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AVRUPA BİRLİĞİ ENSTİTÜSÜ

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THE JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE AND TURKEY -THE LEGAL PROBLEMS IN TURKEY-EU RELATIONS -

DOKTORA TEZİ

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Danışman: Prof. Dr. Haluk KABAALİOĞLU

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ÖZET

Kırkbeş yılı aşkın bir tarihi olan Avrupa Topluluğu-Türkiye Ortaklığı, nihai amacı olan Türkiye'nin Avrupa Birliği'ne üyeliği sonucunu henüz doğurmamış olsa da, Avrupa Adalet Divanı'nın AT-Türkiye Ortaklık Anlaşması, Katma Protokol ve AT-Türkiye Ortaklık Konseyi Kararları ile ilgili olarak vermiş olduğu sayıları kırkı geçen ve giderek de artan kararlar, Ortaklık Hukuku'nun oldukça dinamik ve kendine özgü bir hukuk dalı olmasını sağlamıştır. Divan kararlarının genelde, gurbetçi olarak anılan Türk vatandaşlarının haklarını ve Avrupa Birliği sınırları içerisinde serbest dolaşım konusunu ilgilendirdiği düşünülse de, bu kararlar, Avrupa Birliği ülkelerinde seyahat etmek, iş kurmak, yerleşmek, eğitim görmek, profesyonel hizmet vermek/almak veya çalışmak isteyen tüm Türk vatandaşlarını ilgilendirmektedir. Divan'ın kararlarıyla oluşan içtihatlar, aynı zamanda Ortaklık Anlaşması'nın diğer tarafı olan AT üyesi ülkelerin Türkiye'de ikamet eden veya Türkiye'de yerleşik şirketlerle istihdam ilişkisi içinde olan vatandaşları açısından da önem arz etmektedir. Eşi benzeri olmayan uluslararası bir anlaşma olan AT-Türkiye Ortaklık Anlaşması'nın da bir parçası olduğu AT-Türkiye Ortaklık Hukuku, Divan tarafından 1987 yılından beri belirtildiği üzere AB Hukuku'nun ayrılmaz bir parçasıdır. Ortaklık Hukuku ve AB Hukuku verilen her yeni kararla birbirlerini etkilemekte ve Türk vatandaşları da giderek AB hukukunun birer parçası olmaktadırlar. Ortaklık Hukuku, Türk vatandaşlarını ve Türkiye'yi AB'ye ve hukukuna bağlayan bir çıpa görevi görmektedir ve bu durum Divan kararlarıyla da sürekli tespit ve teyit edilmektedir. Bu noktada yapılması gereken, Avrupa Adalet Divanı'nın Ortaklık Hukuku ile ilgili kararlarının sürekli gündemde tutulması ve Divan'ın vereceği yeni kararlar ile Ortaklık ilişkisinin üyelik ilişkisine geçişinin hukuki çabasının verilmesidir.

ABSTRACT

Even though the forty-five-year old European Community-Turkey Association has not produced the desired result, the judgments delivered by the European Court of Justice on the EC-Turkey Association Agreement, the Additional Protocol and the decisions of the EC-Turkey Association Council have made the Law of the Association become a quite dynamic and unique field of law. The judgments of the Court are considered to be in relation to Turkish migrant workers or to the issue of the free movement of persons. However, those judgments affect and involve all Turkish nationals who wish to travel, set up a business, settle, receive higher education, provide/receive professional service, or be employed in the EU. At the same time, the legal precedent established by the Court in its judgments concern the nationals of the EC member states who are resident or employed in Turkey. The EC-Turkey Association Agreement is the only one of its kind and it constitutes the Law of the EC-Turkey Association which has been regarded by the ECJ as an integral part of EU law since 1987. Every new judgment of the Court strengthens the interaction between the Law of the EC-Turkey Association and EU law, and hence Turkish nationals integrate into the latter. Turkey and her nationals have been pegged to the EU and its law by means of the Law of the Association, a view which has always been expressed and confirmed by the ECJ. What needs to be done is to put the ECJ's judgments on the agenda and make the effort to transform the 'association' into 'membership' through new judgments of the Court.

ABBREVIATIONS

AD	Anno Domini
AG	Advocate General
Art	Article
CFI	Court of First Instance
EAEC	European Atomic Energy Community
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECR	European Court Reports
ed.	Edition
EEC	European Economic Community
et seq.	(and) The following ones
EU	European Union
GATT	The General Agreement on Tariffs and Trade
ibid	The same place
İKV	İktisadi Kalkınma Vakfı
MS	Member State
no.	Note
OJ	Official Journal
p.	Page
pp.	Pages
para.	Paragraph
supra	Above
trans.	Translation
WWI	World War I
WWII	World War II
WTO	World Trade Organization

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INTRODUCTION

The European Court of Justice ("ECJ") ensures that in the interpretation and application of the EC Treaty the law is observed[1]. In carrying out its mission, the ECJ makes use of powerful tools, the most effective of which is the preliminary ruling procedure.

