



ARTICLES

THE INTEGRATION OF MIGRATION CONCERNS INTO EU EXTERNAL POLICIES: INSTRUMENTS, TECHNIQUES AND LEGAL PROBLEMS

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ABSTRACT: This *Article* examines the recent EU practice of concluding practical arrangements designed, on the one hand, to return irregular migrants to countries of origin or transit and, on the other, to provide trade incentives to States hosting refugees, such as Jordan, in exchange for offering Syrian refugees employment opportunities. After examining the legal nature of the mentioned *sui generis* instruments, it is argued that preference for informal agreements with third countries is capable of affecting the external powers enjoyed by the European Parliament and the EU's accountability in its external action. The *Article* stresses that the Compact with Jordan has, to some extent, improved the situation of Syrians in that country. Finally, it is contended that the exceptional importance attached to the readmission of third country nationals in EU relations with developing countries has made the EU lose sight of the primary aim of development cooperation policy, which is to fight poverty.

KEYWORDS: EU migration policy– informal agreements – EU-Jordan Compact – refugees – EU neighbourhood policy – development cooperation policy.

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I. INTRODUCTION

Since 2015, the EU has increasingly used its external powers to contain movements of migrants and asylum seekers, as well as to prevent the smuggling of these persons¹ and the loss of their lives at sea.²

In a Communication of June 2016, the Commission stressed that formal or informal agreements with third countries should be concluded in order to tackle migration upstream.³ It also emphasised that the cooperation between, on the one hand, the EU and/or its Member States and, on the other, countries of origin and transit of migrants and asylum seekers should be enhanced in order to stem the flows of people seeking to enter the Member States' territories.⁴ The point was made that "Development and neighbourhood policy tools should reinforce local capacity building, including for border control, asylum, counter-smuggling and reintegration efforts".⁵ This comment made clear that cooperation in the field of migration would be of strategic importance in EU relations with EU neighbour and developing countries.

This *Article* aims to examine the legal instruments and techniques used by the EU to integrate migration concerns into its external policies. It shows how the dominance of these concerns has affected, on the one hand, the quality of the legal instruments used to shape cooperation with third countries and the principle of institutional balance and, on the other, the consistency of EU external relations. Section II of the *Article* shows that

¹ For example, in 2015 the EU made use of its powers under the Common Security and Defence Policy to authorise a military mission to counter the smuggling of migrants and to prevent illegal migration flows. See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

² However, the use of external powers to address migration concerns is not new. In 1994, the Commission published a Communication in which it emphasised the need for a comprehensive approach to migration pressure that required a coordination of action in the field of foreign policy, trade policy, development cooperation and immigration and asylum policy by the Union and its Member States. See Communication from the Commission to the Council and the European Parliament COM(94) 23 final of 23 February 1994 on Immigration and Asylum Policies, para. 50. Two years earlier, the European Council had adopted a Declaration on Principles governing External Aspects of Migration Policy.

³ Communication COM(2016) 385 of 7 June 2016 from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration.

⁴ This is an aspect of the so-called "externalization of migration controls". See for comments, D. DAVITTI, *Biopolitical Borders and the State of Exception in the European Migration "Crisis"*, in *European Journal of International Law*, 2018, p. 1178 *et seq.*; B. FRELICK, I.M. KYSEL, J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in *Journal of Migration and Human Security*, 2016, p. 190 *et seq.*; M. DI FILIPPO, *Fighting Against Irregular Forms of Migration: the Poisonous Fruits of the Securitarian Approach to Cooperation with Mediterranean Countries*, due to publication in F. IPPOLITO, F. CASOLARI, G. BORZONI (eds), *Bilateral Relations in the Mediterranean: Prospects for Migration Issues*, Cheltenham: Edward Elgar Publishing, forthcoming; G. PAPAGIANNI, *Forging an External EU Migration Policy*, in *European Journal of Migration and Law*, 2013, p. 283 *et seq.*

⁵ Communication COM(2016) 385, cit., p. 2.

the EU and its Member States have concluded practical arrangements with third countries in accordance with the Communication of 2016. Yet, the implementation of the strategy, defined in that Communication, has had an impact on the institutional balance designed by the Treaty. Section III draws attention to the Compacts with EU neighbour countries hosting refugees and in particular the Compact with Jordan. The context of the adoption of this *sui generis* instrument and its controversial legal nature are also considered. Section IV examines how the EU has favoured the adoption of the Compact with Jordan to support the latter's efforts to integrate Syrian refugees in the job market. This section will show that the EU has inaugurated a new technique, consisting of providing trade incentives to third countries hosting large communities of refugees, in exchange for integrating them into the job market. It is the first time that this form of positive conditionality has been used by the EU. Section V considers the actual impact of the Compact on the situation of Syrian refugees, while the following section emphasises the difference between EU-Jordan and EU-Lebanon priorities, as well as the reasons why there are no Compacts with Tunisia. Section VII explores the extent to which it is legally possible to integrate migration concerns into development cooperation policy; this issue needs to be raised since most of the non-European countries of origin/transit of migrant flows are middle -or low- income countries. Importantly, cooperation in the field of migration has been crucial in the negotiation of an important multilateral Treaty between the EU, its Member States and African, Caribbean and Pacific (ACP) countries: this is the post Cotonou Agreement. The exceptional importance attached to cooperation in managing migration flows and borders, in the context of its relations with developing countries, bears the risk of the EU losing sight of the primary aim of development cooperation policy, which is to fight poverty. Section VIII draws some conclusions on the impact that the use of informal instruments, examined in the paper, has had on the position of refugees. At the same time, the EU approach is criticised since the excessive use of practical arrangements affects the powers of the European Parliament. Furthermore, it is emphasised how migration concerns have dominated the EU-ACP countries relations, leading the EU to act in a manner which is not consistent with the objectives of the development cooperation policy.

II. THE COMPACTS AND PRACTICAL ARRANGEMENTS FOR THE RETURN OF IRREGULAR MIGRANTS AND THEIR IMPACT ON THE PRINCIPLE OF INSTITUTIONAL BALANCE

The informalisation of cooperation in the area of migration management has become an established phenomenon in the EU.⁶ After the adoption of the Communication of

⁶ For a recent study on the informalisation of instruments aimed at making the return of third country nationals more efficient see J.P. CASSARINO, *Informalizing EU Readmission Policy*, in A. RIPOLL SERVENT, F.

June 2016, the EU has made use of a wide array of informal instruments in its relations with third countries that are at the origin of migration flows. A few months before this Communication was issued, the Commission listed a number of priority actions to manage the inflows of migrants and refugees. One of them was to make the system of return of irregular migrants work.⁷ The view was taken that EU efforts had to be directed towards third countries with a low return *ratio*. Special attention was also to be given to countries from which irregular entries had significantly increased in 2015, such as Afghanistan and Bangladesh, as well as to countries of origin and/or transit such as Algeria, Ethiopia, Ghana, Ivory Coast, Mali, Niger, Nigeria, Pakistan, Senegal, Somalia, Sudan and Tunisia.⁸ Finally, it was added that where readmission Treaties were in place, as in the case of Pakistan,⁹ their implementation had to improve.

The Commission stated that the EU and its Member States, acting in a coordinated manner, should have agreed with third countries on “comprehensive partnerships” named “Compacts”,¹⁰ designed to better manage migration in full respect of humanitarian and human rights obligations.¹¹ The short-term objectives of these instruments were to save lives – avoiding the situation where migrants and refugees take dangerous journeys – and to increase the rate of return of migrants to countries of origin and transit. Compacts worked by financially supporting the readmitting countries and the communities that would reintegrate those who returned.¹² The prominence of the Compacts in the overall relations with third countries was clearly identified in the words of the Commission that defined them as a “key component” of these relations.¹³ In the first report on the implementation of the partnership framework, Compacts were better defined. In essence, they are instruments of a political nature used by the Member States and the EU to “deliver targets and joint commitments” on the basis of operational cooperation with a third

TRAUNER (eds), *The Routledge Handbook of Justice and Home Affairs Research*, London: Routledge, 2018, p. 83 *et seq.*

⁷ Communication COM(2016) 85 final of 10 February 2016 from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, p. 16.

