Guest Editorial

Quo Vadis Türkiye?

Thomas Vandamme & Ronald van Ooik*

On 12 September 2013, the Ankara Treaty that established the EU-Turkey Association had its 50th anniversary. A 'birthday' it may have been, but it could hardly pass for a 'happy' one as the association, designed to prepare Turkey for full membership in the Union,[1] has on many accounts failed to achieve its ambitions. Today the Union's oldest association with a third country, the EU-Turkey Association's original objective to gradually achieve full free movement of workers, services and free establishment never materialized. The association's current state of affairs is therefore not a very encouraging backdrop for the accession negotiations that are moving forward at a very slow pace, if indeed at all. Yet, harsh as these realities may be, to only focus on the problematic aspects would not do justice to the development of the association over the years. Achievements like the EU-Turkey customs union and the developments in European Court of Justice (ECJ) case law dealing with the rights of Turkish workers and businesses,[2] have resulted in an association that in many ways is sui generis, not just in terms of age but also in terms of achieved integration.

Thus, in view of its sui generis nature, a conference was organized in Brussels under the banner '*Quo Vadis Türkiye*, between Transition and Constitution?' to reassess in legal terms the EU-Turkey Association regime.[3] Indeed, the deepening of EU-Turkish relations (despite all the setbacks that had to be endured) within the framework, both substantive and institutional, of the old association leads to new questions that may be increasingly relevant, especially as the accession talks are progressing so slowly. Many agree that its current purpose and function have

* Amsterdam Centre for European Law and Governance, University of Amsterdam.

1 See Art. 28 of the 1963 Ankara Agreement.

2 Notably under Decision 1/80 of the Association Council, under the standstill clause in Art. 41(1) additional Protocol and under the Association's non-discrimination provisions in Art. 10 Decision 1/80 and Art. 9 of the Ankara Agreement.

3 *Quo Vadis Turkiye*? 50 Years of Ankara Association, between Transition and Constitution, conference held on the 12 Sep. 2013 at the *Centre for European Policy Studies* in Brussels. The event was organized by the *Amsterdam Centre for European law and Governance (ACELG)* and sponsored by the *Centre for European Policy Studies (CEPS)* and the *Economic Development Foundation/İktisadi Kalkınma Vakfı* (*IKV*).

Vandamme, Thomas & van Ooik, Ronald. 'Guest Editorial: *Quo Vadis Türkiye?*'. *Legal Issues of Economic Integration* 42, no. 1 (2015): 1–4.

evolved greatly in comparison with the original Ankara Treaty. Where the accession association treaties (based on what is now Article 217 TFEU) such as the Treaty of Ankara traditionally establish a transitional regime enabling the third country to prepare gradually for accession to the Union, this can hardly be maintained if such 'transitional regime' lasts for more than five decades. [4] The notion of a transitional regime that serves a purpose for which it was not originally designed triggered the question of whether it is capable of evolving into a more lasting regime that, failing accession, satisfies the needs of all parties at stake, both in terms of *substance* and in terms of *institutional setup*. It was questions like these that came to the fore in the Brussels conference and that inspired the contributions of Andrea Ott and Zeynep Pirim.

When it comes to the substantive issues that are dealt with in the association regime, it should be noted that traditionally the CJEU has over time been quite progressive. When dealing with legal questions on association law, such as on the rights of Turkish workers and their families (see for instance the *Toprak* ruling of the CJEU), on first entry of Turkish service providers (cf the *Soysal* ruling) or on non-discrimination of economically active Turkish citizens (cf the *Dutch Visa Charges* ruling), the CJEU deepened the association where the political actors failed to deliver. Yet, there are signs that it also in this field the EU-Turkey Association Regime has reached its outer limits. Whether those limits are dictated by purely legal arguments or by political necessity is up for debate.

One of those recent legal issues where the outer limits of integration materialized is the matter of homogenous interpretation of key provisions of the Association Regime. The seminal *Demirkan* ruling caused quite a stir in this context. Here, the ECJ rejected the notion that the scope of the free movement of services (in the context of the standstill clause of the Additional Protocol) includes the freedom to receive services, thus denying a homogeneous interpretation long since given to Article 56 TFEU in the internal market context. Has the EU-Turkey Association, in legal substantive terms, reached its limits or does the political context start to weigh heavily on the Court's rulings? The question remains open, yet the case undoubtedly represents a big shift of direction in the Court's case law and thus calls for a close scrutiny of its exact argumentation. That exercise was indeed picked up by Andrea Ott who embarks on a horizontal exploration of homogeneity of interpretation (in relation to scope and direct effect) in different types of 'special partnerships' establishing parallel legal orders between the EU and third countries (the European Economic Area, Swiss

[4] And probably will de facto continue even after Turkey's accession to the EU. Cf. R.H. van Ooik & J.H. Mathis, 'Turkey's Accession to the European Union: Temporary and Permanent Derogations from the EU's Economic Acquis?', in B. Akçay and B. Yilmaz (eds.), *Turkey's Accession to the European Union. Political and Economic Challenges*, 2013.

Bilaterals, the Energy Community Treaty, the European Common Aviation Area and the EU-Turkey Association). She points to the lack of a general homogeneity clause in the EU-Turkey Association (apart from the one in Decision 1/95 on the Customs Union). Indeed this seems to be a factor that the court attaches greater importance to in recent cases as opposed to its earlier case law on interpretation of association agreements (EEA, ACP) where such clauses were but one factor to consider. In any event the 'static nature' of the EU-Turkey Association (to use the phrasing of Ott) is relied on by the ECJ in cases like *Demirkan* when dealing with tricky questions that touch upon a more liberal free movement of Turkish citizens (i.e., service recipients).

When it comes to the institutional strains upon the EU-Turkey Association, these are easily demonstrated by reference to the customs union. Its establishment under Association Council Decision 1/95 at a time when full EU Membership was (at best) only a distant ambition is again a feature of the EU-Turkey Association that makes it stand out from all other association regimes. At this juncture the question arises whether the association has the capacity to transmute itself to a sustainable mechanism to manage the EU-Turkey customs union. Zeynep Pirim explores in her contribution the institutional set up of the customs union (decision taking, democratic oversight, dispute settlement) and comes to some harsh conclusions. Apart from the economic concerns (such as the reluctance of third countries to conclude parallel trade agreements with Turkey), the political price to pay in terms of loss of sovereignty may simply be too high. In short, the present framework proves unfit for anything other than a transitory arrangement and does not allow for more sophisticated means of governance of the customs union. Following Pirim, it appears that as a de facto permanent settlement the latter creates a 'relation deprived of legal economic and political equilibrium'. Failing a complete revamping of the customs union institutional architecture (or full accession), the present asymmetry thus seems untenable.