Public version

Public version

ORDER OF THE GENERAL COURT (First Chamber, Extended Composition)

28 February 2017 (*)

(Action for annulment — EU-Turkey statement of 18 March 2016 — Press release — Concept of 'international agreement' — Identification of the author of the act — Scope of the act — Meeting of the European Council — Meeting of the Heads of State or Government of the Member States of the European Union held on the premises of the Council of the European Union — Capacity of the representatives of the Member States of the European Union during a meeting with the representative of a third country — First paragraph of Article 263 TFEU — Lack of jurisdiction)

In Case T-193/16,

NG, residing in Athens (Greece), represented by B. Burns, Solicitor, P. O'Shea and I. Whelan, Barristers,

applicant,

v

European Council, represented by K. Pleśniak, Á. de Elera-San Miguel Hurtado and S. Boelaert, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking the annulment of an alleged agreement concluded between the European Council and the Republic of Turkey dated 18 March 2016 and entitled 'EU-Turkey statement, 18 March 2016',

THE GENERAL COURT (First Chamber, Extended Composition),

composed of I. Pelikánová, President, V. Valančius, P. Nihoul, J. Svenningsen (Rapporteur) and U. Öberg, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

The meetings between the European leaders and the Turkish leader prior to 18 March 2016

1 On 15 October 2015, the Republic of Turkey and the European Union agreed on a joint action plan entitled 'EU-Turkey joint action plan' ('the joint action plan') designed to strengthen their cooperation in terms of supporting Syrian nationals enjoying temporary international protection and managing migration, in order to respond to the crisis created by the situation in Syria.

2 The joint action plan aimed to respond to the crisis situation in Syria in three ways, namely, first, by addressing the root causes leading to a mass exodus of Syrians, secondly, by providing support to Syrians enjoying temporary international protection and to their host communities in Turkey and, thirdly, by strengthening cooperation in the field of preventing illegal migration flows towards the European Union.

3 On 29 November 2015, the Heads of State or Government of the Member States of the European Union met with their Turkish counterpart ('the first meeting of the Heads of State or Government'). Following that meeting, they decided to activate the joint action plan and, in particular, to step up their active cooperation concerning migrants who were not in need of international protection, by preventing them from travelling to Turkey and the European Union, by ensuring the application of the established bilateral readmission provisions and by swiftly returning migrants who were not in need of international protection to their countries of origin.

4 On 8 March 2016, a statement by the Heads of State or Government of the European Union, published by the joint services of the European Council and the Council of the European Union, indicated that the Heads of State or Government of the European Union had met with the Turkish Prime Minister in regard to relations between the European Union and the Republic of Turkey and that progress had been made in the implementation of the joint action plan. That meeting had taken place on 7 March 2016 ('the second meeting of the Heads of State or Government'). That statement specified:

'The Heads of State or Government agreed that bold moves were needed to close down people smuggling routes, to break the business model of the smugglers, to protect [the] external borders [of the European Union] and to end the migration crisis in Europe … [They] warmly welcomed the additional proposals made today by [the Republic of] Turkey to address the migration issue. They agreed to work on the basis of the [following] principles:

– to return all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the [European Union];

– to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the … Member States [of the European Union], within the framework of the existing commitments;

– …

The President of the European Council will take forward these proposals and work out the details with [the Republic of Turkey] before the March European Council. …

This document does not establish any new commitments on Member States as far as relocation and resettlement is concerned.

…'

5 In its Communication COM(2016) 166 final of 16 March 2016 to the European Parliament, the European Council and the Council, entitled 'Next operational steps in EU-Turkey cooperation in the field of migration' ('the communication of 16 March 2016'), the European Commission stated that, on 7 March 2016, the '[European Union] leaders [had] warmly welcomed the additional proposals made by [the Republic of] Turkey and [had] agreed to work with Turkey on the basis of a set of six principles', that 'the President of the European Council [had been] requested to take forward these proposals and work out the details with Turkey before the March European Council' and that 'this Communication [set] out how the six principles should be taken forward, delivering on the full potential for [European Union]-[Republic of] Turkey cooperation while respecting European and international law'.

6 In the communication of 16 March 2016, the Commission stated in particular that 'the return of all new irregular migrants and asylum seekers from Greece to Turkey [was] an essential component in breaking the pattern of refugees and migrants paying smugglers and risking their lives' and that, 'given the extent of flows currently between Turkey and Greece, such arrangements should be considered as a temporary and extraordinary measure which is necessary to end the human suffering and restore public order and which needs to be supported with the relevant operational framework'. According to that communication, recent progress had been made in the readmission of irregular migrants and asylum seekers not in need of international protection to the Republic of Turkey under the bilateral Readmission Agreement between the Hellenic Republic and the Republic of Turkey, which was to be succeeded, from 1 June 2016, by the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (OJ 2014 L 134, p. 3).

