SECTION 3. MIGRATION AND THE LAW

CONSIDERATIONS ON THE LEGAL NATURE AND VALIDITY OF THE EU-TURKEY REFUGEE DEAL

Constanța MĂTUȘESCU*

ABSTRACT

Equally concerned by migratory crisis, European Union and Turkey have negotiated a number of instruments during the last year, including a Joint Action Plan in October 2015 and a statement on 7 March 2016. The cooperation framework was completed on 18 March 2016, through the adoption of a joint statement, which took effect on 20 March. The EU-Turkey statement of 18 March 2016 appears criticisable for several reasons. The question is, beyond the moral and ethical issues, of the legal nature of this document and its legality in accordance with the rules of the European Union law and international law. By making an examination of the applicable provisions of international and European law, international and European jurisprudence and literature, the paper aims to identify the main reasons for that the EU-Turkey statement can be described as treaty, but a treaty whose legality is seriously affected.

Key-words: migratory crisis, the Eu-Turkey deal, legal nature, international law, European Union law.

JEL codes: K33; K37

1. Introduction

It is obvious that today the European Union is facing major challenges related to the large number of people who want to come to Europe, facing the challenge of existing instruments for action being misfit. For approaching this unprecedented migration pressures, the European Union has proposed a number of solutions primarily intended to reduce the unprecedented influx of refugees and migrants and aimed at strengthening the border control, stricter European rules on asylum and the involvement of the third States in controlling migration. Under these measures, special attention is paid to cooperation with Turkey, the country that hosts on its territory over 2.5 million refugees, mostly Syrians, and where they came to Europe only in the year 2015 nearly 860,000 refugees and migrants.

* Associate Professor PhD, “Valahia” University of Targoviste, Faculty of Law and Administrative Sciences.
On 15 October 2015, the EU and Turkey agreed on a Joint Action Plan to prevent irregular migration from Turkey to the EU. Activated at the meeting between the EU and Turkey of 29 November 2015, this action plan contains Turkey’s commitment to intensify its efforts to restrict the movement of people through its territory to Europe and to readmit from the EU all irregular migrants who had transited through Turkey and who were found not to be in need of international protection by EU member states. Whereas in the months following the activation of the plan of action have not been shown notable developments, for the purpose of significantly reducing the uncontrolled arrival of persons from Turkey towards the EU, the dialogue between the two parties regarding the approach of the migration issue has been intensified in the spring of 2016. The culmination of this dialogue was the conclusion on 18 March 2016, of an agreement between the EU and Turkey for the purpose of “deepening Turkey-EU relations as well as addressing the migration crisis”. Having regard to the stated goal of reducing incentives for migrants to seek as irregular routes to the EU and to put in place a system of legal and controlled air inlet, the understanding was presented as the only feasible option to curb uncontrolled flow of migrants through the Aegean and the Balkans, thus putting an end to countless shipwrecks and dead into the sea.

The EU-Turkey deal of 18 March 2016, officially qualified as “statement” and given to publicity in the form of a press release of the European Council, has sparked intense criticism from the civil society and scholars.

A first category of criticism aimed at the deal are considering the questionable character by point of view moral, ethical, and compatible character of this with the international law of human rights, with the international standards for the protection of refugees and the European Union. According to the agreement, “all new irregular migrants crossing from Turkey into Greece islands as from 20 March 2016 will be returned to Turkey”. In exchange, the EU undertook to resettle one Syrian refugee from Turkey to the EU for each Syrian refugee returned from Greece to Turkey (the “one to one” mechanism), up to a maximum of 72,000 people. The European Union also committed to pay up to EUR 3 billion to Turkey (in addition to 3 billion already agreed in the EU-Turkey deal of November 2015) in order to manage the refugees in its territory. It also agreed to lift the visa requirement for Turkish nationals by the end of June 2016 and revive the stalled negotiations for Turkey to accede to the EU. The criticism expressed by a number

