex launched a mission in Albania under which over a hundred armed Frontex officials that have been endowed with full 'executive powers' and immunity from Albania's criminal jurisdiction are present in Albania.[155] The Italy-Albania Protocol for the strengthening of collaboration in migration matters signed on 7 November 2023 by Prime Ministers Giorgia Meloni and Edi Rama can therefore be seen as a continuation and intensification of the long-standing cooperation between the two countries.[156]

Initially, the Protocol was presented as a political agreement that did not require ratification by the Italian parliament but after critique that ratification was a constitutional requirement, the Italian government decided to put the Protocol up to a vote after all.[157] On 24 January 2024, the Italian lower chamber approved the Protocol, dismissing proposals to strengthen the protection

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[151] Derek Lutterbeck, 'Border Encroachments: Comparing Cooperative Border Controls Along the EU's External Frontier' (2023) 39 Journal of Borderlands Studies 6.
[152] Ibid. 6.
[153] Treaty of Friendship and Cooperation between the Italian Republic and the Republic of Albania, signed 13 October 1995.
[154] Lutterbeck (n 151) 6.
[155] Ibid.
[156] Italy-Albania Protocol (n 13).
[157] InfoMigrants. 'Italy: Parliament to ratify Albania deal to process asylum seekers' <https://www.infomigrants.net/en/post/53392/italy-parliament-to-ratify-albania-deal-to-process-asylum-seekers> accessed May 29, 2024.

of fundamental rights in the Protocol.[158] The Italian Senate followed on 15 February 2024.[159] In Albania, the Protocol has been reviewed – and approved – by the Supreme Court after Members of the Albanian Parliament claimed that the Protocol was unconstitutional.[160] Consequently, the Albanian parliament ratified the Protocol on 22 February 2024.[161]

As to the Protocol's objectives, some guidance can be found in the preamble. It refers to 'the problematic deriving from illegal migration', which highlights the 'necessity of cooperation in the framework of management of migratory flows', and 'actions to be taken for preventing irregular migratory flows and human trafficking'.[162] In terms of fundamental rights, the preamble to the Protocol refers to 'accordance with international agreements in the area of human rights and, in particular, in the field of migration' and the 'protection of human rights'.[163] Article 2 summarises the objectives of the Protocol as 'fostering bilateral cooperation (…) in the management of migration flows coming from third countries, in conformity to international and European law'.

Under the Protocol, Italy acquired the right to use two areas located in Albania to establish two 'facilities' for the reception and processing of migrants.[164] During the announcement, PM Meloni said that the facilities should be running by Spring 2024 but construction has been delayed and not been finished at the time of writing.[165] Jointly, the facilities in the Northern Albanian towns of Gjadër and Shëngjin should be able to hold up to three thousand individuals.[166] In the Shëngjin facility, near the town's port, disembarkation, identification and border procedures – including the asylum procedure – will take place, whereas the Gjadër facility is aimed at hosting migrants considered ineligible for asylum.[167] The facilities will be managed by the Italian authorities 'following the applicable Italian and European legislation'

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158 InfoMigrants. 'Italy: Lower house ratifies Italy-Albania migrant deal' <https://www.infomigrants.net/en/post/54766/italy-lower-house-ratifies-italyalbania-migrant-deal> accessed May 29, 2024.

159 Barbie Latza Nadeau. 'Italian Senate passes controversial measure to ship migrants to Albania' <https://www.cnn.com/2024/02/15/europe/italy-senate-migrants-albania-intl/index.html> accessed May 29, 2024.

160 Emma Wallis. 'Albania's top court begins review of asylum deal with Italy' <https://www.infomigrants.net/en/post/54598/albanias-top-court-begins-review-of-asylum-deal-with-italy> accessed May 29, 2024; Fjori Sinoruka. 'Albanian Court Approves Deal with Italy on Processing Migrants' <https://balkaninsight.com/2024/01/29/albanian-court-approves-deal-with-italy-on-processing-migrants/> accessed May 29, 2024.

161 Fatos Bytyci. 'Albanian parliament ratifies migration centres deal with Italy ' <https://www.reuters.com/world/europe/albanian-parliament-ratifies-migration-deal-with-italy-2024-02-22/> accessed 29 May 2024.

