

# **The legal nature of the EU-Turkey Statement**

Putting NF, NG and NM v. European Council in perspective

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## Abstract

The EU-Turkey Statement of 18 March 2016 was one of the central policy measures taken in response to the European migration crisis. Both the Statement's questionable compatibility with human rights and refugee law and its legal nature have sparked controversy. The latter is the subject this dissertation seeks to address. In order to determine the legal nature of the EU-Turkey Statement, two separate questions need to be addressed: the legal nature of the Statement *sensu stricto* – international agreement or political statement – and its authorship – act of the European Council or act of the Heads of State or Government of the Member States. The authorship of the Statement was addressed by the General Court in three orders of 28 February 2017 – NF, NG and NM v. European Council. In these orders, the General Court held that the EU-Turkey Statement cannot be regarded as an act of the European Council or any other EU institution, independent of its legal nature. This dissertation seeks to analyse the legal nature of the EU-Turkey Statement in order to put the General Court's orders in perspective. The core argument developed in this dissertation is that the EU-Turkey Statement should be considered an international agreement, concluded between the European Council and Turkey. In this light this dissertation then continues to assess the consequences of the General Court's orders and the main concerns they have raised.

Key words: EU-Turkey Statement; European Union; Turkey; Legal Nature; Authorship; International Law; EU Law; Asylum and Migration; European Migration Crisis

## Abstract (Dutch translation)

De EU-Turkije Verklaring van 18 maart 2016 was een van de belangrijkste beleidsmaatregelen om de Europese migratiecrisis te bedwingen. Zowel de verenigbaarheid van de EU-Turkije Verklaring met mensenrechten- en vluchtelingenwetgeving, als de juridische aard van de Verklaring hebben tot controverse geleid. Dit laatste vormt het onderwerp van deze scriptie. Om de juridische aard van de EU-Turkije Verklaring te bepalen, moeten twee afzonderlijke vragen beantwoord worden: de juridische aard van de Verklaring in strikte zin – internationaal akkoord of politieke beslissing – en het auteurschap van de Verklaring – maatregel van de Europese Raad of maatregel van de staatshoofden van de lidstaten. Het auteurschap van de EU-Turkije Verklaring is behandeld door het Gerecht in drie beschikkingen van 28 februari 2017 – NF, NG and NM / Europese Raad. In deze beschikkingen heeft het Gerecht verklaard dat de EU-Turkije Verklaring niet kan worden beschouwd als een handeling van de Europese Raad of van enige andere Europese instelling, ongeacht zijn juridische aard. Deze scriptie analyseert de juridische aard van de EU-Turkije Verklaring met als doel de beschikkingen van het Gerecht in perspectief te plaatsen. Het belangrijkste argument dat in deze scriptie wordt ontwikkeld is dat de EU-Turkije Verklaring moet beschouwd worden als een internationaal akkoord, gesloten tussen de Europese Raad en Turkije. Deze scriptie onderzoekt vervolgens de gevolgen van de beschikkingen van het Gerecht en formuleert een aantal bedenkingen bij deze beschikkingen.

Kernwoorden: EU-Turkije Verklaring; Europese Unie; Turkije; Juridische Aard; Auteurschap; Internationaal Recht; Europees Recht; Asiel en Migratie; Europese Migratiecrisis

## List of abbreviations

**CFSP** Common Foreign and Security Policy

**CJEU** Court of Justice of the European Union

**ECHR** European Convention on Human Rights

**ECtHR** European Court of Human Rights

**ERTA** European Road Transport Agreement

**EU** European Union

**ILC** International Law Commission

**IMO** International Maritime Organisation

**MS** Member State

**ICJ** International Court of Justice

**ICJ-Statute** Statute of the International Court of Justice

**TCN** Third Country National

**TEU** Treaty on the European Union

**TFEU** Treaty on the Functioning of the European Union

**VCLT** Vienna Convention on the Law of Treaties

**VCLT-IO** Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

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# Chapter 1. Introduction

## 1.1 The EU-Turkey Statement: framing the issues

The European migration crisis has been making headlines for over three years now. Since 2015, the European Union (hereinafter EU) has been facing the largest influx of migrants and refugees since the end of World War II. Frontline member states (hereinafter MSs) Italy and Greece were and still are most affected by the migrant influx. Their geographical situation has made them the main countries of entry into the EU. In addition, the Dublin III Regulation designates the first country of irregular entry into the EU of an asylum seeker as responsible for examining his or her application for international protection. These debt-laden countries however missed the necessary capacity for processing all arriving migrants.

The EU's immediate response to the migration crisis focused on better managing migratory flows and protecting those in need. The Union's strategy however elicited mixed reactions among the EU MSs, uncovering a fierce opposition between two factions with opposing strategies on how to handle the migration crisis. A group of Western European countries, headed by German Chancellor Angela Merkel, backed the Union's strategy, while a group of Eastern European countries opposed the Union's strategy and advocated for the protection of external borders and the eradication of the root causes of the migration crisis. This unreconcilable divergence of views, resulted in a consistent failure to come to a unanimous solution on how to manage the migration crisis within the EU. Therefore, the idea of externalising the issue arose. Turkey was identified as a key partner for the EU in fending off the migration crisis.

In order to stem the migration flow coming from Turkey to Greece via the Eastern Mediterranean route, the EU, its MSs and Turkey engaged in negotiations starting from September 2015. As a result of these negotiations, the EU-Turkey Joint Action Plan was published on the website of the European Commission on 15 October 2015. The Joint Action Plan was activated during a meeting of the EU Heads of State or Government with Turkey on 29 November 2015. On 7 March 2016, a Statement of the EU Heads of State or Government was published as a press release on the joint website of the European Council

and the Council of the European Union. The President of the European Council was assigned to take forward the proposals mentioned in the Statement and work out the details with its Turkish counterpart before the March European Council. On 18 March 2016, the EU-Turkey Statement was published in the form of a press release on the website of the European Council and the Council of the European Union. The full text of the EU-Turkey Statement is available in Appendix A.

Since its publication on 18 March 2016, the EU-Turkey Statement has been a hot topic in legal literature. Especially its compatibility with European and international human rights and refugee law is deemed questionable. Another issue relating to the EU-Turkey Statement – that originally however got less attention in legal doctrine – is its legal nature. This is the subject this dissertation seeks to address.

It deserves to be emphasised here that both issues are inherently linked. The legal nature of the EU-Turkey Statement will determine if and to which form of judicial scrutiny the Statement can be subjected to establish potential human rights violations. Therefore, the relevance of determining the legal nature of the Statement is not to be underestimated.

Answering the legal nature question, in practice entails answering two separate questions. For starters, it is necessary to assess whether the EU-Turkey Statement is a binding international agreement or a non-binding political statement (i.e. its legal nature *sensu stricto*). Next, it is necessary to determine the authors of the EU-Turkey Statement (i.e. its authorship). Considering that Turkey is one of its authors, the question as to its European counterpart remains. The choice is between the representatives of the MSs, either acting in their capacity as Heads of State or Government of the MSs, or acting in their capacity as Members of the European Council.

The unclarity surrounding the legal nature of the EU-Turkey Statement has led to a heated debate between legal scholars. S. Peers for example considered that *“Since the agreement will take the form of a ‘statement’, in my view it will not as such be legally binding. Therefore, there will be no procedure to approve it at either EU or national level, besides its endorsement by the summit meeting. Nor can it be legally challenged as such. However, the individual elements of it – new Greek, Turkish and EU laws (or their implementation), and the further implementation of the EU/Turkey readmission agreement – will have to be*

*approved at the relevant level, or implemented in individual cases if they are already in force”*.<sup>1</sup> M. Den Heijer and T. Spijkerboer, on the contrary, were of the view that “... *the EU-Turkey Statement is a treaty with legal effects, despite its name and despite internal EU rules not having been observed*”.<sup>2</sup> E. Cannizaro similarly held that “*In spite of its elusive title, the Statement appears to be an international agreement*”.<sup>3</sup> O. Corten and M. Dony concluded that “*On peut donc conclure que cette déclaration constitue bien en réalité un accord international*”.<sup>4</sup>

The authorship of the Statement, on the other hand, seemed less controversial. Most authors seemed convinced that it was an act of the European Council. G. Fernandez Arribas for example, argued that the EU-Turkey Statement was “*concluded by the European Council*”.<sup>5</sup> A. Ott found that “*The European Council has to be considered accountable for this Statement*”.<sup>6</sup>

In three orders of 28 February 2017 – NF v. European Council, NG v. European Council and NM v. European Council (hereinafter NF, NG and NM v. European Council) – the General Court however decided that the EU-Turkey Statement is not an act of the European Council or any other institution, independent of whether the Statement constitutes an international agreement or a political statement. This dissertation analyses and challenges the General Court’s findings.

## 1.2 Scope of the research

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<sup>1</sup> S. PEERS, “The draft EU/Turkey deal on migration and refugees: is it legal?”, EU Law analysis, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>, last accessed on 10 May 2018.

<sup>2</sup> M. DEN HEIJER and T. SPIJKERBOER, “Is the EU-Turkey refugee and migration deal a treaty?”, EU Law Analysis, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed on 10 May 2018.

<sup>3</sup> E. CANNIZARO, “Disintegration Through Law?”, *European Papers* 2016, 3.

<sup>4</sup> O. CORTEN and M. DONY, “Accord politique ou juridique: quelle est la nature du “machin” conclu entre l’UE et la Turquie en matière d’asile?”, EU Immigration and Asylum Law and Policy, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>, last accessed on 10 May 2018.

<sup>5</sup> G. FERNANDEZ ARRIBAS, “The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?”, *European Papers* 2017, 309.

<sup>6</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 29, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

## 1.2.1 Aims

A first aim of this dissertation is to provide a detailed outline of the framework, both politically and legally, within which the EU-Turkey Statement was concluded. Existing studies tend to limit themselves to one aspect of the EU-Turkey Statement: the European migration crisis<sup>7</sup>, the political background of the Statement<sup>8</sup>, its (in)effectiveness<sup>9</sup>, the legal nature of the Statement<sup>10</sup>, the General Court's orders on the Statement<sup>11</sup> and so on. This dissertation brings together the somewhat scattered legal scholarship to make it possible to understand not only the *what* but also the *why*. The need to go further than a mere legal analysis, stems from the inherently political nature of the decision-making process within the EU.

A second aim of this dissertation is to make a coherent and comprehensive analysis of the legal nature of the EU-Turkey Statement. To this end, both the legal nature *sensu stricto* of the EU-Turkey Statement – international agreement or political statement – and its authorship – act of the EU or act of the MSs – will be assessed. In doing so, this dissertation will start from the General Court's orders of 28 February 2017 in NF, NG and NM v. European Council, but will also depart from them in as far as the General Court has omitted to answer certain questions or failed to take into account relevant arguments. This analysis

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<sup>7</sup> S. CARRERA, S. BLOCKMANS, D. GROS and E. GUILD, "The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities", CEPS, 16 December 2015, 7, [https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis\\_0.pdf](https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf), last accessed on 10 May 2018.

<sup>8</sup> I. TOYGÜR and B. BENVENUTI, "The European response to the refugee crisis: Angela Merkel on the move", Istanbul Policy Center – Mercator Policy Brief, June 2016, [http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur\\_BiancaBenvenuti\\_FINAL.pdf](http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur_BiancaBenvenuti_FINAL.pdf), last accessed on 10 May 2018.

<sup>9</sup> T. SPIJKERBOER, "Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and Border Deaths?", Border Criminologies, 28 September 2016, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>, last accessed on 10 May 2018.

<sup>10</sup> M. DEN HEIJER and T. SPIJKERBOER, "Is the EU-Turkey refugee and migration deal a treaty?", EU Law Analysis, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed on 10 May 2018; O. CORTEN and M. DONY, "Accord politique ou juridique: quelle est la nature du 'machin' conclu entre l'UE et la Turquie en matière d'asile?", EU Immigration and Asylum Law and Policy, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>, last accessed on 10 May 2018.

<sup>11</sup> L. LIMONE, "Today's Court (non) decision on the (non) EU 'deal' with Turkey", FREE Group, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>, last accessed on 10 May 2018; E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council", European Papers, 15 March 2017, <http://www.europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018.

will go beyond simply consolidating the existing legal doctrine on the matter and comprise my own informed opinion.

A third and last aim of this dissertation is to identify the consequences of the General Court's orders in NF, NG and NM v. European Council. This will make it possible to understand the main concerns with said orders. The further consequences of the General Court's approach are illustrated by referring to two recent migration "compacts" that are in some way similar to the EU-Turkey Statement – the Joint Way Forward with Afghanistan and the Italy-Libya Memorandum of Understanding. This allows me to frame the EU-Turkey Statement within a broader trend within the migration policy field.

### **1.2.2 Gaps**

Another (at least) equally contentious issue concerning the EU-Turkey Statement is its compatibility with European and international human rights and refugee law. Despite the fundamental importance of this question, this dissertation will not elaborate on it. First, it is a question that has already been broadly discussed by legal scholars and human rights activists. Second, it is a question that does not need to be answered to formulate an informed response to the main research question of this dissertation. The question as to the legal nature of the EU-Turkey Statement, is in fact a preliminary question to assessing the compatibility of the Statement with European and international and human rights law, and not the other way around.

### **1.2.3 Originality**

As mentioned above, the question as to whether or not – most part of legal doctrine being convinced not – the EU-Turkey Statement is in accordance with human rights and refugee law has been widely discussed in legal doctrine. The legal nature of the EU-Turkey Statement on the other hand, has proved to be a less hot topic. It gained however momentum after the General Court's orders in NF, NG and NM v. European Council.

I would argue that today, we face the best possible conditions to make a comprehensive analysis of the legal nature of the EU-Turkey Statement. Roughly two years after the

publication of the EU-Turkey Statement on the website shared by the European Council and the Council of the European Union, it is possible to consider new elements such as the implementation of the Statement in practice and the General Court's orders in NF, NG and NM v. European Council.

Both before and since these General Court orders, the legal nature of the EU-Turkey Statement has been discussed in a number of works. Despite the fact that some of these works give excellent analyses of the legal nature of the Statement, they fail to fully grasp the problem due to their one-sided approach. A few examples hereof are: *The draft EU/Turkey deal on migration and refugees: is it legal?* of S. Peers<sup>12</sup>, *Accord politique ou juridique: Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?* of O. Corten and M. Dony<sup>13</sup> and *The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?* of G. Fernandez Arribas<sup>14</sup>. These studies fail to make the link between the *what*- and the *why*-question.

### 1.3 Research questions

This dissertation seeks to assess the legal nature of the EU-Turkey Statement in order to put the General Court's orders in NF, NG and NM v. European Council in perspective. Therefore, the main research question that has been identified is: what is the legal nature of the EU-Turkey Statement?

To address this issue, four sub-questions have been developed. The first sub-question is: is the EU-Turkey Statement an international agreement? A second sub-question is related to the authorship of the EU-Turkey Statement: if the EU-Turkey Statement is an international agreement, who are the parties to that agreement? These two first sub-questions are

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<sup>12</sup> S. PEERS, "The draft EU/Turkey deal on migration and refugees: is it legal?", EU Law analysis, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>, last accessed on 28 March 2018.

<sup>13</sup> O. CORTEN and M. DONY, "Accord politique ou juridique: quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?", EU Immigration and Asylum Law and Policy, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>, last accessed on 10 May 2018.

<sup>14</sup> G. FERNANDEZ ARRIBAS, "The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?", *European Papers* 2017.



inherently linked and will allow me to answer the main research question. The third and fourth sub-questions form logical and necessary additions to this dissertation. The third sub-question is: what are the consequences of the General Court's orders in NF, NG and NM v. European Council? The fourth and last sub-question is: what are the main concerns with the General Court's orders in NF, NG and NM v. European Council?

## 1.4 Methodology

This dissertation starts from a textual analysis of the EU-Turkey Statement and the General Court's orders thereon. Besides these documents, the main sources of this dissertation are fourfold: legislation, relevant case law, academic literature and instruments of the European institutions.

Chapter 2 of this dissertation (Factual Background of the EU-Turkey Statement) is based on an analysis of academic literature and instruments of the European institutions.

Chapter 3 (The legal nature of the EU-Turkey Statement) entails a comprehensive analysis of the legal nature of the EU-Turkey Statement, starting from legislation and relevant case law. Academic literature will contribute to getting a better understanding of how these sources are relevant for the EU-Turkey Statement. This framework will be applied to the EU-Turkey Statement, the General Court's NF, NG and NM v. European Council orders, and other relevant instruments of the European institutions. This Chapter answers first the question as to the legal nature of the EU-Turkey Statement under public international law and second the question as to its authorship. Addressing both the hypothesis of the EU-Turkey Statement as an EU act and the hypothesis of the EU-Turkey Statement as an act of the MSs, allows to point out the legal issues and possibilities for judicial scrutiny that accompany these respective qualifications.

Chapter 4 of this dissertation (Main concerns with the General Court's order in NF v. European Council) will comprise my proper analysis of the main concerns with the General Court's orders in NF, NG and NM v. European Council. In addition, this Fourth Chapter sheds a light on two recent instruments that are similar to the EU-Turkey Statement and the

possible consequences of the General Court's orders thereon. This analysis will be supported by legislation, relevant case law and academic literature where possible.

The Fifth and last Chapter forms a conclusion

## 1.5 Social relevance of the investigation

The number of asylum seekers that has been returned to Turkey from the Greek islands since the entry into force of the EU-Turkey Statement on 20 March 2016 has remained limited. Nevertheless, the EU-Turkey Statement has had a significant impact on the lives of those returned to Turkey and on the lives of thousands of others who were deterred from commencing their trip to Greece. This makes the social relevance of this investigation undeniable.

In addition, the EU-Turkey Statement has marked a shift towards bilateral migration partnerships or “compacts” in the migration policy field. Since the EU-Turkey Statement, the EU has been seeking to establish and has established new tailor-made partnerships with key third countries of migration origin and transit inspired by the Statement. This development makes it, now more than ever, necessary to review the Union's approach and draw lessons from the EU-Turkey Statement.

It is important to underscore that the legal nature of the EU-Turkey Statement is much more than a theoretical issue that has been studied in legal literature. The legal nature of the Statement will largely influence the possibilities for judicial scrutiny, and, thereby, the possibilities of individuals to obtain judicial protection. In addition, the General Court's orders have raised a number of particular issues such as whether it is possible for the EU institutions to prepare and draft instruments to afterwards deny authorship of these instruments, and, whether there will be a possibility to challenge instruments similar to the EU-Turkey Statement in the future. The question as to the legal nature of the EU-Turkey Statement, is a question that should be answered as a preliminary to engaging in such debates.

## Chapter 2. Factual background of the EU-Turkey Statement

### 2.1 The European migration crisis

Over the past years, the EU has been facing the worst migration crisis since the end of World War II.<sup>15</sup> In 2015 approximately one million migrants entered the EU.<sup>16</sup> Most of those migrants fled to Europe from conflict, terror and persecution in their home countries, hoping to benefit from protection under the 1951 Geneva Convention. While the EU was struggling to cope with this unprecedented refugee influx however, economic migrants trying to escape poverty and hunger saw their chance to enter the Union by blending into the migration flow.<sup>17</sup>

The main routes for access to the EU were the Eastern Mediterranean route (i.e. using Turkey to get to the Greek islands), the Western Balkan route (i.e. from Serbia towards Hungary and Croatia) and the Central Mediterranean route (i.e. to Italy via Libya).<sup>18</sup> This made Italy and Greece the two main entry points into the EU, with several thousand arrivals every day.<sup>19</sup>

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<sup>15</sup> European Parliament, “Europe’s migration crisis”, 30 June 2017, <http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78631/europe-s-migration-crisis>, last accessed on 10 March 2018.

<sup>16</sup> Frontex, Risk Analysis for 2016, 6, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018.

<sup>17</sup> “Human Act or Devil’s Pact. Human rights aspects of migration agreements between EU and third countries”, Netherlands Institute for Human Rights, 18 May 2017, 6, [file:///C:/Users/juliedevrieze/Downloads/Paper%20Human%20Act%20or%20Devils%20Pact%20Engels%20\(2\).pdf](file:///C:/Users/juliedevrieze/Downloads/Paper%20Human%20Act%20or%20Devils%20Pact%20Engels%20(2).pdf), last accessed on 18 March 2018.

<sup>18</sup> Frontex, Risk Analysis for 2016, 6, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018; European Commission, “Questions and Answers: Smuggling of Migrants in Europe and the EU response”, 13 January 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-3261\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-3261_en.htm), last accessed on 7 March 2018.

<sup>19</sup> Frontex, Risk Analysis for 2016, 7, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018.

The Dublin III Regulation<sup>20</sup> establishes which MS is responsible for examining a certain asylum application. The Regulation stipulates that the country where a migrant irregularly enters the territory of the EU, is solely responsible for examining the migrant's application for international protection.<sup>21</sup> Migrants who continue their way to another MS face transfer back to the original country of entry.<sup>22</sup> This resulted in a particularly intense pressure on frontline MSs Italy and Greece.

Moreover, Italy and Greece are two of the MSs that were impacted the most by the 2010 economic crisis and were still struggling to recover from it. Due to the tight budgetary restraints they were facing, their budgets for asylum and migration could not keep up with the growing demands and needs of the 2015 migration crisis.

It soon became apparent that both countries missed the necessary capacity for ensuring rescue, registration and identification of the large numbers of migrants arriving on a daily basis, making an effective enforcement of the Dublin III Regulation impossible. This resulted in thousands of unregistered migrants scattering over the European continent.<sup>23</sup> The November 2015 Paris attacks demonstrated the resulting risks for internal security.<sup>24</sup>

The unprecedented levels of secondary movements within the EU indicate that most migrants entering the EU through Italy or Greece did not have the intention to apply for

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<sup>20</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180.

<sup>21</sup> *Ibid.*, article 13(1).

<sup>22</sup> *Ibid.*, article 26(1).

<sup>23</sup> In this light it has been argued that the European migration crisis was mostly a crisis of the Common European Asylum System (CEAS), including the Dublin III Regulation, as this system does not guarantee a fair distribution of the burden of migration among the EU MSs. See in this regard: E. SHARPSTON, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Final Plenary Session, "Towards "Judicial Passivism" in EU Migration and Asylum Law?", 1 February 2018, <https://www.youtube.com/watch?v=qvaI3UrqVMQ>, last accessed on 3 May 2018.

<sup>24</sup> G. RAYNER, "Paris attacks: How Europe's migrant crisis gave terrorist Abdelhamid Abaaoud the perfect cover", *The Telegraph*, 19 November 2015, <https://www.telegraph.co.uk/news/worldnews/europe/france/12006713/paris-attacks-europe-migrant-crisis-terrorist-abdelhamid-abaaoud.html>, last accessed on 20 March 2018.

asylum in these countries.<sup>25</sup> They preferred continuing their journeys to Western Europe, preferably to Germany, France or the United Kingdom.<sup>26</sup>

In addition, the sea-routes to Europe were far from risk free and many refugees died at sea. The International Organization for Migration (IOM) estimates that more than 3770 persons went missing or died in the Mediterranean area in 2015.<sup>27</sup>

In the course of 2015, Greece overtook Italy as the first point of entry of migrants into the EU, making the Eastern Mediterranean route the most favoured route into Europe.<sup>28</sup> In addition, the Western Balkan route, the second most popular route, was clearly nourished by the influx coming from Turkey.<sup>29</sup> Both routes were used by migrants coming from conflict areas in the Middle East, such as Syria, Afghanistan and Iraq.<sup>30</sup>

The initial EU response to the migration crisis aimed at better managing migratory flows and ensuring shelter and assistance for those in need.<sup>31</sup> To this end, the European Commission proposed a series of immediate actions in her May 2015 Agenda on Migration<sup>32</sup>. In addition to these immediate actions, the Agenda introduced four pillars for an EU migration policy in the longer term: (i) Reducing the incentives for irregular migration; (ii) Saving lives and securing external borders; (iii) Completing a strong common asylum policy; and (iv) Developing a new policy on legal migration.

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<sup>25</sup> Frontex, Risk Analysis for 2016, 32, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018.

<sup>26</sup> Eurostat, “Asylum statistics”, April 2018, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics), last accessed on 2 May 2018.

<sup>27</sup> Since it proved to be impossible to keep an accurate record of all persons who went missing on sea, the number of fatalities can only be estimated. Frontex, Risk Analysis for 2016, 8, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018.

<sup>28</sup> *Ibid.*, 18.

<sup>29</sup> *Ibid.*, 19.

<sup>30</sup> *Ibid.*, 18-19.

<sup>31</sup> European Commission, “EU-Turkey Statement – One year on”, 1, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu\\_turkey\\_statement\\_17032017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf), last accessed on 20 March 2018.

<sup>32</sup> European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration”, 13 May 2015, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf), last accessed on 25 March 2018.

The most controversial ideas laid down in the Agenda were the establishment of a Relocation Scheme on the basis of article 78(3) Treaty on the Functioning of the European Union (hereinafter TFEU) and a Resettlement Scheme.<sup>33</sup> The Relocation Scheme intended to redistribute asylum seekers among the MSs based on criteria such as gross domestic product (GDP), size of population and unemployment rate. This Scheme would ensure a fair and balanced allocation of responsibility between the MSs by temporarily derogating from the Dublin III Regulation.<sup>34</sup> The Resettlement Scheme on the other hand, aimed at welcoming an additional number of 20 000 displaced persons in clear need of international protection from outside the EU.<sup>35</sup>

During the months following the adoption of the proposal, German Chancellor Angela Merkel manifested herself as a big supporter of it. Although some doubted her motives, she advocated among her European counterparts for European values and the need for a common response to the refugee crisis.<sup>36</sup> She stated, *“If Europe fails on the question of refugees, then it won’t be the Europe we wished for”*.<sup>37</sup>

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<sup>33</sup> S. CARRERA, S. BLOCKMANS, D. GROS and E. GUILD, “The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities”, CEPS, 16 December 2015, 7, [https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis\\_0.pdf](https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf), last accessed on 10 May 2018; I. TOYGÜR and B. BENVENUTI, “The European response to the refugee crisis: Angela Merkel on the move”, Istanbul Policy Center – Mercator Policy Brief, June 2016, 2, [http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur\\_BiancaBenvenuti\\_FINAL.pdf](http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur_BiancaBenvenuti_FINAL.pdf), last accessed on 10 May 2018.

<sup>34</sup> European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration”, 13 May 2015, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf), last accessed on 28 March 2018; S. CARRERA, S. BLOCKMANS, D. GROS and E. GUILD, “The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities”, CEPS, 16 December 2015, 7, [https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis\\_0.pdf](https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf), last accessed on 10 May 2018.

<sup>35</sup> European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration”, 13 May 2015, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf), last accessed on 28 March 2018.

<sup>36</sup> I. TOYGÜR and B. BENVENUTI, “The European response to the refugee crisis: Angela Merkel on the move”, Istanbul Policy Center – Mercator Policy Brief, June 2016, 1-2, [http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur\\_BiancaBenvenuti\\_FINAL.pdf](http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur_BiancaBenvenuti_FINAL.pdf), last accessed on 10 May 2018.

<sup>37</sup> “Migrant crisis: Merkel warns of EU ‘failure’”, BBC News, 31 August 2015, <http://www.bbc.com/news/world-europe-34108224>, last accessed on 20 February 2018.

Her reaction was in stark contrast with the reactions of a number of Eastern European countries, often referred to as the Visegrád group. The group, consisting of Hungary, Poland, Slovakia and the Czech Republic, took a stand against any kind of mandatory quota.<sup>38</sup> In their point of view EU action needed to be directed towards protecting external borders and addressing the root causes of the migration crisis, including the Syrian war.

Besides a humanitarian crisis, the migration crisis had now caused an internal tug-of-war between two factions proposing opposing strategies on handling this crisis. A group of Western European countries including Germany, France and Italy supporting the European Agenda on Migration on the one hand, and the Visegrád group rejecting the Commission's proposal on the other hand.

Eventually, the Relocation Scheme, providing for relocation of 160 000 refugees, was forced through and adopted by the Justice and Home Affairs Council in September 2015.<sup>39</sup> The opposition from the Visegrád group however remained. Hungary and Slovakia even went as far as introducing actions for annulment of the decision before the Court of Justice of the European Union (hereinafter CJEU).<sup>40</sup> This dissent in the ranks however struck the EU at the worst possible timing.

Starting from autumn 2015, ten Schengen MSs unilaterally decided to reintroduce temporary controls at their borders in an effort to put a halt to secondary movements within

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<sup>38</sup> D. IVANOVA, "Migrant Crisis and the Visegrád Group's Policy", *International Conference Knowledge-Based Organization* 2016, 35.

<sup>39</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248.

<sup>40</sup> Judgment of the Court, Slovakia v. Council, joined cases C-643/15 and C-647/15, ECLI:EU:C:2017:631; S. PEERS and E. ROMAN, "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018; I. TOYGÜR and B. BENVENUTI, "The European response to the refugee crisis: Angela Merkel on the move", Istanbul Policy Center – Mercator Policy Brief, June 2016, 3, [http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IkeToygur\\_BiancaBenvenuti\\_FINAL.pdf](http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IkeToygur_BiancaBenvenuti_FINAL.pdf), last accessed on 10 May 2018; I. GOLDNER LANG, "Human Rights and Legitimacy in the Implementation of EU Asylum and Migration Law", 24 January 2018, 24-25, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3108379](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108379), last accessed on 8 April 2018.

the EU.<sup>41</sup> They did so, based on articles 23-25 of the Schengen Borders Code<sup>42</sup>. These articles allow for Schengen MSs to temporarily reintroduce border controls in case of “*a serious threat to public policy or internal security*”, after approval by the Commission.

Soon, concerns started to surface about the future of the Schengen area.<sup>43</sup> Although some argued these concerns were exaggerated<sup>44</sup>, European Commission President Jean-Claude Juncker seemed to agree with them. In January 2016 he declared that the EU had less than two months to save the Schengen area.<sup>45</sup>

In the light of these evolutions, the need for a more structural response to the migration crisis became apparent. Due to the consistent failure to come to a unanimous solution on how to manage the crisis within EU territory, the focus shifted towards another pillar of the European Agenda on Migration: reducing the incentives for irregular migration.<sup>46</sup> This pillar stressed the importance of concluding partnerships with third countries of migration origin and transit.<sup>47</sup>

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<sup>41</sup> Germany, Austria, Slovenia, Hungary, Malta, Sweden, Norway, France, Denmark and Belgium. European Council, “Member States’ notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code”, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf), last accessed on 22 February 2018; Frontex, Risk Analysis for 2016, 33, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018.

<sup>42</sup> Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ 2016 L 77.

<sup>43</sup> I. TRAYNOR, “Is the Schengen dream of Europe without borders becoming a thing of the past?”, The Guardian, 5 January 2016, <https://www.theguardian.com/world/2016/jan/05/is-the-schengen-dream-of-europe-without-borders-becoming-a-thing-of-the-past>, last accessed on 24 February 2018.