---


of international organizations\textsuperscript{3}, non-governmental organizations\textsuperscript{4} and numerous analysts (Peers, 2016; Spijkerboer, 2016; Labayle and De Bruycker, 2016; Fernández Arribas, 2016) to this agreement mainly aimed at that may be subject to rapid return towards Turkey and migrants who are potentially eligible for obtaining the asylum (people in real danger in their home States) and Turkey cannot be considered a “safe third country” in terms of access to the asylum procedure, nor in respect of the protection granted. In conditions in which the fundamental rights in this State have not ceased to degrade, there are serious risks of deportation of such persons by their country of origin (for example, Syria or Afghanistan), where life is put into danger. In these circumstances, the Rapporteur of the Parliamentary Assembly of the Council of Europe\textsuperscript{5} considers that the EU-Turkey Agreement represents “at best and at worst strains exceeds the limits of what is permissible under European and international law”.

The second category of criticism, that we will stop in the following, considering the ambiguous character of the EU-Turkey agreement from the point of view of the legal nature and the procedure followed for its adoption. The official name of “statement” given to this agreement and the fact that, at least at first glance, was not followed the procedure laid down in the article 218 of the Treaty on the Functioning of the European Union (TFEU) for the conclusion of international agreements by the Union (which implies the involvement of the European Parliament and the publishing in the Official Journal of the European Union), of a part of the doctrine (Peers, 2016; Fernández Arribas, 2016) to believe that this does not constitute a binding international agreement, but a simple political agreement or a declaration of intent. Starting from the content of the document and its implications, other authors (Corten and Dony, 2016; Gatti, 2016; Spijkerboer, 2016; Cannizzaro, 2016; Favilli, 2016) considers that the EU-Turkey


deal represents an international treaty and, as such, would be affected by illegality, being adopted with disregard of the rules of the European Union concerning the negotiation and conclusion of treaties with the third countries.

2. The legal nature of the EU-Turkey deal

The definition of the legal nature of the EU-Turkey agreement of 18 March 2016 represents a serious challenge. This is the result of a complex dialogue between the Union and Turkey, the Commission itself stated that “Turkey-EU Declaration of 18 March 2016”, which “was preceded by six principles set out in the Declaration of the Heads of State or the Government on 7 March” and which is based on the Joint action plan of EU-Turkey on 29 November 2015, represents “a new phase in the EU-Turkey relationship”.

This document, which according to its terms it is “concluded” by the European Union, and that aims to strengthen the existing cooperation, instituting at the same time a number of new commitments for the Union (such as, for example, the “one to one” mechanism or the additional financial support assumed in favour of Turkey), has a similar content to that of an international agreement, the purpose of the article 216 of the TFEU. However, its official name is “statement” and not “agreement” and does not have the typical form of an international agreement and has not been concluded in accordance with the procedures laid down for this purpose in treaties.

Thus, concerning the form, the Statement of 18 March does not contain any signature and was not published in the Official Journal of the European Union, appearing as a simple press release of the European Council. Regarding the procedure followed to its conclusion, it is not the one set out in art. 218 of TFEU, which constitutes the legal basis of the conclusion by the Union of international agreements, in the sense of binding legal force commitments. According to this provision of primary law, the international agreements in areas where the ordinary legislative procedure applies (such as migration and asylum, in accordance with the provisions of the article 78-79 of the TFEU) are negotiated by the Commission in principle based on the authorization and instructions given by the Council. On the proposal of the negotiator, is the Council who adopts the decision of concluding the agreement, in principle by a qualified majority and after obtaining the approval of the European Parliament. Where the agreement would take

---


8 CJEC, Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty - Avis 1/75. ECLI:EU:C:1975:145.
exclusively or primarily for foreign policy and common security (what we appreciate that it is not the case in this case), the European Parliament “shall be informed immediately and fully throughout all stages of the proceedings.” This procedure has not been followed in the present case, the Statement of 18 March has been negotiated informally by the President of the European Council, sometimes with the direct involvement of Heads of State and Government, and not by the Commission, and, apparently, was reached during a joint meeting of the European Council and of the representatives of Turkey, making it the subject of a communication by the European Council and not a decision of the Council. The European Parliament not only that it was not called upon to approve the understanding, but it was not at all involved.

