Legal constraints on EU Member States as primary law makers : a case study of the proposed permanent safeguard clause on free movement of persons in the EU negotiating framework for Turkey's accession

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3 The Ankara Association Law

3.1 Introduction

The aim of providing a brief account of the Community/Union's association policy over the decades was to understand the nature of association as a legal relationship and to be able to put the Ankara Agreement in context. As briefly discussed above, it was one of the two most ambitious agreements signed in the 1960s, aiming to prepare Turkey for future accession to the Union. The following part firstly, lays down the aim and structure of the agreement, as well as the means that it puts at the Parties' disposal to achieve its objectives. Secondly, it briefly introduces the plan laid down in the agreement for the establishment of a Customs Union, after which, the focus shifts on the provisions of the agreement that envisage the gradual establishment of free movement of workers, services and freedom of establishment. Lastly, the rest of this Chapter examines the case law of the Court interpreting these provisions, since most developments in the *acquis* in this area are products of the case law of the Court rather than the institutions of the association.

The aim of this Chapter is to demonstrate that the free movement of persons regime established by the agreement is already quite developed, and that a PSC would not only be a step back from the Union *acquis* on free movement of persons but also a step back from the existing association *acquis* in some cases. It is argued that standstill clauses in the association agreement as well as similar clauses included in Accession Agreements constitute constraints on Member States, in addition to other constraints flowing from the accession process, which are examined in detail in Part II of this thesis.

3.2 Aims and structure of the Agreement

The Ankara Agreement was the second association agreement ever signed by the EEC and had ambitious objectives. It aimed at "establish[ing] *ever closer bonds* between the Turkish people and the peoples brought together in the [EEC]" and "to preserve and strengthen peace and liberty by *joint pursuit of ideals underlying the Treaty* establishing the [EEC]".[230] Its Article 2 provided

230 Emphasis added. See the preamble of the agreement, OJ L 361/1-2, 31.12.77.

further that the agreement was "to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people". That objective was to be achieved by the support given by the EEC, which would in turn "facilitate the *accession of Turkey to the Community* at a later date".[231]

The very first step in the attainment of that objective was the progressive establishment of a Customs Union, which was to be established over a preparatory, a transitional, and a final stage.[232] Those were also the three stages the association was going to be comprised of.[233] The purpose of the five-year preparatory stage was to give Turkey the time and opportunity to strengthen its economy. In this stage, Turkey would get aid from the Community, and prepare itself for undertaking the obligations that would be delegated on it in the following two stages.[234] The twelve-year transitional stage was to be composed of mutual and balanced obligations, during which the Customs Union was to be progressively established and the economic policies between Turkey and the Community were to be aligned.[235] The final stage was to be based on the Customs Union and would entail closer coordination of economic policies.[236]

Like the EEC Treaty, which it was modelled after, the Ankara Agreement was of programmatic nature and most of its provisions were drafted in general terms. Just like some of the Treaty provisions requiring the promulgation of more detailed secondary law for their implementation, some of the provisions of the Association Agreement required more detailed rules, which were to be issued by the Association Council, the main-decision making body of the Association.[237] It was to be composed of members of the governments of the Member States, members of the Council, the Commission, and members of the Turkish government, and would act unanimously. It could establish further committees to assist it in the fulfilment of its tasks.[238]

The preparatory stage ended when the Additional Protocol (AP), containing detailed rules and the timetable for the implementation of the transitional stage entered into force in 1973.[239] It should be noted that all the stages of the associ-

231 Emphasis added. See ibid.
232 See Article 2(2) of the Ankara Agreement (AA).
233 See Article 2(3) AA.
234 See Article 3 AA.
235 See Article 4 AA.
236 See Article 5 AA.
237 See Article 6 AA and Articles 22-25 AA.
238 See Article 23 AA.
239 This was provided for in Article 8 AA.

ation lasted longer than initially planned.[240] With hindsight, the initial planning was not very realistic. Under ideal conditions, (there were provisions providing for the extension of those stages if need be), the Customs Union (the final stage) could be in force as early as 1981. In terms of the economic development model adopted by Turkey in those years,[241] being part of a Customs Union with the industrialized countries of the West did not make much sense. However, as acknowledged by scholars, it was not economic considerations, but politics and the geostrategic considerations of the cold war that triggered economic cooperation in that period.[242]

The Customs Union was to cover all trade in goods,[243] including agricultural products.[244] The Agreement provided further for the progressive establishment of free movement of workers, and for the abolition of restrictions regarding freedom of establishment and freedom to provide services. Article 12, 13 and 14 AA lay down that in securing those freedoms the Contracting Parties agreed to be guided by the relevant articles of the EEC Treaty.[245] It is by virtue of these references to the EEC Treaty that some of the developments in Community/Union law were subsequently reflected to the case law on the Ankara *acquis*.

Other two indispensable principles for the functioning of the EEC/EC/EU legal order that found their place in the Ankara Agreement are the principle of loyal cooperation, embodied in Article 7 AA, and the prohibition of non-discrimination based on nationality, enshrined in Article 9 AA. Following Article 5 of the EEC Treaty, Article 7 requires the Contracting Parties to "take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement", and to "refrain from any

240 The preparatory stage, which was to last five years, lasted nine years. The transitional stage, which was planned as 12 years in the Ankara Agreement, took 22 years, in line with the plan laid down in the Additional Protocol (AP).

241 As it was the trend with other developing countries at the time, Turkey's growth strategy was based on import substitution. See, K. Boratav, *Türkiye İktisat Tarihi: 1908-2002* [Turkish Economic History], 8 ed. (Ankara: İmge Kitabevi, 2004).

242 J. Pinder, "Positive integration and negative integration: Some problems of economic union in the EEC," *The World Today* (March 1968): 92-93. For a detailed account, see A. Eralp, "Soğuk Savaştan Günümüze Türkiye – Avrupa Birliği İlişkileri," in *Türkiye ve Avrupa*, ed. A. Eralp (Ankara: İmge Kitabevi, 1997), 86-119; İ. Tekeli and S. İlkin, *Türkiye ve Avrupa Topluluğu I* [Turkey and the European Community I], vol. I (Ankara: Ümit Yayıncılık, 1993); Ç. Erhan and T. Arat, "AET'yle İlişkiler," in *Türk Dış Politikası I*, ed. B. Oran (İletişim, 2002); M. A. Birand, *Türkiye'nin Büyük Avrupa Kavgası 1959-2004* [Turkey's Big European Struggle 1959-2004], 11 ed. (İstanbul: Doğan Kitap, 2005); T. Saraçoğlu, *Türkiye Avrupa Ekonomik Topluluğu Ortaklığı (Anlaşmalar)* [Turkey EEC Association (Agreements)] (Akbank Ekonomi Yayınları, 1992).

243 See Article 10(1) AA.

244 See Article 11 AA.

245 For free movement of workers, Articles 48-50 of the EEC Treaty; for freedom of establishment, Articles 52-56 and Article 58 of the EEC Treaty; and finally for free movement of services, Articles 55-56 and Articles 58-65 of the EEC Treaty.

measures liable to jeopardize the[ir] attainment". Similarly, Article 9 AA provides that, without prejudice to any special provisions, "any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community".

Other economic provisions worth mentioning are quite broad. Article 15 AA provides for the extension to Turkey of the transport provisions contained in the Treaty taking into account its geographical situation. Article 16 "recognize[s] that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable" in the relations within the Association. In addition, there are provisions on economic policy, securing overall balance of payments, exchange rates, and payments or transfers relating to movement of goods, services, or capital.[246] The provision on free movement of capital is more modest compared to the provisions on other freedoms,[247] yet it reflects the pace of development of that freedom within the internal market.

Last but not least, comes Article 28 AA, which lays down explicitly the long-term objective of the Agreement. It reads as follows: "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the *accession of Turkey to the Community*."[248] Obviously, Article 28 AA does not guarantee Turkey's future accession to the Community/Union,[249] it provides for the examination of that possibility once Turkey is ready to accept the obligations flowing from the Treaties. As argued by Lichtenberg, it provides for a fair procedure regarding Turkey's application, and "specifically excludes the possibility that, in making a decision on Turkey's membership, criteria other than those found in the *acquis communautaire* and the economic and legal functioning of the Association Agreement could be used".[250] However, more importantly, it makes the arduous discussion on Turkey's geographic location, i.e. the issue whether it is a 'European State', irrelevant for the purpose of accession.[251]

246 See respectively Articles 17, 18, and 19 AA.

247 Article 20(1) AA provides that "The Contracting Parties shall consult each other with a view to facilitating movements of capital between Member States of the Community and Turkey which will further the objectives of this Agreement."

248 Emphasis added.

249 According to Lasok, "it was an express intention of the contracting parties to use the Accession Agreement as a stepping stone to accession", and Article 28 AA expressed that intention, but gave "no guarantee but merely a prospect of admission". See, D. Lasok, "The Ankara Agreement: Principles and Interpretation," *Marmara Journal of European Studies* 1, no. 1-2 (1991): 36.

250 H. Lichtenberg, "Turkey and the European Union," *Marmara Journal of European Studies* 6, no. 1 (1998): 145.

251 Ibid.

3.3 ANKARA ASSOCIATION LAW

Having laid down the main objectives envisaged by the Association Agreement in the previous section, this one tries to briefly outline how far those objectives have been achieved. After providing a brief account of the development of the Customs Union, the focus will be on the rules laid down regarding free movement of workers, freedom of establishment and freedom to provide services. The emphasis will be on showing how far the latter rules on free movement of persons have developed, as the safeguard clause will affect them directly. The main argument that follows is that membership entails more extensive rights and obligations for nationals of a Member State than the nationals of an associate country, or at least equivalent. This is not only in line with common sense, but there is also a provision in the Additional Protocol to ensure that "Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community".[252] Hence, memberships should entail increase and not decrease in the rights enjoyed by Turkish nationals.

3.3.1 The Customs Union

"Believing that the conditions have been established for passing from the preparatory stage to the transitional stage", the Additional Protocol laying down the conditions, arrangements, and timetables for this intermediate stage entered into force on 1 January 1973.[253] It provided for the progressive abolition of customs duties and charges having an equivalent effect over a period of twenty-two years, at the end of which the Turkish Customs Tariff had to be aligned with the Common Customs Tariff.[254] Quantitative restriction on imports and exports and measures having equivalent effect had to be abolished at the latest by the end of the transitional stage.[255] Last but not least, if there were to be free movement of agricultural products between the Community and Turkey, over a period of twenty-two years Turkey would have to adjust its

252 Article 59 AP.

253 See the Preamble to the Additional Protocol signed at Brussels, 23 November 1973. The Additional Protocol was a mixed agreement that formed an integral part of the Ankara Agreement. See, OJ 1973 C 113/17.

254 See, Section I: Elimination of customs duties between the Community and Turkey (Articles 7-16 AP) and Section II: Adoption by Turkey of the Common Customs Tariff (Articles 17-20 AP) of the Additional Protocol. For a more detailed account of the establishment of the Customs Union, see H. Kabaalioğlu, "The Customs Union: A Final Step before Turkey's Accession to the European Union?," *Marmara Journal of European Studies* 6, no. 1 (1998): 113-40.

255 See Chapter II: Elimination of Quantitative Restrictions (Articles 21-29 AP) of the Additional Protocol.

agricultural policy to that of the Community by adopting the necessary measures.[256]

At the end of the envisaged period, the Association Council decided the final stage of the Association could begin on 1 January 1996. To that effect, the Association Council adopted Decision 1/95 on the implementation of the final phase of the Customs Union.[257] The Customs Union would cover "products other than agricultural products",[258] in other words industrial products. The Council reaffirmed the objective to move towards the free movement of agricultural products, but noted that an additional period is required to achieve that aim.[259]

As argued by Kabaalioğlu, Decision 1/95 imposes on Turkey many additional requirements, which do not fall strictly within the basic Customs Union structure. These sweeping requirements together with the Customs Union make sense only when considered as being parts of a temporary or transitional regime that is designed to prepare Turkey for full membership.[260] To provide few examples in order to give an idea as to the scope of these requirements, Turkey is required to provide equivalent levels of effective protection of intellectual, industrial and commercial property rights.[261] "With a view to achieving the economic integration sought by the Customs Union", Turkey had to ensure not only that its legislation in the field of competition law was compatible with that of the Community, but also that it was applied effectively.[262] Hence, it had to establish a competition authority to enforce those rules before the entry into force of Decision 1/95.[263]

When the content of the "Competition rules of the Customs Union" included in Decision 1/95 is examined more closely (Articles 32 to 38), it is surprising to see that most articles are identical copies of the competition provisions of the EEC Treaty, in which the phrase "common market" has been replaced by the "Customs Union".[264] Hence, Article 35 provides that those

256 See, Chapter III: Products Subject to Specific Rules on Importation into the Community as a Result of the Implementation of the Common Agricultural Policy (Article 31 AP); and Chapter IV: Agriculture (Articles 32-35 AP) of the Additional Protocol.

257 Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, 96/142/EC, OJ L 35/1, 13.02.1996.

258 See Article 2 of Decision 1/95. Special rules on agricultural products were set in Chapter II of the Decision.

259 Article 24 of Decision 1/95. Also note that "Processed agricultural products not covered by Annex II to the Treaty establishing the European Community" are dealt under Section V of Chapter I on "Free Movement of Goods and Commercial Policy" (Articles 17 to 23 of Decision 1/95).

260 Kabaalioğlu, "The Customs Union: A Final Step before Turkey's Accession to the European Union?," 123.

261 See Article 31 of Decision 1/95.

262 See Article 39(1) of Decision 1/95.

263 See Article 39(2)(b) of Decision 1/95.

264 Article 32 of Decision 1/95 is a copy of Article 85 of the EEC Treaty; Article 33 is a copy of Article 86 EEC; and Article 34 of Article 92 EEC.

provisions "shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and its secondary legislation".

The Decision further required Turkey to adapt all the aid it granted to the textile and clothing sector to the EC rules before the entry into force of this Decision.[265] All other aid schemes had to be adapted within two years after the entry into force of Decision 1/95.[266] It is notable that Turkey is treated almost like a Member State of the Union regarding the adoption of new aid schemes. It needs to notify the Community of any individual aid to be granted to an enterprise that would be notifiable under Community rules.[267] Similarly, Turkey needs to be informed on the same basis as the Member States "[r]egarding individual aids granted by Member States and subject to the analysis of the Commission".[268] Both parties are entitled to raise objections against an aid granted by the other party, which would be deemed incompatible with EC law. If there is dispute regarding an aid granted by Turkey, which is not resolved within 30 days, either party has the right to refer the case to arbitration.[269] If the dispute concerns an aid granted by a Member State, and the Association Council is not able to resolve it within three months, it may refer it to the Court of Justice.[270]

Other far-reaching provisions are Articles 41 and 42 of Decision 1/95. The former provided that by the end of 1996, Turkey had to ensure that regarding public undertakings and undertakings enjoying special or exclusive rights, the principles of the EEC Treaty, "notably Article 90, as well as the principles contained in secondary legislation and the case-law developed on this basis, are upheld". Article 42 required Turkey to progressively adjust any State monopolies of a commercial character by the end of 1997, so that there is no discrimination regarding the conditions under which goods are procured and marketed. Moreover, Article 43 of the Decision stipulated that the Party believing its interests are negatively effected by the anti-competitive conduct carried out on the territory of the other, "may notify the other Party and may request the other Party's competition authority initiate appropriate enforcement action".[271]

The Decision also includes provisions providing for negotiations aimed at opening the Contracting Parties' respective government procurement markets,[272] provisions on direct and indirect taxation,[273] as well as provisions

265 See Article 39(2)(c) of Decision 1/95.
266 See Article 39(2)(d) of Decision 1/95.
267 See Article 39(2)(e) & (f) of Decsision 1/95.
268 See Article 39(2)(f) of Decsision 1/95.
269 See Article 39(4) of Decsision 1/95.
270 See Article 39(5) of Decsision 1/95.
271 Article 43(1) of Decision 1/95.
272 See Article 48 of Decision 1/95.
273 See repectively Articles 49 and 50 of Decision 1/95.

on settlement of disputes by resorting to arbitration.[274] Lastly, it establishes "an EC-Turkey Customs Union Joint Committee" to oversee the proper functioning of the Customs Union.[275] The Customs Union Joint Committee is composed of representatives of the Contracting Parties, and as a rule meets at least once a month. It is entitled to establish subcommittees or working parties to assist it, if need be.[276]

Even a brief look at the provisions of Decision 1/95 suffices to conclude that it is not only about the Customs Union and Turkey's adoption of the Common Customs Tariff (CCT).[277] It goes way beyond that into aligning Turkey's commercial policy, competition policy, taxation and economic policy with that of the Union. Economically, it does not make sense for a state like Turkey, which is less developed, to adopt all these far-reaching policies in the absence of the prospect of EU accession. As advanced as the EEA regime might be, it should be noted that it does not go as far as adopting the CCT.[278]

In the absence of the membership perspective, it does not make sense either politically or economically for any state to be a part of the Customs Union, since under the existing arrangements, it has officially no say in the decision-making regarding the adoption or changes in the CCT. That can be acceptable only temporarily, as part of a long-term plan that is expected to pay off in other ways in the future, such as EU membership. Association without the membership perspective in the long run, places the associate in "the position of de facto satellite to the [EU]",[279] which, at least for Turkey as a medium-size state, is not that attractive. In short, as Lichtenberg put it: "Association and accession are not alternative options for the relationship between Turkey and the EC [now EU], both are progressive steps towards full membership".[280]

3.3.2 Free movement of persons

Since the test case in identifying the existence of constraints on Member States as primary law makers in the accession context is the PSC on free movement of persons mentioned in Turkey's Negotiating Framework, the free movement of persons aspect of the association regime is central to this study. It is argued that EU membership for Turkey is supposed to lift the remaining obstacles

274 See Articles 61 and 62 of Decision 1/95.
275 See Article 52 of Decision 1/95.
276 See Article 53 of Decision 1/95.
277 M. S. Akman, "Türkiye – Avrupa Birliği Gümrük Birliği İlişkisi ve Ortak Dış Ticaret Politikası," in *Yarım Asrın Ardından Türkiye – Avrupa Birliği İlişkileri*, ed. Belgin Akçay and Sinem Akgül Açıkmeşe (Ankara: Turhan Kitabevi, 2013), 226-35.
278 As noted by Kuijper, in the EEA "free movement of goods remains limited to a free trade area as opposed to a customs union". See, Kuijper, "External Relations," 1339.
279 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 119.
280 Lichtenberg, "Turkey and the European Union," 145.

in front of the free movement of persons, and not introduce new ones. As is illustrated below, the introduction of new obstacles to free movement of workers, services and establishment is prohibited under the existing association regime. Thus, it can be argued that this should be *a fortiori* the case after accession.

