

## Who remembers Turkey's pre-accession?

**Philipp Böhler, Jacques Pelkmans  
and Can Selçuki**

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### **Abstract**

In 2005 the EU and Turkey officially started accession negotiations that were intended to lead to Turkey's full membership of the EU. Yet today, the Turkish accession process has virtually ground to a halt and lost all credibility. Talk of alternatives to full membership can be heard from various sides; we highlight four instances of what we call 'parallelism', namely the elusive concept of a 'privileged partnership', the EU-Turkey customs union, the recently launched 'Positive Agenda' and Turkish participation in the Energy Community Treaty. While a privileged partnership represents a more comprehensive but still remote framework for EU-Turkish relations, the latter three are merely an escape route from pre-accession. We conclude our analysis with a discussion on Turkey's possible membership of the European Economic Area, which in effect would serve none of the parties involved. We conclude that both partners, the EU and Turkey, would be well advised to remember their pre-accession commitments of 13 years ago – for their mutual benefit.

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# Contents

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1. Introduction and purpose.....	1
2. Turkish pre-accession – today’s predicament .....	2
3. Turkey’s pre-accession record .....	4
4. Fleeing towards ‘parallelism’ .....	8
4.1 A privileged partnership .....	8
4.2 The EU-Turkey customs union .....	9
4.3 The ‘Positive Agenda’ .....	11
4.4 Turkey in the Energy Community .....	12
5. The EEA, a <i>contre-coeur</i> alternative to EU membership? .....	14
5.1 Explaining the EEA .....	15
5.2 What the EEA would require from Turkey.....	17
5.3 The Turkish perspective .....	18
5.4 The EU perspective .....	18
6. Conclusions.....	19

## List of Figures

Figure 1. Share of EU in Turkish exports and imports* .....	3
Figure 2. Share of inward EU FDI in total inward FDI .....	3
Figure 3. EU Pre-Accession Support .....	5

## List of Tables

Table 1. Timeline of agreements leading to membership negotiations .....	2
Table 2. Status of Turkish accession negotiations, all 33 chapters .....	7
Table 3. The Ankara Agreement after the establishment of the EU-Turkey Customs Union .....	10
Table 4. Substance of the 2006 Energy Community: Turkey is currently an observer to the EnCT.....	13

# Who remembers Turkey's pre-accession?

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## 1. Introduction and purpose

Turkey first applied for EU membership of the European Union in 1987, and has officially been a candidate country since the Helsinki European Council in 1999. No country has ever held candidate status for as long as 13 years. Only in October 2005 did the Council adopt a negotiation framework and formally open accession negotiations. Seven years later, has Turkey's pre-accession status lost all credibility?

This CEPS Special Report asks the questions that EU and Turkish policy-makers have been strenuously avoiding: what about Turkish accession today – is it still being pursued in earnest – and, if not, what are the credible alternatives? Questions such as these should not be shirked because EU membership is no small matter. Adopting the full *acquis* in earnest, fulfilling the political and economic Copenhagen criteria, demonstrating the required administrative capacity and, more generally, displaying a readiness to address other outstanding issues in a spirit of cooperation and eagerness to join the 'club' is what (pre-)accession is all about. In other words, EU membership cannot be compromised, either in substance or in spirit, and credibility has to be deserved and earned.

In the past, some countries joined the EU without being fully ready to do so, but at least they were eager to accede and insisted on a reasonable pre-accession period so as not to thwart political and business momentum. Mistaken and less than credible these instances may have been, the Turkish case stands out as being far more problematic because, as we show, the adoption of the *acquis* is slower than for any other acceding country previously. In fact, no hard results of any significance can be registered. To put it bluntly: Turkish pre-accession as it stands at the moment is simply not credible. This might change. Indeed, it would be good if it were to change because the economic and strategic potential of having a willing Turkey inside the EU is likely to be great. Nevertheless, it is time to take stock and ask the questions that have to be asked.

Section 2 describes the general predicament of Turkish pre-accession, followed, in section 3, by a more detailed exposé of the hard results of 13 years of pre-accession. Given the very long period spent on rather poor results – not helped by lingering political issues like the Cyprus question (which we shall not discuss here), Turkish and EU policy-makers have been seeking escape routes from the tough reality of pre-accession. We discuss four such escape routes briefly in section 4 under the heading 'parallelism'. Section 5 is devoted to one possibly serious 'alternative', be it temporary or permanent. Finding that the occasional suggestion of a 'privileged partnership' (a denial of EU membership) is no more than an emperor without clothes, we analyse the EEA (European Economic Area) as a *contre-coeur* alternative for Turkey that, one day, might be seen by leading politicians as a default option. For this alternative to be properly understood, it is crucial to comprehend the EEA and how it works. Sadly, this appreciation of the EEA is usually lacking in the literature and suggestions of considering the EEA as an option for Turkey are made much too light-heartedly. Our conclusions are set out in section 6.

Table 1. Timeline of agreements leading to membership negotiations

Date	Event
Jul-59	The Ankara Agreement (EEC Membership)
Nov-70	Additional Protocol (Details of Customs Union)
1987	EU Membership Application
Mar-95	decision 1/95 (Customs Union)
Apr-97	Association Council deems Turkey eligible for membership
Dec-99	The Helsinki European Council (Turkey is officially a candidate country)
Feb-11	The Accession Partnership
Oct-05	Full Membership Negotiations start

Source: Authors' compilation based on Republic of Turkey Ministry for European Affairs website.

## 2. Turkish pre-accession – today's predicament

The predicament affecting Turkish (pre-) accession is essentially determined, on the one hand, by the country's internal resolve to reform and to adapt to *acquis* requirements and, on the other hand, by the wider political and economic context, which has changed considerably over 13 years. Moreover, these two determinants are interdependent, to some extent. By definition, the EU's official recognition of Turkey as a candidate country (with all the political, legal and financial consequences that this entails) might seem to obviate any problem of resolve on the EU side, but, unfortunately, this inference would be wrong.

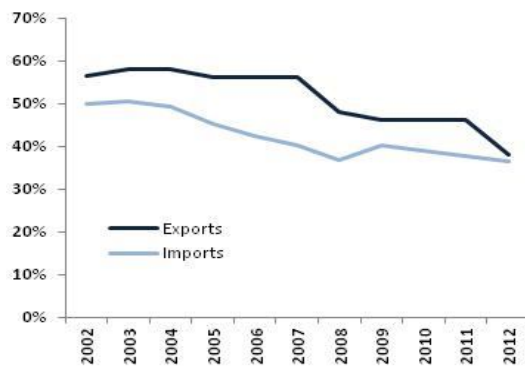
As we show in detail in section 3, little preparation for what accession demands has been undertaken in Turkey. This fact is all the more painful because the EU-Turkish customs union, in force since 1 January 1996, comprises many provisions that are also part and parcel of pre-accession (more on this in the next sections). On the EU side, it is much harder to 'measure' what it takes to facilitate Turkish accession, since the EU does not have to fulfil *acquis* requirements and is obliged by pre-accession to assist Turkey in numerous ways to prepare and incorporate elements of its *acquis*. Nevertheless, there is no denying that the political impetus within the EU has weakened significantly, with concerns about a more religiously conservative Turkish society; the stagnation of human rights reforms; the slow pace of structural and economic reforms and the lack of political will to solve the Cyprus question. This should be seen against the backdrop of a more general enlargement fatigue and lingering doubts about the EU's 'absorption capacity' for a large country that is still relatively poor and, in some respects, culturally distinct. Moreover, the old fear about the size of the country, implying a status equal to (say) Germany in the Council and the European Parliament after accession is regarded by some as worrying.