<sup>44</sup> E. GUILD, E. BROUWER, K. GROENENDIJK and S. CARRERA, “What is happening to the Schengen borders?”, CEPS, December 2015, [https://www.ceps.eu/system/files/No%2086%20Schengenland\\_0.pdf](https://www.ceps.eu/system/files/No%2086%20Schengenland_0.pdf), last accessed on 24 February 2018.

<sup>45</sup> European Council, “Report by President Donald Tusk to the European Parliament on the outcome of the December European Council”, 19 January 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/01/19/tusk-december-euco-report-european-parliament/pdf>, last accessed on 26 February 2018.

<sup>46</sup> I. TOYGÜR and B. BENVENUTI, “The European response to the refugee crisis: Angela Merkel on the move”, Istanbul Policy Center – Mercator Policy Brief, June 2016, 2, [http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur\\_BiancaBenvenuti\\_FINAL.pdf](http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlikeToygur_BiancaBenvenuti_FINAL.pdf), last accessed on 10 May 2018.

<sup>47</sup> European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration”, 13 May 2015, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf), last accessed on 28 March 2018.



Bearing in mind this renewed focus on migration partnerships with third countries of origin and transit, Turkey made an alluring partner.<sup>48</sup> The particular appeal of the Eastern Mediterranean route, had made the country the main transit country for Syrian refugees.<sup>49</sup> In addition, the Union and its MSs had a longstanding relationship with Turkey.

## 2.2 EU-Turkey relations prior to the European migration crisis

### 2.2.1 Turkey's EU accession negotiations

As early as 1963, Turkey and the European Commission concluded the Ankara Association Agreement<sup>50</sup> in order to develop closer economic ties. The Agreement provided for the establishment of a customs union applied to each EU MS.<sup>51</sup>

A first application for full EU membership followed in 1987. This application was denied on the basis of economic and political grounds.<sup>52</sup> During the following ten years, Turkey was side-lined while the accession of ten Central and Eastern European countries, in addition to Malta and Cyprus, proceeded.

During the 1999 Helsinki European Council, Turkey was finally granted candidate status.<sup>53</sup> The European Council however added that Turkey still needed to comply sufficiently with the Union's political and economic criteria, before accession talks could begin.<sup>54</sup>

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<sup>48</sup> I. TOYGÜR and B. BENVENUTI, "One Year On: An Assessment of the EU-Turkey Statement on Refugees", Elcano Royal Institute, March 2017, <http://www.iai.it/sites/default/files/iaiwp1714.pdf>, last accessed on 28 April 2018.

<sup>49</sup> Frontex, Risk Analysis for 2016, 38, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf), last accessed on 2 May 2018.

<sup>50</sup> Agreement establishing an Association between the European Economic Community and Turkey.

<sup>51</sup> V. L. MORELLI, "European Union Enlargement: A Status Report on Turkey's Accession Negotiations", 5 August 2013, 2, <https://fas.org/sgp/crs/row/RS22517.pdf>, last accessed on 16 April 2018; A. OTT, "EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?", Centre for the Law of EU External Relations, 2017, 9, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 15 April 2018.

<sup>52</sup> A. OTT, "EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?", Centre for the Law of EU External Relations, 2017, 9, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>53</sup> *Ibid.*, 9.

<sup>54</sup> V. L. MORELLI, "European Union Enlargement: A Status Report on Turkey's Accession Negotiations", 5 August 2013, 2, <https://fas.org/sgp/crs/row/RS22517.pdf>, last accessed on 16 April 2018.

In 2005, during the consideration of the Treaty establishing a Constitution for Europe, Turkey's EU membership resurfaced as a debating point. Observers suggested that voter concern over the continued enlargement of the EU and, especially, the potential admission of Turkey was one of the factors that contributed to the rejection of the Treaty by French and Dutch voters.<sup>55</sup> Eventually, a compromise formula was agreed to by the Council, requiring Turkey to sign an Additional Protocol adapting the Ankara Association Agreement that would expand the customs union to the new MSs, including the Republic of Cyprus. In July 2005, Turkey signed the Protocol, however making the reservation that by signing the Protocol it was not granting any diplomatic recognition to the Republic of Cyprus.<sup>56</sup> This immediately caused bad blood with many within the EU.

The controversy over Turkey's EU accession continued until 3 October 2005 when the Council opened formal accession talks.<sup>57</sup> The Negotiating Framework provided however that negotiations would be open-ended, implying that the outcome of full membership is not guaranteed.<sup>58</sup>

Before the European migration crisis, 14 out of 35 negotiating chapters had been opened.<sup>59</sup> Negotiations proved however to be difficult, not at least due to Turkey's consistent refusal to recognise Cyprus and fulfil its obligations under the Ankara Association Agreement and Additional Protocol. As a result, the Council decided during the course of 2006 not to open negotiations on eight important chapters of the *acquis*, and not to provisionally close any chapters until the Commission had confirmed that Turkey had fully implemented its

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<sup>55</sup> V. L. MORELLI, "European Union Enlargement: A Status Report on Turkey's Accession Negotiations", 5 August 2013, 3, <https://fas.org/sgp/crs/row/RS22517.pdf>, last accessed on 16 April 2018.

<sup>56</sup> *Ibid.*, 3.

<sup>57</sup> S. PEERS and E. ROMAN, "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018.

<sup>58</sup> A. OTT, "EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?", Centre for the Law of EU External Relations, 2017, 10, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>59</sup> European Council, "Negotiating Status – Turkey", 31 January 2018, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180131-negotiations-status-turkey.pdf>, last accessed on 14 April 2018.

commitments under the Additional Protocol.<sup>60</sup> The Union has not deviated from this condition since.<sup>61</sup>

### 2.2.2 Readmission and Visa Liberalisation

In 2002, a bilateral readmission agreement was concluded between Turkey and Greece.<sup>62</sup> The Greece-Turkey Readmission Protocol was still in force at the beginning of the European migration crisis.

At Union level, the Council approved a mandate for the Commission to negotiate a readmission agreement with Turkey as early as 2002. For a long time, Turkey remained however reluctant to sign a readmission agreement with the EU.<sup>63</sup> In December 2013 the long-awaited EU-Turkey Readmission Agreement was signed, to be ratified in November 2014.<sup>64</sup> The Agreement entered into force on 1 October 2014, except its provisions relating to the readmission of third country nationals (hereinafter TCNs) which were destined to enter into effect in October 2017 (i.e. three years after the date of entry into force of the EU-Turkey Readmission Agreement).<sup>65</sup>

Parallel with the signature of the EU-Turkey Readmission Agreement, the EU and Turkey launched a Visa Liberalisation Dialogue, aimed at allowing Turkish citizens holding

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<sup>60</sup> Council of the European Union, “Press release: 2770th Council meeting. General Affairs and External Relations”, 11 December 2006, [http://europa.eu/rapid/press-release PRES-06-352\\_en.htm?locale=en](http://europa.eu/rapid/press-release PRES-06-352_en.htm?locale=en), last accessed on 14 April 2018; V. L. MORELLI, “European Union Enlargement: A Status Report on Turkey’s Accession Negotiations”, 5 August 2013, 4-5, <https://fas.org/sgp/crs/row/RS22517.pdf>, last accessed on 16 April 2018.

<sup>61</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 25, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>62</sup> European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – First Report on the progress made in the implementation of the EU-Turkey Statement”, 20 April 2016, 5, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf), last accessed on 8 April 2018.

<sup>63</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 13, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>64</sup> Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

<sup>65</sup> *Ibid.*, article 24(3).

biometric passports in line with EU standards to travel to the MSs without a visa for short stays (i.e. up to 90 days in a 180 day period).<sup>66</sup> This Dialogue is based on a roadmap, known as the Visa Liberalisation Roadmap. The Roadmap contains 72 benchmarks or requirements that need to be met by Turkey. When these benchmarks are effectively met, the Commission will present a proposal to the European Parliament and the Council to lift the visa obligation for Turkish citizens by means of an amendment of Council Regulation (EC) No 539/2001<sup>67</sup>, which would allow for visa liberalisation.<sup>68</sup>

Against the background of these prior relations with Turkey, the EU and its MSs decided to step up their cooperation with Turkey to address the European migration crisis. To this end, the EU and its MSs engaged in negotiations with Turkey starting from September 2015.

## 2.3 Conclusion of the EU-Turkey Statement

On an informal European Council meeting on 23 September 2015, the EU Heads of State or Government met to discuss the migration crisis. During this meeting, the European leaders agreed, inter alia, to reinforce the dialogue with Turkey in order to strengthen its cooperation with the EU on stemming and managing migratory flows.<sup>69</sup> This intention would be further put into practice during a planned visit of the Turkish President Recep Tayyip Erdogan on 5 October 2015.

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<sup>66</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 15, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018; M. H. ZOETEWEIJ and O. TURHAN, “Above the Law – Beneath Contempt: The End of the EU-Turkey Deal?”, *Swiss Review of International and European Law* 2017, 154.

<sup>67</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81.

<sup>68</sup> European Commission, “Roadmap: towards a visa-free regime with Turkey”, 16 December 2013, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/news/docs/20131216-roadmap\\_towards\\_the\\_visa-free\\_regime\\_with\\_turkey\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf), last accessed on 17 April 2018.

<sup>69</sup> European Council, “Informal meeting of EU heads of state or government on migration”, 23 September 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/09/23/statement-informal-meeting>, last accessed on 4 March 2018.

This 5 October visit resulted in a Draft Action Plan, published by the European Commission on 6 October 2015.<sup>70</sup> The document aimed at “*Stepping up cooperation on support of refugees and migration management in view of the situation in Syria and Iraq*”. Due to unreconcilable divergences of views between the EU and Turkey the text remained however merely a draft without any binding force.

On 15 October 2015, an *ad referendum* agreement on a coordinated response to the migration crisis was reached with the EU-Turkey Joint Action Plan.<sup>71</sup> The Joint Action Plan was negotiated with Turkey by the vice-president of the European Commission, Frans Timmermans, and endorsed by the Heads of State or Government of the MSs.

The goal of the Plan was twofold: firstly, enhancing support for Syrians under temporary protection in their host communities, and secondly, providing for a strengthened cooperation between Turkey and the EU to prevent irregular migration.

In order to achieve this goal, Turkey committed to step up its cooperation with Bulgarian and Greek authorities for a better protection of the common land borders.<sup>72</sup> Furthermore, Turkey agreed to readmit irregular migrants not in need of international protection entering the EU via Turkey.<sup>73</sup> In return, the EU committed to provide substantial financial and humanitarian assistance for Syrians under temporary protection in Turkey.<sup>74</sup>

To fulfil the EU’s commitment of financial assistance for Syrians under temporary protection in Turkey, on 24 November 2015, a Refugee Facility for Turkey was created by the European Commission.<sup>75</sup> The Facility concerns a legal framework for the coordination of funding accorded by the EU destined to coordinate a total amount of three billion euro.<sup>76</sup>

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<sup>70</sup> European Commission, “Draft Action Plan: Stepping up EU-Turkey cooperation on support of refugees and migration management in the view of the situation in Iraq and Syria”, 6 October 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5777\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5777_en.htm), last accessed on 28 April 2018.

<sup>71</sup> European Commission, “EU-Turkey Joint Action Plan”, 15 October 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm), last accessed on 28 April 2018.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, OJ 2015 C 407.

<sup>76</sup> European Commission, “EU-Turkey Cooperation: A €3 billion Refugee Facility for Turkey”, 24 November 2015, [http://europa.eu/rapid/press-release\\_IP-15-6162\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6162_en.htm), last accessed on 25 March 2018.

The EU-Turkey Joint Action Plan was activated on 29 November 2015 on a meeting of the EU Heads of State or Government with Turkey.<sup>77</sup>

On 15 December 2015 the European Commission presented a Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria.<sup>78</sup> According to European Commission President Juncker, *“This scheme will help establish a fair sharing of responsibility for the protection of displaced Syrian refugees in Turkey”*.<sup>79</sup>

In the months following the activation of the Joint Action Plan, the European Commission published three reports on its implementation.<sup>80</sup> These reports highlighted the realisation of a number of achievements such as the opening of the Turkish labour market for Syrian refugees and the adoption of the three-billion-euro Refugee Facility for Turkey. Despite these results, the main objective of the Joint Action Plan was not achieved: the number of migrants passing from Turkey to Greece remained much too high.<sup>81</sup>

After realising the ineffectiveness of the Joint Action Plan, EU leaders decided to improve the plan and eliminate its flaws. To that end the EU Heads of State or Government met again with their Turkish counterpart on 7 March 2016. After discussing the implementation of the EU-Turkey Joint Action Plan, they decided that it was necessary to further strengthen their cooperation. Turkish Prime Minister Ahmet Davutoğlu confirmed Turkey’s commitment to accept the rapid return of all migrants not in need of international protection

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<sup>77</sup> European Council, “Meeting of the heads of state or government with Turkey – EU-Turkey Statement, 29/11/2015”, 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/>, last accessed on 28 April 2018.

<sup>78</sup> European Commission, “Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria”, 15 December 2015, [http://europa.eu/rapid/press-release\\_IP-15-6330\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6330_en.htm), last accessed on 6 March 2018.

<sup>79</sup> *Ibid.*

<sup>80</sup> European Commission, “Report from the Commission to the European Parliament and the Council. EU-Turkey Joint Action Plan – Third implementation report”, 4 March 2016, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0144&from=EN>, last accessed on 6 March 2018; L. BATALLA ADAM, “The Refugee Card in EU-Turkey Relations: A Necessary but Uncertain Deal”, September 2016, 3, [http://www.iai.it/sites/default/files/gte\\_wp\\_14.pdf](http://www.iai.it/sites/default/files/gte_wp_14.pdf), last accessed on 7 March 2018.

<sup>81</sup> European Council, “Remarks by President Donald Tusk after the meeting of the EU heads of state or government with Turkey”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07/tusk-remarks-eu-turkey-meeting/pdf>, last accessed on 28 April 2018; M. VERWEY, Speech at “The Institute of International and European Affairs”, on “EU-Turkey Statement – 10 months on”, 26 January 2017, <https://www.iiea.com/eu-affairs/the-refugee-crisis-and-the-implementation-of-the-eu-turkey-statement/>, last accessed on 20 March 2018.

coming from Turkey to Greece. Moreover, new principles such as visa liberalisation and additional funding for the Refugee Facility were discussed. European Council President Donald Tusk was assigned to take forward these proposals and work out the details with Turkey for the next European Council meeting on 17 and 18 March 2016.<sup>82</sup>

During this European Council meeting on 17 and 18 March 2016, the Members of the European Council, together with the Presidents of the European Council and the European Commission met again with the Turkish Prime Minister Ahmet Davutoğlu.<sup>83</sup> After this meeting, on 18 March 2016, the EU-Turkey Statement was published in the form of a press release on the website shared by the European Council and the Council of the European Union (Press Release No 144/16).<sup>84</sup>

## 2.4 Content of the EU-Turkey Statement

The 18 March 2016 EU-Turkey Statement intended to accomplish what the 15 October 2015 EU-Turkey Joint Action Plan proved unable to: stop the flow of irregular migration via Turkey to Europe.

Therefore, the Statement established a mechanism governing the return of irregular migrants from Greece to Turkey and the resettlement of Syrians from Turkey to the EU (the one-for-one principle). According to the agreement “*all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey*”. In exchange, Turkey’s counterpart undertook to resettle one Syrian refugee from Turkey to the EU for every Syrian being returned to Turkey from the Greek islands, up to a maximum of 72 000 people. This mechanism intended to discourage illegal migration to

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<sup>82</sup> European Council, “Statement of the EU Heads of State or Government, 07/03/2016”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018; European Council, “Remarks by President Donald Tusk after the meeting of the EU heads of state or government with Turkey”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07/tusk-remarks-eu-turkey-meeting/pdf>, last accessed on 28 April 2018.

<sup>83</sup> European Council, “European Council 17-18 March 2016 in Brussels. Background brief”, 16 March 2016, <http://www.consilium.europa.eu/media/23720/160316-euco-background-note-final.pdf>, last accessed on 26 April 2018.

<sup>84</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.



the EU, while at the same time providing for a safe and legal path to Europe for those entitled to international protection.

The Statement foresaw that all migrants arriving on the Greek islands would be duly registered and that any application for asylum would be individually processed by the Greek authorities. Migrants not applying for asylum or whose applications would be found unfounded or inadmissible would be returned to Turkey. All migrants would be protected in full accordance with the relevant international standards.<sup>85</sup>

The readmission of irregular migrants to Turkey relies on the premise that Turkey must be considered a safe third country.<sup>86</sup> By considering Turkey a safe third country, the possibility was created to send back all migrants who irregularly crossed the Turkish border after an accelerated asylum procedure by the Greek authorities.<sup>87</sup> This procedure merely entails declaring the asylum application inadmissible, since the application could and should have been submitted in Turkey.<sup>88</sup>

As an additional chip to the bargain, Turkey's counterpart committed to investing another three billion euro (on top of the three billion already agreed in the EU-Turkey Joint Action Plan of November 2015) to improve humanitarian conditions for Syrian refugees in Turkey. Turkey's counterpart also agreed to lift the visa requirements for Turkish nationals by the

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<sup>85</sup> European Council, "EU-Turkey Statement", 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.

<sup>86</sup> I. GOLDNER LANG, "Human Rights and Legitimacy in the Implementation of EU Asylum and Migration Law", 24 January 2018, 28, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3108379](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108379), last accessed on 8 April 2018.

<sup>87</sup> European Commission, "Implementing the EU-Turkey Agreement – Questions and Answers", 20 April 2016, [http://europa.eu/rapid/press-release MEMO-16-1494 en.htm](http://europa.eu/rapid/press-release_MEMO-16-1494_en.htm), last accessed on 18 March 2018; "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as a part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and the first country of asylum concept", UNCHR, 23 March 2016, 5, <http://www.unhcr.org/56f3ec5a9.pdf>, last accessed on 1 April 2018.

<sup>88</sup> According to articles 33(1) and 33(2)b of the Asylum Procedures Directive, MSs may consider an application for international protection inadmissible if a country which is not a MS is considered as a first country of asylum for the applicant; E. ROMAN, T. BAIRD and T. RADCLIFFE, "Analysis: Why Turkey is not a 'safe country'", Statewatch, February 2017, 6, <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>, last accessed on 25 March 2018; S. PEERS and E. ROMAN, "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018.



end of June 2016 and to open a new chapter in the negotiations for Turkey's EU membership.<sup>89</sup>

## 2.5 The EU-Turkey Statement in practice

The EU-Turkey Statement took effect as of 20 March 2016: all irregular migrants making their way from Turkey to Greece from this day on, would face deportation back to Turkey. 4 April 2016 was set as the target date for the start of returns of people who arrived in Greece after 20 March and for the first resettlements.

After its adoption, significant efforts were made to implement the EU-Turkey Statement. Thereby, Greece could count on considerable support of the EU: European Commission President Juncker appointed an EU coordinator and reinforced the Commission team already on the ground. Frontex and European Asylum Support Office (EASO) officers were deployed to the Greek islands and with their support the hotspots were turned into closed reception facilities.<sup>90</sup> The examples are numerous.

On 30 April 2018, a total of 2 180 persons was returned from the Greek islands to Turkey. 13 309 Syrians in clear need of international protection were resettled from Turkey to the EU.<sup>91</sup> Although these numbers remain relatively modest, the number of arrivals on the Greek islands has significantly decreased since the adoption of the EU-Turkey Statement.<sup>92</sup>

The EU was quick to praise the EU-Turkey Statement for its steady delivery of tangible results. According to the European Commission both the number of irregular arrivals in Greece and the number of lives lost on the Aegean Sea have dropped significantly because

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<sup>89</sup> European Council, "EU-Turkey Statement", 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.

<sup>90</sup> M. VERWEY, Speech at "The Institute of International and European Affairs", on "EU-Turkey Statement – 10 months on", 26 January 2017, <https://www.iiea.com/eu-affairs/the-refugee-crisis-and-the-implementation-of-the-eu-turkey-statement/>, last accessed on 20 March 2018.

<sup>91</sup> European Council, "Operational implementation of the EU-Turkey Statement", [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_eu\\_turkey\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu_turkey_en.pdf), last accessed on 8 May 2018.

<sup>92</sup> Frontex, Risk Analysis for 2017, 18-19, [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf), last accessed on 2 May 2018.

of the adoption of the Statement.<sup>93</sup> Although these results need to be put in the perspective of an already going downwards spiral in arrivals<sup>94</sup>, the EU-Turkey Statement proved to be an effective tool in curbing the migration flow from Turkey.

Therefore, the Commission announced its intention to establish new tailor-made partnerships with key third countries of migration origin and transit inspired by the EU-Turkey Statement.<sup>95</sup> Accordingly, the EU signed the Joint Way Forward with Afghanistan in 2016.<sup>96</sup> In 2017 a Memorandum of Understanding was reached between Italy and Libya.<sup>97</sup>

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<sup>93</sup> See inter alia: European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – First Report on the progress made in the implementation of the EU-Turkey Statement”, 20 April 2016, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf), where the Commission stated: “*Since the EU-Turkey Statement, there has been a substantial decrease in the numbers leaving Turkey for Greece*”, last accessed on 8 April 2018; European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – Second Report on the progress made in the implementation of the EU-Turkey Statement”, 15 June 2016, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/2nd\\_commission\\_report\\_on\\_progress\\_made\\_in\\_the\\_implementation\\_of\\_the\\_eu-turkey\\_agreement\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/2nd_commission_report_on_progress_made_in_the_implementation_of_the_eu-turkey_agreement_en.pdf), where the Commission stated: “*The sharp decrease in the number of irregular migrants and asylum seekers crossing from Turkey into Greece is proof of the Statement’s effectiveness*”, last accessed on 8 April 2018; European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – Third Report on the progress made in the implementation of the EU-Turkey Statement”, 28 September 2016, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news\\_corner/migration/com\\_2016\\_634\\_fl\\_other\\_act\\_863309.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/migration/com_2016_634_fl_other_act_863309.pdf), where the Commission stated: “*The substantial fall in both crossings and fatalities since the entry into force of the Statement is testament to its effective delivery*”, last accessed on 8 April 2018.

<sup>94</sup> T. SPIJKERBOER, “Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and Border Deaths?”, *Border Criminologies*, 28 September 2016, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>, last accessed on 10 May 2018; I. TOYGÜR and B. BENVENUTI, “One Year On: An Assessment of the EU-Turkey Statement on Refugees”, *Elcano Royal Institute*, March 2017, <http://www.iai.it/sites/default/files/iaiwpl714.pdf>, last accessed on 28 April 2018.

<sup>95</sup> European Commission, “Press release, Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration”, 7 June 2016, [http://europa.eu/rapid/press-release\\_IP-16-2072\\_nl.htm](http://europa.eu/rapid/press-release_IP-16-2072_nl.htm), last accessed on 29 April 2018; “Human Act or Devil’s Pact. Human rights aspects of migration agreements between EU and third countries”, *Netherlands Institute for Human Rights*, 18 May 2017, 3, [file:///C:/Users/juliedevrieze/Downloads/Paper%20Human%20Act%20or%20Devils%20Pact%20Engels%20\(2\).pdf](file:///C:/Users/juliedevrieze/Downloads/Paper%20Human%20Act%20or%20Devils%20Pact%20Engels%20(2).pdf), last accessed on 18 March 2018.

<sup>96</sup> European External Action Service, “Joint Way Forward on migration issues between Afghanistan and the EU”, 5 October 2016, [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf), last accessed on 30 April 2018.

<sup>97</sup> Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, [http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf), last accessed on 10 May 2018.

Reactions to the EU-Turkey Statement were however not all positive. Both content-wise<sup>98</sup> and in relation to its legal nature<sup>99</sup>, the Statement sparked considerable controversy among legal scholars and human rights organisations.

In relation to the content of the EU-Turkey Statement, it has been argued that Turkey's qualification as a safe third country was an easy way for the Union and its MSs to escape their obligation to conduct a reasonable and objective examination of the particular case of every individual TCN.<sup>100</sup> Indeed, reports and studies have shown that Turkey is not a safe third country for asylum seekers and refugees.<sup>101</sup> In this light it has been argued that Statement violates the principle of non-refoulement.<sup>102</sup>

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<sup>98</sup> See inter alia: S. PEERS and E. ROMAN, "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018; "The EU-Turkey deal: Europe's year of shame", Amnesty International, 20 March 2017, <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>, last accessed on 1 April 2018; "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as a part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and the first country of asylum concept", UNCHR, 23 March 2016, <http://www.unhcr.org/56f3ec5a9.pdf>, last accessed on 1 April 2018.

<sup>99</sup> See inter alia: O. CORTEN and M. DONY, "Accord politique ou juridique: quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?", EU Immigration and Asylum Law and Policy, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>, last accessed on 10 May 2018; M. DEN HEIJER and T. SPIJKERBOER, "Is the EU-Turkey refugee and migration deal a treaty?", EU Law Analysis, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed on 10 May 2018; C. MATUSESCU, "Considerations on the Legal nature and validity of the EU-Turkey refugee deal", *Union of Jurists of Romania Law Review* 2016, 91-101.

<sup>100</sup> H. LABAYLE and P. DE BRUYCKER, "The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain", EU Immigration and Asylum Law and Policy, 1 April 2016, <http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/>, last accessed on 24 March 2018.

<sup>101</sup> "No safe refuge: asylum-seekers and refugees denied effective protection in Turkey", Amnesty International, June 2016, <https://www.amnesty.org/download/Documents/EUR4438252016ENGLISH.pdf>, last accessed on 24 March 2018; O. ULUSOY, "Turkey as a Safe Third Country?", *Border Criminologies*, 28 March 2016, <https://www.law.ox.ac.uk/node/12866>, last accessed on 25 March 2018; J. POON, "EU-Turkey Deal: Violation of, or Consistency with, International Law?", *European Papers* 2016, 1195-1203; E. ROMAN, T. BAIRD and T. RADCLIFFE, "Analysis: Why Turkey is not a "safe country"", *Statewatch*, February 2017, <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>, last accessed on 25 March 2018.

<sup>102</sup> J. DE CONINCK, "Circumvention of Complicity – A Questionable and Dangerous Practice in External Migration Management? The EU-Turkey Statement"; J. POON, "EU-Turkey Deal: Violation of, or Consistency with, International Law?", *European Papers* 2016, 1195-1203.

Concerns equally surfaced regarding the legal nature of the Statement – is the Statement an international agreement or a non-binding political statement – and its authorship – is the Statement an act of the European Council or of the MSs.

## 2.6 Institutional response to the legal nature question

Despite the controversy surrounding the legal nature of the EU-Turkey Statement in legal doctrine, the EU institutions surprisingly seem to agree on this issue: the EU-Turkey Statement is not an international agreement and not an EU act.<sup>103</sup> This position was taken not only by the European Council and the Council, but also by the more supranational institutions like the European Parliament and the Commission.

It deserves to be recalled here that EU institutions and representatives did not always seem convinced of their ultimate position as to the legal nature of the EU-Turkey Statement. On 18 March 2016, right after the adoption of the EU-Turkey Statement, European Council President Donald Tusk remarked that “*Today, we have finally reached an agreement between the EU and Turkey*”.<sup>104</sup> During a debate held within the European Parliament on 13 April 2016, the EU-Turkey Statement was equally generally considered to be an international agreement concluded by the European Council, acting on behalf of the EU.<sup>105</sup> During this debate, Donald Tusk repeated: “*At our first Council in March, I was also asked by leaders to take forward new proposals made by Turkey and work out a common European position, with a view to reaching an agreement later that month. That agreement was finally reached at the European Council on 18 March.*”<sup>106</sup> In doing so, the President of the European Council acknowledged that the EU-Turkey Statement concerns “*a common European position*” and was indeed reached at the 18 March European Council. He

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<sup>103</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 28-30; S. CARRERA, L. DEN HERTOOG and M. STEFAN, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, CEPS, April 2017, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018.

<sup>104</sup> European Council, “Remarks by President Donald Tusk after the meeting of the EU heads of state or government with Turkey”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/>, last accessed on 2 May 2018.

<sup>105</sup> European Parliament, “Minutes of the debate of Wednesday 13 April 2016”, 13 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN>, last accessed on 15 March 2018.

<sup>106</sup> *Ibid.*

continued by holding that “... *the two key elements of the agreement were ...*”<sup>107</sup> thereby affirming that the EU-Turkey Statement is an agreement under EU law. During the same debate, Jean-Claude Juncker, President of the European Commission, referred to the EU-Turkey Statement as “*l'accord conclu le 18 mars entre l'Union européenne et la Turquie*”.<sup>108</sup> On 20 April 2016, the Commission issued a press release in which it referred to the EU-Turkey Statement as the “*EU-Turkey Agreement*”.<sup>109</sup> The Commission also stated that this agreement brought “*a new phase in the EU-Turkey relationship*”.<sup>110</sup>

Not much later, EU institutions and representatives however made a 180 degree turn. During a debate within the European Parliament on the legal aspects, democratic control and implementation of the EU-Turkey Statement on 28 April 2016, President-in-Office of the Council Klaas Dijkhoff stated that “*When we look at the legal aspects, [the EU-Turkey Statement] is a political agreement between the Member States and Turkey – between Europe and Turkey – ...*”. He added that “*Regarding the discussion about whether it is a statement or an agreement, I have a lot of agreements with a lot of people that are not legally taken to court so, from the Council position, we can have a discussion. But in our position it is not an agreement within the legal meaning of Article 218 of the Treaty. Of course, a lot of the things in that agreement between the Union and the Member States and Turkey have to be dealt with and elaborated on and those individual aspects will of course, when it is legally bound to be dealt with by the proper institutions*”.<sup>111</sup> On 9 May 2016, the legal service of the European Parliament declared that the EU-Turkey Statement “*was nothing more than a press communique*” and therefore not a binding agreement.<sup>112</sup>

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<sup>107</sup> European Parliament, “Minutes of the debate of Wednesday 13 April 2016”, 13 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN>, last accessed on 15 March 2018.

<sup>108</sup> *Ibid.*

<sup>109</sup> European Commission, “Implementing the EU-Turkey Agreement – Questions and Answers”, 20 April 2016, [http://europa.eu/rapid/press-release\\_MEMO-16-1494\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1494_en.htm), last accessed on 18 March 2018.

<sup>110</sup> European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – First Report on the progress made in the implementation of the EU-Turkey Statement”, 20 April 2016, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf), last accessed on 8 April 2018.

<sup>111</sup> European Parliament, “Minutes of the debate of Thursday 28 April 2016”, 28 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160428%2bITEM-002%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>, last accessed on 15 March 2018.

<sup>112</sup> N. NIELSEN, “EU-Turkey deal not binding, says EP legal chief”, EU Observer, 10 May 2016, <https://euobserver.com/justice/133385>, last accessed on 16 March 2018.