The preliminary ruling procedure enables the Court to establish fundamental principles and doctrines. Accordingly, uniformity among the decisions of the national courts of the Member States is created.

The Law of the EC-Turkey Association, which comprises the EC-Turkey Association Agreement of 1963, the Additional Protocol of 1970 and the Decisions of the EC-Turkey Association Council, is regarded as a source of EU law, the uniform application of which is observed by the ECJ.

Therefore, the ECJ exercises jurisdiction over the Law of EC-Turkey Association and interprets the provisions thereof. By the same token, the ECJ checks whether Turkish nationals can rely on the Law of the Association in the EC Member States which have made commitments in the Association Agreement to progressively secure freedom of movement for Turkish workers within their territories[2] and to abolish restrictions on Turkish nationals' freedom of establishment[3] and the freedom to provide services[4].

Owing to the parallelism between EU law and the Law of the EC Turkey Association and to the direct reference made by the latter to the former, the ECJ extends the principles that it has established as regards the EU nationals to Turkish nationals, i.e. Turkish workers, family members of Turkish workers, Turkish self-employed persons and Turkish service providers/recipients.

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[1] EC Treaty, Art. 220 (ex Article 164).
[2] Article 12 of the EC-Turkey Association Agreement ('Agreement Establishing an Association Between the European Economic Community and Turkey', OJ 1973, C113).
[3] Ibid, Article 13.
[4] Ibid, Article 14.

Therefore, the similarly worded provisions of the Law of Association are interpreted by the ECJ in the same way as the comparable provisions of EU law. Accordingly, the ECJ makes the Law of Association an integral part of EU law and fastens its judgments on the Law of Association to the whole body of its case law.

In the light of the foregoing, the aim of the present dissertation is to analyze the judgments of the ECJ regarding Turkey or rather her nationals and then to draw firm conclusions and precautionary suggestions from those judgments.

Furthermore, the study herein aims at retracing the last judgments of the ECJ and throwing new light on jurists or practitioners who can look at the Law of the Association objectively and treat the Turkey agreement in the same way same as they do any other international agreement concluded by the EU.

The continuous case law and the new approaches adopted by the ECJ to Turkish nationals made it necessary to present an updated study. Moreover, the misapplication of the ECJ case law necessitated a new classification of judgments according to the status of Turkish nationals who take legal actions against the public authorities of the EU Member States.

Everyone must attach great importance to the ECJ case law on Turkish nationals as the judgments of the Court have paved the way for further litigation not only in respect of Turkish nationals (*gurbetçiler*) working or residing in the EU, but also of Turkish nationals who wish to establish a business or to provide services in the territory of the Community[5]. Moreover, the EU nationals in Turkey may find the judgments of the ECJ intriguing as they can[6], by analogy, benefit from the Court's findings whilst residing in the Turkish territory with the purpose of working, studying or raising a family.

[5] The Additional Protocol, Article 41(1):" The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".
[6] Decision No 1/80 of the EC-Turkey Association Council, Article 11: ": Nationals of the Member States duly registered as belonging to the labour force in Turkey, and members of their families who have been authorized to join them, shall enjoy in that country the rights and advantages referred to in Articles 6, 7, 9 and 10 if they meet the conditions laid down in those Articles".

In order to grasp fully the judicial interpretations the ECJ's judgments, the present study concentrates on the judicial aspects only and does not stray into the social and/or political aspects of the judgments. The ECJ case law in this work is treated as hard law and the future predictions depend on the existing findings of the Court only, a methodologhy which must be inevitably used to find support in case law.

It has always been born in mind in this study that the EC-Turkey Association Agreement is regarded as a binding international agreement within the meaning of the EC Treaty in the judgments of the Court on Turkish nationals and that the ECJ, at the very outset of its case law, confirmed that the EC-Turkey Association Agreement should be dealt with from EU law angle[7]. These assumptions hopefully enhance the findings of the present dissertation in spite of Turkish perspective of its writer.

Similarly, having considered that the Law of the EC-Turkey Association does not only provide for the rights relating to Turkish nationals' free movement and that such a categorization might incline the Member States and/or the Court to apprehensively render subjective decisions, the study herein is entitled 'The Judgments of the ECJ Regarding Turkey'[8] and it has targeted at suggesting possible solutions of much greater scope which are in harmony with the Court's understanding.

