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It wasn't me!

The Luxembourg Court Orders on the EU-Turkey Refugee Deal

Sergio Carrera, Leonhard den Hertog and Marco Stefan

Summary

It wasn't me! This was in essence what the European Council, alongside the Council and the Commission, answered to the Court of Justice of the European Union (CJEU) when asked about the authorship of the EU-Turkey Statement. This is surprising, as the Statement – often referred to as the EU-Turkey Refugee Deal – was widely celebrated by the EU institutions themselves as the main EU response to the 'refugee crisis'.

The CJEU cases arose when three asylum seekers located in Greece lodged applications for annulment of the EU-Turkey Statement, challenging its legality. The applicants argued that the EU-Turkey Statement is unlawful because it violates inter alia the principle of non-refoulement and the prohibition of collective expulsion. They also contended that the Statement fails to comply with the Treaty procedures on EU decision and international treaty making. In its Orders, however, the Court found that it lacked jurisdiction to rule on the Statement's lawfulness, asserting that the EU itself is not party to the agreement with Turkey but rather the 28 member states themselves.

We argue in this contribution that the EU institutions purposefully – and unfortunately, successfully – circumvented the democratic and judicial checks and balances as laid down in the EU Treaties. We find this problematic, especially as the Statement constitutes a measure that produces severe legal effects for the rights of asylum seekers and fundamentally alters the course of EU external migration policy. By choosing to conduct major policy decisions through press releases and refusing to take legal responsibility for the Statement, the EU institutions themselves jeopardise the Treaty-based framework that aims to ensure democratic rule of law and fundamental rights.

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Introduction

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 Turkey's President Erdoğan to discuss Turkey-EU relations and address the so-called 'European refugee crisis'.

The main output of that meeting was a press release entitled the "EU-Turkey Statement" and posted on the website of the European Council and the Council of the EU.[1] The Statement, which has come to be known as the "EU-Turkey Refugee Deal", has been officially presented as one of the flagship responses *by the EU* to the crisis.

Both the European Council and the European Commission have regularly claimed ownership of the Statement. They have often praised its effectiveness in decreasing the number of entries by asylum seekers from Turkey into Greece. One of the Statement's main action points was as of 20 March 2016 all new asylum seekers irregularly entering Greece from Turkey would be returned to Turkey.

The EU-Turkey Statement has been the subject of much controversy since its inception. Among the main issues for discussion, two key questions have attracted most of the attention, the first being it actual legal nature from the perspective of European law. That is, what exactly is it? Is it an international agreement or something else? And secondly, does it comply with the EU Charter of Fundamental Rights in light of the unsafe conditions asylum seekers and refugees encounter in Turkey?

These questions have been widely debated in civil society and academic and political arenas. In April 2016, they also spurred two Pakistani nationals and one Afghan national located in Greece to challenge the legality of the EU-Turkey Statement before the Court of Justice of the EU (CJEU) in Luxembourg. The General Court reached its conclusions in the form of three Court Orders (*NF, NG and NM v European Council*, T-192/16, T-193/16 and T-257/16) published 28 February 2017.[2] It is important to note that these Orders by the General Court have recently been

[1] European Council (2016), EU-Turkey Statement, 18 March, Press Release. (http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/).

[2] Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council*. See also http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf. The General Court stated, "Consequently, it is for the Court to assess whether the EU-Turkey statement, as published by means of that press release, reveals the existence of a measure attributable to the institution concerned in the present case, namely, the European Council, and whether, by that measure, that institution concluded an international agreement, which the applicant describes as the 'challenged agreement', adopted in disregard of Article 218 TFEU and corresponding to the contested measure" (para. 46 of Orders).

appealed before the Court of Justice. When referring to 'the Court' in the remainder of this paper, we refer to the General Court.[3]

One of the Court's most surprising findings was that the EU-Turkey Statement was not an act or international agreement attributable to the European Council, but rather that the real authors were the heads of state or government of the EU member states and their Turkish counterparts. Consequently, the Court declared that it did not have jurisdiction to assess the pleas, because none of the EU institutions featured among rhe authors of the EU-Turkey Statement.