Following this declaration, the legal nature of the EU-Turkey Statement was debated before the Civil Liberties Committee of the European Parliament. The Committee followed the approach of its legal service by considering that the EU-Turkey Statement is not legally binding, but is just a political catalogue of measures adopted on their own specific legal basis so that, no matter what had been negotiated, it remained free to adopt or not the legislative, budgetary and operational measures to implement the agreement.<sup>113</sup>

Besides declaring that the EU-Turkey Statement is not a binding international agreement and that there was no EU involvement in the Statement, the EU institutions have actively contributed to the ambiguity surrounding the legal nature of the Statement. This can best be illustrated by a striking example.

On 24 November 2015, the Refugee Facility for Turkey was established by Commission Decision 2015/C 407/07, entitled “Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey”.<sup>114</sup> In February 2016 however, while the EU-Turkey Statement was being negotiated, the Commission amended its earlier decision with Decision 2016/C 60/03.<sup>115</sup> In this Decision, the term “Union” disappeared from the title, as the new decision was entitled “Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015”. Moreover, when it was clear after the first decision that it was up to the

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<sup>113</sup> L. LIMONE, “Today’s Court (non) decision on the (non) EU “deal”? with Turkey”, FREE Group, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>, last accessed on 10 May 2018; S. CARRERA, L. DEN HERTOG and M. STEFAN, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, CEPS, April 2017, 9, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018; E. DE CAPITANI, “Is the European Council responsible for the so-called “EU-Turkey Agreement”? The issue is on the Court of Justice table...”, FREE Group, 7 June 2016, <https://free-group.eu/2016/06/07/is-the-european-council-responsible-for-the-so-called-eu-turkey-agreement-the-issue-is-on-the-court-of-justice-table/>, last accessed on 12 February 2018.

<sup>114</sup> Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, OJ 2015 C 407.

<sup>115</sup> Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015, OJ 2016 C 60.



Commission to decide on the projects for funding<sup>116</sup>, it is now “the Facility” that decides<sup>117</sup>, *de facto* making it completely unclear who has the decision-making capacity.<sup>118</sup>

## 2.7 Actions for annulment of the EU-Turkey Statement before the General Court

During the months following its publication, the EU-Turkey Statement became the subject of three similar actions for annulment under article 263 TFUE before the General Court of the CJEU.<sup>119</sup> The applicants, two Pakistani nationals and one Afghan national, had made their way from Turkey to Greece, where they submitted applications for asylum. In these applications, they state having left their respective country of origin because of fear of persecution and serious harm to their person.<sup>120</sup> In the light of the possibility that they might be returned to Turkey based on the EU-Turkey Statement, the applicants decided to bring actions for annulment before the General Court to challenge the legality of the Statement.<sup>121</sup> The action was founded on the consideration that the EU-Turkey Statement is an

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<sup>116</sup> Article 3 § 1 Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, OJ 2015 C 407.

<sup>117</sup> Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015, OJ 2016 C 60.

<sup>118</sup> T. SPIJKERBOER, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=s2IjCQucj2s&list=PL5j0rT9PoY-S-QNliX6fvFqso42h3Oj6w&index=7>, last accessed on 15 April 2018.

<sup>119</sup> NF v. European Council, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=181014&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=893383>, last accessed on 11 May 2018; NG v. European Council, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=181012&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=890439>, last accessed on 11 May 2018; NM v. European Council, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=181622&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=885609>, last accessed on 11 May 2018.

<sup>120</sup> General Court of the European Union, “Press release No 19/17: Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v. European Council”, 28 February 2017, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>, last accessed on 15 March 2018.

<sup>121</sup> *Ibid.*; L. LIMONE., “Today’s Court (non) decision on the (non) EU “deal”? with Turkey”, FREE Group, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>, last accessed on 10 May 2018.

international agreement that has been concluded between the European Council, as an institution acting in the name of the EU, and Turkey.<sup>122</sup>

In three orders of 28 February 2017 – NF<sup>123</sup>, NG<sup>124</sup> and NM v. European Council<sup>125</sup> – the General Court dismissed the actions for annulment as inadmissible. According to the Court, the EU-Turkey Statement cannot be considered a measure adopted by the European Council, independent of its binding nature. The General Court proclaimed that the EU-Turkey Statement was concluded by the Heads of State or Government of the MSs, acting in their capacity of organs of their States.<sup>126</sup> Therefore, the Court lacked the jurisdiction to rule on the lawfulness of the Statement under article 263 TFEU.

Said Court orders form the subject of an appeal before the CJEU which is still pending.<sup>127</sup>

Since the General Court's approach and reasoning was identical in the NF, NG and NM v. European Council cases, this work will from here on only refer to the NF v. European Council case for clarity reasons.

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<sup>122</sup> E. DE CAPITANI, "Is the European Council responsible for the so-called "EU-Turkey Agreement"? The issue is on the Court of Justice table...", FREE Group, 7 June 2016, <https://free-group.eu/2016/06/07/is-the-european-council-responsible-for-the-so-called-eu-turkey-agreement-the-issue-is-on-the-court-of-justice-table/>, last accessed on 12 February 2018.

<sup>123</sup> Order of the General Court NF v. European Council, T-192/16, ECLI:EU:T:2017:128.

<sup>124</sup> Order of the General Court NG v. European Council, T-193/16, ECLI:EU:T:2017:129.

<sup>125</sup> Order of the General Court, NM v. European Council, T-257/16, ECLI:EU:T:2017:130.

<sup>126</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 71 and 66.

<sup>127</sup> Appeal case before the General Court T-192/16, NF v. European Council, C-208/17.



## Chapter 3. The legal nature of the EU-Turkey Statement

In order to assess the legal nature of the EU-Turkey Statement, two main questions need to be addressed. Firstly, the question whether the EU-Turkey Statement is an international agreement or a non-binding political statement and, secondly, the question as to the authorship of the EU-Turkey Statement.

### 3.1 The General Court's order in NF v. European Council

In its order of 28 February 2017<sup>128</sup>, the General Court confined itself to answering the question as to the authorship of the EU-Turkey Statement, by holding that “... *independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure*”.<sup>129</sup> According to the General Court, the EU-Turkey Statement is an act concluded between the Heads of State or Government of the MSs, acting in their capacity as representatives of those MSs, and the Turkish Prime Minister.

Establishing that the EU-Turkey Statement was not an act of any EU institution was sufficient for the General Court to dismiss the applicant's action for annulment under article 263 TFEU. Article 263 TFEU indeed only gives the Court the power to review the legality of acts of Union institutions, bodies, offices, or agencies, so that an act concluded by the Heads of State or Government of the MSs falls outside the Court's judicial scrutiny.

To come to its conclusion, the General Court developed the following argumentation.

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<sup>128</sup> Order of the General Court NF v. European Council, T-192/16, ECLI:EU:T:2017:128.

<sup>129</sup> *Ibid.*, § 71.

For starters, the General Court reiterated that the action for annulment laid down in article 263 TFEU is available in the case of all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature and form, provided that they are intended to produce legal effects.<sup>130</sup> The General Court equally reiterated that the EU Courts do not have jurisdiction to rule on the lawfulness of measures adopted by national authorities.<sup>131</sup> The Court however added that it does not suffice that a measure is qualified by an institution featuring as the defendant in an action as a “decision of the Member States” of the EU, in order for such a measure to escape legality review under article 263 TFEU.<sup>132</sup>

Next, the General Court considered that the meeting of 18 March 2016 was the third meeting to occur since November 2015.<sup>133</sup> The first meeting on 29 November 2015 gave rise to a Press Release entitled “Meeting of Heads of State or Government with Turkey – EU-Turkey Statement 29/11/2015”.<sup>134</sup> Similarly, the second meeting, held on 7 March 2016, gave rise to a Press Release entitled “Statement of the EU Heads of State or Government, 07/03/2016”.<sup>135</sup>

Therefore, the General Court acknowledged that the EU-Turkey Statement of 18 March 2016 indeed differs in presentation from these previous statements.<sup>136</sup> The 18 March 2016 EU-Turkey Statement states that it is the result of a meeting of the “Members of the European Council” and their Turkish counterpart. Moreover, the Statement mentions that “the EU and Turkey” agreed on a certain number of action points. In this light the General Court found it necessary to determine whether the use of those terms suggests that the representatives of the MSs participated in the 18 March meeting as Members of the European Council.<sup>137</sup>

In assessing the content of the EU-Turkey Statement, the General Court however embraced the European Council’s argument that the terms “European Council” and “EU” as used in

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<sup>130</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 42.

<sup>131</sup> *Ibid.*, § 44.

<sup>132</sup> *Ibid.*, § 45.

<sup>133</sup> *Ibid.*, § 49.

<sup>134</sup> *Ibid.*, § 50.

<sup>135</sup> *Ibid.*, § 51.

<sup>136</sup> *Ibid.*, § 53.

<sup>137</sup> *Ibid.*, § 54.

the EU-Turkey Statement, amount to simplified wording for the target audience of the press release so that they cannot alter the content and legal nature of the Statement.<sup>138</sup>

In the light of what the General Court considers as the “*ambivalence of the expression ‘Members of the European Council’ and the term ‘EU’ in the EU-Turkey Statement*”, the Court proceeded to an analyzation of the documents relating to the meeting of 18 March 2016, which resulted in the EU-Turkey Statement.<sup>139</sup>

In doing so, the General Court found that these documents demonstrated that two separate meetings had taken place: first, a meeting of the European Council on 17 March 2016 and second, one of the Heads of State or Government at an international summit on 18 March 2016.<sup>140</sup> Moreover, the Court noted that the documents relating to the work of 18 March 2016 explicitly and repeatedly refer to a “meeting of the Heads of State of Government with their Turkish counterpart”, and not to a meeting of the European Council.<sup>141</sup>

Therefore, the General Court held that the expressions “Members of the European Council” and “EU” as used in the EU-Turkey Statement must be understood as references to the Heads of State or Government of the EU MSs.<sup>142</sup> Accordingly, the General Court saw no need to rule on the legal nature of the EU-Turkey Statement and lacked jurisdiction to rule on its lawfulness.

It deserves to be mentioned here that, meanwhile, the European Court of Human Rights (hereinafter ECtHR) has issued a first judgment in which it deals with the implementation of the EU-Turkey Statement.<sup>143</sup> While the ECtHR has not explicitly commented on the legal nature of the Statement in its judgment, the Court implicitly seems to agree with the General Court in that the EU-Turkey Statement was concluded by the MSs and not by the EU.<sup>144</sup>

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<sup>138</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 58-59.

<sup>139</sup> *Ibid.*, § 61.

<sup>140</sup> *Ibid.*, § 62-63.

<sup>141</sup> *Ibid.*, § 64-65.

<sup>142</sup> *Ibid.*, § 66.

<sup>143</sup> ECtHR judgment of 25 January 2018, J.R. and Others v. Greece.

<sup>144</sup> *Ibid.*: the ECtHR refers to the EU-Turkey Statement as “*un accord sur l’immigration conclu le 18 mars 2016 entre les Etats membres de l’Union européenne et la Turquie*” (§ 7) and sets out that “*les membres du Conseil européen et le gouvernement turc se sont entendus sur une déclaration visant à lutter contre les migrations irrégulières à la suite de l’afflux massif de migrants dans l’UE*” (§ 39). See in this regard: A.

## 3.2 Criticism on the General Court's order in NF v. European Council

Both the General Court's conclusion and the reasoning leading up to this conclusion have been criticised by legal scholars.<sup>145</sup>

The most returning criticism as to conclusion of the General Court is that the Court, by declaring that it lacked jurisdiction, has avoided answering the applicant's questions as to the legal nature of the EU-Turkey Statement and its compatibility human rights and refugee law.<sup>146</sup>

As to the General Court's reasoning in establishing the authorship of the EU-Turkey Statement, the main point of critique is that it gave too much weight to the arguments of

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PIJNENBURG, "JR and Others v Greece: what does the Court (not) say about the EU-Turkey Statement", Strasbourg Observers, 21 February 2018, <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/>, last accessed on 1 May 2018.

<sup>145</sup> See inter alia: L. LIMONE, "Today's Court (non) decision on the (non) EU "deal"? with Turkey", FREE Group, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>, last accessed on 10 May 2018; E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council", European Papers, 15 March 2017, 3, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018; S. CARRERA, L. DEN HERTOOG and M. STEFAN, "It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", CEPS, April 2017, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018; N. IDRIZ, "Taking the EU-Turkey Deal to Court?", Verfassungsblog, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018.

<sup>146</sup> E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council", European Papers, 15 March 2017, 3, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018; T. SPIJKERBOER, "Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice", 2017, 9; P. GARCIA ANDRADE, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Workshop E on "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum", 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNiX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018.

the (alleged) authors of the Statement.<sup>147</sup> In doing so, the General Court would have deviated from the European Road Transport Agreement (hereinafter ERTA) case law.<sup>148</sup>

In this light, it needs to be assessed whether the EU-Turkey Statement is an international agreement or a political statement, and, whether the General Court performed a correct authorship analysis. Therefore, a coherent and comprehensive analysis of the EU-Turkey Statement is necessary. Said analysis will start from the General Court's reasoning and examine the arguments put forward by the Court, but will also depart from it, as far as the Court has omitted to answer certain questions or failed to take into account relevant arguments.

### 3.3 International agreement or political statement?

Since the publication of the EU-Turkey Statement on 18 March 2016, the legal nature of the Statement has been widely discussed in legal literature. While most scholars argue that

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<sup>147</sup> E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council", European Papers, 15 March 2017, 2, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018; C. DANISI, "Taking the 'Union' out of the 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law", European Journal of International Law, 20 April 2017, <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>, last accessed on 14 April 2018; P. GARCIA ANDRADE, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Workshop E, "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum", 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNliX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018.

<sup>148</sup> N. IDRIZ, "The EU-Turkey statement or the 'refugee deal': the extra-legal deal of extraordinary times?", Asser Institute, 1 December 2017, 8-9, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3080881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881), last accessed on 26 April 2018; T. SPIJKERBOER, "Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice", 2017, 10.

the Statement is an international agreement that is binding upon its parties<sup>149</sup>, some find that it is a non-binding political statement<sup>150</sup>.

The difficulties in determining the legal nature of the Statement stem from a series of ambiguities surrounding this topic, such as the elusive title “Statement”, the publication of the Statement in the form of a press release on the website of the European Council and the Council of the European Union, the fact that there has been no procedure to approve it at either EU or national level, etc.

The General Court has not managed to clarify this issue in *NF v. European Council*, since the Court did not proceed to an evaluation of the legal nature of the Statement.

Scholars that consider the EU-Turkey Statement being an international agreement mainly come to this conclusion based on the content and the context of the EU-Turkey Statement, as well as the internal EU decisions adopted in order to implement the Statement.

Those who come to a different conclusion, namely that the EU-Turkey Statement is not an international agreement but merely a non-binding political statement, base their theories on the form and denomination of the Statement and on the fact that the procedure for the conclusion of EU international agreements as laid down in article 218 TFEU has not been followed.

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<sup>149</sup> See inter alia: M. DEN HEIJER and T. SPIJKERBOER, “Is the EU-Turkey refugee and migration deal a treaty?”, *EU Law Analysis*, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed on 10 May 2018; O. CORTEN and M. DONY, “Accord politique ou juridique: quelle est la nature du “machin” conclu entre l’UE et la Turquie en matière d’asile?”, *EU Immigration and Asylum Law and Policy*, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>, last accessed on 10 May 2018; E. CANNIZARO, “Disintegration Through Law?”, *European Papers* 2016; G. FERNANDEZ ARRIBAS, “The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?”, *European Papers* 2017, 309.

<sup>150</sup> See inter alia: S. PEERS, “The draft EU/Turkey deal on migration and refugees: is it legal?”, *EU Law analysis*, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>, last accessed on 28 March 2018; K. BABICKA, “EU-Turkey Deal seems to be schizophrenic”, *Migration Online*, 22 March 2016, <http://migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic>, last accessed on 7 March 2018; L. BATALLA ADAM, “The Refugee Card in EU-Turkey Relations: A Necessary but Uncertain Deal”, September 2016, 2, [http://www.iai.it/sites/default/files/gte\\_wp\\_14.pdf](http://www.iai.it/sites/default/files/gte_wp_14.pdf), last accessed on 7 March 2018; N. KOENIG and M. WALTER-FRANKE, “One year on: What lessons from the EU-Turkey ‘deal’?”, *Jacques Delors Institut Berlin*, 17 March 2017, [http://www.delorsinstitut.de/2015/wp-content/uploads/2017/03/20170317\\_EU-Turkey-deal-one-year-on-NK-MW.pdf](http://www.delorsinstitut.de/2015/wp-content/uploads/2017/03/20170317_EU-Turkey-deal-one-year-on-NK-MW.pdf), last accessed on 6 March 2018.

In order to determine both the merit of these arguments and whether the EU-Turkey Statement is an international agreement or a political statement, it is necessary to identify the criteria generating the qualification of “international agreement”. These criteria are to be found in international law, in particular in the law of treaties.

Although international agreements are also defined within the EU legal order<sup>151</sup>, as well as within most national legal orders<sup>152</sup>, it is the international law treaty-definition that will be decisive. While domestic treaty-definitions may well be used to determine which domestic body can act internationally, whether treaties have direct effect in the national legal order etc, they are not opposable to other countries. Likewise, the EU treaty-definition is not opposable to non-EU MSs entering into agreements with the EU or its MSs.<sup>153</sup> Outside the EU or national legal order, international agreements are therefore governed by international law.

The treaty-definition under international law is of particular importance since it will not only determine whether a text is a treaty, but will also trigger, in case it is, the application of the law of treaties.<sup>154</sup>

### **3.3.1 Sources of the law of treaties**

The law of treaties can best be described as a part of public international law which provides a definition of a treaty and deals with matters relating to the conclusion, entry into force, application, validity, amendment, modification, interpretation, suspension and termination of a treaty.<sup>155</sup>

Therefore, the sources of the law of treaties coincide with the sources of public international law, including certain specific international conventions.

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<sup>151</sup> Opinion 1/75, ECLI: EU:C:1975:145, where the Court held that the notion “agreement” as figuring in article 218 TFEU should be interpreted broadly as referring to “any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation”.

<sup>152</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 15.

<sup>153</sup> J. ODERMATT, *The European Union as a Global Actor and its Impact on the International Legal Order*, University of Leuven Department of Law, 2016, 156.

<sup>154</sup> A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 13.

<sup>155</sup> A. KACZOROWSKA-IRELAND, *Public International Law. Fifth Edition*, London, Routledge, 2010, 69.

The most important attempt to clarify the sources of international law, was article 38 of the Statute of the Permanent Court of International Justice, which preceded the almost identical article 38 of the Statute of the International Court of Justice (hereinafter ICJ-Statute):

*1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

*a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

*b. international custom, as evidence of a general practice accepted as law;*

*c. the general principles of law recognized by civilized nations;*

*d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

*2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.*

Specifically relating to the law of treaties, the Vienna Convention on the Law of Treaties (hereinafter VCLT) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter VCLT-IO) play an important role. These Conventions should be supplemented by the case law of the International Court of Justice (hereinafter ICJ). It needs to be underlined that the Vienna Conventions codify a significant part of the rules of the law of treaties, but not all these rules. The law of treaties is thus broader than these conventions alone.<sup>156</sup> This work however limits itself to the study of the VCLT and the VCLT-IO and the therefore relevant case law of the ICJ, since these Conventions constitute the core documents of the law of treaties.

### *3.3.1.1 VCLT and VCLT-IO*

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<sup>156</sup> A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 13-14.



Article 38(1)(a) of the ICJ-Statute designates international conventions expressly recognised by the contesting states as a source of international law. The main conventions codifying the law of treaties are the 1969 VCLT and the 1986<sup>157</sup> VCLT-IO. The former is designed to apply to states.<sup>158</sup> The latter applies to international organisations and states in their relations with international organisations.<sup>159</sup>

These Conventions are the work of the International Law Commission (hereinafter ILC). This body was set up by the United Nations General Assembly in 1947 and entrusted with the codification of customary international law, in order to overcome the lack of precision and evidence difficulties characterising this area.

The work of the ILC is double: on the one hand the codification of international law, which is defined as the more precise formulation and systematisation of the existing customary international rules and, on the other hand, the progressive development of international law which entails the creation of new rules of international law.<sup>160</sup> Therefore, the VCLT and the VCLT-IO constitute both codification and the progressive development of the law of treaties.<sup>161</sup>

The VCLT was adopted on 22 May 1969 and entered into force on 27 January 1980, after having received the necessary 35 ratifications. Up till now, the VCLT has been ratified by 116 states.

In 1986, the VCLT-IO was created as a separate convention to apply to treaties to which one or more international organisations are a party. Many of the provisions laid down in the VCLT-IO are identical to VCLT provisions. The VCLT-IO has not yet entered into force, since it has not yet received the therefore required 35 ratifications.

Most but not all EU MSs are a party to the VCLT.<sup>162</sup> The EU is not a party to the VCLT or to the VCLT-IO. Therefore, the question as to the applicability of these Conventions arises.

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<sup>157</sup> The VCLT-IO was created in 1986 but has not yet entered into force.

<sup>158</sup> Article 1 VCLT.

<sup>159</sup> Article 1 VCLT-IO.

<sup>160</sup> A. KACZOROWSKA-IRELAND, *Public International Law. Fifth Edition*, London, Routledge, 2010, 65.

<sup>161</sup> *Ibid.*, 77.

<sup>162</sup> France and Romania have never ratified the VCLT and are therefore not parties to this Convention.

It is generally accepted that states that are not a party to the VCLT apply its provisions as far as they represent customary international law. The same goes for the EU.

Accordingly, the CJEU has on numerous occasions referred to the law of treaties, including explicit references to the VCLT and the VCLT-IO, in its judicial reasoning.<sup>163</sup> In the *Brita* case, the Court explained that “... *the rules laid down in the Vienna Convention apply to an agreement concluded between a state and an international organisation ... in so far as the rules are an expression of general customary international law*”.<sup>164</sup>

For non-parties to the VCLT and the VCLT-IO, these Conventions thus constitute sources of international law under article 38(1)(b) of the ICJ-Statute – and not under article 38(1)(a) of the ICJ-Statute – as far as they represent customary international law.

### 3.3.1.2 Case law of the ICJ

Article 38(1)(d) of the ICJ-Statute designates judicial decisions as subsidiary means for the determination of the rule of law.

In addition, article 59 of the ICJ-Statute provides that decisions of the Court have no binding force, except between the parties and in respect of a particular case.

This last provision was intended to prevent the ICJ from establishing a system of binding judicial precedent. In the *Certain German Interests in Polish Upper Silesia* case, the Court held with respect to article 59 VCLT that “*The object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes*”.<sup>165</sup>

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<sup>163</sup> See inter alia: Judgment of the Court of First Instance, *Opel Austria v. Council*, T-115/94, ECLI:EU:T:1997:3; Judgment of the Court, *Walz*, C-63/09, ECLI:EU:C:2010:251; Judgment of the Court, *Metalsa*, C-312/91, ECLI:EU:C:1993:279.

<sup>164</sup> Judgment of the Court, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, C-386/08, ECLI:EU:C:2010:91, § 41.

<sup>165</sup> PCIJ Judgment of 25 May 1926, *German Interests in Polish Upper Silesia* (Germany v. Poland), § 51.

Therefore, there is no binding authority of precedent in international law and the cases of the ICJ do not make law. In practice, the Court has however followed previous decision in the interest of judicial consistency, and has, where necessary, distinguished its previous decisions from the case actually being heard.<sup>166</sup> Such references are often a matter of “evidence” of the law.<sup>167</sup>

The cause for this practice can be found in that, when the ICJ is unable to discover an existing customary international rule or treaty relevant to a dispute, any rule which it adopts in deciding the case will become in theory a new rule of international law.<sup>168</sup>

### 3.3.2 The definition of a treaty under the VCLT

Article 2(1)(a) VCLT defines a treaty as being “*an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*”. The VCLT-IO uses an almost identical definition.<sup>169</sup>

Despite the fact that article 2(1) VCLT limits this definition to the purpose of the Convention, it is widely accepted<sup>170</sup> and the ICJ has suggested that it represents customary international law<sup>171</sup>.

The definition identifies four elements necessary to constitute a treaty, namely (i) an international agreement; (ii) concluded among states; (iii) in writing; (iv) governed by international law. At the same time the definition mentions the agreement’s designation and its number of instruments as irrelevant.

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<sup>166</sup> A. KACZOROWSKA-IRELAND, *Public International Law. Fifth Edition*, London, Routledge, 2010, 52.

<sup>167</sup> J. CRAWFORD, *Brownlie’s Principles of Public International Law. Eighth Edition*, Oxford, Oxford University Press, 2012, 38.

<sup>168</sup> A. KACZOROWSKA-IRELAND, *Public International Law. Fifth Edition*, London, Routledge, 2010, 51.

<sup>169</sup> Article 2(1)(a) VCLT-IO.

<sup>170</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 12; A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 14; T. SPIJKERBOER, “Minimalist Reflections on Europe, Refugees and Law”, *European Papers* 2016, 554.

<sup>171</sup> ICJ Judgment of 10 October 2002, Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria).

### 3.3.2.1 *An international agreement*

For starters, a treaty requires an international agreement.<sup>172</sup> This requirement influences the understanding of a treaty in that it adds the requirement of mutuality – a treaty demands interchange between multiple participants.<sup>173</sup> Moreover, this interchange must create a normative commitment – a shared expectation of future behaviour, whether this constitutes a change in behaviour or a continuation of existing behaviour.<sup>174</sup>

In order to determine whether the EU-Turkey Statement fulfils the requirement of an international agreement it is necessary to take a look at the content of the Statement. The Statement determines that it is the result of a meeting of the Members of the European Council with Turkey.<sup>175</sup> Therefore, there has been an interchange between the Members of the European Council and Turkey. Next, the Statement outlines a number of specific commitments or “*action points*”, which were agreed between the parties in order to “*end the irregular migration from Turkey to the EU*”.<sup>176</sup> Thus, the parties agreed on a number of commitments with the intention of achieving a common goal. It is a logical consequence of this course of action that the parties mutually expected execution of these commitments. Therefore, the EU-Turkey Statement is the result of an interchange between the parties, creating shared expectations of future behaviour, and fulfils the requirement of an international agreement.

### 3.3.2.2 *Concluded among states*

Next, the VCLT requires that a treaty is “concluded among states”. The VCLT only refers to states. This requirement stems however from expediency and not legal requirement. Article 3 VCLT provides that other subjects of international law can conclude treaties as well.

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<sup>172</sup> The requirement of “an international agreement” from the VCLT treaty-definition should be distinguished from the more broader qualification of a text as an international agreement. Treaties can be designated by a variety of names such as conventions, agreements or international agreements. This dissertation uses the latter.

<sup>173</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 20.

<sup>174</sup> *Ibid.*, 20.

<sup>175</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.

<sup>176</sup> *Ibid.*

Since this requirement does not concern a legal requirement, it is possible to apply the VLCT treaty-definition to the EU-Turkey Statement, independent of whether it is an instrument of the EU or of its MSs.

#### *3.3.2.3 In writing*

Further, a treaty must be in writing. This entails that there must be permanent and readable evidence of agreement between parties. The VCLT excludes oral agreements from the definition for practical reasons, without prejudice to their legal force.

As the EU-Turkey Statement was published in the form of a press release on the joint website of the European Council and the Council of the European Union, this requirement does not pose any problems.

#### *3.3.2.4 Governed by international law*

The last and undoubtedly most important requirement laid down in article 2(1)(a) VCLT is that treaties are “governed by international law”. According to the ILC’s Commentary, this requirement embraces the element of an “*intention to create obligations under international law*”.<sup>177</sup> In case of absence of this intention, an instrument will not be a treaty.

Today, this intent element has become the essential element for classifying an instrument as a treaty. The element is however not without difficulties: identifying the subjective intent of states or international organisations is notoriously difficult, especially where a text remains quiet or ambiguous on this topic.

What is to be understood by the intent element has been further clarified by the case law of the ICJ.

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<sup>177</sup> International Law Commission, “Draft articles on the law of treaties with commentaries” in *Yearbook of the International Law Commission*. 1996. Volume II, 1996, 189; A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 16.

In the 1978 Aegean Sea Continental Shelf case<sup>178</sup>, concerning the delimitation between Greece and Turkey of the Aegean Sea Continental Shelf, the ICJ set out that there is no rule of international law that might preclude a joint communiqué from constituting an international agreement. The Court continued by stating that the question as to whether a document constitutes an international agreement will essentially depend on “*the nature of the act or transaction embodied in the document*”: is the act or transaction intended – or not – to have binding force? To determine the nature of an act or transaction, regard must be had to “*its actual terms*” and “*the particular circumstances in which it was drawn up*”.<sup>179</sup> In this particular case the Court found that there had been no intention to conclude a treaty.

The 1994 Qatar v. Bahrain case concerned the question as to whether the “Minutes” of a meeting between the Foreign Ministers of Qatar and Bahrain could constitute an international agreement, when Bahrain’s Foreign Minister claimed that he had not intended to conclude such an international agreement. The ICJ started its argumentation by observing that “... *international agreements may take a number of forms and be given a diversity of names*”, thereby making a reference to article 2(1)(a) VCLT and the Aegean Sea Continental Shelf judgment.<sup>180</sup> Subsequently, the Court pointed out that, in order to determine whether a treaty has been concluded, “*the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up*”. Applying this to the disputed Minutes, led the Court to consider that the Minutes did constitute an international agreement, creating rights and obligations under international law. In doing so, the Court did not find it necessary to consider the intention of Qatar’s Foreign Minister, since “*the two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a “statement recording a political understanding”, and not to an international agreement*”.<sup>181</sup>

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<sup>178</sup> ICJ Judgment of 19 December 1978, Aegean Sea Continental Shelf case (Greece v. Turkey).

<sup>179</sup> *Ibid.*, § 96.

<sup>180</sup> ICJ Judgment of 1 July 1994, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), § 23.

<sup>181</sup> *Ibid.*, § 26-27.

Intention thus is to be derived from the terms of the instrument itself and the circumstances in which it was drawn up, and not from what the parties afterwards claim was their intention.<sup>182</sup> In this light it is irrelevant whether or not the EU and its MSs consider the EU-Turkey Statement as a binding international agreement: the qualification of the Statement will depend on its actual terms and the particular circumstances in which it was drawn up.

This has been affirmed by the CJEU on several occasions. In Opinion 1/75, the CJEU defined the notion “agreement” for the purposes of article 218 TFEU as “*any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation*”.<sup>183</sup> In *France v. Commission*<sup>184</sup>, the CJEU added that the decisive factor in determining whether a text is an international agreement is the intention of the parties: did the parties intend the instrument to produce legal effects?

