



## POLICY INSIGHTS

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# Turkey and the Codification of Autocracy

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## Summary

Turkey's Parliament has approved a constitutional reform bill that will come into effect if approved in the national referendum on 16 April 2017. This controversial package seeks to replace the current parliamentary system with a fully fledged executive presidential system, without checks and balances. If President Erdoğan's constitutional reform bill is approved, it will centralise power around the presidency and the current separation of powers between the legislative, executive and judicial branches will cease to be. This raises the question of whether Turkey, with its new constitution, will continue to satisfy the Copenhagen criteria for EU membership.

Most EU leaders and institutions have remained conspicuously silent on the matter of constitutional 'reform' in Turkey. Considering the country's backsliding on compliance with the Copenhagen political criteria, the authors of this paper argue that it is time for the EU to deliver a strong message that draws attention to the undemocratic nature of the amendments and the possibility of suspending accession talks if the bill is passed. The EU's red line on the reintroduction of the death penalty should not become a red herring to divert attention from the deeply problematic constitutional 'reform' process. Similarly, Turkey's strategic importance should not override the Union's core democratic principles.

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## 1. Introduction

The failed military coup of 15 July 2016 left 241 people dead and 2,196 wounded, and has become a turning point in Turkey's political history. In the immediate aftermath of the attempt, President Erdoğan declared a three-month state of emergency, which has been extended for up to 12 months. Now ruling via executive decrees, the government has cracked down on the country's military, police force, academia, judiciary, education system, civil service, media and business community (see Appendix). Almost 130,000 people have been sacked, 45,000 arrested and more than 92,000 detained.<sup>1</sup>

Meanwhile, Turkey's internal security challenges have multiplied since the collapse of the peace process between the government and the Kurds in July 2015. Mounting violence in the south-east of the country and various terrorist attacks in metropolitan areas have also left at least 2,571 civilians, state security forces and PKK militants dead.<sup>2</sup> The terrorist threat to Turkey is not limited to Kurdish separatists. The so-called Islamic State has also struck on Turkish soil, as both the cause and effect of Ankara's policy towards Syria and its military intervention in that country under the codename Operation Euphrates Shield. Turkey, in cooperation with Russia and Iran, has recently taken steps to restart negotiations for a peace process in Syria. Turkey hosts nearly 2 million refugees from the war in Syria.

During this period of high tension on the domestic and external front, the President's Justice and Development Party (AKP) has revived the constitutional reform package that was put on hold in December 2013. The proposed amendments met strong opposition in parliament but were nevertheless approved by an AKP-led majority on 21 January 2017.<sup>3</sup> The president endorsed the reform bill in February and a referendum is scheduled for 16 April 2017. This controversial package seeks to replace the current parliamentary system with a presidential one – of the autocratic kind. This raises the question of whether Turkey, with its new constitution, will continue to satisfy the Copenhagen political criteria, which is the *conditio sine qua non* for any candidate country to remain in the EU's pre-accession process. The short answer is 'No'. This view is supported by the findings of the Venice Commission – the Council of Europe's advisory body on constitutional matters, whose opinions on the Turkish

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<sup>1</sup> The website <http://turkeypurge.com> tracks the numbers in several categories. These figures differ from the official numbers included in the executive decrees presented in the Appendix, partially as a result of differences in classification. Rights groups have reported a sharp increase in cases of torture, sexual abuse and other forms of ill-treatment in detention, as well as violations of detainees' right to judicial protection. See, e.g., Amnesty International, "Annual Report 2016/17" ([www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/](http://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/)); Human Rights Watch, "A Blank Check: Turkey's Post-Coup Suspension of Safeguards against Torture", October 2016 ([www.hrw.org/sites/default/files/report\\_pdf/turkey1016\\_web.pdf](http://www.hrw.org/sites/default/files/report_pdf/turkey1016_web.pdf)).

<sup>2</sup> International Crisis Group ([www.crisisgroup.be/interactives/turkey/](http://www.crisisgroup.be/interactives/turkey/)).

<sup>3</sup> Members of the Nationalist Movement Party (MHP) supported the vote, the procedure of which was riddled with irregularities ([www.hurriyetdailynews.com/secret-ballot-debate-grows-as-charter-talks-proceed.aspx?PageID=238&NID=108381&NewsCatID=338](http://www.hurriyetdailynews.com/secret-ballot-debate-grows-as-charter-talks-proceed.aspx?PageID=238&NID=108381&NewsCatID=338)).

constitutional amendments, freedom of the media, and peace judges were adopted on 10 March 2017.<sup>4</sup>