⁸ *Ibid.*, pp. 16-18.

⁹ Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, p. 52 *et seq.*

¹⁰ See *Migration Compact. Contribution to an EU Strategy for External Action on Migration* – Non-paper from Italy, 15 April 2016, governo.it. D. VITIELLO, *Il contributo dell'Unione europea alla governance internazionale dei flussi di massa dei rifugiati e migranti: spunti per una rilettura critica dei Global Compacts*, in *Diritto, immigrazione e cittadinanza*, 2018, p. 21 *et seq.*

¹¹ Communication COM(2016) 385, cit., p. 6.

¹² *Ibid.*, p. 7.

¹³ *Ibid.*, p. 6.

country.¹⁴ The Commission stated that they can lead to the development of a readmission agreement, but there was no obligation for them to do so. The reason for the preference of informal agreements is that the conclusion of EU-wide readmission agreements with third countries of origin or transit of migrants was never easy when it was not coupled with visa-liberalisation treaties.¹⁵ In addition, even where readmission agreements were in place, there were difficulties in returning third countries nationals to their countries of origin,¹⁶ and these hurdles double for EU Member States seeking to return irregular migrants who are not nationals of the countries of departure.¹⁷

Thus, the Commission puts forward the idea of informal arrangements; in its view, the Compact approach “avoids the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement”.¹⁸ The suggestion is made that Member States should make the cooperation mutually beneficial, for example by opening up legal channels of migration.

The use of non-legally binding instruments as a basis for cooperation with third countries in the field of migration is not new.¹⁹ It was inaugurated in 2005 and later

¹⁴ Communication COM(2016) 700 final of 18 October 2016 from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, p. 3.

¹⁵ Third countries do not easily agree on readmission agreements when the EU is not ready to offer in exchange a visa-liberalisation agreement. For example, the EU has not been able to conclude a readmission agreement with Morocco, despite attempts to negotiate such an agreement since 2000. S. CARRERA, J.P. CASSARINO, N. EL QUADIM, M. LAULOU, L. DEN HORTOG, *EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?*, in *CEPS Papers in Liberty and Security*, no. 87, 2016, pp. 5-6.

¹⁶ Although every state has an obligation, under international customary law, to readmit its own nationals, the lack of identification documents often prevents the discharge of this obligation. Communication COM(2017) 200 final of 2 March 2017 from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - a renewed action plan, p. 1. According to the most recent data, the third countries with the highest number of nationals (over 10,000 per year) who were issued with a return decision are Morocco, Ukraine, Albania, Afghanistan, Algeria, Iraq, Pakistan, Guinea, Mali, Tunisia, India and Nigeria. Communication COM(2019) 481 final of 16 October 2019 from the Commission to the European Parliament, the European Council and the Council on Progress report on the implementation of the European Agenda on migration, p. 15.

¹⁷ In this case, there is no obligation for a State to readmit third country nationals.

¹⁸ Communication COM(2016) 700, cit., p. 3.

¹⁹ Informal agreements are used in other areas of EU law, too. For example, in 2006 the EU adopted a memorandum of understanding on a Swiss financial contribution to reducing economic and social disparities in the enlarged Union. This memorandum was the political basis for the conclusion of formal bilateral agreements between Switzerland and countries acceding to the EU. In 2013, the Vice-President of the Commission responsible for external relations and the commissioner for regional policy signed an addendum to that memorandum with Switzerland in order for the latter to financially support Croatia's accession. The need for the memorandum was due to the fact that for Switzerland it was not possible to conclude a binding agreement on such a financial contribution. The Council did not authorise the signature and brought an annulment action against the addendum before the Court of Justice. The latter annulled the Commission decision to sign the addendum for breach of the principle of conferral: the Coun-

changed in 2011 for the Global Approach to Migration and Mobility (GAMM).²⁰ Under this strategy, the EU does not exclusively rely on legally binding readmission agreements to cooperate with third countries (in fact, until 2016 there were only 17 EU-wide agreements,²¹ and a proliferation of bilateral agreements concluded by Member States).²² Informal instruments such as policy dialogues, Common Agendas on Migration and Mobility (CAMMs),²³ and also mobility partnerships were used.²⁴

However, during 2016 the Commission generalised the use of “practical arrangements” instead of formal readmission agreements with countries of origin or transit of third country nationals in preventing uncontrolled movements of peoples and/or in ensuring the readmission of irregular migrants.²⁵ The first instrument of this kind was the

cil, and not the Commission, has the power to sign an agreement. See Court of Justice, judgment of 28 July 2016, case C-660/13, *Council v. Commission* commented by T. VERELLEN, *On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1225 *et seq.*

²⁰ Communication COM(2011) 743 final of 18 November 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The global approach to migration and mobility.

²¹ For a full list of agreements see E. CARLI, *EU Readmission Agreements as Tools for Fighting Irregular Migration: an Appraisal Twenty Years on from the Tampere European Council*, in *Freedom, Security and Justice*, 2019, pp. 13-14.

²² The bilateral readmission agreements concluded by Member States are more numerous than those concluded by the EU. See E. CLUNY, *The EU's New Migration Partnership with Mali: Shifting Towards a Risky Security-Migration-Development Nexus*, in *EU Diplomacy Paper*, 2018, No. 1, College of Europe, p. 18. Indeed, in the area of freedom, security and justice, Member States share their powers with the EU and may act unilaterally until the EU pre-empts their action. This happens when the Council has authorised the opening of the negotiation of a readmission agreement. The principle of pre-emption fully applies when the EU has concluded an international agreement with a third country. Yet, Member States have a duty to refrain from negotiating a bilateral agreement with a third country after the Council has opened the negotiation for the conclusion of an agreement with that State. For a discussion on these issues, see B. VAN VOOREN, *The Principle of Pre-Emption after Opinion 1/2003 and Coherence in the EU Readmission Policy*, in M. CREMONA, J. MONAR, S. POLI (eds), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang, 2011, p. 176 *et seq.*

²³ For a full list of high-level dialogues existing at the time the Communication on a new partnership framework was adopted, see annex II of Communication COM(2016) 385, *cit.* The Agendas are the most recent political instruments intended to help third countries, including by providing financial support, to better manage their borders and prevent migration flows. They also have a humanitarian objective which is to prevent human trafficking and people smuggling.

²⁴ See for more details on the mobility partnerships, S. POLI, C. CINELLI, *Mobility and Legal Migration in the Context of the European Neighbourhood Policy: What Role for the European Union?* in *Revista Española de Derecho Comunitario*, 2017, p. 977 *et seq.*, especially pp. 983-987.

²⁵ For a more comprehensive overview of the external instruments used by the EU see P. GARCIA ANDRADE, I. MARTÍN, *EU Cooperation with Third Countries in the Field of Migration*, in *Study for the LIBE Committee*, 2015; P.J. CARDWELL, *Tackling Europe's Migration 'Crisis' through Law and 'New Governance'*, in *Global Policy*, 2018, p. 1 *et seq.*; S. CARRERA, J. SANTOS VARA, T. STRIK, *The External Dimension of the EU Migration and Asylum Policies in Times of Crisis*, in S. CARRERA, J. SANTOS VARA, T. STRIK (eds), *Constitutionalising the External Di-*

notorious EU-Turkey statement which was coupled with the Facility for Refugees,²⁶ dated March 2016.²⁷ As is known, that declaration was contestably attributed by the General Court to the representatives of Member States' governments and not to the EU.²⁸ The mentioned order has been criticised since it has weakened the EU institutions' accountability for their action. It could also be argued that the Court's interpretation might have provided impetus to the development of further forms of "practical arrangements" to manage the EU migration challenges.