This Policy Insight examines the background and main findings of these Orders, as well as the positions of the various European institutions – the European Council, the Council of the EU, and the European Commission – during the proceedings before the Court. Ever since the release of the EU-Turkey Statement, these EU institutions have publicly claimed ownership of the refugee deal and actively committed to its implementation. Yet, before the Court the same institutions maintained the following position: It wasn't me. As the cartoon below illustrates (see section 2), this strategy effectively and transparently aims at evading any EU legal responsibility for the Statement's authorship and legal effects.

The Policy Insight also assesses the wider implications of the Court's findings for both the framework of democratic rule of law and fundamental rights laid down in the 2009 Lisbon Treaty, and the legitimacy of EU responses to the 'European refugee crisis'. We argue that by choosing to issue the statement in the form of a press release, the heads of state or government rendered inapplicable the Lisbon Treaty innovations, most crucially the democratic and judicial 'checks and balances', that are otherwise applicable to EU international treaty-making.

Democratic scrutiny (consent enshrined in Article 218(6.a) of the Treaty on the Functioning of the European Union - TFEU) by the European Parliament was bypassed, as was the jurisdiction of the CJEU to examine compliance with EU Treaties and the EU Charter of Fundamental Rights, as confirmed by the CJEU's orders. We argue that by purposely avoiding their obligations under the Treaties and EU law, the heads of state or government acted in *mala fide* and thereby jeopardised their legal duties of sincere cooperation laid down in Article 4.3 of the Treaty on the European Union (TEU).

By rejecting ownership of and responsibility for the Statement before the Court – while still being complicit in its origins and implementation – the European Council, the Council and the Commission failed to play the roles attributed to them by the Lisbon Treaty. This in turn allowed 'intergovernmentalism' to find its way back into EU policy-making in the areas of migration and asylum. The result is a strange legal creature that at its best constitutes an example of 'worse' rather than 'better' regulation which exposes and ultimately undermines the legitimacy of the EU's responses to the 'refugee crisis'.

[3] Cases C-208/17 P, C-209/17 P and 210/17 P, *NF, NG and NM v European Council*.

1. 'Zooming in' on the Court Orders: Facts of the case and the search for authorship

The applicants had entered Greece via Turkey. By their own accounts, they applied for asylum in Greece under pressure from the Greek authorities. They claimed they "never wished or had the intention to submit such an application in Greece" because of the member state's poor reception conditions "particularly in terms of infrastructure, and the length of time for the processing of applications for asylum and systematic deficiencies in the implementation of the European Asylum System".[4]

Nevertheless, all three individuals applied for asylum in Greece out of fear of being returned to and detained in Turkey and eventually expelled to their countries of origin. One of the applicants reported he "reluctantly accepted having his fingerprints taken in Moria" (Greece).[5]

In their Court challenge, the three applicants maintained, *inter alia*, that the EU-Turkey Statement was unlawful because it violated the principle of *non-refoulement* and the prohibition of collective expulsion. Furthermore, they challenged its legality on the basis that it makes the unlawful assumption that Turkey could be considered a 'safe third country'.

They also argued that the EU-Turkey Statement ('the challenged agreement') *de jure* constituted an international agreement attributable to the European Council. This would mean that it should fall within the scope and decision-making procedures foreseen in Article 218 TFEU (stipulating the procedure for concluding international agreements) and/or Article 78 TFEU (stipulating the legal basis for EU asylum policy). The alleged failure to comply with these Articles would thus render the 'statement' invalid, according to the applicants.

The decision to adopt the EU-Turkey Refugee Deal in the form of a non-binding 'statement' poses crucial questions as to the document's legal nature under international and EU law, and to the democratic and judicial scrutiny standards applicable to it.

While the use of the term 'statement' appears to reflect the parties' preference for a 'non-binding measure' that excludes the European Parliament's consent and the CJEU's review, the term cannot *de jure* exclude the measure from being considered a legally binding international agreement and legal act. It is the content and not the form of an instrument that determines its legal nature.[6]

The choice of instruments and procedures to conduct EU law- and policy-making is not at the arbitrary will or complete discretion of the European institutions or the member states. In a post-Lisbon Treaty landscape, the EU's law- and policy-making in the field of migration and

[4] Paragraph 12 of Order in Case T-257/16, see also para. 12 in each of the other two Orders. For the sake of brevity, this Policy Insight will only refer to the Order in Case T-257/16, as the other two Orders are almost identical.

