



MODERNIZING THE TURKEY-EU CUSTOMS UNION: THE DIGITAL AGENDA AND THE GREEN DEAL

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About EDAM

The Centre for Economics and Foreign Policy Studies (EDAM) is an Istanbul based independent think-tank with a research focus on Foreign and Security Policy, Cyber Governance & Digital Democracy, Economics & Energy. EDAM aims to contribute to the policy making process within and outside Turkey by producing and disseminating research on the policy areas that are shaping Turkey's position within the emerging global order. EDAM continues to be ranked amongst the best think tanks in Turkey in global think tank rankings. In the latest GoTo think tanks ranking by the University of Pennsylvania EDAM has been the only Turkish think tank that was listed in 8 different categories. EDAM was ranked in the top 20 list of think tanks in the MENA region, best defense and national security think tanks globally and best think tank conference globally.

About the authors

Sinan Ülgen graduated in 1987 from the University of Virginia with a double major in computer sciences and economics. He undertook graduate studies at the College of Europe in Brugge, Belgium where he received, in 1990, a masters degree in European economic integration. He then joined the Turkish Foreign Service as a career diplomat. In 1992, he was posted to the Turkish Permanent Delegation to the European Union in Brussels where he became part of the team that negotiated the Turkey-EU customs union. Ülgen is the founder and managing partner of Istanbul Economics, a public affairs consultancy.

Ülgen is also the chairman of the Istanbul based think tank, Center for Economics and Foreign Policy Studies (EDAM) and a visiting scholar at Carnegie Europe in Brussels. His opinion pieces have been published by the International New York Times, Le Figaro, Financial Times, Wall Street Journal, The Guardian, Project Syndicate and Foreign Policy. He is the co-author of a book on Turkey-EU relations with Kemal Derviş and a book on Turkey's nuclear policy. His latest publication is entitled "The governance of cyber space" and was published by the Carnegie Endowment in January 2016. He was a member of the international security experts established by the former NATO Secretary General Rasmussen and formerly a member of the Academic Advisory Board of the NATO Defense College in Rome.

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NAİL OLPAK

President of DEİK

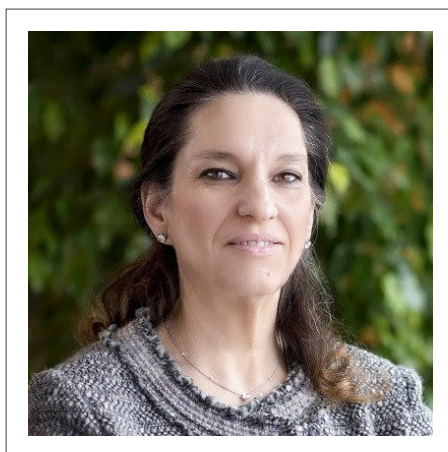
It is a great pleasure for me to present DEİK's "Modernizing the Turkey-EU Customs Union: The Digital Agenda and the Green Deal" report. This new report presents an updated analysis of DEİK's previous paper on the modernization of the EU-Turkey Customs Union titled "The Business Case for a Turkey - EU Customs Union 2.0" reflecting the completely new perspective taking into account the EU's Digitalization and Green Deal Agenda. The timing of this report is very accurate where we are experiencing a paradigm shift in a process of restructuring of the economic re-organization and global supply chains in the post-pandemic era under increasing climate-related concerns and associated natural disasters.

The modernization of the EU-Turkey Customs Union has been on the agenda over the recent years as the European Commission had submitted its mandate for negotiation to the EU Council back in the end of 2016. The mandate and the associated impact assessments focused on the traditional elements of the trade relationship including the extension of the Customs Union to public procurement, services and agriculture. Since those assessments solely concentrated on these sectors, it may mislead decision-makers from fully comprehending the potential for mutual benefits of which may stem from cooperating in EU's Digital and Green Deal Agenda's. There was therefore a clear need for an analytical study to

present the opportunities of including the Digital Agenda and the Green Deal in the scope of the current Customs Union framework.

Both Turkey and the EU set forth goals to restructure their respective economies to prevent any disruption in the supply chain, especially during the Covid-19 outbreak and ensure smooth transition to green economy. As the EU has always been an important economic and trading partner for Turkey, our utmost responsibility is to respond to the developments that are closely linked to our mutual relations. In that perspective, the Customs Union is of high priority on our agenda and has always served as an anchor in Turkey-EU relations diplomatically as well as economically. By this means, we have commissioned this report to provide an accurate and objective overview of the evolutions in the light of new challenges and opportunities in the post-pandemic era and generate the very first and a fruitful discussion of the Modernization of the Customs Union in terms of Digital Agenda and the Green Deal between the parties.

I would like to take this opportunity to thank Zeynep Bodur Okyay, the Coordinating Chairperson of DEİK/Turkey-European Business Councils and Chairperson of EU Working Group and Sinan Ülgen, the Chairman of the Center for Economics and Foreign Policy Studies (EDAM) for their immense contribution in the making of this report.



ZEYNEP BODUR OKYAY

Executive Board Member of DEİK
Coordinating Chairperson of DEİK/Turkey-European Business Councils
Chairperson of DEİK EU Working Group

Accession is the root and backbone of Turkey-EU relations. Therefore, the way forward needs to be structured accordingly. Having followed the negotiations of the Customs Union Agreement as well as the process after that, I know that the Turkey-EU Customs Union has been one of the most significant achievements of the decades-long relationship between the EU and Turkey. Our cooperation enhanced the trade between the two parties and increased Turkey's competitiveness and productivity.

Despite the slow progress in accession negotiations, both parties acknowledge the mutual dependence and the need for cooperation on areas of joint interest, as emphasized in the recent EU Summits. Based on this mindset, the road ahead must involve prioritizing the creation of a broader framework of cooperation between Turkey and the EU to complement the full accession process. An upgraded Customs Union would be a core component of a realistic and mutually beneficial prospect for such a framework.

Combined with the changes in the global economic order and new policy priorities, the existing Customs Union must be modernized. This modernization should involve expanding its scope to services and agriculture, improving its institutional provisions primarily on dispute settlement, and incorporating novel components – beyond the traditional elements of services and agriculture – that effectively address the requirements of today's business and policy environment.

To that end, the modernization sought in the existing Customs Union should introduce the right framework for Turkey and the EU to expand and strengthen their cooperation in digital and green transitions. This is indispensable for the Turkish industry to deepen its ties with the European economy – reflecting the true potential of close relations.

Marking the first of its kind, the current report delivers a sound assessment on how the Digital Agenda and the Green Deal could be conceptualized in the efforts to modernize the Turkey-EU Customs Union. As such, it identifies a range of options to situate digital and green as core elements of the Turkey-EU agenda, guided by the overarching objective to strengthen Turkey's regulatory and policy harmonization with the EU.

Modernizing the Customs Union will unlock economic and commercial benefits in the interest of both parties and establish a common framework for positive engagement. As the Turkish business community, we see our future firmly as part of Europe's future. We are not only a beneficiary but also a facilitator for this process. With this acknowledgement, we hope this report will provide a more informed understanding of how to move ahead and turn our years of commitment into action in the right direction. We remain hopeful that the necessary determination can be consolidated on both sides to allow these negotiations to start.



SINAN ÜLGEN

Executive Chairman of EDAM

The Turkey-EU Customs Union was negotiated in 1993-1994 and entered into force at the end of 1995. In other words, it is a trade agreement that dates back to more than 25 years. In the meantime, not only has the global trade geography undergone consequential changes but also the trade policy of the EU was significantly overhauled. There is therefore a pressing need to modernize the Turkey-EU Customs Union in light of these developments.

As a result, the modernization of the Turkey-EU Customs Union has been on the political agenda for a few years now. Given the importance of this objective, economic stakeholders have also been interested in understanding the potential scope and impact of this future agreement. As EDAM, we have had the opportunity to prepare a study for DEİK in 2018 to examine in more detail the mutual economic benefits that the EU and Turkey could draw from this agreement especially from the standpoint of their international competitiveness. This study was however based on the proposed scope which comprised services, agriculture and also

the revision of institutional rules such as dispute settlement and trade policy convergence.

Since then, the EU's overall agenda has further developed in a direction which emphasized the importance and need for the EU to accelerate its initiatives for a more comprehensive digital agenda and for a more ambitious implementation of the Green Deal. This renewed set of priorities for the EU also triggered a response in Turkey with expectations that the modernized Customs Union should also address these policy areas.

This study is designed to answer this critical question of how the digital agenda and the Green Deal can actually be incorporated in the design of a modernized Customs Union. As such, I believe that it is the first publicly available comprehensive analysis that strives to answer this topical issue. I very much hope therefore that this analysis will contribute to an inclusive discussion in Turkey on how to structure the revision of the Customs Union and I would like to thank DEİK for allowing EDAM to be part of this exercise of thought leadership.



EXECUTIVE SUMMARY

The Customs Union came fully into being with the adoption of the Association Council Decision 1/95 at the end of 1995. In other words, it has now been more than two decades since the trade agreement between Turkey and the EU has been fully functional. Over time the EU has concluded new and more ambitious trade agreements with many of its trading parties. Deep and Comprehensive Trade Agreements with much wider coverage than the Customs Union with Turkey have entered into force. The Turkey-EU Customs Union is therefore in due of a modernisation that would firstly involve the expansion of its scope to services and possibly agriculture and secondly the upgrading of its institutional provisions like dispute settlement. Several studies have already examined these proposals in detail.

This study will approach the task of modernizing the Customs Union from a different perspective. Namely as a complement to the traditional thinking on the modernisation of the Customs Union, this analysis has focused on the implications of enlarging the Customs Union to two new policy areas so as to better reflect the evolving policy priorities of the EU and Turkey. The first area is the Digital Agenda and the second one is the Green Deal.

A. The Integration of the Digital Agenda in the Turkey-EU Customs Union

For this analysis, we need to define and conceptualize how a digital chapter can be incorporated in the efforts to modernize the Turkey-EU Customs Union. The first option is for Turkey to adopt the EEA model which would imply the transposition in the Turkish legislation all the digital policy related acquis of the European Union. Such a complete regulatory harmonisation would surely be effective in eliminating behind the border barriers to trade in digital goods and

services and allow Turkey to be part of the EU's Digital Single Market. It can be surmised that as a result many of the business barriers affecting digital services will be eliminated including restrictions on data localisation, cross border data transfers and e-commerce but also establishment and licensing restrictions for digital platforms.

But ultimately the exact model for the liberalisation of trade in services including digital services between Turkey and the EU is yet to be determined. As briefly discussed in this study, the negotiating parties will have a range of options. Trade liberalisation on the basis of policy harmonisation is undoubtedly the more ambitious option. It will most certainly lead to much higher degrees of market access given that many obstacles to trade in digital services relate to regulatory issues. Such a model would also provide more incentives for FDI. In that sense, Turkey's objective to capture more FDI in digital industries would be better served with a trade liberalisation model that priorities regulatory harmonisation with the EU.

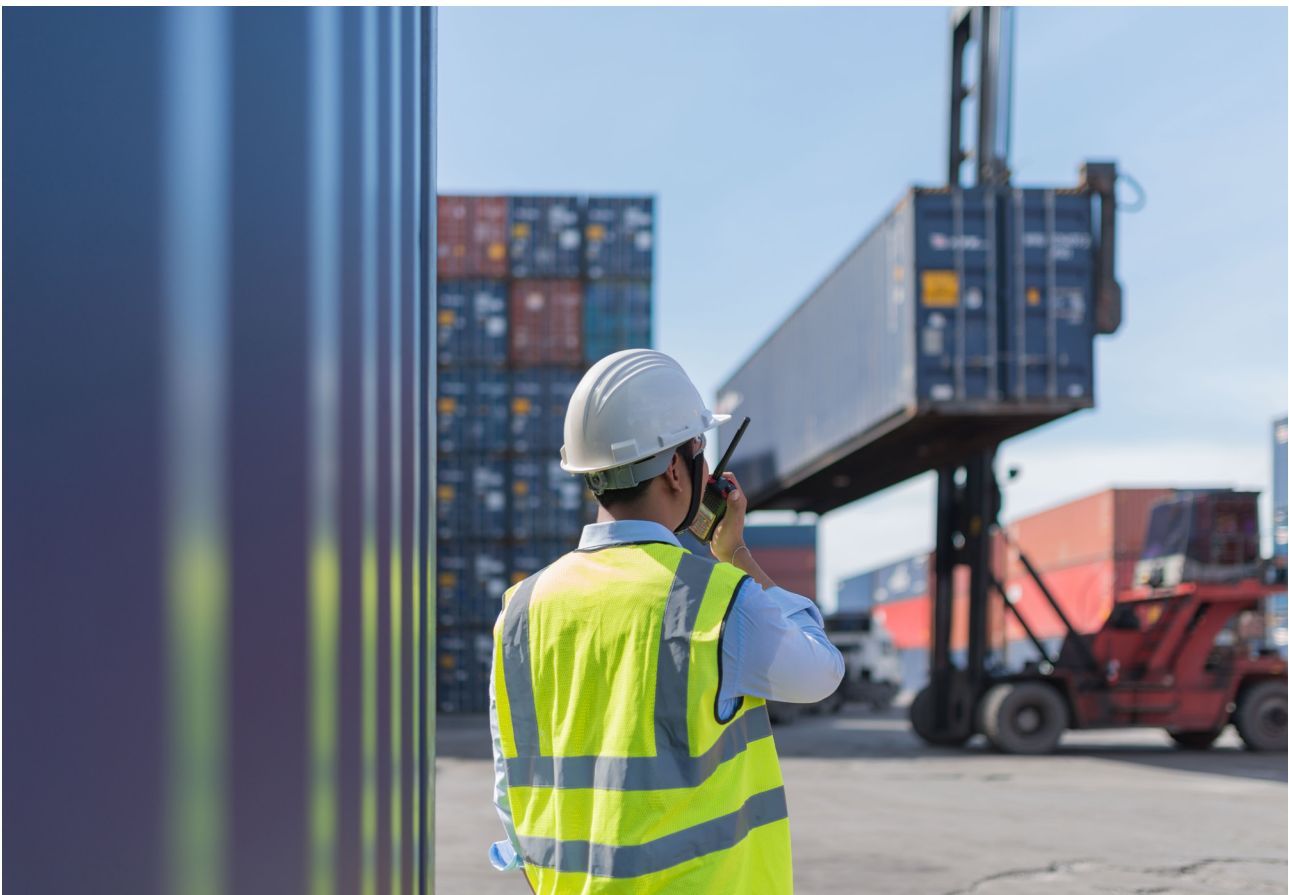
B. The Customs Union and the Green Deal

The second potentially novel component for the modernization of the Customs Union will be the incorporation of climate change linked policies within its scope. In other words, Turkey and the EU may want to explore how the Customs Union can be leveraged to accelerate Turkey's convergence with the EU Green Deal. Viewed from this perspective, Turkey's objectives are likely to be twofold. First Ankara will want to identify a strategy that would exempt Turkey from the scope of the Carbon Border Adjustment Measures – CBAM announced by the European Commission and slated for implementation in 2023 with a transitional period of 3 years. These measures are to impact Turkey's exports in the industries covered by the regulation.

But in addition to negatively affecting the competitiveness of Turkish exports to EU markets, the CBAM regime also represents a serious hindrance for the integrity of the Turkey-EU customs union. A customs union represents a higher degree of trade integration compared to a free trade area because the signatory parties also commit themselves to follow a common commercial policy. That is why bilateral trade under a customs union regime is carried out on the basis of the principle of the free circulation of goods which, unlike a free trade area, does not require a complicated set of rules of origin. Under a customs union, goods can be exported freely without the need to prove their origin. And so it is that under the Turkey-EU customs union, exports from Turkey to the EU are carried out without controlling the origin of goods. The unilateral introduction of CBAMs by the EU is a threat to the integrity of the customs union arrangement in a situation where only one party of the customs union (EU) has a carbon tax policy. Secondly, Turkey will want to have access to the EU funding that will facilitate Turkey's transition to a greener economy.

These goals can best be advanced with the full activation of The Turkey-EU High Level Climate Dialogue. This platform should be viewed as a strategic joint platform designed to leverage the EU's capabilities to help with Turkey's transition to a greener economy based on a common understanding that the climate change theme and the transition to a green economy should be a top priority for the Turkey-EU agenda. The incorporation of the climate change as a theme in the Customs Union would further strengthen the role of the High Level Climate Dialogue.

The platform would be used to align the two contracting parties on climate change and the green transition. Firstly the modalities of a possible exemption to be granted to Turkey on CBAM would be discussed. Secondly the strategic planning of EU origin climate funding earmarked for Turkey would be carried out. Thirdly the platform could also be used to ensure diplomatic convergence between the positions of Turkey and the EU in the international climate negotiations.