To be able to establish how much the existing legal framework would constrain Member States as primary law makers in drafting the Turkish Accession Agreement, one needs to establish the aims set and commitments undertaken regarding the development of free movement of persons under the Ankara Agreement, as well as the actual level of development of those freedoms under the existing association regime. Hence, what follows firstly, is an examination of the objectives of the provisions of the Ankara Agreement with relevance for free movement of persons; secondly, an examination of legal instruments adopted in order to implement those provisions; and lastly, the case law of the Court of Justice, which by interpreting these provisions, contributed greatly to their effective enforcement as well as their further development.

3.3.2.1 In the Ankara Agreement

It is important to begin by acknowledging the importance and enormous contribution of the free movement of persons to the establishment of the internal market and the integration project as a whole. Even though initially people were seen more as factors of production like goods and capital, whose circulation was expected to deliver economic benefits to the economies of both their host and home Member States, that view started changing as early as the first amendment to the Treaties were made with the Single European Act, which added the social provisions. While initially free movement was possible only for economically active nationals of Member States, soon free movement for other nationals who were self-sufficient became also possible. Lastly, as discussed in Chapter 6, free movement of persons was revolutionized and became even more central to the integration project with the introduction of the concept of Union citizenship into the Treaties and its interpretation by the Court of Justice, which inextricably linked Union citizenship and free movement.

In short, free movement of persons has always been part of the very crux of the integration project, and its importance has only increased in time. Its enormous contribution to achieving the ideals underlying the project is self-evident. Some of these ideals mentioned in the preamble of the EEC Treaty were the creation of "an ever-closer union among the peoples of Europe" by ensuring "economic and social progress of their countries" through the elimination of barriers dividing them and by striving for "the constant improvement

of the living and working conditions of their peoples". These lofty ideals were also reflected in the preamble to the Ankara Agreement.[281]

Title I of the Ankara Agreement begins with introducing the main "Principles" of the association, after which Title II of the Agreement on the "Implementation of the Transitional Stage" lays down some of its most important provisions for the purposes of this study. To begin with Article 8, it provides the procedure for the adoption of the Additional Protocol, which was supposed to "determine the conditions, rules and timetables for the implementation of provisions relating to the fields covered by the Treaty establishing the Community". The provisions worth citing for our purposes are the provision providing for the prohibition of discrimination based on nationality and the provisions on free movement of persons.

To begin with the non-discrimination provision, it reads ad follows:

> *Article 9*
> 'The Contracting Parties recognize that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, *any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community*.'[282]

The provisions providing for the free movement of workers, freedom of establishment and freedom to provide services read respectively as follows:

> *Article 12*
> 'The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.'
>
> *Article 13*
> 'The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.'
>
> *Article 14*
> 'The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them.'

Before proceeding to the examination of the provisions preparing the ground for the future implementation of these freedoms in the Additional Protocol, it is worth making a brief comment on the general wording of those provisions. The broad and general formulation of these provisions with reference to the

281 See the first paragraph under title "3.2 Aims and structure of the Agreement".
282 Emphasis added.

corresponding Treaty provisions, proved to be a blessing and a curse at the same time. It proved to be a curse; because Turkish nationals were not able to rely directly on these provisions in order to invoke the freedoms they aimed to establish. As will be analysed in more detail below, the Court ruled that these provisions were of programmatic nature, and were "not sufficiently precise and unconditional"[283] to be capable of conferring directly effective rights on individuals. According to the Court, it was up to the Association Council to take decisions of specific and unconditional nature that would materialize the objectives of those provisions.[284]

The broad formulation of these provisions with reference to corresponding Treaty articles was a blessing as it served as the justification/ground for the Court to give a dynamic interpretation to these provisions. By virtue of these references, the Court interpreted the terms in these provisions, as well as the terms in other measures adopted to implement these provisions, "as far as possible" in line with the meaning given to those terms under Union law.[285] As the meaning and scope given to some concepts was broadened under EU law, so was the case for those concepts under the Ankara Agreement. As generous as the Court seemed to be in that exercise, there are few recent examples in which the Court drew the boundaries between Association Law and EU law by declaring what it deemed not possible.[286]

3.3.2.2 In the Additional Protocol

While the provisions on "Free Movement of Goods" under Title I are many and quite detailed (Articles 2 to 35 AP), there are only seven general provisions under Title II of the Additional Protocol dealing with "Movement of Persons and Services" (Articles 36 to 42 AP). The Protocol set a timetable for establishing free movement of workers and prohibited the introduction of any new restrictions regarding free movement of establishment and freedom to provide

283 *Case 12/86 Demirel*, para. 23.

284 Ibid., paras. 20-21.

285 Van der Mei calls this "the Bozkurt-interpretation rule". See, A. P. Van der Mei, "The Bozkurt-Interpretation Rule and the Legal Status of Family Members of Turkish Workers under Decision 1/80 of the EEC-Turkey Association Council," *European Journal of Migration and Law* 11(2009). See also, N. Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," *Common Market Law Review* 46(2009); F. G. Jacobs, "Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice," in *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, ed. A. Dashwood and M. Maresceau (Cambridge: Cambridge University Press, 2008), 29-31.

286 For instance, it was not possible to extend the personal scope of the freedom to provide services under the Ankara Agreement so as to encompass service recipients, as is the case under EU law. See, *Case C-221/11 Demirkan*, judgment of 24 September 2012, n.y.r. See also, *Case C-371/08 Ziebell*, [2011] ECR I-12735. Compare the ECJ's approach with that of the EFTA Court in *Case E-15/12 Jan Anfinn Wahl*, judgment of 22 July 2013, n.y.r.

services, however, the specific measures that were to turn these freedoms into reality were to be taken by the Association Council.

To begin with the timetable set for the establishment of free movement of workers, Article 36 AP provided that it was to be achieved by progressive stages in line with the principles set out in Article 12 of the Ankara Agreement "between the end of the twelfth and the twenty-second year after the entry into force of that Agreement". Article 37 AP prohibited discrimination on the grounds of nationality between Turkish workers and workers who are nationals of Member States of the Community regarding conditions of work and remuneration. Article 39 AP directed the Association Council to adopt social security measures for Turkish workers and their families residing in the Community. Those measures had to enable Turkish workers "to aggregate periods of insurance or employment completed in individual Member States in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services".[287] Those measures had to ensure that Member States take into account periods completed in Turkey. These measures had to be adopted by the end of the first year after the entry into force of this Protocol. The proposal for the implementation of this provision, as well as Decision 3/80, most provisions of which are too general to be directly effective, has still not been adopted.[288]

As to establishing the timetable and rules on the abolition of restrictions on freedom of establishment and freedom to provide services, Article 41(2) AP designated the Association Council as the competent body. Until the adoption of those rules, Article 41(1) AP introduced a standstill instructing the Contracting Parties to "refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". Since Member States did not refrain from introducing new restrictions, disregarding the standstill clause, the Court of Justice has recently delivered interesting cases concerning the scope and application of the latter clause.[289] Most of the recent developments regarding free movement of persons between Turkey and some of the Member States, which will be dealt with in detail below, are the result of the Court's judgments declaring some of these measures incompatible with Association Law.[290]

287 Article 39(2) AP.

288 See, Proposal for a Council Decision "on the position to be taken on behalf of the European Union within the Association Council set by the Agreement establishing an association between the European Economic Community and Turkey with regard to the provisions on the coordination of social security systems", COM(2012) 152 final, Brussels, 30.03.2012.

289 For an example, see *Case C-221/11 Demirkan*.

290 For an example, see *Case C-228/06 Soysal*, [2009] ECR I-1031.

3.3.2.3 In the Association Council Decisions

The Association Council took few decisions that lay down in concrete terms the rights to be enjoyed by Turkish workers that were already legally employed in a Member State; however, it failed to adopt any decisions that would facilitate the free movement of workers, services or freedom of establishment. The case law of the Court concerning the interpretation of provisions of those decisions with relevance for the free movement of persons between Turkey and the Member States of the EU is examined in detail in the following part. For our purposes, it suffices to mention the most important decisions adopted by the Association Council and the most important provisions contained therein.

3.3.2.3.1 Decision 2/76

The first decision adopted on the implementation of Article 12 of the Ankara Agreement, i.e. the provision providing for the establishment of free movement of workers, was Decision 2/76 of the Association Council.[291] It laid down the rules for the implementation of the first stage of free movement of workers, which was to last four years. It was replaced in time by Decision 1/80 on the Development of the Association.[292] Its only relevant and important provision for free movement of workers for our purposes today is the standstill clause contained in its Article 7, which read as follows: "The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their territory." In other words, the standstill obligation as far as the workers' rights are concerned goes back to 20 December 1976, when Decision 2/76 was adopted and is deemed to have entered into force.

3.3.2.3.2 Decision 1/80

Decision 1/80, which was adopted on 1 December 1980, aimed "to improve the treatment accorded to Turkish workers and members of their families in relation to the arrangements introduced by Decision 2/76 of the Association Council".[293] In what became Article 13 of Decision 1/80, the scope of the standstill clause, which was embodied in Article 7 of Decisions 2/76, was broadened to include the family members of Turkish workers. All other provisions contained in the Decision, concern the rights of Turkish workers who are already legally resident and employed in a Member State. Even though they have no implications for the free movement of workers between Turkey and the Member States of the EU, a brief account of the content of those provisions might be useful to provide an overall view of the extent of rights

291 It was adopted on 20 December 1976.
292 This decision was not published in the Official Journal.
293 See the preamble to Decision 1/80.

enjoyed by the Turkish workers and their families, once they are legally resident and employed in a Member State of the EU.

It is also important to underline that some of the provisions of the Decision were modelled after the first measures that applied regarding free movement of Community workers during the transitional period. Most of Article 6 of Decision 1/80, copies Article 6 of Regulation No. 15 of 1961,[294] which illustrates the intention that the progressive establishment of free movement of workers between Turkey and the EEC at the time, is to follow the steps of development of this freedom within the Community. Just like Council Regulation No. 15 did for Community workers, Article 6 of the Association Council provides for the gradual integration of Turkish workers into the labour force of a Member State. Article 6 reads as follows:[295]

> '1. … a Turkish worker duly registered as belonging to the labour force of a Member State:
> - shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;
> - shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment service of that State, for the same occupation;
> - shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.'

The importance of Article 6 became apparent when the Court interpreted the right of access to the labour market in line with the Court's jurisprudence in this area, i.e. as necessarily implying a right to legal residence. The Court reasoned that a different interpretation would deprive the right of access to

294 The Regulation is not available in English. For the Dutch version, see Verordening No. 15 met betrekking tot de eerste maatregelen ter verwezenlijking van het vrije verkeer van werknemers binnen de Gemeenschap, Publicatieblad van de Europese Gemeenschappen, 1073/61, 26.08.1961.

295 Compare with the wording of Article 6 of Regulation No. 15, which provides as follows: "1. Na één jaar regelmatige arbeid op het grondgebied van een Lid-Staat heft de onderdaan van een andere Lid-Staat die een betrekking heft, recht op verlenging van zijn arbeidsvergunning voor hetzelfde beroep.
2. Na drie jaar regelmatige arbeid verkrijgt deze onderdaan vergunning om een ander beroep in loondienst uit te oefenen waarvoor hij de nodige vakbekwaamheid bezit.
3. Na vier jaar regelmatige arbeid verkrijgt de betrokken onderdaan vergunning om ieder beroep in loondienst te oefenen, onder dezelfde voorwaarden als die welke gelden voor nationale werknemers."

the labour market and the right to work of all effect.[296] In addition, Article 6(2) set out certain legitimate causes of interruption to employment.[297]

Article 7 of Decision 1/80 regulates the rights enjoyed by family members of a Turkish worker in the territory of a Member State.[298] Family members duly authorised to join the worker have to wait for a period of three years to be able to 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.[299] In addition, Article 9 provides for equal access to general education for children of Turkish workers.[300]

Another important provision interpreted generously by the Court is Article 10(1) of Decision 1/80,[301] which is the special provision providing for non-discrimination based on nationality regarding Turkish workers. It provides as follows: "The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers."

Last but not least, Article 14(1) of Decision 1/80 is worth mentioning as it provides that "[t]he provisions of this section shall be applied subject to

296 See, *Case C-192/89 Sevince*, [1990] ECR I-3461, para. 29; *Case C-36/96 Günaydin*, [1997] ECR I-5143, para. 26; *Case C-1/97 Birden*, [1998] ECR I-7747, para. 20.

297 Article 6(2) makes distinction on the basis of the type and length of periods in which a Turkish worker was not working. Accordingly, the first sentence of that provision concerns periods of inactivity involving only a brief cessation to work, such as absences for annual holidays, maternity leave, short period of sickness, etc. Such absences are treated wholly as periods of legal employment within the meaning of Article 6(1). The second sentence concerns periods of inactivity due to long term sickness or involuntary employment. While it is not possible to treat the latter periods of inactivity as legal employment, they may not always result in the Turkish worker losing the rights which he had already acquired. See, *Case C-230/03 Sedef* [2006] ECR I-157, paras. 49-51.

298 As to the definition of a "member of the family" of a Turkish worker, the Court interpreted the concept in line with the interpretation given to the concept in the area of free movement of Union workers. See, *Case C-275/02 Ayaz* [2004] ECR I-8765.

299 First and second indents of Article 7(1) of Decision 1/80. The Court established further that once a family member fulfills 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 *a fortiori* to a family member who has legally resided in a Member State for at least five years. See, *Case C-329/97 Ergat*, [2000] ECR I-1487, paras. 38-39.

300 Article 9 of Decision No 1/80 provides as follows: "Turkish children residing legally in a Member State of the Community with their parents who are or have been legally employed in that Member State, shall be admitted to courses of general education, apprenticeship and vocational training under the same educational entry qualifications as the children of nationals of that Member State. They may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area."

