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Upsetting the Apple Cart: Turkey, The Single Market and the European Court of Justice

Introduction

The European Union can point to any one of the three Copenhagen Criteria as the reasons to postpone or deny Turkey's accession to the EU. The Turkish economy may not present the strong argument to against accession as its Islamic culture, questionable stance on human rights and political instability. However, Turkish economic policy combined with these other factors could effect Turkey's *economic integration* into the EU could be problematic if Turkey eventually becomes a Member State.

Copenhagen Criteria and the Problem of Economic Integration

The Copenhagen Criteria, established in the mid '90s requires all potential member states to meet three requirements before they can be considered for membership. The first is political, the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The second is economic – the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union and the third is acceptance of the Community's body of laws and ability to take on the obligations of membership, including the adherence to the aims of the political, social and monetary union.¹

Turkey's Dual Culture Could be Problematic for the ECJ

Conforming to each of these specific criteria continues to be problematic.

¹ Europa: Gateway to the European Union, glossary at http://europa.eu/scadplus/glossary/accesion_criteria_copenhagen_en.htm (last visited 4/19/07).

Turkey's reluctance or perhaps inability to completely conform to the Copenhagen Criteria may be an indicator that if Turkey were to become a member state, it could disregard or reject entirely unfavorable rulings of the European Court of Justice. If this were to happen, it's uncertain if the ECJ, the Commission or the other Member States are prepared to cope with such a situation. Because Turkey is not a European country in the traditional sense, the ECJ could take one of two paths to resolving Turkish disputes, issuing either uncharacteristically lenient economic rulings which could lead to the resentment of the other Member States who have their own issues with economic supranationalism or they could issue the same ideological rulings it has applied to other Member States and risk the chance that Turkey will object to or simply ignore the rulings creating internal political problems for the ECJ and the Commission.

Turkey insists that this type of scenario would never happen if it were admitted to the EU, but Turkey itself admits it still has a long way to go to conform to each prong of the Copenhagen Criteria for membership. Although it has worked hard to retool and stabilize its economy and has come very close to satisfying the economic Criteria.

The EU has considered the accession of countries that don't quite fit the political and legislative criteria when it considered the accession of the former Eastern Bloc countries. With the Eastern, Bloc the EU felt accession would advance the cause of a single European state.

Although Turkey's economy shows signs of improvement, it is still more restrictive than most Western industrialized countries in product and market regulations, state control and barriers to entrepreneurship, foreign trade and investment.²

However, Turkey's accession also includes another entirely different set of parameters including stabilization of the region and ensuring Turkey's compliance with what some call "European norms" rather than aligning itself with its more volatile Middle-Eastern neighbors.

Under pressure from the EU, Turkey may eventually but grudgingly concede to some human rights and governmental reforms, which many Turks do feel are necessary and desirable. Despite this, they may not see any reason to give up its economic independence regarding the free movement of goods.

There is a possibility that after years as a non-member "special status" trading partner with the EU, Turkey may balk at the idea of the ECJ regarding the free movement of goods into its country on political, social or religious grounds. The ECJ may not be willing and is perhaps not designed to consider cultural and religious differences when it considers trade disputes concerning the free movement of goods. For the Commission, the ECJ and many of the Member States, willingness to abide by the rules of the Single Market may be of as much concern as the human rights and political issues.

Culture, Politics and Economic Integration

One of the primary reasons behind Turkey's quest to join the EU is to take advantage of the benefits of free trade within the EU. However, integration might be difficult despite the best efforts of the EU and Turkey because of the inherent differences between Turkey and

² Meral Varis, *The New Turkish Economy and Accession Talks, Policy Watch 1042* The Washington Institute for Near East Policy, November, 2005 at <http://www.washingtoninstitute.org/templateC05.php?CID=2390>. (last visited 4/25/07).

its "traditional" European Member States will have an effect on Turkey's relations with other member states that could eventually impact the free movement of goods. Even during the accession discussions, the Member States and Turkey have expressed strong feelings about each other, both positive and negative.

If Turkey became a full member of the EU, it would have to accept the economic principles of the single market – something neither Turkey nor the present member states may be willing or able to do. If cases were brought by Turkey or against Turkey, the ECJ could find itself in unfamiliar territory. Deciding Single Market issues involving Turkey would be more complicated and potentially more divisive than any free movement of goods cases the court has seen. It is this type of potential dilemma that could delay another debate on Turkey's accession beyond the 2014 deadline.