Furthermore, since late 2008, the financial and banking crisis, followed by a sovereign debt crisis, have plunged the EU into a 'great recession' causing the EU's political leaders to focus almost singularly on short-term measures to calm financial markets whilst beginning to reconstruct a more robust EMU. The urgency of these matters and the intensity of top level political discourse on EMU and the crisis leave practically no time, energy or political capital to spend on reinvigorating Turkish pre-accession. Despite the pre-occupation of the European Council with the crisis, the EU agenda is loaded with other initiatives. Looking at the recent half-yearly EU presidency agendas, the issue of Turkish accession is hard to pick out. Finally, there are also some painful inconsistencies in the EU's stance towards Turkey today, such as restrictive quotas for road haulage (despite being in a customs union) – with Turkey rightly objecting that these are extremely costly and one-sided. Witness too the non-incorporation *in* ongoing FTA negotiations (e.g. with India, a competitive threat for Turkey,

given its export structure) or in the FTA with South Korea and the visa problems, at least for Turkish business executives to manage their trade in the EU as part of its customs union.

The political resolve on accession in Turkey has also waned for a number of reasons: the country has invested much political and business energy in enlarging its strategic role in the region, for example its Black Sea cooperation, its active response to the Arab spring, its reaching out to Central Asia, its ambivalence towards Kurds inside and outside Turkey, not to mention the turn for the worst in its relations with neighbouring Syria, and – less noticed in Europe – the courtship of deeper trade and investment relations by East Asian countries (led by Indonesia and China). It is not hard to grasp why Turkey is eager to benefit from the numerous opportunities in its wider region and under the WTO. With its trade regime modernised in the EU-Turkey customs union, implying low or zero external tariffs on thousands of product groups (because EU tariffs apply), the Turkish economy became much more exposed to global competitive forces. After a short but painful adjustment, Turkey has emerged stronger. An influx of EU FDI has further strengthened its competitiveness in goods. Furthermore, whilst the EU had modest growth before the crisis and no growth since, Turkey enjoyed healthy economic growth before and during the crisis. Possible explanations for this solid performance might include (besides the boost in trade competitiveness) the stringent but effective financial and banking reforms of a decade ago; the adoption of a technical part of the EU *acquis* via the EU-Turkish customs union (see below), which has helped Turkish acceptance of quality products inside the EU and beyond; endogenous development with a young and better educated labour force and a stable government since Prime Minister Erdoğan came to power in 2003.

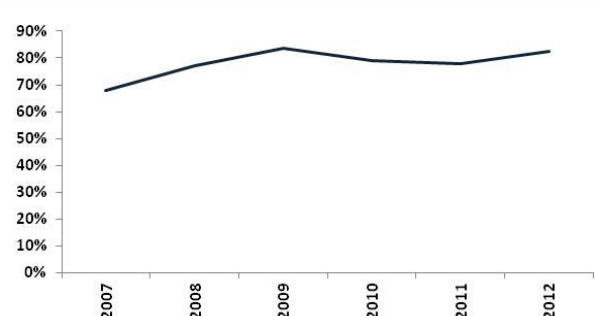
Figure 1. Share of EU in Turkish exports and imports\*



\* First six months of 2012.

Source: TURKSTAT database.

Figure 2. Share of inward EU FDI in total inward FDI



We should not overstate the waning of Turkish political will for EU accession, however. This will remain, as evidenced by the fact that in 2011, Turkey's EU secretariat was transformed into a "Ministry of the EU" with the mandate to pursue full EU membership. Market integration with the EU-27 is already very strong today, with no less than 42% of Turkish trade going to or coming from the EU and a staggering 81% of inward direct investment originating from the Union (2008-2010). EU pre-accession agricultural funds are trying to support the badly needed transformation of Turkish agriculture.

Turkey's per capita income is still comparatively low at 31% of the EU-27 2010 average but real economic growth since 2005 has been 4% on average, making for steady catch-up

growth. This again is partly due to the customs union with the EU,<sup>1</sup> exposing Turkey to fierce competition inside the Euro-Turkish customs area as well as to competition from WTO partners, since EU (and by implication Turkish) tariffs are very low.<sup>2</sup> The inward FDI wave has everything to do with the customs union too, if not with pre-accession as a process: privileged access to the Single Market and an improving investment climate in Turkey combined with low costs and increasing familiarity with, if not adoption of, European standards and regulatory requirements have created a favourable environment for foreign investment.

The current political predicament is also in part due to a curious ambivalence on the part of the EU. Turkey's official pre-accession status notwithstanding, its (pre-)accession to the EU is informally expressed as problematic, a concession, a mistake or at best a mixed blessing, yet there is an underlying recognition, even among those ostensibly opposed to accession itself, that the EU would be better off *with* Turkey as a member under certain reasonable scenarios.

Today, the case for considering Turkey as an enrichment of the EU is only explicitly made in business circles, certain strategic centres and occasional economic reports. The EU would enjoy Turkey's competitive and dynamic emerging economy, a young and up-skilling labour force, great market opportunities at the business level and a gateway to the markets of the Middle East, the Black Sea area and Central Asia. Turkey and the EU are also complementary in important respects: Turkey is a member of NATO, the OECD, the Council of Europe and the OSCE; its tourism is essentially European; millions of Turks live in the EU (often strengthening business ties at the SME level) and many Turks study in EU countries.

The EU's deep ambivalence has of course not gone unnoticed in Turkey. Apart from the Cyprus issue, it is not unreasonable to suspect that Turkey's lacklustre efforts to improve its *acquis* performance is also due to a fear that it would have to incorporate several elements of the EU *acquis* (such as the environmental and employment chapters) which are very costly for Turkey, given its level of development and current ways of doing things, and which it would not pursue before much greater prosperity alter these ways. There is a circular problem here because as long as the probability of eventual EU membership is low (given EU public opinion and the expected referendums), Turkey will not readily assume such burdens only to find that the EU door is closed after agreeing to take them on.

### 3. Turkey's pre-accession record

A more detailed look at Turkish accomplishments during pre-accession is indispensable if the credibility of this period is to be assessed. Table 1 is based on the latest Commission progress report on Turkey.<sup>3</sup> The authors have scored these accomplishments according to seven degrees of 'equivalence' with the *acquis*, ranging from 'no progress' to 'uneven progress' or 'some progress' (and other terms) to 'aligned' with the *acquis*. Note that all these terms are employed in the Commission report itself.

<sup>1</sup> Agreement creating an association between the European Economic Community and Turkey, OJ L217 of 29/12/1964, p. 3685.

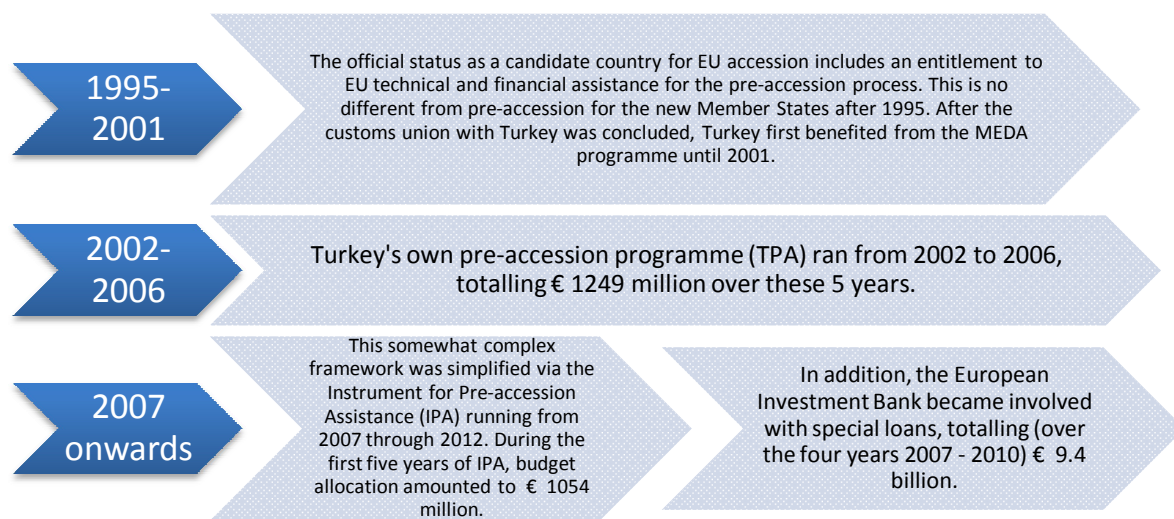
<sup>2</sup> T. Sübidey, "The EU-Turkey Customs Union: A Model for Future Euro-Med Integration", MEDPRO Technical Report No. 9, March 2012.

