

# Levelling EU–Turkey Trade: An Assessment of the Asymmetrical Customs Union between the European Union and Turkey

Arnoud Willems

Maryanne Kamau\*

☞ Customs union; Data sharing; EU law; Free trade agreements; International trade; Turkey

## Abstract

*While both Turkey and the European Union (EU) have benefited from the 1995 Customs Union, the structural asymmetries in the agreement mean that neither party has been able to take full advantage of the increase in trade in the past 20 years. Because two of the asymmetries particularly favour the EU, this situation is increasingly leading to trade complications for Turkey. The first issue relates to Free Trade Agreements (FTAs): the key point here is that Turkey is obliged to accept the FTAs concluded by the EU without receiving any corresponding benefits from the EU's FTA partners. The second issue is that Turkey is not in a position to exercise influence on decisions by the EU relating to customs and trade policy that directly affect the functioning of the Customs Union. The most comprehensive solution, i.e. Turkish accession to the EU, would supersede the regulations of the Customs Union, but accession talks have stalled. Consequently, the best alternative is to modernise the Customs Union. This article analyses the current and historical situation, undertakes a comparison of how other customs unions have addressed similar points of contention, and concludes with reflections on how to improve the current framework.*

## Introduction

The legal relations between the EU and Turkey are anchored in the Ankara Association Agreement of 1963, which envisages far-reaching objectives for the gradual integration of Turkey into the EU.<sup>1</sup> Unlike other EU Association

\* Arnoud Willems and Maryanne Kamau are lawyers with Sidley Austin LLP in Brussels. They can be reached at [awillems@sidley.com](mailto:awillems@sidley.com). Any errors or omissions are the authors' own. The views expressed in this article are exclusively those of the authors. The article has been prepared for academic purposes only and does not constitute legal advice.

<sup>1</sup> Ankara Association Agreement art.2(3).

Agreements, the Ankara Agreement explicitly makes a provision for the establishment of a Customs Union between the two parties.<sup>2</sup>

In fulfilment of this objective, the EU–Turkey Customs Union came into force on 31 December 1995 pursuant to Decision 1/95 of the Association Council (the Decision). This marks the start of new trade relations between the two jurisdictions. Both parties agreed to eliminate all customs duties, quantitative restrictions and charges with equivalent effect on their bilateral trade, except for certain sectors. To this end, Turkey adopted the EU’s common commercial tariff (CCT) and agreed to harmonise its commercial policy with that of the EU and align its legislative framework to mirror EU legislation in the areas covered by the Customs Union.<sup>3</sup>

The Customs Union has given significant impetus to trade in goods between the EU and Turkey, estimated at €154 billion in 2017, an increase of more than 50 per cent since 2007.<sup>4</sup> Moreover, the resulting liberalisation of Turkey’s trade policies vis-à-vis third countries and the adoption of EU technical regulations have enhanced Turkey’s access to global markets and translated into significant welfare gains.<sup>5</sup>

Notwithstanding these economic gains, the legal framework of the Customs Union has some flaws. The EU has followed the global trend of a proliferation of Free Trade Agreements (FTAs) in the aftermath of stalled multilateral negotiations in the World Trade Organization (WTO). On the back of this trend, coupled with the adoption of the “Trade for all” policy, the EU has concluded an increasing number of FTAs with third countries.<sup>6</sup> The Customs Union obliges Turkey to accord similar preferential treatment to the EU’s FTA partners. However, the preferential treatment given by Turkey is not subject to automatic or equivalent reciprocity from the EU’s FTA partners. Turkey has to negotiate separate FTAs to obtain preferential access to the EU’s FTA partners for its companies and products.

This asymmetric situation, which results from the implementation of Decision 1/95 of the Association Council, does not always present a problem, particularly if Turkey concludes an agreement with EU FTA partners. However, some EU FTA partners (e.g. Mexico, South Africa and Algeria) have not concluded similar arrangements with Turkey. Moreover, the negotiating position for Turkey with countries that have already concluded an FTA with the EU is weak because the duty level in Turkey is already zero. With several new EU FTAs lurking, Turkey faces increased trade losses. A timely and effective solution is therefore needed to avert such losses.

This article analyses possible resolutions of this situation. The second section of the article examines the bilateral treaty framework between the EU and Turkey that led to the creation of the Customs Union. The third section examines the legal framework of the Customs Union and explores the asymmetries in the agreement. The fourth section reviews comparable situations in other customs unions to

<sup>2</sup> S. Ülgen and Y. Zahariadis, “The future of Turkish–EU trade relations: Deepening vs widening”, Centre for European Policy Studies No.5 (August 2004), p.21.

<sup>3</sup> Decision 1/95 arts 16 and 39.

<sup>4</sup> European Union, “Trade in goods with Turkey”, [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113456.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113456.pdf) [Accessed August 2018].

<sup>5</sup> Ülgen and Zahariadis, “The future of Turkish–EU trade relations” (August 2004), p.21.

<sup>6</sup> “EU trade agreements in force”, [http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#\\_in-place](http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place) [Accessed 20 February 2019].

determine whether there are best practices that Turkey can use to improve its situation. The fifth section offers recommendations to resolve the asymmetries discussed, and concludes with parting lessons for other states considering close economic integration with the EU.

