



INSIGHT

DENIALISM AS THE SUPREME EXPRESSION OF REALISM A QUICK COMMENT ON *NF v. EUROPEAN COUNCIL*

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ABSTRACT: By Order of 28 February 2017 in case T-192/16, *NF v. European Council*, the General Court dismissed as inadmissible an action for annulment brought against the s.c. EU-Turkey deal concluded on 18 March 2016. In the view of the General Court, independently of its binding nature, the deal is to be attributed to the Member States and not to the EU. This *Insight* examines the technical shortcomings of this conclusion, and its controversial political wisdom.

KEYWORDS: EU-Turkey deal – attribution – decisions of the Member States representatives meeting within the Council – migration crisis – European Council – *acquis constitutionnel*.

I. A FURTHER STEP IN THE TROUBLED QUALIFICATION OF THE EU-TURKEY DEAL

The adoption of the EU-Turkey Statement (hereinafter, “the Statement”), on 18 March 2016, raised a lively debate on its controversial political and ethical wisdom, as well as on its equally controversial legal nature. Diverging views have been presented, from those who praised the Statement for having remedied one of the most acute crises of the EU, prompted by the massive influx of immigrants through the Balkan route, to those who sharply criticized it as a cynical response aimed to soothe the anxieties in European public opinion, at a very high cost in terms of respect for human rights and solidarity.

This divergence was mirrored by a sharp dispute on the legal nature of the Statement. Whereas a number of scholars, including the current author, have argued that, in spite of its tone, the Statement was a binding international agreement, that should have been concluded in the form laid down by Art. 218 TFEU, others have suggested that the Statement was not an agreement but rather a political arrangement and, therefore, that its conclusion did not require any specific form. Surprisingly, this

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latter stance was taken not only by the European Council and by the Member States (hereinafter, "MS"), but also by the more supranational Institutions, such as the European Parliament and the Commission, whose prerogatives had been sacrificed by the purely intergovernmental procedure followed for its adoption.

European Papers has devoted quite some space to this debate, and has hosted contributions arguing the different opinions, in the conviction that, beyond the scholarly confrontation, this event may have profound implication for the stability and credibility of the European institutional balance; or, indeed, for the role of Europe in a changing world.¹

Those interested in this debate have now been offered a second round for confrontation. On 28 February 2017, the General Court released its much-awaited decision in *NF v. The European Council* (hereinafter, "NF"), a case prompted by an action for annulment brought against the Statement by a Pakistani national that had fled his country and entered Greece through the Aegean Sea.²

The action has been declared inadmissible. The General Court found that the Statement, regardless of its nature, is not an act of the EU and, therefore, that it cannot be attributed to the European Council. It is rather an act adopted by the MS within the European Council. Consequently, it cannot be the object of an annulment action under Art. 273 TFEU.

II. THE STANDARD OF ATTRIBUTION ADOPTED BY THE GENERAL COURT

This conclusion is entirely based on a what appeared to the General Court as a communicative mistake. The General Court has recognized, indeed, that, at first sight, the Statement has the outer features of an act of the EU: European Institutions, in particular the Commission and the President of the European Council, played a significant role in preparing, negotiating and concluding the Statement;³ it was published on the Council's website as an act of the European Council;⁴ it explicitly refers to the EU and to the Turkey as its sole parties.⁵

However, the General Court upheld the view of the European Council that the terms "European Council" and "EU" had been used inappropriately, in a "journalistic context" only, and that "some documents are occasionally inadvertently placed under inappropriate sections of the internet site shared by those two institutions and the

¹ T. SPIJKERBOER, *Minimalist Reflections on Europe, Refugees and Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 533 *et seq.*; G. FERNÁNDEZ ARRIBAS, *The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1097 *et seq.*; J. POON, *EU-Turkey Deal: Violation of, or Consistency with, International Law?*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1195 *et seq.*

² Order of the General Court of 28 February 2017, case T-192/16, *NF v. European Council*.

³ *Ibidem*, paras 5-7.

⁴ *Ibidem*, para. 8.

⁵ *Ibidem*, paras 9 and 54.

President of the European Council".⁶ In light of what it labeled as the "ambivalence of the expression 'Members of the European Council' and the term 'EU' in the EU-Turkey statement", the General Court found it appropriate to engage in an analysis of the preparatory documents of the meeting of 18 March 2016, with a view to determining whether, in the process that led to the adoption of the Statement, the MS acted as components of the European Council or rather on their own behalf.⁷

As a result of this analysis, the General Court found that

"the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure".⁸

In the opinion of the General Court, rather, the Statement has been adopted by the Heads of State and Government of the MS, acting in their capacity of organs of their States, using the European Council as a mere occasional venue within which to coordinate their action. The General Court went on to point out that, even if the terms of the Statement were meant to indicate that an exchange of consent was performed between its parties, to the effect that an international agreement was informally concluded through the terms of the Statement, such a hypothetical agreement had as its parties the MS of the EU and their Turkish counterpart.⁹

III. THE MANY MISGIVINGS OF THE ORDER

Both the logical process followed, and the conclusions arrived at, by the General Court appear to be methodologically and substantively very questionable. Three major flaws can be detected, that fatally undermine the persuasiveness of the ruling.

