

SJ-0839/23

D(2023)36736
AN/DM/cd

19 December 2023

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LEGAL OPINION

Subject: Legal status of the Memorandum of Understanding signed in Tunis on 16 July 2023

I. INTRODUCTION

1. On 11 September 2023, the Legal Service received a request from Mr Juan Fernando López Aguilar, Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) for a legal opinion on the legal status of the Memorandum of Understanding (hereafter the “*MoU*”) signed in Tunis on 16 July 2023 by Mr Olivér Várhelyi, Commissioner for Neighbourhood and Enlargement, and Mr Mounir Ben Rjiba, Secretary of State of the Minister of Foreign Affairs, Migration and Tunisians Abroad.
2. In particular, the Legal Service has been asked for advice on *“the legal status, mandate and institutional accountability of “Team Europe”, the normal procedures and their application in this case in relation to concluding agreements and committing the EU budget, including the role of the Council and especially of the Parliament”*.
3. The request for a legal opinion also notes that the Commissioner for Home Affairs, Ms Ylva Johansson, participated in an exchange of views with LIBE Members on 18 July 2023, following which LIBE sought clarification on the MoU directly from Commissioner Johansson by letter of 20 July 2023. Vice-President Schinas and Commissioners Johansson and Várhelyi replied by means of a joint letter dated 20 October 2023.
4. In this context, it is also worth noting that, on 31 August 2023, the Committee on Foreign Affairs (AFET) also held an exchange of views on the MoU with Mr Geert Jan Koopman,

the Director-General of the Commission's Directorate-General for European Neighbourhood Policy and Enlargement Negotiations (DG NEAR).

5. Moreover, a debate on the MoU was held with Commissioner Várhelyi at the plenary sitting in Strasbourg on 12 September 2023.
6. Subsequently, by letter of 4 October 2023, Mr David McAllister, Chair of the Committee on Foreign Affairs requested that the legal opinion be also addressed to that committee.

II. PRELIMINARY OBSERVATIONS ON THE SIGNATURE OF THE MOU AND ITS CONTEXT

A. Signatories of the MoU - Commissioner Várhelyi representing the “*European Union*”

7. It is first important to underline the fact that, according to the title of the MoU there are only two parties to this agreement, namely “*the Republic of Tunisia, hereinafter referred to individually as ‘Tunisia’*” and “*the European Union, represented by the European Commission, hereinafter referred to individually as ‘the EU’*”.
8. This is confirmed notably by the signatures which appear at the very end in the only authentic text of the MoU, which is in French¹, where Mr Olivér Várhelyi, Commissioner for Neighbourhood and Enlargement signed on behalf of the EU and where Mr Mounir Ben Rjiba, Secretary of State of the Minister of Foreign Affairs, Migration and Tunisians Abroad signed on behalf of Tunisia.
9. Thus it is apparent that the Commissioner did not act merely on behalf of the Commission as an individual EU institution, within the remit of its own powers conferred by the EU Treaties, but rather he purported to represent the whole of the European Union. However, based on available information, it has not been possible to identify any Commission decision authorising the signature of the MoU.
10. We should note in this context that the MoU makes no reference to any or all of the EU Member States as separate parties to this agreement. Accordingly, no Member State has signed the MoU and it was reported in the Commission's press release that the Italian Prime Minister Giorgia Meloni and the Dutch Prime Minister Mark Rutte were present at the signing ceremony in Tunis on 16 July 2023 simply as “*witnesses*”.^{2 3}

¹ The English translation of the MoU does not contain these signatures, but includes the following statement at the end: “*The original version of this Memorandum of Understanding is in French. This is an English translation.*” Accordingly, the Legal Service has based the present legal analysis on the full content of the original French version, but will refer to the English translation also here, for convenience. Both English and French versions of the MoU are available on the Commission's website: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887

² https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3881

³ Note the difference to the EU Turkey Statement, which was not concluded by any EU institution. See paragraphs 47 to 72 of Order of the General Court of 28 February 2017 in Case T-192/16, *NF v European Council*, (EU:T:2017:128). Appeals against the Orders of the General Court were rejected by Order of the Court of Justice of 12 September 2018 in Joined Cases C 208/17 P to C 210/17 P, *NF, NG and NM v European Council*, (EU:C:2018:705).

B. Context of the signing of the MoU - the prior meeting in Tunis on 11 June and the subsequent conference in Rome on 23 July 2023

i) The high-level meeting in Tunis on 11 June 2023 - announcement of a partnership package and a Joint declaration

11. As mentioned in the request for a legal opinion, the signing of the MoU in Tunis on 16 July 2023 was preceded by another high-level meeting in Tunis on 11 June 2023, when a "*comprehensive partnership package*" was announced jointly by the President of the European Commission Ursula von der Leyen, the Italian Prime Minister Giorgia Meloni and the Dutch Prime Minister Mark Rutte, in a "*Team Europe*" spirit, alongside the President of Tunisia, Kaïs Saïed.
12. The MoU itself explicitly refers in its preamble to "*the high-level Joint Declaration of 11 June 2023*".
13. It appears that the content of this Joint Declaration in question is a text published by the Commission under the title "*News Article*" dated 11 June 2023. This would appear to follow from the fact that this "news article" uses the form "we" and is later referred to in another "*News Article*" published on 16 July 2023 at the time of signing of the MoU.⁴⁵ Nevertheless, no document in the actual form of a joint declaration has been identified. The Legal Service must therefore make the reservation that there is some uncertainty as to the exact content of the Joint Declaration of 11 June 2023.
14. A "*Press statement by President von der Leyen with Italian Prime Minister Meloni, Dutch Prime Minister Rutte and Tunisian President Saïed*"⁶ was also made on 11 June 2023 which opens with the announcement that "*We are here as Team Europe.*" At the end of this press statement it is also stated that "*There is a lot of work ahead of us. I [i.e. President von der Leyen] have asked Commissioner Várhelyi to take this work forward.*"
15. The text (under the heading "*Check against delivery*") here is clearly just a transcript of the speech given only by President von der Leyen, in the presence of Prime Ministers Meloni and Rutte, but without the Tunisian President, as the video recording of this speech, which is also given here, confirms.⁷ Nevertheless, this press statement is clearly also relevant to the context in which the Joint Declaration was made on the same day.

