

# The “EU-Turkey Statement” of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing

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## 1. THE 18 MARCH 2016 “STATEMENT”

On the 18<sup>th</sup> of March, the “EU-Turkey Statement” was published on the website of the Council of the European Union. The “Statement” (ignoring, for the moment, its nature under international and EU law), which was made on the margin of the Brussels European Council meeting of 17-18 March 2016, followed quick and close negotiation begun in October 2015<sup>1</sup>. After the worsening of the migration crisis during the summer of 2015, on the 15<sup>th</sup> of October EU and Turkey adopted an Action Plan, where, apart from the usual diplomatic formulas and amongst other undertakings (on both sides), Turkey demonstrated its *intention* to «step up cooperation and accelerate procedures in order to *readmit* irregular migrants who are not in need of international protection and were intercepted coming

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<sup>1</sup> Preliminary meetings had been held previously: a working dinner on 17<sup>th</sup> of May and an informal meeting on 23<sup>rd</sup> of September 2015 «where EU leaders called for a reinforced dialogue with Turkey at all levels» (see European Commission, Fact Sheet, EU-Turkey joint action plan, Brussels, 15 October 2015, *Challenges are common and responses need to be coordinated. Negotiating candidate country Turkey and the EU are determined to confront and surmount the existing challenges in a concerted manner*).

from the Turkish territory in line with the established bilateral readmission provisions»<sup>2</sup>. A further development took place in November, when, in a “meeting of heads of State or government with Turkey”, the Action Plan was activated: «As a consequence, both sides will, as agreed and with immediate effect, step up their active cooperation on migrants who are not in need of international protection, *preventing travel* to Turkey and the EU, ensuring the application of the established bilateral *readmission provisions* and *swiftly returning migrants* who are not in need of international protection to their countries of origin»<sup>3</sup>.

Indeed, a readmission agreement was already in existence between EU and Turkey having been signed in 2013 (Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7 May 2014, 3 et seq.). The steps described above were, anyway, necessary: in fact, the section of the agreement concerning readmission to Turkey of third country nationals and stateless persons (i.e. non Turkish citizens) was destined to enter into force only after a period of three years (see art. 24(3) of the agreement), and in the meantime, existing bilateral readmission agreements between Turkey and single Member States of the EU continue to apply<sup>4</sup>. The meetings held were, therefore, in an attempt to strengthen the commitments *already* taken, especially on the Turkish side, awaiting the entry into force of the European readmission agreement (originally expected for 1<sup>st</sup> October 2017, but anticipated by the November “Statement” to 1<sup>st</sup> June 2016<sup>5</sup>).

The reason for this renewed interest of the EU and its Member States in readmission practices on the part of Turkey is clear: unequivocal statistics provided by Frontex show that, in 2015, the Eastern Mediterranean route (i.e. that using Turkey to get to Greece) was the most favoured. The second most popular one, the Western Balkans route (i.e. from Serbia towards Hungary and Croatia), was, according to Frontex<sup>6</sup>, clearly nourished by the influx coming from Turkey. In this scenario, it was clear for the EU and its Members that Turkey’s role was of

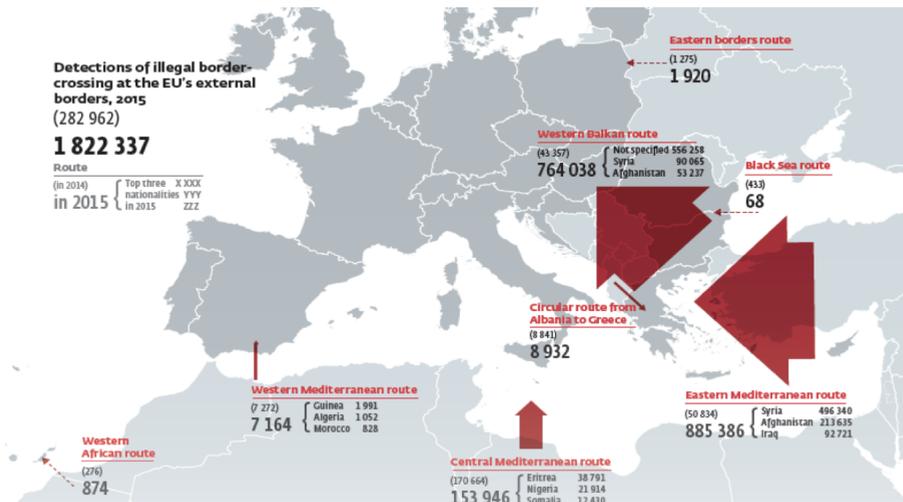
<sup>2</sup> *Ibidem* (emphasis added).