In order to form a general opinion, a deductive reasoning has been followed through a historical perspective in order to show that until the EC-Turkey Association ends with Turkey's membership in the EU, the problems arising from the Association can only be resolved by making use of the judgments of the ECJ and making the association operate in a legal understanding rather than of political.

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[7] For this reason, the EC-Turkey Association Agreement hereinafter shall not be alternatively referred to as the Ankara Agreement.

[8] Compare, Ayşe Burcu Kaplan, **Avrupa Birliği'nde Türk Vatandaşları'nın Serbest Dolaşımı**, İstanbul, Beta, 2008; Saadet Yüksel, **Avrupa Birliği'nde İşçilerin Serbest Dolaşımı ve Türk İşçilerinin Statüsü**, İstanbul, Arıkan, 2007; Arif Köktaş, **Avrupa Birliğinde İşçilerin Serbest Dolaşım Hakkı ve Türk Vatandaşlarının Durumu**, Ankara, Nobel Yayın, 1999.

FIRST CHAPTER

HISTORICAL CONTEXT

I. INTRODUCTION

It is difficult to provide an answer to the question of what causes problems in the implementation of international agreements. Can the reason be that the parties to the agreement are prejudiced against each other and thereby fail to honour their promises?

It is evident that deep-seated prejudices impede further developments in bilateral relations. Thus, the context of EU-Turkey Association can not be fully comprehended by looking at the past few decades[9]. Indeed, even one thousand years after they first encountered the Turks, some leading Europeans still argue that Turkey is a country from another continent and that it has no place in the EU[10].

Europeans must always remember that Mrs. Europa and the historian who had named the old continent after her were both born in today's Turkey. Further, history shows that the plans for unification in the old continent would not be formulated if Turks were not the 'others'. The evolution of the idea of 'europe' owes much to the existence of Turks.

Looking backwards does not necessarily mean that the arguments of the past should be carried forwards. But, history tells a lot to those who can not apprehend why a forty five-year-old association between the EC and Turkey could not drift to the next stage.

[9] Kamran İnan, **İnce-Uzun Yol**, Başkent Üniversitesi Stratejik Araştırmalar Merkezi, 2005, p. 5.
[10] See p. 25-26 below.

II. THE HISTORY OF A UNIFIED EUROPE

A. Europa

The name 'europe' is derived from an ancient story[11]: Mythology holds that in 7th century BC, there lived a Phoenician woman called Europa. She is believed to be either the daughter of the Phoenician King Agenor or (according to Homer) of Agenor's son Phoenix. Zeus, the King of Gods, falls in love with Europa and abducts her to Crete by disguising himself as a white bull. Europa bears Zeus three children. The Phoenician woman later marries to the King of Crete and does not return to her homeland, Anatolia. The Roman poet, Ovid (P. Ovidius Naso[12]), in his narrative poem called 'The Metamorphoses', depicts Europa's life and immortalizes her.

The name 'europe', as a geographical term, was first used by Strabo, a Greek geographer who was born in Amasya, Turkey. In his work entitled 'Geographica', Strabo described the continent as Europe[13]. Today we know that Europe is the second smallest continent with borders extending from Arctic Ocean in the north, Mediterranean Sea in the south, Atlantic Ocean in the west, Caucasus Mountains in the south east and Ural Mountains in the east[14].

According to the United Nations, the population of the whole Europe was 731 million in 2005. The population has a tendency to gradually decrease, i.e. the population of Europe is estimated to be 664 million in 2050[15]. In European Union (EU) sources, the population of the EU of 27 members is 497.2 million as of 1 January 2008[16].

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[11] Nedret Kuran Burçoğlu, "Avrupa ve Avrupalılık", **Akademi Dünyası**, Vol. 23 (2004-2005), p. 9.
[12] N. Davies, **Europe - A History**, Pimlico, 1997, p. 178.
[13] http://en.wikipedia.org/wiki/Europa_%28mythology%29
[14] http://en.wikipedia.org/wiki/Europe
[15] http://esa.un.org/unpp/p2k0data.asp
[16] http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=caa10000

B. The Idea of 'Europe'

The idea of a 'unified Europe' dates back to very early times[17]. It is the Ancient Rome which is regarded as the cradle of integration in Europe[18]. At the outset, it may be that the Roman Empire was a source of inspiration for unity. But after the collapse of the Empire, 'Pax Romana' was the goal to reach[19]. Ward's observation, in this respect, is noteworthy: "The pervasive semiotic has always been that of Rome. From the Roman Empire to the Holy Roman Empire to the Treaty of Rome, Europe has always been trying to 'build' Rome"[20].

The notion of political community did not exist in Europe between the ancient times and the early Middle Ages[21]. By the end of this period the Crusades were initiated. These military expeditions were for religious ends and the Muslims were the enemy. This 'holy war' made the Christian society of Europe unify[22].

