

“Visa Hotline Project”

Background Paper: Turkish Citizens’ Rights in the EU



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by

Narin İdriz / Tezcan

PhD-fellow at Europa Institute of Leiden University

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Foreword

TOBB (Union of Chambers and Commodity Exchanges of Turkey) have frequently brought up the grave problems related with the visa requirements imposed on the Turkish citizens in their visits to the EU Member States since the first inception of visas by EU Member States. Our businessmen and the interests of the business community are harmed by the visa requirement and limitation of the freedom of movement. They can export their goods to the EU without any trade barriers or send them to be displayed in trade fairs throughout the EU, However, when it comes to travelling to the EU with the aim of attending business meetings, signing contracts or participating in fairs, Turkish businessmen are faced with obstacles in the form of burdensome visa requirements. Sometimes the visa application procedure may take so long that the visa is issued only after the date of a conference or a business meeting they would like to attend had passed.

Documents that are demanded from the Turkish citizens during the visa procedure reached inconceivable and preposterous levels. In order to get a visa, businessmen are obliged to submit their personal and commercial bank accounts and present letters of invitation which they need to demand from their foreign business partners. This situation, undeniably infringe the rules on commercial secrecy and hurt the interests of the business community in an unjust way.

Enforcement of visa obligations to the businessmen and industrialists are explicitly against the Ankara Agreement and the Additional Protocol. Furthermore, visa requirements result in unfair competition between Turkish and EU Member State industries because businessmen and industrialists who can freely transport their goods through the borders do not have this right themselves and cannot pass the borders. This situation poses an unacceptable predicament given the fact that our businessmen and industrialists confront with visa requirements not only while they intend to establish new business connections but even while they struggle to sustain the already established ones. With regard to this condition, visa requirements amount to a technical barrier to trade and thus engender an unfair competition environment.

Not only the business community but the Turkish public as a whole severely criticises visa practices. Conferences and meetings that are missed, students who can start their academic semesters belatedly or are obliged to renounce their acquired admittance and grants in Erasmus programmes, researchers who fail to go on research trips, academics or doctors who cannot attend international conferences or seminars on time, families that cannot enjoy reunification are some of the complaints that we experience personally or are experienced by the people around us due to prolonged visa procedures. Such requirements necessitate Turkish citizens to tolerate an unforeseeable process of application and sometimes to endure the complete refusal of visa applications by the EU Member States. Due to these unreasonable visa procedures, many people had to face physical, material and psychological losses and generally these losses are not compensated. This in turn, leads the Turkish public to suppose that they are being discriminated against, when they compare their situation with the unhindered freedom of movement enjoyed by citizens of other countries which did not have as far-reaching and lengthy relations with the EU. Thus they feel that they encounter an unjust treatment in terms of violation of a fundamental human right.

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On the other hand, we strongly believe that, to impose visa obligations on the citizens of a country which initiated an association process with the then EEC in 1963, has held candidacy status since 1999 and has been continuing accession negotiations since 2005 is absolutely contrary to the essence and the spirit of EU integration. While civil society dialogue is being repeatedly emphasized in relations with the EU, no improvement has been achieved with regard to the free movement of persons which is one of the four fundamental freedoms that uphold the idea of the EU. We know that one of the best ways for a country to be 'Europeanised' and for the civil societies to conduct constant dialogue, is to abolish the obstacles preventing the free movement of persons. However, while the Union is liberalising visa requirements for the nationals of Serbia, Macedonia and Montenegro, Turkey, having an association process with the EU nearly for half a century, cannot enjoy similar opportunities. This situation is flaring the negative perception towards the EU in the Turkish public. Aware of the obligations of the Turkish government in this regard, we would like to express our appreciation that steps have been taken in Turkey regarding the transition to biometric passports in the near future.

We have conducted extensive studies, organized seminars and workshops on the issues of the free movement of Turkish citizens in the EU, visa procedures and requirements which we find unjust and against the Association Law. As an important step in our quest to achieve more and contribute to the solution of this problem, we have launched the "Visa Hotline" Project with the initiative of the Economic Development Foundation (IKV) and in collaboration with the European Citizen Action Service (ECAS).

Our fundamental goal in this project is to present the scale of the problems that are experienced in visa applications of Turkish citizens by providing realistic, objective and coherent data. In this manner, we have compiled and classified the problems that are experienced by citizens from different socio – economic groups, professions, and different regions and cities of Turkey in their visa applications.

Within the scope of the Project, we are proud to present this study prepared by Narin İdriz Tezcan, PhD-fellow at Europa Institute of Leiden University together with the "Visa Hotline" Final Report, in order to state legal aspects of the visa implementation to Turkish citizens in a clear manner and to better understand recent developments in this domain.

We hope that this study which presents an in depth analysis of the legal framework of rights enjoyed by different categories of economically active Turkish people under the Ankara Agreement and the reflections on the Soysal judgement will provide a useful basis for prospective debates, deliberations and projects in this field.

M. Rifat Hisarcıklıođlu

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Introduction

The recent *Soysal* judgment has once again brought the spotlight on the judicial developments concerning free movement of persons under the Ankara Agreement. It has challenged the legal ground on which the visa regimes of many Member States were based. Now it is time for Member States to readjust their visa policies so as to bring them in line with their obligations under the Ankara Agreement. In addition to shedding some light on this recent development, the purpose of this report is to lay down the legal framework of rights enjoyed by

different categories of economically active people under the Ankara Agreement.

After providing a brief historical account of EC/EU-Turkey relations and the legal framework surrounding them, the first part of this report focuses on the right of entry to a Member State in the light of the *Soysal* judgment. This part contains a brief discussion of the judgment itself and also of the possible difficulties that are likely to come up in its implementation. Next comes the part concerning the rights of Turkish workers in the EU. From entry to expulsion, the rights of Turkish workers and also of their family members are briefly reviewed. The final part touches upon the rights to be enjoyed by the self-employed and by service providers in the EU. In the absence of Association Council decisions implementing these freedoms, inferences are drawn on the likely developments based on the few cases on Article 41(1) of the Additional Protocol.

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Historical Background

The Ankara Agreement (EEC-Turkey Association Agreement) was signed between the EEC and Turkey on 12 September 1963 in order to “facilitate the accession of Turkey to the Community at a later date.”¹ Therefore, the agreement was drafted so as to prepare Turkey for full membership. The Agreement was modeled on the Treaty of Rome (Treaty Establishing the European Economic Community) both in terms of its substance and nature. Hence both agreements shared the same aims, common policies and were both of a programmatic nature, i.e. laying down general guidelines and objectives to be achieved by means of adopting more specific legal instruments later.²

The most important objectives of both agreements were to gradually establish free movement of goods, by means of establishing a Customs Union, free movement of workers, services, capital and freedom of establishment. The Additional Protocol to the Ankara Agreement signed on 23 November 1970 provided the conditions and timetables for the implementation of these freedoms. The timetable for the final stage of free movement of goods was observed, and on 6 March 1995 the Council of Association³ adopted Decision 1/95 on the completion of the Customs Union between Turkey and the EU as planned in the Additional Protocol.

As to free movement of workers, Article 12 of the Ankara Agreement stipulated that “Contracting Parties agree to be guided by Articles 48, 49, and 50 of the Treaty establishing the Community for *the*

were Additional Protocols and Association Council Decisions.

³ The Council of Association is the body empowered to take decisions and recommendations for the implementation of the objectives set by the Ankara Agreement. It consists of members of the governments of Member States, members of the Council and the Commission as well as members of the Turkish government. It acts with unanimity. See Arts. 6, 8, 22-23 of the Ankara Agreement.

¹ See the preamble of the Ankara Agreement, OJ L 361/2, 31.12.77.

² At Community level these instruments were mainly Directives and Regulations (see, Art. 249 EC), and under the Ankara Agreement those instruments

purpose of progressively securing freedom of movement for workers between them."⁴

The Additional Protocol laid down a timetable for the implementation of this provision. According to Article 36 of the Protocol free movement of workers was to be progressively secured between 1976 and 1986, the latter being the final date.