301 For an evaluation of the precise scope of Article 10(1) by the Court, see *Case C-171/01 Wählergruppe Gemeinsam*, [2003] ECR I-4301.

limitations justified on grounds of public policy, public security and public health". Before the introduction of Directive 2004/38/EC (the Citizenship Directive), these concepts were interpreted in line with EU law, and the procedural guarantees and protection accorded to Community nationals regarding expulsion under Directive 64/221/EEC were also accorded to Turkish nationals falling within the scope of Association Law.[302] However, after the introduction of the Citizenship Directive, the Court in *Ziebell* ruled that it was no longer possible to extend the scheme of protection offered to Union citizens to Turkish nationals, as the status of Union citizenship "is intended to be the fundamental status of nationals of Member States, [… which] justifies the recognition, *for Union citizens alone*, of guarantees which are considerably strengthened in respect of expulsion".[303] *Ziebell* came as a surprise, since the Court had acknowledged only a year ago that it "follows from Article 2(1) of the Association Agreement, that [it] has the objective of *bringing the situation of Turkish nationals and citizens of the Union closer together* through the progressive securing of free movement for workers and the abolition of restrictions on freedom of establishment and freedom to provide services".[304]

3.3.2.3.3 Decision 3/80

Lastly, Decision 3/80 concerned the application of social security schemes of the Member States of the EC to Turkish workers and members of their families.[305] This proved to be the most problematic area concerning the rights of Turkish nationals. There was no specific provision on social security in the Ankara Agreement. As mentioned above, it was Article 39(1) AP that provided that "[b]efore the end of the first year after the entry into force of this Protocol, the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the Community and their families residing in the Community".

It took the Association Council almost a decade to adopt Decision 3/80. Its aim 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/EC[306] or made direct references to them. However, the adoption of this decision was only a first step in granting full and equal social security rights to Turkish workers and their families. For the aim stipulated

302 See, *Case C-136/03 Dörr and Ünal*, [2005] ECR I-4759.

303 Emphasis added. *Case C-371/08 Ziebell*, para. 73. See, K. Hamenstädt, "The Protection of Turkish Citizens Against Expulsion—This Far and No Further? The Impact of the Ziebell Case," *German Law Journal* 41, no. 1 (2013): 239-67.

304 *Case C-92/07 Commission v Netherlands*, [2010] ECR I-03683.

305 OJ 1983 C 110/60.

306 Regulation (EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 194/2, 5.7.1971.

in Article 39 AP to be fully achieved, further measures implementing Decision 3/80 were required. Unfortunately, the initial interpretation provided by the Court in *Taflan-Met*, did not add much clarity to the field.[307]

On 8 February 1983 the Commission submitted to the Council a proposal for a Regulation to bring this Decision 3/80 into force within the Community and to lay down supplementary detailed rules for its implementation.[308] However that proposal, which concerned the social security rights of the largest group of third country nationals (TCNs) in Europe, was never adopted. A recently updated Commission proposal has been adopted by the Council as the position of the EU within the Association Council; however, the latter proposal has still not been adopted by the Association Council.[309]

In conclusion, Association Council decisions were important first steps towards achieving free movement of workers between Turkey and the Member States of the EU. Even though some of these steps, i.e. provisions of Decisions, needed to be complemented with further more specific steps to entitle individuals to directly effective rights,[310] Turkish nationals were able to rely on those which were sufficiently specific and precise. In that sense, the latter provisions could be qualified as an embodiment of already existing "legal constraints" on Member States, which could be placed in the first category of constraints consisting of directly effective, i.e. justiciable law. Since these rights were raised in more than sixty cases in front of the Court, by now most of them are well established and entrenched. They demonstrate the concrete minimum achieved on the way to establish full free movement rights.

While these specific provisions falling within the first category of "legal constraints" defined in the introduction constitute the current minimum, the broader programmatic provisions that do not have direct effect and fall within the second category, such as Article 12, 13 or 14 AA, embody the final objective pursued by those provisions. The specific provisions are just first steps taken

307 Compare *Case C-277/94 Taflan-Met and Others*, [1996] ECR I-4085; to *Case C-262/96 Sürül*, [1999] ECR-I 2685. See also, S. Peers, "Equality, Free Movement and Social Security," *European Law Review* 22(1997): 342-51; Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," 1652-53.

308 OJ 1983 C 110, p.1. *Case C-277/94 Taflan-Met and Others*, paras. 34-35.To a large extent, Commission's proposal was based on Council Regulation (EEC) No 574/72 of March 21, 1972 laying down the procedure for implementing Regulation (EEC) 1408/71, OJ L 74/1, 27.3.1972.

309 See, Council of the European Union, Interinstitutional File: 2012/0076 (NLE), Subject: Council Decision on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community, and Turkey with regard to the adoption of provisions on the coordination of social security systems, Brussels, 20 November 2012, 14798/12, SOC 820 NT 29.

310 For an example, see *Case C-277/94 Taflan-Met and Others*. For a brief discussion of the case, see Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," 1652-53.

to gradually fulfil the broader objectives contained in the Treaties. As demonstrated by the Court's case law below, that is the reason why if unclear, these specific provisions are interpreted in the light of the broader objectives they serve. It should be noted that the fact that general provisions are not directly effective does not mean that they are not binding. It simply means that individuals are not able to rely on those provisions in national courts. The Contracting Parties of the Agreement are under the obligation to give them effect. In short, since both types of provisions are legally binding, arguably both would equally constitute constraints on Member States when negotiating a future Accession Agreement.

It should be emphasised however, that as a first step, these decisions aimed to ensure the rights of workers and their families who were already legally resident on the territory of a Member State of the EU. The next step, which was to institute free movement of workers between Turkey and the Member States, was to follow later. Those next steps were never taken. However, as far as free movement existed at the time the Additional Protocol or the first Decisions were adopted, it was protected by the standstill clauses contained in those instruments,[311] which seemed to have been forgotten for a while. Nowadays, it is those clauses that are the source of any change, since the migration policies of Member States were much more liberal in the 1970s and early 1980s.

Since it is the Court's recent case law on the standstill clauses that provides for the partial establishment or re-institution of free movement of workers, services and establishment between Turkey and some of the Member States of the EU, the focus in the following section is on those cases. They are important for our purposes as they demonstrate that if standstill clauses had been respected, there would already be substantial amount of free movement between Turkey and the EU, which would make the discussion on a PSC untenable as it could imply a step back even from the existing free movement regime. Even if the level of freedom of movement of the 1970s and early 1980s is not likely to be achieved under the existing Association regime, the case law of Court results in the removal of some of these "new restrictions".

3.3.2.4 Case law of the Court of Justice

So far the Court has delivered more than sixty judgments on EU-Turkey Association Law.[312] While some recent cases concern free movement of workers,

311 Article 7 of Decision 2/76, which was replaced by Article 13 of Decision 1/80; and Article 41(1) AP.

312 For an overview of EU-Turkey Association Law, see K. Groenendijk and M. Luiten, *Rechten van Turkse burgers op grond van de Associatie EEG-Turkije* [Rights of Turkish Nationals on the Grounds of the EEC-Turkey Association] (The Netherlands: Wolf Legal Publishers, 2010); N. Rogers, *A Practitioners' Guide to the EC-Turkey Association Agreement* (The Hague: Kluwer Law International, 2000); K. Groenendijk, "The Court of Justice and the Development of

service providers and freedom of establishment between Turkey and Member States of the EU,[313] which will be examined in more detail below, most of the cases in the area of Association Law concern the rights of Turkish workers and their families who are already legally resident and employed in a Member State, in other words cases concerning various provisions of Decision 1/80.[314] While it is important to take note of these rights, and the fact that they have been further complemented and strengthened with other measures aiming to improve the rights of TCNs,[315] the focus in the following part is on the rules of admission to Member States and free movement of persons between Turkey and the Member States of the EU.

Before proceeding to the part on free movement, what follows below is a brief historical account of the Court's case law establishing that it has interpretative jurisdiction over Association instruments, that they form integral part of EU law, and that individuals deriving rights from these instruments are able to rely on them. That case law is of paramount importance as it has emphasized again and again the objective of the Association regime as well as the central role played by the free movement of workers, services and

EEC-Turkey Association Law," in *Grenzüberschreitendes Recht – Crossing Frontiers: Festschrift für Kay Hailbronner*, ed. G. Jochum, W. Fritzmeyer, and M. Kau (C.F.Müller, 2013), 413-28; D. Martin, "The Privileged Treatment of Turkish Nationals," in *The First Decade of EU Migration and Asylum Law*, ed. E. Guild and P. Minderhoud (Martinus Nijhoff Publishers, 2012), 75-91.

313 A. Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?," *European Law Journal* 19, no. 3 (2013); M. T. Karayigit, "Vive la Clause de Standstill: The Issue of First Admission of Turkish Nationals into the Territory of a Member State within the Context of Economic Freedoms," *European Journal of Migration and Law* 13(2011); Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary."

314 T. Theele, "Rights of Turkish Workers on the Basis of the EEC/Turkey Association Agreement," in *Migration, Integration and Citizenship, Volume II: The Position of Third Country Nationals in Europe*, ed. H. Schneider (Forum Maastricht, 2005); K. Groenendijk, "Citizens and Third Country Nationals: Differential Treatment or Discrimination," in *The Future of Free Movement of Persons in the EU, Volume 2*, ed. J. Y. Carlier and E. Guild (Brussels: Bruylant, 2006); T. Takács, "Legal status of migrants under the association, pertnership and cooperation agreements of the EU: How far from EU citizenship?," in *Globalisation, Migration, and the Future of Europe: Insiders and Outsiders*, ed. L. S. Talani (Routledge, 2012), 82-88.

315 The most relevant instruments in this area are Directive 2003/86/EC on the right to family reunification, OJ L 251/12, 3.10.2003, applicable as of 3 October 2005; and Directive 2003/109/EC on the rights of long-term residents, OJ L 16/44, 23.01.2004, applicable as of 23 January 2006. For an extensive elaboration on how these instruments complement the rights of Turkish nationals under Association Law, see Peers, "EU Migration Law and Association Agreements," 53-87. See also, Groenendijk, "Citizens and Third Country Nationals: Differential Treatment or Discrimination."

establishment. By now it constitutes a solid body of case law that is followed and given effect by the national courts of some of the Member States.[316]

3.3.2.4.1 Establishing the Court's jurisdiction

The first case to reach the Court of Justice concerning the Ankara Agreement and its Additional Protocol was that of Mrs. Demirel. She came to rejoin her husband in Germany on a visitor's visa.[317] She overstayed her visa and was faced with an order to leave the country. She challenged the order relying on Articles 7 and 12 AA together with Article 36 AP. In addition to the preliminary references sent by the national court on the interpretation and application of those provisions, the Court also had to deal with the issue of admissibility raised by the German and the UK governments. They contested the Court's jurisdiction to interpret the Ankara Agreement and its Protocol, on the ground that the latter were "mixed" agreements and argued that as far as free movement of workers was concerned, Member States' commitments in this field concerned the exercise of their own powers.[318]

The Court disagreed. First, it reminded Member States of its earlier case law,[319] in which it had established that an agreement signed by the Council under Article 228 and 238 EEC is considered an act of one of the Community's institutions, and that "as from its entry into force, *the provisions of such an agreement form an integral part of the Community legal system*".[320] Hence, it followed that it had jurisdiction to give preliminary rulings concerning the interpretation of such an agreement. It further explained that:

> '…[s]ince the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent,

316 It is especially the national courts of Germany and the Netherlands, both of which host sizable Turkish communities, that follow and apply the Court's Association case law. In many instances they resolve arising issues in line with the case law of the Court, without making preliminary references. For an example, see N. Tezcan/Idriz, "Dutch Courts Safeguarding Rights under the EEC-Turkey Association Law. Case Note on District Court Rotterdam Judgments of 12 August 2010, and District Court Roermond Judgment of 15 October 2010," *European Journal of Migration and Law* 13(2011): 219-39. It should be noted however, that despite hosting large Turkish communities too, there has been no single reference from the Belgian, Danish or French national courts until 2014. See (forthcoming), K. Groenendijk, "The Court of Justice and the Development of EEC-Turkey Association Law," in *Degrees of Free Movement and Citizenship*, ed. D. Thym and M.H. Zoetewij Turhan (Martinus Nijhoff, 2015).

317 She was not able to obtain a family reunification visa, because of the stricter family reunification rules introduced in 1982 and 1984. Those rules increased the continuous and lawful residence requirement for Mr. Demirel from three to eight years. As he was working there since 1979, he was not able to meet the stricter requirement. See, *Case 12/86 Demirel*, paras. 2-3.

318 Ibid., para. 8.

319 The Court referred to *Case 181/73 Haegeman*, [1974] ECR 449.

320 Emphasis added. *Case 12/86 Demirel*, para. 7.

> take part in the Community system, *Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty*. Since freedom of movement for workers is, by virtue of Article 48 et seq. of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238.'[321]

Before establishing its jurisdiction to interpret the Ankara Agreement and its Protocol, the Court lastly recalled its *Kupferberg* judgment,[322] in which it ruled that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil … an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement".[323]

The rest of the judgment was disappointing for Mrs. Demirel. She was not entitled to rely on Article 12 and Article 36 AP, even if the deadline to establish free movement of workers between Turkey and the Member States of the EC at the time had expired. Since those provisions were of programmatic nature, they were not "sufficiently precise and unconditional to be capable of governing directly movement of workers".[324] This implied that Turkish nationals could rely on other provisions of the Agreement, which fulfilled the conditions of direct effect.

As important as *Demirel* was, it did not resolve all questions concerning Association Law. The issues that came up in the following case, *Sevince*, were: firstly, whether the Court had jurisdiction to interpret decisions of the Association Council; and secondly, whether the provisions of those decisions which were sufficiently clear, precise and unconditional, were capable of having direct effect.[325] The Court answered both questions in the affirmative.

In its reply to the first question, the Court referred to a judgment it had delivered in the framework of the Association Agreement with Greece,[326] in which it had already ruled that decisions of the Association Council were directly linked to the Agreement to which they give effect, and that as such they also "form an integral part, as from their entry into force, of the Community legal system".[327] Hence, the Court ruled that it also had jurisdiction to rule on the interpretation of Association Council decisions. In addition, according to the Court, its finding was reinforced by the function of Article 267 TFEU

321 Emphasis added. Ibid., para. 9.
322 *Case C-104/81 Kupferberg*, [1982] ECR 3641.
323 *Case 12/86 Demirel*, para. 11.
324 Ibid., para. 23.
325 See, *Case C-192/89 Sevince*. Mr. Sevince was a Turkish national, who tried to rely on the provisions of Decision 1/80 to challenge the refusal of Dutch authorities to extend his residence permit.
326 See, *Case 30/88 Greece v Commission*, [1989] ECR 3711, para. 13.
327 *Case C-192/89 Sevince*, para. 9.

"to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system".[328]

As to the second question, the Court established that the provisions of an Association Council decision had to satisfy the same conditions as those applicable to the provisions of an Association Agreement mentioned in *Demirel*.[329] According to the Court, the fact that in *Demirel* it established that some provisions of the Ankara Agreement "set out a programme does not prevent the decisions of the Council of Association which give effect in specific respects to the programmes envisaged in the Agreement from having direct effect".[330]

Sevince and the following judgments, revealed how instrumental Association Council decisions were in implementing the general objectives set by the Ankara Agreement and its Protocols. Thanks to their specific and unconditional nature, Turkish workers and their family members were able to invoke most of the provisions of Association Council decisions in national courts. However, except for the standstill clause contained in those decisions, which the Court interpreted to cover "substantive and/or procedural conditions governing the first admission" into the territory of a Member State,[331] all other provisions concern the rights of Turkish workers who are already legally resident on the territory of a Member State.

In recent years it is possible to witness a limited movement of persons between Turkey and some Member States of the EU. This limited movement, did not result from instruments adopted by the Association Council to give effect to the freedoms, but from the case law of the Court of Justice interpreting the standstill clauses that are contained in the Additional Protocol and in the above-mentioned Association Council Decisions. This case law established that some measures introduced by some Member States, such as the visa requirement introduced by Germany on service providers, constituted "new restrictions" prohibited by the standstill clauses,[332] and by virtue of being incompatible with Association Law, they had to be removed. The removal of some of these barriers resulted in a complicated and fragmented regime, the effects of which are analysed in more detail below. However, before proceeding to the analysis of specific case law in different areas of free movement, first a general introduction as to the aims and nature of standstill clauses is provided, as all the cases that follow concern those clauses.

328 Ibid., para. 11.
329 Ibid., para. 14.
330 Ibid., para. 21.
331 *Case C-92/07 Commission v Netherlands*, para. 49.
332 See *Case C-228/06 Soysal*.

3.3.2.4.2 Aims and nature of the standstill clauses

To begin with the main aim of these two clauses, since it plays an important role in how the Court interprets them, they aim "to create conditions conducive to the gradual establishment of freedom of movement for workers, of the right of establishment and of freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms…".[333] Even if those provisions allow the retention of existing obstacles, the Court notes that "it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation"[334] of those freedoms.

