



UvA-DARE (Digital Academic Repository)

Happy Golden Anniversary, EU: Turkey Customs Union

Mathis, J.H.

Publication date

2013

Document Version

Final published version

Published in

Legal Issues of Economic Integration

[Link to publication](#)

Citation for published version (APA):

Mathis, J. H. (2013). Happy Golden Anniversary, EU: Turkey Customs Union. *Legal Issues of Economic Integration*, 40(4), 291-296.

<http://www.kluwerlawonline.com/document.php?id=LEIE2013015>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Legal Issues of Economic Integration
Volume 40, Number 4

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Legal Issues of Economic Integration is published quarterly (February, May, August and November).

Print subscription prices, including postage (2014): EUR 403/USD 538/GBP 296.

Online subscription prices (2014): EUR 373/USD 498/GBP 275. (covers two concurrent users).

Legal Issues of Economic Integration is indexed/abstracted in the *European Access*, *European Legal Journals Index*, *Data Juridica*.

Printed on acid-free paper.

ISSN 1566-6573
© 2013 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to:
Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Board of Editors **Pieter Jan Kuijper**, Chair
Katalin Cseres
Tom Eijsbouts
Annette Schrauwen
René Smits
Enrico Partiti, Associate Editor
James Mathis, Managing Editor

Editorial Advisory Board **Arthur E. Appleton**, Attorney, Geneva
Lorand Bartels, University of Cambridge
Marco Bronckers, University of Leiden
Piet Eeckhout, University College London
Mary Footer, University of Nottingham
Leigh Hancher, Tilburg University
Robert Howse, New York University
Jan Jans, University of Groningen
Bryan Mercurio, Chinese University of Hong Kong
Phedon Nicolaides, European Institute of Public Administration, Maastricht
Christoph Schreuer, University of Vienna
Nico Schrijver, Leiden University
Jacques Steenbergen, University of Leuven
Edwin Vermulst, Attorney, Brussels
Friedl Weiss, University of Vienna
Jan Wouters, University of Leuven

From the Board

Happy Golden Anniversary, EU: Turkey Customs Union

September 2013 marks the fiftieth anniversary of the signing of the European Union (EU) – Turkey customs union.¹ While not the first of the early European Economic Community (EEC) Association agreements (the Greece Association was signed in 1961), it remains the only early Association agreement in force, neither superseded by EU accession nor by any later treaty. While updated by Decision 1/95, the original customs union plan governing bilateral trade in goods remains the primary treaty framework underpinning the substantial and complex economic relationship that has developed between Turkey and the EU.² As time has moved along for both internal and external market developments, the customs union has remained a remarkably static legal entity, and the reality gap between this aged legal framework and the modern economy has increasingly sharpened the anomalies that have inevitably arisen in the legal relationship. Two of these come to mind, one ‘internal’ and one ‘external’.

The first is raised by the fact that the ‘new generation’ template used for the 1995 customs union update with Turkey is no longer ‘new’. On subjects of domestic regulation, the truly new agreements reach far more exhaustively into many more corners of national regulatory space, including among other subjects, intellectual property rights (IP), public procurement, competition policy, Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary measures (SPS) measures,³ trade in services and investment. Turkey and the EU have no treaty framework that binds market access services commitments, including those covering commercial presence (investment) or temporary movement of service

¹ Agreement Establishing an Association between the European Economic Community and Turkey (Ankara Agreement), signed 12 Sep. 1963; Additional Protocol, 23 Nov. 1970. As amended by Decision No. 1/80 of the Association Council, 19 Sep. 1980; and Decision No. 1/95 of the EC-Turkey Association Council of 22 Dec. 1995 on implementing the final phase of the Customs Union (96/142/EC).

² The EU is Turkey’s largest import and export partner. It is the EU’s 7th largest source of imports and 5th in EU export markets. See, ‘EU Summary on Turkey Bilateral Relations’, available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/turkey/>.