Similarly, Articles 13 and 14 of the Ankara Agreement stipulated that restrictions on freedom of establishment and freedom to provide services between Turkey and the EEC should be abolished. As a first step for implementing these provisions the Additional Protocol contained a "standstill" clause in its Article 41(1), prohibiting Member States from introducing any new restrictions on freedom of establishment and freedom to provide services. The legal basis of the recent *Tum and Dari* and *Soysal* cases is this "standstill" provision laid down in the Additional Protocol.⁵

The realization of the goal of free movement of workers looked quite promising at the beginning. Western economies were growing rapidly in the late 1950s and early 1960s and the industry's labour demand could not be satisfied with

domestic workers. Turkey had already signed a bilateral recruitment agreement with Germany on 30 September 1961, before the Ankara Agreement was signed. Other bilateral recruitment agreements followed after the signature of the Ankara Agreement.⁶ Thousands of "guest workers" moved to the West. However, the economic situation in Europe changed drastically after the oil crises of the 1970s. Western economies were hit hard and stagnated. There was no more need for any "guest workers" in the 1970s and 1980s. Moreover, the "guest workers" who were initially expected to go back after a few years of employment have not done so. Most of them have settled permanently, and some have even acquired the nationality of their host countries. Immigration from Turkey to several West European countries took the form of family reunification and/or asylum-seekers after that period.

Economic stagnation in Europe coupled with political turmoil in Turkey⁷ not only resulted in the non-implementation of the timetable set for securing free movement

⁴ Emphasis added.

⁵ Case C-16/05 *The Queen, on the application of: Veli Tum, Mehmet Dari v Secretary of State for the Home Department*, judgment of 20 September 2007, n.y.r., and Case C-228/06, *Mehmet Soysal, Ibrahim Savatli v. Bundesrepublik Deutschland*, judgment of 19 February 2009, n.y.r.

⁶ On 15 May 1964 with Austria; on 15 July 1964 with Belgium; on 19 August 1964 with the Netherlands; on 8 April 1965 with France; and on 10 March 1967 with Sweden. See, Nermin Abadan-Unat, *Bitmeyen Göç – Konuk İşçilikten Ulus-Ötesi Yurttaşlığa (The Unending Migration – From Being a Guest Worker to Trans-national Citizenship)*, 2. Edition (Istanbul Bilgi Üniversitesi Yayınları, 2006), p. 58.

⁷ The political instability of the 1970s in Turkey resulted in a military coup on 12 September 1980.

of workers in the Additional Protocol but worse; it resulted in Member States raising new barriers to free movement of persons. A visa requirement was introduced first by Germany in July 1980, to be followed by France, Belgium, and the Netherlands. What was supposed to be only a “temporary measure” has been in force ever since.⁸ However, after the recent *Soysal* judgment it became apparent that the old Member States, which introduced these visa requirements in the 1980s, will need to change their current policies and adopt a more differentiated visa regime in line with their obligations under the Ankara Agreement.⁹

“A visa requirement was introduced first by Germany in July 1980, to be followed by France, Belgium, and the Netherlands. What was supposed to be only a “temporary measure” has been in force ever since.”

A breakthrough in EU-Turkey relations was the acknowledgment that Turkey is a candidate state for EU membership at the 1999 Helsinki European Summit. The Commission prepared and the Council approved the Accession Partnership for Turkey on 26 February 2001, which was

immediately followed by the announcement of the National Programme on the Adoption of the EU *Acquis* by the Turkish Government on 26 March 2001. A comprehensive constitutional and legislative reform was carried out by the government between February 2002 and July 2004, which led to the finding by the European Council of 16-17 December 2004 that Turkey fulfilled the Copenhagen political criteria and that accession negotiations were to be opened on 3 October 2005. On the latter date, the “Negotiating Framework”¹⁰ for Turkey was adopted, and accession negotiations were officially opened.

⁸ See, İlhan Tekeli – Selim İleri, *Türkiye ve Avrupa Birliği 3 (Turkey and the European Union 3)*, (Ümit Yayıncılık, 2000), p. 37; Mehmet Ali Birand, *31 Temmuz 1959’dan 17 Aralık 2004’e Türkiye’nin Büyük Avrupa Kavgası (From 31 July 1959 until 17 December 2004 Turkey’s Big European Struggle)*, 11. Edition, (Doğan Kitap, 2005), p. 300.

⁹ See, section 3 of the report.

¹⁰ For details see, Negotiating Framework (3 October 2005, Luxembourg). Available online at: http://ec.europa.eu/enlargement/pdf/st20002_05_T_R_framedoc_en.pdf

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What are the Legal Instruments that Confer Rights on Turkish Citizens who wish to be Economically Active in a Member State of the EU?

The instruments that confer rights on Turkish nationals are the provisions of the Ankara Agreement itself, its Additional Protocol and the decisions of the Association Council (henceforth; the Ankara *acquis*).¹¹ As mentioned earlier, the Ankara Agreement provided general objectives which needed to be put into practice by more specific instruments that were to be adopted later. **The Additional Protocol which entered into force on 1 January 1973 provided the timetable for the implementation of the provision on free movement of workers. However, when it became apparent, due to economic and political realities in Europe and Turkey that meeting the timetable was not possible, there was still the question of the rights of Turkish workers who were already working in EC Member States.** Thus, the Council of Association adopted three decisions to ensure that Turkish workers enjoy equal

rights with nationals of the host Member States.¹²

All these instruments are integral parts of Community law. **Just like EU citizens who can rely on the Treaties and secondary legislation to have their rights enforced in national courts, Turkish nationals can rely on these instruments in the national courts of the Member States to enforce their rights.** However, individuals are allowed to rely directly on Treaty articles or provisions of secondary Community law only if these instruments fulfill certain conditions. **To be able to rely on such a provision, it needs to fulfill the so-called conditions of "direct effect":** it needs to be clear, precise, unconditional and must not require any legislative

¹¹ All these documents and decisions adopted within the framework of the Ankara Agreement will be referred to collectively as the Ankara *acquis*.

¹² The first decision was Decision 2/76 on the implementation of Article 12 of the Ankara Agreement. This decision was partially replaced by Decision 1/80 on the development of the Association, which is still in force today. And last but not least, the Association Council adopted Decision 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish Workers and members of their families.

intervention on the part of the Member States.¹³

In *Demirel*, the first case to reach the Court of Justice within the framework of the Ankara Agreement, the Court found that Mrs Demirel could not rely on Article 12 of the Ankara Agreement in combination with Article 36 of the Additional Protocol to remain in Germany because these provisions “are not sufficiently precise and unconditional to be capable of governing directly movement of workers”.¹⁴ **The decision implied, however, that individuals could rely on other provisions of the Ankara Agreement which fulfilled the conditions of direct effect. The following case reaching the Court clarified that individuals could also rely on the provisions of the Association Council decisions before the courts of the Member States, if those provisions were clear, precise, unconditional and need no further implementation.**¹⁵ After *Demirel* and *Sevince*, the national courts of the Member States referred many questions to the European Court of Justice (henceforth;

ECJ) so as to clarify the concepts used and rules established by the decisions of the Association Council, the Ankara Agreement, and its Additional Protocol.

“The Additional Protocol which entered into force on 1 January 1973 provided the timetable for the implementation of the provision on free movement of workers. However, when it became apparent, due to economic and political realities in Europe and Turkey that meeting the timetable was not possible, there was still the question of the rights of Turkish workers who were already working in EC Member States.”

¹³ Case 26/62 *Van Gend en Loos* [1963] ECR 1, p. 13.

¹⁴ See, Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, para 23.

¹⁵ Case C-192/89, *S. Z. Sevince v. Staatsecretaris van Justitie*, [1990] ECR I-3461.

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Is there a right to enter a Member State of the Union without a visa?

3.1. What is the *Soysal* judgment about?

The *Soysal* judgment is about the effect of the “standstill” clause concerning freedom of establishment and freedom to provide services contained in Article 41(1) of the Additional Protocol on the requirement of an entry visa that was introduced for Turkish nationals by Germany in 1980. Article 41(1) reads as follows: “The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.” As the Court explains, the main purpose of this clause is “...to create conditions conducive to the progressive establishment of freedom of establishment [and freedom to provide services] by way of *an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time...*”¹⁶ According to the Court, even if initially existing national restrictions could be retained, it was

The *Soysal* judgment received wide media coverage and has raised the hopes of many in Turkey with regard to visa-free travel. However, whether an individual will have a right to enter a Member State without obtaining a visa will depend on various factors which are examined below. First, let us briefly look at the judgment itself.

¹⁶ *Tum and Dari*, cited note 5 above, para. 61. Emphasis added.

important to ensure that *no new restrictions* were introduced as that would obstruct the gradual implementation of the freedoms.¹⁷

“The Soysal judgment is about the effect of the “standstill” clause concerning freedom of establishment and freedom to provide services contained in Article 41(1) of the Additional Protocol on the requirement of an entry visa that was introduced for Turkish nationals by Germany in 1980.”