<sup>3</sup> Commission Staff Working Document SWD (2012) 336, 10/10/2012, Turkey 2012 Progress report.



Of the 33 *acquis* (also called 'negotiations') chapters, so far only one has been provisionally closed.<sup>4</sup> Twenty chapters have not even been opened yet. Eight chapters remain taboo for the moment, due to the Cyprus problem.<sup>5</sup> Of the eight chapters (all Single Market) declared a priority in 2006,<sup>6</sup> not one has been provisionally closed today. Going through Table 1 chapter by chapter, one immediately sees that progress, in 2012, is rare and dispersed. Thus, of the 145 entries in the table (not counting the chapters column), only 25 are showing 'good progress' or 'aligned' (green or light green). Of the 33 chapters each seen as a whole, only six have these scores. However, these chapters mean relatively little. One is the customs union that of course has long been in place (although there are some lingering problems) and is not an accomplishment of pre-accession as such. Also, foreign & security policy (in *acquis* terms, very 'light'), statistics and science and research (mainly, cooperative and programme participation) are outside the core *acquis* of economic integration or of justice, freedom and security. This leaves 'company law' (including auditing) and one important chapter on ICT, telecoms and media. Starting from the other end, 22 entries indicate 'no progress' or 'close to no progress' and another 26 merely 'very limited progress'. These facts do not augur well for pre-accession in the near future. It should not be forgotten that pre-accession places obligations on the EU as well, in particular to provide EU pre-accession technical and financial assistance, as explained in Table 1. Turkey enjoys similar assistance regarding the *acquis* as the new EU member states enjoyed before their accession in 2004 and, respectively, 2007.

Figure 3. EU Pre-Accession Support



Source: Author's compilation based on European institution documents.

One should be wary of softening interpretations like a correction on the 13 years of pre-accession, arguing that it all began only in 2005. Such a correction would not change the

<sup>4</sup> Chapter 25 Science & Research, provisionally closed in June 2006 under the Austrian Council Presidency; Conclusions of the 2236<sup>th</sup> Council Meeting of the General Affairs and External Relations Council of 12 June 2006, Brussels, 9946/06 (PRESS 161).

<sup>5</sup> Chapters 1, 3, 9, 11, 13, 14, 29, 30 according to the Conclusions of the 2270<sup>th</sup> Council Meeting of the General Affairs and External Relations Council of 11 December 2006, Brussels, 16289/06 (PRESS 352).

<sup>6</sup> Chapter 1: free movement of goods, Chapter 3: right of establishment and freedom to provide service, Chapter 9: financial services, Chapter 11: agriculture and rural development, Chapter 13: fisheries, Chapter 14: transport policy, Chapter 29: customs union and Chapter 30: external relations.

picture because, of the eight priority chapters selected in 2006, not one has been provisionally closed, as noted above. Readjusting pre-accession to 2005 is at least misleading, for two reasons. First, the economic weight and regulatory substance of some chapters is far greater than others. One of the ‘heavier’ ones, if not the heaviest, is chapter 1 on the free movement of goods. Besides general principles and mutual recognition, this consists of many hundreds of technical (‘Old and New Approach’) directives, and references to up to 4000 CEN/CENELEC<sup>7</sup> standards linked to such EU regulation. However, the bulk of these can be found in the annexes of Decision No 2/97 of the EU/Turkey Association Council. In a way, these Annexes amount to pre-accession *avant-la-lettre*, years before Turkey was declared a candidate country. Still, Table 1 scores this chapter as merely showing ‘some progress’ (especially due to Old Approach directives) despite 16 years of efforts. Turkey only became a full member of CEN /CENELEC in 2010. Second, it is also misleading because there was never any reason to ‘wait’ until the so-called accession negotiations started (in 2005).

These ‘negotiations’ are in fact not negotiations, except for highly circumscribed and minor exceptions of the *acquis*, and usually temporary anyway. In the second half of the 1990s and later, pre-accession processes with 12 candidate countries were ongoing, with detailed annual progress reports for all of them. Moreover, the Commission published a White Paper in 1995<sup>8</sup> setting out in minute detail what pre-accession *acquis* requirements were expected. This regulatory guide comprised 899 directives and recommendations over the 23 internal market chapters (internal market, widely conceived, as it should be). PHARE programmes and other EU assistance were of direct help to support countries to incorporate the *acquis* in national legislation and to follow up on market or technical institutions and other aspects of implementation. Later, Turkey was also and is assisted in many *acquis* questions, as well as in pre-cohesion and pre-CAP questions with ample finance and new institutions. Bearing all this in mind, the extremely weak scores in Table 1 after such a long period simply leave no other interpretation than a serious lack of resolve on the part of Turkey about pre-accession. And as a result, pre-accession is not credible. Finally, it should also be noted that the loss of credibility in terms of progress is also because Turkey has lost the perspective of full membership.

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<sup>7</sup> European Committee for Electrotechnical Standardization.

<sup>8</sup> European Commission, White Paper, “Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union”, COM(95) 163, May 1995.



Table 2. Status of Turkish accession negotiations, all 33 chapters

Accession Negotiations										
Chapter name		Main Issues Under Each Chapter								
FREE MOVEMENT OF GOODS	Alignment with general principles	Standardisation	'Old Approach' product legislation	New and Global Approach' product legislation	Procedural Measures					
FREEDOM OF MOVEMENT OF WORKERS	Access to the labour market	Coordination of social security systems	European Health Insurance Card	Participation in European Employment Services	<div>No Progress</div> <div>Close to no progress</div> <div>Very Limited Progress</div> <div>Uneven Progress</div> <div>Some Progress</div> <div>Good Progress</div> <div>Aligned</div>					
RIGHT OF EST. & FREEDOM TO PROVIDE SERVICES	Right of establishment and freedom to provide crossborder services	Postal Services	Mutual recognition of professional qualifications							
FREE MOVEMENT OF CAPITAL	Capital movements and payments	Payment systems	Fight against money laundering							
PUBLIC PROCUREMENT	General principles	Award of public contracts	Remedies							
COMPANY LAW	Company law	Corporate accounting	Auditing							
INTELLECTUAL PROPERTY RIGHTS	Intellectual property law	Copyright and neighbouring rights	Enforcement	Industrial property rights	<div>Good Progress</div> <div>Aligned</div>					
COMPETITION POLICY	Anti-trust and mergers	State aid								
FINANCIAL SERVICES	Banks and financial conglomerates	Insurances and occupational pensions	Financial market infrastructure	Securities markets and investment services						
INFORMATION SOCIETY AND MEDIA	Electronic communications and information and communications technologies (ICT)	Information society services	Audiovisual policy							
AGRICULTURE AND RURAL DEVELOPMENT	Horizontal issues	Common market organisation	Rural development	Quality policy						
FOOD SAFETY, VET. & PHYTOSANITARY POLICY	General food safety issues	Veterinary policy	Placing on the market of food, feed and animal byproducts	Food safety rules	Specific rules for feed	Phytosanitary policy	Genetically modified organisms (GMOs)			
FISHERIES	Resource and fleet management	Inspection and control	Structural actions, market policy and State aid	International agreements						
TRANSPORT POLICY	Road transport	Rail transport	Inland waterways transport	Combined transport	Air transport	Maritime transport				
ENERGY	Security of supply	Internal energy market	Renewable energy	Energy efficiency		Nuclear safety and radiation protection				
TAXATION	Indirect taxation	Direct taxation	Administrative cooperation and mutual assistance		Operational capacity and computerisation					
ECONOMIC AND MONETARY POLICY	Monetary policy	Economic policy								
STATISTICS	Statistical infrastructure	Classifications and registers	Sectoral statistics							
SOCIAL POLICY AND EMPLOYMENT	Labour law	Health and safety at work	Social dialogue	Employment policy	Preparations for the European Social Fund (ESF)	Social inclusion	Social protection	Anti-discrimination	Equal opportunities between women and men	
ENTERPRISE AND INDUSTRIAL POLICY	Enterprise and industrial policy principles	Enterprise and industrial policy instruments		Sector policies						
TRANS-EUROPEAN NETWORKS	Transport networks	Energy networks								
REGIONAL POL. & COORD. OF STRUCTURAL INSTR.	Legislative framework	Strengthening the institutional framework	Administrative capacity	Programming and programme implementation		Monitoring and evaluation		Financial management, control and audit		
JUDICIARY AND FUNDAMENTAL RIGHTS	Reform of the judiciary	Anti-corruption policy	Fundamental rights	Freedom of thought, conscience and religion		Women's rights and gender equality		socially vulnerable and/or persons with disabilities		
	Anti-discrimination policies	Property rights	Respect for and protection of minorities and cultural rights							
JUSTICE, FREEDOM AND SECURITY	Judicial cooperation in civil and criminal matters	Fight against terrorism	External borders and Schengen	Police cooperation and the fight against organized crime		Visa policy	Cooperation in the field of drugs		Customs cooperation	
	Migration	Asylum								
SCIENCE AND RESEARCH	Research and innovation policy	Participation in Framework Programme (FP7)								
EDUCATION AND CULTURE	Education, training and youth	Culture								
ENVIRONMENT	Horizontal issues on environment	Waste management	Industrial pollution control and risk management	Nature protection	Water Quality	Chemicals	Noise	Climate change	Administrative capacity	
CONSUMER AND HEALTH PROTECTION	Consumer protection area	Product safety related issues	Non-safety related issues	Public health	Tobacco control	Communicable diseases	Blood, tissues, cells and organs		Mental health	
CUSTOMS UNION	Customs legislation	Administrative and operational capacity								
EXTERNAL RELATIONS	Common commercial policy	Bilateral agreements with third countries		Development policy and humanitarian aid						
FOREIGN, SECURITY AND DEFENCE POLICY	Common foreign and security policy (CFSP)									
FINANCIAL CONTROL	Public internal financial control (PIFC)	External audit	Protection of the EU's financial interests	Protection of the euro against counterfeiting						
FINANCIAL AND BUDGETARY PROVISIONS	Traditional own resources	Gross National Income resource		Administrative infrastructure						

