

## EDITORIAL COMMENTS

### Turkey's quest for membership of the European Union

During the night of 3 to 4 October 2005, after more than 24 hours of grueling negotiations between the Member States, the Council was finally able to reach agreement on a framework for negotiations on the terms of Turkey's membership of the European Union. Immediately thereafter, the Turkish Foreign Minister flew to Brussels to attend the Intergovernmental Conference opening the accession negotiations in the very early hours of 4 October. The manner in which formal talks on the conditions for Turkish membership of the European Union were launched was anything but dignified.

It will be remembered that the prospect of membership was first held out to Turkey in the Association Agreement signed in Ankara in 1963.<sup>1</sup> The essential objective of the Ankara Agreement and the protocol added in 1970 was the establishment, in three stages, of a customs union. In Decision No. 1/95 of the Association Council,<sup>2</sup> definitive arrangements were laid down for completing the final phase of this customs union. This involved an extensive programme for alignment of Turkish legislation with that of the Community. For the customs union to come into force and to operate smoothly, Turkey had to adopt a large part of the Community *acquis*, which it did successfully. In particular, the measures taken concerned legislation relating to customs duties, quotas, standards, trade policy, competition, state aid, the protection of intellectual and commercial property rights, and taxation.

In 1987 Turkey formally applied for membership but the Commission recommended against that application. The request was premature. At that time, even more so than today, there was a manifest need for further extensive economic and political reform in Turkey. However, after completion of the customs union in 1996, a pre-accession strategy for Turkey was developed and, from 1998 onwards, the Commission, at the request of the Council, began issuing regular reports on Turkey's progress toward accession. In 1999, the Helsinki European Council formally accepted Turkey as a candidate for

1. See Art. 28 of the Ankara Agreement, O.J. 1964, No. 217 of 29 Dec. 1964 (Art. 28 reads as follows: "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community").

2. Decision No. 1/95 of 22 Dec. 1995, O.J. 1996, L 35/1.

membership on the basis of fulfilment of the same criteria as applied to other applicant countries. But no date was set for the beginning of negotiations.

In its recommendation of 6 October 2004, the Commission found that Turkey had made substantial progress in fulfilling the Copenhagen political criteria. It therefore recommended opening accession negotiations, subject to certain conditions. The European Council endorsed this proposal on 16 December 2004. It was decided that negotiations would start on 3 October 2005. While a firm promise was thus held out to Turkey, that promise was not unconditional. Turkey was required to ensure that six important pieces of legislation identified by the Commission would have entered into force. These concerned rules on a zero-tolerance policy for combating torture and maltreatment, and provisions on freedom of association and of expression, religious freedom and women's and minorities' rights. In addition, it would be necessary for Turkey to sign the Protocol on the adaptation of the Ankara agreement to the widened membership of the European Union.

By the end of September 2005, the Commission and the Council recognized that Turkey had fulfilled these conditions. However, when signing the protocol on the extension of the customs union to the 10 new Member States, including Cyprus, Turkey explicitly declared that its signature did not imply recognition of the State of Cyprus. It also made it clear that it was not prepared to allow ships and aircraft from Cyprus to have access to its territory. This attitude did not go down well with the European Parliament, which decided to postpone a vote on the extension of the Ankara Agreement to the new members.<sup>3</sup> Turkey's actions also prompted Austria to block the adoption by the Council of the proposed framework for the negotiations with Turkey. Although the European Council had repeatedly stated that the common aim of the negotiations was accession, - and that accession was neither automatic nor guaranteed -, Austria called for the negotiation mandate to mention a "privileged partnership" as an alternative to full membership. In addition, it intimated that its final position on the mandate for negotiations with Turkey could also depend on the question whether the Council would decide to allow accession talks with Croatia to go forward without further delay. It also stressed that Turkey's accession should not unduly strain the EU's "absorption capacity" and that any arrangements made should ensure that the financial burdens are fairly shared among all Member States.