7 The Commission concluded, in the communication of 16 March 2016, that the 'arrangements for the return of all new irregular migrants and asylum seekers crossing the Aegean Sea from Turkey … [would] be a temporary and extraordinary measure [that] should begin as soon as possible' and that, in that respect, the communication '[set] out a framework that will ensure that the process is carried out in accordance with international and European law, which excludes the application of a "blanket" return policy[, and it] also [indicated] the steps, legislative and logistical, that [needed] to be taken as a matter of urgency for the process to be launched'.

The meeting of 18 March 2016 and the EU-Turkey statement

8 On 18 March 2016, a statement was published on the Council's website in the form of Press Release No 144/16, designed to give an account of the results of 'the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis' ('the meeting of 18 March 2016') between 'the Members of the European Council' and 'their Turkish counterpart' ('the EU-Turkey statement').

9 The EU-Turkey statement provided that, while 'reconfirm[ing] their commitment to the implementation of their joint action plan activated on 29 November 2015[, the Republic of] Turkey and the [European Union] recognise[d] that further, swift and determined efforts [were] needed'. That statement continued in the following terms:

'In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and [the Republic of] Turkey today decided to end the irregular migration from Turkey to the [European Union]. In order to achieve this goal, they agreed on the following additional action points:

(1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with [European Union] and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR [the Office of the United Nations High Commissioner for Refugees]. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. [The Republic of] Turkey and [the Hellenic Republic], assisted by [European Union] institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.

(2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the [European Union] taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, [European Union] agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the [European Union] irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18 000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54 000 persons. …'

The applicant's situation

10 The applicant, NG, is an Afghan national. He claims to have fled the Islamic Republic of Afghanistan with his family because of fear of persecution and serious harm to his person. He claims to have been the target and the victim of direct attacks by the Taliban, who tried to kill him because of his professional responsibilities in a private company having links to the United States of America, committed to carrying out sensitive tasks for the benefit of the regular Afghan army.

11 By his own account, the applicant entered Greece on a date later than 18 March 2016, having the intention of introducing an application for asylum in the Federal Republic of Germany.

12 The applicant explains that he submitted his application for asylum in Greece under coercion, owing in particular to the existence of the 'challenged agreement'. However, he never wished or had the intention to submit such an application in Greece because of the bad reception conditions in that Member State, particularly in terms of infrastructure, and the length of time for the processing of applications for asylum and systematic deficiencies in the implementation of the European Asylum System both at the level of that Member State's administration and at the level of its judicial system. These deficiencies, he claims, were noted, in particular, by the European Courts in the judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), and in the judgment of the European Court of Human Rights of 21 January 2011, *M.S.S. v. Belgium and Greece* (CE:ECHR:2011:0121JUD003069609).

13 Finally, the sole purpose of the applicant's presentation of his application for asylum in Greece was, he claims, to prevent him being returned to Turkey with, as the case may be, the risk of being detained there or being expelled to Afghanistan.

Procedure and forms of order sought

14 By application lodged at the Court Registry on 22 April 2016, the applicant brought the present action, in which, taking the view that the EU-Turkey statement was an act attributable to the European Council establishing an international agreement concluded on 18 March 2016 between the European Union and the Republic of Turkey, which he describes in his pleadings as the 'challenged agreement', he claims that the Court should:

– annul the '[alleged] agreement between the European Council and [the Republic of] Turkey dated 18 March 2016 [and] entitled "EU-Turkey statement, 18 March 2016"' ('the contested measure');

– order the European Council to pay the costs.

The expedited procedure and referral of the case to the First Chamber (Extended Composition)

15 By a separate document lodged at the same time as the application, the applicant requested that the case be dealt with under the expedited procedure pursuant to Article 152 of the Rules of Procedure of the General Court.

16 On 10 June 2016, the European Council submitted its observations on the request for an expedited procedure, concluding, in essence, that the conditions for applying that procedure were not met. By separate document lodged on the same day, that institution requested, principally, referral of the present case to the Grand Chamber pursuant to Article 28(1) and (2) of the Rules of Procedure. In the alternative, that institution requested referral of the present case to a Chamber sitting with at least five Judges pursuant to Article 28(5) of the Rules of Procedure.

17 By letter of 20 June 2016, the Court Registry acknowledged receipt of the request that the present case be referred to the Grand Chamber and informed the parties of its referral, pursuant to Article 28(5) of the Rules of Procedure, to an extended Chamber sitting with five Judges, in this instance the Seventh Chamber (Extended Composition).