Standstill clauses performed an important function in the Community context as well. They were used during the transitional period and similarly aimed to prevent Member States from introducing new obstacles or aggravate existing ones, so as to prepare the ground for future harmonization measures. One of the first and most seminal judgments of EU law, *Van Gend en Loos*,[335] was a case concerning a standstill provision: Article 12 of the EEC Treaty, which had a similar nature and purpose to that of Article 41(1) AP.[336]

As to the nature of the standstill clauses, they have direct effect,[337] however, they do not confer any substantive rights on individuals. They rather serve as quasi-procedural rules which determine, *ratione temporis*, the laws of a Member State that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise one of the freedoms in a Member State.[338] To put it differently, after the entry into force of the instruments containing the respective standstill clauses, that is 1 January 1973 for the Additional Protocol and 1 December 1980 for Decision 1/80, Member States are allowed either not to act, that is to keep the existing obstacles in place,[339] or take steps to lift those obstacles. However, it should be noted that once a Member State lifts an obstacle, it is not allowed to re-introduce it.[340] In other words, the standstill clauses freeze the most favourable conditions for the

333 *Case C-317/01 Abatay and Others*, [2003] ECR I-12301, para. 72.

334 *Case C-16/05 Tum and Dari*, [2007] ECR I-07415, para. 61.

335 *Case 26/62 Van Gend en Loos*.

336 Article 12 of the EEC Treaty provided as follows: "Member States shall refrain from introducing between themselves any new customs duties or imports or exports or any charge having equivalent effect and from increasing those which they already apply in their trade with each other."

337 *Case C-192/89 Sevince*, paras. 18 and 26; *Case C-37/98 Savas*, [2000] ECR I-2927, para. 49; *Case C-317/01 Abatay and Others*, paras. 58-59; *Case C-16/05 Tum and Dari*, para. 46; *Case C-228/06 Soysal*, para. 45.

338 *Case C-16/05 Tum and Dari*, para. 55.

339 *Case 77/82 Peskeloglou*, [1983] ECR 1085, para. 13; *Case C-317/01 Abatay and Others*, para. 81; *Case C-16/05 Tum and Dari*, para. 61.

340 *Joined Cases C-300/09 and C-301/09 Toprak and Oguz*, [2010] ECR I-12845.

exercise of a freedom and prohibit the Member States from taking backward steps. This has been dubbed as the "accumulative rights approach".[341]

To give a few examples as to what has been found to qualify as "a new obstacle" in the EU-Turkey Association context: introducing a work permit requirement for service providers,[342] making stricter immigration rules with regard to those seeking entry to establish themselves in a Member State,[343] introducing a visa requirement for service providers,[344] increasing the fees charged for issuing or extending residence permits,[345] and introducing a requirement for family members to prove a basic level of German language proficiency prior to their entry into Germany,[346] were all considered to constitute new obstacles prohibited by the two standstill-clauses.

Lastly, it should be noted that the standstill clauses used in Association Law are not absolute. There are some limitations to the application of those clauses. Firstly, these clauses do not apply to Turkish nationals whose position in a Member State is not lawful, that is Turkish nationals who have not complied with the rules of the Member State as to entry, residence, employment or establishment.[347] Secondly, by virtue of Article 59 AP, which stipulates that Turkish nationals shall not be treated more favourably than EU nationals, new restrictions on the freedoms are allowed as far as they also apply to EU citizens.[348] Finally, as proclaimed by the Court recently, derogations from these clauses are possible both on the grounds of public policy, public security, and public health, and on the ground of an overriding reason in the public interest.[349]

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341 A. Hogenboom, "Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)," *European Law Review* 35(2010): 713.

342 *Case C-37/98 Savas*. See, A. Ott, "The Savas Case – Anologies between Turkish Self-Employed and Workers?," *European Journal of Migration and Law* 2(2000): 445-58.

343 *Case C-16/05 Tum and Dari*.

344 *Case C-228/06 Soysal*.

345 *Case C-242/06 Sahin*, [2009] ECR I-8465; and *Case C-92/07 Commission v Netherlands*. See, Hogenboom, "Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)," 707-19.

346 *Case C-138/13 Dogan*, judgment of 10 July 2014, n.y.r.

347 *Case C-242/06 Sahin*, para. 53; *Case C-317/01 Abatay and Others*, para. 85.

348 For a more detailed elaboration, see *Case C-92/07 Commission v Netherlands*. See also, Hogenboom, "Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)," 716-18. For another example of a compatibility check with Article 59 AP, see *Case C-325/05 Derin*, [2007] ECR I-6495; for details see, Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," 1662-64.

349 *Case C-225/12 Demir*, judgment of 7 November 2013, n.y.r., para. 40. Even though the Court mentioned the possibility of introducing these restrictions/derogations only regarding Article 13 of Decision 1/80, it is not difficult to foresee that these will apply by analogy to Article 41 AP. As the Court noted in an earlier judgment, the Court is of the opinion that the two standstill clauses are of the same kind and must be acknowledged to have

a) Case law on free movement of workers

Just like in the area of free movement of services and freedom of establishment, the case law carrying the potential to remove the barriers in front of free movement of workers is generated by the standstill clause contained in Decisions 2/76 and 1/80. Article 7 of Decision 2/76 provided that "[t]he Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their respective territories". Article 13 of Decision 1/80 added the phrase "and members of their families" in order to broaden or clarify the scope of the provision. The most important case in this area is the recent *Demir* judgment delivered on 7 November 2013.[350] The judgment is cryptic and concise, however, it confirms the Court's dictum in *Commission v Netherlands* to the effect that issues relating to first entry fall within the scope of the standstill clause contained in Decision 1/80.[351] Hence, it is worth having a closer look at *Demir*.

However, for a better understanding of *Demir*, a brief overview of the Court's previous judgments interpreting the standstill clause would be useful, so as to show how the Court gradually changed its approach to the interpretation of that clause. Thus, the analysis below begins by the first case, in which this clause was ever mentioned, and proceeds to the more recent cases in which the Court broadened its interpretation of the clause, by drawing analogies from its case law on the standstill clause on the freedom of establishment and the freedom to provide services contained in Article 41 AP. Last but not least, follows the analysis of the *Demir* case.

– *First mention of the standstill clause*

When the wording of Article 7 of Decision 2/76 and Article 13 of Decision 1/80 are examined, one is left with the impression that both the material and personal scope of those provisions are limited. The material scope is limited to "the conditions of access to employment", whereas the personal scope is limited to "[Turkish] workers (and their families) legally resident and employed in [Member States'] respective territories". However, as the analysis below reveals, except for the first case in which the clause was implicitly mentioned (*Demirel*), the Court interpreted the scope of the standstill much more broadly than it appears to be at first sight.

In *Demirel*, which was discussed above, the Court implied that standstill had a limited scope. After underlining that Article 36 AP grants the Association Council "exclusive powers to lay down detailed rules for the progressive attainment of freedom of movement for workers in accordance with political

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the same meaning. See, *Case C-37/98 Savas*, para. 50; and *Case C-317/01 Abatay and Others*, 70-71.

350 *Case C-225/12 Demir*.

351 *Case C-92/07 Commission v Netherlands*, para. 49; referred to in *Case C-225/12 Demir*, para. 34.

and economic considerations arising in particular out of the progressive establishment of the customs union and the alignment of economic policies",[352] the ECJ acknowledged that the only decision adopted on the matter, Decision 1/80, concerned "Turkish workers who are already duly integrated into labour force of a Member State".[353] It added that, without explicitly mentioning Article 13, regarding those workers, Decision 1/80 prohibited "any further restrictions on the conditions governing access to employment".[354] However, emphasised the Court, there was no such decision taken in the area of family reunification.

Moreover, according to the Court, it was not possible to infer from Article 7 AA, the provision laying down the principle of loyal cooperation, "a prohibition on the introduction of further restrictions on family reunification".[355] What the latter provision did was to merely "impose on the contracting parties a general obligation to cooperate in order to achieve the aims of the Agreement".[356] It could not confer direct rights on individuals, which had not been conferred on them by other provisions of the Agreement.

In *Sevince*, the second case concerning Association Law, the Court established that "Article 7 of Decisions 2/76 and Article 13 of Decision 1/80 contain an unequivocal 'standstill' clause regarding the introduction of new restrictions on access to the employment of workers legally resident and employed in the territory of the contracting States".[357] This meant the clauses had direct effect.

– *Broadening the scope of the standstill clause by interpretation*

In *Savas*, which was the third case mentioning a standstill clause, it established that Article 41(1) AP is a provision of the same kind as Articles 7 of Decision 2/76 and Article 13 of Decision 1/80.[358] Even if the Court occasionally mentioned the different wording of Article 13,[359] it used its case law on the two clauses interchangeably to shed light on one another. In subsequent case law, it confirmed that the two standstill clauses are of the same kind and added that they must be acknowledged to have the same meaning and objective.[360]

As far as the substantive scope of Article 13 is concerned, the Court does not seem to limit it in any way. While a strict interpretation of Article 13 would mean that it applies only with regard to new restrictions *on the conditions of access to employment*, as the wording of the article suggests, in practice the Court

352 *Case 12/86 Demirel*, para. 21.
353 Ibid., para. 22.
354 Ibid.
355 Ibid., para. 24.
356 Ibid.
357 *Case C-192/89 Sevince*, para. 18.
358 *Case C-37/98 Savas*, para. 50.
359 *Case C-317/01 Abatay and Others*, para. 69.
360 Ibid., paras. 70-71; *Case C-242/06 Sahin*, para. 65.

seems to interpret the provision much more broadly. This is clearly illustrated in paragraph 63 of the *Sahin* judgment. It reads as follows:

> 'It is also settled case-law that the standstill clause enacted in Article 13 prohibits generally the introduction of *any new measure having the object or effect* of making *the exercise* by a Turkish national in its territory of the freedom of movement for workers subject to more restrictive conditions than those which applied at the time Decision 1/80 entered into force with regard to that Member State concerned.'[361]

This is quite a sweeping prohibition covering every new obstacle, which according to the Court affects *the exercise of free movement of workers*, i.e. not just access to employment in the territory of the host Member State. While the Court has been consistent regarding the broad substantive scope of Article 13,[362] it raised some doubts as to its personal scope recently in *Demir*.

In *Abatay*, the Court explained clearly why the substantive and personal scope of Article 13 should not be interpreted restrictively. It emphasized that the purpose of the clause could not be the protection of the rights of Turkish nationals as regards employment, "since those rights are already fully covered by Article 6 of that decision".[363] The German government argued that the standstill clause did not prevent it from introducing new restrictions, but merely from making them applicable to Turkish workers and their families who are already lawfully resident on its territory.[364] The Court found the latter argument:

> '… *paradoxical and liable to deprive Article 13 of any meaning*, since a Turkish national who is already lawfully employed in a Member State no longer needs the protection of a 'standstill' clause as regards access to employment, as such access has already been allowed and the person concerned subsequently enjoys, for the rest of his career in the host Member State, the rights which Article 6 of that decision expressly confers on him. On the other hand, the 'standstill' requirement as regards conditions of access to employment is intended to ensure that the national authorities refrain

361 Emphasis added. The Court refers to *Case C-317/01 Abatay and Others*, paras. 66 and second indent of 117; and by analogy, as regards Article 41(1) AP to *Case C-228/06 Soysal*, para. 47.

362 See *Case C-225/12 Demir*, para. 33.

363 *Case C-317/01 Abatay and Others*, para. 79.

364 The German government argued as follows in paragraph 75 of the Abatay judgment: "the Court cannot uphold the argument, relied on by the German Government inter alia, that Article 13 does not affect the right of the Member States to adopt, even after 1 December 1980, new restrictions on access to employment for Turkish nationals, but merely entails that they are not applicable to those Turkish nationals who are already lawfully employed and thereby have a right of residence in the host Member State when those restrictions are introduced. The German Government infers that interpretation from the wording 'workers and members of their families legally resident and employed in their respective territories' which appears in Article 13 of Decision No 1/80." In the following paragraph, the Court explains that the latter interpretation "disregards the system set up by Decision 1/80 and would deprive Article 13 thereof of its effect".

> from taking measures likely to compromise the achievement of the objective of Decision No 1/80, which is to allow freedom of movement for workers, even if, initially, with a view to the gradual introduction of that freedom, existing national restrictions as regards access to employment may be retained.'[365]

The fact that the standstill clause applies not only to workers, but also to their family members, whose reunion with the worker is not conditional on their exercise of paid employment (or in general to the performance of an economic activity), is another proof that the clause aims to protect *ratione materiae*, more than "access to employment", and *ratione personae*, more than only "Turkish nationals already integrated into the employment market of a Member State".[366] Thus, concludes the Court, the scope of the standstill clause is "not limited to Turkish nationals already integrated into the employment market of a Member State, that provision none the less refers to workers and members of their families 'legally resident and employed in their respective territories'".[367]

Given the arguments mentioned above, it can be convincingly argued that the confusion arises from the formulation of Article 13, which would reflect the overall aims of the decision better had it been formulated as 'workers and members of their families legally resident *or* [rather than 'and'] employed in their respective territories'. The following explanation provided by the Court, clarifies and confirms the latter point. It provides that the terms used in the standstill clause make it clear that the "clause can benefit a Turkish national only if he has complied with the rules of the host Member State as to entry, residence and, *where appropriate*, employment and if, therefore, he is legally resident in the territory of that State".[368] This formulation is much more accurate as it also includes family members, who in accordance with Article 7 of Decision 1/80, do have the right t reside, but not the right to work, during their first three years of presence on the territory of the host Member State.

– *Further broadening: Article 13 covers rules of entry into a Member State*

In *Sahin*, which was the first case in which the Court ruled on the excessive administrative fees imposed by Dutch authorities on Turkish nationals in their applications for residence permits and for the extension of their periods of validity, the Court recalled its analysis of Article 13 of Decision 1/80, mentioned above, in paragraphs 75 to 84 of its *Abatay* judgment and confirmed that Article 13 was "not subject to the condition that the Turkish national concerned satisfy the requirements of Article 6(1) of that decision and that

365 Emphasis added. *Case C-317/01 Abatay and Others*, para. 81; for comparison, the Court refers to *Case 77/82 Peskeloglou*, para. 13.
366 *Case C-317/01 Abatay and Others*, para. 83.
367 Ibid., para. 84.
368 Emphasis added. Ibid.

the scope of that Article 13 is not restricted to Turkish migrants who are in paid employment".[369]

The Court repeated its conclusion regarding the personal scope of Article 13 in *Abatay* to the effect that it "is not intended to protect Turkish nationals already integrated into a Member State's labour force".[370] It clarified further that it "*is intended to apply precisely to Turkish nationals who do not yet qualify for the rights in relation to employment and, accordingly, residence under Article 6(1) of Decision 1/80*".[371] Hence, the fact that Mr. Sahin, who entered the Netherlands legally to be able to live with his Dutch wife, and did not satisfy the requirements under Article 6, did not mean he could not rely on Article 13.

It was established that he complied with all relevant rules as to entry and employment, from 12 September 2000 until 2 October 2002, when the validity of his residence permit expired. He applied for the extension of his permit on 23 April 2003, but his application was refused on the ground that he did not pay the relevant administrative fee (EUR 169). Mr. Sahin contested the fee and the refusal of extension after paying for the fee. As stated by the referring court, his residence had to be deemed legal under domestic law after his application for extension. Moreover, it was not disputed that he would have obtained an extension had he paid the fee in time.[372]

Hence, the Court referred to its established case law according to which residence permits have "only declaratory and probative value".[373] Even though Member States are entitled to require from foreigners resident on their territory to be in possession of such permits and apply for their extension in time, and even if they are empowered to impose penalties for the breach of such obligations, "nevertheless Member States are not entitled to adopt in that regard measures which are disproportionate as compared with comparable domestic cases".[374]

As to the substantive scope of Article 13, the Court first repeated its mantra that it "prohibits generally the introduction of any new measures having the object or effect of making the exercise … of the freedom of movement for workers subject to more restrictive conditions that those which applied at the time when Decision 1/80 entered into force with regard to the Member State concerned".[375] Then, with reference to its parallel mantra regarding Article

369 Emphasis added. *Case C-242/06 Sahin*, para. 50.
370 See, *Case C-317/01 Abatay and Others*, para. 83-84; *Case C-242/06 Sahin*, para. 51.
371 Emphasis added. *Case C-242/06 Sahin*, para. 51.
372 Ibid., para. 55-58.
373 Ibid., para. 59.
374 Ibid.; see also the Court's reference to *Case C-329/97 Ergat*, paras. 52, 55, 56, 61, and 62.
375 *Case C-242/06 Sahin*, para. 63; the Court refers to *Case C-317/01 Abatay and Others*, para. 66 and second indent of para. 117; and by analogy to Article 41(1) AP, *Case C-228/06 Soysal*, para. 47.