The Court had already established in earlier judgments that the standstill clause fulfilled the conditions of direct effect and that individuals could rely on it for the enforcement of their rights.¹⁸ The Court had also ruled that Article 41(1) “precludes a Member State from adopting any new measure having *the object or effect* of making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned.”¹⁹

¹⁷ Ibid. Emphasis added.

¹⁸ See, Case C-37/98, *The Queen v. Secretary of State for the Home Department, ex parte Abdulnasir Savas*, [2000] ECR I-2927, paras. 46-48; C-317/01, *Eran Abatay and Others and Nadi Sahin v. Bundesanstalt für Arbeit*, [2003] ECR I-1230, paras. 58-59; *Tum and Dari*, cited note 5 above, para. 46.

¹⁹ *Savas*, cited note 18 above, para. 69; *Abatay and Others*, cited note 18 above, para. 66; and *Tum and Dari*, cited note 5 above, para. 49. Emphasis added.

As to the factual background of the case, it was brought by Mr. Soysal and Mr. Savatlı who were lorry drivers working for a Turkish company engaged in the transport of goods. After their visa applications were rejected by Germany’s consulate-general in Istanbul, they brought actions before the Administrative Court in Berlin against the decisions refusing them visas. They argued that as lorry drivers providing a service in the international transport of goods, they were entitled to enter Germany without a visa since there was no such requirement when the Additional Protocol entered into force with regard to Germany on 1 January 1973. The visa requirement was introduced in 1980. Thus, the question posed by the German court was whether the visa requirement introduced by Germany was a measure which constituted a new restriction under Article 41(1) of the Additional Protocol.

Legally the answer to the question was quite straightforward.²⁰ **The standstill clause prohibits any new obstacles/restrictions on freedom of establishment and free movement of services.**²¹ The Court first confirmed that

²⁰ Hence, the decision that there was no need for an Advocate General’s Opinion.

²¹ It is worth noting that the standstill clause covers all kinds of restrictions and not only matters regarding entry into a Member State. In *Abatay and Others* for instance, the Court found that the introduction of a work permit requirement for a service provider established in Turkey and providing

Mr. Soysal and Mr. Savatlı were providing services as lorry drivers in the international transport of goods, thus they were covered by Article 41(1).²² Next, the Court checked whether there was a visa requirement in place when the Additional Protocol entered into force with regard to Germany that is 1 January 1973. Indeed, as claimed by the applicants there was no such requirement at the time the Protocol entered into force. It was introduced later, on 1 July 1980.²³ **Obviously, the visa requirement made it more difficult for Turkish nationals to exercise their economic freedoms granted by the Ankara Agreement, especially because of the *additional and recurrent administrative and financial burdens* involved in obtaining it.** Accordingly, the Court concluded that the visa requirement was a 'new restriction' under Article 41(1),²⁴ thus, it constituted a breach of the standstill clause.

services in a Member State was precluded, if such a permit was not already required at the time the Additional Protocol entered into force. See, *Abatay and Others*, cited note 18 above, para. 117. Similarly, in Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie v. T. Sahin*, judgment of 17 September 2009, n.y.r., the Court ruled that the introduction of legislation which makes the granting or the extension of a residence permit conditional on payment of disproportionate administrative charges by Turkish nationals compared to the amount paid by Community nationals is precluded by Art. 13 of Decision 1/80. It should be noted that Art. 13 is the standstill clause of Decision 1/80.

²² *Soysal*, cited note 5 above, paras. 43-44.

²³ *Ibid*, paras. 51-52.

²⁴ *Ibid*, paras. 55-57.

“Obviously, the visa requirement made it more difficult for Turkish nationals to exercise their economic freedoms granted by the Ankara Agreement, especially because of the additional and recurrent administrative and financial burdens involved in.”

According to the Court, its conclusion could not be called into question by the fact that the German legislation on visas at the time was merely implementing secondary Community legislation that is Council Regulation No 539/2001.²⁵ **The Court underlined the primacy of international agreements over provisions of secondary Community law, i.e. the primacy of the Ankara Agreement over Regulation No 539/2001.** This primacy dictates that provisions of secondary legislation be interpreted, as far as possible, in line with obligations under the international agreements.²⁶ Where such an interpretation is not possible, Member States and the Community are jointly under an obligation to make the necessary changes to bring Regulation No 539/2001 in line with their obligations under the Ankara Agreement and its Additional Protocol.

²⁵ Council Reg. No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.03.2001, pp. 1-7.

²⁶ *Soysal*, cited note 5 above, para. 58.

3.2. What are the problems that are likely to come up with the implementation of *Soysal*?

As straightforward as the *Soysal* judgment might seem to be its implementation is bound to be wrought with difficulties. The first issue that is likely to arise concerns the persons who can rely on the standstill provision. The provision concerns freedom of establishment and freedom to provide services. Those freedoms have been defined in Community law, and even though Article 49 EC (of the EC Treaty) speaks about prohibiting "... restrictions on freedom *to provide* services within the Community...", both secondary law²⁷ and the case-law of the Court²⁸ have established that freedom to provide services also encompasses the freedom *to receive* services. Thus, in Community law both service providers and service recipients are able to rely on Article 49 EC.

It is likely that some Member States will argue that Article 14 of the Ankara Agreement talks about abolishing restrictions on freedom *to provide* services between them, thus it covers only service providers and not service recipients. **Those states would be ignoring the fact that because of the nature and purpose of the Ankara Agreement as well as the manner in which the freedoms in it have been phrased²⁹ the Court has always interpreted these freedoms with reference to the freedoms in the EC Treaty.** Concerning the freedom to provide services, the Court has already ruled that the principles enshrined in "the provisions of the Treaty relating to freedom to provide services, must be extended, *so far as possible*, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties."³⁰ This has been the standard phrase used by the Court also regarding the other freedoms in the Ankara Agreement.³¹ However, the

²⁷ Art. 1(1) of Council Dir. 64/221/EEC, OJ, English Special Edition 1963-1964, p. 117, provided as follows: "The provisions of this Directive shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as *a recipient of services.*" Emphasis added.

²⁸ See, Cases 286/82 & 26/83, *Luisi & Carbone v. Ministero del Tesoro*, [1984] ECR 377; Case 186/87, *Ian William Cowan v. Trésor Public*, [1989] ECR 195, para. 17; and Case C-348/96, *Criminal proceedings against Donatella Calfa*, [1999] ECR I-11, para. 16.

²⁹ See, Arts. 12-14 of the Ankara Agreement. For example, Art. 14 of the Ankara Agreement reads as follows: "The Contracting Parties *agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community* [now, Articles 45, 46 and 48 to 54 EC] for the purpose of abolishing restrictions on freedom to provide services between them." Emphasis added.

³⁰ *Abatay and Others*, cited note 18 above, para. 112. Emphasis added.

³¹ To that effect see, inter alia, Case C-434/93, *Ahmet Bozkurt v. Staatssecretaris van Justitie*, [1995] ECR I-1475, paras.19-20; Case C-171/95, *Recep Tetik v. Land Berlin*, [1997] ECR I-329, paras. 20 and 28; Case C-1/97, *Mehmet Birden v. Stadgemeinde Bremen*, [1998] ECR I-7747, para. 23; Case C-340/97, *Ömer Nazli, Caglar Nazli and*

phrase “so far as possible” gives the Member States the opportunity to argue that such an interpretation is not possible. Until the question is expressly addressed by the Court, the Member States will be able to apply the *Soysal* judgment restrictively, i.e. only with regard to service providers.

“It is likely that some Member States will argue that Article 14 of the Ankara Agreement talks about abolishing restrictions on freedom to provide services between them, thus it covers only service providers and not service recipients. Those states would be ignoring the fact that because of the nature and purpose of the Ankara Agreement as well as the manner in which the freedoms in it have been phrased the Court has always interpreted these freedoms with reference to the freedoms in the EC Treaty.”

The second problem regarding the implementation of the *Soysal* judgment arises from the fact that the standstill clause entered into force on different dates regarding different Member States. The Additional Protocol entered into force on 1 January 1973 with regard to the founding Member States,³² Denmark, Ireland and the UK. Regarding the other

Member States the Additional Protocol entered into force as of their own dates of accession to the Union.³³ **What every Member State needs to do is to check for itself what the conditions of entry for Turkish nationals exercising freedom of establishment or freedom to provide services were at the time the Additional Protocol entered into force with regard to its own territory. It needs to compare those conditions with the conditions applicable now. If the current conditions are more restrictive and burdensome than the previously applicable conditions, then that Member State is under the obligation to change its current rules so that they are not more restrictive than the rules applicable at the time when the Additional Protocol entered into force.** This means that if a Member State, such as Austria, already had a visa requirement in place when the Additional Protocol entered into force with regard to its territory, it is allowed to keep that measure in place. If a Member State such as Germany had no such requirement for certain activities at the time the Additional Protocol entered into force, but has a visa requirement now, then it is under an obligation to remove that requirement

Melike Nazli v. Stadt Nürnberg, [2000] ECR I-957, paras. 50-55; Case C-188/00, *Bülent Kurz, né Yüce v. LandBaden-Württemberg*, [2002] ECR I-691, para. 30.