⁴ https://neighbourhood-enlargement.ec.europa.eu/news/european-union-and-tunisia-agreed-work-together-comprehensive-partnership-package-2023-06-11_en The title of the news article dated 11 June 2023 is "*The European Union and Tunisia agreed to work together on a comprehensive partnership package*", but it does not use the title "*Joint Declaration*". Nevertheless, this document appears to be drafted in the form of a joint declaration of the EU and Tunisia, given the repeated use of "*We*" throughout this text and, in particular, the final paragraph which states as follows:

"We have tasked the Minister of Foreign Affairs, Migration and Tunisians Abroad and the Commissioner for Neighbourhood and Enlargement to work out a Memorandum of Understanding on the comprehensive partnership package, to be endorsed by Tunisia and the European Union before the end of June."

⁵ https://neighbourhood-enlargement.ec.europa.eu/news/european-union-and-tunisia-political-agreement-comprehensive-partnership-package-2023-07-16_en

⁶ https://neighbourhood-enlargement.ec.europa.eu/news/press-statement-president-von-der-leyen-italian-prime-minister-meloni-dutch-prime-minister-rutte-and-2023-06-11_en

⁷ Indeed, the video recording shows that Prime Ministers Meloni and Rutte also themselves give speeches after President von der Leyen and these three then pose for a photograph together, without the President of Tunisia being present.

ii) *The subsequent international conference in Rome on 23 July 2023 - launch of the “Rome Process” and the MoU to be a “template” for other countries*

16. On 23 July 2023, the week after the signing of the MoU, an “*International Conference on development and migration*” was organised in Rome upon a “*joint initiative*” of the Italian Prime Minister Meloni and the Tunisian President, Kaïs Saïed, to address the drivers of migration and more effectively counter human trafficking and migrant smuggling. The participants in this Conference, including a wide range of States from the wider Mediterranean region, agreed to launch the “*Rome Process*” - a strategic, comprehensive, inclusive, multi-annual platform for collective action.⁸
17. It is worth noting here that Italian Prime Minister Meloni⁹ and Commission President von der Leyen¹⁰ have both made statements indicating that the MoU with Tunisia is a “*template*” for agreements with other countries in the region.

III. LEGAL ANALYSIS

18. The questions put to the Legal Service can be divided into four parts. First, section A. will address the legal issues relating to “*Team Europe*”, namely its legal status, mandate and institutional accountability. Second, section B. will analyse the normal procedures in relation to concluding agreements with third countries. Third, section C. will analyse the text of the MoU and related documents, bearing in mind that this is suggested as a “*template*”. Fourth, section D. will assess the corresponding procedures for committing the EU budget in this case.

A. The legal status, mandate and institutional accountability of “*Team Europe*”

19. The Commission provides a useful explanation, under the heading “*What is Team Europe?*”, on the website of the Directorate-General for International Partnerships (DG INTPA),¹¹ in the following terms:

“Team Europe consists of the European Union, EU Member States — including their implementing agencies and public development banks — as well as the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD).

Team Europe was initially put in place to ensure a co-ordinated and comprehensive response between the EU and its Member States to the COVID-19 pandemic and its consequences.

The new approach has quickly become the backbone of Global Europe (the main financial tool for EU international cooperation from 2021 to 2027) and its programming. It notably includes the conception of Team Europe Initiatives, which are the flagships of the Team Europe approach.

⁸ See the Conference Conclusions published by the Italian Government: https://www.governo.it/sites/governo.it/files/Conclusioni_230723.pdf

⁹ See the publication of the Italian authorities (in English) of the statement of Prime Minister Meloni on 16 July 2023: <https://www.governo.it/it/articolo/dichiarazioni-congiunte-alla-stampa-tunisi-lintervento-del-presidente-meloni/23157>

¹⁰ https://ec.europa.eu/commission/presscorner/detail/en/speech_23_3981

¹¹ https://international-partnerships.ec.europa.eu/policies/team-europe-initiatives_en

Fundamental to all is a renewed and reenergised EU ambition to ‘work better together’, as originally outlined in the 2017 [European Consensus for Development](#).”