First, the conclusion of the General Court is premised on a reasoning entirely based on the intent of the persons that are, at the same time, Heads of State and Government of the MS, and members of the European Council. However, the Heads of State and Government of the MS do not have an unfettered power to select the capacity in which they are acting. In force of EU constitutional constraints, when the effect of their acts encroaches upon existing EU legislation, they lose their power to act outside the EU framework, as mere representatives of their States.¹⁰

⁶ *Ibidem*, para. 58.

⁷ *Ibidem*, para. 61.

⁸ *Ibidem*, para. 71.

⁹ *Ibidem*, para. 72.

¹⁰ On the tendency to use decisions of the Heads of State and Government of the MS as an alternative to decisions of the EU, see R.A. WESSEL, *The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1306, who notes that "[u]sually, they are needed once Decisions cannot

This principle emerges precisely from the ruling in case *European Parliament v. Council of the European Communities and Commission of the European Communities*, wrongly invoked by the General Court in support of its conclusion.¹¹

The European Parliament had brought an action for annulment against a decision to grant special aid to a developing State, taken by the representatives of the MS meeting within the Council, that infringed its prerogatives in budgetary matters. In the view of the Parliament, this act, in spite of its intergovernmental form, should be regarded as an act of the Council and, consequently, subject to review under Art. 173 TEC.

The Court of justice first determined that the competence of the MS was not preempted and, therefore, that they could have lawfully taken the contested decision, "collectively in the Council or outside it".¹² Since the act could have been lawfully taken by both, the European Communities and the MS, its legal nature was to be determined "having regard to its content and all the circumstances in which it was adopted".¹³ In its Opinion, AG Jacobs stated that "the question whether the contested act constitutes an act susceptible to judicial review depends on its content and effects and not on the description of it given in the press release and in the draft minutes of the meeting at which it was adopted".¹⁴

(solely) be taken by the Institutions, and Member States in their capacity as 'states' need to step in. Indeed, not being an EU decision, the 'Decision' thus adopted seems to be nothing less than an international agreement".

¹¹ Court of Justice, judgment of 30 June 1993, joined cases C-181/91 and C-248/91, *European Parliament v. Council of the European Communities and Commission of the European Communities*. This ruling is invoked in Order of the General Court of 28 February 2017, *NF v. European Council*, cit., para. 45.

¹² *European Parliament v. Council of the European Communities and Commission of the European Communities*, cit., para. 16.

¹³ *Ibidem*, para. 14.

¹⁴ Opinion of AG Jacobs delivered on 16 December 1992, joined cases C-181/91 and C-248/91, *European Parliament v. Council of the European Communities and Commission of the European Communities*, para. 17. The need to determine the legal nature of acts taken in the Council arose also in the famous ERTA case (Court of justice, judgment of 31 March 1971, case 22/70, *Commission of the European Communities v. Council of the European Communities*). In response to an exception of inadmissibility raised by the Council on the ground that the deliberation on 20 March 1970 – where it was agreed that the European agreement on road transport should be concluded by the MS of the Community – was to be attributed to the MS, AG Dutheillet de Lamothe wrote: "either the negotiation and conclusion of the AETR was already, or after a certain date came to be, within the scope of one of the articles of the Treaty relating to the authority of the Community to negotiate and conclude agreements with third countries; or they never were, and at no point have come within that scope. In the first case the application is admissible, as what is brought before the Court is a deliberation of the Council acting as an institution of the Community. In the second case the application is inadmissible, since the contested proceedings are not an act of a Community authority but of the Council in its capacity as the unifying agency of the Member States" (Opinion of AG Dutheillet de Lamothe delivered on 31 March 1971, case 22/70, *Commission of the European Communities v. Council of the European Communities*, pp. 5-6). A few lines before, AG Dutheillet de Lamothe has indicated that "it is indeed the substance, the subject-

This analysis is precisely what was needed in the case at hand but, regrettably, the General Court carefully abstained from performing it. The result of this analysis would have probably led the General Court to find that, by virtue of the fact that the measures plainly fall in an area thickly regulated by EU law, the Statement should be qualified as an act of the EU Institutions.

Second, the General Court failed to consider that, since the Statement was taken on the basis of an exchange of consent with a third State, their author ought to be identified on the basis of the international rules on attribution.

In this regard, one must frankly recognize that the Statement is an absolute *première* in international practice. Never before, to the knowledge of the current author, the paternity of an international compact had been challenged on the ground that its real author was not the one nominated in the act itself.¹⁵

International rules on attribution rely on a basic paradigm: conducts by an organ of a State or of an international organization, performed in that capacity, are attributed to that State or to that international organization. In case of an organ of an international organization composed of representatives of its MS, conducts performed by these representatives will be attributed to their respective State, whereas conducts of the organ as such will be attributed to the international organization.