<sup>3</sup> Meeting of heads of State or government with Turkey – *EU-Turkey statement*, 29 November 2015, para. 7 (emphasis added).

<sup>4</sup> And in fact, both the Action Plan and the “Statement” of 29 November recall the existing bilateral provisions. Among the latter, the readmission agreement between Greece and Turkey (Protocol of 7 November 2001 for the implementation of Article 8 of the agreement between the government of the Republic of Turkey and the government of the Hellenic Republic on combating crime, especially terrorism, organized crime, illicit drug trafficking and illegal migration, signed 20 January 2000) should be mentioned. An English version is available on the website of the Bali process on people smuggling, trafficking in persons and related transnational crime.

<sup>5</sup> See European Commission, *Daily News*, 1 June 2016, Brussels, in the section «EU-Turkey Readmission Agreement: Provisions for Third Country Nationals Enter into Force».

<sup>6</sup> Frontex 2016, 16: «A total of 764 038 detections were recorded on the Western Balkan route, mainly on Hungary’s and Croatia’s borders with Serbia. Most of the migrants had arrived earlier on one of the Greek islands and then left the EU to travel through the former Yugoslav Republic of Macedonia and Serbia».



Frontex 2016, 16.

crucial importance in stopping these large flows of irregulars, principally coming from Syria.

The way the EU and its Member States tried to convince Turkey to play a more significant role in the management of irregular flows is anything but original: the synallagmatic relation is evident from the multiple offers made for Turkey's benefit. It was already clear from the "Statement" of November 2015 and it includes a revitalization of the accession process<sup>7</sup>, a sort of unconcealed promise regarding the visa liberalization process<sup>8</sup>, and, above all, an initial financial sup-

<sup>7</sup> See para. 4: «Both sides welcomed the announcement to hold the Intergovernmental Conference on 14 December 2015 for opening of chapter 17. Furthermore, they noted the European Commission's commitment to complete, in the first quarter of 2016, the preparatory work for the opening of a number of chapters without prejudice to the position of Member States. Preparatory work could subsequently begin also on further chapters».

<sup>8</sup> See para. 5. Needless to say, the visa liberalization process is expressly linked, in the "Statement", to the complete entry into force of the EU-Turkey readmission agreement: «Both sides agree that the EU-Turkey readmission agreement will become fully applicable from June 2016 in order for the Commission to be able to present its third progress report in autumn 2016 with a view to completing the visa liberalisation process i.e. the lifting of visa requirements for Turkish citizens in the Schengen zone by October 2016 once the requirements of the Roadmap are met». This is not news: the EU often negotiates visa liberalization agreements together with a readmission agreement, usually even linking the entry into force of the first to the entry into force of the second. See e.g. art. 15(1-2) of the agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, *OJ L 129*, 17 May 2007, 27 *et seq.*, according to which «1. This Agreement shall be ratified or approved by the Parties in accordance with their respective procedures and shall enter into force on the first day of the second month following the date on which the Parties notify each other that the procedures referred to above have been completed. 2. By way of derogation to paragraph 1 of this Article, the present Agreement shall

port of 3 billion euros (to be extended by a further 3 billion), aimed at helping Turkey face the considerably added expenditure due to the presence of such a large number of migrants in its territory. As has been mentioned, there is nothing new here: the EU and its Members took the path of outsourcing migration some years ago (we take the liberty to make a reference to Cherubini 2015b).

## 2. THE DEAL

To be honest, there is, however, something innovative in the 18<sup>th</sup> March “Statement” compared to the preceding ones (whether regarding Turkey or other third States). Not in the strategy, which is fully within the rationale of outsourcing migration policy<sup>9</sup>; but in the operational scheme of the reciprocal readmission duties. Normally, the core of a readmission agreement is the duty to take on the responsibility of managing the situation of people who have a certain link (whether strong or weak) with the readmitting State: one of citizenship, of course, but even possession of a visa, a residence permit, and, most of all, a previous illegal transit. The 18<sup>th</sup> March “Statement” introduces an element of “innovation”<sup>10</sup>: a (partially) blocked rate of reciprocal readmissions, set as a one-for-one on a restricted *ratione personae* basis concerning only Syrian citizens, however. In other words, for every irregular Syrian readmitted to Turkey<sup>11</sup>, a Syrian will be handed from Turkey to a Member State of the EU<sup>12</sup>; a possible surplus of readmissions, on the Turkey side, would represent only non-Syrian citizens, concerning whom no rate has been established.