Of key importance in the short term would be the EU's political support to Turkey's position to be seen as a developing country for the purposes of multilateral climate negotiations and funding. For long Turkey wanted to be re-categorized as an Annex II country under the Kyoto Protocol. But despite many attempts, the aspired status change which would have enabled Turkey to be treated as a developing country was not achieved. Such an amendment requires a consensus within all the signatory parties. As a result, Ankara has now ratified the Paris Climate Agreement under the reserve that it sees itself as a developing country. A potential EU backing of Turkey's position at the COP 27 that will be held in November 2021 in Glasgow and beyond would create a much welcome momentum for the climate dimension of the Turkey-EU relationship.

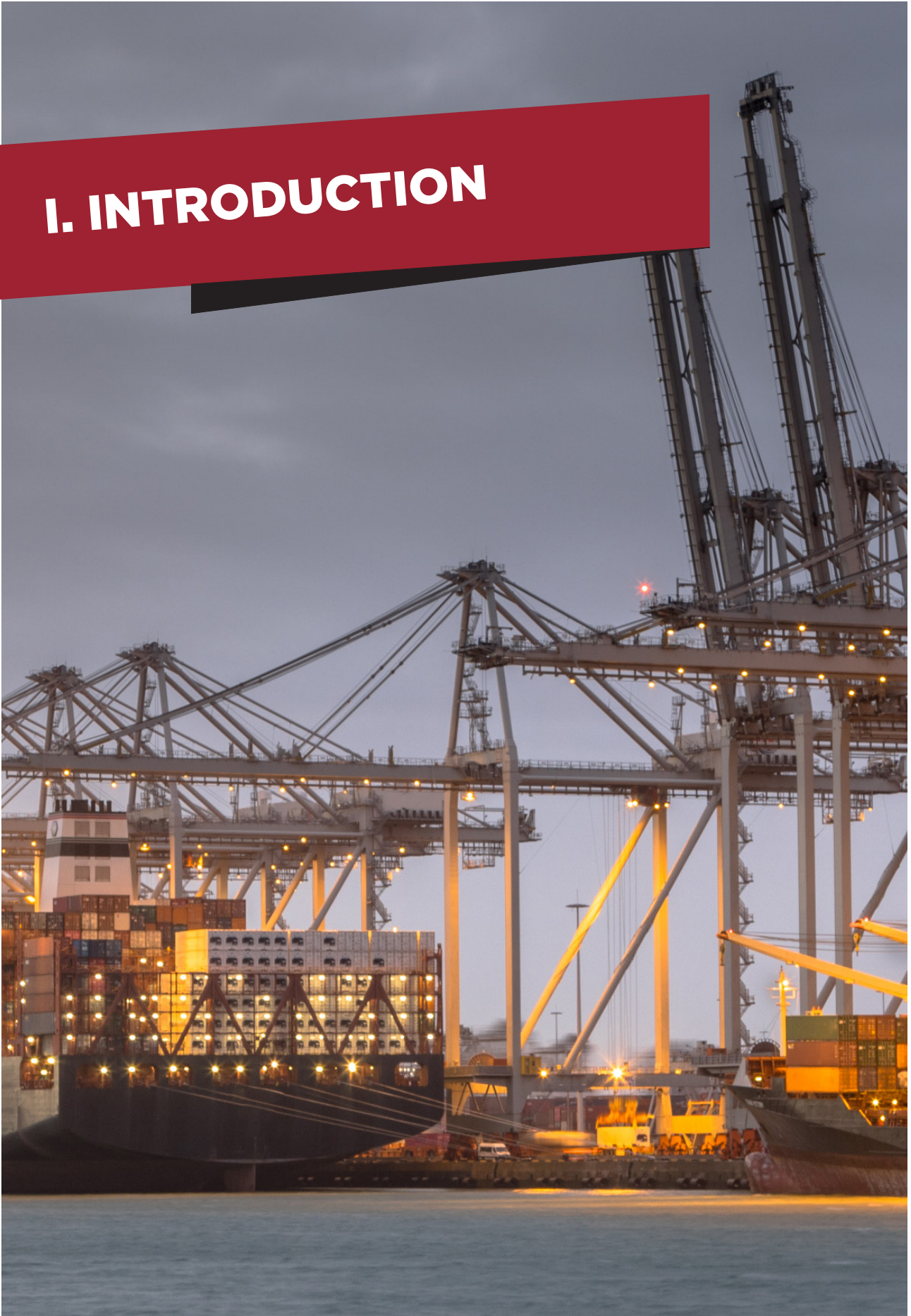
C. Overarching Policy Recommendations

The modernization of the Turkey-EU Customs Union has been on the agenda for the past few years as the European Commission had submitted its mandate of negotiation to the EU Council back in December 2016. Since then, the Council has failed to green light the start of this new round of negotiations essentially on political grounds. The mandate and the associated impact analysis were centered on the traditional elements of the trade relationship including the enlargement of its scope to services and agriculture. But they did

not contemplate the expansion of this regime to the Digital Agenda and the Green Deal. And yet both Turkish and EU authorities have in more recent years emphasized the prospect of embedding these critical policy spheres in the overall agenda of Turkey-EU relations. There is therefore a clear need at the institutional level as well to revise and update the supporting analysis and documentation to clear the path for the proper inclusion of the Digital Agenda and the Green Deal in the scope of the Turkey-EU Customs Union. This report may provide some elements of reflection that could be useful for this necessary work stream.

It would indeed be vital to expand the scope of the Customs Union in this direction. Given the recent and justified political and economic emphasis on digital and the green transformation, Ankara and Brussels should not sidestep the opportunity to explore and identify the right formulas to integrate these areas in the remodeled Customs Union especially since the process will be guided by the overarching aim of modernizing this critical rules-based regime that underpins the Turkey-EU trade relationship. This aim would be all the more important since the publication in early 2021 of the European Commission's Trade Policy Review which has set out very clearly that the EU's new strategy should further integrate EU trade policy within the bloc's economic priorities as reflected in the Green Deal and the European Digital strategy. The Turkey-EU Customs Union should not be an exception to this laudable objective.

I. INTRODUCTION



The European Union is the world's second largest trading block with a global share of 15 % in trade in goods just behind China with a share of 16 %. The EU currently has about 130 trade agreements in place, pending or in the process of being adopted. A very large majority of them are free trade agreements. Apart from a small set of very small economies like Andorra and San Marino, Turkey is the only fully sovereign country that has a trade relationship with the EU based on a customs union. The reason is that Turkey was the second country after Greece to have established a formal agreement with the nascent European Economic Community. The 1963 Ankara Association Agreement, just like the 1962 Athens Association Agreement was essentially a replica of the 1957 Rome Treaty. As a result it had envisaged the formation of a customs union between the Contracting Parties in the final stage which would eventually lead to Turkey's accession.

The Customs Union came fully into being with the adoption of the Association Council Decision 1/95 at the end of 1995. In other words, it has now been more than two decades since the trade agreement between Turkey and the EU has been fully functional. Over time the EU has concluded new and more ambitious trade agreements with many of its trading parties. Deep and Comprehensive Trade Agreements with much wider coverage than the Customs Union with Turkey have entered into force. The Turkey-EU Customs Union is therefore in due of a modernisation that would firstly involve the



expansion of its scope to services and possibly agriculture and secondly the upgrading of its institutional provisions like dispute settlement. Several studies have already examined these proposals in detail¹.

This study will approach the task of modernizing the Customs Union from a different perspective. Namely as a complement to the traditional thinking on the modernisation of the Customs Union, this analysis will focus on the implications of enlarging the Customs Union to two new policy areas so as to better reflect the evolving policy priorities of the EU and Turkey. The first area is the Digital Agenda and the second one is the Green Deal. The following chapter will therefore firstly define the scope and content of the EU's Digital Agenda and then seek to understand the impact on Turkey and the Turkish business community of policy convergence. The next chapter will focus on the Green Deal and in a similar way will strive to clarify the consequences of incorporating the objective of green economic growth in the Customs Union.



¹ See for instance Sinan Ulgen and Pelin Yenigun Dilek. "A new era for the Customs Union and the Business World". TUSIAD. October 2015. Also Sinan Ulgen. "A business case for a Customs Union 2.0". DEIK 2018.

II. THE CUSTOMS UNION AND THE DIGITAL AGENDA



A. The EU and the Digital Agenda

The EU is striving to position itself in the world of American tech giants which have been dominant in the industry and Chinese ones that are under the control of the authoritarian Communist Party. As these two sides are competing to be the main provider of digital and technological services, Europe stands out as a large market with few large-scale domestic competitors. 90% of European digital service providers are small and medium-sized enterprises².

Though the EU is today at the eve of new reforms, its journey of digital services regulation started at the beginning of the millennium. The EU Directive on Electronic Commerce of 2000 was the first comprehensive legal framework defining “information society services” and regulations around them. The directive aimed to extend the scope of EU principles of free movement of services, and freedom of establishment to digital services. It was built based on the European Initiative on Electronic Commerce of 1997 that proposed areas of priority to be addressed in subsequent legislation. Notable among these areas were the creation of a coherent regulatory structure based on the

Single Market principles, and the desire for a compatible regulatory framework at the global level. These principles were echoed in regulation proposals in the following decades as well. The Electronic Commerce Directive covered all digital services that involved business-to-business and business-to-consumer transactions, including those provided free of charge to the recipient.

The 2000 Directive’s goal of ensuring a conducive environment within the Single Market for digital services was carried over to the 2010 Communication called Digital Agenda for Europe. Published in the aftermath of the 2008 financial crisis, this communication stressed the need to catch-up with global competitors and to restore the economic and social progress lost as a result of the crash. The document admitted that digital markets remained fragmented and interoperability was still weak. Notably, the rise of cybercrime and risk of low trust in networks were recognized. Also, inclusivity and sustainability entered the literature surrounding digital economy in this document.

In 2015, the Juncker Commission put forth the Digital Single Market strategy. The shortcoming identified in the 2010 Communication was reiterated, and a set of policy proposals were



² European Commission. “Europe fit for the digital Age: New online rules for businesses. 17 December 2020. Retrieved from https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-businesses_en.

MODERNIZING THE TURKEY-EU CUSTOMS UNION : THE DIGITAL AGENDA AND THE GREEN DEAL

specified. At the strategy's core were three main pillars: "Better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish, and maximizing the growth potential of our European Digital Economy" Legislative measures were proposed based on the pillars. Among those were technical ones aiming to facilitate free flow such as eliminating roaming charges and ensuring affordable, quality cross-border parcel delivery. More fundamental changes were also proposed such as the modernization of the EU copyright framework and reducing VAT related burdens. Cybersecurity related measures and measures aimed at combatting illegal digital content was also included in the strategy alongside a focus on big-data.

The framework established by 2015 Digital Single Market strategy was complemented by several regulations that came into effect in the years that followed. Some of these regulations dealt with the issues of data protection and cybersecurity. In this context, the EU level regulation of digital industries has also aimed to find a proper balance between the commercial interest of the digital leaders and popular concerns over privacy rights.

EU took an important step in 2018 in that regard with the General Data Protection Regulation – GDPR. GDPR became an international benchmark that has since been incorporated in the domestic legal order in many other jurisprudences. More recently, the EU moved to create a more comprehensive framework for regulating large scale digital companies. This detailed work of legislation first appeared as a draft when the Commission presented it in December 2020. Two separate bills were proposed, Digital Services Act – DSA and the Digital Market Act - DMA. DSA's objectives are complementary to the aims the GDPR. It also brings some new obligations for online platforms to improve online safety. One of the most ambitious parts of the new bill is its terms on transparency compelling online platforms to share data with both authorities and researchers. The compulsory data sharing scheme is aimed to improve the enforcement of illegal content and selling of illegal goods and services online. European digital consumers will also be able to put flags on the troubling content as a statement of misconduct which is to be directly shared with online platforms.

DSA has also introduced a set of differentiated obligations for digital platforms according to





their size, role, and impact. The first group, Intermediaries, includes providers of network infrastructure. They have the fewest obligations with no compulsory data sharing. But they must respect fundamental rights, be transparent, and should cooperate with national authorities. The second group, hosting services provides clouds and web hosting. All the obligations for intermediary services are applicable for hosting ones with the extra requirement of sharing information with users.

Online platforms and very large online platforms are the most heavily regulated ones. They are obliged to review the credentials of third parties; cooperate with trusted flaggers; be transparent towards the users with the advertisements they are displaying and report criminal offenses. The very large online platforms are considered the ones posing the greatest risk. Hence, they are required to contribute to the overall risk management of the digital sphere. It is the only group that must share data with authorities and researchers. The other piece of the twin bill is Digital Markets Act. DMA has a concept of “gatekeeper” at its heart. A gatekeeper is an online platform where business owners and consumers meet to conduct transactions. The EU aims to make these transactions fair and safe for both parties. For an

online platform to be considered as a gatekeeper it is stated that such platforms should have a significant impact on the internal market and have a strong and stable position as an intermediary of business transactions. Platforms defined by DMA as gatekeepers are required to help the EU authorities to make the digital sphere safe for business owners and users. Consumers and business owners can switch platforms or combine their favorite facilities from multiple platforms without facing any restrictions from the initial gatekeeper they were using. Also, thanks to DMA, business owners will have access to the data they generate as they were using the gatekeeper’s platform. Also of key importance are the enforcement provisions. Violating the terms of DSA and DMA can cause the parties 6% and 10% of their global turnover respectively.

The draft bills triggered discussions within and outside the EU. The foreign tech giants are claiming that the bill is unfairly targeting non European companies and favoring indigenous ones. There is indeed only one European company, SAP, matching the 45 million users condition of DSA and gatekeeper criteria of DMA. In return human rights advocates are demanding more stringent terms for regulating artificial intelligence.

B. The Integration of the Digital Agenda in the Turkey-EU Customs Union

For this analysis, we need to define and conceptualize how a digital chapter can be incorporated in the efforts to modernize the Turkey-EU Customs Union. The first option is for Turkey to adopt the European Economic Area - EEA model which would imply the transposition in the Turkish legislation all the digital policy related acquis of the European Union. Such a complete regulatory harmonisation would surely be effective in eliminating behind the border barriers to trade in digital goods and services and allow Turkey to be part of the EU's Digital Single Market but at present this option may not be politically realistic. Turkish policy makers will assess the scenario of full regulatory harmonisation against the background of the political vitality of the Turkey-EU relationship. Support for such a scenario of "deep integration" would be conditional on the lifting of uncertainties over Turkey's EU accession prospects. In other words, it is difficult to envisage a scenario where Turkish policy makers would opt for the EEA model as

long as the political environment shaping the future of Turkey-EU relations remains clouded.

The alternative approach would be to adopt a more selective approach in determining the eventual scope of policy harmonisation. In this case, the yardstick could be to evaluate the main barriers that impede Turkey-EU trade on digital goods and services. And to determine the components of the EU acquis which are relevant for the elimination of these barriers. The methodology of this study will therefore adopt a trade centric approach and assess the implications of integrating a digital policy chapter to the Turkey-EU Customs Union on the basis of the main legal and regulatory barriers to trade in digital goods and services.

The study will analyse the implications of Turkey's legal and regulatory harmonisation with the trade and investment relevant parts of the current EU digital acquis but also important slated legislation such as the draft Digital Market Act and the Digital Services Act which are likely to be a formal part of the EU acquis before the end of the Turkey-EU negotiations for the modernisation of the customs union.³



³The most salient trade and investment barriers will be included in the scope of this study. A much more comprehensive analysis would be needed to cover the full range of possible economic and regulatory impacts.



I) Data Localisation

Transferring, sharing data has become one of our daily activities due to the rapid development of digitalization and increased use of technology. At its simplest, we share our personal information with social networking firms when creating a new account. These firms store the data either on their or on a third party cloud-based server. Or our health data is stored in governments' databases for treatment or diagnostic purposes. List of examples where data is shared with third parties keeps increasing in line with our online presence.

With the increasing importance of both personal and non-personal data, Turkish authorities and legislature started to take certain steps on data localization. First, in 2013 sector specific data localization rules were introduced in the banking sector with the Law numbered 6493 on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions ('the Law 6493'). This legislation introduced data localization requirement for the Turkish banking sector. It applies to legal persons authorized

to issue electronic money and the most crucial part for this analysis is the data localization rule introduced for entities falling within the scope of Law 6493. Specifically pursuant to art. 23 of the Law 6493, system operators, payment institutions and electronic money institutions are required to localize data related to this legislation for a minimum period of 10 years in Turkey in a secure manner with access granted to competent governmental institutions at any time. Moreover, the Law 6493 requires the information systems used by the system operators in carrying out activities and their backups to be kept in Turkey as well. In simple terms, the Law 6493 requests all system operators, electronic money and payment institutions to locate their data and their backups in Turkey. This stipulation became a requirement for licensing which became a major obstacle for some of the international electronic payment companies. Turkey's Banking Regulatory Authority-BDDK, denied for instance PayPal's license request and instructed the company to suspend its business operations in Turkey since localizing data in Turkey is a precondition for obtaining a license.