162 Italy-Albania Protocol (n 13).

163 Ibid. Preamble.

164 Ibid. Article 4(1).

165 euronews. 'Albania to temporarily host migrants arriving to Italy pending processing of asylum applications' <https://www.euronews.com/2023/11/07/albania-to-host-migrants-arriving-to-italy-pending-processing-of-asylum-applications> accessed May 29, 2024; euractiv. 'Opening of Italy's migrant centres in Albania delayed' <https://www.euractiv.com/section/migration/news/opening-of-italys-migrant-centres-in-albania-delayed/> accessed May 29, 2024.

166 Italy-Albania Protocol (n 13) Article 4(1).

167 Sergio Carrera, Giuseppe Campesi and Davide Colombi, 'The 2023 Italy-Albania Protocol on Extraterritorial Migration Management: A worst practice in migration and asylum policies' (2023) CEPS Paper 3.

and under Italian jurisdiction.[168] Within the facilities, the maintenance of 'law and order and public security' is the responsibility of the Italian authorities.[169]

It does not follow from the text of the Protocol itself which migrants will be taken to Albania for the processing of their asylum application. Article 1 merely mentions that migrants are third-country nationals 'for whom has to be established or has been established the nonexistence of the conditions to entry, stay and reside' in Italy. This implies that migrants already present on Italian territory could be transferred to Albania, in addition to migrants rescued on the Mediterranean Sea.[170] The subsequent Italian implementing law suggests that the migrants taken to Albania will be migrants intercepted by Italian ships in international waters who have no right to stay in Italy.[171] This implies that the Italian authorities will have to determine immediately who does have a right to stay in Italy. Further, no children and pregnant women will be sent to Albania.[172] The migrants will be transferred to and from the facilities by Italian authorities. The responsibility for the maintenance of 'law and order and public security' during land transfers, however, lies with the Albanian authorities.[173]

On the subject of fundamental rights and the treatment of migrants in the facilities, Article 6(7) lays down that Italy must '[undertake] that such treatment respects fundamental human rights and freedoms in accordance with international law'. Concretely, the Protocol only mentions food and healthcare facilities.[174] Further, Italy and Albania claim that they will respect the rights of the defence – and thereby the right to effective judicial protection – by allowing access to the facilities of lawyers, their assistants and international and European agencies, within the limit of Italian, Albanian and European law.[175]

Finally, the period of migrants' stay in Albanian territory is limited to the maximum duration of detention allowed by Italian law.[176] Their presence in Albania is allowed for 'the sole purpose of carrying out border and return procedures and for the time strictly necessary for it'.[177] If these procedures are finished or the maximum period of detention is reached, the Italian authorities must remove the migrants from Albanian territory.[178] Presumably, Italy would ideally send these unsuccessful applicants to countries of origin or transit but given that only

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[168] Italy-Albania Protocol (n 13) Articles 4(2) and 5(1).
[169] Ibid. Article 6(3).
[170] Carrera (n 167) 6.
[171] Law no. 14 of 21 February 2024, "Ratifica ed esecuzione del Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, fatto a Roma il 6 novembre 2023, nonché norme di coordinamento con l'ordinamento interno", Official Gazette no. 44 of 22 February 2024 Article 3.2.
[172] Satvinder S Juss, 'Written submissions for informal video hearing on Bill C.1620' (*camera.it,* 8 January 2024) <https://documenti.camera.it/leg19/documentiAcquisiti/COM01/Audizioni/leg19.com03.Audizioni.Memoria.PUBBLICO.ideGes.26889.08-01-2024-13-57-49.682.pdf> accessed 24 May 2024.
[173] Italy-Albania Protocol (n 13) Article 6(2).
[174] Ibid. Articles 4(6) and 6(7).
[175] Ibid. Article 9(2).
[176] Ibid. Article 9(1).
[177] Ibid. Articles 4(3) and 4(4).
[178] Ibid. Article 9(1).

3270 third-country nationals were returned by Italy to third countries in 2023 on a total of 130565 applications, this is unlikely.[179] It is therefore not clear whether these transfers will be to Italian territory and whether transfers will take place timely.

4.2 Qualifying the Protocol

Now that the content of the Protocol is clear, the question must be answered how the Protocol must be qualified. The instruments discussed in chapter 2 will provide a reference framework, as the EU-Turkey Statement, EU-Tunisia MoU, EU-Egypt Strategic Partnership and the Italy-Libya MoU have shown to be good examples of externalisation and informalisation in the external sphere of the EU's migration policy. This section will first assess whether the Protocol can be qualified as externalisation before turning to the question whether it constitutes informalisation as well.

