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## EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multi-layered Relationship?

Andrea Ott



**CLEER**



CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**EU-TURKEY COOPERATION IN MIGRATION MATTERS:  
A GAME CHANGER IN A MULTI-LAYERED RELATIONSHIP?**

**ANDREA OTT**

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## ABSTRACT

EU-Turkey bilateral relations are characterised by complexity, mutual ambivalence and a three-layered structure.<sup>1</sup> The first layer is the 50 year-long association relationship based on a customs union. The second layer, in the form of the accession process, provides Turkey with a candidate status since 1999 which resulted in accession talks in 2005 but have since December 2006 been practically frozen. The third and more recent layer is characterised by the compartmentalisation of policy fields such as migration, aviation and energy cooperation. This latter development has two explanations: first, to serve the EU's short-term and mid-term interests, with accession a 'far away' prospect for any of the current candidate countries, and, second, to streamline the approach to Turkey with the other accession candidates. Under the renewed consensus on enlargement since 2006, difficult issues such as administrative and judicial reforms and the fight against corruption will be addressed at an early stage of the negotiations and the more systematic use of benchmarks will be applied, with concrete criteria for the opening and closing of individual negotiation chapters. Since the 2015 EU refugee crisis, new dynamics in EU-Turkey relations appear to develop for all other layers in the bilateral relations. With the political events of 2016 in Turkey, the delicate balance in the multi-layered relationship is threatened and both sides are returning to old habits of mistrust and ambivalence in their relations.<sup>2</sup>

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<sup>1</sup> The author would like to thank two anonymous CLEER Papers reviewers for their helpful comments, the usual disclaimer applies.

<sup>2</sup> A revised version appears in G. Borzoni, F. Ippolito and F. Casolari (eds.), *Bilateral relations in the Mediterranean: Prospects for migration issues*, Edgar Elgar Publishing, forthcoming 2018.

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## 1. INTRODUCTION: 'A HEDGEHOG'S DILEMMA'

Turkey is the 'odd one out' in the bilateral relations the European Union (EU) has established with the countries that belong to the Euro-Mediterranean Partnership (the Partnership). The Partnership aims to establish a free trade area without seeking to determine the ultimate question of accession to the EU for its contracting parties.<sup>1</sup> In contrast, Turkey concluded an Association Agreement with the EU in 1963, finalised its customs union with the EU in 1995 and was granted 'accession candidate' status in 1999. Given its geopolitical importance and size, Turkey remains a key player in the Mediterranean and the EU wants to push cooperation in 'key areas of joint interest'.<sup>2</sup>

EU-Turkey bilateral relations are characterised by a 'hedgehog's dilemma':<sup>3</sup> as the parties move closer together, they increasingly become uncomfortable in each other's presence and this, in turn, acts to force them apart again. For this reason, concrete progress in alignment has historically been slow, unpredictable and cumbersome. The EU-Turkey relationship is characterised by multiple layers: first, a legal relationship based on association law and a trade relationship through the EU-Turkey customs union; second, Turkey's status as an accession candidate which has started accession negotiations; and third, compartmentalised policy fields of importance for the EU such as migration, common aviation policy, energy security and the fight against terrorism. Due to the mounting EU migration crisis beginning the summer of 2015, EU and Member States have involved Turkey as a key partner in stemming migration to the EU. This role may ultimately lead to a readjustment of EU-Turkey relations. Indeed, since October 2015, new dynamics have emerged in migration cooperation that impact upon the other layers of the mutual relationship outlined above. However, further dynamics have been created with the failed Turkish military coup in July 2016 leading to repressive measures against judges, teachers, police and civil servants by the Turkish government under President Erdogan. The slow decline into an autocratic regime has been cemented by the April 2017 referendum in which the population approved constitutional changes replacing a parliamentary with a presidential system.<sup>4</sup> This overshadows any progress in the EU-Turkey relationship.

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<sup>1</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Council, the EP, the Council, ECOSOC and the CoR, A partnership for democracy and shared prosperity with the southern Mediterranean, Brussels, 8.3.2011 COM(2011) 200 final.

<sup>2</sup> Key findings of the 2016 Report on Turkey, European Commission, 9 November 2016.

<sup>3</sup> See on this concept the German philosopher Arthur Schopenhauer, *Parerga und Paralipomena*, Volume II, Chapter XXXI, Section 396.

<sup>4</sup> See critical on these changes: Council of Europe Venice Commission: CDL-AD(2017)005-e Turkey – Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017) and Parliamentary Assembly of the Council of Europe (PACE) decided today to reopen the monitoring procedure in respect of Turkey until 'serious concerns' about respect for human rights, democ-

## 2. THE MULTI-LAYERED EU-TURKEY BILATERAL RELATIONS

EU-Turkey relations are by the above-mentioned political complexity split up into three layers. We shall now outline them in greater detail. The *first layer* is the association between the EU and Turkey established in 1963 through the Ankara Association Agreement.<sup>5</sup> The aims in this association included the ambition to establish a customs union over three stages; the agreement contains two (in)famous phrases which haunt the EU 50 years later. The first famous phrase is that the contracting parties shall be 'guided by' the free movement rights established in the EEC Treaty; this wording, however, needs to be seen against the backdrop of the time of the conclusion of the Ankara Agreement – as yet (and even throughout the duration of the European Economic Community (EEC)) no free movement had been established and no customs union achieved.<sup>6</sup> Another striking phrase can be found in the preamble to the original Association Agreement: the preamble mentioned the aim to improve the standard of living of Turkish citizens together with facilitating the accession of Turkey at a later stage. Whilst no country has a right to accede to the EU, this reference in the preamble serves as a reminder to the special relationship between Turkey and the EU.<sup>7</sup> Due to the steady flood of Turkish migrant workers following the conclusion of bilateral labour-recruitment agreements to EU Member States such as Germany, the Netherlands, Belgium, France and Sweden in the 1960s, four million Turkish citizens currently live in the EU.<sup>8</sup> To secure the status of migrant Turkish workers, the Association Council Decisions 2/76, 1/80 and 3/80 were implemented; since 1987, European Court of Justice (CJEU) case law strengthened the application of these norms through direct effect and a teleological interpretation.<sup>9</sup> In association law, movement of persons issues and customs union matters developed further apart: to guide the implementation of the customs union between the EU and Turkey, an Additional Protocol was added in 1970; the final phase was reached with the adoption of the Association Council Decision 1/95. The CJEU has declared limits on the application of integration principles on this association, correctly setting the Turkish association apart from the internal market established with the EEA countries and the gradual participation therein by Switzerland.<sup>10</sup>

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racy and the rule of law 'are addressed in a satisfactory manner'; see also the 2016 Commission Progress Report on Turkey, Brussels, 9.11.2016 SWD(2016) 366 final.

<sup>5</sup> OJ 1973 C 113/1 (concerning the English version).

<sup>6</sup> The customs union of the EC was only accomplished in 1968 and the common market fundamental freedoms were only progressively liberalised until 1968.

<sup>7</sup> Maresceau calls this integration-oriented, see at Marc Maresceau, *Les accords d'intégration dans les relations de proximité de l'Union européenne*, pp.151 (at pp.153), (who also includes the contractual relations with the micro-states Andorra and Monaco) in Claude Blumann (ed.) *Les frontières de l'Union européenne*, Brussels, Bruylant, 2013.

<sup>8</sup> Philip Martin, *Turkey-EU Migration: The Road ahead*, 2012, <<http://sam.gov.tr/turkey-eu-migration-the-road-ahead/>>, last accessed 21 March 2016.

<sup>9</sup> See on the case law: Narin Tezcan-Idriz, *Free movement of persons between Turkey and the EU: To move or not to move? The response of the judiciary*, CMLRev 2009, pp.1621-1665.

<sup>10</sup> See on this Case C-371/08 *Ziebell* [2011] ECR I-12735 and Case C-221/11 *Demirkan*, ECLI:EU:C:2013:583.

The *second layer* is the EU accession process. For geographical, cultural and political reasons, Turkey has been described as an 'outsider' in the enlargement process.<sup>11</sup> The size of its population influences any future voting rights it may have in the EU decision-making bodies, i.e. the Council and the European Parliament.<sup>12</sup> Furthermore, bilateral relations with its direct EU neighbours – Greece, Cyprus and, lately, also the new EU Member State Bulgaria – have an important influence on any further progress of or digression to EU alignment. EU-Turkey relations are strongly influenced by the individual positions of EU Member States towards Turkey and are further divided between the Council, responsible for coordinating these positions, the Commission, responsible for negotiating with Turkey, and finally the European Parliament (EP), involved in pivotal decisions such as visa liberalisation and accession. Furthermore, the CJEU has manoeuvred into its own position between providing a dynamic and broad interpretation of the provisions of the association rules since the 1980s but recently denied an analogy to supranational principles and EU rules on citizenship and internal market in difference to more extensive integration projects with Switzerland or the EEA countries.<sup>13</sup> The Association Agreement appeared as a stepping-stone for an accession perspective but different political incidents have sent shockwaves, starting with the Turkish occupation of Northern Cyprus in 1974, the military coup in Turkey in 1980 and lately with autocratic changes under Turkish President Erdogan and the 2016 failed military coup to topple the government in Turkey. The first membership application to the EEC from Turkey was in 1987; the application was denied in 1989 on economic and political grounds. Instead, the EU offered a deepening of bilateral relations.<sup>14</sup> In the upcoming ten years, Turkey was side-lined as the accession of ten Central and Eastern European Countries (CEEC), in addition to Malta and Cyprus, proceeded. The political situation changed when Germany and Greece encouraged a rapprochement. Finally, the 1999 Helsinki European Council provided Turkey with EU candidate status: this opened the way for access to EU funding, programmes and participation in EU agencies.<sup>15</sup> The open-

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<sup>11</sup> Allan F. Tatham, *Enlargement of the European Union*, Kluwer Law International, 2009, p.142, Marc Maresceau, *A candidate state for the Union*, pp.315 (at p.318) in Niamh Nic Shuibhne and Laurence W.Gormley, *From Single market to economic union, essays in memory of John A.Usher*, (Oxford University Press), Edgar Lenski, *Turkey*, pp.283, in Steven Blockmans and Adam Lazowski (eds.), *The European Union and Its Neighbours – A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (T.M.C. Asser Press/Cambridge University Press 2006) .