41(1) AP,[376] it reminded its finding that it prohibits any new restrictions "including those relating to *the substantive and/or procedural conditions governing the first admission* to the territory of [the] Member State [concerned]".[377] Since those two standstill clauses were of the same kind and pursued identical objectives,[378] the Court reasoned that the interpretation of Article 41(1) AP regarding conditions of first entry into the territory of a Member State "must be equally valid as regards the standstill obligation which is the basis of Article 13 in relation to freedom of movement for workers".[379]

The Court repeated its latter finding even more explicitly in *Commission v. the Netherlands*, which dealt with the same issue raised in *Sahin*, the compatibility of the increase in the prices of administrative fees paid by Turkish nationals for their residence permits with the existing standstill and non-discrimination clauses in the Association Law. While the Court found the increase in the fees disproportionate and hence incompatible with both types of clauses, what is important for our purposes is that based on the same reasoning just mentioned above in *Sahin*,[380] the Court reached the following conclusion:

> 'It follows that Article 13 of Decision 1/80 precludes the introduction into Netherlands legislation, as from the date on which Decision 1/80 entered into force in the Netherlands, of any new restrictions on the exercise of free movement of workers, *including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to exercise that freedom*.'[381]

As clear as the Court's reasoning and finding was, Member States were not convinced. A standstill clause on free movement of workers interpreted as broadly as the standstill clause on freedom of establishment and freedom to provide services could have important implications on the immigration policies of Member States when considered in combination with the broadly formulated

376 The Court's parallel mantra provides that Article 41(1) AP prohibits the introduction of any new measures having the object or effect of making the exercise by a Turkish national of freedom of establishment or freedom to provide services on the territory of a Member State, subject to stricter conditions than those that applied at the time when the Additional Protocol entered into force with regard to that State. See, *Case C-37/98 Savas*, para. 69; *Case C-317/01 Abatay and Others*, para. 66; *Case C-16/05 Tum and Dari*, para. 49; *Case C-228/06 Soysal*, para. 47; *Case C-242/06 Sahin*, para. 64.

377 Emphasis added. *Case C-242/06 Sahin*, para. 64. See also, *Case C-16/05 Tum and Dari*, para. 69; *Case C-228/06 Soysal*, para. 49.

378 *Case C-242/06 Sahin*, para. 65; the Court refers to *Case C-37/98 Savas*, para. 50; *Case C-317/01 Abatay and Others*, paras. 70-74.

379 *Case C-242/06 Sahin*, para. 65.

380 See ibid., paras. 64-65; and *Case C-92/07 Commission v Netherlands*, paras. 47-48.

381 Emphasis added. *Case C-92/07 Commission v Netherlands*, para. 49.

Articles 12 to 14 AA. Thus, the issue was bound to reach the Court again, and it did in *Demir*.

– Demir*: Partial tightening of the scope of Article 13 by allowing for justifications*
Few years later in *Demir*, the Court was asked to rule on the same issue, namely: firstly, on whether Article 13 covers rules of entry into the territory of a Member States, and secondly on the meaning and relevance of the "legally resident" requirement mentioned in Article 13, i.e. its personal scope. Even though the Court confirms its previous finding that Article 13 should be interpreted as covering the rules applicable to a substantive and/or formal condition governing first admission of Turkish workers into a Member State, its answer in *Demir* seems to be more elaborate and nuanced, providing for the possibility of derogation on parallel justification grounds to those existing under EU free movement law. As important as this latest judgment is, it is difficult to interpret, as the Court's answers to the second question is not only difficult to reconcile with the first, but also with previous case law. In its response to the second question, the Court seems to be taking a step back from its previous findings on the personal scope of Article 13. However, since the national Court did the most logical thing to do, i.e. it ignored the answer given to the second question,[382] the focus in this section is on the first question as it has important implications for the immigration policies of Member States, which failed to respect the standstill clause.

To begin with the facts of the case, Mr Demir obtained a residence permit in 1993 to reside with his Dutch wife. His residence permit also allowed him to work without a work permit. The issue, giving rise to the current case, arose after his divorce in 1995, when his application for a permit of continued residence, as well as his subsequent appeals were all refused.[383] After concluding an employment contract for three years with a Dutch undertaking in 2007, for the first year of which he was also able to obtain a work permit, he applied for an ordinary fixed-term residence permit in view of employment. However, the latter application, which led to this preliminary reference, was refused on the ground that that he did not have a valid temporary residence permit issued for the same purpose as that of the application for a fixed-term residence permit. Since the law imposing the ground on which Mr. Demir's permit was refused, had been introduced only in 2001, he challenged the refusal on the ground that it violated the standstill clause embedded in Article 13 of Decision 1/80.

382 Raad van State, 2008054871/1/V3, judgment of 30 April 2014. For a detailed analysis of the case, see (forthcoming) N. Tezcan, "The puzzle posed by Demir for the free movement of Turkish workers: a step forward, a step back, or standstill?," in *Degrees of Free Movement and Citizenship*, ed. D. Thym and M.H. Zoetewij Turhan (Martinus Nijhoff, 2015).

383 *Case C-225/12 Demir*, paras. 23-25.

As to the national law that gave rise to the current case, on 1 December 1980, when the standstill clause entered into force, it was the Vreemdelingenwet 1965 (Law on Foreign Nationals, henceforth; Vw 1965) and the Vreemdelingenbesluit 1966 (Decree on Foreign Nationals, henceforth; Vb 1966) that governed the admission and residence of foreign nationals in the Netherlands. Even though, the version in force on 1 December 1980, required foreign nationals to have a valid passport and a valid temporary residence permit if they wished to reside for more than three months in the Netherlands, lack of such a permit on its own was not considered a sufficient ground for refusing admission.

On 1 April 2001, the Law of 23 November 2000 comprehensively revising the previous Law on Foreign Nationals (henceforth; Vw 2000) entered into force, as well as a new decree adopted pursuant to that law (henceforth; Vb 2000). Under Article 1(h) of the Vw 2000, 'temporary residence permit' is defined as "a visa for a stay of more than three months which is applied for by the foreign national in person at a diplomatic mission or consulate of the Netherlands in the country of origin and issued by that mission or consulate after prior authorisation has been obtained from the Netherlands Minister for Foreign Affairs".[384]

Under Article 8(a), a foreign national is entitled to reside in the Netherlands if he has a fixed-term residence permit. Under Article 8(f), a foreign national that has applied for such a permit is entitled to stay in the Netherlands pending a decision on the application. However, under Article 16(1)(a) application for such a permit may be refused if the applicant does not posses a valid temporary residence permit issued for the same purpose as that for which the fixed-term resident permit is sought. Lastly, under Article 3.71(1) of the Vb 2000, an application for a fixed-term residence permit is to be refused if the foreign national does not have a valid temporary residence permit.

It was impossible for Mr Demir to fulfil the requirements of the new law after his divorce, as his initial purpose of entry and residence, which was to live with his wife, had disappeared. In other words, while he entered and resided legally in the Netherlands, by changing the conditions for obtaining a fixed-term residence permit with the new law, which he was not able to satisfy, his residence on Dutch territory became illegal. Hence, the first question referred to the Court was whether the standstill clause covered rules, such as those in Vw 2000, relating to substantive and/or procedural conditions on first admission into the territory of a Member State, where those conditions had the objective to prevent unlawful entry and residence.

After repeating its previous findings on the substantive scope of Article 13,[385] the Court confirmed that the standstill clause was of no assistance to those whose position was not lawful. Hence, the measures taken against

384 *Opinion of AG Wahl in Case C-225/12 Demir*, delivered on 11 July 2013, n.y.r., para. 12.
385 See *Case C-242/06 Sahin*, para. 63; and *Case C-92/07 Commission v Netherlands*, para. 49.

unlawful Turkish nationals could be made more stringent.[386] However, the Court added that while such measures might apply to the effects of such unlawfulness, "they must not seek to define the unlawfulness itself".[387] It further explained that:

> '[w]here a measure taken by a host Member State … seeks to define the criteria for the lawfulness of the Turkish nationals' situation, by adopting or amending the substantive and/or procedural conditions relating to entry, residence and, where applicable, employment, of those nationals in its territory, and where those conditions constitute a new restriction of the exercise of the freedom of movement of Turkish workers, within the meaning of the 'standstill' clause referred to in Article 13, *the mere fact that the purpose of the measure is to prevent, before an application for a residence permit is made, unlawful entry and residence, does not preclude the application of that clause*.'[388]

Such a restrictive measure was prohibited according to the Court, unless it could be justified on the grounds mentioned in Article 14 of Decisions 1/80, i.e. public policy, public security or public health, or in so far as it was justified by an overriding reason in the public interest, and fulfilled the conditions of proportionality.[389] The Court added that "the objective of preventing unlawful entry and residence constituted an overriding reason in the public interest",[390] however, it concluded by repeating that the latter objective did not preclude the application of the standstill clause where the measure taken defined the criteria of lawfulness of the Turkish national's situation.[391]

In short, Vw 2000 constituted a new restriction as it defined the criteria based on which the lawfulness of Mr. Demir's residence was determined. The example of Mr. Demir is a clear illustration of how Member States can change the status of individuals from legal to illegal, by changing how they define legality in their laws. Therefore, even if the 'legality requirement' looks perfectly logical and legitimate at first sight, a closer look reveals the pitfalls attached. Thus, Turkish nationals whose status appears to be illegal should be able to rely on the standstill clause, as it might be the new tighter rules that pushed them to the status of illegality. As argued by Wiesbrock, after examining the merits of the case under the relevant national law, if the status of individual relying on the standstill clauses still does not change, or if there is an issue

386 See *Case C-242/06 Sahin*, para. 53; and *Case C-317/01 Abatay and Others*, para. 85.
387 *Case C-225/12 Demir*, para. 38.
388 Emphasis added. Ibid., para. 39.
389 To be proportionate, a measure needs to be "suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it". See, ibid., para. 40.
390 Ibid., para. 41.
391 Ibid., para. 42.

of abuse of rights, Member States are free to take any measures applicable under their laws to illegal migrants.[392]

It is worth noting that *Demir* is the first case in which the Court introduces the possibility to justify derogations to a standstill clause on the grounds of overriding reasons in the public interest. This is the transplantation of the "rule of reason" Association Law, which was foreseen by Göçmen.[393] Given the longevity of the "transitional period" within which the standstill clauses were to apply, it may be argued that it proved inevitable for the Court to introduce further legitimate grounds of derogation, (in addition to those existing under Article 14), akin to those introduced to free movement law in the Court's seminal *Cassis* ruling.[394] It will be interesting to see, whether this development (the possibility to justify derogations to a standstill clause on the grounds of overriding reasons in the public interest) will remain as something unique to Ankara Association Law, or the Court will introduce the latter possibility in other areas where EU law has made use of standstill clauses.

– *Current state of affairs*

The Court's answer to the first question in *Demir* has serious implications for the immigration policies of Member States. It should be noted that the standstill regarding workers' rights applies as of 20 December 1976.[395] While one would think that the standstill regarding the rights of their family members applies as of 19 September 1980 (since they were explicitly added to the standstill of Article 13 of Decision 1/80),[396] the Court's interpretation in *Dogan* suggests that if the right to family reunification were considered to be the right of the worker, without which he would be dissuaded from using that right,[397] then, arguably the reference date for the reunification of family members could still be considered to be 20 December 1976.

Turkey signed bilateral recruitment agreements with many West European countries in the 1960s.[398] Even though it is known that most of them stopped

392 *Case C-186/10 Oguz*, [2011] ECR I-6957, para. 31-33. See also, Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?," 434.

393 İ. Göçmen, "To Visa, or Not to Visa: That is the (only) Question, or is it? Case C-228/06 Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland [2009] ECR I-1031," *Legal Issues of Economic Integration* 37, no. 2 (2010): 158-61.

394 See *Case 120/78 Cassis de Dijon*, [1979] ECR 649.

395 The date when Decision 2/76, and the standstill clause contained in its Article 7, were adopted and were deemed to have entered into force.

396 The date of adoption of Decision 1/80.

397 *Case C-138/13 Dogan*, paras. 34-36.

398 Bilateral recruitment agreements were signed between Turkey and the Federal Republic of Germany – 30 Sept. 1961 (extended on 30 Sept. 1964); Austria – 15 May 1964; Belgium – 15 July 1964; The Netherlands – 19 Aug. 1964; France – 8 Apr. 1965; Sweden – 10 March 1967. See A. Y. Gökdere, *Yabancı Ülkelere İşgücü Akımı ve Türk Ekonomisi Üzerine Etkileri* [The movement of workforce to foreign countries and its effects on the Turkish economy]

the intake of Turkish workers after the first oil crisis of 1973, an investigation is needed, similar to that conducted by the Commission in the aftermath of *Soysal* case, to establish which of those agreements were still in force at the time Decision 2/76 entered into force. Moreover, as a follow up to *Dogan*, the rules on family reunification existing at the time need to be identified and revised accordingly, if they had been made more restrictive over time.

Hence, Member States, which had no restrictive measure hindering the access of Turkish workers and their family members to their national territory or employment markets in 1976, or when they acceded to the Union, would have to apply the liberal rules of the past. Once Turkish workers have access to the market of a given Member State and are legally employed and resident, they (and in some cases their family members as well) will be able to rely on the system established by Article 6(1) of Decision 1/80 for their gradual integration into the labour force of the host Member State. In the meantime, both workers and their family members would be able to rely on the wide prohibition of non-discrimination under Article 10(1) of Decision 1/80, and the standstill clause to fight any "new" obstacles making the exercise of their rights more difficult.

Demir shows how the standstill clause in combination with the liberal immigration rules Member States had few decades ago, might in practice amount to a market access right for Turkish workers regarding some of the Member States' territories. Obviously, it would be untenable for the nationals of a Member State as citizens of the Union, to be subject to a free movement regime that could in certain instances be more restrictive than the free movement regime of an associate country. For the purposes of our analysis, *Demir* demonstrates the possibility of how step by step prohibited restrictions could be identified and eventually removed, gradually leading to a more liberal regime on free movement. The rights and freedoms accumulated as a result of the Court's case law could undoubtedly be regarded as acquired rights, a minimum, and such compel Member States to go beyond that minimum during accession negotiations.

b) Freedom of establishment

As mentioned above, the Association Council did not prepare any schedule neither did it take any decisions for the implementation of freedom of establishment and the freedom to provide services. Thus, the legal framework regarding these freedoms is comprised of the generally formulated Articles 13 and 14 AA, the standstill clause contained in Article 41(1) AP, and the Court's case law interpreting these provisions.

(Türkiye İş Bankası Kültür Yayınları, 1978). 275 cited in; N. Abadan-Unat, *Bitmeyen Göç: Konuk İşçilikten Ulus-ötesi Yurttaşlığa* [The unending migration: From being a guest-worker to trans-national citizenship], 2 ed. (İstanbul Bilgi Üniversitesi Yayınları, 2006). 58.

The most important cases regarding the freedom of establishment with implications on the free movement of persons between Turkey and the Member States of the EU are the *Tum and Dari* and the *Dogan* cases. While the former case concerns whether the right to first admission of Turkish nationals seeking to exercise the economic freedom falls within the scope of Article 41 (1) AP, the latter case concerns whether they have the right to be joined by their family members and whether that right also falls under the scope of the standstill clause.

– Tum and Dari: *The right to first admission for the self-employed*

Tum and Dari was not the first case in which the Court was asked to interpret Article 41(1) AP,[399] but it was the first case in which the Court was explicitly asked to rule on whether rules of entry (first admission) into a Member State fall within its scope. Put more precisely, the question referred was whether the conditions of and procedure for entry of Turkish nationals seeking to establish themselves in business in a Member State fell within the scope Article 41(1) AP.

The applicants in the case were two Turkish nationals who sought admission on the basis of the Ankara Agreement and more specifically Article 41(1) AP, and requested that their applications be considered with reference to the 1973 Immigration Rules rather than the more restrictive rules of 1994, which were in force at the time.[400] Their applications were, however, considered under the latter immigration rules, which were much more difficult to fulfil. They were not granted leave to enter the UK, upon which they made claims for judicial review. The reviewing court found in their favour, and the Court of Appeal also upheld that decision.[401] The Secretary of State appealed those decisions to the House of Lords, which referred the matter to the Court of Justice for a preliminary ruling.