4.2.1 Does the Protocol qualify as externalisation?

In chapter 2, we have seen that externalisation takes place when the responsibility for migration control is shifted to a third country or organs of a third country[180], with the effect of shifting the state's border outwards.[181]

Regarding the aspect of control, firstly, the Protocol only concerns migrants that are intercepted at sea by Italian ships, who will subsequently be transferred to facilities in Albania by Italian authorities. Italian control continues within the premises of the facilities, which are run under exclusive Italian jurisdiction and within which Italian authorities are responsible for the maintenance of order and security and the treatment of migrants. However, since Albanian authorities are responsible for the order and security during land transfers, there seems to be some form of responsibility sharing but this is not further specified.[182] Leaving aside the unclarity about the control over migrants during land transfers, it is clear that Italy unmistakably exercises control over these migrants during their sea travel to Albania and within the facilities.

This sets the Protocol apart from other externalisation measures, since these commonly result in the transferring of responsibility to other countries and their organs,[183] as is the case with the cooperation with Libya, Turkey, Tunisia and Egypt. In these cases, the cooperation with centred

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[179] Eurostat, 'Third-country nationals returned following an order to leave, by type of return, citizenship, country of destination, age and sex – quarterly data' (*ec.europa.eu,* 12 June 2024) <https://ec.europa.eu/eurostat/databrowser/view/migr_eirtn1__custom_11597150/default/table?lang=en> accessed 21 June 2024; Eurostat, 'Asylum applicants by type, citizenship, age and sex – annual aggregated data' (*ec.europa.eu*, 18 April 2024) <https://ec.europa.eu/eurostat/databrowser/view/migr_asyappctza/default/table?lang=en&category=migr.migr_asy.migr_asyapp> accessed 21 June 2024

[180] Moreno-Lax and Lemberg-Pedersen (n 47) 33.

[181] Schachar (n 53) 7.

[182] Carrera (n 167) 3.

[183] Andreina De Leo. 'On the incompatibility of the Italy-Albania Protocol with EU asylum law' <http://www.sidiblog.org/2023/11/15/on-the-incompatibility-of-the-italy-albania-protocol-with-eu-asylum-law/> accessed May 29, 2024.

around supporting and strengthening their border management forces, such as the coast guard. In Tunisia, the majority of funds was allocated to the police, search and rescue, returns and border management equipment. Similarly, in the deal with Egypt, the EU provided €200 million as a grant for migration management. In Libya, Italy and the EU funded a satellite detection system and provided boats to the coast guard. The Italy-Albania Protocol is different, since it does not focus on capacity building for the Albanian border management forces, neither does it foresee involvement of the Albanian coast guard in executing the Protocol. In contrast, Italy will maintain – for the better part –control and assume responsibility for the migrants that are transferred to and processed in Albania.

Further, the processing of migrants in these facilities leads to the outwards shifting of the border because migrants will be processed under Italian jurisdiction by Italian authorities in a place that does not correspond to Italy's actual territorial borders. The processing in Albania through border procedures creates a legal fiction of a border where there, in practice, is none.[184] Because migrants are intercepted on the high seas and brought to a third state, the idea seems to be that there is no point in time at which the migrants enter Italian territory before their procedure is completed.

The conclusion must therefore be that the Protocol exemplifies certain aspects of the externalisation of migration control by extending Italy's migration management beyond its territorial borders. This is achieved by establishing migrant processing facilities in Albania and through – sea – transfers under Italian jurisdiction, thereby ensuring that Italy maintains substantial control over migrants throughout the process. On the other hand, the procedures under the Protocol diverge from other externalisation measures, which typically involve transferring responsibility to other states and their organs, as can be seen in the EU's collaboration with countries Turkey, Tunisia and Egypt and Italy's cooperation with Libya. It can therefore best be seen as a different type of externalisation that is both further-reaching and more limited than the other externalisation measures discussed in this thesis. It is more far-reaching because it involves the transfer of the whole asylum procedure to the territory of a third state, as opposed to only transferring border management. At the same time, it is more limited since control and responsibility are not transferred towards a third state and remain with Italy.