<sup>12</sup> For 2020 it is predicted that its population number will be higher than any other EU Member State, including Germany (being the EU Member State currently with the highest population). See also Cemal Karakas, *Gradual Integration: An attractive integration process for Turkey and the EU*, *EFARev* 2006, pp.311-331.

<sup>13</sup> See for instance the early case *Sevince*, Case C-192/89 *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461 and on the other hand *Demirkan*: Case C-221/11 *Demirkan* ECLI:EU:C:2013:583.

<sup>14</sup> Tatham, *supra* n.11, p.144. Maresceau, *op.cit.* n.7, p.330.

<sup>15</sup> In 2002 Turkey and the EU concluded a framework agreement on the participation of Turkey in EU programmes. And this participation was extended to the intergovernmental Common Foreign and Security Policy (CFSP) and Turkey participated in a police mission in the former Yugoslav Republic of Macedonia; see further Steven Blockmans, *Participation of Turkey in the*

ing of accession negotiations was, however, far away: both political changes in Turkey in 2002 and the election of conservative governments in Germany and France delayed the opening of negotiations.<sup>16</sup> In 2005, once political changes occurred in Turkey and EU Member States, negotiations officially started. These negotiations were dominated by ambivalence and doubts, symbolised by the Council negotiating framework. This framework stressed the open-ended process, referring to the Copenhagen criteria and the EU's absorption capacity;<sup>17</sup> it contemplated an alternative to accession in the form of a commitment to form the 'strongest possible bond.' The negotiating mandate also indicated the possible inclusion of long transitional periods, derogations, specific arrangements and permanent safeguard clauses in areas of the free movement of persons, structural policies or agriculture in any future accession treaty.<sup>18</sup> The framework further included, in strong conditional terms, the possibility to suspend negotiations in case of serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Such a suspension requires a decision of the Council according to qualified majority voting. The framework also included a requirement of specific conditionality on the part of Turkey to ensure that it would uphold the fundamental values referred to above.<sup>19</sup> After a negative Progress Report by the Commission on Turkey's progress on human rights and rule of law matters, and the non-

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EU's Common Security and Defence Policy: Kingmaker or Trojan Horse, pp.143-173, in Haluk Kabaalioglu, Andrea Ott and Allan F. Tatham (eds.), *EU and Turkey: Bridging the differences*, Economic Development Foundations No.250, Istanbul 2011.

<sup>16</sup> The discussion resurfaced whether Turkey culturally belongs to Europe and whether the relationship should be transformed into a privileged partnership.

<sup>17</sup> The Copenhagen criteria have evolved over time and, since 1993, into the three political, economic and legal criteria including the Madrid criterion (administrative capacity to effectively apply and implement the *acquis*), the good neighbourly relations and undertaking to resolve any outstanding border disputes (later coined SAA criteria), Turkey's support to achieve comprehensive settlement of Cyprus problem (Turkey conditionality) and the EU's absorption capacity (renamed in 2006 to integration capacity) which evolved over time from simply being institutionally prepared for enlargement been slowly transformed by adding financial sustainability since 2004 and finally at the time of the renewed consensus in 2006 a broad and sustained public support has become an erratic condition.

<sup>18</sup> Council of the European Union Opening Statement, negotiating framework, 12 October 2005.

<sup>19</sup> Negotiating Framework with Turkey, October 2005. The Copenhagen criteria, which set down the following requirements for membership: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU; the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the *acquis*; Turkey's unequivocal commitment to good neighbourly relations and its undertaking to resolve any outstanding border disputes in conformity with the principle of peaceful settlement of disputes in accordance with the United Nations Charter, including if necessary jurisdiction of the International Court of Justice; Turkey's continued support for efforts to achieve a comprehensive settlement of the Cyprus problem within the UN framework and in line with the principles on which the EU is founded, including steps to contribute to a favourable climate for a comprehensive settlement, and progress in the normalisation of bilateral relations between Turkey and all EU Member States, including the Republic of Cyprus; the fulfilment of Turkey's obligations under the Ankara Association Agreement and its Additional Protocol extending the Association Agreement to all new EU Member States, in particular those pertaining to

fulfilment of the benchmark of applying the Additional Protocol of the Ankara Agreement on Cyprus in the 'Enterprise and Industrial Policy' chapter, negotiations on eight important negotiation chapters were partially suspended by the EU in December 2006.<sup>20</sup>

*A third and more recent layer* was added more recently by compartmentalising policy fields, which are of importance for the EU, namely policy fields such as migration, common aviation policy, energy security and the fight against terrorism. These policies could not be adequately addressed in the accession process. This was caused by the frozen negotiations in important negotiation chapters (outlined above) and the fact that Turkish negotiations started before the renewed consensus on enlargement in 2006 had prioritized rule of law matters with a strict conditionality and applied benchmarks. The avenues chosen to move beyond this blockade included further alignment in specific key areas. The Energy Community (EnCT) and European Common Aviation Area (ECAA) were created: each policy integration mechanism involved the Western Balkans, some ENP (European Neighbourhood Policy) countries and Turkey in a regulatory framework for approximation.<sup>21</sup>

Whilst the EU called these areas 'joint interests', Turkey demonstrated, however, great reluctance to participate in either the EnCT or the ECAA: the 2009 negotiations on Turkey's accession to the Energy Community have only led to an observer status for Turkey, and Turkey does not currently participate in the ECAA. The same sentiment can be detected in Turkey's approach to cooperation in fighting illegal migration and its contribution to the EU's migration management system, where concrete short-term incentives in the interests of Turkey, namely visa liberalisation, were (until recently) not offered by the EU. The same reluctance can be detected in regard to another tool to familiarise third countries with EU structures: EU agencies. Turkey is currently only a member (without voting rights) in two regulatory agencies, the European Environmental Agency since 2001 and the European Monitoring Centre for Drugs and Drug Addiction since 2007.<sup>22</sup> Consequently, the EU still struggles in developing a convincing strategy to revitalise cooperation in certain policy fields while creating at the same time an impact on other layers of the relationship.

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the EU-Turkey customs union, as well as the implementation of the Accession Partnership, as regularly revised.

<sup>20</sup> In December 2006, 14 chapters were opened and only one provisionally closed. The eight chapters in which negotiations are suspended are: Free Movement of Goods, Agriculture and Rural Development, Freedom to Provide Services, Financial Services, Fisheries, Transport, Customs Union, and External Relations. See European Commission, COM (2006) 649 final and further on this Tatham, *supra* n. 11, p.155.

<sup>21</sup> See on both entities, Adam Lazowski and Steven Blockmans, *Between dream and reality: the Western Balkans*, p.108 (at p.122) in Peter van Elsuwege and Roman Petrov (eds), *Legislative approximation and application of EU law in the Eastern Neighbourhood of the European Union*, Routledge Publisher, 2014; Marc Maresceau, *Les accords d'intégration*, pp.164-171 in Claude Blumann, *Les frontières de l'union européenne*, Bruylant Brussels.

<sup>22</sup> Cooperation is enabled since 2002 through the Framework Agreement between the European Community and the Republic of Turkey on the general principles for the participation of the Republic of Turkey in Community programmes, OJ 2002 L 61/29. This is enabled by an international agreement regulating full participation with the exception that Turkey has no right to vote in the Management Board.

### 3. EU-TURKEY BILATERAL RELATIONS IN MIGRATION MATTERS

When focusing on the EU-Turkey bilateral relations in migration matters – part of the third layer of the relationship identified in this paper – the situation becomes more complex the closer one looks. Turkey acts as an important geostrategic and economic partner to the EU in a volatile and violent neighbourhood; it forms a hub for illegal migration from the Near and Far East (East Mediterranean Route). Turkey is a source of both legal and illegal migration arising from its own contractual relations with the EU and, also, illegal migration (particularly asylum-seekers from Iran, Iraq and Afghanistan), and Turkey hosted, in October 2017, 3,235,992 Syrian refugees – the largest number of any country in the world. As well as Turkey forming a transit state for third country nationals seeking to enter the EU via the Eastern Mediterranean route,<sup>23</sup> migration matters between the EU and Turkey concern illegal migration to the EU by Turkish citizens.<sup>24</sup> Due to the geographical size of Turkey and its long land border with Bulgaria and land/sea border with Greece, Turkey's bilateral relations with these EU countries influence Turkey's bilateral relations with the EU.<sup>25</sup> As in the enlargement process, Turkey is a 'special case': it remains the only accession candidate lagging behind in achieving visa-free travel for its citizens. Through visa facilitation agreements and a 'roadmap' for a temporary visa-free regime in the interim, the Western Balkan states (Albania, Bosnia-Herzegovina, Macedonia, Montenegro and Serbia) and ENP countries Ukraine and Moldova achieved visa-free travel. Turkey could possibly accuse the EU of double standards but – as was stated above – this stricter conditionality is linked to the special circumstances of Turkey given its size, population and the diverse interests of the EU Member States in relation to Turkey. Turkey is faced with the dilemma of simultaneously participating in the EU migration management system with its possible violation of international refugee law and at the same time attempting to improve its own human rights record in line with accession *acquis*. Turkey faces criticism from the UN Special Rapporteur for its protection of the human rights of migrants and the detention of migrants and their families.<sup>26</sup> In addition, both EU Member States and Turkey are held to have violated the

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<sup>23</sup> Over the years, the land and sea borders between Turkey and Greece have transformed into the most active migration route in Europe for migrants from Asia and Africa.

