ECONOMIC DEVELOPMENT FOUNDATION
Publication No: 310

EU-TURKEY ASSOCIATION IN THE CASE-LAW OF EUROPEAN COURT OF JUSTICE

Prof. Dr. Vilenas Vadapalas


İKTİSADİ KALKINMA VAKFI
İKV
1965


İSO
İSTANBUL
SANAYİ ODASI


TÜRKİYE ODALAR VE BORSALAR BİRLİĞİ
TOBB


İSTANBUL
TİCARET
ODASI
1882


TİM
TÜRKİYE İHRACATÇILAR MECLİSİ


TİSK


İSTANBUL
TİCARET
BORSASI
1924


TÜSİAD


İHKİB


İTHİB


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KOCAELİ CHAMBER OF INDUSTRY

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2020

This publication is prepared by **Prof. Dr. Vilenas Vadapalas**

Istanbul, October 2020

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IKV Publications
Publications No: 310
ISBN: 978-605-7756-04-6

Preparation for Publication

Anadolu Basın Merkezi
www.anadolubasin.com

PROLOGUE

The European Union is a unique attempt to establish the basis for continued peace and prosperity on the European Continent. It is based on a detailed and coherent legal system governing the relations between the supranational bodies and member states as well as rules and norms of conduct in the Single European market and area of free movement for natural and legal persons. The Association with non-member countries including Turkey is also part of the EU law and constitute a primary source of law. In addition to Turkey's candidacy to join the EU, the country had entered into an Association with the then European Economic Community as far back as 1963. The Ankara Agreement established an Association between Turkey and the EEC which would be based on a progress in three stages, including the preparatory, transitional and final phases of the Association. The final phase would be based on a Custom Union. The Ankara Agreement created a framework for an extensive association including the goals of attaining free movement of goods, labour, services and capital. Article 28 of the Ankara Agreement stipulated the prospect of Turkey's eventual membership to the Community:

"As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community."

The 1970 Additional Protocol and several decisions of the Association Council created rights for Turkish citizens which were mostly successfully defended in the European Court of Justice. Article 41(1) of the Additional Protocol, i.e. the standstill clause, prohibited the Parties from bringing new restrictions to the freedom of establishment and freedom to provide services which formed the basis of the Court's judgment in the Soysal case (Case C-228/06). Hence the law regarding the Turkey-EU Association relationship and the case law of the ECJ constitute the backbone of Turkey-EU relations to this day.

This book contains an in-depth and extensive analysis of Turkey-EU Association Law through the case law of the ECJ. The author is a dear friend of mine whom I had the good fortune of getting acquainted with in conferences on EU Law. He also came to Istanbul and taught EU Law at the Yeditepe University Faculty of Law during my term there as the Dean of the Faculty. Prof. Vilenas Vadapalas is a graduate of Vilnius University Faculty of Law. He also studied and carried out research at the Moscow State University, Hague Academy of International Law, University of Warsaw, University Paris II, Max Planck Institute for Comparative Public Law and International Law, and Swiss Institute of Comparative Law. He has been a professor of Law at his Alma mater since 1997 and held the Jean Monnet Chair of EU Law between 2000 and 2004. He served the government of his home country in the capacity of advisor on foreign affairs at the Office of the Prime minister and director general of the EU Law department. He took part in Lithuania's delegation in the EU accession negotiations between 1991-2004. He served as a Judge at the General Court of the EU between 2004 and 2013. He is working as an Attorney at Law at his Law offices EUROLEX since 2016. He has been awarded Order for Merits to Lithuania, Cross of the Knight and Order of the Academic Palms in France. In addition to Lithuanian, he speaks 5 languages, English, French, German, Polish and Russian.I would like to thank him for this very timely and important contribution to the literature on EU Law and EU-Turkey relations.

Prof. Dr. Haluk Kabaalioğlu

IKV Vice-Chairman, Jean Monnet Professor of EU Law

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Introduction: EU-Turkey Association in a Changing World

Turkey's association with the European Union has a very long and complex history. Having started in 1963, when Turkey acquired status of association with the European Economic Community, this relationship was marked by periods not only of development, but also of stagnation and even temporary recession.

European Union has concluded 21 association agreements, even if some of them should be classified under free trade agreements (FTAs). The conclusion of an association agreement signifies already high level of economic relationship between the members of association. From an economic point of view, the EU-Turkey relations are already well-developed relations of free trade and customs union. Turkey has the oldest and the most developed status of association with the EU. Since the conclusion of the Ankara Agreement establishing an association between the EEC and Turkey in 1963, Turkey concluded 16 agreements with the Union in the framework of association law. EU-Turkey association status was developed by the decisions of the EU-Turkey Association Council and the Customs Committee. In addition, there are more than one hundred preliminary rulings and other judgments of the Court of Justice and General Court dealing with implementation and application of the Ankara Agreement. Turkey is an important economic partner of the EU; it is one of the biggest economies in the world with its 16th position on the list of largest economies.

Last several years were the most difficult years of the EU-Turkey relations. In 2016, Turkey suffered from a violent coup d'état attempt in which 248 people were killed and many injured. Severe measures were taken afterwards under the state of emergency with the aim of establishing security. Limitations of rights and freedoms had massive negative effects on a large number of citizens as well as on the protection of fundamental freedoms. As the Commission's 2019 Report on Turkey stresses:

"The state of emergency introduced on 15 July 2016 in the aftermath of the attempted coup ended on 18 July 2018, when its last extension expired, but was immediately followed by the adoption by the Turkish parliament of a law that retained many elements of the emergency rule

[1] See: OECD Economic Survey of Turkey 2016. - http://www.oecd.org/turkey/economic-survey-turkey.htm

for further three years. The law limits certain fundamental freedoms, allowing in particular to dismiss public servants (including judges) and to prolong detentions, to restrict freedom of movement and public assembly, and extending powers for government-appointed provincial governors."

"The EU, which immediately and strongly condemned the attempted coup, reiterated its full support for the country's democratic institutions and recognized Turkey's legitimate need to take swift and proportionate action in the face of such a serious threat. However, the broad scale and collective nature of measures taken since the attempted coup under the state of emergency, such as widespread dismissals, arrests and detentions, continued to raise very serious concerns. During the state of emergency, 36 decrees were issued constraining certain civil and political rights, as well as defense rights, expanding police powers and those of prosecutors for investigations and prosecutions as well as foreseeing the dismissal of more than 152 000 civil servants, including academics, teachers and public officials. The Constitutional Court has ruled that it does not have a mandate to review the legality of decrees using legal powers issued during the state of emergency. (…) With coming to an end of the state of emergency, Turkey has withdrawn its derogations from the European Convention on Human Rights and from the International Covenant on Civil and Political Rights (ICCPR). However, the full monitoring procedure that the Parliamentary Assembly of the Council of Europe reopened in April 2017 remains in place. Beyond the Inquiry Commission on the State of Emergency Measures, the capacity of Turkey to ensure an effective domestic legal remedy in the sense of the European Court of Human Rights has been further undermined. Several court rulings favourable to prominent defendants, including human rights defenders, were swiftly reversed by another or even by the same court, in some instances following comments from the executive. Many human rights defenders, civil society activists, media, academics, politicians, doctors, lawyers, judges and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, are still detained – sometimes without indictment, and are facing smear campaigns by the media and senior politicians. The space for civil society organisations working on fundamental rights and freedoms has further shrunk, notably exemplified by the introduction of further administrative obstacles. The rights-based organisations closed down under the state of emergency have not been offered any legal remedy in respect to confiscations. Since October 2018, following the amendment of the

Parliament's rules of procedure, civil society organisations are excluded from the legislative consultation process at parliamentary committees. Inclusive mechanisms for consulting across society as widely as possible are not present." [2]

In 2019, EU-Turkey relations continued to deteriorate, this time because of conflict concerning natural resources of the Cypriot continental shelf. The European Council in Conclusions of 20 June 2019 stated:

"The European Council expresses serious concerns over Turkey's current illegal drilling activities in the Eastern Mediterranean and deplores that Turkey has not yet responded to the EU's repeated calls to cease such activities. The European Council underlines the serious immediate negative impact that such illegal actions have across the range of EU-Turkey relations. The European Council calls on Turkey to show restraint respect the sovereign rights of Cyprus and refrain from any such actions. The European Council endorses the invitation to the Commission and the EEAS to submit options for appropriate measures without delay, including targeted measures. The EU will continue to closely monitor developments and stands ready to respond appropriately and in full solidarity with Cyprus."[3]

Cyprus problem which lasts already more than forty years becomes an insurmountable obstacle for progress in the EU-Turkey relations. It needs a solution based on good will and political reason of all involved parties.

Notwithstanding of all current threats and dangers of further deterioration of the EU-Turkey relations, these relations still remain based on solid economic and legal grounds. The Association Agreement concluded between the European Economic Community and Turkey in 1963 (commonly known as the Ankara Agreement) is the oldest EU association agreement in force. The Ankara Agreement was the second Association Agreement concluded by the EEC after the Association Agreement with Greece concluded in 1961 which served as a blueprint for the Association Agreement with Turkey.[4] The Agreement establishing an Association between the European Economic Community and Turkey

[2]Turkey 2019 Report. Commission Staff Working Document. Brussels, 29.5.2019 SWD(2019) 220 final, pp. 3-4.
[3]European Council meeting (20 June 2019). Conclusions, Brussels, 20 June 2019 (OR. en), EUCO 9/19, CO EUR 12 CONCL, p. 4.
[4]See Marc Maresceau. Bilateral Agreements concluded by the European Community. Academie de droit international de La Haye. Recueil des cours, vol. 309, 2006, p. 326.

('the Ankara Agreement' or 'the Association Agreement') was signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one part and by the Member States of the EEC and the Community on the other part. It was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1964 217, p. 3685), which was adopted on the basis of Article 238 of the EEC Treaty (now Article 217 TFEU). The Ankara Agreement took effect on 1 December 1964.

The Ankara Agreement which was complemented by additional protocols and the acts adopted during the last decades under the Ankara Agreement created a legal system of EU-Turkey association law. This well-developed basis for association relations contributed significantly to economic development and close economic ties of Turkey with the EU. The rules of this association law were the subject of intensive interpretation by the Court of Justice and General Court of European Union.

The 1992 Agreement on the European Economic Area, which brings together the EU Member States and the three EEA EFTA States - Iceland, Liechtenstein and Norway - in a single market is the only more far reaching association status created with the EU than that of the Ankara Agreement. In comparison, the EEA Agreement does not create customs union of these states with the EU, whereas the EU-Turkey Customs Union exists already more than twenty years.

It should be noted that financial assistance of the EU to Turkey has played its role in growing number of common projects, ERASMUS, etc., even if there is still no sufficient link or correspondence between financial assistance, on the one hand, and accession negotiations and enlargement priorities, on the other. The recent studies indicated that the EU financial assistance was functioning rather well in Turkey despite the current political problems and stagnation in the accession negotiations and negotiations concerning upgrading of the EU-Turkey Customs Union. There has been a large diffusion of the financial assistance but it remains weak in terms of its impact on Turkish social actors involved in it.[5] Nevertheless, the EU allocations for IPA II (the Instrument for

[5] Claire Visier. European financial assistance in Turkey: a very small world. İstanbul Bilgi University, European Institute, Working Paper No: 9, March 2016.
http://eu.bilgi.edu.tr/media/files/WORKING_PAPER_9_250316.pdf

Pre-Accession Assistance 2014-2020) amounted to €4,453.9 million (not including the allocation for Cross-border Cooperation)[6] . Unfortunately, as it was shown by the Commission's 2019 Report on Turkey, recently there were some significant cuts to the EU IPA II allocations for Turkey. The Commission adopted the revised Indicative Strategy Paper of Turkey in August 2018, strengthening the focus of EU financial assistance on the fundamental pillars of the enlargement strategy. . Furthermore, as a consequence of low absorption capacity, lack of performance and backsliding on reforms, this revision involved a substantial cut of the budget of the Instrument for Pre Accession Assistance, that was reduced by EUR 759 million for the 2018-2020 period. The total allocation for the year 2018 amounted to EUR 387 million. This was composed of the annual programme with a EUR 110.8 million EU contribution designed to support activities on fundamental rights, to co-finance Turkey's participation in Union programs and agencies in order to continue to enhance people-to-people contacts between Turkey and the EU and to provide support to civil society (EUR 12.4 million). An EU allocation of EUR 145 million was made to the multi-annual action programmes on Environment and Climate Action; Education, Employment and Social policies; Competitiveness and Innovation; and Transport. Finally, EUR 131 million were allocated to the Agricultural and Rural Development programme. [7]

During long years of the EU-Turkey neighbourhood relations, the Ankara Agreement was not always respected. It was faced with the period of temporary suspension of the Association Agreement from 1982 to 1987 by the EC after the military coup in Turkey. There have also been periods of unwillingness to apply progressively the association rules to Turkish workers, of obstacles in bilateral trade in the form of application of safeguard clauses on Turkish side and persisting obstacles with regard to trade in agricultural products. Nowadays, in free movement of goods Turkey established the need for surveillance certificates and imposed different means on apparel and textiles, alcoholic spirits, beef, pharmaceuticals, second hand goods and metal hand tools. Turkey also introduced duties on footwear imports of up to 50%, without asking the views of the Commission and informing Customs Union Joint Committee in accordance with Decision No. 1/95 of the Council of Association. On the other side, some Member States, without having regard to customs union

[6] See: https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/turkey_en
[7] Turkey 2019 Report. Commission Staff Working Document Brussels, 29.5.2019 SWD(2019) 220 final, p.106.

and free movement of goods, imposed road quotas and transit permits on Turkish road transport, although almost 40% of Turkish foreign trade is carried by its international road transport.

Turkey is EU's fifth largest trading partner and the EU is the largest export and import partner of Turkey. In 2016, EU exports to Turkey have grown by 185%, and imports by 160%. EU exports to Turkey have, however, been stable since 2014, whereas imports continue to grow which has led to a decrease in EU's trade balance from EUR 20 billion to EUR 10 billion.[8]

In 2018, Turkey (4 %) was the fifth largest partner for EU exports of goods after United States (21 %), China (11 %), Switzerland (8 %) and Russia (4 %). In imports, Turkey (EUR 76 billion, 3.8 %) was the sixth largest partner of the EU, between Norway (EUR 84 billion, 4.2 %) and Japan (EUR 70 billion, 3.6 %). Among EU Member States, Germany was both the largest importer of goods from and the largest exporter of goods to Turkey. According to EUROSTAT, EU exports to Turkey of manufactured goods (80 %) had a higher share than primary goods (14 %). The most exported manufactured goods were machinery & vehicles (40 %), followed by other manufactured products (22 %) and chemicals (17 %). In 2018, EU imports of manufactured goods (89 %) also had a higher share than primary goods (9 %). The most imported manufactured goods were other manufactured products (43 %), followed by machinery & vehicles (42 %) and chemicals (5 %). In 2018, the EU had trade surpluses in chemicals (EUR 9.8 billion), other products (EUR 3.8 billion), raw materials (EUR 3.6 billion) and energy (EUR 2.4 billion). The EU had trade deficits in machinery & vehicles (EUR 1.3 billion), food & drink (EUR 2.1 billion) and other manufactured products (EUR 15.2 billion). EU exports to Turkey were highest in 2017 (EUR 85 billion) and lowest in 2009 (EUR 44 billion). EU imports from Turkey were highest in 2018 (EUR 76 billion) and lowest in 2009 (EUR 36 billion).[9]

Nevertheless, nowadays there are more and more voices on Turkish side asking for dissolution of the mutual customs union between Turkey and EU. It goes without saying that it would be a step backward for the Turkish economy and would have negative impact to the interests of consumers in the EU.

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[8] See: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements, 1 January 2016 - 31 December 2016, Brussels , 9.11.2017 COM(2017) 654 final, p. 24.

[9] See:https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Turkey-EU_-_international_trade_in_goods_statistics

The need to modernise the customs union is acknowledged by a great majority of the Turkish business community. The proponents of such scenario argue that the imbalance resulting from asymmetric customs duties in trade relations would be eliminated: Turkey would not be bound by the EU trade agreements with third countries anymore. Turkish goods don't profit from the EU trade agreements on the markets of third countries in situations where Turkey doesn't have bilateral agreements with such third countries, whereas their goods are coming into Turkish market under the rules of the customs union. However, in such a pessimistic scenario, without a customs union, the Turkish economy would lose its privileged access to the EU internal market. By 2014, the share of exports to the EU in total exports had reached to 43.5 %.[10] Critics on the Turkish side underline that the EU has conducted negotiations and concluded preferential trade agreement with third countries without involving Turkey despite the fact that Turkey in the EU-Turkey customs union will be affected by flow of goods from these countries without reciprocity. It is despite the dispositions of Article 14 (1) of the Decision 1/95 of the Council of Association concerning duty to inform Turkey and to conduct consultations with the Union's partner of the Customs Union. [11]

In any case, it goes without saying too much that the EU-Turkey customs union contributed to the development of trade relations. On the other hand, it is also evident that this customs union needs updating and modernisation taking into consideration all contemporary trends and experiences of new EU trade agreements with third countries (Korea, Canada, Japan, Mercosur countries - Argentina, Brazil Paraguay and Uruguay, etc.) and economic interests of Turkey itself. However, Turkey's recent bilateral political disputes with individual EU member states have

[10]Bringing EU-Turkey trade and investment relations up to date? European Parliament. Policy Department, Directorate-General for External Policies. EP/EXPO/B/INTA/FWC/2013-08/Lot7/19, May 2016 - PE 535.014, p. 20. The World Bank report notes that the CU has coincided with more deeply integrated production networks between Turkish and EU firms, particularly in the automobiles and clothing sectors. Consequently, intra-industry trade between Turkey and the EU has increased from 30 per cent in 1990 to over 50 per cent today. The reduction in trade costs associated with the CU, including the harmonisation of standards and elimination of rules of origin is likely to have promoted growing intra-industry trade along global value chains, which are known to be particularly sensitive to trade costs. – 25 p.

[11] "Turkey shall be informed of any decisions taken by the Community to amend the Common Customs Tariff, to suspend or reintroduce duties and any decision concerning tariff quotas or ceilings in sufficient time for it simultaneously to align the Turkish customs tariff on the Common Customs Tariff. Prior consultations shall be held within the Customs Union Joint Committee for this purpose."

so far hindered prospects for updating the customs union and related progress in trade relations. An alternative, more gradual and open-ended strategy is therefore required to move the process forward.[12]

It is a matter of fact that the Ankara Agreement provided for progressive development of the EEC-Turkish relations together with existing perspectives of accession, but long stagnation in bilateral relations and current political difficulties led towards grooving opinions that the EU-Turkish association had purely economic nature. It seems that this rather simplistic approach does not explain such a complex phenomenon of longstanding political, economic and cultural relations, however deep some political controversies may be at a given stage of the EU-Turkey relations.

Since the conclusion of the Ankara Agreement between Turkey and the Communities in 1963, the EU became a political and highly integrated union. However, except the creation of the customs union (CU), there has been a rather limited development of association in EU-Turkey relations. It is true from a formal legal point of view that, apart from the CU rules, the strongest rules of EU-Turkish association are the so-called 'standstill clauses' on the freedom of establishment, the freedom to provide services and non-discrimination of Turkish workers, permitting the tests of legality of the acts and omissions of the parties, while the dispositions of the Ankara Agreement on future accession to the Communities were interpreted as programmatic rules, a kind of "soft-law of the Association". Consequently, the Court of Justice of the EU concluded that the EU-Turkey Association has economic purpose. The Court confirmed this approach in case *C-221/11, Demirkan* in following words:

"50 First of all, with regard to objectives, the Court has already held that the EEC-Turkey Association pursues a solely economic purpose (Ziebell, paragraph 64). The Association Agreement and its Additional Protocol are intended essentially to promote the economic development of Turkey (Savas, paragraph 53)."

It is true that the Court of Justice of the European Union, in its voluminous case-law, interprets the EU-Turkey association rules in economic cases concerning mostly the well-known stand-still clauses prohibiting the

[12] See: EU–Turkey Customs Union: Prospects for Modernization and Lessons for Brexit. - https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-12-eu-turkey-customs-union-hakura.pdf

introduction of new national restrictions on the right of establishment and the freedom to provide services and freedom of movement for workers, as well as in some cases – customs union (see subsequent chapters of this study). On the other hand, it is apparent that the development of the EU-Turkey economic relations is not and cannot be based mostly on stand-still clauses, and even on the customs union, however important it could be. Programmatic dispositions aimed at the development of the association law and future accession (as one of main tasks of Ankara agreement) should be taken into consideration or, at least, should not be neglected. The European Communities turned into a political union of 28 Member States, and the EU economy and *acquis communautaire* became very complex. The path of economic integration to achieve political goals is very long. It is also apparent that the development of economic integration would be limited without achievement of political goals of partners of integration. On the other hand, economic realities and necessities of a changing world and economic competition on a global scale have direct impact on the goals of achieving closer integration and cooperation of already highly integrated economies and markets of Turkey and the EU Member States. Political goals of cooperation and further integration are the matter of future developments.

The important question is whether the circumstances that led to an association between the EEC and Turkey, the subsequent creation of a customs union and the recognition of the status of Turkey as a candidate State have changed to an extent that could put the parties in essentially a different position, and thus changing their rights and obligations? From a legal point of view, there has not been any fundamental change of circumstances permitting to invoke Article 82 of the Vienna Convention on the law of treaties in the EU-Turkey association relations based on international treaties.[13] Rebus sic stantibus clause ("things thus standing") for terminating or withdrawing from international treaty may be invoked only in exceptional situation: (a) that the circumstances existing at the time of the conclusion of the treaty were indeed objectively essential to the obligations of treaty, and (b) the instance wherein the change of

[13] Article 62
Fundamental change of circumstances
1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

circumstances has had a radical effect on the obligations of the treaty. Nobody could legally argue that in 1963 the parties based their consent to the conclusion of the Ankara Agreement on economic characteristics of the EEC and thus excluded the validity of the Agreement in case of future political development of the Communities. On the other hand, the obligations taken under the Ankara Agreement are effectively executed by the EU, its Member States and Turkey. In fact, as Marc Maresceau wrote, "at the time the Ankara Agreement was signed, there was little in-depth discussion on the far-reaching political and legal implications of the incorporation of the integration and accession principles in the Agreement. It almost seems as if this incorporation was taken for granted. In 1963, no doubt, the reference to accession of Turkey to the Community in the preamble of the Agreement, and in Article 28, was highly symbolic."[14]

The general rule of interpretation under Article 31 (1) of the Convention on the law of treaties is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Negotiations should finally conduct to agreement changing the treaty norms or to more developed and progressive rules. "Despite setbacks and delays caused by economic and political turbulences in Turkey and the EU, relations survived, each crisis being averted by carrying the process to a higher level," – concludes Prof. Halûk Kabaalioğlu.[15] It is true, notwithstanding the fact that this has been a slow and long movement forward since in 1963.

Rebus sic stantibus doctrine of treaty law has nothing to do with the Ankara Agreement. Marc Maresceau concludes that substantive amendments leading to a fundamental change of the nature of the 1957 EEC Treaty did not lead to a revision of existing bilateral agreements which had been

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2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

[14] Marc Maresceau. Bilateral Agreements concluded by the European Community, p. 327.

[15] Halûk Kabaalioğlu. Turkey's Relations with the European Union : Customs Union and Accession Negotiations. In: Turkey and the European Union. Schriftenreihe des Arbeitskreises Europäische Integration ; Bd. 76, 2012, p. 11.

signed with third countries under this original Treaty; the EC has never envisaged applying the *rebus sic stantibus* clause with regard to the accession references in the Ankara Agreement, nor has the EC ever considered denouncing this Agreement or parts of it. As a consequence, the mere existence of references to accession in the Ankara Agreement has continued to have an immense political impact on the later relations of Turkey to the EU. [16]

As for the political perspectives, it should be noted that the post-2005 developments, after the accession negotiations began in 2005, also entail a process, which may be referred to as 'de-europeanisation' [17], is increasingly gaining momentum in Turkey and gives rise for growing doubts about conformity of Turkey with the 'Copenhagen criteria' including the Rule of law, freedom of expression and the independence of judiciary. Even if the meaning of political terms 'europenisation'[18] or 'de-europenisation' remains unclear, the current situation may be characterized as mutual mistrust, continuing to weaken cooperation and growing pessimism about prospects of further integration. Destructive declarations are becoming "a mantra" of Turkish leaders, and at the same time it becomes more and more visible that unwillingness to deepen integration is a common trend on both sides of the EU-Turkey relations. Better understanding of the current refugee crisis should be explained by longstanding consequences of the collapse of the Ottoman Empire, Atatürk's war of independence and voluntary tracing of borders in the whole region of the Asia Minor and the Middle East by the victors of World War I. 'Balkanization' of the former region of the Ottoman Empire resurrected again and expanded further to Middle East together with new ethnic and religious wars, extremist Islamism and memories of historic blessings and mistrust. All this inevitably burdens the EU-Turkey association relations.

Nevertheless, economic realities will necessarily prevail over political difficulties, and there is no other choice than going towards modernization of the Turkish-EU economic links, especially in the area of customs union and services. Economic integration between the EU and Turkey should be strengthened by including into customs union agriculture, services,

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[16] Marc Maresceau, Bilateral Agreements concluded by the European Community, p. 331-332.

[17] See: Senem Aydın-Düzgit & Alper Kaliber (2016) Encounters with Europe in an Era of Domestic and International Turmoil: Is Turkey a De-Europeanising Candidate Country?, South European Society and Politics, 21:1, p. 4, DOI: 10.1080/13608746.2016.1155282.

[18] See: Sevim, Huseyin, "L'européanisation des pays candidats. Le cas de l'administration turque", Politique européenne, 2013 (3), 41, 64-87.

government procurement, new dispute settlement mechanism, etc. The efficient settlement of disputes concerning the EU-Turkey association rules should give more protection first of all to economic actors and individuals.

EU-Turkey cooperation is based on a set of rules described as the EU-Turkey association law. Since 1963 the EEC and the EU concluded 16 bilateral agreements with Turkey, the Association Council adopted several important decisions aimed at development of association. Up to now, the EU-Turkey association law has been interpreted in 114 judgments and orders of the Court of Justice and General Court of the European Union.[19] Judicial interpretation has contributed for the clarification and development of the rules of association in the situation of even the most original basic provisions of association law which were created long time ago and are programmatic in their nature and content.

The Court of Justice in Judgment in *Case C-81/13*, United Kingdom v Council, held that the "preamble to the Association Agreement records the intention of the Contracting Parties 'to establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community' (first recital); it further expresses the recognition by the Contracting Parties 'that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date' (fourth recital)." [20]

In order to attain the objectives of the Association Agreement, the Association Council was established and empowered to take binding decisions and to review the functioning of the Association. The Association Council consists of members of the Governments of the Member States and members of the Council and of the Commission on the one hand and of members of the Turkish Government on the other.

The Additional Protocol, signed on 23 November 1970 in Brussels, annexed to the EEC-Turkey Agreement and concluded, approved and confirmed on behalf of the Community by the Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1) ('the Additional Protocol'), which, in accordance with Article 62, forms an integral part of

[19] Status as of 11 December 2017.

[20] Judgment of the Court of Justice of 18 December 2014 in Case C-81/13, United Kingdom v Council, ECLI:EU:C:2014:2449, paragraph 16.

that agreement. The Additional Protocol entered into force on 1 January 1973. Article 41 (1) of The Additional Protocol established stand-still clauses in the areas on the freedom of establishment and the freedom to provide services: the Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

The Ankara Agreement envisaged 3 stages for the integration of Turkey and the EC, namely a preparatory stage, a transitional stage and a final stage. The completion of the Customs Union was planned at the end of the transitional stage. With the finalization of the preparatory stage as foreseen in the Agreement, the provisions of the transitional stage and the obligations of the Parties were determined in the 1970 Additional Protocol which entered into force in 1973. The Ankara Agreement also explicitly specified that the partnership regime that it established would facilitate Turkey's accession to the EC.

Decision No 1/80 of 19 September 1980 on the development of the Association (Article 13) provided for a stand-still clause in the area of employment of workers: the Parties may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.

According to Article 39 of the Additional Protocol, Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60, 'Decision No 3/80') was adopted.

With the completion of the transitional period, the Customs Union, which constitutes an important stage of Turkey's integration with the EU, entered into force on 1 January 1996. Decision No 1/95 of the EEC-Turkey Association Council was adopted on 22 December 1995 (OJ 1996 L 35, p. 1). It laid down the conditions for the entry into force of the final phase of the Customs Union. Decision No 1/95 establishes a Customs Union between the European Community and Turkey applying in principle to all goods with the exception of agricultural products, services or public procurement. A free trade agreement (FTA) between the European Coal

and Steel Community (ECSC) and Turkey was signed on 29 February, 1996 and followed by the Commission Decision 96/528/ECSC of 29 February 1996 on the conclusion of an Agreement between the European Coal and Steel Community and the Republic of Turkey on trade in products covered by the Treaty establishing the European Coal and Steel Community covering the ECSC products. Turkish economy was integrated into European Economic Area, apart from agricultural products.

May the modernization or upgrading of the Customs Union be a substitution for full accession? It seems that that is a political rather than a legal question.

Turkey is the only country in Europe –other than San Marino and Andorra- that has concluded the Customs Union with the EU but has not started the accession negotiations. This means that it has opened its market to the EU markets to the same degree as the candidate countries have, but it is receiving much less financial assistance from the Community. Turkey treated the Customs Union as a step towards full membership, while Brussels saw it as a kind of substitute.[21]

Turkish membership of the customs union is initially restricted to industrial goods and processed agricultural goods in free circulation in the Community or in Turkey. It provides for the elimination of customs duties and charges having equivalent effect and for the abolition of quantitative restrictions and measures of equivalent effect in the trade of industrial goods with the EU as of January 1, 1996. The Community and Turkey refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect. These provisions also apply to customs duties of a fiscal nature. Bilateral trade concessions apply to agricultural products; however, the customs duties on almost all agricultural products were decreased to "zero" already by 1987. Common external tariff for the products imported from third countries is applied. EU-Turkey Customs Union came into force on 31 December 1995.

According to Decision 1/95, Turkey was required to adopt the EU's Common External Tariffs (CET) on third-country imports and adopt all the preferential agreements the EU had concluded or will conclude with third countries. Consequently, Turkey has concluded FTAs with European Free

[21] See: Rafi Karagöl. Free Movement of Capital in the Context of Turkey's EU Candidature. Ankara Bar Review, 20018/1, p. 64.

Trade Association (EFTA) countries, Israel, Macedonia, Bosnia-Herzegovina, Palestine, Tunisia, Morocco, Syria[22] , Egypt, Albania, Georgia, Montenegro, Serbia, Chile, Jordan, Mauritius, South Korea, and Malaysia. In total, the EU concluded 25 trade agreements. However, Turkey is not a State Party to the EU's FTAs and other trade agreements with third states. It creates asymmetry in Turkey's trade relations with them. In addition, Turkey is bound to align its legislation with *acquis communautaire* concerning free trade regimes of the EU with third countries, whereas Turkey is not involved in the EU legislative process and cannot influence it. Up to now, there is no permanent consultation mechanism in this area.

The EU does not have to align itself to Turkey's FTAs or preferential agreements, whereas Turkey has to do it in respect of such agreements of the European Union. Turkey cannot participate in the negotiations between the EU and third countries. Moreover, Turkey cannot unilaterally apply new EU negotiated preferences to new EU's trading partner outside EU-Turkey region since this would trigger violations of the GATT's cornerstone principle, the most-favoured nation obligation. At the same time, the EU-Turkey CU has stagnated in comparison with other EU trade partners' obligations under FTAs. Several third parties that are not in accession to the EU, have secured market access commitments from the EU in the areas of services, investment, public procurement, geographical indicators and agriculture that extend far beyond those established in the legal framework of the EU-Turkey CU.

The world trade and industry today is increasingly managed through global value chains. The EU-Turkey customs union was constructed when successful industrialization might be achieved mostly via building a domestic supply chain. Manufacturing is closely linked with services which are not included in the CU. The modification of the CU should liberalize services between the EU and Turkey. Both the EU and Turkey are among negotiating parties to the Trade in Services Agreement (TiSA), which would cover majority of world trade in services.

Nowadays, developing countries join global value chains covering manufacturing and services and thus achieve rapid growth. Tariffs are eliminated, transport costs and administrative costs are low, and delays are shorter. Lower barriers to investment are facilitating investments by transnational corporations leading to integration of economies in

[22] Syria suspended Syrian-Turkish FTA on 6 December 2011.

international production networks. New FTAs concluded by the EU and the major industrial countries include provisions that are facilitating the development of trade based on global value chains. In addition, more efficient mechanisms of settlement of disputes were created under new preferential agreements of the EU. The Canada-EU Comprehensive Economic and Trade Agreement (CETA)[23] created a new structure of an investment court system as a complement to private-to-state dispute settlement and government-to-government dispute settlement. The CETA establishes a permanent "Appellate Tribunal", similar to the World Trade Organization (WTO) Appellate Body. A similar body is included in the draft text of the EU-Vietnam free trade agreement. Both the EU and Turkey are also interested in securing protection for their investors against discrimination in terms of the most-favoured-nation treatment and national treatment. Future EU-Turkey CU should provide Turkey a framework from which to accede to the WTO Government Procurement Agreement.

Liberalisation of agriculture and a more efficient settlement of disputes could be achieved by extending the present CU to agriculture. This option would require amendment of Decision 1/95. On the other hand, liberalisation of services and public procurement most probably could be achieved by signing a separate FTA with the EU covering those sectors. It could be done via conclusion of a new Protocol to the Ankara Agreement, which, however, would require a full treaty-making procedure necessitating ratifications, pursuant to TFEU Articles 217 and 218.

The institutional framework of the CU established by the completion of the CU in 1996 is composed of:

1) Association Council;

2) Association Committee;

3) Joint Parliamentary Committee;

4) Customs Cooperation Committee;

5) Customs Union Joint Committee; and

6) Joint Consultative Committee. [24]

However, the diplomatic or intergovernmental character of the EU-Turkey

[23] Not yet in force.

[24] Detailed analysis of institutional framework of the EU-Turkey association see: Kobal, Mahmut. Customs & Excellence. A comparative approach on administrative and regulatory compliance perspectives of the EU-Turkey customs union. Dissertation to obtain the degree of Doctor at Maastricht University. MGSoG Dissertation Series, nr 75 (2016), p. 49.

association institutional mechanism, which is based on the unanimity principle, does not correspond to economic needs anymore and has shown its weaknesses. An efficient consultation and dispute settlement mechanism should be created. "All institutions and committees stand side by side and live their own lives with their own challenges and rules. Furthermore, we could observe that the set-up to govern and manage the association consists of a number of boards and committees, however, that most of them reveal lack of power to make any changes. The Association Council is the highest authority and the only institution of the EU-Turkey association which is empowered to take decisions, with a unanimous requirement, and to make appropriate recommendations to achieve the set objectives. All other committees and subcommittees used to provide preparatory and supporting activities and do not have any decision-making power and are only obliged to report after each of their meetings to the Association Committee." [25]

The European Council granted the status of candidate country to Turkey in December 1999 and the accession negotiations were opened in October 2005. The Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union was concluded on 29 July 2005 but did not enter into force due to the failure of Turkish side to apply this protocol to the Republic of Cyprus. The year 2017 brought bad news for the accession process: The European Parliament on 6 July 2017 adopted a resolution calling the Commission and the Member States, in accordance with the Negotiating Framework, to formally suspend the accession negotiations with Turkey without delay if the constitutional reform package wasn't voted in the referendum of 16 April 2017. The Parties are negotiating free visa agreement.[26] It will facilitate the functioning of the EU-Turkey trade. In this area, the free visa regime would be an important tool for Turkish business people, truck drivers, etc. As it is noted in the above-mentioned resolution of the European Parliament, visa liberalisation is of great importance for Turkish citizens, particularly for business people and for people of Turkish origin in the EU, and will enhance people-to-people contacts. However, the visa liberalisation negotiations based on 2013 Roadmap towards a visa free regime with Turkey still remained unfinished mainly due to events followed by the

[25] Ibid., p. 307

[26] See: European Council. Meeting of heads of state or government with Turkey - EU-Turkey statement, 29/11/2015.

coup d'état and the declaration of the state of emergency. As for the Roadmap which consists of 72 criteria, it addresses four blocks: documents security, migration and border management, public order and security, and fundamental rights. Changes to Turkey's anti-terror law remain the most contentious criteria for visa liberalization. The EU demands that Turkey, which is fighting against multiple terrorist organizations, revise its broad definition of terrorism. One of the last obstacles for removing the visa burden was already removed: bilateral EU-Turkey readmission agreement entered into force on 1 October 2014. There were already indications that the negotiations are at the last step.[27]

In the absence of significant progress in developing of the association law by international treaty provisions (i.e. concluding new agreements) and decisions of the Association Council, the most important role is played by the case law of the Court of Justice and General Court of the EU interpreting provisions of the Association Agreement, the Additional Protocol and the decisions of the Association Council, even if these instruments do not establish directly the jurisdiction of the Court to interpret these provisions. The Court of Justice interpreted these provisions on the basis of its jurisdiction established by the Treaties with regard to the acts of EC/EU law, mostly by way of preliminary rulings. The Ankara Agreement together with the acts adopted on its basis is the most cited by the Court of Justice bilateral agreement of the EU.[28]

The example of EU-Turkey Association Agreement represents a special case in EU external relations. This is one of the few association agreements achieving the objective of establishing a customs union between the EU and an associated country. The other states currently in a similar situation are San Marino and Andorra, the States which cannot be compared with Turkey.[29] The associations with Greece, Cyprus and Malta were based on a customs union which resulted in the accession of these countries to the EU. Associations of the Community established with the countries of the Central and Eastern Europe by Europe agreements after 1993 were aimed at establishing, before the accession, not customs union but free trade areas. Customs union was achieved only after their accession to the

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[27] Turkey has just made a huge step on EU visa liberalization. Schengen visa info, 4 December 2017. - https://www.schengenvisainfo.com/turkey-just-made-huge-step-eu-visa-liberalization/

[28] Marc Maresceau. L'accord d'Ankara revisité. Quelques réflexions sur les relations entre l'Union européenne et la Turquie. Turquie et Union européenne. Etat des lieux. Bruxelles : Bruylant, 2012, p. 56.

[29] Halûk Kabaalioğlu. Turkey's Relations with the European Union: Customs Union and Accession Negotiations. In: Turkey and the European Union. Schriftenreihe des Arbeitskreises Europäische Integration; Bd. 76, 2012, p. 13.

European Union. None of the other candidate countries: Former Yugoslav Republic of Macedonia, Montenegro and Serbia have established customs union with the EU.[30] Stabilisation and Association Agreement with Albania and the Association agreements with Georgia, Moldova and Ukraine also do not establish customs union.

Association agreements based on customs union create the most advanced form of association facilitating accession to the Union. Such kind of rare association agreements combined with customs union create serious advantages for countries like Turkey negotiating for membership to the EU even if the negotiations are proceeding at a slow pace due to political problems.[31]

Due to the prospect of the evolving and deepening nature of the EU-Turkey association, the contemporary scope of the *acquis communautaire* relevant to Turkey should go and indeed goes far beyond the trade-oriented objectives of the Ankara Agreement. The alignment of national legislation to the *acquis communautaire* remains an attractive objective for all scenarios of the EU-Turkey relations including perspective of future accession to the EU. However, in this process, the liberalization of national economy and the protection of fundamental freedoms and democracy shall go together.

Association of Turkey with the European Union and its Member States and the EU-Turkey Customs Union plays an important role in the economic development of all participants of this economic union. The adoption by Turkey of the EU regulatory standards and granting to Turkey preferential access to the EU's internal markets, this economic union increased the competitiveness of Turkish manufactured products. As a result of the Customs Union established in 1995 between the Communities and Turkey, bilateral trade between Turkey and the EU increased almost six times, making Turkey one of the EU's largest trading partners, while the EU became Turkey's largest. Today Turkey is the EU's 4th largest export market and 5th largest provider of imports. The EU is by far Turkey's number one import and export partner. The fact that Turkish manufactured products

[30] See: Zeynep Pirim, Ceren. The EU-Turkey customs union : from a transitional to a definitive framework? Legal issues of economic integration. Vol. 42 (2015), issue 1, p. 39-40.
[31] Halûk Kabaalioğlu, op. cit., p. 13-14.

met EU standards also significantly increased demand for Turkish exports, stimulating economy and contributing to its growth.[32]

The European Commission's Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement (Final Report, 26 October 2016) shows that the existing EU-Turkey bilateral preferential trade framework ("BPTF") "has worked to sustain bilateral trade intensity at a higher level than it otherwise would have been: in 2016, the EU's exports to Turkey are assessed as being about 9% higher than they would have been without the BPTF being in place and Turkey's exports to the EU are about 7% higher than without the BPTF, notwithstanding the preference erosion that the bilateral relationship experienced.

Driven by trade gains, the BPTF has impacted positively on both the EU and Turkey, both in terms of increasing real output and in terms of expanding economic welfare. The gains are substantially greater for Turkey in both percentage and value terms, reflecting the much greater impact of the BPTF on it compared to the impact of the BPTF on the EU."[33]

Turkey became one of the most important neighbors and economic partners of the European Union. Notwithstanding all political troubles, Turkey and the European Union shall share the same broad vision for the European neighborhood, ranging from stability and prosperity, to peace and democracy in the region, even if this shared vision does not mean always agreement on policy. Talking about the "loss" of Turkey, Turkey's "change of axis" and its "drift to the East" was commonplace, about the search for a credible alternative to EU enlargement. Turkey continues to pursue its strategic autonomy. The rules of EU-Turkey association are also of particular interest in the context of negotiations concerning possible modification of the Ankara Agreement and upgrading of the Customs Union, even if there is no progress in this process due to political obstacles. Draft Negotiating directives adopted by the Commission on 21 December 2016. The Council started its deliberations on the Commission`s proposal on 20 January 2017. During 2017, the proposal was under

[32] See more at: http://www.gmfus.org/publications/why-eu-turkey-customs-union-upgrade-good-turkey#sthash.i4bp9rzw.dpuf

[33] European Commission. Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement. Final Report, 26 October 2016, p. 12.

discussion in the Council Working Groups on Enlargement and Countries Negotiating Accession (COELA) and Trade Policy Committee (TPC), as well as in the European Parliament. It is up to the Council to conclude its work on the Negotiating directives. The negotiations can start once the Council adopts the Negotiating directives. However, the General Affairs Council meeting of 26 June 2018 noted in its conclusions: "Turkey has been moving further away from the European Union. Turkey's accession negotiations have therefore effectively come to a standstill and no further chapters can be considered for opening or closing and no further work towards the modernisation of the EU-Turkey Customs Union is foreseen." Nevertheless, the European Parliament, in European Parliament resolution of 13 March 2019 on the 2018 Commission Report on Turkey (2018/2150(INI)), stressed that the modernisation of the Customs Union would further strengthen the already strong ties between Turkey and the EU and would keep Turkey economically anchored to the EU; believes, therefore, that a door should be left open for the modernisation and upgrade of the 1995 Customs Union between the EU and Turkey, to include relevant areas such as agriculture, services and public procurement, which currently are not covered; recalls that Turkey is the EU's fifth largest trading partner, while the EU is Turkey's largest, that two thirds of Foreign Direct Investment (FDI) in Turkey comes from EU Member States and that Turkey is an important growth market for the EU.