In the end, Austria got most of what it wanted, including a decision that Croatia was co-operating sufficiently with the International Criminal Tribunal for the former Yugoslavia to enable accession talks with that country to

3. The debate in the EP is reported in *Agence Europe*, No. 9037 of 29 Sept. 2005, pp. 3–6.

begin right away.<sup>4</sup> What it did not obtain was a specific reference in the negotiating framework to alternatives to full accession for Turkey. The latter country was adamant that it would not accept any objective for the negotiations other than full membership. However, the text that was finally approved by the Council (and not opposed by Turkey) comes close to envisaging a possible outcome of the negotiations that falls short of full membership. It is true that the Council re-affirmed that the negotiations are based on Article 49 of the Treaty on European Union and that the shared objective of these negotiations is accession. But it was also said that the negotiations are “an open-ended process, the outcome of which cannot be guaranteed beforehand”. The Council further stated: “While having full regard to all Copenhagen criteria, *including the absorption capacity of the Union*, if Turkey is not in a position to assume all the obligations of membership it must be ensured that Turkey is fully anchored in the European structures through the strongest possible bonds”.<sup>5</sup>

The manner in which reference is made to the Union’s absorption capacity is surprising and slightly puzzling. It is hard to see how the Union’s absorption capacity could be part of the Copenhagen criteria. Yet, this is what the text suggests. These criteria set out the requirements to be satisfied by applicant countries, but it is not the responsibility of a candidate for membership to undertake action to safeguard or improve the Union’s absorption capacity. So this is not an additional condition to be satisfied by Turkey but rather an obligation to be assumed by the Union or an escape clause allowing it to back out of the accession process. The formula must therefore be seen as a reminder that fulfilment of the three sets of Copenhagen criteria (relating to the political criteria, the economic criteria and to the ability of the candidate State to adopt and implement the *acquis*) can lead to accession only if the Union manages to put its house in order. Obviously, even though this is not an obligation imposed on Turkey, it is not a matter that should leave that country indifferent. Turkey can only hope to join if the Union is able to carry through the sort of institutional reforms that are proposed in the ill-fated constitutional treaty, if the budgetary problems are solved and if the demands made by Turkey on the solidarity policies (CAP, Cohesion Fund and other structural funds and financial instruments) are not such as to threaten the financial and administrative viability of these policies. Enlargement and deepening of EU co-operation are parallel processes which will have to move forward hand-in-hand.

4. See Press release concerning the 2678th Meeting of the Council of General Affairs and External Relations (3 Oct. 2005), No. 12514/1/Rev 1.

5. Negotiation framework, point 2.

It goes without saying that any hint on the part of the Member States that recognition of Cyprus is a condition for *beginning* the negotiation process has invariably been liable to touch a raw nerve and to spark off massive protests on the Turkish side. The Council, by not insisting on prior recognition, has correctly refrained from exposing itself to the criticism that it was trying to renege on the promises made in December 2004. Even so, this is an important issue and the negotiating framework makes clear that the Council expects Turkey to take decisive steps in the right direction very soon. Progress in preparing for accession will be measured against Turkey's efforts to achieve a comprehensive settlement of the Cyprus problem within the context of the UN and in line with the principles on which the Union is founded. Likewise, Turkey must fulfil its obligations under the Ankara Agreement and the Additional Protocol extending the Association Agreement to all new EU Member States, in particular those pertaining to the EU-Turkey customs union. So, even if Turkey has refused to make firm promises to recognize Cyprus any time soon, such recognition may have to materialize by dribs and drabs through acts that in the longer term may add up to *de facto* recognition or that would at least lend themselves to such an interpretation. In any event, it is indisputable that accession will be impossible if Turkey does not recognize Cyprus before the conclusion of the membership negotiations. Even so, it would have to be considered as highly incongruous and undesirable if Turkey were to be permitted for the duration of the negotiations to continue claiming that membership negotiations with 25 Member States in the framework of the Intergovernmental Conference does not imply some form of recognition of Cyprus.

Regardless of the issue of non-recognition, however, it is difficult to see how respect for the Ankara Agreement and the provisions on the extended customs union can be properly ensured if Turkey insists on boycotting Cyprus. Of course, it is not impossible for a State to act pragmatically in respect of a country that it refuses to recognize formally. It even happens that there is no recognition at all, but that courts and authorities admit the existence of a "de facto" though unrecognized government and that they draw inferences from such a finding.<sup>6</sup> But in this case a different treatment by