In 2019, a Presidential Circular on Information and Communication Security Measures was published. The main aim of the Presidential Circular was to minimize security risks and take necessary security measures to ensure safety of important data capable of threatening national security and the public order⁴. While the Presidential Circular requests special personal data such as identity, health, communication, genetic and biometric data to be localised in Turkey, it addresses all the measures to public authorities and institutions⁵.

And most recently, in the second half of 2020 a data localization requirement for social network platforms was enacted. The recent amendments to the Law numbered 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through such Broadcasts ('the Law 5651') also introduced a data localization clause. It requests SNPs to take adequate steps to ensure localization of data in Turkey. Moreover, the Law



⁴ 2019/12 Sayılı Cumhurbaşkanlığı Bilgi ve İletişim Güvenliği Tedbirleri Genelgesi.

⁵ Ibid.

5651 does not impose any sanctions on Service Network Providers- SNPs for failing to localize the data they generate in Turkey from their users in Turkey, at least for now. However, it may be that in the future, data localization clause applying to SNPs will become a binding obligation like the one in the banking sector considering the emphasis made on data localization in the National Cyber Security Strategy and Action Plan ('the Action Plan') covering the period between 2020 and 2023. The Action Plan was published in December 2020 and it makes reference to localizing data domestically whose source and aim are in Turkey⁶.

The EU Acquis: General Data Protection Regulation & the Regulation for the Free Flow of Non-Personal Data

Data localisation rules under the EU law vary depending on the type of data in hand. While the General Data Protection Regulation ('GDPR') regulates localization of personal data, the Regulation for the Free Flow of Non-Personal Data provides guidance for the free movement of non-personal data. Therefore, in the following the assessment will be made according to this framework. In terms of personal data, the GDPR ensures the free movement of personal data stating that the proper functioning of the internal market requires the free movement of personal data within the Union⁷. In practice this means, no MS may impose provisions nor concerted practices restricting, limiting or prohibiting the processing and/or restoring of personal data in a specific MS. In terms of non-personal data, meaning any kind of information relating to an unidentified or unidentifiable subject, the relevant legislation is the Regulation numbered 2018/1807 for the Free Flow on Non-Personal Data ('the Regulation'). In short, the Regulation prohibits any type of country based data localization requirement in the EU⁸.



Therefore, it grants the freedom to every organization to store and process data anywhere in the EU. Any obligation, prohibition, condition, limit or requirement in the laws, regulations or administrative provisions of a member state or resulting from a general and consistent administrative practices in a member state or its administrative body which imposes the processing of data in a specific territory or hinders the processing of data in any member state is deemed illegal and should be repealed⁹. Exceptions to this prohibition are justified only if they are imposed on public security ground and respect the principle of proportionality.

The Regulation does not however undermine the competence of the relevant national authorities (Data Protection Agencies) to request, obtain or access the data for the performance of their duties in line with the EU law. In other words, the general prohibition to data localization requirement under the Regulation does not preclude competent authorities from accessing data processed in another member state¹⁰.

⁶ *Ulusal Siber Guvenlik Stratejisi ve Eylem Planı 2020-2023* <https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/%283%29%20TUR%20NCSS%20%282020-2023%29.pdf> accessed 26 July 2021, p.21.

⁷ *Regulation (EU) 2016/679 Of The European Parliament And Of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, Recital 13 and art.1(3).*

⁸ *Ibid*,art.4(1).

⁹ *Ibid*, artt.(3)5 and 4(1),(3).

¹⁰ *Ibid*, art.5(1).

The effects of Compliance with the EU Acquis

Bearing the EU rules explained above in mind, in the following the assessment of Turkey's compliance with the EU acquis in terms of data localization will be made. The analysis will be carried out in line with the framework followed under the EU acquis, meaning first the focus will be on the effects of compliance with data localization rules on personal data then on non-personal data. The main conclusion is that compliance with the EU acquis will essentially mean that Turkey will not be able enforce strict data localisation requirement restricting data storage to the Turkish territory. Instead the scope of the data localisation requirements will need to be expanded to include EU jurisdictions.

In terms of personal data, under the Law 5651 SNPs providing services in Turkey, therefore generating data from their users in Turkey are requested to take necessary steps to ensure data localization in Turkey. Even though as stated above there are no sanctions for breaching this obligation under the Law 5651 for now, hence the rule is of a recommendation nature, if Turkey

complies with the EU acquis, this clause will be repealed. As a consequence, SNPs subject to the Law 5651 will not be facing pressure from public authorities on localising their data in Turkey. For instance, social networking service TikTok that localizes its data in Ireland and Singapore¹¹ will be able to continue its operations in the same way thanks to its data center in Ireland, without moving the data it generates from Turkey to Turkey in case of compliance. Or, Facebook will be able to restore its data generated from Turkey in its data centre in Sweden, Denmark or Ireland. The MS in the EU where the personal data is stored will be deemed sufficient. The same conclusion must be drawn for financial service providers¹².

Financial service providers that have a license to operate in the EU will need to be allowed to operate in Turkey without any additional restrictions regarding their geolocation of their data storage. Finally, in terms of non-personal data, imposing data localization requirements will be deemed void upon compliance with the EU rules as well. Therefore, any restrictions imposed



¹¹ Lomas N, 'TikTok Announces First Data Center In Europe – TechCrunch' (TechCrunch, 6 August 2020) <<https://techcrunch.com/2020/08/06/tiktok-announces-first-data-center-in-europe/>> accessed 26 July 2021.

¹² With the assumption that the modernized Customs Union will also allow for free trade in financial services.

on firms regarding localizing data related to servers, primary or secondary systems will be repealed.

The liberalisation of cross border data transfers between Turkey and the EU will however require Turkey to be recognized as a safe country by the EU as per the terms of GDPR. This in turn will necessitate two major changes in the policy framework. The first one is the amendment of the domestic law so as to ensure the independence of the Data Protection Authority – DPA. At present the Turkish DPA is not deemed to fulfil the conditions of independence from the executive. Changes need to be introduced for the selection of the DPA Board Members. Secondly, the conditions of access of public authorities to personal data gathered by third countries should be brought in line with European practices. At present, some state agencies are allowed unrestricted access to this data. And as a result companies are treated as an intermediary by the government to access citizens' personal data.

That is the case particularly for state security, intelligence and law enforcement agencies. In addition, more recently even the Communications Directorate of the Presidency has been granted such unhindered access to personal data. On 24 July 2018 a Presidential Decree on the Organization of the Directorate of Communications ('the Presidential Decree') was published. The Presidential Decree allowed the Directorate of Communications ('the Directorate'), a presidential institution, to request and access data that is deemed necessary in relation to its duties from any public authority, legal and/or natural persons¹³.

The enactment of this Presidential Decree, especially the aforementioned provision, was challenged by the main opposition party and in June 2021, the Turkish Constitutional Court ruled on the matter. While the provision was declared unconstitutional by only five members of the Court, ten members stated that it is not unconstitutional therefore, the Directorate has



the competence on accessing data from any public authority, legal or natural person that is deemed necessary for the fulfilment of its duties.

In simple terms, the decision causes firms to be used as an intermediary between data subjects and the Directorate for the latter's requests related to accessing personal data. Moreover, the Directorate is authorized to request any type of personal data on the ground that the requested data is 'deemed necessary' for the performance of its duties. In practice the use of the word 'necessary' is open for interpretation and can be arbitrarily used hence, the powers vested to the competent authority can be easily abused by the authority itself. The wording of such regulation should have been explicit, clear with a definite scope. It is worth mentioning here that personal data covers any identified or identifiable data belonging to a natural person,¹⁴ hence the scope is broader than only names and surnames.

II) Cross Border Data Transfers

Turkish Personal Data Protection Law numbered 6698 ('DPL') was enacted in 2016 and since then it is the relevant piece of legislation regulating

¹³ İletişim Başkanlığı Teşkilatı Hakkında Cumhurbaşkanlığı Kararnamesi, madde 17(2).

¹⁴ Kişisel Verilerin Korunması Kanunu 6698, madde 3(1)d.



matters relating to processing and transfer of personal data in Turkey. In the following, the focus will be on the cross border data transfer pursuant to the DPL, more specifically how the absence of the safe country list for cross-border data transfers under the DPL affects operation of firms that are subject to the DPL. Under the DPL personal data may be transferred abroad upon explicit consent of the data subject.¹⁵ Explicit consent of the data subject is not necessary where conditions relating to processing of personal data including special personal data are fulfilled and data is transferred to a country that has an adequate level of protection.

The safe country list that is one of the cumulative conditions for cross-border data transfers where explicit consent is missing has been missing in Turkey since the enactment of the DPL. Hence, every country including member states of the EU, even though they have adopted the General Data Protection Regulation ('GDPR') to their domestic laws, are treated as insecure in terms of cross-border data transfer by Turkey. The safe country list is to be announced by the Data Protection Authority, until its announcement data controllers can only rely on two methods. These are obtaining

explicit consent of the data subject or submitting a letter of undertaking to the Board. The letter of undertaking in simple terms is a letter submitted by controllers in Turkey and in the related foreign country. So far, only two letters of undertakings have been approved by the Board. The first one of these is the letter approving cross-border data transfer of the vehicle fleet firm TEB Arval¹⁶ and the second letter of undertaking approved Amazon Turkey's¹⁷ cross-border data transfer. Both of these decisions are very recent.

The Board published the Binding Corporate Rules (Bağlayıcı Şirket Kuralları) which enable multinational group companies operating in countries where there is no adequate protection to transfer personal data to their affiliates. Once Binding Corporate Rules are established, it is deemed that adequate protection is ensured within the group company structure for personal data transfers.

And yet even though the absence of the safe country list does not fully prevent cross-border data transfer, it makes it difficult. Firstly, it is because obtaining explicit consent is operationally difficult and data subjects in some

¹⁵ Kişisel Verilerin Korunması Kanunu 6698, Madde 9(1).

¹⁶ Kişisel Verileri Koruma Kurumu | KVKK | Taahhütname Başvurusu Hakkında Duyuru' (9 February 2021) <<https://www.kvkk.gov.tr/Icerik/6867/TAAHHUTNAME-BASVURUSU-HAKKINDA-DUYURU>> accessed 26 July 2021.

¹⁷ Ibid.

cases do not provide consent or even withdraw their consents at later dates. Secondly, in terms of letter of undertakings the Board's decisions have been very delayed. Additionally the lack of a safe country list for cross-border data transfer prevents new investments, impairs competition and leaves firms' operations in the lurch¹⁸.

It is worth mentioning that firms using cloud-based services also engage in cross-border data transfer and severe restrictions on cross border data transfer do not only impair their own business model and investment plans for Turkey but also hinder the emergence of more innovative, cloud based economic activity.

The Data Protection Authority so far only stated in its most recent announcement on cross-border data transfer that the ongoing work is carried out for determining the safe countries even though no requests from other countries to the Authority had been made. More specifically, the Authority highlighted the reciprocity criteria required for determining whether an adequate level of protection is ensured and in this assessment being a party to international conventions solely does not automatically amount to adequate protection ensured in a country's domestic law.¹⁹ Additionally, emphasis was made to accelerate the harmonization process of Turkey's privacy Law with the EU's. Nevertheless, there is no

action and Turkey still lacks a safe country list. While avoiding the safe country list impairs predictability for global firms, it also results in difficulties encountered by firms conducting cross border data transfer.

The EU Acquis: the General Data Protection Regulation ('GDPR')

The relevant EU acquis in this field is the General Data Protection Regulation ('GDPR'). The GDPR governs the processing of personal data and free movement of such data. Pursuant to the GDPR, cross-border data transfer is prohibited unless certain conditions are fulfilled by the data controller or processor.²⁰ The main reasoning behind this general prohibition is to ensure that the level of protection provided to natural persons in respect of their personal data is not undermined outside the EU.²¹

The Regulation then provides a long list of exemptions to this general prohibition. Accordingly, the first condition that allows for cross-border data transfer under the GDPR is the adequacy decision. In simple terms, the European Commission ('the Commission') decides whether the data will be transferred to a foreign country with adequate jurisdiction in terms of privacy. While this decision is made, the Commission assesses whether the foreign country respects rule of law, human rights and fundamental



¹⁸ 'Kişisel Verilerin Yurtdışına Aktarılması Sorunu' (YB Veri Koruma) <<https://ybverikoruma.com/kisisel-verilerin-yurtdisina-aktarilmasi-sorunu/>> accessed 26 July 2021.

¹⁹ International agreements to which Turkey is a party to was stated as one of the criteria under this the list published by the ²⁰ Authority, as well as under Article 9 of the DPL. However, the Board rendered a decision (2020/559) that the countries that are party to Council of Europe Convention 108 Concerning the Automatic Processing of Personal Data ("Treaty No. 108") cannot be automatically deemed as countries which have an adequate level of protection.

²⁰ Regulation (Eu) 2016/679 Of The European Parliament And Of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, art.44(1).

²¹ Ibid, Recital 101, 102.

freedoms including legislation concerning public, security, defence, criminal and data protection. Moreover, the existence and effective functioning of independent supervisory authorities and international commitments the foreign country or international organization has entered into that will take place in data transfer are taken into account. If the Commission believes that all these conditions outlined are fulfilled, then it implements an act allowing for cross-border data transfer. This is one of the exceptions that apply to the general prohibition of cross-border data transfer under the GDPR. The adequacy decision is subject to periodic reviews, therefore the Commission always maintains the power to amend, suspend or withdraw the Adequacy Decision given.

Secondly, where the data controller or processor has provided the appropriate safeguards and enforceable rights and effective legal remedies to data subjects, cross-border personal data transfer will be allowed. Agreements between a public authority in the EU and a public authority in a foreign country, binding corporate rules that allow transfer within a group of undertakings or enterprises, standard data protection clauses

are deemed as appropriate safeguards within the scope of the GDPR. Contractual clauses between the transferor controller or processor and the transferee controller or processor are accepted as long as it is approved by the Data Protection Authority ('DPA') as well.²² Thirdly, any court decision or decision of an administrative body of a third country is treated as an exception to the general prohibition on cross-border data transfer if the transfer is based on an international agreement. Consent given by the data subject itself and transfers arising due to a contractual relationship between a data subject and a controller are also treated as exceptions to the prohibition on cross-border personal data transfer. Last but not least, public interest ground, transfer necessary for legal claims, data subject's vital interest and data controller's compelling legitimate interest are deemed as valid grounds for transfer.

The effects of Compliance with the EU Acquis

The current situation in terms of cross-border data transfer under Turkish law is causing multinational companies, firms using cloud services or any firm engaging in cross-border personal data transfer for any purpose to be



²² *Ibid*, art.46(3).

more sceptical towards Turkish market. In case of compliance it is very likely that this belief will change firstly because multinational firms operating in Turkey will be able to transfer personal data from Turkey to all EU member states. Therefore, while now all EU countries are treated as 'not safe' countries, the compliance will ensure eradication of all personal data transfer issues between Turkey and 27 member states. Additionally, considering that the Commission so far has given adequate jurisdiction decisions to other thirteen different countries²³, Turkey will be able to benefit from these decisions as well. Therefore, while before complying with the EU acquis, Turkey had no safe countries in terms of personal data transfer and transfer was subject to either explicit consent of data subject or letter of undertakings, upon complying it will be possible for firms engaging in cross-border data transfer in Turkey to conduct transfer to forty different countries.

Secondly, in relation to the safe country list, problems experienced while transferring cross-border data for legal claims, contractual relationships or other grounds provided under the DPL will be eliminated. This is because currently under the DPL these exceptions are subject to the condition of safe country list. Last but not least, under the Turkish Data Protection Law the competent authority is the Data Protection Authority however, the Authority is having delays preparing the safe country list since the preparation as stated by the Authority itself requires 'a case by case examination that causes delays in the preparation and termination of the safe country list'.²⁴ Upon compliance the competent authority will no longer be the Turkish Data Authority but the Commission, and it is very likely that this shift will ensure accelerating the conclusion of adequacy decisions considering that so far the Commission



has approved thirteen different countries' jurisdiction for cross-border data transfer.²⁵

III) Geographical restrictions on E-commerce

The smooth functioning of the internal market is an overarching goal of the EU. This objective also has implications for e-commerce. While in 2018, only 19%²⁶ of European consumers were buying online, this rate increased to 30% in 2020.²⁷ Moreover, in terms of national and cross-border online sales, 30% of individuals who bought or ordered goods over the internet purchased goods from sellers from other MS, whereas only 21% concluded sales from sellers from outside the EU, from third countries. In line with the Digital Single Market Strategy published in 2015 and with changing consumer behaviour in cross border shopping, the EU accelerated the harmonization and accordingly adopted new, additional rules aiming to enhance harmonization and ensure that e-commerce reaches its full potential.

²³ 'Adequacy Decisions' (European Commission) <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 26 July 2021.