18 By decision of 22 June 2016, the General Court granted the request for an expedited procedure.

The plea raised by the European Council and the applications to intervene

19 By document lodged at the Court Registry on 11 July 2016, the Council raised a plea entitled 'plea of inadmissibility' pursuant to Article 130 of the Rules of Procedure.

20 By document lodged at the Court Registry on 19 July 2016, NQ, NR, NS, NT, NU and NV sought leave to intervene in support of the form of order sought by the applicant.

21 By documents lodged on 20 and 22 July 2016 respectively, the Kingdom of Belgium and the Hellenic Republic sought leave to intervene in support of the form of order sought by the European Council.

22 By document lodged on 3 August 2016, the Commission sought leave to intervene in support of the form of order sought by the 'Council of the European Union'. By letter of amendment of 11 August 2016, the Commission indicated that it intended to intervene in support of the form of order sought by the 'European Council'.

23 By document lodged on 15 August 2016, Amnesty International sought leave to intervene in support of the form of order sought by the applicant.

24 In its plea, the European Council formally requests the Court to:

– dismiss the action as 'manifestly inadmissible';

– order the applicant to pay the costs.

25 On 3 August 2016, the applicant submitted his observations on the plea raised by the European Council, in which he claims that the Court should:

– dismiss that plea;

– declare the action admissible;

– order the European Council to pay the costs which he has incurred in the context of the preliminary issue relating to admissibility.

26 By letter from the Registry of 3 October 2016, the parties were informed that a new Judge-Rapporteur had been designated and that the present case had been reassigned to the First Chamber (Extended Composition), in which that Judge sits.

The replies to the measures of organisation of procedure

27 By letters from the Registry of 3 November 2016, the European Council was invited to comply with measures of organisation of procedure adopted by the Court pursuant to Article 89(3)(a) and (d) and Article 90(1) of the Rules of Procedure, while the Council and the Commission were, for their part, invited by the Court to reply to certain questions and to provide certain documents pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union and Article 89(3)(c) of the Rules of Procedure. In that context, those institutions were asked, in particular, to inform the Court whether the meeting of 18 March 2016 had led to a written agreement and, if so, to send it any documents enabling the identification of the parties that had agreed the 'additional action points' referred to in the EU-Turkey statement.

28 In its replies of 18 November 2016 to the Court's questions, the European Council explained, inter alia, that, to the best of its knowledge, no agreement or treaty in the sense of Article 218 TFEU or Article 2(1)(a) of the Vienna Convention on the law of treaties of 23 May 1969 had been concluded between the European Union and the Republic of Turkey. The EU-Turkey statement, as published by means of Press Release No 144/16, was, it submitted, merely 'the fruit of an international dialogue between the Member States and [the Republic of] Turkey and — in the light of its content and of the intention of its authors — [was] not intended to produce legally binding effects nor constitute an agreement or a treaty'.

29 The European Council also provided a number of documents relating to the meeting of 18 March 2016 which constituted, according to that institution, a meeting of the Heads of State or Government of the Member States of the European Union with the representative of the Republic of Turkey, and not a meeting of the European Council in which that third country had participated.

30 In its reply of 18 November 2016, the Commission informed the Court, inter alia, that it was clear from the vocabulary used in the EU-Turkey statement, in particular the use of the word 'will' in the English version, that it was not a legally binding agreement but a political arrangement reached by the 'Members of the European Council, [that is to say,] the Heads of State or Government of the Member States, the President of the European Council and the President of the Commission', which had been recounted in its entirety in the body of Press Release No 144/16 relating to the meeting of 18 March 2016 and setting out the EU-Turkey statement.

31 In its reply of 2 December 2016, the Council explained, inter alia, that it was not the author of the EU-Turkey statement and that it had not been in any way involved in the structured dialogue that took place between the representatives of the Member States and the Republic of Turkey or in the activities of the President of the European Council leading to that statement. The preparatory work that took place within the Permanent Representatives Committee (Coreper) concerned only the preparation of meetings of the European Council, some of which concerned the management of the migration crisis. By contrast, the Council had not prepared the summit held on 18 March 2016 between the Members of the European Council, who are the Heads of State or Government of the Member States of the European Union, and the Turkish Prime Minister.

32 The Council indicated, moreover, that it fully shares the position developed by the European Council in its plea made pursuant to Article 130 of the Rules of Procedure. In that regard, it claimed in particular that, to the best of its knowledge, no agreement or treaty had been concluded between the European Union and the Republic of Turkey in connection with the migration crisis.