#### 3.3.2.4.1 The actual terms used in the EU-Turkey Statement

The terms used in the EU-Turkey Statement are the following: “*in order to break the business model of the smugglers and to offer migrants an alternative to putting their live at risk, the EU and Turkey today **decided** to end the irregular migration from Turkey to the EU*”; “*In order to achieve this goal, they **agreed** on [several] additional action points*”.<sup>185</sup> These action points are subsequently enumerated and described.

The enumerated action points are all described in a similar way, using the term “will”. The first action point for example determines that “*All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 **will** be returned to Turkey*”.<sup>186</sup> The second action point adds that “*For every Syrian being returned to Turkey from the Greek islands, another Syrian **will** be resettled from Turkey to the EU ...*”.<sup>187</sup>

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<sup>182</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 28; A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 30.

<sup>183</sup> Opinion 1/75, ECLI: EU:C:1975:145.

<sup>184</sup> Judgment of the Court, *France v. Commission*, C-327/91, ECLI:EU:C:1994:305.

<sup>185</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 may 2018.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

While the use of the terms “agreed” and “decided” seems to indicate that the parties intended the Statement’s provisions to be binding in their reciprocal relations, the use of the generic term “will” suggests otherwise. Contrary to the terms “shall” or “should”, the term “will” is typical for non-binding arrangements.<sup>188</sup> The wording used in the EU-Turkey Statement is thus inconclusive.

This ambiguity can be resolved by looking at the bigger picture. Indeed, looking at the scheme of the EU-Turkey Statement – enumerating a number of commitments to which the parties have consented – reveals a striking resemblance between the EU-Turkey Statement and the Minutes at issue in the ICJ Qatar v. Bahrain case.<sup>189</sup> In the Qatar v. Bahrain case, the ICJ concluded that the Minutes of a meeting between state representatives of Qatar and Bahrain were “... *not a simple record of a meeting ... [as] they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented.*”<sup>190</sup> This led the Court to conclude that these Minutes amounted to an international agreement. A same conclusion could and should therefore be drawn regarding the EU-Turkey Statement.

E. Cannizzaro came to the same conclusion, stating that “... *there is little doubt that the Statement is not a mere declaration of principles, but rather a full-fledged regulatory scheme, spelling out specific conduct for the parties*”.<sup>191</sup> Similarly, O. Corten and M. Dony found that “... *la déclaration ne contient pas simplement un certain nombre d’actions que les parties entendent appliquer sur une base volontaire mais bien des engagements à caractère obligatoire*”. They added that “... *au vu des termes mêmes de la déclaration, il paraît difficile de lui dénier la qualité de « traité » au sens du droit international public*”.<sup>192</sup>

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<sup>188</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 27; M. DEN HEIJER and T. SPIJKERBOER, “Is the EU-Turkey refugee and migration deal a treaty?”, *EU Law Analysis*, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed on 10 May 2018; M. GATTI, “The EU-Turkey Statement: A Treaty That Violates Democracy. Part 1 of 2”, *European Journal of International Law*, 18 April 2016, <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>, last accessed on 5 May 2018.

<sup>189</sup> E. CANNIZARO, “Disintegration Through Law?”, *European Papers* 2016, 4; M. GATTI, “The EU-Turkey Statement: A Treaty That Violates Democracy. Part 1 of 2”, *European Journal of International Law*, 18 April 2016, <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>, last accessed on 5 May 2018.

<sup>190</sup> ICJ Judgment of 1 July 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), § 25.

<sup>191</sup> E. CANNIZARO, “Disintegration Through Law?”, *European Papers* 2016, 4.

<sup>192</sup> O. CORTEN and M. DONY, “Accord politique ou juridique: quelle est la nature du “machin” conclu entre l’UE et la Turquie en matière d’asile?”, *EU Immigration and Asylum Law and Policy*, 10 June 2016,



#### 3.3.2.4.2 The particular circumstances in which the EU-Turkey Statement was drawn up

As regards to the particular circumstances in which the EU-Turkey Statement was drawn up, it is important to link back to the developments leading up to the conclusion of the EU-Turkey Statement.

After roughly 10 years of negotiations, the EU-Turkey Readmission Agreement was signed on 16 December 2013.<sup>193</sup> Article 4 of the EU-Turkey Readmission Agreement determines *inter alia* that Turkey shall readmit all TCNs or stateless persons who do not fulfil the conditions for entry to, presence in, or residence on the territory of the requesting MS, provided that these persons illegally and directly entered the territory of the MS, after having stayed on or transited through the territory of Turkey. This provision was destined to come into effect in October 2017.<sup>194</sup> On 15 October 2015, the EU and Turkey agreed *ad referendum* on a Joint Action Plan.<sup>195</sup> This plan was activated on a subsequent meeting of the Heads of State or Government of the MSs with Turkey.<sup>196</sup> On 7 March 2016, the Heads of State or Government of the MSs met again with their Turkish counterpart. As a result of this meeting a statement was published.<sup>197</sup>

The 15 October Joint Action Plan and the 7 March Statement do not foresee any legally binding commitments: the former merely defines what each party “intends” to do<sup>198</sup>, while the latter only acknowledges that the parties “agreed to work” on a number of issues<sup>199</sup>. In

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<http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>, last accessed on 10 May 2018.

<sup>193</sup> Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

<sup>194</sup> *Ibid.*, article 24(3).

<sup>195</sup> European Commission, “EU-Turkey Joint Action Plan”, 15 October 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm), last accessed on 28 April 2018.

<sup>196</sup> European Council, “Meeting of the heads of state or government with Turkey – EU-Turkey Statement, 29/11/2015”, 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/>, last accessed on 28 April 2018.

<sup>197</sup> European Council, “Statement of the EU Heads of State or Government, 07/03/2016”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

<sup>198</sup> European Commission, “EU-Turkey Joint Action Plan”, 15 October 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm), last accessed on 28 April 2018.

<sup>199</sup> European Council, “Statement of the EU Heads of State or Government, 07/03/2016”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

this light it has been argued that the EU-Turkey Statement was adopted to transform these earlier, non-binding instruments in legally binding treaty commitments.<sup>200</sup>

This argumentation is supported by the 7 March Statement, which stipulates that “*The President of the European Council will take forward these proposals and work out the details with Turkey before the March European Council*”.<sup>201</sup> In my opinion, this indicates the intention of the parties to undertake concrete steps and conclude a binding agreement during the March European Council.

An argument invoked by the EU institutions to deny the binding nature of the EU-Turkey Statement, is that the Statement merely represents a reconfirmation of earlier commitments, in particular those arising from the Greece-Turkey Readmission Protocol and the EU-Turkey Readmission Agreement.<sup>202</sup> M. Gatti<sup>203</sup> and M. Den Heijer and T. Spijkerboer<sup>204</sup> however rightfully argued that the commitments made under the EU-Turkey Statement concern, at least partially, new obligations. In particular the return of all irregular migrants crossing from Turkey into the Greek islands as from 20 March 2016, the one-for-one principle and the additional financial commitments made in the EU-Turkey Statement had not yet been agreed before. This is underpinned by the fact that legal action to implement these commitments only followed after the publication of the EU-Turkey Statement on 18 March 2016.<sup>205</sup>

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<sup>200</sup> N. IDRIZ, “The EU-Turkey statement or the ‘refugee deal’: the extra-legal deal of extraordinary times?”, Asser Institute, 1 December 2017, 10, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3080881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881), last accessed on 26 April 2018; A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 24, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>201</sup> European Council, “Statement of the EU Heads of State or Government, 07/03/2016”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

<sup>202</sup> C. MATUSESCU, “Considerations on the Legal nature and validity of the EU-Turkey refugee deal”, *Union of Jurists of Romania Law Review* 2016, 97.

<sup>203</sup> M. GATTI, “The EU-Turkey Statement: A Treaty That Violates Democracy. Part 1 of 2”, *European Journal of International Law*, 18 April 2016, <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>, last accessed on 5 May 2018.

<sup>204</sup> M. DEN HEIJER and T. SPIJKERBOER, “Is the EU-Turkey refugee and migration deal a treaty?”, *EU Law Analysis*, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed on 10 May 2018.

<sup>205</sup> On 21 March 2016, the Commission proposed the amendment of the Council Decision of 22 September 2015, providing for the relocation of 120 000 persons from Italy and Greece. This amendment would allow using 54 000 not yet allocated places under Council Decision of 22 September 2015 for the purpose of resettling Syrians from Turkey to the EU. Next, on 1 April 2016, the EU-Turkey Joint Readmission Committee adopted a decision advancing the date of entry into force of the provisions of the EU-Turkey Readmission Agreement on TCNs to 1 June 2016. This decision was subsequently approved by the Turkish

### 3.3.2.5 Irrespective of its form and designation

The treaty-definition of article 2(1)(a) VCLT also highlights two non-determining characteristics of treaties: the number of instruments a treaty is embodied in and its particular designation. The ICJ has clarified that “*international agreements may take a number of forms and be given a diversity of names*”.<sup>206</sup>

The finding that international agreements may take a number of forms dismisses the argument that the EU-Turkey Statement is not an international agreement since it was published in the form of a press release on the joint website of the European Council and the Council of the European Union. The form of the EU-Turkey Statement diverges indeed of that of a typical international agreement as it does not contain any signature and was not published in the official journals of either the Union or its MSs.<sup>207</sup>

The atypical form of the EU-Turkey Statement however does not prevent it from being an international agreement. In the past, the ICJ did not hesitate to qualify the exchange of letters<sup>208</sup>, the minutes of a meeting<sup>209</sup>, a joint communication<sup>210</sup> and a joint declaration<sup>211</sup> as international agreements. Similar to the EU-Turkey Statement, the latter concerned a declaration that did not bear any signature or initials and was issued directly to the press.<sup>212</sup>

Since international agreements may be given a diversity of names, the argument that the EU-Turkey Statement is not an international agreement since it is formally designated as a

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Parliament. On 14 March 2018, the Commission decided to allocate an additional three billion euro of additional resources for the Facility for Refugees in Turkey.

<sup>206</sup> ICJ Judgment of 1 July 1994, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), § 23.

<sup>207</sup> C. MATUSESCU, “Considerations on the Legal nature and validity of the EU-Turkey refugee deal”, *Union of Jurists of Romania Law Review* 2016, 94.

<sup>208</sup> ICJ Judgment of 3 February 1995, Territorial Dispute (Libyan Arab Jamahiriya v. Chad).

<sup>209</sup> ICJ Judgment of 1 July 1994, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain).

<sup>210</sup> ICJ Judgment of 10 October 2002, Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria).

<sup>211</sup> ICJ Judgment of 19 December 1978, Aegean Sea Continental Shelf case (Greece v. Turkey).

<sup>212</sup> *Ibid.*, § 95.

“Statement” has no merit. S. Peers had argued in this regard that “*Since the agreement will take the form of a ‘statement’, in my view it will not as such be legally binding*”.<sup>213</sup>

At first glance this argument might seem well founded. The use of the notion “statement”, is indeed typical for non-binding instruments. International practice however proves that a varied nomenclature is used to designate international agreements and that one cannot rely on the title of an instrument in order to determine its legal nature.<sup>214</sup>

The use of the term “Statement” is thus not indicative for the legal nature of the EU-Turkey Statement. This designation may however be of importance in another respect: the name an international agreement carries may evidence the intent of the parties.<sup>215</sup>

In my opinion, the use of the title “EU-Turkey Statement” however does not indicate the intention of the parties to opt for a non-binding political statement. Rather, it can be seen as an effort to mask the agreement as such a political statement, in order to avoid the lengthy procedures for the negotiation and conclusion of international agreements and to avoid judicial scrutiny in the light of the questionable compatibility of the Statement with European and international human rights and refugee law. This has also been argued by M. Gatti<sup>216</sup>, A. Ott<sup>217</sup> and C. Woollard<sup>218</sup>.

### 3.3.3 Distinguishing treaty commitments from political commitments

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<sup>213</sup> S. PEERS, “The draft EU/Turkey deal on migration and refugees: is it legal?”, EU Law Analysis, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>, last accessed on 10 May 2018.

<sup>214</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 29; A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 24.

<sup>215</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 29.

<sup>216</sup> M. GATTI, “The EU-Turkey Statement: A Treaty That Violates Democracy. Part 1 of 2”, European Journal of International Law, 18 April 2016, <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>, last accessed on 5 May 2018.

<sup>217</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 29, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>218</sup> C. WOOLLARD, “Weekly Editorial: EU-Turkey – Deconstructing the deal behind the statement”, ECRE, 16 March 2018, <https://www.ecre.org/weekly-editorial-deconstructing-the-deal-behind-the-statement/>, last accessed on 17 April 2018.

The VCLT treaty-definition thus identifies the elements required in order to constitute a treaty as well as a number of non-essential elements. It fails however to explicitly differentiate treaties from other commitments or agreements

It is important to distinguish treaties from political commitments, which are not governed by law. D. B. Hollis has defined political commitments as “*agreements between states, intended to establish non-legal commitments of an exclusively political or moral nature*”.<sup>219</sup> Similar to treaties, they involve mutuality and a shared expectation of commitment. The distinctive criterion is the intent. Indeed, states may constitute political commitments, without any legal force, if that is their intention. Just as they may opt for the creation of treaties, governed by international law. Often states choose to create a treaty comprising both political commitments that were not intended to have legal force and treaty commitments that are legally binding.

The possibility of political commitments, on their own or comprised in a treaty, complicates thus the intent inquiry. In general, it is necessary to examine treaties, provision by provision, in order to establish the intent of the parties rather than simply assigning one label to the instrument in its entirety. This requires an interpretative exercise. As the EU-Turkey Statement is rather short and all the commitments laid down in the Statement are formulated in the same manner, such exercise is however not necessary with regards to the EU-Turkey Statement. It flows from the overall scheme of the EU-Turkey Statement and the circumstances surrounding its adoption that the parties intended the Statement’s provisions to be binding in their reciprocal relations.

The particular importance of distinguishing treaty commitments from political commitments stems from article 26 VCLT. This article lays down the fundamental principle of *pacta sunt servanda* as it determines that “*every treaty in force is binding upon the parties to it and must be performed in good faith*”. This thus contrary to political commitments.

### **3.3.4 The EU-Turkey Statement as an international agreement**

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<sup>219</sup> D. B. HOLLIS (ed.), *The Oxford Guide to treaties*, Oxford, Oxford University Press, 2012, 33.

The foregoing analysis has revealed the criteria to rely on in order to determine whether a text is a treaty. The fundamental criterium is the intention of the parties: did the parties intend the instrument to be binding in their reciprocal relations? This intention is to be derived from the substance of the instrument – its actual terms and the circumstances surrounding its adoption – irrespective of what the parties afterwards say was their intention.

In this regard it should be concluded that the EU-Turkey Statement is a binding international agreement. This is supported by both the overall scheme of the Statement and the circumstances surrounding its adoption. As F. Cherubini put it: *“There is convincing evidence in favour, while, on the other hand, the arguments denying that it is an agreement are not so solid”*.<sup>220</sup>

This conclusion is further underpinned by the swift action undertaken to implement the Statement. Since 4 April 2016, migrants are being returned from Greece to Turkey<sup>221</sup> and Turkey is accepting the returned asylum seekers<sup>222</sup>. To this end, the Turkish Parliament approved the revised date of entry into effect of the provisions of the EU-Turkey Readmission Agreement concerning TCNs. Similarly, Syrians are being resettled from Turkey to the EU under the one-for-one principle.<sup>223</sup> To this end, a Council Decision of 29 September 2016 amended the Council Decision of 22 September 2015 on relocation, in order to transfer some of the places initially committed for the relocation of asylum seekers arriving in Italy and Greece, to places for the resettlement of Syrians from Turkey to the EU.<sup>224</sup> Mere application of the EU-Turkey Statement cannot change its legal nature, but

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<sup>220</sup> F. CHERUBINI, “The “EU-Turkey Statement” of 18 March 2016: A (Umpteenth) Celebration of Migration Outsourcing”, 17 June 2016, 40, [https://www.openstarts.units.it/bitstream/10077/15219/1/BSA3\\_04-Cherubini.pdf](https://www.openstarts.units.it/bitstream/10077/15219/1/BSA3_04-Cherubini.pdf), last accessed on 22 April 2018.

<sup>221</sup> “Greece Passes Law Allowing Migrants’ return to Turkey”, BBC News, 1 April 2016, <http://www.bbc.com/news/world-europe-35948447>, last accessed on 29 March 2018.

<sup>222</sup> P. KINGSLEY and H. SMITH, “First boats returning migrants and refugees from Greece arrive in Turkey”, The Guardian, 4 April 2016, <https://www.theguardian.com/world/2016/apr/04/first-moves-to-deport-refugees-from-greece-to-turkey-underway>, last accessed on 29 March 2018.

<sup>223</sup> H. LABAYLE, “L’accord Union européenne avec la Turquie: l’heure de vérité?”, Réseau Universitaire européen dédié à l’étude du droit de l’Espace de liberté, sécurité et justice, 28 April 2016, 3, <http://www.gdr-elsj.eu/2016/04/28/asile/laccord-union-europeenne-avec-la-turquie-lheure-de-verite/>, last accessed on 10 April 2018.

<sup>224</sup> European Commission, “Proposal for a Council Decision amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, 21 March 2016, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we->

does present a strong indication of the parties' intention to conclude a binding international agreement.<sup>225</sup>

In the light of the conclusion of this section, the EU-Turkey Statement will from here on be considered an international agreement.

### 3.4 Act of the European Council or act of the 28 Member States?

Having established that the EU-Turkey Statement is an international agreement, it is necessary to determine who the parties to that agreement are. While the answer is rather obvious for Turkey, the answer has proved to be less evident when it comes to its European counterpart.<sup>226</sup> The choice is between the representatives of the MSs either acting in their capacity as Heads of State or Government of the MSs or acting in their capacity as Members of the European Council.

While the EU-Turkey Statement itself suggests that it is an act of the European Council<sup>227</sup>, the EU institutions have claimed otherwise<sup>228</sup>. The authorship inquiry is further

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[do/policies/european-agenda-migration/proposal-implementation-package/docs/20160321/provisional\\_measures\\_area\\_international\\_protection\\_benefit\\_italy\\_and\\_greece.pdf](https://ec.europa.eu/policies/european-agenda-migration/proposal-implementation-package/docs/20160321/provisional_measures_area_international_protection_benefit_italy_and_greece.pdf), in the proposals preamble, the Statement of EU Heads of State or Government of 7 March 2016 is however presented as the rationale for the amendment; Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2016 L 268.

<sup>225</sup> G. FERNANDEZ ARRIBAS, "The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?", *European Papers* 2017, 309.

<sup>226</sup> Before the General Court's order in *NF v. European Council* legal scholars seemed quite certain that the EU-Turkey Statement was an EU act; see inter alia: S. PEERS, "The draft EU/Turkey deal on migration and refugees: is it legal?", *EU Law Analysis*, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>, last accessed on 10 May 2018; M. GATTI, "The EU-Turkey Statement: A Treaty That Violates Democracy. Part 2 of 2", *European Journal of International Law*, 19 April 2016, <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/>, last accessed on 5 May 2018; C. MATUSESCU, "Considerations on the Legal nature and validity of the EU-Turkey refugee deal", *Union of Jurists of Romania Law Review* 2016, 92; L. IZUZQUIZA, "One year later: what we (still don't) know about the EU-Turkey agreement and accountability", *Access Info Europe*, 18 March 2017, <https://www.access-info.org/uncategorized/27982>, last accessed on 25 April 2018; S. CARRERA, L. DEN HERTOOG and M. STEFAN, "It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", *CEPS*, April 2017, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018.

<sup>227</sup> European Council, "EU-Turkey Statement", 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.

<sup>228</sup> Order of the General Court, *NF v. European Council*, T-192/16, ECLI:EU:T:2017:128, § 28-30; S. CARRERA, L. DEN HERTOOG and M. STEFAN, "It wasn't me! The Luxembourg Court Orders on the EU-



complicated by the fact that the EU-Turkey Statement is part and parcel of a body of measures taken in response to the European migration crisis since September 2015.<sup>229</sup> These measures are intertwined and can hardly be seen apart from each other.

As mentioned above, the General Court followed the reasoning of the EU institutions that the EU-Turkey Statement was an act of the representatives of the MSs, acting in their capacity as Heads of State or Government of the MSs, and thus not an act attributable to the European Council.<sup>230</sup>

This finding has been broadly criticized by legal scholars. S. Carrera, L. Den Hertog and M. Stefan for example found the General Court's assessment "... *troubling, not only because the EU-Turkey Statement cannot well be understood outside the long-standing framework of cooperation between the EU and Turkey, but also because it falls squarely within EU internal and external competences in migration policies and has been hailed as the main policy response to the European refugee crisis*".<sup>231</sup> Likewise, L. Limone pointed out that "... *the real problem is that apparently the General Court does not object on the fact that all members of an EU institution can adopt measures falling in the EU competence without being bound by the EU law*".<sup>232</sup> These findings were shared by many others in legal literature.<sup>233</sup>

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Turkey Refugee Deal", CEPS, April 2017, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018.

<sup>229</sup> See inter alia: European Council, "Meeting of the heads of state or government with Turkey – EU-Turkey Statement, 29/11/2015", 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/>, last accessed on 28 April 2018; European Council, "Statement of the EU Heads of State or Government, 07/03/2016", 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

<sup>230</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 71.

<sup>231</sup> S. CARRERA, L. DEN HERTOOG and M. STEFAN, "It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", CEPS, April 2017, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018.

<sup>232</sup> L. LIMONE, "Today's Court (non) decision on the (non) EU 'deal'? with Turkey", FREE Group, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>, last accessed on 10 May 2018.

<sup>233</sup> See inter alia: E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council", European Papers, 15 March 2017, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018; L. IZUZQUIZA, "One year later: what we (still don't) know about the EU-Turkey agreement and accountability", Access Info Europe, 18 March 2017, <https://www.access-info.org/uncategorized/27982>, last accessed on 25 April 2018; N. IDRIZ, "Taking the EU-Turkey Deal to Court?", Verfassungsblog, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018; P. GARCIA ANDRADE, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and



It is striking that these scholars all seem to agree that the General Court should have proceeded to an analysis of the competences that were exercised in the conclusion of the EU-Turkey Statement.

The idea of assessing the competences that have been exercised in the conclusion of an act, to determine the authorship of that act, was a first time laid down in a less known part of the ERTA judgment<sup>234</sup> and has been repeated in joined cases C-181/91 and C-248/91<sup>235</sup>.

### 3.4.1 ERTA case and joined cases C-181/91 and C-248/91

The 1971 ERTA case – mostly known for constituting the starting point of the doctrine of implied external powers – concerned the conclusion of the ERTA, designed to harmonise certain social aspects of international road transport. The negotiations of the ERTA were conducted by the MSs. Before the finalisation of the negotiations however, the Council adopted a regulation harmonising certain social provisions in the field of road transport (Regulation 543/69)<sup>236</sup>. Since ERTA was seen as a step in the same direction, be it on the international plane, the MSs agreed to coordinate their positions through the Council.

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Asylum Policies”, Workshop E, “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNiIX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018; M. GATTI, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E, “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=6-sRjLp8Isc&index=8&list=PL5j0rT9PoY-S-QNiIX6fvFqso42h3Oj6w>, last accessed on 15 April 2018; F. DEHOUSSE, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Final Plenary Session, “Towards “Judicial Passivism” in EU Migration and Asylum Law?”, 1 February 2018, <https://www.youtube.com/watch?v=ONcFmv0grVU>, last accessed on 18 April 2018.

<sup>234</sup> Judgment of the Court, *Commission v. Council*, C-22/70, ECLI:EU:C:1971:32, § 70; I. GOVAERE, “Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon”, *Cambridge yearbook of European Legal Studies* 2011, 92.

<sup>235</sup> Judgment of the Court, *European Parliament v. Council and Commission*, joined cases C-181/91 and C-248/91, ECLI:EU:C:1993:271; P. GARCIA ANDRADE, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNiIX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018.

<sup>236</sup> Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport, OJ 1969 L 77.

Hereafter, the attitude to be taken by the MSs in the negotiations of the ERTA was discussed in the Council.

The Commission however felt that conclusion of the ERTA encroached on its competences and brought the matter before the CJEU. It asked the annulment of the Council proceedings regarding the negotiation and conclusion of the ERTA by the MSs, as the Agreement should have been concluded by the EU.<sup>237</sup> The Council asked the Court to declare the Commission's application inadmissible, since the Council proceedings were not an act of which legality could be reviewed under the annulment procedure as they did not lay down a binding course of action.<sup>238</sup>

The Court decided that, to be able to take a decision on admissibility, it was necessary to first establish which authority was at the relevant time empowered to negotiate and conclude the Agreement.<sup>239</sup> It held that "*The legal effect of the proceedings differs according to whether they are regarded as constituting the exercise of powers conferred on the [Union], or as acknowledging a coordination by the member states of the exercise of powers which remained vested in them*".<sup>240</sup>

After having laid down that the MSs cannot, outside the framework of the Union institutions, assume obligations which might affect common rules or alter their scope, the Court decided that the conclusion of the ERTA was an exclusive EU competence. Therefore, the MSs could not act outside the framework of the common institutions and the Council proceedings had laid down a binding course of action, making it possible for these proceedings to be the subject of an annulment procedure.<sup>241</sup> The decisive criterion in the Court's argumentation was the substance of the act and not its form.

In the 1993 joined cases C-181/91 and C-248/91 *Parliament v. Council and Commission*<sup>242</sup>, the CJEU reiterated what it had established in its ERTA judgment. These cases concerned

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<sup>237</sup> Judgment of the Court, *Commission v. Council*, C-22/70, ECLI:EU:C:1971:32, § 1.

<sup>238</sup> *Ibid.*, § 2.

<sup>239</sup> *Ibid.*, § 3.

<sup>240</sup> *Ibid.*, § 4.

<sup>241</sup> *Ibid.*, § 53.

<sup>242</sup> Judgment of the Court, *Parliament v. Council and Commission*, joined cases C-181/91 and C-248/91, ECLI:EU:C:1993:271.

actions for annulment of the European Parliament against a decision to grant special aid to Bangladesh taken by the representatives of the MSs, meeting within the Council, and its implementing measures.<sup>243</sup> The Parliament held that this decision should be regarded as an act of the Council and could therefore be the subject of an action for annulment under article 263 TFEU.<sup>244</sup> The Council, on the other hand, argued that the contested act was not act of the Council and therefore not an act of which the legality could be reviewed under article 263 TFEU.<sup>245</sup>

In its judgment, the Court stated that “... *it is not enough that an act should be described as a 'decision of the Member States' for it to be excluded from review under [article 263 TFEU]. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.*”<sup>246</sup>

In this light, the Court assessed the competences that were exercised by granting special aid to Bangladesh. As the Court found that the Union did not have exclusive competence in the field of humanitarian aid, it decided that the MSs were not precluded from exercising their competence outside the Council, so that it was possible that the act granting special aid to Bangladesh was an act of the MSs.<sup>247</sup> Taking into account the further content and all the circumstances in which it was adopted, the Court therefore decided that the act granting special aid to Bangladesh was not an act of the Council, but an act taken collectively by the MSs.

While the General Court did reiterate the finding from joined cases C-181/91 and C-248/91 – that it is not sufficient for an act to be described as a “decision of the Member States” for it to be excluded from judicial review under article 263 TFEU – in the NF v. European Council case<sup>248</sup>, it failed to actually apply this finding to the EU-Turkey Statement and assess the competences that were exercised in the conclusion of the Statement<sup>249</sup>. In what

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<sup>243</sup> Judgment of the Court, Parliament v. Council and Commission, joined cases C-181/91 and C-248/91, ECLI:EU:C:1993:271, § 1-2.

<sup>244</sup> *Ibid.*, § 4.

<sup>245</sup> *Ibid.*, § 9.

<sup>246</sup> *Ibid.*, § 14.

<sup>247</sup> *Ibid.*, § 16.

<sup>248</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 45.

<sup>249</sup> N. IDRIZ, “Taking the EU-Turkey Deal to Court?”, *Verfassungsblog*, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018.

follows, a more thorough analysis of the authorship of the EU-Turkey Statement is made, by taking a closer look at the content of the Statement – including an assessment of the competences that were exercised – and all the circumstances in which it was adopted.

Such analysis is in line with the general rule of interpretation of treaties as comprised in article 31 VCLT. Article 31(1) VCLT holds that “*A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.

### **3.4.2 Content of the EU-Turkey Statement**

In order to determine the authorship of the EU-Turkey Statement, it is necessary to perform an analysis of the content of the Statement, including the commitments that were made in it. Regarding the latter, the division of competences between the EU and its MSs to establish international cooperation in the field of asylum and migration will have to be analysed. Such analysis is complicated due to two main factors. First, the sensitivity that foreign affairs and migration represent for national sovereignty, and second, the ambiguity in the provisions of EU law concerning external action, in particular those codifying the ERTA-doctrine.<sup>250</sup>

Consistent with the CJEU’s approach in the ERTA case and joined cases C-181/91 and C-248/91, this section starts with a competence analysis and then looks at the further content of the EU-Turkey Statement.

#### *3.4.2.1 Competence to conclude the EU-Turkey Statement*

##### 3.4.2.1.1 External competence in asylum and migration

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<sup>250</sup> P. GARCIA ANDRADE, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNiX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018.

Since the entry into force of the Lisbon Treaty in 2009, the Union's legal personality is explicitly recognised by article 47 Treaty on the European Union (hereinafter TEU). Well before the entry into force of the Lisbon Treaty however, the Union satisfied the requirements for international legal personality and was recognised as having such legal personality by the international community.<sup>251</sup> This implies that the EU can enter – and has been entering for a long time – into relations on the international level, giving rise to rights and obligations. The MSs have equally maintained their ability to conclude international agreements outside the EU framework, as long as this does not interfere with exclusive EU competences.<sup>252</sup> Determinate in deciding who is to act – being the Union or its MSs – is the division of competences.<sup>253</sup>

Under the division of competences, the EU only has the competences that have been conferred to it by the EU Treaties. The competences that have not been conferred to the Union, remain with the MSs. This principle is stated in article 5(2) TEU and concerns both the EU's internal and external action.<sup>254</sup>

The former European Community (EC) acquired competence in the field of asylum and migration with the entry into force of the Amsterdam Treaty in 1999.<sup>255</sup> The Treaty inserted Title IV concerning “Visas, asylum, immigration and other policies related to the free movement of persons” in Part Three of the Treaty establishing the European Community (TEC). With the entry into force of the Lisbon Treaty in 2009, asylum and migration policies were brought under a new Title V of Part Three TFEU concerning the “Area of

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<sup>251</sup> ICJ Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*; F. HOFFMEISTER, “The Contribution of EU Practice to international Law in Developments in EU External Relations Law”, in M. CREMONA (ed.), *Developments in EU External Relations Law*, Oxford, Oxford University Press, 2008, 42; I. GOVAERE, “Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon”, *Cambridge yearbook of European Legal Studies* 2011, 89-90.