Five countries, some of which had already agreed CAMMs,²⁹ are identified by the Commission as possible parties to launch and agree Compacts: these are Niger, Nigeria, Senegal, Mali and Ethiopia.³⁰ They are considered explicitly as priority countries in the first progress report on the new Partnership framework, and the detailed reasons for this are identified in this document.³¹ Cooperation with Asian countries such as Afghanistan is also considered of "high importance".³²

After the publication of the Communication, no formal readmission agreements were concluded with the priority countries.³³ In its most recent reports on the implementation of the 2016 Communication on a partnership framework, no mention was made of any progress in the cooperation on return of irregular migrants with Niger, Nigeria, Senegal and Mali. However, a number of non-legally binding initiatives were taken with respect to non-priority countries. In October 2016, the "Joint Way Forward on migration issues" was

mensions of EU Migration Policies in Times of Crisis – Legality, Rule of Law and Fundamental Rights Reconsidered, 2019, Cheltenham: Edward Elgar, p. 1 *et seq.*

²⁶ See EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. For a recent comment, see V. ZAMBRANO, *Accordi informali con Stati terzi in materia di gestione dei flussi migratori: considerazioni critiche con riferimento alla prassi dell'Unione europea e dell'Italia*, in *Freedom, Security and Justice*, No 1, 2019, pp. 127-129.

²⁷ J.P. CASSARINO, *Informalising Readmission Agreements in the European Neighbourhood*, in *The International Spectator*, 2007, p. 179 *et seq.*

²⁸ General Court, order of 27 February 2017, case T-192/16, *NF v. European Council*; General Court, order of 28 February 2017, case T-193/16, *NG v. European Council*, and General Court, order of 28 February 2017, case T-257/16, *NM v. European Council*. For comments see E. CANNIZZARO, *Denialism as the Supreme Expression of Realism - A Quick Comment on NF v. European Council*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 251 *et seq.*

²⁹ This is the case of the CAMM with Nigeria, which was agreed in March 2015, and of Niger and Ethiopia whose CAMMs were signed on the first day of the EU-Africa Valletta Summit (11-12 November 2015). See the Press release IP/15/6050 of the European Commission of 23 September 2015. For the texts of the CAMMs with Nigeria and Ethiopia see ec.europa.eu. Finally, see the Mali-EU Joint Communiqué on the High Level Dialogue on Migration of April 2016.

³⁰ Communication COM(2016) 385, *cit.*, p. 16.

³¹ Niger is a key transit country, Nigeria and Senegal are countries of origin of migration, and Mali and Ethiopia are both countries of origin and transit of migrants (and of refugees in the case of Ethiopia).

³² Communication COM(2016) 700, *cit.*, p. 11.

³³ The negotiation of such an EU-wide readmission agreement is ongoing with Nigeria since October 2016. *Ibid.*, p. 7.

agreed with Afghanistan.³⁴ It is not even clear which institution negotiated such an instrument; the document is published on the website of the European External Action Service. Under the terms of this non-legally binding document, the Parties commit to step up their cooperation on addressing and preventing irregular migration and on the return and reintegration of irregular migrants. This is complemented by bilateral memoranda of understanding concluded in parallel by several EU Member States. Therefore, it seems that the Joint Way Forward has somehow opened up the possibility for Member States to conclude bilateral informal agreements in parallel with the EU.

The second example of informal arrangements is the 2017 Standard Operating Procedures (SOP) for the identification and return of persons without authorisation to stay, agreed with Bangladesh. They are inspired by principles similar to those of the Joint Way Forward with Afghanistan.³⁵ They were laid down to support the EU Member States' bilateral relations with Bangladesh: these procedures, which do not create rights or obligations for the Parties, are intended to ensure the smooth, dignified and orderly return of Bangladeshi nationals who have no legal basis to stay in the territory of the requesting country and who do not hold a valid travel document. In an unpublished document, which is not formally attributed to any EU institutions, it is rather ironic to read about the intention to establish "*transparent* procedures" (emphasis added) for the identification of persons. The SOP with Bangladesh is based on cooperation between the administrative authorities of the EU Member States and the third country concerned and is facilitated by the EU. Although the intention of the parties is for the SOP not to create rights and obligations under international or EU law, the document lays down a number of specific commitments undertaken by the Parties to exchange information and documents within precise time limits. For this author, it is at least arguable that this document (and others of its kind) has legally binding effects.³⁶

In addition to the two informal agreements mentioned above, in its report of 2019 the Commission states that new "practical arrangements"³⁷ were agreed with Guinea,

³⁴ See the EU-Afghanistan Joint Way Forward on migration issues of 2 October 2016, available at eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en. For comments on this instrument see C. WARIN, Z. ZHEKOVA, *The Joint Way Forward on Migration Issues Between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law*, in *Cambridge International Law Journal*, 2017, p. 143 et seq.

³⁵ EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, included in Annex 1 to Commission Decision of 8 September 2017 on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, on file with the author and not accessible to the public.

³⁶ See also the comments made by C. MOLINARI, *The EU and Its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns*, in *European Law Review*, 2019, pp. 835-836.

³⁷ The practical arrangements concluded by the Commission are additional to those attributable to Member States. Considering the special bonds between Italy and Libya, a memorandum of understanding was concluded on 2 February 2017 between the two countries. This is an example of an agreement

Ethiopia, Gambia, Côte d'Ivoire.³⁸ Once again, it is not possible to find traces of the texts of these informal agreements in the official journal. It seems that cooperation with these countries takes the form of regular meetings, migration Liaison Officers are sent from the EU Member States to third countries, while third countries' liaison officers in key EU Member States help with the identification of potential returnees.³⁹ In substance, this form of cooperation is intended to lead "to equivalent results in terms of cooperation on actual returns".⁴⁰

It is submitted that by privileging the conclusion of informal arrangements in order to overcome the difficulties of concluding formal ones, the EU has undermined the democratic principle,⁴¹ the principle of institutional balance and, to some extent, the rule of law,⁴² which is one of its values.

At this juncture, it is necessary to briefly examine how the European Parliament has reacted to the use of informal arrangements. It should be noted that in a resolution of 2017 this institution expressed regret that the EU and its Member States had opted for the conclusion of agreements with third countries, which avoid parliamentary scrutiny.⁴³ Here, in reality, the Parliament is not complaining of not being informed on the negotiation of an international agreement on readmission or of not being asked to approve it. Indeed, should the Commission and the Council take this course of action, the decision concluding the agreement would certainly be challenged before the Court of Justice and annulled for breach of Art. 218, para. 6, let. a), TFEU.⁴⁴ Rather, the Parlia-

concluded by a Member State *qua* Member State without the formal involvement of the Union. The text of the memorandum can be found on this website: eumigrationlawblog.eu. For comments see: A.V. PALM, *The EU External Policy on Migration and Asylum: What Role for Italy in Shaping Its Future?*, Policy Brief, in *Observatory on European Migration Law*, May 2017. See A. LIGUORI, *Migration Law and the Externalization of Border Controls*, Oxon: Routledge, 2019.

³⁸ Communication COM(2018) 798 final of 4 December 2018 from the Commission to the European Parliament, the European Council and the Council on Managing migration in all its aspects: progress under the European agenda on migration, p. 9. For further details, see E. TEMPRANO ARROYO, *Using EU Aid to Address the Root Causes of Migration and Refugees Flows*, in *EUI Migration Policy Centre*, 2019, p. 77.

³⁹ Communication COM(2018) 798, p. 10.

⁴⁰ COM(2017) 471 final, Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, p. 3.

⁴¹ The lack of parliamentary control at EU level goes in parallel with the circumvention of the Italian parliament's powers under Art. 80 of the Italian Constitution. Indeed, *memoranda* of understanding with Sudan on the one hand, and with Libya on the other, were respectively signed by Italy in 2016 and 2017 in a simplified form, while they should have been concluded in solemn form. V. ZAMBRANO, *Accordi informali con Stati terzi*, cit.