## 2. Constitutional Changes

For years, the AK Party has railed against the current constitution of 1982, which was written under military tutelage. In fact, the AK Party's unrelenting push for reform raised hopes in society for the first-ever civilian constitution in Turkish history. With the aim of establishing a stable democracy with civilian control over the military, the AKP passed a series of constitutional amendments during its first time in power in 2002. Heeding EU demands, these reforms saw the abolition of the death penalty and an increased level of democratic freedoms and human rights protection. The direct election of the president, introduced in a constitutional amendment in 2007, turned Turkey's parliamentary system into a semi-presidential one. Further attempts to bolster the power of the president ran aground over the AKP's determination to bring the military to heel in the 'Sledgehammer' and 'Ergenekon' cases, named after alleged military coup plots in 2003 and 2007, respectively. Both cases were procedurally flawed and accompanied by a witch-hunt among the armed forces. The AKP's concomitant attempts at constitutional reform were suspended in 2013 due to the political fallout of the crackdown on demonstrators at Gezi Park, and corruption scandals which implicated members of (then Prime Minister) Erdoğan's government, family and circle of cronies. Declaring his government the victim of a plot designed by a 'parallel state', Erdoğan muzzled the media, dismissed and arrested thousands of police, prosecutors and judges, thereby evading justice. This crackdown escalated into a massive purge in the wake of the failed military coup of July 2016. It is in this context that the AKP, with the support of the Nationalist Movement Party (MHP), submitted a draft bill to parliament introducing a fully fledged executive presidential system.

The constitutional reform package, which comprises 18 articles,<sup>5</sup> projects the accumulation of so much power in the position of the president that, if the bill passes in the referendum in April – which polls indicate it will, the current separation of powers between the legislative, executive and judicial branches will be lost. Rather than introducing a "Turkish-style"

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<sup>4</sup> See the website of the Venice Commission of the Council of Europe ([www.venice.coe.int/webforms/events/?lang=EN](http://www.venice.coe.int/webforms/events/?lang=EN)). The Venice Commission had issued earlier reports about constitutional reform in Turkey. See Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, CDL-AD(2009)006; and Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors of Turkey, CDL-AD(2010)042. The Venice Commission also issued an opinion in the wake of the constitutional amendment enacted on 20 May 2016, by which the parliamentary immunity of several members of parliament was lifted, and which was followed by the detention of in November 2016 of the president and several deputies of the second-largest and pro-Kurdish opposition party HDP. See Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution of Turkey (parliamentary inviolability), CDL-AD(2016)027.

<sup>5</sup> Venice Commission, Turkey: Unofficial Translation of the Amendments to the Constitution, Strasbourg, 6 February 2017, CDL-REF(2017)005; see also CDL-REF(2017)003 and 018.

presidential system akin to those in France and the US, the constitutional amendments represent the codification of autocracy, pure and simple.<sup>6</sup>

## 2.1 Legislative power

Under the current constitution,<sup>7</sup> the legislative power is vested in the Grand National Assembly of Turkey (TGNA). The entry into force of the proposed amendments will see a demonstrable decline in the powers of parliament, thereby damaging the system of checks and balances. This decline starts with parliament's powers of inquiry and debate with the executive.

<p><b>Parliament's Powers of Inquiry</b></p> <p>The TGNA currently exercises its supervisory power by means of oral and written questions, parliamentary inquiry, general debate, censure and parliamentary investigations (Article 98). The duties and powers of parliament are to authorise and scrutinise the Council of Ministers and ministers individually (Article 87). Parliamentary investigation may be requested against the prime minister or ministers through a motion tabled by at least one-tenth of the total members of the TGNA (Article 100, to be abolished). The President of the Republic may be impeached for high treason on the proposal of at least one-third of the total number of members of the TGNA and by a decision of at least three-quarters of the total number of members (Article 105).</p>	
<p><b>Parliament's powers of inquiry decrease</b></p> <p>In the proposed amendments, the TGNA must exercise its powers of acquiring information and supervision by means of parliamentary inquiry, general debate, parliamentary investigations and written questions. The right to oral questions will be abolished. In the proposed amendments, vice-presidents and ministers will be accountable to the president and parliamentary investigation may be requested against them through a motion tabled by an absolute majority of the total number of members of the TGNA. The assembly may decide to launch an investigation with at least three-fifths majority of the total number of members, by secret ballot. The TGNA may take a decision to refer to the Supreme Court with two-thirds majority of the total number of members by secret ballot (Article 106). Parliamentary investigations may be requested claiming that the president has committed a crime through a motion tabled by an absolute majority of the total number of members of the TGNA. Three-fifths majority of the total number of members will be required to launch the investigation and two-thirds majority will be required to refer to the Supreme Court (Article 105).</p>	

The Turkish parliament's role in scrutinising government will be further reduced with the shift of the right of investiture and the dismissal of ministers. In fact, both the status and the structure of the cabinet will change.

<sup>6</sup> Recep Tayyip Erdoğan has been keen to pronounce that a "Turkish-style" presidential system is needed ([www.hurriyetdailynews.com/turkish-style-presidential-system-needed-erdogan-repeats.aspx?pageID=238&nID=78988&NewsCatID=338](http://www.hurriyetdailynews.com/turkish-style-presidential-system-needed-erdogan-repeats.aspx?pageID=238&nID=78988&NewsCatID=338)).