<sup>252</sup> I. GOVAERE, “Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon”, *Cambridge yearbook of European Legal Studies* 2011, 91; A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 28, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>253</sup> J. ODERMATT, *The European Union as a Global Actor and its Impact on the International Legal Order*, University of Leuven Department of Law, 2016, 56-57.

<sup>254</sup> Opinion 2/94, ECLI:EU:C:1996:140, § 24.

<sup>255</sup> K. EISELE and N. RESLOW, “Encouraging legal migration and preventing irregular migration: coherence or contradiction?”, in B. SEGHAERT, C. GORTAZAR and M.-C. PARRA (eds.), *European Migration and Asylum Policies: Coherence or Contradiction?*, Larcier, 165; M. FLETCHER, E. HERLIN-KARNELL and C. MATERA (eds.), *The European Union as an Area of Freedom, Security and Justice*, Abingdon, Routledge, 2017, 13-14.

Freedom, Security and Justice”, also containing policies relating to police and judicial cooperation in criminal matters.

The area of freedom, security and justice is listed by article 4(2)(j) TFEU as an area of shared competence. This entails that both the Union and the MSs may legislate and adopt legally binding acts in this area. The MSs may exercise their competence to the extent that the Union has not exercised its competence or to the extent the Union has ceased to exercise its competence.<sup>256</sup>

The treaty provisions relating to asylum and migration, and even to the area of freedom, security and justice as a whole, contain only one legal basis conferring explicit external competence to the Union: article 79(3) TFEU on readmission agreements. Therefore, the remainder of the Union’s external powers in the field of asylum and migration have an implied character.

The starting point of the doctrine of implied external powers was the 1971 ERTA case.<sup>257</sup> The ERTA case law has been codified by the Lisbon Treaty and is now embodied in articles 216(1) and 3(2) TFEU.<sup>258</sup>

Article 216(1) TFEU decides on the existence of Union competence to conclude international agreements. The article states:

*The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*

This article should be read together with article 3 TFEU, which decides on the distinct but related question of the (exclusive) nature of the external competence. While article 3(1)

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<sup>256</sup> Article 2(2) TFEU.

<sup>257</sup> Judgment of the Court, *Commission v. Council*, C-22/70, ECLI:EU:C:1971:32.

<sup>258</sup> I. GOVAERE, “Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of CJEU Opinion 1/13”, *Common Market Law Review* 2015, 1278.

TFEU sets out the policy areas where the EU enjoys exclusive competence, article 3(2) TFEU determines:

*The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.*

Where the EU has an exclusive external competence, the MSs “no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”.<sup>259</sup> In Opinion 1/13, the CJEU clarified that an international agreement does not have to coincide fully with the EU rules already adopted in order to “affect common rules or alter their scope”<sup>260</sup> and that EU rules may be affected as soon as the international agreement covers an area that is already covered to a large extent by Union rules<sup>261</sup>. In addition, exclusive EU external competence not only prohibits the MSs from concluding international agreements, but also prohibits them from taking any actions which may lead to the adoption of acts having legal effects.<sup>262</sup> In the International Maritime Organisation (hereinafter IMO) case<sup>263</sup>, the CJEU found in this regard that Greece had failed to fulfil its obligations under the Treaties by submitting a proposal to the Maritime Safety Committee of the IMO, since such a proposal could lead to legally binding rules over time.<sup>264</sup> As the EU had already adopted common rules in the same area, Greece was pre-empted from acting.

#### 3.4.2.1.2 Decomposing the EU-Turkey Statement

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<sup>259</sup> Judgment of the Court, Commission v. Council, C-22/70, ECLI:EU:C:1971:32, § 17; G. DE BAERE, “The Framework of EU External Competences for Developing the External Dimension of EU Asylum and Migration Policy”, in M. MAES, M.-C. FOBLETS and P. DE BRUYCKER (eds.), *External Dimensions of EU Migration and Asylum Law and Policy*, Brussels, Bruylant, 2011, 134-135.

<sup>260</sup> Opinion 1/13, ECLI:EU:C:2014:2303, § 72.

<sup>261</sup> *Ibid.*, § 73.

<sup>262</sup> N. IDRIZ, “Taking the EU-Turkey Deal to Court?”, *Verfassungsblog*, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018.

<sup>263</sup> Judgment of the Court, Commission v. Greece, C-45/07, ECLI:EU:C:2009:81.

<sup>264</sup> *Ibid.*, § 20-23.

The EU-Turkey Statement itself does not explicitly point out the competences that have been exercised. When it comes to EU competence, it is the legal basis that will determine if the Union has the competence to act and what the nature of that competence is.<sup>265</sup> When there exists no legal basis in the treaties conferring competence to the Union, the competence has remained with the MSs.<sup>266</sup>

Determining the competences that have been exercised in the conclusion of the EU-Turkey Statement requires an in-depth study of the content of the Statement. Therefore, the commitments or “action points” laid down in the Statement will be analysed one by one.

#### *3.4.2.1.2.1 The readmission of irregular migrants to Turkey*

The first and without doubt most important action point laid down in the EU-Turkey Statement is that “*All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey*”. This provision allows for the readmission of irregular migrants to Turkey.<sup>267</sup>

The particular importance of this provision stems from the fact that it is the only provision that directly addresses the main goal of the EU-Turkey Statement, i.e. ending irregular migration from Turkey to the EU.<sup>268</sup> In this light the additional commitments or action points are mere incentives for Turkey to implement the Statement, as has been argued by several legal scholars.<sup>269</sup>

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<sup>265</sup> I GOVAERE, “Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon”, *Cambridge yearbook of European Legal Studies* 2011, 94-95; P. CRAIG and G. DE BURCA, *EU Law. Text, cases and materials. Sixth edition*, Oxford, Oxford University Press, 2015, 322.

<sup>266</sup> In accordance with the principle of conferral as laid down in article 5(2) TEU.

<sup>267</sup> Although the EU-Turkey Statement does not explicitly mention the term “readmission”, the first action point of the Statement coincides with the definition of readmission given in article 1 of the EU-Turkey Readmission Agreement.

<sup>268</sup> S. PEERS and E. ROMAN, “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?”, *EU Law Analysis*, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018.

<sup>269</sup> See inter alia: F. CHERUBINI, “The “EU-Turkey Statement” of 18 March 2016: A (Umpteenth) Celebration of Migration Outsourcing”, 35-36, 17 June 2016, [https://www.openstarts.units.it/bitstream/10077/15219/1/BSA3\\_04-Cherubini.pdf](https://www.openstarts.units.it/bitstream/10077/15219/1/BSA3_04-Cherubini.pdf), last accessed on 22 April 2018; N. KOENIG, “The EU’s External Migration Policy: towards win-win-win partnerships”, 6 April 2017, [http://www.delorsinstitut.de/2015/wp-content/uploads/2017/04/20170406\\_ExternalMigrationPolicy-NKoenig.pdf](http://www.delorsinstitut.de/2015/wp-content/uploads/2017/04/20170406_ExternalMigrationPolicy-NKoenig.pdf), last accessed on 20 April 2018; M. H. ZOETEWEIJ and O. TURHAN, “Above the Law – Beneath Contempt: The End of the EU-Turkey Deal?”, *Swiss Review of International and European Law* 2017, 151-165; A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered



The implementation of this first provision is based on two successive legal bases.<sup>270</sup> Starting from 4 April 2016<sup>271</sup> irregular migrants would be returned to Turkey on the basis of the existing Greece-Turkey Readmission Protocol. From 1 June 2016 onwards however, readmissions would take place on the basis of the EU-Turkey Readmission Agreement that would succeed the Greece-Turkey Readmission Protocol.<sup>272</sup>

The provisions of the EU-Turkey Readmission Agreement concerning the readmission of TCNs were originally destined to come into effect in October 2017.<sup>273</sup> Following the EU-Turkey Statement, a decision of the Joint Readmission Committee, established to monitor and coordinate the implementation of the EU-Turkey Readmission Agreement<sup>274</sup>, however revised the date of entry into effect of these provisions, making it 1 June 2016.<sup>275</sup> This decision would become applicable as soon as the Turkish Parliament would approve it.<sup>276</sup>

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relationship?”, Centre for the Law of EU External Relations, 2017, 21 and 24, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>270</sup> European Commission, “EU-Turkey Statement: Questions and Answers”, 19 March 2016, [http://europa.eu/rapid/press-release\\_MEMO-16-963\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-963_en.htm), last accessed on 18 March 2018; European Commission, “Implementing the EU-Turkey Agreement – Questions and Answers”, 4 April 2016, [http://europa.eu/rapid/press-release\\_MEMO-16-1664\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm), last accessed on 18 March 2018; H. LABAYLE, “L’accord Union européenne avec la Turquie: l’heure de vérité?”, Réseau Universitaire européen dédié à l’étude du droit de l’Espace de liberté, sécurité et justice, 28 April 2016, <http://www.gdr-elsj.eu/2016/04/28/asile/laccord-union-europeenne-avec-la-turquie-lheure-de-verite/>, last accessed on 10 April 2018.

<sup>271</sup> Being the date set out as the target date for the start of returns of people who arrived in Greece after 20 March.

<sup>272</sup> European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – First Report on the progress made in the implementation of the EU-Turkey Statement”, 20 April 2016, 4-5, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf), last accessed on 8 April 2018.

<sup>273</sup> Article 24 Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation; S. PEERS and E. ROMAN, “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?”, EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018.

<sup>274</sup> Article 19 Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

<sup>275</sup> European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – First Report on the progress made in the implementation of the EU-Turkey Statement”, 20 April 2016, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf), last accessed on 8 April 2018.

<sup>276</sup> H. LABAYLE, “L’accord Union européenne avec la Turquie: l’heure de vérité?”, Réseau Universitaire européen dédié à l’étude du droit de l’Espace de liberté, sécurité et justice, 7 April 2016, 2, <http://www.gdr->

In June 2016, the Commission confirmed that the Turkish Parliament approved the entry into force of the provisions of the EU-Turkey Readmission Agreement concerning TCNs as of 1 June 2016.<sup>277</sup>

#### *A. Legal framework*

The legal basis for the conclusion of readmission agreements between the EU and third countries is article 79(3) TFEU:

*The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.*

Article 79 TFEU falls under Title V of Part Three TFEU (“Area of Freedom, Security and Justice”). Therefore, this part of the EU-Turkey Statement falls within the scope of the area of freedom, security and justice that is classified as an area of shared competence in article 4(2)(j) TFEU. Moreover, it concerns a shared pre-emptive competence in the light of article 2(2) TFEU. This implies that the MSs are allowed to exercise their competence to the extent that the Union has not exercised its competence or to the extent the Union has ceased to exercise its competence.

#### *B. Application of the legal framework to the EU-Turkey Statement*

The conclusion of readmission agreements is a shared competence (article 79(3) TFEU *iuncto* article 4(2)(j) TFEU). Upon concluding the EU-Turkey Readmission Agreement, the Union however exercised its competence in the field of the readmission of TCNs to Turkey, excluding MSs’ competence to conclude an agreement with Turkey on the same topic. Accordingly, the MSs were pre-empted from deciding on this first action point.

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[elsj.eu/2016/04/28/asile/laccord-union-europeenne-avec-la-turquie-lheure-de-verite/](https://elsj.eu/2016/04/28/asile/laccord-union-europeenne-avec-la-turquie-lheure-de-verite/), last accessed on 10 April 2018.

<sup>277</sup> European Commission, “Implementing the EU-Turkey Statement – Questions and Answers”, 15 June 2016, [http://europa.eu/rapid/press-release MEMO-16-1664\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm), last accessed on 8 April 2018.

In addition, the last sentence of article 3(2) TFEU determines that the Union shall have exclusive competence to conclude international agreements, insofar as their conclusion “*may affect common rules or alter their scope*”. Since the readmission of TCNs to Turkey affects common rules and/or alters their scope, the Union thus has an exclusive competence to decide on this commitment.

An evident example of how the readmission of TCNs to Turkey has altered the scope of common rules is that it is based on the implicit premise that Turkey is a “safe third country”, while article 38(1)(e) of the Asylum Procedures Directive<sup>278</sup> clarifies that this concept is only to be applied to countries in which “*the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention*”. Turkey is a party to the Geneva Convention, but has maintained geographical limitations as to the application of the Convention and does not grant refugee status to asylum seekers coming from outside Europe.<sup>279</sup> Therefore, the EU-Turkey Statement changes the scope of the “safe third country” concept, as far as Turkey does not fulfil the requirements of article 38 of said Directive.<sup>280</sup>

Another example of how the readmission of TCNs to Turkey has altered the scope of common rules is that it has caused the transformation of the hotspots on the Greek islands into closed detention facilities.<sup>281</sup> These hotspots – originally destined to ensure the swift

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<sup>278</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180.

<sup>279</sup> Articles 62 and 63 Law on Foreigners and International Protection (Turkey) determine that only persons fleeing as a result of “events occurring in European countries” can be given refugee status; S. PEERS and E. ROMAN, “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?”, EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018; S. PEERS, “The draft EU/Turkey deal on migration and refugees: is it legal?”, EU Law Analysis, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>, last accessed on 10 May 2018; A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 18-19, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>280</sup> E. CANNIZARO, “Disintegration Through Law?”, *European Papers* 2016, 5; N. IDRIZ, “The EU-Turkey statement or the ‘refugee deal’: the extra-legal deal of extraordinary times?”, Asser Institute, 1 December 2017, 12, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3080881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881), last accessed on 26 April 2018.

<sup>281</sup> European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council – First Report on the progress made in the implementation of the EU-Turkey Statement”, 20 April 2016, 5, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf) which outlines that “the hotspots are being adapted to facilitate swift returns to Turkey from the islands”, last accessed on 8 April

identification, registration and fingerprinting of migrants<sup>282</sup> – were turned into closed pre-removal detention centres, where post-EU-Turkey Statement arrivals are being mandatorily confined to ensure quick returns to Turkey. According to article 15 of the Directive on common standards and procedures for the reception of applicants for international protection, detention can only be used as a measure of last resort and should last for as short a period as possible.<sup>283</sup> Article 8(1) of the Reception Conditions Directive<sup>284</sup> also stipulates that applying for asylum in accordance with the Asylum Procedures Directive cannot be the sole reason for detaining someone. In practice, the application of the EU-Turkey Statement has however led to the automatic detention of all new irregular migrants arriving on the Greek islands as from 20 March 2016.<sup>285</sup> Therefore, the commitment to return all irregular migrants to Turkey has altered article 15 of the Directive on common standards and procedures for the reception of applicants for international protection and article 8(1) of the Reception Conditions Directive in as far as it has led to the automatic detention of all irregular migrants arriving in Greece.

The exclusive EU competence in regards to the first action point is further underpinned by the fact that this commitment entails a change to the EU-Turkey Readmission Agreement (i.e. its date of entry into effect). Changes and amendments to the main body of an agreement may only be made by the signatory parties.<sup>286</sup>

#### *3.4.2.1.2.2 Resettlement of Syrians in need of international protection*

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2018; N. IDRIZ, “The EU-Turkey statement or the ‘refugee deal’: the extra-legal deal of extraordinary times?”, Asser Institute, 1 December 2017, 12, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3080881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881), last accessed on 26 April 2018.

<sup>282</sup> European Commission, “The hotspot approach to managing exceptional migratory flows”, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf), last accessed on 20 April 2018.

<sup>283</sup> Article 15 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348.

<sup>284</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ 2013 L 180.

<sup>285</sup> A. FILI, “The Continuum of Detention in Greece”, *Border Criminologies*, 25 May 2016, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/continuum>, last accessed on 21 April 2018; A. PAPADOPOULOU, “The implementation of the Hotspots in Italy and Greece. A study”, ECRE, 5 December 2016, 38, <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>, last accessed on 21 April 2018; see also: ECtHR judgment of 25 January 2018, *J.R. and Others v. Greece*;

<sup>286</sup> Article 39 VCLT.

A next action point laid down in the EU-Turkey Statement concerns the resettlement of Syrians in need of international protection. The EU-Turkey Statement determines that “*For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU ...*”.<sup>287</sup> Under this mechanism a maximum of 72 000 Syrian refugees can be resettled from Turkey to the EU.<sup>288</sup>

The EU-Turkey Statement further provides that “*resettlement under this mechanism will take place by honouring the commitments previously taken by the Member States in the Council conclusions of 20 July 2015 to resettle 22 000 persons, of which 18 000 places for resettlement remain*”. The Statement adds that “*Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54 000 persons*” and that in this light “*The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision*”.<sup>289</sup>

#### A. Legal framework

Resettlement entails the transfer of individual displaced persons in clear need of international protection, on submission of the UNCHR and in agreement with the country of resettlement, from a third country to a MS.<sup>290</sup> Since no provision of Title V of Part Three TFEU allows the Union to decide on the resettlement of displaced persons in need of international protection from outside the EU, this power has remained with the MSs in accordance with the principle of conferral.<sup>291</sup> The MSs have thus retained exclusive competence to decide on the volumes of admission of migrants from other countries.<sup>292</sup>

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<sup>287</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> European Commission, “Commission Recommendation of 8.6.2015 on a European resettlement scheme”, 8 June 2015, 4, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/recommendation\\_on\\_a\\_european\\_resettlement\\_scheme\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf), last accessed on 8 April 2018.

<sup>291</sup> Article 5(2) TFEU.

<sup>292</sup> P. GARCIA ANDRADE, “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, EU Immigration and Asylum Law and Policy, 17 January 2018,

The Union however does have the competence to decide on relocation. Article 78(3) TFEU determines in this regard that in the event of one or more MSs being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional relocation measures for the benefit of the MS(s) concerned.

### *B. Application of the legal framework to the EU-Turkey Statement*

The MSs have the exclusive competence to decide on the resettlement of Syrians in need of international protection from outside the EU. This explains why the EU-Turkey Statement explicitly refers to the MSs earlier commitments on resettlement and relocation. A recall of these commitments.

On 8 June 2015, the Commission presented a recommendation to the MSs on a European Resettlement Scheme providing for the resettlement of 20 000 people in need of international protection over a two-year-period.<sup>293</sup> Thereafter, the representatives of the MSs, meeting in the Council, adopted a conclusion to resettle 22 504 persons through multilateral and national schemes.<sup>294</sup> At the time of conclusion of the EU-Turkey Statement approximately 18 000 places for resettlement from these commitments remained.<sup>295</sup>

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<http://eumigrationlawblog.eu/external-competence-and-representation-of-the-eu-and-its-member-states-in-the-area-of-migration-and-asylum/>, last accessed on 5 May 2018; P. GARCIA ANDRADE, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNliX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018.

<sup>293</sup> European Commission, “Commission Recommendation of 8.6.2015 on a European resettlement scheme”, 8 June 2015, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/recommendation\\_on\\_a\\_european\\_resettlement\\_scheme\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf), last accessed on 9 April 2018.

<sup>294</sup> Council of the European Union, “Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection”, 22 July 2015, <http://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf>, last accessed on 10 April 2018.

<sup>295</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.



As to the additional 54 000 places for resettlement, the EU-Turkey Statement anticipates an amendment of the Council Decision of 22 September 2015.<sup>296</sup> Under this decision, 120 000 persons were to be relocated from Italy and Greece and divided between the MSs. Said amendment would allow using 54 000 not yet allocated places under this decision for the purpose of resettling Syrians from Turkey to the EU.

Accordingly, the Commission made a proposal for this amendment to the Council on 21 March 2016.<sup>297</sup> A Council Decision followed on 29 September 2016.<sup>298</sup> This decision provided that MSs may choose to meet their obligations under the Relocation Scheme by admitting Syrian nationals present in Turkey into their territory.

In this light the EU-Turkey Statement does not establish any new commitments concerning resettlement for the MSs: the envisaged 72 000 places for resettlement are no newly created places for refugees, but places that were already pledged by the MSs, either for resettlement or for relocation.<sup>299</sup>

At the same time, the one-for-one principle has led to the Council Decision of 29 September 2016 which amended the Council Decision of 22 September 2015. Therefore, it can be argued that the EU did have the competence to decide on this action point on the basis of article 216(1) TFEU, as it was “*likely to affect common rules or alter their scope*”. It concerns a competence that would moreover be exclusive in the light of article 3(2) TFEU as it affects indeed common rules. There is however room for discussion, as the MSs have retained exclusive competence to decide on the volumes of admission of TCNs.

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<sup>296</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248.

<sup>297</sup> European Commission, “Proposal for a Council Decision amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, 21 March 2016, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160321/provisional\\_measures\\_area\\_international\\_protection\\_benefit\\_italy\\_and\\_greece.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160321/provisional_measures_area_international_protection_benefit_italy_and_greece.pdf)

<sup>298</sup> Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2016 L 268.

<sup>299</sup> H. LABAYLE, “L’accord Union européenne avec la Turquie: l’heure de vérité?”, Réseau Universitaire européen dédié à l’étude du droit de l’Espace de liberté, sécurité et justice, 28 April 2016, <http://www.gdr-elsj.eu/2016/04/28/asile/laccord-union-europeenne-avec-la-turquie-lheure-de-verite/>, where the author talks about “[une] approche strictement comptable”, last accessed on 10 April 2018.

### 3.4.2.1.2.3 Visa liberalisation

The EU-Turkey Statement further stipulates that “*the fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision*”.<sup>300</sup>

#### A. Legal framework

Pursuant to article 77(2)(a) TFEU, the eventual decision to lift visa requirements lays with the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. The EU can conclude agreements with third countries on visa liberalisation pursuant to article 77(2)(a) *iuncto* article 216(1) TFEU. This concerns once more an area of shared competence under article 4(2)(j) TFEU.

The ERTA line of exclusivity comprised in article 3(2) TFEU however gives the Union exclusive competence to conclude international agreements in as far as their conclusion may “*affect common rules or alter their scope*”. This provision prohibits the MSs from concluding international agreements in the field of visa liberalisation, since this would impede a uniform application of the Visa Code<sup>301</sup>, establishing the procedures and conditions for issuing visas for short stays in and transit through territories of EU countries, and the Schengen borders Code<sup>302</sup>, governing the movement of persons across borders.

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<sup>300</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018.

<sup>301</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ 2009 L 243.

<sup>302</sup> Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ 2016 L 77.



Both the Visa Code<sup>303</sup> and the Schengen Borders Code<sup>304</sup> provide for exceptions on the condition of possession of a valid visa for the nationals of states that are listed in Annex II of Council Regulation (EC) No 539/2001<sup>305</sup>. To this end, article 1(2) of Council Regulation (EC) 539/2001 provides that the nationals of the third countries that are listed in Annex II of the Regulation shall be exempt from the requirement to be in possession of a visa when crossing the external borders of the MSs. Turkey is currently listed under Annex I of the Regulation among those countries whose nationals are required to hold a visa when crossing the external borders of the MSs.

### *B. Application of the legal framework to the EU-Turkey Statement*

The conclusion of international agreements on visa liberalisation is an exclusive EU competence on the basis of articles 77(2)(a) *iuncto* 216(1) and 3(2) TFEU.<sup>306</sup> MSs action in the field of visa liberalisation would impede on a uniform application of the Visa Code and the Schengen Borders Code. In addition, visa liberalisation for Turkish citizens requires an amendment of Council Regulation (EC) 539/2001.

Up till today, the commitment to lift the visa requirements for Turkish citizens has not been realised.

#### *3.4.2.1.2.4 Re-energising Turkey's accession process*

In the EU-Turkey Statement, the EU and Turkey reconfirmed their commitment to re-energise Turkey's accession process. The Statement sets out that both parties welcomed the

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<sup>303</sup> Article 1(2) Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ 2009 L 243.

<sup>304</sup> Article 6(1)(b) Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ 2016 L 77.

<sup>305</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81.

<sup>306</sup> European Commission, "EU-Turkey Readmission Agreement signed and Visa Liberalization Dialogue launched", 16 December 2013, [https://ec.europa.eu/home-affairs/what-is-new/news/news/2013/20131216\\_01\\_en](https://ec.europa.eu/home-affairs/what-is-new/news/news/2013/20131216_01_en), last accessed on 27 April 2018; P. GARCIA ANDRADE, "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum", EU Immigration and Asylum Law and Policy, 17 January 2018, <http://eumigrationlawblog.eu/external-competence-and-representation-of-the-eu-and-its-member-states-in-the-area-of-migration-and-asylum/>, last accessed on 5 May 2018.

opening of Chapter 17 on 14 December 2015 and decided to open Chapter 33 during the Netherlands' presidency<sup>307</sup>.

#### A. *Legal framework*

Accession to the EU is governed by article 49 TEU. The procedure for accession is the following. Any European state which wishes to become a member of the EU can submit an application, addressed to the Council, to that end. Only after consulting the Commission and receiving the consent of the European Parliament, the Council can decide, by unanimity, to open the formal membership negotiations.

Formal membership negotiations are preceded by a “screening process”, where an analytical examination of the *acquis* is carried out jointly by the Commission and the candidate country. This allows the candidate country to become more familiar with the *acquis*, in order to indicate the country's alignment with the *acquis* and outline plans for further alignment.<sup>308</sup>

The formal membership negotiations take place during intergovernmental “Accession conferences”<sup>309</sup> that unite representatives at ministerial level of both the MSs and the candidate country and an EU delegation. The eventual goal of the formal membership negotiations is to ensure compliance with the accession criteria, including the adoption and implementation of the *acquis* by the candidate country.<sup>310</sup> To this end, the *acquis* has been divided in 35 Chapters. Every Chapter corresponds to an area of the *acquis*, for which reforms are necessary to meet the accession conditions.<sup>311</sup> Chapters can only be opened or closed with the approval of all EU MSs.<sup>312</sup>

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<sup>307</sup> I.e. during the Netherlands' presidency of the Council of the European Union (during the first half of 2016).

<sup>308</sup> European Commission, “Screening of the *acquis*”, 6 December 2016, [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/screening\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/screening_en), last accessed on 13 April 2018.

<sup>309</sup> European Commission “Accession Negotiations”, 6 December 2016, [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accesion-negotiations\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accesion-negotiations_en), last accessed on 13 April 2018.

<sup>310</sup> European Commission, “Conditions for membership”, 6 December 2016, [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en), last accessed on 13 April 2018.

<sup>311</sup> *Ibid.*

<sup>312</sup> Article 49 TEU states in this regard “*The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the*

## *B. Application of the legal framework to the EU-Turkey Statement*

The EU-Turkey Statement welcomed the opening of Chapter 17 on economic and monetary policy on 14 December 2015<sup>313</sup> and anticipated the opening of Chapter 33 on budget policy. Accordingly, Chapter 33 was opened during the 30 June 2016 Accession conference.<sup>314</sup> The MSs have the final say in the opening of new Chapters, so that these commitments pertain to the exclusive competence of the MSs.

The opening of Chapter 17 and Chapter 33 brings the total balance of opened chapters on 16 of the 35 negotiating chapters.<sup>315</sup>

It deserves to be underlined that, against the backdrop of the prior accession negotiations with Turkey, the EU-Turkey Statement cannot be seen as a remarkable step forward in Turkey's accession process. For starters, Chapters 17 and 33 are not central to the accession process and its further progress.<sup>316</sup> In addition, Turkey has been moving away from the accession criteria since the failed coup d'état attempt in July 2016.<sup>317</sup> Examples hereof can be found in the dismantlement of the state of law and alleged Turkish war crimes against the Kurdish population.<sup>318</sup> Moreover, the commitment to "revive Turkey's accession process" is not an obligation of result (i.e. an obligation to achieve a fixed result)<sup>319</sup>, but

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*contracting States in accordance with their respective constitutional requirements*"; V. L. MORELLI, "European Union Enlargement: A Status Report on Turkey's Accession Negotiations", 5 August 2013, 1, <https://fas.org/sgp/crs/row/RS22517.pdf>, last accessed on 16 April 2018.

<sup>313</sup> Council of the European Union, "Accession conference at Ministerial level opens negotiations with Turkey on Chapter 17 - Economic and monetary policy", 14 December 2015, <http://www.consilium.europa.eu/media/24454/press-release-accession-conference-with-turkey.pdf>, last accessed on 17 April 2018.

<sup>314</sup> Council of the European Union, "Accession conference with Turkey: Talks opened on Chapter 33 - Financial and budgetary provisions", 30 June 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/06/30/turkey-accession-conference/pdf>, last accessed on 17 April 2018.

<sup>315</sup> European Council, "Negotiating Status – Turkey", 31 January 2018, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180131-negotiations-status-turkey.pdf>, last accessed on 14 April 2018.

<sup>316</sup> A. OTT, "EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?", Centre for the Law of EU External Relations, 2017, 30, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>317</sup> I. TOYGÜR and B. BENVENUTI, "One Year On: An Assessment of the EU-Turkey Statement on Refugees", Elcano Royal Institute, March 2017, 5, <http://www.iai.it/sites/default/files/iaiw1714.pdf>, last accessed on 28 April 2018.

<sup>318</sup> L. HAFERLACH and D. KURBAN, "Lessons Learnt from the EU-Turkey Refugee Agreement in Guiding EU Migration Partnerships with Origin and Transit Countries", *Global Policy* 2017, 85.

<sup>319</sup> R. WOLFRUM, "Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations", in M. H. ARSANJANI, J. COGAN, R. SLOANE and S.

merely an obligation of conduct (i.e. an obligation that must be implemented through conduct)<sup>320</sup>, which largely depends on Turkey's alignment with the EU acquis. This alignment-process has however evolved slowly or has even come to a standstill after the adoption of the EU-Turkey Statement.<sup>321</sup>

#### *3.4.2.1.2.5 Additional resources for the Facility for Refugees in Turkey*

A last crucial action point laid down in the EU-Turkey Statement is that the EU will further speed up the disbursement of the initially allocated three billion euro under the Facility for Refugees in Turkey. Moreover, commitment was given for the mobilisation of an additional three billion euro for the Facility up to the end of 2018. To this end, the Statement provides that *“once [the initially allocated] resources are about to be used to the full, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018”*. The prospect of mobilising an additional three billion euro is thus strictly conditional and will depend on Turkey's performance under the EU-Turkey Statement.

#### *A. Legal framework*

The Refugee Facility for Turkey was established by a Commission Decision<sup>322</sup> on the basis of article 210(2) and 214(6) TFEU. Article 210(2) TFEU allows the Commission to take any useful initiative to promote the coordination of Union and MSs' policies on development cooperation and aid programmes. Moreover, article 214(6) TFEU determines that the Commission may take any useful initiatives to promote coordination between actions of the Union and those of the MSs, in order to enhance the efficiency and complementarity of Union and national humanitarian measures.

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WIESSNER (eds.), *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman*, Leiden, Martinus Nijhoff Publishers, 2010, 364.

<sup>320</sup> *Ibid.*, 364.

<sup>321</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 30, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.

<sup>322</sup> Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, OJ 2015 C 407.