4.2.2 Does the Protocol qualify as informalisation?

In chapter 2, we have seen that informalisation occurs when states opt for soft law instruments, that do not contain legally binding commitments, rather than formal treaty-making procedures. The Italy-Albania Protocol was initially announced as an informal agreement, a Memorandum of Understanding, before being subjected to – and approved after – a parliamentary ratification procedure in both Italy and Albania.[185] This makes the Protocol different from the other

[184] Carrera (n 167) 3.
[185] Lorenzo Tondo. 'Italy to create asylum seeker centres in Albania, Giorgia Meloni says' <' target='_blank'>https://www.theguardian.com/world/2023/nov/06/italy-to-create-asylum-seeker-centres-in-albania-giorgia-meloni-

instruments discussed in the thesis. Unlike the EU-Turkey Statement, the EU-Tunisia MoU, the EU-Egypt Strategic Partnership and the Italy-Libya MoU, the Protocol constitutes an international agreement containing binding commitments under international law.

What also sets the Protocol apart from these instruments is the fact that the national parliaments have been able to exercise democratic control over the Protocol. In both Italy and Albania, the ratification of the Protocol has taken place through the adoption of legislation. This also allows national courts to exercise jurisdiction over the Protocol because the implementing legislation can be challenged before a court. In Albania, the Protocol itself has also been challenged before the Albanian Supreme Court. It can therefore not be said that the Protocol constitutes an informal agreement that circumvents judicial controls.

4.3 Consequences of the Protocol

In the previous section, we have seen that the Protocol does not qualify as an informal agreement and that it is different from the externalisation measures employed by the EU with Turkey, Tunisia and Egypt and by Italy with Libya. This section revolves around the question whether the concerns that arose as a consequence of these arrangements will arise as a consequence of the Protocol as well. At the EU level, externalisation and informalisation have led to migrants being prevented from reaching the territory of EU Member States, as well as to of fundamental rights violations.

Similar to the informal agreements already discussed, fundamental rights violations are a realistic prospect. This starts with the Protocol's focus on 'illegal migration' on the one hand, and its generic references to 'international agreements in the area of human rights and (…) in the field of migration', as well as 'respect for fundamental human rights and freedoms' on the other. At first sight, the references seem positive but, as we have seen, the track record of such formulations in preventing fundamental rights violations is shaky at best. This can be explained by a lack of clearly formulated human rights standards, monitoring tools, and enforcement measures in case of violations.[186] For instance, the Protocol could have referred to concrete measures that would be taken and services that would be made available to give clarity as to the level of treatment of migrants in the facilities. This would have made it easier to monitor and subsequently ensure that treatment would be in full compliance with migrants' fundamental rights.

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says#:~:text=Italy%20to%20create%20asylum%20seeker%20centres%20in%20Albania%2C%20Giorgia%20Meloni%20says,-This%20article%20is&text=Italy's%20far%2Dright%20government%20has,Tirana%20to%20manage%20migration%20flows.> accessed 29 May 2024.

[186] This difficulty comes to the fore in other fields of international law as well, for instance with EU trade agreements with third states, see Nicolas Hachez, ''Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way that helps Human Rights?' (2015) 53 Cuadernos Europeos de Deusto 91 and Francesca Martines, 'Human Rights Clauses in EU Agreements' (2016) 5 CLEER Papers 37.

Further, it is doubtable whether, as Article 9(2) of the Protocol states, the rights of the defence – and the right to effective judicial protection – can sufficiently be guaranteed in the facilities.[187] This would require migrants in the facilities to have prompt access to trusted legal representation and a competent interpreter, which is especially difficult during the identification procedure in the first few hours after arrival.[188] It is difficult to imagine how Italy would be able to guarantee a sufficient number of lawyers and interpreters, given that major problems with the accessibility of legal aid for migrants exist in Italy.[189] If these problems persist on Italy's own territory, it is doubtable whether Italy will manage to sufficiently address these issues in a third country and uphold migrants' procedural rights.

Another issue is that of disembarkation of vulnerable migrants. It is likely that this will take place on Italian territory, meaning that the 'regular' migrants would remain on board while the vulnerable migrants would be disembarked. The alternative, transferring vulnerable migrants to another ship on the high seas, seems far-fetched, given the practical and logistical difficulties, financial expenses and the condition of the vulnerable migrants.[190] Under Article 18 of the Charter, migrants have the right to apply for asylum. Article 3(1) of the Asylum Procedures Directive further specifies that the APD applies to 'all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States'. This therefore applies to 'regular' migrants, who have the right to remain in Italian territory, at the border or in transit zones for the duration of the processing of their application under Article 9 of the APD.[191] Selective disembarkation, whereby only vulnerable migrants would be disembarked on Italian territory would therefore be a violation of the Charter and the asylum acquis.