## History of the EU–Turkey Customs Union

### *The Ankara Association Agreement*

Turkey sought close economic ties with the European Economic Community (EEC) as early as 1959 when it applied for associate membership. The EEC and Turkey signed an Association Agreement in 1963, the Ankara Agreement, which is the legal basis of EU–Turkey relations.<sup>7</sup> This agreement calls for integrating Turkey into the European Community through a gradual, three-phased process: preparatory, transition and completion<sup>8</sup> helping to establish a customs union and ultimately, consideration of Turkey’s accession to the European Community.<sup>9</sup>

### *Additional Protocol to the Association Agreement 1973*

The Additional Protocol marked the beginning of the second phase (transition), during which the customs union envisioned in the Association Agreement would be gradually created. As a result, the EU and Turkey agreed on a schedule for the elimination of tariffs and quantitative restrictions on goods within 22 years.<sup>10</sup>

### *EU–Turkey Bilateral Party Framework (BPTF)*

The last phase (completion) was concluded by the entry into force of the EU–Turkey Association Council Decision No.1/95 and two other preferential agreements,<sup>11</sup> collectively called the EU–Turkey bilateral preferential trade framework (BPTF).<sup>12</sup>

The entry into force of the Decision on 31 December 1995 established the EU–Turkey Customs Union, which covers industrial goods and certain processed agricultural products. One of the key elements of the Decision is the obligation imposed on Turkey to harmonise its legal framework with the EU in areas of direct relevance to the operations of the Customs Union. This entails adopting the EU Common Customs Tariff (CCT), harmonising its commercial policy with that of the EU, and aligning its rules on competition and intellectual property with those of the EU.<sup>13</sup>

<sup>7</sup> Council Decision 64/732 [1964] OJ L217, [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1506947253135&uri=CELEX:21964A1229\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1506947253135&uri=CELEX:21964A1229(01)) [Accessed 20 February 2019].

<sup>8</sup> Ankara Association Agreement arts 3, 4(1) and 5.

<sup>9</sup> Ankara Association Agreement arts 10 and 28.

<sup>10</sup> S. Peers, “Living in sin: Legal integration under the EC–Turkey Customs union” (1996) 7 Eur. J. Int’l L.412.

<sup>11</sup> The European Coal and Steel Community (ECSC)–Turkey FTA on trade in ECSC products (1996) and the EU–Turkey Association Council Decision No1/98.

<sup>12</sup> Krisztina Binder, “Reinvigorating EU–Turkey bilateral trade: Upgrading the customs union” (March 2017), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2017\)599319](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599319) [Accessed 20 February 2017].

<sup>13</sup> Decision 1/95 art.54.

Regarding the institutional structure, the Customs Union Joint Committee serves as a co-ordinating body and delivers recommendations and opinions to the Association Council, the decision-making organ.<sup>14</sup>

## **Legal Framework of the EU–Turkey Customs Union—flawed design?**

This article argues that the structure of the EU–Turkey Customs Union limits the mutual realisation of the benefits of integration owing to the asymmetrical commitments the parties have undertaken. To support this position, this article reviews the legal design of the Customs Union.

### *Principal components of the Customs Union*

In keeping with the nature of customs unions, the EU–Turkey Customs Union requires both parties to liberalise bilateral trade through the removal of customs duties, charges of equivalent effect and quantitative restrictions on industrial goods and certain processed agricultural products.<sup>15</sup> The requirement of applying a common external tariff is fulfilled by Turkey’s commitment to match its external tariff with the EU’s Common Customs Tariff (CCT).<sup>16</sup>

Another key feature of the EU–Turkey Customs Union obligates Turkey to approximate its internal legal order with EU laws relating to the elimination of technical barriers to trade, protecting competition, and the administration of border procedures including rules of origin.<sup>17</sup> Turkey must also ensure the adequate and effective protection of intellectual property rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>18</sup> The approximation of laws by Turkey extends to the EU’s Common Commercial Policy (CCP). As a result, Turkey is required to align its commercial relations with third countries with the EU’s preferential regime. This entails concluding preferential trade agreements with third countries on its own initiative, similar to the arrangements that the EU has.

The central features of the Customs Union discussed here reveal a lack of even-handedness in the obligations assumed by the parties. Turkey obviously bears the greater burden of constantly aligning its internal order to that of the EU in areas covered by the Customs Union. This arrangement between the parties creates possibilities for conflict or inconsistencies in the harmonisation of policies, which may affect the future of the integration if proper co-operation and consultation does not take place. Although peculiar, the adoption of the EU *acquis* by Turkey is thought to serve as a precursor for its accession into the EU as envisaged by the Ankara Agreement.<sup>19</sup>

<sup>14</sup> Decision 1/95 art.52.

<sup>15</sup> Decision 1/95 arts 4 and 5.

<sup>16</sup> Decision 1/95 art.13.

<sup>17</sup> Decision 1/95 arts 8, 28 and 39 respectively.

<sup>18</sup> Decision 1/95 art.31.

<sup>19</sup> Ankara Agreement art.28.

### *Asymmetric free trade agreements with third parties*

Article 16 of the Decision calls for Turkey’s progressive alignment with the EU’s preferential customs regime which includes the autonomous trade regime and preferential agreements. To achieve this Turkey is required to “take the necessary measures and negotiate agreements on a mutually advantageous basis with the countries concerned”. Therefore, when the EU concludes a preferential agreement with a third state, Turkey must align itself to the agreement and accord the same preferential access to that state for products covered by the Customs Union.

Given that most of the preferential agreements signed by the EU are negotiated on a reciprocal basis, ideally, Turkey should also gain preferential access to the third state’s markets. However, the concessions by third states only cover products originating from EU countries. Since Turkey is not a member of the EU, these agreements cannot apply equally to it. Turkey therefore has to pursue negotiations with EU FTA partners on its own initiative.

In pursuit of compliance with the obligation under art. 16 of the Decision, Turkey faces several challenges.

First, Turkey must adopt the EU’s preferential regimes even though it has no voice in the negotiation of the EU’s FTAs. Under art. 207(3) of the Treaty on the Functioning of the European Union (TFEU), the European Commission (Commission) and Council of the European Union (Council) are responsible for ensuring that international agreements with third countries are negotiated in line with EU policies and rules. Moreover, the Commission conducts the negotiations in consultation with a Committee appointed by the Council (Committee 133, nowadays called the Trade Policy Committee). Turkey is not represented in these three bodies.