20. It thus appears that the basic concept underlying “*Team Europe*” is rather a practical means of ensuring better cooperation and coordination between the institutions of the European Union and the Member States in certain fields. It has, as such, no formal legal status under the EU Treaties, but it may still be regarded as a way for the EU institutions and the Member States to pursue the principle of “*sincere cooperation*”, in line with Article 4(3) TEU. This implies that the Member States shall both “*facilitate the achievement of the Union’s tasks*” and “*refrain from any measure which could jeopardise the attainment of the Union’s objectives*.”
21. The fact that both the EU and the Member States participate in “*Team Europe*” in the context of the Global Europe Regulation¹² should also be seen against the background that, under Article 4(4) TFEU, development cooperation is a Union policy which does not prevent the Member States from exercising their own competences on development cooperation.
22. It is also explained on DG INTPA’s website that there are more than 150 “*Team Europe Initiatives*” (TEIs) being prepared across the world.
23. Furthermore, the Commission has developed a “*Team Europe Initiative and Joint Programming tracker*” which offers an overview of TEIs and joint programming, for each country, as well as participating Team Europe members and other supporting documents.¹³
24. It can be seen from this tracker that certain Team Europe Initiatives have already been developed for Tunisia, such as “[Tunisia - Investment](#)” and “[Tunisia - Water](#)”, in which a number of different Member States participate, including (but not limited to) Italy and the Netherlands.
25. That said, it is apparent from the tracker that the particular MoU signed by Commissioner Várhelyi on 16 July 2023 is not itself formally included in the list of “*Team Europe Initiatives*”, although there clearly is some overlap between the subject-matter of the TEIs listed in the tracker for Tunisia (e.g. the MoU also refers, *inter alia*, to water management and investment in Tunisia). It should be emphasised that, as a matter of principle, the institutional accountability of the Commission towards both the European Parliament and the Council, under the Treaties, cannot be changed by any practical cooperation arranged with certain Member States in a Team Europe “*spirit*”. The relevant legal procedures under the Treaties for the conclusion of an agreement such as the MoU will therefore be discussed in more detail in the next section below.

¹² Regulation (EU) No 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument - Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (OJ L 209 of 14.6.2021, p. 1)

¹³ <https://capacity4dev.europa.eu/resources/team-europe-tracker>

B. The procedures for concluding agreements with third countries

i) procedure for concluding agreements with binding legal effects - Article 218 TFEU

26. Article 218 TFEU governs the procedure for the negotiation and conclusion of “*agreements between the Union and third countries or international organisations.*”
27. According to settled case-law, the reference to an “*agreement*” here uses the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has “*binding force whatever its formal designation.*”¹⁴
28. As a result, the procedure set out in Article 218 TFEU must be followed whenever an agreement between the Union and a third country has binding legal effect.¹⁵ Conversely, where an agreement between the Union and a third country has no binding legal effects, then the procedure under Article 218 TFEU does not apply.¹⁶

ii) procedure for concluding agreements without binding legal effects - Article 13(2) TEU - the principle of distribution of powers and the principle of institutional balance

29. The Court of Justice has ruled that the Commission cannot be regarded as having the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country because the Commission is required to exercise its powers with due regard for the powers of the other institutions.¹⁷ The decision to sign an agreement — irrespective of whether or not that agreement is binding — requires an assessment to be made, of the Union’s interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled. This assessment concerns the compliance with the strategic guidelines laid down by the European Council and the principles and objectives of the Union’s external action laid down in Article 21(1) and (2) TEU. Therefore, a decision concerning the signature of a non-binding agreement is one of the measures which might define the Union’s policy and its external action planning for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU. This is a matter which falls within the powers conferred on the Council by the Treaties.¹⁸

¹⁴ See Opinion 1/75 of the Court of Justice of 11 November 1975 (EU:C:1975:145).

¹⁵ See also the Judgment of the Court of Justice of 9 August 1994 in Case C-327/91, *French Republic v Commission* (EU:C:1994:305).

¹⁶ See the Judgment of the Court of Justice of 23 March 2004 in Case C-233/02, *French Republic v Commission* (EU:C:2004:173), paragraph 45.

¹⁷ The case concerned an agreement, which had to be non-binding, concerning the contribution by a third country to an enlarged EU, which had to be followed up with a bilateral agreement between the third country and the EU Member State to benefit from the contribution. The Council had authorised the Commission to negotiate an agreement but there was no evidence of any authorisation from the Council for the Commission to then conclude the agreement. See in particular paragraph 36 of the Judgment of the Court of Justice (Grand Chamber) of 28 July 2016 in Case C-660/13, *Council v Commission* (EU:C:2016:616).

¹⁸ See paragraphs 38 to 40 of the Judgment of the Court of Justice (Grand Chamber) of 28 July 2016 in Case C-660/13, *Council v Commission* (EU:C:2016:616).

30. As a result, in order for the Commission to sign, on behalf of the Union, a non-binding agreement with a third country, it is normally necessary for the Commission to obtain the Council's prior approval, in the exercise of that institution's policy making powers in external relations. Failure by the Commission to seek the Council's prior approval for this would amount to an infringement of the principle of distribution of powers in Article 13(2) TEU and the principle of institutional balance.¹⁹
31. Nevertheless, as the purpose of the approval by Council is to allow the Council to carry out policymaking, the case law should not be understood as necessarily requiring an approval even if it is clear that no policy making at all is at stake. It must be taken into account that the need to implement Union legislation, in which the policy is already set, may sometimes require a purely technical arrangement with third countries. The cases so far decided by the Court of Justice have not concerned such purely technical arrangements and not touched upon the potentially applicable procedure for them. In any event, it is unclear whether Council's prior approval was indeed sought in the present case.

iii) Powers of the Parliament under the Treaties - Democratic control of external relations - Duty of Commission to provide information to the Parliament on signature of MoU

32. For the case that the MoU is considered to be a non-binding agreement, the Treaties provide for no specific decision-making process, and the Court of Justice has not yet had the opportunity to rule on Parliament's rights in this context. However, since the MoU has been portrayed as a "template" for future agreements with other countries in the region, the Legal Service is of the view that further reflection should be given to the means to ensure appropriate information of the European Parliament. There are in fact good arguments for considering that the European Parliament should, in principle, also be appropriately informed where such a non-binding agreement with a third country is being prepared.²⁰ We may recall that, under Article 14 TEU, the European Parliament shall exercise the functions of political control as laid down in the Treaties.
33. The Court of Justice has declared that the Union is founded on "*democratic principles*" and, in particular, has stated that the Parliament's involvement in the decision-making process is the reflection, at EU level, of the "*fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.*"²¹
34. It is true that these findings of the Court were made in the context of the negotiations on international agreements under Article 218 TFEU in the field of the CFSP. However, the terms used by the Court clearly show that the right to involvement of the European Parliament, as part of the fundamental "*democratic principles*" of the Union that the Court recognises, applies generally to the whole field of external relations (including also

¹⁹ Ibid, paragraph 46.