³² The founding Member States are Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

³³ 1 January 1981 for Greece; 1 January 1986 for Spain and Portugal; 1 January 1995 for Austria, Sweden, and Finland; 1 May 2004 for Poland, Hungary, Czech Republic, Cyprus, Malta, Estonia, Latvia, Lithuania, Slovakia, Slovenia; 1 January 2007 for Bulgaria and Romania.

with respect to those activities for which there was no visa requirement. However, the fact that all EU Member States, with the exception of the UK, Ireland, Bulgaria, Romania and Cyprus, are part of the Schengen area,³⁴ which provides for passport and visa free travel, further complicates the implementation of the judgment.

3.3. Can you rely on Article 41(1) of the Additional Protocol to enter a territory of a Member State without a visa?

Whether you will be able to rely on the standstill clause will depend on the following factors: first, whether you are exercising freedom of establishment or freedom to provide services; secondly, whether the Member State that you want to go to had no visa restriction in place at the time the Additional Protocol entered into force; and if so, finally, whether that state has already implemented the *Soysal* judgment.

To begin with the first requirement, **only those exercising freedom of**

³⁴ For the definition of the 'Schengen *acquis*' see, Art. 1 of Annex A to Council Dec. of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* (1999/435/EC), OJ L 171/1, 10.07.1999.

establishment or freedom to provide services are able to rely on the standstill clause. Those wishing to work in one of the Member States or join a family member there are not able to do so. To avoid any confusion, the distinguishing characteristics of these Community freedoms are briefly explained below.

Free movement of workers: According to the Court the essential feature of being a worker, in other words of being in an employment relationship, "is that for a certain period of time a person performs services *for and under the direction of another person* in return for which he receives remuneration."³⁵

Freedom of establishment: The provisions on freedom of establishment require abolishing restrictions on the rights of individuals and companies to maintain a permanent place of business in a Member State. Establishment is defined as "the actual pursuit of an economic activity through a *fixed establishment in another Member State for an indefinite period*."³⁶ As far as individuals are concerned what distinguishes freedom of establishment from free movement of workers is that

³⁵ Case 66/85, *Lawrie Blum v. Land-Baden Württemberg*, [1986] ECR 2121, para. 17. Emphasis added.

³⁶ Case C-221/89, *R. v. Secretary of State for Transport, ex p. Factortame*, [1991] ECR I-3905, para. 20. Emphasis added.

people exercising freedom of establishment are providing a service in a self-employed capacity, i.e. they are not working for or under the direction of another person.

Freedom to provide services: The freedom to provide services is about carrying out an economic activity for a temporary period in a Member State in which either the provider or the recipient of the service is not established. What distinguishes freedom to provide services from freedom of establishment is that the former is provided on a temporary basis, while the latter is permanent. According to Article 50(2) EC "services" include activities of an industrial and commercial character as well as activities of craftsmen and activities of the professions. As mentioned above, Article 1 of Directive 64/221 protected the position of recipients of services who reside in or travel to another Member State for that purpose. In *Luisi & Carbone*, the ECJ confirmed that the Treaty Articles themselves cover the situation of recipients as well as providers of services, and explained:

It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by

restrictions, even in relation to payments, and that *tourists, persons receiving medical treatment and persons travelling for the purposes of education or business are to be regarded as recipients of services.*³⁷

What needs to be determined next is when the Additional Protocol entered into force with regard to the Member State where you want to be established or provide services. Once you know the date, you might be able to determine whether a visa requirement existed at the time. If so, you will not have the right to enter that Member State. However, if there was no such requirement at the time the Additional Protocol entered into force with regard to that Member State, in principle you are entitled to enter that Member State.

³⁷ *Luisi & Carbone*, cited note 28 above, para. 16. Emphasis added. This is not an exhaustive list but just a few examples of who can be considered as recipients of services. Please note that studies in a University or an Institute of Higher Education which are financed out of public funds do not constitute services within Art. 50 EC. However, studies financed by private funds, i.e. the students themselves paying fees with the aim that the courses/programme generates profit are covered by Art. 50 EC. See, Case C-109/92, *Stephan Max Wirth v. Landeshauptstadt Hannover*, [1993] ECR I-06447, paras. 15-17; *Case 263/86, Belgian State v. Humbel*, [1988] ECR 5365, paras, 17-19.

3.3.1. As a service recipient

It is not possible to provide information regarding the dates or reasons for introducing visa requirements regarding each and every Member State. However, it is possible to provide some guidelines regarding certain groups of Member States. To begin with the situation regarding service recipients, the first group of Member States consists of the original six, plus the UK, Denmark, Ireland, Spain and Portugal. The original six, plus Spain and Portugal were all parties to the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe.³⁸ There was free movement of persons between Turkey and the original six until the 1980 military coup, following which they suspended the application of the agreement regarding Turkish nationals in line with its Art. 7.³⁹

³⁸ CETS No. 025. Art. 1(2) of the Agreement provided for visa-free travel for up to three months. Art. 1(3) provided that nationals of Contracting Parties wishing to stay for a period longer than three months or pursue a gainful activity on the territory of another Contracting Party might be subject to visa requirements. For text of the Treaty and parties to the agreements, see : <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=025&CM=8&DF=25/09/2009&CL=ENG>

³⁹ See, the list of declarations made with respect to Treaty No. 025. Belgium, the Netherlands and Luxembourg suspended the Treaty as of 1 November 1980, France suspended it as of 5 October 1980, Germany as of 10 July 1980, and Portugal suspended it as of 24 June 1991 (that is five years after its accession to the Community). Italy was also a party to the Agreement; however, like Spain it has not made a declaration suspending the Agreement. Groenendijk confirms that Spain

The UK, Denmark and Ireland were not parties to the Council of Europe Agreement, however, given the fact that these Member States have reported to the Commission that they allowed the visa-free entry of service providers to their territory, it would not be too far-fetched to assume that they had also allowed the visa-free entry of service recipients as well. With respect to this group of Member States, which introduced visa requirements for service recipients after the Additional Protocol entered into force in 1973, it can be concluded that they are in breach of Article 41(1) of the Additional Protocol.

The second group of Member States consists of those Member States, whose applicable visa regime at the time of accession is difficult to determine, that is Greece, Sweden and Finland. Greece was a party to the Council of Europe Agreement on Free Movement of Persons, however, the date it suspended the Agreement is unknown, since it failed to issue declarations to that effect. Finland and Sweden were not parties to the Council of Europe Agreement when they

and Portugal became parties to the Council of Europe Agreement prior to their accession to the EC, and ended the application of the agreement to Turkish nationals following their accession. See, Groenendijk, *Jurisprudentie Vreemdelingenrecht* 2009, Nr. 144. The declarations suspending the CET No. 025 are available on line at: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=025&CM=8&DF=25/09/2009&CL=ENG&VL=1>

acceded to the Union in 1995, thus, it was not possible to determine their applicable visa regimes at the time of accession.

The final group of Member States consists of the twelve new Member States, which had to adopt visa requirement with regard to Turkey before acceding to the Community plus Austria, which had a pre-existing visa requirement in place at the time of its accession.⁴⁰ The twelve new Member States were under an obligation to adopt the entire Community *acquis* and thus impose visa requirements, since Turkey was on the list of countries whose nationals need to obtain a visa as dictated by Council Regulation No 539/2001. Thus, it seems this group of countries can keep their visa requirements in place.

3.3.2. As a service provider

As far as visa requirements concerning service providers are concerned, it appears from the replies to the Commission inquiry following *Soysal* that **only four Member States allowed visa-free access to their territories: Germany, the UK, Denmark and Ireland.** We should note

⁴⁰ Austria joined the Communities in 1995 together with Finland and Sweden. Austria is a party to the Council of Europe Agreement on Free Movement of Persons and has suspended the application of the Treaty with regard to Turkish nationals as of 17 April 1990. See, <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=025&CM=8&DF=25/09/2009&CL=ENG&VL=1>

that, for instance regarding Germany, visa-free provision of services was possible only with respect to certain services. Whether there were such restrictions on the types of services that could be provided on the territories of the UK and Ireland is not known, since the "Guidelines on the Movement of Turkish Nationals Crossing the External Borders of EU Member States in order to Provide Services Within the EU"⁴¹ prepared by the Commission concerns only Germany and Denmark, which are part of the Schengen area.