<sup>24</sup> After the recruitment of Turkish workers in the western EU Member States stopped, Turkish migrants still entered the EU through family reunification and irregular migration. As such, already bilateral readmission agreements exist between Germany, UK and The Netherlands for instance.

<sup>25</sup> Frontex defines the Eastern Mediterranean route as passage used by migrants crossing through Turkey to the EU via Greece, southern Bulgaria or Cyprus. <<http://frontex.europa.eu/trends-and-routes/eastern-mediterranean-route/>>, last accessed 10 April 2016. Frontex published figures that while between 2014 and February illegal migration via the land route decreased by 46 percent, the number increased for the sea route with 123 percent and or land route via Bulgaria increased by 162 percent.

<sup>26</sup> See on this GlobalDetentionProject, Turkey Detention Profile, last updated April 2014, <<http://www.globaldetentionproject.org/countries/europe/turkey/>>, last accessed 31 March 2016, and Report by the Special Rapporteur on human rights of migrants, Regional study. Management of the external borders of the EU and its impact on the human rights of migrants, 24 April 2013, UN GA Human Rights Council, p.13, <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf)>, last accessed 31 March 2016.

European Convention of Human Rights (ECHR) by the European Court of Human Rights (ECtHR) in their migration and asylum policy; in *Hirsi*, the ECtHR held, in 2012, that Italy had violated Articles 3, 4 and 14 ECHR by returning Somali and Eritrean migrants travelling by sea back to Libya. Italy's defence, that this was in line with the bilateral readmission agreement concluded with Libya, was not accepted by the Strasbourg judges. In 2014, the ECtHR – in *Shariff*<sup>27</sup> – held that EU Member States cannot eschew their obligations under the ECHR when implementing EU law; the court held that Italy had violated the prohibition on the collective expulsion of aliens (Article 4 of Protocol 4 ECHR), as well as the prohibition of inhumane and degrading treatment (Article 3) and the right to an effective remedy (Article 13) by returning a group of Afghan asylum applicants to Greece. In turn, the ECtHR ruled that Greece had also breached Article 2 and 13 ECHR, read in conjunction with Article 3, given the lack of access to the asylum procedure in Greece and the risk of deportation to Afghanistan.

### 3.1 A Readmission Agreement in Exchange for a Visa Facilitation Dialogue

Against the backdrop of the international obligations of the EU, Member States and Turkey, bilateral commitments have to be reconciled with the – sometimes – conflicting interests of Turkey and the EU. The Turkish side perceived the conclusion of a readmission agreement as an interim step to achieve short-term visa-free access while the EU wanted to apply readmission commitments as part of externalising its border management. The negotiation and signing of a readmission agreement turned out, however, to be a long and cumbersome process. Already, in 2002, Turkey and the EU had agreed on opening negotiations but these negotiations stagnated because of Turkish reluctance and ambivalence to move further in the negotiation process.<sup>28</sup> This reluctance was linked to the status of its own citizens but also to the fear of becoming a 'buffer' between the EU and an unstable neighbouring region.<sup>29</sup> In this context, Turkey also started to negotiate readmission agreements with Greece (2001), Syria (2001), Kyrgyzstan (2003), Romania (2004) Ukraine (2005), Pakistan (2010), Yemen (2011), Russia (2011), Nigeria (2011), Moldova (2012), and Bosnia-Herzegovina (2012).<sup>30</sup> The EU, partly as a consequence of Turkey's more liberal visa policy, has gradually become a destination for migration via the

<sup>27</sup> ECtHR, *Sharifi and Others v Italy and Greece* (no. 16643/09) [Articles 2, 3, 13, Article 4 Protocol 4], 21 October 2014.

<sup>28</sup> See Niels Coleman, *European Readmission Policy: Third country interest and refugee rights*, p.18; Sarah Wolff, *The Politics of negotiating EU readmission agreements: Insights from Morocco and Turkey*, *European Journal of Migration and Law* 2014, p.69 (at p.86).

<sup>29</sup> Nedime Aslı Şirin, *The issues of irregular migration in the light of Turkey-EU relations and its effect on the negotiations*, 2013, <[https://www.academia.edu/2972953/The\\_Issue\\_of\\_Irregular\\_Migration\\_in\\_the\\_Light\\_of\\_Turkey-EU\\_Relations\\_and\\_Its\\_Effects\\_on\\_the\\_Negotiations](https://www.academia.edu/2972953/The_Issue_of_Irregular_Migration_in_the_Light_of_Turkey-EU_Relations_and_Its_Effects_on_the_Negotiations)>, last accessed 31 March 2016.

<sup>30</sup> Ahmet İçduygu and Damla B. Aksel, *Two-to-tango in migration diplomacy*, *European Journal of Migration and Law*, 2014, p.351.

Eastern Mediterranean route.<sup>31</sup> Both sides finally started negotiations in 2002 but these broke off in 2006; they resumed in 2009 with a reluctant Turkish partner. In addition to the above outlined Turkish concerns, Turkey long held hopes that visa-free travel could be secured by the judicial interpretation of the CJEU in the *Soysal* case (decided 2009)<sup>32</sup> and the (then) pending *Demirkan* case. However, in the 2013 *Demirkan* case, the Grand Chamber of the CJEU denied such an extensive interpretation, deciding that the EU-Turkey association should have a purely economic purpose.<sup>33</sup> This ruling might be criticised for its justification but not for its result. An identical EU internal market 'reading' of the four freedoms cannot be extended on the existing Association Agreement with Turkey. Such an interpretation is disabled by the wording of the provisions and it would otherwise put the agreement on the same footing as the special integration agreements with Switzerland and the EEA countries with more far-reaching aims and goals in their provisions and the judicial, institutional or interpretative mechanisms created by these latter agreements.<sup>34</sup> Turkey subsequently changed its strategy and negotiations were finalised in 2013. However, Turkey made the ratification of the readmission agreement conditional on further liberalisation and achievement of visa-free travel for Turkish citizens. This also turned out, for the EU, to be of interest because important aspects of the area of freedom, security and justice could be prioritized and the stalled negotiation process could be revived in this area through a different pathway.<sup>35</sup> This approach of focussing

<sup>31</sup> Icduygu and Aksel, Two-to-tango in migration diplomacy, *European Journal of Migration and Law*, 2014, p.346.

<sup>32</sup> The *Soysal* case concerned the freedom to provide services and the judges saw a breach of Art.42 of the standstill clause of the 1974 Additional Protocol by Germany because the country introduced stricter visa requirements for Turkish nationals after July 1980, Case C-228/06 *Soysal*, ECLI:EU:C:2009:101.

<sup>33</sup> Case C-221/11 *Demirkan*, ECLI:EU:C:2013:583, Case C-451/11, *Dülger v. Wetteraukreis*, ECLI:EU:C:2012:504 and Case C-371/08, *Ziebell v. Land Baden-Württemberg*, ECLI:EU:C:2011:809 .

<sup>34</sup> See generally on the EEA and the Swiss bilaterals: Adam Lazowski, Box of chocolates integration: the European Economic area and Swiss model revisited. in: Blockmans, S. and Prechal, S. (ed.) *Reconciling the deepening and widening of the European Union* The Hague, Netherlands TMC Asser Press. pp. 87-110. Lazowski, A. 2008. Box of chocolates integration: the European Economic area and Swiss model revisited. in: Blockmans, S. and Prechal, S. (ed.) *Reconciling the deepening and widening of the European Union* The Hague, Netherlands TMC Asser Press. pp. 87-110 Lazowski, A. 2008. Box of chocolates integration: the European Economic area and Swiss model revisited. in: Blockmans, S. and Prechal, S. (ed.) *Reconciling the deepening and widening of the European Union* The Hague, Netherlands TMC Asser Press. pp. 87-110 Lazowski, A. 2008. Box of chocolates integration: the European Economic area and Swiss model revisited. in: Blockmans, S. and Prechal, S. (ed.) *Reconciling the deepening and widening of the European Union* The Hague, Netherlands TMC Asser Press. pp. 87-110 Lazowski, A. 2008. Box of chocolates integration: the European Economic area and Swiss model revisited. in: Blockmans, S. and Prechal, S. (ed.) *Reconciling the deepening and widening of the European Union* The Hague, Netherlands TMC Asser Press. pp. 87-110 Lazowski, A. 2008. Box of chocolates integration: the European Economic area and Swiss model revisited. in: Steven Blockmans, and Sacha Prechal (ed.) *Reconciling the deepening and widening of the European Union* The Hague, Netherlands TMC Asser Press.2008, pp. 87-110.

<sup>35</sup> But it also clear that MS were divided from the start on visa liberalisation, Germany, France, Austria and Greece opposing it while Italy, UK, Sweden, Finland, Poland and Spain favouring a perspective to Turkey.

on difficult topics with close monitoring, introducing opening and closing benchmarks for the candidate country through the implementation monitoring of the readmission agreement and the visa liberalisation dialogue has brought Turkey more in line with other accession candidates, such as Albania or Serbia, who had already fallen under the renewed consensus on enlargement in 2006.<sup>36</sup>

The EU-Turkey Readmission Agreement (EURAD) covers the readmission of Turkey's own nationals and third country nationals and stateless persons (Art.4) if these individuals entered the EU through Turkey.<sup>37</sup> Article 24, paragraph 3 gives Turkey three years before the obligations set out under Articles 4 and 6 fully apply.<sup>38</sup> The EU's externalisation of managing borders with third states requires the EU to assist those States in implementing such an agreement: Article 23 of the EURAD addresses technical assistance – the EU is committed to making financial resources available to implement the agreement. Turkey will benefit from financial and technical support in order to build up its border police and install border surveillance equipment; these capacities will assist Turkey in securing its borders with fragile neighbouring countries such as Syria, Iran and Iraq. A joint declaration on technical assistance added to the EURAD tries to link it to the Turkish Accession Partnership and the Turkey NPAA (National Programme for the Adoption of the Acquis) from 2008.<sup>39</sup> Due to the differentiation in, and extension of, the area of freedom, security and justice, Turkey needs to conclude separate readmission agreements with Denmark and with EEA countries Iceland, Norway, Liechtenstein, and Switzerland.<sup>40</sup> In addition, the EURAD defines the legal parameters which have to be respected: Art.18 of the agreement refers to the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention), the ECHR, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the association law including association council decisions, and relevant CJEU case law.