²⁰ See in this respect the previous legal opinion SJ-2021-006950 dated 10 December 2021, requested by the AFET and SEDE Chairs, on Permanent Structured Cooperation (PESCO), participation of third States in a project on military mobility, funding from the Union budget and scrutiny by Parliament, in particular paragraphs 68 to 79.

²¹ See the judgment of the Court of Justice of 24 June 2014, *Parliament v Council*, C 658/11, (EU:C:2014:2025), paragraph 81.

the CFSP) and it includes but is not limited to the information requirement laid down in Article 218(10) TFEU.

35. Against this background it can be argued that, in principle, the signature of an agreement between the Union and a third country, whether or not it has binding legal effects,²² needs to be subject to democratic scrutiny to ensure the coherence and consistency of the Union's external action as a whole, particularly where that agreement relates to sensitive policy decisions.

C. The effects and nature of the EU-Tunisia MoU

i) The terms of the MoU in general

36. In view of the above, it is necessary to assess whether or not the MoU has binding legal effects, in order to determine the procedure to follow for its adoption, and the consequences on Parliament's legal situation.
37. Under both international law and EU law, the binding effect of an agreement depends in particular on the parties' intention to be bound by it as a matter of international law. That intention is to be established on the basis of, in particular, the actual terms of the agreement and also the circumstances in which it was drawn up. By contrast, the name and form of the agreement are not of decisive relevance alone for establishing whether an international agreement is binding or non-binding. In fact, it has been shown in practice that the name "*Memorandum of Understanding*" can be used in both senses, for either a non-binding or a binding agreement, depending on the circumstances of the particular case.²³
38. Furthermore, it should be noted that, under international customary law, as expressed in the Vienna Convention on the law of treaties, firstly a "*treaty*" may be embodied in a single document or in several documents and secondly a "*treaty shall be interpreted in good faith in accordance with the meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". This implies that the "*joint declaration*" referred to in the MoU may be part of the MoU but other statements, like the Press Statement of 11 June 2023, are only part of the context relevant for the interpretation of the MoU.²⁴
39. Before turning to the text of the MoU, it is relevant to note that it is possible for the Commission to draft MoUs in a way that removes any possible doubt as to the legal effects of an agreement with a third country by inserting a provision on this. The text of this MoU contains no provision which expressly denies that it has legal effects, unlike other recent MoUs signed by the Commission with other third countries which do contain clear provisions that definitively exclude any possible legal effects: see for example

²² See the Judgment of the Court of Justice (Grand Chamber) of 28 July 2016, *Council of the European Union v European Commission*, Case C-660/13, (EU:C:2016:616), in particular paragraphs 39 and 40.

²³ See Advocate General Sharpston's Opinion in Case C-660/13, *Commission v. Council*, cited above, in particular paragraph 66 and footnotes 30, 31 and 32.

²⁴ It may be noted that the Vienna Convention on the law of the Treaties applies to binding agreements.

recent MoUs with Ukraine²⁵, Egypt and Israel²⁶, as well as Azerbaijan²⁷. An analysis of the wording of the MoU is therefore necessary to determine its legal effects.

40. The MoU is divided into five pillars. Three pillars clearly only express intent to improve cooperation in a vague and general sense, without containing any explicit language that could possibly imply a legal obligation imposed on either Party to achieve a specific result, and no financial obligations appear to be assumed by either Party in this connection - e.g. the pillars on "Economy and trade", "Green energy transition" and "People-to-people contacts".
41. The last pillar on "Migration and mobility" likewise contains mostly general language on the intent to improve cooperation and develop a "holistic approach to migration"²⁸. However, this last pillar also appears to include, on the face of it, some stronger language that could convey the impression of an intention to lay down an obligation to achieve certain specific goals within this general approach.²⁹ There is also a corresponding commitment that the European Union is to "endeavour to provide sufficient additional" financial support to further improve the management of Tunisia's borders.

²⁵ See for example the "Memorandum of understanding between the European Union and Ukraine on a Strategic Partnership on Biomethane, Hydrogen and other Synthetic Gases" signed on 2 February 2023 by President von der Leyen: https://energy.ec.europa.eu/system/files/2023-04/MoU_UA_signed.pdf "This Memorandum of Understanding does not create rights or obligations under international or domestic law. In particular, nothing in this Memorandum represents a commitment of financing for either side."

²⁶ See the EU Egypt Israel Memorandum of Understanding signed on 15 June 2022 by Commissioner for Energy Kadri Simson: <https://energy.ec.europa.eu/system/files/2022-06/MoU%20EU%20Egypt%20Israel.pdf> Section 7, "Nothing in this Memorandum of Understanding will create any legally binding obligations or commitments, or any financial obligations or commitments, between the Sides or in relation to any third party, under domestic or international law."

²⁷ See the Memorandum of Understanding on a Strategic Partnership between the EU and Azerbaijan in the Field of Energy, signed by the then President of the Commission and the President of the European Council in 2006: https://energy.ec.europa.eu/system/files/2022-12/mou_azerbaijan_en.pdf "The present document records intent alone and provides for no legal commitment."