The Court ruled that Article 41(1) AP did not confer on Turkish nationals a right of entry into the territory of a Member State, since no such right could be derived from Community law. That right was still governed by national law. However, the Court explained that Article 41(1) was supposed to operate as a quasi-procedural rule which stipulated, *ratione temporis*, to which provisions of a Member State's legislation one had to refer to for assessing the

399 The first case on Article 41(1) was *Case C-37/98 Savas*. For a detailed analysis, see Ott, "The Savas Case – Anologies between Turkish Self-Employed and Workers?."

400 Mr Tum and Dari were granted temporary admission to the UK pending their asylum applications. Their applications were eventually refused. However, in the meantime both of the applicants had established their businesses and they applied to the immigration authorities for leave to enter the UK so that they could continue operating their businesses. They based their applications on the Ankara Agreement and Article 41(1) AP.

401 For details see, *Case C-16/05 Tum and Dari*, para. 32.

position of a Turkish national who wished to exercise freedom of establishment in a Member State.[402]

The Court examined the wording and the aim of Article 41(1) AP, and found there was nothing to limit its sphere of application. It was clear that the intention was to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on Member States against introducing any new obstacles to the exercise of that freedom. Thus, the Court concluded that the standstill clause had to be regarded as applicable to rules relating to the first admission of Turkish nationals into a Member State in the territory of which they intend to exercise their freedom of establishment.[403]

In other words, even if in principle the first entry of Turkish nationals to a territory of a Member State is governed by the national law of that State, Member States do not have complete freedom in applying their immigration rules to Turkish nationals intending to establish a business or provide a service. Each Member State needs to determine for itself whether its current immigration rules are more onerous or restrictive compared to the rules that were applicable when the Additional Protocol entered into force with respect to that Member State. If its current rules are more onerous, it is under an obligation to apply the less restrictive rules.

The Court's judgment in *Tum and Dari* is particularly important. It had implications not only for the individual national immigration policies and measures of Member States, but also for measures introduced at Community level that might be considered to constitute new obstacles or new restrictions for Turkish nationals wishing to exercise their freedom of establishment or freedom to provide services in a Member State. In this respect, the logical question was whether Council Regulation No. 539/2001,[404] which lists Turkey as one of the countries whose nationals need to obtain a visa when crossing the EU's external borders, was one of these 'new restrictions', which were prohibited by Article 41(1) AP. Since the Schengen *acquis* in general and this Regulation in particular were introduced after 1 January 1973, when the Additional Protocol entered into force *vis-à-vis* the EEC, it seemed like these measures would also fall under the prohibition of the standstill clause. The *Soysal* judgment, which is dealt under the following sub-section, provided some clarity.

402 Ibid., para. 55.

403 Ibid., paras. 60-63.

404 Council Regulation 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 81/1, 21.03.2001.

– Dogan: *The right of the self-employed to be accompanied by their family members*

Dogan is another recent case with important implications for free movement of persons between Turkey and the EU as it established that economically active people, such as workers and the self-employed, have the right to be joined by their family members, if that had been the case when the respective instruments containing the standstill clauses entered into force regarding certain Member States. In other words, it established that rules on family reunification also fall under the scope of standstill clause, which puts all the Member States under the obligation to freeze their most favourable conditions regarding family reunification in the period after the entry into force of those clauses. Any rules that have been tightened could be qualified as a "new restriction" by the Court, unless objectively justified and proportionate.

As to the facts of the case Mr. Dogan was the managing director of a limited liability company of which he was also the majority shareholder. He lived in Germany since 1998 and had a residence permit of unlimited duration since 2002. In 2011, his wife Mrs. Dogan applied to the German embassy in Ankara for a family reunification visa for herself and two of their children (they had four). In addition to other documents required, she submitted a language certificate issued by the Goethe Institute verifying she had passed a level A1 test with a 'satisfactory' grade (62 points out of 100). Her application was dismissed on the ground that she was illiterate and had obtained the grade by randomly answering multiple choice questions and learning three standard sentences by heart for the writing part of the test. After her application for reconsideration was also refused, Mrs. Dogan brought an action before Verwaltungsgericht Berlin arguing that the language requirement infringed the prohibition to introduce new restrictions under Article 41(1) AP. The national court referred the issue to the ECJ inquiring whether the requirement for family members to prove a basic level of German language proficiency prior to their entry into Germany fell within the scope of the standstill clause.

The Court started its analysis by establishing firstly, that the language requirement, which was introduced after the AP entered into force (1 January 1973), had tightened the conditions for family reunification; secondly, that Mr. Dogan was earning his income from a self-employed activity; and lastly, that his situation fell within the scope of the freedom of establishment. Hence, Mr Dogan's situation had to be analysed in the light of Article 41(1) AP. Then, the Court referred to a previous ruling, in which it had established that family reunification was essential to enable Turkish workers to lead a family life, which would contribute "both to improving the quality of their stay and to their integration in [the host] Member States".[405] Hence, reminding one of its rulings concerning the family rights of Union citizens, it provided that: "The decision of a Turkish national to establish himself in a Member State in order

405 *Case C-138/13 Dogan*, para. 34; the Court refers to *Case C-451/11 Dülger*, judgment of 19 July 2012, n.y.r., para. 42.

to exercise there a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey".[406]

Accordingly, the Court ruled that the language requirement concerned constituted a 'new restriction' under Article 41(1) AP. Following its reasoning in *Demir*, the Court added that such a restriction is prohibited, unless justified by an overriding reason in the public interest, which is also proportionate, i.e. suitable to achieve the objective pursued and not going beyond what is necessary to attain it.[407] The Court established further that the prevention of forced marriages and the promotion of integration, the derogation grounds on which Germany relied, could constitute overriding reasons in the public interest. However, added the Court, the disputed language requirement went beyond what is necessary to achieve those objectives in so far as the absence of proof to that effect automatically led to the dismissal of the application for family unification. The Court noted that in their evaluation, the authorities had to take into account the specific circumstances of each case. Hence, Article 41(1) AP precluded the disputed measure.[408]

Dogan is significant, not only for confirming the application of the rule of reason to the Ankara *acquis*, but also for overturning the Court's finding in *Demirel*, which seemed to require the Association Council to adopt a specific decision to materialize family reunification.[409] Hence, what the Court established for self-employed under Article 41(1) AP, with reference to case law in the area of free movement of workers,[410] should also be valid for workers themselves under Articles 7 and 13 of Decisions 2/76 and 1/80 respectively. This means that Member States which introduced new restriction in the area of family reunification after the entry into force of Decision 2/76 (20 December 1976) and the Additional Protocol (1 January 1973) will have to remove those restrictions, unless they are able to meet the objective justification and proportionality requirements laid down by the Court.

406 *Case C-138/13 Dogan*, para. 35.

407 Ibid., para. 37; with reference to *Case C-225/12 Demir*, para. 40.

408 *Case C-138/13 Dogan*, paras. 38-39.

409 The entire paragraph reads as follows: "The only decision which the Council of Association adopted on the matter was Decision No 1/80 of 19 September 1980, with regard to Turkish workers which are already duly integrated in the labour force of a Member State, prohibits any further restrictions on the conditions governing access to employment. In the sphere of family reunification, on the other hand, no decision of that kind was adopted". See, *Case 12/86 Demirel*, para. 22.

410 See *Case C-138/13 Dogan*, para. 34.

– *Current state of affairs*

The UK took steps to implement *Tum and Dari* and 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 are considered under the business provisions that were in place in 1973.[411] However, applicants who have participated in fraud in relation to their applications will not be accepted. Fraudulent activity has been defined broadly. Having made an asylum claim that has been discredited, for instance, is considered as a fraudulent conduct. This means that were Mr Tum and Mr Dari to apply under the current procedure, their applications would not have succeeded.[412]

As to the rules of other Member States regarding freedom of establishment, the Commission did not take any steps for the implementation of this judgment. There has been no action regarding *Dogan* either, as it is quite recent. In short, the rules on free movement of workers, freedom of establishment as well as the rules on family reunification in force in the Member States when Decision 2/76 and the Additional Protocol entered into force (the first nine Member States), or when the Member States acceded to the Union and took on the *acquis* (Member States that joined in and after the 1980s), is still to be established. *Dogan* is an additional step towards achieving free movement and contributing to the body of case law capable of constituting a constraint on Member States when negotiating Turkey's accession.

c) Freedom to provide services

Even though there are not many provisions that apply to this freedom, only Article 14 AA and Article 41(1) AA, this freedom is more complicated, than the freedom of establishment to which similar provisions apply, due to the Court's case law in this area. As is explained in more detail below, the Court ruled that the freedom to provide services could not be interpreted in line with the corresponding rules existing in EU law. To be more precise, this freedom can be interpreted in line with EU law only in so far as it covers the freedom *to provide* services. It does not cover the freedom *to receive* services, which according to the Court is too closely intertwined with the concept of Union citizenship and as such cannot be transposed to the Association Law with Turkey.

This part will analyse the case law of the Court starting with the *Soysal* judgment, which was delivered immediately after *Tum and Dari*. The issue referred to the Court in *Soysal* was whether the visa requirement introduced by a Member State after the entry into force of the Additional Protocol consti-

411 For details, see the the website of the UK's Border Agency: http://www.ukba.homeoffice.gov.uk/visas-immigration/working/turkish/business/.

412 N. Tezcan/Idriz and P. J. Slot, "Free movement of persons between Turkey and the EU: The Hidden potential of Article 41(1) of the Additional Protocol," in *CLEER Working Papers 2010/2* (The Hague: TMC Asser Institute, 2010), 15-16.

tuted 'a new restriction' to the freedom to provide services that fell within the scope of Article 41(1) AP. After the Court's affirmative reply, the issue in the following case (*Demirkan*) was whether the freedom to provide services under the Ankara *acquis* also covered the freedom to receive services, and if so, whether visa requirements introduced after the entry into force of the Additional Protocol *vis-à-vis* Turkish recipients of services could also be considered as new restrictions. Hence, what follows is an analysis of *Soysal* and *Demirkan*, as well as the measures taken to bring national and EU law in line with those judgments with the aim to establish the currently applicable free movement rules between Turkey and the Member States concerning this freedom.

– Soysal: *Establishing visa requirement is 'a new restriction' under Article 41(1) AP*

The main question referred to the Court in *Soysal* was whether the introduction of a visa requirement constituted a new restriction on freedom to provide services under Article 41(1) AP. Mr. Soysal and Mr. Savatli, the appellants in this case, were Turkish nationals who worked in international transport for a Turkish undertaking as drivers of lorries owned by a German company registered in Germany. They had to obtain Schengen visas to enter Germany[413] even though on the date on which the Additional Protocol entered into force they were permitted to enter the Federal Republic without a visa. The issue arose when Germany's consulate-general in Istanbul rejected their visa applications.

Firstly, the Court verified that, as claimed by the appellants, when the Additional Protocol entered into force with regard to Germany, namely 1 January 1973, Turkish nationals engaged in the provision of services had the right to enter German territory without having to obtain a visa. That requirement was only introduced as from 1 July 1980 with the German legislation on aliens. That legislation was later replaced by the Aufenthaltsgesetz, which implements Regulation No 539/2001 at the Member State level.

The Court ruled that national legislation that makes the exercise of the right to freedom to provide services conditional on issuing of a visa was "liable to interfere with the actual exercise of that freedom, in particular because of the *additional and recurrent administrative and financial burdens* involved in obtaining such a permit which is valid for a limited time".[414] Moreover, the denial of a visa, as in the main proceedings, entirely prevented the exercise of that freedom. Thus, the legislation at issue in the main proceedings consti-

413 That requirement arose under paragraphs 4(1) and 6 of the Aufenthaltsgesetz (German Law on Residence) of 30 July 2004 and Article 1(1) of Council Regulation (EC) No 539/2001, note 404 above . The regulation has been amended several times.

414 Emphasis added. *Case C-228/06 Soysal*, para. 55.

tuted a "new restriction" of the right of Turkish nationals resident in Turkey to freely provide services in Germany within the meaning of Article 41(1) AP.[415]

The Court added that its finding could not be called into question by the fact that the German legislation in force at the time merely implemented a provision of secondary Community legislation (Regulation No 539/2001). In that respect, the Court referred to an earlier judgment[416] in which it had already ruled that international agreements concluded by the Community have primacy over provisions of secondary Community legislation, which in practice means that the provisions of the latter must be interpreted, so far as is possible, in a manner consistent with the former.[417] The Court provided no guidance as to what should happen when it is not possible to interpret the piece of secondary law concerned in line with the provision of the international agreement. The primacy of international agreements would imply an obligation on the part of the EU to adjust the secondary legislation so as to make it compatible with its international obligations.[418]

After the Court declared that the procedure and conditions of first admission fall within the scope of Article 41(1) AP in *Tum and Dari*, it was much easier and straightforward for the Court to take the second step and pronounce that a visa requirement introduced after the entry of the Additional Protocol constituted "a new restriction" prohibited by Article 41(1) AP. Whether there would be a third step or not, was to be decided in *Demirkan*. Even though the Court expressly stated that Article 41(1) AP referred "*in a general way, to new restrictions* inter alia 'on the freedom of establishment' and that *it does not limit its sphere of application* by excluding, as does Article 13 of Decision No 1/80, certain specific aspects from the sphere of protection afforded on the basis of the first of those two provisions",[419] neither the Member States nor the Commission were willing to draw conclusions from existing case law. As it is shown below, the Court proved them right in their reluctance to take any steps.

– Demirkan: *Emerging limits of Association Law?*

In terms of its repercussions for free movement of Turkish nationals between Turkey and the Member States of the EU, *Demirkan* was the most promising judgment in terms of its potential to lift obstacles regarding free movement

415 Ibid., paras. 55-57.
416 *Case C-61/94 Commission v Germany*, [1996] ECR I-3989, para. 52.
417 *Case C-228/06 Soysal*, paras. 58-59.
418 Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," p. 1629-30.
419 *Case C-16/05 Tum and Dari*, para. 60.

of persons,[420] since none of the Member States of the EEC on 1 January 1973 required a visa from Turkish visitors and tourists. The first and most important question raised in the case was whether the scope of the freedom to provide services in Article 41(1) AP encompassed also the passive freedom to provide services.[421] In other words the referring court sought to ascertain whether or not freedom to provide services under Article 41(1) AP had to be interpreted in line with EU law to cover also service recipients. If so, the second question asked whether Article 41(1) AP could be extended to Turkish nationals, like the applicant, Ms. Leyla Ecem Demirkan, who planned to enter Germany not to receive a specific service, but to visit relatives relying on the possibility of receiving services.

The applicant, Ms. Demirkan was fourteen years old and lived with her mother in Turkey, while her stepfather lived in Germany. In 2007, she and her mother applied for a visa to visit her stepfather. Both applications were refused, upon which they appealed. During the appeal process, Ms. Demirkan's mother was issued a visa on the basis of family reunification. However, Ms. Demirkan's claim to a visa free entry, or in the alternative to a visitor's visa, was refused by a judgment of 26 October 2009. The judge found that the standstill clause did not apply to the applicant, even when she invoked receiving services, since that was not the primary aim of her visit but just an incidental result.

As to the legal regime of free movement of persons applicable between Germany and Turkey, when the visa requirement for visitors and tourists was introduced (1980), they were both parties to the European Agreement on Regulations Governing the Movement of Persons between the Member States of the Council of Europe since 1958 and 1961 respectively. The Agreement provided for visa free visits of up to three months for the nationals of other parties to the agreement holding one of the documents listed in its Appendix. Article 7 of the Agreement allowed the temporary suspension of the Agreement on grounds relating to *ordre public*, security or public health. Such a measure had to be notified to the Secretary General of the Council of Europe. Relying on Article 7, Germany introduced a general visa requirement for Turkish nationals as from 5 October 1980.[422]

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420 For an in-depth analysis of the case, see V. Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," *Common Market Law Review* 51, no. 2 (2014): 647-64; and T. Vandamme, "'Le temps détruit tout'? Het dienstverkeer binnen EU-Turkije Associatie na de uitspraak van het Hof van Justitie in Demirkan," *Nederlands Tijdschrift voor Europees Recht* 20, no. 2/3 (2014): 61-67.

421 *Case C-221/11 Demirkan*.

422 See the Declaration contained in a Note Verbale of the Permanent Representation of Germany, dated 9 July 1980, and registered at the Secretariat General on 10 July 1980. Available online at: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=025&CM=&DF=&CL=ENG&VL=1 See also the relevant national law: The Elfte Verordnung

Previously, Turkish nationals were required to obtain a visa prior to their entry to Germany only if they wanted to work there. There was no visa requirement for tourists or visitors. In addition to German law, the obligation to obtain a visa for Turkish nationals for stays not exceeding three months also flew from Article 5(1)(b) of Regulation (EC) No 562/2006,[423] which referred to Regulation (EC) No 539/2001 listing third countries whose nationals had be in possession of visas when crossing external borders in its Annex I.[424] Turkey was listed in Annex I.

