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TURKEY-EU CUSTOMS UNION: PROBLEMS AND PROSPECTS¹

Haluk KABAALIOĞLU*

Abstract

Turkey entered the final stage of its association with the European Union with the entry into force of the customs union on 1.1.1996. A customs union is an advanced form of economic integration which brings commercial and economic costs and benefits to both parties. In this connection Turkish industry entered a period of restructuring and increased its share in European markets. As of today, there are a number of problems stemming from the implementation of the customs union. The final target is Turkey's membership to the EU as a result of the accession negotiations continuing since 2005. However, until that day, the current problems have to be resolved within the Association Council by way of joint decision –making mechanisms.

Keywords: Customs Union, Turkey-EU Relations, Free Movement

TÜRKİYE-AB GÜMRÜK BİRLİĞİ: SORUNLAR VE BEKLENTİLER

Özet

Türkiye'nin Avrupa Birliği ile ortaklık ilişkisinin son aşaması 1.1.1996 tarihinde gümrük birliğinin yürürlüğe girmesi ile gerçekleşmiştir. Gümrük birliği, taraflara ticari ve ekonomik faydalar ve maliyetler getiren ileri bir ekonomik bütünleşme modelidir. Bu bağlamda Türk sanayisi önemli bir yeniden yapılanma sürecine girmiş ve Türkiye'nin AB ülkelerinde Pazar payı artış göstermiştir. Bugün itibarıyla, gümrük birliğinin uygulanmasından kaynaklanan çeşitli sorunlar bulunmaktadır. Nihai hedef Türkiye'nin 2005 yılından bu yana yürüttüğü AB üyelik müzakereleri süreci sonucunda tam üyeliğinin gerçekleşmesidir. Ancak o güne dek, var olan sorunlar Ortaklık Konseyi içinde, ortak karar mekanizmaları yoluyla çözüme kavuşturulmalıdır.

Anahtar Kelimeler: Gümrük Birliği, Türkiye-AB İlişkileri, Serbest Dolaşım

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* Professor, Dean of School of Law, Yeditepe University, President of the Economic Development Foundation, and President of Turkish University Association for European Studies (TUNAECS), e mail: kabaalioglu@yeditepe.edu.tr

INTRODUCTION

Today, Turkey is one of few countries that have a customs union with the EU without being a member. The other states one may cite are San Marino and Andorra, miniscule states that cannot be compared to Turkey. Turkey is at the same time a country negotiating for membership to the EU. Until now, twelve chapters have been opened to negotiations, the latest being food safety, veterinary and phytosanitary policy, and only one chapter has been provisionally closed. The negotiations are proceeding at a slow pace due to some problems related with the European Council's decision not to open eight chapters of the *acquis*, and blocking of additional chapters by some Member States. Compared with Croatia that started negotiations with the EU at the same time, negotiations with Turkey have been progressing at a slow pace since 2006, with Croatia provisionally closing 22 chapters and aiming to sign the accession treaty in 2011. The future of the process is fraught with uncertainties since, governments of especially two leading Member States, France and Germany, adopted a position against Turkey's full membership².

The Greek Administration of Southern Cyprus (GASC) became a member state as of 1 May 2004 after rejecting a UN plan for reunification of the island. This act is against EU law and it has been a grave mistake for the EU to accept a Member State where a UN peacekeeping force is situated in. The GASC then used its membership to block progress in the negotiations with Turkey, blocking a regulation for direct trade with the Turkish Republic of Northern Cyprus and the opening of a critical chapter in the negotiations, the energy chapter, in addition to others. It was again a grave mistake in the part of the EU to take the decision not to open eight chapters of the *acquis* to negotiations with Turkey, with the alleged reason that Turkey is not fully implementing the customs union to the new Member States by not accepting vehicles coming from the GASC to Turkish ports and airports. While this issue is taken unilaterally and evaluated as related with the operation of the Turkey-EU customs union, without taking into account the isolation of the Turkish Cypriots on the island after the EU membership of the GASC, the implementation of transportation quotas by EU member states to Turkish trucks is evaluated as falling under services and not related with the operation of the customs union.

The customs union which commenced as of 1.1.1996 displays a number of structural problems. In the following section, some of these problems will be explained.

² It should be noted that the German government under the premiership of Angela Merkel declared that they would uphold the decision of opening negotiations with Turkey and would act in accordance with the principle of "pacta sunt servanda". However, personally Ms Merkel is for a privileged membership.