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only enter into force at the date of the entry into force of the agreement between the Russian Federation and the European Community on readmission if this date is after the date provided for in paragraph 1 of this Article».

<sup>9</sup> See *EU-Turkey statement*, 18 March 2016, especially its para. 5 *et seq.*, where the commitments of the EU are reiterated (e.g. «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»).

<sup>10</sup> These elements were also outlined very briefly in a preceding “Statement”: see Statement of the EU Heads of State or Government, 7 March 2016, where EU Member States (exclusively) «agreed to work on the basis of the principles» contained in some additional proposals made by Turkey. A similar precedent can be found in Clause 7 of the 25 July 2011 Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement.

<sup>11</sup> *EU-Turkey statement*, 18 March 2016, para. 1: «All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey».

<sup>12</sup> *Ibidem*, para. 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».

Such a mechanism poses two problems (which are normally beyond the remit of readmission agreements, whether or not the “Statement” we are analysing is one of them): the identification of *which* categories of migrants and Syrians have to be readmitted, respectively, to Turkey and the EU; the determination of the criteria for the settlement *from* Turkey, and particularly the quotas of Syrians distributed in each of the EU Member States.

As for the categories of migrants to be handed to Turkey, the “Statement” is apparently very clear: the deal concerns «new irregular migrants crossing from Turkey to Greek islands from 20<sup>th</sup> March 2016». The irregular nature of the migrant situation comes, presumably, from the non-compliance with the parameters provided by the Schengen Borders Code<sup>13</sup> (which is anyway not mentioned by the “Statement”). Consistently, the position of those who have applied for international protection has been considered regular: only after a negative outcome of the application (which has to be examined in full respect of the Procedures Directive<sup>14</sup>), or in the case in which the application has not even been presented, the migrant will automatically be in an irregular position<sup>15</sup>. Obviously, the “Statement” recalls the principle of *non-refoulement*: thus it shows an awareness of the fact that, before any readmission takes place (and not only readmissions following a negative result of the international protection application), Greece has to consider, *in singular cases*, whether or not the migrant will be exposed to renown risks in the country of destination, i.e. Turkey (Cherubini 2015a: *passim*, and the bibliography included).

The other side of the coin lies in its very newness, and this concerns only Syrian citizens. The reason for this choice is obvious: «to deter people from attempting unsafe journeys via smugglers» (Peers 2016a). Consistently, the “Statement” seems to repay a particular category of Syrian migrants, who are given priority: those «who have not previously entered or tried to enter the EU irregularly». Syrians, exclusively, have been identified, probably for two reasons: according to Frontex, their citizenship is by far the most numerous along the routes involving Turkey. It represents, in fact, 56% of the whole Eastern Mediterranean route (Frontex 2016, 17). In addition to this, the composition of the Syrian influx has a particular advantage in the perspective of their integration in the host coun-

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<sup>13</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L* 105, 13 April 2006, 1 *et seq.*

<sup>14</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 L* 180, 29 June 2013, 60 *et seq.* Note that for some of its provisions the transposition deadline has not yet expired: for those, the old Procedures Directive applies (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ L* 326, 13 December 2005, 13 *et seq.*).

<sup>15</sup> *EU-Turkey statement*, 18 March 2016, para. 1: «Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the [Procedures] directive will be returned to Turkey».

tries: almost in 2015, a study of the UNHCR, conducted among Syrians who had arrived in the Greek islands, proved that 86% of them held a secondary or university education level<sup>16</sup>. The only other indication given by the “Statement” is the reference to the UN Vulnerability Criteria, which, in its most recent version, privileges «[w]omen and girls at risk; survivors of violence and/or torture; refugees with legal and/or physical protection needs; refugees with medical needs or disabilities; children and adolescents at risk»<sup>17</sup>.