Source: Commission Staff Working Document SWD (2012) 336, 10/10/2012, Turkey 2012 Progress report.

Regaining credibility is only possible with a different mindset, different priorities in Ankara and a radically improved *acquis* performance in a short timeframe, complemented by a credible plan for finalising it. If such a clear U-turn is not performed, the EU will inevitably conclude – sooner or later – that the risks of taking in an ill-prepared country, beset by internal struggle, are simply too great.

#### 4. Fleeing towards ‘parallelism’

Given this predicament and the hard facts of the dismal *acquis* performance, both partners would seem to be stuck in a ‘pre-accession’ arrangement that does not work. But it is extremely difficult, not to mention politically risky, even in communication terms, to terminate the process now. Pre-accession being a dead-end street, the response has typically been not to give up on it explicitly, while proposing or initiating escape routes from the cul-de-sac. This is a curious affair, however: the suggestions or new initiatives differ from pre-accession, indeed, are presented as ‘alternatives’, whilst pre-accession (which could absorb all such suggestions in substance) remains in process. This can only mean that the ‘alternatives’ are parallel activities to pre-accession, although, by virtue of their substance, they effectively constitute a denial of pre-accession!

We briefly discuss four instances of ‘parallelism’ to pre-accession: the so-called ‘privileged partnership’; the regulatory agenda of the customs union; the so-called ‘Positive Agenda’ and the incorporation of Turkey into the Energy Community. Different as they might be in substance, it is the escape route from the pre-accession ‘trap’ that they all have in common.

##### 4.1 A privileged partnership

The vague notion of a ‘privileged partnership’ has been a phantom ever since Commissioner Andriessen coined the phrase in the early 1990s with reference to the countries having just freed themselves from communism. Ever since it was suggested that Turkey become an official candidate in the late 1990s, privileged partnership has been left undefined, or at least its contours were little more than shadows on a wall. As Dedeoglu and Gürsel<sup>9</sup> (2010) rightly note, such vague suggestions are often made orally and amount to little more than a denial of Turkish EU membership. Although one can find literature on all kinds of sectoral or partial agreements with Turkey, such (often rather casual) suggestions simply start from the assumed irrelevance or hopelessness of the pre-accession project. Of course, if Turkey were to return to the status of being an important neighbouring country of the EU, anything is possible – there would seem to be no value-added whatsoever in such suggestions. One possible exception is interesting enough to consider the scenario briefly. According to Dedeoglu and Guersel, there have been Turkish suggestions of a ‘gradual integration’ via roadmaps, or more precisely, ‘gradual membership’ over several stages. The core idea is that, at some point during pre-accession, Turkey could begin to participate in EU decision-making passively, then later without veto options, and only (much) later as a fully-fledged member of the EU. Similar arrangements are currently provided for in the context of the Schengen/Dublin association of EFTA countries and, to a certain extent, in the EEA. However, a clear distinction must be made between the latter and EU membership. As indicated, legally speaking a ‘second class’ EU membership is not feasible.

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<sup>9</sup> Dedeoğlu B., Gürsel S. “EU and Turkey: The Analysis of Privileged Partnership or Membership”. Betam Research Reports, May, 2010 ([http://betam.bahcesehir.edu.tr/en/archives/666/eu-and-turkey-the-analysis-of-privileged-partnership-or-membership\\_final](http://betam.bahcesehir.edu.tr/en/archives/666/eu-and-turkey-the-analysis-of-privileged-partnership-or-membership_final)).

Although the suggestion would seem to greatly underestimate what it would take – legally and otherwise – for the EU to accept such a solution, the interesting aspect is the presumed solution to the chicken-and-egg problems of Cyprus (which comes first?) and the circular issue of the lack of incentives for Turkey to do more about the *acquis*, despite wanting greater certainty of becoming an EU member. The author Cemal Karakas insists that, in the current set-up, the date of genuine EU membership can easily be postponed so that Cyprus or other issues and prevailing sensitivities inside the EU cannot lead to a situation of blackmail. One might consider this idea as somewhat ‘naive’ or rather desperate, but it does show how deep-seated the problems of incentive are. As far as we know, it is also the sole suggestion whose escape route does not lead to parallelism, or a de facto denial of (future) EU membership.

#### 4.2 *The EU-Turkey customs union*

Although one might reasonably assume that the customs union treaty is just that – the removal of tariffs and quotas between partners while agreeing on a common external tariff – this interpretation is mistaken. Of course, the customs union has been firmly established, but the 1995 decision entails so much more than that; in fact, the customs union treaty is a misnomer. It is an ‘internal-market-minus’ treaty. It foresees the gradual establishment of the free movement of goods (and that is much more than free trade inside a customs union, it implies the regulatory goods *acquis*), services, capital and persons (and hence all the concomitant EU regulation and sometimes market institutions). It includes an option to gradually build up the Turkish basis for the CAP and explicitly contains an impetus to negotiate the mutual opening of public procurement markets at a later date.