33 In his observations lodged on 19 December 2016, the applicant contested the position of the European Council, the Council and the Commission according to which, first, no agreement had been concluded with the Republic of Turkey during the meeting of 18 March 2016 and, secondly, that the outcome of the discussions with that third country had to be classified as a political arrangement. In particular, the applicant is of the view that, taking into account the language used in what he describes as the 'challenged agreement', the use of the English word 'agree' shows that it is an agreement intended to produce legal effects vis-à-vis third parties. Furthermore, he submits, the absence of the term 'Member States' indicates that the 'challenged agreement' could not have been concluded by the Member States of the European Union.

Law

34 Pursuant to Article 130 of the Rules of Procedure, where, by separate document, the defendant applies to the Court for a decision on inadmissibility or lack of competence without going to the substance of the case, the Court must decide on the application as soon as possible, where necessary after opening the oral part of the procedure.

35 In the present case, the Court considers that it has sufficient information from the documents before it and decides to give its decision without any need to propose to the plenum that the present case be referred to the Grand Chamber or to open the oral procedure.

36 In the context of the plea which it raises, the European Council alleges, principally, that the Court has no jurisdiction to rule on the present action.

37 It being understood that the rules on the jurisdiction of the Courts of the European Union, as laid down by the FEU Treaty and also by the Statute of the Court of Justice and the annex thereto, form part of primary law and are central to the European Union's legal order and that, therefore, respect for those rules constitutes a fundamental requirement in that legal order (judgment of 10 September 2015, *Review Missir Mamachi di Lusignano* v *Commission*, C-417/14 RX-II, EU:C:2015:588, paragraph 57), the Court must first of all

examine that question.

38 In support of its plea of lack of jurisdiction, the European Council contends that neither it nor any of the entities referred to in the first paragraph of Article 263 TFEU is the author of the EU-Turkey statement, as published by the Council by means of Press Release No 144/16, with the result that it cannot properly be designated as being the defendant in the present case.

39 According to the European Council, the EU-Turkey statement was issued by the participants in an international summit held, in this instance, on 18 March 2016 in the margins of and following the meeting of the European Council. Therefore, that statement is attributable to the Members of the European Council, which are the Member States of the European Union, and their 'Turkish counterpart', since they met in the context of a meeting distinct from that of the European Council. That distinct meeting followed the first two meetings of the Heads of State or Government, of the same type, which had taken place on 29 November 2015 and 7 March 2016 and had resulted in the publication of either a joint statement, such as that at issue in the present case as set out in Press Release No 144/16, or a joint action plan. The European Council contends that the EU-Turkey statement cannot therefore be classified as a measure adopted by it.

40 The applicant opposes that analysis by claiming that what he describes as the 'challenged agreement', as a contested measure, having regard to its content and all of the circumstances surrounding its adoption, must be regarded as a measure of the European Council because, in the present case, contrary to what that institution claims, the Member States of the European Union acted collectively within that institution and did not exercise national competences outside the institutional framework of the European Union. Furthermore, the applicant maintains that the European Council and the Commission actively participated in the preparation and negotiation of that 'challenged agreement', as is shown, in that respect, by the content of the communication of 16 March 2016, and that that 'challenged agreement' is in fact an international agreement.

41 The applicant disputes the contention that the European Council may, on the one hand, assert that the members of that institution acted, in this case, in their capacity as representatives of their governments or States and, on the other hand, assert that the Member States were thus able to act in the name of the European Union by binding it to a third country by what he describes as the 'challenged agreement', which, moreover, is contrary to the standards laid down by the applicable secondary European Union law on asylum.

42 In any event, he submits, reference must be made to the terms used in the EU-Turkey statement as published by means of Press Release No 144/16, in particular the fact that it, first, refers to the fact that the 'EU' and the Republic of Turkey 'agreed' on certain additional action points, 'decided' and 'reconfirmed' certain aspects and, secondly, states the specific obligations accepted by each of the parties, which, in his view, corroborates the existence of a legally binding agreement. Furthermore, concerning the Commission's explanations relating to the existence of a legislative and regulatory framework already enabling the financing of return operations, which was an additional action point referred to in the EU-Turkey statement, this, in the applicant's view, suggests that what he describes as the 'challenged agreement' was concluded in a context enabling its implementation, which reinforces the capacity of that 'challenged agreement' to produce legal effects.