Potential Problems Conforming to Economic and Monetary Goals

Turkey's economy is also more closely connected to its culture and its political history than most current member states. Much attention has been focused on human rights issues and political instability in Turkey, but the requirement of the "existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union and ... the ability to take on obligations of membership including the aims of economic and monetary union." ³

Despite its best efforts to present itself as a qualified candidate for accession, it seems that Turkey wants the economic advantages of the EU membership without having to give up any of its national independence and control over the free movement of goods into its

³ Europa, Gateway to the European Union, Glossary at http://europa.eu/scadplus/glossary/accession_criteria_copenhagen_en.htm (last visited 4/24/07). The Copenhagen Criteria for potential member states meet certain political, legislative and economic requirements in order to be admitted to the European Union.

own country. For this reason I think it would be difficult for a fiercely independent country like Turkey with political and cultural organizations and beliefs that differ in so many respects from the original (and even the newer members from the former Eastern Bloc) that it is uncertain whether or not Turkey would be willing to accept EU Law as its own.

Turkey admits it does not yet conform to the Single Market requirements

The uncertainty and the concern that Turkey will not accept the doctrine of mutual recognition and direct effect are illustrated by its ongoing political drama with Cyprus. Cyprus is a member of the EU and according to Treaty and EU law, Turkey must recognize Cyprus. However, Turkey continued to deny vessels and aircraft flying the Cyprus flag, or whose last port of call was in Cyprus, access to its ports.⁴

The EU Single Market was established to ensure the free market movement of goods, people, capital and services. The Member states have a wide range of their own regulations and standards and the Single Market was designed to reign in any protective or discriminatory prohibitions. Article 30 offers some exceptions to the free movement of goods, for example the existence of the Single market " shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property." However, Article 30 is not meant to sanction arbitrary discrimination or a disguised restriction on trade between Member States.

⁴ Republic of Turkey Prime Ministry Secretariat General for EU Affairs, *Commission Staff Working Document: Turkey 2006 Progress Report* at <http://www.euturkey.org.tr/indexen.html> (last visited 4/24/07) p. 30-33.

This could be true in the area of the free movement of goods where Turkey acknowledges it has made limited progress in its efforts to conform to the general principles applying to free movement of goods. Turkey has not agreed to comply with the mutual recognition requirements included in both the Treaty and in the *Cassis di Dijon* line of cases.⁵

As we discussed in class, the free movement of goods creates a tension between the Treaty and the ECJ's interpretations of the treaty to create economic supranationalism and the power of the individual member states to regulate themselves. The ECJ's line of cases emphasizes free movement of goods between all member states sweeping cultural and nationalist goals and traditions to pursue the goal of the Single Market.

ECJ Rulings Favor the Single Market over Cultural Issues

The ECJ has been firm in refusing to allow the individual states to prohibit the free movement of goods to protect the economic or cultural interests of the Member States. In *Commission v. Ireland*, the Irish government introduced program to promote to "achieve switch form imports to Irish products equivalent to three percent of total consumer spending."⁶ To accomplish this Ireland encouraged the use of a "Guaranteed Irish" symbol for products made in Ireland. The Commission argued that this "Buy Irish" publicity campaign encourage consumer to buy only domestic products. The ECJ ruled that by organizing a campaign to promote the sale and purchase of Irish products within its territory, Ireland has failed to fulfill its obligations under the treaty by organizing a campaign to promote the sale and purchase of Irish Goods within its territory.⁷ Since it gained independence from Britain in 1916, Ireland has been deeply concerned with re-

⁵ *Id.* at p. 33

⁶ *Commission v. Ireland* (also known as the "Buy Irish" case) 249/81. (1972)

⁷ *Turkey 2006 Progress Report* at ¶28, 29.

establishing its cultural and political traditions and identity. In economic disputes with the Commission Ireland argues its trade practices are based on the need to promote or preserve the Irish culture and identity. Regardless of these legitimate concerns, the ECJ has always ruled against Ireland and in favor of the Single Market.

The ECJ further makes its commitment to the Single Market clear in *Costa v. ENEL*⁸: "Applications by Member States for authority to derogate from the treaty are subject to a special authorization procedure which would lose their purpose if Member States could renounce their obligations by means of an ordinary law."

Common culture aids ECJ in resolving disputes

The common history, religion and Western culture are necessary for the EU to operate effectively. The Copenhagen Criteria, particularly the third requirement to accept the present EU body of law makes dispute resolution among the Member States possible. The ECJ's decisions concerning economic disputes surrounding the free movement of goods have relied on a close reading of the Treaty and an across the board declaration of mutual recognition – a concept Turkey is not yet ready to embrace.