Secondly, there is no guarantee that Turkey will be able to conclude FTAs with the same countries with which the EU has FTAs. The institutional and legal realities of the EU framework do not provide for a mandate to the Commission or Council to include Turkey in the EU’s negotiation agenda.<sup>20</sup> The EU cannot compel its partners to conclude FTAs with Turkey. Moreover, where the EU already has FTAs with third countries, Turkey has little leverage in negotiations since the third country already profits from preferential market access to Turkey through the Customs Union.

Thirdly, Turkey faces challenges where EU FTA partners have not concluded similar agreements with Turkey (e.g. Mexico, South Africa and Algeria).<sup>21</sup> In such cases, Turkish exports do not enjoy the same preferential treatment as EU exports to these countries (while exporters from those EU FTA partner countries can export goods to the EU and Turkey at a preferential rate). This may lead to trade deflection, which places Turkish exporters at a competitive disadvantage compared to EU exporters in the EU FTA partners’ markets.<sup>22</sup>

Fourthly, the EU is not restricted to offering its FTA partners the same preferential treatment given to Turkey under the Customs Union. For example, if the EU were to provide more favourable market access to its FTA partners than

<sup>20</sup> TFEU arts 3(e), 207 and 218.

<sup>21</sup> World Bank, “Evaluation of the EU–Turkey Customs Union”, Report No.85930-TR (28 March 2014), p.25.

<sup>22</sup> World Bank, “Evaluation of the EU–Turkey Customs Union”, Report No.85930-TR (28 March 2014), p.25.

to Turkey, this would erode the preference for Turkish goods in the EU.<sup>23</sup> This is the case for agricultural products which are not covered by the Customs Union but are covered by some of the EU's FTAs.

Finally, the asymmetries tied to EU FTAs extend to the substantive text of the agreements. For Turkey to meet its obligations under art.16 of the Decision, the FTAs it concludes must have the same features as EU FTAs. EU FTAs frequently include a large number of asymmetrical concessions that allow EU FTA partners to liberalise at a slower pace than the EU. The adoption of similar liberalisation models in Turkey's FTAs portends huge losses for Turkey.<sup>24</sup> Examples of these asymmetrical concessions can be found in the FTAs Turkey has signed with Morocco, Syria, Egypt and Tunisia.<sup>25</sup>

With the EU's increased FTA negotiations with other countries,<sup>26</sup> the losses faced by Turkey are set to rise. Legally, although Turkey's failure to conclude agreements with the EU's FTA partners is beyond its immediate control, it technically amounts to a failure to comply with its obligation under art.16 of the Decision.

### *Turkey's involvement in decisions concerning the Customs Union*

In view of the fact that Turkey does not have a right to vote on EU commercial policies, the harmonisation obligations under art.16 of the Decision put Turkey in the position of a follower of the EU, with outcomes that compare unfavourably with those of the other trading partners. This argument is made in the context of art.28 of the Association Agreement, which stipulates that Turkey's accession negotiations would commence once the country demonstrates that it can undertake obligations arising from membership. Adopting EU laws and commercial policies was crucial in demonstrating Turkey's commitment. For Turkey, being left out of the decision-making process was not a major problem at the time because it was on the path to EU membership. As an EU member, Turkey would influence trade policies in the EU. However, talks regarding Turkey's accession to the EU have been protracted, with no end in sight.

Since Turkey is not a member of the EU, it has no representation in the EU institutions that shape the commercial policy of the EU or legislation concerning the Customs Union. The legal framework of the Customs Union does, however, prescribe a consultation and information-sharing structure, which relegates Turkey to the position of being compelled to simply accept the EU's decisions. A clear distinction should be made between the consultation processes where Turkish input is required or considered, and the information-sharing processes where the EU decides and merely informs Turkey for the relevant legal alignment to take place.

<sup>23</sup> Binder, "Reinvigorating EU-Turkey bilateral trade" (March 2017), p.5, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2017\)599319](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599319) [Accessed 20 February 2019].

<sup>24</sup> O. Çalışkan, "An Analysis on the Alignment Process of Turkey to the EU's FTAs under the Customs Union and Current Challenges" (2009) 27 *Hacettepe University/Journal of Economics and Administrative Sciences* 1, 12.

<sup>25</sup> Çalışkan, "An Analysis on the Alignment Process of Turkey to the EU's FTAs under the Customs Union and Current Challenges" (2009) 27 *Hacettepe University/Journal of Economics and Administrative Sciences* 1, 12.

<sup>26</sup> "EU Trade for All – New EU Trade and Investment Strategy", <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/#strategy> [Accessed 20 February 2019].

The process of harmonising Turkish legislation with EU laws in areas of direct relevance to the functioning of the Customs Union is governed by the procedural rules in arts 55–60 of the Decision.<sup>27</sup> These areas include, inter alia, legislation on technical barriers, intellectual property law, customs and competition, the common commercial policy and agreements with third countries comprising a commercial dimension for industrial products.

Where the EU is contemplating new legislation in the areas concerned, art.55 of the Decision requires the European Commission to informally consult with Turkish experts. Consultations within this pre-decision phase are aimed at facilitating the decision most appropriate for the proper functioning of the Customs Union.<sup>28</sup> If the legislation is subsequently adopted, the EU must inform Turkey immediately for the adaptation (inclusion) of the legislation in Turkey.<sup>29</sup> If issues arise in Turkey’s adoption of this legislation, the Customs Union Joint Committee must find a mutually acceptable solution that favours the proper functioning of the Customs Union.<sup>30</sup>

Consultation with Turkish experts is also required under art.59 of the Decision where draft measures on the areas concerned are tabled before committees that assist the Commission in the exercise of its executive powers. If these measures are subsequently referred to the Council, the Commission must communicate the views of the Turkish experts to the Council. While this mechanism gives the appearance that Turkey is able to influence commercial policy, the EU institutions are free to ignore the views of Turkish experts.