Nevertheless, current negative developments in the upgrading process do not necessarily mean that this process was ended. In general, world trade is nowadays suffering from protectionist politics started on the other side of the Atlantic. At the same time, there were successful negotiations between the EU and several American countries. The European Union and Mercosur countries (Argentina, Brazil, Paraguay and Uruguay[34]) reached an ambitious, balanced and comprehensive trade agreement on 28 June 2019. The new trade framework is a part of a wider Association Agreement between the two regions. The agreement will extensively liberalise trade in goods. Mercosur will fully liberalise 91% of its imports from the EU over a transition period of up to 10 years for most products. The EU will liberalise 92% of its imports from Mercosur over a transition period of up to 10 years. In terms of tariff lines, Mercosur will fully liberalise 91% and the EU 95% of lines in their respective schedules. The agreement will remove unnecessary discriminatory obstacles and provide new

[34] Venezuela was suspended from this South American trade bloc on 5 August 2017.

opportunities to invest through establishment in both services and manufacturing sectors. Dispute settlement mechanism comprises the establishment of an arbitration panel composed of three arbitrators.

Another example to follow in future for the modification of the Ankara Agreement could be the model of Canada-European Union Comprehensive Economic and Trade Agreement (CETA) signed on 30 October, 2016. CETA is a balanced agreement that will create the level playing field for European operators in Canada in comparison to its NAFTA (North American Free Trade Agreement) partners, which have benefited from preferential treatment in Canada since 1994. CETA even goes beyond this, for example on services market access and in particular on government procurement, where the opening to European bidders is unprecedented. The outcomes on geographical indications, on patents or on market access for ships and certain maritime services have never been granted by Canada to a trading partner before. On investment protection and on the mutual recognition of professional qualifications, the EU and Canada have broken new ground in creating effective rules to facilitate economic activities, without affecting their ability to regulate these activities in the public interest.

Jean-Claude Junker described CETA as "the best and most-progressive agreement we have ever, as a European Union, negotiated".[35] In the perspective of modernisation of the EU-Turkey trade regime, one may expect that current negative trend in Turkey-EU relations will disappear as a temporary period of recession, and newly created rules of the EU-Turkey association law could go even further than CETA free trade regime, since this association already comprises such a strong element as the EU-Turkey customs union.

[35] Canada-EU trade deal 'best' Europe has negotiated: Juncker. - http://www.macleans.ca/news/canada-eu-trade-deal-ceta-juncker-best/

1. LEGAL NATURE OF THE ANKARA AGREEMENT

The Ankara Agreement was concluded according to Article 238 of the EEC Treaty (now Article 217 TFEU).[36] The legal basis for the Union's external action in the framework of Article 21 TUE include a power to establish associations. This power is laid down in Article 217 TFEU. According to Article 217, the Union may conclude, with one or more third countries or international organizations, agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Such kind of association is called treaty association. Contrary to the specific association concept which is generally used by international organizations, the treaty association provided for in Article 217 TFEU does not establish a membership status of a lower level (like e.g. an observer status). Only the substantive provisions of the Treaties may be the object of an association agreement but not participation in the Union's organizational structure or its legislative, administrative or judicial system. Therefore, the association agreements do not create jurisdiction of the CJUE over the disputes between the parties. The bodies deciding the disputes between the parties are the association councils and arbitral tribunals created by parties.

There are several association agreements in force between the EU and its Members States, on one side, and third countries, on other: 1963 Association Agreement with Turkey; 2014 Association Agreements with Georgia, Moldova and Ukraine, Stabilization and Association Agreements with FYR Macedonia (2001); Albania (2006), Montenegro (2007), Bosnia and Herzegovina (2008) and Serbia (2013); Euro-Mediterranean Association Agreements concluded between 1998 and 2005 with seven countries in the southern Mediterranean: Algeria, Egypt, Jordan, Israel, Morocco and Tunisia; Euro-Mediterranean Interim Association Agreement with Palestinian Authority; Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other part (so called ACP-EC Partnership agreement concluded in 2000, revised in 2010); 1993 Agreement on the European Economic Area, etc.

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[36] Preamble of Ankara Agreement stipulated, that the Parties have decided "to conclude an Agreement establishing an Association between the European Economic Community and Turkey in accordance with Article 238 of the Treaty establishing the European Economic Community (…)."

The lack of precise legal definition of association of a third State with the EU and its Member States makes a legal analysis of concept of association difficult and largely depends on policy oriented purposes. Large number and variety of the EC and EU agreements comprising association with third states led to banalization of this type of instruments. Marc Maresceau distinguishes *grosso modo* two types of bilateral agreements: association agreements may contribute to preparing a third country for accession to the EU but they may also be totally disconnected from the enlargement dimension and used to express the importance of a particular relationship with a particular third country.[37] According to their political purpose, associations may be divided into three groups: associations preparing the accession to the EU, associations establishing closer economic and political ties and associations promoting a third state's development.[38] Ankara Agreement concluded by the EEC in 1963 already combined three different elements of today's association agreements: under its Article 2, the Agreement aimed at (1) strengthening of trade and economic relations between the Parties, while taking full account of (2) the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people, when the conditions will be met (3) the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.[39] As for the first element, the Ankara Agreement included the provisions which are similar to the provisions of the first generation of agreements, i.e. the cooperation agreements concluded with third countries such as agreements with Mediterranean countries in the 1970s. The Ankara Agreement provided for three stages of association: (a) a preparatory stage aimed at strengthening of Turkish economy; (b) a transitional stage for establishing a customs union and aligning the economic policies of Turkey and the Community more closely; (c) a final stage based on the customs union and entailing closer coordination of the economic policies.

Article 217 TFEU does not give definition of association agreements. Taking into consideration the role of the Member States in the negotiation

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[37] Marc Maresceau, Bilateral Agreements concluded by the European Community, p. 318.

[38] European Union Treaties. Ed. by Geiger/Khan/Kotzur, C.H. Beck and Hart publ., 2015, 785 p.

[39] 'Article 28
As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.'

and conclusion of such agreements, they are mixed agreements.[40] The Union and its Member States as partners the associated states are jointly liable for the fulfilment of every obligation arising from the commitments undertaken.[41] In *UK v Council*, C-81/13, the Court decided that the Council is entitled, on the basis of Article 217 TFEU, to adopt a measure in the framework of an association agreement on the condition that the measure relates to a specific area of EU competence and is also founded on the legal basis corresponding to that area (paragraph 62). The United Kingdom by its action asked the Court to annul Council Decision 2012/776/EU of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems (OJ 2012 L 340, p. 19). In fact, it concerned future decision of the Association Council on the coordination of social security systems. The European Union measure adopted in the context of an association agreement must be grounded not on the general legal basis used to conclude that agreement, but on the specific legal basis corresponding to the sphere of action to which that measure pertains. The Court held, in this case, although the contested decision could not legitimately be adopted solely on the basis of Article 217 TFEU or solely on the basis of Article 48 TFEU[42] , it ought by contrast to have been adopted on the basis of those articles in conjunction with one another, since it has been adopted in the framework of an association agreement and is aimed at the adoption of measures coordinating social security systems.[43]

Provisions of international agreements concluded between the Communities and third countries or international organizations can produce vertical direct effect, but the test is stricter than the normal test for direct effect of the EU law in general, in that the direct effect must be consistent with the system and context of the international treaty, as well

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[40] Alfredo Rizzo. L'Accord d'Ankara: accord d'association ou de veritable "pre-adhesion"? –Turquie et Union européenne. Etat des lieux. Bruxelles: Bruylant, 2012, p. 108-111.

[41] See: Judgment of the Court of Justice in Case C-316/91, European Parliament v Council, ECR [1994] I-653, paragraphs 26 and 29.

[42] "Article 48 (ex Article 42 TEC)
The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self- employed migrant workers and their dependants (…)."

[43] Judgment of the Court of Justice of 18 December 2014 in Case C-81/13, United Kingdom v Council, ECLI:EU:C:2014:2449, paragraph 63.

as satisfying the other standard conditions for direct effect (Cases 21–24/72 International Fruit Company, ECLI:EU:C:1972:115). In the *Demirel* judgment (paragraph 14), the Court of Justice held that a provision of an agreement concluded by the Community with non-member States is to be regarded as having direct effect when, having regard to its terms and the subject-matter and the nature of the agreement, it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Discussions are still ongoing whether or not provisions of international agreements can be horizontally directly effective as there is no clear case laws on this point.

As for the direct effect of the Ankara Agreement, the Court of Justice the *Demirel* judgment (paragraph 16) the Court of Justice held:

"In structure and content, the Agreement is characterised by the fact that, in general, it sets out the aims of the association and lays down guidelines for the attainment of those aims without itself establishing the detailed rules for doing so. Only in respect of certain specific matters are detailed rules laid down by the protocols annexed to the Agreement, later replaced by the Additional Protocol."

The Court of First Instance in Case T-367/03, *Yedaş Tarim v Council and Commission*, concluded:

"Accordingly, having regard to its nature and scheme, the Ankara Agreement is not included, in principle, in the norms in whose light the Court of First Instance reviews the lawfulness of the acts of the Community institutions." [44]

This conclusion concerns only such norms of Ankara Agreement of 1963 which are not directly applicable and do not have direct effect. On the contrary, directly applicable provisions of EU agreement as the provisions of the EU international treaty have higher ranking than the acts of secondary law. As for secondary law applicable to EU-Turkey relations, this set of rules comprises not only acts adopted by the Association Council, but also binding acts the EU institutions having direct effect to EU-Turkey trade. As Rusen Ergec and Koen Coppenhole wrote, the Turkish entity could challenge anti-dumping measures taken by the Commission

[44] Judgment of the Court of First Instance 30 March 2006 Court of First Instance in Case T-367/03, Yedaş Tarim v Council and Commission, ECLI:EU:T:2006:96, paragraph 41.

on the ground that it infringes the Association Agreement.[45] Here in practical terms, the notion "Association Agreement" means binding acts of EU-Turkey association law having direct effect. In cases *Miller and Others v Commission*, T-147/99 and *CAS SpA v Commission*, T-23/03, the Court of First Instance annulled the decisions of the Commission concerning EEC-Turkey Customs Union on the ground that the Commission did not respect of association law norms contained in Ankara Agreement and acts adopted on its basis. In the hierarchy of norms, international agreements take precedence over secondary Community legislation as confirmed by the Court on many occasions. According to Katharina Eisele, that even though Turkish citizens can, as third-country nationals, derive rights from EU immigration law adopted by the Community institutions (such as Council Directive 2003/86/EC on family reunification and Council Directive 2003/109/EC on long-term resident status), more favourable rules of the EU-Turkey association prevail for them.[46] Legal nature of the decisions of the Association Council is similar to such of the EU international agreements. Advocate General Sharpston in her Opinion of 16 July 2015 in Case C-73/14, Council v Commission reminded that "many bilateral or multilateral international agreements, through which the EU assumed obligations vis-à-vis third States or other international organisations, established bodies entrusted with implementing the agreements and empowered to adopt decisions having (binding) legal effects for the Contracting Parties. An early example is the EEC-Turkey Association Council, (18) whose decisions concerning the rights of Turkish workers are, according to the Court, capable of having direct effect within the EU legal order. The status of those decisions is therefore generally assimilated to that of the underlying international agreements; and they may consequently be considered as an additional source of EU law." [47] In that respect Advocate General noted:

"As is the pattern with Association Agreements, the EEC-Turkey Association Council is composed of representatives of both the European Union and Turkey. Article 22 of the EEC-Turkey Association Agreement (OJ 1973 C

[45] Ergec, Rusen and Coppenholle, Koen. Dispute settlement and judicial remedies under the customs union between EC and Turkey. - Revue des affaires européennes. No. 3 (1996), p. 241.

[46] Katharina Eisele. The Movement Regime of Turkish Citizens Based on the Ankara Association – An Ever-Growing Mosaic of Rights. In: EU and Turkey: Bridging the Differences in a Complex Relationship. Economic Development Foundation Publications No. 250, p. 36-37. The author of this article in fact makes reference not to Ankara Agreement, but to Decision 1/80 applied by the Court of Justice in Case Payir and Others, C-294/06, ECLI:EU:C:2008:36, paragraph 48.

[47] Opinion of Advocate General Sharpston of 16 July 2015 in Case C-73/14, Council of the European Union v European Commission, ECLI:EU:C:2015:490, paragraph 70.

113, p. 2) confers a 'power of decision' on the Association Council for the attainment of the objectives laid down by that agreement." [48]

Legal nature of the EU-Turkey association may be fully evaluated only taking full account of its development since 1963. Association has passed from the preparatory stage to the transitional stage by signing the Additional Protocol supplementing the Ankara Agreement on 23 November 1970. Its Article 41 prohibited the introduction of any new restrictions on the freedom of establishment and the freedom to provide services. Decision No 1/80 of the Association Council prohibited introduction of new restrictions on the access to employment applicable to workers and members of their families who are legally resident and employed. Court of Justice in Case *Abatay, C-317/01*, held that the individuals may rely on these provisions before the courts of the Member States: "those two provisions have direct effect in the Member States so that Turkish nationals to whom they apply are entitled to rely on them before the national courts to prevent the application of inconsistent rules of national law." [49]

Decision No 1/95 concludes that association relations as provided for in Article 5 of the Ankara Agreement are entering into their final phase based on the Customs Union. On 17 December 2004, the European Council decided to open the accession negotiations with Turkey in October 2005. The European Council agreed that Turkey was a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States and, subsequently, concluded that, if it were to decide at its December 2004 meeting, on the basis of a report and recommendation from the Commission, that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay.[50] Up to now, 14 chapters of total number of 35 chapters of accession negotiations were open (last chapter 'Economic and Monetary Policy' was opened on 14 December 2015). Since 2006 when chapter of negotiations no. 25 'Science and Research' was opened and closed, no new chapter was closed.

[48] Ibid., note 18.
[49] Judgment of the Court of Justice of 21 October 2003 in Joined Cases C-317/01 and C-369/01, Eran Abatay and Others (C-317/01) and Nadi Sahin (C-369/01), ECLI:EU:C:2003:572, paragraph 117.
[50] Presidency Conclusions – Brussels, 16/17 December 2004, p.1.

The Accession Partnership, which is based on the pre-accession strategy, is the main instrument providing Turkey with guidance in its preparations for accession.[51]

The pre-accession strategy combines the frameworks and different instruments relating to the accession process of a new Member State, offering Turkey a coherent accession program and enabling it to familiarize itself with the European Union's procedures and policies, notably by giving it the opportunity to participate in the EU programs.

The objective of the Accession Partnership is to incorporate in a single legal framework: the priorities for reform with a view to preparing for accession; guidelines for financial assistance for action in these priority areas; the principles and conditions governing implementation of the Partnership.

The Accession Partnership with Turkey was established in 2001 and has been revised three times (in 2003, 2006 and 2008). It evolves as the country progresses and continues its efforts to prepare for accession.

With a view to achieving the objectives identified in the Accession Partnership, Turkey adopted a national programme for transposing the Community acquis (NPAA), in which it sets out procedures and a programme for implementing action in the priority areas.

Unfortunately, EU-Turkey relations suffered from the consequences of events which followed the coup d'état of 2016 and put Accession Partnership and accession negotiations as a whole into danger.[52]

Approximation of Turkish law with *acquis communautaire* is an important part of Accession Partnership of Turkey and its status of a candidate country. Duty of approximation of Turkish law is also a part of association obligations of Turkey in areas specified by Decision No 1/95 of Association

[51] See: Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ 2008 L 51/04.
[52] European Parliament in Resolution of 6 July 2017 on the 2016 Commission Report on Turkey caked on the Commission "to take into account the latest developments in Turkey when conducting the mid-term review of the Instrument for Pre-Accession Assistance (IPA) funds in 2017, and to suspend the pre-accession funds if accession negotiations are suspended".

Council: customs union (Articles 28 and 54 of the Decision), protection of intellectual, industrial and commercial property (Article 31 and Annex 8) and competition (Article 39).[53]

Does the incorporation of the EU law into the Turkish legal system make the EU law directly applicable in Turkey? The Court of Justice has dealt with a similar question in Case *C-507/15, Agro Foreign Trade & Agency Ltd v Petersime NV*. The case concerned an enterprise Agro, a company incorporated under Turkish law, established in Ankara (Turkey), which acted as the commercial agent of its principal Petersime, a company incorporated under Belgian law, established in Olsene (Belgium). After Petersime notified Agro of the termination of the commercial agency contract, Agro brought legal proceedings before the Commercial Court in Ghent, Belgium, seeking an order requiring Petersime to pay compensation for termination of the contract and a goodwill indemnity, the repossession of the remaining stock as well as the payment of outstanding claims. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents specifies the circumstances in which the commercial agent is entitled to an indemnity or to compensation for the damage he suffers as a result of the termination of his relations with the principal. The Republic of Turkey transposed that directive into its national law. Commercial Court referred the following question to the Court of Justice for a preliminary ruling:

"Is the Law of 1995, which transposes Directive 86/653 into Belgian national law, in accordance with that directive and/or the provisions of the Association Agreement which has as its express aim the accession of Turkey to the European Union and/or the obligations between Turkey and the European Union to eliminate restrictions with regard to the free movement of services between them, when that law provides that it only applies to commercial agents whose principal place of business is in Belgium, and does not apply when a principal established in Belgium and an agent established in Turkey have explicitly chosen Belgian law?"

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[53] Article 51 of Decision No 1/95 stipulates:
"The Association Council may recommend the Parties to take measures to approximate laws, regulations or administrative provisions in respect of fields which are not covered by this Decision but have a direct bearing on the functioning of the Association, and of fields covered by this Decision but for which no specific procedure is laid down therein."

The Court of Justice held that, in the context of EU law, the protection of the freedom of establishment and the freedom to provide services, by means of the regime provided for by Directive 86/653 with respect to commercial agents, is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market. Therefore, the differences between the Treaties and the Association Agreement concerning the objective pursued by them preclude the system of protection laid down by Directive 86/653 with respect to commercial agents from being held to extend to commercial agents established in Turkey, in the context of that agreement. The Court concluded that the fact that the Republic of Turkey transposed that Directive into its national law, as is apparent from the order for reference, in no way alters the above conclusion, since such a transposition results not from an obligation imposed by the Association Agreement, but from the will of that third State." As regards Article 41(1) of the Additional Protocol which prohibits any new restrictions of the exercise by a Turkish citizen of freedom to provide services it concerns only Turkish nationals who exercise their freedom of establishment or to supply services in a Member State. "Consequently, a commercial agent established in Turkey, who does not supply services in the Member State concerned, such as the applicant in the main proceedings, does not fall within the personal scope of application of that provision." [54]

It is true, that the validity of the EU law is not extended to third states. In general, the Judgment in *Agro Foreign Trade* follows the line drawn by the Court of Justice in Case *C-221/11, Demirkan*. CJEU was asked whether the notion of services recipient valid internally could be translated to the notion of freedom to provide services enshrined in article 41(1) of the Additional Protocol (prohibition of all new restriction). While reaffirming that "the principles enshrined in the provisions of the Treaty relating to freedom to provide services must be extended, so far as possible, to Turkish nationals" (Joined cases *C-317/01 Abatay and Others*), the CJEU held in *Demirkan* that the standstill clause of Article 41(1) is applicable only in connection to the exercise of an economic activity. As a result of this, while the CJEU had the occasion to declare in *C-228/06 Soysal and Savatli* that Article 41(1) precluded the introduction of a visa requirement for Turkish nationals willing to provide services in Germany if the said

[54] Judgment of Court of Justice of 16 February 2017 in Case C-507/15, Agro Foreign Trade & Agency Ltd v Petersime NV.ECLI:EU:C:2017:129, paragraphs 43-49.

requirement was introduced after the signature of the Additional protocol, the Court introduced the distinction between active and passive freedom to receive services in *Demirkan*.

Judgment of the General Court of 13 September 2018 in Case T-798/14, *DenizBank A.Ş. v Council of the European Union*, raised important questions about hierarchy and priority of set of legal norms governing the EU-Turkey association. The applicant, DenizBank A.Ş., a Turkish commercial bank established in Istanbul (Turkey) which, at the time an application was lodged, was more than 50% owned by Sberbank of Russia OAO ('Sberbank'), a Russian retail bank established in Moscow (Russia). According to contested by DenizBank in this case acts, namely the Decision 2014/512, as extended or amended by Decision 2014/659, Decision 2014/872, Decision 2015/2431, Decision 2016/1071 and Decision 2016/2315 and (ii) Regulation No 833/2014, as amended by Regulation No 960/2014 and Regulation No 1290/2014 prohibiting all EU operators from carrying out certain types of financial transaction with credit institutions established in Russia, DenizBank which was controlled by Sberbank was falling under such restrictions. The applicant alleged that the restrictive measures at issue infringe the provisions on the free movement of capital within the meaning of Article 50(3) of the Additional Protocol to the Ankara agreement. Those measures also undermine Article 6(1) of the Financial Protocol to the Ankara agreement, concerning access to financing provided by the European Investment Bank ('EIB'). The Court held:

"150 It is settled case-law that international agreements concluded by the European Union pursuant to the provisions of the Treaties constitute, as far as the European Union is concerned, acts of the EU institutions (see, to that effect, judgments of 16 June 1998, Racke, C162/96, EU: C:1998:293, paragraph 41, and of 25 February 2010, Brita, C386/08, EU: C:2010:91, paragraph 39). In that respect, such agreements form, from the coming into force thereof, an integral part of EU law (see, to that effect, judgment of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraph 5). Accordingly, their provisions must be entirely compatible with the provisions of the Treaties and with the constitutional principles stemming therefrom (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C402/05 P and C415/05 P, EU:C:2008:461, paragraph 285). Thus, the primacy of

the international agreements concluded by the European Union over EU secondary legislation does not extend to EU primary law (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C402/05 P and C415/05 P, EU: C:2008:461, paragraph 308).

151 Consequently, even in the absence of an express provision in the Ankara agreements enabling a party to take such measures as it considers necessary for the protection of the essential interests of its security, it is possible for the Council to restrict the rights stemming from the Ankara agreements as a result of its powers under Article 29 TEU and Article 215 TFEU, provided that such restrictions are non-discriminatory and proportionate, as the applicant itself indeed concedes."

Thus, in principle, the Ankara Agreement and other international treaty acts have priority over contested acts of secondary legislation; however, the powers of the EU to adopt restrictive measures under the founding treaties justifies the adoption of such restrictive measures. In this respect, the General Court also held:

"156 In addition, it must be pointed out that the restrictive measures at issue do not provide for the interruption, in part or completely, of economic and financial relations with the Republic of Turkey, but with the Russian Federation, as a legitimate foreign policy instrument, in accordance with the European Union's external action objectives laid down in Article 21 TEU. In other words, the restrictive measures apply to the applicant solely because it is an entity more than 50% owned by Sberbank, which is itself a Russian entity whose name is included in the lists in annex to the contested acts, not in its capacity as an undertaking established in Turkey.

157 Since such measures are targeted and time limited, the applicant cannot claim that the negative effects stemming therefrom should be considered disproportionate. The importance of the aims pursued under Article 29 TEU is such as to justify negative consequences, even of a substantial nature, for some operators who are in no way responsible for the situation which led to the adoption of those measures (see, to that effect, judgment of 30 July 1996, Bosphorus, C-84/95, EU:C:1996:312,

paragraph 23). Moreover, it is apparent from examining the fourth plea in law above that the restrictive measures at issue are suitable to achieve the legitimate objective pursued and do not go beyond what is necessary in order to attain it (see paragraphs 115 to 142 above)."

Further development of EU-Turkey association needs modification of existing legal basis of association. Revision of the Customs Union is still a part of the agenda of the EU-Turkey relations. In this context, according to Turkish Ministry of Foreign Affairs, upon the agreement of Turkish and the EU sides on the revision in 2017, a series of technical meetings were held and a framework was adopted. It is essential that the revision process should proceed without creating an alternative path to Turkey's EU membership.[55] Turkey aims to extend its customs union with the European Union to cover services, agricultural goods and public procurement.[56] Turkey's negotiating agenda includes the task to get influence on the EU's decision-making regarding regulations that affect the Customs Union and to adhere to the EU's common commercial policy. In the area of this policy, every time the EU negotiates and signs a new free trade agreement with a third party, Turkey has to launch its own initiative to conclude a similar agreement with that country in order to enjoy the same set of rights in terms of market access. However, the EU is not bound by any obligation to encourage third parties to negotiate trade agreements with Turkey. As a consequence and according to the rules of EU-Turkey association, third-party goods enter Turkey via the EU internal market without any preferential access being granted to Turkish goods — to the detriment of Turkey's economy.

The country is currently negotiating free trade agreements with 17 other countries, including Ecuador, Ukraine, Japan, Thailand and Indonesia. Before the current administration of the United States changed the American international trade policy towards protectionism, the perspectives of a bilateral FTA between the United States and Turkey were more real than today. The fact that services could be included in the EU-Turkey Customs Union upgrade would bring Turkey's foreign trade regime much more in line with such FTAs that the United States has signed with countries such as South Korea. An FTA with the United States, combined with an upgraded Customs Union, could not only remove

[55] http://www.ab.gov.tr/index.php?p=46234&l=2

[56] "EU and Turkey Announce Modernisation of Customs Union," European Commission Daily News, May 12, 2015, http://europa.eu/rapid/midday-express-12-05-2015.htm.

the negative repercussions of being excluded from the Transatlantic Trade and Investment Partnership (TTIP), but also align Turkey with the new standards that are being developed for TTIP.[57] Unfortunately, the perspectives of conclusion of the TTIP seem to be lost.

The EU and Japan's Economic Partnership Agreement entered into force on 1 February 2019. The EU-Japan Economic Partnership Agreement is the biggest bilateral trade agreement ever negotiated by the European Union. Tariffs on more than 90% of the EU's exports to Japan will be eliminated at entry into force of the economic partnership. Once the agreement is fully implemented, Japan will have scrapped customs duties on 97% of goods imported from the EU (in tariff lines), with the remaining tariff lines being subject to partial liberalisation through tariff rate quotas or tariff reductions. This, in turn, will save EU exporters around €1 billion in customs duties per year. Tariffs on industrial products will be fully abolished, for instance, in sectors where the EU is very competitive, such as chemicals, plastics, cosmetics as well as textiles and clothing. For leather and shoes, the existing quota system that has been significantly hampering EU exports will be abolished at the agreement's entry into force. Agreement ensures that both Japan and the EU will fully align themselves to the same international standards on product safety and the protection of the environment, meaning that European cars will be subject to the same requirements in the EU and Japan, and will not need to be tested and certified again when exported to Japan. The agreement will eliminate or sharply reduce duties on agricultural products in which the EU has a major export interest. In particular, the EU-Japan agreement will scrap today's customs duties (with a transitional period) for processed agricultural products. The EU-Japan Economic Partnership Agreement includes liberalization of trade in services. Inevitably, because of the customs union between EU and Turkey, the EU-Japan trade agreement will have its important impact on the Turkish market. It reaffirms the necessity of eliminating asymmetry in customs union. In parallel, Turkey and Japan are currently negotiating bilateral Economic Partnership Agreement.

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[57] See: Kemal Kirisci and Sinan Ekim. Why an EU-Turkey Customs Union Upgrade is good for Turkey. German Marshall Fund of the United States (GMF), May 29, 2015 - http://www.gmfus.org/publications/why-eu-turkey-customs-union-upgrade-good-turkey#sthash.i4bp9rzw.dpuf. See also: Commissions Roadmap 2015 TRADEE2/NEARA5 Enhancement of EU-Turkey bilateral trade relations and modernization of the EU-Turkey Customs Union.

2. EU-TURKEY ASSOCIATION LAW: CASE-LAW OF THE ECJ, REMEDIES AND SETTLEMENT OF DISPUTES

The Ankara Agreement does not provide for jurisdiction of the Court of Justice. According to its Article 25, the Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey (paragraph 1). The Council of Association may settle the dispute by decision; it may also decide to submit the dispute to the Court of Justice (paragraph 2). It should be noted that under Article 23 of the Ankara Agreement, the Council of Association acts unanimously. An attempt of the Turkish Government to submit to the Court of Justice dispute concerning application of safeguard clause to Turkish textile imports failed because of the impossibility to reach unanimity in the Association Council.[58]

The Ankara Agreement also provided for the possibility for establishing the rules of arbitration (paragraph 4). However, dispute settlement mechanism established by Article 25 was never applied.

The competence of the Association Council in resolution of disputes relating to the Association Agreement does not mean that this is the only existing way of legal remedies in cases of violation of this Agreement. It might be reminded that the Association Council is not competent to deal with the complaints of legal or moral persons: it is a body which is competent to resolve association disputes between the EU, its Member States and Turkish Republic. It would be erroneous to consider that all disputes concerning EU-Turkey association law are within exclusive competence of the Association Council. Article 25 (1) of the Association Agreement provides that the Contracting Parties may submit their dispute to the Council of Association:

"1. The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey."

[58] See: Ceren Zeynep Pirim. Une exemple d'association à Communauté européenne : le cas de la Turquie. Bruxelles: Bruylant, 2012, p. 231.

Article 25, paragraph 2, provides that the Council of Association may settle the dispute or submit it to the Court of Justice or other competent judicial authority:

"2. The Council of Association may settle the dispute by decision; it may also decide to submit the dispute to the Court of Justice of the European Communities or to any existing court or tribunal."

Interpretative Declaration on the definition of the expression 'Contracting Parties' used in the Agreement of Association stipulates:

"The Contracting Parties agree that for the purposes of the Agreement of Association 'Contracting Parties' means the Community and the Member States or alternatively the Member States alone or the Community alone on the one hand, and the Turkish Republic on the other. The meaning to be given to this expression in each particular case is to be deduced from the context of the Agreement and from the corresponding provisions of the Treaty establishing the Community. In certain circumstances 'Contracting Parties' may, during the transitional period of the Treaty establishing the Community, mean the Member States, and after the expiry of that period mean the Community."

A third state may not submit a dispute to the Association Council.[59]

When one of the Contracting Parties does not wish to bring the dispute to the Court of Justice or to bring it "to any existing court or tribunal" Article 25 (2) of the Ankara Agreement, using unanimous procedure of Association Council for this purpose, the conflict, as Halûk Kabaalioğlu concludes, remains unresolved. This is another fact of the "institutional void". A mechanism will be required to compensate for this deficiency to allow for an efficient interpretation and implementation of the customs union. It may be argued that the customs union is not in itself an end to this relationship and is introduced only as a pre-accession period, which should lead to full membership in due course; therefore, the present anomaly is only temporary.[60] This situation is typical for association

[59] Halûk Kabaalioğlu. The customs union: a final step before Turkey's accession to the European Union? - Juridikum. Nr. 4 (2008), p. 184.
[60] Halûk Kabaalioğlu, op. cit., p. 184.

agreements where the possibility of judicial settlement of disputes is subject to unanimity in the association councils. As for the arbitration procedure, it was never used in the EU-Turkey relations.[61]

Turkey cannot submit an association dispute to the Court of Justice or General Court. EU treaties do not establish a right of a third state to bring an action before the Court of Justice. An idea proposed by Claudie Weisse-Marchal, that a third country may bring a direct action of annulment, failure to act or action for damages on the basis of Article 19, paragraph 3, Treaty on European Union (TEU) acting as a legal person of public law provided that dispute concerns Union law,[62] cannot find its legal basis. First of all, Article 19 (3) of TEU does not establish grounds of jurisdiction. Grounds of jurisdiction of the Court of Justice and General Court are established in dispositions of the Treaty on the Functioning of the European Union (TFEU). These grounds are exhaustive. Under Article 259, a Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Under Article 263, the Court of Justice has jurisdiction in actions brought by a Member State to review legality of legislative acts of the EU institutions and the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. According to Article 265, the Member States may bring an action before the Court of Justice for failure to act of the institutions, bodies, offices or agencies. Article 269 provides for jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State. There are no grounds of jurisdiction for the actions of third states in any other disposition of the Treaties.

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[61] Mahmut Kobal, op.cit, p. 58

[62] Claudie Weisse-Marchal. Le statut contentieux des Etats tiers devant la juridiction de l'Union : quelles(s) évolution(s) souhaitable(s) et envisageable(s). – L'Etat tiers en droit de l'Union européenne. Bruxelles : Bruylant, 2014, p. 163-164.
Article 19, paragraph 3, stipulates:
"3. The Court of Justice of the European Union shall, in accordance with the Treaties:
(a) rule on actions brought by a Member State, an institution or a natural or legal person;
(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
(c) rule in other cases provided for in the Treaties."

Example of case *T-319/05, Swiss Confederation v Commission*, (case on appeal C-547/10 P, EU:C:2013:139)[63] quoted by Weisse-Marchal is irrelevant: basis for jurisdiction of the ECJ in this case was provided in Article 20 of the Agreement between the European Community and the Swiss Confederation on Air Transport: "All questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement shall be of the exclusive competence of the Court of Justice of the European Communities." As far as Turkey is regarded, there is no such EU-Turkey special agreement providing for jurisdiction of the Court of Justice of the European Union.

The situation of the Member States and the EU institutions is more preferential since they may challenge the acts adopted by other EU institutions and related to Ankara Agreement before the Court of Justice. The case *C-81/13, United Kingdom v Council* can be taken as an example concerning the position to be taken on behalf of the European Union within the Association Council, with regard to the adoption of the provisions on the coordination of social security systems between the EU and Turkey.

Turkey cannot intervene in cases before the ECJ. As far as third States are concerned, there is only one exception of this right to intervene, which is reserved only to the States parties to the Agreement on the European Economic Area in cases before the Court where one of the fields of application of that Agreement is concerned (Article 40, paragraph 3, of the Statute of the Court of Justice).[64]

Weisse-Marchal also submits that third states acting in their capacity of legal persons, are entitled to intervene in the disputes of individuals before the EU jurisdictions and makes reference to some cases of annulment and a case of preliminary reference.[65] The author also raises general question of judicial protection of third states, parties to external agreements with the EU.

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[63] Judgment of the General Court of 9 September 2010 in Case Swiss Confederation v Commission, T-319/05, EU:T:2010:367.

[64] In Case C-3/00, Denmark v Commission ECLI:EU:C:2003:167 Iceland and Norway intervened in their capacity of the EEA Member States. In Joined Cases C-14/06 and C-295/06, European Parliament and Denmark v Commission, ECLI:EU:C:2006:721, Norway intervened as in capacity of the EEA Member State.

[65] Claudie Weisse-Marchal, p. 175 and 176

Third States may submit to the Court of Justice statements or written observations where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement (Statute of the Court, Article 23 (4).[66]

Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC) provided for creation of arbitral tribunal sitting in Brussels and composed of three arbitrators. Article 61 of the Decision provides that, if within 6 months, the Association Council cannot settle a dispute relating to trade protection measures, safeguard measures or rebalancing measures, either Party may refer the dispute to arbitration.[67] The competence of arbitral remedies is limited to disputes concerning such measures and excludes the disputes between the Parties of the Ankara Agreement on one side and private or moral persons on the other. In general, private and moral persons are excluded from the dispute settlement mechanism established by the EU-Turkey association law.

Rusen Ergec and Koen Coppenholle argue that there is a blatant distortion between the integration process realized by the Customs Union and the dispute settlement mechanism. This mechanism remains mainly centered on diplomatic procedures in line with classical international law. An individual who is confronted with prohibitive or restrictive measures does not have direct access to the dispute settlement bodies under the Ankara Agreement. The individual must bring his complaints before the competent national authorities who will then decide in a discretionary manner as to whether it is worth bringing the case before the joint dispute resolution bodies. [68]

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[66] See also Article 2 Protocol 2 on the uniform interpretation of the 2007 Lugano Convention and on the Standing Committee. In Case C-456/11, Gothaer, the Swiss Government submitted its observations on the basis of this provision.

[67] Article 61 Without prejudice to paragraphs 1 to 3 of Article 25 of the Ankara Agreement, if the Association Council fails to settle a dispute relating to the scope or duration of protection measures taken in accordance with Article 58 (2), safeguard measures taken in accordance with Article 63 or rebalancing measures taken in accordance with Article 64, within six months of the date on which this procedure was initiated, either Party may refer the dispute to arbitration under the procedures laid down in Article 62. The arbitration award shall be binding on the Parties to the dispute.

[68] Ergec, Rusen and Coppenholle, Koen. Dispute settlement and judicial remedies under the customs union between EC and Turkey. - Revue des affaires européennes. No. 3 (1996), p. 237.

In this connection, it is useful to add that, under the WTO dispute settlement mechanism, there is a possibility to scrutinize measures taken within the EU-Turkey Customs Union. When Turkey started to align its customs policy, it adopted quantitative restriction on imports of textile and clothing according to Article 12 (2) of Decision 1/95. Confronted with this less favourable customs policy, India contested these measures before the Dispute Settlement Body of the WTO. Both the Panel and the Appellate Body ruled that Turkey had violated the WTO rules.[69]

The CJUE is competent to decide on the interpretation of the Ankara Agreement according to the EU law. According to the consistent case-law, an agreement concluded by the European Union and one or more non-member States is, as far as the Union is concerned, an act of one of the EU institutions within the meaning of point (b) of the first subparagraph of Article 267 TFEU, and, as from its entry into force, the provisions of such an agreement form an integral part of the Union legal system and thus, within the framework of that system, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.[70] Already in 1987, the Court of Justice in the *Demirel* judgment, 12/86, held that the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Ankara Agreement, as a part of the Community legal system.[71] In Case *Sevince*, C-192/89, the Court of Justice held that, since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the Community legal system. The Court concluded that since the Court has jurisdiction to give preliminary rulings on the Agreement, in so far as it is an act adopted by one of the institutions of the

[69] See: Cécile Rapoport. EC-Turkey customs union and the WTO system. In: EU and Turkey. 2011, p. 188-189, 192-193.
[70] See the judgments in Haegeman (181/73, EU:C:1974:41, paragraphs 3 to 6) concerning the Agreement establishing an Association between the European Economic Community and Greece, signed in Athens on 9 July 1961, concluded in the name of the Community by Council Decision 63/106/EEC of 25 September 1961 (OJ, English Special Edition, Series II, Volume I(1), p. 3, 'the EEC-Greece Association Agreement'); Demirel (12/86, EU:C:1987:400, paragraph 7) concerning the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963, concluded in the name of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1977 L 361, p. 29, 'the EEC-Turkey Association Agreement'); Andersson and Wåkerås-Andersson (C-321/97, EU:C:1999:307, paragraphs 26 and 27); Ospelt and Schlössle Weissenberg (C-452/01, EU:C:2003:493, paragraph 27); and Établissements Rimbaud (C-72/09, EU:C:2010:645, paragraph 19) concerning the Agreement on the European Economic Area, signed on 2 May 1992 (OJ 1994, L 1, p. 3, 'the EEA Agreement') and approved by Decision 94/1/EC, ECSC of the Council and the Commission of 13December 1993 on theconclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (OJ 1994 L 1, p. 1).
[71] Judgment of the Court of Justice of 30 September 1987, Meryem Demirel v Stadt Schwäbisch Gmünd, Case 12/86, ECR, p. 3719, paragraph 7.

Community, it also has jurisdiction to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with the responsibility for its implementation.[72] The Council of Association cannot be regarded exclusively as an organ of the Association. The Ankara Agreement and the decisions of the Council of Association form part of the EU legal order.

According to Article 218, paragraph 9, the Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision establishing the positions to be adopted on the Union's behalf, in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

Advocate General Sharpston in her Opinion in Case *C-73/14, Council v Commission*, concluded that "Article 218(9) TFEU was included because many bilateral or multilateral international agreements, through which the EU assumed obligations vis-à-vis third States or other international organisations, established bodies entrusted with implementing the agreements and empowered to adopt decisions having (binding) legal effects for the Contracting Parties. An early example is the EEC-Turkey Association Council, (18) whose decisions concerning the rights of Turkish workers are, according to the Court, capable of having direct effect within the EU legal order. (19) The status of those decisions is therefore generally assimilated to that of the underlying international agreements; and they may consequently be considered as an additional source of EU law.[73]

May the parties of the Association Agreement set up a joint court within the EC-Turkey Customs Union or within a more general framework of EU-Turkey association law? Rusen Ergec and Koen Coppenholle gave a positive answer under some conditions .[74] The authors quote Opinion 1/91 of the Court of Justice (EU:C:1991:490) where the Commission asked where an association agreement could foresee in an establishment of a court system (EEA Agreement providing for the setting up of a EEA Court (EFTA Court). The Court of Justice concluded that an international agreement

[72] Judgement of the Court of Justice of 20 September 1990, S. Z. Sevince v. Staatssecretaris van Justitie, ECR I-3461, paragraphs 9 and 10.
[73] Opinion of Advocate General Sharpston of 16 July 2015 in Case C-73/14, Council of the European Union v European Commission, ECLI:EU:C:2015:490, paragraph 70.
[74] Ergec, Rusen and Coppenholle, Koen, op.cit., p. 238.

providing for a system of courts, including a court with jurisdiction to interpret its provisions, is not, in principle, incompatible with Community law and may therefore have Article 238 of the EEC Treaty (now Article 217 TFEU) as its legal basis (points 40 and 70). However, such a system shall not duplicate judicial system established by the Treaties and shall not be in conflict with the jurisdiction of the Court of Justice.[75] The Court of Justice shall have exclusive jurisdiction to interpret the Association Agreement by way of preliminary rulings. General Court still shall have jurisdiction in actions challenging the legality of legislative acts of the EU institutions and the legality of acts of bodies, offices or agencies of the Union concerning the Ankara Agreement and its additional protocols, etc. As far as a judicial body which may be established under modified Association Agreement is concerned, it may have jurisdiction over disputes of the parties of the Agreement and over direct actions of investors challenging violations of the Agreement concerning investments.

Modern treaty practice of the European Union contains new advanced models of settlement of disputes concerning the interpretation and application of association and trade agreements with third states.