[5] Para. 12 of Order in Case T-257/16.

[6] M. den Heijer and T. Spijkerboer (2016), "Is the EU-Turkey refugee and migration deal a treaty?", EU Law Analysis Blog, 7 April (http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html). See for a similar line of reasoning: M. Gatti (2016), "The EU-Turkey statement: a Treaty that violates democracy (pt. 1 of 2)", Blog of the European Journal of International Law, April https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/

asylum are subject to a number of material and procedural safeguards, and the full application of 'Community method' legal guarantees and procedures.

Therefore, a key point of the cases brought before the Court consisted of the determination of the Statement's authorship, based on its content and all the circumstances in which it was adopted. Was the Statement a measure adopted by an EU institution? If the Court answered yes to this question, it would have also been expected to test the compliance of the Statement with human rights standards.

As the Court reminded us in its Orders, also because the Lisbon Treaty established the European Council as an EU institution, measures adopted by the European Council "no longer escape the review of legality".[7] This means that pursuant to Article 263 TFEU,[8] the Court has jurisdiction to assess the legality of a measure adopted by the European Council, whatever its nature or form, provided that it is intended to produce legal effects *vis-à-vis* third parties.

2. Positions of EU institutions and the Court's conclusions: It wasn't me!

Right after the Statement's publication on the European Council/Council website, several European institution representatives celebrated both the symbolic and operational significance of the mutual commitments undertaken in the Statement with Turkey.

The European Council, the Council, and the Commission publicly praised the EU-Turkey Statement as *the* main EU policy response to the 'refugee crisis'. Certainly, the commitment to the actual implementation of the Statement is reflected in a number of EU legal, policy and budgetary measures that followed the document's release. These measures, such as the €3 billion Facility for Refugees in Turkey,[9] show how the EU institutions as well as Turkey understand the Statement as binding them to implementing its elements *bona fide* (in good faith).

Against this background, it is all the more surprising that all these European institutions distanced themselves from the authorship and legal responsibility for the Statement, arguing before the Court that it is actually not any form of agreement to which they are parties.

The European Council argued that "to the best of its knowledge, no agreement or treaty […] had been concluded". It added that the Statement was merely "the fruit of an international dialogue between the Member States and [the Republic of] Turkey and — in the light of its content and of the intention of its authors — [was] not intended to produce legally binding effects nor constitute an agreement or a treaty".

Hence the European Council did not consider itself the author of the Statement. Instead, it provided the Court with a number of meeting and protocol documents to support its position

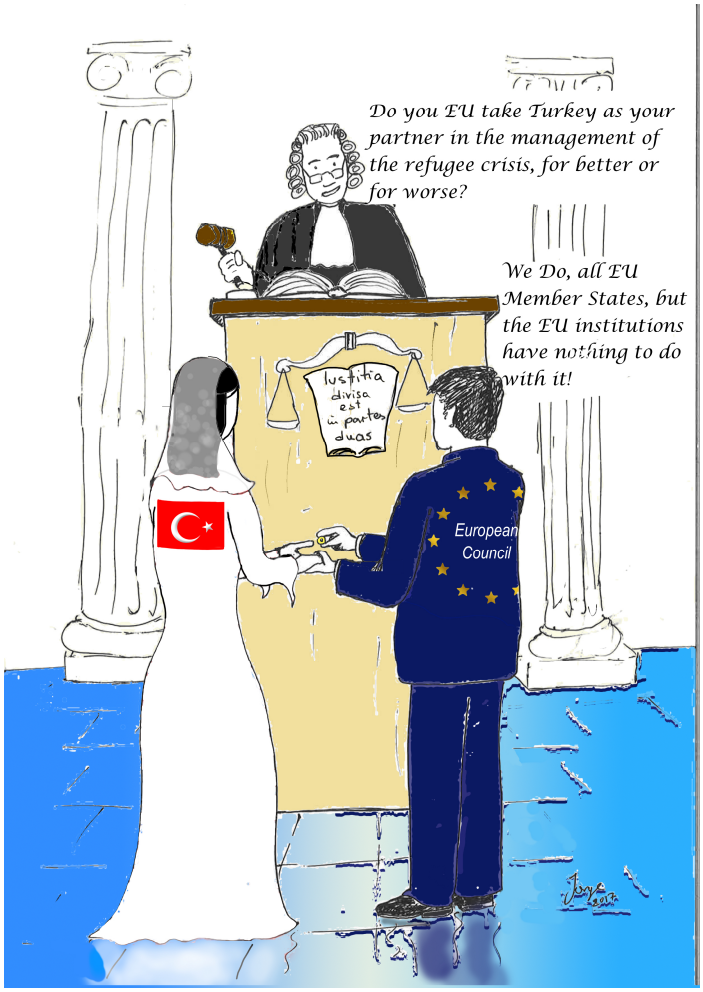
[7] Ibid., para. 43.

