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Does informality lead to better or worse migration partnerships, and for whom?

Maria Gabrielsen Jumbert
Peace Research Institute Oslo

Marie Godin
Leicester University

Niels Ike
Leiden University

Elaine Lebon-McGregor
Maastricht University

Julia Schweers
University of Oxford

Mathias Hatleskog Tjønn
Peace Research Institute Oslo

The rise in informal, rather than formal, arrangements between the European Union (EU) and third countries in the area of migration can be understood as driven forward by a desire for more efficient processes. There are several risks involved, however.

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The use of soft law and informal tools allows the EU to circumvent its own democratic and judicial procedures.

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The absence of legally binding consequences in informal arrangements raises questions about accountability, effectiveness and compliance with international human rights standards.

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Third countries can also use soft law in migration partnerships as a deliberate strategy to confront EU conditionalities.

A returnee welcome centre in Baidoa, Somalia

Source: Camilla Kasavan for MIGNEX.

Over the past decade, the EU has increasingly resorted to concluding so-called "informal arrangements" on migration and the use of soft-law instruments with third countries instead of establishing formal agreements. But what does this trend mean for the migration partnerships more broadly? Drawing on MIGNEX analysis, this policy brief further elucidates the implications of this trend of "informalisation" of partnerships.

This Policy Brief is based on research documented in the MIGNEX Background Paper *Comparative experiences of third-country cooperation.*[1]

The EU's increased use of informal soft law allows the EU to act on migration without the approval of the democratically elected European Parliament

With the inability to conclude legally binding and formal agreements with partner countries, the European Commission increasingly seeks to establish informal arrangements and use soft-law instruments.

Within these arrangements, the EU increasingly uses conditionality and compensation as a way to further its migration interests. This trend was further amplified in the aftermath of the 2015 surge of arrivals at the EU's external borders.

By resorting to soft-law measures, the EU is able to establish and implement cooperation with partner countries without the democratic approval of the European Parliament. Indeed, informal arrangements with third countries can be concluded by the European Commission alone (still requiring the approval from the Council in a Non-Binding Agreement procedure, including approval from the Member States).

The swiftness of negotiations and the ability to act pragmatically on migration make the use of informal cooperation particularly appealing for the EU, but also for third countries.

In this respect, it is not surprising that the EU increasingly resorts to soft law in contexts seen as 'crisis': informal cooperation is less sensitive for both parties, remains largely out of public scrutiny and is, hence, easier to establish.

Informal cooperation and the use of "soft law" raise questions about accountability and effectiveness

The informality of agreements – and the absence of legally binding consequences – raises questions around the accountability and effectiveness of cooperation.

First, the lack of formal agreements results in a grey area where nobody can be formally held accountable for specific actions.

Second, the lack of accountability and legal consequences of informal cooperation sometimes leads to non-action. Both parties can thus withhold implementation of the arrangement at any time without carrying responsibility.

The lack of transparency in informal arrangements has led to human rights violations

An even graver consequence of the informality is intransparency (i.e. avoiding disclosure of policy-making information), which opens the door for human rights violations.

An example is the highly controversial informal readmission arrangement, signed in 2016, between the EU and Afghanistan, which has been severely criticised for its extensive and repeated violation of international human rights standards.

The informal readmission of irregular Afghan nationals to Afghanistan was already in violation of the internationally stipulated principle of non-refoulement. The seizure of power by the Taliban in Afghanistan in August 2021 further demonstrated that the designation of the country as a "safe destination", if not already inaccurate, would now be in strong violation of fundamental human rights.

The use of soft law has allowed the EU to take concrete action – returning Afghan nationals in times of crisis – at lower judicial and sovereignty costs while bypassing formal accountability.[2]

The use of soft law and informal cooperation, however, can also be a deliberate strategy of third countries to confront EU conditionalities

It is important to note that use of soft law is not necessarily just an EU strategy, but can also be adopted as a deliberate negotiation strategy by partner countries.

The case of Ghana provides an illustrative example in this regard, where no formal agreements have been signed, but close collaboration exists informally. The lack of formal cooperation and EU support, for example, allowed the Ghanaian government to celebrate its National Migration Policy as its own sovereign achievement.

Moreover, Ghana actively enhances its negotiation power by engaging in informal arrangements with the EU and bilateral agreements with individual Member States. Doing so limits the influence of the EU within Ghana, while reaping the benefits of cooperation nonetheless.

A returnee's house in New Takoradi, Ghana, where 19% of young adults were found to have returnee migrant family or friends, especially from Europe.

Data source: MIGNEX Data. Image source: Marie Godin for MIGNEX.

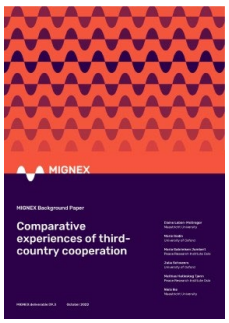
The increasing "informality" of migration partnerships risks cutting off the usual democratic and juridical control of partnerships

Being drafted and concluded in policy-making backrooms, such non-binding agreements come with a significant lack of transparency and accountability. This is particularly serious in view of the significant risks of human rights violations inherent in migration management.

There is also the question of use (or misuse) of public funds as these agreements often include considerable financial provision and incentives.

It is essential, therefore, that migration partnership agreements and their negotiation process allow for public scrutiny and democratic oversight. This can be achieved through prioritising the negotiation of formal bilateral agreements, which comply with international human rights standards.

Further reading



Lebon-McGregor, E., Godin, M., Gabrielsen Jumbert, M., Schweers, J., Hatleskog Tjønn, M. and Ike, N. (2022) Comparative experiences of third-country cooperation. MIGNEX Background Paper.

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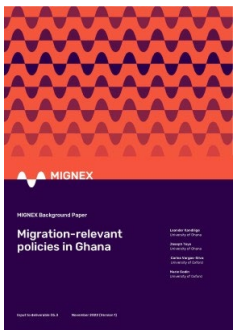

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Notes

1. This policy brief is based on research documented in Lebon-McGregor, E., Godin, M., Gabrielsen Jumbert, M., Schweers, J., Hatleskog Tjønn, M. and Ike, N. (2022) *Comparative experiences of third-country cooperation*. MIGNEX Background Paper. Oslo: Peace Research Institute Oslo. Available at https://www.mignex.org/d093.
2. See Slominski, P., and Trauner, F. (2021) 'Reforming me softly – how soft law has changed EU return policy since the migration crisis' *West European Politics* 44(1): 93–113. Available at https://doi.org/10.1080/01402382.2020.1745500

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