⁴² C. MOLINARI, *The EU and its Perilous Journey*, cit., pp. 837-839.

⁴³ See European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), P8_TA(2017)0124, para. 70.

⁴⁴ Indeed, the Parliament can exercise its power to reject an EU-wide agreement in areas where the ordinary legislative procedure applies; under Art. 79, para. 2, TFEU the Parliament has co-legislative powers with the Council and therefore the power to approve agreements in the area of readmission is con-

ment complains about the lack of its involvement in the negotiation of informal agreements and in their implementation.

Although the conclusion of informal agreements is not prohibited by EU primary law, abuse of these instruments may affect the principle of institutional balance. After the Lisbon Treaty, Member States conferred on the European Parliament the power to approve readmission agreements. Should informal arrangements, with similar effects to readmission agreements, be concluded instead of legally binding Treaties, this institution would be excluded from the decision-making process and, as a result, the institutional balance designed by the Treaty, as far as the European Parliament's role in EU external relations is concerned, would be altered. This institution would face legal hurdles in challenging the practical arrangements before the Court since it is not clear to what extent these acts have legal effects. The Court has not yet had the chance to rule on whether the recurrent use of informal arrangements without any form of involvement by the Parliament could breach the principles of loyal cooperation, or conferral of powers or institutional balance. In contrast, the Court had this opportunity with respect to the external activity of other institutions.⁴⁵

III. COMPACTS WITH COUNTRIES HOSTING REFUGEES: THE CONTEXT OF THEIR ADOPTION AND THEIR LEGAL NATURE

The Communication on a new partnership framework refers to the discussion on the Partnership priorities with Jordan and Lebanon that started in 2015. These are not priority countries, but they host large communities of refugees since their territories are heavily affected by the consequences of the Syrian conflict. In particular, because of this war, the two southern neighbours have hosted high numbers of displaced persons for a protracted period. Neither of them has ratified the UNHCR Geneva 1951 Refugee Convention, nor the New York Protocol. Syrian refugees have arrived in these countries in very poor condition and with scarce prospects of integration, given that they are not allowed to work. Therefore, Jordan and Lebanon provide ideal test cases to experiment on new approaches to the management of refugees⁴⁶ whereby the integration of these persons into the host countries should be favoured and incentivised.

In 2016, two "Compacts" were agreed with Jordan⁴⁷ and Lebanon,⁴⁸ once again without the involvement of the European Parliament. Before delving into the content of the

ferred on the Parliament. M. GATTI, *La Dichiarazione UE-Turchia sulla Migrazione: un Trattato Concluso in Violazione delle Prerogative del Parlamento?*, in *Eurojus.it*, 11 aprile 2016, www.rivista.eurojus.it.

⁴⁵ For example, the Court of Justice held that the Commission had breached the mentioned principles by signing a memorandum of understanding with Switzerland in 2013 without the Council's authorisation. See *Council v. Commission*, cit.

⁴⁶ See *infra*, section IV.

⁴⁷ The Compact with Jordan is detailed in the Annex of Decision 1/2016 of the EU-Jordan association Council of 19 December 2016 agreeing on EU-Jordan Partnership Priorities.

Compacts, it is necessary to briefly refer to the context that led to their adoption. In February 2016, the United Nations, together with the leaders of Germany, Kuwait, Norway, and the United Kingdom, organised an International Conference on the Syrian crisis in London. One of the aims of the meeting was to raise funds and to obtain loans from donors,⁴⁹ to support the efforts of Syria's neighbouring countries (and other countries such as Iraq and Turkey) in hosting Syrian refugees. As we can learn from the final declaration of the countries at the end of the Conference, the participants of this meeting "agreed to reduce the pressure on countries hosting refugees by supporting them in providing access to jobs and education that will benefit both refugees and host communities. Through linking relief and development efforts, this will provide a lasting benefit for those countries as well as the tools for Syrians to re-build their own country once they are able to return".⁵⁰ The declaration further states: "[...] participants agreed to support [hosting governments] in areas such as access to external markets, access to concessional financing and increased external support for public and private sector job creation".⁵¹ Jordan issued a position paper at the Conference in which it claimed that the Syrian crisis could be transformed into a development opportunity for the country.⁵²

However, this could be possible only through financial support and access to European markets under easier terms than those available under the Euro-Mediterranean agreement that binds the southern neighbour to the EU.⁵³ The request was advanced to accelerate the plans to revise preferential rules of origin applicable under that treaty by the end of the summer 2016. The Jordanian Government undertook "to designate five development zones and provide these with maximum incentives under the new investment law".⁵⁴ These initiatives were held to have the potential to provide additional jobs for Jordanians and Syrian refugees. The point was made that there was a clear link between the generosity of access to EU markets and the creation of additional employment opportunities. The Government committed to modify the legislation to allow Syrian refugees to apply for work permits both inside and outside the designated zones. It was estimated that with the necessary support of the international community,

⁴⁸ See Decision 1/2016 of the EU-Lebanon Association Council of 22 December 2016. The Compact is included in the Annex of this act.

⁴⁹ The World Bank, The European Investment Bank, The European Bank for Reconstruction and Development and the Islamic Bank.

⁵⁰ See Co-hosts declaration of the supporting Syria and the region Conference, available at assets.publishing.service.gov.uk, para. 9.

⁵¹ *Ibid.*, para. 10.

⁵² See Jordan's statement published on the website of the London Conference of 4 February 2016, available at assets.publishing.service.gov.uk.

⁵³ See Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part. For the text of the agreement see eur-lex.europa.eu.

⁵⁴ See Jordan's statement, cit.

about 200,000 job opportunities for Syrian refugees could be created in the coming years. Finally, Jordan committed to strengthen the education of Syrian children.

In July 2016, the EU-Jordan Association Committee, operating in the context of the Euro-Mediterranean agreement,⁵⁵ temporarily (until 2026) modified the rules of origin applicable to Jordan's exports of goods.⁵⁶ In December 2016, the EU-Jordan Association Council endorsed a list of priorities⁵⁷ of cooperation between 2016 and 2018 and a Compact that replaced the Action Plan between the EU and Jordan of 2012. The new list of priorities includes the most important areas of cooperation between the parties in a time span of two years. Since the first one is strengthening cooperation in regional stability, a plan on how to achieve this objective is detailed and articulated in the text and in the *addenda* of the Compact. In short, the EU intends to facilitate trade with Jordan by changing the rules of origin provided in the existing association agreement between the two parties and the Member States so as to favour the import of products coming from Jordan's designated areas under the condition that Syrians are employed in these zones.⁵⁸ The Compact is used here as a *sui generis* instrument which favours the integration of Syrian refugees in the job market through trade incentives. It is a way for the EU to reward partners that prevent the movement of refugees. This instrument has potential beneficial effects for the refugees and the host country, as well as for the EU. Indeed, its primary aim is to improve the living conditions of refugees and to strengthen Jordan's resilience. In addition, the host country is provided with macro-financial assistance and other forms of assistance.⁵⁹ Furthermore, Syrians who work in Jordan are less likely to cross the Mediterranean Sea to reach the territories of the Member States.

⁵⁵ See art. 93 of the Euro-Mediterranean agreement, cit.

⁵⁶ Decision n. 1/2016 of the EU-Jordan Association Committee of 19 July 2016 amending the provisions of Protocol 3 to the Euro-Mediterranean Agreement establishing an Association 'between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, concerning the definition of the concept of originating products' and the list of working or processing required to be carried out on non-originating materials in order for certain categories of products, manufactured in dedicated development zones and industrial areas, and connected with generating employment for Syrian refugees and Jordanians, to obtain originating status.

⁵⁷ These are political commitments which replace the Action Plan between the EU and Jordan of 2012; they do not as such have legally binding force.