²⁴ 'kişisel Verileri Koruma Kurumu | KVKK | Yürtdişına Veri Aktarımı Kamuoyu Duyurusu' (KVKK, 26 October 2020) <<https://kvkk.gov.tr/Icerik/6828/YURTDISINA-VERI-AKTARIMI-KAMUOYU-DUYURUSU>> accessed 26 July 2021; The Working Party, 'Transfers of personal data to third countries : Applying Articles 25 and 26 of the EU data protection directive' (1998) the Working Party <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/1998/wp12_en.pdf> accessed 26 July 2021, p.26.

²⁵ European Commission. 'Adequacy Decisions' <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 26 July 2021.

²⁶ European Commission, 'Digital Single Market, Making the Most of the Digital Opportunities in Europe' (Factsheet) p.1

²⁷ Eurostat, 'E-Commerce Statistics For Individuals - Statistics Explained' (Eurostat, June 2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#E-shopping_from_other_EU_countries> accessed 26 July 2021.



In 2015, e-commerce websites restricting customers to buy from another EU country was a common problem experienced by a majority of consumers in the EU.²⁸ As a result of this, on 28 February 2018 the Geo-Blocking Regulation was adopted. The Geo-Blocking Regulation aims to contribute to the proper functioning of the internal market by preventing unjustified geo-blocking and other forms of discrimination, direct or indirect, based on customers' nationality, place of establishment or place of residence.²⁹ In simple terms, the Regulation prevents a trader in a member state from adopting measures that have the effect of blocking or limiting a customer's access to the trader's online interference for reasons related to the customer's nationality, place of residence or place of establishment.³⁰ Additionally, discrimination for reasons related to payment are prohibited. While the Geo-Blocking Regulation aimed to remove discriminatory

practices, it helped to increase the volume of e-commerce sales by ensuring that every EU consumer could shop from any seller established in any member state.

The effects of Compliance with the EU Acquis

Global e-commerce firms operating in Turkey adopt different, additional Terms and Conditions (T&C) for their customers in Turkey who are importing goods from the EU. In case of compliance due to the Geo-Blocking Regulation, application of different conditions will be removed since different T&C were adopted for sale of imported goods on consumer's nationality, place of residence and establishment ground and the Geo-Blocking Regulation is putting an end to this. Consequently, the cost of doing business for global and domestic e-commerce firms in Turkey will be the same and a fairer competition environment will be ensured.

IV) Licensing Requirement of Streaming Platforms

This increase in popularity of streaming platforms has compelled the Turkish government to regulate how streaming platforms operate under Turkish jurisdiction. Accordingly, the competent authority for provision of radio, television and on-demand services which is the Radio and Television Supreme Council ('RTUK') introduced obligations that require streaming platforms to obtain an online broadcasting license. The Regulation on the Provision of Radio, Television and On-Demand Media Services via Internet Environment ('the Regulation') that introduced the obligation on streaming platforms to acquire an online broadcasting license from RTUK entered into force on 1 August 2019. While prior to the enactment of this licensing obligation streaming platforms were allowed to offer their series, films or documentaries freely to their members on a subscription fee, with the amendment streaming Platforms were needed first to submit an online broadcasting license

²⁸ Commission, 'Digital Single Market, Making the Most of the Digital Opportunities in Europe' (Factsheet).

²⁹ Regulation (EU) 2018/302 Of The European Parliament And Of The Council of 28 February 2018 On Addressing Unjustified Geo-blocking And Other Forms Of Discrimination Based On Customers' Nationality, Place Of Residence Or Place Of Establishment Within The Internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L60I, art.1(1).

³⁰ *Ibid*, Art.3(1).

to RTUK. The licensing obligation acts as a two pillared barrier by first requiring platforms to be established in Turkey pursuant to the Turkish Commercial Code ('TCC')³¹ and second by asking for additional, different paperwork for submitting online broadcasting license applications. Hence, prior to submitting their license applications to RTUK, companies like Netflix and Amazon Prime both formed their joint stock companies in line with the Turkish commercial code.³²

The EU Acquis: The Audiovisual Media Services Directive

Like Turkey, the European Union ('EU') has taken certain steps to keep up with the pace of changing consumer behaviour in the technology and media sector. Instead of adopting a new piece of legislation however, the Audiovisual Media Services Directive ('AVMSD') was revised. Previously the AVMSD was covering only services that had the principal purpose of provision of programmes to inform, entertain and educate. With amendments AVMSD's scope was extended first to streaming and video-sharing platforms without changes to the jurisdiction clause.

Accordingly, audiovisual media service providers are required to abide by the rules of only one member state defined as the Country of Origin (COO) and not the national rules of every 27 member state. This principle while ensuring legal certainty for media service providers,³³ also guarantees the protection of free movement of goods and services which are enshrined in the EU's founding treaties. In more simple terms COO allows only one member state to have jurisdiction over an audiovisual media service provider.³⁴ However, this does not preclude MS from adopting stricter rules on media service providers as long as it does not contradict with



the jurisdiction clause as well as the whole directive.³⁵ The jurisdiction that an audiovisual service provider is subject to is decided first by taking into account the place of the significant workload in the pursuit of the programme related audiovisual media service activity. Secondly, the member state where the provider has its head office would have a jurisdiction over the firm. If it is not possible to establish based on these two factors - so the firm is established outside the EU- then the member state where the provider first began its activity will have jurisdiction.³⁶

The effects of Compliance

The licencing requirement imposed on streaming platforms by RTUK is incompatible with the COO principle. This is because prior to submitting an application for license, RTUK requires companies to establish an entity in Turkey in line with the Turkish commercial law. So for instance Netflix and Amazon Prime as two global streaming

³¹ *The Audiovisual Media Services Directive [2018] OJ L 303, art.7(1).*

³² *Los Gatos Turkey Yayın Hizmetleri A.Ş. Unvanlı Kuruluş İnternet Ortamından İsteğe Bağlı Yayın Hizmeti (İnternet-İBYH) Lisansı Verilmesi 9 (2020) <<https://www.rtuk.gov.tr/ust-kurul-kararlari/los-gatos-turkey-yayin-hizmetleri-a-s-unvanli-kurulusa-internet-ortamindan-istege-bagli-yayin-hizmeti-internet-ibyh-lisans-verilmesi/30477?Aciklama=Netflix>>; Amazon Turkey Video Dijital Yayıncılık A.Ş. (Amazon Digital UK Limited) Unvanlı Kuruluş İnternet Ortamından İsteğe Bağlı Yayın Hizmeti (İnternet-İBYH) Lisansı Verilmesi 10 (2020) <<https://www.rtuk.gov.tr/ust-kurul-kararlari/amazon-turkey-video-dijital-yayincilik-a-s-amazon-digital-uk-limited-unvanli-kurulusa-internet-ortamindan-istege-bagli-yayin-hizmeti-internet-ibyh-lisans-verilmesi/30478?Aciklama=Amazon>>.*

³³ *The Audiovisual Media Services Directive [2018] OJ L 303, Recital 33.*

³⁴ *Ibid recital 34.*

³⁵ *The Audiovisual Media Services Directive [2018] OJ L 303, art.4.*

³⁶ *Ibid, art.2(3)b.*



platforms that had acquired online broadcasting licenses by RTUK, have established a physical presence in Turkey by forming joint stock companies. Prior to this licensing requirement Netflix was providing its services in Turkey from the Netherlands as the company's Europe, Middle East and Africa – EMEA headquarter³⁷ and was subject to Dutch law. Since within the Union only one MS has jurisdiction over an audiovisual service provider and the licensing requirement indirectly requires Turkey to have jurisdiction over an audiovisual service provider as well, the requirement hinders free movement of audiovisual services. Therefore, if Turkey complies with the EU acquis, more specifically with the AVMSD then the licensing requirement imposed under the Turkish law would be seen as being incompatible the COO principle and the AVMSD. In practice, the licensing obligation which acts as a barrier for streaming platforms to enter Turkish market will be repealed and an audiovisual service provider already subject to one of member state jurisdiction will be able to provide its services in Turkey without forming another entity and without having the online

broadcasting license. Compliance will also make it easier for small and medium sized streaming platforms to expand their services to Turkey.

V) Legal Representative Appointment Obligation

The Internet has become one of the main communication and information channels worldwide. In 2012 the average time an adult spent on social media was 90 mins, in 2020 it was over 3 hours.³⁸ With the increase of social media use, it has become necessary to regulate the lives behind phones, computers, screens. Turkey is one of the countries that has taken certain regulatory measures in order to ensure that fundamental freedoms and rights are respected online in the same way they are protected offline. Accordingly, in mid 2020 the Law numbered 5651 on Regulation of Internet Broadcasts and Prevention of Crimes Committed through Such Broadcasts ('the Social Media Law') which entered into force in 2007, was amended and the obligation on Social Network Providers (SNP) to appoint a legal representative was introduced.

³⁷ 'Europe, Middle East, Africa' (Netflix Jobs) <<https://jobs.netflix.com/region/europe-middle-east-africa>> accessed 2 June 2021.

³⁸ 'How Much Time Do People Spend on Social Media (11 Insights) | Blog | Whatagraph' (Whatagraph, 31 August 2020) <[shorturl.at/cyFIM](https://www.whatagraph.com/blog/how-much-time-do-people-spend-on-social-media/)>.

Pursuant to this new obligation, SNPs whose daily traffic in Turkey is over a million became obliged to appoint a legal representative.³⁹ In practice it meant for leading platforms like Facebook, Twitter, TikTok, Google to designate a legal representative responsible for their services in Turkey. Legal representatives can be a natural or a legal person. In the former scenario the Social Media Law requires the representative to be a Turkish citizen whereas in the latter case the representative should be incorporated under Turkish law. With this obligation, the public authorities and the Turkish legislature aimed to ensure a direct addressee for their requests such as removal of content or access blocking to the respective SNP. In other words, appointment of a legal representative obligation acts as a prevention mechanism for SNPs to avoid authorities' requests. Enforcement clauses included heavy administrative penalties and the throttling of bandwidth.

The EU Acquis: Digital Services Act

Currently there is no EU legislative act imposing social media platforms the obligation to appoint a legal representative that will be responsible for content moderation, enforcement of decisions and cooperate with relevant authorities in MS. However, on the 15th December 2020, the European Commission ('the Commission') shared its draft Digital Services Act ('DSA') proposal with the Public and the European Parliament ('EP') as part of the EU's legislative process. Even though there is no existing legal representative obligation, the DSA draft includes a provision requiring SNPs to establish a single contact point for direct communication with MS' authorities and the Commission where these SNPs are established in the EU. In case a SNP does not have an establishment in the EU but offers services in the Union, then the DSA requests the SNP to designate a legal representative in one of the MS where services are provided.

The DSA draft categorizes SNPs on the basis of their sizes and imposes obligations accordingly.

The obligation to establish a single point of contact to facilitate communication with MS' authorities and the obligation to appoint a legal representative apply to all intermediary services, so they are both basic obligations under the DSA. Communication information of the single point of contact and the legal representative should be made public to ensure better enforcement of the DSA and better protection of users. Under the Commission's proposal an appointed representative can be held liable for breaching the obligations prescribed by the DSA, next to the liability of the respective SNP. In other words, in case of a breach, the breaching SNP will not be solely held liable, also the representative who acted in breach may be held liable. The latter's liability is separate from the former. Once again it is important to underline that even though these rules are not in force yet, for the purpose of this paper it is assumed that these rules shall be applicable once the regulation is adopted.

A legal representative will be in breach when he fails to take down content that is deemed illegal without undue delay or when he fails to provide information requested by competent authorities. Moreover, the representative should ensure enforcement of the DSA. Firms offering services in the EU but not having an establishment in the Union are required to designate this legal representative, therefore this obligation is directed towards intermediary services established in the USA, China or in any other third country.

The Effects of Compliance

In case Turkey complies its Social Media Law with the EU's, the legal representative obligation imposed on SNPs will need to be repealed. Hence leading SNPs like Twitter, Facebook, Google, TikTok that had established their legal entities pursuant to the Social Media Law in the first half of 2021 will be allowed to offer their services without a physical presence in Turkey provided that they have a physical establishment and a contact entity in any of the EU Member

³⁹ *İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İslenen Suçlarla Mücadele Edilmesi Hakkında Kanun 5651, Ek Madde 4(1).*

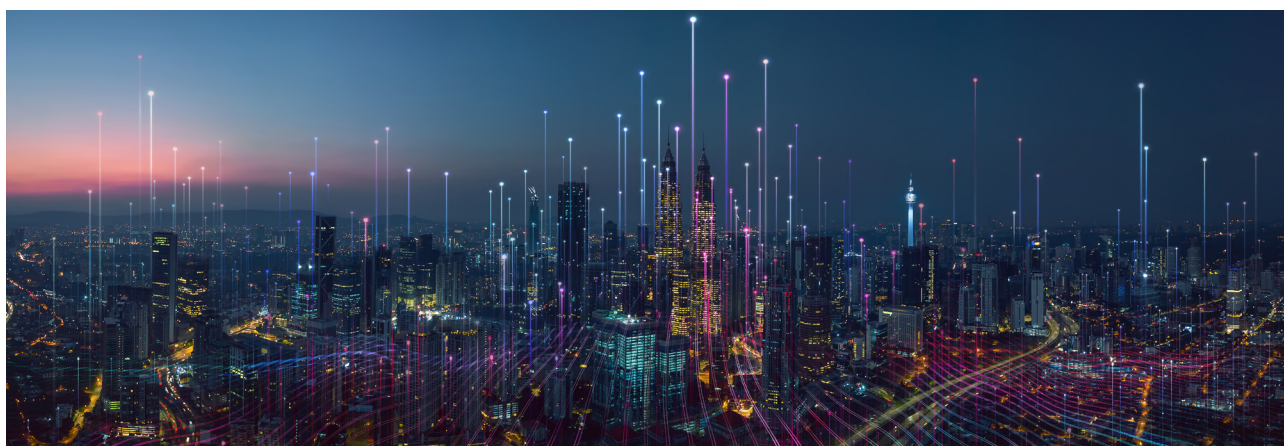
States or Turkey. This observation is based on the assumption that the EU adopts the DSA the way it is proposed and analysed above. Considering that there is an ongoing global trend towards ensuring user safety online just as in the physical world, it is more likely that the EU will enact the legal representative clause for provision of social media services. The DSA indeed introduces the concept of a single contact point and the legal representative clause for SNPs. First, the presence of a single point of contact and/or legal representative in the digital sector will become a common practice that ensures better user protection. Second, because the liability clause under the DSA is explicit, imposes liability to legal representatives next to the liability of the intermediary services, the application of the rules for SNPs will be foreseeable and accordingly SNPs can implement better mechanisms (notice and take down mechanisms, webforms etc.) for the protection of their legal representatives.

C. Policy Recommendations

This analysis was predicated on the assumption that the incorporation of a digital agenda in the renewed Customs Union would imply Turkey's policy convergence with the EU on the digital acquis. But ultimately the exact model for the liberalisation of trade in services including digital services between Turkey and the EU is yet to be determined. As briefly discussed in this study, the negotiating parties will have a range of options. Trade liberalisation on the basis of policy harmonisation is certainly the more ambitious option. It will most certainly lead to much higher degrees of market access given that

many obstacles to trade in digital services relate to regulatory issues. Such a model would also provide more incentives for FDI. In that sense, Turkey's objective to capture more FDI in digital industries would be better served with a trade liberalisation model that priorities regulatory harmonisation with the EU. Some of the more important effects of this model for cross border trade and investment were covered in this study. In return, trade liberalisation based on regulatory convergence is not the only option for the modernisation of the Customs Union. The EU and Turkey could also decide to opt for a General Agreement on Trade in Services- GATS like approach which would essentially imply the elimination of statutory restrictions to trade and investment without a commitment for regulatory harmonisation. Such an option would limit the economic benefits since it would not possible to eliminate the real restrictions to digital services trade in the form of divergent laws and practices. However Turkish policy makers may nonetheless decide to favour the GATS option for the exact reason that this approach does not involve regulatory harmonisation. As a result, Turkey can continue to uphold its own policy preferences.

Therefore it is of critical importance for Turkish policy makers, more than the EU side, to start assessing the full implications of the various options for services trade liberalisation. This aim will require an assessment of the economic consequences of this new trade deal, with a disaggregated analysis based on the different service industries. This study can provide a contribution to this future but inevitable task.





III. THE CUSTOMS UNION AND THE GREEN DEAL



The second potentially novel component for the modernization of the Customs Union will be the incorporation of climate change linked policies within its scope. In other words, Turkey and the EU may want to explore how the Customs Union can be leveraged to accelerate Turkey's convergence with the EU Green Deal. Viewed from this perspective, Turkey's objectives are likely to be twofold. First Ankara will want to identify a strategy that would exempt Turkey from the scope of the Carbon Border Adjustment Measures – CBAM announced by the European Commission and slated for implementation in 2023 with a transitional period of 3 years. These measures are to impact Turkey's exports in the industries covered by the regulation. Secondly, Turkey will want to have access to the EU funding that will facilitate Turkey's transition to a greener economy. This chapter will therefore firstly introduce the EU's Green Deal agenda and its implications for Turkey. The core question will be to understand the scope for Turkey's potential exemption from the CBAM regime. The second part of the chapter will focus on the potential access to EU finance for funding Turkey's structural transformation for green growth. The third section will conclude with a set of policy recommendations.