In practice, changes in the common commercial policy have sometimes been made without proper consultation. This is evidenced by some of the FTAs the EU has concluded without considering the proper functioning of the Customs Union. In FTAs with Mexico, South Africa and Algeria, the EU made concessions on market access that affected the Turkish market (through the Customs Union), yet Turkey was not granted parallel access rights in these markets.<sup>31</sup>

Beyond the consultation and information-sharing mechanism, art.60 of the Decision provides for the involvement of Turkish experts in a list of select committees that assist the Commission in the exercise of its executive powers in areas of direct relevance to the functioning of the Customs Union. This involvement does not, however, extend to international trade agreements, because key committees such as the committee on common rules for imports of textile products from certain third countries (autonomous regime), the advisory committee on the implementation of activities relating to the Community market access strategy (market access), and the Generalised Scheme of Preferences (GSP) Committee and the Customs Code Committee are not included in this list. Moreover, Turkey does not have representation in the Trade Policy Committee, which advises the Commission when negotiating trade agreements with third countries.<sup>32</sup> This means that Turkey is unable to influence the negotiation of trade agreements.

<sup>27</sup> Decision 1/95 art.54.

<sup>28</sup> Decision 1/95 art.55(4).

<sup>29</sup> Decision 1/95 art.56.

<sup>30</sup> Decision 1/95 art.56.

<sup>31</sup> Ülgen and Zahariadis, “The Future of Turkish–EU Trade Relations” (August 2004), p.8.

<sup>32</sup> Trade Policy Committee (TPC), <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/trade-policy-committee/> [Accessed 20 February 2019].

Finally, art.14 of the Decision requires prior consultations to be held within the Customs Union Joint Committee with respect to decisions made by the EU to amend its Common Custom Tariff (CCT). Turkey has to be informed of the decision taken by the EU in good time for it to adopt the changes into its external customs tariff. In view of the pivotal role that a common external tariff plays in the functioning of a Customs Union, it is interesting to note the minimal influence that Turkey has on its amendments.

### *Roles reversed? Turkey's FTAs with third parties*

Turkey's FTAs with third countries on products covered by the Customs Union are guided by the framework under arts 16 and 54 of the Decision. Following art.16 of the Decision, Turkey can negotiate bilateral arrangements with existing EU FTA partners in areas of direct relevance to the operations only of the Customs Union. It cannot initiate FTA negotiations based on its own economic priorities, as these would be distinct from those of the EU.<sup>33</sup>

Notably, Turkey had to seek EU's approval prior to its FTA negotiations with Macedonia (agreement signed in 1999) to which at the time, the EU only offered a GSP regime.<sup>34</sup> The EC Regular Report 1998 for Turkey's progress towards accession spells out the Commission's position on Turkey's independent FTA negotiation where it stated that:

“Turkey should refrain from negotiating preferential agreements with countries, which have no agreement linking them to the Union in accordance with the Customs Union decision.”<sup>35</sup>

Interestingly, the FTA that Turkey has with Malaysia defies this legal reasoning, since Malaysia does not have an FTA with the EU. The circumstances behind this situation are unique. Turkey began negotiations with Malaysia for the conclusion of an FTA after the EU had started its own FTA negotiations with Malaysia. However, the negotiations with Turkey were concluded faster than those with the EU, resulting in an agreement in 2015.<sup>36</sup> The EU–Malaysia FTA talks were formally suspended in 2012 and, to date, no agreement has been reached.<sup>37</sup>

The enforcement of this FTA appears to be in breach of art.16 of the Decision, which provides that Turkey will align its policy where agreements are already in place with the EU. Moreover, for countries without a preferential regime with the EU, the Common Custom Tariff applies. Turkey has an obligation to align its tariff with the CCT and cannot maintain a tariff lower than the CCT.<sup>38</sup> To date, the EU had made no comment on the compatibility of such treaties with Turkey's obligations in the Customs Union.

<sup>33</sup> Çalişkan, “An Analysis on the Alignment Process of Turkey to the EU's FTAs under the Customs Union and Current Challenges” (2009) 27 *Hacettepe University Journal of Economics and Administrative Sciences* 1, 14.

<sup>34</sup> A. Güney and A. Tekin (eds), *The Europeanization of Turkish Public Policies: A Scorecard* (London; Routledge, 2015), p.18.

<sup>35</sup> EC, “Regular Report on Turkey's Progress towards Accession” (Brussels, 1998), p.126, [https://www.ab.gov.tr/files/AB\\_Itiskileri/Tur\\_En\\_Realitons/Progress/Turkey\\_Progress\\_Report\\_1998.pdf](https://www.ab.gov.tr/files/AB_Itiskileri/Tur_En_Realitons/Progress/Turkey_Progress_Report_1998.pdf) [Accessed 20 February 2019].

<sup>36</sup> Malaysia–Turkey Free Trade Agreement (MTFTA), <https://fta.miti.gov.my/index.php/pages/view/malaysiaturkey> [Accessed 12 March 2019].

<sup>37</sup> EU–Malaysia Trade, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia> [Accessed 20 February 2019].

<sup>38</sup> Decision 1/95 art.14(2).

Nonetheless, Turkey’s conclusion of FTAs with third parties may be possible based on art.57 of the Decision. This provision envisages a situation where Turkey would like to amend or adopt legislation in areas covered by the Customs Union and prescribes the procedural aspects to be followed. Amendments are allowed, provided that the Customs Union Joint Committee has concluded that the amended legislation does not affect the proper functioning of the Customs Union. For new legislation, Turkey is required to informally seek the views of the Commission and hold consultations within the Customs Union Joint Committee. Turkey is further required to inform the Customs Union Joint Committee when it adopts legislation in areas of direct relevance to the functioning of the Customs Union.

This provision fails to address the question of whether agreements with third parties constitute legislation in the areas of direct relevance to the functioning of the Customs Union. Under art.54, these areas include agreements with third parties comprising a commercial dimension for industrial products, from which it follows that FTAs that cover this dimension could fall within the meaning of legislation in art.57 and the procedural elements reflected in art.57 must be observed. In light of this, it is arguable that Turkey can initiate FTAs with third parties if the procedural elements in art.57 are followed.