The Guidelines are contained in the recently adopted Commission recommendation on amending a previous recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)".⁴² The Commission has noted down in the second footnote of the document that this is only a provisional reaction to the *Soysal* judgment, and that the document gives no consideration to the issue of travel in the context of the right to establishment or as a recipient of services. **It is hoped that the Commission will take the**

⁴¹ C(2009) 7376 final, Brussels, 29.9.2009, Commission Recommendation of 29.9.2009, on amending the Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons (C(2006) 5186 final).

⁴² Ibid.

necessary steps for the fulfillment of these rights as soon as possible.

“As far as visa requirements concerning service providers are concerned, it appears from the replies to the Commission inquiry following Soysal that only four Member States allowed visa-free access to their territories: Germany, the UK, Denmark and Ireland.”

As far as **Germany** is concerned, the Guidelines provide that a Turkish national residing and exercising activities in Turkey can enter German territory for a stay up to two months “for the purpose of lawfully providing services there as employee of an employer established in Turkey, either as a mobile worker (driver) employed in the cross-border transport of passengers or goods (excluding itinerant trade), or to perform assembly or maintenance work or repair on delivered plants and machinery” or “for the purpose of lawfully providing services there consisting of paid lectures or performances of special artistic or scientific value or consisting of paid sports performances.”⁴³

For **Denmark**, Turkish nationals residing and exercising their activities in Turkey are able to enter Denmark, for one or several visits, the duration of which does not exceed three months for the purpose of lawfully providing services there on a

temporary basis, either on their own behalf (Turkish nationals exercising self-employed activity) or on behalf of an undertaking established in Turkey. The Guidelines provide the following examples: Turkish architects, builders, lawyers, computer scientists, commercial agents, scientists and lecturers, artists, fitters and instructors installing or repairing machinery or informing of the use thereof, professional athletes and trainers, etc. established in Turkey and traveling to Denmark in order to carry out their services under a contract are also to be considered as providing services.⁴⁴

The Guidelines provide that **when Turkish nationals present themselves at the external border without a visa for the Member State where they intend to provide services, they must be able to prove that the above mentioned conditions are met**, i.e. that they or their employers are established in Turkey, by presenting for instance, a certificate by a Chamber of Commerce or any other means of proof that they are actually carrying out service activities in Turkey, and that they are traveling in order to temporarily provide a service in the Member State concerned by presenting, for instance, a contract concluded with the service recipient. As far as documentation is concerned, according

⁴³ Ibid., p. 4.

⁴⁴ Ibid.

to the Commission, **it is for each Member State to determine in more detail what documents are to be presented by the service provider.**⁴⁵

Moreover, the Commission warns that individuals, who do not travel directly to Germany or Denmark by plane or ship, but indirectly, after transiting one or several other Member States, which do not permit entry without a visa, will still need to obtain a Schengen visa.⁴⁶

Obviously, these Guidelines are a useful first step for the implementation of the *Soysal* judgment. However, one wonders why the Commission has not taken any parallel steps for the implementation of the earlier *Tum and Dari* judgment, which concerns the freedom of establishment. Although the Commission declares that this is a provisional reaction to *Soysal*, the fact that the Commission has not taken any steps or position concerning service recipients, gives the impression that not much is to be expected from it until the Court of Justice explicitly rules that service recipients in the context of the Ankara Agreement are covered by the provision on free movement of services.

One should also keep in mind that the standstill clause is not only about visa requirements, but also about other

restrictions/measures that make the exercise of the freedoms of establishment and provide services more difficult than it was when the Additional Protocol entered into force with regard to that Member State.⁴⁷ Therefore, consulting a legal advisor with the aim of knowing the rules applicable at the time the Additional Protocol entered into force with regard to that state is crucial.

“(...) one wonders why the Commission has not taken any parallel steps for the implementation of the earlier Tum and Dari judgment (...) Although the Commission declares that this is a provisional reaction to Soysal, the fact that the Commission has not taken any steps or position concerning service recipients, gives the impression that not much is to be expected from it until the Court of Justice explicitly rules that service recipients in the context of the Ankara Agreement are covered by the provision on free movement of services.”

As a final remark, the *Soysal* judgment is a relatively recent judgment and it might take Member States some time to implement it. **If a Member State has not yet implemented the judgment, you might either: wait for its implementation; try to enter the country without a visa and if/when refused bring an action against the**

⁴⁵ Ibid., pp. 4-5.

⁴⁶ Ibid., pp. 5-6.

⁴⁷ See, note 21 above.

refusal in the courts of that Member State; if you incur any damages as a result of that refusal, sue the Member State for those damages in its own courts;⁴⁸ or send a complaint to the Commission urging it to take action against that Member State.⁴⁹

3.4. How have the Member States implemented the *Soysal* and *Tum and Dari* judgments?

The German government has interpreted the judgment and thereby the right to freedom to provide services for Turkish nationals restrictively, i.e. as applying to service providers but not to service recipients.⁵⁰ The freedom is restricted to service providers who belong to specific professional groups; that are artists, academicians, sportsmen, drivers and repair and maintenance workers working

for a Turkish company. Turkish nationals belonging to these groups are able to enter Germany only after obtaining “visa exemption” from the German embassy in Istanbul;⁵¹ a somewhat eased procedure which arguably still involves *additional and recurrent administrative and financial burdens*.

With a view to implementing the Court’s *Tum and Dari* judgment, **the UK government has also created a new procedure whereby Turkish citizens who wish to establish themselves in business in the UK are granted entry clearance**. In line with the judgment, applications will be considered under the business provisions that were in place in 1973.⁵² However, **applicants who have participated in fraud/abuse in relation to their applications will not be accepted**. Fraudulent/abusive activity has been defined broadly.⁵³ Having made

⁴⁸ The remedy of obtaining damages from Member States resulting from their non-implementation of Community law is a result of the *Francovich* line of case law. See, Joined Cases C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci v Italian Republic* [1991] ECR I-5357; and Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur SA v Germany, and the Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029.

⁴⁹ Given the Commission’s current ‘wait and see’ approach, not much is to be expected from the Commission. In principle, as the guardian of the Treaties and of the *acquis communautaire*, the Commission can start an enforcement procedure under Art. 226 EC against a Member State that fails to fulfil its obligations under the Treaty. However, whether to do so or not is entirely at the discretion of the Commission.

⁵⁰ *Rundschreiben BMI v. 28.05.2009 InfAusIR 2009*, p. 269.

⁵¹ For details, see the Information Note available on the website of the German Embassy in Turkey (in Turkish). http://www.ankara.diplo.de/Vertretung/ankara/tr/03/Pressemitteilungen/2009_21_pressemitteilung_download_property=Daten.pdf

⁵² <http://www.ukba.homeoffice.gov.uk/ukresidency/citizensofturkey/>

⁵³ Fraudulent/abusive activity is considered to include, but is not limited to, any of the following conduct. Applying to establish in business or having already established in business in the UK:

- having entered or having sought to enter the UK illegally;
- having sought or obtained leave by deception;
- whilst in breach of the conditions of leave to enter or remain;
- whilst on temporary admission or absconding from temporary admission;
- having made an asylum claim that is discredited;

an asylum claim that has been discredited, for instance, is considered as a fraudulent/abusive conduct. In other words, were Mr Tum and Mr Dari to apply under the current procedure, their applications would not have succeeded.

Obviously, the *Soysal* and *Tum and Dari* judgments are not only binding on the Member States whose courts made the preliminary references, but on all of the Member States. **Now it is up to the Commission as the guardian of the Treaties to take the initiative and investigate how these judgments are to be applied with regard to different Member States.** The opinions of leading academics could be a useful point of reference for determining the scope of the freedom to provide services. Most academics are of the opinion that freedom to provide services encompasses the freedom to receive services also within the framework of the Ankara Agreement.⁵⁴

- having made false representations and/or failed to disclose material facts whilst making your application.