A. The European Union and the Climate Change Agenda

This year is likely to be a watershed in the EU's efforts to lead the global fight against climate change. The European Commission has unveiled its proposals for the implementation of the Green Deal as the "Fit for 55" package. At the core of the proposal lies the European Green Deal, the long-term program outlining the EU's ambition to transform its economy to achieve continent-wide climate-neutrality by 2050. As an intermediary step, the EU seeks to reduce its carbon emissions by 55% from 1990 levels by 2030. The Fit for 55 package aims to achieve this objective. It is comprised of new legislative proposals and initiatives to revise existing measures dealing with emissions reduction. Overall, the package reflects the more ambitious stance taken by the EU in regards to climate change; carbon reduction targets for numerous sectors are raised, and a comprehensive regulatory revamp is proposed to achieve these newly set targets.

The proposed regulations include tweaking emissions standards for cars and vans, new energy efficiency targets and energy taxes to incentivize the shift to renewables. However, most of the





package deals with adjusting and extending the EU Emissions Trading System (ETS), which currently covers 40% of EU emissions.

The main mechanism that facilitates emissions reduction in Europe is the EU ETS, a cap-and-trade system where emission permits for certain sectors are traded freely on a market, with the EU auctioning off the decreasing supply of permits each year. The reasoning behind this mechanism is that the decrease in permit supply will drive the emission price up, incentivizing companies that participate in the ETS to adapt and lower their emissions. Since its inception in 2005, carbon price had not risen drastically until 2020. However, since the beginning of 2020, it rose by around 328%, reaching an all-time high. Building on this momentum, the Fit for 55 package aims to extend its scope to other sectors such as shipping and airlines, and to create a separate ETS for road transport and construction. The proposal also includes measures to make ETS more efficient, for instance by reducing the number of free emission permits allocated.

It is also recognized within the Fit for 55 proposal that emission reductions, particularly in road transport and heating, will affect parts of the society more deeply. Thus, the package also includes a Social Climate Fund financed by the revenues from the new ETS proposed for transportation and building sectors. This fund will

help vulnerable households, micro-enterprises and transport users to reduce their dependence on fossil fuels.

Alongside these measures directed at the internal EU market, the package also contains a Carbon Border Adjustment Mechanism (CBAM) that will affect carbon-intensive imports into the EU single market. EU importers will have to pay the carbon price that would have been paid had the imported goods been produced in the EU. If the importer bought the goods from producers from non-EU countries that participate in the EU ETS (Iceland, Liechtenstein and Norway) or others that pay a carbon price in a third country will be exempt from CBAM. This means that the mechanism will not apply to producers from countries that price carbon domestically.

The reason for this mechanism's introduction is two-fold. First, as the EU ETS carbon prices increase, European companies will be incentivized to move their carbon-intensive production abroad. This reduces EU emissions only on paper, resulting in the phenomenon known as 'carbon leakage'. CBAM overcomes this problem by pricing the carbon on imports as well, removing the incentive to relocate production abroad. On the other hand, products from countries that do not have strict emissions regulations will be even cheaper compared to those produced within the EU. This raises the problem of carbon-intensive imports overtaking EU products. CBAM also addresses this by rectifying what the EU considers to be unfair competition against its producers.

A summary of the proposed CBAM regime

The European Commission proposed on the 14th July 2021 the Regulation on Carbon Border Adjustment Mechanism under the Fit for 55 Package. First and foremost, the Draft CBAM Regulation sets the ambition of a climate-neutral European Union by 2050 by preventing the risk of carbon leakage that is seen as a primary cause of climate change. With this choice of instrument, the Draft CBAM Regulation upon its entry into force will become binding in its entirety on all member states and will be directly applicable. Therefore, MS will not need to transpose the CBAM Regulation into their domestic law.

Scope

In terms of material scope, the Draft CBAM Regulation applies only to specific materials when they are imported to the Union through a third country.⁴⁰ These are; cement, electricity, fertilisers, iron and steel and aluminium pursuant to Annex I of the Draft CBAM Regulation. Compared to the current EU ETS list, the goods covered under the Draft CBAM Regulation is very narrow, therefore it is likely that in the future the scope may be expanded. The Draft CBAM Regulation excludes certain countries and territories from its scope. This is the case for goods originating from Iceland, Norway, Switzerland and Liechtenstein or from Busingen, Heligoland, Livigno, Ceita or Melilla territories.⁴¹ Exclusion applies firstly when countries and/or territories are either part of the EU ETS or have an agreement with the EU and the Union is linking the EU ETS with the third country.⁴² And secondly, the price paid in the country of origin is effectively charged on those goods without any rebate beyond those applied in the EU ETS.⁴³ When both these cumulative conditions are fulfilled the Draft CBAM Regulation will not be applicable, hence countries will be excluded. This application also demonstrates that the CBAM Regulation functions as an alternative to the EU ETS but not as a successor. The Draft CBAM Regulation also outlines provisions specific to the importation of electricity to the EU.

Authorised Declarant

The Draft CBAM Regulation introduces the 'authorised declarant' term. Authorised declarant is a person who has the sole authority to import goods to the Union.⁴⁴ Authorisations are granted by competent authorities that are designated by each MS.⁴⁵ Applications for authorized declarant should include contact details of the applicant, Economic Operators Registration and Identification (EORI) number, information on the main activity carried out, certification by



the tax authority, declaration of honour stating the absence of custom legislation, taxation legislations, market rules infringements as well as serious criminal offences relating to economic activity, information relating to the declarant's financial and operational capacity to fulfil its obligations. Moreover, an estimated monetary value and volume of imports of goods and contact information of the persons on behalf of whom the declarant is acting should be included. Where application is lodged in accordance with art.5 of the CBAM Regulation, pursuant to art.17 Draft CBAM Regulation, the declarant will be deemed authorized. The applicant has a right to object to a decision where its application has been refused.⁴⁶ It is worth underlining that declarants should be established in the Union.⁴⁷ Authorized declarants are required to submit on a yearly basis their 'CBAM Declaration' to the respective competent authority stating the total quantity of goods imported, total embedded

⁴⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment

⁴¹ Mechanism [2021], art.1(1)

⁴² Ibid, Annex II, Section A.

⁴³ Ibid, art.5(2)a.

⁴⁴ Ibid, art.4.

⁴⁵ Ibid, art.11(1).

⁴⁶ Ibid, art.11(1).

⁴⁶ Ibid, art.17(3).

⁴⁷ Ibid, art.5.

emissions calculated in line with the CBAM Regulation and total number of CBAM certificates corresponding to the total embedded emissions after necessary reductions being made.⁴⁸

CBAM Certificates

CBAM certificates are electronic certificates that correspond to one tonne of embedded emissions in goods.⁴⁹ They are sold by each member states' competent authority to authorised declarants.⁵⁰ The sale price of CBAM certificates are determined by the Commission according to the average of the closing prices of EU ETS allowances on the common auction platform for each calendar week.⁵¹ The average price is published by the Commission on its website on the first working day of the following week.⁵² CBAM certificates shall be surrendered by authorised declarants by 31st of May each year.⁵³

Calculation and Verification of Embedded Emissions

Annex III of the Draft CBAM Regulation outlines the methods for calculating embedded emissions. Embedded emissions in goods other than electricity are calculated according to their actual emissions. Where it is not possible, then default values set in Annex III, point 4.1 are taken into account. Methods of calculation for goods other than electricity differ for simple and complex goods. The calculation method of imported electricity is explained under point 5 of the Annex III.⁵⁴ After embedded emissions are declared in CBAM Declarations, the authorised declarant should also verify the emissions pursuant to Article 8 of the Draft CBAM Regulation. Verification is

carried out by a verifier accredited according to art.18 under the Draft CBAM Regulation. The verification principles outlined in Annex V should be followed during verification.

Competent Authorities

With the adoption of the Draft CBAM Regulation, each member state will be required to designate a competent authority to carry out the obligations under the Regulation and inform the Commission.⁵⁵ Next to the competent authorities' obligation to review authorisation applications, they are also required to establish a national registry containing the data regarding authorised declarants and their CBAM certificates.⁵⁶ Overall, competent authorities under the Draft CBAM Regulation are responsible for granting authorization to declarants, reviewing their applications and CBAM certificates.

Additionally, the Commission bears certain obligations next to competent authorities. The Commission's main task is to provide guidance to competent authorities and issue delegated acts as well as implementing acts regarding further outlining the application of the Draft CBAM Regulation such as the methodology to calculate the average price of CBAM certificates.⁵⁷ The Commission is also responsible for the announcement of MS' competent authorities in the Official Journal of the European Union.⁵⁸

Enforcement

Under the Draft CBAM Regulation, every 31st of May each year the authorised declarant is obliged to surrender a number of CBAM certificates to the competent authority. Where the authorised

⁴⁸ *Ibid*, art.6(1),(2).

⁴⁹ *Ibid*, art.3(18).

⁵⁰ *Ibid*, art.20(1).

⁵¹ *Ibid*, art.21(1).

⁵² *Ibid*, art.21(2).

⁵³ *Ibid*, art.22(1).

⁵⁴ *Ibid*, art.7(3).

⁵⁵ *Ibid*, art.11(1).

⁵⁶ *Ibid*, art.14.

⁵⁷ *Ibid*, art.21(3).

⁵⁸ *Ibid*, art.11(1).

declarant fails to do so, s/he will be liable to a penalty identical to the excess emissions penalty prescribed under the EU ETS Directive.⁵⁹ Payment of the penalty does not release the authorised declarant from its obligation to surrender.⁶⁰

Transitional Period

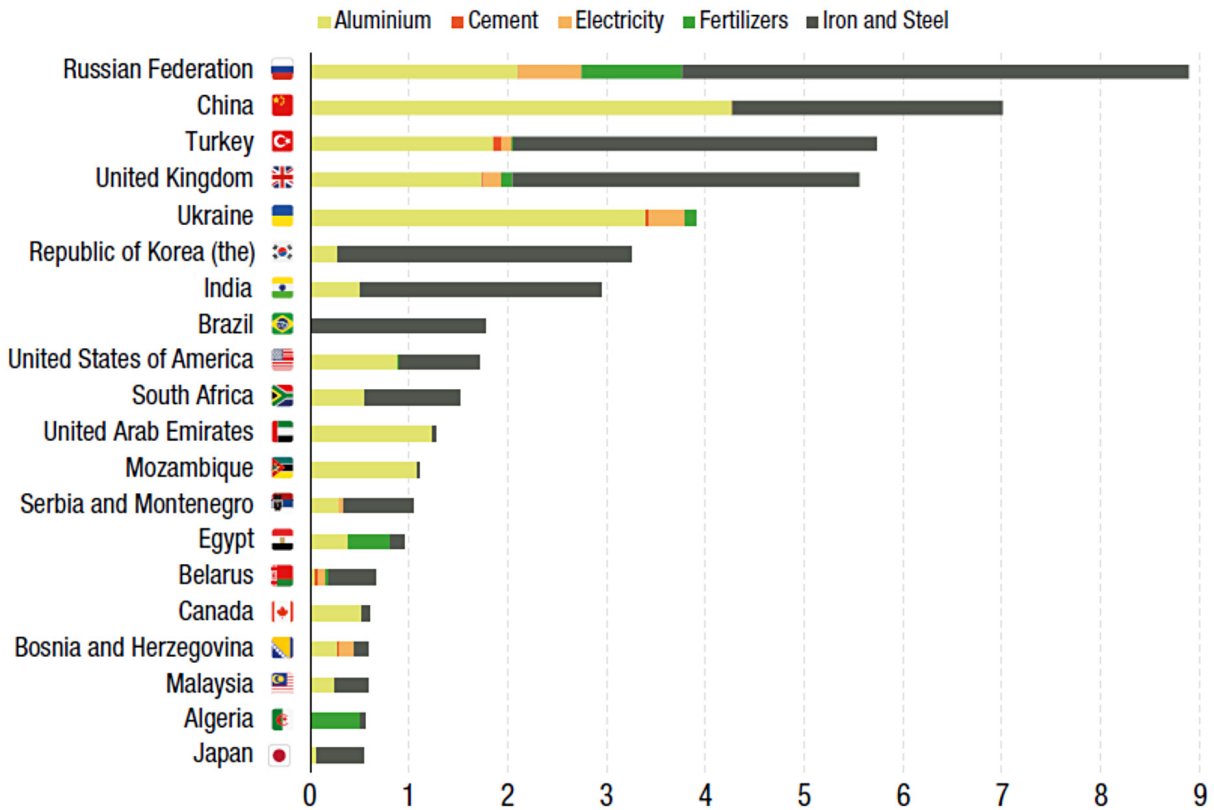
Under the Draft CBAM Regulation, the time period between 1 January 2023 and 1 January 2026 is considered as the transitional period hence, the CBAM mechanism applies as a reporting obligation as outlined under Article 32 of the Draft CBAM Regulation during this time period. It becomes fully applicable from 1 January 2026.⁶¹ Therefore, importers will be required to obtain their certificates in order to import goods within the scope of the CBAM Regulation to the Union. Now the Draft CBAM Regulation is still being negotiated

B. Impact on Developing Countries

Though it is not designed explicitly as a tariff, CBAM will affect countries that export to the EU. The cost of CBAM certificates will be reflected on the imports, making them more expensive. Moreover, the EU is planning to apply the instrument initially to the imports from carbon-intensive sectors of “iron and steel, cement, fertiliser, aluminium and electricity”⁶² A significant amount of EU imports from these sectors are sourced from developing economies. A large majority of these exporters do not have carbon pricing mechanisms in place, and their share of global emissions is relatively lower. It is also dubious if they will be willing or able to develop such mechanisms in time not to be affected by CBAM.

Figure 1 Potential impact of CBAM on EU's trading partners

Exports to the European Union 2019 in selected sectors likely to be considered in the CBAM.
20 most exposed countries in terms of aggregated value of exports (billion \$)



Source: UNCTAD⁶³

⁵⁹ Ibid, art.26(1).

⁶⁰ Ibid, art.26(3).

⁶¹ Ibid, art.36.

⁶² Ibid



The issue is exacerbated by two factors. First, since the price of CBAM certificates will mirror that of the carbon price under ETS, the upward trend in the value of the latter will increasingly affect developing exporters over time. This also makes it harder to estimate CBAM's effects at this point since it depends on carbon price forecasts for 2026. A report by UNCTAD states that up to \$16 billion worth of developing country exports could be subjected to CBAM charges if the mechanism is only applied to products currently covered by the EU ETS.⁶⁴ Second, if developed exporters that do have carbon pricing mechanisms are exempted from CBAM, this will put additional burden on developing exporters still subject to the instrument.⁶⁵

However, not all developing exporters will be affected equally. Sandbag and E3G claim in their report that some third countries that produce their goods with lower carbon-intensiveness may benefit in comparison to not only other exports but also to the EU producers. Additionally, they expect that the increased costs due to CBAM will be borne by consumers as EU importers

pass on the costs to them.⁶⁶ One key and heavily debated consideration has been the compatibility of CBAMs with World Trade Organisation - WTO rules and in particular the "national treatment" rule. In other words, CBAMs should not be applied so as to discriminate between domestic and imported products. In all likelihood, the WTO will be seized of this matter once EU CBAMs are introduced. A WTO Panel will ultimately rule on the compliance of imposing a carbon content based tax on the border on imported goods. The European Commission is obviously aware of this difficulty and has essentially proposed to gradually eliminate the free award of emission certificates to specific industries so as to guarantee that local and imported goods are treated equitably.

C. Impact on Turkey

For Turkey, the introduction of CBAMs creates a major conundrum. Firstly, the proposed CBAM arrangements are set to negatively impact the competitiveness of Turkish exports and secondly they represent a complication for the functioning of the Turkey-EU Customs Union. Turkey is the EU's

⁶³ "A European Union Carbon Border Adjustment Mechanism: Implications for Developing Countries." UNCTAD, July 2021. <https://unctad.org/webflyer/european-union-carbon-border-adjustment-mechanism-implications-developing-countries>.

⁶⁴ *Ibid.*

⁶⁵ Lowe, Sam. "The EU's Carbon Border Adjustment Mechanism: How to Make It Work for Developing Countries." Centre for European Reform, April 2021. <https://www.cer.eu/publications/archive/policy-brief/2021/eus-carbon-border-adjustment-mechanism-how-make-it-work>.