Table 3. The Ankara Agreement after the establishment of the EU-Turkey Customs Union

Ankara Agreement		
Decision 1/95 EU-Turkey Association Council		
Decision 2/97		Decision 2/2000
TBT Annex II (goods)	Competition Art 32-38	Services and Public Procurement Markets
Motor Vehicles	Rules Applicable to undertakings (Art 101-105)	Negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the Community and Turkey shall begin in April 2000
Lifting and Mechanical Handling Appliances		
Gas Appliances	Rules applicable to State Aid (Art 107-109 TFEU)	
Construction Plant and Equipment		
Pressure Vessels	Public Undertakings and undertakings with special or exclusive rights (Art 106 TFEU)	
Measuring Instruments		
Electrical Material		
Textiles		
Foodstuffs		
Medicinal Products		
Fertilizers		
Dangerous Substances		
Cosmetics		
Environmental Protection		
Information Technology, Telecommunications and Data Processing		
General Provisions in the Field of Technical Barriers to Trade		
Free Movement of Goods General (Commission Communication concerning the consequences of the “Cassis de Dijon” judgement 120/78)		
Construction Products		
Personal Protective Equipment		
Toys		
Machinery		
Tobacco		
Energy		
Spirits Drinks		
Cultural Goods		
Explosive for Civil Use		
Medical Devices		
Recreational Craft		

Another aspect of the EU-Turkey customs union is the obligation on Turkey, as of 1996, to align its external commercial policy with the EU's Common Commercial Policy. With a view to achieving such an alignment, Turkey is bound to negotiate free trade agreements with the same third countries as the EU does, but this does not mean that the EU includes Turkey in its negotiations. It is up to the latter to achieve similar outcomes as the EU in its negotiations. As third countries are aware of this obligation towards the EU, Turkey is placed in a potentially difficult position. This is especially the case because it has no influence on the formation of EU Common Commercial Policy, effectively rendering Turkey an EU satellite when it comes to its commercial policy. Turkey made this concession in the prospect of a fast accession process, which, 16 years later, has proven to be a unrealistic prospect.<sup>10</sup>

It may thus come as a surprise that the EU and Turkey have two parallel routes at their disposal to accomplish largely the same thing: the customs treaty and pre-accession. At first, the customs union was a prelude to Turkish candidature (until 1999) but today it is sometimes hailed as an alternative means of improving the *acquis* performance. Table 2 summarises the substantial content of Decision No. 2/97 of the EU-Turkey Association Council under the Ankara Agreement pre-dating pre-accession, showing a huge programme dedicated to the removal of numerous technical barriers to trade, harmonisation of competition rules and a decision to begin services and public procurement negotiations. The latter was taken in 2000, when Turkey was already a candidate but accession negotiations had not yet started; a clear instance of 'forum shopping' with the good intention to make progress as rapidly as possible.

Nowadays, the early head start of adopting the *acquis* via the customs union may turn into its antithesis: with pre-accession now in a dead-end road the customs union may serve as a fall-back option. This is undoubtedly a deterioration, since no general and hard obligation underlies the customs union's regulatory programmes (unlike pre-accession). It would seem that the progress in item 1 of Table 1 is almost entirely due to the regulatory work programme under the customs union, as shown in Table 2. Since it is more discretionary, it took many years and is still not finished. Otherwise, the great ambitions of moving to an 'internal market minus' via the customs union treaty have never been seriously taken up, whether services, capital or the CAP.

### 4.3 The 'Positive Agenda'

In May 2012, in an attempt to revitalise the accession process, Turkey and the European Commission launched the "Positive Agenda" which aims to intensify cooperation in areas of mutual interest. According to Commissioner Füle, the Positive Agenda's main focus lies in the adoption of the EU *acquis*, political reforms in the areas of fundamental rights, visa, mobility and migration, trade, energy, counter-terrorism or dialogue on foreign policy.<sup>11</sup> In contrast to the accession negotiation, the Positive Agenda emphasises a very partial approach to Turkish integration into the EU. But, as is immediately apparent, it overlaps almost entirely with the equivalent items in pre-accession.

<sup>10</sup> According to Decision No. 1/95 of the EU-Turkey Association Council, a procedure shall be set up between the EU and Turkey with the objective of exchanging views prior to trade negotiation. This has not yet been implemented; for further details, see Haluk Kabaalioglu, "Turkey's Relations with the European Union: Customs Union and Accession Negotiations", pp. 15-16, in Peter-Christian Müller Graff and Haluk Kabaalioglu (eds), *Turkey and the European Union*, 2012, Baden-Baden: Nomos.

<sup>11</sup> Positive EU-Turkey agenda launched in Ankara by Commissioner Füle, *RAPID*, 17.05.2012, MEMO/12/359.

The first result of the Positive Agenda materialised rather swiftly. On 21 June 2012, Turkey and the European Commission initialled a re-admission agreement; a first step towards visa liberalisation between Turkey and the EU – an issue that has been on the top of the Turkish agenda since the early 1980s<sup>12</sup> and one of the bitterest complaints from the world of Turkish business. In contrast to the accession talks, this shows that when there is a goal in sight, progress is more easily realised.

On 14 June 2012, Commissioners Öttinger and Füle met with Turkish Ministers Yıldız and Bağış in Stuttgart and in the conclusions of the meeting reiterated the importance and the determination of both sides to further Turkish integration into the Single Market for electricity and gas, the promotion of renewable energy, energy efficiency and clean energy technologies, long-term perspectives on energy scenarios and energy mix, global and regional energy cooperation and nuclear safety and radiation protection.<sup>13</sup> The aim of the Positive Agenda was clearly stated as being not to replace but to complement and support Turkey's accession process.<sup>14</sup> However, as it stands now, the Positive Agenda is the only instrument on which visible progress is being achieved. This kind of discretionary 'parallelism' is at the very least most curious for a candidate already on the pre-accession road to EU membership for so long. The political statement about being 'complementary' to pre-accession, despite the overlap, is simply not credible, unless something changes drastically quite soon.

#### 4.4 Turkey in the Energy Community

At the same time, parallelism was practised in the form of cooperation at the sectoral level. The Energy Community Treaty (EnCT) is an EU external energy policy instrument providing for the creation of an integrated market in natural gas and electricity in south-east Europe. This is achieved by exportation of the EU's internal energy market legislation to its third country members. The EnCT currently has ten members<sup>15</sup> and four observers.<sup>16</sup> Turkey was granted observer status by the first Energy Community (EnC) ministerial meeting in 2006. On the same occasion the Commission and Turkey expressed the intention to work together to provide for the eventual full membership of Turkey in EnCT.<sup>17</sup> The EnCT aims at creating "a single regulatory space for trade in network energy," obliging its members to implement EU rules on energy, the environment, competition and renewables.<sup>18</sup> Table 3 provides a list of the EU *acquis* that was to be implemented following the EnCT's entry into force on 1 July 2006. However, the EnCT is a dynamic treaty, similar to that of the European Economic area (see below), whose substantial content evolves in parallel to the EU's internal legislative

<sup>12</sup> Statement by EU Commissioner Cecilia Malmström on the initialling of the EU-Turkey Readmission Agreement, Commissioner Malmström, *RAPID*, 21.06.2012, MEMO/12/477.

<sup>13</sup> Enhanced EU-Turkey energy cooperation, joint statement by EU Commissioners Oettinger and Füle and Turkish Ministers Bağış and Yıldız, *RAPID*, 14.06.2012, MEMO/12/434.

<sup>14</sup> Positive EU-Turkey agenda launched in Ankara, op cit.

<sup>15</sup> Albania, Bosnia and Herzegovina, Croatia, the EU, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia, Ukraine and the United Nations Interim Administration Mission in Kosovo (UNIMK).

<sup>16</sup> Armenia, Georgia, Norway and Turkey.

<sup>17</sup> Conclusions of the Ministerial Council meeting, 17.11.2006, Skopje, points 8 and 9.

<sup>18</sup> Articles 2 and 3 of the Treaty Establishing the Energy Community, OJ L198/18, 20.7.2006, pp. 18-37.



developments. Accordingly, the EnCT Ministerial Council adopted the third legislative package for the energy market in October 2011.<sup>19</sup>

The EnCT is a very ambitious regulatory project. The EU's energy market regulation is in most cases very intrusive and obliges countries to undergo deep reforms of their energy sectors to live up to the obligations binding EnCT members. As can be seen from the member countries, which are mainly neighbouring countries with little or no membership perspective, the EnCT aims at permanently integrating these countries into the EU's internal energy market, in most cases, short of actual membership. It appears that the EnCT was designed to last.

*Table 4. Substance of the 2006 Energy Community: Turkey is currently an observer to the EnCT*

Energy Community Treaty					
Electricity energy/goods	Gas energy/goods	Environment	Competition	Renewables	Energy Efficiency
Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity	Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas	Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment		Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market	Directive 2006/32/EC on energy end-use efficiency and energy services
Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment	Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply	Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment		Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport	Directive 2010/31/EU of the European Parliament and of the Council on the energy performance of buildings
Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity	Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks	Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment			Directive 2010/30/EU on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products

Source: Energy Community Treaty, OJ L198/18, 20/07/2006.