In particular, the comprehensive trade agreement with Chile contained in Part IV of 2002 Association Agreement with Chile, which the European Commission considers to be a great success and which has increased trade flows between the EU and Chile. It has established a strong and detailed institutional structure to prevent or settle disputes between the parties. Though the Association Agreement goes beyond trade to cover political dialogue and cooperation issues, its trade provisions stand out as one of the most advanced in EU bilateral agreements.[76] Apart from trade in goods, the agreement covers services, investment, government procurement, intellectual property rights, competition, customs procedures and, in annexed agreements, wine and spirits, and sanitary and phytosanitary standards. Apart from issues covered by the competition title, the dispute settlement provisions apply to the entire Part IV of the agreement, which covers all trade and trade-related matters. Compared with the other EU FTAs, the procedure for settling disputes is faster. As in the other agreements, it is stressed that the Parties shall make

[75] Opinion 1/91 of the Court of 14 December 1991, European Court reports 1991, Page I-06079, paragraphs 70 and 71.

[76] See: Ex-ante Study of a Possible Modernisation of the EU-Chile Association Agreement. Final Report. Prepared by ECORYS – CASE, February 2017.

every attempt through cooperation and consultations to avoid and settle disputes between them and to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Any matter perceived to be in violation of the agreement is first referred to the Association Committee, which is similar to the Joint Committee with Mexico, the Cooperation Council with South Africa and the Association Council of Euro-Mediterranean Association Agreements (MED agreements). If no solution can be agreed upon within 45 days (or 90 days for financial services), the complaining party may ask for an arbitration panel to be formed. Unlike the other agreements, the members of the panel are not selected on an ad hoc basis. The Association Agreement obliges the Association Committee to compile, within six months of the agreement's entry into force, a fixed list of 15 arbitrators. A third of those listed must have neither Chilean nor EU nationality, and it is only from these five people that a chairperson may be selected. Arbitration panel shall be established within three days. The chair of the Association Committee selects three arbitrators from the list: the first one is taken from the individuals nominated by the complaining party; the second one is taken from the individuals nominated by the defending party; and the third one is taken from the list of arbitrators from the nationals of third states. In the case of financial services, the chairperson is selected not from this list, but from a preselected group of five financial experts, albeit under identical conditions. Each Party shall be bound to take the measures necessary to comply with the ruling of the arbitration panel. The jurisdiction of the arbitration panel in the dispute settlement model established by the EC-Chile Association Agreement is limited to disputes between the Parties of the Agreement: the EC (now - EU) Member States and the EC (now – EU), the one part, and Republic of Chile, on the other. Individuals are excluded from this dispute settlement mechanism.

The European Union has included dispute settlement mechanism based on the WTO dispute settlement mechanism in all of its Free Trade Agreements since 2000. Since 2009, the European Union also includes investor-to-state dispute settlement mechanisms in trade and investment agreements. However, a comparison of various trade agreements recently signed by the EU shows that they have not included any standard dispute settlement procedure.

Dispute settlement obligations are among the elements that determine the overall credibility of any international agreement as an instrument that can be effectively enforced. The comprehensive character of a dispute settlement mechanism determines whether it is effective or not. An effectively enforced dispute settlement mechanism also helps to clarify the interpretation and scope of terms and conditions of an agreement, leading to a more coherent application. If a trade agreement excludes certain trade provisions or trade partners from the application of its dispute settlement mechanism, the credibility of these provisions is undermined. It is also essential that the parties recognize the arbitrators' final decision and that legal means are available for enforcing this decision. Comprehensive arrangements for settling disputes involving individuals create effective measures for protection of trade partners. Future modifications of the EU-Turkey Association Agreement in this area should include individuals in dispute settlement mechanism.

However, the establishment of a dispute settlement mechanism providing for individual-to-state actions will be not an easy task. Usually, trade agreements do not contain dispositions of dispute settlement which allow individuals to bring actions against States parties. For example, the only participants in WTO dispute settlement system are the Member States of the WTO, which can take part either as parties or as third parties. Since only the WTO Member governments can bring disputes, it follows that individuals (companies, etc.) do not have direct access to the dispute settlement system, even if they may often be the ones (as exporters or importers) most directly and adversely affected by the measures allegedly violating the WTO Agreement. Intergovernmental nature of dispute settlement mechanisms of trade agreements may be explained by the fact that trade agreements establish rules of trade between States parties, but not individuals, at least not directly for them. As far as the protection of foreign investors is concerned, they already enjoy extensive protection through the legal system of democratic countries because property rights are fully enforceable in impartial courts. Turkey has bilateral investment treaties with all EU Member States.[77] Turkey ratified

[77] Turkey currently has Bilateral Investment Promotion and Protection Agreements (BIPPA's) with over 74 countries in the world from Europe, USA, Africa and Asia. BIPPA's are concluded with Afghanistan, Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Moldova, Mongolia, Morocco, Netherlands, Oman, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Syria, Tajikistan, Thailand, United Arab Emirates, Yemen, United Kingdom, United States of America, Tunisia, Turkmenistan, Ukraine, Uzbekistan.

the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) of 1965 on 24 June 1987. Until 2015, Turkey has been involved in eight ICSID investment treaty arbitrations. All EU Member States are Contracting States of the ICSID Convention.

Turkish citizens and companies may use the remedies established by the Treaty on the Functioning of the European Union (TFEU) against the acts of the EU institutions, bodies, offices or agencies intended to produce legal effects vis-à-vis third parties under its Article 263, paragraph 1, and against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures under Article 263, paragraph 4. With regard to protection of rights of individuals against such acts, the Court of Justice held in the Judgment of 19 December 2013 in Case C-274/12 P, *Telefónica v Commission*:

"28 It should be explained in this regard, first, that where a regulatory act entails implementing measures, judicial review of compliance with the European Union legal order is ensured irrespective of whether those measures are adopted by the European Union or the Member States. Natural or legal persons who are unable, because of the conditions governing admissibility laid down in the fourth paragraph of Article 263 TFEU, to challenge a regulatory act of the European Union directly before the European Union judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails.

29 Where responsibility for the implementation of such acts lies with the institutions, bodies, offices or agencies of the European Union, natural or legal persons are entitled to bring a direct action before the European Union judicature against the implementing acts under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the illegality of the basic act at issue. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a

preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU (Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013] ECR, paragraph 93)." [78]

Accordingly, Turkish citizens and companies may bring actions in cases of breaches of rules of the EU law, including the rules of the Ankara Agreement, its protocols and decisions of the Association Council.

It is evident that the establishment of the right of individual complaint depends mainly on the political will of States parties negotiating the trade agreement. However, the right of individual complaint against a State party of agreement remains an exception. Arbitration under ICSID Convention may be an example.

States commonly agree to investor-state dispute settlement to gain the benefits associated with foreign investment.

The dispute settlement provisions of the EU trade agreements are inspired by the WTO dispute settlement mechanism. Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization created specific and transparent WTO rules and established the Dispute Settlement Body (DSB) whose decisions, subject to appeal, are directly enforceable. The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements.

As the Committee on International Trade of the European Parliament suggested in Draft Report "Towards a new trade framework between the European Union and Turkey and the modernisation of the Customs Union", it is important to introduce a dispute settlement mechanism that is able to operate within a framework of impartiality and legal certainty in keeping with the rules and practice of the WTO. [79]

Drawing substantially from the WTO model, recent EU bilateral agreements have included increasingly detailed provisions for dispute settlement. In

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[78] Judgment of the Court of justice of 19 December 2013 in Case C-274/12 P, Telefónica v Commission, ECLI:EU:C:2013:852.

[79] European Parliament. Draft Report on 'Towards a new trade framework between the European Union and Turkey and the modernisation of the Customs Union' (2016/2031(INI)), 10.1.2017. Committee on International Trade. Rapporteur: David Borrelli, p. 5

line with the spirit of the WTO dispute settlement mechanism, all types of EU FTAs stress the obligation resting on both parties to engage in consultation among either senior officials or ministers, before taking recourse to arbitration.

However, the agreements differ considerably in terms of the likelihood of the establishment of an arbitration panel and a risk of unsuccessful complaint at initial stage. The MED agreements provide that either party may refer to the Association Council any dispute relating to the application or interpretation of the Association Agreement. Should it not be possible to resolve the dispute in this manner, the complaining party can appoint an arbitrator. However, the defending party might not easily be convinced to concede and to appoint an arbitrator. There are no provisions that describe how such a situation should be resolved. Instead, the party claiming to be damaged by a measure taken by the other party could be deterred from engaging in the arbitration phase because the political costs could be perceived as being higher than the gains that could be derived from arbitration. On the other hand, the MED agreements do not stipulate what a complaining party can do if the other party fails to uphold the decision. In this respect, the latest agreements with Mexico, Chile and Canada are much more elaborated making the establishment of arbitration panels and enforcement of arbitration decisions much more operational.

Under Article 344 TFEU (ex Article 292 TEC), Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. The Court of Justice in the Judgment of 30 May 2006 in Case C-459/03, *Commission v Ireland*, held that by instituting dispute-settlement proceedings against the United Kingdom under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield (United Kingdom), Ireland has failed to fulfil its obligations of cooperation under Article 10 EC and to respect the exclusive nature of the Court's jurisdiction under Article 292 EC. An international agreement such as the Convention cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of the Community law. [80]

[80] Judgment of Court of Justice of 30 May 2006 in Case C-459/03, Commission v Ireland, ECLI:EU:C:2006:345, paragraph 132.

EU-Canada Comprehensive Economic and Trade Agreement (CETA), which could be a model for future trade agreements of the EU, was signed on 30 October 2016 and is provisionally applied from 21 September 2017. CETA establishes a new tribunal, called the Investment Court System, to resolve investor-state disputes. However, the Investment Court System of CETA will not take effect provisionally; it will only take effect once Canada and over 40 national and regional EU parliaments ratify CETA.

The general dispute settlement procedures set out in Chapter Twenty-Nine of the Agreement, which apply to the interpretation and application of the CETA as a whole. [81] This State-to-state dispute settlement mechanism covers the resolution of disputes between the EU, its Member States and Canada. The system is intended as a last resort, should the parties fail to resolve disagreements relating to the interpretation and implementation of the Agreement's provisions by other means (notably consultation and mediation). Should parties fail to reach an agreement through formal consultations, they can request the establishment of a panel, made up of independent experts.

The dispute settlement provisions of CETA compliment the multilateral dispute settlement framework as set out in the WTO. For any given dispute, Canada or the EU are able to utilize the WTO dispute settlement process if they so desire. However, the same dispute cannot be heard simultaneously under both the WTO and CETA dispute settlement processes.

The requesting Party shall transmit the request in writing for consultations to the responding Party, and the Parties shall enter into consultations within 30 days of the date of receipt of this request. If a matter has not been resolved within 45 days of the date of receipt of the request for consultations, the requesting Party may refer the matter to an arbitration panel.

The arbitration panel shall be composed of three arbitrators. The Parties shall consult, with a view to reaching an agreement on the composition of the arbitration panel, within 10 working days of the date of receipt by the responding Party of the request for the establishment of an

[81] Dispute settlement procedure under this Chapter shall be governed by the rules of procedure for arbitration in Annex 29-A, unless the Parties agree otherwise.

arbitration panel. In the event that the Parties are unable to agree on the composition of the arbitration panel within this time frame, either Party may request the Chair of the CETA Joint Committee, or the Chair's delegate, to draw by lot the arbitrators from the list established by the Committee.

The CETA Joint Committee shall establish a list of at least 15 individuals, chosen on the basis of objectivity, reliability and sound judgment, who are willing and able to serve as arbitrators. The list shall be composed of three sub-lists: one sub-list for each Party and one sub-list of individuals who are not nationals of either Party to act as chairpersons. Each sub-list shall include at least five individuals.

The arbitration panel shall issue a report. The final panel report sets out the findings of fact, the applicability of the relevant provisions of CETA Agreement and the basic rationale behind any findings and conclusions that it makes. The ruling of the arbitration panel in the final panel report shall be binding on the Parties. No later than 20 days after the receipt of the final panel report by the Parties, the responding Party shall inform the other Party and the CETA Joint Committee of its intentions in respect of compliance. If, after the expiry of a reasonable period of time, the responding Party fails to notify any measures taken to comply with the final panel report, or the arbitration panel establishes that a measure taken to comply is inconsistent with that Party's obligations, the requesting Party shall be entitled to suspend obligations or receive compensation.

Investment disputes under CETA's Investment Court System are subject to special procedures established by Chapter Eight of the Agreement.

The investor shall submit to the other party, Member State, Canada or European Union, a request for consultations. Consultations occur between the investor and the respondent party with a view to settling disputes instead of proceeding to arbitration. A request for consultations must generally be submitted no later than three years after the investor has acquired knowledge of the alleged breach of CETA obligations. Unless the disputing parties agree to a longer period, the consultations shall be held within 60 days of the submission of the request for consultations. The disputing parties may at any time agree to have recourse to mediation.

If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim, the investor shall deliver to the European Union a notice requesting a determination of the respondent. The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent.

If a dispute has not been resolved through consultations, a claim may be submitted to the Tribunal by an investor of a party of CETA on its own behalf or on behalf of a locally established enterprise which it owns or controls.

The conditions an investor must satisfy before a claim is submitted to the Tribunal include the investor giving its consent to arbitration and allowing 180 days to pass from the time it requested consultations. The investor must also withdraw from any proceedings in other domestic or international courts or tribunals relating to the same measure, and waive its right to initiate such proceedings in the future.

The Submission of a claim to the Tribunal article establishes that only investors may submit a claim, either on their own behalf or on behalf of an enterprise they own or control. The article also specifies the arbitration rules that will govern the proceedings.

As set out in the Constitution of the Tribunal article, CETA departs from Canada's typical practice of appointing arbitrators on an ad hoc basis, i.e. for the purpose of hearing a single claim. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries. The cases are heard before the divisions of the Tribunal, each comprising three Members randomly selected by the President of the Tribunal. The Members are generally appointed for a 5-year term and are paid a monthly retainer fee.

The CETA Tribunal may dismiss a claim in an expedited way – i.e. before the first session of the division hearing the claim – if the claim is found to be manifestly without legal merits. It may also dismiss a claim later in the

proceedings if it has come to believe that, as a matter of law, the claim is not one for which an award in favour of the claimant may be made. In both scenarios, the tribunal is to assume the alleged facts to be true. Also, an investor who has submitted a claim and has been inactive for a period of six months is deemed to have withdrawn its claim from arbitration.

The CETA establishes a permanent Appellate Tribunal similar in concept to the WTO Appellate Body. The establishment of a similar appellate body was recently included in the draft text of the EU-Vietnam free trade agreement. The introduction of an Appellate Tribunal is a fundamental change allowing to challenge an award of panel on the basis of a legal error. It is expected that the new Appellate Tribunal will act similarly to the WTO Appellate Body, which carefully applies the rules of interpretation. Such system of appeal will increase the consistency and predictability of the jurisprudence.

Since 2015, the European Commission has been working to establish a permanent Multilateral Investment Court. The objective is that over time the Multilateral Investment Court would replace all investment dispute resolution mechanisms provided in the EU agreements, the EU Member States' agreements with third countries and in trade and investment treaties concluded between non-EU countries. The Multilateral Investment Court would have a first instance tribunal and an appeal tribunal, rule on disputes arising under future and existing investment treaties where an investment treaty already explicitly allows an investor to bring a dispute against a State. This system will provide for effective enforcement of its decisions. Both the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement foresee setting up a permanent multilateral mechanism and contain a reference to it.[82]

From the perspective of the consistency and the predictability of the dispute resolution mechanism under the investment chapter of the CETA, this system may be a model for modification of the EU-Turkey Association Agreement. Both governments and investors would benefit

[82] Article 8.29 of CETA foresee future establishment of a multilateral investment tribunal and appellate mechanism:
"The Parties shall pursue with other trading partners the establishment of a multilateral
investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements."

from improved consistency and predictability of such system. The general dispute settlement procedures set out in Chapter Twenty-Nine of the Agreement may serve as a model for a new dispute settlement mechanism of the EU-Turkey Association Agreement, which would apply to disputes between Turkey, Member States and the EU concerning the interpretation and application of the Association Agreement.

2.1. The Grounds of Jurisdiction of the Court of Justice and General Court in Cases Concerning EU-Turkey Association Law

It is a well-known principle of the EU law that agreements concluded by the Community and the Union form an integral part of the EU legal system. The acts adopted by the organs established by such agreements form also an integral part of the EU legal system. Consequently, the interpretation of agreements must also be uniform since agreements, constitute acts of European Union, and therefore come within the jurisdiction of the European Court of Justice.[83] The grounds of jurisdiction of the ECJ in cases concerning their interpretation and application are in principle the same as in cases concerning other categories of the acts of European Union.

Analysis of the case-law of the EU courts concerning the Ankara Agreement and acts adopted on its basis shows that the Court of Justice and General Court had four grounds of jurisdiction in such cases:

1. Preliminary rulings under Article 267 TFEU (ex Article 234 TEC);

2. Direct actions under Article 263 TFEU (ex Article 230 TEC) or 265 TFEU (ex Article 232 TEC) brought by natural or legal persons and Member States before the General Court and the Court of Justice;

3. Infringement cases brought by the Commission against the Member States under Article 258 TFEU (ex Article 226 TEC) or by a Member State under Article 259 TFEU (ex Article 227 TEC).

4. Actions for damages under Article 268 TFEU (ex Article 235 TEC): actions of Turkish citizens or enterprises claiming for compensation of damages allegedly caused to them by the EU institutions, etc.

In addition, the Court may have jurisdiction in inter-institutional cases under Article 263, paragraph 2. For the moment, there have been no cases of this category.

[83] Maresceau, Marc. Bilateral Agreements concluded by the European Community, p. 265.

2.2. Preliminary Rulings

A preliminary ruling is a judgement of the Court of Justice on the interpretation of European Union law, given in response to a request from a court or tribunal of a Member State under Article 267 TFEU (ex Article 234 TEC).[84] Interpretation of the EU-Turkey association law is is based mostly on preliminary rulings.

The most important question in this category of cases is the question of direct effect of the Ankara Agreement and of decisions taken on the basis of it.

The provisions of the Ankara Agreement and of acts taken on the basis of it are justifiable by the Court of Justice under Article 267 TFEU. It means that these provisions can be relied upon a national judge of a Member State provided that the provision relied contains a clear and precise obligation and is not subject to the adoption of subsequent measure (*Demirel*, paragraph 14, *Sevince*, paragraph 15).[85] This rule of direct effect with regard to the acts of EU-Turkey association was confirmed in the Judgment of the Court of Justice of 13 December 2007 in *Asda Stores*, C-372/06:

"90 Regarding, finally, the provisions of Article 47 of Decision No 1/95, however, these do meet the conditions of the case-law cited above on direct effect. They set out in clear, precise and unconditional terms, without being subordinate in their execution or effects to the intervention of any other measure, an obligation on the authorities of the importing State to request the importer to indicate the origin of the products concerned on the customs declaration. Given the nature and purpose of the provisions in question, such an obligation, demonstrating the will of the contracting

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[84] "Article 267 (ex Article 234 TEC) The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

[85] Judgment of the Court of 30 September 1987 in Case 12/86, *Demirel*, ECLI:EU:C:1987:400;
Judgment of the Court of 20 September 1990 in Case C-192/89, *Sevince*, CLI:EU:C:1990:322.

parties to require importers to provide certain information, is capable of directly governing the legal position of operators. Those provisions must therefore be recognised as having direct effect, which implies that the individuals to whom they apply have the right to rely on them before the courts of the Member States." [86]

On the contrary, as concluded by the Court, Article 45 of the Decision 1/95 which provides that the Parties shall endeavour, through exchange of information and consultation, to seek possibilities for coordinating their action does not contain any obligation either. The case-law on direct effectiveness therefore does not apply to that provision either (paragraph 89). In addition, as it follows from this case-law, direct effect needs also that the purpose of agreement or decision should be such as to allow individuals to rely upon it.

The Ankara Agreement was interpreted by the Court of Justice in many cases referred by the courts of Member States by way of references for preliminary rulings under Article 267 TFEU (ex Article 234 TEC). According to this procedure, the rules of which are laid down in Article 267, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. This jurisdiction includes also interpretation and validity of the Ankara Agreement and the decisions of the Council of Association and the Customs Union Joint Committee.

Most of the cases concerning the Ankara Agreement and the decisions of the EU-Turkey Association Council concern requests from the courts of Member States for preliminary rulings and relate to the most important questions of association law: movement of workers, prohibition of discrimination, right of establishment and provision of services, charges having equivalent effect to customs, etc. The Court of Justice also held that the stand-still clause prohibiting any new restrictions on the freedom of establishment and the freedom to provide services (Article 41 (1) of Additional Protocol) was clear, precise, unconditional and unequivocal, and thus must be regarded as being directly applicable.[87] A considerable part of the preliminary rulings is focused on the acts of the Association

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[86] Judgment of the Court of Justice of 13 December 2007 in *Asda Stores*, C-372/06, ECLI:EU:C:2007:787, paragraph 90.

[87] Judgment of the Court of Justice of 11 May 2000 in Case C-37/98, *Savas*, ECLI:EU:C:2000:224, paragraphs 46 and 48.

Council. It is also true that some conclusions of the Court made in preliminary rulings were regarded by doctrine as conservative, namely, "that the notion of 'freedom to provide services' in Article 41(1) of the Additional Protocol must be interpreted as not encompassing freedom for Turkish nationals who are the recipients of services to visit a Member State in order to obtain services."[88] On the contrary, the ECJ made a very important conclusion for Turkey in the Judgment of 19 October 2017 in Case C-65/16, *Istanbul Lojistik* that "Article 4 of Decision No 1/95 of the Association Council must be interpreted as meaning that a tax on motor vehicles such as that at issue in the main proceedings, which must be paid by persons operating heavy goods vehicles registered in Turkey and in transit through Hungarian territory, constitutes a charge having equivalent effect to a customs duty within the meaning of that article." [89]

However, neither Turkey, nor Turkish courts can take the case to the Court of Justice. Under paragraph 2 of Article 25 of the Ankara Agreement, the Council of Association may decide to submit the dispute to the Court of Justice of the European Communities or to any existing court or tribunal. However, the Council shall decide by unanimity. In fact, it means that a decision to submit the dispute to adjudication needs agreement of the representatives of the EU and Turkey in the Council.

[88] Judgment of the Court of Justice of 24 November 2013 in Case C-221/11, *Demirkan*, EU:C:2013:583, paragraph 63.

[89] Judgment of the Court of Justice of 19 October 2017 in Case C-65/16, I*stanbul Lojistik Ltd v Nemzeti Adó - és Vámhivatal Fellebbviteli Igazgatóság*, ECLI:EU:C:2017:770, paragraph 49.

2.3. Direct Actions

Direct actions (actions for annulment and actions for failure to act) may be brought before the General Court of the European Union by Member States, institutions of the Union and individuals under Articles 263 and 265 TFEU. [90] Until now, there were only some actions for annulment brought before the General Court by natural and legal persons concerning the Ankara Agreement and acts adopted on its basis. The decisions adopted on the basis of association agreements should be regarded under Article 263, paragraph 1, as "the acts of bodies, offices and agencies of the Union intended to produce legal effects vis-à-vis third parties."

The Ankara Agreement as such cannot be attacked before the Court. [91] TFEU does not provide for such kind of actions. On the contrary, there are no obstacles for judicial review of the decisions of the Association Council as "the acts of bodies of the Union" before the General Court under Article 263 TFEU. The Association Council is a body the Union established by international agreement. The acts of the Association Council, depending on their content, may belong to the category of acts defined in Article 263 (4) including regulatory acts which are of direct concern to natural or legal persons and does not entail implementing measures. The decisions of the Association Council are regulatory acts and cannot be qualified as the legislative acts which could not be attacked by natural or legal persons under Article 263 (4) TFEU.

There is one atypical case where the position to be taken on behalf of the EU within the Association Council was contested by a Member State. In case C-81/13, UK v Council, the United Kingdom sought to annul the Council Decision 2012/776/EU of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems. The action was based on the jurisdiction of the Court of Justice under Article 263, paragraph 1, to review the legality of acts adopted by the Council. The United Kingdom contested the legal basis chosen by the Council to adopt the Council Decision 2012/776/EU: Article 48 TFEU

[90] Article 263 TFEU allows Member States, the EU institutions, natural or legal person and applicants to bring an action for annulment against all legal acts from EU institutions or other EU bodies, offices or agencies. Article 265 provides for direct actions against failure to act by an institution, body, office or agency of the Union.

[91] See: Ergec, Rusen and Coppenholle, Koen, op. cit., p. 240.

providing for competence of the European Parliament and the Council to adopt measures in the field of social security as are necessary to provide freedom of movement for workers. The UK Government submitted that the appropriate legal basis for adopting such a decision is not that provision but Article 79(2)(b) TFEU which allows the adoption of measures relating to the definition of the rights of third-country nationals residing legally in a Member State. The Applicant claimed that by not using that provision as the legal basis for the contested decision, the Council denied the United Kingdom the right that it derives from Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU and FEU Treaties, not to take part in the adoption of that decision and not to be bound by it. The Court dismissed this action.[92]

Action for annulment can be brought against the Council Decision implementing the Agreement. The refusal of the Commission to submit to the Council proposal for adoption of such measure cannot be contested. In Case T-2/04, Korkmaz and others v Commission, (paragraphs 51 and 64), the Court of First Instance stated that such could not in itself be regarded as producing binding legal effects capable of affecting the applicants' interests by bringing about a significant change in their legal position. The proposal could not be classified as an act of that kind and in response to which, moreover, the Council is not required to take action. The Court held:

"69 Consequently, the action must be dismissed as inadmissible in so far as it seeks, in any event, an injunction requiring the Commission to propose to the Council suspension of pre-accession assistance until Turkey has brought to an end its failures to meet the criteria for membership of the European Union, to take action through the machinery provided for by the EC-Turkey Association Agreement and to suspend accession negotiations until Turkey has brought those infringements to an end."[93]

Proceedings may be introduced by any person, without regard to the nationality of the applicant. On the basis of Article 263, paragraph 4, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and

[92] See Judgment of the Court of Justice in Case C-81/13, *United Kingdom v Council*, ECLI:EU:C:2014:2449.
[93] Order of the Court of First Instance of 30 March 2006 in Case T-2/04, *Korkmaz and others v Commission*, ECLI:EU:T:2006:97, paragraph, 69.

against a regulatory act which is of direct concern to them and does not entail implementing measures. The Treaty of Lisbon introduced the possibility to contest a regulatory act which does not entail implementing measures and is of direct concern of a person, without requirement of individual concern.

It is settled case-law that a natural or legal person is directly concerned by an act that directly affects the legal situation of that person and that leaves no discretion to its addressees, its implementation being purely automatic and resulting from the EU rules without the application of other intermediate rules.[94] The meaning of a 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts. Legal acts adopted according to the procedure defined in Article 294 TFEU, referred to as 'the ordinary legislative procedure', constitute legislative acts.[95]

May the legality of the acts of the EU institutions, bodies, offices and agencies be challenged under Article 263 TFEU on the basis of the Ankara Agreement? In other words, would the provisions of a secondary law be considered illegal if these provisions breach the Ankara Agreement or the Additional Protocol as the EU international agreements?

According to Article 216, paragraph 2, TFEU, the agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. The well-established case-law of the ECJ acknowledges that Article 216(2) TFEU may constitute the basis upon which a provision of secondary law that is incompatible with international law may be invalidated. Advocate General Niilo Jääskinen, in Opinion in *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Joined Cases C-401/12 P to C-403/12 P, submitted that in order to avoid creating an area free from any judicial review, the lack of direct effect of a provision should not preclude an examination of legality, provided that the characteristics of the convention in question do not preclude this. "By contrast, a provision of international law which is capable of serving as a reference criterion for the purposes of the review of legality must necessarily include sufficiently clear, intelligible and precise elements.

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[94] See: Judgment of General Court of 15 July 2015 in Case T-337/13, *CSF v Commission*, EU:T:2015:502, paragraph 17.

[95] See: Order of General Court of 6 September 2011in Case T-18/10, *Inuit Tapiriit Kanatami v Parliament and Council*, ECLI:EU:T:2011:419,paragraphs 56 and 60.

Nevertheless, it is important to point out that such a provision may be mixed in nature. If it is possible to isolate parts of the content of that provision which satisfy that requirement, it must be possible to conduct the review of legality." [96]

In legal literature, this position is shared by Jean Félix Delile who considers that an act of secondary law is illegal if it breaches a conventional obligation, even if this obligation does not have direct effect, because the second prevails over the first one on the basis of Article 216, paragraph 2, TFEU. [97]

The approach adopted by the Court of Justice, in the Judgment of 13 January 2015 in *Vereniging Milieudefensie* and *Stichting Stop Luchtverontreiniging Utrecht*, was more restrictive. The Court confirmed its case-law that provisions of the EU international agreement can be relied on in support for the annulment of an act of secondary EU legislation or an exception based on the illegality of such an act only where, first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise. The Court of Justice held that with regard to Article 9(3) of the Aarhus Convention, that article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions.[98]

With regard to the Ankara Agreement, the General Court in T-367/03, *Yedaş Tarim v Council and Commission*, reminded that Court of Justice in Demirel, paragraph 16, characterized the Ankara Agreement by the fact that, in general, it sets out the aims of the association and lays down guidelines for the attainment of those aims without itself establishing the detailed rules for doing so. Only in respect of certain specific matters are detailed rules laid down by the protocols annexed to the Agreement, later replaced by the Additional Protocol. Accordingly, concluded General Court, "having regard to its nature and scheme, the Ankara Agreement

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[96] Opinion of Advocate General Niilo Jääskinen of 8 May 2014 in Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht,* ECLI:EU:C:2014:310, paragraphs 78 and 79.

[97] Jean Félix Delile. L'invocabilité des accords internationaux devant le juge de légalité des actes de l'Union européenne. Etat des lieux a l'occasion des arrêts *Vereniging Milieudefensie et Stichting Natuur en Milieu*. Cahiers de droit européen, 2015/1, p.163-164.

[98] Judgment of Court of Justice of 13 January 2015 in Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4, paragraphs 54 and 55.

is not included, in principle, in the norms in whose light the Court of First Instance reviews the lawfulness of the acts of the Community institutions."[99]

This conclusion of the General Court is applicable to the provisions of the Ankara Agreement or the Additional Protocol which do not have direct effect. At the same time, for example, the directly applicable stand-still clause of Article 41 (1) of Additional Protocol may serve as a basis for reviewing the legality of the acts of the EU secondary law. This provision is addressed to the Contracting Parties, therefore, it bounds not only the Member States and Turkey, but also the EU Institutions.

What legal consequences would follow from violations of the provisions of the Ankara Agreement which do not have direct effect? It is clear that non-respect of provisions of the Agreement should entail legal consequences. It seems that the consequences of such infringement cannot be limited only to the possibilities of liability of Parties for non-respect of international agreement. Infringements of the provisions of the EU international agreement which are not directly applicable should also have consequences in the context of the annulment of the EU acts adopted in breach of the international agreement. On the other hand, from a practical point of view, it would be very difficult to separate directly applicable provisions of an agreement from other provisions.

The case law of the General Court shows that a measure or failure to act by the Commission may be challenged on the ground that it infringes the Association Agreement and acts adopted on its basis.

The Judgment of the Court of First Instance of 10 May 2001 in Joined Cases T-186/97, Kaufring AG and Others v Commission, T-147/99, ECLI:EU:T:2001:133, concerned a remission of customs duties for television sets imported to Germany, France, the Netherlands and Belgium from Turkey. They were produced by various Turkish companies which employed in their manufacture, besides components of Turkish origin, components of Community origin and components from third countries. Since the legislation on the compensatory levy was not transposed by the Turkish authorities at that time, no component of third country origin imported could be included in goods intended for the Community since the

[99] Judgment of General Court in Case T-367/03, *Yedaş Tarim v Council and Commission*, ECLI:EU:T:2006:96, paragraphs 40-41.

Turkish customs authorities were not able to collect the compensatory levies on such components. The necessary measures were not adopted and implemented until 1994. Turkish customs authorities which issued A.TR.1 certificates to the importers had no precise information on the type, origin or value of the components actually included in the television sets intended for the Community. After the importers asked the customs offices concerned to grant them a remission of customs duties, competent national authorities in accordance with Regulation No 2454/93 (existence of special situation) submitted the cases to the Commission, informing it of its view that the conditions laid down for the remission of customs duties were met. Subsequently, the Commission by several decisions adopted in 1997, found that the grant of the remissions applied for was not justified.

The Court of First Instance in *Kaufring held* that pursuant to the EC Treaty and the principle of good administration, the Commission had a duty to ensure the proper application of the Association Agreement and the Additional Protocol including duty to monitor its application. That duty also resulted from the Association Agreement (see *inter alia* Articles 6, 7 and 25) and the various decisions adopted by the Association Council on the application of Articles 2 and 3 of the Additional Protocol. Furthermore, the Commission is represented on the Association Council (Article 23 of the Association Agreement) and it participates, as the representative of the Community, in various committees, including the customs cooperation committee, set up by that Council (Article 24). Moreover, the Commission has a permanent representation in Turkey which enables it to be reliably informed of political, legal and economic developments in that State.[100] The Court of First Instance found that clear deficiencies can be attributed to the Commission as regards the monitoring of the implementation of the Association Agreement and the Additional Protocol (see paragraphs 258-260 of the Judgment). Consequently, the Court annulled contested decisions concerning applications for non-recovery and remission of import duties. It is necessary to note, that the annulment of these decisions of the Commission was based inter alia on non-respect of the provisions of Article 3 (1) of Additional Protocol. Some of them are not directly applicable and are subject to implementing measures.[101]

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[100] See paragraphs 257-259.

[101] The Court of First Instance found in Kaufring:

"9. In particular, Article 3(1) of that protocol was applicable. It states that the provisions of the Additional Protocol on the elimination of customs duties and quantitative restrictions (hereinafter preferential treatment) are to likewise apply to goods obtained or produced in the Community or in Turkey, in the manufacture of which were used products coming from third countries and not in free circulation either in the Community or in Turkey.(…)

Similarly, in Case T-23/03, CAS *SpA v Commission,* the Court of First Instance held that with regard to the alleged failures relating to the supervision and monitoring of the implementation of the Association Agreement, the Commission had a duty to ensure the proper application of the Association Agreement. That duty also resulted from the Association Agreement itself and the various decisions adopted by the Association Council.[102]

Individuals can bring an action before the General Court against anti-dumping measures imposed on imports from Turkey, an action for repayment and remission of import duty and against other acts taken by institutions, bodies, offices and agencies of the EU on the conditions that they have *locus standi* under paragraph four of Article 263 TFEU.

Individuals may bring an action on the basis of all decisions adopted by the Association Council provided that they are sufficiently clear and have direct effect. In particular, actions may be brought on the basis of Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC). Article 52 of Decision 1/95 established the EC-Turkey Customs Union Joint Committee (Customs Committee). According to Article 24 of the Association Agreement, the function of the Customs Committee is to assist the Association Council in its functions. Under Article 52 (1) of the Decision, the Committee shall carry out exchange of views and information, formulate recommendations to the Association Council and deliver opinions with a view to ensuring the proper functioning of the Customs Union. In contrast to the Association Committee, neither the Association Agreement, nor Decision 1/95 gives power to the Customs Committee to adopt binding acts. It follows that the acts of the Customs Committee cannot be contested before the EU courts.

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11. It is also provided that the Association Council is to determine the percentage of the compensatory levy and the arrangements for its collection. Finally, the Association Council is to decide on methods of administrative cooperation to be used in implementing Article 3(1) of the Additional Protocol (Article 4 of the Additional Protocol)."

[102] See: Judgment of the General Court in Case CAS SpA v Commission, T-23/03, ECLI:EU:T:2007:32, paragraph 234.

2.4. Infringement Proceedings

Cases brought against Member States for their failure to fulfil their obligations under agreements concluded by the Community or the Union form an important part of the case-law of the Court of Justice.[103] It is established case-law that the Commission may institute infringement proceedings each time it forms the view that a Member State has failed to fulfil an obligation under Community law, without it being required to draw distinctions based on the nature or gravity of the infringement. [104] In *Kupferberg*, 104/81, the Court of Justice stated:

"In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in Case 181/73 *Haegeman* [1974] ECR 449, form an integral part of the Community legal system." [105]

The Court of Justice in the Judgment of 29 April 2010 in Case Commission v Netherlands, C-92/07, held that by introducing and maintaining a system for the issue of residence permits providing for charges which are disproportionate in relation to those imposed on the nationals of the Member States for the issue of similar documents, and by applying that system to Turkish nationals who have a right of residence in the Netherlands on the basis of the Association Agreement, the Additional Protocol or Decision No 1/80, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 9 of the Association Agreement, Article 41(1) of the Additional Protocol and Articles 10(1) and 13 of Decision No 1/80.[106]

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[103] Tristan Materne. La procédure en manquement d'Etat. Guide à la lumière de la jurisprudence de la Cour de justice de l'Union européenne. Bruxelles, Editions Lancier, 2012, p. 186-190.

[104] See: Case C-209/88 Commission v Italy [1990] ECR I-4313, paragraph 13, Case C-333/99, Commission v France [2001]ECR I-01025, paragraph 32.

[105] Judgment of the Court of 26 October 1982 in Case Kupferberg, 104/81, ECR [1982] I- 3644, paragraph 13.

[106] Judgment of the Court of Justice of 29 April 2010 in Case *Commission v Netherlands*, C-92/07, ECLI:EU:C:2010:228, paragraph 76.

2.5. Action for Damages

Under Article 268 TFEU (ex Article 235 TEC), the Court of Justice has jurisdiction in disputes relating to compensation for damage. This jurisdiction includes cases of non-contractual liability for damage caused by its institutions or by its servants in the performance of their duties under second paragraph of Article 340 TFEU (ex Article 288 TEC). The actions are brought against the EU that is represented by the institution, body, office or agency which is responsible for the damage.

It is settled case-law that for the Community to incur non-contractual liability, a series of conditions must be met, namely the conduct of the institutions which are accused must have been unlawful, the damage must be real and a causal link must exist between the conduct and the damage complained of.[107]

In principle, moral and legal persons are entitled to bring actions for damages caused to them in violation of the Association Agreement or acts adopted on its basis provided that a violation of the provision conferring rights on individuals was committed.

In Case T-367/03, *Yedaş Tarim ve Otomotiv Sanayi ve Ticaret AŞ*, the action was brought against the Council and the Commission for compensation for damage allegedly caused by the implementation of the procedures of the Customs Union instituted by the Agreement establishing an Association between the EEC and Turkey and its Additional Protocols and Decision 1/95. The applicant, a producer of ball bearings, claimed that, because of the abolition of customs duties in 1996, the Customs Union had a negative effect on the import operations of its commercial division, since the intensified competition had the effect of reducing its sales and requested the compensation of EUR 4,578,518. Yedaş Tarim argued inter alia that the inadequacy of the financial support granted by the Community and its omissions infringe or disregard Article 2(1), the first subparagraph of Article 3(1) and Article 6 of the Ankara Agreement.

The Court of First Instance held that Article 2(1) of the Ankara Agreement describes in general terms the purpose of the agreement, which consists in strengthening the trade and economic relations between Turkey and

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[107] See: Case 26/81 *Oleifici Mediterranei v EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 I*nternational Procurement Services v Commission* [1996] ECR II-729, paragraph 44; and Case T-283/02 *EnBW Kernkraft v Commission* [2005] ECR II-0000, paragraph 84.

the Community. It is not sufficiently precise and unconditional and is, of necessity, subject, in its implementation or effects, to the adoption of subsequent measures, precluding its having direct effect on the applicant's situation. In addition, it is not intended to confer rights on individuals. The same is true with regard to Article 3(1) of the Ankara Agreement, the first subparagraph of which indicates in general terms the purpose of the preparatory stage of the association between Turkey and the Community. The same conclusion must also be reached with regard to Article 6 of that agreement, which is an institutional provision creating an Association Council. The Court concluded that there were no conditions for non-contractual liability of the Community, inter alia no condition of causal link between the conduct complained of and the loss claimed.[108] One of rare actions for damages based on EEC-Turkey Association Agreement was brought in Case Formenti Seleco v Commission, T-210/09, ECLI: EU:T:2011:228. The case concerned the application for compensation for the damage allegedly suffered by the applicant as a result of the Commission's failure to take measures preventing the Turkish authorities from infringing the Agreement establishing an Association between the European Economic Community and Turkey when determining the origin of colour televisions imported into the Community from Turkey. The General Court held that the applicant did not prove any irregularity committed after the Commission adopted antidumping regulation 1531/2002 and therefore dismissed the action as inadmissible because of non-respect of five years statutory time limit.[109]

The Treaty on the Functioning of the European Union provides for set of remedies available within the framework of EU-Turkey association law. As it was suggested before, the Treaties do not preclude setting up a joint court within the EU-Turkey Customs Union. International agreement providing for a court with jurisdiction to interpret its provisions, is not in principle incompatible with European Union law. However, such a system shall not duplicate the judicial system established by the Treaties and shall not be in conflict with the jurisdiction of the Court of Justice. The Court of Justice shall have exclusive jurisdiction to interpret the Association Agreement by way of preliminary rulings. The judicial body established by the Association Agreement may have jurisdiction over disputes of the parties of the Agreement and over direct actions of investors challenging violations of the Agreement concerning investments.

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[108] Judgment of the Court of First Instance in Case T-367/03, Yedaş Tarim v Council and Commission, ECLI:EU: T:2006:96, paragraphs 41-43, 61.

[109] Order of General Court of 19 May 2011 in Case Formenti Seleco v Commission, T-210/09, ECLI:EU:T:2011:228, paragraphs 62 and 63.

3. PRINCIPLE OF PROGRESSIVE INTERPRETATION OF PROVISIONS OF ANKARA AGREEMENT AND OTHER ACTS OF ASSOCIATION LAW

The provisions of the Ankara Agreement and the decisions taken on the basis of it are interpreted as the provisions of the EU law. The Court of Justice held that the Association Agreement and the Association Council's decisions are binding EU law that should be applied uniformly in the European Union. However, there should be some difference in the approaches to be taken with regard to the interpretation of the main rules of the Ankara Agreement, on one hand, and of the rules of the Customs Union according to Decision 1/95, on the other.

The Ankara Agreement uses the wording "the Contracting Parties agree to be guided" by Articles 48, 49 and 50 of the EC Treaty for the purpose of progressively securing the freedom of movement for workers, by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on the freedom of establishment and by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on the freedom to provide services between them.