Parallel to the signing of the EURAD in December 2013, a visa liberalisation dialogue was launched with the long-term aim to end visa requirements for Turkish citizens travelling to the Schengen area for short-term visits under the condition that irregular migration would be prevented and that Turkey establish a migration and asylum system in line with international standards. To guide the process, a 'roadmap' towards a visa-free regime with Turkey was launched. This included benchmarks similar to the enlargement negotiations with the Western Balkans and was divided into five blocks: document security, migration management, public order and security, fundamental rights, and readmission of irregular migrants. Originally, the roadmap did not set a specific deadline for the conclusion of the dialogue; however, in the 2015 refugee crisis (outlined below), the EU came under pressure to offer Turkey a short-term incentive for

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<sup>36</sup> See Council Conclusions on Enlargement and Stabilisation and Association Process, 16 December 2014.

<sup>37</sup> OJ 2014 L 267/1.

<sup>38</sup> During this time, the existing bilateral readmission agreements between Turkey and EU MS will, however, apply.

<sup>39</sup> Joint Declaration on technical assistance.

<sup>40</sup> Joint Declaration in this regard.

cooperation. The EU has brought up the aim of achieving free access to the EU by June 2016. Since October 2014, the Commission has reported to the Council and Parliament on Turkey's progress in Turkey's implementation of the benchmarks set out in the visa liberalisation roadmap.<sup>41</sup> This process appears to be stricter when compared to that of the other candidate countries: for example, Albania signed a bilateral agreement with the EU even before it reached the status of a candidate country on visa facilitation.<sup>42</sup> Again, this can be explained by the geographical size of Turkey, the length of the sea and land borders with EU Member States and the stalled negotiation process whereby such issues cannot be addressed in the negotiation chapters.<sup>43</sup> The roadmap gives the EU the possibility to include concrete benchmarks in this policy field that would otherwise not be possible under the overall enlargement policy and negotiations. Turkey started the negotiation process before the renewed consensus on enlargement and further progress on substantial chapters cannot be achieved given that EU Member States froze negotiations in 2006. Since 2006 the renewed consensus applied to Western Balkan states Serbia and Montenegro and accession negotiations now start with difficult chapters such as administrative and judicial reform and rule of law issues, including the setting of opening and closing benchmarks.<sup>44</sup> The concrete benchmarks in the roadmap on visa liberalisation are divided into those matters designed to ensure the ratification and effective application of the EURAD and, also, those fulfilling more indirectly related aspects such as the non-discriminatory access of EU citizens to Turkey and the fulfilment of EU standards on data protection. Turkey has to live up to international standards and effectively apply the Geneva Refugee Convention (excluding any geographical limitations of protecting refugees), ratify Protocols no.4 and 7 of the ECHR, respectively, and the Council of Europe Convention on Action against Human Trafficking.<sup>45</sup> In addition, the EU requires Turkey to cooperate with the Justice and Home Affairs (JHA) agencies – Frontex, Europol, and Eurojust – by formalising the working relations through arrangements and/or agreements. In 2012, a Memorandum of Understanding (MOU) between Frontex and Turkey (Ministry of Foreign Affairs) was signed to establish coop-

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<sup>41</sup> Report from the Commission to the EP and Council on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, COM (2014) 646 final, Report from the Commission to the EP and the Council, Brussels, 4.3.2016, COM (2016) 140 final; Report from the Commission to the EP and the Council, Brussels, 4.5.2016, COM (2016) 278 final.

<sup>42</sup> Agreement between the EC and the Republic of Albania on the facilitation of the issuance of visas, OJ 2007 L 334/85. Similar agreements have been signed with Bosnia and Herzegovina, FYROM, Montenegro, Serbia and the Eastern European ENP countries including Russia. This Visa Facilitation agreement followed the readmission agreement between EU and Albania set into force in 2006. The later agreements fall under the framework of the Mobility Partnerships.

<sup>43</sup> The chapter related to justice and home affairs has not been opened and these issues are only addressed generally in the yearly Progress Reports. In comparison, Montenegro has started with these chapters 23 and 24, judiciary and fundamental rights and justice, freedom and security in 2013.

<sup>44</sup> Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and main challenges 2006-2007, Brussels, 8.11.2006 COM (2006) 649.

<sup>45</sup> Roadmap towards a visa-free regime with Turkey, <[http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap\\_towards\\_the\\_visa-free\\_regime\\_with\\_turkey\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf)>, last accessed 11 April 2016.

eration for the management of external borders giving rise to the exchange of know-how and the participation of Turkey in Frontex co-ordinated activities. The importance of Turkey for Frontex is also highlighted by the deployment of the first Frontex Rapid Border Intervention Teams (RABIT) in Greece between 2010 and 2011 and the 2010 Poseidon Sea operation to fortify the borders between Greece and Turkey. Guest officers from 26 EU Member States were deployed to support the Greek authorities in their border control activities. Whilst Turkey signed a cooperation agreement with Europol in 2010, this falls short of the operational and strategic agreements usually agreed with accession candidates as, for example, in the case of Serbia.<sup>46</sup> In March 2014, Turkey and Europol signed a liaison agreement enabling the Turkish side to deploy an officer at the agency: the EU also urged Turkey to pass a personal data protection law to ensure closer co-operation with Europol in the future.<sup>47</sup>

The EU links the application of the EURAD by Turkey with the hope of curbing illegal migration to the EU and combatting cross-border crimes.<sup>48</sup> The EURAD puts new pressure on Turkey to admit illegal migrants from the EU and abolish the applicable geographical limitation clause.<sup>49</sup> Until now, however, the practical impact EURAD in general has had on these aims is disputable; the EU has, until now, preferred to send illegal migrants back to their countries of origin. In addition, bilateral readmission agreements such as the one between Turkey and Greece may be applied in the meantime. And finally, the EU migration crisis has become a concern for all EU Member States since 2015. Novel instruments were agreed with Turkey in statements on 29 November 2015 and 16 March 2016<sup>50</sup> to, among other things, provisionally apply in practice important parts of the EURAD. Overall, this is an important step in reviving relations and monitoring Turkey's progress through the conditionality applied towards other candidate countries. It is also becoming an important tool in new developments relating to the EU refugee crisis and to the arrangements agreed between Turkey and the EU to be discussed under point 4.

### 3.2 Turkey's Migration and Asylum Policy

Turkey forms a hub for illegal migration from the Near and Far East to the EU via the East Mediterranean land and sea route. Turkey is a country of origin for

<sup>46</sup> See Agreement with Serbia, 16 January 2014, <<https://www.europol.europa.eu/content/agreement-operational-and-strategic-co-operation-between-republic-serbia-and-european-police>>, last accessed 20 April 2016.

<sup>47</sup> Annex to the Communication from the Commission to the EP and the Council on the state of play of implementation p.10

<sup>48</sup> See EP recommendation on the draft Council decision on the conclusion of the Readmission agreement, 10 February 2014.

<sup>49</sup> Turkey Detention Profile, last updated April 2014, Global Detention Project, <<http://www.globaldetentionproject.org/countries/europe/turkey>>, last accessed 31 March 2016.

<sup>50</sup> Meeting of heads of state or government with Turkey – EU-Turkey Statement, 29/11/2015, <<http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>>; EU-Turkey Statement, 18 March 2017, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

legal and illegal migration under its own contractual relations with the EU and has also received asylum seekers from, especially, Iran, Iraq and Afghanistan. Turkey has been confronted with a massive influx of Syrian refugees since 2011.<sup>51</sup> Its 11,000 km long border, in combination with an extensive visa-free regime towards African states, has contributed to Turkey becoming the main transit country of migrants seeking to enter the EU. The biggest groups consist of Afghans, Somalians, and Syrian refugees.<sup>52</sup> In recent years, Turkey's migration identity has shifted as a country of emigration and transit to a destination for immigrants and people fleeing conflicts and the rise of the Islamic State of Iraq and the Levant (IS), and those seeking to participate in the still strong Turkish economy in times of financial crisis elsewhere.<sup>53</sup> Of the four million refugees that have fled since the Syrian civil war started, it is estimated that Turkey hosts about two million refugees from Syria and Iraq, supplying 22 refugee camps in its territory.<sup>54</sup>

In April 2013, the Turkish Parliament adopted a Law on Foreigners and International Protection, Law No.6458, which aims to manage legal and illegal migration to Turkey with a focus on irregular and humanitarian migrants.<sup>55</sup> It is the first Turkish law to address asylum and has been in force since April 2014.<sup>56</sup> While it has been considered as a major step forward, critics have raised concerns about Turkey's capacity to implement and apply the rules respecting human rights and refugee laws.<sup>57</sup> The law refers to the principle of non-refoulement (Art.4) and gives a right to asylum; however, its protection varies according to a geographical distinction between asylum-seekers from Europe (Art.61) and non-European refugees, who can be granted conditional refugee status

<sup>51</sup> Asylum claims in 2013 were 34,576, in another overview they speak of 118,000 applications for 2013, see Kemal Kisci, Syrian refugees and Turkey's challenges: Going beyond hospitality, Brookings May 2014, p.9, <<http://www.brookings.edu/~media/research/files/reports/2014/05/12-turkey-syrian-refugees-kirisci/syrian-refugees-and-turkeys-challenges-may-14-2014.pdf>>, last accessed on 13 April 2016. See generally Ibrahim Kaya, Reform in Turkish asylum law: adopting the EU acquis?, CARIM research report 2009/16, pp.1, <[http://cadmus.eui.eu/bitstream/handle/1814/11849/CARIM\\_RR\\_2009\\_16.pdf?sequence=2&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/11849/CARIM_RR_2009_16.pdf?sequence=2&isAllowed=y)>, last accessed 10 April 2016.