From a pre-accession point of view, it is confusing, if not superfluous or wasteful, to go through the EnCT whilst every regulatory item in Table 3 and the dynamic development of the EnCT can more logically and permanently be accomplished via pre-accession (chapter 15 of the negotiation chapters), indeed, directly under EU law and its enforcement. It is not difficult to understand the political rationale of this curious move: Turkey is becoming a vital part of the network of gas pipelines from Central Asia, the Caucasus and Russia to Europe and, apparently, the uncertainty or lack of credibility of pre-accession is so great that Turkey

<sup>19</sup> Energy Community, Ministerial Council Decision No. 2011/02/MC-EnC on the implementation of the Third Internal Energy Package, Chisinau, Moldova, 6 October 2011.

opted to embed itself in a permanent legal framework today rather than stick to a seemingly futile approach that holds out for change that might come tomorrow.

## 5. The EEA – a *contre-coeur* alternative to EU membership?

Parallelism is either a denial of possible EU membership (privileged partnership) or an escape route from the impasse of pre-accession (the customs union regulatory package, the Energy Community and the Positive Agenda). The former is delusory and the latter has serious drawbacks, like too much discretion and/or a very partial approach, thereby discrediting pre-accession with its more robust and integrated solutions for the very same problems.

There is one option, however, suggested occasionally, which would not necessarily discredit (pre-)accession. Indeed, it could even exploit the pre-accession route effectively. It can thus not be characterised either as parallelism or as an escape route. On the contrary, it makes full and effective use of pre-accession but would first focus on the internal market in the wider sense. This idea consists of Turkey joining the European Economic Area (EEA).

What of this option? The EEA<sup>20</sup> enlarges the geographical scope of the Internal Market and its flanking policies to the three EFTA countries: Iceland, Liechtenstein and Norway. No other agreement ever concluded between the EU and a third country (or, indeed, anywhere else in the world) features such deep and close market integration. Decision-shaping, continuous take-over of new EU legislation (on the internal market) and an own legal EEA system with the EFTA court presiding over it, to name but a few distinct features of the EEA, make it the most privileged form of association with the Union. This can rightly be called a ‘privileged partnership’ and, unlike vague suggestions in the literature that are often ad hoc and ignore the accession *acquis*, it is congruent with 21 of the 33 chapters<sup>21</sup> of the accession negotiations.

The EEA option for Turkey can have two variants: the permanent one and the waiting-room one. The former is currently practised by Norway and Liechtenstein; the latter has been practised by Austria, Finland and Sweden in the run-up to EU membership and the national referenda about this decision. This might be followed by Iceland, which has recently applied for EU membership and is now a candidate country, like Turkey. Superficially, there might seem to be compelling arguments for both the EU and Turkey to favour this solution. First, it is in principle compatible with pre-accession. For the permanent solution, the pre-accession process for the relevant 21 chapters can be fully followed and the related cohesion and technical agricultural support could even be maintained for an agreed number of years.

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<sup>20</sup> Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area, OJ L1, 3.1.1994, pp. 3-522. For further information on the EEA, see: S. Norberg (ed.), *EEA Law: A Commentary on the EEA Agreement*, 2004, Kluwer Law International; M. Cremona, “The ‘dynamic and homogeneous’ EEA: Byzantine structures and various geometry”, *European Law Review*, Vol. 19, 1994, pp. 508-526; J. Forman, “The EEA Agreement Five Years On: Dynamic Homogeneity in Practice And Its Implementation By The Two EEA Courts”, *Common Market Law Review*, Vol. 36, 1999, pp. 751-781; Christophe Hillion, “Integrating an outsider – An EU perspective on relations with Norway”, *Europautredningen, Rapport 16*, 2011 (<http://www.europautredningen.no/eksterne-utredninger/>).

<sup>21</sup> The 23 internal market chapters (wider sense), except agriculture (11) and fisheries (13).

For the temporary variant, it can be fully integrated with pre-accession; the difference being that these 21 chapters would all have to be closed before Turkey could become an EEA member. Second, it could be presented as an elegant mode of gradually solving the political and constitutional problems (linked to some of the Copenhagen criteria, but presumably also to Cyprus), without undue pressure or haste, whilst fully participating in the EU internal market - undoubtedly highly advantageous for Turkey. Clearly, if this aim is explicit, then, by definition, the variant is the 'waiting room' one. If it is left open, the permanent mode is at stake, implying that striving for Turkish EU membership is no longer an axiom (so, its candidature status would have to be abandoned). Third, and related to the latter issue, the risk of referenda on Turkey's EU membership yielding a 'No' somewhere in the EU might be so great that the EEA option is considered to be the next-best option.

Joining the EEA would go far beyond the customs union between the EU and Turkey by ensuring a very deep and wide internal market (minus agriculture and fisheries). It would combine deeper economic integration with common institutions for surveillance and adjudication of infringements, when they arise. At the same time, today's EEA, being a free trade area, does not include the participation of its contracting parties in the EU customs union or in the Common Commercial Policy (chapter 29 of Table 1). It follows that Turkish participation in the EEA (if it could be combined with the customs union) would amount to even deeper economic integration with the EU than currently enjoyed by EFTA/EEA countries.

The EEA alternative is a serious and economically substantive one, no doubt, unlike the very partial or at times other, untenable suggestions of parallelism. Nevertheless, in our view Turkish membership of the EEA would be a bad idea. It would be bad for the EEA, inappropriate for Turkey and unhelpful for the EU. One major reason for this interpretation (though not the only one) is that the EEA is not appreciated for what it is (namely, a *de facto* membership of the Single Market) and how it works for non-EU EEA countries.

### 5.1 *Explaining the EEA*

The EEA agreement finally entered into force in 1994 after a rather troublesome early development. Its main purpose is to deepen and widen market integration between the EFTA countries and the EU by extending the Internal Market (with the exception of fisheries and agriculture) to the countries of EFTA. The entry into force of the EEA agreement marked the end of a decades-old divide between two European economic blocks, the classical-free-trade driven EFTA on the one side and the supranational EU on the other. It also provides a 'deep', yet still incomplete, alternative to full participation in the European integration project for countries unwilling to integrate all the way. The upshot is that the EEA is based on public international law, without the EU constitutional doctrines of supremacy and direct effect that govern the EU legal order. Non-EU EEA countries have no decision-making power and do not even participate without a vote in EU decision-making (except in Schengen decisions). All they can do is play an active role in the preparatory process of EU law making ('decision-shaping'), but even this only vis-à-vis the Council and Commission, not directly in the European Parliament.

The EEA now consists of 30 countries, three of which are non-EU members, namely Iceland, Liechtenstein and Norway. Over the last 20 years, "the EEA countries have demonstrated an excellent record of proper and regular incorporation of the *acquis* into their own

legislation.<sup>22</sup> Indeed, the three EFTA/EEA countries achieved the European Council's 1% transposition deficit target in 2011, whereas just 11 EU member states achieved the same. The EEA has its own 'surveillance' body and court. These two bodies and their case practices are very closely aligned to the EU's equivalent bodies and enjoy a reputation of true independence and efficiency. For all practical (economic) purposes, the EEA is thus a part of the Single Market, also in a dynamic sense in that the steady stream of new internal market *acquis* is continuously adopted by the EEA-3 countries' national parliaments. What this means is that easily more than 1,000 new or amended EU directives and many EU regulations have been adopted from the EU internal market *acquis* since 1995.<sup>23</sup>

The ease with which the EU Internal Market *acquis* is implemented within the EEA is due to the well recognised mutual benefits derived from participation in the Internal Market by the EFTA/EEA countries, their highly competitive economies and not least the political consensus among the 30 countries concerning the Internal Market. Besides having capable public administrations,<sup>24</sup> it is this prior consensus on the overwhelming majority of new EU legislation in the Single Market that renders it feasible, even for the small-sized Principality of Liechtenstein to incorporate the permanent flow of new EU internal market *acquis* into its domestic legal regimes and enforce them properly, including with regard to citizens' access to justice.