<sup>7</sup> Constitution of the Republic of Turkey ([https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf)).

### Parliament's Power of Scrutiny

A vote of confidence for the Council of Ministers will be held before it takes office (Article 110, to be abolished); if the prime minister deems it necessary, there may be another vote of confidence while the ministers are in office (Article 111, to be abolished). A motion of censure will be tabled on behalf of a political party group or by the signature of at least 20 deputies. In order to unseat the Council of Ministers or a minister, an absolute majority vote of the total number of members is required, in which only the votes of no-confidence may be counted (Article 99, to be abolished).

### Parliament's power to scrutinise government shifts to the president



In future, there will be no Council of Ministers (Article 109, to be abolished). The president will appoint and dismiss vice-presidents and ministers (Article 104).

What is more, under the proposed amendments the president's right to retain ties to a political party would negate the rule of impartiality and give him or her broad powers to control parliament and its agenda. The distinction between the executive and legislative branches would be blurred.

### Legislative Powers and Party Membership

Under the current constitution, if the president-elect is a member of a party, his/her relationship with that party would be severed and his/her membership of the TGNA would cease (Article 101).

### The president acquires legislative powers



In the proposed changes, if a deputy is elected as president, his/her membership of the TGNA would cease. The first part of Article 101 is deleted, however, thus granting the president the right to act as a member – or even the leader – of a political party. According to the amended Article 77, parliamentary and presidential elections would henceforth take place simultaneously, diminishing chances of co-habitation – and thus the separation of powers.

In future, the power to legislate would still be vested in the TGNA but the president would also obtain a right to rule by means of decree. While this right does not extend to categories of basic rights and freedoms, political rights and duties,<sup>8</sup> the trend of legislative powers flowing to the presidency is confirmed.

<sup>8</sup> i.e., the basic rights and freedoms enshrined in the first and second chapters of the second part of the current constitution, as well as the political rights and duties laid down in the fourth chapter. Areas unregulated by law can be covered by presidential decrees.

### Duties and Powers of the TGNA

The duties and powers of the TGNA are to enact, amend and repeal laws and to issue decrees having the force of law on certain matters (Article 87).

#### Parliament's power to issue decrees shifts to the president



Parliament's power to issue decrees having the force of law is removed from the amended Article 87. The head of state may issue presidential decrees on matters of executive power. In the event of conflict between presidential decrees and existing laws, the latter would prevail. The president may issue by-laws to ensure the implementation of laws, providing that they are not contrary to these laws and regulations (amended Article 104).

## 2.2 Executive power

The draft bill allows for the creation of vice-presidential positions. The abolition of the office of prime minister and that of the cabinet would give the president the unsupervised power to appoint and dismiss ministers and vice-presidents.

### Powers of Appointment

Under the current constitution, ministers are appointed and dismissed by the president upon the proposal of the prime minister (Article 109, to be abolished).

#### The prime minister's powers shift to the president



In the proposed amendments, the post of prime minister is annulled (Article 109, to be abolished). Future ministers would be appointed and dismissed by the president (amended Article 104).

Moreover, the president would gain the almost unfettered power to establish the budget.

### Budgetary Powers

The Council of Ministers submits to the TGNA a budget bill and report indicating the national budgetary estimates (Article 162, to be abolished).

#### Government's budgetary powers move to the president




According to the amended Article 161, the president must submit the central government's budget bill to the TGNA's Budget Committee. The amendment is silent on what happens if the budget proposal is rejected in the plenary. In that case, the president could arguably still dispose of the re-evaluated budget of the previous year, thus bypassing parliament. The TGNA could only block such a move by dissolving itself and triggering new presidential elections.

Also, responsibility for national security policies would move from the government to the president.

**National Security Policies**

In the current constitution, the Council of Ministers, to which the National Security Council reports, is responsible to the TGNA for the national security policies and the preparation of the armed forces for the defence of the country (Articles 104, 117 and 118).


**Government's responsibility for national security policies shifts to the president** 

According to the new draft constitution, it would be the president who “determines the national security policies and takes the necessary measures” (amended Article 104) and who would be responsible to the TGNA (amended Article 117). The National Security Council would report to the president (amended Article 118). Its advisory role would remain unchanged but instead of its organisation and duties being regulated by law, they would henceforth be regulated by presidential decree.

The president will be granted the exclusive power to declare a state of emergency.

**Declaration of a State of Emergency**

Under the current constitution, the Council of Ministers, meeting under the chairmanship of the president, after consultation with the National Security Council, may declare a state of emergency (Article 120, to be abolished).

**Only the president can declare a state of emergency** 

In future, the president alone would decide on the declaration of a state of emergency and the issuing of the necessary decrees (amended Article 119), i.e. without the limitations set forth in Article 104 (about basic rights and freedoms, political rights and duties).

All in all, this new constitution would accumulate and invest an excessive amount of executive power in the office of the president.