Preliminary considerations

43 As a preliminary point, it should be remembered that the action for annulment laid down in Article 263 TFEU must be available in the case of all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature or form, provided that they are intended to produce legal effects (judgments of 31 March 1971, *Commission* v *Council*, 22/70, EU:C:1971:32, paragraph 42, and of 4 September 2014, *Commission* v *Council*, C-114/12, EU:C:2014:2151, paragraphs 38 and 39; see, also, judgment of 28 April 2015, *Commission* v *Council*, C-28/12, EU:C:2015:282, paragraphs 14 and 15 and the case-law cited). In this regard, the fact that the existence of a measure intended to produce legal effects vis-à-vis third parties was revealed by means of a press release or that it took the form of a statement does not preclude the possibility of finding that such a measure exists or, therefore, the jurisdiction of the European Union Courts to review the legality of such a measure pursuant to Article 263 TFEU, provided that it emanates from an institution, body, office or agency of the European Union (see, to that effect, judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14).

44 With regard to the European Council, the Lisbon Treaty established that body as an institution of the European Union. Thus, contrary to what had been found previously by the European Union Courts (orders of 13 January 1995, *Roujansky* v *Council*, C-253/94 P, EU:C:1995:4, paragraph 11, and of 13 January 1995, *Bonnamy* v *Council*, C-264/94 P, EU:C:1995:5, paragraph 11), the measures adopted by that institution, which, according to Article 15 TEU, does not exercise legislative functions and consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission, no longer escape the review of legality provided for in Article 263 TFEU (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 30 to 37).

45 However, it follows from Article 263 TFEU that, generally, the European Union Courts have no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (judgments of 3 December 1992, *Oleificio Borelli* v *Commission*, C-97/91, EU:C:1992:491, paragraph 9, and of 15 December 1999, *Kesko* v *Commission*, T-22/97, EU:T:1999:327, paragraph 83) or of a measure adopted by the representatives of the national authorities of several Member States acting in the framework of a committee provided for in a European Union regulation (see, to that effect, judgment of 17 September 2014, *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229, paragraph 51). In the same way, measures adopted by the representatives of the Member States physically gathered in the grounds of one of the European Union institutions and acting, not in their capacity as members of the Council or European Council, but in their capacity as Heads of State or Government of the Member States of the European Union, are not subject to judicial review by the European Union Courts (judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 12).

46 However, it does not suffice, in this regard, that a measure is classified, by an institution featuring as the defendant in an action, as a 'decision of the Member States' of the European Union in order for such a measure to escape the review of legality established by Article 263 TFEU, in the present case, measures of the European Council. In order for such a measure to be excluded from review, it

is still necessary to determine whether, having regard to its content and all the circumstances in which it was adopted, the measure in question is not in reality a decision of the European Council (judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14).

The authors of the contested measure

47 Those clarifications having been made, the Court finds that, in the present case, the contested measure is formally described in the application as being the 'agreement entered into by the European Council dated 18 March 2016 with [the Republic of] Turkey entitled "EU-Turkey statement, 18 March 2016"', namely, a measure governed by international treaty law. However, concerning the review of legality by the European Union Courts of measures relating to international treaty law, this can concern only the measure by which an institution sought to conclude the international agreement at issue, and not the latter as such (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 286). The form of order sought by the applicant must therefore be understood as seeking, in essence, the annulment of a measure by which the European Council sought to conclude, on behalf of the European Union, an agreement with the Republic of Turkey on 18 March 2016 (see, to that effect, judgment of 9 August 1994, *France* v *Commission*, C-327/91, EU:C:1994:305, paragraph 17), the content of which was set out in the EU-Turkey statement as published by means of Press Release No 144/16.

48 Consequently, it is for the Court to assess whether the EU-Turkey statement, as published by means of that press release, reveals the existence of a measure attributable to the institution concerned in the present case, namely, the European Council, and whether, by that measure, that institution concluded an international agreement, which the applicant describes as the 'challenged agreement', adopted in disregard of Article 218 TFEU and corresponding to the contested measure.

49 To the extent that, for the purposes of the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, the contested measure was given form by the applicant through the production of Press Release No 144/16, the circumstances in which the EU-Turkey statement, as published by that press release, was adopted and the content of that statement must be examined in order to determine whether it may constitute or reveal the existence of a measure attributable to the European Council and, thus, falling under the review of legality laid down in Article 263 TFEU (see, to that effect, judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14), in the present case a measure that corresponds to the contested measure and concludes what the applicant describes as the 'challenged agreement'.

50 As mentioned in the EU-Turkey statement, the meeting of 18 March 2016 was the third meeting to occur since November 2015. However, as regards the two previous meetings, which took place, respectively, on 29 November 2015 and 7 March 2016, the representatives of the Member States participated in those meetings in their capacity as Heads of State or Government of the Member States of the European Union and not as Members of the European Council.