⁶⁶ Tsang, Byford, et al. "A Storm in a Teacup: Impacts And Geopolitical Risks Of The European Carbon Border Adjustment Mechanism." E3G. E3G and Sandbag, August 27, 2021. <https://www.e3g.org/publications/a-storm-in-a-teacup/>.

sixth largest trading partner with around 41.3% of Turkish exports going to the EU in 2020.⁶⁷ Carbon-intensive goods such as transport equipment, machinery, base metals and plastics made up 56.8% of Turkish exports to the EU in 2020.⁶⁸ A report commissioned by the European Bank for Reconstruction and Development- EBRD found that yearly costs caused by CBAM could range from USD 468 million to USD 912 million for Turkey with up to 50% of additional costs covered by cement exports.⁶⁹

The Turkish Ministry of Trade argued against CBAM by raising its incompatibility with the Customs Union.⁷⁰ However, the country has also taken steps to adapt to CBAM and the European Green Deal in general. In a report penned by the Boston Consulting Group, Turkey is listed among the countries that would benefit comparatively in the steel sector as steel manufacturing is relatively less carbon-intensive in Turkey.⁷¹

But in addition to negatively affecting the competitiveness of Turkish exports to EU markets, the CBAM regime also represents a serious hindrance for the integrity of the Turkey-EU customs union. A customs union represents a higher degree of trade integration compared to a free trade area because the signatory parties also commit themselves to follow a common commercial policy.

That is why bilateral trade under a customs union regime is carried out on the basis of the principle of the free circulation of goods which, unlike a free trade area, does not require a complicated set of rules of origin. Under a customs union, goods can be exported freely without the need to prove their origin. And so it is that under the Turkey-EU

customs union, exports from Turkey to the EU are carried out without controlling the origin of goods. The unilateral introduction of CBAMs by the EU is a threat to the integrity of the customs union arrangement in a situation where only one party of the customs union (EU) has a carbon tax policy. According to the proposition of the European Commission, the initial version of CBAMs will cover 5 industries (steel, cement, fertilizer, aluminum and electricity). The proper functioning of this new regime will require the carbon intensity of all such imports to be determined and a carbon tax to be accordingly calculated and imposed. This calculation will necessitate the origin of the good to be known.

The carbon tax will be determined on the basis of the carbon intensity of the exporting country or industry. In other words, unlike the trade regime where for non-preferential trade, all imports are treated the same and Most Favored Nation - MFN duties are applied regardless of the origin of the exporting country, under CBAMs the carbon tax can be different for each exporting country since it will be a function of the carbon intensity and



⁶⁷ "Countries and Regions - Turkey." European Commission. Accessed September 24, 2021. <https://ec.europa.eu/trade/policy/countries-and-regions/countries/turkey/>.

⁶⁸ Directorate-General for Trade, European Commission § (2021). https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_turkey_en.pdf.

⁶⁹ Fleeson, William. "Turkey Could Face over \$900 Million in CBAM-Related Export Costs." IHS Markit, August 12, 2021. <https://ihsmarkit.com/research-analysis/turkey-could-face-over-900-million-in-cbamrelated-export-costs.html>.

⁷⁰ Views of the Government of Turkey on the Carbon Border Adjustment Mechanism within the Framework of the Inception Impact Assessment (2020). https://ticaret.gov.tr/data/5f901d8813b8760d9ce54aeb/AB%20S%C4%B1n%C4%B1rda%20Karbon%20D%C3%BCzenleme%20Mekanizmas%C4%B1%20Etki%20Analizi-%C3%9C%20G%C3%B6r%C3%BC%5%9F%C3%BC_Ek_Turkey%20Views%20on%20CBA.pdf.pdf

⁷¹ Aylor, Ben, Marc Gilbert, Nikolaus Lang, Michael McAdoo, Johan Öberg, Cornelius Pieper, Bas Sudmeijer, and Nicole Voigt. "How an EU Carbon Border Tax Could Jolt World Trade." BCG Global. BCG Global, June 3, 2021. <https://www.bcg.com/publications/2020/how-an-eu-carbon-border-tax-could-jolt-world-trade>.

the (non)existence of a domestic carbon scheme. Therefore the proper functioning of CBAMs will require documentation related to the origin for the imported goods covered by the CBAM regime.

This requirement will represent a clear departure from the current trading arrangement under the Turkey-EU Customs Union where the origin of exported goods need not be demonstrated. Going forward, even under the Turkey-EU Customs exported goods covered by the CBAM regime will need to be accompanied by a certificate of origin. Such a requirement will reduce the benefits of the customs union. Exporting industries willing to reduce their carbon tax will need to produce documentation about the origin of their products exactly as if the trading arrangement between Turkey and the EU had been a free trade agreement and not a customs union. To be fair, a failure to demonstrate origin will not lead to the imposition of trade tariffs but the calculation of the carbon tax on the basis of higher default values.

In addition, in the absence of origin certification, third country goods which are re-exported from Turkey to the EU will be treated under the CBAM regime as goods being imported from Turkey and will be taxed at the rate that will be specific to Turkey. This setup provides scope for trade deflection as countries that end up having higher carbon tax rates than Turkey can re-export their goods to the EU via Turkey. The scope for trade deflection will grow with the scope and coverage of the CBA system. The more goods that are brought under the CBA the more opportunity there shall be for third countries to abuse this trade arrangement.

For the transitional period of 2023-2026 these complications will be limited to the above mentioned product groups. But the draft Commission regulation also refers to the possibility of enlarging the scope of CBAMs to new product groups and also to value chains. So for instance in the future not only steel products but industries that are consumers of these products like white goods or motor vehicles can possibly

be brought under the CBAM regime. There are indeed ample reasons why the envisaged CBAM regime should not be limited to these basic set of commodities. To effectively prevent carbon leakage would require a larger scheme extending to other industrial products, possibly covering the whole spectrum of goods included in the EU's Emission Trading System.

The CBAM regime becomes incompatible with the Turkey-EU customs union essentially because Turkey has so far resisted introducing a carbon tax scheme of its own.

D. The External Financing of The Green Transition

By adopting the European Green Deal and the Fit for 55 package, the EU made clear its ambition to be the global leader in the fight against climate change. Though most of the proposed policies target the EU internally, it is also acknowledged that action directed outside the EU borders will be necessary to reach climate neutrality by 2050 and the intermediate goal of reducing emissions by 55% of 1990 levels by 2030.

A line of reasoning often employed by developing countries is that developed countries share greater responsibility in the fight against climate change, a concern addressed by the Common but Differentiated Responsibilities principle in the United Nations Framework Convention on Climate Change -UNFCCC. By providing developing partners with funds and expertise, the EU can cement its leadership position. More pragmatically, European support regarding climate change is needed to prevent issues such as carbon leakage, and to ensure that neighbours and potential members adapt their economies to EU climate standards. To this end, the EU has revamped external financial mechanisms in its long-term Multiannual Financial Framework 2021-2027 (MFF). These instruments are found under the MFF's 'Heading 6 – Neighbourhood and the world' (Heading 6).⁷² All figures provided below are in 2021 prices unless stated otherwise. The trilateral negotiations that started in 2018

⁷² EPRS. "Neighbourhood and the World: Heading 6 of the 2021-2027 MFF." *Neighbourhood and the world: Heading 6 of the 2021-2027 MFF*, April 2021. https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282021%29690546.

were finalized in December 2020 with the MFF's adoption, providing the EU with a budget of around EUR 1.1 trillion.⁷³ Initial spending proposals under many headings were slashed due to the economic crisis caused by the pandemic. Unfortunately, Heading 6 was also affected with the initially proposed EUR 112 billion falling to EUR 101 billion.

Nevertheless, the new MFF brought about several advantages. Notably, the EU has agreed to allocate 30% of this budget to reach its climate goals, which is reflected under several headings.⁷⁴ In addition to integrating parts of the European Development Fund (EDF) into the MFF, an innovation found in this budget is the combining of 8 previous budgetary instruments under the Neighbourhood, Development and International Cooperation Instrument (NDICI) also known as Global Europe.

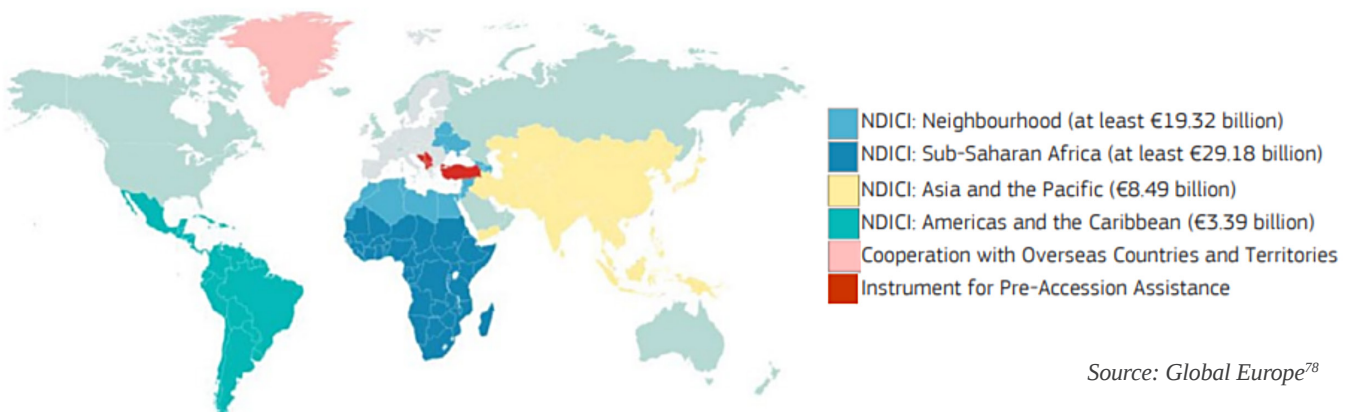
NDICI - Global Europe

Comprising one of the two policy clusters found under Heading 6, NDICI aggregates EUR 79.5 billion for external action, a 12% increase for the same function over the previous MFF.⁷⁵ The

instrument will be the main channel for funding cooperation with developing partners. It is worth noting that NDICI will address several goals simultaneously, therefore it is not solely focused on measures to combat climate change.

Taking the 17 Sustainable Development Goals as a benchmark, the European Commission lists "eradicating poverty and promoting sustainable development, prosperity, peace and stability" as the main points to be addressed by the instrument.⁷⁶ In line with the MFF, 30% of the NDICI budget, around EUR 23.9 billion, will be allocated for climate and biodiversity targets.

More specifically, spending in these areas is projected to reach 7.5% by 2024 and 10% by 2026⁷⁷. This will be done through the instrument's three pillars: Geographic, thematic and rapid-response. The most extensive is the geographic pillar, which sets aside tranches of the NDICI budget for different regions with the Neighbourhood and Sub-Saharan Africa receiving particularly higher allocations. With a share of EUR 60.4 billion, this pillar will focus on multiple goals including climate change.



Source: Global Europe⁷⁸

⁷³ The European Parliament. "Legislative Train Schedule: New Boost for Jobs, Growth and Investment." European Parliament, February 2018. <https://www.europarl.europa.eu/legislative-train/theme-new-boost-for-jobs-growth-and-investment/file-mff-2021-2027-mff>.

⁷⁴ Cabuzel, Thierry. "Supporting Climate Action through the EU Budget." Climate Action - European Commission, December 7, 2017. https://ec.europa.eu/clima/policies/budget/mainstreaming_en.

⁷⁵ The European Commission. "European Commission Welcomes the Endorsement of the New €79.5 Billion NDICI-Global Europe Instrument to Support EU's External Action." European Commission - European Commission, March 2021. https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1267.

⁷⁶ The European Commission. "Neighbourhood, Development and International Cooperation Instrument (NDICI) – 'Global Europe.'" https://ec.europa.eu/european-commission/system/files/factsheet-global-europe-ndici-june-2021_en.pdf.

⁷⁷ The European Commission. "Global Europe: Neighbourhood, Development and International Cooperation Instrument - Performance." European Commission, August 24, 2021. https://ec.europa.eu/info/strategy/eu-budget/performance-and-reporting/programmes-performance/global-europe-neighbourhood-development-and-international-cooperation-instrument-performance_en.

⁷⁸ The European Commission. "Neighbourhood, Development and International Cooperation Instrument (NDICI) – 'Global Europe.'" https://ec.europa.eu/european-commission/system/files/factsheet-global-europe-ndici-june-2021_en.pdf.



The thematic pillar, on the other hand, will complement the geographic one on the global level. Though the exact functions of funds from this pillar are not specified, allocations for different themes are pre-determined. EUR 2.7 billion of an envelope of EUR 6.4 billion is set aside for 'global challenges', which include environment, climate change and sustainable energy. The amount that will be utilized directly for climate-related issues, though, is left vague. The last pillar, rapid-response, aims to address conflict prevention and crisis response with an envelope of EUR 3.2 billion. It is plausible that funds from this pillar will be used in case of climate emergencies as well. Finally, around EUR 9.5 billion is left unallocated as an additional flexibility cushion, earmarked for unexpected events such as crises or migratory pressure.⁷⁹

⁷⁹ *Ibid.*

⁸⁰ The European Commission. "Questions and Answers: the EU Budget for External Action in the next Multiannual Financial Framework." European Commission, June 2020. https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_988.

⁸¹ GCCA+. "About EU GCCA+: Global Climate Change Alliance+." GCCA+. Accessed September 22, 2021. <https://www.gcca.eu/about-eu-gcca>.

In addition to these pillars, NDICI will also provide some of the funds for the European Fund for Sustainable Development (EFSD+), which contains the External Action Guarantee (EAG). These sub-mechanisms will aim to facilitate third-party investment through grants and financial instruments such as loans, guarantees and blending. EFSD+ and EAG will have a budget of EUR 53.5 billion with EUR 10 billion provided by the EU budget and the rest financed by other partners such as the European Investment Bank (EIB), though the latter amount is still subject to change. The mechanisms will serve economic development at large, including the areas of renewable energy and sustainable agriculture. It is unknown if the benchmark of 30% will be used for climate-related activities here as well, though the EU estimates EFSD+ and EAG to mobilize over half a trillion euros of private sector investment between 2021 and 2027, part of which will certainly reach sustainability-related projects.⁸⁰

A final instrument that may be connected to NDICI is the Global Climate Change Alliance Plus (GCCA+). Created after the Paris Agreement, this instrument seeks to aid least-developed countries and small island developing states through project-based funding. Between 2007 and 2020, GCCA+ has raised around EUR 750 million.⁸¹ Though the instrument is still operational, some of the financing mechanisms that it depended on have been merged into NDICI through the new MFF. New documents detailing the allocation of NDICI funds do not mention GCCA+ funding, which paints an uncertain picture regarding the financing of this instrument.

Pre-Accession Assistance Instrument (IPA III)

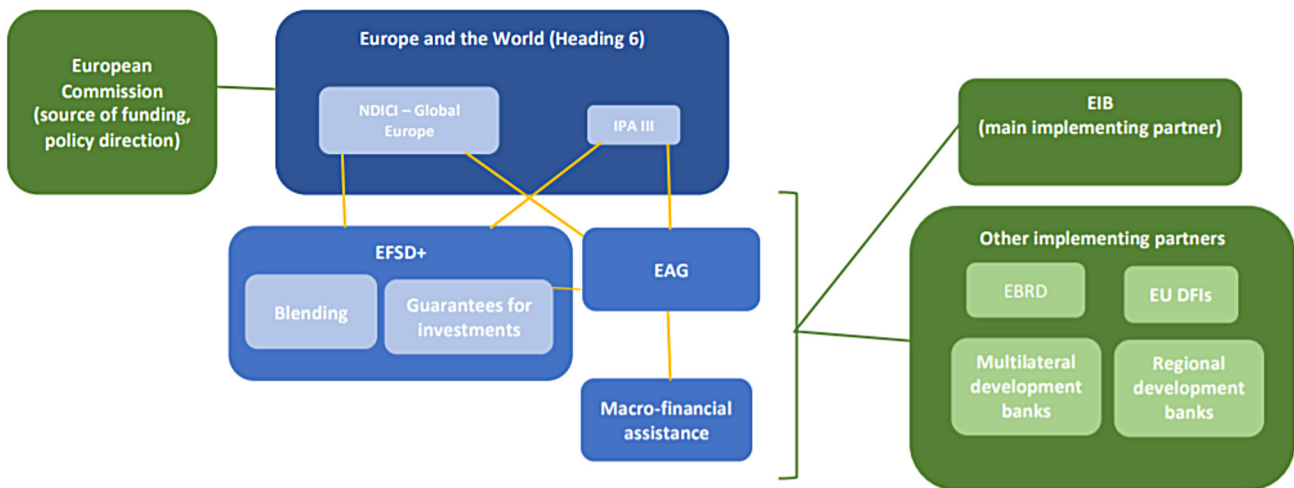
The other main instrument under Heading 6 is IPA III, which corresponds to the second policy cluster 'pre-accession assistance'. Though the European Council stresses coherence and synergy between the two instruments, IPA III is

separate from NDICI. As of the instrument’s final adoption on 15 September 2021, EUR 14.2 billion is allocated as its budget targeted at fostering EU integration for accession candidates Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia and Turkey.⁸² IPA III differs from its previous iterations by phasing out separate envelopes for countries in favour of performance-based funding around thematic areas. The thematic aspect is at the fore as the EU decided to centre the instrument around ‘fundamentals’, which include rule of law and the strengthening of democratic institutions. The European Commission makes it clear that IPA III will allow the Union to “reward performance and progress towards key priorities”⁸³ Alongside the values-based fundamentals, IPA III will also aid candidates in economic recovery from the pandemic and tackling climate change. Indeed, in September 2021, the Commission proposed including a reference to the 30% spending target for climate objectives into the IPA III budget, and “raising the spending target for climate action to 18% with the objective to increase this

percentage to 20% by 2027”.⁸⁴ It is therefore reasonable to expect that at least 18% of the IPA III budget, or EUR 2.6 billion, will be allocated for climate-related projects. Moreover, countries covered by IPA III will also have access to the thematic and rapid-response pillars of NDICI as well as the investment guarantees and financial tools for private investment provided by EFSD+ and EAG. Though IPA III is still in the process of being implemented, it is clear that it will present avenues for candidate countries to access funds for climate change objectives. The performance-based reward system advocated by the EU may also provide extra incentive to demonstrate commitment to these objectives.