See also Commission Decision dated 15.7.2022 (C(2022) 5088 final) on the Memorandum of Understanding on a Strategic Partnership in the Field of Energy between the European Union represented by the European Commission and the Republic of Azerbaijan. This MoU was signed by the President of the Commission on 18 July 2022: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4583

²⁸ See, for example: "Both sides express their intention to develop a holistic approach to migration", "In this regard, both Parties agree to promote sustainable development in disadvantaged areas...", "The two Parties also share the priorities of combating irregular migration in order to avoid loss of human lives and developing legal pathways for migration. Tunisia reiterates its position that it is not a country of settlement for irregular migrants. It also reiterates its position to control its own borders only", "Both Parties agree to continue working together to address the challenges posed by the increase in irregular migration within Tunisia and the EU...", "They agree to work to further improve the coordination of search and rescue operations at sea and the implementation of effective measures to combat migrant smuggling and human trafficking", "Both Parties agree to further support the return and readmission from the EU of Tunisian nationals in an irregular situation...", "The European Union shall endeavour to take appropriate measures to facilitate legal mobility between the two Parties...", "The two Parties agree to work towards the implementation of a Talent Partnership to promote legal migration, in their common interest...".

²⁹ "This approach shall be based on respect for human rights and shall include combating criminal networks of migrant smugglers and human traffickers, as part of the reinforced operational partnership against migrant smuggling and trafficking in human beings announced in April 2023 - the content of which is currently under discussion, effective border management - and the development of a system for the identification and return of irregular migrants already present in Tunisia to their countries of origin."

42. However, the authentic French text of the MoU uses the future indicative tense “*sera*” here, which points to a less prescriptive meaning.
43. For the Union’s part, the use of the terms “*endeavour to provide*” (in French, “*s’efforce à fournir*”) in respect of the financial support in the MoU shows sufficiently that a binding commitment was not envisaged. This conclusion appears to be confirmed by the context, object and purpose of the MoU, including the financial commitment, which will be assessed below.³⁰
44. The first pillar on “*Macroeconomic stability*”, contains language according to which the “*European Union shall support the reforms in particular through budget support whose amount for the year 2023 shall be paid in full*”. This wording requires a closer examination.
- ii) *Can the first pillar of the MoU on “Macroeconomic stability” be interpreted as having binding legal effects?*
45. The first pillar on “*Macroeconomic stability*” in fact deals with two different albeit interconnected aspects.
46. First, there is a general undertaking by the European Union to assist Tunisia in its efforts to boost economic growth.³¹ This first part does not contain any language which imposes a specific legal obligation on the European Union, nor does it refer to any specific financial contribution to be made. Furthermore, this undertaking is only given by the Union “*in accordance with the relevant rules and decision-making practice*”, so this clearly appears to exclude any obligation to achieve a particular result at this stage and is subject to the Union’s own internal rules and practice. It is also stated in this regard that implementation “*shall be discussed in the third quarter of 2023*”, which merely reflects therefore an intention to have further discussions.
47. By contrast, the second part of this first pillar concerning budgetary support³² does contain a more direct language (“*shall support*” and “*shall be paid in full*”).
48. Here again, we should though exercise some caution when reading the English version of the MoU, given that the only authentic text is in French, as explained above.³³ The French

³⁰ Nevertheless, it may be noted that the Press statement contains more categorical language under which the “*EU will provide EUR 100 million...*”.

³¹ “*The European Union undertakes, in accordance with the relevant rules and decision-making practice, to assist Tunisia in its efforts to boost economic growth with the aim of establishing a sustainable and non-exclusive development model through appropriate policies, including the socio-economic reforms designed by Tunisia. The implementation of this approach shall be discussed in the third quarter of 2023.*” [emphasis added]

³² Also, to put this in its proper context, we should recall here that “*budget support*” has a particular meaning in Article 236 of the Financial Regulation and also under the Global Europe - NDICI Regulation, as helpfully explained in detail by the European Commission on its website: “*Budget support is central to our international cooperation. The EU is the world’s top provider of grant budget support. It involves direct financial transfers to the national treasury of partner countries engaging in sustainable development reforms.*” https://international-partnerships.ec.europa.eu/funding-and-technical-assistance/funding-instruments/budget-support_en#:~:text=The%20EU%20is%20the%20world%27s,performance%20assessment%2C%20and%20capacity%20building

³³ See footnote 2 above.

version of the MoU uses the future indicative tense here, which arguably is less stringent, even though this can also be used to indicate an obligation in some cases:

« **L'Union européenne accompagnera les réformes notamment à travers un soutien budgétaire dont le montant au titre de l'année 2023 sera versé dans sa totalité.** »

49. However, there is another reason why this clause should not be understood as a binding commitment: the amount in question here is not specified in the MoU or the Joint Declaration but only in the Press Statement of 11 June 2023.
50. The “*Press Statement*” of 11 June 2023 (see footnote 2) reports as follows:
- “The first pillar is economic development. We will support Tunisia to strengthen its economy. The European Commission is considering macro-financial assistance as soon as the necessary agreement is found. We are ready to mobilise up to EUR 900 million for this purpose. And as an immediate step, we could provide an additional EUR 150 million in budget support.”**
51. While the press statement contains an amount, the words “*could provide*” clearly indicate this amount as a simple possibility. While it may be discussed whether a simple press statement could add such an essential element to an agreement, it is clear that this one does not do that. Instead, as the assessment of the procedure for committing the EU budget will show, the press statement must be understood as simply announcing measures that have been taken or could be taken in accordance with the relevant Union legislation. In these circumstances and in the absence of any other evidence as to what the “*full amount*” referred to is, it can be concluded that there is no clear commitment to provide any specific amount of financial assistance expressed in the first pillar of the MoU.