Decision 1/95 uses the same wording as the EC Treaty (now TFEU) when we compare the provisions of Articles 4, 5, 6, and 7 of the Decision with corresponding articles of TFEU: Articles 30 (ex Article 25 TEC), 34 (ex Article 28 TEC), 35 (ex Article 29 TEC) and 36 (ex Article 30 TEC).

Correspondingly, except some categories of products indicated in the Decision 1/95, customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States and Turkey. This prohibition shall also apply to customs duties of a fiscal nature (Article 4 of the Decision and Article 30 TFEU), quantitative and qualitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States and Turkey (Articles 5 and 6 of the Decision and Articles 34 and 35 TFEU), the same exemptions may be applicable on imports, exports or goods in transit (Article 7 of the Decision and Article 36 TFEU).

According to Article 66 of the Decision 1/95, the provisions of this Decision, in so far as they are identical in substance to the corresponding provisions of the Treaty, shall be interpreted for the purposes of their implementation and application to products covered by the Customs Union, in conformity with the relevant decisions of the Court of Justice.[110] These provisions are similar to the provisions of Article 6 of the EEA Agreement concluded in 1994, with the main difference that the provisions of the EEA Agreement "shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement." [111] This is due to the establishment of the EFTA Court which in its jurisprudence based itself on the ECJ case law.

The Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition (2003/C 265/02) states:

"Provisions for the elimination of measures having an effect equivalent to customs duties between the European Union and Turkey must, for the purposes the Customs Union, be interpreted in conformity with the relevant judgments of the Court of Justice, particularly the 'Cassis de Dijon' case. The Member State of destination of a product must allow the placing on its market of a product lawfully manufactured and/or marketed in another Member State or in Turkey."

The proper functioning of the EU-Turkey Customs Union would be impossible if its rules would not correspond to the EU Customs Union. For example, Article 16 of the Decision 1/95 stipulates the obligation of Turkey to "align itself progressively with the preferential customs regime of the Community". Therefore, granting of "tariff preferences shall

[110] Article 66
The provisions of this Decision, in so far as they are identical in substance to the corresponding provisions of the Treaty establishing the European Community shall be interpreted for the purposes of their implementation and application to products covered by the Customs Union, in conformity with the relevant decisions of the Court of Justice of the European Communities.

[111] Article 6
Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

be conditional on compliance with provisions relating to the origin of products identical to those governing the granting of such preferences by the Community."

With regard to the meaning of the words of the Association Agreement, "the Contracting Parties agree to be guided" by corresponding articles of the Treaty, it should be noted that this wording does not lead to the interpretation by analogy. In *Demirkan*, C-221/11, the Court of Justice held that "the use in Article 14 of the Association Agreement of the verb 'to be guided by' indicates that the Contracting Parties are not obliged to apply the provisions of the Treaty on the freedom to provide services or indeed those adopted for the implementation of those provisions but simply to consider them as a source of guidance for the measures to be adopted in order to implement the objectives laid down in that agreement."[112] The Court indicated that the Association Council has not adopted any substantive measure for the liberalization of services. This approach to freedom to provide services is due to the fact that Decision 1/95 does not cover the freedom to provide services; it is a matter of future negotiations on updating of the EU-Turkey Customs Union. On the contrary, the provisions of the Treaty concerning the freedom of movement of goods are applicable within the EU-Turkey Customs Union.

What consequences might be drawn from the identity of the words of the corresponding provisions of Decision 1/95 and the Treaty? Logically, the dispositions of Article 66 of Decision 1/95 and the Commission interpretative communication should lead to the conclusion that analogous provisions of the EU-Turkey Customs Union are subject to the interpretation by analogy with regard to the establishment of the customs union. Therefore, the EU-Turkey Customs Union is a part of the EU Customs Union with exceptions established with regard to some products (for ex., processed agricultural products).

It is true that the Court, in its *Polydor* judgment concerning the Agreement between the EEC and Portugal considered that the similarity of terms is not sufficient reason for transposing to the provisions of the Agreement the case-law of the Court.[113] Nevertheless, the conclusions of the Court in Polydor judgment dealing with former EC-Portugal agreement cannot be fully applicable to the EU-Turkey Customs Union and other provisions

[112] ECJ Judgment in Case *Demirkan*, C-221/11, ECLI:EU:C:2013:583, paragraph 45.
[113] Case 270/80, Polydor, paragraph 15, Reports of Cases 1982 00329.

of the decisions of the Association Council. Already in 1995, the Court of Justice in *Bozkurt*, case C-434/93, the judgment Reports of Cases, 1995 I-01475 ECLI:EU:C:1995:168, the Court first noted that, when the Association Council adopted the social provisions in Decision No 1/80, its aim was to go one stage further, guided by Articles 48, 49 and 50 of the Treaty, towards securing the freedom of movement for workers (paragraph 19). The Court held:

"20 In order to ensure compliance with that objective, it would seem to be essential to transpose, so far as is possible, the principles enshrined in those articles to Turkish workers who enjoy the rights conferred by Decision No 1/80."

Recently, Kees Groenendijk suggested that "the principle of analogous interpretation and the central role of secure residence and equal treatment as instruments furthering integration in the new EU migration directives, apparently stimulated the Court to apply the same principles when interpreting association law." [114]

The system of the EU law is a coherent body of legal norms and it cannot be interpreted as a set of separate legal instruments. The dispositions of the Association Agreement and acts adopted on its basis form an integral part of the EU legal order and thus should be interpreted according to the rules of this order. For example, in the area of free movement of capital, as Advocate General Melchior Wathelet concluded in his recent opinion concerning Euro-Mediterranean Association Agreement with Tunisia and Lebanon in *SECIL*, C-464/14, that the case-law of the Court of Justice concerning free movement of capital shall be transposed to the area of this agreement first of all because the Treaty makes free movement of capital applicable in relations with third countries. [115]

The Association Agreement is an international treaty which shall be interpreted according to the rules of interpretation established by the 1969 Vienna Convention on the Law of Treaties. Article 31 (General rule of interpretation) of the Vienna Convention stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning

[114] Koes Groenendijk. The Court of Justice and the Development of EEC-Turkey Association law. Grenzüberschreitendes Recht : Festschrift für Kay Hailbronner. 2013, p. 420.

[115] Opinion of the Advocate General Wathelet of 27 January 2016 in Case C-464/14, SECIL, EU:C:2016:52, paragraph 121.

to be given to the terms of the treaty in their context and in the light of its object and purpose. A special meaning shall be given to a term if it is established that the parties so intended.

International treaties are based on the reciprocity of obligations of the contracting parties. Also the object and purpose of a treaty play a very important role for the interpretation of treaty provisions.

The Court of Justice in *Demirkan*, C-221/11, ECLI:EU:C:2013:583, paragraphs 45-47 and 50, held that the use in Article 14 of the Association Agreement of the verb 'to be guided by' the EU primary law in order to secure free movement of services indicates that the Contracting Parties are not obliged to apply the provisions of the Treaty on the freedom to provide services or indeed those adopted for the implementation of those provisions but simply to consider them as a source of guidance for the measures to be adopted in order to implement the objectives laid down in that agreement. A comparison between the objectives and context of the Agreement and those of the Treaty, according to the Court, is of considerable importance in that regard. The Court confirmed its case-law that with regard to its objectives, the EEC-Turkey Association pursues a solely economic purpose. [116]

Ms. Demirkan, a Turkish national wishing to visit her German step-father, was refused an entry visa. She brought her case before German courts arguing that such a visit will necessarily entail the decisive element – receipt of services– she is entitled, as the beneficiary of such services, to the tourist visa. Article 41(1) of the Additional Protocol: "Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". She argued that this clause is directly applicable, and Turkish nationals may invoke it in order to counter the introduction of "fresh" restrictive measures, including a visa requirement, after the entry into force of the Additional Protocol, on 1 January 1973. The visa requirement was imposed on Turkish visitors to Germany in 1980.

The Court found that the notion of 'the freedom to provide services' in Article 41(1) of the Additional Protocol must be interpreted as not encompassing freedom for Turkish nationals who are the recipients of services to visit a Member State in order to obtain services. It was only

[116] Judgment of the Court of Justice in Case Demirkan, C-221/11, ECLI:EU:C:2013:583, paragraphs 45-47 and 50.

in 1984, in *Luisi and Carbone*, 286/02 and 26/83, EU:C:1984:35, that the passive provision of services came to be considered under the EC Treaty, when the Court clearly indicated that the freedom of provision of services within the meaning of the Treaty included passive freedom of provision of services. It follows "that because of differences of both purpose and context between the Treaties on the one hand, and the Association Agreement and its Additional Protocol on the other, the Court's interpretation of Article 59 of the EEC *Treaty in Luisi and Carbone* cannot be extended to the 'standstill' clause in Article 41(1) of the Additional Protocol." (paragraphs 59 and 62)[117]

Like in *Demirkan*, in *Hengartner and Gasser*, C-70/09, EU:C:2010:430, the Court of Justice refused to apply passive freedom of services, as opposed to active freedom of service providers, under EC-Swiss Agreement on the free movement of persons, notwithstanding the fact that this agreement was concluded in 1999, well after the Luisi and Carbone judgment (1984). The Agreement establishes, inter alia the objective to facilitate the provision of services in the territory of the contracting parties and to liberalize the provision of services of brief duration and guarantees the principle of non-discrimination of nationals of contracting parties. The case concerned charging of a hunting tax with a higher rate of tax being applied to Swiss nationals than which applies to EU citizens. The Court found that Agreement and its annexes do not contain any specific rule intended to allow recipients of services to benefit from the principle of non-discrimination in connection with the application of fiscal provisions relating to the commercial transactions whose subject is the provision of services. The Court has also stated that the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself.[118]

It is interesting to note that the Ankara Agreement, like the EC-Swiss Agreement on the free movement of persons establishes the same objectives: the purpose of abolishing restrictions on the freedom to provide services (Ankara Agreement, Article 14) and the objective to facilitate the provision of services in the territory of the Contracting

[117] Detailed analysis of the case see: Vassilis Hatzopoulos. Turkish service recipients under the EU-Turkey Association Agreement: Demirkan. - Common Market Law Review 51: 647–664, 2014.

[118] Judgment of the Court of Justice of 15 July 2010 in Case Hengartner and Gasser, C-70/09, EU:C:2010:430, paragraphs 40 and 42.

Parties, and in particular to liberalise the provision of services of brief duration (EC-Swiss Agreement, Article 1 (b). Nevertheless, the absence of the passive right to receive services was based by the Court on the grounds of difference of provisions of both agreement, on one hand, and the provisions of the EU law concerning the internal market (see paragraph 44 in *Demirkan* and paragraph 42 in *Hengartner and Gasser*), on the other. Free movement of persons under the EU-Swiss Agreement did not change the result: the Agreement does not contain full passive right to receive services which would be guaranteed under the EU law. This kind of interpretation in literature was called a context-related interpretation. Christa Tobler wrote that this approach requires a comparison between the objectives and context of the agreement in question and those of the EU law. "Only in the case of or at least comparable objectives and context is a parallel interpretation called for. However, as in all arguments of "equal treatment" that are comparison-based, this raises questions regarding what is relevant for this purpose (e.g. with respect to the Ankara Association Law: economic integration or also the perspective of membership?)."[119] Indeed, this interpretation raises difficult questions including a question what consequences should be attached to the objective of "facilitating the accession of Turkey to the Community at a later date" according to the Ankara Agreement? In Hengartner and Gasser (paragraph 41), the Court has observed that the Swiss Confederation did not join the internal market of the Community, the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services and the freedom of establishment (paragraph 41). Nevertheless, with regard to the interpretation of the EU-Turkey association law, the context is different. Turkey was granted formal candidacy status in 1999. Turkey-EU relations reached its highest point in December 2004 when the European Council decided to open the accession negotiations in October 2005. The Ankara Agreement is qualified in literature a pre-accession treaty on the basis that its Article 28 provides that "as soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the contracting parties shall examine the possibility of the accession of

[119] Christa Tobler. Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU. In: Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship. Leiden/Boston: Brill Nijhoff, 2015, p. 126.

Turkey to the Community." It is also argued that not only the wording of Article 28 but also the whole system provided by the Ankara Agreement makes the latter a pre-accession treaty. [120]

In Joined Cases *Abatay and Others* (C-317/01) and *Nadi Sahin* (C-369/01), the Court of Justice applied the fundamental principle of freedom to provide services enshrined in the EC Treaty with regard to Turkish providers of services: "according to settled case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation such as a work permit constitutes a restriction on the fundamental principle enshrined in Article 59 of the EC Treaty". The Court held that "it is clear from the wording of Article 14 of the Association Agreement, as well as from the objective of the EEC-Turkey Association, that the principles enshrined in Articles 55 of the EC Treaty (now Article 45 EC) and 56 of the EC Treaty (now, after amendment, Article 46 EC), and in the provisions of the Treaty relating to the freedom to provide services, must be extended, so far as possible, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties". In this case, the Court of Justice applied stand-still clauses prohibiting introduction of new restrictions on the freedom to establishment and the freedom to provide services (Article 41 of the Additional Protocol) and on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories (Article 13 of Decision No 1/80 of Association Council) in close connection with analogous prohibitions established by the EC Treaty.[121] The meaning given to the words "the Contracting Parties agree to be guided" by the corresponding articles of Treaty was that the restrictions on the freedom to provide services by Turkish nationals are prohibited also according to the terms of the EC Treaty.

With regard to interpretation by analogy (or parallel interpretation), the Court of Justice in *Ziebell*, C-371/08, held that, in deciding whether a provision of the European Union law lends itself to application by analogy under the EEC-Turkey Association, a comparison must be made between the objective pursued by the Association Agreement and the context

[120] Ceren Zeynep Pirim. The Turkey-EU Customs Union: From a Transitional to a Definitive Framework? - Legal Issues of Economic Integration 42, no. 1 (2015), p. 37.

[121] Judgment of the Court of Justice of 21 October 2003 in Joined Cases C-317/01 and C-369/01, Abatay and Othersand Nadi Sahin, ECLI:EU:C:2003:572, paragraphs 111 and 112, 116 and 117.

of which it forms a part, on the one hand, and those of the European Union law instrument in question, on the other (paragraph 62) .[122] The main question in this case was dealt with the possibility of extension of the rules concerning the expulsion of the Union citizens and their family members on grounds of public policy or public security under Directive 2004/38 to the provisions of Article 14 of Decision No 1/80 concerning limitations of free movement of Turkish citizens who are permanent residents of a Member State. The Court concluded that it follows from the substantial differences to be found not only in their wording but also in their object and purpose between the rules relating to the EEC-Turkey Association and the European Union law concerning citizenship that the two legal schemes in question cannot be considered equivalent, with the result that the scheme providing for protection against expulsion enjoyed by the Union citizens under Article 28(3)(a) of Directive 2004/38 cannot be applied mutatis mutandis for the purpose of determining the meaning and scope of Article 14(1) of Decision No 1/80.

However, it seems that the principles of interpretation of the rules of association law in *Ziebell* case involving the EU citizenship cannot be fully transposed to all areas of the association law, especially into the area of the EU-Turkey Customs Union. The EU-Turkey Customs Union implies close integration of Turkish customs territory into the EU customs territory. It presupposes the necessity of application of identical rules governing all trade in goods. Therefore, the interpretation of the rules of association law shall be in line with the rules of the EU Customs Union. It is evident, that the dispositions of Articles 5, 6 and 7 of Decision 1/95 prohibiting quantitative and qualitative restrictions on imports and all measures having equivalent effect and allowing exemptions from such restrictions and by using the same terms as the Treaty, go further than gradual approximation of law and the aim "to be guided" by provisions of fundamental freedoms. The Association Agreement providing for the establishment of a Customs Union pursues the aim of close economic integration. Such kind of association agreement, by its content and objective, pursues the most ambitious aims of association. According to this association formula, the establishment of the customs union necessitates not only the elimination of the customs duties and other restrictive measures between the parties but also the adoption by the associated country of the external common tariff of the Community.

[122] Judgment of the Court of Justice of 8 December 2011 in Case Ziebell, C-371/08, ECLI:EU:C:2011:809, paragraphs 62 and 74.

This kind of agreement provides a customs union which should be accompanied not only by common commercial policies, but also by competition policies and even agricultural policies. The bonds created by this type of association are so tight that the customs union progressively obliges the parties to bring closer several of their policies. Following the approximation of economic and commercial policies, the partner's assimilation by the Community becomes inevitable.[123]

The Court of Justice in Istanbul Lojistik, C-65/16, held that "Article 66 of Decision No 1/95 of the Association Council provides that the provisions of the decision, in so far as they are identical in substance to the corresponding provisions of the EC Treaty, now the FEU Treaty, are to be interpreted in conformity with the relevant decisions of the Court of Justice. Since Article 4 of the decision is identical in substance to Article 30 TFEU, it must be interpreted in conformity with the case-law of the Court concerning the latter provision." [124]

The case-law of the Court of Justice is already well-established in the area of the Association Agreement and especially, as far as the rights of Turkish workers are concerned. On the contrary, rare are the cases where the Court of Justice interpreted Decision 1/95 (and subsequent decisions No 1/96 and 1/2001) and the rules of the Customs Union. [125]

With regard to the application of the rules of the EU-Turkey Customs Union, it is important to make reference to Article 3 of Decision No 1/2001 amending Decision No 1/96 laying down detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council:

"Without prejudice to the provisions on free circulation laid down in the basic Decision, the Community customs code and its implementing provisions, which are applicable in the customs territory of the Community,

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[123] Zeynep Pirim, Ceren, p. 35-36.

[124] Judgment of the Court of Justice of 19 October 2017 in Case C-65/16, Istanbul Lojistik, ECLI:EU:C:2017:770, paragraph 38. The texts of both articles are almost identical.
Article 4 of Decision 1/95 stipulates: "Import or export customs duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey on the date of entry into force of this Decision. The Community and Turkey shall refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect from that date. These provisions shall also apply to customs duties of a fiscal nature."
TFEU Article 30 (ex Article 25 TEC) stipulates:
"Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature."

[125] Decision No 1/95 was complemented by Decisions No 1/96 and No 1/2001 laying down detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council

and the Turkish customs code and its implementing provisions, which are applicable in the customs territory of [the Republic of] Turkey, shall apply in trade in goods between the two parts of the customs union under the conditions laid down in the present Decision."

In *Ilumitrónica*, C-251/00, the Court of Justice held that the declarant is obliged to supply the customs authorities with all the necessary information as required by the Community rules, and any national provisions which supplement or transpose them, in relation to the customs treatment requested for the goods in question (see, in particular, Hewlett Packard France, paragraph 29). The Court interpreted accordingly the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).[126]

It is clear that the implementation of the EU-Turkey Customs Union needs that its main rules should have direct effect in legal systems of the Member States. In C-372/06, *Asda Stores v Commission*, the Court held that the provisions of Article 47 of Decision No 1/95 concerning the formalities involved in importing products covered by trade defence instruments meet the conditions of the case-law on direct effect (duty of authorities the importing State to ask the importer to indicate the origin of the products concerned on the customs declaration, to request additional supporting evidence where absolutely necessary because of serious and well-founded doubts in order to verify the true origin of the product in question, etc.). The Court concluded that they set out in clear, precise and unconditional terms, without being subordinate in their execution or effects to the intervention of any other measure, an obligation on the authorities of the importing State to request the importer to indicate the origin of the products concerned on the customs declaration. Given the nature and purpose of the provisions in question, such an obligation, demonstrating the will of the contracting parties to require importers to provide certain information, is capable of directly governing the legal position of operators. Those provisions must therefore be recognized as having direct effect, which implies that the individuals to whom they apply have the right to rely on them before the courts of the Member States.[127] It follows from the Judgment of the Court of Justice in *C.A.S. SpA v Commission*, C-204/07 P, that the dispositions of Decision No

[126] Judgment of the Court of Justice of 14 November 2002 in Case Ilumitrónica, C-251/00, ECLI:EU:C:2002:655, paragraph 61.

[127] Judgment of the Court of Justice of 13 December 2007 in Case C-372/06, Asda Stores v Commission, ECLI:EU:C:2007:787, paragraph 90.

1/95 of the Association Council and Decision No 1/96 of the EC-Turkey Customs Cooperation Committee of 20 May 1996 laying down detailed rules for the application of Decision No 1/95 concerning cooperation of the customs authorities of the Member States of the Community and of Turkey in checking the authenticity and accuracy of the certificates also have direct effect.[128]

In general, since the rules of association which prohibit quantitative and qualitative restrictions on imports and exports and charges having equivalent effect are identical in substance with the corresponding provisions of the Treaty, they shall be interpreted according to the Treaty. Nevertheless, there is no overall identity between the EU customs rules and the customs rules of the Republic of Turkey. There are two composite parts of the customs union as it follows from Decision 1/2001 and practice, notwithstanding the fact that they are harmonised and integrated into EU-Turkey Customs Union.[129] It seems that the development of the EU-Turkey Customs Union should go to the same direction as the European Economic Area where the expansion of the EU Internal Market to EFTA Member States (Iceland, Norway and Liechtenstein) entailed the formation of a harmonised legal environment. The EEA is based on the homogeneity of the EU-EEA common rules which is supported by uniform interpretation. The EU Internal Market acquis is binding for the EFTA Member States in the areas necessary to the functioning of the EU Internal Market: four freedoms, competition and state aid, procurement, product liability, energy, social security, transport (with the exceptions of such areas as agriculture, fisheries and taxation). Such a parallel may be seen also from the perspectives of the existing EU-Turkey association law: Article 3 (1) of the Decision No 1/95 of the Association Council stipulates

"The Customs Union foresees that Turkey shall align national law to the *acquis communautaire* in several essential internal market areas"; under Article 54 (1) of the Decision in areas of direct relevance to the operations of the Customs Union Turkish legislation shall be harmonized

[128] Judgment of the Court of Justice of 25 July 2008 in Case C.A.S. SpA v Commission, C-204/07 P, ECLI:EU:C:2008:446, paragraphs 103 and 119.

[129] According to Article 3, paragraph 3 of the Decision 1/95 of Association Council "the customs territory of the Customs Union shall comprise:

- the customs territory of the Community as defined in Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,
- the customs territory of Turkey."

as far as possible with the Community legislation. Of course, possible transformation of the EU-Turkey association law into the law of the EEA model would need revision of the Ankara Agreement which does not envisage a homogeneity procedure similar to the EEA Agreement. In such a perspective, the Association Council would have the functions similar to the functions of the EEA Joint Committee: to keep the development of the *acquis communautaire* under constant review to implement the EU legislation into the association law and to interpret uniformly the adopted *acquis communautaire* and the association rules. The Association Council would adopt the decisions with the purpose of extending the applicability of the EU legislation to the legal order of the Association Agreement. One may envisage the establishment of a court with the competence similar to the competence of the EFTA Court.

The provisions of the Ankara Agreement and the Additional Protocol, dated 1963 and 1970, form the legal basis of the association law. Most of them are programmatic in their nature and purpose. At the moment of the conclusion of the Ankara Agreement, the EEC Common Market was still under construction. Since then the European Union and European Union law has intensively developed and acquired a new quality which is hardly comparable of the level of the EEC and the Community law of that period. The world of trade that exists today is not the same as that which existed when the Customs Union was established more than twenty years ago. The schedule of the three stages of association: preparatory, transitory and final would not have sense if the interpretation of the association law would remain on the level of development of the Community at the moment of the conclusion and entry into force of the 1963 Ankara Agreement and the 1970 Additional Protocol. The Ankara Agreement, as noted by Cécile Rapoport, was also clearly a pre-accession agreement built on the model of the association agreement of Greece which joined the EEC in 1981. The long term goal of these agreements explains why it sought the achievement of a customs union and not just a free trade area (FTA).[130]

It is true that the EU-Turkey association law was also developed and complemented by the decisions of the Association Council and the case-law of the Court of Justice. At the same time, it should be noted that the Association Council was not very active in the role and the decisional

[130] Cécile Rapoport. EC-Turkey Customs Union and the WTO System. In: EU and Turkey : bridging the differences in a complex relationship. 2011, p. 174.

power attributed to him by Article 22 of Ankara Agreement, namely to attain the objectives of this Agreement and periodically review the functioning of the Association. Therefore, the role of the judicial and doctrinal interpretation of the provisions of the association law was more significant. It is evident that the level of development of these provisions cannot be limited to the level of the EC law, including the EC-Turkey association law which existed at the moment of the conclusion of the Ankara Agreement and the Additional Protocol. These norms should be interpreted taking due respect to the development and the current status of the EU law and the case-law of the ECJ. Progressive implementation of law governing the EU-Turkey relations follows, first of all, from Article 2 (1) of the Ankara Agreement:

"The aim of this Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people." This principle may be supported by the aims proclaimed in the Preamble of the Agreement: "to establish ever closer bonds" and "facilitate the accession of Turkey to the Community at a later date". As Daniel Thym concludes, the "ever closer union" formula in the preamble of the original EEC Treaty and today's TFEU is a symbolic reference point for the dynamic interpretation of the Union law.[131]

The Court of Justice confirmed in the Joined Cases C-317/01 and C-369/01, Abatay and Sahin, "the spirit and purpose of the EEC-Turkey Association (...) is intended to introduce progressively certain economic freedoms, including the freedom to provide services." [132]

The Court of Justice in *Bozkurt*, C-434/93, noted that "when the Association Council adopted the social provisions in Decision No 1/80, its aim was to go one stage further, guided by Articles 48, 49 and 50 of the Treaty, towards securing freedom of movement for workers. In order to ensure compliance with that objective, it would seem to be essential to transpose, so far as is possible, the principles enshrined in those articles to Turkish

[131] Daniel Thym. Constitutional Foundations of the Judgments on the EEC-Turkey Association Agreement. Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship. Leiden, Boston, 2015, p. 17, footnote 18.

[132] Abatay and Sahin, paragraph 100.

workers who enjoy the rights conferred by Decision No 1/80."[133] In Genc, C14/09, the Court confirmed: "The Court has consistently inferred from the wording of Article 12 of the EEC-Turkey Association Agreement and from Article 36 of the Additional Protocol, as well as from the objective of Decision No 1/80, that the principles laid down in Articles 48 and 49 of the EC Treaty (now, after amendment, Articles 39 EC and 40 EC) and in Article 50 of the EC Treaty (now Article 41 EC) must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by that decision." [134]

The Ankara Agreement and the subsequent acts of the association law are oriented towards progressive development, interpretation and application of the rules of the association law. This conclusion may be drawn not only from the spirit of these acts but also from their terms such as "the Parties agreed to be guided by provisions of establishing the Community for the purpose of abolishing restrictions", "using the relevant provisions of the Treaty establishing the European Community as guidelines", "Association relations are entering into their final phase", etc. According to the Ankara Agreement, the Contracting Parties, by concluding the Agreement, agreed to be guided by the corresponding provisions of the Treaty of Rome for the purpose of abolishing restrictions on the freedom of establishment (Article 13) and on freedom to provide services (Article 14) between them. Decision No 2/2000 of the EC-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening of the procurement markets between the Community and Turkey stipulates:

"Articles 13 and 14 of the EC-Turkey Association Agreement and Article 41(2) of the Additional Protocol thereto envisage, by Decision of the Association Council, the progressive abolition of restrictions on freedom to provide services and freedom of establishment, using the relevant provisions of the Treaty establishing the European Community as guidelines."

As it is stated in the Preamble of Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union (96/142/EC), the Association relations as provided for in Article 5

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[133] Judgment of the Court of 6 June 1995 in Case ***Bozkurt***, C-434/93, ECLI:EU:C:1995:168, paragraphs 19 and 20.
[134] Judgment of the Court of Justice of 4 February 2010 in Case ***Genc***, C14/09, ECLI:EU:C:2010:57, paragraph 17. Objective of Decision 1/80 in this area is "to improve the treatment accorded to workers and members of their families".

of the Ankara Agreement are entering into their final phase based on the Customs Union, which will complete the transitional phase through the fulfilment by the two parties of their reciprocal obligations and which leads to the elaboration of the modalities for the effective functioning of the Customs Union within the framework of the Ankara Agreement and the Additional Protocol."

Progressive interpretation of the association law may require, where appropriate, interpretation identical to meaning of the acquis communautaire. According to Article 66 Decision 1/95, the provisions of this Decision, "in so far as they are identical in substance to the corresponding provisions of the Treaty establishing the European Community shall be interpreted for the purposes of their implementation and application to products covered by the Customs Union, in conformity with the relevant decisions of the Court of Justice of the European Communities. "The principle of elimination of measures having an effect equivalent to customs duties between the EU and Turkey is identical to the same principle of acquis communautaire.[135] The harmonisation of Turkish law with acquis communautaire also requires a progressive approach to the association law.

As Roman Petrov concluded with regard to the interpretation of the rules of the EU-Turkey Customs Union, that Turkey is obliged to interpret the provisions of Decision 1/95 identical in substance to the corresponding provisions of the EC Treaty in conformity with the relevant case law of the Court of Justice and the General Court, and to ensure by the end of the first year following the entry into force of the Customs Union the application of principles contained in the EC primary and secondary legislation, as well as those developed by the ECJ/General Court. These provisions go far beyond similar provisions on the application of the ECJ rulings in the EEA Agreement and in the EC-Swiss sectorial agreements. On the one hand, as Roman Petrov wrote, this approach disproportionately extends the EC judicial authority over the Turkish legal system without offering the Turkish side any real possibilities to be involved in the EU decision-making process. On the other hand, from the accession perspective, it ensures the effective implementation of the EC judicial

[135] Commission interpretative communication on facilitating the access of products to the markets of other Member States: practical application of mutual recognition (2003/C 265/02) stipulates: "Provisions for the elimination of measures having an effect equivalent to customs duties between the European Union and Turkey must, for the purposes the Customs Union, be interpreted in conformity with the relevant judgments of the Court of Justice, particularly the 'Cassis de Dijon' case."

acquis into the Turkish legal system.[136] At the same time, the process of harmonization of Turkish law with acquis communautaire is a voluntary harmonization process also aimed to future accession to the EU. The perspectives of such harmonization also depend on real perspectives of accession.

The case-law of the ECJ does not confirm the conclusion that "the EU institutions are not required to interpret the Ankara Agreement, the Additional Protocol from 1970 and the Association Council Decisions in the same dynamic teleological fashion as employed when interpreting the EU Treaty provisions."[137] Analogous rule shall be interpreted in an analogous way.

The principle of progressive interpretation of the association law requires that its provisions should be interpreted with due regard of the current status of the EU law especially where these provisions are identical or analogous to the corresponding provisions of the EU law. This task is also closely related with the aims of harmonization of Turkish law with the *acquis communautaire*.

[136] Roman Petrov. Exporting the Acquis Communautaire through European Union External Agreements. Heidelberg Schriften zum Wirtschaftsrecht und Europarecht. Band 64, Nomos, 2011, p. 141-142.
[137] Bringing EU-Turkey trade and investment relations up to date? Workshop. European Parliament. Policy Department, Directorate-General for External Policies. EP/EXPO/B/INTA/FWC/2013-08/Lot7/19, May 2016 - PE 535.014, p. 26.

4. FOUR FREEDOMS AND THE EU-TURKEY ASSOCIATION LAW

The legal base for the EU-Turkey relations remains the Ankara Agreement. The Court of Justice in *Demirel*, 12/86, already described the Ankara Agreement in following terms:

"Since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty." [138]

Title II of the Agreement, which deals with the implementation of the transitional stage, includes two chapters on the customs union and agriculture, together with a third chapter containing other economic provisions, of which the provisions of Article 12 on the freedom of movement for workers, Article 13 on freedom of establishment and Article 14 on freedom to provide services form part. All these provisions constructed in 1963, speak about the purposes of the Agreement. At the same time, there are some differences in their wordings: whereas Article 12 speaks about "the purpose of progressively securing freedom of movement for workers between them", other two articles are aimed at abolishing restrictions on freedom of establishment (Art. 13) and restrictions on freedom to provide services (Art. 14) between the Parties. As it was said before, these provisions reflect wording used in the corresponding provisions of the EEC Treaty. In addition, Article 15 provides for future extension to Turkey of the transport provisions contained in the Treaty "with due regard to the geographical situation of Turkey". Article 16 recognizes that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in the Treaty establishing the Community must be made applicable in the relations of the Parties within the Association.

As for the free movement of goods, the Decision No 1/95 establishing the Customs Union applies in principle to all goods with the exception of agricultural products, services or public procurement. It provided for the

[138] Judgment of the Court of Justice of 30 September 1987 in Case 12/86, Demirel, ECLI:EU:C:1987:400, paragraph 9.

elimination of customs duties and charges having equivalent effect and for the abolition of quantitative restrictions and measures of equivalent effect. The Community and Turkey refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect. Trade between the EU and Turkey in agriculture and steel products is regulated by separate preferential agreements.

The Ankara Agreement and other acts of the association law laid down the legal base of what could have been a common market including four freedoms, customs union and common transport policy. Regrettably, these constructive elements have not quite reached the same level of integration.

4.1. Free Movement of Workers: Status of Turkish Workers and Their Family Members under the Association Law

Free movement of workers contributed substantively to the establishment of the EU Internal Market. In the Community, the freedom of movement of workers was achieved progressively. In this sense, here there is clear parallel with the provisions of the EU-Turkey association law which was modelled according to the development of the EEC law in this area.

The Ankara Agreement establishes the guidelines for the purpose of progressively securing the freedom of movement for workers between Turkey and the Community. By progressively securing this freedom, the Parties agreed to be guided by the corresponding provisions of the EEC Treaty (Article 12). The Agreement did not create the rules directly applicable for the status of workers, except its Article 9 which prohibits within the scope of this Agreement any discrimination on grounds of nationality in accordance with the principle laid down in Article 7 (Article 18 TFEU) of the Treaty establishing the Community.

It is the Decision No 1/80 on the development of the Association that developed the complex regime regulating the status of Turkish workers and their families within the Community labor market. It is clear from the structure and purpose of Decision No 1/80 that, at the current stage of development of the freedom of movement for workers under the EEC-Turkey Association, that decision is essentially aimed at the progressive integration of Turkish workers in the host Member State through the pursuit of lawful employment which should be uninterrupted.[139]

In fact, as it stated in its Preamble, this decision improves "the treatment accorded to workers and members of their families in relation to the arrangements introduced by Decision No 2/76 of the Association Council". In comparison with Decision No 2/76, it introduced dispositions concerning the status of family members of the workers. Decision No 1/80 guarantees an advanced set of rights upon which Turkish workers and the members of their families can rely on. In addition, the social security matters are regulated by the Decision No 3/80 on the application of the social security schemes of the Member States to Turkish workers and members of their families.

[139] See judgment in Abatay and Others, EU:C:2003:572, paragraph 90.

It should be noted that Turkish workers and members of their families are the third-country nationals who under the EU-Turkey association law have more favourable status than general status of third-country nationals under the EU law.

Article 15, paragraph 3, TFEU, guarantees to the nationals of third states the right to equal conditions:

"Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

It is evident that Turkish citizens as third-country nationals are not covered by the fundamental freedom of the free movement of citizens and free movement of workers. Decision 1/80 becomes applicable only once the Turkish worker lawfully resides and works in the territory of a Member State. This decision does not interfere into the competence of the Member States to regulate the entry into their territory of third-country nationals and the conditions of taking up their first employment.

There is no right of third country nationals to be admitted to the labour market of the Member States. Neither the Charter, nor the EU law in general establish for third-countries nationals a right to enter the Member States. Free visa regime granted to the citizens of some third countries' nationals does not change this general rule.

Article 1(1) of 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 [of the Member States] and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1) provides:

'Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States.'

According to Annex I the Republic of Turkey is still one of the States on that list.

The Court of Justice on 16 February 2017 in Case C-507/15, Agro Foreign Trade & Agency Ltd v Petersime NV, ECLI:EU:C:2017:129, concluded:

"43 The development of economic freedoms for the purpose of bringing about freedom of movement for persons of a general nature which may be compared to that afforded to European Union citizens under Article 21 TFEU is not the object of the Association Agreement. Neither that agreement nor the Additional Protocol establishes any general principle of freedom of movement of persons between Turkey and the European Union. Furthermore, the Association Agreement guarantees the enjoyment of certain rights only within the territory of the host Member State (see, to that effect, judgment of 24 September 2013, Demirkan, C-221/11, EU:C:2013:583, paragraph 53).

44 By contrast, in the context of EU law, the protection of the freedom of establishment and the freedom to provide services, by means of the regime provided for by Directive 86/653 with respect to commercial agents, is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market.

45 Therefore, the differences between the Treaties and the Association Agreement concerning the objective pursued by them preclude the system of protection laid down by Directive 86/653 with respect to commercial agents from being held to extend to commercial agents established in Turkey, in the context of that agreement." [140]

The Court of Justice ruled in the Judgment of 19 February 2009 in Case C-228/06, Mehmet Soysal and Ibrahim Savatli that Turkish nationals residing in Turkey and travelling to a Member State in order to provide services there on behalf of an undertaking established in Turkey are not required to have a visa to enter the territory of that Member State, if the Member State in question did not require such a visa at the time of the entry into force, with regard to that Member State, of the Additional Protocol of 23 November 1970 to the Agreement establishing an Association between the EEC and Turkey of 12 September 1963. Article 41(1) of the Additional Protocol contains a standstill clause that "the

[140] Judgment of the Court of Justice of 16 February 2017 in Case C-507/15, Agro Foreign Trade & Agency Ltd v Petersime NV, ECLI:EU:C:2017:129.

Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". Accordingly, any new restriction introduced after 1973, when the Additional Protocol came into force, shall be invalid.[141] In 1973, five EU countries were not applying visa requirements towards Turkish services providers and no EU member state had visa requirements for stays of less than two months.

Under Article 45, paragraph 2, TFEU, the freedom of movement of workers of the Member States entails the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

Under Article 15, paragraph 2, every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

Decision 1/80 regulates the situation of the Turkish workers who are already integrated into the labour force of the host Member State. The decision applies to a "Turkish worker duly registered as belonging to the labour force of a Member State" (Article 6) and the "members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized to join him"(Article 7). Katharina Eisele notes, in this regard, that nonetheless, the remaining competence of the Member States to regulate the entry and taking up

[141] Judgment of the Court of Justice of 19 February 2009 in Case C-228/06, Soysal and Savatli,ECLI:EU:C:2009:101, paragraphs 55-57.

by Turkish nationals of first employment, the Member States are bound by the principle of proportionality when restricting rights granted under Community law. [142]

According to Article 6 (1) of the Decision 1/80, a Turkish worker shall be entitled in a Member State where he is registered: (a) after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available; (b) after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation; (c) after four years of legal employment to enjoy free access in that Member State to any paid employment of his choice.

Under Article 7, the members of the family of a Turkish worker shall be entitled: (a) subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State; (b) to enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

The rights of the Turkish workers under Article 6 of Decision 1/80 have been subject to the well-established case law of the Court of Justice. The meaning of worker which is inherent to the Community law, was applied by the Court of Justice to Turkish workers in Birden, C-1/97, where (paras 23-24) the Court applied Article 12 of the Ankara Agreement according to which the Contracting Parties shall be guided by Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers between them. Neither the origin of the funds from which the person is to be paid, nor the specific nature of the employment relationship under national law, nor the level of productivity of the worker have any consequence with regard to the existence of status of worker (para. 28). Worker is any person who, for a certain period of time, performs services for and under the direction of another person in return for remuneration. This economic activity must be effective and genuine in nature. [143]

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[142] Katharina Eisele. The Movement Regime of Turkish Citizens Based on the Ankara Association – An Ever-Growing Mosaic of Rights? In: EU and Turkey : bridging the differences in a complex relationship, 2011, p. 37-38.

[143] Judgment of the Court of Justice of 26 November 1998 in Case C-1/97, Birden, ECLI:EU:C:1998:568, paragraphs 23-25 and 28.

It is a well established case law of the Court of Justice concerning the rights of Turkish workers that, first, Article 6(1) of Decision No 1/80 has direct effect in the Member States and that Turkish nationals who satisfy its conditions may therefore rely directly on the rights given them by the various indents of that provision and, second, that the rights which the three indents of Article 6(1) confer on Turkish workers in regard to employment necessarily imply the existence of a right of residence for the person concerned, since otherwise the right of access to the labour market and the right to work as an employed person would be deprived of all effect. [144]

The stand-still clause established in Article 13 of the Decision 1/80 is one of the most important provisions for the rights of Turkish workers:

"The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories."

This provision due to its clear, precise and unconditional terms has direct effect: it is capable of direct application to the situation of the Turkish workers duly registered as belonging to the labour force of a Member State (see C-192/89, Sevince, para. 19). However, this provision in itself does not confer any substantive rights on the individuals. After the entry into force of the Decision 1/80 containing the standstill clause, that is 1 December 1980, the Member States are not allowed to introduce any new restrictions for entry, residence and employment rights of Turkish workers and their families. This is reciprocal obligation: the same standstill clause is applicable with regard to the EU citizens in Turkey. The Member States and Turkey freeze the most favourable conditions for the exercise of a freedom of movement of workers and shall not take backward steps. This is an obligation or duty "not to act", not to jeopardize the status quo and the attainment of purposes of the Association Agreement.

The stand-still clause contained in Article 13 of the Decision 1/80 and prohibiting new restriction on the conditions of access to employment is applicable together with the stand-still clause of article 41 (1) of the Additional Protocol of 1970 prohibiting new restrictions on the freedom

[144] Judgment of the Court of Justice of 30 September 1997 in Case Günaydin, C-36/96, ECLI:EU:C:1997:445, paragraphs 24 and 26.

of establishment and the freedom to provide services. They pursue the same objective, which is to create conditions conducive to the gradual establishment of the freedom of movement for workers, of the right of establishment and of the freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms so as not to make the gradual achievement of those freedoms more difficult between the Member States and the Republic of Turkey. In *Toprak and Oguz*, Joined Cases C-300/09 and C-301/09, ECLI:EU:C:2010:756, the Court of Justice held:

"54 Having regard to the convergence in the interpretation of both Article 41 of the Additional Protocol and Article 13 of Decision No 1/80 as regards the objective pursued, it must be held that the scope of the standstill obligation in Article 13 extends by analogy to any new obstacle to the exercise of free movement by workers which makes more stringent the conditions which exist at a given time.

55 It is thus necessary to ensure that the Member States do not depart from the objective pursued by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 within their territory." [145]

The Court of Justice has extensively interpreted the notion "new restrictions". The stand-still clauses protect not only against national legislation or practices regulating the conditions valid for the exercise of economic activities, such as permits, licenses, trade and commercial legislation but also against more restrictive conditions defining the entry and residence of a Turkish national and his/her social rights, provided that there is a context with the intention to take up employment on the labour market or self-employed activity. The preservation of the immigration law framework is protected by stand-still clauses against new restrictions.[146]

The recognition of the right of residence for Turkish workers who have become part of the regular labour market for a certain period of time means that the immigration law framework is included into the stand-

[145] Judgment of the Court of Justice of 9 December 2010 in Joined Cases Toprak and Oguz, C-300/09 and C-301/09, ECLI:EU:C:2010:756.