It's important to note that it's never been easy for the original Member States to acquiesce to the Single Market theory. By design, the Single Market will always be at odds with the individual policies and regulations of the Member States. The Treaty provides for the unrestricted free movement of goods that is often at odds with the desire of the Member States to retain ultimate regulatory power over trade and importation. This is why the ECJ is often asked to rule on the whether labels noting country of origin can be placed in clothing (*Commission v. England*) or how imported beer can be labeled in Germany. In

⁸ *Costa v. ENEL*, 6/64 ECR 585 (1964)

each case, the Member States try to reassert their rights to protect their own products from an influx of goods from the Member States.

It's not difficult to foresee a situation in which Turkey would ask to depart from the specific articles of the Treaty or established ECJ precedent for cultural, social or political reasons. This could be problematic because unlike the unique cultural and traditional issues raised in the "Buy Irish" case as well as other cases where Member states cited tradition and customs as a reason for prohibiting free movement of goods, they were all willing to accept the holdings of the ECJ as the final word even when they were arguing that important cultural issues were at stake. Turkey, on the other hand, may not be as willing to set aside its cultural and nationalist interests and accept the policies of the Single Market.

One reason could be that Turkey's legal system is volatile and is likely to remain so in the foreseeable future. Because of this, different political leaders may take radically different stands regarding compliance with the economic free movement of goods. Turkey is eager to export its goods within the EU, but it may be more reluctant to allow importation of certain goods into the country for social or cultural reasons citing the Article 30's public interest of public morality exceptions.

The ECJ's decisions regarding the free movement of goods seem to reflect a belief that the broadest possible interpretation of Article 30 brings more choice to the member states, but the member states counter by maintaining that the states have other social concerns such as preserving cultural values and traditions. One of the greatest barriers to Turkey's accession that I can see would be the EU's lack of familiarity and understanding of Turkey's culture and politics.

Using Treaty Exceptions to Circumvent ECJ Economic Law and Policy

The landmark case of *Cassis di Dijon* the ECJ establishes the doctrine of mutual recognition – with the only exceptions being prohibitions for environmental, consumer protection, public health or general public interest concerns.

In *Cassis di Dijon*, the Court held that a member state could only limit free movement of goods in matters relating to effective fiscal supervision, public health or consumer protection.⁹ *Cassis* concerned a French importer of fruit liqueur who was denied a license to import the liqueur into Germany on the grounds that the Cassis di Dijon only had 20 percent alcohol content when the German requirement was a minimum of 25 percent. The Court cited Article 28 of the Treaty and held that there was no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.¹⁰

Cassis di Dijon's "mutual trust" principle states that if one state's rules allow a product to be marketed, all the other States should have confidence in the first State's judgment and likewise allow the product to be marketed.¹¹

It's unknown how either Turkey or the Member States would respond if the ECJ ruled in favor of Turkish protectionism based on the "general public interest" exception of Article 28 or the public interest exceptions contained in Article 30. Turkey could argue that the regulations are based on cultural beliefs or religious laws. They could be willing to

⁹ *Rewe-Zentral v. Bundesmonopolverwaltung Für Branntwein (better known as Cassis di Dijon)*, Case 120/78 [1979] ECR 649, paragraph 9.

¹⁰ *Cassis di Dijon*, at 14.

¹¹ George A. Berman et al., *Cases and Materials on European Union Law*, West 2d ed. 2002, p. 511.

enter the process of gaining an official exception if the ECJ ruled against them or perhaps ignore the directive entirely to retain control of imported goods.

Although the ECJ has consistently ruled in favor of the Single Market in cases involving the free movement of goods it, it might be hesitant to interpret the law, in the case of Turkey it might not be willing to rule with the same certainty about the supremacy of the Single Market with the same clear-cut vision it had in the "Buy Irish" and the *Cassis di Dijon* cases. If Turkey become an EU member, would the ECJ feel it had to consider Turkey's issues in a different light than it considers other cases because of the delicate balance of power within Turkey and what might be a tenuous relationship with the EU.

Conclusion

Economic Integration into the single market may be as big a barrier to turkey's accession to the EU as its human rights and political issues. This is because Turkey itself is still unclear on how it will integrate itself into the Single Market. Given its refusal to allow Cyprus free movement of goods, economic integration could play a large role in determining if Turkey is admitted to the EU and conversely if Turkey decides that deferring its foreign policy objectives – regardless of whether they are considered to be right or wrong – to conform to the three-pronged membership criteria.