The Facility aims at coordinating and streamlining financed actions, in order to deliver efficient and complementary support to Syrians under temporary protection and host communities in Turkey and was foreseen to coordinate an initial amount of three billion euro. This amount was envisaged to be financed partially by the EU budget and partially by funding from the MSs.<sup>323</sup>

The decision to establish the Refugee Facility for Turkey should however be distinguished from the decision to actually allocate funds to the Facility for coordination. In this light, article 4(4) TFEU sets out that, in the areas of development cooperation and humanitarian aid, the Union shall have the competence to carry out activities and conduct a common policy. The provision adds that exercise of that competence by the Union shall not result in the MSs being prevented from exercising theirs. The Union and its MSs thus have a parallel competence in the areas of development cooperation and humanitarian aid.<sup>324</sup> In practice this implies that it is up to each MS to decide on how much funding it wants to provide from its own budget in response to a particular crisis.

#### *B. Application of the legal framework to the EU-Turkey Statement*

The EU-Turkey Statement does not change anything to the originally committed three billion euro and merely provides that the Union will speed up its disbursement. The initial decision to allocate three billion euro of resources to the Facility for Refugees in Turkey was taken on 29 November 2015 by the Heads of State or Government of the MSs, meeting in the European Council.<sup>325</sup> After fierce negotiations between the Commission and the MSs, it was decided that those resources would be provided by combining financing from the EU

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<sup>323</sup> Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, OJ 2015 C 407; European Commission, “EU-Turkey Cooperation: A €3 billion Refugee Facility for Turkey”, 24 November 2015, [http://europa.eu/rapid/press-release\\_IP-15-6162\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6162_en.htm), last accessed on 10 March 2018.

<sup>324</sup> G. DE BAERE, “The Framework of EU External Competences for Developing the External Dimension of EU Asylum and Migration Policy”, in M. MAES, M.-C. FOBLETS and P. DE BRUYCKER (eds.), *External Dimensions of EU Migration and Asylum Law and Policy*, Brussels, Bruylant, 2011, 135-136.

<sup>325</sup> European Council, “Meeting of the heads of state or government with Turkey – EU-Turkey Statement 29/11/2015”, 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/>, last accessed on 28 April 2018.

budget (one billion euro) and national contributions made by the MSs according to their share in the EU gross national income (for a total of two billion euro).<sup>326</sup>

The pledge to mobilise an additional three billion euro, in principle concerns a parallel competence of the EU and its MSs. However, as it was certain that the additional three billion euro would (at least partially) be financed through the EU budget<sup>327</sup>, the MSs did not have the competence to decide on this last action point. This is underscored by the Commission Decision of 14 March 2018 on the Facility for Refugees in Turkey<sup>328</sup>, in which the Commission decided to allocate the additional three billion euro to the Refugee Facility for Turkey.

#### 3.4.2.1.3 Three main action points as exclusive EU competences

The foregoing decomposition exercise has proved that the commitments made in the EU-Turkey Statement correspond to a complex intertwining of powers between the Union and its MSs. At the same time, this decomposition exercise has revealed that at least three of the main action points comprised in the EU-Turkey Statement fall within the scope of EU exclusive competence, as they affect common rules or alter their scope. In particular the commitments concerning the readmission of all irregular migrants to Turkey, visa liberalisation and additional resources for the Facility for Refugees in Turkey pertain to the

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<sup>326</sup> European Council, “Refugee Facility for Turkey: Member states agree on details of financing”, 3 February 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/03/refugee-facility-for-turkey/>, last accessed on 15 March 2018; L. DEN HERTOOG, “EU Budgetary Responses to the ‘Refugee Crisis’. Reconfiguring the Funding Landscape”, CEPS, May 2016, 3, <https://www.ceps.eu/system/files/LSE%20No%2093%20LdH%20on%20EU%20Budgetary%20Responses%20to%20the%20Refugee%20Crisis.pdf>, last accessed on 12 March 2018.

<sup>327</sup> C. DANISI, “Taking the ‘Union’ out of the ‘EU’: The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law”, *European Journal of International Law*, 20 April 2017, <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>, last accessed on 14 April 2018; M. GATTI, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=6-sRjLp8Isc&index=8&list=PL5j0rT9PoY-S-QNliX6fvFqso42h3Oj6w>, last accessed on 15 April 2018.

<sup>328</sup> Commission Decision of 14 March 2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 as regards the contribution to the Facility for Refugees in Turkey, OJ 2018 C 106; European Commission, “The EU Facility for Refugees in Turkey”, April 2018, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit\\_factsheet.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf), last accessed on 10 May 2018.

exclusive competence of the EU. This is where the ERTA case and joined cases C-181/91 and C- 248/91 have their relevance.

As the EU-Turkey Statement concerns – inter alia – exclusive EU competences, the representatives of the MSs do not have the ability to freely decide, whether they have acted in their capacity as Heads of State or Government of the MSs or in their capacity as Members of the European Council, in concluding the Statement. The fact that the commitments relating to the readmission of all irregular migrants to Turkey, visa liberalisation and additional resources for the Facility for Refugees in Turkey concern exclusive EU competences, entails that the MSs could not have acted outside the framework of the EU institutions in deciding on these commitments.<sup>329</sup> This is the case even if one would consider that the EU-Turkey Statement is not an international agreement but a mere political statement. Indeed, exclusive EU competence entails that the MSs are equally prohibited from taking any action which may lead to the adoption of acts having legal effects.<sup>330</sup> Thus, even in the case that the EU-Turkey Statement would not be considered an international agreement, it is easy to point out the Greek and Turkish laws providing for the implementation of the EU-Turkey Statement. These laws prove that the EU-Turkey Statement has in any case led to the adoption of acts having legal effects, and that the MSs thus were prohibited from deciding on the commitments of the EU-Turkey Statement that pertain to EU exclusive competence. Therefore, it was in their capacity of Members of the European Council that the representatives of the MSs concluded the parts of the EU-Turkey Statement relating to the readmission of all irregular migrants to Turkey, visa liberalisation and additional resources for the Facility for Refugees in Turkey, and, the EU-Turkey Statement should be considered – at least to that extent – an act of which the legality can be reviewed under article 263 TFEU.

#### *3.4.2.2 Identification of the parties in the EU-Turkey Statement*

The text of the EU Turkey Statement supports the view that the Statement was concluded between the EU and Turkey. The Statement, entitled “EU-Turkey Statement”, starts by outlining that “*Today the Members of the European Council met with their Turkish*

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<sup>329</sup> Judgment of the Court, Commission v. Council, C-22/70, ECLI:EU:C:1971:32, § 22.

<sup>330</sup> N. IDRIZ, “Taking the EU-Turkey Deal to Court?”, Verfassungsblog, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018.



counterpart”. Subsequently, it determines that “*the EU and Turkey today decided to end the irregular migration from Turkey to the EU*”.

The EU institutions however maintained that the EU-Turkey Statement is not an EU act. To this end, the European Council argued before the General Court that the use of the expression “Members of the European Council” must be understood as a reference to the Heads of State or Government of the MSs, as they constitute the European Council. Furthermore, the European Council held that the references to the “EU” in the Statement, amount to simplified wording for the general public in the context of the press release and must be understood as referring to the Heads of State or Government of the MSs.<sup>331</sup>

The General Court accepted the European Council’s argumentation. In the light of what it calls the “*ambivalence of the expression ‘Members of the European Council’ and the term ‘EU’ in the EU-Turkey Statement*”, the General Court therefore proceeded to an analysis of the documents relating to the 18 March 2016 meeting.<sup>332</sup>

This course of action is criticisable. For starters, there is nothing ambiguous about the expression “Members of the European Council” and the term “EU”. In accordance with article 31(1) VCLT, the Court should have interpreted these terms within their ordinary meaning. Article 1 TEU determines that the High Contracting Parties have established among themselves a European Union, on which the MSs confer competences to attain common objectives. Article 13 TEU designates the European Council as one of the Union’s institutions.

Moreover, there is also nothing really complex about the expression “Heads of State or Government of the Member States”.<sup>333</sup> In any case, this expression is not of such complexity that its use would render the EU-Turkey Statement incomprehensible for the

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<sup>331</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 57-58.

<sup>332</sup> *Ibid.*, § 61.

<sup>333</sup> C. DANISI, “Taking the ‘Union’ out of the ‘EU’: The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law”, *European Journal of International Law*, 20 April 2017, <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>, last accessed on 14 April 2018.



general public. This is underpinned by the use of this expression in the two previous press releases of 29 November 2015<sup>334</sup> and 7 March 2016<sup>335</sup>.

In the light of the foregoing it is surprising that the General Court was ready to accept the European Council's argumentation and disregard the terms used in the EU-Turkey Statement.

### **3.4.3 Circumstances surrounding the adoption of the EU-Turkey Statement**

The General Court took into account the context within which the EU-Turkey Statement was adopted. To this end, the General Court considered that the meeting of 18 March 2016, which resulted in the EU-Turkey Statement, was the third meeting to occur since November 2015. The first meeting on 29 November 2015 gave rise to a Press Release entitled "Meeting of Heads of State or Government with Turkey – EU-Turkey Statement 29/11/2015". Similarly, the second meeting, held on 7 March 2016, gave rise to a Press Release entitled "Statement of the EU Heads of State or Government, 07/03/2016". Therefore, the General Court acknowledged that the EU-Turkey Statement of 18 March 2016 differs in presentation from these previous statements.

It is correct that the EU-Turkey Statement is to be framed within a broader context of cooperation on migration issues. The starting point of this cooperation was however the signature of the EU-Turkey Readmission Agreement and the launch of the Visa Liberalisation Dialogue, which date back to December 2013.<sup>336</sup> These agreements form a vital precondition for the EU-Turkey Statement, not at least due to the fact that the EU-Turkey Statement builds on the provisions of the EU-Turkey Readmission Agreement and the commitments made in the framework of the Visa Liberalisation Dialogue.<sup>337</sup> In this

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<sup>334</sup> European Council, "Meeting of the heads of state or government with Turkey – EU-Turkey Statement, 29/11/2015", 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/>, last accessed on 28 April 2018.

<sup>335</sup> European Council, "Statement of the EU Heads of State or Government, 07/03/2016", 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

<sup>336</sup> Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation; European Commission, "EU-Turkey Readmission Agreement signed and Visa Liberalization Dialogue launched", 16 December 2013, [https://ec.europa.eu/home-affairs/what-is-new/news/news/2013/20131216\\_01\\_en](https://ec.europa.eu/home-affairs/what-is-new/news/news/2013/20131216_01_en), last accessed on 27 April 2018.

<sup>337</sup> N. IDRIZ, "Taking the EU-Turkey Deal to Court?", *Verfassungsblog*, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018.

light, it is surprising that the General Court only made reference to the 29 November 2015 and 7 March 2016 press releases.

Next, the General Court examined the official documents relating to the meeting of 18 March 2016 which resulted in the EU-Turkey Statement, such as the invitations sent to the parties and the “Working Programme of the Protocol Service”. According to the General Court, these documents show that two separate meetings were organised: a meeting of the European Council on 17 March 2016 on the one hand, and, an international summit with Turkey on 18 March 2016 on the other hand.<sup>338</sup> Moreover, the Court found that the EU-Turkey Statement was concluded on the international summit, between the Heads of State or Government of the MSs and the Turkish Prime Minister.<sup>339</sup>

In deciding so, the General Court however gave an overriding weight to the documents produced by the (alleged) authors of the Statement<sup>340</sup>, while failing to take into account other pertinent circumstances surrounding the adoption of the EU-Turkey Statement.

For starters, it is hard to conceive that the entire negotiating and decision-making process concerning the EU-Turkey Statement took place during one single meeting.<sup>341</sup> Therefore, it is surprising that the General Court accepted that the EU-Turkey Statement was an act of the Heads of State or Government of the MSs, simply and solely because the representatives of the MSs acted in their capacity as Heads of State or Government of the MSs during one single meeting on 18 March 2016.

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<sup>338</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 63-65.

<sup>339</sup> *Ibid.*, § 66.

<sup>340</sup> P. GARCIA ANDRADE, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=FRD0LV1MG-o&list=PL5j0rT9PoY-S-QNliX6fvFqso42h3Oj6w&index=5>, last accessed on 15 April 2018; C. DANISI, “Taking the ‘Union’ out of the ‘EU’: The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law”, European Journal of International Law, 20 April 2017, <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>, last accessed on 14 April 2018; E. CANNIZARO, “Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council”, European Papers, 15 March 2017, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018.

<sup>341</sup> L. IZUZQUIZA, “One year later: what we (still don’t) know about the EU-Turkey agreement and accountability”, Access Info Europe, 18 March 2017, <https://www.access-info.org/uncategorized/27982>, last accessed on 25 April 2018.

In addition, it is clear that the EU used its international role to speed up the cooperation with Turkey on managing the migration crisis. In all meetings between the Heads of State or Government of the MSs and Turkey reference was made to “EU-Turkey relations”<sup>342</sup>, this new cooperation with Turkey on migration matters was included in Turkey’s path to EU membership, funding from the EU budget was pledged, etc. Denying all Union involvement in the EU-Turkey Statement is therefore not convincing.

Last, it seems odd that the President of the European Council and the President of the Commission – which, together with the representatives of the MSs, constitute the European Council<sup>343</sup> – would participate in an international summit of the Heads of State or Government of the MSs. The General Court decided in this respect that “*the fact that the President of the European Council and the President of the Commission, not formally invited, had also been present during that meeting cannot allow the conclusion that ... the meeting of 18 March 2016 took place between the European Council and the Turkish Prime Minister*”.<sup>344</sup> Their presence makes it nevertheless more likely that the EU-Turkey Statement was adopted during a meeting of the European Council, rather than during an international summit of the Heads of State or Government of the MSs. The European Council explained the presence and active participation of its President by submitting that “*the Heads of State or Government of the Member States of the European Union conferred upon him the task of representation and coordination of the negotiations with the Republic of Turkey in their name*”.<sup>345</sup> The European Council – entrusted with providing the Union with the necessary impetus for its development and defining the general political directions and priorities thereof<sup>346</sup> – is however not an organ at the disposal of the MSs which they can freely deploy in their own interest.

It is important to remark that the EU Treaties do not grant the European Council the power to negotiate and/or conclude international agreements on behalf of the EU.<sup>347</sup> Considering

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<sup>342</sup> European Commission, “EU-Turkey Joint Action Plan”, 15 October 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm); European Council, “Statement of the EU Heads of State or Government, 07/03/2016”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

<sup>343</sup> Article 15(2) TEU.

<sup>344</sup> Order of the General Court, NF v. European Council, T-192/16, ECLI:EU:T:2017:128, § 67.

<sup>345</sup> *Ibid.*, § 68.

<sup>346</sup> Article 15(1) TEU.

<sup>347</sup> The procedure for the negotiation and conclusion of EU international agreements is laid down in article 218 TFEU.

that the EU-Turkey Statement is an act of the European Council thus implies that this institution would have acted *ultra vires*.

The EU-Turkey Statement is thus to be framed within a wider context of cooperation with Turkey on migration issues, of which the EU-Turkey Readmission Agreement and the Visa Liberalisation Dialogue constitute the starting point. In addition, the EU used its international role to speed up the cooperation with Turkey on managing the migration crisis. The EU-Turkey Statement was negotiated by the President of the European Council and both the European Council and Commission President were present during the meeting on 18 March 2016 which resulted in the EU-Turkey Statement. These circumstances indicate that the EU-Turkey Statement was concluded by the European Council and not by the Heads of State or Government of the MSs. The fact that the European Council did not have the internal competence to negotiate and conclude the Statement does not undo this finding.

#### **3.4.4 The EU-Turkey Statement as an act of the European Council**

From the foregoing analysis it follows that the EU-Turkey Statement was concluded by the European Council, acting on behalf of the EU. This is supported by the fact that the EU-Turkey Statement partly concerns EU exclusive competences, the explicit references to the “Members of the European Council” and the “EU” comprised in the Statement and the circumstances surrounding the adoption of the Statement. Moreover, deciding otherwise would imply that the representatives of the 28 MSs have acted collectively in areas of EU exclusive competence, in their capacity as Heads of State or Government of the MSs. This would infringe the division of competences, the duty of sincere cooperation and the principle of autonomy.

Nevertheless, the General Court came to the conclusion that the EU-Turkey Statement is an act of the Heads of State or Government of the MSs, acting in their capacity as representatives of those MSs. It is therefore necessary to also explore the possibility that the EU-Turkey Statement is an act of the MSs.

### 3.5 Hypotheses

Both the hypothesis that the EU-Turkey Statement is an international agreement concluded by the European Council and the hypothesis that the EU-Turkey Statement is an international agreement concluded by the Heads of State or Government of the 28 MSs will be assessed in the light of the legal issues these hypotheses create and the possibilities for judicial scrutiny they leave. The legal issues that are discussed are of a procedural nature. Other legal issues, in particular those related to accordance with European and international human rights and refugee law, are not discussed in this dissertation.

It deserves to be noted that the human rights issues surrounding the EU-Turkey Statement create the possibility for individuals to introduce an application before ECtHR.<sup>348</sup> The ECtHR was established with the adoption of the European Convention on Human Rights (hereinafter ECHR) in 1950 “to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”.<sup>349</sup> The EU is – for the time being – not a party to the ECHR.<sup>350</sup> Therefore, complaints directly addressed to the Union are inadmissible.<sup>351</sup> The MSs, on the other hand, are all parties to the ECHR so that they are subject to the jurisdiction of the ECtHR.<sup>352</sup> Therefore, the possibility exists to introduce an application against an individual MS on the subject of the EU-Turkey Statement – if the EU-Turkey Statement is considered an act of the MSs – and against national laws implementing the EU-Turkey Statement – irrespective of whether the EU-Turkey Statement constitutes an EU act<sup>353</sup> or an act of the MSs. On 25 January 2018, the ECtHR has issued its first judgment dealing with the implementation of the EU-Turkey Statement.<sup>354</sup>

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<sup>348</sup> Article 34 ECHR.

<sup>349</sup> Article 19 ECHR.

<sup>350</sup> Since the Lisbon Treaty, article 6(2) TEU stipulates that “*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*”. After an agreement on EU accession to the ECHR was negotiated, the CJEU however ruled that the agreement did not provide for sufficient protection of the EU’s specific legal arrangements and the Court’s exclusive jurisdiction. Until now, no new agreement has been drafted. See in this regard: Opinion 2/13, ECLI:EU:C:2014:2454.

<sup>351</sup> Y. HAECK and C. B. HERRERA, “Procederen voor het Europees Hof voor de Rechten van de Mens”, Antwerpen, Intersentia, 2011, 224.

<sup>352</sup> *Ibid.*, 225.

<sup>353</sup> MSs retain their liability under the ECHR for the implementation and application of EU law in their internal legal order. When a MS has a discretionary power to implement EU law in their internal legal order, it can be held responsible for the resulting human rights violations. See in this regard: *Ibid.*, 225-227.

<sup>354</sup> ECtHR Judgment of 25 January 2018, J.R. and Others v. Greece.

### **3.5.1 The EU-Turkey Statement as an international agreement concluded by the European Council**

The conjecture that the EU-Turkey Statement is an international agreement concluded between the European Council, acting on behalf of the EU, and Turkey immediately raises some further questions as to the compatibility of the EU-Turkey Statement with EU law and the possibilities for judicial scrutiny.

#### *3.5.1.1 Legal issues*

##### 3.5.1.1.1 Violation of article 218 TFEU

Since the Lisbon Treaty, article 218 TFEU lays down a single and unified procedure for the conclusion of international agreements by the EU.<sup>355</sup> It is only by following the procedure laid down in article 218 TFEU that the EU can lawfully – under EU law – conclude international agreements. The provision stipulates a division of tasks between the institutions, with a central role for the Council. For reasons of irrelevance, the specific arrangements for agreements relating to the Common Foreign and Security Policy (hereinafter CFSP) are not being discussed here.

The first step in concluding an international agreement is for the Council to authorise the opening of negotiations, and to adopt negotiating directives addressed to the party or parties undertaking the negotiations.<sup>356</sup> The Council will nominate an EU negotiator or negotiating team. In most cases, the negotiations will be led by the European Commission<sup>357</sup>, who first addressed a recommendation to the Council for the opening of the negotiations<sup>358</sup>. Article

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<sup>355</sup> This procedure applies to all agreements except, partly, for those concluded in the context of the Common Commercial Policy (CCP) and agreements on monetary policy. R. GEIGER, D.-E. KHAN and M. KOTZUR (eds.), *“European Union Treaties: A Commentary”*, München, Beck, 2015, 791.

<sup>356</sup> Article 218(2) TFEU.

<sup>357</sup> Article 17(1) TEU gives the Commission the competence to “ensure the Union’s external representation”, with the exception of the CFSP and other cases provided for in the Treaties; P. EECKHOUT, *EU External Relations Law. Second Edition.*, Oxford, Oxford University Press, 2011, 196; P. KOUTRAKOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 141.

<sup>358</sup> Article 207(3) TFEU; Article 218(3) TFEU.

218(10) TFEU provides that the Parliament shall be immediately and fully informed at all stages of the procedure, including thus the negotiating phase.<sup>359</sup>

When an agreement has been negotiated, the text of the agreement is submitted to the Council. If the Council approves the text of the agreement, it shall adopt a decision authorising the signing of the agreement.<sup>360</sup> After its signing, the Council shall adopt a decision concluding the agreement.<sup>361</sup>

The act of conclusion of international agreements is governed by article 218(6) TFEU. This provision requires involvement of the European Parliament prior to the formal conclusion of an agreement by the Council for most types of agreements. The provision distinguishes between two forms of parliamentary participation: consultation and consent. Especially relevant in the light of the EU-Turkey Statement is article 218(6)(a)(v) TFEU that determines that agreements covering fields to which the ordinary legislative procedure applies can only be concluded after obtaining the consent of the European Parliament.

Article 218(11) TFEU gives the CJEU a pre-emptive jurisdiction as to the compatibility of envisaged agreements with EU law.

In Opinion 1/75, the Court found that the notion “agreements” figuring in article 218 TFEU should be interpreted broadly as referring to “*any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation*”.<sup>362</sup>

Having established under Section 3.3 of this Chapter (International agreement or political statement) that the EU-Turkey Statement concerns an international agreement under the law of treaties, and thus has binding force, and considering in addition that the EU-Turkey Statement is an EU act, implies that the procedure laid down in article 218 TFEU should have been followed for the conclusion of the Statement. A brief look at the process leading up to the conclusion of the EU-Turkey Statement however suffices to establish that the

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<sup>359</sup> P. KOUTRAKOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 143.

<sup>360</sup> Article 218(5) TFEU.

<sup>361</sup> Article 218(6) TFEU.

<sup>362</sup> Opinion 1/75, ECLI: EU:C:1975:145.

Statement was not concluded in accordance with the procedure laid down in article 218 TFEU.

The Statement was informally negotiated between the President of the European Council and Turkey<sup>363</sup>, sometimes with direct involvement of the Heads of State or Government<sup>364</sup>. As a result, the Council, designated by article 218 TFEU as the central institution in the conclusion of international agreements, was side-lined. The Commission had some role in the preparatory work of the EU-Turkey Statement, and a little role, if any, in the negotiations. The European Parliament was in no way involved. Apparently, an agreement on the Statement was reached during a joint meeting of the European Council and representatives of Turkey.<sup>365</sup>

The European Council is the highest political institution of the EU. Article 15 TEU determines that the European Council shall provide the Union with the necessary impetus for its development and define its general political directions and priorities. The EU Treaties however do not grant the European Council the power to conclude international agreements on behalf of the EU, except in the area of CFSP.<sup>366</sup>

The Council did not authorise the opening of negotiations or the signing of the agreement and did not conclude the agreement, as it should according to article 218(1) TFEU.

As to the Parliament, both article 218(10) TFEU – imposing the immediate and full information of the Parliament at all stages of the procedure – and article 218(6)(a)(v) –

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<sup>363</sup> European Council, “Statement of the EU Heads of State or Government, 07/03/2016”, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/pdf>, last accessed on 28 April 2018.

<sup>364</sup> Especially German Chancellor Angela Merkel and Dutch Prime Minister Mark Rutte have contributed to the preparation of the EU-Turkey Statement. J. A. EMMANOUILIDIS, “Elements of a complex but still incomplete puzzle: an assessment of the EU(-Turkey) summit”, European Policy Center, 21 March 2016, [http://www.epc.eu/documents/uploads/pub\\_6417\\_post-summit\\_analysis\\_-\\_21\\_march\\_2016.pdf?doc\\_id=1719](http://www.epc.eu/documents/uploads/pub_6417_post-summit_analysis_-_21_march_2016.pdf?doc_id=1719), last accessed on 28 April 2018.

<sup>365</sup> European Council, “EU-Turkey Statement”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, last accessed on 14 May 2018; European Council, “Remarks by President Donald Tusk after the meeting of the EU heads of state or government with Turkey”, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/>, last accessed on 1 May 2018.

<sup>366</sup> Articles 24-26 TEU; A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 27, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018.



entailing the obligation to obtain parliamentary consent before the conclusion of an international agreement covering fields to which the ordinary legislative procedure applies – were ignored. As established under Section 3.4.2.1 of this Chapter (Competence to conclude the EU-Turkey Statement), the EU-Turkey Statement mainly concerns the readmission of TCNs under article 79(3) TFEU to which the ordinary legislative procedure applies.

Moreover, there has been no possibility to consult the CJEU on the compatibility of the Statement with EU law.<sup>367</sup>

It deserves to be added here that non-compliance with the procedure set out in article 218 TFEU will, in principle, not invalidate the Union's consent to be bound at international level.<sup>368</sup> Article 46(1) VCLT determines in this respect:

*1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*

Hereafter, a violation of the procedure as set out in internal law does not entail the inexistence of a treaty, unless in the exceptional circumstance of a manifest violation of a rule of fundamental importance. Manifest is defined by article 46(2) VCLT as “*objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith*”.

It is doubtful that this exception could be relevant in the particular case of the EU-Turkey Statement.

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<sup>367</sup> Article 218(11) TFEU; N. IDRIZ, “The EU-Turkey deal in front of the Court of Justice of the EU: An unsolicited Amicus Brief”, Asser Institute, 2017, 8.

<sup>368</sup> EU law is not opposable to third countries entering into agreements with the EU. J. ODERMATT, *The European Union as a Global Actor and its Impact on the International Legal Order*, University of Leuven Department of Law, 2016, 156.

For starters, it is unlikely that a violation of the internal EU rules on the conclusion of international agreements could be called manifest. These rules are characterized by a considerable complexity and one can understand that they lack clarity for third countries and international organisations entering into agreements with the Union. Therefore, a violation of these rules would unlikely be “*objectively evident to any State conducting itself in the practice*”.<sup>369</sup>

The fact that Turkey is a candidate country for EU-membership and has been engaging in formal accession talks since 2005, might lead to presume that the country should have been rather familiar with the Union’s internal provisions. This argument has merit, but the question as to the extent to which Turkey should have had knowledge about internal EU law remains. Moreover, the significance of this argument is disputable in the light of the definition of “manifest” in article 46(2) VCLT (“objectively evident to *any State*”).

In the Cameroon v. Nigeria case<sup>370</sup>, the single occasion where the ICJ addressed article 46 VCLT, the Court decided that “*there is no general obligation for states to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States*”.<sup>371</sup> Accordingly, there existed no obligation for Turkey to keep informed on the legislative and constitutional developments in the Union.

Moreover, there exists no case law of the ICJ where the exception of article 46 VCLT was successfully invoked.

This all makes it unlikely that a violation article 218 TFEU could be successfully invoked to invalidate the EU-Turkey Statement at international level. A violation of article 218 TFEU is thus only liable to invalidate the European Council act concluding the EU-Turkey Statement.

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<sup>369</sup> A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University press, 2013, 274.

<sup>370</sup> ICJ Judgment of 10 October 2002, Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria).

<sup>371</sup> *Ibid.*, § 266.

#### 3.5.1.1.2 Failure to mention a legal basis

When entering into an international agreement, the Union is in principle required to set out the legal basis on which it enters into that agreement. The legal basis will indicate compliance with the principle of conferral and will determine the nature and extent of Union competence.<sup>372</sup> According to the CJEU “*the choice of the appropriate legal basis has constitutional significance*”.<sup>373</sup>

Where an agreement is concluded without indicating the legal basis on which it is founded, this is liable to invalidate the EU act concluding the agreement, making it necessary to re-adopt the agreement on the correct legal basis.<sup>374</sup> This situation was at issue in the CITES case.<sup>375</sup> There, the Court invalidated a Council decision, adopted without explicit reference to a legal basis, emphasizing the importance of the indication of the legal basis in preserving the prerogatives of the different institutions. The absence of a legal basis however does not invalidate the binding nature of the agreement in international law.<sup>376</sup> Therefore, the Court usually maintains the effects of the original EU act, until a corrective decision enters into force.

In this light the EU-Turkey Statement’s mere omission to mention the legal basis on which it has been concluded is enough to invalidate the Statement within the EU legal order.

#### 3.5.1.1.3 Violation of the principle of inter-institutional sincere cooperation under article 13(2) TEU

The fact that the EU-Turkey Statement was concluded by the European Council entails a violation of the principle of sincere cooperation under article 13(2) TEU. This provision determines:

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<sup>372</sup> P. KOUTRAKOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 53.

<sup>373</sup> Opinion 2/00, ECLI:EU:C:2001:664, § 5.

<sup>374</sup> Judgment of the Court, Commission v. Council, C-370/07, ECLI:EU:C:2009:590; I. GOVAERE, E. LANNON, P. VAN ELSUWEGE and A. STANISLAS (eds.), *The European Union in the world. Essays in Honour of Marc Mareseau*, Leiden, Martinus Nijhoff Publishers, 2014, 66.

<sup>375</sup> Judgment of the Court, Commission v. Council, C-370/07, ECLI:EU:C:2009:590.

<sup>376</sup> Article 46 VCLT; Judgment of the Court, France v. Commission, C-327/91, ECLI:EU:C:1994:305.

*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.*

The European Council, as the highest political institution, does not possess the competence to conclude international agreements on behalf of the EU, with the exception of CFSP<sup>377</sup>. Regarding all other matters, the Commission shall ensure the external representation of the Union.<sup>378</sup> Therefore, it was up to the Commission to defend the Union's position and negotiate the Statement with Turkey.<sup>379</sup> This power should be distinguished from the power to determine the Union's position to be defended, which lies with the Council.<sup>380</sup> In acting *ultra vires*, the European Council encroached on the prerogatives of both the Commission and the Council and violated the principle of inter-institutional sincere cooperation under article 13(2) TEU.

### *3.5.1.2 Judicial scrutiny*

Considering that the EU-Turkey Statement is an international agreement concluded by the European Council, entails that there are two possibilities for judicial scrutiny: (i) an action for annulment under article 263 TFEU; and (ii) a request for a preliminary ruling under article 267 TFEU.