Finally, the “Statement” relies on the results of the very hard won achievements of the previous months to solve the distribution problem: it recalls «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», where they agreed<sup>18</sup>, following the Conclusions of the 25-26 June 2015 European Council<sup>19</sup>, to a relocation programme for 40.000 «persons in clear need of international protection» from Greece and Italy. The formal Decision (2015/1523<sup>20</sup>) was taken on the 14<sup>th</sup> of September, but a few days later, following an agreement found in the Council on the same day, a more ambitious Decision (2015/1601<sup>21</sup>), concerning 120.000 persons, was taken. It is within this framework that the resettlement scheme created by the “Statement” operates: in other words, «Member States did not increase willingness to receive asylum seekers, especially Syrians» (see Favilli 2016, 6, translation added). And in fact, the Commission proposed a modification of Decision 1601, aimed at reducing the obligation of EU Member States proportionally to the number of Syrians relocated from Turkey<sup>22</sup>: Decision 1601 has then been amended by

<sup>16</sup> UNHCR, *Syrian Refugee Arrivals in Greece. Preliminary Questionnaire Findings*, April-September 2015, esp. 6.

<sup>17</sup> As reported by the 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*, Brussels, 20 April 2016, COM (2016) 231 final, 7.

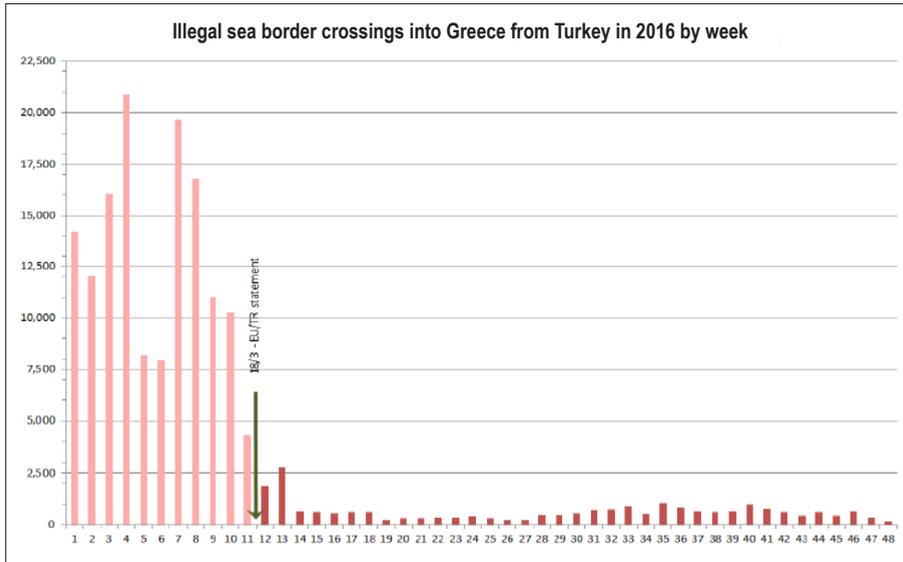
<sup>18</sup> See *Outcome of the Council Meeting*, 3405<sup>th</sup> Council meeting Justice and Home Affairs, Brussels, 20 July 2015.

<sup>19</sup> European Council meeting (25 and 26 June 2015), *Conclusions*, esp. 2.

<sup>20</sup> Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15 September 2015, 146 *et seq.*

<sup>21</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 L 248, 24 September 2015, 80 *et seq.* The mechanism was at first opened also to relocations from Hungary, which refused, and was not even satisfied with this: it challenged Decision 1601 for different reasons (see Action brought on 3 December 2015, C-647/15, *Hungary v Council of the European Union*, OJ C 38, 1 February 2016, 43). The very day before even Slovakia challenged, for similar reasons, Decision 1601: see Action brought on 2 December 2015, Case C-643/15, *Slovak Republic v Council of the European Union*, OJ C 38, 1 February 2016, 41. Both cases are still pending.

<sup>22</sup> 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, COM (2016) 171.



EU Commission, *Fourth Report on the progress made in the implementation of the EU-Turkey Statement*, Brussels, 2016, 3.

Decision 2016/1754<sup>23</sup>, and its art. 4 has now a new para. 3a, which states that «[i]n relation to the relocation of applicants [...], Member States may choose to meet their obligation by admitting to their territory Syrian nationals present in Turkey under national or multilateral legal admission schemes for persons in clear need of international protection, other than the resettlement scheme which was the subject of the Conclusions of the Representatives of the Governments of the Member States meeting within the Council of 20 July 2015. The number of persons so admitted by a Member State shall lead to a corresponding reduction of the obligation of the respective Member State» (emphasis added).