This rule is enshrined, in almost identical terms, in Art. 4 of the Articles on State Responsibility and in Art. 6 of the Articles on the Responsibility of International Organizations. Moreover, Art. 7 of the Articles on State Responsibility and Art. 8 of the Articles on the Responsibility of International Organizations, add that conduct performed by an organ of a State or, respectively, of an international organization, acting in this capacity, is attributed to the State or, respectively, to the international organization, even if the organ has exceeded its authority under domestic law.

The same formal test is employed by international law of treaties, with the specification that the conclusion of a treaty requires a special qualification, usually referred to as “full powers”.¹⁶ With regard to international organizations, Art. 7, para. 3,

matter, the content and the effects of the disputed expression of intent, not the form selected by its authors, which confer upon it its true nature” (*ibidem*, p. 4).

¹⁵ In its Advisory Opinion of 2010, the International Court of Justice attributed the declaration of independence of Kosovo, namely a unilateral act, to persons that were members of the interim self-administration of Kosovo, but acting in their personal capacity. Even in that case – one of the less convincing in the long history of the International Court of Justice –, however, attribution was not based on the presumed intent of these persons, but rather on the textual and contextual interpretation of the declaration. The Court found that a declaration of independence was totally extraneous to the functions conferred to the interim self-administration, to the point that it could not have been taken in that capacity. Cf. International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, advisory opinion of 22 July 2010, paras 105 *et seq.*

¹⁶ See Art. 7, para. 1, of the Vienna Convention on the Law of Treaties: “A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose

of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (hereinafter, “the 1986 Vienna Convention”) indicates that a person is entitled to express the consent of the organization if it appears from the circumstances that this person is “representing the organization for such purposes”.

The application of this test in the case at hand inexorably leads to the conclusion that an international instrument that plainly falls within the competence of the EU, negotiated by the President of the European Council and by the President of the European Commission – two organs entrusted with the international representation of the EU –, adopted at a meeting of the European Council and Turkey held in the headquarters of the European Council, communicated in the form of a press release of the European Council and posted in its website, whose wording immediately conveys the idea that its consent has been agreed upon by Turkey and the EU, cannot but be attributed to the EU.

Nor the failure to follow the detailed procedure established by Art. 218 TFEU can lead to the attribution of the Statement to the MS. Under Art. 46 of the 1986 Vienna Convention, the violation of a provision of the internal law of an international organization, regarding the competence to conclude a treaty by that organization, constitutes a ground of invalidity of that treaty, and does not concern the distinct profile of attribution.

IV. CONSTITUTIONAL IMPLICATIONS

Even from a constitutional perspective, *NF* seems to be a dangerous precedent.

By recognizing to the MS the power to act in their own capacity even in matters potentially falling within the scope of the EU exclusive competence, it seems to deviate from the principles, developed by a consistent line of case law, that prevent the MS, acting individually or collectively, from undertaking international obligations that encroach upon existing or foreseeable legislation.

NF may further create an incentive to use the European Council as a means for circumventing the system of remedies set up by the founding treaties. As a consequence of its attribution to the MS, the Statement cannot be judicially reviewed by the CJEU, neither through action for annulment, nor through preliminary reference.

Finally, and paradoxically, it could open the door to a greater tendency of National judges to review the acts of the European Council against a purely domestic constitutional standard. This tendency is far from unlikely, at a time where the

of expressing the consent of the State to be bound by a treaty if: *a*) He produces appropriate full powers; or *b*) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers”.

protection of individual fundamental rights has become a field of confrontation between European and National judiciatures.

This is precisely the fate that could be met by the Statement. After *NF*, every judge, in Greece or elsewhere, is entitled to judicially review it, and, if it were found to be inconsistent with domestic standards, to disregard it. Not only the objective to put the EU-Turkey deal beyond the reach of judicial control would not be achieved; the judicial review of the Statement could be split in a potentially infinite pattern of decisions by national jurisdictions, that may endanger the unitary position of Europe *vis-à-vis* its "Turkish counterpart".

V. CONCLUSIONS

All in all, the reading of the Order conveys the impression that attribution has been the avoidance technique behind which the General Court has hidden the real issue at stake, namely the dubious consistency of the Statement with international and EU law. Along this line, the General Court has bent the authority of the European judicial system to the demands of *realpolitik*. However, at the end of the analysis, and in light of the many logical, constitutional and political pitfalls entailed by its decision, the question lingers whether realism is the appropriate ingredient that a court of justice must include in its recipe, in particular when fundamental rights of individuals are potentially at stake. In more general terms, one may further wonder whether avoidance is the right technique to adopt *vis-à-vis* situations that touch upon the very essence of the EU and its constitutional identity.