See: <http://ukinturkey.fco.gov.uk/en/visas/association-agreement>

⁵⁴ Groenendijk, *Jurisprudentie Vreemdelingenrecht* 2009, Nr. 144; Dienelt, *ZAR* 2009, 182; Militz, *NVwZ* 2009, 278 cited in *Report Ausländer- und Europarecht* Nr. 20, p. 1. Hailbronner, interprets the judgment restrictively. See, Hailbronner, *NVwZ* 2009, 760, cited in *Report Ausländer- und Europarecht* Nr. 20 (*Informationsblatt von Volker Westphal und Edgar Stoppa*), p. 1. Available online at: <http://www.westphal-stoppa.de/Oreport/20ReportSeptember2009.pdf>

See also, Peers, "EC immigration law and EC association agreements: fragmentation or integration?", (2009) 34 *E.L. Rev.* August, p. 633. Dienelt, "Effects of *Soysal* decision (European Court

Thus, **tourists also fall within the scope of the stand-still clause.**

"The freedom is restricted to service providers who belong to specific professional groups; that are artists, academicians, sportsmen, drivers and repair and maintenance workers working for a Turkish company. Turkish nationals belonging to these groups are able to enter Germany only after obtaining "visa exemption" from the German embassy in Istanbul; a somewhat eased procedure which arguably still involves additional and recurrent administrative and financial burdens."

of Justice)/ Visa process Turkish Citizens Germany", available online at: http://www.migrationsrecht.net/index2.php?option=com_content&do_pdf=1&id=1390

Visa Hotline Project

Background Paper: Turkish Citizens' Rights in the EU

What rights do you enjoy as a worker in the EU?

There is no definition of a “Turkish worker” in the Ankara *acquis*. However, the references to various EC Treaty provisions and the general commitment to eventual accession have been interpreted by the Court as an indication that the concept “Turkish worker” should take on the Community law definition of a worker.⁵⁵

⁵⁵ From the wording of Art. 12 AA, Art. 36 AP, and the objectives of Dec. 1/80, the Court has repeatedly concluded that the principles enshrined in Arts. 39, 40 and 41 EC, must be extended as far as possible to Turkish nationals who enjoy rights under Dec. 1/80. To that effect see, inter alia; *Birden*, note 31 cited above, paras. 23-25; *Tetik*, note 31 cited above, paras. 20 and 28; Case C-294/06, *The Queen, on the application of: Ezgi Payir an Others v. Secretary of State for the Home Department*, [2008] ECR I-203, para. 28 . For the

Turkish workers have been granted wide ranging rights under the Ankara *acquis*, such as the right to residence in the territory of a Member State, the right to non-discrimination with regard to remuneration and other conditions of work, and rights for their family members. **After four years of legal residence and employment, Turkish workers' rights are almost as extensive as the rights of Community workers.** Some of these rights are dealt with in more detail below.

4.1. Right to entry

There is no right to enter the territory of a Member State without a visa as a worker. It is completely at the Member State's discretion to allow entry or not. **Turkish workers and their family members have certain rights only *once they are legally resident in a Member State*.** If they are legally resident, they can rely on the rights granted to Turkish workers

Community definition of a worker see, note 35 above.

under Decision 1/80 of the Association Council.

Turkish workers have been granted wide ranging rights under the Ankara acquis, such as the right to residence in the territory of a Member State, the right to non-discrimination with regard to remuneration and other conditions of work, and rights for their family members.

However, it should be noted that one does not need to have entered the territory of a Member State as a worker to be able to rely on the rights provided by Decision 1/80. As long as the entry is legal, whatever the reason for entry is, be it marriage,⁵⁶ professional training,⁵⁷ learning a language, or studies,⁵⁸ once a Turkish national is legally employed and performs a genuine and effective economic activity, he/she automatically falls under the scope of Decision 1/80 and benefits from the rights provided thereby.

4.2. Right to residence

Member States are free to control the first access of Turkish workers to their territory. However, **once Turkish workers are admitted to a Member**

State and have access to its labour market, their legal position is regulated by Decision 1/80 in general and by Article 6 of that decision in particular. Article 6 of Decision 1/80 provides for the gradual integration of Turkish workers to the labour force of a Member State. According to the first indent of Article 6(1) of Decision 1/80, a Turkish worker duly registered as belonging to the labour force of a Member State, after one year's legal employment, shall be entitled to the renewal of his work permit for the same employer, if a job is available. The second indent of Article 6(1) provides that after three years of legal employment in that Member State, this worker shall be entitled to respond to another offer of employment for the same occupation with an employer of his choice. However, this right is subject to the priority to be given to workers of other Member States. The third indent finally stipulates that after four years of legal employment, the Turkish worker shall enjoy free access to any paid employment of his choice in that Member State.

The Court interpreted the right to work in line with Community case law in the area, i.e. as necessarily implying a right to legal residence. The Court explained that a different interpretation would deprive the right of access to the labour market and

⁵⁶ See, *Birden*, cited note 31 above; and Case C-237/91, *Kazim Kus v. Landeshauptstadt Wiesbaden*, [1992] ECR I-6781.

⁵⁷ See, *Kurz*, cited note 31 above.

⁵⁸ See, *Payir* cited note 55 above.

the right to work of all effect.⁵⁹ However, the structure of Article 6(1) needs to be observed very strictly. A Turkish worker who does not follow the steps provided for in that article and for instance changes his employer before he is allowed to do so, i.e. before having worked for one and the same employer for three years, risks losing his residence rights under Decision 1/80.⁶⁰

4.3. Right to non-discrimination on grounds of nationality

There is one general and a few specific non-discrimination provisions contained in the Ankara *acquis*. **The general non-discrimination provision applies only in the absence of a specific non-discrimination provision in a given area.**⁶¹ Article 9 of the Ankara Agreement, the general non-discrimination provision, prohibits any discrimination on grounds of nationality, in accordance with the

⁵⁹ See, *Sevince*, cited note 15 above, para. 29; Case C-36/96, *Faik Günaydin, Hatice Günaydin, Günes Günaydin, and Seda Günaydin v. Freistaat Bayern*, [1997] ECR I-5143, para. 26; and *Birden*, cited note 31 above, para. 20.

⁶⁰ See, Case C-355/93, *Hayriye Eroglu v. Land Baden-Württemberg*, [1994] ECR I-5113, and Case C-386/95, *Süleyman Eker v Land Baden-Württemberg*, [1997] ECR I-2697. For an exception see *Sedef*, cited in note 82 below.

⁶¹ See, Case C-262/96, *Sema Sürül v. Bundesanstalt für Arbeit*, [1999] ECR-I 2685 para. 64; Joined Cases C-102/98 and C-211/98, *Ibrahim Kocak v. Landesversicherungsanstalt Overfranken und Mittelfranken and Ramazan Örs v. Bundesknappschaft*, [2000] ECR I-1287, para. 36; and Case C-373/02, *Sakir Öztürk v. Pensionsversicherungsanstalt der Arbeiter*, [2004] ECR I-3605, paras. 49-50.

principle laid down in Article 7 (now, Article 12 EC) of the Treaty establishing the Community. As to the most important special provisions on non-discrimination, they are contained in; first, Article 10 of Decision 1/80, which prohibits discrimination with regard to remuneration and other conditions of work; second, Article 3(1) of Decision 3/80, which proscribes discrimination in the area of social security; and third, Article 9 of Decision 1/80, which bans discrimination with respect to access to general education for children of Turkish workers.⁶²

4.3.1. Non-discrimination with regard to remuneration and other conditions of work

Article 10(1) of Decision 1/80 prohibits discrimination on the basis of nationality between the Turkish and Community workers as regards remuneration and other conditions of work. According to the Court of Justice, the term “other conditions of work” has to be interpreted as having a broad scope in so far as Article 39(2) EC “provides for equal treatment in *all matters directly or indirectly related to the exercise of activity as an employee in the host Member State.*”⁶³ In other words,

⁶² See, section 4.5.3.

⁶³ Case C-171/01, *Wählergruppe Gemeinsam Zajedno/Birlikte Alternative und Grüne*

with regard to the principle of non-discrimination with regard to remuneration and other conditions of work, **Turkish workers enjoy a right to non-discrimination which is as extensive as that enjoyed by Community workers.**

4.3.2. Non-discrimination in the area of social security

Article 3(1) of Decision 3/80 on the application of social security schemes provides for **the equal treatment of Turkish nationals to whom this Decision applies** with the nationals of the State where they reside. Article 3(1) was found to be clear, precise and unconditional enough to be relied on by individuals.⁶⁴ The Court interpreted Article 3(1) very broadly, as prohibiting not only direct but also indirect forms of discrimination.⁶⁵ Even though the Court managed to partially protect some of the rights of Turkish nationals in the field of social security by means of broad interpretation of Article 3(1), **due to the lack of implementing legislation,** Turkish workers are not able to rely on most of the provisions of Decision 3/80.