EU Commission completed a very speedy evaluation of the efficacy of the “deal” with Turkey: «in the three weeks preceding the application of the EU-Turkey Statement to arrivals in the Greek islands, 26.878 persons arrived irregularly in the islands – in the three subsequent weeks 5.847 irregular arrivals took place»<sup>24</sup>, i.e. a reduction of 78%. Predictably, the mechanism of relocation and

<sup>23</sup> Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268, 1 October 2016, 82 *et seq.*

<sup>24</sup> *First Report on the progress made in the implementation of the EU-Turkey Statement*, 2. This trend has been confirmed in a *Second Report* (15 June 2016 COM (2016) 349 final) made by the Commission («[i]n the month before the implementation of the Statement, around 1,740 migrants were crossing the Aegean Sea to the Greek islands every day. By contrast, since 1 May the average daily number of arrivals is down to 47», 2), and in a *Third Report* (28 September 2016 COM (2016) 634 final, esp. 2-3). The average significantly increased to 81 daily arrivals in

resettlement was more complex: 325 persons who did not apply for international protection were returned to Turkey, while 103 Syrians were resettled from Turkey to Germany, Finland, the Netherlands and Sweden<sup>25</sup>. The whole scenario raises many problems, which may be reduced, more or less, to its compatibility with international and EU law.

### 3. IS THE “STATEMENT” AN INTERNATIONAL AGREEMENT?

The compatibility of the “deal” with international and EU law entails a pair of preliminary questions: is the “Statement” an international agreement? And, if this is the case, who are the parties to this agreement? These questions do not have a mere academic nature: as we will see, they have practical consequences, especially on the possible judicial scrutiny that may be carried out.

On the nature of the “Statement”, we can record a certain tendency among legal scholars to affirm that it is an international agreement<sup>26</sup>. We think this prevalent opinion better reflects the nature of the “Statement” (which we can now call by name an agreement). On the one hand, there is convincing evidence in favour, while, on the other, the arguments denying that it is an agreement are not so solid. Starting from the latter, a mere formal analysis is not decisive: to say that such an act is not an agreement just because its formal denomination is “Statement” or it includes the “will” formula instead of “shall” is to deduce more than the data tells us. Both the International Court of Justice and the European Court of Justice have supported a substantial approach (see the references in den Heijer, Spijkerboer 2016). The latter is indeed the one suggested by the Vienna Convention on the Law of Treaties as it is widely interpreted. Particularly, its art. 2(1)(a), which may be considered part of customary international law<sup>27</sup>, requests,

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October and November, anyway «lower in comparison to the same period» in 2015 (see *Fourth Report*, 8 December 2016, COM (2016) 792 final, 2), and then again dropped to 43 in winter (see *Fifth Report*, 2 March 2017, COM (2017) 204 final, 2).

<sup>25</sup> *First Report*, 4 and 7. Even this (negative) trend has been confirmed in the following reports: 137 relocated in Turkey *vis-a-vis* 408 Syrians resettled in Europe (*Second Report*, 4 and 8), 116 persons *v.* 1.103 Syrians (*Third report*, 5 and 8), and 170 persons *v.* 1.147 Syrians (*Fourth Report*, 5 and 9). «The total number of migrants returned to Turkey since the date of the EU-Turkey Statement is 1,487», while «[a]s of 27 February 2017, the total number of Syrians resettled from Turkey to the EU under the 1:1 framework was 3,565»; «[a]s in the previous reporting period, the pace of resettlement is considerably advanced compared to returns from the Greek islands, and there is a regular pace of resettlements, which needs to be maintained and further strengthened» (*Fifth Report*, 5 and 8).

<sup>26</sup> See especially den Heijer, Spijkerboer 2016; Favilli 2016, 16; and Gatti 2016a; *adde*, almost implicitly, Roman 2016; Labayle and De Bruycker 2016; and Chetail 2016. *Contra* see Peers 2016a, and Babická 2016.