If Italy were to find an alternative method whereby migrants do not enter into Italian territory, this would constitute an attempt to shift its border outwards. Keeping migrants out of Italian territory and processing them in Albania would amount to an attempt by Italy to circumvent the territorial scope of the EU's secondary asylum acquis and its obligations thereunder. In the cases of Turkey, Libya, Tunisia and Egypt, the EU funds third countries to strengthen their border management to ensure that migrants do not enter into EU territory, thereby trying to circumvent the territorial scope of EU asylum rules. In terms of effect, the case of Albania is quite similar, with the main difference being that it is Italy itself that would ensure that the migrants do not enter into its territory. In that regard, the Protocol can best be seen as a variation on the standing practice of externalising migration control by the EU and Italy.

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[187] Articles 47 and 48 EU Charter.
[188] Carrera (n 167) 13.
[189] Katia Bianchini, 'Legal Aid for Asylum Seekers: Progress and Challenges in Italy' (2011) 24 Journal of Refugee Studies 390–410.
[190] Amnesty International. 'Amnesty International Public Statement: The Italy-Albania Agreement: Pushing Boundaries, Threatening Rights' <https://www.amnesty.org/en/documents/eur30/7587/2024/en/> accessed 30 May 2024.
[191] Directive 2013/32 (n 2) Article 2(p).

4.4 Conclusion

In conclusion, while the Italy-Albania Protocol does not qualify as an informal agreement due to its legally binding nature and the ratification by both the Italian and Albanian parliaments, it still raises concerns that are similar to those that arise from the previously discussed informal agreements. The Protocol is insufficiently equipped to uphold fundamental rights standards because of the vague nature of the commitments enshrined in the Protocol. Its focus on 'illegal migration' and vague references to human rights commitments can be seen in informal instruments as well. Its lack of specific fundamental rights safeguards and enforcement mechanisms cause a risk of inadequate protection of migrants, for instance in terms of standards of treatment, the right to asylum, the rights of the defence and the right to effective judicial protection. Where Italy has committed to protecting a specific fundamental right, such as the rights of the defence, it is highly doubtable whether Italy will be able to guarantee this right in practice. At the same time, the Protocol is an attempt to circumvent the territorially limited scope of EU's secondary asylum acquis. Therefore, even though the Protocol is a formal agreement, the concerns that arise as a consequence of externalisation and informalisation at the EU level are quite similar to those arising from the Protocol.

Chapter 5: The Protocol vis a vis Union loyalty

In this final chapter, I will answer the question to what extent the Protocol is compatible with Italy's obligations under the principle of Union loyalty. The assessment of the Protocol is structured on the basis of the obligations identified in chapter 3: the duty to consult and inform and the duty of abstention. Herein, the findings from chapter 4 on the Protocol's consequences will be connected to the framework developed in chapter 3. Finally, the chapter draws from the findings in the Italo-Albanian context to provide a more general overview of the compatibility of bilateral agreements by Member States with third countries with Union loyalty.

5.1 Zooming in: the compatibility of the Protocol with Union loyalty

This section will analyse to what extent the Protocol is compatible with the two duties under Union loyalty that have been identified in chapter 3, the duty to consult and inform and the duty of abstention.

5.1.1 Duty to inform and consult with the Commission

In chapter 3, we have seen that the duties of action are rules aimed at preventing autonomous Member State action from jeopardising either the unity of the EU's external representation or the effectiveness of EU law. By requiring Member States to inform and consult with the relevant EU institutions, the latter can prevent the former from assuming obligations vis a vis third countries that adversely affect unity or effectiveness. This is especially relevant in the external context given that a Member State has little options to alter or renounce its international obligations after it has assumed them.[192] For instance, in *MOX Plant*, which dealt with an area of shared competences, the CJEU found that Ireland should have informed and consulted with the Commission before deciding to refer its case to an Arbitral Tribunal.[193] By not doing so, Ireland jeopardised the effective application of EU law because the Arbitral Tribunal's judgment would not take EU law into account but Ireland would still be bound to its judgment.[194]