6. For instance with respect to litigation involving the application of the "Act of State" doctrine. See e.g. the case of *Salimoff v. Standard Oil of New York*, NY Court of Appeals, 1933; 262 N.Y. 220. The question to be decided was whether the New York Court could give effect to a decree for the confiscation of private property issued by the (non-recognized) Soviet Government. The plaintiffs, former owners of oil lands in Russia, contended that the acts of the unrecognized Soviet government had "no other effect in law on the rights of the parties than seizure by bandits". The court held that, even though courts were not allowed to recognize the Soviet government as the *de jure* government until the State Department gave the word, they

Turkish authorities of e.g. goods imported from Cyprus, compared to that granted to merchandise originating in one of the other 24 EU member States, is in direct conflict with the *acquis* and no amount of theorizing about the nature and consequences of non-recognition under international law can remedy the illegality of such conduct under EU law. The conclusion is the same if it were to appear that Turkey does not discriminate against Cypriot goods directly, but that it denies access of Cypriot ships and planes to Turkish harbours and airports (which is tit for tat for the formal closure of the North's ports and airports by the Republic of Cyprus). According to the Turks this comes under the freedom to provide services, which is not covered by the protocol on the extension of the customs union. The Union, however, argues that such wholesale restrictions on access to means of transportation constitute a restriction on the free movement of goods. This view is supported by the Court's judgment in the *Brenner motorway* case. In that case the Court found that the principle of free movement of goods requires Member States to ensure that essential communication links between Member States remain open.<sup>7</sup>

The populations of the Member States are not brimming with enthusiasm at the prospect of a Turkish membership of the EU, to say the least. Some argue that so much has already been done by Turkey (political and economic reforms, alignment of legislation with the *acquis*) and by the EU (pre-accession partnership) that it will be hard not to let Turkey in if it continues the process of fulfilling the Copenhagen criteria. We think such a view is oversimplistic. Regardless of one's ideas concerning the merits of the case for enlargement of the EU with Turkey, accession of that country in the medium term is by no means a foregone conclusion. By drawing up the framework for negotiations with Turkey, which constitutes the legal underpinning of the accession talks during the next 10 years or so, the Union has proved that it is capable of acting purposefully and responsibly. Indeed it may be regarded as a remarkable feat of diplomacy that the Union has managed to honour its promises to Turkey without renouncing the defence of its principles, its values and its interests, and without creating the impression that the views of the population do not matter. As a matter of fact, the negotiation framework aims at reassuring the public that there is no need to fear an uncontrollable influx of the Turkish equivalent of the proverbial (but in re-

were in a position to say that the unrecognized government was not a band of robbers but a government, maintaining internal peace and order, providing for national defence and the general welfare, carrying on relations with other governments, and so on. The confiscation was therefore held to be effective.

7. Judgment of 13 June 2003 in Case C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659.

ality hardly in evidence) Polish plumbers or annihilation of the benefits derived from structural policies. Where Turkey may only make requests for transitional measures in strictly defined and exceptional cases and of limited duration and scope, the framework is distinctly more generous as regards the right of the Member States to request safeguard measures. This asymmetry translates itself into the availability of long transitional periods, derogations, specific arrangements or safeguard clauses permanently available as a basis for measures of protection. The Commission will include such clauses in its proposals in areas such as the freedom of movement of persons, structural policies or agriculture.<sup>8</sup>

If it is true that one need not fear that accession of Turkey will be more or less automatic, neither can one be confident that the membership talks will be at all successful. Clearly, in 2015 the Union will not be the same organization that it is today and Turkey will probably have undergone significant changes as well. Hopefully, the interests and aspirations of those pursuing Kemal Atatürk's dream and the disciples of Jean Monnet who nurture the vision of a united and peaceful Europe have converged significantly by that time. However, as was noted before, circumstances may dictate a final result of the negotiations different from full membership. Furthermore, it is not to be excluded that "accidents de parcours" may cause the negotiation process to slow down considerably. Not only Austria, but each of the Member States can legally block progress at any time. This is so because the *acquis* is broken down in 35 chapters, each covering a specific policy area. The Council will have to decide, acting by unanimity on a proposal from the Commission, on the (provisional) closure and on the opening of negotiations on each chapter. Agreements reached in the course of negotiations on specific chapters may not be considered as final until agreement has been reached for all chapters. This means that each of the 25 Member States has 70 opportunities to cast a veto impeding further progress of the negotiations. So everybody can speak softly because legally each Member State carries a big stick. Hopefully, these sticks will be used very sparingly, if at all.

8. Negotiating framework, point 12.