# Editorial

## Disintegration Through Law?

This is certainly not the most propitious time to publish a Journal "on Law and Integration". The *Zeitgeist* is captured by the European Council in its recent meeting of 18 and 19 February, where it stated that the reference to an "ever closer Europe", a formula which resounds in every founding instrument from Rome to Lisbon, has no interpretative effect; the only possible effect that it could be reasonably deemed to produce.

It is disintegration, not integration, that seems to be the dominant motive behind the contemporary events in Europe; it is the *panacea* offered to soothe the fears raised by the multiple crises which hold the present state of Europe in a tight grip; it is the invisible thread keeping together the anxieties which underlie the scholarly discussions about its future.

It is not our task to determine the multifarious factors, of a social, political or cultural nature, which led to the current state of things. But the analysis of law as a possible disintegration factor would clearly be part of our brief.

A classical and, to my knowledge, unprecedented example comes from the recent EU-Turkey Statement of 18 March 2016 on the large influx of migrants and asylum seekers in Greece. This Statement has been harshly criticised in the press and in specialised blogs for its dubious consistency with international and European refugee law and with the imperatives of public morality.

There is, however, a further reason to be critical, less evident but equally or even more insidious, concerning the nature of the Statement and the procedure followed for its adoption.

In spite of its elusive title, the Statement appears to be an international agreement. As is well known, the law of treaties does not give a special decisive meaning to the designation of an instrument to determine its legal nature. Rather, the legal nature of an international instrument is to be determined on the basis of its contents and of the intent of its parties (see, along these lines, International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* judgment on jurisdiction and admissibility of 1 July 1994, paras 23-30; the International Court of Justice (ICJ) applied customary law as codified by Art. 2, para. 1, lett. c), of the 1969 Vienna Convention on the Law of Treaties).


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With regard to its content, there is little doubt that the Statement is not a mere declaration of principles, but rather a full-fledged normative scheme, spelling out specific conduct for the parties. In the case referred to above, which in many aspects is similar to the case at hand, the ICJ ruled:

> "the Minutes are not a simple record of a meeting [...] they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement".

With regard to the intent, the phraseology used in the Statement clearly indicates that the parties intended its provisions to be binding in their reciprocal relations: "The EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points [...]". This sentence indicates that the parties "decided" on the purpose of the Statement and "agreed" on the means to be used to attain it. Moreover, in the subsequent practice of the European Institutions, the Statement is commonly referred to as an agreement and its provisions are referred to as "agreed" by the parties (see, for example, the press release MEMO/16/1221 of the European Commission, *Implementing the EU-Turkey agreement*, 4 April 2016).

But, if the Statement is an international agreement, who are the parties to it? While the answer is quite obvious for Turkey; it is far less obvious for its European counterpart.

According to the terms of the Statement, it is "concluded" by the European Union. However, the procedure of Art. 218 of the Treaty on the Functioning of the European Union (TFUE), which forms the basis for the conclusion of international agreements by the European Union, was not used. The Statement has been negotiated by the President of the European Council and, apparently, concluded in the course of a joint meeting between the European Council and the Turkish counterpart. The Commission had some role in the preparatory work of the Statement, and a little role, if any, in the negotiations, whereas the European Parliament had no role at all. Even if the Statement were related exclusively to the Common Foreign and Security Policy (CFSP), which appears to be highly questionable, Parliament should nonetheless have been immediately and fully informed at all the stages of the procedure (Art. 218, para. 10, TFEU; see also Court of Justice, judgment of 20 June 2014, case C-258/11, *European Parliament v. Council*, para. 54). In no case, under the founding Treaties, can an agreement be concluded by the European Council.

It is also complicated to assume that the Statement has been concluded by the Member States acting within the European Council. The subject of the Statement falls clearly within the exclusive competence of the EU. A number of its provisions may affect

common EU rules or alter their scope or still prejudge the further development of EU legislation, under the *ERTA* doctrine and its progeny (see, Court of Justice, opinion of 7 February 2006, 1/03, para. 126 and judgment of 4 September 2014, case C-114/12, *Commission v. Council*, para. 90 *et seq*.). To mention the most obvious example, the Statement determines that Turkey is to be considered as a first asylum country or third safe country under the Directive procedures (Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection). Moreover, the Statement intends to have effect in an area already covered by the readmission agreement between the EU and Turkey of 16 December 2013. Following an understanding with Turkey, the agreement should be provisionally applied from 1 June 2016 (see Communication COM(2016) 166 final from the Commission to the European Parliament, the European Council and the Council, *Next operational steps in EU-Turkey cooperation in the field of migration*).

Thus, neither the European Council, acting on behalf of the EU, nor the Member States, acting on their own behalf, did have the authority, under EU law, to conclude the Statement and to assume the rights and obligations contained therein.

As a consequence, the legality of the Statement can only be based on a superior source of authority. But does this source exist within the European legal order? The only possibility which remains to be explored is that the Statement relies on the unanimous consent of the Member States, which, allegedly, could overcome the legal hurdles imposed by EU law. It would be international law, in this perspective, which provides for the overarching source of authority within the EU legal order.

Beyond mere legalism, there is thus a great deal at stake. According to its classical foundations, EU law is based on the principle of autonomy, according to which the Member States cannot, neither individually not collectively, act beyond and above the founding Treaties, to affect their procedures or to alter their scope.

In *Defrenne*, the Court of Justice famously clarified that, in light of the principle of autonomy, agreements concluded among the Member States that aimed to derogate from a rule of the (then) Treaty on the European Community, are "ineffective" within the European legal order (Court of Justice, judgment of 8 April 1976, case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, paras 58-59). This is quite obvious in a Constitutional legal order in which law is produced by a *numerus clausus* of sources and the powers of the public authorities are legitimated through a *numerus clausus* of procedures.

In all its aspects, the EU-Turkey Statement is going in the opposite direction and seems to be exploiting the potentialities offered by international law as an alternative decision-making procedure within the EU legal system. This is not a completely unexplored road. The *Brexit* agreement, adopted by the Member States, acting within the European Council on 18 and 19 February 2016, and mentioned at the outset of this edi-

torial, equally seems to subvert the very mission of the founding Treaties: to create an ever closer Union. Even with respect to this precedent, however, the EU-Turkey Statement seems to go one step further as it represents a visible example of the creeping modifications of the EU legal and political system, which almost inadvertently happens with the abdicant consent of the other political EU Institutions.

This road has a symbolic cost which can hardly be overestimated. For decades, law has discharged a key role in the process of European integration. It has often heralded the way through which social conduct was to proceed. Now, law, and more specifically the normative instruments offered by international law seem to be used by the Member States to pursue their objectives over and above the Constitutional framework established by the Treaties.

This use of international instruments has the effect of disregarding the European institutional balance upon which the *acquis européen* has developed and which, with all its limits, constitutes the legacy of the first phase of the European integration. It may shift the centre of gravity to the Member States, the *unmoved movers* of the European legal universe. It may subdue the institutional pluralism, which has represented the hallmark of the political experience of the European integration, and create, instead, an institutional desert, where the political power is concentrated in the hand of the States acting through the European Council. It may mark the return to a Europe of sovereign States and the definite disappearance of the notion of a European public interest, of which we are in desperate need.

**E. C.**