In the case of the Italy-Albania Protocol, it is again an area of shared competence within which a Member State undertakes autonomous action, in this case by concluding an international agreement which stands at odds with EU law. In chapter 4, we have seen that the Protocol is most likely incapable of upholding fundamental rights standards and protecting migrants against violations of these standards. There are risks of violations of the right to asylum because of Italy's plan to disembark vulnerable migrants only and the right to effective judicial protection due to the difficulties of ensuring competent legal aid for the migrants transferred to the facilities. Further, by externalising Italy's asylum procedure to Albania, the Protocol attempts to circumvent the scope of the EU's secondary asylum acquis. A first example thereof

[192] Molinari (n 110) 273.
[193] Case C-459/03 (n 125).
[194] Ibid.

can already be seen in terms of the reception conditions, where the Protocol is far less detailed than the Reception Conditions Directive in terms of treatment standards.

Articles 67 and 78 TFEU stipulate that fundamental rights must be respected in the AFSJ and in the construction of the CEAS. In other words, asylum policies by the EU and its Member States must be in line with their commitment to protect fundamental rights. By concluding the Protocol in its current form, there is now a Member State that relocates part of its asylum procedure to a third state without clearly laying down the fundamental rights standards that are to be complied with. In that way, Italy is risking undermining the attainment of one of the objectives of the EU's asylum system. Above that, by trying to circumvent the territorially limited scope of the secondary asylum acquis, the effectiveness of these pieces of legislation is negatively impacted because Italy can opt to apply them selectively. It follows that there is a risk that the Protocol jeopardises the effective application of EU law.

It seems that Italy had not informed the Commission of its plans to conclude an agreement with Albania. News coverage on the Commission's initial reaction to the Protocol seems to have blindsided the Commission, with an official stating that the Commission is ' in contact with the Italian authorities because [it needs] to see the details. We're asking for detailed information on this kind of arrangement'.[195] It would have been sensible for Italy to cooperate with the Commission and inform it of its intention to conclude an agreement with the aim of outsourcing part of its asylum procedure. This would have been all the more sensible given the legislative developments in the field, such as the recent adoption of the New Pact.[196] Not only would it have been sensible, but also necessary, given the potential impact of the Protocol in its current form on the effectiveness of the CEAS and the protection of fundamental rights protected under the Charter and other relevant fundamental rights instruments. By informing and consulting with the Commission, Italy would have given the Commission the chance to assess to what extent the Protocol could pose a risk for the effective and uniform application of EU law, specifically Articles 67 and 78 TFEU, the Charter and the secondary asylum acquis.

5.1.2 Duty to refrain from concluding the Protocol

The duty to inform and consult does not necessarily entail that Italy should have refrained from concluding the Protocol. Whether that is the case is dependent on the existence of a common concerted strategy or the nature of the international obligations and the affected competences.

Unlike the *Inland Waterways* cases, no common concerted strategy can be identified in this case.[197] There are no indications that the Commission is preparing to negotiate an agreement in the field of migration with Albania, nor has the Commission been given a mandate to negotiate

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[195] Ugo Realfonzo. 'A political stunt: Confusion in Brussels over Italy-Albania migrant deal' <https://www.brusselstimes.com/787520/a-political-stunt-confusion-in-brussels-over-italy-albania-migrant-deal> accessed 11 June 2024.

[196] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM(2020) 609 final.

[197] Case C-266/03 (n 107); Case C-433/03 (n 107).

such an agreement. Since there is no common concerted strategy and no indication that the EU might negotiate a similar agreement with Albania, the unity of the EU's external representation does not seem endangered by the Protocol.

Should Italy then have refrained from concluding the Protocol because it is likely to adversely affect the effective application of EU law? As follows from chapter 3, this is dependent on the nature of the international obligations assumed by Italy, the affected EU competences and the consequences for the effectiveness of EU law.

In terms of international obligations, Italy has committed to executing its extraterritorial processing of migrants in line with EU and Italian law, as well as applicable international (human rights) law. We have seen that these fundamental rights commitments are vague because they are not clearly formulated and there is no enforcement mechanism included in the Protocol that can ensure the protection of fundamental rights. Further obligations imposed by the Protocol on Italy are to ensure healthcare, the maintenance of law and order, the execution of transfers, or to reimburse Albania for certain services. Again, the commitments made by Italy are vague, such as how Italy will ensure that the rights of the defence and the right to effective judicial protection are respected. Given the difficulties posed by ensuring legal aid and competent translators, especially during the identification and selection procedures, it is unlikely that the practices following from the Protocol will sufficiently guarantee these rights. Neither is it clear how Italy will respect the right to apply for asylum in case of selective disembarkation. Further, the Protocol offers little insight in what the treatment of migrants in the facilities will look like. It only refers to healthcare services and that treatment must be in line with fundamental rights, without referring to the APD itself.