Notably, the FTAs concluded by states are now more comprehensive and wider in scope and cover areas such as agriculture, services, e-commerce and investment. The interesting question is whether Turkey will be able to negotiate FTAs in areas that are not part of its Customs Union with the EU. In principle, where an FTA relates to areas not of direct relevance to the functioning of the Customs Union, Turkey has the freedom to negotiate FTAs with third countries and create its own trade policy.<sup>39</sup> This is only possible because the EU–Turkey Customs Union is not a full Customs Union within the meaning of art.XXIV(8)(b) of the WTO General Agreement on Tariffs and Trade (GATT) as it does not cover substantially all the trade between the constituent territories.

Following the argument above relating to art.57, Turkey would probably have to develop agreements with a dual structure, one covering trade in areas covered by the Customs Union and the other on areas outside the scope of the Union. The first agreement would then be subject to consultation with the EU as per art.57 of the Decision. This split structure of FTAs was proposed to the EU for its comprehensive FTA with Singapore and subsequent FTAs that encompass both areas falling under EU’s exclusive competence and those under shared competence with Member States. Following the opinion of the Court of Justice of the European Union on the EU–Singapore FTA, the EU cannot conclude such mixed agreements alone.<sup>40</sup>

### *Other asymmetries?*

The problems within the EU–Turkey Customs Union are not limited to the EU’s FTAs with third parties. Similar asymmetrical issues are present in relation to amendments to the Common Customs Tariff. As discussed in the section “Turkey’s

<sup>39</sup>European Commission, “Study of the EU–Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of its Possible Enhancement”, Final Report (October 2016), [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2016/turkey\\_anx6\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/turkey_anx6_en.pdf) [Accessed 20 February 2019].

<sup>40</sup>Opinion 2/15 of the Court of 16 May 2017, EU:C:2017:376 at [305].

involvement in decisions concerning the Customs Union” above, decisions to amend are made by the EU while Turkey is informed of the amendments made so it can implement them. Although consultations are to be held within the Customs Union Joint Committee, the views expressed by Turkey during these consultations are not binding on the EU. Under art.31 of the TFEU, the Common Customs Tariff is fixed by the Council on a proposal from the Commission. The Council is guided by the factors in art.32 of the TFEU, none of which include the functioning of the EU–Turkey Customs Union.

Article 66 of the Decision sets out that provisions of the Decision substantially identical to the TFEU will be interpreted in conformity with the decisions of the Court of Justice of the European Union (ECJ). In *Istanbul Lojistik Ltd v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság*, the ECJ based its reasoning on art.66 of the Decision while interpreting art.4 of the Decision, given the case law relating to art.30 of the TFEU. On this basis, it held that a customs duty within the meaning of art.4 of the Decision includes “any pecuniary charge” which applies to “goods by reason of the fact that they cross a border”.<sup>41</sup>

This corresponds with the case law from the ECJ on the transposition of EU law to agreements concluded by the EU with non-Member States. In *Leyla Ecem Demirkan v Bundesrepublik Deutschland*, the ECJ observed that interpreting EU law provisions may be extended automatically to agreements concluded by the EU with a non-Member State if the agreement has express provisions to that effect.<sup>42</sup> However, due consideration must also be given to the objectives and context of the agreement and compared with those of EU law.<sup>43</sup> The fact that EU law is the benchmark to be utilised when interpreting Decision No.1/95 illustrates the asymmetry of the EU–Turkey Customs Union.

## Comparable situations in other customs unions

### *European Union Customs Union*

The European Union Customs Union comprises all the members of the European Union. Under art.2 of the TFEU, in areas where the EU has exclusive competence, only the EU can legislate and adopt laws. EU Member States can only do so individually if they are empowered by the EU. Under art.3 of the TFEU, the EU has exclusive competence over the Common Commercial Policy. Under art.218 of the TFEU, the EU has sole responsibility for negotiating agreements with third countries on behalf of all members. Accordingly, members of the EU Customs Union cannot unilaterally negotiate FTAs with third parties covering areas in the Common Commercial Policy.

### *EU Customs Union with Andorra and San Marino*

Andorra has had a Customs Union with the EU since 1990, but it is limited to industrial goods.<sup>44</sup> Customs duties and equivalent charges are eliminated on products

<sup>41</sup> *Istanbul Lojistik Ltd v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság* (C-65/16) EU:C:2017:770 at [48].

<sup>42</sup> *Leyla Ecem Demirkan v Bundesrepublik Deutschland* (C-221/11) EU:C:2013:583; [2014] 1 C.M.L.R. 39 at [44].

<sup>43</sup> *Demirkan v Deutschland* EU:C:2013:583; [2014] 1 C.M.L.R. 3 at [47].

<sup>44</sup> Agreement between the European Economic Community and the Principality of Andorra art.2.

covered by the Customs Union between the two parties. Article 7 of the EU–Andorra Customs Union requires the Principality of Andorra to adopt the EU’s import formalities towards third countries and customs rules necessary for the proper functioning of the Customs Union. The Agreement provides for remedying trade deflection caused by one party’s actions or measures under art.10. Like Turkey, the Principality of Andorra has no right to participate in the EU’s decision-making processes, but must implement EU laws.<sup>45</sup>

San Marino concluded an Agreement on Cooperation and Customs Union with the EU in 2002. The Agreement establishes a full customs union, and eliminates customs duties and charges having equivalent effect between the two parties. Much like Turkey, San Marino agreed to apply the EU common customs tariff to goods from third countries and adopt the common commercial policy and EU legislation in several areas, with no participatory rights in EU decision-making.<sup>46</sup> However, the economic effects of these asymmetries for Andorra and San Marino cannot compare to those for Turkey, which has a considerably larger economy.