JOINT DECISION-MAKING

At the time the customs union decision was adopted by the EC-Turkey Association Council, it was expected that full membership will follow in a considerably short period of time ranging from four to eight years. After all the EEC was based on a customs union³ and once Turkey demonstrates that she can undertake obligations arising from membership, accession negotiations would commence as provided in the Article 28 of the Association Agreement. Therefore the decision making was not considered a major problem. Once Turkey becomes a member of the EU, it would take part in the decision making and have its representatives in the institutions of the Union. Thus Turkey would have the opportunity to influence and impact on the making of economic and trade policies in the EU. However, it has been fifteen years since the entry into force of the customs union decision and still we do not have a clear prospect for membership. This situation complicates the operation of the customs union due to lack of effective joint decision-making mechanisms.

Turkey adopted all the instruments, agreements, protocols concerning the Common Commercial Policy and a substantial part of the *acquis communautaire* in 1996. The external commercial policies of both Turkey and EC were almost identical since the customs union necessitated Turkey's harmonization of its legislation with that of the EU in the area of commercial policy.

The Turkey-EU customs union is part of a global trade regime and is permitted by the World Trade Organization under Article 24 of the General Agreement on Tariffs and Trade. Both the EU and Turkey have been supporters of multilateral trade negotiations within the GATT/WTO system. With the collapse or failure of the current round of multilateral trade negotiations, the Doha round, the EU increasingly turned to bilateral trade negotiations and agreements as a way to compensate for the lack of progress in the multilateral arena. EC started to have many bilateral agreements as multilateral possibilities were not realized.

Whilst the European Commission starts and negotiates such agreements on behalf of the Council, it does so concerning the "European Customs Area". An important point to note is that the "European Customs Area" is not composed of only the Member States, but it actually means 27 Member States plus Turkey. Countries such as San Marino and Andorra may also have customs union arrangements with the EU, but the impact of these customs unions may be neglected since the mentioned countries are mini-states with a population of about 31,000 and 84,000 respectively. Turkey, having a population of 72 million and being the 16th largest economy in the world as well as the sixth largest economy in Europe is a major trade partner of the EU. It is unfair and inappropriate to accept Turkey's external trade relations to be decided in Brussels by 27 Member States excluding Turkey.

³ Former Article 9 of the EEC Treaty

The lack of any effective procedures for Turkey's involvement in EU's trade negotiations including Committee 133 where the Union's common negotiation position is determined, leads to the negotiation and conclusion of such Free Trade and other Agreements without any meaningful discussion or consultation with Turkey.

Europe goes ahead and negotiates and concludes all these agreements asking Turkey and the partner country to enter into a similar agreement. However, there is no obligation on the part of the third country to conclude such an agreement with Turkey and in the absence of any compelling economic or commercial considerations they refuse to do so. Such a process is not the way to operate a customs union. EU is not complying with the implicit requirements of the custom union with Turkey which includes the necessity to reach a common position before starting negotiations.

An accession country which has *a full customs union*, in all industrial products and some of the agricultural (processed) products, deserves a better treatment. A possible remedy may be Turkey's sitting as observer in relevant Council meetings which directly concerns Turkey. If this cannot be achieved and both sides are to go ahead on their own, still, a *common position* must be established and both negotiations must be held parallel to each other, to be concluded together and, to the extent possible, to enter into force together.

Commission officials recently came up with a solution to this problem: the Turkey clause. They will include a clause in a prospective FTA asking that third State to conclude a similar agreement with Turkey. Obviously this is not binding and has no binding effect on that country. Thus the Turkey clause will not have any practical effect and will not provide a solution to the problem.

EQUAL COMPETITIVE CONDITIONS

Turkey experienced a further disadvantage in the custom union since it cannot make use of funds which are targeted to aid ailing industries or less-developed or declining regions. As a country which is not yet a member of the EU, it cannot be a party to EU structural funds which are made available to EU firms and regions.

Before entry into force of the customs union, Turkey adopted all the competition rules of the EU and established a Competition Authority which is considered as much more efficient than most of the Member State competition authorities⁴.