Turning to the affected EU competences, the Protocol operates within an area of shared competences, where the EU has laid down an extensive legislative framework. If a Member State assumes international obligations in a field that has already been heavily regulated by the EU, such as asylum, then it is more likely that the effective functioning of that area is affected. As mentioned earlier, Articles 67 and 78 TFEU require the European asylum system to be compatible with fundamental rights. Subsequently, the secondary asylum acquis further fills in who qualifies for protection, what the procedures are and which living standards must be ensured. Given that most of the secondary asylum acquis is territorially limited in scope, the problem of the selective application of EU law arises because it is unclear to which parts of EU law Italy intends to adhere.[198]

Since it is not yet entirely clear whether Italy will actually violate its fundamental rights obligations or whether the standards of treatment of migrants in the facilities will be lower than under EU law, one might say that no duty of abstention exists on Italy's part. If the Protocol has not yet adversely affected the effectiveness of EU law, why should Italy have lost its sovereign right to conclude international agreements on subject matter that does not exclusively lie within the competences of the EU? It follows from the *Inland Waterways* cases, however,

[198] Amnesty International (n 190).

that the CJEU takes a principled approach in this matter by not looking at actual interference but the possibility of conflict between the autonomous Member State action and the Commission's negotiations. The same principled approach should apply here. It is likely that Italy will not comply with its fundamental rights obligations and that its conduct will lead to circumvention of the asylum acquis as a consequence of the Protocol in its current form. In a an intra-EU situation, one might say that time will tell whether the effectiveness of EU law will actually be jeopardised, as there are sufficient means to remedy the infringement of EU law. However, international obligations are not easily amended or revoked,[199] and to 'wait and see' what happens is simply too dangerous, especially given the vulnerable position of migrants and the risks of violations of their fundamental rights. Italy should therefore have refrained from concluding the Protocol in its current form and has, by failing to do so, violated its duties under the principle of Union loyalty.

5.1.3 Conclusion

From the analysis of the Protocol in light of Italy's obligations under the principle of Union loyalty, it follows that Italy has violated two of the duties that it was under when negotiating and concluding the Protocol. First, it should have informed and consulted with the Commission on the possibilities for concluding such an agreement with Albania as there was at that time a risk that the Protocol would adversely affect the effectiveness of EU law. This is related to the fact that the Protocol operates in an area of shared competence and the risks of fundamental rights violations and the circumvention of the secondary asylum acquis. It is, however, doubtable whether this would have led to a different outcome in this specific case, since the Commission afterwards saw no problems with EU law.

Not only was Italy under a duty to inform and consult but Italy should have refrained from concluding the Protocol altogether. The Protocol in its current form fails to meet the thresholds set by EU law in relation to the right to asylum and the right to effective judicial protection and the standards for treatment of migrants. The CJEU's principled approach suggests that potential conflicts can be sufficient to warrant abstention from such agreements. Despite it not being entirely clear whether the Protocol will actually adversely affect the effectiveness of EU law, international obligations are difficult to amend, making a 'wait and see' approach too risky, especially for vulnerable migrants.

In conclusion, the Italy-Albania Protocol is incompatible with Italy's duties under the principle of Union loyalty. Italy's actions jeopardise the effective application of EU law and undermine the EU's objective of creating an asylum system that upholds fundamental rights.

5.2 Zooming out: the compatibility of bilateral agreements with Union loyalty

In order to say something about the compatibility of bilateral agreements by Member States with third countries in the field of migration, the findings regarding the Italy-Albania Protocol

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[199] Eckes (n 109) 99-100.

must be generalised. Therefore, this section will draw from the findings from the analysis in the previous section and the discussion of externalisation and informalisation in chapter 2.

In chapter 2, it has become clear that externalisation and informalisation are at odds with migrants' fundamental rights. The instruments employed by the EU and Italy have led to the shifting of responsibility for migration management to third countries without providing for adequate protection of fundamental rights. Further, because of their informal nature, they have eluded democratic and judicial controls that might have strengthened that protection.