### 2.3 Judicial power

In any parliamentary and presidential system, the judiciary has to be fully independent to be able to check, and if necessary vote down, acts adopted by the executive and the legislative. While the draft constitutional package abolishes the system of military courts (Article 145), a change which ought to be welcomed, the amendments are neither absolute (special disciplinary courts may remain in the armed forces, cf. Article 142(2)), nor do they prevent the transfer of jurisdiction to civil courts from falling under the control of the president.

The draft bill introduces other changes that limit the judicial independence vis-à-vis the president. For instance, the competence of the Council of State to review draft legislation proposed by the Council of Ministers has been removed. Conversely, the advisory body has not been given the competence to give its opinion on presidential decrees, which would have been desirable in view of the potential conflicts with existing laws.

Also, the proposed amendments allow the president to tighten his or her grip on the (High) Council of Judges and Prosecutors, which performs, inter alia, a disciplinary function in the legal system in Turkey.

#### Appointment of the Judiciary

Under the current constitution, the president appoints three of the 22 regular members of the Council of Judges and Prosecutors. Seven members are appointed by the TGNA; seven are chosen by administrative judges and public prosecutors; three more are elected. The President of the Council is the Minister of Justice. The Undersecretary for Justice is an *ex officio* member of the Council (Article 159).

#### Judicial power diminishes and moves to the executive and legislative

In the proposed amendments, the Council of Judges and Prosecutors would be reduced to 13 members, four of which would be appointed by the president. The Minister of Justice and his/her Undersecretary would remain the president, resp. an *ex officio* member of the Council, but under the draft bill both would be appointed by the president in the government. The TGNA would appoint the other seven members of the High Council (amended Article 159). If the president hails from a political party that has the majority in parliament, then a single political family would be able to appoint all members of the High Council.

The Council of Judges and Prosecutors is also responsible for the election of members of the Court of Cassation and the Council of State, which, in turn, nominate candidates for the Constitutional Court. Any greater influence of the president on the High Council would thus have a knock-on effect on the composition of the Constitutional Court.

#### Constitutional Court Powers

Currently, the Constitutional Court checks laws empowering the Council of Ministers to issue decrees having the force of law (Article 148).

#### Constitutional Court's jurisdiction is restricted

The Council of Ministers would no longer be able to issue decrees having the force of law (amended Article 87) and the president would not need an empowering law when issuing his or her decrees (amended Article 104). Under the amendments, the Constitutional Court would lose the possibility to check for potential conflicts between presidential and existing laws.



From the foregoing it is clear that the proposed constitutional reform package represents a retreat from democratic values in Turkey and violates the principle of the separation of powers. The envisaged “Turkish-style” presidential system is a step back from the rule of law; if enacted the new constitution will codify the law of the ruler. This begs the question whether Turkey, with its new constitution, would still satisfy the political criteria for EU membership.

### 3. Political Criteria for EU Membership

The promotion of democracy, human rights and the rule of law was not an aim proclaimed in the constituent treaties of the European Communities (EC), or a prerequisite for joining them. Nevertheless, compliance with such standards could be inferred as a necessary condition for membership, in that the original members were all democracies, although in the cases of Italy and West Germany, relatively fledgling ones. Accession negotiations with Greece, Portugal and Spain were only opened in the mid-1970s, after the respective authoritarian regimes had collapsed and these states had embarked upon a course of democratisation.

While the limited scope of membership conditionality was enough to allow the EC/EU to expand to 15 members without undermining its functioning, the prospect of the ‘reunification of Europe’ (after the fall of the iron curtain and the entry of ten or more mostly poor post-communist states) triggered the June 1993 European Council Summit in Copenhagen to develop more stringent criteria to assess the level of preparedness of both these candidates and the EU. Since 1993, EU membership requires, inter alia, that candidate countries have “achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>9</sup> These conditions are commonly referred to as the Copenhagen political criteria.<sup>10</sup>

The Treaty of Amsterdam included a reference in the new Article 49 TEU calling on “any European State” applying for EU membership to respect the Union’s founding principles set out in Article 6(1) TEU (liberty, democracy, human rights and fundamental freedoms and the rule of law). The Treaty of Amsterdam entered into force in 1999, thereby codifying the essence of the first Copenhagen criterion but leaving out respect for and protection of minorities.

Building on the demonstrative list of standards developed in its “Conclusions on the principle of conditionality governing the development of the European Union’s relations with certain countries of south-east Europe” of 29 April 1997, the Council has helped to clarify the normative content of the first Copenhagen criterion while turning the concept of EU membership conditionality into a multi-dimensional instrument aimed at reform and integration:

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<sup>9</sup> See Bulletin EU 6-1993, point 13.

<sup>10</sup> For backgrounds and analysis, e.g., C. Hillion, “The Copenhagen Criteria and Their Progeny”, in C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, 2004; and M. Emerson, S. Aydin, J. De Clerck-Sachsse and G. Noutcheva, “Just what is this ‘Absorption Capacity’ of the EU?”, CEPS Policy Brief No. 113, September 2006.