Taking into account the lack of form and specific procedure, that there is no provision of EU law authorizing the European Council to conclude international agreements, while the Union treaties do not contain provisions on the procedures for the conclusion of other international non-binding acts, you might say, at first sight, that the Declaration of the EU-Turkey on 18 March represents a non-binding international instrument. In this regard has been pronounced and European authorities, the Legal Service of the European Parliament presenting at 9 May 2016, in front of the Commission for Civil Freedoms, Justice and Home Affairs (LIBE), a point of view on the legal nature of the EU-Turkey deal showing that the Statement is not a binding agreement and that it “was nothing more than a press communiqué.” Having regard to the form and the language used (the description of the commitments of the parties through the use of the term “will” instead of the word “shall”, specific to the international agreements binding), it says that “it is very difficult conclude that both the European Union and Turkey wanted to be legally bound under international law by this declaration.” As such, the Statement represents a simple political commitment between the two parties and all legal changes stemming from this deal will have to follow the usual procedures, which in some cases involve Parliament, such as visa liberalization or disbursing funds for assisting refugees in Turkey. It is also clear that despite the lack of clarity behind the statement, it still conforms to EU law. This opinion is not shared, however, by a part of the EP members that since the conclusion of the agreement had raised a number of questions about its compatibility with the Union law and the international law, and the lack of democratic control, demanding answers from the Council (without receive them) if it considers that the Statement is a treaty.

---


and, if not, to what extent the Turkish part was informed of its non-binding character.

Despite the lack of the name and form specific of the international agreements, a number of arguments in the light of the international law and the European Union law advocates for the qualification of the Statement of 18 March as the international treaty. As shows in most of the works devoted to this subject (Corten and Dony, 2016; Gatti, 2016; Spijkerboer, 2016; Favilli, 2016), the name and form of the document is not a decisive criterion in the assessment of its legal nature. According to the definition contained in the article 2 (1) of the Vienna Convention of 1969 on the law of treaties, which codifies the customary law in this field, the definition to be found in the same terms in article 2 (1) of the Vienna Convention of 1986 on the law of the treaties concluded between the States and the international organizations or between the international organizations, international agreement means a treaty concluded between States or international organizations 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. From this definition, the International Court of Justice (ICJ) said that the international agreements may take a number of forms and be given the diversity of names, and that any international instrument which has been agreed between the parties and containing a list of the commitments undertaken by them creates rights and obligations in international law. Accordingly, it has recognized the quality of the international treaty of atypical international instruments, such as a joint communication11, a joint declaration12 or even the minute of a meeting13.

In turn, the Court of Justice of the European Union (CJEU) stated in a relatively recent judgment14, referring to the Avis 1/75, referred to above, that the term “agreement” used in article 218 of the TFEU “being understood in a general sense to indicated any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation”. Accordingly, the Court held that the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela represents an agreement within the meaning of the article 218 of the TFEU. In another case15, the Court of Justice of the European Union has been called upon to decide the likelihood that a document, hereinafter referred to as “the guidelines” and which do not bear any signature to be consider ed an international agreement. Although he said that is not the case in question, it was stated that the decisive criterion for

---

12 ICJ, Aegean Sea Continental Shelf (Greece v. Turkey), [1978] ICJ Rep 3, paras 95-98.
14 CJEU, Parliament and Commission v Council, Joined cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400.
considering such a document as an agreement the intention of the parties to give its binding force.

It follows, therefore, that according to the international jurisdiction and the European one, the form of a document has less importance for its qualification as an international agreement, its aim and content is the essential criteria in relation to which it may determine if it contains commitments with binding force. The intention of the parties may also be determined in relation to the concrete actions taken to achieve the objectives. From this point of view, the doctrine is quite categorical in considering that the Statement of the EU-Turkey constitutes an international agreement, saying that, from the content point of view, “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” (Cannizzaro, 2016), or that “the Declaration does not contain simply a series of actions that the parties intend to apply on a voluntary basis, but even binding commitments” (Corten and Dony, 2016).