<sup>52</sup> Niels Frenzen, Pace calls for urgent measures to assist Greece and Turkey with mounting migratory tensions in Eastern Mediterranean, 29.1.2013, <<https://migrantsatsea.org/2013/01/29/pace-calls-for-urgent-measures-to-assist-greece-and-turkey-with-mounting-migratory-tensions-in-eastern-mediterranean/>>, last accessed on 10 April 2016.

<sup>53</sup> Rebecca Kilberg, Turkey's Evolving migration identity, Migration Policy Institute, 24 July 2014, <<http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity>>, last accessed 10 April 2016.

<sup>54</sup> 2015 UNHCR country operation profile –Turkey, www.unhcr.org. The numbers mean that Turkey has taken in 10 times more refugees than the European Union with a population of 510 million and Turkey with a population of 75 million.

<sup>55</sup> In 2005 a National Action Plan on asylum and migration was adopted. The plan includes the creation of a specialised agency for asylum and migration, a regional network of reception centres.

<sup>56</sup> Previously only a 1994 regulation on asylum existed.

<sup>57</sup> Rebecca Kilberg, Turkey's evolving migration identity, Migration Policy Institute, 24 July 2014, <<http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity>>, last accessed 10 April 2016.

upon completion of the refugee status determination process (Art.62).<sup>58</sup> A foreigner or stateless person who falls under neither of these two categories can be granted subsidiary protection status if he would otherwise be sentenced to death, face torture or inhuman or degrading treatment, or is faced with serious threat in a situation of international or nationwide armed conflict (Art.63). As an original signatory party to the 1951 Refugee Convention, Turkey applies a geographical limitation concerning the status of refugees: only persons fearing prosecution in Europe can be considered refugees in Turkey. The 1967 Protocol Relating to the Status of Refugees to the Refugee Convention removed the geographic restrictions but Turkey approved this Protocol only under the reservation of 'geographical boundaries'. Due to these restrictions, only a temporary right to stay in Turkey is granted to refugees from neighbouring countries Iran, Iraq and Syria. Only as a consequence of financial support by the EU and further pressure did Turkey, on 15 January 2016, grant Syrians under temporary protection the right of access to the Turkish labour market.<sup>59</sup> However, Turkey is confronted with a backlog of asylum applications: of the 200,000 applications pending at the end of February 2016, only 38,595 received protection.<sup>60</sup>

On paper, the new rules comply – apart from the geographical boundaries – with EU standards; whether Turkey has the administrative capacity and political will to apply these rules, however, is another matter. In the past, Turkey has lost a series of cases in front of the ECtHR in Strasbourg for breaching the ECHR relating to asylum rights.<sup>61</sup> It is predictable that Turkey struggles as much as its EU neighbours, Greece and Bulgaria, to comply with standards of international refugee law and the ECHR.

#### 4. THE EU'S REFUGEE CRISIS AND EU-TURKEY RELATIONS – NEW DYNAMICS AND OLD HABITS

The migration layer of EU-Turkey relations has received renewed attention following the events of the recent EU refugee crisis. Since 2015, the EU has faced the largest influx of refugees since the end of World War II. Indeed, this migration wave topped the influx of refugees during the Balkans crises of the 1990s. By the end of February 2016, more than 1.1 million people had fled to the EU; 80 percent arrived via a sea or land route from Turkey to Greece and Bulgaria.<sup>62</sup> Applications for asylum doubled between 2014 and 2015 to over 1.3 million

<sup>58</sup> Report on Turkey, [www.unhcr.org](http://www.unhcr.org), last accessed on 10 April 2016.

<sup>59</sup> EU-Turkey Joint Action Plan – Implementation Report, Brussels, 10.2.2016, COM (2016) 85 final, p.6.

<sup>60</sup> Elizabeth Collett, The Paradox of the EU-Turkey refugee deal, March 2016, <<http://reliefweb.int/report/world/paradox-eu-turkey-refugee-deal>>, last accessed 10 April 2016. In the Commission implementation report on the EU-Turkey Joint Action Plan the following figures are given: in 2015 64,109 asylum requests were registered with 459 only being concluded, EU-Turkey Joint Action Plan – Implementation Report, Brussels, 10.2.2016, COM (2016) 85 final, p.6.

<sup>61</sup> This concerned in two cases returning two Iranian refugees to Iran and breaching the principle of non-refoulement. *Adolkhani and Kaimnia v. Turkey*, 2009.

<sup>62</sup> Some 1,000,573 people had reached Europe via the Mediterranean, mainly to Greece and Italy, in 2015, Hereward Holland, Over one million sea arrivals reach Europe in 2015, 30 Decem-

in the 28 EU Member States.<sup>63</sup> Under these circumstances, the general ground rule of the European asylum system, that a third country national has to apply in the country of entry for asylum, has become an unmanageable burden for the southern European countries Italy and Greece.<sup>64</sup> It has also led to attempts by the EU and individual Member States to take action against smugglers and to take control of, and manage, the massive influx of migrants through the establishment of hotspots in Greece and Italy.<sup>65</sup> Relocation plans of up to 120,000 refugees from the southern European Union Member States since September 2015 have proved to be unsuccessful given the resistance of Central Eastern European countries such as Poland, Hungary, Slovakia and Czech Republic to accept the assigned quota.<sup>66</sup> As figures for the last quarter of 2015 show, the majority of asylum applications by refugees were filed in Germany (with over 162,500 applicants, or 38% of total applicants in the EU Member States), followed by Sweden (87,900, or 21% of total applicants), Austria (30,800, or 7% of total applicants), and Italy and France (both with over 23,500, or 6% of total applicants each).<sup>67</sup> The European Agenda on Migration, announced in May 2015, introduced an ambitious design based on four elements: *viz.* reducing the incentives for irregular migration, ensuring effective border management, a strong common asylum policy, and a new policy on legal migration.<sup>68</sup> The migration flow led to the temporary re-introduction of border controls, especially in the Schengen countries Austria, Sweden, Denmark and Germany,<sup>69</sup> and led – in March 2016 – to a decision to discourage refugees from leaving to the EU by involving Turkey in concrete and ad hoc implementation plans.

ber 2015, <<http://www.unhcr.org/5683d0b56.html>>, last accessed 10 April 2016.

<sup>63</sup> Eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded), Last update: 04-10-2017, <[http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyappctza&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en)>, last accessed 24.10.2017.

<sup>64</sup> The collapse of a functioning asylum system has been recognised as early as 2011 by the ECtHR, *M.S.S. v. Belgium and Greece*, ECtHR, 21 January 2011.

<sup>65</sup> Under this hotspot approach all relevant EU agencies and experts from EU Member States work with national and local authorities to organise a migration and border management report from the Commission to the EP and the Council, Progress report on the implementation of the hotspot approach in Greece, Brussels, 4.3.2016, COM (2016) 141 final.

<sup>66</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, 15.9.2015, pp. 146–156; Council Decision EU 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248/80; Communication from Commission to the EP, European Council and the Council, First report on relocation and resettlement, Brussels, 16.3.2016 COM (2016) 165 final.

<sup>67</sup> Asylum quarterly report, 3 March 2016, <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report)>, last accessed 8 April 2016.

<sup>68</sup> Communication from the Commission to the EP, Council, ECOSOC and the Committee of Regions, A European Agenda on Migration, Brussels, 13.5.2015 COM (2015) 240 final. See on this Sergio Carrera, Steven Blockmans, Daniel Gros and Elspeth Guild, The EU's Response to the refugee crisis Taking stock and setting policy priorities, CEPS Essay, No.20/16 December 2015, <[https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis\\_0.pdf](https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf)>, last accessed 8 April 2016.

<sup>69</sup> Member States' notification of the temporary reintroduction of border control at internal borders pursuant to Article 23 et seq of the Schengen Borders Code, <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)>, last accessed 1 April 2016.

#### 4.1 A Turkey Migration ‘Deal’ in Exchange for Visa Liberalisation?

Since the summer 2015, the EU and its Member States tried to win Turkey over as a partner to tackle migration to the EU and have employed a wide array of soft law tools and instruments *sui generis* to quickly implement political and practical arrangements. Under these circumstances, Turkey can – possibly for the first time in the 50 years of bilateral relations – reverse the conditionality principle. Turkey makes its cooperation with the EU in migration matters dependent on financial support from the EU and also on the EU’s political support for the visa-free access of Turkish citizens. Other aims in respect of the other layers are, in Turkey’s perspective of lesser import, namely opening new – marginal – negotiation chapters.

The first step in migration cooperation was the EU-Turkey Joint Action Plan of 15 October 2015 which identified two main actionable parts: support for Syrians under temporary protection and their Turkish hosting communities, and the strengthening of cooperation to prevent irregular migration. The EU committed its Instrument for Pre-accession (IPA) funding and designed an EU Trust Fund for the Syrian crisis but also coupling it to the EU-Turkey visa dialogue. Turkey committed itself to intensify cooperation with the JHA agencies and deploy a liaison officer to Europol.<sup>70</sup> A three-billion-euro refugee facility for Turkey was agreed in November 2015. One billion euros is financed from the EU budget and the remaining two billion by contributions from the Member States according to their share in EU gross national income; the latter is implemented through a Common Understanding establishing a governance and conditionality framework for the refugee facility for Turkey between EU Member States and the European Commission.<sup>71</sup> This Facility has a coordinating function and streamlines financial contributions from the Member States. The financial aid of three billion euros is made conditional on the basis of the fulfilment of the EU-Turkey Joint Action Plan and the EU-Turkey Statement from 29 November 2015 in force from 31 March 2016 until 31 December 2017. This money will be used for concrete projects for refugees. The Commission regularly provides the Member States with information and also files progress and situation reports.<sup>72</sup> The Commission reports to a Steering Committee comprised of one representative of each Member State and two representatives of the Commission.<sup>73</sup> The Com-

<sup>70</sup> EU-Turkey Joint Action Plan, 15 October 2015. A liaison agreement was concluded with Europol in March 2016.