[8] According to Article 263 TFEU, the Court can only review the legality of acts adopted by EU institutions, bodies and agencies.

[9] See: https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en.

that the Statement was rather concluded with Turkey at a separate international summit of the member states' heads of state or government, outside the purview of the European Council.

EU-Turkey marriage vows



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According to the European Council, the terms in the press release, such as references to "the EU", have to be seen as "journalistic".[10] The "inappropriate use of the expression 'Members of the European Council' and the term 'EU' in a press release" should not be understood to "bind the European Union in any way". Thus the Statement is to be understood as "merely a political commitment of the Heads of State or Government of the Member States of the European Union vis-à-vis their Turkish counterparts".[11]

[10] Ibid., para. 57.

[11] Ibid., para. 59.

The fact that European Council President Tusk actively participated in the international summit with Turkey was explained by stating that he was tasked by the heads of state and government with "the representation and coordination of negotiations with the Republic of Turkey in their name". So if the European Council wasn't the author, was it the Council?

The Council also submitted to the Court that "it was not the author of the EU-Turkey Statement and that it had not been in any way involved in the structured dialogue that took place between the representatives of the Member States and the Republic or Turkey".[12] The Council maintained that while the Permanent Representatives Committee (Coreper) admittedly contributed to the preparation of meetings of the European Council, "some of which concerned the management of the migration crisis",[13] the Council had not prepared the 18 March 2016 summit between the members of the European Council and the Turkish prime minister. The Council stated that it "fully shares" the European Council's position that "no agreement or treaty had been concluded between the European Union and the Republic of Turkey in connection with the migration crisis".[14]

So what about the European Commission? The Commission claimed that "no agreement" had been concluded between the EU and the Republic of Turkey. Rather, the Commission argued, it is clear "from the vocabulary" that the EU-Turkey Statement constituted a "political arrangement" reached by the heads of state or government of the member states.[15]

The Orders acknowledge that several elements of the Statement may create the impression that the European Council, on behalf of the EU, had concluded an agreement with Turkey. The Court, however, accepted the European Council's argument that separate meetings had taken place, one of the European Council on 17 March and one of the heads of state or government at an international summit with Turkey on 18 March. Despite recognising that the Statement published as a press release includes "inaccuracies",[16] and is "ambiguous",[17] the Court found that it was during the international summit that the Statement with Turkey was concluded.

The Court also held that "no conclusions can be drawn" from indications of the European Council's involvement in such a press release, and that "official documents…provided by the European Council at the Court's request" show that a separate international summit took place.[18] It found that the terms used, such as "Members of the European Council" and "the EU", were ambivalent and "could, admittedly, imply that the representatives of the Member

[12] Ibid., para. 29.

[13] Ibid.

[14] Ibid., para. 30.

[15] Ibid., para. 28.

[16] Ironically, the word "inaccuracy" is only mentioned in the Court's press release on the judgment and not in the judgment itself.

[17] General Court (2017), op. cit., para. 77.

[18] CJEU, General Court, Case T-257/16, op. cit., resp. para. 54 and 61.