The arguments supporting such a conclusion are related, first of all, by the terminology used in both the text of the Statement, as well as in some of the subsequent references to this document in the practice of the European institutions. In the text of the Statement was expressly stated that EU and Turkey “decided” to end the irregular migration from Turkey to the EU and, in order to achieve this goal, they “agreed” on the following additional action points. Then, it describes the content of these action points, thereby enumerating the commitments to which the parties have consented, specifying that they will be brought accomplished “in full compliance with the EU law and the international law.” Furthermore, in the period immediately following the adoption of the Statement, even the European Commission referred to it as an “agreement”16, it also stating that, ”under the Statement, the EU will resettle a Syrian from Turkey to the EU for every Syrian returned to Turkey from Greek islands”17.

If, from the point of view of terminology, there are little signs of doubt that the commitments assumed through the EU-Turkey Statement of 18 March 2016 have a normative and prescriptive character and not one of recommendation (Corten and Dony, 2016), an argument frequently invoked by the European institutions (including the opinion of the legal service of the European Parliament) to deny the binding nature of the agreement is that it does not represent anything other than a reconfirmation of the existing commitments (arising from readmission agreements concluded between the EU and Turkey and between Turkey and Greece) without

---


containing new obligations that involve changing the legal framework of the Union. Several authors have examined these aspects (Gatti, 2016; Spijkerboer, 2016; Favilli, 2016), noting that, in reality, part of their commitments under this Statement represents the new obligations. Mostly, it is about the return of “all” the irregular migrants to Turkey, the “one to one” mechanism and additional financial commitment assumed by the Union. Thus, the mechanism of repatriation established by the Statement requires consideration of Turkey as the first country of asylum or a “safe” third country under the Directive 2013/32/EU on common procedures for granting and withdrawing international protection, assuming that it satisfies the conditions laid down in the directive. Consequently, Greece has modified its legislation before the return to Turkey of the first applicants for asylum (Spijkerboer, 2016). The idea that EU-Turkey Statement of 18 March does not require any changes to the existing legal framework is contradicted by the proposal of the Commission on 21 March 2016 on the amendment of the Council Decision of 22 September 2015 concerning the imposition of the provisional measures, in respect of international protection in favor of Italy and Greece. Although using a “switching tactically”, this refers to the statement of 7 March 2016 (representing a mere declaration of principles) as a basis for those changes, it is obvious that it aims at ensuring the legal framework for the “one to one” mechanism, referred to above.

3. The Implications of the EU law and the plan of the democratic functioning of the Union

If, on the basis of the arguments presented above, the EU-Turkey Statement of 18 March 2016 can be defined as an international agreement, it raises a number of questions about its legality and the existing legal possibilities to act against him, but also from the point of view of the democratic considerations.

The qualification of the agreement as a treaty not only involves the obligation of parties to meet their commitments arising out of this, but also opens up the possibility of a judicial examination before the Court of Justice for any possible conflicts with the provisions of the Union treaties or with other international agreements to which it is a party. How to obtain an advisory opinion on the part of the Court pursuant to article 218, para. 11 of the TFEU is no longer possible whereas understanding has already been completed, the solution remains a posteriori control path of direct actions, pursuant to art. 263 of the TFEU, or a preliminary reference, pursuant to art. 267 of the TFEU.

---

Promoting an action in annulment before the Court might be founded on the breach of essential procedural rules laid down in the article 218 of the TFEU and, at least in principle, on the violation of the norms on substantial law on the protection of fundamental rights. Regarding this latter argument, it seems rather difficult to report in terms of understanding and wide enough freedom seems to be granted to the Member States for the implementation of the obligations arising from this (Spijkerboer, 2016). Although the Court of Justice stated in its jurisprudence\(^\text{19}\) that “an action for annulment must be available in the case of all measures adopted by the EU institutions, irrespective of their nature or form, provided that they are intended to have legal effects”, the possibility that the Statement of EU-Turkey to be aborted on the path of such shares arises however as quite unlikely. None of the “privileged claimants”, namely the European Parliament, the Council, the Commission or the Member States, does not seem concerned to use this route, and the period within which the action can be promoted (two months after the entry into force of the contested act) seems to be exceeded, if we relate, for example, the early returns of the applicants for asylum from Greece by Turkey, which took place at the beginning of April 2016. As regards the actions for annulment brought by natural or legal persons, although a number of three such actions have already been introduced by the applicants for asylum in Greece in order to prevent their return to Turkey\(^\text{20}\), bearing in mind the requirement laid down in article 263 para. 4 of the TFEU as the act in question to regard them “directly and individually”, but also how narrowly the Court made its interpretation in its previous jurisprudence, it is difficult that the requirement will be fulfilled in these cases. In addition, as noted in the doctrine (Corten and Dony, 2016), even in the case of acceptance of such requests, the result of the constant jurisprudence of the Court, with reference to the judgment of 9 August 1994 in \textit{France v Commission}, cited above, that the Court of Luxembourg will only be able to nullify or invalidate the decision concluding an international agreement and not the agreement itself.