⁵⁸ M. PANIZZON, *Trade-for-Refugee Employment: Nexing for Deterrence or Development in the EU-Jordan Compact?*, in S. CARRERA, L. DEN HERTOEG, M. PANIZZON, D. KOSTAKOPOULOU (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Leiden: Brill, 2018, p. 244 *et seq.* See also S. POLI, *The Principle of Conditionality in the EU's Relations with Neighbours: its Evolution and Reconciliation with the Principle of Consistency*, in *Il diritto dell'Unione europea*, 2018, p. 525 *et seq.*, especially pp. 543-550.

⁵⁹ The European Commission proposed on 29 June 2016 a second Macro-Financial Assistance (MFA) operation for Jordan in the amount of EUR 200 million, after the first operation was authorised in 2013. See Decision 2016/2371 of the European Parliament and of the Council of 14 December 2016 providing further macro-financial assistance to the Hashemite Kingdom of Jordan.

In exchange for the EU's support, the negotiation of an EU-Jordan readmission agreement and of an EU-Lebanon mobility partnership should have started.⁶⁰

From a legal point of view, the Compact is a bilateral instrument since it has been adopted by the EU-Jordan Association Council, a body formed by representatives of Jordan and EU officials from the Council and the Commission. The legal nature of the Compact is subject to debate: indeed, the EU-Jordan Association Committee, which simplified the rules of origin of the EU-Jordan Association Agreement, has legally binding powers under Art. 94, para. 2, of that agreement and has actually modified Protocol no. 3 of the Euro-Mediterranean agreement through a legally binding Decision.⁶¹ Therefore, it seems that the Compact had legally binding effects. However, as we can read from the text of the Decision adopted by the Association Council in December 2016, the latter body *recommends* that the Parties implement the EU-Jordan Partnership Priorities, including the Compact, under Art. 91 of the Euro-Mediterranean agreement.⁶² Therefore, it seems that the Compact is not legally binding. It may be argued that the Compact is a legal hybrid which was pragmatically used to support a country hosting refugees and also to disincentivise refugees from crossing the Mediterranean Sea.

IV. THE INTEGRATION OF REFUGEES IN THE JOB MARKET OF THE HOST COUNTRY THROUGH TRADE INCENTIVES IN THE EU-JORDAN COMPACT

After the London Conference of 2016, the EU acted to favour the implementation of the commitments made by Jordan and by Lebanon in that context.⁶³ The terms of the Compacts with these countries are quite different. For the purpose of this study, the most interesting is the former since it is pervaded by a new form of conditionality which is aimed not merely at “adequately hosting refugees” but also at integrating them into the job market of the receiving State. In contrast, the Compact with Lebanon presents limited commitments as far as the integration of the Syrians in the job market is concerned, as we shall see later.

⁶⁰ Communication COM(2016) 960 final of 14 December 2016 from the Commission to the European Parliament, the European Council and the Council on Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration, p. 9.

⁶¹ See *supra*, footnote 56.

⁶² Art. 91 of the EU-Jordan Association agreement provides the Association Council with the power to issue (legally binding) decisions and to adopt recommendations. For the text of the Decision, see *supra*, footnote 47.

⁶³ See Council Decision on the Union position within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, with regard to the adoption of EU-Jordan Partnership Priorities and annexed Compact, JOIN(2016) 41, p. 11.

The Compact with Jordan may be appreciated since it is designed both by the EU and the host country, although it is based on a number of conditions defined by the EU.⁶⁴ In adopting the Compact with Jordan, the EU was influenced by the debate on Global Refugee Compacts carried out in the UN context⁶⁵ and to some extent, with its action, it is favouring the implementation of the UN-led initiative; the EU considers Global Compacts “a unique opportunity to bring forward a common approach on migration and forced displacement at the global level”.⁶⁶ The idea promoted by the UN General Assembly is that developed countries and donors should support the economic integration of refugees in the labour market of the host communities rather than providing assistance to these persons in camps, a solution that should be used only exceptionally and for a short period of time.⁶⁷ The Compact with Jordan is an exemplification of the new philosophy and is to some extent inspired by a human rights approach to migration-related problems. At the same time, this instrument has positive side-effect for the EU: refugees are less likely to leave Jordan when they are integrated into the job market.

The trade incentives are the most innovative aspect of the Compact. The EU undertakes to temporarily⁶⁸ relax the rules of origin for products originating from production facilities located in 18 pre-determined Special Development Zones (SEZ) and Industrial Areas, “*as long as these are linked to job opportunities under the same conditions for both Jordanians and Syrian refugees*” (emphasis added).⁶⁹ The target to reach is 15 per cent of jobs for Syrians in the first two years and 25 per cent thereafter, “with the overall aim to reach the target of 200,000 job opportunities for Syrian refugees at Country level”.⁷⁰ Relaxation of the rules of origin implies that products from the designated areas will be subject to the same regime available to less-developed countries, under the Generalised System of Preferences (GSP): “everything but arms”.⁷¹

While the use of unilateral trade measures to achieve developmental objectives is well established in EU practice,⁷² and is based to some extent on political conditionality, it is the first time that the EU has made trade concessions for a low-middle-income country,

⁶⁴ See also P. GARCIA ANDRADE, *EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally*, in *Common Market Law Review*, 2018, p. 158.

⁶⁵ The first draft of the Compact dates 9 March 2018. See un.org.

⁶⁶ See CFSP Report on Our priorities in 2018, as endorsed by the Council on 16 July 2018, document 11161/18 of 16 July 2018, para. 98, p. 51.

⁶⁷ P. COLLIER, A. BETTS, *Refuge: Transforming a Broken Refugee System*, New York: Penguin Random House, 2017.

⁶⁸ For 10 years.

⁶⁹ JOIN(2016) 41, cit., p. 12.

⁷⁰ *Ibid.*

⁷¹ See E. TEMPRANO ARROYO, *Promoting Labour Market Integration of Refugees with Trade Preferences: Beyond the EU-Jordan Compact*, in *RSCAS Working Paper*, no. 42, 2018, p. 6.

⁷² The Generalised System of Preferences was inaugurated in 1979 and throughout the years has been subject to numerous changes.

subject to the successful integration of refugees into the job market.⁷³ It should be noted that the EU's move is in line with the Global Compact on refugees, which states: "In some contexts, where appropriate, preferential trade arrangements could be explored in line with relevant international obligations, especially for goods and sectors with high refugee participation in the labour force; as could instruments to attract private sector and infrastructure investment and support the capacity of local businesses".⁷⁴

However, commentators have criticised the trade concessions made by the EU as they are subject to a number of conditions which may be considered "overly restrictive".⁷⁵ Indeed, relaxation of the rules of origin is limited *ratione loci* and *temporis*. Only exporters who are located in the designated zones or industrial sites benefit from the relaxation of the rules of origin if they manufacture specific goods and meet the targets of employing enough Syrians. Furthermore, although the possibility to extend the simplified version of these rules to all goods is envisaged, again this is tied to meeting the employment targets set out above.⁷⁶ The EU's upgrade of economic cooperation with Jordan⁷⁷ is also connected to the country's successful integration of Syrian refugees in the job market.⁷⁸ This may be considered an essential condition to develop the cooperation and bring it to a higher level.

The reason why the conditions of the Compact are very strict is that the trade concessions were designed to make it very attractive to the Jordanian Government to integrate Syrians in the job market and for the refugees to stay in the host country. Certainly, the EU has also provided macro-financial assistance to Jordan in the form of loans in

⁷³ It should be noted that, so far, the implementation of the Jordanian commitments has been problematic: this country is far from reaching its targets of 200,000 work permits. Although there was a sharp increase in the number of job permits issued to Syrians, the overall target of 200,000 which Jordan had undertaken to reach at the London Conference is very high for a country with a widespread informal job market. E. TEMPRANO ARROYO, *Promoting Labour Market Integration*, cit., pp. 10-11.