D. The procedures for committing the EU budget and their application in this case

i) The references to financial assistance in the MoU in general

52. As for the procedures to follow for committing the EU budget in relation to this MoU, both the Treaties³⁴ and the Financial Regulation³⁵ emphasise the need to respect the relevant “*basic act*”.
53. Given the wide-ranging scope of this MoU covering various fields of EU competences (e.g. economic stability, trade, migration, energy, industry, research, education, development etc), there are a number of “*basic acts*” which could possibly apply to financial payments to be made by the European Union from the EU budget here.
54. In his letter dated 20 July 2023 to Commissioner Ms Ylva Johansson, the LIBE Chair, Mr Juan Fernando López Aguilar, requested the Commission to provide, inter alia, “*a full breakdown of the financial aspects of the agreement, including from what budgets they will be paid, with what objectives, to which projects and whom will be the beneficiary.*”

³⁴ See Article 310(3) TFEU: “*The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322 [i.e. the Financial Regulation], except in cases for which that law provides.*”

³⁵ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union. For the consolidated text, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02018R1046-20221214>

The Commission's reply of 20 October 2023 confirmed that "[t]he figures that the President of the Commission mentioned in her remarks in Tunis are part of our ongoing or planned cooperation with Tunisia, which is channelled through various Commission funding instruments". The Legal Service notes that the Commission's letter does not provide a breakdown, nor identify the budget lines in question or explain under which legal instrument the assistance is provided.

55. We may also recall that up to **EUR 900 million** could potentially also be offered by the Union to Tunisia for macro-financial assistance (MFA) under the policy of Economic, financial and technical cooperation under pillar one of the MoU, but this is not likely at present, due to the refusal of the President of Tunisia to accept the current IMF proposal, which MFA support from the EU is designed to be complementary to.
56. In addition, the Connecting Europe Facility³⁶ under the policies of Trans-European Networks and Energy (which applies to pillar three on Green energy transition, notably for over **EUR 300 million** for the ELMED project) also appears to be of interest.³⁷ Further details of such projects are also given on the website of Commission's DG Energy.³⁸ However, the MoU under Green energy transition refers to this project in clearly non-binding terms. Without having had the occasion to examine in detail the relevant measures to be adopted under the relevant Union legislation, it is clear that the MoU does not change anything in that regard.
57. One applicable EU Regulation in particular clearly stands out here as likely to provide by far the most significant financial contributions for this MoU, namely the Global Europe - NDICI Regulation (which applies to pillar one on macroeconomic support, notably for **EUR 150 million** for budget support, and pillar five on migration, notably for **EUR 105 million** for migration funding). We will therefore examine the procedure to follow under this basic act in more detail below.

³⁶ Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1316/2013 and (EU) No 283/2014, OJ L 249 of 14.7.2023, p. 38.

³⁷ According to information published by the Commission at the end of 2022, the EU Member States have given the green light to a Commission proposal to invest €602 million of EU funds in eight cross-border energy infrastructure projects under the [Connecting Europe Facility](https://energy.ec.europa.eu/news/connecting-europe-facility-over-eu-600-million-energy-infra-structure-support-european-green-deal-and-2022-12-08_en) (CEF) for [Trans-European Networks for Energy](https://energy.ec.europa.eu/news/connecting-europe-facility-over-eu-600-million-energy-infra-structure-support-european-green-deal-and-2022-12-08_en). The largest amount of funding worth **€307.6 million** is intended for an electricity transmission project, which supports the construction of a first interconnection between Italy and Tunisia with an undersea high-voltage electricity cable, called the ELMED interconnector. See the press release on 8 December 2022 on the website of DG Energy, "[Connecting Europe Facility: over € 600 million for energy infrastructure in support of the European Green Deal and REPowerEU](https://energy.ec.europa.eu/news/connecting-europe-facility-over-eu-600-million-energy-infra-structure-support-european-green-deal-and-2022-12-08_en)": https://energy.ec.europa.eu/news/connecting-europe-facility-over-eu-600-million-energy-infra-structure-support-european-green-deal-and-2022-12-08_en

³⁸ https://energy.ec.europa.eu/topics/infrastructure/projects-common-interest/funding-projects-common-interest_en

ii) Global Europe - NDICI Regulation

58. The Global Europe - NDICI Regulation³⁹ provides for EU funding for third countries around the world, in particular in support of the EU development cooperation policy and also the EU neighbourhood policy.
59. Also, there are specific rules for the EU neighbourhood policy,⁴⁰ which includes “*multi-country indicative programmes in the Neighbourhood area*” which address challenges common to all or a number of partner countries, based on priorities of the Eastern Partnership and the southern dimension of the reviewed European Neighbourhood Policy.
60. In general, the first step for implementation of the Global Europe-NDICI Regulation is carried out for geographic programmes through multiannual country and multi-country “indicative programmes”,⁴¹ which are adopted by the Commission as implementing acts.⁴² These “*indicative programmes*” are built on various kinds of programming documents prepared in cooperation with the relevant third country or countries, depending on the kind of programme in question.⁴³ It can also include, where relevant, “*a joint document between the Union and the partner or partners concerned setting out common priorities and mutual commitments.*” Furthermore, to increase the impact of collective cooperation of the Union, where possible and appropriate, a “*joint programming document*” can replace the Union’s and Member States programming documents.⁴⁴
61. Following the adoption of “*indicative programmes*” in a Commission implementing act, the next step is then for the Commission to adopt “action plans and measures”,⁴⁵ also as implementing acts,⁴⁶ which are usually based on programming documents.
62. Once both “*indicative programmes*” and “*action plans*” have been adopted, through separate Commission implementing acts, then the Commission is in a position to commit the EU budget, in accordance with the Financial Regulation, through one of the recognised means of financing foreseen in the latter, such as directly by the Commission, by Union delegations or by executive agencies, or indirectly through other specified entities.⁴⁷
63. Union funding may thus be provided through the types of financing envisaged by the Financial Regulation and in particular by “budget support”.⁴⁸

³⁹ Regulation (EU) No 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument - Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (OJ L 209 of 14.6.2021, p. 1)

⁴⁰ See Chapter II, articles 18 to 21.