[146] Kay Hailbronner. The Stand Still Clauses in the EU-Turkey Association Agreement and Their Impact upon Immigration Law in the EU Member States. In: Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship. Leiden, Boston: Brill, Nijhoff, 2015, p. 193.

still clauses under the EU-Turkey association law. It inevitably affects the powers of the Member States to adopt stricter immigration rules with regard to Turkish citizens in situations of economic and migration crises. Does it mean that the Member States are not allowed to limit existing rights of movement and establishment of Turkish citizens?

It is evident that such limitations are allowed even with regard to the EU citizens: Article 45 (3) (ex Article 39 (3) TEC) provides that the rights deriving from the freedom of movement of workers: to accept offers of employment, to move freely and stay for the purpose of employment and to remain after being employed in a Member State may be subject to limitations justified on grounds of public policy, public security or public health.

The association law contains the same grounds for eventual limitation of rights of movement of workers. Article 14 (1) of the Decision 1/80 stipulates that the provisions of this section (employment and free movement of workers) shall be applied subject to limitations justified on grounds of public policy, public security or public health.

Whereas the grounds for limitation of rights of workers under EU law and the EU-Turkey association law are the same, the content of such rights is not. In Bozkurt, the Court found that "in the absence of any specific provision conferring on Turkish workers a right to remain in the territory of a Member State after working there, a Turkish national's right of residence, as implicitly but necessarily guaranteed by Article 6 of Decision No 1/80 as a corollary of legal employment, ceases to exist if the person concerned becomes totally and permanently incapacitated for work." Furthermore, the rules applicable under the Treaty with regard to the Community workers' rights cannot simply be transposed to Turkish workers. [147]

From a legal point of view, the meaning and content of "restrictions" and "limitations" are different. In principle, the main difference lies between the general nature of restrictions: these are general measures of legislative or administrative character[148] , whereas the limitations are

[147] Bozkurt, C-434/93, paragraphs 40 and 41.
[148] Court constantly repeats: "That standstill clause prohibits generally the introduction of any new measures (…)." – See Demirkan, EU:C:2013:583, paragraph 39.

rather individual ones.[149] In addition, when a limitation is applied, it shall be subject to proportionality and respect of human rights test. In Ziebell, C-371/08, the Court of Justice held:

"Furthermore, measures on grounds of public policy or public security may be taken only following a case-by-case assessment by the competent national authorities showing that the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat to a fundamental interest of society. In that assessment, those authorities are also required to observe both the principle of proportionality and the fundamental rights of the person concerned, in particular, the right to privacy and family life (see, to that effect, Case C-303/08 *Bozkurt*, paragraphs 57 to 60 and the case-law cited)."[150]

The prohibition of restrictions in a stand-still clause is clear and direct. The Court of Justice interpreted the content of the stand-still clause contained in Article 41 (1) of the Additional Protocol in the same sense as the stand-still clause prohibiting the Member States from introducing any new restrictions on the right of nationals of other Member States to establish themselves in their territories (Article 53 of the EC Treaty repealed by the Treaty of Amsterdam). In Savas, the Court has held that "such an express prohibition, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any other measure, is legally complete in itself." [151]

There should be a balance between status quo guaranteed by the stand-still clauses of the association law and the overriding public interest. According to Kay Hailbronner, the overriding public interest is the inevitable compensation for the court's excessive concept of the prohibition of restrictions.[152] There is no unlimited individual right of entry and residence, neither under EU law, nor under the EU-Turkey association law. In fact, the Court in its jurisprudence did not confront

[149] In Ziebell, para. 86, the Court held that Article 14(1) of Decision No 1/80 must be interpreted as meaning that that provision does not preclude an expulsion measure based on grounds of public policy from being taken against a Turkish national, in so far as the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of the society of the host Member State and that measure is indispensable in order to safeguard that interest. It is for the national court to determine, in the light of all the relevant factors relating to the situation of the Turkish national concerned, whether such a measure is lawfully justified in the main proceedings.

[150] Ziebell, C-371/08, paragraph 82.

[151] Case C-37/98 Savas, paragraph 47.

[152] Kay Hailbronner, Op. cit., p. 197.

the prohibitions of restrictions under Article 13 and the possibility of limitations of rights of Turkish workers and members of their families: the Court interpreted the provisions of Article 14 (1) by analogy to the provisions of Article 45 TFEU (ex Article 39 TEC). Such interpretation is in conformity with Article 12 of the Ankara Agreement: the Parties agreed to be guided by the corresponding articles of the EEC Treaty for the purpose of progressively securing freedom of movement for workers between them.

It seems that the interpretation given by the Court to the stand-till clauses of the EU-Turkey association should not be regarded as an excessive concept of the prohibition of restrictions. In some cases, the Court applied the principle of proportionality when assessing the legality of measures taken by the Member States in relation with restrictions to the rights of Turkish workers and the freedom of establishment. Proportionality is rather an indication of a balanced approach to the legality of restrictions.

The Court of Justice in Ergat, C-329/9, applied the requirement of proportionality in situation where the authorities of a Member State refused to extend the residence permit of a Turkish worker on the ground that he made his application late (delay of 26 days). The Court reaffirmed that, on the one hand, the Member States have retained the power to regulate both the entry into their territory of a member of the family of a Turkish worker and the conditions of his residence during the initial three-year period before he has the right to respond to any offer of employment, it is, on the other hand, no longer open to them to adopt measures relating to residence which are such as to impede the exercise of the rights expressly conferred by Decision 1/80 on a person who satisfies the conditions it lays down and who is therefore already legally integrated into the host Member State, given that the right of residence is essential to access to and the pursuit of any paid employment.[153] In that connection, it follows from the settled case-law on the subject of failure to comply with the formalities required to establish the right of residence of an individual enjoying the protection of Community law that, whilst Member States are entitled to make failure to comply with such provisions subject to penalties comparable to those attaching to minor offences committed by their own nationals, they are not entitled to

[153] Judgment of the Court of Justice of 16 March 2000 in Case C-329/97 Ergat, ECLI:EU:C:2000:133, paragraph 42.

impose a disproportionate penalty that would create an obstacle to that right of residence. That applies in particular to a sentence of imprisonment and, a fortiori, to deportation, which negates the very right of residence conferred and guaranteed by Decision No 1/80.[154]

The Court applied the principle of proportionality to new restrictions in a broader way in Commission v. the Netherlands, C-92/27 with regard to the compatibility of the increase in the prices of administrative fees paid by Turkish nationals for their residence permits with both types of standstill clauses and the general rule of non-discrimination laid down in Article 9 of the Association Agreement and Article 10 of Decision No 1/80. The Court stated that, "by applying to Turkish nationals charges of a disproportionate amount for obtaining a residence permit or the extension of one in comparison with the charges applied to citizens of the Union for similar documents, the Kingdom of the Netherlands, by so doing, imposed charges of a discriminatory nature."[155] It is contrary to obligations undertaken under Article 9 of the Association Agreement, Article 41(1) of the Additional Protocol and Articles 10(1) and 13 of Decision No 1/80.

The principle of proportionality was applied by the Court also in the context of possible limitations of the freedom of establishment and the freedom to provide service. In the recent judgment in Dogan, C-138/13, concerning the German legislation requiring evidence of basic linguistic knowledge with regard to the family member wishing to enter the national territory, the Court held:

"38 In that regard, on the assumption that the grounds set out by the German Government, namely the prevention of forced marriages and the promotion of integration, can constitute overriding reasons in the public interest, it remains the case that a national provision such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case." [156]

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[154] Ergat, paragraphs 56 and 57.

[155] Judgment of the Court of Justice of 29 April 2010 in Case Commission v Netherlands, C-92/07, ECLI:EU:C:2010:228, paragraph 75.

[156] Judgment of the Court of Justice of 10 July 2014 in Case C-138/13 Dogan, ECLI:EU:C:2014:2066, paragraph 38.

The Court of Justice, in Judgment of August 2018 in Case C-123/17, Nefiye Yön, dealt with the question whether the introduction of a visa requirement in Germany for a family member who entered German territory from the Netherlands was justified on the basis of an overriding reason in the public interest, in particular the objective of effective immigration control and the management of migration flows. Ms Yön visited the Netherlands under a Schengen visa granted by the Dutch Embassy in Ankara in order to visit her sister. Later, she entered Germany from the Netherlands in order to join her husband. The Court concluded that the national measure which makes the grant, for the purposes of family reunification, of a residence permit to third-country nationals who are family members of a Turkish worker residing lawfully in the Member State concerned, subject to such nationals obtaining, before entering national territory, a visa for the purpose of that reunification, constitutes a 'new restriction' within the meaning of that provision. Such a measure may nevertheless be justified on the grounds of the effective control of immigration and the management of migratory flows, but may be accepted only provided that the detailed rules relating to its implementation do not go beyond what is necessary to achieve the objective pursued, which it is for the national court to verify.

4.2. Free Movement of Goods and the EU-Turkey Customs Union

Association of Turkey with European Union created a broad set of rules of free movement of goods through the establishment of the Customs Union. The Customs Union covers all industrial goods but does not address agriculture (except processed agricultural products). Decision No 1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products abolishes quantitative restrictions on imports and on exports of agricultural products and all equivalent measures between the Community and Turkey (Article 1). Customs duties are abolished for some agricultural products and gradually reduced for others. Bilateral trade concessions apply to agricultural products. Parties decreased the majority of agricultural customs tariffs almost to zero. [157]

Article 4 of the Ankara Agreement provided that during the transitional stage, the Contracting Parties shall establish progressively a customs union between Turkey and the Community. This stage shall last not more than twelve years, subject to such exceptions as may be made by mutual agreement. The exceptions must not impede the final establishment of the customs union within a reasonable period. According to Article 10, the customs union shall involve the prohibition between member States of the Community and Turkey, of customs duties on imports and exports and of all charges having equivalent effect, quantitative restrictions and all other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of this Agreement.

Article 2 (1) of the Ankara Agreement provided that the aim of the agreement was "to promote the continuous and balanced strengthening of trade and economic relations between the Parties."

[157] Two of the three protocols comprising Decision 1/98 of the EU-Turkey Association Council lay out a broad reduction in tariffs for agricultural products to the point where many consider it a de facto FTA for agriculture. Because of these, as well as duty-free EU MFN rates for some agricultural products, 67 percent of EU agricultural tariff lines have been liberalized for Turkish exports. On average, 85 percent of Turkish agricultural products which are exported to the EU entered the EU duty-free between 2008 and 2010. See: World Bank. Evaluation of the EU-Turkey Customs Union. March 28, 2014, p. 61.

Article 10 of the Ankara Agreement stipulates:

"1. The customs union provided for in Article 2 (2) of this Agreement shall cover all trade in goods.

2. The customs union shall involve:

• the prohibition between member States of the Community and Turkey, of customs duties on imports and exports and of all charges having equivalent effect, quantitative restrictions and all other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of this Agreement;

• the adoption by Turkey of the Common Customs Tariff of the Community in its trade with third countries, and an approximation to the other Community rules on external trade."

According to Article 11 (1), the "Association shall likewise extend to agriculture and trade in agricultural products, in accordance with special rules which shall take into account the common agricultural policy of the Community".

The provisions of the Ankara Agreement on the establishment of a Customs Union constitute a preparatory phase of the Customs Union. The Ankara Agreement provided for the final stage of the Association which should be based on a Customs Union and shall entail closer coordination of the economic policies of the Contracting Parties. (Article 5).

Further steps towards the progressive establishment of free movement of goods and customs union were made by the 1970 Additional Protocol which provided for the gradual abolishment of quantitative restrictions and all other measures having equivalent effect in trade. First, under Article 7 the Parties shall refrain from introducing between themselves any new customs duties on imports or exports or charges having equivalent effect, and from increasing those already applied. Second, on the entry into force of the Protocol, the Community shall abolish customs duties and charges having equivalent effect on imports from Turkey (Article 9). Third, the Protocol established the timetable for the reductions to be effected by Turkey in such a way that the final reduction is made at the

end of the transitional stage (Article 10). The 1970 Additional Protocol which entered into force on 1 January 1973 provided for the progressive abolition of customs duties and charges having an equivalent effect over a period of twenty-two years, at the end of which the Turkish Customs Tariff had to be aligned with the Common Customs Tariff. Quantitative restrictions on imports and exports and measures having equivalent effect had to be abolished at the latest by the end of the transitional stage. According to Additional Protocol (Article 33 (1), over a period of twenty-two years, Turkey shall adjust its agricultural policy with a view to adopting, at the end of that period, those measures of the common agricultural policy which must be applied in Turkey if free movement of agricultural products between it and the Community is to be achieved.

Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union marked the creation of the customs union and contained all the regulations and provisions on implementing its final stage. It extended and replaced the customs union´s related rules and obligations of the Ankara Agreement and the 1970 Additional Protocol. Basically all tariff and non-tariff trade barriers between the contractual parties were abolished. According to Article 4, all import or export customs duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey on the date of entry into force of this Decision. The Community and Turkey shall refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect from that date. These provisions shall also apply to customs duties of a fiscal nature. Decision No1/95 eliminated quantitative restrictions or measures having equivalent effect (Articles 5 and 6). Upon the date of entry into force of this Decision, Turkey, in relation to countries which are not members of the Community, aligned itself on the Common Customs Tariff (Article 13). According to Article 3 of the Decision, the Customs Union should apply to goods a) "produced in the Community or Turkey, including those wholly or partially obtained or produced from products coming from third countries which are in free circulation in the Community or in Turkey" and/or to goods b) "coming from third countries and in free circulation in the Community or in Turkey". The customs territories of both

parties became unified and form the customs territory of the Customs Union. Agriculture and agricultural products were excluded from the free movement of goods. An additional period was considered as necessary for these products to meet the required conditions (Article 24) and to protect the common agriculture market.

The Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 contains all the provisions necessary for the implementing of the final stage of the Customs Union. It extended and replaced the customs unions related rules and obligations of the Ankara Agreement and the Additional Protocol. Basically all tariff and non-tariff trade barriers between the Contractual Parties should be abolished. At the same time, the Decision covers broader issues beyond the customs union: customs legislation (Article 28) and the harmonization of trade policies (Article 16). Furthermore, it includes the adjustment of the legislation (Articles 39-43) in particular in the area of competition rules (Articles 32-38 of the Decision; Articles 85, 86 and 92 EEC-Treaty) and the protection of intellectual property (Article 31 of the Decision; Article 86 EEC-Treaty) as well as institutional provisions (Articles 52-62of the Decision).

The Customs Union should apply to goods a) "produced in the Community or Turkey, including those wholly or partially obtained or produced from products coming from third countries which are in free circulation in the Community or in Turkey" and/or to goods b) "coming from third countries and in free circulation in the Community or in Turkey" (Article 3 (1). Thereby the customs territories of both parties form the customs territory of the Customs Union (Article 3 (3).

Customs Union came into force on 31 December 1995 after the Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union (96/142/EC) was adopted and entered into force. On 1 January 1996, Turkish economy has been integrated into the European Economic Area, apart from agricultural products. Decision No 1/95 establishes far reaching rules of economic and legal integration of Turkey. Under Article 31 (2) of the Decision of Association Council No 1/95 on implementing the final phase of the Customs Union, the

Parties recognize that the Customs Union can function properly only if equivalent levels of effective protection of intellectual property rights are provided in both constituent parts of the Customs Union. Under Article 12, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implementing measures which are substantially similar to those of the Community's commercial policy set out in the Community regulations governing this policy measures. According to Article 28, Turkey shall adopt provisions, based on the Community Customs Code and Commission Regulation (EEC) No 2454/93 laying down its implementing provisions concerning origin of goods; customs value of goods; introduction of goods into the territory of the Customs Union; customs declaration, etc. Decision 1/95 establishes the same competition rules of Customs Union as the rules of the Community competition law: Article 32 with regard to cartels, Article 33 with regard to abuse of dominant position, etc. with one difference, i.e. such prohibitions of anticompetitive practice are established "in so far as they may affect trade ("affects trade" in State aid) between the Community and Turkey". Çiğdem Boga concludes in this connection that in the areas of cartels, abuses of dominant position and anti-competitive mergers, "Turkish rules and prohibitions are at a general level almost identical to the EU competition rules as laid down in the primary and secondary legislation."[158]

The place and role of the EU-Turkey customs union should be determined within the overall framework of the EU-Turkey relations. The Customs Union was not a final target of association; it was regarded as a final stage of the association before membership.[159] The Association Council, in its Decision 1/95, considered that the "Association relations as provided for in Article 5 of the Ankara Agreement are entering into their final phase based on the Customs Union, which will complete the transitional phase through the fulfilment by the two parties of their reciprocal obligations." Under Article 28 of the Ankara Agreement, "as soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the

[158] Çiğdem Boga . The adoption of competition rules in new and future member states to European Union law (V): Turkey. Baden-Baden: Nomos, 2015, p. 276.

[159] According other opinion, since the current enlargement process is uncertain, "the CU cannot be seen as a step towards enlargement anymore. Therefore its governance needs improvement so that the relations between the two parties of the CU become more balanced and sustainable in the long run." - Cécile Rapoport. EC-Turkey customs union and the WTO system. In: EU and Turkey: bridging the differences in a complex relations. Istanbul : Economic Development Foundation, 2011, pp. 194-195.

Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community."

As Prof. Kabaalioğlu suggests, "although the customs union was an important aspect of the association (which provided not only the free movement of goods between Turkey and the EC, but also the adoption of the Common Customs Tariff (CCT) and the Common Commercial Policy of the Community by Turkey), it was not only the free movement of goods, which was adopted from the Treaty. As this is pre-accession association, the model included furthermore all the aspects of the Treaty of Rome establishing the Community: not only free movement of goods, but also free movement of workers, free movement of services and free movement of capital, together with the freedom of establishment, and common policies of the Community."[160] All these elements were included into the accession model of the Ankara Agreement with the timetables contained in the 1970 Additional Protocol.

The European Commission, in Turkey 2015 and 2016 Reports made in the framework of the enlargement strategy, concluded that Turkey has reached a good level of preparation in the areas of free movement of goods and the Customs Union. [161]

It should be noted that in international trade relations, the customs union arrangements are the exception. All the existing or currently negotiated trade agreements between the EU and the WTO partner countries are FTAs, except the customs unions with three micro-states Andorra and San Marino and the customs union between the EU and Turkey. Monaco is a part of the EU customs union due to its customs union with France[162]. Important to underline that free trade areas, rather than customs unions, are the typical trade arrangements between the EU and its partners, including those with whom it shares Internal Market within the European

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[160] Kabaalioğlu, Halûk A. EU-Turkey customs union : has the association "advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising from membership"? Spezifika einer Südost-Erweiterung der EU. 2003, p. 73-89. Schriftenreihe des Arbeitskreises Europäische Integration e.V. ; Bd. 49, p. 77.

[161] See: Commission Staff Working Document. Turkey 2015 Report. Brussels, 10.11.2015, SWD(2015) 216 final, p. 34 and 79.Turkey 2016 Report 9.11.2016, SWD(2016) 366 final, p. 40 and 90.

[162] Since 1968, the Principality of Monaco has been part of the Community customs territory, due to its customs union with France (cf. Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 amending Regulation (EEC) No 2913/92 establishing a Community Customs Code. Article 1. (…) Although situated outside the territory of the French Republic, the territory of the Principality of Monaco as defined in the Customs Convention signed in Paris on 18 May 1963 (Official Journal of the French Republic of 27 September 1963, p. 8679) shall, by virtue of that Convention, also be considered to be part of the customs territory of the Community.

Economic Area (EEA): Iceland, Liechtenstein and Norway, which belong to the European Economic Area (EEA). EU-Swiss trade relations are governed by the Free Trade Agreement of 1972 and two sets of sectorial agreements concluded in 1999 and 2004 as a consequence of the rejection of the EEA membership by Swiss referendum in 1992.

Despite the extremely close economic ties between Iceland, Lichtenstein, Norway and Switzerland and the EU, these four countries, which together form the European Free Trade Association (EFTA), are outside the EU customs union. They trade freely with the EU and with each other, participate in the internal market via the EEA or special agreements (Switzerland), but do not belong to the customs union. Therefore, EFTA Member States and Switzerland are free to negotiate trade agreements with third countries. For instance, Iceland and Switzerland each have a free trade agreement with China, which has been operational since 2014, while the EU is not even considering a similar deal at the moment.[163]

Membership of both the EU Internal Market and the EU customs union is presently reserved for EU Member States only. Three micro-states geographically inside the EU (Andorra, Monaco and San Marino) have special status: Monaco is included into EU customs union due to its customs union with France, whereas Andorra and San Marino have established customs unions with the Community according to their agreements on cooperation and customs union.[164] The EFTA countries (Iceland, Liechtenstein, Norway and Switzerland) participate only in the EU internal market, and only Turkey has association and the customs union with the EU. One of the main differences is that belonging to the EU internal market implies applying complex EU Internal Market rules and regulations, whereas belonging to the customs union should imply applying the EU's common commercial policy.

Today EEC-Turkey association agreement is a unique association agreement, which establishes customs union with the EU. All other association agreements concluded by the EU are by their essence the FTAs. Even the most developed recent free trade agreements of the EU, such as the CETA with Canada do not establish the customs union regime.

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[163] In 2013 the EU and China launched negotiations for an Investment Agreement.

[164] On 18 March 2015, the EU opened negotiations on one or several association agreement(s) between the EU and the Principality of Andorra, the Principality of Monaco and the Republic of San Marino.

The reality, however, is different for a country like Turkey, which has a customs union with the EU but is not an EU Member State. Without the EU membership, Turkey is not able to take part in shaping the EU's commercial policy, participate in or even have influence in the EU external trade negotiations. On the other hand, Turkey is not willing to fully abandon its sovereignty over trade policy.

As a result of long and complex relations with the EU, the EU-Turkey customs union is in fact a hybrid between a genuine customs union, and a free trade agreement. As Mahmut Kobal suggests, "the association agreement between the European Economic Community and Turkey not only includes the abolishment of customs duties but rather is packed with features and structural characteristics and goes beyond a customs union as it possesses for instance the alignment with policies and the harmonization of legislation in areas such as competition, intellectual property, commercial policy and standardization. (…). It can be reasonably assumed that the EU-Turkey customs union is a hybrid form of a customs, economic and political union rather than a classical customs union in theoretical terms. This is certainly also due to the fact that the customs union was shaped and clearly is marked by Turkey´s aspirations to become a member of the European Union." [165]

Turkey adopted the EU's common external tariff for most, but not all, industrial products and only for some agricultural products. Turkey applies additional customs duties for some textile products from countries outside the EU and the EU's FTA partners. It also applies trade defence instruments, such as anti-dumping and countervailing duties, in a totally different manner (for different products and countries) than the EU. Finally, Turkey has not concluded FTAs with some EU free trade partners (Mexico, South Africa, Ukraine and some others). On 19 January 2017, the European Commissioner for Trade, Cecilia Malmström, informed that the EU is negotiating 15 trade agreements with third countries. In addition, a trade agreement with the UK will be negotiated in the nearest future in the framework of Brexit negotiations.[166]

One of the most problematic issues was non-participation of Turkey in such important free trade negotiations of the EU as EU-US Transatlantic

[165] Kobal, Mahmut. Customs & Excellence. A comparative approach on administrative and regulatory compliance perspectives of the EU-Turkey customs union. Dissertation to obtain the degree of Doctor at Maastricht University. MGSoG Dissertation Series, nr 75 (2016), p. 310.
[166] Agence Europe, 117 08 21/1/ 2017, p. 11.

Trade and Investment Partnership (TTIP) negotiations and EU-Canada Comprehensive Trade and Economic Agreement (CETA) negotiations, despite the fact that their outcome would have major implications for Turkey. This situation has created quite a bit of tension between the EU and Turkey. Freezing of TTIP project under the current US administration removed this problem from bilateral relations. The perspectives of Turkey-USA trade agreement negotiations remain unclear.

For Turkey, after CETA agreement was signed on 29 October 2016, a major concern remains the country's own bilateral relations with Canada – which do not benefit from a trade agreement, despite the fact that Turkey does have a customs union with the EU. Turkey did indicate its interest in pursuing an FTA with Canada in 2009, paralleling the EU's effort but only preliminary consultations have been held, and no agreement has been reached that would allow negotiations to start." [167] In February 2010, a bilateral consultation took place in Ottawa, allowing the two sides to explore the feasibility of such an undertaking. Turkey's failure to conduct parallel free trade negotiations created similar asymmetry in the past as well.

The slow progress of the WTO's Doha Round of multilateral trade negotiations has also its negative consequences. As Turkey has not secured parallel FTAs with several EU's partner countries and regions, the asymmetry of the EU's and Turkey's trade relations has deepened. This has proved costly for both Turkey and the EU, and both parties are now weighing the introduction of product origins controls, the absence of which has been a key benefit of the joint customs union.

Until now, Turkey has been willing to accept such asymmetric situation mostly due to the fact that it is negotiating accession to the EU and thus wants to adopt EU policies, even if only partially. If and when the prospect of EU membership were to disappear, will Turkey want to regain its autonomy in trade policy and convert the EU-Turkey CU into an FTA in order to regain sovereignty, even though it would entail some economic costs?

The Association imposed on Turkey important obligations to apply Community's commercial policy with regard to third states. According to

[167] Wanda Troszczynska-Van Genderen. Stakeholder, parliamentary and third country concerns about the EU-Canada Comprehensive Trade and Economic Agreement (CETA), - European Parliament, Directorate-general for External Policies. Policy Department, DG EXPO/B/PolDep/Note/2014_116 December 2014, pp. 15-16.

Article 12 of the Decision 1/95, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implement measures which are substantially similar to those of the Community's commercial policy. This obligation implies that Turkey shall in fact apply the rules of the Community Customs Code. Under its Article 13, Turkey shall, in relation to countries which are not members of the Community, align itself on the Common Customs Tariff. Article 16, paragraph 1, stipulates that Turkey shall align itself with the preferential customs regime of the Community within five years as from the date of entry into force of this Decision. This alignment concerns both the autonomous regimes and preferential agreements with third countries. To this end, Turkey will take the necessary measures and negotiate agreements on a mutually advantageous basis with the countries concerned.

These obligations to align itself to the Community's commercial policy with regard to third states created an asymmetric situation when such alignment necessitates applying quotas limiting imports from emerging economies and, subsequently, violate the provisions of WTO as it was in the Indian textile and clothes case.[168] Cécile Rapoport concluded that the completion of Turkey's alignment with the EU commercial policy rules should diminish considerably the source of disputes, but new types of disputes could emerge since Turkish alignment now potentially exposes it to many of disputes involving the EU.[169] At the same time, Turkey shall carry on with many EU trade agreements, present and future ones. When the EU negotiates regional trade agreements, Turkey needs to negotiate such agreements with third states concerned in order to avoid asymmetry in trade with third states. Such process could lead to non-respect of the Most Favoured Nation Treatment Clause. In general, the EU defines its own trade policy without needing to take account of Turkish position.[170]

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[168] WTO Dispute settlement: Dispute DS34 Turkey — Restrictions on Imports of Textile and Clothing Products. Dispute Turkey concerned Turkey's imposition of quantitative restrictions on imports of a broad range of textile and clothing products. India claimed that those measures are inconsistent with Articles XI and XIII of GATT 1994, as well as Article 2 of the WTO Agreement on Textiles and Clothing (ATC). On 31 May 1999, the Panel found that the quantitative restrictions at issue were inconsistent with GATT Art. XI (prohibition on quantitative restrictions), Art. XIII (non-discriminatory administration of quantitative restrictions), and ATC Art. 2.4. (Report WT/DS34/R) On 22 October 1999, the Appellate Body upheld the Panel's conclusion that Article XXIV (prohibition on new restrictions) does not allow Turkey to adopt, upon the formation of a customs union with the EC, quantitative restrictions which were found to be inconsistent with Articles XI and XIII of GATT 1994 and Article 2.4 of the ATC (Report WT/DS34/AB/R).

[169] Cécile Rapoport. EC-Turkey Customs Union and the WTO System, p. 192.

[170] Op. cit., p. 185.

Decision 1/95 of the Association Council provides for consultation and cooperation of the Parties aiming at the proper functioning of the customs union. In particular, Article 16 provides for the obligations of the parties in the alignment of both the autonomous regimes and the preferential agreements with third countries: on the one hand, Turkey shall align itself progressively with the preferential customs regime of the Community and will take the necessary measures and negotiate agreements with the countries concerned, on the other, the Association Council shall periodically review the progress made. In particular, Article 56 (2) provides that "the Customs Union Joint Committee shall make every effort to find a mutually acceptable solution maintaining the proper functioning of the Customs Union." According to Article 57 (2), "the Parties shall cooperate in good faith with a view to facilitating, at the end of the process, the decision most appropriate for the proper functioning of the Customs Union."

With regard to these provisions, Onur Bülbül and Aslı Orhon argue that Article 56 imposes joint responsibility on both Parties for maintaining the proper functioning of the customs union:

"It is unquestionable that whenever the EU signs an FTA with a third country, it leads to disturbance in the CU due to the fact that Turkey has to indirectly open its markets to the goods traveling through the EU without benefiting in return from a similar preferential treatment. While Article 56 may not be sufficient to limit the EU's freedom to engage in FTAs with third countries, it does impose on the EU a shared responsibility to find a mutually acceptable solution to this systematic problem." [171]

The functioning of the customs union necessitates that the new FTAs of the EU should include the participation of Turkey as a State Party to the FTA or a clause enabling Turkey to join such FTA.

The common external tariff is what distinguishes a customs union from a free trade area established under other association agreements concluded by the EU. In addition, the EU-Turkey Customs Union includes the obligation of Turkey to align itself on the Common Customs Tariff

[171] Onur Bülbül and Aslı Orhon. Beyond Turkey-EU Customs Union: Predictions for Key Regulatory Issues in a Potential Turkey-U.S. FTA following TTIP. – Global Trade and Customs Journal. Volume 9, Issue 10, 2014, p. 446.

(Article 13). In a classical free trade area, trade among the member states flows tariff free, but the member states maintain their own distinct external tariff with respect to imports from the rest of the world.[172]

From a legal point of view, the EU-Turkey Customs Union is not identical to the EU Customs Union. The EU is part of three customs unions, with (respectively): Turkey, Andorra and San Marino. Customs territory of Turkey is not included into the customs territory of the Community as defined in Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. Other differences are that the EU-Turkey customs union does not include agricultural products; the institutional and dispute settlement structures are different, there is still possibility of taking anti-dumping measures, etc.

Fadi Hakura concludes, that given that the CU is not a 'regulatory union', Turkey remains outside the EU's single market and its regulatory, institutional and judicial framework. The CU does not therefore abolish all technical barriers to trade, and many indirect costs remain for Turkish exporters. For example, the EU refused to accept Turkish conformity assessments – certificates issued by the manufacturer or an authorized body confirming that a product placed on the market complies with all EU regulations. This meant that many goods from Turkey were subject to inspection as they crossed the border with Bulgaria and Greece. Over time, the EU has negotiated mutual recognition agreements with Turkey, enabling more Turkish goods to enter the EU market without inspection. However, the EU was empowered to reach such agreements only in areas where it has fully harmonized regulations across the member states. Where rules are still set at the national level (covering 20 per cent of industrial products), the national customs authorities are still entitled to inspect Turkish goods. Turkey has responded by imposing customs and 'rules of origin' controls on woven fabrics and apparel that are 'freely circulating in the EU contrary to the terms and spirit of the CU'.[173]

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[172] The North American Free Trade Agreement (NAFTA) is one of the best known examples of free trade agreements. Canada, the United States, and Mexico do not share a common external tariff, despite allowing free trade on products traded among the three countries.

[173] Hakura, Fadi. EU–Turkey Customs Union. Prospects for Modernization and Lessons for Brexit. - Chatham House, the Royal Institute of International Affairs. December 2018, p. 4 - https://roundcube.serveriai.lt/?_task=mail&_action=get&_mbox=INBOX&_uid=3347&_part=1&_frame=1&_extwin=1.

The EU Customs Union is defined in Article 28 (1) TFEU:

"The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries."

The EU-Turkey Customs Union corresponds to the definition given to customs union by Article XXIV, paragraph 8 of General Agreement on Tariffs and Trade 1994:

"a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (…) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9[174] , substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union."

According to the WTO Appellate Body, the terms "substantially all the trade between the constituent territories of the union" does not mean "totality" of commercial exchanges. The Appellate Body considered that "the constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, sub-paragraph 8(a)(ii) does not require each constituent member of a customs union to apply the same duties and other regulations of commerce as other constituent members with respect." The phrase "substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union" offer a

[174] Under paragraph 9 the preferences referred shall not be affected by the formation of a customs union.

certain degree of "flexibility" to the constituent members of a customs union in "the creation of a common commercial policy."[175] In fact, such "flexibility" may also follow from the terms of Article 12 (2) of the Decision 1/95:

"In conformity with the requirements of Article XXIV of the GATT Turkey will apply as from the entry into force of this Decision, substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing."

However, it is hard to imagine how in practice Turkey would be able to respect Article 13 of the Decision 1/95 ("Turkey shall, in relation to countries which are not members of the Community, align itself on the Common Customs Tariff") if it would apply lower customs tariff in such a situation.

Although the European Union does not have to align itself to Turkey's external agreements, it must still comply with GATT Article XXIV's customs union requirements for a harmonised external regime.[176] For its part, according to Article 16 (1) of the Decision 1/95, Turkey shall align itself progressively with the preferential customs regime of the Community within five years as from the date of entry into force of this Decision. To this end, Turkey shall take the necessary measures and negotiate agreements on a mutually advantageous basis with the countries concerned. However, under the EU-Turkey Customs Union, Turkey is obliged to align with the preferential agreements that the Community signs with third countries, these third countries do not have any obligation to conclude such agreements with Turkey. Indeed, it is more advantageous for these countries not to conclude preferential agreements with Turkey because they already have access to the Turkish market through the EU-Turkey Customs Union. In this situation, if Turkey does not conclude agreements with third parties signing preferential agreements with the EU, Turkey must apply reduced or zero tariff rates for the imported products from these countries in order to comply with its obligations under the EU-Turkey CU.[177]

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[175] "Turkey - Restrictions on Imports of Textile and Clothing Products - Report of the Panel" para. 48 and 49, WT/DS34/AB/R, 22 October 1999.

[176] See: Bringing EU-Turkey trade and investment relations up to date, p. 26.

[177] Ibid.

Under Article 12 of the Decision 1/95 Article 12, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implement measures which are substantially similar to those of the Community's commercial policy set out in the Regulations enumerated in this Article. It also means that Turkey shall align its legislation and practice with the EU trade defence instruments. At the same time, the measures taken under these provisions shall be WTO compatible. Cécile Rapoport noted with regard to trade defence instruments within the EU-Turkey customs union, "as Decision 1/95 allows both Parties to the CU to use Trade Defence Instruments towards one another, the question was raised of the real existence of a CU as defined in Article XXIV 8 of the GATT." In any case, the use of trade defence measures inside the customs union is bound to disappear.[178]

To provide transitional adjustment support to Turkey, a compensatory levy provision was established in Article 16 (3) for the first five years of the implementation of the customs union. This aimed at reducing Turkey's economic burden but it was a complicated calculation: where Turkey maintained a tariff policy different from that of the Community, goods imported from third countries into the Community and released for free circulation with preferential treatment by reason of their country of origin or of exportation were subject to the payment of a compensatory levy imported into Turkey from countries to which the same preferential tariff treatment is not granted by Turkey and inter alia, the duty to be paid in Turkey is at least five percentage points higher than that applicable in the Community, and thus an important distortion of traffic related to these goods has been observed.

A recent study "Bringing EU-Turkey trade and investment relations up to date" of the Policy Department, Directorate-General for External Policies of the European Parliament described the situation of Turkey as "structural asymmetry and temporary and overcomplicated compensatory instrument set out under the CU framework and the Association Agreement." Turkey cannot take part in the negotiations between the EU and third countries and moreover, neither can Turkey unilaterally apply new EU negotiated preferences to the trading partner since this would trigger violations of the GATT's cornerstone principle the most-favoured nation obligation. The countries inside and outside the region are treated

[178] Cécile Rapoport. EC-Turkey Customs Union and the WTO System, p. 191. According to GATT Article XXIV (8) customs union means a "substitution of a single customs territory for two customs territories".

differently and this may have a negative effect on countries outside the region. GATT Article XXIV prohibits exceptions to the MFN requirement unless tariffs and other barriers to trade are eliminated on substantially all trade within the region as long as they don't raise barriers to third parties. "In sum, the existing legal and institutional framework of the CU translates into an overall relationship of general dependency both economically and politically of Turkey upon the EU. Turkey is obliged to adopt a considerable part of the acquis in several fields and to align its custom and commercial legislation with the EU legislation, without involvement in the EU's external trade decision-making processes with regard to negotiating FTAs with third parties." [179]

In order to facilitate Turkey's negotiation of the FTAs process with third countries and its adoption of the EU preferential trade regime, so called "Turkey Clause" in the form of joint declarations has been introduced in some free trade agreements of the European Union. This is a kind of invitation to the other party of the EU agreement to negotiate similar agreement with Turkey. [180]

The EU-South Africa free trade agreement (Agreement on Trade, Development and Cooperation) contains more far reaching declarations concerning its application to San Marino and Andorra, both countries having the customs unions with the EU:

"Joint Declaration concerning the Republic of San Marino

1. Products originating in the Republic of San Marino shall be accepted by South Africa as originating in the Community within the meaning of this Agreement.

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[179] Ibid., p. 27.

[180] Under the pressure of the Turkish authorities, in order to remedy to this unfair competitiveness, the European authorities have introduced a "Turkey Clause" in a Joint Declaration annexed to the free trade agreements signed with some countries such as Algeria and lately South Korea, inviting the latter to negotiate a FTA with Turkey. But this clause is far from being legally binding and does not help prevent the reluctances shown by some countries. For instance, although the EU-Algeria Association Agreement entered into force in 2005; Algeria shows still some reluctance towards concluding an agreement with Turkey. A more recent example can be given also with the FTA signed between the European Union and South Korea which has entered into force on the 1st July 2011 whereas Turkey's FTA with South Korea which only entered into force on the 1st May 2013 after a two year-gap puts pressure on Turkish companies especially in the automotive sector. - Selen Akses. Implications of Free Trade Agreements on Turkey-EU Customs Union. www.evrim.com. See also: Onur Bülbül, Aslı Orhon. Op. cit., p. 448.

2. Protocol 1 shall apply mutatis mutandis for the purpose of defining the originating status of the abovementioned products." [181]

"Joint Declaration concerning the Principality of Andorra

1. Products originating in the Principality of Andorra falling within Chapters 25 to 97 of the Harmonised System shall be accepted by South Africa as originating in the Community within the meaning of this Agreement.

2. Protocol 1 shall apply, mutatis mutandis, for the purpose of defining the originating status of the abovementioned products."
Similar declarations concerning Andorra and San Marino are included into the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the Free Trade Agreement between the European Union and the Republic of Korea, the Economic Partnership Agreement between the European Union and its Member States and SADC EPA Group comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland (Annex XI), etc.

However, these FTAs do not contain analogous provisions concerning Turkey and products originating in the Community, notwithstanding the EU-Turkey customs union.

EU-Korea FTA contains Joint Declaration on Turkey of softer nature which invites Korea to enter into negotiations with Turkey:

"The Community recalls that according to the Customs Union in force between the Community and Turkey, the latter has the obligations in relation to countries which are not members of the Community to align itself on the Common Customs Tariff and, progressively, with the preferential customs regime of the Community, taking the necessary measures and negotiating agreements on mutually advantageous basis with the countries concerned.

Consequently, the Community had invited Korea to enter into negotiations with Turkey as soon as possible. Korea informs that Korea will enter into

[181] See Protocol 1 concerning the definition of the concept of "originating products" and methods of administrative cooperation.

negotiations with Turkey based on the result of a joint feasibility study on an agreement establishing a free trade area between Korea and Turkey."[182]

The FTA between the European Union and South Korea entered into force in 2011, and Turkey's FTA with South Korea entered into force in 2013.

The Trade Agreement between the European Union and Colombia and Peru contains Joint Declaration which uses more neutral terms of "States with which it has established a Customs Union". Under this Declaration, "the EU Party has invited the signatory Andean Countries to this Agreement to enter into negotiations with those States as soon as possible. Signatory Andean Countries inform that they will make their best efforts to negotiate with those States agreements establishing free trade areas." [183] In fact, this soft provision concerns only one State with which the EU has established a Customs Union -Turkey, since joint declarations concerning Andorra and San Marino (Annex II to the Agreement) provide that products originating in Andorra and San Marino "shall be accepted by the signatory Andean Countries as originating in the European Union."[184]

CETA contains Joint declaration of the Parties on countries that have established a customs union with the European Union (Annex 30-D). Canada shall endeavour to start negotiations "with a view to conclude a comprehensive bilateral agreement establishing a free trade area in accordance with the relevant WTO Agreement provisions on goods and services, provided that those countries agree to negotiate an ambitious and comprehensive agreement comparable to this Agreement in scope and ambition. Canada shall endeavour to start negotiations as soon as possible with a view to have such an agreement enter into force as soon as possible after the entry into force of this Agreement."[185] This formula contains commitments which are more binding in character in comparison with the provisions mentioned above.

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[182] http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145195.pdf
[183] http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147727.pdf
[184] http://trade.ec.europa.eu/doclib/press/index.cfm?id=691. See Annex II to the Agreement.
[185] http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf. See Annex 30-D to the CETA.

Attempts of introducing non-binding "Turkish clauses" were not successful in all cases. The proliferation of the FTAs concluded by the EU with the countries of all continents necessitates finding more efficient treaty formulas allowing Turkey to minimize the potential adverse effects of agreements. A legally binding clause may be introduced into future free trade agreements of the EU in order to create two effects: (i) negotiation and conclusion of an FTA with Turkey as quickly as possible following the conclusion of an FTA with the EU; and (ii) granting Turkish products in free circulation of the Turkey-EU customs union same preferential treatment in the market of this third country with the EU products until an FTA is concluded with Turkey.[186] The World Bank Report presents a model of a revised Turkey Clause which is based on such effects.[187]

The establishment of the EC-Turkey Customs Union does not mean that customs territory of Turkey was fully integrated into the EU customs territory. According to Article 3 (3) of Decision 1/95, the customs territory of the Customs Union shall comprise the customs territory of the Community as defined in Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, and the customs territory of Turkey. In this regard, Mahmut Kobal wrote in his study on the EU-Turkey customs union:

"For instance, the EU-Turkey customs union constitutes a common customs territory where Turkey is considered not a third country; however, in all other policy and legal relations Turkey is treated like a third country. Both, in the preparation stage and after entering into force of the customs union, different type of associations, contracts and treaties

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[186] Onur Bülbül, Aslı Orhon. Op. cit., p. 448.