<sup>27</sup> See Gautier 2011, 45. More recently, the same idea was expressed in the analysis of the 18<sup>th</sup> March Agreement by den Heijer, Spijkerboer 2016.

in addition to the written form<sup>28</sup>, that an agreement, to be as such, must be «governed by international law», which (also) means that it must have a minimum legal content<sup>29</sup>. As has been stated before, the contractual nexus is perhaps the most evident part of the deal: it is indisputable that the EU and its Members keep offering their neighbours money and other benefits (visa facilitation, an acceleration of the accession process, in the case of Turkey) in exchange for commitments in the management of irregular influxes. In other words, they are paying for non-entry measures, which is a more solid nexus than the ones contained in many other “ordinary” agreements. Formal elements, which as we have noted are not decisive, are anyway ambiguous: sometimes the wording is more appropriate for an agreement, sometimes it is less so (Favilli 2016, 14), but this might possibly be intentional, in an attempt to hide the real contractual nature of the act (Gatti 2016a).

As for the parties to this agreement, assuming that one of them is Turkey, the position of the EU and its Member States has still to be determined. There are three different hypotheses: that only the EU is part of it, that only its Member States are, or that both are. In the latter case, we would have a mixed agreement. A fundamental premise is that, in each of these three cases, the fact that internal legislation (the EU’s or national ones) were not respected does not have any consequences on the agreement, unless, obviously, in the exceptional circumstances described in art. 46 of the Vienna Convention (den Heijer, Spijkerboer 2016), circumstances that are unlikely to appear in the case of the agreement with Turkey. If we do not take into consideration, as seems correct, internal legislation, then the content of the agreement would be decisive. If it were a pure readmission agreement, the mixed solution would be rather strange: such agreements do exist on a bilateral basis, with the third State on one side and the EU or one of its Member States on the other. The point is that the one with Turkey is not a pure readmission agreement, and since it involves both EU and Member States competences, it is a typical case of a mixed agreement (this is not, anyway, the position expressed by the General Court of the EU: see *infra*). In particular, the financial undertakings rest on both the EU and its Members, other “carrots” (benefits) have been offered by the EU (negotiations on visa liberalization and accession), the shared resettlement quotas have been/should be taken on by EU Member States, and finally some specific duties weigh exclusively on Greece’s shoulders.

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<sup>28</sup> But it is not excluded that an agreement may have an oral form: see Gautier 2011, 39.

<sup>29</sup> See Gautier (2011, 44): «The [International Law] Commission dropped the reference to this requirement because, faced with the difficulty “to find any convenient general phrase” [...]. In addition, it considered that such reference was not necessary since it was largely subsumed in the expression “agreement ... governed by international law” already contained in the definition of “treaty”».

#### 4. IS THE AGREEMENT WITH TURKEY LEGAL?

Before having a look at the consequences of the solution which has been proposed (most of all, in terms of justiciability), we should say something about the compatibility of the agreement with international and EU law. Here the problems have been widely underlined both in the legal literature and by NGOs reports (see footnote 26, *adde* the report of Amnesty International 2016). The greatest obstacle is represented by the principle of *non-refoulement*: the agreement does not have express provisions that infringe it (indeed, if it did, it would be rather bizarre), but the risk is inherent in *how* readmissions from Greece are carried out. As has already been stated, the above mentioned principle demands an individual examination of the risks implied by the transfer to another State, no matter whether an application for international protection has been presented or not. It is a procedural matter, and neither the Directive of the same name nor the Returns Directive give unyielding guarantees: the first one, which applies if a request for international protection is made, offers EU Member States the renowned concept of safe third country, which may jeopardise the full respect of the principle of *non-refoulement* by diminishing the guarantees that surround it; the second, which applies if a request for international protection is lacking, does not even “proceduralise” the principle of *non-refoulement*, being satisfied with many (unhelpful?) references to this principle and few (seemingly weak) procedural rules (see Cherubini 2015a, 247 *et seq.*).

This potential compression of the principle of *non-refoulement* via the absence of a solid procedural framework is alarming: in fact, it is questionable that a person who was returned to Turkey would not face the risk of persecution or any other serious violation of his/her fundamental human rights (e.g. torture; see Favilli 2016, 9 *et seq.*). Indeed, there is much more evidence regarding the opposite scenario: it is highly likely that such a risk materialises with little probability that this prevision could emerge from a less “guaranteed” procedure. To mention but one possible hypothesis: a weak procedure may misconceive the concept of a safe third country, bending it to the benefit of a disputable readmission. Considering that the destination country would be Turkey and what the definition of a safe place is, according to the Procedures Directive, the need for a stronger (instead of a weaker) procedure is evident.