51 As regards the first meeting of the Heads of State or Government, this gave rise to a press release, entitled 'Meeting of [European Union] Heads of State or Government with [the Republic of] Turkey — EU-Turkey statement, 29 [November] 2015', in which it was stated that it was the 'Leaders of the European Union' who had met with their 'Turkish counterpart'.

52 As regards the second meeting of the Heads of State or Government, it gave rise to a press release, entitled 'Statement of the [European Union] Heads of State or Government', in which it was stated that it was the '[European Union] Heads of State or Government' who had met with the Turkish Prime Minister and that 'they [had] agreed … on the basis of the principles … contain[ed] [in the additional proposals made on 7 March 2016 by the Republic of Turkey]: to return all new irregular migrants [who crossed] from Turkey into the Greek islands with the costs covered by the [European Union]; to resettle, for every Syrian readmitted by [the Republic of] Turkey from Greek islands, another Syrian from Turkey to the Member States of the European Union, within the framework of the existing commitments'.

53 In that context, the Commission's communication of 16 March 2016 was released, which cannot be regarded as a proposal within the meaning of Article 294(2) TFEU (see, to that effect, judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraphs 17 and 18). That communication indicates that the 'new phase in EU-Turkey cooperation to tackle the migration crisis will require concerted efforts from [the Hellenic Republic] and [the Republic of] Turkey, supported by the Commission, [European Union] agencies and partner organisations' and that 'it will also require the support of Member States, both in terms of the provision of personnel and the willingness to make pledges for resettlement'.

54 However, the EU-Turkey statement, as published following the meeting of 18 March 2016 by means of Press Release No 144/16, differs in its presentation in comparison with the previous statements published following the first and second meetings of the Heads of State or Government.

55 Press Release No 144/16 relating to the meeting of 18 March 2016 states, first, that the EU-Turkey statement is the result of a meeting between the 'Members of the European Council' and their 'Turkish counterpart'; secondly, that it was the 'Members of the European Council' who met with their Turkish counterpart and, thirdly, that it was 'the EU and [the Republic of] Turkey' which agreed on the additional action points set out in that statement. It is therefore necessary to determine whether the use of those terms implies, as the applicant submits, that the representatives of the Member States participated in the meeting of 18 March 2016 in their capacity as members of the 'European Council' institution or that they participated in that meeting in their capacity as Heads of State or Government of the Member States of the European Union.

56 In this regard, the Court notes that, although Press Release No 144/16, by which the EU-Turkey statement was published, includes, in its online version provided by the applicant as an annex to the application, the indication 'Foreign affairs and international relations', which relates in principle to the work of the European Council, the PDF version of that press release provided by the European Council, for its part, bears the heading 'International Summit', which relates in principle to the meetings of the Heads of State or Government of the Member States of the European Union with the representatives of third countries. Consequently, no conclusion can be drawn regarding the presence of those indications.

57 Next, with regard to the content of the EU-Turkey statement, the use of the expression ‘Members of the European Council’ and the indication that it was the European Union which agreed on the additional action points with the Republic of Turkey could, admittedly, imply that the representatives of the Member States of the European Union had acted, during the meeting of 18 March 2016, in their capacity as members of the ‘European Council’ institution and had, notwithstanding that institution’s lack of legislative competence, as expressly mentioned in Article 15(1) TEU, decided to conclude legally an agreement with that third country outside of the procedure laid down in Article 218 TFEU.

58 However, in its reply of 18 November 2016, the European Council explained that the expression ‘Members of the European Council’ contained in the EU-Turkey statement must be understood as a reference to the Heads of State or Government of the Member States of the European Union, since they make up the European Council. Furthermore, the reference in that statement to the fact that ‘the EU and [the Republic of] Turkey’ had agreed on certain additional action points is explained by the emphasis on simplification of the words used for the general public in the context of a press release.

59 According to that institution, the term ‘EU’ must be understood in this journalistic context as referring to the Heads of State or Government of the Member States of the European Union. In this regard, the European Council insisted on the form in which the EU-Turkey statement at issue in the present case was published, namely, that of a press release which, by its nature, serves only an informative purpose and has no legal value. The defendant stresses that this informative support is produced by the press office of the General Secretariat of the Council in order to address the general public. This explains, first, the affixing, in certain documents published on the internet, such as the online version of Press Release No 144/16 relating to the EU-Turkey statement provided by the applicant, of a double header ‘European Council/Council of the European Union’, and, secondly, the fact that some documents are occasionally inadvertently placed under inappropriate sections of the internet site shared by those two institutions and the President of the European Council.