In its answer to the fist question the Court firstly explained that the freedom to provide services under Article 56 TFEU, conferred on Member State nationals, who were also Union citizens, the "'passive' freedom to provide services, namely the freedom for recipients of services to go to another Member State in order to receive a service there, without being hindered by restrictions".[425] The Court emphasized that Article 56 TFEU "covers *all European Union citizens* who, independently of other freedoms guaranteed by the FEU Treaty, visit another Member State where they intend or are likely to receive services".[426] According to its established case law, (the Court refers to *Luisi and Carbone*), tourists, people receiving medical treatment and those travelling for educational purposes or business are to be regarded as recipients of services.[427] While the Court's emphasis here seems to be on the fact that it is the *Union citizens*, who are entitled to visit another Member State with the intention to receive services, its established case law dating back to the 1980s, that is prior to the introduction of the concept of Union citizenship, reveals that individuals were entitled to this right (to receive services) under Article 56 TFEU as *nationals of Member States of the EEC/EC.*

After citing its previous findings on Article 41(1) AP,[428] the Court acknowledged that under established case law "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".[429] For a second time

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zur Änderung der Verordnung zur Durchführung des Ausländergesetzes (Eleventh regulation amending the DVAuslG), BGBl. I, p. 782.

423 Council Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13.4.2006.

424 For details, see note 404 above.

425 *Case C-221/11 Demirkan*, para. 35. The Court refers to *Cases 286/82 and 26/83 Luisi and Carbone*, [1984] ECR 377, para. 16; *Case 186/87 Cowan*, [1989] ECR 195, para. 15; *Case C-274/96 Bickel and Franz*, [1998] ECR I-7637, para. 15; *Case C-348/96 Donatella Calfa*, [1999] ECR I-11, para. 16; N. Foster, *EU Law: Directions*, 2 ed. (Oxford: OUP, 2010). para. 37.

426 *Case C-221/11 Demirkan*, para. 36.

427 *Cases 286/82 and 26/83 Luisi and Carbone*, para. 16.

428 See *Case C-221/11 Demirkan*, para. 37-42.

429 Emphasis added. Ibid., para. 43. To that effect, the Court refers to *Case C-317/01 Abatay and Others*, para. 112 and the case law cited therein.

in the history of the Ankara Association Law,[430] the Court refers to the principle established in *Polydor*,[431] in which it ruled that the interpretation given to provisions of EU law relating to the internal market could not be automatically extended by analogy to the interpretation of an agreement concluded by a non-Member State unless there were explicit provisions to that effect in the agreement itself.[432]

According to the Court, the fact that the freedom to provide services embedded in Article 14 AA was "to be guided by" the corresponding Treaty provisions indicated that the latter provisions were to be considered merely as a source of guidance. There was no obligation to apply the provisions of the Treaty.[433] The Court added that the possibility to extend the interpretation of Treaty provision to a comparable, similar or identically worded provisions of an agreement concluded by a third State depended, *inter alia*, on the objectives pursued by each provision in its specific context. Hence, a comparison between the aims and contexts of the Ankara Agreement and those of the Treaty was needed.[434]

The Court argued that there were fundamental differences between the aims and context of Article 41(1) AP and Article 56 TFEU. To begin with comparing the aims of the agreements, regarding the Ankara Agreement, the Court cited its only former case, the *Ziebell* case, in which it established that the agreement "pursues a solely economic purpose".[435] In all other previous cases in which the Court had to identify the objective of the Ankara Agreement, it had consistently held that its objective was Turkey's accession to the Union. Mostly, those references were part of the "Legal context" under which "The EEC-Turkey Association" was described,[436] and sometimes part of the reasoning of the relevant judgment.[437]

Ironically, the reference to the ultimate objective of the Ankara Agreement, i.e. "*facilitating the accession of Turkey* to the Community at a later date" is present in the description of the legal context of the association in both *Ziebell*

430 The first time was in *Case C-371/08 Ziebell*, para. 61.

431 *Case 270/80 Polydor*, [1982] ECR 329.

432 *Case C-221/11 Demirkan*, para. 44. The Court refers to *Case 270/80 Polydor*, paras. 14-16; *Case C-351/08 Grimme*, [2009] ECR I-10777, para. 29; and *Case C-70/09 Hengartner and Gasser*, [2010] ECR I-7233, para. 42.

433 *Case C-221/11 Demirkan*, para. 45.

434 Ibid., para. 47. The Court further refers to *Case C-312/91 Metalsa*, [1993] ECR I-3751, para. 11; *Case C-63/99 G³oszczuk*, para. 49; and *Case C-162/00 Pokrzeptowicz-Meyer*, para. 33.

435 *Case C-221/11 Demirkan*, para. 50. The Court referes to *Case C-371/08 Ziebell*, para. 64.

436 *Case C-37/98 Savas*, para. 3; *Case C-171/01 Wählergruppe Gemeinsam*, para. 3; *Case C-317/01 Abatay and Others*, para. 3; *Case C-136/03 Dörr and Ünal*, para. 7; *Case C-16/05 Tum and Dari*, para. 3; *Case C-325/05 Derin*, para. 3; *Case C-228/06 Soysal*, para. 3; *Case C-242/06 Sahin*, para. 3; *Case C-371/08 Ziebell*, para. 3; *Joined Cases C-300/09 and C-301/09 Toprak and Oguz*, para. 3; *Case C-451/11 Dülger*, para. 3; *Case C-221/11 Demirkan*, para. 4.

437 *Case C-262/96 Sürül*, para. 70; *Case C-37/98 Savas*, para. 52. See also, *Case C-416/96 El-Yassini* [1999] ECR I-1209, para. 49.

and *Demirkan*.[438] That reference is in stark contrast to the Court's conclusion that "the EEC-Turkey Association pursues *solely a purely economic objective*".[439] One cannot help but remind judges not to take the existing legal framework for granted and refresh their memories once in a while, which is admittedly not very appealing given how tedious and repetitive the latter framework has been for the last four-five decades.

According to the Court, the fact that the aim of the Association Agreement is purely economic was reflected not only in the wording of the agreement but also in the titles of its various Chapters,[440] which the Court failed to mention, reflect entirely the titles and structure of the EEC Treaty. As explained above, the structure and content of the Athens and Ankara Agreements followed that of the EEC Treaty and were indeed purely economic, and so was the European *Economic* Community. The aim at the time was accession to the EEC. However, as will be discussed in the next Chapter, it was obvious that States wishing to join the Community/Union had to accept the latter as an evolving entity and had to adopt the entire *acquis communautaire* as it stood at the time of their accession. Hence, when the Community became the Union, the objective of accession to an economic Community was replaced with that of accession to a complex Union with many dimensions going beyond economy. This was verified at the 1999 Helsinki European Summit, in which Turkey's status as a candidate for membership to the *Union* was officially confirmed.[441]

The Court went on to explain that "[t]he development of economic freedoms for the purpose of bringing about freedom of movement of a general nature which may be compared to that afforded to European Union citizens under Article 21 is not the object of the Association".[442] The Court emphasized that there was no general principle of freedom of movement of persons between Turkey and the Union, but as explained above, that is simply because there was no such objective in the original EEC Treaty itself. Only economically active individuals were entitled to free movement initially, i.e. workers, self-employed, service providers and service recipients. As is briefly explained in Chapter 6, the right to free movement of persons with sufficient financial means emerged only in the 1990s.

The Court concluded that Article 41(1) AP could be invoked "only where the activity in question is the corollary of *the exercise of an economic activity* that the 'standstill' clause may relate to conditions of entry and residence of Turkish

438 Emphasis added. *Case C-371/08 Ziebell*, para. 3; *Case C-221/11 Demirkan*, para. 4.
439 Emphasis added. *Case C-371/08 Ziebell*, para. 72.
440 See *Case C-221/11 Demirkan*, para. 51.
441 See the Presidency Conclusions of the Helsinki European Council of 10-11 December 1999, para. 12, in which it was established that "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States". Available online at: http://www.europarl.europa.eu/summits/hel1_en.htm
442 *Case C-221/11 Demirkan*, para. 53.

nationals within the territory of the Member States",[443] implying that receiving services does not qualify as such. The Court contradicts itself immediately in the following paragraph, which explains the role of the passive freedom to provide services in establishing the internal market, which was the crux of the EEC project, as well as of the project to integrate Turkey gradually into that market by means of the association. To provide the Court's reasoning in full with the aim to avoid any misunderstanding, it read as follows:

> 'By contrast, under European Union law, protection of passive freedom to provide services is based on *the objective of establishing an internal market*, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market. It is precisely that objective which distinguishes the Treaty from the Association Agreement, which pursues an essentially economic purpose, as stated at paragraph 50 above.'[444]

The Court seems to be attaching a meaning to the internal market that goes beyond being merely economic.[445] And since it had established that the Ankara Agreement was merely economic, the objectives of those had to be different. As illustrated above, the Court's reasoning is at times contradictory and difficult to follow. It tries to justify it with unconventional and novel arguments, such the importance of "the temporal context" of provisions.[446] In principle, the Court's interpretation of a particular provision is retroactive, which means, it is considered to have always meant so, unless exceptionally the Court explicitly limits the temporal effect of a judgment due to previously unforeseen drastic economic consequences.[447]

Hence, the Court's argument that there was nothing to indicate that the Contracting Parties intended to include service recipients into the scope of the freedom to provide services, since *Luisi and Carbone* was delivered only in 1984, i.e. after the entry into force of the Additional Protocol in 1973,[448] is unconvincing.[449] The Court blatantly ignored the fact that there was secondary

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443 Emphasis added. Ibid., para. 55.

444 Emphasis added. Ibid., para. 56.

445 Hatzopolous successfully summarizes the Court's reasoning in one of the titles of his case note as the "regressive interpretation of the Ankara Agreement" and "idealistic projection of the EU Treaty". The author agrees with his opinion that "it is difficult to see the difference between "an internal market" on the one hand and "an agreement which pursues an essentially economic purpose" on the other". See, Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 657.

446 *Case C-221/11 Demirkan*, para. 57.

447 See *Case 43/75 Defrenne II*, [1976] ECR 455; *Case C-262/88 Barber*, [1990] ECR I-1889. See also, Foster, *EU Law: Directions*: 162.

448 *Case C-221/11 Demirkan*, para. 59-60.

449 With that type of logic one could argue against the extension of almost any principle or legal doctrine of EU law to the Ankara Agreement, since the latter was signed the year *Van Gend en Loos* (Case 26/62, [1963] ECR 1) was delivered. Then, one could even argue

law in place defining clearly the scope of the freedom to provide services dating back to 1964.[450] In other words, the Court did not come up with the interpretation of the concept of services in *Luisi and Carbone*, as it seems to suggest, but simply applied the definition of the concept, as it existed under secondary law.[451]

At the end, the Court ruled that "because of differences of both purpose and context between the Treaties on the one hand, and the Association Agreement and its Additional Protocol on the other, the Court's interpretation of Article 59 of the EEC Treaty in *Luisi and Carbone* cannot be extended to the 'standstill' clause in Article 41(1) of the Additional Protocol".[452] One cannot help but agree with Hatzopolous' that the latter finding in *Demirkan* was "[o]verall: Politically unavoidable yet legally embarrassing".[453]

After *Demirkan*, it is now possible to identify a clearly delineated area concerning the free movement of persons in the Association Law that will have to be brought to the level of the Union *acquis* at the time of accession. While there is some scope for the actual development of the other freedoms over time depending on how liberal the rules on free movement were in the past (when the relevant standstill clauses entered into force), free movement of recipients of services seems to emerge as an area in which the Union rules will have to be adopted in their entirety, in line with existing *acquis* and well-established accession practice that are identified in the next Chapter.

– *Implementation of* Soysal *and current state of affairs*

Ziebell confirmed that it was possible to interpret concepts used under the Ankara *acquis* in line with corresponding concepts of EU free movement (economic) law; however, it established that the latter interpretation could not go as far as encompassing rights and duties connected to the concept of "Union

against the extension of the principle of direct effect, as it was still controversial back in 1963.

450 Directive 64/220/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ 845/64, 4.4.1964, p. 115, was quite clear, as its Article 1(1)(b) stipulated explicitly that it applied to "nationals of Member States wishing to go to another Member State as *recipients of services*". Emphasis added. Moreover, Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ Eng. Spec. Ed. 1963-1964, p. 117, in its Article 1(1) also provided that its provisions "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.

451 See the Court's reference to the relevant Directives, *Cases 286/82 and 26/83 Luisi and Carbone*, para. 12.

452 *Case C-221/11 Demirkan*, para. 62.

453 Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 653.

citizenship".[454] *Demirkan* established that interpreting some of the economic provisions of the Ankara *acquis* in line with EU law, such as the provision of the freedom to provide services, was not possible either. Although not explained clearly by the Court, the underlying reason for the Court's ruling in *Demirkan* seems to be its view of the passive freedom to provide services as the harbinger to the free movement right linked inextricably to the concept of Union citizenship.[455] What the Court seems to be saying is that receipt of services as an economic activity is 'not economic enough' to justify its transposition to Association Law. Hatzopoulos argues that the Court's interpretation is legally untenable, as it "does not correspond to either EU and/or international legal practice or to economic theory".[456]

Since service recipients fall outside the scope of Article 41(1) AP, Member States are allowed to keep the new restrictions they introduced after the entry into force of the Additional Protocol in this area. In other words, unlike after *Soysal*, Member States do not have to take any steps for the implementation of *Demirkan*. After *Soysal*, visa restrictions introduced both at EU and Member State level after 1973, and for Member States joining the Union after their accession dates, had to be eliminated. What follows is an analysis of how *Soysal* was implemented, first at EU and then, at Member State levels, with a view to showing the current picture regarding the free movement of service providers between Turkey and the EU.

To begin with *Soysal*'s implementation at EU level, the most important measure was Council Regulation (EC) No. 539/2001, which listed Turkey as one of the countries whose nationals had to obtain a visa when crossing EU's external borders. Since the Schengen *acquis* in general and this Regulation in particular were introduced after 1 January 1973, when the Additional Protocol entered into force *vis-à-vis* the EEC, these measures also fall under the prohibition of the stand-still clause. The preliminary reference in *Soysal* confirmed precisely that point.

The first step taken by the Commission as a follow up to *Soysal* was to conduct an inquiry into the applicable laws of Member States concerning service providers at the time the Additional Protocol entered into force regarding their territories. The replies to the inquiry revealed that only four Member States allowed visa-free access to their territories at the relevant time: Germany, the UK, Denmark and Ireland. It should be noted that, for instance in 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

454 *Case C-371/08 Ziebell*. See, Hamenstädt, "The Protection of Turkish Citizens Against Expulsion – This Far and No Further? The Impact of the Ziebell Case."

455 See the Court's reasoning in *Case C-221/11 Demirkan*, para. 53. For the inconsistency compare with the Court's reasoning in para. 56.

456 Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 663.

provided on the territories of the UK and Ireland is not known. Since the UK and Ireland are not part of the Schengen area, they were also not included in the Commission's follow up documents issued to clarify the implementation of *Soysal*. Obviously, the fact that they are not part of Schengen does not absolve the UK or Ireland from taking the necessary measures to bring their current immigration rules regarding Turkish service providers in line with their rules applicable on 1 January 1973.

The first document adopted by the Commission was its Recommendation on amending the "Practical Handbook for Border Guards (Schengen Handbook)" adopted at the end of 2009.[457] In the Annex to the Commission Recommendation one finds the "Guidelines on the Movement of Turkish Nationals Crossing the External Borders of EU Member States in order to Provide Services Within the EU" (the Guidelines). According to the Guidelines entry without a visa for service providers is possible only to Germany and Denmark.[458] Three years later, the Commission had to add the Netherlands next to Germany and Denmark in its new Recommendation on amending the "Schengen Handbook",[459] as a result of a judgment of the Raad van State (highest general administrative court) of the Netherlands.[460] Raad van State established that the Netherlands did not require visa for service providers of Turkish nationality when the Additional Protocol entered into force. In their study, Groenendijk and Guild found out that just like the Netherlands, Belgium, France and Italy, also did not have visa requirement in place regarding for Turkish service providers on 1 January 1973.[461] Given how sensitive immigration issues are in most of the Member States, recourse to findings of academics or independent experts would have been more reliable.