[187] World Bank. Evaluation of the EU-Turkey Customs Union, p. 30

Box 6: Example of revised Turkey Clause (Joint Declaration Concerning Turkey)

The EU recalls the Customs Union between the EU and Turkey based on the principle of free movement of goods, whereas goods originating in third countries can freely circulate between Turkey and the EU once all import formalities are completed in Turkey or in the EU, and the requirement of the parties within the Customs Union to apply common commercial policies including preferential trade agreements and the common customs tariff in accordance with Article XXIV of the GATT.

In this context, the EU and [FTA partner] have declared as follows:

1. [FTA partner] and Turkey shall conclude an FTA between the two parties on a mutually advantageous basis, to enter into force simultaneously with the entry into force of the agreement between the EU and [FTA partner].
2. If the agreement between the EU and [FTA partner] enters into force before the agreement between [FTA partner] and Turkey, products originating in Turkey falling within Chapters 25 to 97 of the Harmonized System and which are in free circulation in the EU shall be accepted by [FTA partner] as originating in the EU within the meaning of this Agreement, until the entry into force of the FTA between [FTA partner] and Turkey.
3. The rules established to define the originating status of the products subject to this Agreement shall apply mutatis mutandis for the purpose of defining the originating status of the products mentioned in paragraph 2.

Source: Ministry of Economy, Government of Turkey.

complicate the proper functioning of the EU-Turkey customs union from an administrative perspective and the appropriate application and enforcement of customs legislation."[188]

Since the internal market of Turkey is not included into the EU Internal Market, Turkish goods cannot be considered the goods produced in the EU, and thus they do not profit from the FTA's of the EU. As for the differences between the EU Customs Union, on the one hand, and the EU-Turkey Customs Union, on the other, the latter, using the terms of GATT Article XXIV (8), means a "substitution of a single customs territory for two customs territories", whereas the EU Customs Union implies the existence of Internal Market. The system provided by the Ankara Agreement implies the progressive implementation of four fundamental freedoms of Internal Market together with acceptance of the EU competition rules and the Common Agricultural Policy, broad harmonization of Turkish legislation with the acquis communautaire, i.e. gradual integration of Turkey into the EU Internal Market, a kind of "common market under construction".

The study "Bringing EU-Turkey trade and investment relations up to date" undertaken in 2016 by the Policy Department of Directorate-General for External Policies of European Parliament concludes that the EU-Turkey association law is not unified under one regime, rather it is made up of different legal principles derived from different primary and secondary association rules along with various interpretations set out in CJEU case law. [189]

Nevertheless, the most important achievement of association is that the EU-Turkey customs union guarantees free movement of industrial goods between Turkey and EU Member States. Decision No 1/95 implies free movement (elimination of customs duties and quantitative restrictions) between the two parts of the customs union for goods either wholly produced or put in free circulation after their importation from third countries in either Turkey or the EC. The proof of this customs status of 'goods in free circulation' is established by an A.TR. movement certificate. Articles 5 and 6 of the Decision 1/95 prohibit quantitative and qualitative restrictions on imports and all measures having equivalent effect between

[188] Mahmut Kobal. Op.cit., p. 26.
[189] Bringing EU-Turkey trade and investment relations up to date, p. 26.

the Parties. "Commission interpretative communication on facilitating the access of products to the markets of other Member States: practical application of mutual recognition (2003/C 265/02)" stipulates:

"Provisions for the elimination of measures having an effect equivalent to customs duties between the European Union and Turkey must, for the purposes of the Customs Union, be interpreted in conformity with the relevant judgments of the Court of Justice, particularly the 'Cassis de Dijon' case.

The Member State of destination of a product must allow the placing on its market of a product lawfully manufactured and/or marketed in another Member State or in Turkey.

In the absence of harmonised Community rules, the Member States have the power to adopt technical rules, (except 23 „New Approach Directives").

The Member State of destination must allow an EEA/Turkish product free access to its market, provided that it provides an equivalent level of protection of the various legitimate interests at stake. This is a principle of 'mutual recognition'.

An essential principle of Community law is that an EEA/Turkish product enjoys the basic right of free movement of products, guaranteed by the EC Treaty, provided that the Member State of destination has not taken a reasoned decision of refusal, based on proportionate technical rules."

The current status of the customs union shall be evaluated also in connection with road transport quotas in the EU Member States since such quotas directly affects EU-Turkey customs union. Prof. Kabaalioğlu notes:

"The quotas delivered insufficiently and gradually to the Turkish transporters and visa applied to the truck and lorry drivers constitute an obstacle to the free movement of goods and they are against customs union agreement." [190]

[190] Halûk Kabaalioğlu. Turkey's Relations with the European Union: Customs Union and Accession Negotiations, p. 21.

Quantitative restrictions on imports and exports and all measures having equivalent effect are prohibited between the Parties under Articles 5 and 6 of the Decision 1/95. Road transport quotas, permissions and taxes on motor vehicles can constitute "charges having equivalent effect to a customs duty" in trade between Turkey and the EU even if such practice is not expressis verbis prohibited by the Association Agreement and other acts of the EU-Turkey association law. The ECJ in Abatay judgment stated that "to date the Association Council has taken no measure to extend to the Republic of Turkey the Community provisions applicable in the field of transport, so that, at the current stage of development of the EEC-Turkey Association, there are no specific rules in that field."[191] Nevertheless, restrictive quotas and permissions may be qualified as non-respect of Articles 5 and 6 of the Decision 1/95 concerning prohibition of non-tariff barriers in trade. In case C-28/09, *Commission v. Austria*, the Court of Justice "recalled that the free movement of goods is one of the fundamental principles of the Treaty. That freedom entails the existence of a general principle of free transit of goods within the European Union (see, inter alia, Case 266/81 SIOT [1983] ECR 731, paragraph 16; Case C-367/89 R*ichardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 14; and Case C-320/03 *Commission v Austria*, paragraphs 63 and 65)." [192] Under Article V "Freedom of transit" of GATT, no distinction shall be made which is based on the origin of other means of transport (paragraph 2), that traffic of goods in transit coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions (paragraph 3), all charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic (paragraph 4).

The World Bank Report shows restrictive character of road transport quotas applied to Turkish trucks in the EU Member States:

"Preliminary results in a report prepared by Doğuş University for the professional association UND, show that Turkey's lost export opportunities to 11 EU countries amounted to 1.66 billion tons of goods worth US$5.56 billion due to the quota system alone. Another estimate of the total burden for Turkish road transport operators of restrictive road quotas has

[191] Judgment of the Court of Justice of 21 October 2003 in Joined Cases C-317/01 and C-369/01, Eran Abatay and Others (C-317/01) and Nadi Sahin (C-369/01), ECLI:EU:C:2003:572, paragraph 98.

[192] Judgment of the Court of Justice of 21 December 2011 in case C-28/09, Commission v. Austria, ECLI:EU:C:2011:854, paragraph 113.

been estimated at €100 million per year (UNECE, 2008). (…) For example, Turkish road transport operators transit Austria 130,000 times per year, mainly to reach Germany which is the destination of 70 percent of Turkish carriers, but receive just 15,000 permits so the remaining transits take place by RO-LA (truck-on-train) at an additional cost of €250/truck/transit. The RO-LA also creates large waiting times (4-5 days) waiting for transit documents." [193]

Already in case 266/81, SIOT, the Court of Justice concluded:

"The customs union established by Part Two, Title I, Chapter 1 of the EEC Treaty necessarily implies that the free movement of goods between Member States should be ensured. That freedom could not itself be complete if it were possible for the Member States to impede or interfere in any way with the free movement of goods." [194]

It is even more evident with regard to the current legal status of free movement of goods. The World Bank in its Evaluation of the EU-Turkey Customs Union concluded that "[R]oad quotas, and notably transit permits, create obstacles to the free movement of goods and impede transit traffic thereby hindering the full operation of the CU." [195]

Road quotas and transit permits are applicable to Turkish-registered vehicles that can carry goods in the territory of the EU Member States. In the EU, bilateral road transport agreements including quota negotiation remain a sovereign attribute of the individual EU member states. By limiting the number of Turkish-registered vehicles that can carry goods in their territory, EU member states in fact set limits on Turkish goods that can be transported to the EU by Turkish road transport operators (although they can still be carried by EU road transport operators). This raises costs if the most efficient transport operator can no longer be used. Consequently, liberalization of the quota system between Turkey and the EU Member States would facilitate trade.

In this connection the World Bank suggested in its Evaluation of the EU-Turkey Customs Union:

[193] World Bank. Evaluation of the EU-Turkey Customs Union. March 28, 2014, p. 53-54.
[194] Judgment of the Court of 16 March 1983 Case 266/81, SIOT, ECR 731, paragraph 16.
[195] World Bank. Evaluation of the EU-Turkey Customs Union. March 28, 2014, p. 51.

"Road transport quotas both on bilateral and transit transportation should be eliminated, at least for those goods covered by the CU, as they hinder free circulation, impose burdens on Turkish trade and prevent Turkish carriers from efficiently using their trucks."

Consequently, the World Bank recommended in the Report:

"191. Road transport permits, especially for transit, should be liberalized at least for those goods covered by the CU. While bilateral road transport agreements including quota negotiation remain a sovereign attribute of the individual EU member states, road transport permits do create obstacles to the free movement of goods thereby hindering the full operation of the CU. Assuming the European Commission were able to receive a mandate from the 28 member states to negotiate on its own behalf and on behalf of the member states, full liberalization of international road transport between Turkey and EU member states could be considered if both Turkey and the EU as a whole were willing to fully liberalize their bilateral road transport in the context of a services trade agenda." [196]

A recent Case C-65/16 Istanbul Lojistik concerning motor vehicle tax imposed on Turkish vehicles in transit is ground-breaking for the EU-Turkey Customs Union. Istanbul Lojistik is a company registered in Turkey which carries goods by road from Turkey to various EU Member States. Motor vehicles registered in a Member State are not required to pay Hungarian motor vehicle tax, whilst persons operating motor vehicles registered in Turkey must pay that tax in respect of transit through Hungary. The amount of tax depends on criteria that are linked, inter alia, to the quantity of goods that can be carried and to their destination. In 2015, the Hungarian tax authorities found that the Hungarian tax on motor vehicles had not been paid in respect of a heavy goods vehicle belonging to that company, which was transporting textiles from Turkey to Germany, and ordered Istanbul Lojistik Ltd. to pay the tax concerned and imposed penalties.[197]

[196] Ibidem, p. 85-86.

[197] The authority required the company to pay HUF 60 000 (approximately EUR 200) in respect of that tax, together with a tax penalty of HUF 300 000 (approximately EUR 1 000) and an administrative fine in the same amount, amounting to a total of HUF 660 000 (approximately EUR 2 200).

The Hungarian court inter alia asked the Court of Justice whether the tax in question is compatible with Article 4 of Decision No 1/95 of the Association Council abolishing between the Community and Turkey import or export customs duties and charges having equivalent effect, and whether the tax constitutes a charge having equivalent effect to a customs duty.

Advocate General Saugmandsgaard Øe in his Opinion of 6 April 2017 in Istanbul Lojistik case concluded that "Article 4 of Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union must be interpreted as meaning that a motor vehicle tax such as that at issue in the main proceedings, which is levied on all persons operating heavy goods vehicles registered in a country that is not an EU Member State crossing the territory of Hungary in transit to reach another Member State, and which must be paid each time the Hungarian border is crossed, constitutes a charge having equivalent effect to a customs duty in respect of the goods covered by that union and is therefore prohibited by that article." [198]

In Judgment of 19 October 2017 in Istanbul Lojistik case the Court observed, first, that under that decision, customs duties and charges having equivalent effect to such duties are abolished between the EU and Turkey. In that regard, the Court explained that the rules laid down in that decision must be interpreted in accordance with the Court's case-law on the provisions of the FEU Treaty concerning the free movement of goods. Accordingly, the Court noted that, whatever its designation, mode of application or amount, any pecuniary charge which is imposed unilaterally on goods that cross a frontier and which is not a customs duty in the strict sense constitutes a charge having equivalent effect to a customs duty. The Court also observed that a charge which is triggered by the carriage of goods and is imposed not on a product as such, but on a necessary service in connection with the product, may also be made subject to the requirements stemming from the principle of free movement of goods.

In that respect, the Court noted that the amount of tax concerned depends on criteria that are linked, inter alia, to the quantity of goods that can be carried and to their destination. Accordingly, the Court held that,

[198] Opinion of Advocate General Saugmandsgaard Øe of 6 April 2017 in Case C-65/16, Istanbul Lojistik Ltd. v Nemzeti Adó - és Vámhivatal Fellebbviteli Igazgatóság, ECLI:EU:C:2017:282, paragraph 102.

even though the tax in question is not levied on products as such, it is imposed on the goods transported by vehicles registered in Turkey when they cross the Hungarian border, not on the transport service as such.

The Court found that the Hungarian tax on motor vehicles imposed on a heavy goods vehicle belonging to a Turkish company, which was transporting textiles from Turkey to Germany was imposed unilaterally on products by reason of the fact that they cross the border, and thus constitutes a charge having equivalent effect to a customs duty within the meaning of Decision No 1/95 of the Association Council and is, therefore, incompatible with that decision.[199]

Istanbul Lojistik case is important not only with regard to Hungarian tax on motor vehicles. Similar taxes were levied on Turkish transporters in Bulgaria and Romania. During the transfer of Turkish export products to western countries, transit fees were paid in Hungary, Bulgaria and Romania, which in turn increased the costs of cargo shipments. That practice continued for years.[200]

The judgement is ground-breaking for the CU in many ways. It confirms that the free movement of goods principles laid out in the CU must be interpreted in accordance with the CJEU's "free movement of goods" precedents rooted in the respective principles of the Treaty on the Functioning of the European Union.

Does Istanbul Lojistik case have impact on road quotas applied on Turkish trucks by EU Member States? For example, Turkey has a quota of 21,000 vehicles in Austria and 150,000 in Germany. In other words, since the rules laid down in that decision must be interpreted in accordance with the Court's case-law on the provisions of the FEU Treaty concerning the

[199] See: Judgment of Court of Justice of 19 October 2017 in Case C-65/16, Istanbul Lojistik Ltd v Nemzeti Adó - és Vámhivatal Fellebbviteli Igazgatóság (ECLI:EU:C:2017:770), paragraphs 37-49.

[200] See: https://www.dailysabah.com/economy/2017/10/21/top-eu-court-rules-tax-imposed-on-turkish-trucks-illegal

free movement of goods, does transport quota mean also a quantitative restriction in terms of products being transported? Case-law of the Court of Justice does not give direct answer to this question.[201]

As far as international carriage of goods in the European Union is concerned, there are no quantitative restrictions or quotas on carriage of goods by roadsince 1993. The provision of international road freight transport services within the European Union is not subject to any quotas or limitations in the volume or the frequency of services.[202] Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market states that the establishment of a common transport policy implies the removal of all restrictions against the person providing transport services on the grounds of nationality or the fact that he is established in a different Member State from the one in which the services are to be provided (Recital 4). According to the general principle stipulated in Article 3 of the Regulation, the international carriage shall be carried out subject to possession of a Community licence and, if the driver is a national of a third country, in conjunction with a driver attestation. Therefore, the international carriage of goods by road in the EU is subject to qualitative licensing controls. The Community licence shall be issued by a Member State, in accordance with this Regulation, to any haulier carrying goods by road for hire or reward who is established in that Member State and is entitled in this Member State to carry out the international carriage of goods by road (Article 4). The regulation applies to all international carriage on Community territory. The carriage from Member States to third countries is still largely covered by bilateral agreements between the Member States and those third countries. Turkey has concluded 25 bilateral road transport agreements with EU Member

[201] There is a pending request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 7 December 2016 in Case C-629/16, CX:
"Does EU law, and in particular the Agreement establishing an Association between the European Economic Community and Turkey (64/733/EEC), Journal Officiel 1964, 217, p. 3687/64, the Additional Protocol to the Association Agreement, Journal Officiel 1972, L 293, p. 3, and Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC), OJ 1996 L 35, p. 1, preclude national legislation under which goods transport undertakings established in the Republic of Turkey may engage in cross-border commercial carriage of goods to or through the territory of the Republic of Austria only if they have, in respect of the motor vehicles concerned, passes issued as part of a quota established between Austria and Turkey pursuant to a bilateral agreement, or if they are granted authorisation for the individual carriage of goods, in which case there must be a significant public interest in the individual carriage of goods and the applicant must demonstrate that the journey cannot be avoided by organisational measures or by the choice of a different means of transport?"

[202] See, for ex.,: Opinion of Advocate General Tanchev 23 of November 2017 in Case C-541/16, Commission v Denmark, ECLI:EU:C:2017:894.

States.[203] As far as Regulation (EC) No 1072/2009 is concerned, it does not apply to that part of the journey within the territory of the Member State of loading or unloading as long as the necessary agreements between the Community and the third countries concerned have not been concluded. It should, however, apply to the territory of a Member State crossed in transit (Recital 3 of the Regulation). However, this regime of licences does not apply to vehicles registered in Turkey. Under Article 2 (1) of the Regulation, 'vehicle' means a motor vehicle registered in a Member State, or a coupled combination of vehicles the motor vehicle of which at least is registered in a Member State, used exclusively for the carriage of goods.[204] Therefore, the EU Member States apply the rules of their bilateral agreements with Turkey providing for the regime of quotas with regard to all parts of journey from and to Turkey, including transit. It limits the carriage of goods since the number of permissions in some countries is not sufficient. For Turkish hauliers, the principal issue is that demand for transit permits exceeds the supply provided by some Member States (Italy, Austria, Hungary, Slovenia, and Romania).[205] Insufficient number of permissions in the countries of transit may have the most negative impact because it may limit delivery of goods to final destination in a Member State, notwithstanding the fact that this Member State issued sufficient number of permissions.

According to the Study on the economic impact of an Agreement between the EU and the Republic of Turkey conducted by the consulting companies ICF International, TRT and DIW Econ in 2014, the EU hauliers have access to a sufficient supply of Turkish permits, though they often have to use one permit to enter in Turkey with an empty vehicle (in general permits are required only for laden vehicles) and in some cases spend two permits instead of one to accelerate the bureaucratic procedures to leave Turkey. The representatives of EU hauliers report the application of ad hoc controls (e.g. on the origin and destination of route based on the invoice heading) when entering Turkey. These result in unscheduled increases in waiting times, and in some cases in high penalties.[206]

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[203] The countries who did not concluded such agreements with Turkey are Cyprus, Ireland and Malta. Since 2013, a total of 961,087 permits of all types were issued to Turkish road transport companies by 25 Member States. See: Servantie, Deniz. The Quota Issue of the Turkish Road Transport Sector in the EU. Istanbul: IKV – Economic Development Foundation, 2017, p.7.

[204] Licences are not needed for vehicles with a maximum laden mass of up to 3,5 tonnes (Recital 8 of the Regulation).

[205] Study on the economic impact of an Agreement between the EU and the Republic of Turkey", Final Report by ICF International, TRT and DIW Econ, 14 October 2014, p. 5

[206] Ibidem.

With regard to transport, the Ankara Agreement contained a special article providing for the extension of the EEC Treaty provisions on transport to Turkey and the adoption of measures of implementation of those provisions "with due regard to the geographical situation of Turkey". Stricto sensu, the rules of transport services do not belong to the rules of free movement of services of the Ankara Agreement.[207]

The special rules applicable to transport sector don't mean that restrictions imposed by Member States on transport services originated in Turkey could not be subject of other rules, especially rules of free movement of goods.

According to Articles 26 and 27 of 1970 Protocol, the quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between the Contracting Parties within twenty-two years or by the end of the transitional stage at the latest. Finally, Decision 1/95 of Association Council (Articles 5 and 6) Association Council prohibited all quantitative restrictions and all measures having equivalent effect both on imports and exports between the parties.

The study on the economic impact of an Agreement between the EU and the Republic of Turkey proposes three possible scenarios of solution of transit problem.[208]

First scenario: transit liberalisation plus additional EU permits. With the implementation of such a scenario, the overarching aim would be to remove all hurdles to bilateral trade imposed as a result of the limited number of permits which are granted at the current moment to the hauliers. However, one should add that certain parameters such as an estimate figure of the demand and how the offer could meet it would have to be determined by the parties. It is said that the overall result of such a scenario would be very close to that of the scenario of full liberalisation.

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[207] Article 15
The rules and conditions for extension to Turkey of the transport provisions contained in the Treaty establishing the Community, and measures adopted in implementation of those provisions shall be laid down with due regard to the geographical situation of Turkey.

[208] Study on the economic impact of an Agreement between the EU and the Republic of Turkey, Final Report by ICF International, TRT and DIW Econ, 14 October 2014, p. v. CF International, TRT and DIW Econ, "Study on the economic impact of an Agreement between the EU and the Republic of Turkey", Final Report, 14 October 2014.

Second scenario: EU management of quotas. With this scenario, it is assumed that the EU would actually have legal ownership upon the negotiation process between the Member States and Turkey. Thus, the EU would act as the guarantor of the swift implementation and management of the quota system, negotiated at the EU level. One could assume that this scenario would give further leverage to Turkey as the Turkish authorities would have the possibility to directly refer to the EU when being faced by any kind of issue or problem with one of the Member States.

Third scenario: full liberalisation. Undoubtedly, this would represent the most ambitious scenario for both the EU and Turkey as it would signify a full liberalisation of services between the parties. Indeed, it would effectively result in the lifting of all bilateral and transit permits and extra costs which result from the current situation. However, such a scenario would require important and swift measures in order to properly secure and enforce EU regulations both in the Member States and in Turkey. Indeed, this would be needed in order to monitor thoroughly how the system is being implemented and to make sure that no fee or other type of restrictions is introduced at the national level which could undermine in one way or another the full liberalisation scenario. Within the scope of this scenario, another important point which needs to be highlighted is the fact that the ECMT licenses system[209] would also be further affected by such a scenario as a remarkable reduction in terms of the overall ECMT licenses which are distributed to the hauliers would be realised.

The resolution of road transport quotas should be found in the framework of the modification of the EU-Turkey Customs Union. On the other hand, approximation of Turkish legislation in the transport sector and with regard to environmental rules of road transport would facilitate negotiations in this area. The Commission mentioned in the Turkey 2018 Report that on road transport, the legal framework is at a good level of alignment with the acquis. Roadside inspections are being performed rigorously, but the legislation and the procedures need to be updated, especially to introduce new elements of roadworthiness such as cargo

[209] ECMT (European Conference of Ministers of Transport) licences are multilateral licences issued under the International Transport Forum / OECD for the international carriage of goods by road for hire or reward by transport undertakings established in an ECMT member country, on the basis of a quota system.

securing. Priority should be given to aligning road safety policies with the acquis and designating a lead agency to implement the 'vision zero' strategy.[210]

One of the most sensitive problems of road transport quotas applied to Turkish transporters is the problem of limited number of transit quotas in some Balkan countries on the road to Central and Western Europe. At the same time, EU road transport operators which are allowed to transit freely transport from Turkey to the EU and from the EU to Turkey without being subjected to such quotas. These restrictions do not correspond to principles of freedom of transit and non-discrimination proclaimed in Article V of GATT "Freedom of Transit".[211]

It should be kept in mind that Articles 5 and 6 of Decision 1/95 of the Association Council establish the general principle of prohibition of quantitative restrictions on imports and exports. Article 7 of Decision 1/95 stipulates:

"The provisions of Articles 5 and 6 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties."

The Court of Justice in the Judgment of 19 October 2017 in *Istanbul Lojistik* case held that the Member States would contravene the principle of free movement of goods if they were to apply to goods in transit, through their territory transit, duties or other charges imposed in respect of

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[210] European Commission. Turkey 2018 Report, SWD(2018) 153 final, 76 p.

[211] According to Article V (2) there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport. Under part 3 of this Article transit shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit,except charges fortransportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

transit. The Court has previously held that a charge which is triggered by the carriage of goods and which is imposed not on a product as such, but on a necessary activity in connection with the product, may fall within the scope of prohibition on customs duties on imports and exports and charges having equivalent effect (Article 30 TFEU). The Court of Justice concluded that the interpretation of the provisions of the FEU Treaty in respect of the free movement of goods within the European Union may be transposed to the provisions concerning the free movement of goods within the Customs Union stemming from the EEC-Turkey Agreement (see paragraphs 42-44 of the Judgment).

Turkish companies do obtain Schengen visas for their drivers which are multiple entries, with a validity of about a year and with a total cost approximating 130 to 150 euros. Nonetheless, such a visa only gives an access of 90 days for the drivers within the territory of the Member States, thus being faced with prospects of renewing the visas. One should note, though, that this issue has been the object of discussions between the parties not only within the framework of the negotiations on the liberalisation of the visas for Turkish citizens launched in December 2013 but also with respect of the ongoing negotiations on the modernisation of the Turkey-EU Customs Union.

The Customs Union is the most important element of the EU-Turkey association law. It marked the final stage of association and as proclaims the Preamble of Decision of the Association Council No 1/95 "the Customs Union represents an important qualitative step, in political and economic terms, within the Association relations between the Parties." The ratio of the EU-Turkey Customs Union may be fully explained only in the context of the aims and purposes of the Association Agreement. There is a close link and interdependence between the aim proclaimed in the Preamble to "facilitate the accession of Turkey to the Community at a later date" and the provision of Article 5 that "the final stage shall be based on the customs union and shall entail closer coordination of the economic policies of the Contracting Parties."

Prof. Haluk Kabaalioğlu argues that Decision 1/95 on implementing the final phase of the Customs Union imposes on Turkey many additional requirements, which do not fall strictly within the basic Customs Union structure. These sweeping requirements together with the Customs

Union make sense only when considered as being parts of a temporary or transitional regime that is designed to prepare Turkey for full membership. The examples of such kind of requirements, as Kabaalioğlu considers, are the equivalence protection of intellectual, industrial and commercial property rights; the compatibility of Turkish legislation with EU competition law and its effective application; the establishment of a competition authority to enforce the competition rules.[212] Here we may make comparison between the EU-Turkey association and the European Economic Area: as advanced as the EEA development might be, it does not go as far as adopting the Common Customs Tariff by Turkey.

In general, the association agreements providing the establishment of a customs union are by their content and objectives the most advanced external agreements of the European Union. In this type of association, the establishment of the customs union necessitates not only the elimination of the customs duties and other restrictive measures between the parties but also the adoption by the associated country of the external common tariff of the Community and its alignment to common commercial policy. At the same time, the extent of the association obligations in the framework of the EU-Turkey Customs Union is not limited to the elimination of the customs duties and restrictive measures, the application of the same common tariff towards third countries, accompanied by the alignment of commercial policies and even agricultural policies. Moreover, Customs Union requires approximation and even harmonization of Turkish legislation with that of the EU in the areas of competition law and the equivalent protection of intellectual, industrial and commercial property rights.

As Roman Petrov concluded, with regard to the interpretation of the rules of the EU-Turkey Customs Union, Turkey is obliged to interpret the provisions of Decision 1/95 identical in substance to the corresponding provisions of the EC Treaty in conformity with the relevant ECJ/General Court case law, and to ensure by the end of the first year following the entry into force of the Customs Union the application of the principles contained in the EC primary and secondary legislation, as well as those developed by the ECJ/General Court. These provisions go far beyond similar provisions on the application of the ECJ rulings in the EEA Agreement and in the EC-Swiss sectoral agreements. Roman Petrov concludes that this approach disproportionally extends EC judicial

[212] Haluk Kabaalioğlu. The Customs Union: A Final Step before Turkey's Accession to the European Union?, p. 123.

authority over the Turkish legal system without offering the Turkish side any real possibilities to be involved in the EU decision-making progress. On the other hand, from the accession perspective, it ensures the effective implementation of the EC judicial acquis into the Turkish legal system.[213] In any case, it should not be forgotten that the jurisdiction of the Court of Justice offers judicial remedies for the protection of the rights of persons acting in the framework of the EU-Turkey customs union. At the same time, we shall have in mind that the process of harmonization of Turkish law with acquis communautaire is a voluntary harmonization process also aimed to the future accession to the EU. The progress of such harmonization also depends on real perspectives of accession.

According to dominant opinion, the bonds created by the association based on a customs union are so tight that the customs union progressively obliges the parties to bring closer several of their policies.[214]The customs union cannot be considered as an end point, but should be seen as a transitory stage to accession. The associations based on a customs union with Greece, Cyprus and Malta ended by accession, whereas Turkey is still a candidate country negotiating accession to the EU. Under the Ankara Agreement, the progressive establishment of a customs union shall be followed by accession to the Community: "as soon as the operation of this Agreement has advanced far enough (…) the Contracting Parties shall examine the possibility of the accession of Turkey to the Community"(Article 28).

Ceren Zeynep Pirim argues that "the motif of the association theories and the Ankara Agreement's structure is that the customs union with the Community is bearable for a third country only within an accession perspective. In a contrary case, there would be created economic and political constraints which would prevent the acceptance of the customs union by the third country."[215]

It is difficult to foresee the perspectives of the EU-Turkey Customs Union and possible future scenarios. As for modern free trade agreements, they no longer contain only the elimination of customs duties but increasingly also trade-related rules and regulations such as investments, government procurement and intellectual property rights.

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[213] Roman Petrov. Exporting the Acquis Communautaire through European Union External Agreements. Heidelberg Schriften zum Wirtschaftsrecht und Europarecht. Band 64, Nomos, 2011, p. 141-142.
[214] Ceren Zeynep Pirim. The EU-Turkey customs union: from a transitional to a definitive framework? Legal issues of economic integration. Vol. 42 (2015), issue 1, p. 35-36.
[215] Ceren Zeynep Pirim. Op. cit., p. 38.

From the perspective of modernisation of the EU-Turkey customs union, it is interesting to make reference to the Roadmap of the European Commission "Enhancement of EU-Turkey bilateral trade relations and modernisation of the EU-Turkey Customs Union" (TRADE E2/NEAR A5, August 2015). The Roadmap assumes that five options of future development are possible:

• The first option, or status quo scenario, would be to keep the CU as it stands, i.e. with the current and worsening implementation deficit and non-compliance record.

• The second option would be to modernise the current CU and to make it more balanced and more operational, and improve its functioning. This would be achieved through amendment of Decision 1/95 without changing its sectoral scope.

• The third option would be to enhance bilateral trade relations to a level comparable with that achieved in recent ambitious FTAs concluded by the EU, by concluding a new agreement to cover new areas. This could imply approving this enhancement either through a new Decision of the Association Council or through a new Protocol to the Association Agreement, thus requiring a full treaty-making procedure pursuant to TFEU Articles 217 and 218.

• The fourth option would be to combine the second and third options, i.e. modernise the CU and deepen trade relations. This would be possible both by adapting Decision 1/95, and through a new Decision of the Association Council or through a new Protocol to the Association Agreement.

• The fifth option would be to replace the CU with a new comprehensive FTA comparable to FTAs recently concluded by the EU, and covering e.g. industrial goods, agriculture, services, public procurement. This would represent a major shift in the EU-Turkey contractual relations, requiring substantial adaptations to the Association Agreement.[216]

[216] European Commission. Enhancement of EU-Turkey bilateral trade relations and modernisation of the EU-Turkey Customs Union (TRADE E2/NEAR A5, August 2015), p. 3. http://docplayer.net/8287871-Inception-impact-assessment-a-context-subsidiarity-check-and-objectives.html

Replacing the customs union with a new comprehensive FTA (without customs union) raises questions whether such a step could be consistent with the spirit and aims of the Association Agreement: "envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community" allowing the Contracting Parties to "examine the possibility of the accession of Turkey to the Community" (Article 28 of the Agreement). The customs union is the final stage of association (Article 5) which should lead to a definitive step - accession to the Community.

Other important question that arises: Could this step backwards from the customs union be justified from an economic point of view? For Turkey, according to the European Commission's Final Report of Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement of 26 October 2016, this step "risks causing net negative impacts depending on the extent of the increase in trading costs in switching from a CU to an FTA for industrial goods trade: while the less ambitious tariff liberalization erodes the export gains to the EU on that score only marginally compared to the ECF (Enhanced Commercial Framework), the increase in trade costs for exports to the EU for industrial products drives a much larger decline in exports, which the services and FDI liberalization do not fully offset. Nonetheless, the cost reduction generated by the DCFTA [217] results in a modest real GDP gain. Accordingly, obtaining international commercial policy autonomy by abandoning the CU would come at a welfare price for Turkey, but not in terms of real GDP. The sensitive sectors for Turkey continue to be marginally negatively affected under a DCFTA, not because of a surge in imports from the EU, but because of the negative income effect from the DCFTA overall; the impact is, however, about half as great as under the ECF. The main negative impact is on the industrial goods sector, which faces higher trading costs with its major market." [218]

Given the authoritarian trends in Turkey, the decreasing support for EU membership by Turkish public opinion and the lack of a unanimous stance among EU Member States regarding future enlargements, reinforced by the absence of an unequivocal commitment that Turkey

[217] Deep and Comprehensive Free Trade Agreements (DCFTAs) are concluded by the EU with Georgia, Moldova and Ukraine and allowing them to access provisionally to the European Single Market in selected sectors before the association agreements with these countries entered into force.

[218] European Commission. Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement. Final Report, 26 October 2016, p. 232.

will be accepted as a Member State, the incentive for development and reform of the EU-Turkey relationship has been weakened. As a result of these negative trends, an idea of "privileged partnership" instead of future accession and a concept of customs union as the definitive framework of the EU-Turkey relationship emerged. From a legal point of view, this perspective of a definitive customs union contradicts the spirit and aims of the Association Agreement. Under the EU-Turkey association law, the customs union cannot be conceived as the end point of the EU-Turkey association.[219] On the other hand, the current status and content of the EU-Turkey association law in general and of the customs union in particular which is characterized by unfinished rules, institutional void, lack of efficient dispute settlement mechanism and the asymmetry in the common commercial policy, all these problems necessitate taking further steps towards real reform of the EU-Turkey relationship.

Further development of the EU-Turkey legal and economic integration seems a difficult task without political integration. Ceren Pirim notes that "neither would it be realistic to expect Turkish accession to the EU from today to tomorrow. Therefore, this 'harsh conclusion' does not refute the possibility, for the parties, to improve the customs union structures until the Turkish accession is realized." [220]

In any perspective of the development of the EU-Turkey relations, next step means further integration of the Turkish economy into the EU Internal Market. For Turkey to be included in the EU Internal Market, Turkey has to commit to all obligations of the acquis communautaire in the areas pertaining to the Internal Market. A complete legal and regulatory harmonization will have many advantages: it will allow Turkey to be a part of the Internal Market and facilitate accession negotiations. At the same time, according to the TÜSIAD (Turkish Industry and Business Association) report on the impacts of a modernized Customs Union prepared in 2015 "accepting a commitment for the full adoption of the EU acquis without being an EU member is tantamount to agreeing to implement this acquis devoid of the ability to contribute to its shaping. The consequence will be to create a situation of policy dependency in

[219] See more analysis in: Ceren Zeynep Pirim. Op. cit., p. 32-38.
[220] Ibidem, p. 52.

all the policy areas covered by the deepened Customs Union. This will lead to the transfer of sovereignty to an institution to which Turkey is not a member." [221] Nonetheless, this report ends with a positive conclusion with regard to deepening of the customs union:

"First and foremost, the deepening of the Customs Union will have a positive influence on Turkey's economic governance. Such an ambitious agreement seeking to integrate Turkey with the EU's Single Market will bring about a convergence of Turkey's economic legislation and regulatory framework, shaping Turkey's business and investment environment, with the EU. Hence it will improve the predictability of public policy that impacts economic endeavors. Furthermore, the introduction of more competition in services, industries and public procurement will positively influence economic productivity. This outcome will allow the Turkish economy to improve its investment environment, attract more investments and reach its potential growth. As a matter of fact, good governance, policy predictability and rule based governance were emphasized as recommendations for enhancing growth in OECD's 2014 economic report on Turkey.

Another outcome of the deepened Customs Union of major interest for the business community will be the set of institutional provisions that, on the one hand, will allow a faster resolution of disputes and, on the other, will constrain the ability of the state to skew fair market competition." [222]

It is true that the asymmetry in relations within the EU-Turkey customs union is a serious problem diminishing overall positive impact of the customs union. However, the weakness of this structure which lacks efficient institutional mechanism may be eliminated by the establishment of bilateral institutions providing for the tools of efficient cooperation. Turkey shall be directly involved in the decision making process concerning the EU-Turkey customs union. In addition, a binding dispute settlement mechanism should be created which would be vested with competence to protect inter alia the rights of physical persons and legal entities.

[221] TÜSİAD. A new era for the Customs Union & the business world. Executive summary by Sinan Ülgen and Pelin Yenigün Dilek. October 2015, Publication No: T/2015,10-568. 2015, TÜSİAD/British Embassy, Ankara, p. 17.
[222] Ibidem

The EU Commissioner for Trade and the Turkish Minister of Economy on 28 February 2014 decided to set up a Senior Official Working Group (SOWG) to explore the possibilities to resolve current concerns relating to the structure and the functioning of the customs union as well as to further deepen and widen bilateral preferential trade relations, and to report back.

On 27 April 2015, the SOWG presented its Report on the update of the EU-Turkey Customs Union and trade relations. The SOWG recommended amending the certain provisions of Decision 1/95 in order to improve the functioning of the CU, notably, but not limited to:

- Develop a legally binding provision that should enable Turkey to benefit simultaneously from the FTAs concluded by the EU with third countries;

- Improve dispute settlement mechanism under modalities to be defined by both parties;

- Improve joint decision making mechanism to bring about the proper functioning of the CU, including consultation mechanisms, in particular in advance on legislation what may impact on the functioning of the Customs Union;

- Participation of Turkey in the EU committees and specialised agencies relevant to the Customs Union;

- Communication by the Commission to Turkey of the new acquis that Turkey has to incorporate in its domestic legislation;

- Communication by Turkey of the acquis incorporated in its domestic legislation;

- Improve the framework for the implementation of technical barriers to trade (TBTs) commitments;

- Improve the framework for the implementation of the existing intellectual property rights (IPR) commitments;

- Better customs cooperation to improve the free movement of goods;

- Review-assess the effective implementation of certain provisions concerning trade defence instrument (Articles 44 to 47 of the Decision 1/95).

The SOWG Report suggested that the areas to be covered in the enhancement bilateral relations should include services, public procurement and further bilateral concessions in agricultural products. The Commission notes that, for Turkey, road transportation is considered an integral and essential part of the package and that the resolution of road transport quota restrictions faced by Turkey is urgent.

The SOWG Report also concluded that the current general structure set up under the Association Agreement will be kept, as well as the Customs Union will be kept and amended. The instruments to formalize new areas (services, public procurement and concessions in agricultural products) should be concluded either as the Association Council decisions or – if necessary - by way of new protocols as part and parcel of the Association Agreement.

The optimal way to modernize the customs union would be to adopt a new decision of the Council of Association because the Council is competent to adopt necessary measures. Article 22 (1) of the Association Agreement provides that in order to attain the objectives of this Agreement, the Council of Association shall have the power to take decisions in the cases provided for therein. Under Article 22 (3), once the transitional stage has been embarked on, the Council of Association shall adopt appropriate decisions where, in the course of implementation of the of the Association arrangements, attainment of an objective of this Agreement calls for joint action by the Contracting Parties but the requisite powers are not granted in this Agreement.

Proposed measures may be adopted also by way of new protocols additional to the Association Agreement. However, this way is more complicated as the process of ratification of the EU-Ukraine Association Agreement has shown. It necessitates a full treaty-making procedure pursuant to TFEU Articles 217 and 218. It shall also be reminded that

Article 63 of the 1970 Additional Protocol provided that it shall be ratified by the Signatory States. In addition, the Council shall act unanimously in case of agreements in the fields of trade in services (Article 207 (4) TFEU), for association agreements and the agreements with the States which are candidates for accession (Article 218 (8) TFEU). The consent of the European Parliament in case of the association agreements is needed in accordance with Article 218 (6) TFEU.

4.3. Freedom of Establishment and Freedom to Provide Services

Legal framework regarding the freedom of establishment and the freedom to provide services is constructed in the provisions of Articles 13 and 14 of the Association Agreement [223] , and by the standstill clause contained in Article 41(1) of the Additional Protocol.[224] The Court of Justice has interpreted these provisions on many occasions.

Personal scope of the freedom of establishment and the freedom to provide services under the EU-Turkey association law concerns individuals, companies and firms. Individuals must hold the nationality of one of the Member States or Turkey; companies or firms must be formed in accordance with the law of a Member State or Turkey and have their registered office, central administration or principal place of business within the EU or in Turkey. Individuals shall be self-employed persons. Undertakings shall pursuit genuine economic activity in host Member State or Turkey. Service providers may perform a service on a temporary or sporadic basis.[225]

Under the EU law, free movement of services also includes free movement of recipients of services, i.e. persons receiving medical treatment and persons travelling for the purpose of private education or business, tourists, etc. The conclusion that service recipients also benefit from the freedom to provide services, since it is a 'necessary corollary' of this freedom was made already in 1984 by the Court of Justice in the joined

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[223] Article 13
The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.
Article 14
The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them.

[224] Article 41
1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.
2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services. The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.

[225] See: Kabaalioğlu, Halûk A., Gutman, Rolf. The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union : The Trend developed out of Standstill Provision Within Association Agreement (December 2007,Istanbul), p.39.

cases *Luisi and Carbone*.[226] The freedom to provide services covers the situations where service providers move to a Member State or Turkey to provide services for the recipients or where neither the provider nor the recipient move but the service itself moves.

In the EU law and according to the settled case-law of the Court, the national legislation which makes the provision of services in the national territory by an undertaking established in another Member State subject to the issue of an authorization constitutes a restriction on the fundamental principle enshrined in Article 56 TFEU.