*“Even though the Court managed to partially protect some of the rights of Turkish nationals in the field of social security by means of broad interpretation of Article 3(1), due to the lack of implementing legislation, Turkish workers are not able to rely on most of the provisions of Decision 3/80.”*¹⁴

4.4. Rights in the field of social security

Social security proved to be the most problematic area concerning the rights of Turkish workers. On 19 September 1980 the Association Council adopted Decision 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families. The aim of this Decision was to coordinate Member States' social security schemes so as to enable Turkish workers employed or formerly employed in the Community, members of their families and their survivors to qualify for benefits in the traditional branches of social security. The Decision either copied the provisions of Regulation 1408/71/EC⁶⁶ or made direct references to them. The adoption of this decision was only a first step in granting full and equal social security rights to Turkish workers and their families. **Failing the adoption of measures fully implementing the decision,⁶⁷ it is not**

⁶⁶ Reg. (EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

⁶⁷ On 8 February 1983 the Commission submitted a proposal for a Regulation to the Council to bring this Decision 3/80 into force within the Community and to lay down supplementary detailed rules for its implementation. However that proposal was never adopted by the Council. OJ 1983 C 110, p.1. Case C-277/94, *Z. Taflan-Met and Others v. Bestuut van de Social Verzekeringsbank and O. Akol v. Bestuut van de Nieuwe Algemene Bederijfsvereniging*, [1996] ECR I-4112, paras. 34-35. To a large extent, the Commission's proposal was based on Council

possible for individuals to rely on most of the provisions of Decision 3/80.⁶⁸ However, Turkish nationals might still be able to enjoy certain rights in the field of social security by virtue of an existing bilateral agreement between Turkey and their host State.⁶⁹

4.5. Rights for family members

The term “member of the family”⁷⁰ of a Turkish worker includes the spouse of a migrant worker and the descendants of the worker and of his spouse, who are under the age of 21 or are dependents,⁷¹ and relatives in the ascending line of the worker and of his spouse who live with him in the host Member State.⁷²

Reg. (EEC) No 574/72 of March 21, 1972 laying down the procedure for implementing Reg. (EEC) 1408/71.

⁶⁸ See, *Taffan-Met*, cited note 67 above.

⁶⁹ Turkey has signed Social Security Agreements with the following countries: Germany (30 April 1964), Austria (12 October 1966), Belgium (4 July 1966), the Netherlands (5 April 1966), France (20 January 1972), Sweden (2 September 1977), and Denmark (13 November 1970). See, Ahmet Y. Gökdere, *Yabancı Ülkelere İşgücü Akımı ve Türk Ekonomisi Üzerine Etkileri*, (Türkiye İş Bankası Kültür Yayınları, 1978), p. 275 cited in Nermin Abadan-Unat, *op. cit.*, p. 58.

⁷⁰ See Case C-275/02, *Engin Ayaz v. Land Baden-Württemberg*, [2004] ECR I-8765.

⁷¹ Case C-413/99, *Baumbast and R v. Secretary for the Home Department*, [2002] ECR I-7091, para. 57.

⁷² The Court refers to Case C-179/98, *Belgian State v. Fatna Mesbah*, [1999] ECR I-7955, in *Ayaz*, cited note 70 above, para. 47.

4.5.1. Right to entry

There is no right to family reunification or right to entry for family members under the Ankara *acquis*. However, since the entry into force of the Family Reunification Directive⁷³ in 2005, **the spouse and minor children of a third-country national have the right to join him/her**, if he/she fulfils the conditions laid down by the directive.⁷⁴ This a right derived directly from Community law on which Turkish nationals fulfilling the necessary requirements can also rely.

4.5.2. Right to residence and work

Article 7 of Decision 1/80 regulates the rights enjoyed by family members of a Turkish worker in the territory of a Member State. Family members duly authorised to join the worker have to wait for a period of three years to be able to

⁷³ Council Dir. 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 03.10.2003, pp. 12-18. The UK, Ireland and Denmark are not bound by this Directive. See, paras. 17-18 of the Preamble to the Directive. For an analysis and critique of the Directive see, Groenendijk, “Family Reunification as a Right under Community Law”, 8 *European Journal of Immigration and Law* (2006), pp. 215-230; and Groenendijk, “Legal Concepts of Integration in EU Migration Law”, 6 *European Journal of Immigration and Law* (2004), pp. 118-121.

⁷⁴ The main conditions are that the sponsor must have a residence document valid for one year with the prospect of permanent residence, stable and regular resources sufficient to maintain the family, normal accommodation and health insurance (Art. 7). The Member State may also require the sponsor to have stayed lawfully on its territory for a period not exceeding two years before allowing the family reunification (Art. 8(1)).

respond to an offer of employment, and then, only subject to the priority to be given to Community workers. Family members enjoy free access to employment of their choice **only after five years of legal residence** in the Member State concerned. The Court has established that once a family member fulfils the condition of legal residence for three years stipulated in the first indent of Article 7(1), Member States are no longer entitled to attach conditions to his/her residence. This applies all the more so to a family member who has legally resided in a Member State for at least five years.⁷⁵

4.5.3. Right to non-discrimination with regard to access to education

Article 9 of Decision 1/80 provides for **non-discriminatory access to education** for the children of Turkish workers. It covers all forms of education, including university education. The Court of Justice also acknowledged the eligibility of Turkish children to all advantages provided in the area of education to the children of Community nationals, including access to education grants.⁷⁶

⁷⁵ Case C-329/97, *Sezgin Ergat v. Stadt Ulm*, [2000] ECR I-1487, paras 38-39.

⁷⁶ Case C-374/03, *Gaye Gürol v. Bezirksregierung Köln* [2005] ECR I-6199.

4.6. Right to free movement within the Union

Decision 1/80 does not grant a right to free movement between Member States. Turkish nationals enjoy equality and residence rights under Decision 1/80 only in the first Member State of their residence. However, there might be such a possibility under the Long Term Residence Directive,⁷⁷ which not only reinforces the rights of third-country nationals who have been legally resident in the Community for more than five years,⁷⁸ but also grants them the right to work and live in another EU Member State.⁷⁹ Yet, it should be noted that this right is not automatic and its application becomes possible only after having legally resided for more than five years in one and the same Member State.

“Turkish nationals enjoy equality and residence rights under Decision 1/80 only in the first Member State of their residence. However, there might be such a possibility under the Long Term Residence Directive (...)”

⁷⁷ Council Dir. 2003/109 concerning the status of third-country nationals who are long-term residents, OJ L16/44, 23.01.2004.

⁷⁸ Art. 9 of Dir. 2003/109.

⁷⁹ Chapter III: Arts. 14-23 of Dir. 2003/109. This right is not automatic. The second Member State may examine the situation of its labour market and apply its national procedures regarding the filling of a job vacancy, or for exercising an activity in a self-employed capacity (Art. 14(3)). The second Member State may require third-country nationals to comply with integration measures in accordance with national law (Art. 15(3)).

4.7. Protection against expulsion

The Court established that to ensure the effectiveness of the individual rights granted to Turkish workers “it is essential to grant those workers *the same procedural guarantees* as those granted by Community law to nationals of Member States”.⁸⁰ According to the Court, such guarantees are inseparable from the rights to which they related. This interpretation is valid both for the workers themselves and members of their families.

4.7.1. Protection against the expulsion of workers

There are **only three grounds to terminate the right to residence of Turkish workers** under Decision 1/80. Firstly, the right to residence ceases to exist when a worker definitively ceases to belong to the labour force of the host Member State, either because he/she reaches retirement age or becomes totally and permanently incapacitated to work.⁸¹ Secondly, the residence rights of a worker might be denied if he/she does not strictly observe the requirements of Article 6(1) of Decision 1/80, and changes his/her employer before fulfilling the requirement of working for the one and same employer

⁸⁰ Case C-136/03, *Georg Dörr v. Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v. Sicherheitsdirektion für das Bundesland Vorarlberg*, [2005] ECR I-4759, para 67-68.

⁸¹ *Bozkurt*, cited note 31 above, para. 39.

for an uninterrupted period of three years.⁸² Finally, a Member State may terminate the residence right of a Turkish worker on the grounds of public policy, public security or public health as provided by Article 14(1) of Decision No 1/80.⁸³

4.7.2. Protection against the expulsion of family members

There are two grounds on which a family member of a Turkish worker can lose his rights under Article 7 of Decision 1/80. Firstly, on public policy grounds, i.e. under Article 14(1) of Decision 1/80. Secondly, when the family member leaves the territory of the host Member State *for a significant length of time without a legitimate reason*.⁸⁴ These two grounds for loss of rights for family members of Turkish workers were confirmed in subsequent case law as exhaustive

⁸² See, *Eroglu and Eker*, cited note 60 above. However, it should be noted that the Court takes into account special circumstances. For instance, if the nature of the job is such as to require consecutive contacts of limited duration as was the case with Mr Sedef who was employed as a seaman on various German ships. See, Case C-230/03, *Mehmet Sedef v. Freie und Hansestadt Hamburg*, [2006] ECR I-157.