The case of the Netherlands is a good example of 'internalization' of rules and case law of Court by the judiciary, which acted as constraint in this context. As far as Belgium, France and Italy are concerned, they are in no way constrained by theirs. It would be interesting to know whether the complete

457 Commission Recommendation of 29.9.2009, C(2009) 7376 final, 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.

458 For a more detailed account of the Guidelines see, N. Tezcan/Idriz and P. J. Slot, "Free movement of persons between Turkey and the EU: The hidden potential of Article 41(1) of the Additional Protocol," in *EU and Turkey: Bridging the differences in a complex relationship*, ed. H. Kabaalioglu, A. Ott, and A. Tatham (Istanbul: IKV, 2011), 82-86.

459 Commission Recommendation of 14.12.2012, C(2012) 9330 final, 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).

460 Raad van State, 201T02803/1/V3, judgment of 14 March 2012.

461 K. Groenendijk and E. Guild, *Visa Policy of Member States and the EU Towards Turkish Nationals after Soysal*, 3 ed. (Istanbul: Economic Development Foundation Publications No 257, 2012). 37.

silence or inactivity of the judiciary in these states in the area of Association Law is due to absence of conflicts, which does not seem very likely; the ignorance of national judges on the topic; or their conscious choice to ignore that area of law.

It should be noted that neither the Commission nor the Member States have passively waited for *Demirkan*. A visa liberalization process was under way between Turkey and the EU in line with the precedent of the Western Balkans. The Council invited the Commission "in parallel to the signature of the readmission agreement between Turkey and the EU, to take steps towards visa liberalisation".[462] Under the readmission agreement, Turkey commits to take back not only its own nationals that are illegally on EU territory, but also all third-country nationals who have reached the EU illegally via Turkish territory.[463] Turkey signed the agreement on 16 December 2013, which was also the date on which the Visa Liberalisation Dialogue was launched.[464] It ratified the agreement on 26 June 2014.[465]

The Commission prepared a "Roadmap towards a Visa-Free Regime with Turkey",[466] which has already been adopted by the Council. It is part of "A Broader Dialogue and Cooperation Framework on Justice and Home Affairs between the EU and its Member States and Turkey",[467] though it is clear that there is not much to talk about or negotiate. The list of requirements in the Roadmap needs to be unilaterally fulfilled by Turkey. Given the Court's ruling in *Demirkan*, the Roadmap seems to be the only viable solution to visa-free travel for Turkish citizens prior to (or in the absence of) Turkey's accession to the EU.

To have a brief look at the implementation of *Soysal* at Member State level, the country to implement visa-free travel for service providers most swiftly was Denmark. It implemented visa-free travel in line with the Guidelines

462 Council of the European Union, Council conclusions on developing cooperation with Turkey in the areas of Justice and Home Affairs, Luxembourg, 21 June 2012, p. 2.

463 For Turkey's role in illegal migration to the EU see, "Facts and figures related to visa-free travel for Turkey," (Brussels: European Stability Initiative, 15 June 2012), 19-20.

464 European Commission – IP/13/1259, 16.12.2013,"Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey". Available online at: http://europa.eu/rapid/press-release_IP-13-1259_en.htm

465 European Commission, "Statement by Cecilia Malmström on the ratification of the EU-Turkey readmission agreement by the Turkish Parliament", 26 June 2014, STATEMENT 14/210. Available online at: http://europa.eu/rapid/press-release_STATEMENT-14-210_en.htm

466 See Annex II to the ANNEX, Council of the European Union, Brussels, 30 November 2012, 16929/12, LIMITE, ELARG 123, JAI 849, pp. 13-28. The Roadmap consists of a long list of requirements that Turkey needs to fulfill in areas related to the readmission of illegal immigrants, document security, migration management, public order and security and fundamental rights. These general titles are then broken into specific titles and then further into specific requirements to be fulfilled, which add up to a 16-page list of requirements.

467 See Annex I to the ANNEX, Council of the European Union, Brussels, 30 November 2012, 16929/12, LIMITE, ELARG 123, JAI 849, pp. 7-12.

issued by the Commission. The country that reported to the Commission that it had no visa requirement in place for service providers at the time the AP entered into force, but did not take any steps to remedy the situation (as far as the author is aware) is Ireland. Conversely, the Netherlands reported that it had no visa requirement in place. However, its national courts disagreed. After a series of appeals, its highest court on the matter (Raad van State) ruled that there was no visa requirement in place, upon which the Commission took steps to include the Netherlands in the Guidelines next to Denmark.

Germany, announced initially that Turkish nationals providing the services mentioned above would be able to enter Germany only after obtaining "visa exemption" from the German embassy in Istanbul, providing for a somewhat eased procedure which arguably still involved "*additional and recurrent administrative and financial burdens*".[468] Though obtaining the "visa exemption" is no longer mandatory, service providers who wish to do so are informed that they are able to obtain that document from the visa section of Germany's consulates and embassy in Turkey.[469]

The UK has taken some half-hearted steps to implement *Soysal*. On 1 May 2012, it introduced a visa facilitation package to improve economic relations between the two countries. In line with this package, Turkish companies were invited to register with the UK Trade & Investment (UKTI) by presenting a list of required documents. Once registration is completed, employees and partners of these companies are able to apply for visa only with a letter from their companies, fingerprints and photos. Moreover, while previously visas were issued for six months only, this period is extended to a year, 5 years or longer.[470] It was announced that visa facilitation would cover students and academics too.[471] As welcome as those steps are, they are a far cry from implementing *Soysal*. The UK had no visa restrictions in place concerning the provision of services in 1973 when the Additional Protocol entered into force, which means that its current visa regime is still incompatible with its obligations under the Ankara *acquis*.

Overall, Denmark and Germany seem to be the most-compliant Member States with the judgment, while Belgium, France, Ireland, Italy and the UK

468 Emphasis added. *Case C-228/06 Soysal*, para. 55.

469 Almanya Büyükelçiliği'nin 21 No'lu ve 05.06.2009 tarihli Basın Bildirisi (German Embassy's Press Release No 21 of 05.06.2009). Available online at: http://www.ankara.diplo.de/Vertretung/ankara/tr/03__Presse/Archiv__Pressemitteilungen/2009__21__pressemitteilung.html.

470 "Şirket çalışanları tek bir mektup ile İngiltere vizesi alabilecek", *Hürriyet*, 19 May 2012. Available online at: http://www.hurriyet.com.tr/ekonomi/20585135.asp. See also the electronic weekly bulletin of the Economic Development Foundation, İktisadi Kalkınma Vakfı E-Bülteni, 16-22 May 2012, "İngiltere Türk Vatandaşlarına Vize Kolaylığı Uygulamasına Ba?ladı". Available online at: http://www.ikv.org.tr/images/upload/data/files/ikv_e-bulten_16-22_mayis_2012.pdf.

471 "İngiltere'den vize kolaylığı", *TRT Haber*, 2 April 2012. Available online at: http://www.trthaber.com/haber/dunya/ingiltereden-vize-kolayligi-35046.html.

are labelled as "ostriches".[472] Like the Netherlands, Belgium, Italy and France seem to have provided incorrect information,[473] the difference being the absence of cases on the matter in their national courts. This provides a mixed picture for our conclusion. In the absence of 'internalization', the constraining effect of law is rather limited as demonstrated here. The Commission is reluctant to take any steps or start enforcement proceedings as far as non-compliance with Association law is concerned.[474] Hence, the need to analyse areas containing rules and procedures with stronger constraining power in the following two Parts of this thesis.

3.4 CONCLUSION

The aim of the first Chapter of Part I was to examine what kind of relationship "association" is and identify exactly what it entails so as to be able to establish the extent to which association agreements could be capable of constraining Member States when drafting an Accession Treaty. More specifically, the aim was to map out the legal regime on free movement of persons that developed under the Association law so as to see if it could preclude Member States from introducing a PSC on free movement of persons in the Turkish Accession Agreement.

Association proved to be a very flexible relationship capable of changing over time. The focus of this Chapter was on different types of Association Agreements signed between the EEC/EC/EU and third European countries. Chapter 2 revealed that even though some of those agreements had more modest objectives initially, as soon as the associates were willing and ready to join the Union, the agreements could be reoriented with the aid of additional instruments to achieve the objective of full membership. That was the fate of almost all association agreements signed with European countries,[475] which served as efficient springboards for EU membership.

Association comprises a wide range of agreements: it has been defined as "anything between full membership minus 1% and a trade and cooperation agreement plus 1%".[476] While the latter part of the definition is not so difficult

472 Groenendijk and Guild, *Visa Policy of Member States and the EU Towards Turkish Nationals after Soysal*: 39.

473 Ibid., 37.

474 Over the half-century in which the Association Law exists, the Commission has taken enforcement action only twice. See, *Case C-465/01 Commission v Austria*, [2004] ECR I-8291; *Case C-92/07 Commission v Netherlands*.

475 The main exceptions are the EEA Agreement (Norway, Iceland and Liechtenstein) and the regime of Bilateral Agreements with Switzerland. However, it should be noted that if these countries were to change their minds, their membership to the Union could be easily arranged, as they are already applying big chunk of the acquis.

476 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 23.

to establish, the definition of "full membership" is more complicated today than forty years ago due to increased differentiation and opt-outs. However, as it will be illustrated in Part II, permanent differentiation and opt-outs have generally been ruled out for new comers. Only transitional measures carrying the purpose of gradual but full integration of the acceding states to various policy areas are allowed. Hence, it will be assumed that full membership requires the adoption or at least the commitment to adopt the *acquis communautaire* in its entirety (as soon as the transitional period expires).

As discussed above, the Association Agreements with Greece and Turkey were the oldest and most comprehensive association agreements, which had the objective of preparing these countries for their future accession to the EEC/EC/EU. The priority of both agreements, which was also the priority of the EEC at the time, was to establish a Customs Union. Establishing an internal market by ensuring free movement of persons, services and capital was the next step. While Greece joined the EEC back in 1981, Turkey is still a candidate for EU membership. It achieved the objective of establishing a Customs Union back in 1996; however, its achievements in the area of free movement of persons are rather mixed.

Even though the Additional Protocol laid down a timetable according to which free movement of workers should have been completed by 1986, after the economic crises of the 1970s, as well as the political crises that Turkey went through in the early 1980s, Member States were not willing to take any steps on this front. The maximum they were prepared to do was to grant rights to Turkish workers who had already settled in the Member States of the EU. Hence, the Association Council adopted decisions providing for the gradual integration of Turkish workers into the labour force of the Member States in line with measures adopted for the integration of Community workers in their host Member States during the transitional period.[477]

While the case law of the 1990s focused on the consolidation of the rights of Turkish workers legally resident and employed on the territories of the Member States of the EU, in the new millennium, there were some cases dealing with the standstill clauses in the Ankara *acquis* that managed to lift some obstacles and provide impetus for the development of free movement of persons between Turkey and some Member States of the EU. Hopes were raised by the Court's wide interpretation of the two standstill clauses, which established that Member States had introduced new restrictions, such as visa requirements for the entry of service providers into their territories,[478] which were incompatible with Association Law.

Despite the different formulation of the standstill clauses, the Court established that both clauses were of the same kind and pursued the same objective. Hence, what was established for Article 41(1) AP was reflected to the case law

477 See footnotes 294-295 above.
478 *Case C-228/06 Soysal*.

on Article 13 of Decision 1/80, which meant that the entry (first admission) of Turkish workers into the territories of Member States was also found to fall within the scope of Article 13.[479] Some of these restrictions were removed and free movement resumed. However, as illustrated above, both the Commission and some Member States are dragging their feet in the implementation of the Court's judgments. This could be interpreted as a sign that Member States take Association Law less seriously than other areas of Union law, which would in turn imply that the constraining power of the former is weaker than the latter.

As courageous as the Court was in its first judgments on the standstill clauses, it was perhaps unrealistic to expect it to maintain that line in *Demirkan* regarding the interpretation of the personal scope of the freedom to provide services, especially given the fact that this would have repercussions for the free movement rules of all the first twelve Member States. Hence, the Court had to be cautious. As observed by Hatzopoulos, the political climate seems to have "compelled the Court to legal acrobatics, since the opposite solution seemed forthcoming from a legal point of view".[480]

Another case that could be considered as retreating from the Court's previous approach was the *Ziebell* case. In *Ziebell*, the Court established that the concept of public policy, which was previously interpreted in line with Directive 64/221/EEC,[481] could no longer be interpreted in line with Directive 2004/38/EC, which replaced the former Directive, and provided for a system of strengthened protection of Union citizens against expulsion. According to the Court, it was justified in recognizing for Union citizens alone this strengthened system of protection.[482] The Court's seems to have changed its view on the matter within a year, since in *Commission v Netherlands*, it had ruled that the objective of the Ankara Agreement was to bring "the situation of Turkish nationals and citizens of the Union closer together through the progressive securing of free movement for workers and the abolition of restrictions on freedom of establishment and freedom to provide services".[483]

The Court's steps back in *Ziebell* and *Demirkan* are in stark contrast to *Demir* and *Dogan*, which are the most recent additions to the list of cases with important repercussions for the free movement of persons between Turkey and the Member States of the EU. The latter two cases are important firstly, because the Court ruled that the first admission of Turkish workers fell within the scope of the standstill clause concerning workers (Article 13 of Decision 1/80 in *Demir*); and similarly, that national rules on family reunification also fell

479 *Case C-92/07 Commission v Netherlands*; *Case C-242/06 Sahin*.
480 Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 654-55.
481 See *Case C-136/03 Dörr and Ünal*.
482 *Case C-371/08 Ziebell*, para. 73.
483 *Case C-92/07 Commission v Netherlands*, para. 67.

within the scope of the standstill on freedom of establishment (Article 41(1) AP in *Dogan*). Secondly, these two cases do not only open the horizons for the free movement of new category of Turkish nationals, i.e. workers and the family members of economically active Turkish nationals, but they also seem to illustrate a return to the Court's previous approach in which it did not shy away from transplanting some of the free movement rules it developed in the framework of the internal market to that of association law. The transplantation of the rule of reason to the Ankara *acquis* in *Demir* and *Dogan* is the most important example to that effect.

Overall, despite the Court's occasional half-heartedness and retreat regarding its approach to Association Law, this does not change the fact that that law constitutes the most developed pre-accession legal regime. Even under the current restrictive interpretation of the standstill clauses, there is much room for the development of free movement of persons.[484] Association Law is crucial not only because it provides the legal context and the past of EU-Turkey relations, but also because it lays down the objectives and commitments as to their future. The case law of the Court, which generally interprets various provisions in the light of those general objectives, contributes further to their internalization and entrenchment. Thus, it could be argued that Association Law constitutes the minimum, the basis that will be complemented and topped up by other rules and policies at the time of accession. The more developed the basis, the less work there will be to do at the time of accession.

It is important to establish again that that the analysis above does not only serve to demonstrate the framework of pre-existing relations between EU and Turkey, but to demonstrate that these relations have been grounded in a solid legal framework with a clear objective that has been spelled out at the very start, i.e. EU membership. Downgrading the commitments established in the Ankara Agreement and subsequent legal instruments would clearly violate Article 7 AA, in which Member States as Contracting Parties to the Ankara Agreement committed to "take all appropriate measures … to ensure the fulfilment of the obligations arising [therefrom]", and to "refrain from any measures liable to jeopardize the attainment of [those] objectives". Another important principle worth emphasising here, though not autochthonous to EU law, is the building block of international law: *pacta sunt servanda*.

To sum up, after placing the Ankara *acquis* in the specific context of association as defined in time by Union law and practice, this Part demonstrated the extent to which free movement rights have already developed under the Association regime as well as the existing potential for their further development. By now Ankara *acquis* constitutes a complex area of EU Association Law

484 As noted by Wiesbrock, the rulings on the standstill clauses require substantial changes in the immigration policies of Member States. See, Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?," 438.

with its own *sui generis* rules and character. While there is a solid body of case law accumulated over the years on the rights of Turkish nationals legally resident and/ or employed on the territory of the Member States, the focus in Chapter 3 was on the case law on the standstill clauses which developed in the last fifteen years, since the latter case law has the potential to further remove some of the obstacles in front of free movement. The current state of affairs revealed that the implementation of those judgments was far from being perfect, exhibiting arguably the weaker constraining power of Association Law in comparison to what Member States consider as being hard core EU Law.

Identifying the constraints flowing from Association Law was important, however it is not sufficient to draw a complete picture of legal constraints that would be at work during the process of accession negotiations. The constraints identified here will join forces with constraints flowing from well-established practice and law of enlargement, the topic of Part II, as well as with constraints flowing from the constitutional foundations of the Union, the topic of Part III. Arguably, the combination of legal constraints flowing from all three levels will provide us with the most accurate appraisal as to the possibility of the eventual inclusion of a PSC in Turkey's future Accession Agreement.