(i) Democratic principles: representative government and accountable executive; government and public authorities to act in a manner consistent with the constitution and the law; separation of powers (government, administration, judiciary); free and fair elections at reasonable intervals by secret ballot.

(ii) Human rights, rule of law: freedom of expression, including independent media; right of assembly and demonstration; right of association; right to privacy, family, home and correspondence; right to property; effective means of redress against administrative decisions; access to courts and right to fair trial; equality before the law and equal protection by the law; freedom from inhuman or degrading treatment and arbitrary arrest.

(iii) Respect for and protection of minorities: right to establish and maintain their own educational, cultural and religious institutions, organisations or associations; adequate opportunities for minorities to use their own language before courts and public authorities; adequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority.<sup>11</sup>

In the latest development of the contents of EU membership conditionality, the Lisbon Treaty has amended Article 49 TEU to refer to Article 2 TEU, which now includes an explicit reference to the respect for minority rights and clarifies some of the principles upon which the open and democratic societies of EU member states are based:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Another, more striking, amendment of the EU membership clause concerns the addition of the following sentence to the first paragraph:

The conditions of eligibility agreed upon by the European Council shall be taken into account.

This sentence not only codifies the criteria developed by the 1993 European Council at Copenhagen; its open-ended wording also suggests that further changes to the contents of EU membership conditionality decided upon in future European Council meetings should not be excluded from the scope of Article 49 TEU.

In its annual reports the European Commission closely monitors progress in fulfilling the EU's membership conditions. Through screening processes in the pre-accession phase, the Commission identifies the main weaknesses and technical adaptations needed by the candidate countries, sets out priorities and benchmarks accordingly and directs EU funds towards relevant projects.

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<sup>11</sup> See Bulletin EU 4-1997, point 2.2.1.

#### 4. Writing on the Wall

Turkey, which was attributed the status of ‘candidate country’ by the December 1999 European Council meeting in Helsinki,<sup>12</sup> has been closely scrutinised by the European Commission ever since Ankara submitted its application for membership in April 1987. Several positive progress reports by the Commission, and Ankara’s expressed intention to continue its reforms towards compliance with the Copenhagen criteria, led the December 2002 European Council to envisage accession negotiations if and when Turkey fulfilled the political criteria for EU membership.<sup>13</sup> After the Commission recommended the opening of accession negotiations in October 2004,<sup>14</sup> the European Council of December declared the Copenhagen political criteria “sufficiently” fulfilled to start membership talks on 3 October 2005, subject to the further conditions that Turkey enact amendments to six statutes relating mainly to the judiciary and that it recognise the Republic of Cyprus by signing the Adaptation Protocol to the 1963 Association Agreement.<sup>15</sup>

Despite substantial progress in various areas, mainly economic, the necessity of further reforms in the areas of justice, rule of law and human rights has always been prominent on the Commission’s pre-accession agenda for Turkey. The gradual regression in complying with the Copenhagen political criteria has been well documented by the Commission in successive annual reports. In its most recent report on Turkey, the European Commission underlined, *inter alia*, the deterioration in the security situation in the south-east of the country, widespread fundamental human rights violations due to disproportionate anti-terror measures, and a “backsliding” in the independence of judiciary with “extensive changes to the structures and compositions of high courts”.<sup>16</sup> The Commission also qualified parliament’s role in law-making as “limited” and its oversight of the executive as “weak” due to political polarisation. It is fair to say that the constitutional reform package represents the culmination of this descent into autocracy.

The argument that a presidential constitutional system may not necessarily lead to autocratic behaviour should be rejected. For years, it has been plain for all to see that it is Erdogan’s intention to legitimise and codify his slide into authoritarianism by way of constitutional reform, sanctioned by popular mandate. The proposed constitutional amendments have been pushed through under the state of emergency by excessive use of urgent procedures with insufficient consultation and minimal input from experts. The mass liquidation of media outlets

<sup>12</sup> See Bulletin EU 12-1999, point 12. For background analysis into this political decision, see W. Park, “Turkey’s European Union Candidacy: From Luxembourg to Helsinki – to Ankara”, *Mediterranean Politics* No. 5, Vol. 3, 2000.

<sup>13</sup> See Bulletin EU-12-2002, point 19.

<sup>14</sup> European Commission, Recommendation on Turkey’s progress towards accession, COM (2004) 656 final, at 9.

<sup>15</sup> See Bulletin EU 12-2004, points 19 and 22.

<sup>16</sup> European Commission, Turkey Report, 9 November 2016, SWD(2016) 366, ([https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_turkey.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf)).