⁷⁴ See General Assembly, Report of the United Nations High Commissioners on Refugees, Part II Global Compact on Refugees of 13 September 2018, UN Doc. A/73/12, para. 2.2, p. 14.

⁷⁵ *Ibid.*, p. 6.

⁷⁶ "Once the latter target is achieved, the EU will consider further extending the Rule of Origin derogations and simplifying the conditions necessary for producers in Jordan to benefit from these new rules of origin regime". See JOIN(2016) 41, p. 12.

⁷⁷ It has been announced that preparations will start to launch negotiations of an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA) to enable Jordanian products of selected sectors to enter the EU market without additional technical controls. The possibility to negotiate a Deep and Comprehensive Free Trade Agreement (DCFTA) is also envisaged. Finally, despite the existence of a mobility partnership, the possibility to have a visa-liberalisation agreement is made subject to the conclusion of a readmission agreement.

⁷⁸ It should be added that the EU support is linked to the compliance with the target of the integration of Syrians in the job market. For example, in 2016 the EU has granted macro-financial assistance to boost Jordan's economic stability. However, such an assistance is deprived of conditions related to the employment of Syrians.

order to create a good investment environment in this country;⁷⁹ yet, the Compact is centred on the integration of Syrian migrants rather than on fostering the growth of the host country. In the next section, we shall see to what extent the EU's goal to improve the situation of Syrians on the ground was achieved.

V. AN ASSESSMENT OF THE EU-JORDAN COMPACT

In December 2018, the EU and Jordan agreed to prolong the duration of the trade preferences to 2030, thus showing the Parties' support for the model of burden sharing inaugurated with the Compact.⁸⁰ It is necessary to examine the effects of the adoption of this partnership in order to assess whether the decision to prolong the trade preferences was sound.

The first observation that can be made is that, looking at the bare figures, the number of work permits issued in 2016 was over 103,000; this is remarkable, even though the target was 200,000. Thus, it can be argued that the situation of Syrians has improved; before the Compact was agreed on, refugees were not allowed to apply for work permits and were forced to rely on informal work. Yet, not all jobs are available to Syrians. A further worrisome factor is that the work permits do not include an integrated social/health/insurance package. The new law on health of January 2018 provides that Syrian refugees must pay 80 per cent of the standard fees of health insurance. As recognised by the High Representative of the Union for Foreign Affairs and Security, this "weakens the incentives to seek legal, declared work".⁸¹ In addition, the fact that work permits were issued does not mean that the working conditions are decent. In this respect, it is reassuring that the EU has signed a contract with the International Labour Organization (ILO) for the latter to monitor the labour standards of the authorised companies.⁸² The ILO has also conducted interviews with Syrians and has highlighted that the Compact provides tangible improvements for them. The ILO study shows that the possibility of having access to work permits has enhanced the feeling of security and has improved the economic conditions of refugees.⁸³ It is to be hoped that in the coming years the efforts made by the Jordan government⁸⁴ to ease the granting of work

⁷⁹ See Decision 2016/2371, cit.

⁸⁰ E. GRAWERT, *The EU-Jordan Compact*, in *Bonn International Center for Conversion (BBIC) Policy Brief*, No. 3, 2019, p. 3.

⁸¹ Commission Staff Working Document of 12 November 2018, Report on EU-Jordan relations in the framework of the revised ENP (2017-2018), SWD(2018) 485 final, p. 9.

⁸² *Ibid.*, p. 8.

⁸³ ILO report, *Lessons learned and emerging good practices-Of ILO's Syria crisis response*, 2018, pp. 31 and 70.

⁸⁴ SWD(2018) 485 final, cit., p. 10.

permits will continue.⁸⁵ The data available in the first five month of 2018 raise some worries since they reveal that only a limited number of permits (20,000) were issued.⁸⁶

While the conclusion of the EU-Compact with Jordan has implied an improvement in the situation of Syrians, it is not clear whether the host country has benefited from the operation of the Compact. Indeed, only a limited number of Jordanian companies have been authorised to export under this scheme.⁸⁷ Although the Compact is presented as an occasion to turn the challenges posed by the Syria crisis into concrete opportunities for the benefit of the population of Jordan, Syrian refugees and the EU, it is a myth that this instrument promotes Jordan's prosperity. The Compact intends to strengthen Jordan's stability and, more broadly, regional stability by integrating Syrian refugees in the job market,⁸⁸ thus preventing migration flows. The EU decided to limit the exceptions to the rules of origin to products coming from the designated zones. It is not at all certain that the trade scheme will actually have a positive impact on Jordan's growth.⁸⁹ Although the trade preferences given to goods manufactured in Jordan's designated industrial sites cover 85 per cent of the exports,⁹⁰ the EU could have been more generous in drafting the exceptions to the rules of origin. For example, the Union could have eased exports of Jordan's manufactured agricultural products,⁹¹ as requested by this country. It is regrettable that the EU has only made trade concessions linked to the objective of integrating Syrians in the job market. Besides, the EU could have been more benevolent with Jordan, merely on account of the hardships that this country has had in hosting Syrian refugees.

VI. THE EU-LEBANON PARTNERSHIP PRIORITIES AND THE LACK OF A COMPACT WITH TUNISIA

By contrast with the EU-Jordan Compact, the EU-Lebanon partnership priorities 2016-2018 and the Compact, approved by the EU-Lebanon Association Council in November 2016, sets out very limited commitments with respect to the employment integration of Syrians living in this small country.⁹²

⁸⁵ The Jordan government has waived the fees to request a work permit.

⁸⁶ SWD(2018) 485 final, cit., p. 9.

⁸⁷ *Ibid.*, p. 11.

⁸⁸ The relation of the rules of origin is intended to mitigate "the costs imposed by hosting a large number of Syrian refugees".

⁸⁹ It should be noted that similar trade schemes, adopted by the US, did not produce spillover effects on the Jordanian economy. E. TEMPRANO ARROYO, *Promoting Labour Market Integration*, cit., p. 16.

⁹⁰ *Ibid.*, p. 6.

⁹¹ *Ibid.*, p. 12.

⁹² There are 1.5 million Syrians in Jordan, either as registered or unregistered persons.

Indeed, the presence of refugees is considered temporary;⁹³ in addition, as a result of Lebanon's statement at the London Conference, this country intends to ease Syrians' access to jobs in certain sectors where refugees are not in direct competition with nationals.⁹⁴ Lebanon has hinted at the possibility of issuing work permits as appropriate to Syrians if new investments in the country create new jobs. Decision 1/2016 of the EU-Lebanon Association Council, in which priorities for cooperation and the Compact are formalised, significantly states: "Improving economic opportunities for refugees and displaced persons from Syria will have to come in the broader context of improving the economic resilience of the country as a whole through foreign and local investments in job-creating projects, infrastructures and local economic development".⁹⁵ The Compact included in the annex to the mentioned decision adds: "Any measures undertaken within the scope of this Compact will not be to the detriment of the Lebanese people and will be in conformity with the Lebanese Constitution, Lebanese laws and regulations".⁹⁶ The commitment to ease access to work in the Decision is possibly drafted in stricter terms than those made in Lebanon's statement at the London Conference of February 2016; indeed, the former document adds that easing access to jobs for Syrians is a "controlled" process.⁹⁷ The reason for Lebanon's more restrictive approach to the integration of Syrians in the job market may be explained by Lebanon's opposition to integrating Syrians in the country.⁹⁸

In contrast to Jordan and Lebanon, the EU has not agreed on a Compact with Tunisia, despite the fact that this country hosts large numbers of Libyans who left their country after 2011, and it is becoming a significant country of departure.⁹⁹ According to recent data, Tunisia was the country with the highest number of departures to Italy in 2019.¹⁰⁰ The Communication on a new partnership framework envisages the conclusion of visa liberalisation and readmission agreements.¹⁰¹ The Commission has recommended the opening of negotiations for the conclusion of a readmission agreement since 2014.¹⁰² Should the negotiations succeed, Tunisia would be the first southern neighbour with a visa facilitation agreement. Yet, at the time of writing, discussion with

⁹³ See also on this issue F. DE BEL-AIR, *Migration Profile: Lebanon*, in *Robert Schuman Centre for Advanced Studies, Policy Briefs*, no. 12, 2017, p. 5.