The promise made by 15 Member States -when the CU decision 1/95 was concluded- in a declaration for "substantial medium and long term financial

⁴ Rules on competition and state aids are being applied strictly by Turkish authorities in line with the requirement of the customs union to have free and fair competition.

assistance" to Turkey in order to make the customs union a success -considering that Turkey will face competition with the most advanced industrialized countries of the EU- was never realized due to the veto of one Member State (Balkır et al., 2009: 8). Since Turkey's candidacy was recognized and accession talks started the financial assistance granted to Turkey -compared to previous candidate states like Poland, Hungary, Czech Republic etc- is a minimal amount (Balkır et al., 2009: 8)⁵.

Whilst Turkey undertakes almost all obligations arising from membership in a customs union, it has not received adequate support from the EU with regard to problems of competitiveness and adjustment costs resulting from the opening up of the Turkish economy. A company called YEDAŞ operating in the ball bearing manufacturing sector, applied to the European Court of Justice, with the intention of appealing for damages from the EU for losses incurred due to the customs union⁶. While Turkey assumed the cost of adjustment to the customs union, this was in line with a reasonable expectation of membership. Customs union was not seen as an end in itself but a step further towards full membership of the EU. The hope of full membership that we had in 2004 when the EU took the decision to open accession negotiations in October 3, 2005 receded due to complications, blockages and negative messages on the part of the EU. Customs unions are transitional arrangements that pave the way for further integration as observed in the case of the German Zollverein established in 1818 and led to the unification of the German principalities under Prussian leadership in 1871.

FREE MOVEMENT OF PERSONS

EU economic actors- businessmen, industrialist, service providers, researchers, market analysts- and all EU citizens travel with no restrictions and enter into Turkey either with no visa or with a visa to be obtained at the border post before making entry. The situation is completely reversed for Turkish citizens. All Member States imposed an entry visa requirement for citizens of Turkey under the insistence of the German Government which itself introduced the visa requirement entering into force 5 September 1980, under the pretext of preventing political asylums. It is a well-known fact that under the 1951 Geneva Convention Relating to the Status of Refugees, States are under an obligation to consider requests for political asylum even if the applicant cannot show any document, even a passport. Thus visa requirement would not be an effective device to prevent an asylum application.

The visa requirement was later imposed by France and Benelux in 1982 following Germany. It now covers 27 Member States. On the other hand, the Association Agreement envisaged a timetable for the introduction of free

⁵ For more information: Arzu Odabaşı, *Türkiye'ye Yönelik AB Fonları ve Kullanım Koşulları*, İKV, İstanbul, 2004.

⁶ Please see notices posted by the company on the web site www.yedas.com.tr, Accessed on 11.08.2010.

movement of workers between the EEC and Turkey until 1986. It was a clearly defined target date with a clear reference to EEC Treaty and its relevant provisions concerning free movement of workers between Member states to be applied between EEC and Turkey⁷.

Customs Union -free movement of goods- was to be achieved between the twelfth and twenty-second year after entry into force of the Additional Protocol, which meant end of 1995 as the Protocol entered into force in 1973. Likewise, free movement of workers was to be achieved between the twelfth and twenty-second year after entry into force of the Association Agreement of 1963 in December 1964.

Article 36 of the Additional Protocol stated that “Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement.” The article of the Association agreement referred to stipulated that the related articles of the Rome Treaty would be taken as a model guiding the relations between the parties in this area: “The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.”

Thus when the Additional Protocol determined the time-tables for these free movements in 1970, it was absolutely clear that Turkey considered that she will be opening up her borders to EU industrial products in 1996, that is a full ten years after entry into force of the free movement of workers.

European Court of Justice, whilst pointing out that this does not have direct effect-as it requires a decision of the Council of Association- underlines that this is a clear obligation under International Law. At the present time, since 1996 there is a full customs union as provided in the Association Agreement and Additional Protocol, the EEC obligation for establishing free movement of workers between Turkey and EEC as of 1986 is still not implemented. There may be social reasons, rising unemployment rates, economic crises at the time that hindered the fulfillment of this target. However, this is still a fundamental column of the EC-Turkey Association Agreement which has not been achieved.

To make the situation worse, a new restriction was imposed as of 1980, the entry visa requirement, whilst the free movement of workers was not implemented. This is a condition which also negatively affects the operation of the Customs Union. Turkish citizens, especially economic actors that are actually primarily involved with the operation of the customs union such as businessmen,

⁷ Additional Protocol Annexed to the Agreement establishing an association between the EEC and Turkey, Article 36. *Official Journal of the EC*, L 361, 31.12.1977, p.1-120. http://www.avrupa.info.tr/Files/File/EU&TURKEY/e-add_ENG.rtf (02.02.2010)

industrialists, commercial agents, service providers, and Turkish citizens in general must obtain an entry visa from MS Consular Offices.