Unlike the case with Turkey, some of the EU’s FTAs require its partners to recognise products originating in the Principality of Andorra falling within Chs 25 to 97 of the Harmonized System (HS) and all products originating in the Republic of San Marino as originating in the EU. These products therefore receive the same preferential treatment extended to EU Member States. The EU–Korea FTA, EU–Central America Association Agreement and EU–Chile FTA are examples where joint declarations were made to this effect.<sup>47</sup> To the extent that such joint declarations in the EU’s FTAs apply to Turkey, they often only include an invitation by the EU calling on its partners to negotiate separate agreements with Turkey.

### *Other non-EU customs unions*

#### **SACU**

The Southern Africa Customs Union (SACU) is a Customs Union between South Africa, Botswana, Lesotho, Namibia and Swaziland. Article 31 of the SACU Agreement of 2002 covers trade relations with third countries and requires all SACU members to establish a common negotiating mechanism and not to amend or enter into new agreements with third states without the consent of the other SACU Members. Bilateral agreements signed prior to the agreement of 2002 may remain in place but consent must be sought and granted by all members.<sup>48</sup> SACU

<sup>45</sup> College of Europe/European University Institute, Joint Conference on Differentiation in the European Union: “A new pragmatism or the end of ‘ever closer union’?” (17 November 2016), Position Papers and Summary of Proceedings, [https://www.coleurope.eu/sites/default/files/uploads/event/coe-eui\\_conference\\_on\\_differentiation\\_papers\\_and\\_summaries.pdf](https://www.coleurope.eu/sites/default/files/uploads/event/coe-eui_conference_on_differentiation_papers_and_summaries.pdf) [Accessed 20 February 2019].

<sup>46</sup> European Affairs Directorate – Foreign Affairs Department, “A History of the Relations between San Marino and the European Union” (2016), <http://www.esteri.sm/on-line/en/home/foreign-affairs/san-marino-and-the-eu/history-of-relations/documento1084663.html> [Accessed 20 February 2019].

<sup>47</sup> Joint Declaration concerning the Principality of Andorra and the Joint Declaration concerning the Republic of San Marino in the EU–Korea FTA, Protocol Concerning the Definition of “Originating Products” and Methods of Administrative Cooperation and Joint Declarations in EU–Chile FTA.

<sup>48</sup> OECD, “Agricultural Policies in Emerging Economies: Monitoring and Evaluation: Highlights” (2009), p.145, <https://www.oecd.org/tad/agricultural-policies/42347206.pdf> [Accessed 20 February 2019].

has concluded FTAs jointly for instance, with the European Free Trade Association (EFTA)<sup>49</sup> and Southern Common Market (MERCOSUR).<sup>50</sup>

## Eurasian Customs Union

The Treaty on the Eurasian Economic Union (treaty) establishes the Eurasian Economic Union (EAEU) and a Customs Union with free movement of goods and services and a common commercial policy.<sup>51</sup> The treaty, which entered into force in 2015, concerns Belarus, the Republic of Kazakhstan, the Russian Federation, Armenia and Kyrgyzstan.

An examination of the treaty reveals the members' desire for close cooperation and co-ordination of their external (trade) policies for the proper functioning of the Customs or Economic Union. The conclusion of FTAs is governed by art.102 of the treaty, which prescribes that a member may unilaterally grant trade preferences to a third party through an international treaty concluded before 1 January 2015 or an international treaty to which all the Member States are participants. Effectively, FTAs between individual members and third parties are only allowed if they were concluded before the treaty entered into force. The asymmetries present in the EU–Turkey Customs Union relating to third-party FTAs do not exist and are prevented by the legal framework of the EAEU.

Some asymmetry can, however, be found regarding the adoption of a common customs tariff where the Customs Union based its tariff provisions on Russia's regime. Other members (e.g. Kazakhstan) were forced to raise their tariffs to join this Customs Union. This complicated Kazakhstan's WTO accession process.<sup>52</sup>

### *Drawing conclusions?*

The analysis of other Customs Union models shows that they created a solid legal framework to avert structural asymmetries, particularly regarding trade relations with third parties.

First, Member States must abide by a common trade policy and negotiate FTAs with third countries under a common mechanism. Individual FTAs with third countries are only permitted if they existed prior to the creation of the Customs Union. However, unlike the EU–Turkey Customs Union, all parties are represented in the institutions or governing bodies that decide the commercial policy to be adopted. This eliminates asymmetries that would otherwise arise.

Secondly, regarding EU FTAs, specific safeguards have been introduced to ensure that products from San Marino and Andorra are accorded similar treatment as those from EU Member States. It goes without saying that similar provisions in EU FTAs for Turkish products covered by the EU–Turkey Customs Union would avert the challenges faced by Turkey without requiring Turkey to sign FTAs with EU FTA partners.

<sup>49</sup> EFTA–SACU Free Trade Agreement, <https://www.efia.int/free-trade/free-trade-agreements/sacu> [Accessed 15 March 2019].

<sup>50</sup> Preferential Trade Agreement between the Common Market of the South (MERCOSUR) and the Southern African Customs Union (SACU), <http://www.sacu.int/docs/agreements/2016/mercosur-and-sacu-tradeagreement.pdf> [Accessed 15 March 2019].

<sup>51</sup> Treaty on the Eurasian Economic Union art.1.

<sup>52</sup> Nico Popescu, "Eurasian Union: the real, the imaginary and the likely" (2014), p.12, [https://www.files.ethz.ch/isn/183574/CP\\_132.pdf](https://www.files.ethz.ch/isn/183574/CP_132.pdf) [Accessed 20 February 2019].