(149 were shut down) and the arrest of 162 journalists, which constitutes a breach of a Copenhagen political sub-criterion, have made informed public debate about the constitutional reform package impossible, thus eviscerating any prospect of a free and fair plebiscite, and adding a second violation of EU membership conditions to the list.<sup>17</sup>

Whereas the electoral and other fundamental rights could, in theory, be easily restored after the enactment of the new constitution, enacting the substance of the proposed amendments would create structural changes which, in practice, are even less likely to be reversed any time soon. By transferring executive and legislative powers to the president and increasing his or her control over the judiciary, the draft bill would not only hollow out existing weaknesses in the *trias politica* to the extent that these institutions are rendered unstable (a third violation of the Copenhagen political criteria), it would also lead to the almost complete erosion of the separation of powers in Turkey. For this reason, too, the controversial constitutional reform, which seeks to replace Turkey's parliamentary system with an autocratic presidential one, is incompatible with the Copenhagen criteria as enshrined in EU primary law.

## 5. How the EU should respond: Red lines, not red herrings

Apart from weak Council conclusions last November, a non-binding resolution of the European Parliament condemning the repressive measures taken in the wake of the failed coup, and calling for the suspension of accession negotiations, most EU leaders and institutions have been conspicuously silent on the matter of constitutional 'reform' in Turkey.

This passivity is untenable in view of recent and upcoming developments. Following the sharp condemnation of the constitutional reform package and the state of media freedom in Turkey in a set of opinions adopted by the Venice Commission on 10 March 2017, the European Union has to speak out – not so much in an attempt to sway voters to say 'No' in the referendum, because such a tactic would undoubtedly backfire when cited by President Erdoğan and his followers as evidence of unwarranted intervention in Turkey's internal political affairs. The EU should rather send a signal to Turkish and European citizens, and indeed others, that it upholds certain principles and European values. This is not the time for the Union to be tactically pragmatic; it is certainly not the time for appeasement. In the face of a worsening crisis of true democracy, a strong value statement needs to be delivered.

The very least the European Commission should do, as guardian of the Treaties, is issue a statement by Johannes Hahn, responsible for Enlargement Negotiations, underlining the opinions of the Venice Commission, aligning with the grave concerns it expresses and warning of the dangers of disregarding them. The statement should also refer to the problematic context in which the referendum is being organised, which would render the outcome invalid. Finally, the statement should stress that, with the entry into force of the constitutional

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<sup>17</sup> Cf. Venice Commission, Opinion on the Measures Provided in the Recent Emergency Decree-laws with Respect to Freedom of the Media in Turkey, CDL-AD(2017)006.

amendments, Turkey would no longer meet the Copenhagen political criteria, leaving the Commission with no other choice but to advise the Council to suspend accession negotiations.

Many European policymakers have shied away from drawing this inevitable conclusion, diverting attention away from the highly problematic constitutional reform process by repeating their warning that accession talks will be automatically suspended if Turkey reintroduces the death penalty. As much as this is a red line, it is also a red herring. EU leaders know that Ankara will not grant them the satisfaction of crossing that rubicon. Instead, they have allowed Erdoğan and his followers to continue unhindered on their road towards the codification of autocracy.

The argument that shutting the door on Turkey's accession to the EU would irreparably harm bilateral relations is not a convincing one. Over the years, the EU and Turkey have developed a much wider strategic agenda that serves the interests of both. This will not be cast aside on account of suspending dysfunctional EU accession negotiations. Erdoğan's regime has struck a mutually beneficial deal with the EU to contain the flow of refugees across the Aegean – and Turkish territory, for that matter. Turkey remains an ally of European countries within NATO.<sup>18</sup> And there is renewed talk of modernising the Customs Union, facilitating even greater trade flows than current ones.<sup>19</sup> In fact, conducting a strategic dialogue without having to keep up appearances in the context of accession talks would inject a much-needed dose of sincerity into the bilateral relationship.

Turkey's EU membership talks have barely advanced since they started more than a decade ago. Resolving the Cyprus issue could unlock the stalemate but hopes of a breakthrough in the protracted mediation process are unfortunately fading fast. Yet, irrespective of whether there might be a peace deal for Cyprus, Erdoğan turned his back on the EU's pledge of membership years ago. His regime has already slid into authoritarianism and will cross many more red lines if and when it enacts the proposed constitutional reform package.

The EU should therefore not deviate from upholding its own core principles on grounds of Turkey's strategic importance for the Union. The dilution of the conditions for membership would not only send the wrong signal to Turkish and European citizens, it would also damage the credibility of the EU's enlargement policy and could rob other pre-accession countries in south-east Europe of their ambition to comply with the Copenhagen political criteria.

To be sure, the suspension of accession negotiations with Turkey would not mean the end of those talks. Indeed, the door should be left open to Turkey to resume membership talks if and when it complies with the Copenhagen political criteria, but the EU should hold firm in its approach and not waver in its defence of core European values.

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<sup>18</sup> Questions about Turkey's increasingly autocratic nature and its compatibility with NATO membership may also be raised.

<sup>19</sup> Currently, Turkey is the EU's 5<sup>th</sup>-biggest trading partner. See European Commission Directorate General for Trade, European Union Trade in Goods with Turkey, 17 February 2017 ([http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113456.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113456.pdf)).