The visa application procedure is a cumbersome process which necessitates the provision of various legal and official documents by the applicant including the following: bank accounts, credit card information, land registry information and documents, circular of the firm, and other personal and commercial documents and information. In addition, an invitation letter from the corresponding firm in the EU is also required which damages the condition of equality in commercial relations. How can you have an arm's length negotiation with a company if even your presence in that country depends on a letter of invitation to be supplied by your counterpart? An Erasmus student going to Netherlands must pay 460 euro for a visa covering the Erasmus semester. The visa procedure, and considerable fees levied for long-term stays in EU Member states harms the true intention and aim of this program which is supposed to contribute to social and educational integration among European youth⁸.

Turkish businessmen, exporters who will go to a Fair (Frankfurt or Hannover Messe) after complying with all these outrageous demands for documentation and paying substantial visa fees, still have to wait days, sometimes weeks, thereby missing the dates of the fairs, appointments, bids, etc.. Goods are in free circulation but persons who will sell these goods are barred, restricted or delayed with horrendous bureaucracy and costs involved.

Judgments of the European Court of Justice including Savas, Tüm & Dari, and the latest Soysal made it absolutely clear that Article 41 of the Additional Protocol which provided a standstill clause on free movement of services and right of established has a direct effect. The article states that "the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". An entry visa requirement constitutes a new restriction which is contrary to the ban of any new measures that will restrict the freedom of establishment and freedom to provide services between the parties. Thus the situation applicable when the Protocol entered into force will be the yardstick and no back sliding would be allowed. The criteria to determine whether Member States' policies were in line or contrary to this provision would be to check whether they applied a visa at the time of entry into force of the Additional Protocol (1973) for Turkish citizens or for those countries that became members of the EC/EU after 1973, whether they implemented a visa for Turkish citizens at the time they became a Member of the EC/EU. Under the Council of Europe Convention each Member State was to allow entry to citizens of other Member States without a visa requirement for touristic trips. Some did require a visa for services or business, but service providers or

⁸ For an extended explanation of the visa procedure implemented by EU Member states to Turkish citizens, see Zeynep Ozler, Melih Ozsoz, *Visa Hotline Project: Final Report*, (translation by Leyla Tunç Yeltin), IKV Publications, No:231, İstanbul: March 2010 and Narin İdriz Tezcan, *Visa Hotline Project Background Paper: Turkish Citizens' Rights in the EU*, IKV Publications, No:228, İstanbul, February 2010.

businessmen could travel to a Member State without any restriction to make market research or conduct analysis before establishing their own business there.

After the Soysal judgment by the European Court of Justice The European Commission communicated with the Member States to evaluate whether their related legislation was in line with the judgment and asked whether they implemented a visa to Turkish nationals either at the time of entry into force of the Additional Protocol or at the time of their entry to the EU. Only two Member States, Germany and Denmark replied. The Commission argued that since this issue was under national jurisdiction, it did not have any enforcement powers over the Member States. However, if a Member State is applying visas to Turkish nationals who want to visit their countries with the aim of provision of services, and if this is a requirement enforced after the entry into force of the Additional Protocol or after their entry to the EC/EU, this clearly demonstrated a violation of EU law. As is well-known international agreement and treaties constitute one of the primary sources of EU law and is above the secondary legislation such as the Schengen Regulation including a list of countries whose nationals require a visa to go to the EU⁹. Schengen Regulations of the EU must be in compliance with primary sources of EU Law, among others Turkish Association Agreement and Protocols¹⁰.

Is it only service providers but also service users/beneficiaries who would be able to travel without a visa? Darmstadt Verwaltungsgericht said a Turkish citizen can travel without a visa if he or she will benefit from medical service in Germany provided he had an insurance coverage (or probably sufficient financial resources). Tourism is an important service sector. Tourists should also benefit from this as user of the services.

Thus such hurdles and unequal treatment lead to the conclusion that conditions for equal competition between Turkey and EU countries, between Turkish businessmen and EU businessmen, between Turkish industrialists and EU industrialists does not exist despite the customs union. It is beyond the confines of this paper to elaborate on yet other issues complicating the working of the customs union, such as the quotas on Turkish trucks and Turkey's not sharing the customs duties collected at the different ports and customs of the EU by way of the EU budget.