States of the European Union had acted, during the meeting of 18 March 2016, in their capacity as members of the 'European Council' institution."[19]

The HTML and PDF versions of the Statement played a key role in the arguments, as only the PDF version mentioned "international summit" (albeit next to the European Council logo). The Court ultimately followed the arguments put forward by the European Council, the Council and the Commission, and found that "the plea of lack of jurisdiction raised by the European Council must be upheld".[20]

The Court held that "even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, 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."[21] Thus the Court concluded that it had no jurisdiction to rule on the lawfulness of an international agreement finalised by the member states.[22]

4. The challenges to EU democratic rule of law: reversing 'Lisbonisation' of EU migration policy

The Court Orders make determining (and holding to account) the responsible actor more difficult, especially when all the three EU institutions in question claim, 'It wasn't me'. This serious challenge to the transparency, accountability and quality of EU decision-making also means that extra-Treaty decision-making can (and in fact has) effectively evaded the Lisbon Treaty democratic rule of law framework, including EU parliamentary scrutiny and judicial review.

A central objective of the Lisbon Treaty was to expand the application of the 'Community method' of cooperation to all areas falling under the rubric of the Area of Freedom, Security and Justice (AFSJ). It also made the European Council an EU institution. Borders, asylum and migration policies fall under the Union's Ordinary Legislative Procedure and the Treaty procedures for concluding international agreements, with full involvement of the Parliament and the Court's jurisdiction.[23] This aimed at addressing the democratic and judicial deficits that characterised European cooperation under the former 'Third Pillar' in some of these domains.

[19] Ibid., resp. para. 60 and 55.

[20] Ibid., resp. para. 73.

[21] Ibid., para. 72.

[22] Ibid., resp. para. 76. Interestingly, the Court deviated from the standard rule that applicants, if unsuccessful, pay the costs of the other party. Rather, by using a rule that invokes reasons of "equity", the Court stated: "[I]n view of the circumstances of the present case, in particular the ambiguous wording of Press Release No 144/16, the Court deems it fair to decide that each party is to bear its own costs".

[23] See resp. Art. 294 and Art. 218 TFEU.

The EU-Turkey Refugee Deal challenges these Treaty-based standards. It constitutes a form of crisis-led governance that falls outside and challenges the EU Treaty framework. The Statement can therefore be read as an attempt to reverse 'Lisbonisation' of EU migration policies and a far-reaching step backwards to intergovernmental logics of European cooperation which escape the rules and procedures laid down in the Treaties and inter-institutional arrangements. Claiming that it was in fact the member states which agreed on the Statement in their capacity as 'independent international law actors' also results in excluding the involvement of the Court of Justice in Luxembourg in scrutinising the deal's compliance with EU refugee rights commitments and the EU Charter of Fundamental Rights.

Indeed, the EU has exercised its competences in these areas extensively during the last 18 years of European integration. The ERTA doctrine developed by the Court[24] and laid down in Article 3(2) TFEU is important in this regard. It implies that the EU has an exclusive external competence in harmonised policy fields, and in fields "covered to a large extent" by common Union rules.[25] Member states cannot independently enter into international obligations outside the EU institutions in such fields, "even if there is no contradiction between those commitments and the common rules".[26]

We argue that that the EU-Turkey Statement includes fields "covered to a large extent" by existing common Union rules adopted in the areas of external border management, asylum, and return. The competence acquired by the EU in these specific policy areas, should have prevented member states from acting independently to conclude an international agreement outside any EU institution and venue. Even if an EU exclusive external competence in these fields would be found not to exist, then at least the EU-Turkey Statement should have been concluded as a 'mixed agreement', i.e. covering member state and EU competences. While the Luxembourg Court found that the EU-Turkey Statement was not an 'EU' international agreement, it could have invalidated it on these very bases.

Furthermore, the cases brought before the Luxembourg Court reveal several examples of *mala fide* actions falling within the scope of Article 4.3 TEU. This provision envisages the duty of sincere and loyal cooperation by member states and European institutions. Its compliance is considered to be central in ensuring trust and loyalty-based cooperation among all relevant European institutions and respective member state governments.

By concluding the EU-Turkey Refugee Deal outside the EU legal framework and decision-making process, the member states purposely undermined EU *acquis* consistency and 'international unity' in these domains. As the Court stated in the 2006 *Lugano Convention* case, member state

[24] CJEU, Case 22/70, *ERTA*, [1971] ECR 263. It is further defined in a large number of cases, see e.g. the Open Skies cases: Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, para. 82; Case C-476/98 *Commission v Germany* [2002] ECR I–9855, para. 108.