Figure 3 Summary of financing instruments available to developing countries under MFF 2021-2027



Source: ECPDM⁸⁵

⁸² The European Commission. “Enlargement Region: European Commission Welcomes Final Adoption of EU’s New €14 Billion Pre-Accession Assistance Budget for 2021-2027.” European Commission, September 15, 2021. https://ec.europa.eu/neighbourhood-enlargement/news/enlargement-region-european-commission-welcomes-final-adoption-eus-new-eu14-billion-pre_en.

⁸³ The European Commission. “European Commission Welcomes Political Agreement on New €14.2 Billion Pre-Accession Assistance Instrument (IPA III).” European Commission, June 2021. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2810.

⁸⁴ The European Commission. “Communication From the Commission to the European Parliament Pursuant to Article 294(6) of the Treaty on the Functioning of the European Union Concerning the Position of the Council on the Adoption of a Regulation of the European Parliament and of the Council on the Instrument for Pre-Accession Assistance (IPA III) for the Period 2021-2027.” European Commission, September 2021. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM%3A2021%3A575%3AFIN&rid=3>.

⁸⁵ ECDPM. “The EU Budget and External Climate Financing: The State of Play.” ECDPM, May 21, 2021. <https://ecdpm.org/publications/eu-budget-external-climate-financing-state-of-play/>.

An assessment of the financing instruments

There is no doubt that the EU, alongside its member states, is the biggest contributor to international climate finance. In 2019, they contributed EUR 21.9 billion for climate finance in developing countries.⁸⁶ The increase in funding for external action in MFF 2021-2027 of EUR 4.5 billion over the previous external action budget and disaggregated European Development Fund, together with a spending target of 30% for climate action, represent more opportunities for developing countries to capture EU-sourced climate finance. However, the new framework under MFF 2021-2027 also raises some questions. Fundamentally, the European Green Deal and the Fit for 55 package do not contain external financing instruments. The task of providing climate funding is instead deferred to MFF. It is possible to view this as a result of these programmes being designed essentially as internal policy proposals of the EU, and external assistance as a budgetary topic. Indeed, the EU's previous primary instrument for development aid, EDF, was integrated into the MFF 2021-2027 after a long debate between EU organs regarding its budgetary planning.⁸⁷ On the other hand, the Fit for 55 package does include the CBAM mechanism, which is not only directed outwards but also risks harming developing exporters to the EU. Thus, the lack of an additional funding mechanism proposed within the Green Deal seems like a drawback.

This becomes more pertinent when the absence of a dedicated climate financing instrument under Heading 6 is considered. As it currently stands, the most clearly articulated commitment to climate financing for developing countries in this section is the 30% spending target applied as part of the MFF generally. Otherwise, mentions of financing for climate issues are dispersed throughout the pillars of NDICI, mainly the geographic one, and IPA III. Moreover, climate is not categorised on its own as a spending area under any of these instruments. Therefore, even though the allocation of funds is more or less definitive at this point, it is still vague how much of it exactly will go towards climate finance.

The broad categorisation does give the EU room to manoeuvre in implementing the budget. A leaner structure and increased flexibility were indeed among the main concerns of the EU in modernising the structure of the MFF for 2021-2027.⁸⁸ Nevertheless, vagueness in the name of adaptability risks masking the EU's vision regarding global climate cooperation. It will also be harder to evaluate the effectiveness of the instruments given their goals are not specified. An issue where this already shows itself is the cuts implemented to Heading 6 budget since negotiations started in 2018. The NDICI budget, for instance, was reduced from a proposed EUR 96.4 billion in 2020⁸⁹ to its current amount of EUR 79.5 billion. Similarly,



⁸⁶ The European Council. "Climate Finance: EU and Member States' Contributions Continued to Increase in 2019." European Council, October 29, 2020. <https://www.consilium.europa.eu/en/press/press-releases/2020/10/29/climate-finance-eu-and-member-states-contributions-continued-to-increase-in-2019/>.

⁸⁷ Lilyanova, Velina. "Financing EU External Action in the New MFF, 2021-2027 Heading 6 'Neighbourhood and the World'." European Parliament, November 2019. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/644173/EPRS_BRI\(2019\)644173_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/644173/EPRS_BRI(2019)644173_EN.pdf).

⁸⁸ EPRS. "Neighbourhood and the World: Heading 6 of the 2021-2027 MFF." *Neighbourhood and the world: Heading 6 of the 2021-2027 MFF*, April 2021.

⁸⁹ "The EU Budget for Recovery Increases Funds for a Stronger Europe in the World: EU Commission Press." PubAffairs Bruxelles, June 2020. <https://www.pubaffairsbruxelles.eu/the-eu-budget-for-recovery-increases-funds-for-a-stronger-europe-in-the-world-eu-commission-press/>.

EAG was sized down by EUR 76.5 billion from its initial 2018 proposal.⁹⁰ Granted, MFF in general suffered reductions mainly due to the economic crisis resulting from the pandemic, and some reduction through negotiations is reasonable given the EU decision-making process. It is not the budget cuts themselves that are concerning here. Rather, the unclear objectives laid out for the instruments, especially in the area of climate, make it significantly harder to understand how the lowered budget will affect their performance. Granted, the MFA is a long-term budget, therefore objectives and expectations can be further clarified on a per-project basis, and within yearly budgets.

E. Avenues of Green Finance for Turkey

Securing the necessary funding has been Turkey's primary concern in the global fight against climate change. Despite being part of the UNFCCC, as an OECD member, Turkey was classified as a developed economy and was listed as an Annex I country in the Kyoto Protocol with other developed nations. Being subject to the most demanding conditions under this international climate treaty, Ankara strived to change its status under the Kyoto Protocol.

On the other hand, Turkey has launched initiatives of its own to adapt to the European Green Deal. Indeed, even before the Green Deal became public, the Ministry of Environment and Urbanisation and the World Bank were jointly researching and designing carbon pricing instruments for Turkey through the Partnership of Market Readiness -PMR programme since 2013.⁹¹ On 16 July 2021, two days after the Fit for 55 package was announced, the Ministry of Trade published its Green Deal Action Plan. The plan's foreword penned by the Minister of Trade states that the main motive behind adapting to



the Green Deal is to secure the competitiveness of Turkish exports, and to take advantage of the evolving economic structure in Europe and the world.⁹² The plan frames the Ministry of Trade as the coordinator and aggregator of information on economic coherence with the European Green Deal. In addition to outlining individual responsibilities for the state institutions, the action plan also draws attention to the need for a carbon pricing mechanism, green taxonomy and incentives for renewable energy in Turkey. The report also calls for research on what avenues of funding and cooperation can be secured through the EU.⁹³

As the actions of the Ministry of Trade demonstrate, the trade risks emanating from CBAM and the potential competitive advantage that can be secured by adapting to the Green Deal presents Turkey with a carrot and stick situation vis-à-vis the European Union. Categorized as a candidate

⁹⁰ Dessoy, Philippe. "EIC Webinar on Eu External Financing Instruments." EIC, October 2020. <https://www.eic-federation.eu/conferences/eic-webinar-eu-external-financing-instruments>.

⁹¹ "PMR Turkey." PMR Türkiye. Accessed September 22, 2021. <https://pmrturkiye.csb.gov.tr/pmr-turkey/?lang=en>.

⁹² Yeşil Mutabakat Eylem Planı 2021 (2021). <https://ticaret.gov.tr/data/60f1200013b876eb28421b23/MUTABAKAT%20YE%C5%9E%C4%B0L.pdf>.

⁹³ Ibid.



country, Turkey is expected to benefit from the IPA III and EAG instruments instead of NDICI, which is aimed for third countries. Funding for climate action will not be a novel feature of IPA III; the EUR 4.4 billion that was allocated to Turkey as part of IPA II included EUR 664 million earmarked for environment and climate action of which EUR 111 million was spent.⁹⁴ Unfortunately, it is not possible to make an inference based on the new budget for IPA III based on this figure as national envelopes were abolished in this iteration of the instrument. However, a workable figure in IPA III is the climate spending target of 18% at the minimum. If it is assumed that Turkey's share from the IPA III budget will not fall below its share in IPA II, it is reasonable to expect that Turkey will receive at least EUR 5.3 billion over 7 years. In turn, if the 18% target is applied to this number, it is possible for the IPA III funding

for climate change to target EUR 961 million for Turkey over the same period. Though IPA III was recently officially adopted, the IPA III Programming Framework is still being worked on by the EU and other stakeholders such as government ministries.⁹⁵

This framework will outline how IPA III funds will be used, and although there is no official EU draft yet, documents released by several Turkish ministries illuminates some of its fundamental characteristics. Both the Ministry of Environment and Urbanisation⁹⁶ and the Ministry of the Interior⁹⁷ indicate that IPA III projects will be evaluated in two criteria: relevance and maturity. Given the absence of country envelopes, Turkish government bodies will have to compete with other candidate state organs in presenting the most relevant and mature projects. Therefore, a major component of access to funds will be the quality of the projects proposed. Another detail shared by the two ministries' releases is the mention of 5 thematic frameworks that projects will have to relate to. These are likely the elaborations of 'thematic areas' mentioned in previous EU documents regarding IPA III. One of these thematic frameworks⁹⁸ is 'Green Agenda and Sustainable Connectivity' which shows that the EU indeed decided to include a connection between the Green Deal and IPA III in the Programming Framework. Though it is indicated that the funds will not be allocated equally among the thematic frameworks, the fact that there are 5 of them, and the 18% spending target for climate indicate that it is within reason that at least around one-fifth of the total funding allocated to Turkey will be used for climate-related projects. As of September 2021, 6 out of 15 projects agreed upon in principle between

⁹⁴ "IPA." T.C. Çevre ve Şehircilik Bakanlığı Avrupa Birliği ve Dış İlişkiler Genel Müdürlüğü. Accessed September 22, 2021. https://ipa.gov.tr/IPA_1071.

⁹⁵ The European Commission. "Enlargement Region: European Commission Welcomes Final Adoption of EU's New €14 Billion Pre-Accession Assistance Budget for 2021-2027." European Commission, September 15, 2021. https://ec.europa.eu/neighbourhood-enlargement/news/enlargement-region-european-commission-welcomes-final-adoption-eus-new-eu14-billion-pre_en.

⁹⁶ "EU Instrument for Pre-Accession Assistance IPA-III Term." Republic of Turkey Ministry of Environment and Urbanization Directorate of European Union Investments. Accessed September 22, 2021. <https://ab.csb.gov.tr/en/eu-instrument-for-pre-accession-assistance-ipa-iii-term-i-100210>.

⁹⁷ AB ve Dış İlişkiler Dairesi Başkanlığı, İçişleri Bakanlığı (2021). [https://icisleri.gov.tr/kurumlar/icisleri.gov.tr/IcSite/diab/Proje\(1\)/IPA-III-Rehberi.pdf](https://icisleri.gov.tr/kurumlar/icisleri.gov.tr/IcSite/diab/Proje(1)/IPA-III-Rehberi.pdf).

⁹⁸ EU Instrument for Pre-Accession Assistance IPA-III Term." Republic of Turkey Ministry of Environment and Urbanization Directorate of European Union Investments. Accessed September 22, 2021. <https://ab.csb.gov.tr/en/eu-instrument-for-pre-accession-assistance-ipa-iii-term-i-100210>.

Turkey and the EU are related to the Green Deal. Funding-wise, this corresponds to EUR 55 million for Green Deal related projects out of a total of EUR 204 million.⁹⁹ This means that 27% of the funding presently secured will go towards climate-related project. While this is in line with the minimum one-fifth projection, it is still too early to draw definitive conclusions as the IPA III period has just begun.

It should be noted, however, that the IPA III period presents greater risks for recipient countries, especially Turkey, compared to before. The departure from the 'fair-share' logic applied through country envelopes in favour of the performance-based thematic method grants more say to the EU on how to distribute the funds. Since no country-based commitments are made initially, the EU will have the right to withhold funds in practice. This may cause complications in case of political tensions between Turkey and the EU.

On the private sector side, Turkey is included in the Annex I of IPA III, which lists candidate countries eligible for the financial instruments contained within the External Action Guarantee, therefore the country is granted access also to the EFSD+ mechanism to some extent.¹⁰⁰ The distribution method of EAG and EFSD+ funds depends on negotiations, especially for IPA III countries. EAG's priority areas do include to "contribute to climate action and environmental protection and management" alongside references to sustainable growth and renewables. Moreover, EAG's focus on SMEs may present a funding opportunity for climate-related Turkish start-ups. It should be noted, however, that EAG operations for IPA III countries will be sourced



from the allocated IPA III budget, therefore the aforementioned EAG budget figures do not apply in this case.¹⁰¹ Additionally, Turkey plans to combine IPA III funds with resources sourced from other international organizations to provide leverage for credit packages for the private sector. This echoes the European plan of attracting higher amounts of private capital by using Green Deal funds as leverage such as in the InvestEU programme. Indeed, the Turkish government is also negotiating with the EU for access to certain internal EU programmes such as InvestEU. Others include Horizon Europe and the European Innovation Council. These initiatives aim to foster innovation and provide support to private sector actors in developing new technologies, including for sustainability-related sectors. Finally, another point that is being negotiated is the creation of a mechanism similar to the West Balkan Investment Framework (WBIF).¹⁰² WBIF gathers resources from the IPA funds and bilateral donors from within and outside Europe to provide support for the socio-economic development of West Balkan EU candidate countries.¹⁰³ Its areas of investments include environment. A similar mechanism geared towards private sector development is proposed by Turkey, though the details of the negotiations are not known yet.

⁹⁹ Özcan, Bülent. In *Avrupa Yeşil Mutabakatı Toplantısı*. ESİAD, EĞİAD and İZSİAD, 2021. <https://www.egiad.org.tr/esiad-egiad-izsiad-ortak-toplanti-ab-yesil-mutabakati/>.

¹⁰⁰ Annexes to the Proposal for a Regulation of the European Parliament and of the Council Establishing the Instrument For Pre-Accession Assistance (IPA III) (2018). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CONSIL%3AST_10184_2018_ADD_1_COR_1.

¹⁰¹ Official Journal of the European Union, REGULATION (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009 (2021).

¹⁰² Özcan, Bülent. In *Avrupa Yeşil Mutabakatı Toplantısı*. ESİAD, EĞİAD and İZSİAD, 2021. <https://www.egiad.org.tr/esiad-egiad-izsiad-ortak-toplanti-ab-yesil-mutabakati/>.

¹⁰³ "About the WBIF." WBIF. Accessed September 22, 2021. <https://www.wbif.eu/about/about-wbif>.



F. Policy Recommendations

Turkey's possible exemption from the CBAM regime

As explained in previous sections, the introduction of CBAM by the EU present not only a threat to the competitiveness of Turkish exports but is also a hindrance to the good functioning of the Customs Union. As a result, Turkey and the EU should initiate a dialogue with a view to explore how ultimately as a Customs Union partner, Turkey can be exempted from the scope of the slated CBAM. This discussion should be based on the existing provisions in the draft CBAM Regulation which envisage such an option.

In addition, the European Commission has also stated that "the EU stands ready to work with low and middle-income countries towards the decarbonisation of their manufacturing industries. The Union should support less developed countries with the necessary technical assistance to facilitate their adaptation to the new obligations established by this regulation"¹⁰⁴. A successful CBAM should also facilitate producers

in developing countries invest in cleaner technologies, allowing them to both compete in the single market and reduce emissions at home.

Pursuant to art.2(11) of the Draft CBAM Regulation, the Commission has the competence to adopt delegated acts amending the list of countries falling outside the scope of the Draft CBAM Regulation under Annex II, Section A and B. At the moment EFTA countries (Iceland, Liechtenstein, Norway, Switzerland) as well as Busingen, Heligoland, Livigno, Ceuta and Melilla are excluded from the scope. The reason of these countries exclusion is they are either part of the EU ETS or have an agreement with the EU linking them to the EU ETS are excluded from the scope of the Draft CBAM Regulation provided that the price paid on the country of origin is effectively charged on those goods without any rebate beyond those applied in the EU ETS.¹⁰⁵ In the following sub sections, the system created and followed by Norway and Switzerland will be explained in order to find out the possibility for Turkey to adopt a similar system, and to be excluded from the scope of the Draft CBAM Regulation.