However, the Court may, on the occasion of the trial of the alleged cancellation requests above, provide clues as to how it relates to the judgement deduced document, what could help clarify the legal nature of it. Moreover, in case of reminded disputes, the Council was notified by the European Court to answer the question if it has requested to state whether ‘additional action points’ referred to in the ‘EU-Turkey Statement, 18 March 2016’ can be regarded as reflecting the existence of an oral/unwritten agreement or of a written agreement. In the absence of such an agreement, the European Council, the Council of the European Union and/or the Commission are requested to send to the General Court any document\(^\text{19}\) \textit{CJEU, Commission v Council, C-425/13, ECLI:EU:C:2015:483.}\n\(^\text{20}\) \textit{CJEU, Cases T-192/16 NF v. European Council, T-193/16 NG v. European Council and T-257/16 NM v. European Council.}
making it possible to determine the parties which agreed the ‘additional action points’ referred to in the ‘EU-Turkey Statement, 18 March 2016’21.

An indirect possibility to obtain a solution of the Court is the formulation of the national court who judges individual complaints of the persons subjected to the measures laid down in the refund agreement and in which it was invoked by the lack of validity of the agreement, of a preliminary reference of its validity, in accordance with the article 267 of the TFEU.

Beyond the legal aspects of EU-Turkey agreement, which, undoubtedly do not stop at the above stated, the most problematic issue related to this deal shall be that of its consequences on the democratic foundations of the Union. From the point of view of the EU rules, it appears pretty clear that the Statement of 18 March was reached with the total disregard of the provisions of art. 218 of the TFEU, which represents, according to the qualification given by the Court of Justice in the case Commission v Council, cited previously, “an autonomous and constitutional provision of constitutional scope, in that it confers specific powers on the EU institutions” in order to have the “establishing balance between those institutions.” The way it was adopted the agreement with Turkey clearly unbalanced institutional balance to the detriment of European Parliament, affecting the European governance, because the European Parliament’s involvement in the process of concluding the international treaties, is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly”22.

4. Concluding remarks

The EU-Turkey deal describes a new mode of action at the European level, where often the alternative decision-making procedures are preferred to the detriment of those established by the Treaties, and in which the centre of gravity is moved towards the Member States, with the denial of the institutional pluralism (Cannizzaro, 2016).

An undertaking by the heads of States and Governments of the international commitments on behalf of the European Union, in a matter within the competence of the Union, through recourse to various “legal engineering” to mask the mandatory nature of the commitments, according to some authors with the obvious intention to circumvent the democratic control, both European and national level (Favilli, 2016; Corten and Dony, 2016), seems hard conciliating with the democratic standards that the Union has assumed.

To paraphrase an author (Gatti, 2016), the EU-Turkey deal of 18 March 2016 is “bad for refugees” and “bad for democracy”, representing a dangerous precedent

---

both in terms of standards of protection of the fundamental rights and the respect of the democratic standards at the European level.

An additional reason for concern is the lack of reaction of the European Parliament, whose prerogatives have been infringed by the adoption of the Statement of 18 March and which has not bring action against it. Regardless of the outcome of such actions, it would have at least meant to discourage the European Council to replace the democratic debate and other delicate issues.

References