[25] CJEU, Opinion 2/91, *ILO* [1993] ECR I-1061, para. 25.

[26] G. De Baere (2010), "The Framework of EU External Competences for Developing the External Dimensions of EU Asylum and Migration Policy", Leuven Centre for Global Governance Studies, Working Paper No. 50, May.

external action should "not be capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish".[27]

Furthermore, the European Commission should have better fulfilled its role as guarantor of the Treaties. It's surprising that the Commission has not stood up to defend its competences in this field. This is quite a contrast to the numerous cases in which the Commission has argued before the Court – based on the ERTA doctrine – that member states should refrain from entering into international agreements that infringe on EU external competence and instead act within the EU institutional framework.[28] It this case, the EU institutions helped the member states act outside the Treaty-based rule of law framework of checks and balances. The Commission should not have allowed, and indirectly supported, member state governments to act outside EU framework responses in domains belonging to shared EU competence. Its position undermined its own rules on 'better regulation and law-making'.

The fact that the Commission eventually proposed legislative amendments to the Asylum Procedures Directive COM(2016)476[29] clearly demonstrates that in its current form EU asylum law does not envisage practices of the kind mentioned in the EU-Turkey Statement. This appears particularly evident when it comes to (in)-admissibility decisions which the new recast Asylum Procedures Directive proposal would require EU member states to adopt (automatically) on the basis of 'safe third country' concept, as currently interpreted by the Commission.[30]

The European Parliament has repeatedly expressed concerns over the decision to deliver this defining EU response to the so-called 'European refugee crisis' through a 'Statement'. The Parliament's Legal Service has argued that the Statement was not a proper international agreement, with some MEPs denouncing it as a strategy to avoid the Parliament's involvement.[31] Following the Court Orders, several MEPs recently posed parliamentary questions to the European Commission, asking what the legal basis now is for the involvement of the EU institutions in the implementation of the Statement.[32]

We understand the EU-Turkey Statement to constitute extra-Treaty decision-making in EU migration policy. Unfortunately, this confirms a wider tendency that is currently affecting the cogency of EU governance, and not only in this policy field. An example of this general trend

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[27] CJEU, Opinion 1/03, *Lugano Convention* [2006] ECR I-1145, paras 126, 127 and 133.

[28] See, e.g. the cases referred to here above in the preceding footnotes: Case C-467/98, *Commission v Denmark*; Case C-476/98 *Commission v Germany*.

[29] Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, 13.7.2016.

[30] See European Commission, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final.

[31] N. Nielsen (2016), "EU-Turkey deal not binding, says EP legal chief", *EUobserver*, 10 May (https://euobserver.com/justice/133385).

[32] See www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BOQ%2BO-2017-000014%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN.

was provided by the proposed 'new deal' for the UK in the EU, i.e. pre-Brexit, which was unilaterally drafted by European Council President Tusk. Leading to a Decision of the Heads of State or Government, it aimed to evade EU democratic and judicial review. UK government actors and the EU institutions were well aware that the EU rule of law framework included the possibility for the CJEU to review and eventually overturn parts of the 'deal', which they therefore attempted to circumvent.[33]

This is analogous to the EU-Turkey Statement: the EU institutions were most likely also quite aware of possible challenges before the CJEU and thus opted for an extra-Treaty 'Statement' concluded by the heads of state or government. The Court Orders discussed in this contribution clearly indicate the Statement constituted a *mala fide* attempt to circumvent the set of guarantees and standards on decision-making and democratic and judicial scrutiny carefully laid down in the Treaties.

One can hardly underestimate the significance this form of 'crisis-led policy-making' will have. Firstly, it will exacerbate mistrust in EU inter-institutional relations. Secondly, it will make more remote the possibility of resolving legal dilemmas caused by the negative impacts of the EU-Turkey Statement on fundamental rights of asylum seekers in the EU.

5. Conclusions

We recently learned, one year after the adoption of the EU-Turkey Statement, that the EU had nothing to do with the EU-Turkey Statement. Despite publicly taking ownership of and actively participating in its implementation, European institutions have successfully claimed before the Court in Luxembourg that they were not the authors of the Statement.