## **Levelling the field in the EU–Turkey Customs Union—possible solutions**

The drawbacks of the EU–Turkey Customs Union discussed above need fixing to ensure the proper functioning of the Customs Union and the realisation of benefits for all parties. Although it seems as if the problems posed by the asymmetries largely affect Turkey, EU businesses also stand to suffer. A World Bank report on the EU–Turkey Customs Union indicated that the asymmetries in the common commercial policy hurt EU-majority owned businesses operating in Turkey.<sup>53</sup> This suggests that it would also be in the EU’s interest to find a solution for the current situation, e.g. by helping Turkey conclude FTAs with third countries with which the EU has, or will negotiate, FTAs.

The easiest fix to this challenge is for Turkey to become an EU member. As an EU Member State, it would share uniform policies with other Member States in the areas of EU competencies, it would have co-decision powers, and the FTA’s would be aligned. However, this is a political question that lies outside the scope of this article.

### *Updating the customs union legal framework*

The drawbacks of the EU–Turkey Customs Union stem from the design of its legal framework. Turkey and the EU may revise the framework and address its shortcomings. Some of the key elements that should be looked into are the information-sharing and consultation mechanism, e.g. including Turkey in the Customs Union decision-making mechanism and FTA negotiations. The EU and Turkey have already begun preparations for negotiations aimed at updating the framework of their Customs Union.<sup>54</sup> The resolution of the asymmetries discussed here is still an important issue.

### *Co-negotiation of third-party FTAs with the EU*

The status quo of the legal framework of the Customs Union prevents Turkey from concluding its own FTAs with third parties in areas covered by the Customs Union. With that in mind, one way of resolving the FTA asymmetry problem is to have Turkey’s interests represented in FTA negotiations between the EU and third parties. This can be achieved either by having Turkey, the EU, and third parties, in tripartite FTA negotiations, or by having the EU negotiate reciprocal treatment for Turkey in its FTAs.

Although this seems like an easy fix on the surface, co-negotiation would fall foul of international law, EU Treaty law and Turkish national laws. On the question of the EU negotiating for Turkey, international law dictates that where a person represents a state and agrees to the adoption of a Treaty, that state can only be bound if the person representing it has full powers to do so.<sup>55</sup> This would require an agreement between Turkey and the EU under a decision of the Association Council expressly mandating the EU to negotiate and conclude FTAs on its behalf.

<sup>53</sup> World Bank, “Evaluation of the EU–Turkey Customs Union, Report No.85930-TR (28 March 2014), p.25.

<sup>54</sup> Binder, “Reinvigorating EU-Turkey bilateral trade” (August 2017), p.10, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2017\)599319](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599319) [Accessed 20 February 2019].

<sup>55</sup> Vienna Convention on the Law of Treaties art.7(1).

On Turkey's part, delegating this function to the EU would be relinquishing its sovereignty in this area. On the EU's part, guaranteeing to protect Turkey's interests, could potentially raise concerns of inconsistencies with EU law since Turkey is not an EU member: art.218 of the TFEU recognises the negotiation of agreements only between third parties and the EU where the EU acts on behalf of its members and in line with its competencies under art.3 of the TFEU.

There are no legal barriers to including Turkey at the negotiating table if each party represents its own interests. Turkey's inclusion in trade talks would depend on the agreement of the third parties. Certain EU FTA partners, however, like the US, Mexico and South Africa, have rejected the inclusion of Turkey in their negotiations.

### *Parallel track negotiations—Turkey clause*

Turkey could continue its current practice of holding parallel track negotiations akin to those of the EU. The aim would be to ensure that both Customs Union members begin and conclude FTA negotiations with third countries simultaneously. However, this alternative offers no guarantee of positive or similar results for the parties, or that the agreements will be reached simultaneously. As discussed, if the parallel track negotiations are not obligatory for third parties, there is a higher likelihood that FTAs may not be concluded with Turkey since the other countries stand to profit more from the EU FTA.<sup>56</sup>

To make the parallel track negotiations binding, the EU and Turkey could work on strengthening the "Turkey Clause" in EU FTAs. This clause was first introduced in the EU–Algeria FTA negotiations and requires the third party to make best efforts for the conclusion of a mutually advantageous agreement with Turkey.<sup>57</sup> That no subsequent agreement was made between Algeria and Turkey shows that the clause is weak. For effective results, the clause needs revision and should be made legally binding.

The EU could adopt the joint declarations it has made with its partners regarding Andorra and San Marino to Turkey and require the FTA partners to recognise goods covered by the EU–Turkey Customs Union as originating in the EU. This way the products covered under the Customs Union receive similar treatment outside the Union.

### *Turkey avoids opening up market to EU FTA partners—protects itself against consequences*

Failing to open up Turkey's market to EU FTA partners would contravene key provisions of the Decision. Turkey must adhere to the Common Custom tariff and adopt the EU's preferential regime. In addition, Turkey cannot close off its market entirely to EU FTA partners as this would contravene its WTO obligations under arts I and XI of the GATT 1994.

Article 56(2) of the Decision prescribes that where there are problems for Turkey in adopting legislation in an area of direct relevance to the functioning of the Customs Union, the Customs Union Joint Committee will address the matter and

<sup>56</sup> cf. discussion on trade deflection in section "Asymmetric free trade agreements with third parties" above.

<sup>57</sup> World Bank, "Evaluation of the EU–Turkey Customs Union", Report No.85930-TR (28 March 2014), p.29.

find a mutually acceptable solution. If no solution can be found, and either party considers that the discrepancies in the legislation may affect the free movement of goods, deflect trade or create economic problems on its territory, the party may, under art.58, refer the matter to the Customs Union Joint Committee for recommendations on ways of avoiding any injury.