The collision course between the principle of *non-refoulement*, on the one hand, and the “Statement” (with all the relevant EU rules, especially of procedural nature), on the other, is just one side of its invalidity. The other, which is even more crystalline, concerns EU treaty-making powers: if the “Statement” is a mixed agreement, then it is clear that it is has been concluded in serious violation of art. 218 TFEU. This, perhaps intentional, move by EU (and its Members) almost completely excluded the European Parliament (which in this case probably needed to approve it), the Commission (in its typical role of negotiator) and possibly the European Court of Justice (being impossible to ask its advisory opinion).

These different profiles of possible invalidity of the “Statement” have been the object of three individual applications to the General Court<sup>30</sup>: indeed, legal literature did hypothesise that an action for annulment was possible, under the conditions provided by art. 263 TFUE (den Heijer, Spijkerboer 2016, who maintain that even a validity preliminary ruling should be possible). The General Court concluded, just recently, for the inadmissibility of the applications, moving from the following reasoning: in order to exercise the competence laid down in art. 263 TFEU, the General Court has to assess whether the contested measure (the “Statement”, in this case) is attributable to an EU institution (i.e.: the European Council)<sup>31</sup>; «[i]n order for such a measure to be excluded from review, it is [...] necessary to determine whether, having regard to its *content* and all the *circumstances* in which it was adopted, the measure in question is not in reality a decision of the European Council»<sup>32</sup>; «Press Release No 144/16 relating to the meeting of 18 March 2016 states, first, that the EU-Turkey statement is the result of a meeting between the “Members of the European Council” and their “Turkish counterpart”; secondly, that it was the “Members of the European Council” who met with their Turkish counterpart and, thirdly, that it was “the EU and [the Republic of] Turkey” which agreed on the additional action points

<sup>30</sup> See Action brought on 22 April 2016, Case T-192/16, *NF v European Council*, OJ C 232, 27 June 2016, 25, Action brought on 22 April 2016, Case T-193/16, *NG v European Council*, OJ C 232, 27 June 2016, 26, and Action brought on 19 May 2016, Case T-257/16, *NM v European Council*, OJ C 251, 11 July 2016, 43. The pleas emerging from the three applications were identical: «First plea in law, alleging that the agreement between the European Council and Turkey [...] is incompatible with EU fundamental rights, particularly Articles 1, 18 and 19 of the Charter of Fundamental Rights of the European Union. Second plea in law, alleging that Turkey is not a safe third country in the sense of Article 36 of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [...]. Third plea in law, alleging that Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [...] should have been implemented. Fourth plea in law, alleging that the challenging agreement is in reality a binding Treaty or “act” having legal effects for the Applicant and that the failure to comply with Article 218 TFUE and/or Article 78.3 TFUE, either together or separately, render the challenged agreement invalid. Fifth plea in law, alleging that the prohibition of collective expulsion in the sense of Article 19.1 of the Charter on Fundamental Rights of the European Union is breached». All the applications have been proposed by third country nationals (two from Pakistan, the other one from Afghanistan) staying in refugee camps in Greece: see De Capitani 2016. Apart from individual complaints, the most probable applicant, the European Parliament, did not challenge the “Statement”: that is because, as Favilli (2016, 16) put forward, the Legal Service of the European Parliament did not qualify the “Statement” as an agreement (see (LIBE/8/06399) *Legal aspects of the EU-Turkey statement of 18 March 2016*).

<sup>31</sup> Order of the General Court of 28 February 2017, Case T-192/16, *NF v European Council*, paras. 42-44; order of the General Court of 28 February 2017, Case T-193/16, *NG v European Council*, paras. 43-45; order of the General Court of 28 February 2017, Case T-257/16, *NM v European Council*, paras. 41-43.