This is troubling, not only because the EU-Turkey Statement cannot be well 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 EU policy response to the 'European refugee crisis'. Certainly, in the design, conclusion and implementation of the Statement, the role of EU legal competences and budget and operational activities has been paramount.

The European Council's line of reasoning before the Court, as supported by the Council and the Commission, was effectively: 'It wasn't me!' The Court Orders concluded that the author of the statement was in fact not the European Council (or any other EU institution), but rather member state heads of state or government. As noted in the introduction, the Orders by the General Court have recently been appealed before the Court of Justice. This means that the Court of Justice could take a different approach by not following the line of reasoning put forward by the EU institutions and the General Court. From this Policy Insight, four main conclusions can be drawn:

[33] See E. Guild (2017), *BREXIT and its Consequences for UK and EU Citizenship or Monstrous Citizenship*, Leiden: Brill Nijhoff, pp. 16-19.

First, the EU should not have it both ways. It is illogical that the EU is heavily involved through its legal competences and budget and operational activities, and at the same does not legally see itself as a party to any agreement that forms the basis of these activities. This reasoning defies any meaningful understanding of an effective delivery of transparent and accountable EU governance under the Lisbon Treaty.

In a post-Lisbon Treaty era, where the European Council is a European institution, such 'smoke and mirrors' may apparently work before the Luxembourg Court, but it is out of line with the EU general principle of democratic rule of law, which is not only a core EU value but also a fundamental ingredient for legitimate EU decision-making. It also directly undermines the principle of sincere and loyal cooperation laid down in Article 4.3 TEU.

By formally adopting crucial policy responses in the form of a press release containing ambiguities and inaccuracies, EU democratic scrutiny and judicial review has been evaded. The result begs the question of how much extra-Treaty and press release-based policy-making the EU constitutional system can endure without profoundly undermining its existence.

A second conclusion is that the outcome should make all of us rethink the deeper implications of the proliferation of extra-Treaty policy-making in migration and asylum policy. In practice, shifting legal responsibility over measures such as the EU-Turkey Statement has resulted in negative repercussions on the ground, including well-documented violations of asylum seekers' fundamental rights.[34]

The Statement itself reads that it constitutes a "temporary and extraordinary measure".[35] This kind of crisis-led decision-making has also attracted criticism by independent international actors such as the UN and the Council of Europe.[36] Extra-Treaty and press release-based policy-making challenges the EU's legitimacy in advancing refugee protection in Greece and Turkey, and hampers commitments undertaken within the United Nations, namely in the framework of the Global Compacts Process.[37] This approach undermines EU fundamental values and its own strategic and diplomatic interests.

Certainly, it is past time to correct this and return to the law- and policy-making within the rule of law framework set up by the Lisbon Treaty. This entails EU institutions giving priority to the proper reform and implementation of the EU *acquis* in these fields in Greece and beyond, in particular the Common European Asylum System and the necessary reform of the Dublin system.[38]

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[34] See Amnesty International (2017), "A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal", EUR 25/5664/2017, 14 February (www.refworld.org/docid/58a30b0b4.html).

[35] EU-Turkey Statement, op. cit., point 1.

[36] See Council of Europe Parliamentary Assembly (2016), "The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016", Doc. 14028, 19 April.

[37] Refer to https://refugeesmigrants.un.org/refugees-compact.

[38] See also: S. Carrera and E. Guild (2015), "Can the new refugee location system work? Perils in the Dublin logic and flawed reception conditions in the EU", CEPS Policy Brief, No. 334, October; E. Guild, C. Costello, M. Garlick,

It also entails that the EU-Turkey Readmission Agreement (EURA) should govern activities in the field of expulsion and readmission, rather than EU-financed and coordinated returns through bilateral cooperation. As the EURA clearly states, it cannot affect the Union's and member states' obligations under the Geneva Refugee Convention, its 1967 Protocol, the European Convention for Human Rights or, of course, applicable EU law in these areas.[39]

Third, both increasing political instability and widespread rule of law and human rights violations provide mounting proof that Turkey cannot actually be considered 'safe' for asylum seekers. This has also been clearly confirmed by the Greek Asylum Appeal Committees.[40]