<sup>71</sup> Common Understanding establishing a governance and conditionality framework for the refugee facility for Turkey, between the EU Member States and the European Commission, 5 February 2016, <[https://www.parlament.gv.at/PAKT/EU/XXV/EU/09/23/EU\\_92309/imf\\_name\\_10606249.pdf](https://www.parlament.gv.at/PAKT/EU/XXV/EU/09/23/EU_92309/imf_name_10606249.pdf)>.

<sup>72</sup> Report from the Commission to the EP and the Council, EU-Turkey Joint Action Plan – Third implementation report, Brussels, 4.3.2016 COM (2016) 144 final.

<sup>73</sup> <<http://data.consilium.europa.eu/doc/document/ST-5845-2016-INIT/en/pdf>>, last accessed 21 March 2016. See implementing Commission decision of 24.11.2015 on the coordination of the actions of the Union and the Member States through a coordination mechanism. The Refugee Facility for Turkey, Strasbourg, 24.11.2015 C(2015) 9500 final and Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) of 24 November 2015, OJ 2016 C60/3-6.

mission gave its first report on the implementation of the October 2015 EU-Turkey Joint Action Plan on 17 December 2015.<sup>74</sup> These implementation reports are updated regularly.<sup>75</sup> The Commission also presented its third report on progress on the visa liberalisation dialogue (VLD) as of Turkey on 4 May 2016.<sup>76</sup> At a European Council-Turkey summit in March 2016 both sides agreed to introduce new principles to return all new irregular migrants crossing from Turkey to the Greek islands with the costs covered by the EU, and to resettle – for every Syrian readmitted by Turkey from the Greek islands – another Syrian from Turkey to the EU Member States, within the framework of the existing commitments, to accelerate the implementation of the visa liberalisation roadmap with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016.<sup>77</sup> These hastily-agreed commitments needed further explanations and were accompanied by a Commission paper on the next operational steps on 16 March 2016,<sup>78</sup> another meeting, and, finally, the EU-Turkey cooperation deal – the so-called EU-Turkey Statement. That EU-Turkey Statement, of 18 March 2016, aims to tackle the influx of migrants into the European Union and help the plight of Syrian refugees by going into further detail on what both sides commit to.<sup>79</sup> According to this Statement all new irregular migrants crossing from Turkey to the Greek islands are to be returned to Turkey with the costs covered by the EU, and for every Syrian readmitted by Turkey from the Greek islands, the Statement aims to resettle another Syrian from Turkey to the EU Member States. Migrants arriving in the Greek islands will be duly registered, according to its wording, and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with the United Nations High Commissioner for Refugees (UNHCR).

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<sup>74</sup> Annex to the 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

EU-Turkey Joint Action Plan – Implementation Report, <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing\\_the\\_refugee\\_crisis\\_state\\_of\\_play\\_20160210\\_annex\\_01\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_01_en.pdf)>, last accessed 1 April 2016.

<sup>75</sup> See EU-Turkey Joint Action Plan – Third implementation report, Brussels, 4.3.2016 COM (2016) 144 final.

<sup>76</sup> Report from the Commission to the EP and the Council, Third Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, Brussels, 4.5.2016 COM (2016) 278 final.

<sup>77</sup> Statement of the EU Heads of State 8.3.2016.

<sup>78</sup> Communication from the Commission to the EP and the Council, Next operational steps in EU-Turkey cooperation in the field of migration, Brussels, 16.3.2016 COM (2016) 166 final.

<sup>79</sup> EU-Turkey Statement of 18 March 2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

## 4.2 The Legal Status and Implications of the EU-Turkey Statement of March 2016

The text of the EU-Turkey Statement, published as a press release on the website of the European Council/Council of the European Union, mentions the 'Members of the European Council' and, further in the text, the 'EU and its Member States'.<sup>80</sup> However, for some time the EP perceived this Statement to be a European Council agreement with Turkey,<sup>81</sup> until the legal service of the EP interpreted it to be a political commitment in line with evaluations by Commission and Council.<sup>82</sup> Consequently, the EU-Turkey Statement is plagued by two fundamental questions: its authorship and its legal nature under international law.<sup>83</sup> The difficulty of identifying the actor on behalf of the EU or EU Member States arises not only from its form of publication through a press release on the website of the European Union, but also given that the Statement of 18 March 2016 is part and parcel of other measures and meetings between Turkey and the EU and its different representatives since September 2015. The Commission on 15 October 2015 initiated the EU-Turkey Joint Action Plan,<sup>84</sup> which was activated by a meeting of Heads of State or Government with Turkey, the first EU-Turkey Statement on 29 November 2015.<sup>85</sup> This was followed by another Statement of the EU Heads of State or Government on 7 March 2016,<sup>86</sup>

<sup>80</sup> EU-Turkey Statement of 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>.

<sup>81</sup> <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>. See also in this direction the Parliamentary Assembly of the Council of Europe, Doc. 14028 19 April 2016 <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYm5lMmNvZS5pbncveG1sL1hSZWYyVWdJLURXLWV4dHluYXNwP2ZpbGVpZD0yMjYxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWVudGljcGFJZS5uZXQvWHNsdC9QZGYvWFJlZi1XRRC1BVVC1YUWwYUERGlnhzbA==&xsltparams=ZmlsZWlkPTlyNjEy>.

<sup>82</sup> Carmelo Danisi, Taking the 'Union' out of 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law, <<https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>>.

<sup>83</sup> See on this General Court in T-192/16 *NF v. European Council*, ECLI:EU:T:2017:128; T-193/16 *NG v. European Council*, ECLI:EU:T:2017:129; T-193/16 *NG v. European Council*, ECLI:EU:T:2017:129; T-257/16 *NM v. European Council* ECLI:EU:T:2017:130 (all of them have been challenged before the CJEU C-208/17P, C-209/17P and C-210/17P). On the EU-Turkey Statement: Gloria Fernández Arribas, The EU-Turkey Agreement: A controversial attempt at patching up a major problem, *European Papers* 2016, pp.1097-1104; Mauro Gatti, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*, in *EJIL Talk!*, 18 April 2016, [www.ejiltalk.org](http://www.ejiltalk.org); Mauro GATTI, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2)*, in *EJIL Talk!*, 19 April 2016, <<https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>>. Enzo Cannizzaro, Denialism as the supreme expression of Realism A quick comment on *NF v. European Council*, *European Papers* 2017, pp.251-25; Sergio Carrera, Leonard den Hertog and Marco Stefan, It wasn't me! The Luxembourg Court orders on the EU-Turkey refugee deal, *CEPS Policy insights*, 2017, pp.1-13; Thomas Spijkerboer, *Minimalist Reflections on Europe, Refugees and Law*, *European Papers* 2016, pp.553-558.

<sup>84</sup> EU-Turkey Joint Action Plan, 15 October 2015. A liaison agreement was concluded with Europol in March 2016.

<sup>85</sup> <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>.

<sup>86</sup> <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>.

leading to the final EU-Turkey Statement between the Members of the European Council and Turkey of 18 March 2016.<sup>87</sup> The Commission paper of 16 March 2016 implemented the EU-Turkey statement of 7 March 2016 and clarifies the next operational steps by referring to the Heads of State or Government of the European Union of 7 March 2016.<sup>88</sup> Consequently, the documents are intertwined but the 18 March EU-Turkey Statement in particular includes more concrete commitments and consequences for individuals.<sup>89</sup>

This document connects the three layers of EU-Turkey relations through a byzantine mix of financial commitments, commitments under conditions and simple expectations or rhetoric.<sup>90</sup> This EU-Turkey multilayered relationship is based on a few legally binding commitments in the form of the Ankara Association Agreement and the 2014 EU-Turkey Readmission Agreement. The main incentive for Turkey to participate in this 'deal' was the commitment by the Member States and the European Union to lift visa requirements for Turkish citizens travelling to the EU and for financial support for refugees hosted in Turkey. The former incentive is, however, under the strict conditionality that Turkey fulfil the roadmap benchmarks<sup>91</sup> and that a final EP and Council decision is adopted providing for a visa waiver.<sup>92</sup> It does not go beyond what has been promised in the process of the EU-Turkey Readmission Agreement but puts more force behind it. Also, 're-energising' the accession process has been more rhetoric than reality with Turkey moving, since the political events of 2016, away from the Copenhagen criteria and the EU's applied conditionality. Other elements of rhetoric are the opening of a new negotiating chapter which was already promised in the EU-Turkey Statement of 29 November 2015.<sup>93</sup> Chapter 17 (economic and monetary policy) and chapter 33 (budget policy)<sup>94</sup> are not central to the accession process and its further progress. The EU also made clear that, for the closing of this chapter, one of the benchmarks to be fulfilled is that 'Turkey has fulfilled its obligations of full, non-discriminatory implementation of the Additional Protocol to the Association Agreement towards all Member States.' The negotiations on eight chapters are not opened based on the Council Deci-

<sup>87</sup> <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

<sup>88</sup> Communication from the Commission to the EP and the Council, Next operational steps in EU-Turkey cooperation in the field of migration, Brussels, 16.3.2016 COM (2016) 166 final.

<sup>89</sup> The 18 March 2016 EU-Turkey Statement includes that all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.

<sup>90</sup> EU-Turkey statement, 18 March 2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>, last accessed 26 March 2016.