## Appendix: All Executive Decrees

Decree Number	Dismissed/Suspended Officers	Closure/Reopening of Organisations Reinstatement	Other Orders
Executive Decree 667 (23 July 2016)		Closure <ul style="list-style-type: none"> <li>❖ 35 Healthcare organisation</li> <li>❖ 934 Private School</li> <li>❖ 109 Private Dormitory</li> <li>❖ 104 Foundation</li> <li>❖ 1125 Association</li> <li>❖ 15 Private University</li> <li>❖ 19 Union</li> </ul>	<ul style="list-style-type: none"> <li>❖ All movable and immovable properties, assets, rights and receivables of closed charitable foundations are transferred to the General Directorate of Foundations.</li> <li>❖ The maximum period a person may be held under custody has been increased to 30 days for both individual and collective offences.</li> <li>❖ Upon a decision by the public prosecutor, meetings between the attorney and his/her arrested client may be recorded, held in the presence of an official, limited in time or ended.</li> </ul>
Executive Decree 668 (25 July 2016)	➤ 1684 from Turkish Armed Forces	Closure <ul style="list-style-type: none"> <li>❖ 45 Newspaper</li> <li>❖ 18 Television</li> <li>❖ 3 News Agency</li> <li>❖ 23 Radio</li> </ul>	<ul style="list-style-type: none"> <li>❖ Gendarmerie and coast guard subordinated to the Interior Ministry.</li> </ul>
Executive Decree 669 (31 July 2016)	<ul style="list-style-type: none"> <li>➤ 193 from Turkish Armed Forces</li> <li>➤ 1196 Gendarmerie</li> </ul>	Closure <ul style="list-style-type: none"> <li>❖ Military Secondary Education Schools</li> </ul>	<ul style="list-style-type: none"> <li>❖ Army, Navy and Air Force Commands have been subordinated to the Minister of National Defence.</li> </ul>

Executive Decree 670 (17 August 2016)	<ul style="list-style-type: none"> <li>➤ <b>196</b> from Information &amp; Communication Technologies Authority</li> <li>➤ <b>63</b> Junior Officer from Ministry of Defence</li> <li>➤ <b>44</b> Petty Officer from Ministry of Defence</li> <li>➤ <b>5</b> Specialist Sergeant from Ministry of Defence</li> <li>➤ <b>24</b> from Coast Guard Command</li> <li>➤ <b>2360</b> from Security General Directorate</li> </ul>		❖ Passport authorities will cancel the passports of dismissed officers.
Executive Decree 671 (17 August 2016)			❖ The Authority may obtain and use of information, documentation, data, and records from the relevant authorities within the scope of its tasks.
Executive Decree 672 (1 September 2016)	<ul style="list-style-type: none"> <li>➤ <b>28163</b> from the Ministry of Education</li> <li>➤ <b>7669</b> from the Security General Directorate</li> <li>➤ <b>323</b> from the Gendarmerie General Command</li> <li>➤ <b>236</b> Academic</li> <li>➤ <b>83</b> from the Council of State</li> <li>➤ <b>215</b> from the Foreign Ministry</li> <li>➤ <b>12</b> from the Ministry of EU Affairs</li> <li>➤ <b>369</b> from the Interior Ministry</li> <li>➤ <b>10693</b> from other public officers</li> </ul>		

Executive Decree 673 (1 September 2016)		Reopening ❖ <b>54</b> Private School	❖ Passports of spouses of those whose passports were revoked will also be cancelled.
Executive Decree 674 (1 September 2016)			❖ The authorities of trustees who were appointed to the companies on the grounds of their membership, coherence or relation to terrorist organisations will be transferred to the Saving Deposits Insurance Fund.
Executive Decree 675 (29 October 2016)	<ul style="list-style-type: none"> <li>➤ <b>183</b> from the Presidency of the Judicial Council</li> <li>➤ <b>69</b> from the Council of State</li> <li>➤ <b>2534</b> from the Ministry of Justice</li> <li>➤ <b>102</b> from the Foreign Ministry</li> <li>➤ <b>2219</b> from the Ministry of Education</li> <li>➤ <b>101</b> from the Turkish Armed Forces</li> <li>➤ <b>1082</b> from the Security General Directorate</li> <li>➤ <b>1267</b> Academic</li> <li>➤ <b>3657</b> from other public officers</li> </ul>	<p>Closure</p> <ul style="list-style-type: none"> <li>❖ <b>16</b> Newspaper</li> <li>❖ <b>2</b> News Agency</li> <li>❖ <b>3</b> Journal</li> <li>❖ <b>1</b> Television</li> <li>❖ <b>2</b> Radio</li> </ul> <p>Reinstatement</p> <ul style="list-style-type: none"> <li>❖ <b>31</b> to Ministry of Education</li> <li>❖ <b>39</b> to Turkish Armed Forces</li> <li>❖ <b>4</b> to Public Offices</li> </ul>	❖ Scholarships of 68 exchange students studying abroad will be cut off and their degrees will not be recognised by Turkey.
Executive Decree 676 (29 October 2016)			❖ Officials can monitor all conversations between attorneys and clients.