Articles 67 and 78 TFEU stipulate that fundamental rights must be respected within the CEAS and Member States are, in principle, required to refrain from actions that jeopardise the attainment of the EU's objectives. In chapter 3, it has become clear that, in the context of external action, Member States can be required to inform and consult with the Commission and to refrain from concluding certain international agreements to ensure the unity of the EU's external representation and the effectiveness of EU law.

Agreements, like the Italy-Albania Protocol, that lead to externalisation of migration control, be they formal or informal, pose certain threats for these objectives. Threats for the unity of the EU's external representation arise if Member States undertake autonomous action when there is a common EU strategy, for instance to conclude an EU agreement with the third state in question. To ensure the effectiveness of EU law, Member States' agreements with third countries must not jeopardise the objectives of the CEAS by respecting fundamental rights and cannot circumvent the standards and procedures laid down in the secondary asylum acquis. It is important that Member States adhere to their duty to inform and consult the Commission before undertaking autonomous external action in the field of migration to ensure that these risks can be mitigated from the outset.

For similar future agreements that will possibly be pursued by Member States,[200] it is important to bear in mind that, in order to comply with the principle of Union loyalty, they cannot adversely affect the effective application of EU law, especially in the densely regulated field of migration. Neither should they be concluded by an individual Member State if there is a common concerted strategy on behalf of the Union. In those cases, Member States must abstain from negotiating such an agreement themselves. If such a common concerted strategy does not exist, then Member States must still ensure the unity of the EU's external representation and the effectiveness of EU law.

To prevent this from happening, some lessons can be drawn from the Italy-Albania Protocol. First, Member States should inform the Commission of their intention to conclude migration deals with third countries and consult with the Commission to ensure that the risks of jeopardising the unity of the EU's external representation and the effectiveness of EU law is

[200] euronews. '15 EU countries call for the outsourcing of migration and asylum policy' <https://www.euronews.com/my-europe/2024/05/16/15-eu-countries-call-for-the-outsourcing-of-migration-and-asylum-policy> accessed on 21 June 2024.

are mitigated. Further, when negotiating similar agreements with third countries, Member States should explicitly lay down and ensure that the standards and procedures correspond to those laid down by the secondary asylum acquis. Finally, they should draft clearly formulated fundamental rights standards, establish fundamental rights monitoring systems and ensure that the fundamental rights enshrined in the Charter, the Geneva Convention and the ECHR are, in practice, complied with.

Conclusion

In this thesis, I have set out to assess to what extent bilateral international agreements are compatible with the principle of Union loyalty. The aim was to contribute to a broader understanding of EU constitutional law and its application in the context of migration and to clarify the legal boundaries of Member States' autonomy when employing external migration management instruments. The Italy-Albania Protocol concluded in November 2023 has served as a case in point to highlight the problems that arise as a consequence of this practice by the EU and its Member States, in this case Italy.

If we zoom out and look at research question: *To what extent is the conclusion of bilateral international agreements by EU Member States in the field of EU migration law compatible with the principle of Union loyalty?* Then it follows that bilateral agreements by Member States in the field of migration are not restricted per se under the principle of Union loyalty. This is dependent on their effects for the unity of the EU's external representation and the effectiveness of EU law. It is paramount that Member States maintain a dialogue with the European Commission to mitigate these risks and ensure the compliance of future agreements with EU law.

If a Member State fails to do so and proceeds with the conclusion of an agreement that adversely affects the effectiveness of the heavily regulated field of EU asylum law, then the Commission should step up and put this conduct up for judicial scrutiny by the CJEU. It has done so in the *Inland Waterways, MOX Plant,* and several other cases, so it should do the same to protect the integrity of the EU's asylum system, especially given the recent adoption of the New Pact. Admittedly, there seems to be little enthusiasm in Brussels to put Italy's deal with Albania to the test before the CJEU,[201] but a new Commission should value the protection of the integrity of the EU's legal system higher than the current political wind in many Member States to further externalise – parts of – the EU's migration management.

[201] AP News. 'Top EU official lauds Italy-Albania migration deal but a court and a rights commissioner have doubts' <https://apnews.com/article/eu-italy-albania-migration-asylum-rescue-court-91a92ebe5a0ea0e4273609a7ad0eed47> accessed on 23 May 2024.

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