<sup>91</sup> The 2016 reports reflects that 7 out of 72 benchmarks have not yet been fulfilled but among them are the legislation and practices on terrorism which has be brought into line with European standards. See third report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, Brussels, 4.5.2016 COM (2016) 278 final.

<sup>92</sup> The EP clarified that it would not approve any visa waiver before the last outstanding seven benchmarks are accomplished by Turkey.

<sup>93</sup> Meetings of the heads of state or government with Turkey – EU-Turkey statement 29 November 2015.

<sup>94</sup> Accession Conference at Ministerial level opens negotiations with Turkey on Chapter 17 – Economic and monetary policy, 14 December 2015.

sion of December 2006<sup>95</sup> and no chapter will be provisionally closed in the case that Turkey does not undertake its obligations stemming from the Additional Protocol to the Ankara Agreement in its entirety and concerning the Republic of Cyprus. The EU has not deviated from this condition and will not be able to do so as further progress depends on unanimous decision-making in the European Council. The most feasible layer to be modernised is the EU-Turkey customs union as part of the first layer. Also in this case, the EU announced in May 2015 its ambition to update its outdated customs union arrangement and bring it in line with modernised relations with other important trading partners.<sup>96</sup> The Commission finalised its impact assessment in December 2016 on three policy options, stating that keeping the status quo was not viable in an economic environment in which the EU and Turkey and their respective trading partners aimed for and implemented ambitious and comprehensive trade agreements.<sup>97</sup> While this aim may be detached from geopolitical struggles, it may nevertheless fail if a lack of will or ability to implement the desired commitments prevails. The overall reaction to this EU-Turkey Statement has been critical, both in relation to its legal aspects and its practical impact on the third layer of migration policy.<sup>98</sup> The Commission quickly circulated six underpinning principles for EU-Turkey cooperation and explained that legal safeguards for the return of new irregular migrants would apply only temporarily to break the pattern of migrants relying on criminal networks to smuggle them to Europe. All returns would be carried out in line with refugee protection safeguards insofar as every asylum application would be treated individually and refugees would fall into either of two categories: (1) readmission of people in no need of international protection who would be returned under Greek-Turkish readmission agreements (as the EU-Turkey EURAD only entered into force on 1 June 2016); and (2) returning persons in need of international protection. An asylum application could be closed if a refugee comes from a safe third country (in line with Article 38 of the

<sup>95</sup> See n.20. See further Frank Emmert and Siniša Petrović, *The Past, Present and Future of Enlargement*, 37 *Fordham International Law Journal*, pp.1349 (at p.1389).

<sup>96</sup> EU and Turkey announce modernisation of customs union, Statement 12 May 2015, see also Report of the senior official working group (SOWG) on the update of the EU-Turkey customs union and trade relations, 27 April 2015, <[http://trade.ec.europa.eu/doclib/docs/2016/march/tra\\_doc\\_154367.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tra_doc_154367.pdf)>, last accessed 1 April 2016.

<sup>97</sup> The other options presented by the Commission split up into an ambitious CU modernization and FTAs in services, agriculture/fisheries and public procurement, on the one hand, and a deep and comprehensive FTA comparable to the one with Ukraine on the other hand, see Commission Staff working document impact assessment, COM (2016)830final, Brussels, 21.12.2016.

<sup>98</sup> See Steve Peers, *The final EU/Turkey refugee deal: a legal assessment*, <<http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>>, last accessed 30 March 2016; Camino Mortera-Martinez, *Doomed: Five reasons why the EU-Turkish refugee deal will not work*, 24 March 2016, <<http://www.cer.org.uk/insights/doomed-five-reasons-why-eu-turkish-refugee-deal-will-not-work>>, last accessed 30 March 2016; Sergio Carrera and Elspeth Guild, *EU-Turkey plan for handling refugees is fraught with legal and procedural challenges*, 10 March 2016, <<https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges>>, last accessed 30 March 2016; Janis A. Emmanouilidis, *Elements of a complex but still incomplete puzzle: an assessment of the EU(-Turkey) summit*, European Policy Centre, 21 March 2016, <[http://www.epc.eu/documents/uploads/pub\\_6417\\_post-summit\\_analysis\\_-\\_21\\_march\\_2016.pdf](http://www.epc.eu/documents/uploads/pub_6417_post-summit_analysis_-_21_march_2016.pdf)>.

EU Asylum Procedures Directive) or already has been recognised as a refugee (first country of asylum according to Article 35 of the Asylum Procedures Directive). This would mean that Turkey would be recognised as a safe third country. Currently, huge discrepancies exist between EU Member States' determinations of lists of safe countries, and the Commission has initiated a proposal for a new regulation adopting a common list consisting of potential and current accession countries, including Turkey.<sup>99</sup> Observers have criticised considering Turkey a safe country that guarantees the protections afforded by the Geneva Refugee Convention.<sup>100</sup> As highlighted above, due to the geographical restriction applied by Turkey, non-Europeans are not recognised as refugees and Syrian refugees have received only temporary status. In February 2016, 57,000 migrants arrived on the Greek islands, of which 52 percent were Syrian nationals and 41 percent were Afghan and Iraqi nationals.<sup>101</sup> Turkey needs to guarantee equivalent status to both sets of refugees. In addition, to implement this effectively and legally, Greece needs to dramatically improve its existing asylum procedures.<sup>102</sup> In both texts it is indicated that all asylum requests will be duly registered but that the refugee will then be sent back to Turkey. How this is implemented, and also how it will comply with the right to an effective legal remedy under Article 47 of the European Charter of Fundamental Rights,<sup>103</sup> remains unknown; in the first days of the application of the plan, it became clear that there were an insufficient number of expert staff in Greece to complete the asylum procedures quickly. The application of these new rules also has to comply with strict conditions for the detention of asylum seekers established by the ECtHR.<sup>104</sup> Another point raised and which was not addressed in the Statement is the question of what would happen to refugees saved in international and Turkish waters.<sup>105</sup>

The '1:1' resettlement scheme will only work if the existing commitments of EU Member States under the Voluntary Humanitarian Admission Scheme are used. However, the resettlement scheme is not adequately implemented and,

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<sup>99</sup> Proposal for a Regulation of the EP and the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM/2015/0452 final. The aim is to combine this list with Asylum Procedure Regulation which takes the assessment by EASO into account.

<sup>100</sup> Steve Peers, The final EU/Turkey refugee deal: a legal assessment, EU law analysis, <<http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>>, last accessed 30 March 2016.

<sup>101</sup> Elizabeth Collett, The Paradox of the EU-Turkey refugee deal, March 2016, <<http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>>, last accessed on 30 March 2016.

<sup>102</sup> Mortera-Martinez, supra n. 98.

<sup>103</sup> See on this CJEU, Case C-69/10 Diouf, ECLI:EU:C:2011:524 and generally: Francesca Ippolito, Migration and Asylum cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?, European Journal of Migration and Law 17(2015) pp.1-28 (at p.21).

<sup>104</sup> See in this regard for instance: *Dougoz v. Greece*, 6 June 2011; *Addolkhani and Karimnia v. Turkey*, 27 July 2011, *Khlaifia and Other v. Italy*, 1 September 2015; *Mahamed Jama v. Malta*, 26.11.2015.

<sup>105</sup> See on this Steve Peers. The final EU/Turkey refugee deal: a legal assessment, EU law analysis, <<http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>>, last accessed 22 March 2016.

in particular, EU Member States Hungary and Slovakia resist it.<sup>106</sup> Until 15 March 2016, only 4,555 people out of 22,504 were resettled through multilateral and national schemes.<sup>107</sup> Since 4 April 2016, when the 1:1 mechanism started to be applied, 37 Syrians have been resettled to Germany, 11 to Finland and 31 to the Netherlands.<sup>108</sup> In addition the resettlement plan will stop once 72,000 refugees are reached. The literature is divided on whether the temporary resettlement scheme is a breach of international law; it is suggested that this is a breach of the non-discrimination principle under Article 3 of the 1951 Refugee Convention.<sup>109</sup> However, it can be argued that if all asylum applications are duly registered, then provisions would be applied to refugees without discrimination. In addition, if the exchange of refugees restricted to Syrians is seen as problematic, then it needs to be accepted that Turkey cannot violate these provisions in regard to non-European refugees due to the applicable geographical limitation.<sup>110</sup>

Finally, observers have devoted some thinking to the legal nature of, in particular, the latest deal of 18 March 2016 and its implications for legal review and the rights of the EP. While it is labelled the EU-Turkey Statement, doubts exist about its author (on the EU side) and whether it can be considered an international agreement. Commentators are divided on the legal categorisation of this text. Some have argued this statement needs to be considered an international agreement of the European Council, the Council of the European Union or the Member States. In consequence, the literature has argued that this is an international agreement concluded by the European Council or Council of the European Union which would have to follow the procedure under Article 218 TFEU and require the consent of the EP.<sup>111</sup>

Primarily from the EU perspective, it has to be clarified that the European Council as a political institution is not able to conclude an international agreement on behalf of the EU. An international agreement can be concluded only by the European Council under Article 218 TFEU on behalf of the EU or by Member States due to their own international treaty-making powers. The general understanding, confirmed by CJEU case law, is that the Member States

<sup>106</sup> Joined cases C-647/15 *Hungary v. Council* and Case C-643/15 *Slovakia v. Council*, ECLI:EU:C:2017:618.

<sup>107</sup> Communication from the Commission to the EP, the European Council and the Council, First report on relocation and resettlement, Brussels, 16.3.2016, COM (2016) 165 final, p.16.

<sup>108</sup> Communication from the Commission to the EP, the European Council and the Council, First report on relocation and resettlement, Brussels, Second report on relocation and resettlement, 12.4.2016, COM (2016) 222 final.

<sup>109</sup> Article 3 Non-discrimination (1) The Contracting States shall apply the provisions (2) of this Convention to refugees without discrimination (3) as to race, religion or country of origin. (4). See in this direction: Sergio Carrera and Elspeth Guild, EU-Turkey plan for handling refugees is fraught with legal and procedural challenges, but contra: Steve Peers, The final EU/Turkey refugee deal: a legal assessment.