¹⁰⁴ European Commission. "Carbon Border Adjustment Mechanism: Questions and Answers". 14 July 2021. https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3661

¹⁰⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment Mechanism [2021], art.5(2)a,b.

Option 1 Norway Example - Full Integration with the EU ETS

Norway has been part of the EU ETS through the EEA Agreement since 2008.¹⁰⁶ Norway established its own ETS back in 2005 with the adoption of the Norwegian greenhouse gas emission trading act. From the very beginning the Norwegian ETS was always very similar to the EU ETS. In order to ensure full compatibility with the EU ETS, Norway incorporated the Directive 2003/87 as amended.¹⁰⁷ A National Allocation Plan was adopted by Norway.¹⁰⁸ The plan outlined the allocation of allowances required to surrender emission allowances under the emission trading scheme by reflecting both the EEA provisions and Norwegian law for their application. For transfer of allowances between Norwegian installations and EU ETS, the EFTA Surveillance Authority's approval was necessary. Moreover, Norway extended its own ETS scope in a way covering the same sectors covered under the EU ETS and defined the framework for allocation of allowances.¹⁰⁹ To be more precise, the offshore industry and wood processing were included in the scope.¹¹⁰ During the Phase II, while Norwegian cap was 15 million tCO₂e/year, the EU ETS cap was 2,083 million tCO₂e/year.¹¹¹ Official linking took place when both ETSs' were in their second phase, period covering the years 2008-2012 and then they were fully integrated in the beginning of Phase III covering years 2013-2020.¹¹²

Option 2 - Agreement linking Third Country's Own ETS System to the EU ETS - Switzerland Model

Under art.25 of the EU ETS Directive, agreements can be concluded between the EU and third countries, linking the latter's ETS program to the EU's ETS. As the article states however, such agreements shall be concluded only if the third country is listed in Annex B of the Kyoto Protocol. Accordingly, Switzerland is listed under Annex B of the Kyoto Protocol.¹¹³ In line with this, on 20 January 2010, the Council authorised the opening of negotiations between the EU and Switzerland for linking Switzerland's ETS to the EU's. On 1 January 2020 the Agreement entered into force.

The Swiss ETS started in 2008 with a five-year voluntary phase as an alternative to CO₂ taxes on fossil fuels.¹¹⁴ While it was mandatory for big, energy-intensive companies it was optional for small ones.¹¹⁵ Making participation a mandatory obligation for large, energy-intensive entities resulted in Swiss ETS to fulfill one of the three fundamental requirements for linking. Secondly, the Swiss ETS also had an absolute emission cap.¹¹⁶ The Swiss ETS was covering cement, pharmaceuticals, paper, refinery and steel sectors. In order to link its own ETS to the EU's, Switzerland extended its ETS scope to aviation as well.¹¹⁷

¹⁰⁶ Norwegian Ministry of Foreign Affairs, 'Climate Change And The Environment' (Norwegian Ministry of Foreign Affairs) <<https://www.norway.no/en/missions/eu/values-priorities/climate-env/>> accessed 21 September 2021

¹⁰⁷ Environmental Defence Fund, CDC Climat, IETA, Norway - *The World's Carbon Markets: A Case Study Guide to Emissions Trading* <https://www.ieta.org/resources/Resources/Case_Studies_Worlds_Carbon_Markets/norway_case_study_may2015.pdf> accessed on 21 September 2021, p.2.

¹⁰⁸ Norwegian Ministry of the Environment, 'Norwegian National Action Plan for the Emission Trading System in 2008-2012' <https://www.regjeringen.no/globalassets/upload/md/vedlegg/planer/nap_final_esa_260308.pdf> accessed 21 September 2021, p.6.

¹⁰⁹ *Ibid.*

¹¹⁰ Sandbag, 'Brexit and the EU ETS Greater as the Sum or in Parts?' <<https://ember-climate.org/wp-content/uploads/2017/05/Brexit-and-EUETS-Final-Annexes.pdf>> accessed 21 September 2021.

¹¹¹ European Commission (February 2012). "Preparing the EU's Quantified Emission Limitation or Reduction Objective (QELRO) based on the EU Climate and Energy Package." Commission Staff Working Document 2012, <http://ec.europa.eu/clima/policies/international/negotiations/docs/swd_13022012_en.pdf> accessed 21 September 2021 p.11; Norwegian Ministry of the Environment, 'Norwegian National Action Plan for the Emission Trading System in 2008-2012' <https://www.regjeringen.no/globalassets/upload/md/vedlegg/planer/nap_final_esa_260308.pdf> accessed 21 September 2021.

¹¹² Environmental Defence Fund, CDC Climat, IETA, Norway - *The World's Carbon Markets: A Case Study Guide to Emissions Trading* <https://www.ieta.org/resources/Resources/Case_Studies_Worlds_Carbon_Markets/norway_case_study_may2015.pdf> accessed on 21 September 2021, p.2.

¹¹³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Annex B.

¹¹⁴ International Carbon Action Partnership, 'Swiss ETS' <https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems%5B%5D=64> accessed 21 September 2021.

¹¹⁵ *Ibid.*

¹¹⁶ European Council. "Green Light For The Agreement Linking The EU And Swiss Emissions Trading Systems" <<https://www.consilium.europa.eu/en/press/press-releases/2017/11/10/green-light-for-signing-the-agreement-linking-the-eu-and-swiss-emissions-trading-systems/>> accessed 21 September 2021.

¹¹⁷ Council Decision 13076/17 on the conclusion of the Agreement between the European Union and Swiss Confederation on the linking of their greenhouse gas emissions trading systems, p.3.

Option 3 – Carbon Taxation

A third option for Turkey is to launch a carbon tax scheme domestically. Recent academic studies¹¹⁸ indicate that a carbon tax could over the longer run not only help with efforts to mitigate carbon emissions but also lead to a higher and sustainable growth path for the Turkish economy. The specific design of the carbon tax scheme is critical. For instance the scope of its coverage, the rate of the carbon tax as well as the modalities for the fiscal spending related to the carbon tax will in reality determine the long term impact of this scheme. At the same time Turkey will need to engage in a dialogue with the EU so that the slated domestic carbon taxation scheme will allow for Turkey to be exempted from the CBAM.

Emissions Trading or Carbon Taxation ?

Today, carbon pricing is considered essential to limit emissions in a rational and systematic manner. Several countries such as Canada, China, and the EU have implemented measures to price carbon. In total, 22% of worldwide emissions are subject to carbon pricing regulations.¹¹⁹ With the announcement of CBAM, the issue also entered the

agenda of countries that export to EU, especially those exporting carbon intensive products. As detailed in the previous sections, to be exempt from the CBAM duty, exporting countries have to either join the EU ETS, or develop a domestic carbon pricing mechanism that their export goods will be subject to. The latter option implies a policy choice between two alternatives: implementation of a carbon tax or the development of a cap-and-trade mechanism, that is, an ETS.

The two policies are basically different methods for pricing carbon. With carbon taxation, the government would set the price of carbon emissions per ton based on its emissions reduction target and apply it as a tax on emitting businesses. With an ETS, the government distributes licences for emissions with the total volume in line with the country's emission target. These licences are then traded on an open market, letting the carbon price be determined by market participants.¹²⁰ In the carbon tax scenario, the government adjusts the tax rate to determine emission reduction. The ETS allows the government to directly determine total national emissions by adjusting



¹¹⁸ See for instance TUSIAD. “Ekonomik Göstergeler Merceğinden Yeni İklim Rejimi”. 2020. Also see

¹¹⁹ “Carbon Pricing around the World.” Citizens’ Climate Lobby, 26 Oct. 2021, <https://citizensclimatelobby.org/laser-talks/carbon-prices-around-world/>.

¹²⁰ Frank, Charles. 2021. “Pricing Carbon: A Carbon Tax Or Cap-And-Trade?”. Brookings. <https://www.brookings.edu/blog/planetpolicy/2014/08/12/pricing-carbon-a-carbon-tax-or-cap-and-trade/>.



the number of traded licences. In a hypothetical perfect-market scenario, both mechanisms are equally effective. However, in reality, each contain advantages and risks which may affect the choice of governments.

Turkey is currently in a position where it has the incentive to develop either of the methods or a combination of them. It risks being disproportionately affected by CBAM if the necessary steps are not taken. Moreover, some preliminary groundwork is already there, such as a Monitoring, Reporting and Verification System for Greenhouse Emissions developed in cooperation with Germany.¹²¹ The country also has a voluntary carbon market.¹²²

A carbon tax would have two main advantages for Turkey. First, it would be easier to implement compared to an ETS since the policy framework for taxation is already well established. This would also make the carbon tax easier to understand, facilitating the private sector's adaptation.¹²³ Second, it would provide a steady stream of income for the government. Since the price of carbon is predetermined by the government in this scenario, price volatility and the resulting

uncertainty would not be an issue. If the funds generated from the carbon tax are redistributed appropriately, it can greatly benefit the green transition of the economy.¹²⁴ The biggest potential drawback is the need to calculate the carbon price centrally, which requires significant information. Here, the capability of the government to access and process economy-wide emissions data is key. Since the carbon tax may be passed on to the consumers, an overestimation of the tax would hurt consumers more, while its underestimation would hinder emissions reduction goals.

The main advantage of the ETS is its delegation of carbon pricing to the market participants. This would allow Turkey to pursue its emissions reduction goals more strictly as the government would be setting emissions volume directly. It would also allow greater flexibility for companies as they would be able to adjust their emissions in case of positive and negative externalities. For example, emergence of new, climate efficient technologies or energy price shocks would be factored in emissions decisions through licence price fluctuations. The information problem found in the carbon tax method is absent here, rendering the potential cost of emissions

¹²¹ "What Is MRV? | MRV". 2021. Carbon-Turkey.Org. <https://carbon-turkey.org/en/what-is-mrv>.

¹²² Duyan, Özlem. 2021. "A Voluntary Carbon Market In Need Of Carbon Pricing Policy In Turkey - Climate Scorecard". Climate Scorecard. <https://www.climate-scorecard.org/2020/03/a-voluntary-carbon-market-in-need-of-carbon-pricing-policy-in-turkey/>.

¹²³ Bavbek, Gökşin. 2016. "Adopting A Carbon Tax In Turkey: Main Considerations". Edam.Org.Tr. https://edam.org.tr/wp-content/uploads/2016/10/EDAM_TurkeyCarbonTax_October2016.pdf.

¹²⁴ Aliusta, Hakan, Baki Yılmaz, and Hilmi Kirlioğlu. 2016. "Küresel Isınmayı Önleme Sürecinde Uygulanan Piyasa Temelli İktisadi Araçlar: Karbon Ticareti ve Karbon Vergisi". *International Journal Of Management Economics And Business* 12 (icaftr): 0-0. doi:10.17130/ijmeh.2016icaftr22450.

abatement lower. Moreover, emissions trading systems of multiple polities can be linked, which would be particularly beneficial for Turkey.¹²⁵ Linking the Turkish ETS with the European one would be a secure way of overcoming CBAM. Finally, Turkey has already been collaborating with the World Bank through the PMR program on developing an ETS, thus some groundwork is already laid. One potential drawback of the ETS method is the volatility of licence prices, which may create uncertainty, increasing the cost of abatement. It is also open to market manipulation if regulation is not sufficient. It is also harder to implement it in sectors such as transportation and heating-cooling.¹²⁶

In sum, Turkey's choice depends on the government's aim in carbon pricing. If the goal is to establish an all-encompassing system to reduce emissions, raise revenue for climate adaptation, a carbon tax can be used given sufficient institutional capability in gathering and processing emissions and market data. However, this method would have a greater impact on end consumers,

therefore it entails a higher political cost. On the other hand, some effort is already present for an ETS, and it is easier to ensure compatibility with EU regulations through this policy option. If the risk of emissions licence price volatility is deemed acceptable, and ETS would provide a more flexible path for emissions abatement.

Turkey-EU High Level Climate Dialogue

The Turkey-EU High Level Climate Dialogue should be viewed as a strategic joint platform designed to leverage the EU's capabilities to help with Turkey's transition to a greener economy based on a common understanding that the climate change theme and the transition to a green economy should be a top priority for the Turkey-EU agenda. The incorporation of the climate change as a theme in the Customs Union would further strengthen the role of the High Level Climate Dialogue. The platform would be used to align the two contracting parties on climate change and the green transition. Firstly as highlighted in the previous section, the modalities of a possible exemption to be granted to Turkey



¹²⁵ "Roadmap For the Consideration Of Establishment And Operation Of A Greenhouse Gas Emissions Trading System In Turkey". 2016. Pmrturkiye.Csb.Gov.Tr. <https://pmrturkiye.csb.gov.tr/wp-content/uploads/2018/12/PMR-Turkey-Roadmap-for-the-Consideration-of-Establishment-and-Operation-of-a-Greenhouse-Gas-Emissions-Trading-System-in-Turkey.pdf>.

¹²⁶ Bavbek, Gökşin. 2016. "Adopting A Carbon Tax In Turkey: Main Considerations". Edam.Org.Tr. https://edam.org.tr/wp-content/uploads/2016/10/EDAM_TurkeyCarbonTax_October2016.pdf.

on CBAM would be discussed. Secondly the strategic planning of EU origin climate funding earmarked for Turkey would be carried out.

Thirdly the Platform could also be used to ensure diplomatic convergence between the positions of Turkey and the EU in the international climate negotiations. In this respect Turkey should also consider joining Structured Discussions on Trade and Environmental Sustainability under the aegis of the WTO which was launched in November 2020. The WTO working group will be an important platform for deliberations on the compatibility of carbon border taxes with multilateral trade rules.

Of key importance in the short term would be the EU's political support to Turkey's position to be seen as a developing country for the purposes of multilateral climate negotiations and funding. For long Turkey wanted to be re-categorized as an Annex II country under the Kyoto Protocol. But despite many attempts, the aspired status change which would have enabled Turkey to be treated as a developing country was not achieved. Such an amendment requires a consensus within all the signatory parties. As a result, Ankara has now ratified of the Paris Climate Agreement under the reserve that it sees itself as a developing country. A potential EU backing of Turkey's position firstly at the COP 27 that will be held in November 2021 in Glasgow and beyond would create a much welcome momentum for the climate dimension of the Turkey-EU relationship.

Implications for the Turkey-EU Customs Union

The modernization of the Turkey-EU Customs Union has been on the agenda for the past few years as the European Commission had submitted its mandate of negotiation to the EU Council back in December 2016. Since then, the Council has

failed to green light the start of this new round of negotiations essentially on political grounds. The mandate and the associated impact analysis were centered on the traditional elements of the trade relationship including the enlargement of its scope to services and agriculture.¹²⁷ But they did not contemplate the expansion of this regime to the Digital Agenda and the Green Deal. And yet both Turkish and EU authorities have in more recent years emphasized the prospect of embedding these critical policy spheres in the overall agenda of Turkey-EU relations.¹²⁸ There is therefore a clear need at the institutional level as well to revise and update the supporting analysis and documentation to clear the path for the proper inclusion of the Digital Agenda and the Green Deal in the scope of the Turkey-EU Customs Union.

This report may provide some elements of reflection that could be useful for this necessary work stream. It would indeed be vital to expand the scope of the Customs Union in this direction. Given the recent and justified political and economic emphasis on digital and the green transformation, Ankara and Brussels should not sidestep the opportunity to explore and identify the right formulas to integrate these areas in the remodeled Customs Union especially since the process will be guided by the overarching aim of modernizing this critical rules-based regime that underpins the Turkey-EU trade relationship. This aim would be all the more important since the publication in early 2021 of the European Commission's Trade Policy Review which has set out very clearly that the EU's new strategy should further integrate EU trade policy within the bloc's economic priorities as reflected in the Green Deal and the European Digital strategy.¹²⁹ The Turkey-EU Customs Union should not be an exception to this laudable objective.

¹²⁷ European Commission. "Commission Staff Working Document Impact Assessment Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship and on the modernisation of the Customs Union". 21 December 2016. https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155238.pdf

¹²⁸ See Aysu Biçer. "Updated Customs Union 'key' for better EU ties: Turkey". Anadolu Agency. 24 February 2021. <https://www.aa.com.tr/en/economy/updated-customs-union-key-for-better-eu-ties-turkey/2155647>. See also Daily Sabah. "Turkey takes steps towards being part of European Green Deal". 18 July 2021. <https://www.dailysabah.com/politics/eu-affairs/turkey-takes-steps-towards-being-part-of-european-green-deal>

¹²⁹ European Commission. "Trade Policy Review - An Open, Sustainable and Assertive Trade Policy". 18 February 2021. https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf



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