⁹⁴ Such as agriculture, construction and other labour-intensive sectors. See London Conference, Lebanon statement of intent, available at: assets.publishing.service.gov.uk.

⁹⁵ Decision 1/2016, cit., p. 117.

⁹⁶ *Ibid.*, p. 120.

⁹⁷ *Ibid.*, p. 121.

⁹⁸ See E. TEMPRANO ARROYO, *Promoting Labour Market Integration*, cit., p. 8.

⁹⁹ Communication COM(2019) 126 final of 6 March 2019 from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration, p. 3.

¹⁰⁰ COM(2019) 481, cit., p. 3.

¹⁰¹ Joint Declaration on Mobility Partnership between Tunisia, and the European Union and its Member States of 3 March 2014. The participating EU Member States to this partnership are 10.

¹⁰² COM(2014) 493 final (the document is declassified only in part).

this third country is still ongoing. It should be noted that managing migration effectively was a priority both for the EU and for Tunisia in 2014;¹⁰³ however, the latest EU-Tunisia strategic priorities for the period 2018-2020 consider the conclusion of a deep and comprehensive free trade agreement a priority in order to contribute to Tunisia's gradual integration into the EU's internal market.¹⁰⁴ There is no mention of any Compacts with Tunisia. This may be explained by the fact that the number of refugees in the country is limited in absolute terms,¹⁰⁵ and it is not worth it for the EU to insist on having a Compact similar to that of Jordan.

VII. THE INTEGRATION OF MIGRATION CONCERNS INTO EU RELATIONS WITH DEVELOPING COUNTRIES: LEGAL AND POLICY ISSUES

All EU priority countries listed in the Communication on a new partnership framework are low-income or middle-income economies. Cooperation between the EU and developing countries stretches to the field of migration. The multifaceted nature of EU development cooperation was acknowledged in the judgment *Portugal v. Council*¹⁰⁶ in which the Court stated that a cooperation agreement with India, covering various fields, including protection of human rights, could be based on the provision of the Treaty dealing with development cooperation. In a later case, the Court had the opportunity to examine whether an agreement based on Art. 209 TFEU could also cover the obligations to readmit third country nationals. In the *Philippines Partnership Cooperation* case,¹⁰⁷ the Court recognised the possibility of envisaging *general* obligations in the field of readmission of third country nationals in an agreement of this kind,¹⁰⁸ thus confirming the broad scope of development cooperation policy.¹⁰⁹ Yet, the EU institutions could not use a development cooperation agreement to impose *specific* obligations on third countries to readmit irregular migrants. Should the EU be interested in obtaining a commitment from its partner country

¹⁰³ *Ibid.*, p. 11.

¹⁰⁴ Decision 1/2018 of the EU-Jordan association Council of 12 December 2018 agreeing on a two-year extension of the EU-Jordan Partnership Priorities.

¹⁰⁵ There are about 4500 refugees in the country. See <https://data2.unhcr.org/en/country/tun>, accessed on 15 March 2020.

¹⁰⁶ Court of Justice, judgment of 3 December 1996, case C-268/94, *Portugal v. Council*.

¹⁰⁷ See Court of Justice, judgment of 11 June 2014, case C-377/12, *Commission v. Council*.

¹⁰⁸ *Ibid.*

¹⁰⁹ The Court annulled the decision concluding a framework agreement on partnership and cooperation between the EU, its Member States and the Philippines since the Council had wrongly included Art. 79, para. 3, TFEU as one of the legal bases of the mentioned act. That Treaty provision recognises an explicit competence of the EU to conclude readmission agreements. However, the Court found that Art. 209 TFEU was a sufficient legal basis to cover the general obligations in the field of migration included in Art. 26 of the concerned agreement.

to readmit his own nationals, it ought to conclude an *ad hoc* agreement based on Art. 79, para. 3, TFEU. This is in line with the principle of conferral.¹¹⁰

Looking at the practice, EU institutions give cooperation in the field of migration a central role in their relations with developing countries. The new European Consensus on Development of 2017 presents migration as an opportunity for development for developing countries: well-managed migration and mobility foster the growth and sustainable development of poor countries;¹¹¹ in addition, migrants' remittances and "brain circulation" tend to reduce poverty. It is submitted that while cooperation in the field of migration is legally possible and mutually beneficial for the EU and developing countries,¹¹² considering cooperation in migration management an essential aspect of EU relations with those countries lies in conflict with the policy objective of development policy. After the publication of the 2016 Communication on a new partnership framework, cooperation in the area of migration has gained exceptional importance in the EU and Member States' relations with poor countries. The following paragraph of the Commission is particularly meaningful:

"Increasing coherence between migration and development policy is important to ensure that development assistance helps partner countries manage migration more effectively, and also incentivises them to effectively cooperate on readmission of irregular migrants. Positive and negative incentives should be integrated in the EU's development policy, rewarding those countries that fulfil their international obligation to readmit their own nationals, and those that cooperate in managing the flows of irregular migrants from third countries, as well as those taking action to adequately host persons fleeing conflict and persecution. Equally, there must be consequences for those who do not cooperate on readmission and return".¹¹³

The invoking of the principle of coherence between internal and external EU policies by the Commission is striking and does not take into consideration that the EU also has an obligation to act consistently with development cooperation policy.¹¹⁴

Having promoted the partnership framework with third countries in the field of migration, the Commission has subordinated fighting poverty in developing countries to

¹¹⁰ M. BROBERG, R. HOLDGAARD, *Demarcating the Union's Development Cooperation Policy After Lisbon: Commission v. Council (Philippine PCFA)*, in *Common Market Law Review*, 2015, p. 566.

¹¹¹ New European Consensus on development, available at ec.europa.eu, par. 39. See also M. BORRACCETTI, C. CARLETTI, *Il Global Compact sulla migrazione tra scenari internazionali e realtà europea*, in *Freedom, Security and Justice*, 2018, p. 39 *et seq.*

¹¹² J. SILGA, *Assessing the Consistency of EU Development Cooperation with Readmission in the EU-Philippines Agreement Case – a Balancing Exercise*, in *European Law Review*, 2015, p. 452 *et seq.*

¹¹³ Communication COM(2016) 385, cit., p. 9.

¹¹⁴ Under Art. 21, para. 3, TEU, the Union shall ensure consistency between the different areas of its external action and between these and its other policies (including development cooperation policy).

their cooperation in the field of readmission.¹¹⁵ The quality of such cooperation seems to affect overall relations with the EU. The Parliament does not seem to share the Commission's position and has advocated a "balanced approach" in the application of the partnership framework. The view is taken that the EU should not aim at achieving measurable increases in the number and rate of returns in EU relations with third countries; mobility partnerships and circular migration agreements, facilitating the movement of third-country nationals to the EU, should also be agreed so as to sustain the socio-economic development of both parties.¹¹⁶

A further index of the prominence of migration concerns in EU relations with developing countries is the use of the Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa.¹¹⁷ This fund, which was created in 2015 after the EU-Africa Summit, is supported by the Commission and by most of the Member States, while it is not subject to Parliamentary scrutiny.¹¹⁸ The fund not only aims at providing greater economic and developmental opportunities and at preventing conflicts, or strengthening the resilience of the most vulnerable, but it is also intended to improve the migration management in countries of origin, transit and destination. It has been correctly observed that funds of this kind are set up to tackle situations of emergencies rather than to address the root causes of migration.¹¹⁹

The disproportionate importance attached to the containment of migration flows, in the context of EU relations with developing countries, is confirmed by the Communication on renewed partnership with the ACP Group of States,¹²⁰ in which the Commission sets out its ideas on how to change the Partnership Agreement between the ACP States on the one hand, and the EU and its Member States on the other (the "Cotonou Agreement"), signed in 2000 and due to expire in February 2020.