³ TBT refers to technical barriers to trade (product standards) and SPS refers to sanitary and phytosanitary measures (food safety measures).

providers.⁴ For public procurement, Decision 1/95 only pledged future negotiations⁵ and while Turkey is not a signatory to the World Trade Organization (WTO) Agreement on Government Procurement, it is not a beneficiary of the EU's commitments under that regime. Intellectual property obligations are treated by Decision 1/95,⁶ except that the entire field of geographical indications (GIs) is absent, a subject notably present and accounted for in new EU trade agreements. Only competition policy and TBT / SPS measures surface as arguably 'modern' in approach. The competition policy section in Decision 1/95, which also followed the model of the new generation agreements, still appears robust when compared to newer EU agreements. TBT measures are dealt with by Turkey's obligation to absorb Community law and the unusual 'one-way' mandatory recognition provision for EU products (including foodstuffs) that have been attested to be in conformity with EU directives.⁷ Finally, the bilateral dispute settlement mechanism, limited as it is to unanimous Association Council resolution and potential referral to the European Court of Justice, provides a museum quality example of EEC external relations antiquity⁸

Yet, while the treaty framework has remained static, Turkey's actual alignment to EU internal market law has proceeded apace as a part of the accession process, even given the delays in opening new chapters for negotiation. As indicated by the Commission in its 2011 Progress Report, 'Alignment is advanced in certain areas, such as free movement of goods, anti-trust policy and State aid, energy, economic and monetary policy, enterprise and industrial policy, consumer protection, statistics, Trans-European Networks, and science and research'.⁹

This exposes the anomaly. The accession process is an alignment by Turkey with EU regulatory regimes that extends far beyond those regulatory obligations incurred by other EU trade partners while they, not on the accession path, secure EU commitments in their reciprocal agreements that go extensively beyond the framework of the EU Turkey customs union. This is in part the result of the

⁴ Articles 13 and 14 of the Ankara agreement indicate that the parties shall be guided the relevant EEC Treaty articles for the right of establishment and free movement of services. To the extent that Turkey or the EU grant new preferential treatment for a WTO GATS mode of supply, that treatment would be governed by GATS Art. 2 MFN in the absence of a notified GATS V agreement. Turkey appears to maintain bilateral investment treaties (BITS) with all members of the EU with the exception of Ireland. See, Turkish Ministry BIT map, available at www.economy.gov.tr/index.cfm?sayfa=trade_agreements&bolu=bilateral.

⁵ Decision 1/95, Art. 48.

⁶ Decision 1/95, Annex 8.

⁷ Decision 1/95, Art. 10.

⁸ Ankara agreement, Art. 25. An arbitration procedure is designated for certain protective, safeguard and rebalancing measures in Decision 1/95, Art. 61.

⁹ EU, Enlargement Strategy Report 2010–2011, Conclusions on Turkey. Areas noted that are not advanced include environment, public procurement, freedom to provide services, social policy and employment and taxation.

structure of the customs union plan with its hints of accession process, reciprocal for trade in goods, but non reciprocal for Turkey's alignment to EU law for other policies, such as trade in services. The accession process of alignment, also going beyond the customs union alignment provisions, is not itself a treaty law framework. It is not a 'trade agreement' and does not have the elements of reciprocity or a bilateral institutional arbitral device for interpreting alignment provisions or resolving disputes. One result of this is that while subjects may be highly aligned, the interpretations governing the EU internal market do not appear to be available to Turkey.¹⁰ Thus, advanced alignment – yes, internal market – no.