The freedom of establishment and the freedom to provide services form a part of overall construction of the Ankara Agreement aimed at the gradual creation of the common market between Turkey and the Communities involving customs union and free movement of goods, workers, freedom of establishment and freedom to provide services. This construction comprised the "progressive establishment of customs union" between the Parties (Article 2), which "shall cover all trade in goods" and involved prohibition "of customs duties on imports and exports and of all charges (…) and all other measures having equivalent effect", (Article 10), the purposes of "progressively securing freedom of movement for workers" (Article 12), "abolishing restrictions on freedom of establishment (Article 13) and "abolishing restrictions on freedom to provide services between them" (Article 14). With regard to free movement of capital, the Parties undertook "to authorize, in the currency of the country in which the creditor or the beneficiary resides, any payments or transfers connected with the movement of goods, services or capital, and any transfers of capital or earnings, to the extent that the movement of goods, services, capital and persons between them has been liberalized pursuant to this Agreement" (Article 19) and to "consult each other with a view to facilitating movements of capital" (Article 20). Under Article 9, the Parties "recognize that within the scope of this Agreement (…) any discrimination on grounds of nationality shall be

[226] Joined Cases 286/82 and 26/83, Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro, [1984] ECR 377, paragraph 10.The Court held: "10. By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital."

prohibited." The 1970 Additional Protocol set out a detailed timetable to complete the CU as well as the other freedoms. The standstill clause of Article 41(1) of the Additional Protocol provided that the Parties "shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services." Article 41(2) charged the Association Council with the duty of setting the timetable and rules for the progressive abolition of restrictions on these freedoms between the Parties:

"The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade."

However, there has not yet been any Association Council decision on this point. In fact, the efforts and negotiations aimed at the liberalization of services and establishment started after entry into force of the Additional Protocol, later suspended and resumed in 1987 but from then on focused on goods trade (Customs Union issues) while services and establishment rules are still based on a standstill. It seems that new attempts which started in 2016 were more focused on updating of the Customs Union, than on services and establishment.

Nevertheless, the idea and the aim of progressive development of the freedom of establishment and the freedom to provide services is one of the principal ideas of the association law. In joined cases C-317/01, Abatay and Others, and C-369/01, Sahin, the Court of Justice held that "it is clear from the wording of Article 14 of the Association Agreement, as well as from the objective of the EEC-Turkey Association, that the principles enshrined in Articles 55 of the EC Treaty (now Article 45 EC) and 56 of the EC Treaty (now, after amendment, Article 46 EC), and in the provisions of the Treaty relating to the freedom to provide services, must be extended, so far as possible, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties (see, as regards Article 12 of that agreement, Nazli , paragraph 55, and Kurz paragraph 30)." [227]

[227] Judgment of the Court of Justice of 21 October 2003 in Joined Cases C-317/01, Eran Abatay and Others, and C-369/01, Nadi Sahin, ECR I-12301, para. 112.

In this context, it should be noted that services, on the one hand, and transport – on the other, are separate subject matters in the Treaty on the Functioning of the European Union, notwithstanding that both of them are closely related (namely, services, in general, and transport services, in particular). Taking it in the context of the EU-Turkey relations the services of cross-border road haulage are of special importance. They are not yet liberalized in the framework of the Ankara Agreement and Decision No 1/95 of the Association Council. However, as Advocate General Saugmandsgaard Øe pointed out in his opinion of 6 April 2017 in Case C-65/16, Istanbul Lojistik Ltd., "that the Court has held that at the current stage of development of the EEC-Turkey Association, there are no specific rules in the field of transport, but that transport services provided in the context of that Association cannot be removed from the ambit of the general rules applicable to the provision of services, and in particular Article 41(1) of the Additional Protocol to the EEC-Turkey Association Agreement, which prohibits a Member State from introducing any new restrictions on the freedom of establishment and the freedom to provide services, from the date of entry into force of that protocol with regard to it (see judgments of 21 October 2003, Abatay and Others, C-317/01 and C-369/01, EU:C:2003:572, paragraphs 92 to 102, and of 24 September 2013, Demirkan, C-221/11, EU:C:2013:583, paragraph 37 et seq.)." [228]

In *Istanbul Logistic* case, the ECJ held that Article 4 of Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union must be interpreted as meaning that a tax on motor vehicles such as that at issue in the main proceedings, which must be paid by persons operating heavy goods vehicles registered in Turkey and in transit through Hungarian territory, constitutes a charge having equivalent effect to a customs duty within the meaning of that article.

In a recent judgment of 11 July 2018 the Court of Justice in Case C-629/16, *CX v Bezirkshauptmannschaft Schärding*, ECLI:EU:C:2018:556 [229] the Court confirmed legality of existing in the EU Member States system of quotas of authorisations issued to Turkish hauliers for the international carriage by road of goods. Turkish company CX argued that Austrian system allows semi-trailers to be transported by rail but entails additional costs

[228] Opinion of Advocate General Saugmandsgaard Øe of 6 April 2017 in Case C-65/16, Istanbul Lojistik Ltd., ECLI:EU:C:2017:282, para. 58, note 32.

[229] Judgment of the Court of Justice of 11 July 2018 in Case C-629/16, CX v Bezirkshauptmannschaft Schärding, ECLI:EU:C:2018:556.

and extends the transport time compared to road transport. Limits of the quota are determined on the basis of the Austria-Turkey Agreement on road transport. Extra-quota permits may be issued only if the transport is of substantial public interest. According to CX, the annual quota infringes the rules of the association between the European Union and the Republic of Turkey, in particular Articles 5 and 6 of Decision No 1/95 of the Association Council, in that it restricts the free movement of goods within the association and discriminates against Turkish hauliers on grounds of their nationality, contrary to Article 9 of the EEC-Turkey Agreement. The Court observed that, in the EEC-Turkey Association, the free movement of goods, the freedom to provide services and transport are distinct matters subject to different rules. In this respect, the Court reminded that the legislation at issue in CX case may be distinguished from that at issue in the case in which judgment was given on 19 October 2017, *Istanbul Lojistik* (C-65/16, EU:C:2017:770). In that case, which concerned a tax on heavy goods vehicles which had to be paid when they entered Hungarian territory, both on the outward and on the return journey, the amount of which depended on criteria linked inter alia to the quantity of goods that could be carried and to their destination, the Court found, in paragraphs 45 and 46 of that judgment, that, even though the tax on heavy goods vehicles was not levied on the products transported as such, it was imposed on goods transported by vehicles registered in a third country when they crossed the border, and therefore had to be examined with respect to the rules applicable to the free movement of goods. The provisions concerning the free movement of goods between the Republic of Turkey and the European Union, such as those of Decision No 1/95 of the Association Council, do not apply to the dispute in the main proceedings. The fact, relied on by CX, that the additional cost of a possible use of alternative itineraries or means of transport may have an indirect effect on the movement of the goods is of no relevance in this respect. Such a possible indirect effect of the legislation in question does not invalidate the conclusion that the purpose of the legislation is to impose certain conditions on the provision of transport services. Article 15 of the EEC-Turkey Association Agreement and Article 42(1) of the Additional Protocol stipulated that the provisions of EU law on transport and the acts adopted pursuant to those provisions may be extended by the Association Council to the Republic of Turkey, with

due regard to its geographical situation.[230] To this date, the Association Council has not taken any measures to extend the provisions of EU law on transport services to the Republic of Turkey, so that in the present state of development of the association between the Republic of Turkey and the European Union there are no specific rules in this field. So, as long as the Association Council has not adopted rules on transport services, the conditions of access of Turkish hauliers to the EU transport market remain governed by the national legislation of the Member States and the bilateral agreements concluded between the Member States and the Republic of Turkey. The ECJ concluded that the EU-Turkey association law must be interpreted as not precluding Austrian legislation, provided that that legislation is not a new restriction on the freedom to provide services within the meaning of Article 41(1) of the Additional Protocol, which is for the referring court to ascertain. Proportionality as such of Austrian quotas was not directly challenged in this case.[231]

With regard to comparisons between freedoms of establishment and to provide services according to the EU law with the same freedoms in the EU-Turkey association law, there should be no essential differences in scope and content of the same rules. Ilke Göçmen considers *à juste titre* that in this area the rules of EU-Turkey association law should be in principle interpreted in accordance with the EU law:

"Since the scope and effects of these freedoms in association law is not fully-fledged, it becomes necessary to draw analogies with their counterparts in European Union law. This has been also the position of the ECJ which stated that association law will be interpreted, as far as possible, in accordance with European Union law." [232]

Freedom of establishment under the EU-Turkey law also covers the freedom of establishment of self-employed persons and related family

[230] Article 42(1) of the Additional Protocol reads as follows:

"The Council of Association shall extend to Turkey, in accordance with the rules which it shall determine, the transport provisions of the Treaty establishing the Community with due regard to the geographical situation of Turkey. In the same way it may extend to Turkey measures taken by the Community in applying those provisions in respect of transport by rail, road and inland waterway."

[231] Judgment of the Court of Justice of 11 July 2018 in Case C-629/16, CX v Bezirkshauptmannschaft Schärding, ECLI:EU:C:2018:556

[232] İlke Göçmen. Freedom of establishment and to provide services: a comparison of the freedoms in European Union Law and Turkey-EU association law. Ankara Law Review, Vol. 8 No. 1 (Summer 2011), p. 116.

reunification.[233] For instance, Article 41(1) of the Additional Protocol must be interpreted as meaning that the 'standstill' clause set out in that provision precludes a measure of national law, introduced after the entry into force of that additional protocol in the Member State concerned, which imposes on spouses of Turkish nationals residing in that Member State, who wish to enter the territory of that State for the purposes of family reunification, the condition that they demonstrate beforehand that they have acquired basic knowledge of the official language of that Member State.[234]

The Ankara Agreement and the Additional Protocol do not contain detailed rules of freedom of establishment and freedom to provide services, comparing with corresponding provisions of the EU law.

As the Court of Justice held in Case C-258/08, Ladbrokes Betting [2010] ECR I-4757 15, Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services.[235]

The case-law of the ECJ went in line with the idea of analogous interpretation of such prohibitions first of all with regard to the stand-still clause contained in Article 41 (1). Such kind of clauses prima facie contains clear element of progressive development of rules, even if an idea of a stand-still status based on status quo. In 2003 Abatay judgment, the Court underlined the aim of achieving of "gradual abolition of national obstacles to the freedom of establishment and the freedom to provide services":

"66 However, it is clear from paragraph 69 of Savas that the standstill clause in Article 41(1) of the Additional Protocol precludes a Member State from adopting any new measure having the object or effect of

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[233] See in this sense the ECJ Judgment in case C-138/13, Dogan, ECLI:EU:C:2014:2066, paragraph 35: "The decision of a Turkish national to establish himself in a Member State in order to exercise there a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey".

[234] Judgment in Dogan case, paragraph 29.

[235] Judgment of the Court of Justice of 3 June 2010 in Case C-258/08, Ladbrokes Betting [2010] ECR I-4757, §15.

making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned.

67 Given that Article 41(1) applies both to the right of establishment and to the freedom to provide services, the same interpretation must also be valid as regards that latter freedom.

68 Article 41(1) of the Additional Protocol thus appears to be the necessary corollary to Articles 13 and 14 of the Association Agreement, and constitutes the indispensable means of achieving the gradual abolition of national obstacles to the freedom of establishment and the freedom to provide services."

In 2007, in Case C-16/05, Tum and Dari, the Court of Justice confirmed the intention of contracting parties "to create conditions conducive to the progressive establishment of freedom of establishment" with the aim of "progressive establishment of freedom of establishment" and "to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment" in the EU-Turkey association". [236] The words "in order not to further obstruct", however reflected limits of the legal nature of such stand-still clause introduced in Article 41 (1): notwithstanding the necessity to interpret this prohibition of new restrictions for the purposes of progressive and gradual implementation of both freedoms, this clause is an obligation to abstain from negative acts. The duty of development of these freedoms first of all with regard to implementation of all sets of secondary legislation on services and establishment was vested on the Council of Association in paragraph 2 of Article 41 ("determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields ….."). However, a continuing inaction and silence of the Council does not allow making

[236] Judgment of the Court of Justice of 20 September 2007 in Case C-16/05, Tum and Dari, ECLI:EU:C:2007:530, para 61: ""It must be added that Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. (…) Even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained (see, by analogy, Case 77/82 Peskeloglou [1983] ECR 1085, paragraph 13, and Abatay and Others, paragraph 81), it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment."

far reaching conclusions with regard to the direct applicability of this secondary legislation in the EU-Turkey association law (on this point see below the analysis of recent Judgment of Court of Justice C-507/15, Agro Foreign Trade & Agency).

In *Abatay* case, the Court interpreted prohibitions established by Article 41 (1) by using analogy with the principle of freedom of establishment and to provide services enshrined in the EC Treaty:

"111 As to the question whether the national legislation entails a restriction on the freedom to provide services, it must be observed that, first, according to settled case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation such as a work permit constitutes a restriction on the fundamental principle enshrined in Article 59 of the EC Treaty (now, after amendment, Article 49 EC) (see Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12; Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 14; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15, and Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 35)."

It should be also reminded that the Court of Justice in *Abatay* case ruled that Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 must be interpreted as meaning that "those two provisions have direct effect in the Member States so that Turkish nationals to whom they apply are entitled to rely on them before the national courts to prevent the application of inconsistent rules of national law".

Against the background of suspended negotiations on the Turkish accession to the EU commenced in 2005 and a long "stand-still" in upgrading the EU-Turkey customs union, the ECJ has proved to be more integrationist when dealing with the standstill clauses. It consistently held that those Turkish citizens who wished to provide a service in the EU could not be subjected to visa requirements if these did not exist at the time the standstill clauses entered into force between Turkey and the EC Member State that later imposed such new requirements. This line of argument was usually opposed to the arguments of some national

governments, whose interpretation of the legislation relied on methods of interpretation leading to outcomes that would be disadvantageous to Turkish workers, businessmen or service providers.[237]

The World Bank Report on Turkey notes that the efforts to liberalize the EEC-Turkey trade in services were already suspended once in 1974. They were resumed in 1987 but from then on focused on goods trade while services and establishment remain at a standstill. Despite exploratory talks, the Decision 1/95 did not contain provisions on services. Decision 1/95 does not mention the free movement of services, establishment or capital although these issues are still covered (only in part) by the other agreements. Negotiations to extend the Customs Union (CU) to trade in services were held between the years 2001 and 2004. However, an agreement could not be reached for several reasons: the asymmetric structure of the CU, sensitivities related to free movement of persons and public procurement; and the recognition of qualifications.[238]

The recent Report of the Senior officials working group (SOWG) on the update of the EU-Turkey customs union and trade relations of 27 April 2015 suggests that the enhancement of the bilateral relations shall cover services, including issues such as mutual recognition of qualifications to achieve the objectives set out in the Association Agreement in this area. European Commission Staff Working Document of 21 December 2016 "Recommendation for a Council Decision authorizing the opening of negotiations with Turkey" envisages further development of trade relations including trade in services between the EU and Turkey as the EU during last two decades has concluded and has been negotiating several FTAs (e.g. with South Korea, Ukraine, Canada, Japan, etc.) which cover areas of 'deep' integration such as services, investment, public procurement and other important areas addressed through rules establishing a more predictable and transparent legal and economic environment. [239]

According to the World Bank report, Turkey has a relatively unrestricted services trade regime compared to comparator countries. Authors of

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[237] See: Thomas Vandamme. The EU-Turkey Association and the Court of Justice: Back to the Future…and Return to the Past. Blogactiv.EU. October 2, 2013. - https://acelg.blogactiv.eu/2013/10/02/the-eu-turkey-association-and-the-court-of-justiceback-to-the-future%E2%80%A6and-return-to-the-past/

[238] World Bank. Evaluation of the EU-Turkey Customs Union, p. 76.

[239] See: European Commission. Commission Staff Working Document. Impact Assessment accompanying the document "Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship and on the modernisation of the Customs Union COM(2016) 830 final, SWD(2016) 476 final, Brussels, 21.12.2016, pp. 6, 22, 23 and 86.

the Report concluded that its overall level of services trade openness is similar to Brazil, Korea and Russia but significantly more restrictive than Poland. Turkey is under-trading services with nearly all EU member states suggesting untapped potential to increase bilateral trade. While overall the services trade regulatory regimes in Turkey and the EU share similar levels of openness, aggregation hides major difference in some sub-sectors. While it might be expected that the liberalization of services trade between Turkey and the EU would have a more pronounced impact on Turkey because it would allow genuine competition to emerge in key sectors of its economy which, in turn, would lower the costs of all industries using these as inputs, analysis using the World Bank's Services Trade Restrictiveness Index (STRI) suggests that, on aggregate, levels of openness are relatively similar between the two parties.[240] According to the Study of the EU-Turkey Bilateral Preferential Trade Framework, including the Customs Union, and an Assessment of its Possible Enhancement of 26 October 2016 conducted under the auspices of the European Commission, Turkey indeed became a prominent services exporter to the EU internal market in several categories, including insurance, construction, and tourism. There was one major exception, however, namely business and professional services, where Turkey's export performance lagged badly the performance in comparator countries. The study observes that the gravity model applied to Turkey's exports of business and professional services is well-behaved: exports increase as the size of the destination market increases and as Turkey's supply capacity as measured by its own GDP increases; exports decrease with increasing distance.[241]

Under Articles 13 and 14 of the Ankara Agreement, the Parties agreed to be guided by corresponding articles of the Treaty establishing the Community for the purpose of abolishing restrictions on the freedom of establishment and on the freedom to provide services between them. However, there are some differences in corresponding provisions of the TFEU and the association law as far as prohibition of discrimination is concerned. Relevant provisions regarding the freedoms of establishment and to provide services under the European Union and the association law differs in two aspects: contrary to Articles 49 and 56 of the TFEU, which lay down a specific non-discrimination rule, there is only a general non-discrimination rule in Article 9 of the Ankara Agreement and

[240] World Bank. Evaluation of the EU-Turkey Customs Union, p. 74.
[241] European Commission. Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement. Final Report, 26 October 2016. 67-68.

in contrast to Articles 49 and 56 of the TFEU which prohibit restrictions on these freedoms. Article 41(1) of the Additional Protocol forbids only the introduction of new restrictions.[242] Thus, even in the absence of general prohibition of discrimination in the area of the freedoms of establishment and to provide services, any new national rule of discriminatory character in this area is nevertheless prohibited under Article 41(1).

It is a well-established principle of the EU law that a provision in an agreement concluded by the Union with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. On this basis, the Court of Justice in Case C-37/98, Savas, concluded that Article 13 of the Association Agreement does no more than lay down in general terms, with reference to the corresponding provisions of the EC Treaty, the principle of eliminating restrictions on the freedom of establishment between the contracting parties, and does not itself establish precise rules for the purposes of attaining that objective (paragraph 42). Article 14 providing that the Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them is of the same nature. However, does it mean that the wordings "Parties agree to be guided by Articles (…) of the Treaty for the purpose of abolishing restrictions on freedom of establishment" (Article 13) and "for the purpose of abolishing restrictions on freedom to provide services" are devoid of binding legal force?

According to Article 41 (2) of the Additional Protocol, the Council of Association "shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services." The Court of Justice in its judgment of 20 September 2007 in case C-16/05, Tum and Darı, noted that "to date, it is true, the Association Council has not adopted any measures on the basis of Article 41(2) of the Additional Protocol with a view to the actual removal by the Contracting Parties of existing restrictions on freedom of establishment,

[242] See: İlke Göçmen. Freedom of establishment and to provide services: a comparison of the freedoms in European Union Law and Turkey-EU association law. Ankara Law Review, Vol. 8 No. 1 (Summer 2011), p. 85.

in accordance with the principles set out in Article 13 of the Association Agreement. Furthermore, it is apparent from the case-law of the Court that neither of those two provisions has direct effect (Savas, paragraph 45)."[243]

It is also true that since 1970, when the Additional Protocol was concluded, and up to now, the Association Council has not adopted any such measure. What could be the consequence of this inaction of the Association Council?

As it was noted before, the Decision 1/95 of the Association Council did not make any further steps towards removal of the obstacles to the establishment and provision of services. The decision stated that the Association relations as provided for in Article 5 of the Ankara Agreement are entering into their final phase based on the Customs Union. From a formal point of view, this final phase should not necessarily include removal of restrictions on the freedom of establishment and services. At the same time, it should be noted that the situation concerning the stand-still clause of the association law based on Article 41 (1) of the Additional Protocol is in many aspects similar with the situation of the development of freedom of establishment and freedom to provide services in the European Communities at the time of conclusion of the Additional Protocol in 1970. Article 13 of the Association Agreement inter alia provides that the Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the EC Treaty. Article 52 of the EC Treaty established that within the framework of the provisions set out below, the restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period.

Former Article 53 of the EC Treaty[244] established a stand-still clause similar to the clause of Article 41 (1) of the Additional Protocol:

"Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty."

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[243] Judgment of the Court of Justice of 20 September 2007 in case C-16/05, Tum and Darı,EU:C:2007:530, paragraph 62.

[244] Article 53 of the EC Treaty was repealed by the Treaty of Amsterdam which entered into force on 1 May 1999.

With respect of this similarity, the Court has already held in Savas case that Article 53 of the EC Treaty (repealed by the Treaty of Amsterdam), prohibiting Member States from introducing any new restrictions on the right of nationals of other Member States to establish themselves in their territories, contains an obligation entered into by the Member States which amounts in law to a duty not to act. Such an express prohibition, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any other measure, is legally complete in itself and therefore capable of producing direct effects on the relations between Member States and individuals. Therefore, as the Court concluded, the Article 41(1) of the Additional Protocol has the same effect:

"48. Since the wording of Article 41(1) of the Additional Protocol is almost identical to that of Article 53 of the EC Treaty, it must be regarded as being directly applicable for the same reasons. However, Article 41(1) of the Additional Protocol prohibits the introduction of new national restrictions on the freedom of establishment and the right of residence of Turkish nationals as from the date of entry into force of that protocol in the host Member State. (…)

54. It follows from the considerations set forth above that Article 41(1) of the Additional Protocol lays down a precise and unconditional principle that is sufficiently operational to be applied by a national court and therefore capable of governing the legal position of individuals. The direct effect which must therefore be accorded to that provision implies that the individuals to which it applies have the right to rely on it before the courts of Member States." [245]

There is also a clear similarity between Article 41(2) of the Additional Protocol establishing the competence of the Council of Association for "progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services" and Article 54 (1) of EC Treaty giving the power to the Council for "the abolition of existing restrictions on freedom of establishment within the Community." The later establishes:

"Before the end of the first stage, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Economic

[245] Judgment of the Court of Justice of 11 May 2000 in Case Savas, Case C-37/98, Reports of Cases 2000 I-02927, para. 47-49.

and Social Committee and the European Parliament, draw up a general program for the abolition of existing restrictions on freedom of establishment within the Community. The Commission shall submit its proposal to the Council during the first two years of the first stage."

Regarding an absence of such program, the Court of Justice has already held in its judgment of 21 June 1974 (Case 2/74 *Reyners v Belgium* [1974] ECR 631), in laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 imposes an obligation to attain a precise result the fulfilment of which must be made easier by, but not made dependent on, the implementation of a programme of progressive measures. Consequently, the fact that the Council has failed to issue the directives provided for by Articles 54 and 57 cannot serve to justify failure to meet the obligation.[246]

May we draw further analogy with regard to the inaction of the Council of Association to decide on the development of the freedom of establishment and to provide services? For instance, the Court of First Instance in *Miller and Others v Commission*, T-147/99, ECLI:EU:T:2001:133, paragraphs 257-259, held that the pursuant to EC Treaty and the principle of good administration, the Commission had a duty to ensure the proper application of the Association Agreement and the Additional Protocol including the duty to monitor its application. That duty also resulted from the Association Agreement (see inter alia Articles 6, 7 and 25) and the various decisions adopted by the Association Council on the application of Articles 2 and 3 of the Additional Protocol. Furthermore, the Commission is represented on the Association Council (Article 23 of the Association Agreement) and it participates, as the representative of the Community, in various committees, including the customs cooperation committee, set up by that Council (Article 24). Moreover, the Commission has a permanent representation in Turkey which enables it to be reliably informed of political, legal and economic developments in that State. The Court of First Instance found that clear deficiencies can be attributed to the Commission as regards the monitoring of the implementation of the Association Agreement and the Additional Protocol (see paragraphs 258-260 of the Judgment). Consequently, the Court annulled contested decisions concerning applications for non-recovery and remission of

[246] See also the Judgment of the Court of Justice of 26 June 2007 in Case 107/83, Ordre des avocats au barreau de Paris / Klopp, paragraph 10.

import duties. It is necessary to note, that the annulment of these decisions of the Commission was based inter alia on non-respect of the provisions of Article 3 (1) of the Additional Protocol. Some of these provisions are not directly applicable and are subject to implementing measures.

However, this jurisprudence regarding the monitoring of the implementation of the Association Agreement and the Additional Protocol cannot be transposed into the areas where the Contracting Parties did not adopt legal rules in form of decisions of the Association Council or by means of new international agreements or their amendments. In both cases there is no consensus of both parties of association as for creation of new rule. Failure of the monitoring of the implementation of legal rules is not the same thing as the absence of new rules, as regrettable as such absence could be. Accordingly, the Court of First Instance held in its Order in Case T-2/04, *Korkmaz and others v Commission*, that "even if there was a refusal to submit to the Council a proposal for an appropriate measure, that refusal could not in itself be regarded as producing binding legal effects capable of affecting the applicants' interests by bringing about a significant change in their legal position."[247] The same would be in cases of the absence of consensus in the Association Council. Such kind of legal lacuna cannot be filled by way of interpretation. Adjudication and judicial interpretation go further together with the progress in development of legal basis for bilateral relations.

Since the official 'legislator' of the Association, the Association Council has not delivered the progressive establishment of full economic freedoms between the EU and Turkey, the standstill clauses are often the only rules available to test the legality of Member State and EU legislation that affect Turkish nationals who wish to deploy economic activities in the EU.[248]

On 24 September 2013, the Court of Justice delivered judgment in Case C-221/11, *Leyla Ecem Demirkan v Bundesrepublik Deutschland* thus giving rise to many discussions about the real content of the freedom to provide services and the stand-still clause contained in the Additional Protocol (Article 41).

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[247] Order of the Court of First Instance in Case T-2/04, Korkmaz and others v Commission (ECLI:EU:T:2006:97), paragraph 51.

[248] Thomas Vandamme. The Standstill Clause as a Travesty: The ECJ's fresh (yet 'familiar') approach to the EU-Turkey Association, June 16, 2016.
http://acelg.blogactiv.eu/2016/06/16/the-standstill-clause-as-a-travesty-the-ecjs-fresh-yet-familiar-approach-to-the-eu-turkey-association/

Ms Demirkan, a Turkish national whose application for a visa to visit her stepfather who lives in Germany was refused by the German authorities, has invoked that 'standstill' clause before the German courts. She maintained that, as a visit to a family member in Germany will necessarily entail the possibility of obtaining services there, she must be regarded as a potential recipient of services. Moreover, Turkish nationals intending to visit a family member in Germany were not required under German law to obtain a visa at the date of entry into force of the Additional Protocol as regards that Member State, that is, in 1973. Therefore, the effect of the 'standstill' clause is that the general visa requirement subsequently introduced by Germany for Turkish nationals in 1980 cannot be applied to her.[249]

High Administrative Court of Berlin-Brandenburg (Oberverwaltungsgericht Berlin-Brandenburg), before which the case was brought on appeal, asked the Court of Justice to clarify the scope of the 'standstill' clause.

The Court of Justice in this preliminary ruling held that the stand-still clause of the Additional Protocol does not prevent the introduction, after its entry into force, of a visa requirement where the purpose of the visit is to obtain services. The CJEU noted that the 'standstill' clause prohibits generally the introduction of any new measure having the object or effect of making the exercise by a Turkish national of such economic freedoms in the territory of a Member State subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to that Member State. The Court found that the notion of the 'freedom to provide services' referred to in the 'standstill' clause of the Additional Protocol does not encompass passive freedom of provision of services, namely the freedom for Turkish nationals who are the recipients of services to visit a Member State in order to obtain services. The Court pointed out that the freedom to provide services conferred by the EU Treaties on Member State nationals, and thus on EU citizens, encompasses not only active freedom to provide services

[249] At the time when the Additional Protocol entered into force in 1973, Turkish citizens could travel freely without tourist visa to all nine countries that made up the EEC – France, Germany, Italy, Belgium, Luxembourg, the Netherlands, Denmark, Ireland and the UK until the military coup of September 1980. The fear of thousands of Turkish political refugees coming to Europe led countries to impose visa requirements. Germany introduced visas in 1980, together with France, Belgium, the Netherlands and Luxembourg. Denmark did it in 1981, the UK and Ireland in 1989, Spain and Portugal in 1991. See in: Turkish tourists and European justice. The Demirkan ruling and how Turkey can obtain visa-free travel. 26 September 2013. ESI. Pp. 5-6. https://www.esiweb.org/index.php?lang=en&id=156&document_ID=142.

but also – as the Court accepted in its judgment in *Luisi and Carbone*[250] in 1984 – as the necessary corollary, passive freedom of provision of services. The Court has found that there was nothing to indicate that the Contracting Parties intended to include service recipients into the scope of the freedom to provide services, since *Luisi and Carbone* was delivered only in 1984, i.e. after the entry into force of the Additional Protocol in 1973.

However, in *ratio decidendi of Luisi and Carbone* judgment (paragraph 12), there is a reference to Council Directive of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (64/221/EEC):

"(…) According to Article 1 thereof, Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117) applies inter alia to any national of a Member State who travels to another Member State "as a recipient of services." [251]

It seems that the logic of *Demirkan* judgement was based rather on the *ratio* of the EU internal market and its difference with the legal regime established under EU-Turkey association law. According to this judgment, the EU citizens who visit another Member State where they intend to or are likely to receive services, such as tourists or patients, enjoy the protection of passive freedom of provision of services, whereas this protection was not granted under the Additional Protocol. That protection of the EU citizens is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market. On account of the fundamental differences of both purpose and context between the EU Treaties, on the one hand, and the Association Agreement and its Additional Protocol,

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[250] Judgment of the Court of 31 January 1984 in Joined cases 286/82 and 26/83, Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro. European Court Reports 1984 -00377, ECLI: EU:C:1984:35.

[251] Article 1 (1) of the Directive provided that the provisions of this Directive shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services. The only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit shall be those listed in the Annex to this Directive. Member States shall not introduce new provisions or practices which are more restrictive than those in force at the date of notification of this Directive (Article 4).

on the other, the interpretation of the notion of the freedom to provide services advocated by the Court in 1984 for the EU Treaties as encompassing the passive freedom of provision of services cannot be extended to the 'standstill' clause of the Additional Protocol. The Court concluded that unlike the EU Treaties, the EEC-Turkey Association has a purely economic purpose, the Association Agreement and its Additional Protocol being intended essentially to promote the economic development of Turkey. The development of economic freedoms for the purpose of bringing about the freedom of movement for persons of a general nature which may be compared to that afforded to EU citizens under the EU Treaties is not the object of the Association Agreement. The Court also pointed out that the Association Council, which, in accordance with the Additional Protocol, is required to determine the timetable and rules for the progressive abolition of restrictions on freedom of establishment, has not, to date, adopted any measure which would suggest that substantive progress has been achieved towards the realisation of such freedom. Moreover, there is nothing to indicate that the contracting parties to the Association Agreement and the Additional Protocol envisaged, when signing those documents – that is, 21 and 14 years before the judgment in *Luisi and Carbone* (1984), respectively – freedom of provision of services as including passive freedom of provision of services.

It seems that the Court followed the lines of *Ziebell* case and accepted the reasoning of the Opinion of Advocate General Cruz Villalon in *Demirkan* case, when the Advocate General found that the clause of the Agreement according to which the parties are to "be guided by" EU primary law in order to secure free movement of services, means that the EU law is to serve as a model, but not to be extended in its entirety to the Association Agreement. In the Advocate General's view, despite the fact that the Agreement's final objective is accession to the EU, important differences remain: "the Agreement constitutes a programme for integration and not a complete, immediately applicable and comprehensive treaty" while the EU Treaty envisions a true internal market which "can only develop if citizens are acknowledged and protected also in spheres outside of their economic activities".

In the absence of the development of the freedom to provide services in the EU-Turkey association law and the inaction of the Association Council during the years it would be erroneous to expect that the Court would

put the sign of equality between four freedoms (including freedom to provide services) in the EU law and the EU-Turkey association law. Already in 2011 in *Ziebell* case, the Advocate General Bot compared freedom of movement for Turkish workers under Ankara Agreement and Decision No 1/80, on one hand, and freedom of movement of persons under Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States:

"44. The aim of the Association Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Republic of Turkey and the European Union.

45. Three stages have been established in order to attain this aim. During the preparatory stage, the Republic of Turkey must strengthen its economy so as to enable it to fulfil the obligations which will devolve upon it during the other two stages. The aim of the transitional stage is to establish progressively a customs union between the parties and to align their economic policies. Lastly, the final stage is based on a customs union and entails closer coordination of the economic policies of the Republic of Turkey and the European Union.

46. In view of the aim of the Association Agreement and of these three stages, there is no doubt as to the exclusively economic purpose of the Association Agreement. (…)

54. Whilst it is true that, under the Association Agreement, Turkish nationals enjoy specific rights which confer on them a special status compared with other third-country nationals, the fact remains that they do not have the status of Union citizens and that the legal scheme applicable to them is not comparable to the scheme applicable to Union citizens. Consequently, to apply the strengthened protection arrangements introduced by Directive 2004/38 to Turkish nationals would amount to equating them with Union citizens, which was not the intention of the parties to the Association Agreement." [252]

[252] Opinion of Advocate General Bot delivered on 14 April 2011 in Case C-371/08, Nural Ziebell v Land Baden-Württemberg, ECLI:EU:C:2011:244.

The Court of Justice in Ziebell judgment followed the same way of reasoning:

"72 It follows from that comparison that, unlike the European Union law as it results from Directive 2004/38, the EEC-Turkey Association pursues solely a purely economic objective and is restricted to the gradual achievement of the free movement of workers.

73 By contrast, the very concept of citizenship, as it results from the mere fact that a person holds the nationality of a Member State and not from the fact that that person has the status of a worker, and which, according to the Court's settled case-law, is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82, and Case C-34/09 Ruiz Zambrano [2011] ECR I-0000, paragraph 41), as described in Articles 17 EC to 21 EC, is a feature of European Union law at its current stage of development and justifies the recognition, for Union citizens alone, of guarantees which are considerably strengthened in respect of expulsion, such as those provided for in Article 28(3)(a) of Directive 2004/38.

74 It thus follows from the substantial differences to be found not only in their wording but also in their object and purpose between the rules relating to the EEC-Turkey Association and European Union law concerning citizenship that the two legal schemes in question cannot be considered equivalent, with the result that the scheme providing for protection against expulsion enjoyed by the Union citizens under Article 28(3)(a) of Directive 2004/38 cannot be applied mutatis mutandis for the purpose of determining the meaning and scope of Article 14(1) of Decision No 1/80."

Thomas Vandamme commented Demirkan judgment as putting the end on the "era of 'progressive' case law":

"Starting with judgments like Ziebell, the Court has qualified the Association as a 'purely economic enterprise'. This new appraisal of the Association has not proven to be hollow rhetoric. In Demirkan, it

was used as an argument to deny that the standstill clause on services would also cover the reception of services (so much for 'analogous interpretation'….)."[253]

Thomas Vandamme further considers that "right after Demirkan, the Court embarked on a new strand of case law in which it regarded the standstill clauses as if they provided 'rights' from which the Member States may deviate when justified by overriding reasons of public interest, subject to conditions of suitability and proportionality."

However, it is apparent that the case of Turkish national whose application for a visa for the purposes to visit her relatives in Germany is rather about the visa regime and, in fact, about the reunification of family.[254] It was not an appropriate occasion to test content of the freedom to receive services by Turkish nationals in the EU Member States from the angle of conditions of suitability and proportionality.

It is true, that the Court of Justice in its Judgment of 24 September 2013 in Case C-221/11, *Demirkan*, has given its new interpretation of applicability of Internal Market rules to the EU-Turkish association refusing in this case a possibility of interpretation by analogy:

"44 However, the interpretation given to the provisions of the European Union law, including Treaty provisions, concerning the internal market cannot be automatically applied by analogy to the interpretation of an agreement concluded by the European Union with a non-Member State, unless there are express provisions to that effect laid down by the agreement itself (…).

45 The use in Article 14 of the Association Agreement of the verb 'to be guided by' indicates that the Contracting Parties are not obliged to apply the provisions of the Treaty on the freedom to provide services or indeed

[253] Thomas Vandamme. The Standstill Clause as a Travesty: The ECJ's fresh (yet 'familiar') approach to the EU-Turkey Association. Blogactiv.eu. June 16, 2016- https://acelg.blogactiv.eu/2016/06/16/the-standstill-clause-as-a-travesty-the-ecjs-fresh-yet-familiar-approach-to-the-eu-turkey-association/

[254] "At the centre of the court case was Leyla Ecem Demirkan, a 20-year old Turkish woman from the city of Mersin, now a student in Izmir. When Leyla was a teenager, her mother married a German, Jorg Huber. In October 2007, Leyla wanted to visit her stepfather and applied at the German consulate in Ankara for a visa.2 Her request was denied. She went to court, arguing that Germany's visa requirement for Turkish citizens was illegal to start with, as it conflicted with the rights accorded to Turkish citizens by the 1963 Turkey-EU Association Agreement" - Turkish tourists and European justice. The Demirkan ruling and how Turkey can obtain visa-free travel, p. 3.

those adopted for the implementation of those provisions but simply to consider them as a source of guidance for the measures to be adopted in order to implement the objectives laid down in that agreement."

Demirkan judgment does not allow drawing far reaching conclusions about the end of era of the progressive interpretation of the EU-Turkey association law or association law rules in general. On the contrary, taking by analogy the interpretation of the Euro-Mediterranean Agreements establishing an association with Tunisia and Lebanon in the judgment of the Court of Justice of 24 November 2016 in Case C-464/14, SECIL, we may see that the Court did not apply the same inter-temporary logic with regard to the Internal Market freedoms. The case concerned free movement of capital under the Euro-Mediterranean Agreements in respect of income taxation. In particular, this case-law allows making of conclusion that Article 64(1) TFEU providing a possibility to apply restrictions on free movement of capital which probably existed on 31 December 1993 with regard to third States under the national law of Member States or the Union law cannot be applicable under the association law.

Analogous or progressive interpretation of association law in line with the EU law also follows from the judgment of the Court of Justice of 19 October 2017 in Case C-65/16, *Istanbul Lojistik*, which states that (para. 44) "the interpretation of the provisions of the FEU Treaty in respect of the free movement of goods within the European Union may be transposed to the provisions concerning the free movement of goods within the Customs Union stemming from the EEC-Turkey Agreement."

In the context of freedom of establishment in the association law, it is important to underline, that the case-law of the Court of Justice cited above indicates various possibilities of analogous interpretation. The Court of Justice in the above-mentioned Case C-629/16, CX (paragraphs 52 and 53) admitted that in principle the issue of an authorisation constitutes a restriction on the fundamental principle enshrined in Article 56 TFEU in case where it takes the form of an authorisation issued within the limits of the quota determined under the Austria-Turkey Agreement on road transport or a permit for a single transport of substantial public interest. This results in a restriction of the right of natural or legal persons established in Turkey to provide transport services freely in Austrian territory.

In any case, it does not mean that the rules of freedom to provide services are identical in both legal systems. As the Court held in paragraph 44 of its judgment *SECIL* case concerning dividends received from a company established in a non-member State which is party to the association agreement[255] ,"it must also be borne in mind that, since the Treaty does not extend freedom of establishment to non-member States, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with those states does not enable economic operators who do not fall within the territorial scope of the freedom of establishment to profit from that freedom (judgments of 11 September 2014, *Kronos International*, C-47/12, EU:C:2014:2200, paragraph 53 and the case-law cited, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 31)." From a formal point of view, we also should take into consideration the fact that the corresponding secondary EU legislation is not directly and automatically applicable except it is expressly provided in the association law.

In this respect, The Court of Justice in Case C-37/98, Savas held:

"48. Since the wording of Article 41(1) of the Additional Protocol is almost identical to that of Article 53 of the EC Treaty, it must be regarded as being directly applicable for the same reasons. However, Article 41(1) of the Additional Protocol prohibits the introduction of new national restrictions on the freedom of establishment and right of residence of Turkish nationals as from the date of entry into force of that protocol in the host Member State."

Nevertheless, there are some differences between the provisions of Article 41 (1) of the Additional Protocol and former Article 53 of the EC Treaty: the latter gives national treatment for nationals of other Member States for the purposes of establishment, whereas Article 41 (1) prohibits the introduction of new national restriction. Already in Costa v ENEL case, the Court of Justice concluded that "Article 53 is therefore satisfied so long as no new measure subjects the establishment of nationals of other

[255] This case concerned Portugal, Tunisia and Lebanon, and possibility of relying on Article 64 TFEU concerning remaining restrictions of free movement of capital with non-member States in relation to the EC-Tunisia and EC-Lebanon association agreements.

Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertaking." (…)[256]

The Judgment of the Court of Justice of 16 February 2017 in Case C-507/15, *Agro Foreign Trade & Agency Ltd v Petersime NV*, raised new questions concerning freedom of establishment in the EU-Turkey association law. The case concerned the applicability of the system of protection provided for by Directive 86/653 with regard to a commercial agent established in Turkey, the principal of which is established in a Member State (Belgium), in the light of the obligations of the Republic of Turkey and the European Union with a view to abolishing restrictions on freedom to provide services between them, in the context of the Association Agreement. It was necessary to determine whether the application of Directive 86/653 to commercial agents established in Turkey can follow from the Association Agreement concerning such obligations, namely Article 14 of that agreement and Article 41(1) of the Additional Protocol.

The Court of Justice held in paragraph 38 of the Judgment that "[A]s regards Article 14 of the Association Agreement, it is clear, admittedly, from the wording of that provision as well as from the objective of that agreement, that the principles enshrined in Articles 45 and 46 TFEU, and in the provisions of the Treaty relating to the freedom to provide services, must be extended, so far as possible, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties (judgment of 21 October 2003, *Abatay and Others*, C-317/01 and C-369/01, EU:C:2003:572, paragraph 112 and the case-law cited)." However, as the Court concluded in paragraph 39, "the interpretation given to the provisions of European Union law, including Treaty provisions, concerning the internal market cannot be automatically applied by analogy to the interpretation of an agreement concluded by the European Union with a non-Member State, unless there are express provisions to that effect laid down by the agreement itself (judgment of 24 September 2013, *Demirkan*, C-221/11, EU:C:2013:583, paragraph 44 and the case-law cited)." In that regard, "the Court has already held that the use in Article

[256] Nevertheless, there is some difference between the provisions of Article 41 (1) of Additional protocol and former Article 53 of the EC Treaty: the later gives national treatment for nationals of other Member States for the purposes of establishment, whereas Article 41 (1) prohibits the introduction of new national restriction."Article 53 is therefore satisfied so long as no new measuresubjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertaking." Costa v ENEL, 6/64, Rec. p. 597.