Further:

“If discrepancies between Community and Turkish legislation or differences in their implementation in an area of direct relevance to the functioning of the Customs Union *cause or threaten to cause impairment of free movement of goods or deflections of trade and the affected Party considers that immediate action is required*, it may itself *take the necessary protection measures* and notify the Customs Union Joint Committee thereof; the latter may decide whether to amend or abolish these measures. *Priority should be given to measures which least disturb the functioning of the Customs Union.*”<sup>58</sup>

Arguably, failing to open up markets to EU FTA partners could qualify as a protection measure taken by Turkey owing to the threat of or actual deflections of trade caused by the EU FTA. Based on this provision, Turkey introduced a protection measure based on rules of origin for motor vehicles originating in Mexico and being exported to Turkey via the EU.<sup>59</sup> Mexico has no FTA with Turkey but can gain free access to its market through the EU–Mexico FTA.<sup>60</sup> The question to be addressed is whether EU FTAs with third countries constitute a case of discrepancies between EU and Turkish legislation or differences in their implementation that would justify Turkey’s adoption of protection measures.<sup>61</sup>

Although the resolution mechanism is not perfect, disputes relating to the scope or duration of protection measures are to be resolved by the Association Council. If no settlement is reached within six months from the date a measure was initiated, either party may refer the dispute to arbitration under art.62 of the Decision. The arbitration award binds the parties.<sup>62</sup>

These provisions clarify that the remedies available to Turkey under the Decision are limited to: (1) imposing protection measures; (2) pursuing its claims before the Association Council; or (3) arbitration where the conditions warranting such proceedings exist. Outside the Customs Union framework, other legal remedies available to Turkey would only rest in the WTO, which grants its members access to its dispute settlement mechanism. However, under the regulatory framework of the WTO, Turkey has to show that the benefits accruing to it directly or indirectly under the WTO covered agreements are impaired as a result of either: the EU violating its WTO obligations, measures taken by the EU, or any other situation.<sup>63</sup> Provided that art.XXIV5(b) and 8(b) of the GATT on the formation of a free-trade area are complied with, concluding asymmetric FTAs, even though they result in

<sup>58</sup> Decision 1/95 art.58(2) (emphasis added).

<sup>59</sup> World Bank, “Evaluation of the EU–Turkey Customs Union”, Report No.85930-TR (28 March 2014), p.25.

<sup>60</sup> Comprehensive EU–Mexico Free Trade Agreement covering trade in goods and trade in services, which came into force in October 2000 and 2001, respectively.

<sup>61</sup> European Commission, “Study of the EU–Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement: Final Report” (October 2016), [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2016/turkey\\_anx6\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/turkey_anx6_en.pdf) [Accessed 20 February 2019].

<sup>62</sup> Decision 1/95 art.60.

<sup>63</sup> DSU art.3.3.

trade deflection or loss of preference in the EU for Turkey, does not violate the EU's obligations.

Turkey would equally not succeed in a non-violation claim or situation claim. In *Japan—Film*, the Panel laid out three elements to be demonstrated to succeed in a non-violation claim. First, that the imported products are subject to and benefit from a relevant market access concession. Secondly, that the competitive position of the imported products is being upset. Lastly, that the competitive position is being upset by applying a measure not reasonably anticipated.<sup>64</sup> These three elements do not exist in Turkey's case, especially since the conclusion of FTAs by the EU is reasonably expected from the Decision. In any case, non-violation claims in the WTO are approached with caution and treated as an exceptional concept.<sup>65</sup>

### *Negotiating split-structure FTAs*

As highlighted in the section “Roles reversed? Turkey's FTAs with third parties”, Turkey also has the option of negotiating split-structure FTAs: one agreement applying to areas covered by the EU–Turkey Customs Union and a separate agreement for areas outside the scope of the Customs Union. This split approach to negotiations has been adopted by the EU itself as well, e.g. regarding trade and investment agreements, because of the Opinion of the Court of Justice of the European Union on the division of competences between the EU and its Member States.<sup>66</sup> In Turkey's case, the agreement covering areas related to the functioning of the Customs Union would be subject to consultation with the EU as per art.57 of the Decision. Being outside the scope of the Customs Union, the other agreement would be negotiated free of the EU's input. This approach would ensure that Turkey does not incur trade costs in all sectors of the economy.

## **Conclusion**

The EU–Turkey Customs Union has bolstered bilateral trade through mutual elimination of tariff and non-tariff restrictions to trade. In Turkey's case, liberalisation of its trade policies in line with the Customs Union has also enhanced its access to global markets. Nonetheless, the devil remains in the detail. The trade effect of economic integration is closely tied to the agreements bringing them into play. The legal framework adopted for the EU–Turkey Customs Union has asymmetric commitments that increasingly will lead to trade complications for Turkey.

Notably, Turkey is obliged to accept FTAs concluded by the EU without receiving any corresponding benefits from the EU's FTA partners. This creates huge real income losses for Turkey that limit its realisation of the benefits of integration. Turkey is also not in a position to exercise any influence on decisions by the EU relating to customs and trade policy that directly affect the functioning of the Customs Union. The associated trade costs affect both Turkish-owned

<sup>64</sup> Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper* (WT/DS44/R), para.10.41.

<sup>65</sup> Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R), para.187.

<sup>66</sup> *Council conclusions on the negotiation and conclusion of EU trade agreements* (8 May 2018), <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf> [Accessed 20 February 2019].

companies and EU-majority owned firms operating in Turkey. Thus, the incentive to solve such asymmetries should be just as present for the EU as it is for Turkey.

This article has outlined five solutions that would address the shortcomings of the Customs Union’s legal framework and even out trade between the EU and Turkey. First, the parties could introduce an effective information-sharing and consultation mechanism where Turkey is included in the Customs Union decision-making mechanism and FTA negotiations. Secondly, Turkey could join the EU and its third-country FTA partners in trilateral negotiations. Thirdly, in the alternative, the EU could introduce a requirement in its FTAs for its partners to conclude a similar FTA with Turkey (Turkey clause). Fourthly, Turkey could avoid opening up its market to EU FTA partners and qualify its actions as a protection measure taken in response to the threat of or actual deflections of trade caused by the EU FTA. Finally, Turkey could adopt a split structure to its FTAs: one agreement applying to areas covered by the EU–Turkey Customs Union and a separate agreement for areas outside the scope of the Customs Union.