The second anomaly, this one external, is raised by the legal form of a customs union itself. Pledged to conform to General Agreement on Tariffs and Trade (GATT) Article XXIV's requirement to apply 'substantially the same' duties and other regulations of commerce to the trade of non-members, Turkey obliges itself in the customs union treaty to align its commercial policy with the EU's autonomous regimes (GSP) and preferential trade agreements, as in, 'Turkey will take the necessary measures and negotiate agreements on mutually advantageous basis with the countries concerned'.¹¹ One need not account for the entire list of recent EU free-trade areas now concluded, concluding or being negotiated to understand that Turkey's task of maintaining external alignment with EU commercial policy is a daunting one. Even assuming that the Turkish trade ministry could handle the load (some have suggested that the Commission is having its own difficulties managing the load of negotiating mandates), how many of these new trade agreement parties will be receptive to Turkey's request for negotiations on 'a mutually advantageous basis' to conclude 'substantially the same' arrangements as those concluded with the EU?¹² These new partners can calculate that Turkey may have to offer some or all of these new trade preferences without reciprocating as Turkey must satisfy its own customs union obligations. And, if such a mutually advantageous negotiation did occur, 'substantially the same' terms would require that Turkey and its new trade partner have similar interests in the same product lines and sectors in order to make the exchanges sufficient for Turkey's EU external alignment.

¹⁰ See by analogy, Case C-547/10, 7 Mar. 2013, *Swiss Confederation v. European Commission, et al.*, paras 78–80. Commenting on the consequences of the Swiss Federation non membership in the European Economic Area, '...by its refusal, the Swiss Confederation did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements ...'.

¹¹ Decision 1/95, Art. 16.

¹² The US has reportedly turned down Turkey's request to negotiate a free-trade area. Financial Times, 'Customs union adds stress to economy's life on the edge, online edition 9 May 2013, available at www.ft.com/intl/cms/s/0/62b03614-ae7e-11e2-bdfd-00144feabdc0.html#axzz2bAtzvfq4.

Like the EU, Turkey also does not have a static trade policy. It explores its own regional interests, somewhat divergent from the EU's, and generates its own free-trade areas.¹³ The EU of course does not have any alignment obligation to Turkey's agreements, but that does not nullify the application of GATT Article XXIV's custom union requirements for a harmonized external regime.¹⁴

The anomaly here is that while a customs union is considered to be a more advanced form of economic integration than a free-trade area for its potential to create internal free circulation and external institutional capacity, the form itself is incredibly inflexible for a longer term relationship between major trading partners, at least when they do not wish to represent a common negotiating presence. This of course would be resolved if Turkey were to join with the EU in its trade negotiations, similar perhaps to how South Africa maintains the South African Customs Union in its external agreements. But, as recently noted by the EU Ambassador to Ankara, '... it is "totally impossible" for a non-member to take part in negotiations with third countries'.¹⁵ Likewise, it is totally impossible for Turkey to unilaterally apply new EU negotiated preferences to the trading partner since this would trigger violations of the GATT (and the GATS) most-favoured nation obligation.

Turkey's accession to the EU would resolve both of these outstanding anomalies. Internal market law would apply for the first one and Turkey would join the EU's external trade agreements for the second. But if we consider that Turkey is now 'in the meantime', what does it mean if the 'meantime' becomes a 'very long time'? At what point do the tensions raised by these anomalies either undermine the quality of free movement within the customs union or jeopardize its legal viability under WTO law? Does this perhaps suggest a new interim arrangement, notably membership by Turkey in the European Economic Area (EEA), which would also resolve both anomalies? Even though Iceland is in the process of acceding to the EU from the EEA, this step by candidate countries along the way to EU membership has been viewed more as a diversionary 'stall' rather than a step. Similarly, a GATS V services agreement, which resolves only one facet of the internal anomaly, is also likely to be perceived as more of a side track than a stop along the way.

One recognizes that the anomalies posed here are only about 'economic integration'; that political and social developments in the EU and Turkey frame a larger context that truly drives this economic cart. But, if one acknowledges that

¹³ After the EU, Turkey's major export markets are, Iraq, Russia, USA, UAE and Iran.