⁴¹ See article 14, “*Programming documents for geographic programmes*”

⁴² See article 16, “*Adoption and amendment of multiannual indicative programmes*”

⁴³ For example, for development policy, this can include a national or regional strategy in the form of a development plan or a similar document accepted by the Commission as a basis for the corresponding multiannual indicative programme, at the time of adoption of the latter document.

⁴⁴ Article 14(4)

⁴⁵ See Article 23, “*Action plans and measures*”.

⁴⁶ See Article 25, “*Adoption of action plans and measures*”.

⁴⁷ C.f. Article 26, “*Methods of cooperation*”.

⁴⁸ See Article 27, “*Forms of Union funding*”.

64. In respect of the financial assistance referred to in the MoU, the Joint Declaration and the Press statement, it appears that the Commission has adopted or is in the process of adopting the relevant measures under the NDICI-Global Europe Regulation. There are thus multiannual country and multi-country “*indicative programmes*” in the form of implementing acts adopted in 2021⁴⁹ and 2022.⁵⁰
65. According to information published by the Commission on DG NEAR’s website, there is not yet actually a country specific indicative programme for Tunisia (only a draft version, it appears).⁵¹ That said, it also appears that Tunisia does benefit from regional programmes for the Southern Neighbourhood.⁵² In particular, it is reported that:
*“In 2023, Tunisia will benefit from an indicative amount of €105 million migration-related funding.”*⁵³
66. This is also confirmed in a “*Fact Sheet*” on migration support for Tunisia, also published by DG NEAR in June 2023, which reports that, under the NDICI - Global Europe Regulation:
“A further allocation of €105 million is foreseen for 2023 covering the fight against irregular migration to and from Tunisia and the prevention of loss of life at sea (including fighting against smugglers and human traffickers, strengthening border management, registration and voluntary return in full respect of human rights).”^{54 55}

⁴⁹ In this context, we may note that there is in fact a “multi-country indicative programme” for the Southern Neighbourhood region, adopted by Commission Implementing Decision of 16 December 2021, which does cover Tunisia and so could be relevant here for the MoU in question. See the “*Regional Multiannual Indicative Programme (MIP) 2021-2027 for EU support to the Southern Neighbourhood*”, C(2021)9399 of 16.12.2021, which is published, as the Annex to the Commission Implementing Decision, on the website of DG NEAR: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-01/C_2021_9399_F1_ANNEX_EN_V2_P1_1627350.PDF

⁵⁰ In addition, the Commission has also adopted a specific multi-country “migration” indicative programme for the Southern Neighbourhood region, by a Commission Implementing Decision of 11 November 2022, which likewise covers Tunisia for this purpose. See the “*Multiannual Indicative Programme (MIP) 2021-2027 for a Multi-Country Migration Programme for the Southern Neighbourhood*”, C(2022) 8015, the Annex of which is published on the website of DG NEAR: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-11/C_2022_8015_F1_ANNEX_EN_V5_P1_2262950.PDF

⁵¹ See the DG NEAR webpage on Tunisia which indicates, under the heading “*Bilateral cooperation*” that “*under NDICI-GE, bilateral assistance follows multiannual programming through the draft Multiannual Indicative Programme 2021-2027, yet to be adopted for Tunisia, defining the areas of focus for EU assistance, in line with the Strategic Priorities ... For the period 2021-2024, the EU’s bilateral assistance to Tunisia under NDICI amounts to €600 million ...*” [emphasis added]. https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/tunisia_en

⁵² See the same website, under the heading “*Regional cooperation*”, where it is indicated that “*In addition to bilateral cooperation, Tunisia benefits from regional and Neighbourhood-wide cooperation programmes under the NDICI-GE and previously under the ENI in the sectors of economic development and business environment; education, training and research; culture and media; migration and asylum; justice, freedom and security; environment, climate change and energy; civil society*” [emphasis added].

⁵³ See the same website, under the heading “*Support in the field of migration under the EUTF Africa*”.

⁵⁴ See the Fact Sheet on EU Migration Support in Tunisia, dated June 2023: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-07/EUTF-Tunisia_v9.pdf

⁵⁵ It may be noted that Article 27(4) of the Global Europe-NDICI Regulation provides “*When providing budget support in accordance with Article 236 of the Financial Regulation, the Commission shall clearly define and monitor criteria for budget support conditionality, including progress in reforms and transparency, and shall support the development of parliamentary control, national audit capacities and increased transparency and public access to information*”.

67. Against this background, it appears that the MoU signed on 16 July 2023 did not actually form part of the programming phase foreseen under the Global Europe - NDICI Regulation. It is also apparent that the signature of this MoU was not required by this Regulation for the Commission to be able to commit the EU budget.
68. Specifically, we may note that the EU budget for 2023 includes budget lines which make available sufficient financial resources to cover the relevant amounts for both “*budget support*” to Tunisia under the first pillar of the MoU (i.e. EUR 150 million) as well as grants to Tunisia for migration related support under the fifth pillar of the MoU (i.e. EUR 105 million).⁵⁶
69. We should also note that, in accordance with Articles 112(4) and 236 of the Financial Regulation, the Commission will first have to conclude a new “*financing agreement*” with Tunisia setting out particular conditions and requirements, before paying any “*budget support*” for 2023.⁵⁷ It is not known if the Commission has yet concluded such a “*financing agreement*” with Tunisia, under the Financial Regulation, for the purpose of paying “*budget support*” in 2023, subject to such conditionality. The letter of 20 October does not contain any information about this.