<sup>32</sup> *NF v European Council*, para. 45 (emphasis added). See also *NG v European Council*, para. 46, and *NM v European Council*, para. 44.

set out in that statement»<sup>33</sup>. Does «the use of those terms implies, as the applicant submits, that the representatives of the Member States participated in the meeting of 18 March 2016 in their capacity as members of the “European Council” institution or that they participated in that meeting in their capacity as Heads of State or Government of the Member States of the European Union»<sup>34</sup>? According to the General Court, «no conclusion can be drawn regarding the presence of those indications»: in fact, while the online version of the press release has «the indication “Foreign affairs and international relations”, which relates in principle to the work of the European Council», its PDF version «bears the heading “International Summit”, which relates in principle to the meetings of the Heads of State or Government of the Member States of the European Union»<sup>35</sup>. Nor is it possible to infer – following the reasoning of the General Court – something more decisive from the content of the “Statement”: «taking into account the *ambivalence* of the expression “Members of the European Council” and the term “EU” [sic] in the EU-Turkey statement [...] reference must be made to the documents relating to the meeting of 18 March 2016 in order to determine their scope»<sup>36</sup>. And «[i]n this regard, the Court finds that the official documents relating to the meeting of 18 March 2016, provided by the European Council at the Court’s request, show that *two separate events*, that is to say, the meeting of that institution and an international summit, were organised in parallel in distinct ways from a legal, formal and organisational perspective, confirming the distinct legal nature of those two events»<sup>37</sup>. *Ergo*, the “Statement” (regardless of whether

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<sup>33</sup> *NF v European Council*, para. 54. See also *NG v European Council*, para. 55, and *NM v European Council*, para. 53.

<sup>34</sup> *NF v European Council*, para. 54. See also *NG v European Council*, para. 55, and *NM v European Council*, para. 53.

<sup>35</sup> *NF v European Council*, para. 55. See also *NG v European Council*, para. 56, and *NM v European Council*, para. 54.

<sup>36</sup> *NF v European Council*, para. 61 (emphasis added). See also *NG v European Council*, para. 62, and *NM v European Council*, para. 60.

<sup>37</sup> *NF v European Council*, paras. 62 (emphasis added) and 63-71. The reasoning of the General Court seems particularly “original” when it deals with «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»: «Referring to several documents produced by its President, the European Council indicated that, in practice, the Heads of State or Government of the Member States of the European Union conferred upon him a task of representation and coordination of negotiations with the Republic of Turkey *in their name*, which explains his presence during the meeting of 18 March 2016. Likewise, the presence of the President of the Commission in that meeting is explained by the fact that that meeting was *a continuation of the political dialogue* with the Republic of Turkey initiated by the Commission in October 2015 at the invitation of the Heads of State or Government of the European Union made on 23 September 2015. As the European Council correctly points out, those documents refer explicitly and repeatedly, as regards the work of 18 March 2016, to a meeting of the Heads of State or Government of the European Union with their Turkish counterpart, and not to a meeting of the European Council» (emphasis added). See also *NG v European Council*, para. 63 *et seq.*, and *NM v European Council*, para. 61 *et seq.*

it is an agreement or not: a question that the General Court refrains from answering) is not attributable to the EU, thus falling outside the scrutiny of its Court of Justice.

In a surge of legal precision, urged by a specific (and more than suspect) wording of the “Statement” («the EU and [the Republic of] Turkey agreed on [...] additional action points»), the General Court underlines, «[f]or the sake of completeness», that, «even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016 [...], that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister»<sup>38</sup>. At the end of the day, the General Court seems to lever on formal evidence more than to investigate on the very content of the “deal”: the latter suggests, as we tried to demonstrate above (see para. 3), a different result. There is something more, indeed: the cautious approach of the General Court arises in the very singular context where the EU and its Members, on one hand, subcontract non-entry measures to a neighbour country where, on the other, never miss the opportunity to accuse the very same country of seriously violating human rights. If domestic courts are seemingly unwilling to investigate this ambiguity, both on the Union side and on national ones, it is also clear that, at least EU Members (most likely Greece) may have to face scrutiny by the European Court of Human Rights. And in so far as they implemented the “deal”, especially after the inadmissibility orders delivered by the General Court, the application of the *Bosphorus* doctrine could yield, for once, some unexpected results<sup>39</sup>.

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<sup>38</sup> *NF v European Council*, para. 72. See also *NG v European Council*, para. 73, and *NM v European Council*, para. 71.

<sup>39</sup> Judgment of the European Court of Human Rights of 30 June 2005, *Bosphorus Hava Yollar Turizm ve Ticaret Anonim Şirketi v Ireland*, where, as well-known, the Strasbourg Court held that «[i]f [...] the State had been obliged as a result of its membership of an international organisation to act in a particular manner, the only matter requiring assessment was the equivalence of the human rights protection in the relevant organisation» (esp. para. 109).

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