#### 3.5.1.2.1 Action for annulment under article 263 TFEU

Under article 263 TFEU, the CJEU shall review the legality of acts of EU institutions<sup>381</sup>, bodies, offices or agencies intended to produce legal effects vis-à-vis third parties. To that

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<sup>377</sup> Articles 24-26 TEU.

<sup>378</sup> Article 17 TEU.

<sup>379</sup> P. GARCIA ANDRADE, "Who is in charge? The external representation of the EU on dialogues on immigration and asylum with third countries", EU Immigration and Asylum Law and Policy, 13 January 2016, <http://eumigrationlawblog.eu/who-is-in-charge-the-external-representation-of-the-eu-on-dialogues-on-immigration-and-asylum-with-third-countries/>, last accessed on 21 April 2018.

<sup>380</sup> Article 16(6) TEU; *Ibid*.

<sup>381</sup> Since the Lisbon Treaty, the European Council has become a fully-fledged EU institution so that measures adopted by the European Council no longer escape legality review under article 263 TFEU; T. VERNISEAU, "L'ambiguïté fondamentale de la déclaration « EU-Turquie » relative à l'immigration : acte international ou acte du conseil européen ?", Jus Politicum Blog, 24 October 2017, <http://blog.juspoliticum.com/2017/10/24/lambiguite-fondamentale-de-la-declaration-ue-turquie-relative-a->

end, an action for annulment may be brought before the Court. The Court shall annul the act concerned if it is judged to be contrary to EU law. Article 263 TFEU further determines that any natural or legal person may refer an action for annulment of an act to the CJEU, if that act is “*of direct and individual concern to them and does not entail implementing measures*”.<sup>382</sup>

As to “direct concern”, the general rule is that an act will be of direct concern to the applicant if it directly affects the legal situation of the applicant and leaves no discretion to the addressee of the act, who is entrusted with its implementation.<sup>383</sup>

Next, as to “individual concern”, the test to be applied is the Plaumann test. This test stipulates that individuals can only be individually concerned by a decision addressed to another if they are in some way differentiated from all other persons, and by reason of those distinguishing features singled out in the same way as the initial addressee.<sup>384</sup>

It is doubtful that an annulment action against the EU-Turkey Statement would pass this admissibility threshold.<sup>385</sup> As to direct concern, the EU-Turkey Statement indeed affects the situation of individuals and seems automatic<sup>386</sup>. The situation of these individuals is however not directly caused by the EU-Turkey Statement itself, but rather by the existence of intermediate rules such as the Greece-Turkey Readmission Protocol and the EU-Turkey Readmission Agreement.<sup>387</sup> Individual concern would be even harder to prove.

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[l'immigration-acte-international-ou-acte-du-conseil-europeen-par-theophile-verniseau/](#), last accessed on 1 May 2018.

<sup>382</sup> P. GARCIA ANDRADE, “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, EU Immigration and Asylum Law and Policy, 17 January 2018, <http://eumigrationlawblog.eu/external-competence-and-representation-of-the-eu-and-its-member-states-in-the-area-of-migration-and-asylum/>, last accessed on 5 May 2018.

<sup>383</sup> P. CRAIG and G. DE BURCA, *EU Law. Text, cases and materials. Sixth edition*, Oxford, Oxford University Press, 2015, 515.

<sup>384</sup> *Ibid.*, 519.

<sup>385</sup> A. OTT, “EU-Turkey cooperation in migration matters: a game changer in a multi-layered relationship?”, Centre for the Law of EU External Relations, 2017, 29, [http://www.asser.nl/media/4085/cleer17-4\\_web.pdf](http://www.asser.nl/media/4085/cleer17-4_web.pdf), last accessed on 10 May 2018; N. IDRIZ, “The EU-Turkey deal in front of the Court of Justice of the EU: An unsolicited Amicus Brief”, Asser Institute, 2017, 7.

<sup>386</sup> As irregular migrants are being sent back to Turkey from 20 March 2016.

<sup>387</sup> N. IDRIZ, “The EU-Turkey deal in front of the Court of Justice of the EU: An unsolicited Amicus Brief”, Asser Institute, 2017, 7.

Next, the individual applicant would have to prove that the EU-Turkey Statement is an act intended to produce legal effects vis-à-vis third parties. As set out in Section 3.3 of this Chapter (International agreement or political statement?), the EU-Turkey Statement is an international agreement. International agreements are in essence intended to produce legal effects vis-à-vis third parties<sup>388</sup>, so that this requirement should not cause any problems. However, if the Court would judge otherwise and find that the EU-Turkey Statement is not an international agreement, it could still be argued that it has nonetheless legal effects on third parties within the meaning of article 263 TFEU. In the past, the Court has judged that a measure can be the subject of an action for annulment under article 263 TFEU if that measure is “*capable of affecting the interests of the applicant by bringing about a distinct change in his legal position*”. The EU-Turkey Statement has profoundly changed the legal position of asylum seekers in arriving in Greece via the Eastern Mediterranean route, so that this requirement should be considered fulfilled.

If this all would lead the Court to conclude that an action for annulment under article 263 TFEU is admissible, the Court would need to proceed to an examination of the substance of the matter. If the Court, on the other hand, would conclude that the EU-Turkey Statement is an EU act but would judge that the admissibility requirements for an action for annulment under article 263 TFEU are not fulfilled, a possible follow-up would be a request for a preliminary ruling by a Greek national judge in the framework of national proceedings.

#### 3.5.1.2.2 Request for a preliminary ruling under article 267 TFEU

Article 267 TFEU allows national courts to refer questions concerning “*the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*” to the CJEU. A national court that is confronted with a question of Union law in the proceedings before it, can thus decide to suspend those proceedings and request a ruling from the CJEU on the Union law at issue. The CJEU’s ruling is then transmitted to the national court, which will apply it in disposing of the case.<sup>389</sup>

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<sup>388</sup> Article 26 VCLT; Article 216(2) TFEU.

<sup>389</sup> D. EDWARD and R. LANE, *Edward and Lane on European Union law*, Cheltenham, Edward Elgar, 2013, 246.

In the *Haegeman* case<sup>390</sup>, the CJEU established that EU association agreements are acts of the institutions in the meaning of article 267 TFEU. Therefore, the provisions of these agreements form an integral part of EU law and the Court has the jurisdiction to give preliminary rulings on their interpretation.<sup>391</sup>

Where the national court's request concerns the interpretation of a provision of Union law, the Court is bound to reply to it, unless it is being asked to rule on a purely hypothetical general problem without having available the information as to fact or law, necessary to enable it to give a useful reply to the questions referred to it.<sup>392</sup>

A preliminary question under article 267 TFEU cannot result in the annulment of an EU act, but only in a declaration of “invalidity” of the act. This implies that the act cannot be applied in the main proceedings before the national court and creates an obligation for the relevant institution to correct the invalid act.<sup>393</sup> The Court has however found that such a declaration of invalidity in the context of a preliminary ruling under article 267 TFEU has effect *erga omnes*, and may thus be relied upon by other persons in other proceedings.<sup>394</sup>

Accordingly, a Greek national judge has the possibility to request a preliminary ruling from the CJEU on the validity of the EU-Turkey Statement. In this instance, the Court would have no room left to stay away from the substance of the matter and would be compelled to rule on the compatibility of the EU-Turkey Statement with European and international law.<sup>395</sup>

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<sup>390</sup> Judgment of the Court, *Haegeman v. Belgium*, C-181/73, ECLI:EU:C:1974:41.

<sup>391</sup> P. CRAIG and G. DE BURCA, *EU Law. Text, cases and materials. Sixth edition*, Oxford, Oxford University Press, 2015, 371; A. VON BOGDANDY and M. SMRKOLJ, “European Community and Union Law and International Law”, in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 830.

<sup>392</sup> Judgment of the Court, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859.

<sup>393</sup> D. EDWARD and R. LANE, *Edward and Lane on European Union law*, Cheltenham, Edward Elgar, 2013, 264-265.

<sup>394</sup> Judgment of the Court, *International Chemical Corporation v. Amministrazione delle finanze dello Stato*, C-66/80, ECLI:EU:C:1981:102; D. EDWARD and R. LANE, *Edward and Lane on European Union law*, Cheltenham, Edward Elgar, 2013, 265.

<sup>395</sup> T. SPIJKERBOER, “Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice”, 2017, 10.

### **3.5.2 The EU-Turkey Statement as an international agreement concluded by the Member States**

While, in my opinion, it is rather clear that the representatives of the MSs acted in their capacity of Members of the European Council in concluding the EU-Turkey Statement, the General Court came to a different conclusion. It found that the representatives of the MSs acted in their capacity of Heads of State or Government of those MSs in concluding the EU-Turkey Statement. This raises some different legal issues, while at the same time limiting the possibilities of judicial scrutiny at EU level.

#### *3.5.2.1 Legal issues*

##### 3.5.2.1.1 Violation of the division of competences

As established in Section 3.4.2.1 of this Chapter (Competence to conclude the EU-Turkey Statement), some of the main action points of the EU-Turkey Statement fall within exclusive EU competence. Thus, considering that the EU-Turkey Statement is an act of the Heads of State or Government of the MSs, implies that the 28 MSs, acting collectively, concluded an international agreement with Turkey comprising elements of EU exclusive competence.

The only possibility for the MSs to lawfully act in areas of EU exclusive competence, is after having received an explicit authorisation from the Union to that end or in order to implement Union measures.<sup>396</sup> Given that the MSs did not receive such Union authorisation for the conclusion of the EU-Turkey Statement and that the Statement does not concern the implementation of EU measures, the MSs violated the division of competences.

##### 3.5.2.1.2 Violation of the principle of sincere cooperation under article 4(3) TEU

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<sup>396</sup> Article 2(1) TFEU.



The principle of sincere cooperation between the EU and its MSs is a key constitutional principle of EU law.<sup>397</sup> It is enshrined in article 4(3) TEU, which imposes two general obligations on the MSs:

*The Member States shall take any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.*

In the field of external relations, these obligations imply that the MSs must abstain from entering into negotiations or concluding international agreements which would deviate from the position taken by the EU and from enacting any rules conflicting with EU rules. This duty applies where the EU's competence is exclusive or shared. In areas of EU exclusive competence, the MSs however have less flexibility as they are under an obligation of result.<sup>398</sup> Therefore, they have a choice between following the Union position or not acting at all.<sup>399</sup> Thus, if the Union does not succeed in adopting a common position, the MSs cannot act, either individually or collectively. Accordingly, the MSs violated the principle of sincere cooperation under article 4(3) TEU by concluding the EU-Turkey Statement without a common Union position having been adopted.

#### 3.5.2.1.3 Violation of the principle of autonomy

The principle of autonomy is one of the founding principles of the EU. It was developed through the case law of the CJEU starting from the early '60s.<sup>400</sup> Only more recently however, the CJEU started to explicitly refer to the notion "autonomy".<sup>401</sup> As the EU developed and increased its relations with external actors, the CJEU equally developed a

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<sup>397</sup> P. VAN ELSUWEGE, "The duty of sincere cooperation (Art. 4(3) TEU) and its implications for the national interest of EU Member States in the field of external relations", UACES, September 2015, 1, <https://www.uaces.org/documents/papers/1501/Van%20Elsuwege.pdf>, last accessed on 15 April 2018.

<sup>398</sup> *Ibid.*, 7.

<sup>399</sup> *Ibid.*, 7.

<sup>400</sup> Judgment of the Court, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, C-26/62, ECLI:EU:C:1963:1; Judgment of the Court, Flaminio Costa v. E.N.E.L., C-6/64, ECLI:EU:C:1964:66.

<sup>401</sup> Opinion 1/91, ECLI:EU:C:1991:490.

concept of external autonomy. External autonomy entails that the integrity of EU law should not be undermined by the international action of the Union or its MSs.<sup>402</sup> This prohibits the MSs *inter alia* from acting above and beyond the EU Treaties, either individually or collectively, to affect their procedures or alter their scope.<sup>403</sup>

In the *Defrenne* case, the Court declared in this regard that, in the light of the principle of autonomy, agreements concluded among MSs that aimed to derogate from a rule of the treaties, are ineffective within the EU legal order.<sup>404</sup> Therefore, it can be argued that the EU-Turkey Statement should be declared ineffective within the EU legal order.

### 3.5.2.2 *Judicial scrutiny*

Considering that the EU-Turkey Statement is not an EU act, visibly curtails the possibilities for judicial scrutiny at EU level. Acts of the MSs cannot be the subject of an action for annulment<sup>405</sup> or a preliminary question<sup>406</sup> before the CJEU. There are however still two possibilities to undertake action against the EU-Turkey Statement at EU level: (i) infringement proceedings by the European Commission under article 258 TFEU and (ii) an action for failure to act against an EU institution under article 265 TFEU. If these would prove unsuccessful, the remedies at national level remain.

#### 3.5.2.2.1 Infringement proceedings under article 258 TFEU

Under article 258 TFEU, the Commission – as the guardian of the Treaties<sup>407</sup> – has the possibility to start infringement proceedings against a MS, when it considers that a MS has failed to fulfil an obligation under the EU Treaties. Infringement proceedings start with an informal phase, in which the Commission addresses a letter of formal notice to the MS, inviting the MS to submit its observations. Where the MS's observations fail to persuade

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<sup>402</sup> J. ODERMATT, "When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law", European University Institute, 2016, 1, [http://cadmus.eui.eu/bitstream/handle/1814/41046/MWP\\_2016\\_07.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/41046/MWP_2016_07.pdf?sequence=1), last accessed on 15 April 2018.

<sup>403</sup> E. CANNIZARO, "Disintegration Through Law?", *European Papers* 2016, 5.

<sup>404</sup> Judgment of the Court, *Defrenne v. Sabena*, C-43/75, ECLI:EU:C:1976:56, § 57.

<sup>405</sup> Article 263 TFEU.

<sup>406</sup> Article 267 TFEU.

<sup>407</sup> Article 17(1) TEU.

the Commission to change its point of view, or where the MS fails to respond, the Commission may start a formal infringement procedure under article 258 TFEU. In this formal stage, the Commission delivers a reasoned opinion on the infringement, giving the MS an additional two-month period to comply. If the MS fails to conform to EU law within this period, the Commission can decide to bring the matter before the CJEU, which will issue a binding judgment. This judgment can only declare the existence of an infringement by a MS and does not rule on the specific rights of individual citizens.<sup>408</sup> Individual rights have to be pursued through proceedings before national courts, after the judgment of the CJEU.

Since the MSs have concluded the EU-Turkey Statement in violation of EU law, the Commission could decide to start infringement procedures against the 28 MSs. The Commission could decide so in its own initiative or after having received a complaint to this end.

The CJEU has however recognised that the Commission has discretionary powers in deciding whether or not to start an infringement procedure against a MS. The Court held that *“Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought”*.<sup>409</sup> Therefore, it is possible for the Commission to consider that there is indeed a breach of EU law, but that legal action is not appropriate or necessary.

Since the Commission has recognised that the EU-Turkey Statement is an act of the MSs<sup>410</sup> and has not acted yet, the chance that the Commission would decide to bring infringement proceedings against the MSs in the future is minimal. Even if the Commission would receive a complaint to this end, it would still have wide discretionary powers to decide

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<sup>408</sup> K. LENAERTS, I. MASELIS and K. GUTMAN, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 159.

<sup>409</sup> Judgment of the Court, *Commission v. Germany*, joined cases C-20/01 and C-28/01, ECLI:EU:C:2003:220, § 30; see also: Judgment of the Court, *Commission v. Belgium*, C-471/98, ECLI:EU:C:2002:628, § 39; Judgment of the Court, *Commission v. Germany*, C-476/98, ECLI:EU:C:2002:631, § 38.

<sup>410</sup> Order of the General Court, *NF v. European Council*, T-192/16, ECLI:EU:T:2017:128, § 29.

whether or not to start infringement proceedings, so that the chances of success are limited if not non-existent.

#### 3.5.2.2.2 Action for failure to act under article 265 TFEU

Another possibility for individuals to – indirectly – undertake action against the EU-Turkey Statement is to pursue an action for failure to act under article 265 TFEU. Article 265 TFEU determines that any natural or legal person may bring an action before the CJEU if an EU institution, body, office or agency fails to act, in infringement of the Treaties. In relation to the EU-Turkey Statement, an option would be to direct an action for failure to act against the Commission, for not starting infringement proceedings against the MSs. Similarly, an action for failure to act against the Council, for not requesting the Commission to start infringement proceedings against the MSs, can be imagined.

The conditions for a successful action for failure to act are however very strict. For starters, article 265 TFEU requires the applicant to prove that the institution had an obligation to act.<sup>411</sup> The existence of wide discretionary powers of the Commission to decide whether or not to start infringement proceedings, will normally preclude the finding that the Commission had an obligation to start such infringement proceedings.<sup>412</sup> Next, the applicant would first have to call upon the relevant institution to act.<sup>413</sup> Last, the CJEU has held in ENU that an individual applicant would only have standing under article 265 TFEU if he was directly and individually concerned without it being necessary that he was the actual addressee of the decision.<sup>414</sup> This test is applied in the same restrictive manner as

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<sup>411</sup> K. LENAERTS, I. MASELIS and K. GUTMAN, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 420.

<sup>412</sup> P. CRAIG and G. DE BURCA, *EU Law. Text, cases and materials. Sixth edition*, Oxford, Oxford University Press, 2015, 537; S. BOELAERT, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Workshop E on “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, 1 February 2018, <https://www.youtube.com/watch?v=tq4hm8PU1uM&index=9&list=PL5j0rT9PoY-S-QNliX6fvFqso42h3Oj6w>, last accessed on 15 April 2018.

<sup>413</sup> Article 265 TFEU; K. LENAERTS, I. MASELIS and K. GUTMAN, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 420.

<sup>414</sup> Judgment of the Court, ENU v. Commission, C-357/95, ECLI:EU:C:1997:144.

under article 263 TFEU.<sup>415</sup> This all makes it unlikely that an action for failure to act against the Commission or the Council could be successful.

If successful, an action for failure to act results in a declaration of the CJEU that this failure to act was unlawful.<sup>416</sup> Article 266 TFEU then requires the institution to take the necessary measures to comply with this judgment.<sup>417</sup>

The foregoing illustrates that the possibilities to – successfully – challenge the EU-Turkey Statement before the CJEU are very limited, so that *de facto* only the remedies at national level remain. This while it is quite conceivable that there exists no proper remedy at national level.

### 3.6 Conclusion

Taking into account the assessment presented in this Chapter, the EU-Turkey Statement should be considered an international agreement, concluded between the European Council, acting on behalf of the EU, and Turkey. The General Court however judged otherwise when it found that the Statement was an act concluded by the representatives of the MSs, acting in their capacity of Heads of State or Government of those MSs, independent of whether the Statement constitutes an international agreement. In doing so, the General Court sided with the European Council, the Council and the Commission.

To come to its conclusion, the General Court developed an artificial argumentation that reads as an exercise with a pre-determined goal, namely finding that the EU-Turkey Statement is not an EU act. To this end, the General Court selectively chose between different arguments, focusing entirely on arguments supporting its finding, while leaving out arguments undermining it. In doing so, the General Court completely disregarded the division of competences between the EU and its MSs.

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<sup>415</sup> K. LENAERTS, I. MASELIS and K. GUTMAN, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 430-431; P. CRAIG and G. DE BURCA, *EU Law. Text, cases and materials. Sixth edition*, Oxford, Oxford University Press, 2015, 539.

<sup>416</sup> K. LENAERTS, I. MASELIS and K. GUTMAN, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 421.

<sup>417</sup> *Ibid.*, 439-440.

The General Court has thus found it necessary to deny Union involvement in the EU-Turkey Statement and exclude it from judicial review under article 263 TFEU. This means that, in the General Court's point of view, it is possible for representatives of the 28 MSs to act collectively, within the premises of the European Council, in areas of EU exclusive competence, as Heads of State or Government of the MSs. In deciding so, the General Court deviated from a consistent line of case law which started with the ERTA judgment.

The most pressing question is therefore the question as to the General Court's rationale. Why did the General Court rule out Union involvement in the EU-Turkey Statement?

As the preceding analysis has proved, the General Court's course of action – qualifying the EU-Turkey Statement as an act of the MSs – has visibly curtailed the possibilities of judicial review of the EU-Turkey Statement by the Luxembourg Court, thereby reducing the chance of success in such a procedure to practically zero.

If the General Court on the other hand would have found that the EU-Turkey Statement was an act of the European Council, it would have been left with only two options.

First, the Court would have had the possibility to declare the action for annulment under article 263 TFEU inadmissible on another ground. It is conceivable that the admissibility threshold for individual applicants – direct and individual concern – was not reached. Similarly, the Court could have decided that the EU-Turkey Statement was not an act intended to produce legal effects vis-à-vis third parties.<sup>418</sup> Declaring the action for annulment inadmissible on another ground would have allowed the Court to fend off the applicant's questions as to the compatibility of the EU-Turkey Statement with EU law, but would have been nothing more than a stay of execution: a possible – and likely – follow-up would have been a preliminary request by a Greek national court, in which the CJEU would have no room left to stay away from the substance of the matter.

Second, the Court could have decided to proceed to an analysis of the compatibility of the Statement with EU law. The outcome of such analysis is uncertain. If the Court would find

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<sup>418</sup> In doing so, the Court would manifestly reduce the scope of the notion "agreement" under article 218 TFEU for the future, thereby equally reducing its proper competence under article 218(11) TFEU.

the EU-Turkey Statement to be incompatible with human rights and refugee law – as it should, according to legal scholars and human rights organisations<sup>419</sup> – this could result in an explosive political situation, with the Court at the heart of the controversy. After all, the EU-Turkey Statement did indeed (help to) remedy one of the most acute crises of the EU. The annulment of the Statement could possibly lead to a new and uncontrolled influx of migrants arriving in Greece through the Eastern Mediterranean route. Therefore, the Court’s approach can be explained as a desire to accommodate itself to political reality and the MSs’ intentions, without having to rule on compliance with EU law.<sup>420</sup>

In this light, it is possible that the Court went for what it judged to be the less bad of two bad options. Whether considering the EU-Turkey Statement as an act of the MSs was in fact a better option, will be assessed in the last Chapter.

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<sup>419</sup> S. PEERS and E. ROMAN, “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?”, EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, last accessed on 4 May 2018; UNCHR, “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as a part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and the first country of asylum concept”, 23 March 2016, <http://www.unhcr.org/56f3ec5a9.pdf>, last accessed on 1 April 2018. “The EU-Turkey deal: Europe’s year of shame”, Amnesty International, 20 March 2017, <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>, last accessed on 1 April 2018.

<sup>420</sup> I. GOLDNER LANG, Speech at “The Odysseus Network’s 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies”, Final Plenary Session, “Towards “Judicial Passivism” in EU Migration and Asylum Law?”, 1 February 2018, <https://www.youtube.com/watch?v=x8U98izwkyA>, last accessed on 3 May 2018; P. K., “A Realist Court”, *European Law Review* 2017, 311-312; T. SPIJKERBOER, “Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice”, 2017, 9-10.

## Chapter 4. Main concerns with the General Court's order in NF v. European Council

Chapter 3 has revealed that the EU-Turkey Statement should be considered an EU act and that the General Court has actively avoided answering the legal questions raised by the applicant in deciding differently. Most likely this approach frames within an effort of the General Court to adapt itself to political reality.

The General Court's order in NF v. European Council is not an isolated example of such an approach. For a little more than one year now, the CJEU has been showing signs of what some call "judicial passivism"<sup>421</sup> in relation to asylum and migration law.<sup>422</sup> Contrary to judicial activism, the term judicial passivism has never before been used in relation to EU law or the case law of the CJEU. Judicial passivism has been defined by I. Goldner Lang as "*a sub group of judicial activism, referring to cases where the Court is consciously not using its powers where it should, thereby sending a message to the EU institutions and Member States*".<sup>423</sup> Others have referred to this new approach as "realism".<sup>424</sup>

This new approach has not stayed confined to the area of asylum and migration law. The CJEU has been similarly reserved in other areas such as for example the EU sovereign debt

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<sup>421</sup> I. GOLDNER LANG, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Final Plenary Session, "Towards "Judicial Passivism" in EU Migration and Asylum Law?", 1 February 2018, <https://www.youtube.com/watch?v=x8U98izwkyA>, last accessed on 3 May 2018; E. SHARPSTON, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Final Plenary Session, "Towards "Judicial Passivism" in EU Migration and Asylum Law?", 1 February 2018, <https://www.youtube.com/watch?v=qvaI3UrqVMQ>, last accessed on 3 May 2018.

<sup>422</sup> Besides in relation to the General Court's orders of 28 February 2017 concerning the EU-Turkey Statement, the CJEU has been accused of judicial passivism in relation to the X and X and AS and Jafari cases. See in this regard: Judgment of the Court, X and X, C-638/16, ECLI:EU:C:2017:173; Judgment of the Court, Jafari, C-646/16, ECLI:EU:C:2017:586; Judgment of the Court, A.S., C-490/16, ECLI:EU:C:2017:585.

<sup>423</sup> I. GOLDNER LANG, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Final Plenary Session, "Towards "Judicial Passivism" in EU Migration and Asylum Law?", 1 February 2018, <https://www.youtube.com/watch?v=x8U98izwkyA>, last accessed on 3 May 2018.

<sup>424</sup> E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on NF v. European Council", European Papers, 15 March 2017, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018; P. K., "A Realist Court", *European Law Review* 2017, 311-312.



crisis.<sup>425</sup> It is however clear that such an approach is not without dangers. Therefore, the question that arises is at what cost the Court has developed this new passivist/realist approach.

## 4.1 Compromise or betrayal of principles?

In concluding the EU-Turkey Statement, the EU institutions and MSs have circumvented the procedural safeguards offered by EU law, including parliamentary scrutiny and judicial review by the CJEU. By deciding to stay passive, the General Court has *de facto* condoned this course of action. In doing so, the General Court proved willing to acknowledge a wide discretion for the Union's and the MSs' decision-making institutions and to accept the policy choices they make. This proves how the checks and balances built into the EU system can be entirely sidestepped when the EU institutions collude with the MSs to act outside the Treaty framework.<sup>426</sup> Besides limiting the possibilities for judicial scrutiny (see to this end Section 3.5 of Chapter 3 (Hypotheses)), such an approach sets a dangerous precedent, undermining both accountability and transparency and the CJEU's role as a human rights court.

### 4.1.1 A dangerous precedent

The General Court's order sets a dangerous precedent for cooperation with third countries, both in the field of asylum and migration and beyond.<sup>427</sup>

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<sup>425</sup> Judgment of the Court, *Ledra Advertising v. Commission and ECB*, C-8/15 P, ECLI:EU:C:2016:701; T. VERNISEAU, "L'ambiguïté fondamentale de la déclaration « EU-Turquie » relative à l'immigration : acte international ou acte du conseil européen ?", *Jus Politicum Blog*, 24 October 2017, <http://blog.juspoliticum.com/2017/10/24/lambiguite-fondamentale-de-la-declaration-ue-turquie-relative-a-immigration-acte-international-ou-acte-du-conseil-europeen-par-theophane-verniseau/>, last accessed on 1 May 2018; See in this regard: C. KILPATRICK, "Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis", in M. CREMONA and C. KILPATRICK (eds.), *EU Legal Acts. Challenges and Transformations*, Oxford, Oxford University Press, 2018, 70-105.

<sup>426</sup> N. IDRIZ, "Taking the EU-Turkey Deal to Court?", *Verfassungsblog*, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>, last accessed on 28 March 2018.

<sup>427</sup> E. CANNIZARO, "Denialism as the Supreme Expression of Realism – A quick Comment on *NF v. European Council*", *European Papers*, 15 March 2017, <http://europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council>, last accessed on 10 May 2018; I. GOLDNER LANG, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Final Plenary Session, "Towards 'Judicial Passivism' in EU Migration and Asylum Law?", 1 February 2018, <https://www.youtube.com/watch?v=x8U98izwkyA>, last accessed on 3 May 2018.

The General Court's order in *NF v. European Council* entirely disregards the division of competences between the EU and its MSs and in particular the ERTA doctrine, as laid down in article 3(2) TFEU. This provision stipulates that the EU has an exclusive external competence for the conclusion of international agreements “*insofar as [their] conclusion may affect common rules or alter their scope*”. Applying this to the EU-Turkey Statement should have led the Court to consider that the conclusion of the EU-Turkey Statement was, at least partially, an EU exclusive competence, so that the MSs could not act outside the EU institutions. In deciding not to assess the competences that had been exercised, the General Court recognised that it is possible for the representatives of the MSs to decide in their capacity of Heads of State of Government on matters falling within EU exclusive competence. This goes against both the rule of law<sup>428</sup> and the principle of conferred powers<sup>429</sup>.

In relation to the EU-Turkey Statement this has led to what has been called “*reversing ‘Lisbonisation’ of EU migration policy*”<sup>430</sup>. The General Court gave priority to intergovernmental cooperation in the field of asylum and migration, rather than cooperation within the EU institutional framework, while one of the central objectives of the Lisbon Treaty was expanding the former Community method to all areas falling under the “Area of Freedom, Security and Justice”.<sup>431</sup>

The consequences of the General Court's order do however not remain limited to the field of asylum and migration. They also concern EU law in general. Indeed, the precedent established in *NF v. European Council* not only enables the EU-Turkey Statement to endure, but also opens the door for a whole line of similar “agreements” to be concluded outside the framework of EU law and exempt from judicial review of the CJEU.<sup>432</sup> These “agreements” can cover any field of EU competence.

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<sup>428</sup> Article 2 TEU.

<sup>429</sup> Article 5(2) TEU.

<sup>430</sup> S. CARRERA, L. DEN HERTOOG and M. STEFAN, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, CEPS, April 2017, 7-8, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018; L. BATALLA ADAM, “The EU-Turkey Deal One Year On: A Delicate Balancing Act”, *The International Spectator* 2017, 16-17.

<sup>431</sup> M. FLETCHER, E. HERLIN-KARNELL and C. MATERA (eds.), *The European Union as an Area of Freedom, Security and Justice*, Abingdon, Routledge, 2017, 517 p.

<sup>432</sup> S. CARRERA, L. DEN HERTOOG and M. STEFAN, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, CEPS, April 2017, <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal>, last accessed on 6 May 2018.

#### 4.1.2 Undermining accountability and transparency

Following M. Bovens' widely accepted definition of accountability, the notion can best be seen as "*a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct; the forum can pose questions and pass judgment, and the actor may face consequences*".<sup>433</sup> Enhancing accountability within the EU was one of the key objectives of the Lisbon Treaty.<sup>434</sup> One of the main strategies for achieving this objective, was to strengthen the role of the European Parliament<sup>435</sup>, the Union's only directly-elected institution. In relation to EU international agreements, this has led to a duty to immediately and fully inform the Parliament at all stages of the procedure<sup>436</sup> and a duty to obtain parliamentary consent for what is now the majority of international agreements<sup>437</sup>, including "*agreements covering fields to which the ordinary legislative procedure applies*"<sup>438</sup>.