⁸³ In *Nazli*, cited note 31 above, which was the first case where the ECJ interpreted Article 14 (1) of Decision 1/80, the Court ruled that the public policy exception of Article 14(1) had to be interpreted restrictively, so that the existence of a criminal conviction could justify expulsion only so far as it would constitute evidence of personal conduct which presented a threat to the requirements of public policy, and that the threat is of a genuine and sufficiently serious nature.

⁸⁴ *Ergat*, cited note 75 above, paras. 46 and 48.

grounds.⁸⁵ The Court also clarified that the rights conferred by Article 7 could not be limited in the same situations as those conferred by Article 6 of Decision 1/80.⁸⁶ While the right to residence of workers is dependent on employment, the rights of family members are not. Article 7 grants family members a right to employment, without imposing on them an obligation to work.⁸⁷

⁸⁵ Case C-467/02, *Inan Cetinkaya v. Land Baden-Württemberg*, [2004] ECR I-10895, para. 36; Case C-373/03, *Ceyhun Aydinli v. Land Baden-Württemberg*, [2005] ECR I-6181, para. 27; Case C-502/04, *Ergün Torun v. Stadt Augsburg*, [2006] ECR I-1563, para. 21; Case C-349/06, *Murat Polat v. Stadt Rüsselsheim*, judgment of 4 October 2007, n.y.r., para. 21; Case C-453/07, *Hakan Er v. Wetteraukreis*, judgment of 25 September 2008, n.y.r., para. 30.

⁸⁶ *Aydinli*, cited note 85 above, para. 31; and *Torun*, cited note 85 above, para. 26.

⁸⁷ *Aydinli*, cited note 85 above, para. 29; and *Er*, cited note 85 above, para. 31.

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Background Paper: Turkish Citizens' Rights in the EU

What rights do you enjoy as a self-employed person, or a service provider in the EU?

The Association Council has not taken any decisions for the implementation of the freedom of establishment and freedom to provide services, respectively Articles 13 and 14 of the Ankara Agreement. These two freedoms have come to the fore with the fairly recent cases on Article 41(1) of the Additional Protocol. As discussed above, unlike for workers, there is a right to entry into some Member States for people who want to establish themselves or provide a service.⁸⁸

⁸⁸ For details see, section 3.

As to their rights after entry into a Member State, the Court has ruled that in so far as the position of such an individual in the Member State is regular, "the person concerned may claim certain rights under Community law in relation to ... exercising self-employed activity, and correlatively, in relation to residence",⁸⁹ confirming that the principles established in the context of the interpretation of the provisions on free movement of workers in the Ankara Agreement will also apply in the context of the provisions concerning the right of establishment.⁹⁰ As far as freedom to provide services is concerned, due to the temporary nature of that freedom, its implementation might be less problematic, since the provider does not need to reside in a Member State for a long period.

It is also possible to infer from *Savas* that a Turkish national who is lawfully resident and lawfully carrying out a genuine

⁸⁹ *Savas*, cited note 18 above, para. 65.

⁹⁰ *Ibid*, para. 63.

economic activity in a self-employed capacity in a Member State, has the right to continue that activity and, as a corollary, the right to extend his residence in that State. By analogy to the logic in other cases, any other interpretation would make the exercise of these rights contained in the Ankara Agreement “purely illusory”.

Once the Member States adapt their visa regimes in line with the *Tum and Dari* and *Soysal* judgments, Turkish nationals will be moving into Member States to exercise freedom of establishment and freedom to provide services. **The Association Council might then take the initiative to lay down the rules for the implementation of these two freedoms. If not, it will be up to the Court to put these freedoms into practice.** How precisely the Court is going to develop these freedoms remains to be seen.

“It is also possible to infer from Savas that a Turkish national who is lawfully resident and lawfully carrying out a genuine economic activity in a self-employed capacity in a Member State, has the right to continue that activity and, as a corollary, the right to extend his residence in that State. By analogy to the logic in other cases, any other interpretation would make the exercise of these rights contained in the Ankara Agreement ‘purely illusory’.”

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Conclusion

As this overview reveals, the legal framework of the rights Turkish workers enjoy in their host Member States is quite clear and well-established. Yet, this is not the case for freedom of establishment and freedom to provide services. Cases concerning these two freedoms have reached the Court of Justice fairly recently. It is not difficult to foresee that after the *Tum and Dari* and *Soysal* judgments the pace at which these two freedoms develop will accelerate. The case law on the rights of Turkish workers will provide some guidance for the Court. However, given the differences between these freedoms, its task might not be very easy. Thus, the

cooperation of the Member States is essential for the full implementation of these freedoms. Perhaps from time to time Member States should be reminded that **by virtue of the “duty of loyal cooperation” embedded in Article 10 EC and Article 7 of the Ankara Agreement they are under an obligation to “take all appropriate measures, whether general or particular, to ensure the fulfillment of the obligations arising” from these agreements.**

Similarly, the “duty of loyal cooperation” is binding also on the Community institutions. **The Commission seems reluctant to take the appropriate steps to implement *Tum and Dari* and *Soysal*.** So far it has taken no steps to

“(...) by virtue of the “duty of loyal cooperation” embedded in Article 10 EC and Article 7 of the Ankara Agreement they are under an obligation to “take all appropriate measures, whether general or particular, to ensure the fulfillment of the obligations arising” from these agreements”

inquire into the applicable conditions of entry for Turkish nationals wishing to exercise their freedom of establishment at the time of entry into force of the Additional Protocol with regard to every Member State. Where the Commission has taken steps,⁹¹ contrary to its usual practice to do whatever necessary to make Community law fully effective, it has constrained itself to do the absolute minimum required by the *Soysal* judgment.

Finally the Turkish government, which for whatever reasons practices self-restraint just like the Commission, is under an obligation to implement a more pro-active strategy with a view to improving the current situation and reminding the European Commission and Member States of their responsibilities. While civil society, NGOs, universities, Chambers of Commerce organize seminars and conferences to raise awareness on this issue, not much is heard from the government or related bureaucratic institutions. While it may be understandable that the issue is a delicate one which is interlinked with related areas such as management of migration, further action is needed to implement rights of Turkish citizens deriving from the Ankara *acquis*. In the absence of any initiative on the side of Turkish authorities, the European Commission and Member States, the result of judgments which could have sweeping implications on the free movement of Turkish nationals is currently restricted to the free movement of service providers to Denmark and of certain categories of service providers to Germany.

⁹¹ See, the Guidelines cited in note 41 above.

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Chronology of Important Dates in EU-Turkey Relations

31 July 1959 – Turkey applied to be an associate member of the European Economic Community

12 September 1963 – The Ankara Agreement (EEC-Turkey Association Agreement) was signed

1 December 1964 – The Ankara Agreement entered into force

23 November 1970 – The Additional Protocol was signed

1 January 1973 - The Additional Protocol entered into force

20 December 1976 – Decision 2/76 of the Association Council on the Implementation of Article 12 of the Ankara Agreement was adopted

19 September 1980 – Decision 1/80 of the Association Council on the Development of the Association was adopted. This Decision replaced Decision 2/76 and is still in force

19 September 1980 – Decision 3/80 of the Association Council on the Application of the Social Security Schemes of the Member States of the European Communities to Turkish Workers and Members of their Families was adopted

6 March 1995 – Decision 1/95 on the completion of the Customs Union between Turkey and the EU in industrial and processed agricultural goods was adopted

1 January 1996 – The Customs Union entered into force

10-11 December 1999 – At Helsinki European Council Summit Turkey was officially recognized as a candidate state for accession to the EU

16-17 December 2004 – The European Council established that Turkey fulfills the Copenhagen criteria and set the date for opening accession negotiations as 3 October 2005

3 October 2005 – The start of EU-Turkey accession negotiations

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Key Documents

- Website of the Delegation of the European Commission to Turkey:
http://www.avrupa.info.tr/AB_ve_Turkiye/Tarihcesi.html
- Website of the Economic Development Foundation:
<http://www.ikv.org.tr/en/temelbelgeler.php>
- Website of the Turkish Ministry of Foreign Affairs:
<http://www.mfa.gov.tr/sub.en.mfa?6ff60bd9-ffd0-4ac2-a177-f7438895084f>