60 On account of the target audience of such informative support, the press release in which the EU-Turkey statement had been set out intentionally used simplified wording, plain language and shorthand. However, this popularisation of words cannot be used to proceed with legal and regulatory assessments and, in particular, cannot alter the content or the legal nature of the procedure to which it relates, namely, an international summit, as the PDF version of the press release relating to the EU-Turkey statement indicates.

61 Thus, according to the European Council, the inappropriate use of the expression ‘Members of the European Council’ and the term ‘EU’ in a press release, such as Press Release No 144/16 setting out the EU-Turkey statement, cannot in any way affect the legal status and the role in which the representatives of the Member States met with their Turkish counterpart, in the present case in their capacity as Heads of State or Government, and cannot bind the European Union in any way. The EU-Turkey statement, as published by Press Release No 144/16, is in reality, it submits, merely a political commitment of the Heads of State or Government of the Member States of the European Union vis-à-vis their Turkish counterpart.

62 In regard to these explanations of the European Council and taking into account the ambivalence of the expression ‘Members of the European Council’ and the term ‘EU’ in the EU-Turkey statement, as published by Press Release No 144/16, reference must be made to the documents relating to the meeting of 18 March 2016 in order to determine their scope.

63 In this regard, the Court finds that the official documents relating to the meeting of 18 March 2016, provided by the European Council at the Court’s request, show that two separate events, that is to say, the meeting of that institution and an international summit, were organised in parallel in distinct ways from a legal, formal and organisational perspective, confirming the distinct legal nature of those two events.

64 First, in its replies of 18 November 2016 to the Court’s questions, the European Council explained, by producing the various items of press material published by it, that the meeting of the European Council was initially intended to extend over two days but that, taking intervening migratory events into account, it had been decided to dedicate no more than a single day to that meeting, namely, 17 March 2016, and to replace the second day of the initially envisaged meeting of the European Council, namely, 18 March 2016, by a meeting between the Heads of State or Government of the Member States of the European Union and their Turkish counterpart, a meeting which, for reasons of costs, security and efficiency, had taken place in the same building as that used for the meetings of the European Council and those of the Council.

65 Secondly, it follows in particular from the invitation sent on 9 March 2016 by the President of the European Council to the different Member States of the European Union that the ‘Members of the European Council’ were invited on 17 March 2016 to a meeting of the European Council, the work of which was scheduled from 16:45 to 19:30 and was followed by a dinner, while, as regards 18 March 2016, the arrival of the ‘[European Union] Heads of State or Government and the Head of Government of Turkey’ was scheduled between 9:15 and 9:45 and followed by a ‘working lunch for the … Heads of State or Government [of the European Union] and the Head of Government of Turkey’ at 10:00. A note of 11 March 2016 sent by the General Secretariat of the Council to the Mission of the Republic of Turkey to the European Union describes, in the same terms, the course of the meeting of 18 March 2016 by inviting the Turkish Prime Minister to a meeting with the Heads of State or Government of the European Union and not with the Members of the European Council.

66 Furthermore, a note of 18 March 2016 of the Directorate for Protocol and Meetings of the Directorate-General ‘Administration’ of the Council, entitled ‘Working Programme of the Protocol service’, indicates, for its part, as regards the meeting of 18 March 2016, that the arrival of the ‘Members of the European Council, the Prime Minister of the Republic of Turkey and the High Representative of the Union for Foreign Affairs and Security Policy’ would take place without protocol order between 12:00 and 12:45 and that a ‘working lunch for Members of the European Council and High Representative’ would be offered from 13:00, with no mention of the Turkish Prime Minister’s presence. By contrast, that note, produced by the service in charge of protocol, invited the participants to a ‘working session of the … Heads of State and Government and High Representative [of the European Union] with Prime Minister of Turkey’ scheduled to begin at 15:00, corroborating the fact that it was in that latter capacity, and not in their capacity as Members of the European Council, that the representatives of the Member States of the European Union were invited to meet their Turkish counterpart.

67 Those documents, officially sent to the Member States of the European Union and the Republic of Turkey, thus establish that,

notwithstanding the regrettably ambiguous terms of the EU-Turkey statement, as published by means of Press Release No 144/16, it was in their capacity as Heads of State or Government of the Member States that the representatives of those 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 building.

68 In this regard, the fact that the President of the European Council and the President of the Commission, not formally invited, had also been present during that meeting cannot allow the conclusion that, because of the presence of all those Members of the European Council, the meeting of 18 March 2016 took place between the European Council and the Turkish Prime Minister.