14 of the Association Agreement of the verb 'to be guided by' indicates that the contracting parties are not obliged to apply the provisions of the Treaty on freedom to provide services or indeed those adopted for the implementation of those provisions but simply to consider them as a source of guidance for the measures to be adopted in order to implement the objectives laid down in that agreement" (para. 40).

The reasoning used by the Court in deciding whether a provision of European Union law lends itself to application by analogy under the association law. It was done on the grounds of comparison made between the objective pursued by the Association Agreement and the context of which it forms a part, on the one hand, and those of the European Union law instrument in question, on the other. The ECJ found that "in the context of EU law, the protection of the freedom of establishment and the freedom to provide services, by means of the regime provided for by Directive 86/653 with respect to commercial agents, is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market" (para. 44).

Therefore, as the Court concluded in paragraph 45, "the differences between the Treaties and the Association Agreement concerning the objective pursued by them preclude the system of protection laid down by Directive 86/653 with respect to commercial agents from being held to extend to commercial agents established in Turkey, in the context of that agreement." The fact that the Republic of Turkey transposed that directive into its national law "in no way alters the above conclusion, since such a transposition results not from an obligation imposed by the Association Agreement, but from the will of that third State" (para. 45).[257] The later conclusion raises important question whether voluntary transposition by a candidate State of an act of secondary legislation in accordance with this status of a candidate and in line with the Commission's communications on EU Enlargement Policy and in particular having in

[257] The Court's preliminary ruling in Agro Foreign Trade case concludes: "49 Consequently, a commercial agent established in Turkey, who does not supply services in the Member State concerned, such as the applicant in the main proceedings, does not fall within the personal scope of application of that provision. (…) 52 In view of the foregoing considerations, the answer to the question referred is that Directive 86/653 and the Association Agreement must be interpreted as not precluding national legislation transposing that directive into the law of the Member State concerned, which excludes from its scope of application a commercial agency contract in the context of which the commercial agent is established in Turkey, where it carries out activities under that contract, and the principal is established in that Member State, so that, in such circumstances, the commercial agent cannot rely on rights which that directive guarantees to commercial agents after the termination of such a commercial agency contract".

mind its regular Turkey Reports on the candidate's progress was really without consequences to the rights of Turkish individuals in the EU, or it was a limited case of applicability of Directive relating to self-employed commercial agents within the EU Internal market?

Does it mean that the same approach should be taken with regard to legal nature of all association agreements concluded by the EU and the Member States? The answer may be found in comparing the Ankara Agreement with more recent Euro-Mediterranean Association Agreements concluded by the EU between 1995 and 2005 with seven countries in the southern Mediterranean. These agreements effectively provide a suitable framework for North-South political dialogue. They also serve as a basis for the gradual liberalisation of trade in the Mediterranean area, and set out the conditions for economic, social and cultural cooperation between the EU and each partner country. These agreements do not seem much more advanced and developed, in comparison with Ankara Agreement and all set of the EU-Turkey association law rules. It is interesting to note that with regard to Euro-Mediterranean Association Agreements, the allegedly historic and exclusively economic approach to the EU-Turkey association principles taken by the Court of Justice starting from his Judgment *Demirkan* case was not shared by Advocate General Wathelet in his Opinion of the of 27 January 2016 in Case C-464/14, SECIL (EU: C:2016:52):

"45. As the Court has held on several occasions, the aim of the Euro-Mediterranean Agreements 'is to promote overall cooperation between the Contracting Parties with a view to contributing to the economic and social development of [the third State in question] and helping to strengthen relations between those parties'.

46. Consequently, by introducing provisions for the freedom of establishment and the free movement of capital, the EC-Tunisia and EC-Lebanon Agreements are in line with the underlying principles of the FEU Treaty, and do not pursue objectives which are inconsistent with those pursued by that treaty." [258]

In the *SECIL* case, the referring Portuguese court asked, in essence, whether the provisions of the FEU Treaty relating to the free movement of capital,

[258] Opinion of Advocate General Wathelet in his Opinion of the of 27 January 2016 in Case C-464/14, SECIL (EU: C:2016:52).

as well as the provisions of the EC-Tunisia and EC-Lebanon agreements must be interpreted as precluding the tax treatment granted, in Portugal, to dividends distributed to a company established in that Member State by companies established in non-member States, namely, respectively, the Republic of Tunisia and the Republic of Lebanon.

What lesson may be drawn from SECIL case of interpretation and application of free movement of capital under Euro-Mediterranean Association Agreements and other association agreements in line with the FEU treaty?

The ECJ, in its Judgment of 24 November 2016 in *SECIL* case, has taken as a preliminary point the principle of settled case-law that an international treaty must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. The Court recalled that Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (para. 94). Consequently, according to the settled case-law of the Court, a provision in an agreement concluded by the Union with a non-member State must be regarded as having direct effect where, regard being given to its wording and to the purpose and nature of that agreement, the provision lays down a clear and precise obligation which is not subject, in its implementation or its effects, to the adoption of any subsequent measure.

The right of establishment is linked with the right of entry into the territory of a Member State for the purposes of establishment. The most important ECJ judgments regarding the freedom of establishment with implications on the free movement of persons between Turkey and the Member States of the EU are the *Tum and Dari*, C-16/05[259] , and the *Dogan*, C-138/13[260] .

Tum and Dari case concerns the right to first admission for the self-employed persons. The Court of Justice was asked to interpret Article 41(1) of the Additional Protocol, i.e. whether rules of entry (first admission) into a Member State fall within its scope. The applicants in the case were two Turkish nationals who sought admission on the basis of the Ankara

[259] Judgment of the Court of Justice of 20 September 2007 in Case C-16/05, Tum and Dari, ECLI:EU:C:2007:530.
[260] Judgment of the Court of Justice of 10 July 2014 in Case C-138/13 Dogan, ECLI:EU:C:2014:2066.

Agreement and Article 41(1) of the Protocol. They requested that their applications be considered with reference to the UK 1973 Immigration Rules rather than the more restrictive rules of 1994, which were in force at the time. Their applications were, however, considered under the latter immigration rules, which were much more difficult to fulfil. In case under appeal made by the Secretary of State, the House of Lords referred the matter to the Court of Justice for a preliminary ruling.

The Court of Justice in Tum and Dari ruled that the stand-still clause contained in Article 41(1) did not confer on Turkish nationals a right of entry into the territory of a Member State, since no such right could be derived from the Community law. That right was still governed by national law. At the same time, the Court in Tum and Dari case examined the wording and the aim of Article 41(1), and came to the conclusion that there was nothing to limit its sphere of application. It was clear that the intention was to create conditions conducive to the progressive establishment of the freedom of establishment by way of an absolute prohibition on Member States against introducing any new obstacles to the exercise of that freedom. Therefore, the Court concluded that the standstill clause had to be regarded as applicable to rules relating to the first admission of Turkish nationals into a Member State in the territory of which they intend to exercise their freedom of establishment. Even if in principle the first entry of Turkish nationals to a territory of a Member State is governed by the national law of that State, Member States do not have complete freedom in applying their immigration rules to Turkish nationals intending to establish a business or provide a service. Each Member State needs to determine *ratione temporis* whether its immigration rules currently in force are more restrictive compared to the rules that were applicable when the Additional Protocol entered into force and shall apply the less restrictive rules.

Dogan case concerned the right of Turkish nationals already enjoying the right of establishment to be joined by their family members and whether that right also falls under the scope of the standstill clause under Article 41(1). Mr. Dogan was the managing director of a limited liability company established in Germany of which he was also the majority shareholder. He had a residence permit of unlimited duration since 2002. In 2011, his wife Mrs. Dogan applied to the German embassy in Ankara for a family

reunification visa for herself and two of their children. In addition to other documents required, she submitted a language certificate issued by the Goethe Institute. Her application was dismissed on the ground that she was illiterate and had obtained the grade by randomly answering multiple choice questions and learning three standard sentences by heart for the writing part of the test. After her application for reconsideration was also refused, Mrs. Dogan brought an action before Verwaltungsgericht Berlin arguing that the language requirement infringed the prohibition to introduce new restrictions under Article 41(1).

The Court started its analysis by establishing firstly, that the language requirement was introduced after the Additional Protocol entered into force. The ECJ confirmed its case-law that family reunification constitutes an essential way of making possible the family life of Turkish workers who belong to the labour force of the Member States, and contributes both to improving the quality of their stay and to their integration in those Member States (see judgment in Dülger, C-451/11, EU:C:2012:504, paragraph 42) and held:

"35 The decision of a Turkish national to establish himself in a Member State in order to exercise there a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey.

36 It must therefore be held that legislation such as that at issue in the main proceedings, which makes family reunification more difficult by tightening the conditions of first admission to the territory of the Member State concerned by spouses of Turkish nationals in relation to those conditions applicable when the Additional Protocol entered into force, constitutes a 'new restriction', within the meaning of Article 41(1) of the Additional Protocol,"

The Court of Justice also ruled that conditions more restrictive than those applicable at the date of entry into force of the Additional Protocol, are prohibited, unless they are justified by an overriding reason in the public interest and suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it (see, by analogy, judgment in Demir, C-225/12, EU:C:2013:725, paragraph 40):

"38 In that regard, on the assumption that the grounds set out by the German Government, namely the prevention of forced marriages and the promotion of integration, can constitute overriding reasons in the public interest, it remains the case that a national provision such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case."

Existing rules of the stand-still clause and non-discrimination with regard to freedom of establishment and freedom to provide services between the EU and Turkey may have direct effect. At the same time, there is a need to go further in liberalization in this area and there are many legal possibilities including future decisions of the Association Council. According to the World Bank Report on Turkey, other two options for further steps are possible. One option would allow Turkey to participate in the EU's single market for services under practically the same conditions as the EU member states. For example, the EEA Agreement follows the EU approach in banning measures that restrict the right of establishment or trade in services. In addition, in order to ensure a true expansion of the internal market in those areas, it establishes a new legal and institutional framework that recreates the EU legal framework. Another option would be to conclude an FTA in services. Turkey is participating in the multilateral services negotiations in Geneva. If successful, these would allow for improved market access and national treatment in services trade between Turkey and the EU. The EU has also separately concluded FTAs that include chapters on services. The main provisions of such agreements are normally GATS+ that do not stipulate regulatory convergence. In other words, they are related to market access and national treatment and do not necessarily require adopting additional supporting regulations such as the acquis. Such an agreement would be static if the main legal obligations would be provided in the agreement and there would be no need to adopt additional regulatory obligations unless the parties agreed to develop regulations in specific sectors to facilitate trade. A bilateral agreement could, therefore, be a less deep way to integrate the Turkish and EU services markets because it would not necessarily provide for any substantive harmonization of laws or regulations or any obligations to facilitate services trade such

as mutual recognition agreements. Of course, the precise structure and coverage of any agreement would be subject to negotiation between the parties. So even if an agreement would not foresee full regulatory harmonization (as this, for example, will be taken up in the context of accession negotiations), regulatory principles could still be developed on a sectoral basis or mutual recognition agreements requiring a degree of regulatory harmonization in parallel to market access and national treatment commitments.[261]

The EU-Ukraine Free Trade Agreement gives another good example for progress. EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA) includes a chapter that, unlike classical FTAs, provides for both the freedom of establishment in services and non-services sectors, subject to limited reservations, and the expansion of the internal market for a set of key services sectors once Ukraine effectively implements the acquis, thus providing dynamism. The agreement provides for a right of establishment (as opposed to commercial presence) in services and non-services sectors. This right is subject to a number of reservations identified in a negative list. This approach is unprecedented for the EU and guarantees automatic coverage for new services and further liberalization not listed as exceptions. This is complemented by a process of legislative approximation in financial services, telecommunications services, postal and courier services, and international maritime services. Ukraine will be committed to take over the existing and future acquis in these sectors and, when it has done so, Ukrainian firms will be granted access to the EU internal market for the sectors concerned.

Another example is the rule of national treatment established under the EU-Canada CETA agreement. Article 9.3 of CETA stipulates :

"National treatment

1. Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to its own service suppliers and services.

2. For greater certainty, the treatment accorded by a Party pursuant to paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member

[261] See World bank Report, p. 76-77.

State of the European Union, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to its own service suppliers and services."

Nevertheless, this is not "full national treatment" like in the EU for providers of services accorded by the TFEU since, according to the CETA Annex 9-A, a government of a Member State of the European Union may accord more favourable treatment pursuant to the Treaty on the Functioning of the European Union to those natural persons who are nationals of another Member State of the European Union, or to enterprises formed in accordance with the law of another Member State of the European Union and having their registered office, central administration or principal place of business within the European Union, and to the services supplied by these natural persons or enterprises. Financial services under CETA include services without the requirement of establishment. The same principle of national treatment is applicable.

With regard to the supply of a service through the temporary presence of natural persons (temporary entry), the agreement contains important provisions, notably for intra-corporate transferees, that will facilitate the activities of both European and Canadian professionals and investors. Whenever investment is liberalised, inter-corporate transferees are guaranteed access.

According to the Turkish Industry and Business Association (TUSIAD) 2015 Report, the most significant transformation of the deepened Customs Union will be caused by the opening of the Turkish services industries, which represent, according to the TUSIAD Report almost 70% of the Turkish economy, to EU competition. The essence of liberalization of trade in goods is the elimination of tariff and non-tariff barriers. However, with regard to trade in services, the national legislation and regulatory framework create the greatest impediment to market entry. Hence in trade in services, there are several models for liberalization depending on the degree of legal harmonization agreed between the parties. It is evident that the most ambitious of such models is European Economic Area (EEA) comprising the EU and EFTA members. This model is based on total legal harmonization and the EU acquis adoption, allowing the liberalization of trade in services to be undertaken in ideal circumstances. Due to the complete harmonization of legislation, it is possible to overcome the

impediments to trade caused by legislative and regulatory differences. Nevertheless, this model has a serious handicap in so far as it creates total policy dependency for EFTA nations. In the opposite spectrum of the liberalization of trade in services, with no legislative integration, is the General Agreement on Trade in Services (GATS) model. According to this model which underpins that the World Trade Organization (WTO) led multilateral efforts for the liberalization of trade, all parties commit to lifting barriers to market entry and national treatment resulting from national legislation. If the political disadvantages of the EEA model are more substantial than the economic benefits, using the principles of GATS model for the trade in services with the EU is another option. The disadvantage of the GATS model is that it leads a less advanced form of economic integration compared to the EEA model. For example with this model, more exceptions to the EU Single Market rules can be expected. Especially limitations on the establishment rights and the movement of workers may continue. Complete trade liberalization may not be possible for a range of industries including financial services. Since it does not foresee legal harmonization, this model will not create a particular advantage for the membership talks.

Finally, as it is suggested in the TUSIAD Report, a hybrid model entitled Deep Free Trade Agreement is possible. In areas where legal harmonization is achievable and desirable, parties can move forward with the EEA model, and in areas where legislative integration is not desired, the GATS model would be applied. The EU recently has made a similar agreement with Ukraine. Taking into account all the prevailing political and economic conditions, a Deep FTA may indeed represent the most suitable model for liberalization of trade in services between EU and Turkey.[262]

As it was stated before in this Chapter, the Report of the Senior Officials Working Group (SOWG) on the update of the EU-Turkey customs union and trade relations suggests that the enhancement of the bilateral relations shall cover services, including issues such as the mutual recognition of qualifications to achieve the objectives set out in the Association Agreement in this area. The European Commission Staff Working Document of "Recommendation for a Council Decision authorizing the opening of negotiations with Turkey" also envisages further development of trade relations including trade in services between the EU and Turkey.

[262] A new era for the Customs Union & the business world, p. 8-9.

4.4. Free Movement of Capital

From the point of view of European Union law and especially the rules of Internal Market, the freedom of capital movement has special importance. On one hand, it is one of the four fundamental freedoms along with the freedom of movement of goods, persons and services in the EU. On the other, without the free movement of capital, the other three freedoms would be less significant and less efficient. Free movement of capital is an essential precondition for a stable investment climate, competitiveness and profitable business environment. It is evident that free capital movements are necessary for a harmonious, balanced and sustainable economic development. It should be noted in the first instance, that liberalization of free movement between the EU and Turkey and liberalization of capital market in Turkey made essential contribution to the successful growth of Turkish economy and foreign trade during last decades.

Free movement of capital and payments require that, first, all restrictions should be lifted between Member States and between Member States and third countries and second, that legal and natural persons should be treated equally within the EU. As for the EU-Turkey association law, the first remark could be even disappointing: the provisions on free movement of capital are more modest compared to the provisions on other freedoms. In this area, even a well-known stand-still clause is absent. The Ankara Agreement contained two dispositions concerning free movement of capital (Articles 19 and 20):

"Article 19
The Member States of the Community and Turkey undertake to authorize, in the currency of the country in which the creditor or the beneficiary resides, any payments or transfers connected with the movement of goods, services or capital, and any transfers of capital or earnings, to the extent that the movement of goods, services, capital and persons between them has been liberalized pursuant to this Agreement.

Article 20
The Contracting Parties shall consult each other with a view to facilitating movements of capital between Member States of the Community and Turkey which will further the objectives of this Agreement.

They shall actively seek all means of promoting the investment in Turkey of capital from countries of the Community which can contribute to Turkish economic development.

With respect to arrangements for foreign capital residents of all Member States shall be entitled to all the advantages, in particular as regards currency and taxation, which Turkey accords to any other Member State or to a third country."

Today these dispositions may look rather modest, but in 1963, at the time when the Ankara Agreement was concluded they were not insufficient for movements of capital and payments between the parties. First, Article 19 and 20 reflected the level of development of that freedom within the internal market (at that time single market). The drafters of this disposition took account of the pace of development of movements of capital both in the Community and Turkey. Second, this provision is programmatic with regard to the "objectives of this Agreement", the future development of association. At that time, the basic text of Article 67 of the Treaty of Rome on movement of capital was itself of programmatic nature and provided for transitional period and progressive abolishment of restrictions.[263] the vague character of the provisions of the Ankara Agreement in this area was most probably due to the fact that at that time the EEC Treaty itself did not provide for almost absolute freedom of movement of capital as it is today under the Article 63 TFEU. The EEC Treaty did not require that the restrictions on the movement of capital and payments between Member States and between Member States and third countries simply shall be prohibited as now the Article 63 TFEU requires. At that time and before 1990, many financial operations with other Member States were subject to prior authorization requirements known as 'exchange controls'. The basic requirement set out in Article 67(1) of the "EEC Treaty" was that during the transitional period, Member States should progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested, but only "to the extent necessary

[263] ARTICLE 67
1. During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested.
2. Current payments connected with the movement of capital between Member States shall be freed from all restrictions by the end of the first stage at the latest.

to ensure the proper functioning of the common market." Article 71 EEC required Member States to "endeavour to avoid introducing within the Community any new ex-change restrictions on the movement of capital and current payments connected with such movements, and to endeavour not to make existing rules more restrictive." Article 70 EEC provided that the Council by unanimous vote shall issue directives with regard to free movement of capital with third countries and endeavour to achieve the highest possible degree of liberalization.

Thus the Ankara Agreement and the 1970 Additional Protocol do not contain clear and concrete provisions on liberalization of movements of capital between the parties, or even a kind of a stand-still clause comparable with well-known clauses on services and establishment in the EU-Turkey association law. Whereas the Ankara Agreement does not itself create free movement of capital and payments in the EU-Turkey Association law, Article 63 TFEU expressly prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third countries (i.e. here between EU and Turkey).

It is obvious that from today's perspective, the Ankara Agreement established vague rules in the area of the free movement of capital. However, whereas the Ankara Agreement does not itself create free movement of capital and payments in the EU-Turkey Association law, Article 63 TFEU expressly prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third countries (i.e. between the EU and Turkey too). Since long time, the Union already liberalized capital and payments movements between the Members States and between Member States and third countries. The Council adopted a capital liberalisation directive 88/361/EEC in 1988, providing for the removal of all remaining exchange controls by mid-1990. As part of the drive towards the Economic and Monetary Union, the freedom of capital movements gained the same status as the other Internal Market freedoms with the entry into force of the Maastricht Treaty. From 1 January 1994 not only were all restrictions on capital movements and payments between EU Member States prohibited, but also still some restrictions between EU Member States and third countries were.[264]

[264] See: John A. Usher. The Evolution of the Free Movement of Capital. – Fordham International Law Journal. Vol. 31, Issue 5, 2007,p. 1533 – 1570.

According to the Article 19 of the Ankara Agreement, the Parties undertook to authorize, in the currency of the country in which the creditor or the beneficiary resides, any payments or transfers connected with the movement of goods, services or capital, and any transfers of capital or earnings, to the extent that the movement of goods, services, capital and persons between them has been liberalized pursuant to this Agreement. Under Article 20, the Parties shall consult each other with a view to facilitating movements of capital between Member States of the Community and Turkey.

In addition to the dispositions of the Articles 19 and 20 of Ankara Agreements, the 1970 Additional Protocol provided in its Article 50 (1):

"The Contracting Parties declare their readiness to undertake the liberalization of payments beyond the extent provided for in Article 19 of the Agreement of Association, in so far as their economic situation in general and the state of their balance of payments in particular so permit."

The *acquis communautaire* provided for full liberalization of the movement of capital between the Member States and between the Member States and third countries as of 1 July 1990. This important step of liberalization of single market was one of the prerequisites for the first stage of the development of the European Monetary Union (EMU). Since then, the Member States and the candidate countries should have lifted all restrictions relating to the freedom of capital movements and cross border payments between Member States and between Member States and third countries.

Free movement of capital comprises three closely related issues: free movement of capital, payment systems and prohibition of money laundering. At the same time, the freedom of capital movement could not be achieved without the existence of a well-developed payment system. The acquis communautaire in this area is aimed at the standardization of technical methods and the application of payment systems, which facilitate the free movement of capital. The full liberalization of capital movement should not hinder the application of measures against money laundering.

According to the Capital Movement Directive 88/361/EEC (Annex 1), the free movement of capital means any one of the following movements of capital when carried out on a cross-border basis: foreign direct investment (FDI), including investments which establish or maintain lasting links between a provider of capital (investor) and an enterprise (in effect setting up, taking-over, or acquiring an important stake in a company or institution); real estate investments or purchases; securities investments (e.g. in shares, bonds, bills, unit trusts); granting of loans and credits; and other operations with financial institutions or personal capital operations (gifts, personal loans, inheritances, etc.).

Whereas the Ankara Agreement and the EU-Turkey association law per se does not create free movement of capital and payments in the EU-Turkey relations, the Article 63 TFEU expressly prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third countries. In this respect, the dispositions of the EU-Turkey association law concerning liberalization of capital movements and authorization of any payments and transfers, even in the current status of development, shall be taken into consideration for the purposes of applicability of this.

Under Article 63 TFEU, the movements to and from third countries are to be treated the same way as movements between Member States. It is well known that the current provisions of the EC Treaty including the provisions on capital were drafted with the EMU in mind. Therefore, in principle the same rules apply to all Member States, irrespective of the fact that they do or do not participate in the Monetary Union. There is big difference between the original Article 67 of the EEC and the current Article 63 TFEU. The first of them (Article 67 EEC) merely required a person to be resident in one of the Member States of the EEC in order to rely on the freedom of capital, whereas the second (Article 63 TFEU) makes no reference to such a requirement. Like the provisions relating to the free movement of goods, and in contrast to those relating to services and people, the provisions on capital may be relied on by third country nationals, i.e. by Turkish nationals, both legal and natural. As a general principle, the situation should be the same whether the capital movement is intra-Union, or between a third country (Turkey) and the Union. Nevertheless, in reality the differences remain with respect to third

countries. These differences are stipulated in the TFEU. Article 64 TFEU (ex Article 57 TEC) deals with the possibility of maintaining certain existing restrictions as of 31 December 1993 under national or Community law vis-à-vis third countries. Such restrictions may limit the freedom of capital between Member States and third countries. However, there were no such particular restrictions between the EU Member States and Turkey at that date. Otherwise, the Member States are not required to abolish their existing lawful restrictions. Article 64(1) TFEU, which introduces a "standstill" clause, provides as follows:

"The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets. …"

There is no stand-still clause prohibiting any new restrictions on free movement of capital between the EU and Turkey. Nevertheless, there were no restrictions which existed between the EU, its Member States, on one hand, and Turkey, on the other, which could justify the application of "negative" stand-still clause provided in the Article 64(1) TFEU.

The current Article 65 TFEU (ex Article 58 TEC) gives power to the Commission or Council to adopt a decision allowing restrictive tax measures adopted by a Member State concerning one or more third countries for the purposes of differentiation of situations of taxpayers or prevention of infringements of national law. Article 66 (ex Article 59) provides for the possibility of taking safeguard measures if movements of capital to or from third countries cause serious difficulties for the operation of the Economic and Monetary Union. Whereas the basic Article 63 TFEU (ex Article 56) provides free movement of capital and payments with third countries, these articles provide for possible restrictions and safeguard measures and thus establish possible exceptions for free movement of capital. In reality these exceptions are rarely applicable. Furthermore, Article 64 (ex Article 57 TEC) which is empowering the Council to legislate on those restrictions on capital movements to or from third countries involving direct investment, financial services or the

admission of securities to capital markets, nevertheless makes reference to endeavoring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent. The Council may act to remove such measures. Article 65 (ex Article 58 TEC) stipulates that the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and are compatible with the proper functioning of the internal market. The Council shall act unanimously on the application by a Member State.

In exceptional circumstances, the Council may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.[265]

In the area of common foreign and security policy, the Council may adopt, under Article 215 TFEU and in accordance with Chapter 2 of Title V of the Treaty on European Union, restrictive measures providing for the interruption or reduction of economic and financial relations with one or more third countries or against natural or legal persons and groups or non-State entities. These decisions may include measures limiting capital movement. Council may take urgent measures where Community action to interrupt or reduce economic relations with one or more third countries is required by a common position or in a joint action adopted under the EU provisions regarding a common foreign and security policy, in relation to the movement of capital and payments with regards to the third countries concerned.[266]

All these possibilities of restrictions or safeguard measures may give rise to the conclusion that capital movements to and from third countries seem to be less liberalized than intra-Union movements, notwithstanding that the general principle of Article 63 TEC prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third countries.

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[265] Article 66 (ex Article 59 TEC)
Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

[266] In addition, under general international law and corresponding resolutions of the UN Security Council, the EU Member States by themselves may take according to the decisions of the EU Council or even unilateral measures against a third country with regards to capital movements and payments for grave violations of international law.

At the same time any possibility, even theoretical, of restricting capital movements between the EU and an associated country should conform to the aims and dispositions of the association agreement in force. With regard to the Ankara Agreement, the full respect of its dispositions shall be guaranteed for the purposes of "any payments or transfers connected with the movement of goods, services or capital, and any transfers of capital or earnings" (Article 19) and "facilitating movements of capital between Member States of the Community and Turkey which will further the objectives of this Agreement" (Article 20). The Additional Protocol (Article 50) called for the liberalization of payments beyond the extent provided for in Article 19 of the Agreement of Association. Therefore, the association status of Turkey, and especially the rules and purposes of the Customs Union call for strict interpretation of possible restrictions of capital movements within the framework of the association law. Moreover, as the Court held in the *Association Eglise de Scientologie de Paris* case, derogations from the fundamental principle of the free movement of capital must be interpreted strictly.[267] The character and scope of restrictions to free movement of capital without are under supervision of the EU institutions. Such restrictions could be allowed only in exceptional circumstances.

From the point of view of possible restrictions on free movement of capital and payments, the Judgment of the General Court in *Case T-798/14, DenizBank* represents a special interest in situation when the Council has taken restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine and therefore included the Turkish bank controlled by a Russian bank Sberbank into the category of entities to which the restrictive measures apply. The case concerned prohibitions imposed on the purchase or sale of, the direct or indirect provision of investment services for or assistance in the issuance of, or any other dealing with bonds, equity, or similar financial instruments with a maturity exceeding 90 days, also prohibiting to directly or indirectly make or be part of any arrangement to make new loans or credit with a maturity exceeding 30 days, etc. The General Court concluded that the Council could legitimately find that, in order to attain the objective of protecting Ukraine's territorial integrity, sovereignty and independence, and promoting a peaceful settlement of the crisis, it was appropriate to target not only the major credit institutions or finance development institutions established in Russia with over 50% public ownership or

[267] Case C-54/99, Association Eglise de scientologie de Paris v. Prime Minister [2000] ECR I-1335.

control, but also any legal person, entity or body established outside the European Union owned for more than 50% by such Russian Bank. If entities such as the applicant were not included in the scope of the measures provided for by the contested acts, the Russian entities referred to in annex to those acts could easily circumvent those prohibitions by having them carried out by their subsidiaries or by entities acting on their behalf. According to the Court, it is irrelevant in that regard that the applicant cannot carry out transfers of funds in favour of Sberbank since it is supervised by the Turkish banking regulator. Assuming that is true, it remains the case that the Council could legitimately find that the fact of restricting the access of Sberbank and the entities more than 50% owned by it, such as the applicant, to the EU capital market was likely to contribute to achieving the objective of the contested acts, namely increasing the costs of the actions of the Russian Federation designed to undermine Ukraine's territorial integrity, sovereignty and independence, and promoting a peaceful settlement of the crisis. In the event of financial difficulties incurred by the applicant because of the restrictive measures at issue, it would be for its shareholders and, as a last resort, the Russian State to bail it out, which would accord with that objective. The General Court pointed out that the measures adopted by the Council in the present case consist in targeted economic sanctions, which cannot be considered a total interruption of economic and financial relations with a third country, although the Council has such a power under Article 215 TFEU and cannot be considered to be disproportionate.

The liberalization of movements of capital in the Community,- and in parallel in Turkey - to a great extent went together with the reduction of tariff barriers to trade, convertibility of the currency, and the establishment of the Customs Union with the Community. In addition, the launch and development of privatization programs both in the Member States and Turkey have represented an important step towards increased openness of financial markets. The creation of a regulatory framework for the purposes of restructuring the Turkish economy contributed to this openness. Turkey liberalized its capital account transactions and abandoned the real exchange rate policy already in 1989, opening doors for the flows of international and European capital. The process intensified very quickly, especially after 1990 when Turkey introduced full convertibility to the Turkish Lira. The complete financial liberalization package was adopted in 1989, which removed restrictions on capital controls, thus allowing

foreign investors to invest freely. Additionally, in 1990, Turkey accepted the Articles of Agreement of the International Monetary Fund's (IMF), especially Article VIII, which prohibited restrictions on current payments and discriminatory currency practices, provided for the convertibility of foreign-held balances and thus allowed both residents and non-residents to conduct foreign exchange operations in Turkey and abroad, permitting commercial banks to engage freely in foreign exchange transactions. Finally, the interest rate ceiling on deposits was also removed in 1991.[268]

The screening, or analytical examination of the *acquis communautaire*, has started in 2005 and was carried out jointly by the Commission and Turkey. The European Commission's Turkey Reports show that the Turkish regime on the free movement of capital is to a certain degree aligned with the EU regulations. However, some restrictions still remain.

The European Commission, in its Turkey 2019 Report, repeated main conclusions already made in previous reports (see, for example, 2015, 2016 and subsequent reports). According to the 2019 Report, Turkey is still moderately prepared in the area of free movement of capital. On the other hand, Turkey has already reached a good standard in the payment systems. In the EU, capital and investments must be able to move without restriction and there are common rules for cross-border payments. Banks and other economic operators apply certain rules to support the fight against money laundering and terrorist financing. However, as the 2019 Report states overall, there has been backsliding in this area. Confronted with large capital outflows linked to the currency crisis of August 2018, the authorities imposed restrictions on capital outflows and foreign exchange-denominated transactions. Legislation on the real estate acquisition is not aligned with the acquis. There has been some progress in the fight against money laundering and the financing of terrorism during the reporting period. In addition to addressing the shortcomings set out below, Turkey should pay particular attention in the coming year to: drafting and adopting an action plan to lift restrictions and increase transparency on real estate acquisition by foreigners; further aligning with the acquis by strengthening measures to prevent the misuse of its financial system for the purposes of money laundering and the financing of terrorism.

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[268] See: Rafi Karagöl, Free Movement of Capital in the Context of Turkey's EU Candidature. Ankara Bar Review 2008, especially p. 70 and seq. See also: Witkowska, Janina. Capital Movements Between The European Union And Turkey Within The Integration Processes. - Comparative Economic Research, Volume 17, Number 3, 2014.

On capital movements and payments, Turkey's legislation on real estate acquisition by foreigners remains opaque and does not apply to all EU nationals in a non-discriminatory way. Turkey needs to adopt and implement an action plan to further liberalise the purchase of real estate by foreigners, bringing its laws in line with the acquis. Turkey has eased the conditions for granting Turkish citizenship to foreign investors, who are investing in capital or buying a real estate, by lowering the quantitative criteria (see further down below). Restrictions on foreign ownership remain in place in sectors such as radio and TV broadcasting, transport, education and the electricity market. In the wake of the August 2018 currency crisis, the authorities imposed numerous restrictions on capital movements for residents and nonbanking corporations in particular for transactions denominated in foreign currencies (such as banning the use of foreign currencies in high value transactions (car lease and real estate) and forcing transfers of foreign currency proceeds into domestic currency). Turkey has reached a good standard in payment systems. The central bank and the banking regulatory and supervision agency are the two authorities that can grant licences for payment system operators.[269]

It is without doubt that the remaining barriers to capital movements between Turkey and the EU shall be removed for the purposes of the well-functioning of the association. Liberalization, as far as possible, must be extended to all transactions. At the same time, such remaining restrictions could not be regarded as essential obstacles for the movements of capital and payments between Turkey and the EU Member States. In addition, we should take into consideration the fact that the capital movements to and from third countries seems to be less liberalized than intra-Community movements and, therefore, the freedom of capital movements is far from absolute.[270] As it was argued before, the Turkish regime on the free movement of capital was already liberalised and is to a large degree aligned with the main rules of the *acquis* in this area.

The current status of the legal development of free movement of capital between Turkey and the EU does not create, as it seems, major obstacles for movement of capital and payments between the parties. On the EU side, the basic rules of Article 63 (ex Article 56 TEC) prohibit all restrictions on capital and payments "between Member States and third countries". On the Turkish side, foreign capital residents of all Member States shall

[269] See: Turkey 2019 Report, pp. 65-66.
[270] See: Karagol, op.cit., p.81.

be entitled to all the advantages, in particular as regards currency and taxation, which Turkey accords to any other Member State or to a third country. As for freedom of movement of capital, it is of great importance for foreign investments in Turkey and development of its economic ties with the EU Member States, especially with the big EU economies such as Germany, UK, The Netherlands.

The free trade agreements with third countries concluded by the EU typically consist of the following provisions:

(1) a provision to ensure that payment operations remain unrestricted;

(2) a provision ensuring that transactions related to direct investment made in accordance with the host country or in accordance with the provisions of the respective agreement remain free of restrictions;

(3) a clause allowing for time-limited safeguard measures in case of serious difficulties for the operation of monetary and exchange rate policy; and

(4) in some cases, there is a standstill clause.

In this context, it is interesting to note that the EU-Canada CETA, the most advanced free trade agreement ever concluded by the European Union comprising free movement of goods, services, public procurement, etc., does not include any special provision concerning free movement of capital. In CETA, free movement of capital is dealt with only in two areas: transfer of capital and payments for the purposes of investments (Article 8.13) and free supply of financial services (Article 13.7). It could mean that the drafters of CETA did not see serious obstacles for liberalization of trade relations in the absence of express treaty provisions on free movement of capital between the parties. The same logic could be applicable to EU-Turkey association.

The EEA Agreement is going further providing with the rules on free movement of capital and payment similar to those of the TFEU.[271]

[271] See, in particular its Articles 40 and 41:
Article 40 : Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.
Article 41: Current payments connected with the movement of goods, persons, services or capital between Contracting Parties within the framework of the provisions of this Agreement shall be free of all restrictions.

According to the well established case-law of the Court of Justice "the rules ... prohibiting restrictions on the movement of capital and discrimination are identical, so far as concerns relations between the States party to the EEA Agreement, irrespective of whether they are members of the European Union or members of EFTA, to the rules under EU law regarding relations between the Member States" [272].

In comparison, the EFTA Agreement provides for free movement of capital for the purposes of establishment, i.e. movement of capital relating to the establishment in another Member State's territory of a company or firm of that Member State (Article 28).[273]

In conclusion, capital movement is one of the easiest topics to be adopted during the process of harmonization.[274] Taking into consideration remaining barriers for capital movement in the Turkish legislation, it seems Turkey does not need to make any significant concession for the purposes of full implementation of free movement of capital as one of the main freedoms of internal market. From the point of view of the functioning and development of the EU-Turkey relations, the full liberalization of free movement of capital is a question of future updating of the Ankara Agreement rather than a current problem of the association law.

Taxation questions may fall within the scope of the freedom of establishment or of the free movement of capital, therefore, as far as establishment is concerned, within the scope of Article 41 (1) of the Ankara Agreement and Articles 49 TFEU (freedom of establishment) and 63 TFEU (free movement of goods). According to the body of settled case-law of the Court which may be applied in this case, "the tax treatment of dividends may fall within Article 49 TFEU on freedom of establishment

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[272] See the Opinion of the Advocate General Wathelet of 27 January 2016 in Case C-464/14, SECIL (EU:C:2016:52), paragraph 37.

[273] ARTICLE 28

1. Within the framework of this Chapter, there shall be no restrictions between the Member States on the movement of capital relating to the establishment in another Member State's territory of a company or firm of that Member State.

2. The movement of capital not relating to establishment between the Member States shall be ensured in accordance with the international agreements to which they are parties.

3. The Member States agree to review the present provision within two years after the entry into force of the Agreement amending the Convention establishing the European Free Trade Association of 21 June 2001 in order to broaden the scope of, and ultimately eliminate the remaining restrictions to, the movement of capital.

[274] Karagol, op.cit., p. 85.

and Article 63 TFEU on the free movement of capital." [275] In addition, taxation of goods may fall within the rules of free movement of goods and the Customs Union.

As regards the justification based on the effectiveness of fiscal supervision in the context of capital movements between Member States and third States, according to the case-law of the Court, that justification "can only be accepted where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions in compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State and where, because that non-Member State is not bound under an agreement to provide information, it proves impossible to obtain that information from it".[276]

With regard to tax advantages including tax deduction with third associated countries, the Judgment of the Court of Justice of 24 November 2016 in Case C-464/14, *SECIL*, presents an important step which should be equally applicable in the EU-Turkey relations. The case concerned the refusal to grant by Portuguese tax authorities a full or partial deduction from the beneficiary company's taxable amount of the dividends received by a parent company SECIL established in Portugal which receives dividends from majority-owned companies whose seats were in Tunisia and Lebanon respectively.[277] This is a case of interpretation of Articles 63 to 65 TFEU and the Euro-Mediterranean Agreements concluded with Tunisia and Lebanon. The Euro-Mediterranean Agreements are similar with Ankara Agreement as far as the principles prohibiting restrictions on the movement of capital and discrimination are concerned. Besides, it was a case where Tunisia has concluded with Portugal the Double Taxation Convention as would be the same in an eventual analogous case concerning Turkey and Portugal, since Turkey has double taxation avoidance conventions with all Member States of the EU including

[275] See the Opinion of the Advocate General Wathelet of 27 January 2016 in Case C-464/14, SECIL (EU:C:2016:52), paragraph and Judgment in Test Claimants in the FII Group Litigation (C-35/11, EU:C:2012:707, paragraphs 59-62 and the case-law quoted in the Opinion: judgments in Test Claimants in the FII Group Litigation (C-446/04, EU:C:2006:774, paragraph 36); Haribo Lakritzen Hans Riegel and Österreichische Salinen (C-436/08 and C437/08, EU:C:2011:61, paragraph 33); and Accor (C-310/09, EU:C:2011:581, paragraph 30).

[276] See the Opinion of the Advocate General in SECIL case, paragraph 130.

[277] Judgment of the Court of Justice of 24 November 2016 in Case C-464/14, SECIL (ECLI:EU:C:2016:896).

Portugal.[278] Therefore, the situation, as it would be with Portugal, is just the same: if a resident of a Contracting State, Turkey or Portugal, receives income which, in accordance with this Convention, may be taxed in the other Contracting State, the first mentioned State shall deduct from the income tax of that resident an amount equal to the income tax paid in that other State. However, the amount of the deduction cannot exceed that portion of the income tax calculated before the deduction, corresponding to income which may be taxed in the other State.[279]

As far as Turkey could be concerned in a similar case of tax deduction, the Judgment in Case C-464/14, *SECIL* would mean that (1) where the authorities of the Member State in which the beneficiary company is resident can obtain information from the Republic of Turkey, the State in which the company paying the dividends is resident, and (2) such information therefore would allow tax authorities to verify that the condition relating to the tax liability is satisfied, (3) full or partial deduction from the taxable amount of the company receiving the dividends distributed should be granted. As a result (4), a member State concerned would not be entitled to rely, in this respect, on Article 64(1) TFEU providing a possibility to apply restrictions on free movement of capital with Turkey which probably existed on 31 December 1993 under its national or Union law.

It should be inter alia also noted that Turkey has concluded a series of treaties on the avoidance of double taxation with almost all Member States of the EU (except the Republic of Cyprus). As a result, residents of Turkey and the EU Member States may deduct from their income tax the liability of foreign taxes assessed on foreign income. However, as for Turkey itself, the deductions may not exceed the amount of the tax assessed on such income in Turkey. The Court of Justice of the EU has ruled that, in the absence of an EU-wide measure to eliminate double

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[278] Turkey has concluded big number of treaties for the avoidance of double taxation with: Albania, Algeria, Australia, Azerbaijan, Austria, Bahrain, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Moldova, Mongolia, Montenegro, Morocco, the Netherlands, New Zealand, Northern Cyprus, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, South Africa, Singapore, Slovakia, Slovenia, Spain, Sudan, Syria, Sweden, Tajikistan, Thailand, Tunisia, Turkmenistan, Ukraine, the United Arab Emirates, the United Kingdom, the United States of America, Uzbekistan and Yemen. - https://www.companyformationturkey.com/double-tax-treaties-turkey.

[279] See, for example, the Convention Between The Republic Of Turkey And The Portuguese Republic For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income concluded on 15 December 2006.

taxation, EU countries retain the power to define by double taxation treaty, or unilaterally, the criteria for allocating their power of taxation between them, particularly with a view to eliminating double taxation. Furthermore, EU countries are not obliged under EU law or international law to conclude tax treaties with each other or third countries.

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ECONOMIC DEVELOPMENT FOUNDATION
Publication No: 310

55 years

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