In 2016, the Commission started to define the way multilateral partnership should change and to assess the way it worked in the past. The Commission is critical of cooperation with ACP countries in the field of readmission of third country nationals. Indeed, despite the fact that the Cotonou agreement contains a clause concerning cooperation

¹¹⁵ The same European Consensus on development uses ambiguous words: "partner countries are invited to seize the opportunities of migration". This may imply that countries sealing their borders so as to prevent uncontrolled movement of persons will receive additional financial support from the EU.

¹¹⁶ See European Parliament resolution P8_TA(2017)0124, paras 49-50.

¹¹⁷ For more information on the multidonor Trust funds supported by the EU between 2013 and 2016 see www.ec.europa.eu.

¹¹⁸ S. CARRERA, L. DEN HERTOOG, J. NÚÑEZ, FERRER, R. MUSMECI, L. VOSYLIŪTE, M. PILATI, *Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices*, European Parliament study (CONT Committee), 2018, p. 9. However, the European Parliament has been invited to participate as an observer to the meeting of the Boards of the EU Trust Fund for Africa.

¹¹⁹ *Ibid.*, p. 87 *et seq.*

¹²⁰ Joint Communication to the Council and to the European Parliament, A renewed partnership with the countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52.

in the field of irregular migration, the EU has been unable to use it to readmit irregular migrants from ACP countries. Art. 13, para. 5, of the agreement envisages that ACP countries may conclude bilateral readmission agreements with the EU. This is a very similar provision to Art. 26, para. 4, of the Philippines partnership cooperation agreement whose legality was examined in the above-mentioned case *Commission v. Council*.¹²¹ It is not possible to impose specific obligations to take back nationals for ACP countries on the basis of that provision: a separate readmission agreement must be concluded. In 2010, the EU attempted to change the article under consideration so as to be able to expedite the return of irregular migrants coming from ACP countries of origin. However, the EU met the opposition of ACP countries; a compromise solution was the adoption of a Joint Declaration of the ACP-EU Joint Council which opened up a regional dialogue between the Parties in the concerned area. In this context, it does not come as a surprise that the Commission's proposal that in future the partnership "integrate [...] important policy developments such as the European Agenda on Migration and related Partnership Framework".¹²² According to the Commission, the objective is to help "to respond to crises through immediate and measurable results, but also lay the foundations of an enhanced cooperation with countries of origin, transit and destination with a well-managed migration and mobility policy at its core".¹²³ Once again, the idea emerges that the greater the success in managing migration, the larger the benefits that partner countries will receive from the EU. Political conditions were traditionally attached to the disbursement of aid: yet, these were related to respect of values such as democracy and human rights rather than to border controls and cooperation in the field of migration. In development cooperation policy post 2015, cooperation in this area seems to have the same importance as respect of the mentioned political values.

On its side, the ACP group of States emphasises that the return and readmission processes to the country of origin should be on a voluntary basis.¹²⁴ It further argues that the contribution of remittances to development is limited since they cannot be equated to other international financial flows, such as foreign direct investment, Official Development Assistance or other public sources of financing for development. It makes the point that the new agreement should include political dialogue that addresses migration, taking into account the rights of migrants, and finally states that the use of development aid for the negotiation of restrictive border controls should be excluded.¹²⁵

At the time of writing, it is not possible to examine how the provisions of the post-Cotonou agreement with ACP countries were changed since the final text has still to be

¹²¹ *Commission v. Council*, cit.

¹²² JOIN(2016) 52, cit., point 3.1.3.

¹²³ *Ibid.*

¹²⁴ See ACP negotiating mandate for a post-Cotonou partnership agreement with the European Union, ACP/00/011/18 final, 30 May 2018, point 158.

¹²⁵ *Ibid.*, point 159.

signed. In December 2019, the decision was taken to prolong the partnership agreement between the EU, its Member States and the ACP countries until the end of December 2020.¹²⁶

VIII. FINAL REMARKS

After the EU migration crisis reached its peak in 2016, the EU and its Member States have favoured the use of practical arrangements, political dialogues and *sui generis* instruments (such as Compacts) with countries of origin and/or transit of migrants or with countries hosting refugees. The recurrent use of these instruments, which is not forbidden by the Lisbon Treaty, has reduced the accountability of the EU institutions and has affected the institutional balance to the detriment of the European Parliament. The EU has been ready to use trade incentives to support the integration of Syrian refugees into Jordan's economic life and has attempted to make cooperation in the area of migration more central in its relations with developing countries. Overall, the measures adopted so far by the EU have contributed to reducing to the minimum the number of irregular entries in 2018 compared with the previous five years,¹²⁷ and have made the EU Member States more resilient to the challenges posed by migration, despite the lack of cooperation of the Visegrad group which has substantially boycotted the relocation and resettlement schemes. However, these positive developments have not led to the abolishment of the internal border controls in certain members of the Schengen area that had re-introduced them in 2015.¹²⁸ In addition, the EU has not ensured consistency between its actions and activities and the main objective of development cooperation policy, in breach of Art. 7 TFEU.¹²⁹ Indeed, the EU's development assistance is now geared towards the enhancement of the capacity of developing countries to manage their borders rather than to fight poverty, which is the overarching objective of development cooperation policy.

The Compact with Jordan is not very different in spirit from the controversial EU-Turkey statement of 18 March 2016 which is considered part of an innovative and successful approach,¹³⁰ despite the increase in the number of arrivals to the Greek islands in 2018 and the low rate of returns from the Greek islands to Turkey.¹³¹ Two equally important drives lie at the basis of the EU's decision to innovate its approach to migration. These are, on the one hand, the need to improve the situation of Syrians in the host state

¹²⁶ See Decision 3/2019 of the ACP-EU Committee of ambassadors of 17 December 2019, p. 3 *et seq.*

¹²⁷ Communication COM(2019) 481, cit., p. 1.

¹²⁸ The internal border controls were re-introduced because of the pressure coming from the nationals of Western Balkans as well as from other third country nationals using the Eastern migration route. See ec.europa.eu.

¹²⁹ "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

¹³⁰ Communication COM(2019) 481, cit., p. 6.

¹³¹ *Ibid.*, p. 18.

and, on the other, the necessity to prevent asylum seekers from taking Central and Eastern migration routes. Indeed, it is less costly for developed countries to financially support refugees if they stay in a developing country (or, as in the case of Jordan, in a lower-middle-income country) rather than hosting them in their territories. At the same time, it should also be acknowledged that Turkey, Jordan and Lebanon are the countries which had most of their refugees re-settled in the EU.¹³² This implies that the Member States, through the EU, have supported, to some extent, countries hosting refugees.

Undeniably, both initiatives grant non-humanitarian assistance to the receiving countries to improve Syrians' access to basic services and, in the case of the Jordan Compact, the integration of refugees in the job market is facilitated. Fostering access to employment and the integration of refugees is a policy option worth pursuing since it does help improve the situation of refugees. Yet, the mentioned initiatives do not offer long-term solutions to problems which are not of a temporary nature. Leaving aside the case of asylum seekers, in order to prevent the loss of lives of economic migrants in the Mediterranean Sea, it would be necessary to open legal channels of migration, depending on the needs of the job market at national levels. Yet, in this area, Member States are exclusively competent;¹³³ and the major obstacle is their unwillingness to take initiatives in the field of legal migration.¹³⁴

¹³² *Ibid.*

¹³³ See Art. 79, para. 4, TFEU.

¹³⁴ Report from the Commission to the European Parliament, the European Council and the Council, Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2017) 350, pp. 13-14.