<sup>110</sup> See on this Commentary on the Refugee Convention 1951, Published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, Article 3, <<http://www.unhcr.org/3d4ab5fb9.pdf>>, last accessed 31 March 2016.

<sup>111</sup> Marten den Heijer and Thomas Spijkerboer, Is the EU-Turkey refugee and migration deal a treaty?, EU Law Analysis, 7 April 2016, <<http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>>, last accessed 12 April 2016.

have not lost their ability to conclude international agreements with third countries outside the framework of EU law if does not interfere with the exclusive EU competences according to Article 3 TEU.<sup>112</sup>

An internationally binding agreement is defined as an international agreement made between entities, both or all of which are subjects of international law possessed of an international legal personality and treaty-making capacity, and which is intended to create rights and obligations, or to establish relationships, governed under international law.<sup>113</sup> The label of the legal text (as a 'statement' rather than an 'agreement') is not decisive of whether it should be considered an international agreement. Rather, it needs to be determined whether the text clarifies the will to be bound, whether the circumstances indicate that the parties, which are instilled with treaty-making powers, have the intention to be bound and create binding rights and obligations. The EU-Turkey Statement does not clarify whether the parties have the intention to be bound, so other factors have to be considered such as the drafting history, the language of the text, the circumstances of the conclusion and subsequent practice such as ratification or signature. If the intent of the parties cannot be established based on objective criteria, it has to be assumed that no legal relations have been established.<sup>114</sup> The dividing line between binding and non-binding international instruments is, however, blurred in practice as both can hold political obligations, which are not enforceable in practice.<sup>115</sup> A comparison can be made to other joint declarations<sup>116</sup> that the Commission or Council have initiated with third countries that can also include concrete commitments but of a political nature.<sup>117</sup> The intention of parties to be bound can also be deduced from the wording and the use of the words 'shall' or 'will'. The statement avoids the use of the word 'shall', reverting instead to the use of word 'will' in several paragraphs of the statement. The EU institutions and Member States have indicated that they consider this statement only to result in political commitments not legally enforceable and indicated that

<sup>112</sup> Joined Cases C-181/91 and C-248/91 *EP v. Council and EP v. Commission*, ECLI: EU:C:1993:271, para.14.

<sup>113</sup> Gerald Gray Fitzmaurice, Third Report on the Law of Treaties, Yearbook of the International Law Commission II (1958) p.24. See also the wording of Art.2 (1) (a) VCLT: "treaty means an international agreement in written form concluded between states and governed by international law".

<sup>114</sup> Kirsten Schmalenbach, Art.2 VCLT paras. 35-36, in Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A commentary, Springer Publisher, Berlin, 2011.

<sup>115</sup> See Oscar Schachter, The twilight existence of nonbinding agreements, AJIL 1977, pp.96.

<sup>116</sup> Defining it as a politically binding joint declaration, see Karolina Banická, EU-Turkey deals seems to be schizophrenic, 22 March 2016, <<http://www.migrationonline.cz/en/e-library/eu-turkey-deal-seems-to-be-schizophrenic>>, last accessed on 12 April 2016.

<sup>117</sup> As an example the 2016 Joint Way Forward on migration issues between Afghanistan and the EU can be provided signed on 2 October 2016 and adopted by a Commission decision, <[https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_is\\_sues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_is_sues.pdf)>, adopted by Commission Decision on the signature on behalf of the European Union of a "Joint Way Forward on migration issues between Afghanistan and the EU, C(2016)6023/F1. It is explicitly stating that it is not legally binding but addresses commitments made by Afghanistan to readmit its citizens who entered into the EU or are staying in the EU irregularly and clarified that the EU intends to meet the costs of travel for Afghans up to the final destination in Afghanistan which normally find entry only into legally binding readmission agreements.

neither the Council of the European Union nor the European Council were the author of statement and instead this statement was agreed between the Heads of States.<sup>118</sup> This reading was confirmed in recent rulings by the General court. It argued that the 'journalistic context' of the press release No.144/16 communicating the use of EU-Turkey statement' is ambivalent and 'regrettably ambiguous' in its use of terms.<sup>119</sup> It relies instead on the official documents relating to the meeting of 18 March 2016 indicating two separate events, the meeting of the European Council and an international summit; the Heads of State or Government of the Member States met with the Turkish Prime Minister on 18 March 2016 in the premises shared by the European Council and the Council, namely, the Justus Lipsius and cannot be regarded, according to the Court, as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union.<sup>120</sup> It is considered, instead, a Head of States instrument and the Court leaves it open whether it sides with the EU institutions and considering it a political statement or an international agreement as the applicant perceives it.

The argument of a journalistic context is misleading and appears to lead the European Council away from its responsibility. The European Council has to be considered accountable for this Statement, which should also be seen in the context of other political commitments given in other meetings which also mandated the EU institutions, especially the Commission, to implement them. The European Council is not in the position to conclude international agreements on behalf of the EU. Art.15 TEU stipulates that the European Council defines the general political direction but shall not exercise legislative functions. Hence, it appears that the EU carefully avoids the impression of an informally concluded international agreement by using the term 'statement' and by involving the European Council. In any event, it could only be legally challenged under Article 263 TFEU if the condition that this European Council act is intended to be legally binding is met and that the claim by an individual (non-privileged) applicant is directly and individually concerned by the act (which would anyway fail due to strict *locus standi* rules developed through the case law on standing). This increasing practice of international soft law is a difficult balancing act between legal uncertainties and result-oriented efficiency. Soft law in international law is an attractive 'tool for diplomats and policy-makers.'<sup>121</sup> This Statement joins ranks with other soft law tools employed in the EU enlargement process and the EU-Turkey relations but needs to be closely monitored for the reasons of its lack of accountability, transparency and procedure in EU law .

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<sup>118</sup> See in this regard: Case T-192/16 *NF v. European Council*, ECLI:EU:T:2017:128, paras. 27-30.

<sup>119</sup> Paras.61 and 66.

<sup>120</sup> Paras.66-71.

<sup>121</sup> Jan Klabbers, Law-making and constitutionalism, p.89 in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International law*, Oxford University Press 2009.

## 5. CONCLUSIONS

This contribution has outlined that the EU's multi-layered relationship with Turkey is complex, ambivalent and in flux. This complex three-layered relationship is comprised of: the EU-Turkey association and customs union (first layer); accession negotiations (second layer); and the compartmentalisation of key areas including the fight against terrorism, energy policy and migration (third layer). It is also made ambivalent through a tangled web of diverting interests between the involved players (Turkey, individual EU Member States, the Commission and the EP). Whilst accession negotiations are practically frozen, other layers are in motion. Millions of Turkish migrant workers live in EU Member States resulting regularly in CJEU case law on the interpretation of association rules. These different levels are in perpetual motion but also in danger of getting out of balance. An asymmetry of incentives and interests prevails between the EU and Turkey. One of the most dynamic areas in the last five years has been migration which has also contributed to new dynamics to the other layers under the association policy and, especially, the accession process. Much as the Turkish efforts to host two million Syrian refugees need to be recognised, Turkey aims to instrumentalise the refugee to achieve short-term objectives such as visa-free access to the EU.<sup>122</sup> However, despite the new dynamics, the complexity of EU-Turkey relations, the interrelation between the layers and EU conditionality slow down any progress. Until now the tangible incentive raised in several EU-Turkey Statements in 2016, to achieve visa-free access for Turkish citizens by June 2016, has not been realised. Moreover, the EP has urged in a July 2017 resolution to suspend the accession negotiations if the Turkish constitutional reforms were to be implemented and a Turkish referendum on the reintroduction of the death penalty staged.<sup>123</sup> Finally, further concrete progress from the EU side in the accession layer is only achieved if Turkey recognises the Republic of Cyprus and applies the Additional Protocol to Cyprus.<sup>124</sup> Instead, progress in alignment to the EU *acquis* – except in the *acquis* linked to visa policy – has remained slow or come to a stand-still.<sup>125</sup> Consequently, the 'jury' is still out on whether EU-Turkey co-operation in the field of migration is a game changer for the overall political and legal relationship. It might also be beneficial

<sup>122</sup> The special role Turkey holds needs to be recognised in comparison to other European Neighbourhood Policy (ENP) countries such as Lebanon and Egypt, each hosting an extraordinary number of Syrian refugees. With a population of 4,467 million Lebanon hosted in December 2015 1,835,840 refugees, <<http://www.unhcr.org/pages/49e486676.html>>, last accessed on 11 April 2016; Egypt hosted 120,000 Syrian refugees, <<http://www.unhcr.org/pages/49e486356.html>>, last accessed on 11 April 2016.

<sup>123</sup> EP Resolution of 6 July 2017 on the 2016 Commission Report on Turkey (2016/2308(INI)).

<sup>124</sup> The integration capacity can become a major stumbling stone if existing EU member states put future accession up to referendum. After discussion for and against a mandatory referendum, the French National Assembly agreed on 2008 on allowing the President to decide on a nationwide referendum or for Parliament to decide by means of a parliamentary vote. In Austria, these remarks have also been made since 2008. See further Vaughne Miller, Referendums on the European Union, 13 November 2012, House of Commons Library, <<http://researchbriefings.files.parliament.uk/documents/SN06472/SN06472.pdf>>, last accessed 1 March 2016.

<sup>125</sup> See European Commission, 2016 Progress Report on Turkey.

for both sides to move away from the immobile layers of accession negotiations which appear to have been abandoned in 2017 and turn to a policy of small steps, refocussing on the layers which engage both sides without major commitments. In sum, EU-Turkey relations remain locked in the 'hedgehog's dilemma': both sides feel uncomfortable together but do need to be in each other's proximity for economic, political and geostrategic purposes.