iii) *The procedure for the conclusion of the memorandum of understanding*

70. As already seen under sections C. and D. above, the references to financial assistance in the MoU appear to be covered by measures being taken in accordance with the applicable Union legislation, and the object and purpose of the MoU appear to be limited to making a policy statement about possible next steps on the basis of Union action already decided by the competent institutions of the European Union.
71. Against this background and while bearing in mind that there is some uncertainty as to the exact content of the Joint Declaration, it may be concluded that the MoU did not add any legally binding commitment under international law.
72. It should be underlined that the MoU and the Joint Declaration do not contain any technical arrangements of the kind that may be necessary for the practical implementation of a Union legislative act on the financing of external action, such as NDICI-Global Europe.
73. While it is open to question how far the parties viewed the different pillars of this MoU - financing and migration - as being interconnected, the comprehensive “*package approach*” of bundling a wide range of EU policy fields (e.g. in particular budget support and migration, not to mention also trade, energy, research, etc) clearly involves delicate policy-making decisions, and potential “*trade-offs*” - or to use the language of the Court, there is a need to “*reconcile*” the “*divergent interests*” in EU relations with a third country here. Against this background, the hypothesis that the MoU could be limited to so some kind of technical arrangement under the applicable Union legislation must be discarded.

⁵⁶ See, for example, budget line 14 02 01 10 on the “*Southern neighbourhood*”.

⁵⁷ It appears that the Commission had previously concluded other “*financing agreements*” with Tunisia for budget support to be provided in previous years, notably for financial support in the context of the COVID pandemic, but this is not relevant here for budget support to be provided in 2023 in accordance with this MoU.

74. This means that Article 218 TFEU does not apply, whilst the requirements stemming from the case law of the Court of Justice on non-binding agreements outlined above apply.

IV. CONCLUSIONS

75. The Legal Service reaches the following conclusions:

On “*Team Europe*”

- a) The basic concept underlying “*Team Europe*” is a practical means of ensuring better cooperation and coordination between the institutions of the European Union and the Member States in certain fields, but it has as such no formal legal status under the EU Treaties. It may though be regarded as a way for the EU institutions and the Member States to pursue the principle of “*sincere cooperation*”, in line with Article 4(3) TEU.
- b) As a matter of principle, the institutional accountability of the Commission towards both the European Parliament and the Council, under the EU Treaties, cannot be changed by any practical cooperation arranged with certain Member States in a Team Europe “*spirit*”.

On the procedure for concluding international agreements

- c) The procedure to follow, under the EU Treaties, for the EU to conclude a written agreement with a third country depends on whether or not the agreement is legally binding. Article 218 TFEU sets out the normal procedure for the EU to conclude an agreement with a third country where it has binding legal effects.
- d) Where an agreement does not have binding legal effects and so falls outside of the scope of the procedure set out in Article 218 TFEU, it is still necessary for the Commission to obtain the Council’s prior approval, in the exercise of that institution’s policy-making powers in external relations under Article 16 TEU. This does not exclude that the Commission may conclude purely technical agreements where it is clear that there is no policy making at stake, such as within the context of the implementation of Union legislation.
- e) As it appears that the Commission aims to use the MoU with Tunisia as a “*template*” for new agreements with other third States in the region, further consideration should be given to the means to ensure that the European Parliament is appropriately informed by the Commission where this type of non-binding agreement is being prepared, so that it can exercise its powers of democratic scrutiny in accordance with Article 14 TEU.

On the effect and nature of the EU-Tunisia MoU

- f) It should be noted that there is still some uncertainty as to which document actually constitutes the Joint Declaration referred to in the MoU. It is understood here that the content of the Joint Declaration is provided in a “*News Article*” dated 11 June 2023 and published on the Commission’s website. A reservation must thus be made for this uncertainty.
- g) The MoU and the Joint Declaration contain terms that are generally non-committing and even for the terms that could potentially be understood as expressing a commitment it does not contain any specification as to the amounts

the EU would have committed itself to. While the press statement of 11 June 2023 does contain references to the available amounts, it does so in terms that indicate a possibility rather than a commitment. It is not part of the agreement and does not appear to express any declaration of intent but should rather be understood as a mere announcement to the press. In this situation, it appears that the MoU does not have legally binding effects. The MoU thus falls outside the scope of Article 218 TFEU.

- h) The MoU is not a purely technical arrangement but involves rather important statements of policy.

On the procedure for committing the EU budget

- i) Given the wide-ranging scope of this MoU covering various fields of EU competences, there are a number of “*basic acts*” (i.e. EU legislation) which apply to financial assistance from the European Union here.
- j) In particular, the Global Europe - NDICI Regulation applies to pillar one of the MoU on macroeconomic support, notably for **EUR 150 million** for “*budget support*” to Tunisia. This Regulation also applies to pillar five of the MoU on migration, notably for **EUR 105 million** for migration funding to support the Tunisian border authorities.
- k) According to the information available, the relevant measures are being taken by the Commission under the Global Europe-NDICI Regulation, through the adoption of Commission implementing measures. Even if the Commission has not provided full information about these measures, it can nevertheless be concluded that the MoU does not seem capable of producing legal effects on any of them.
- l) Other measures referred to in the MoU include the Connecting Europe Facility under Trans-European Networks and Energy policy and macro-financial assistance (MFA) under Economic, financial and technical cooperation with third countries. The MoU does not produce any legal effects in respect of any of the measures that may be taken in these areas.

[*signed*]
Dominique MOORE

[*signed*]
Rob VAN DE WESTELAKEN

[*signed*]
Freddy DREXLER
The Jurisconsult

Annex: Request for a legal opinion dated 29 August 2023.