Assessing the safety of a third country of transit requires a careful and factual evaluation of the concrete risks that asylum seekers face in the eventuality of their return to it. In a recent judgment,[41] the ECtHR found Hungary in violation of Article 3 of the ECHR for automatically declaring asylum applications inadmissible based on the qualification of Serbia as a 'safe third country'. The Court stressed that "it is incumbent on the domestic authorities" to assess the fundamental rights risks associated with the expulsion of asylum seekers. Information about such risks should be ascertained from the many "reliable and objective sources", such as those provided by the UNHCR. Only upon a rigorous evaluation of evidence can expulsion of asylum seekers be considered, and it must take place according to adequate procedural standards. By analogy, similar practices related to the claimed inadmissibility of applications in Greece – by framing Turkey as a 'safe third country' – could be found in violation of the Convention and thereby trigger the responsibility of the state parties involved.

Fourth, from a foreign affairs perspective, these kinds of 'deals' leave the EU in a highly vulnerable and dependent position *vis-à-vis* a third-country government. On a number of occasions, Erdoğan has threatened to suspend the agreement. By allowing itself to be held hostage by the Turkish president,[42] the EU automatically weakens its own ability to address the

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and V. Moreno-Lax (2015), "Enhancing the Common European Asylum System and Alternatives to Dublin", CEPS Paper in Liberty and Security in Europe, No. 83, September.

[39] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, *OJ* L 134/3, 7.5.2014.

[40] In light of the limited protection perspectives and the risks to which would-be asylum seekers and actual refugees are currently exposed in Turkey, Greek asylum appeals authorities have consistently ruled that Turkey cannot be generally considered, *de jure* and *de facto*, a safe country. In fact, as of 2 March 2017, out of the 439 appeal decisions on admissibility, 415 second-instance appeal decisions reversed the first-instance inadmissibility decisions, and only 24 second-instance appeal decisions confirmed the first-instance inadmissibility decisions. The total figure includes second-instance decisions reversing first-instance inadmissibility decisions, as well as granting refugee status. See, European Commission (2017), Fifth Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 204 final. See also: S. Carrera and E. Guild (2016), "EU-Turkey plan for handling refugees is fraught with legal and procedural challenges", CEPS Commentary, March. In the meantime, Turkey itself has also become an ever more important source country of asylum applicants in the EU, reported both in Germany and in Belgium by their respective authorities. See www.reuters.com/article/us-germany-turkey-migrants-idUSKBN13D00P and www.knack.be/nieuws/belgie/explosieve-stijging-van-turkse-asielaanvragen-in-belgie/article-normal-835685.html.

[41] ECtHR (2017), *Ilias and Ahmed v Hungary* (Application No. 47287/15), 14 March.

[42] See S. Blockmans and S. Yilmaz (2017), "Why the EU should terminate accession negotiations with Turkey", CEPS Commentary, April.

ever-worrying general situation in Turkey – itself now a source of asylum applicants – regarding rule of law, fundamental rights and individual freedoms. This erodes EU legitimacy *vis-à-vis* Turkey but also on a global scale. With accession nowhere closer and visa liberalisation paralysed, the Statement results in a narrowing or closing of access to asylum in Europe and an absence of cooperation on legal migration. Urgent priority should be given to reforming (and moving beyond) the EU Dublin System of sharing responsibility for asylum applications.[43]

A 'crisis' should not exempt European Union actors from their obligation to ensure that policy responses are in full compliance with EU democratic rule of law standards laid down in the Treaties and law-making rules.[44] The very legitimacy of the EU project is at stake.

[43] See E. Guild, V. Moreno-Lax, and C. Costello (2017), Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, European Parliament Study, Directorate General for Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs; and S. Carrera, S. Blockmans, J.P. Cassarino, D. Gros, E. Guild, (2017), *The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?*, CEPS Task Force Report, February (https://www.ceps.eu/publications/european-border-and-coast-guard-addressing-migration-and-asylum-challenges).

[44] See also S. Carrera, S. Blockmans, D. Gros and E. Guild (2015), "The EU's responses to the Refugee Crisis – Taking Stock and Setting Policy Priorities", CEPS Essay, No. 20, December.