69 Referring to several documents produced by its President, the European Council indicated that, in practice, the Heads of State or Government of the Member States of the European Union conferred upon him a task of representation and coordination of negotiations with the Republic of Turkey in their name, which explains his presence during the meeting of 18 March 2016. Likewise, the presence of the President of the Commission in that meeting is explained by the fact that that meeting was a continuation of the political dialogue with the Republic of Turkey initiated by the Commission in October 2015 at the invitation of the Heads of State or Government of the European Union made on 23 September 2015. As the European Council correctly points out, those documents refer explicitly and repeatedly, as regards the work of 18 March 2016, to a meeting of the Heads of State or Government of the European Union with their Turkish counterpart, and not to a meeting of the European Council. That is in particular the case with regard to statement No 151/16 of the President of the European Council, communicated immediately after the meeting of 18 March 2016, entitled ‘Remarks by President Donald Tusk after the meeting of … Heads of State or Government [of the European Union] with Turkey’.

70 In those circumstances, the Court finds that the expression ‘Members of the European Council’ and the term ‘EU’, contained in the EU-Turkey statement as published by means of Press Release No 144/16, must be understood as references to the Heads of State or Government of the European Union who, as during the first and second meetings of the Heads of State or Government on 29 November 2015 and 7 March 2016, met with their Turkish counterpart and agreed on operational measures with a view to restoring public order, essentially on Greek territory, that correspond to those already mentioned or stated previously in the statements published in the form of press releases following the first and second meetings of the Heads of State or Government of the Member States of the European Union with their Turkish counterpart. This is corroborated by the fact that the statement adopted following the second meeting of the Heads of State or Government, held on 29 November 2015, equally and invariably used the term ‘EU’ and the expression ‘European leaders’ to designate the representatives of the Member States of the European Union, acting in their capacity as Heads of State or Government of those Member States, during that meeting of 29 November 2015, in a similar way to that of 18 March 2016.

71 It is clear from that overall context preceding the online publication on the Council’s website of Press Release No 144/16 setting out the EU-Turkey statement that, concerning the management of the migration crisis, the European Council, as an institution, did not adopt a decision to conclude an agreement with the Turkish Government in the name of the European Union and that it also did not commit the European Union within the meaning of Article 218 TFEU. Consequently, the European Council did not adopt any measure that corresponds to the contested measure, as described by the applicant and of which the content was allegedly set out in that press release.

72 It follows from all of the foregoing considerations that, independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, 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.

73 For the sake of completeness, with regard to the reference in the EU-Turkey statement to the fact that ‘the EU and [the Republic of] Turkey agreed on … additional action points’, the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.

74 However, in an action brought under Article 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States (judgment of 5 May 2015, *Spain* v *Parliament and Council*, C-146/13, EU:C:2015:298, paragraph 101).

75 Accordingly, the plea of lack of jurisdiction raised by the European Council must be upheld, bearing in mind that Article 47 of the Charter of Fundamental Rights of the European Union is not intended to change the system of judicial review laid down by the Treaties (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97).

76 As the plea of lack of jurisdiction has been upheld and the action must, accordingly, be dismissed, there is no longer any need to rule on the applications for leave to intervene submitted by NQ, NR, NS, NT, NU and NV, by Amnesty International, and by the Kingdom of Belgium, the Hellenic Republic and the Commission.

Costs

77 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. However, pursuant to Article 135(1) of those rules, the General Court may, if equity so requires, decide that an unsuccessful party is to bear his own costs, but is to pay only part of the costs incurred by the other party, or even that he is not to be ordered to pay any costs.

78 In view of the circumstances of the present case, in particular the ambiguous wording of Press Release No 144/16, the Court deems it

fair to decide that each party is to bear its own costs.

79 Under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before the application for leave to intervene has been decided upon, the applicant to intervene and the main parties must each bear their own costs relating to the application for leave to intervene. Consequently, NG, the European Council, NQ, NR, NS, NT, NU and NV, Amnesty International, the Kingdom of Belgium, the Hellenic Republic and the Commission must bear their own costs relating to the applications for leave to intervene.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby orders:

1. **The action is dismissed on the ground of the Court's lack of jurisdiction to hear and determine it.**

2. **There is no need to rule on the applications for leave to intervene submitted by NQ, NR, NS, NT, NU and NV, Amnesty International, the Kingdom of Belgium, the Hellenic Republic and the European Commission.**

3. **NG and the European Council shall bear their own costs.**

4. **NQ, NR, NS, NT, NU and NV, Amnesty International, the Kingdom of Belgium, the Hellenic Republic and the Commission shall bear their own costs.**

Luxembourg, 28 February 2017.

E. Coulon I. Pelikánová

Registrar President

** Language of the case: English.