<p>Executive Decree 677 (22 November 2016)</p>	<ul style="list-style-type: none"> <li>➤ <b>1988</b> from Turkish Armed Forces</li> <li>➤ <b>403</b> from the Gendarmerie General Command</li> <li>➤ <b>7586</b> from the Security General Directorate</li> <li>➤ <b>2696</b> from the Interior Ministry</li> <li>➤ <b>119</b> from the Ministry of Education</li> <li>➤ <b>942</b> Academic</li> <li>➤ <b>15</b> from High Council of Judges and Prosecutors</li> <li>➤ <b>1659</b> from other public officers</li> </ul>	<p>Closure</p> <ul style="list-style-type: none"> <li>❖ <b>357</b> Association</li> <li>❖ <b>7</b> Newspaper</li> <li>❖ <b>1</b> Journal</li> <li>❖ <b>1</b> Radio</li> </ul> <p>Reopening</p> <ul style="list-style-type: none"> <li>❖ <b>1</b> Healthcare Org.</li> <li>❖ <b>18</b> Foundation</li> <li>❖ <b>175</b> Association</li> </ul> <p>Reinstatement</p> <ul style="list-style-type: none"> <li>❖ <b>139</b> to Public Offices</li> <li>❖ <b>16</b> to Academia</li> </ul>	
<p>Executive Decree 678 (22 November 2016)</p>			<ul style="list-style-type: none"> <li>❖ Turkish military can rehire retired military personnel for regular service or as recruiters.</li> </ul>
<p>Executive Decree 679 (6 January 2017)</p>	<ul style="list-style-type: none"> <li>➤ <b>8</b> from the Presidency of the Judicial Council</li> <li>➤ <b>699</b> from the Ministry of Justice</li> <li>➤ <b>2687</b> from the Security General Directorate</li> <li>➤ <b>763</b> from Turkish Armed Forces</li> <li>➤ <b>631</b> Academic</li> <li>➤ <b>2611</b> from other public officers</li> </ul>	<p>Closure</p> <ul style="list-style-type: none"> <li>❖ <b>83</b> Association</li> </ul> <p>Reopening</p> <ul style="list-style-type: none"> <li>❖ <b>7</b> Association</li> <li>❖ <b>11</b> Newspaper</li> </ul> <p>Reinstatement</p> <ul style="list-style-type: none"> <li>❖ <b>190</b> to public offices</li> <li>❖ <b>42</b> to Academia</li> </ul>	

Executive Decree 680 (6 January 2017)			<ul style="list-style-type: none"> <li>❖ The Law on Police Duties and Responsibilities grants police the authority to access information on the identity of internet users for purposes of investigating crimes committed online.</li> <li>❖ This decree could revoke citizenship of individuals abroad who do not respond to judicial summons issued by courts or prosecutors within 90 days.</li> </ul>
Executive Decree 681 (6 January 2017)			<ul style="list-style-type: none"> <li>❖ The general and admiral cadres previously determined by the General Staff before discussion in annual Supreme Military Council (YAŞ) meetings will now be determined by the Defence Ministry.</li> </ul>
Executive Decree 682 (23 January 2017)			<ul style="list-style-type: none"> <li>❖ Discipline provisions for Law enforcement forces</li> </ul>
Executive Decree 683 (23 January 2017)	<ul style="list-style-type: none"> <li>➤ <b>134</b> from the Interior Ministry</li> <li>➤ <b>433</b> from other public officers</li> </ul>	<p>Closure</p> <ul style="list-style-type: none"> <li>❖ <b>2</b> Television</li> </ul> <p>Reinstatement</p> <ul style="list-style-type: none"> <li>❖ <b>124</b> to public offices</li> </ul>	
Executive Decree 684 (23 January 2017)			<ul style="list-style-type: none"> <li>❖ Detention period reduced to 7 days. But maximum detention period for those detained on terror charges will continue to be 30 days.</li> </ul>
Executive Decree 685 (23 January 2017)			<ul style="list-style-type: none"> <li>❖ State of Emergency Actions Monitoring Commission established to examine applications from individuals affected by state of emergency government decrees.</li> </ul>
Executive Decree 686	<ul style="list-style-type: none"> <li>➤ <b>10</b> from the Presidency of the Judicial Council</li> <li>➤ <b>48</b> from the Foreign Ministry</li> </ul>	<p>Reinstatement</p> <ul style="list-style-type: none"> <li>❖ <b>17</b> to public offices</li> </ul>	

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	<ul style="list-style-type: none"><li>➤ <b>49</b> from the Interior Ministry</li><li>➤ <b>417</b> from the Security General Directorate</li><li>➤ <b>893</b> from the Gendarmerie General Command</li><li>➤ <b>2585</b> from the Ministry of Education</li><li>➤ <b>330</b> Academic</li><li>➤ <b>132</b> from other public officers</li></ul>		
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