Closely linked to the notion of accountability is the notion of transparency: a certain degree of transparency is instrumental for accountability. Transparency comprises a number of elements, such as the holding of meetings in public, the provision of information and the right of access to documents.<sup>439</sup> The EU Treaties provide for transparency in a number of ways. Article 1 TEU determines that "[*The TEU*] marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". This is reiterated by article 10(3) TEU that provides: "*Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*". Article 11(2) TEU stipulates: "*The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly*

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<sup>433</sup> M. BOVENS, "Analysing and Assessing Accountability: A Conceptual Framework", *European Law Journal* 2007, 450. See also: M. PHILP, "Delimiting Democratic Accountability", *Political Studies* 2009, 32; G. J. BRANDSMA, E. HEIDBREder and E. MASTENBROEK, "Accountability in the post-Lisbon European Union", *International Review of Administrative Sciences* 2016, 624.

<sup>434</sup> M. CREMONA and C. KILPATRICK (eds.), *EU Legal Acts. Challenges and Transformations*, Oxford, Oxford University Press, 2018, 9.

<sup>435</sup> *Ibid.*, 9.

<sup>436</sup> Article 218(10) TFEU.

<sup>437</sup> Article 218(6)(a) TFEU. In other cases the Parliament must be consulted.

<sup>438</sup> Article 218(6)(a)(v) TFEU.

<sup>439</sup> P. CRAIG and G. DE BURCA, *EU Law. Text, cases and materials. Sixth edition*, Oxford, Oxford University Press, 2015, 567.

*exchange their views in all areas of Union action*". This is reinforced by article 15(1) TFEU: *"In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible"*.

By concluding the EU-Turkey Statement outside the EU framework, these checks and balances built into the EU system were successfully circumvented. The adoption of the EU-Turkey Statement was indeed anything but transparent, let alone it was the result of an open and transparent dialogue with civil society and representative organisations. The Statement emerged in the form of a press release on the joint website of the European Council and the Council of the European Union after the 17 and 18 March 2016 European Council. Apparently, there has been no procedure for its approval at either EU or national level. While it was clear that the EU institutions played a central role in the preparation and conclusion of the Statement, its legal nature and EU character remained unclear and troublesome.

The severe lack of transparency surrounding the EU-Turkey Statement is further illustrated by two recent Access Info Europe v. Commission cases.<sup>440</sup> These cases concerned requests of Access Info Europe – an NGO concerned about the compatibility of the EU-Turkey Statement with human rights and refugee law – to access the documents of the Commission relating to the meetings of 7 March and 18 March 2016 pursuant to the Transparency Regulation<sup>441</sup>.<sup>442</sup> The applicant requested access to *"all documents generated or received by the European Commission containing legal advice and/or analysis of the legality of the actions to be carried out by the EU and its Member States in implementing the actions set out in the statement on the agreement reached with Turkey on the summit held on [respectively] 7 March 2016 and 18 March 2016 ... documents drawn up both before and*

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<sup>440</sup> Order of the General Court, Access Info Europe v. Commission, T-851/16, ECLI:EU:T:2018:69; Order of the General Court, Access Info Europe v. Commission, T-852/16, ECLI:EU:T:2018:71.

<sup>441</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145.

<sup>442</sup> H. DARBISHIRE and L. IZUZQUIZA, "Access Info challenges European Commission secrecy around EU-Turkey refugee deal legal advice before the European Court of Justice", Access Info Europe, 2 December 2016, <https://www.access-info.org/article/27029>, last accessed on 25 April 2018; P. LEINO and D. WYATT, "No public interest in whether the EU-Turkey refugee deal respects EU Treaties and international human rights law?", European Law Blog, 28 February 2018, <https://europeanlawblog.eu/2018/02/28/no-public-interest-in-whether-the-eu-turkey-refugee-deal-respects-eu-treaties-and-international-human-rights/>, last accessed on 25 April 2018.

*since the meeting was held, to date*".<sup>443</sup> After a number of documents were identified as falling within the applicant's request, the Commission denied access to these documents in its decisions C(2016) 6029<sup>444</sup> and C(2016) 6030<sup>445</sup>. In order to do so, the Commission relied on a number of exceptions comprised in the Transparency Regulation, being that the release of these documents would undermine the protection of the court proceedings and legal advice, the Commission's internal decision-making process and the public interest as regards to international relations. In response, Access Info Europe introduced two actions for annulment under article 263 TFEU against these Commission decisions with the General Court. In both cases, the General Court decided that the Commission was right to deny access to the documents and that there was no overriding public interest in disclosure of these documents.<sup>446</sup>

Such absence of transparency inevitably limits accountability. Roughly two years after the publication of the EU-Turkey Statement on the website shared by the European Council and the Council of the European Union, the Statement's legal nature and lawfulness remain unclear. In addition, the lack of transparency also concerned the authorship of the Statement. It goes without saying that not being able to identify the author of an act, makes it virtually impossible to hold someone accountable for it.<sup>447</sup> It took until the General Court's order of 28 February 2017 – which is by itself considerably controversial – to learn that if someone is to be held accountable for the EU-Turkey Statement, it is not the EU.

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<sup>443</sup> "Legal advice and/or analysis of the legality on EU-Turkey agreements", 17 March 2016, [https://www.asktheeu.org/en/request/legal\\_advice\\_andor\\_analysis\\_of\\_t\\_2](https://www.asktheeu.org/en/request/legal_advice_andor_analysis_of_t_2), last accessed on 26 April 2018; "Legal advice and/or analysis of the legality on EU-Turkey agreement", 26 April 2016, [https://www.asktheeu.org/en/request/legal\\_advice\\_andor\\_analysis\\_of\\_t\\_6](https://www.asktheeu.org/en/request/legal_advice_andor_analysis_of_t_6), last accessed on 26 April 2018.

<sup>444</sup> European Commission, C(2016) 6029, "Decision of the Secretary General on behalf of the Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) N° 1049/2001", 19 September 2016, <https://www.asktheeu.org/en/request/2695/response/11199/attach/4/20161681C%202016%206029%20F1%20DECISION%20LETTER%20EN%20V2%20P1%20859906.PDF.pdf>, last accessed on 27 April 2018.

<sup>445</sup> European Commission, C(2016) 6030, "Decision of the Secretary General on behalf of the Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) N° 1049/2001", 19 September 2016, <https://www.asktheeu.org/en/request/2851/response/11200/attach/4/2016%202228C%202016%206030%20F1%20DECISION%20LETTER%20EN%20V2%20P1%20861263.pdf>, last accessed on 27 April 2018.

<sup>446</sup> Judgment of the General Court, Access Info Europe v. Commission, T-851/16, ECLI:EU:T:2018:69; Judgment of the General Court, Access Info Europe v. Commission, T-852/16, ECLI:EU:T:2018:71.

<sup>447</sup> L. IZUZQUIZA, "One year later: what we (still don't) know about the EU-Turkey agreement and accountability", Access Info Europe, 18 March 2017, <https://www.access-info.org/uncategorized/27982>, last accessed on 25 April 2018; M. GATTI, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Workshop E, "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum", 1 February 2018, <https://www.youtube.com/watch?v=6-sRjLp8Isc&index=8&list=PL5j0rT9PoY-S-QNiX6fvFqso42h3Oj6w>, last accessed on 15 April 2018.

The national parliaments of the MSs were however also not involved in the preparation and conclusion of the Statement.<sup>448</sup> This lack of parliamentary involvement has been explained by claiming that “*the EU-Turkey Statement merely concerns a “Statement” without any binding force*”.<sup>449</sup> However, is this “statement”, in terms of its substantive content, really any less binding than a formal international agreement?

While the EU-Turkey Statement could have been put into place following the established processes for the conclusion of international agreements, the Union’s and the MSs’ decision-making institutions decided to use alternative informal means. This course of action undermines accountability and transparency. The fact that the General Court did not intervene perpetuates the violation of these values.

#### **4.1.3 Undermining the CJEU’s role as a “human rights court”**

That the General Court has decided to stay passive in *NF v. European Council* is particularly striking since the EU-Turkey Statement concerns asylum and migration policies, which present a strong link with a number of hard core fundamental rights that lay at the heart of the EU.<sup>450</sup>

The respect for human rights is reiterated on several occasions in the EU Treaties and beyond. Article 2 TEU determines that “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”. Article 5(3) TFEU adds that “*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development*

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<sup>448</sup> M. GATTI, “The EU-Turkey Statement: A Treaty That Violates Democracy. Part 1 of 2”, *European Journal of International Law*, 18 April 2016, <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>, last accessed on 5 May 2018.

<sup>449</sup> I. TOYGÜR and B. BENVENUTI, “One Year On: An Assessment of the EU-Turkey Statement on Refugees”, *Elcano Royal Institute*, March 2017, <http://www.iai.it/sites/default/files/iaiw1714.pdf>, last accessed on 28 April 2018.

<sup>450</sup> Inter alia the principle of non-refoulement as comprised in article 78 TFEU, article 18 CFR and article 19 CFR.

*of international law, including respect for the principles of the United Nations Charter*". In the Kadi case, the CJEU judged that the protection of fundamental rights and the rule of law forms part of the very foundations of the Union legal order.<sup>451</sup> Further references to human rights protection can be found in EU law on both external action<sup>452</sup> and migration and refugees<sup>453</sup>.

The Lisbon Treaty has further increased the emphasis on fundamental rights protection within the EU legal system by converting the Charter of Fundamental Rights of the European Union (hereinafter CFR) into a legally binding document, giving the rights comprised in the CFR the same legal value as the EU Treaties.<sup>454</sup> The CJEU was given the fundamental role of guaranteeing an effective remedy for every person whose fundamental rights have been allegedly violated in this new fundamental rights architecture.<sup>455</sup> In this way, the CJEU *de facto* became a human rights court.

The General Court's order in *NF v. European Council* however raises doubts about the CJEU's capacity to act as a human rights court. In *NF v. European Council*, the General Court had the opportunity to confirm the Union's dedication to the promotion and protection of human rights and to prove that the many references to human rights protection in EU law are more than just rhetoric. Instead, the General Court has chosen to place the EU-Turkey Statement outside the scope of EU law and the CFR, exempting it from judicial control at EU level and leaving individuals without judicial protection. This is detrimental to the Court's credibility as a "human rights court". When EU institutions or MSs tend to forget that the EU legal order is based on fundamental rights, it is up to the Court to send a clear signal that these rules – that lay at the core of the EU legal order – are to be respected

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<sup>451</sup> Judgment of the Court, *Kadi and Al Barakaat International Foundation v. Council and Commission*, C-402/05, ECLI:EU:C:2008:461, § 303-304.

<sup>452</sup> Article 21(1) TEU; Article 205 TFEU.

<sup>453</sup> See inter alia: paragraph 3 of the preamble to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180; paragraphs 3, 4 and 34 of the preamble to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337.

<sup>454</sup> Article 6(1) TEU.

<sup>455</sup> Article 47 CFR; S. CARRERA, M. DE SOMER, and B. PETKOVA, "The Court of Justice of the European Union as a Fundamental Rights Tribunal. Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice", CEPS, August 2012, 5, <https://www.ceps.eu/publications/court-justice-european-union-fundamental-rights-tribunal-challenges-effective-delivery>, last accessed on 29 April 2018.



at all times. This is all the more the case during times of crisis. The law constrains and is indeed inconvenient at times, particularly in crises. At these crucial moments, the Court should intervene and make sure that the principles that constitute the very foundations of the EU legal order are respected.

#### **4.1.4 Passivism/realism at high cost**

While one can understand the General Court's desire to adapt itself to political reality, the General Court's order in *NF v. European Council* runs counter with some of the fundamental principles of the EU legal order. Accountability and, especially, fundamental rights protection reflect core values of the EU legal order. These fundamental values should not be sidestepped for reasons of political expediency. When this does happen, it is up to the Court to defend accountability and fundamental rights protection, even against the common will of the political leaders. This is exactly what the General Court failed to do in *NF v. European Council*. This makes the *NF v. European Council* case an even more dangerous precedent.

There is however no need for excessive negativity yet. The three orders of the General Court in *NF*, *NG* and *NM v. European Council* have been appealed before the CJEU so that the chance remains that the CJEU will use this opportunity to set the record straight.

## **4.2 A new trend in the migration policy field?**

As the number of arrivals on the Greek islands and the number of lives lost in the Mediterranean dropped after the adoption of the EU-Turkey Statement, the European Commission announced its intention to establish similar tailor-made partnerships with key third countries of migration origin and transit.<sup>456</sup> These partnerships would take the form of "compacts", developed according to the situation and needs of each partner country. Meanwhile, the first results of this effort have seen the light of day. Both the 2016 Joint

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<sup>456</sup> European Commission, "Press release, Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration", 7 June 2016, [http://europa.eu/rapid/press-release\\_IP-16-2072\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2072_en.htm), last accessed on 29 April 2018.



Way Forward with Afghanistan and the 2017 Italy-Libya Memorandum of Understanding have been compared to the EU-Turkey Statement.<sup>457</sup>

#### 4.2.1 The Joint way Forward with Afghanistan

In October 2016, during the Afghanistan donor conference, the EU and Afghanistan signed the Joint Way Forward, which was heralded as a “*joint commitment of the EU and the Government of Afghanistan to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants*”.<sup>458</sup> Contrary to for the EU-Turkey Statement, the EU institutions did take responsibility for this text.<sup>459</sup>

Although the Joint Way Forward explicitly states that it “*is not intended to create legal rights or obligations under international law*”, it fulfils the purpose of a readmission agreement as it sets out that its objective is “*to establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals who do not fulfil the conditions in force for entry to, presence in, or, residence on the territory of the EU, and to facilitate their reintegration in Afghanistan in a spirit of cooperation*”.<sup>460</sup> It was not,

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<sup>457</sup> See in regard to the Joint Way Forward with Afghanistan: L. LIMONE, “EU-Afghanistan “Joint Way Forward on migration issues”: another surrealist EU legal text?”, FREE Group, 11 April 2017, <https://free-group.eu/2017/04/11/eu-afghanistan-joint-way-forward-on-migration-issues-another-surrealist-eu-legal-text/>, last accessed on 1 May 2018; See in regard to the Italy-Libya Memorandum of Understanding: M. G. GIUFFRÉ, “From Turkey to Libya: the EU Migration Partnership from bad to worse”, 20 March 2017, Eurojus.it, <http://rivista.eurojus.it/from-turkey-to-libya-the-eu-migration-partnership-from-bad-to-worse/>, last accessed on 1 May 2018; A. PALM, “The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe”, EU Immigration and Asylum Law and Policy, 2 October 2017, <http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>, last accessed on 3 May 2018.

<sup>458</sup> European External Action Service, “Joint Way Forward on migration issues between Afghanistan and the EU”, 5 October 2016, [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf), last accessed on 30 April 2018.

<sup>459</sup> L. LIMONE, “EU-Afghanistan “Joint Way Forward on migration issues”: another surrealist EU legal text?”, FREE Group, 11 April 2017, <https://free-group.eu/2017/04/11/eu-afghanistan-joint-way-forward-on-migration-issues-another-surrealist-eu-legal-text/>, last accessed on 1 May 2018.

<sup>460</sup> European External Action Service, “Joint Way Forward on migration issues between Afghanistan and the EU”, 5 October 2016, [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf), last accessed on 30 April 2018.

however, adopted via the normal procedure for the conclusion of EU international agreements as laid down in article 218 TFEU.<sup>461</sup>

This suggests that the Joint Way Forward is yet another attempt to conclude a readmission agreement outside the legal framework offered by the EU Treaties, by presenting it as a “statement”.<sup>462</sup>

The Joint Way Forward explicitly states that the EU and Afghanistan remain committed to respect their international obligations, in particular the 1951 Convention relating to the Status of Refugees and its 1951 New York Protocol, the International Covenant on Civil and Political rights, the EU CFR and the Universal Declaration on Human Rights<sup>463</sup>. The instrument has however sparked severe concerns on the human rights plan.<sup>464</sup> The security situation in Afghanistan is far from safe and is still deteriorating.<sup>465</sup> A number of human rights organisations – such as Save the children, Amnesty International and the European Council on Refugees and Exiles – have warned “*about the situation in Afghanistan and about the major risks of violations of rights such as the principle of non-refoulement, protection against collective expulsion and the right to asylum*”.<sup>466</sup>

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<sup>461</sup> C. RIMMER, “EU Migration Policy and Returns: Case Study on Afghanistan. Summary and ECRE’s Recommendations”, ECRE, <https://www.ecre.org/wp-content/uploads/2017/11/Returns-Case-Study-on-Afghanistan.pdf>, last accessed on 2 May 2018.

<sup>462</sup> L. LIMONE, “EU-Afghanistan “Joint Way Forward on migration issues”: another surrealist EU legal text?”, FREE Group, 11 April 2017, <https://free-group.eu/2017/04/11/eu-afghanistan-joint-way-forward-on-migration-issues-another-surrealist-eu-legal-text/>, last accessed on 1 May 2018.

<sup>463</sup> European External Action Service, “Joint Way Forward on migration issues between Afghanistan and the EU”, 5 October 2016, [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf), last accessed on 30 April 2018.

<sup>464</sup> See inter alia: C. RIMMER, “EU Migration Policy and Returns: Case Study on Afghanistan. Summary and ECRE’s Recommendations”, ECRE, <https://www.ecre.org/wp-content/uploads/2017/11/Returns-Case-Study-on-Afghanistan.pdf>, last accessed on 2 May 2018; “Open Letter: The European Parliament must immediately address the Joint Way Forward Agreement between the EU and Afghanistan”, ECRE, 26 October 2016, <https://www.ecre.org/open-letter-the-european-parliament-must-immediately-address-the-joint-way-forward-agreement-between-the-eu-and-afghanistan-as-a-headline/>, last accessed on 30 April 2018.

<sup>465</sup> C. RIMMER, “EU Migration Policy and Returns: Case Study on Afghanistan. Summary and ECRE’s Recommendations”, ECRE, 28-29; <https://www.ecre.org/wp-content/uploads/2017/11/Returns-Case-Study-on-Afghanistan.pdf>, last accessed on 2 May 2018.

<sup>466</sup> “Open Letter: The European Parliament must immediately address the Joint Way Forward Agreement between the EU and Afghanistan”, ECRE, 26 October 2016, <https://www.ecre.org/open-letter-the-european-parliament-must-immediately-address-the-joint-way-forward-agreement-between-the-eu-and-afghanistan-as-a-headline/>, last accessed on 30 April 2018.

## 4.2.2 The Italy-Libya Memorandum of Understanding

In February 2017, Italy and Libya signed a Memorandum of Understanding on “*cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*”.<sup>467</sup> The Italy-Libya Memorandum of Understanding is not an EU instrument, but has been endorsed by the Council in its Malta Declaration on the external aspects of migration.<sup>468</sup>

The two main objectives of the Memorandum of Understanding are controlling migratory flows coming from Libya and supporting Libyan development. Articles 1 and 2 of the Memorandum outline the commitments of the parties. Article 1 determines that the parties commit themselves to start cooperation initiatives in order to stem the illegal migrants’ fluxes and face their consequences. Italy commits itself to provide support and financing for development programs in the affected regions and technical and technological support to the Libyan institutions in charge of the fight against illegal migration. Article 2 further details some of Italy’s commitments.<sup>469</sup> As to migration control, the Memorandum of Understanding in essence provides that Italy will support the Libyan coast guard, in order to boost the coast guard’s capacity to rescue migrants at sea and return them to Libya.<sup>470</sup>

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<sup>467</sup> Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, [http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf), last accessed on 10 May 2018; A. PALM, “The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe”, EU Immigration and Asylum Law and Policy, 2 October 2017, <http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>, last accessed on 3 May 2018.

<sup>468</sup> European Council, “Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route”, 3 February 2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>, last accessed on 5 May 2018.

<sup>469</sup> Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, [http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf), last accessed on 10 May 2018.

<sup>470</sup> M. TOALDO, “The EU deal with Libya on migration: a question of fairness and effectiveness”, European Council on Foreign Relations, 14 February 2017, [https://www.ecfr.eu/article/commentary\\_the\\_eu\\_deal\\_with\\_libya\\_on\\_migration\\_a\\_question\\_of\\_fairness\\_a](https://www.ecfr.eu/article/commentary_the_eu_deal_with_libya_on_migration_a_question_of_fairness_a), last accessed on 7 May 2018.

Similar to the EU-Turkey Statement, the Memorandum of Understanding has not been concluded in the form of a formal international agreement.

In relation to human rights protection, article 5 of the Memorandum of Understanding determines that “*the parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are parties*”. Libya is however not a party to the 1951 Geneva Convention, nor is there any equivalent national protection framework for migrants.<sup>471</sup> Human rights organisations such as Amnesty International and Human Rights Watch have reported systematic violations of fundamental rights in the country.<sup>472</sup> Recently, 17 migrants filed an application against Italy before the ECtHR for alleged human rights violations in the implementation of the Italy-Libya Memorandum of Understanding.<sup>473</sup>

#### **4.2.3 Legal boundaries to the externalisation of migration policy?**

The Joint Way Forward with Afghanistan and the Italy-Libya Memorandum of Understanding demonstrate that the thought of the EU-Turkey Statement and the General Court’s order thereon setting a dangerous precedent, is not an idle one. The EU-Turkey Statement forms the first of a number of partnerships aimed at reinforcing cooperation with third countries in order to better manage the European migration crisis.

These partnerships are concluded with regimes with doubtful human rights records. In addition, they are negotiated and concluded with involvement of both the Union and its MSs, outside the decision-making procedures established by the EU Treaties, *de facto* making it completely unclear who decides and blurring all lines of responsibility.

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<sup>471</sup> A. PALM, “The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe”, EU Immigration and Asylum Law and Policy, 2 October 2017, <http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>, last accessed on 3 May 2018.

<sup>472</sup> “Pushed Back, Pushed Around Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers”, Human Rights Watch, September 2009, [https://www.hrw.org/sites/default/files/reports/italy0909web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf), last accessed on 3 May 2018.

<sup>473</sup> P. GRUPPEN, “Zeventien migranten dagen Italië voor Europees mensenrechtenhof”, De Morgen, 9 May 2018, <https://www.demorgen.be/buitenland/zeventien-migranten-dagen-italie-voor-europees-mensenrechtenhof-b5cf0238/9cWVm/>, last accessed on 10 May 2018.

The Joint Way Forward with Afghanistan and the Italy-Libya Memorandum of Understanding prove how much is at stake in the *NF v. European Council* case and the appeal which is currently pending. *NF v. European Council* in fact concerns the questions as to whether the EU's main response to the migration crisis – the externalisation of migration control through partnerships with key third countries of migration origin and transit – is subject to parliamentary control and judicial scrutiny and as to whether there exist constitutional legal boundaries to this practice.

Therefore, it is up to the Court to take its responsibility and take a stand against such practices. Instead of a precedent, the EU-Turkey Statement should become a lesson for the Union's political leaders.

### 4.3 Conclusion

As the European migration crisis seems to have passed its peak and the number of migrants arriving in the EU is steadily going downwards<sup>474</sup>, the topic has been fading to the background. It is however important to keep in mind how the Union has “handled” this crisis.

One of the main responses to the European migration crisis, was the 18 March 2016 EU-Turkey Statement. The EU-Turkey Statement was adopted by the representatives of the MSs outside the legal framework offered by the EU Treaties, thus circumventing the checks and balances built into this framework. In considering the EU-Turkey Statement an act of the MSs, the General Court condoned this course of action. Thereby, the General Court has set a dangerous precedent that undermines accountability and transparency and undermines the CJEU's role as a human rights court.

Meanwhile, “agreements” similar to the EU-Turkey Statement have been concluded with other countries with doubtful human rights records such as Afghanistan and Libya. The EU-Turkey Statement has thus become a blueprint for a number of partnerships with third countries of migration origin and transit aimed at externalising migration control. This

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<sup>474</sup> Eurostat, “Asylum statistics”, April 2018, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics), last accessed on 2 May 2018.

makes the General Court's order in *NF v. European Council* an all the more dangerous precedent and underscores the importance of the appeal before the CJEU which is currently pending. It is up to the CJEU to demonstrate that there do exist legal boundaries to the externalisation of migration policy.

As Advocate-General Mengozzi pointed out in relation to the recent *X and X* case: *"It is, in my view, crucial that, at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law or, if you will allow me the expression, their EU law and our EU law"*.<sup>475</sup>

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<sup>475</sup> Opinion of Advocate-General Mengozzi in *X and X*, C-638/16 PPU, ECLI:EU:C:2017:173, § 4.

## Chapter 5. Conclusion

This dissertation sought to assess the legal nature of the EU-Turkey Statement in order to put the General Court's orders in NF, NG and NM v. European Council in perspective. In these orders, the General Court decided that, irrespective of whether the EU-Turkey Statement constitutes an international agreement or a political statement, it is not an act of the European Council or any other EU institution and thus not an act of which the legality can be reviewed under article 263 TFEU. This dissertation more precisely sought to examine whether there is room for an alternative reading of the legal nature and authorship of the EU-Turkey Statement, what the consequences of the General Court's reading are and what the main concerns with this reading are.

In the light of these aims, four research questions were identified.

The first research question was whether the EU-Turkey Statement is an international agreement. This question was answered on the basis of the law of treaties and in particular on the basis of the treaty-definition of article 2(1)(a) VCLT. It follows from this definition that whether a text is a treaty essentially depends on the intention of the authors, and not on its form or denomination. The intention of the authors is to be derived from the actual terms of an instrument and the particular circumstances in which the instrument was drawn up. In relation to the EU-Turkey Statement this has revealed that the EU-Turkey Statement constitutes a binding international agreement under the law of treaties.

A second research question concerned the authorship of the EU-Turkey Statement. The difficulty in determining the author of the EU-Turkey Statement on the EU side stems from the fact that the representatives of the MSs that constitute the European Council are at the same time the Heads of State or Government of the MSs. It was thus necessary to establish in which capacity they had acted in concluding the EU-Turkey Statement. Consistent with the CJEU's approach in the ERTA case and joined cases C-181/91 and C-248/91, determining the authorship of the EU-Turkey Statement required an analysis of the content of the Statement – including the competences that were exercised – and all the circumstances in which it was adopted. As the EU-Turkey Statement partially concerns exclusive EU competences, the EU-Turkey Statement is an act of the European Council at

least to that extent. The further content of the EU-Turkey Statement – that provides for explicit references to the “Members of the European Council” and the “EU” – and the circumstances surrounding the adoption of the Statement – such as the involvement of the President of the European Council and the presence of the President of the European Commission – support the conclusion that the representatives of the MSs acted in their capacity of Members of the European Council in concluding the EU-Turkey Statement. The EU-Turkey Statement is thus an act of the European Council, acting on behalf of the EU.

Having established that the General Court could well have found that the EU-Turkey Statement was an act of the European Council, the question arises as to why the General Court has decided otherwise. A third research question therefore related to the consequences of the General Court’s orders in NF, NG and NM v. European Council. In order to answer this question, this dissertation consecutively addressed the hypothesis that the EU-Turkey Statement is an international agreement concluded by the European Council and the hypothesis that the EU-Turkey Statement is an international agreement concluded by the MSs. For both hypotheses, the (procedural) legal issues they create and the possibilities for judicial scrutiny they leave were discussed. This exercise has demonstrated that the General Court’s reading has severely limited the possibilities for judicial scrutiny of the EU-Turkey Statement at EU level. Considering the EU-Turkey Statement as an international agreement concluded by the MSs indeed rules out the possibility of both an action for annulment under article 263 TFEU and a request for a preliminary ruling under article 267 TFEU. The remaining remedies at EU level have a very limited chance of success so that *de facto* only the remedies at national level remain. In deciding that the EU-Turkey Statement was not an act of the European Council the General Court has thus ensured that the EU-Turkey Statement cannot be challenged at EU level. Most likely, this approach frames within an effort of the General Court to adapt itself to political reality.

A fourth and last research question related to the main concerns with the General Court’s orders in NF, NG and NM v. European Council. Three main shortcomings of the General Court’s orders were identified. First, these orders set a dangerous precedent for other similar “agreements” in the future. The General Court completely disregarded the division of competences, thereby allowing the MSs to act in areas of EU exclusive competence. In doing so, the General Court placed the EU-Turkey Statement outside the scope of EU law,



thus also excluding its own competence to rule on the legality of the Statement. Second, the General Court's orders undermine accountability and transparency. Accountability and transparency are key values within the EU legal order. The importance of transparency is reiterated on several occasions in the EU Treaties. In relation to EU international agreements, accountability is reflected in a duty to inform the Parliament at all stages of the procedure and a duty to obtain parliamentary consent for the majority of international agreements. By allowing the representatives of the MSs to act outside the EU legal framework, the General Court made it possible to successfully circumvent these checks and balances. Third, the General Court's orders undermine the CJEU's role as a human rights court. The EU-Turkey Statement concerns asylum and migration policies, which present a close link to a number of fundamental rights. By placing the EU-Turkey Statement outside the scope of EU law and the CFR, the General Court has missed the opportunity to show that these fundamental rights are to be respected at all times. The General Court should have exercised its judicial function by scrutinizing the EU-Turkey Statement.

The General Court's NF, NG and NM v. European Council orders are the subject of an appeal before the CJEU which is currently still pending. Therefore, the chance remains that the CJEU will consider the EU-Turkey Statement as an EU act and address the substance of the matter.



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**PRESS RELEASE**

144/16

18/03/2016

## EU-Turkey statement, 18 March 2016

Today the Members of the European Council met with their Turkish counterpart. This was the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis.

The Members of the European Council expressed their deepest condolences to the people of Turkey following the bomb attack in Ankara on Sunday. They strongly condemned this heinous act and reiterated their continued support to fight terrorism in all its forms.

Turkey and the European Union reconfirmed their commitment to the implementation of their joint action plan activated on 29 November 2015. Much progress has been achieved already, including Turkey's opening of its labour market to Syrians under temporary protection, the introduction of new visa requirements for Syrians and other nationalities, stepped up security efforts by the Turkish coast guard and police and enhanced information sharing. Moreover, the European Union has begun disbursing the 3 billion euro of the Facility for Refugees in Turkey for concrete projects and work has advanced on visa liberalisation and in the accession talks, including the opening of Chapter 17 last December. On 7 March 2016, Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU also agreed to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea. At the same time Turkey and the EU recognise that further, swift and determined efforts are needed.

In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:

- 1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.
- 2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.
- 3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU,

and will cooperate with neighbouring states as well as the EU to this effect.

4) Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.

5) The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision.

6) The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs, that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018.

7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.

8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules.

9) The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe.

All these elements will be taken forward in parallel and monitored jointly on a monthly basis.

The EU and Turkey decided to meet again as necessary in accordance with the joint statement of 29 November 2015.

*NB: Reference to this press release has been made in the orders rendered by the General Court on 20 February 2017 in cases T-192/16, T-193/16 and T-257/16 which are currently under appeal.*

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