One important aspect that is frequently and sometimes deliberately omitted in the debate on the proper functioning of the EEA is the so-called 'nuclear option'. As an intergovernmental treaty, linked directly to the EU *acquis*, EEA-3 countries always have the option of rejecting a particular element of new *acquis* (which EU countries, of course, do not have). However, the direct link with the overall EU *acquis* must then imply that the entire domain of EU *acquis* cannot be applied to that EEA-3 country. This is called the 'nuclear' option since the costs of rejection are seen as extremely high. Article 102 of the EEA-Agreement (EEA-A) provides for the suspension of the relevant policy area (i.e. one Annexe of the EEA-A) in case of non-incorporation of a single legislative act of 'EEA-relevance' from that policy area.

The 'nuclear option' is revealing: EEA countries, willing to accept deep market integration, might sometimes refuse to pay the price of new *acquis*, insisting on their regulatory autonomy. But the price of refusal is higher still. This deliberate political and legal compromise, designed to safeguard EEA members' (nominal) sovereignty, shows clearly that the factual allocation of power in the EEA is *highly EU-biased*. The EFTA/EEA countries are not granted a vote in the internal EU procedures leading to EEA-relevant acts, yet are bound by the obligation to incorporate them, save facing the 'nuclear solution' of Article 102 EEA. It follows that the market integration strategy, policy approaches and implementation methods of the EFTA/EEA countries have to be broadly convergent with those of the EU in order to accept EU *acquis* on a regular basis without threatening the homogeneity of the Internal Market.

<sup>22</sup> Council of the European Union, Council conclusions on EU relations with EFTA countries, 3060<sup>th</sup> General Affairs Council meeting, Brussels, 14 December 2010 ([www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/118458.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf)).

<sup>23</sup> Not to mention relevant decisions, recommendations and comitology regulations or the post-Lisbon implementing regulations, or discretionary decisions of some EU agencies.

<sup>24</sup> The so-called national administrative capacity of properly incorporating the *acquis* and enforcing it is crucial for the good functioning of the internal market. Hence, capable administrations are a prerequisite for a successful EEA as well.

## 5.2 What the EEA would require from Turkey

In this subsection, we argue that allowing Turkey into the EEA would undermine the EEA and its proper functioning. In years to come, depending on progress made in adopting the Single Market *acquis* inside Turkey, today's EFTA/EEA countries would consider Turkish EEA membership as a major threat to 'their' arrangement. An arrangement that is economically beneficial works well legally and institutionally and raises few issues.

This matters because the EU *itself* cannot 'offer' Turkey EEA membership. Before becoming a non-EU EEA country, one must first be accepted as an EFTA member.<sup>25</sup> The EEA-3 is very reluctant to take in any new member, let alone countries that do not follow practices in line with theirs nor have excellent records in administrative capacity and implementation and enforcement of the EU *acquis* (insofar as it applies). In addition, there are two other formidable objections to Turkish EEA membership: first, the proper functioning of the EEA would be undermined by the implementation and enforcement record of Turkey, even if its record were to improve considerably; second, the 'absence' of high[er] politics – so archetypal for the EEA – would be brought to an end; something that would alter the EEA beyond recognition.

It would be a serious mistake to suggest that the 'waiting-room' idea might be used for a learning process during which countries can, in the EEA, gradually improve their implementation/enforcement record until they are ready for EU membership. As far as the Single Market is concerned, the EEA is identical to EU membership, nothing less. Participation in the EU's Internal Market is no simple matter. It requires stringent reforms and a large degree of approximation, going as far as complete harmonisation in various fields.<sup>26</sup> Similarly, it requires ambitious implementation and enforcement regimes in order to retain the credibility of the single market to business and consumers. And, so far, the Turkish track record on this leaves a lot to be desired, as Table 1 shows only too well. Worse still, the EU-Turkish customs-union-plus, in force since 1996, works reasonably well on the tariff and customs side, but is plagued by a series of implementation and enforcement issues as well as a backlog in regulations and European technical standards issues stemming from parts of chapter 1 (free movement of goods) and chapter 29 (customs union and its annexes).

At the moment, it is far from clear whether EEA countries would have a basic trust in Turkey's 'administrative capacity' to enforce the *acquis* properly and in a timely manner. An avalanche of bad enforcement cases from Turkey would result in the collapse of the small, already overloaded EEA bodies and destroy the trust that exists at the moment.

A politicisation of the EEA would not be welcomed either. From the sheer fact of its size, if Turkey were to enter the EEA, EU-Turkish relations would immediately affect the working and day-to-day problem solving capabilities of the EEA, even though formally the two (EEA membership and EU-Turkish relations) are not linked. Eventually, this would replace the current working relationships inside the EEA, which are based on trust, with an attitude that posits EEA questions as 'negotiable'. Such a political mindset would undermine the explicit compromise under which EEA member states implement EU laws they have had no say in legislating.

<sup>25</sup> Art. 128 (1) EEA: "Any European State becoming a member of the Community shall, or becoming a member of EFTA may, apply to become a Party to this Agreement...."

<sup>26</sup> M. Cremona, "The European Union as an International Actor: The Issues of Flexibility and Linkage", *European Foreign Affairs Review*, 3 (1), pp. 67-94, 1998.



### 5.3 *The Turkish perspective*

From a Turkish perspective, EEA membership is not desired, nor for that matter is any form of ‘privileged partnership’ with the EU. Turkey seeks EU membership and has done so since 1959.<sup>27</sup> The EEA focuses on market integration only, assuming the fulfilment of the Copenhagen criteria (as a matter of course, a formal conditionality has never been regarded as necessary) and well-functioning governments. Agendas such as the building up of fully functional democratic institutions, the full implementation of the rule of law and good governance in public administration are alien to the EEA; such political and institutional accomplishments are prerequisites of EEA membership. Today’s EFTA/EEA members are all highly developed democratic countries, which do not require any systematic reform of their constitutional or social systems. Turkey has already travelled some distance along the path of internal political reforms and partially adjusted its constitutional system to the requirements of EU membership. But its journey is not over yet. One might argue that a successful achievement of internal Turkish reforms requires a powerful external incentive – full EU membership – for painful political and social transformations to be acceptable.

Another critical but unavoidable issue is that, were Turkey to adopt ‘only’ the 21 chapters of the Single Market *acquis*, it would signify a fundamental U-turn for the country. The domestic political reform process with respect to human rights, so-called ‘justice-and-home-affairs’ issues, foreign and security policy and a range of institutional and other questions might all be set aside. Strictly speaking, Turkey does not ‘need’ the EU to implement reform in human rights and democracy; it can pursue them on the basis of its own convictions of ‘enlightened self-interest’. However, given its history, its turbulent domestic politics and the forces of religious conservatism in the country, such convictions may not necessarily prevail. Thus, confronted with such a fundamental choice, Turkey will have to count the potential gains a deep economic and political integration with the EU would yield and seriously assess the regional alternatives of going it alone.

One forceful argument against Turkey going it alone is that its regional positioning need not be incompatible with EU membership, or rather, is precisely one of the additional benefits for the EU and Turkey alike, were Turkey to join the EU. True, if Turkey’s membership of the EU, having completed pre-accession successfully, were to be rejected by referendum in an EU country, Turkey is likely to try and make the best of things and opt for a ‘workable’ economic relationship with the Union outside of, but very similar to, the EEA. The reason for this suggestion is obvious: the completion of the *acquis* is very demanding and amounts to a de facto reform of regulations, institutions and policies of the country in a fundamental fashion, which is not to be thrown away so easily. The legitimacy of this process is only warranted if the incentive of future accession as a full member in the EU is on the table.<sup>28</sup> The only serious ‘privileged partnership’, the EEA, will therefore only emerge *after* a long process, following referenda in the EU. This sequence cannot be altered: joining the EEA while still in the pre-accession phase is not in Turkey’s best interests.

### 5.4 *The EU perspective*

Turkey’s current position is clear to the EU: the pre-accession process provides a well-tested framework with extensive legal and institutional help and special agricultural and cohesion

<sup>27</sup> Haluk Kabaalioglu, “Turkey’s Relations with the European Union: Customs Union and Accession Negotiations”, pp. 15-16, in Peter-Christian Müller Graff and Haluk Kabaalioglu (eds), *Turkey and the European Union*, 2012, Baden-Baden: Nomos.