¹⁴ Ironically, the phrase 'substantially the same duties and other regulations of commerce' was the subject of interpretation by the Appellate Body in the *Turkey – Textiles* case (WT/DS34/AB/R), there the AB noting at para. 50 that '...something closely approximating "sameness" is required...'

¹⁵ Financial Times, *supra* n. 12.

strong economic institutions have served as one European means of resolving (or sidestepping) political and social history, then it can also be considered that ‘weak’ systems drifting past their sell-by date are not likely to contribute to that.

This brings us to the ‘do nothing’ option, the current and favoured course of least resistance and therefore, the viable one as long as accession remains Turkey’s goal. After all, the Ankara agreement has already had a fifty-year run. So, happy anniversary EU – Turkey customs union, and (apparently), best wishes for many more to come.

JHM,
August 2013.

[A] Aim of the Journal

Legal Issues of Economic Integration publishes thought-provoking articles, case-notes and book reviews on European and international economic integration. The journal includes contributions from regarded practitioners, academics, and legal representatives of international economic organizations, and aims to provide a discussion of the legal choices that are raised by the process of economic liberalization. It compares European and other regional systems, and draws the developments into the larger framework of the World Trade Organisation and other international bodies.

[B] Contact Details

Manuscripts should be submitted to the Managing Editor, James Mathis.

E-mail address: J.H.Mathis@uva.nl

[C] Submission Guidelines

- [1] Manuscripts should be submitted electronically, in Word format, via e-mail.
- [2] Submitted manuscripts are understood to be final versions. They must not have been published or submitted for publication elsewhere.
- [3] Articles should not exceed 10,000 words.
- [4] Only articles in English will be considered for publication. Manuscripts should be written in standard English, while using 'ize' and 'ization' instead of 'ise' and 'isation'. Preferred reference source is the Oxford English Dictionary. However, in case of quotations the original spelling should be maintained. In case the complete article is written by an American author, US spelling may also be used.
- [5] The article should contain an abstract, a short summary of about 200 words. This abstract will also be added to the free search zone of the Kluwer Online database.
- [6] A brief biographical note, including both the current affiliation as well as the e-mail address of the author(s), should be provided in the first footnote of the manuscript.
- [7] An article title should be concise, with a maximum of 70 characters.
- [8] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
- [9] A bibliography including book, journal and case citations is welcome.
- [10] Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Tables should be numbered and should include concise titles.
- [11] Heading levels should be clearly indicated.
- [12] The editors invite correspondence for publication (500 words or less) in response to published articles or reviews, or concerning topics of interest to our readers.
- [13] For further information on style, see the House Style Guide on the website:
www.kluwerlaw.com/ContactUs/

[D] Review Process

- [1] Legal Issues of Economic Integration provides a process of peer review for articles. Decisions regarding publication are made by academic staff of the University and outside experts.
- [2] Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision.
- [2] The journal's policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally referred for review, this period may be extended.
- [3] The editors reserve the right to make alterations as to style, punctuation, grammar etc.
- [4] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

[E] Copyright

- [1] Publication in the journal is subject to authors signing a 'Consent to Publish and Transfer of Copyright' form.
- [2] The following rights remain reserved to the author: the right to make copies and distribute copies (including via e-mail) of the contribution for own personal use, including for own classroom teaching use and to research colleagues, for personal use by such colleagues, and the right to present the contribution at meetings or conferences and to distribute copies of the contribution to the delegates attending the meeting; the right to post the contribution on the author's personal or institutional web site or server, provided acknowledgement is given to the original source of publication; for the author's employer, if the contribution is a 'work for hire', made within the scope of the author's employment, the right to use all or part of the contribution for other intra-company use (e.g. training), including by posting the contribution on secure, internal corporate intranets; and the right to use the contribution for his/her further career by including the contribution in other publications such as a dissertation and/or a collection of articles provided acknowledgement is given to the original source of publication.
- [3] The author shall receive for the rights granted a free copy of the issue of the journal in which the article is published, plus a PDF file of his/her article.