⁹ See Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *Official Journal*, L 81, 21.3.2001, p.1-7.

¹⁰ See report by Professors Kees Groenendijk and Elspeth Guild covering 12 Member States legislation applicable in 1973. Kees Groenendijk, Elspeth Guild, *Visa Policy of Member States and the EU Towards Turkish Nationals After Soysal*, IKV Publications, No:232, Istanbul, March 2010.

CONCLUSION

Turkey is a candidate country to the EU which has the longest lasting relations dating back to the Association Agreement of 1963. As stipulated in Article 28 of the Agreement, membership was always a long-term vision of this relation, however, its timing and circumstances were not clear. Turkey made its application for membership in 1987 which was followed by the entry into force of the customs union in 1996 and the proclamation of candidacy to the EU in 1999. The dates between 1999 and 2004 were quite busy for the Turkish governments that aimed to fulfill the political part of the Copenhagen criteria to start the negotiations. Two comprehensive constitutional amendments and seven harmonization packages were passed through the parliament, including among other measures, the abolition of the death penalty, extension of the sphere of constitutionally granted human rights, adoption of a zero-tolerance for torture policy, the permission of broadcast in languages traditionally used by citizens in their daily lives, and teaching of such languages in private courses, the reorganization of the composition and function of the National Security Council, adoption of a new Civil and Penal code.

These efforts led to a positive evaluation and recommendation to open negotiations by the European Commission in October 2004 and a decision by the European Council to start negotiations as of 3 October 2005. This was a victory long sought after by Turkey. The European Council confirmed its consensus on Turkey's membership to the EU based on a successful negotiation process. However the negotiation framework of 3 October 2005 setting out the main parameters of the negotiations was not so optimistic. It stipulated that the negotiations are a process whose "outcome cannot be guaranteed beforehand". Even if the negotiations do not culminate in membership, Turkey should remain "anchored to European structures. The document also foresaw long transition periods and permanent derogations in sensitive areas such as agriculture, structural funds and free movement of persons. Thus, it was clear that Turkey's negotiation process would be quite difficult and not comparable to earlier candidate countries. The discriminatory and cautious attitude of the EU displayed in the negotiation framework was the first blow to the accession process.

The second blow to the negotiations came with the Council's decision of 2006 not to open eight chapters of the *acquis* to negotiations and not to close any chapter provisionally. The reasoning behind this decision was explained above. Thus a successful conclusion of negotiations would be dependent on the resolution of the Cyprus issue which was quite difficult after the EU's unilateral act of accepting the GASC as a member of the EU in the absence of a resolution of the division of the island.

The third blow came on the political side. First Angela Merkel before being elected as the Chancellor of Germany made it clear that she did not support Turkey's membership to the EU and would prefer an alternative relationship, the so-called "privileged partnership". After she formed the government, Germany announced that it would stay loyal to earlier decisions however the stance of the

government made a critical difference. After Merkel, Nicholas Sarkozy, elected as the president of France in 2007, questioned Turkey's eligibility for membership on grounds of culture, geography and identity. He said that Turkey is Asia Minor which is not Europe. His messages were blunt, simple and easy to understand, however they were against the principles of the EU taking into account that Turkey was already declared as an eligible country for the then EC in the Commission's *Avis* regarding Turkey's application for membership in 1987. Differently from Germany, France vetoed the opening of certain chapters in the negotiations process such as economic and monetary union arguing that they were linked with full membership which was not contemplated in Turkey's case.

At the moment, the negotiation process is continuing albeit slowly. After the opening of the chapter on to negotiations in June 2010, three chapters may be possibly opened in the near future. However, the remaining chapters cannot be opened either because of the Council's 2006 decision, or one or more Member State's –i.e. France or GASC- blockage. A swift culmination of the negotiations leading to full membership depends on strong will and determination on both sides. The problems are not unsolvable and progress may be achieved depending on Turkey's pace in fulfilling the benchmarks for the opening of chapters. Before this however, the vetoes by Member States should be lifted and the Cyprus issue should not be used as a pretext to keep Turkey away from Europe. Above all, Turkey needs to be given a target date to make the whole negotiation process desirable and sensible. The waning support for the EU in Turkey is proof that the EU no longer exerts an honest and reliable image in the eyes of average citizens. Constructive steps should be taken especially by the EU and EU Member States to integrate Turkey into the EU as a member, a country that has so much to contribute to the well-being, security and prosperity of the Continent.

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