<sup>28</sup> C. Bretherton and J. Vogler, *The EU as a Global Actor*, 1999, London and New York: Routledge, p.137.



funding to guide Turkey towards the adoption of the *acquis*. The monitoring is strict, transparent and annual. The EU itself is likely to bring in special provisions in the accession treaty which will help the Union to gradually adjust to Turkish membership. The experience gained with pre-accession helps the EU to prepare itself for the entry of a large country with an 'emerging economy' status (the 'absorption capacity' of the Union). Against the backdrop of these challenges in Turkey's accession process, the EU adopted an amended negotiation framework<sup>29</sup> that allows for more control and veto opportunities on the part of the EU than in any other framework before it. It introduces the possibility to adopt safeguard clauses (even permanent ones) in sensitive areas such as the free movement of persons, structural policy and the Common Agricultural Policy.<sup>30</sup> These provisions in the negotiation framework formally provide for a loophole for Turkey's 'second class membership' of the EU.<sup>31</sup> The mere possibility of permanent safeguard clauses at least challenge the all-inclusive nature of accession, as restrictions of the rights and obligations of an EU member state under the Treaties are usually applied very restrictively and only temporarily.

The EU is, at least on paper, fully prepared to give the Turkish accession process a positive outcome. It is difficult, from the point of view of the EU, to come up with any argument in favour of admitting Turkey into the EEA. Giving a country the status of 'candidate' for EU membership has many legal, procedural, financial and political consequences in 'Brussels', in the country at stake and, often, for international business. A shift away from this status cannot and will not be undertaken done lightly.

Despite these well prepared and very far-reaching safeguard instruments - unique in the EU's accession history - Council committees still speak of "negotiations with Turkey" (rather than accession negotiations). Is accession not the natural outcome of successful (pre-) accession negotiations and Turkey's candidature in the first place?

## 6. Conclusions

After an unprecedented 13 years of pre-accession yielding poor results, Turkish pre-accession is no longer credible. The official stance on both sides shows no recognition of this fact, although there are many informal indications, both in the EU and in Turkey, that (pre-) accession has simply been forgotten. As a legacy of the past, the highly structured pre-accession process is duly continued but merely in a quasi-automatic mode, apparently without much impetus from top political leaders and without much prospect of Turkey achieving the near-complete adoption of the EU *acquis* any time soon.

Although the Cyprus problem has had a paralysing effect, there is little reason to expect that, once that issue is resolved, Turkey would eagerly and happily embrace the demanding EU political, institutional and economic *acquis* in all the chapters. Recently, in Brussels, Deputy Prime Minister Ali Babacan explained that Turkey will prioritise the alignment of its

<sup>29</sup> Negotiation Framework agreed by the EU Member States on 3 October 2005, Luxembourg ([www.ec.europa.eu/enlargement/pdf/turkey/st20002\\_05\\_tr\\_framedoc\\_en.pdf](http://www.ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf)).

<sup>30</sup> Point 12 of the Negotiation Frameworks states: "Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture. Furthermore, the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a maximum role of individual Member States."

<sup>31</sup> B. Lippert, "The Conceptual Dimension of Turkey-EU relations", p. 25, in Peter-Christian Müller Graff and Haluk Kabaalioglu (eds), *Turkey and the European Union*, 2012, Baden-Baden: Nomos.

legislation with the *acquis* in areas that support Turkey's economic growth. What he meant was short-term economic growth, because EU membership, with solid market institutions and credible enforcement, ambitious intellectual property rights (IPR) protection and a much wider scope than goods, trade and foreign direct investment (FDI), with (on the whole) well-tested EU regulation in many policy areas, is bound to be good for the long-run growth of Turkey. Advocating an *à-la-carte* approach to pre-accession after 13 years of pre-accession and more than 16 years since the customs union treaty (with its huge regulatory agenda covering two large chapters in pre-accession) cannot be interpreted as anything other than merely a perspective on pre-accession and as a privileged channel of permanent negotiation with the EU, with an open agenda and discretionary outcomes. But that is not and cannot be what pre-accession is all about. Such political statements and agendas are in effect a denial of pre-accession and hence, a denial of Turkey's status as a candidate country.

The EU has done little to create a different impression. It has shown clear signs of enlargement 'fatigue' in general and notable reticence, to say the least, in the case of Turkey in particular. In Council circles, the official terminology speaks of 'the' negotiations with Turkey, which again is a denial of pre-accession. As a result, some political circles in the EU, but also the EU and Turkey together, have fled into (what we call) 'parallelism'; constructions and initiatives that are parallel to pre-accession. It is hard to make sense of such parallelisms when pre-accession, as a comprehensive and integrated framework, has already been working for many years, with EU membership in sight at the end of the tunnel.

We have discussed four instances of parallelism: notions of a 'privileged partnership' (which turn out to be void of substance), the (by definition, selective) follow-up of the little-known regulatory agenda of the EU-Turkey customs union pre-dating pre-accession, Turkey's possible membership of the Energy Community and the 2012 Positive Agenda (mind the wording!). All of these initiatives either deny or disregard pre-accession or are regarded as diversions from the dead-end street of pre-accession. The problem with these initiatives is that pre-accession is only further discredited. Most, if not all, of these activities can be better achieved within a pre-accession framework than outside it. Anyway, none of them bring much compared to EU membership, except the regulatory customs union agenda (but that has, after 16 years, yielded results in chapters 1 and 29 of pre-accession, which are the same).

There is, however, one possible 'alternative' that is not *a priori* in contradiction with pre-accession and later EU membership. We refer to Turkish membership of the EEA, temporarily as a 'waiting room' outside full EU membership, or permanently, which is strictly a denial of membership but the road to the EEA could still be based on pre-accession processes. In terms of *acquis*, the EEA is identical to 21 chapters of the accession negotiations, except for the EEA enforcement institutions. The unwritten *acquis* of the EEA, a non-problem for today's non-EU EEA countries, is that EEA countries fulfil all the Copenhagen criteria and have more than adequate administrative capacity at their disposal.

Our analysis shows that, although the internal market substance of the EEA is 'deep', has broad scope and is hence a serious alternative and economically useful for Turkey, EEA membership would be a bad idea: bad (indeed, unacceptable) for the present EEA, unsuitable for Turkey, given its desire to become an EU member and nothing less, and unhelpful for the EU.

We conclude that, if pre-accession processes are not to degenerate into mere rituals driven by a legacy of the past, Turkey and the EU will have to face up to their own promises, self-imposed obligations and the visions proclaimed with much fanfare ever since the late 1990s. Special arrangements or sector agreements are possible with any neighbouring country or trusted partner; but when clearly overlapping with detailed pre-accession obligations, as in

the case of Turkey, they are inappropriate, if not damaging. Being a candidate country and working towards EU membership should not be a discredited aim.

Sooner or later, the issue of an 'alternative' is likely to return with full force at the highest political level. One scenario could be that Turkey does make a serious attempt to close many chapters of the *acquis*, followed by a treaty of accession and national referenda on that treaty. If one EU country were to reject it, Turkey might be in a better position than today to consider the EEA as an option. Still, it is reasonable conjecture to expect Turkey to refuse this option, or even a bilateral but very similar variant of the EEA.

Another, more speculative scenario is that the EU itself changes in the meantime. Imagine a scenario whereby the UK (minus Scotland) votes to withdraw its membership of the European Union in 2014. In such a case the EU Treaty calls for negotiations between the UK-minus and the EU. It might come to signify a new type of EU of two concentric circles, namely, a core EU based on today's *acquis* (including the eurozone, but perhaps not necessarily for all) and a lighter version of the EU for the wider circle, led by the UK-minus. The latter is likely to include the internal market with some clearly delimited exceptions or derogations, but without Schengen and without the eurozone. For the EU to accept that, one has to avoid the bilateral Swiss 'salami' approach and find a way to maintain the 'homogeneity' of the Single Market via credible and EU-based enforcement (except for the derogations). It is conceivable that, should such a 'new EU' emerge, Turkey might find it acceptable to join the UK-minus in the wider circle and still enjoy many of the benefits of market integration.



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