Until the Age of Enlightenment, the Christianity was the cement of unification in Europe. The Christian nations were uniting against the non-Christians. But the situation changed afterwards. Latin Christians had to be engaged[23] in the 'unification'. Besides, Russia was on the world stage and a new concept had to be formed in order to maintain the peace in Europe. Therefore, Europe, a new modern idea based on western political consciousness[24] rather than on Christianity, emerged. 'Respublica Christiana' ('the Christian Commonwealth') was last referred to in the Treaty of Utrecht of 1713[25].

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[17] Y. Keskin, "Ortak Pazar ve Türkiye", **Avrupa Ekonomik Topluluğu Çeşitli Hukuki Sorunlar Üzerine Konferanslar**, İstanbul Üniversitesi Hukuk Fakültesi Milletlerarası Hukuk ve Milletler Arası Münasebetler Enstitüsü Yayını No. 9, 1973, p. 39.
[18] Haluk Kabaalioğlu, **AB Kurumları ve Avrupa Hukukunun Uluslarüstü Özellikleri Işığında Avrupa Birliği ve Kıbrıs**, İstanbul, Yeditepe Üniversitesi Yayınları, 1997, p. 22.
[19] İnan, p. 7.
[20] I. Ward, **A Critical Introduction to European Law**, 2nd edition, Lexis Nexis, 2003, p. 1.
[21] T. Mastnak, "Europe and the Muslims: The Permanent Crusade?", **The New Crusades**, E. Qureshi and M. A. Sells (eds.), New York, Columbia University Press, 2003, p. 206-207.
[22] Ibid, p. 206.
[23] Ibid, p. 206-207.
[24] Ibid.
[25] Davies, p. 7.

Ward points out that "the idea of Europe is embedded in Christendom"[26]. That is true, but only until the emergence of the Age of Reason.

C. Early Proposals for Unity

First suggestion for a united Europe was made by Pierre Dubois in "De Recuperatione Terre Sancte" ("Treatise on the Way to Shorten Wars")[27]. In his book dated 1306, the French lawyer advised the French King to raise an army of crusaders from secular European states and to establish a Council that would resolve the conflicts of international nature[28]. What Dubois devised to achieve was to enlarge the French dominance in Europe[29]. To do so, he had suggested peculiar ideas just to protect the boundaries and norms of the 'Respublica Christiana' from the heathens[30].

Compared to Dubouis, Podebrad had identified the 'heathen' more specifically: the Turks. Podebrad (George of Poděbrady) was the Bohemian King in 1465 and his plan was one of the first examples as to the integration in Europe. The plan was in fact drafted by the King's consultant Antonie Marigny who had proposed that the Christian rulers of Europe should establish peace among themselves against the Turks[31]. The plan attracted huge attention but Podebrad failed to resist the Pope[32]. The Papacy, because of being kept outside, expelled Podebrad from the Church. Final shot was that the Pope urged the Hungarian King to attack Bohemia and Podebrad was dethroned[33].

In 1623, Emeric Cruce's imagination was beyond Podebrad's. In his work entitled "Le Nouveau Cynee" ("The New Cyneas"), the French monk had devised a 'World Union' rather than the 'Confederation' of Podebrad. Cruce discussed the possibility of establishing a general peace and liberty in the whole world by means of a sovereign 'Union'

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[26] Ward, p.2.
[27] D.Chalmers, **European Union Law**, Volume I, Dartmouth Publishing, 1998, p. 3.
[28] Kabaalioğlu, p. 22.
[29] Chalmers, p. 3.
[30] Ward, p. 2.
[31] Kabaalioğlu, p. 23.
[32] Chalmers, p. 3.
[33] Kabaalioğlu, p. 23.

representing all peoples, even the Turks. The 'Union' would have a 'Council of Permanent Representatives', the meetings of which would be held in Venice[34] where "all the Powers had ambassadors"[35].

Then, the faithfull right-hand man of Henry IV of France, Maximilien de Béthune (Duke of Sully), suggested a 'Grand Design' to allow France have more influence in Europe and to lessen Habsburg's power.[36] According to the Grand Design, Europe would be composed of 15 roughly equal States, under the direction of a 'Very Christian Council of Europe' which is charged with resolving differences and disposing of a common army[37]. Turks were still 'the outsiders' in de Bethune's mind and he had not considered them as 'European'[38].

Another 'pro-confederation' was the German polymath Gottfried Wilhelm Leibniz. He is said to have conceived the European Union in 1677. This versatile man had devised a council or senate that would drive the European confederation. Members of the council would represent entire nations and they would be free to vote without any interference[39]. The Thirty Years' War did concern Leibniz and he viewed that 'universal jurisprudence' is necessary to reunite Europe and to maintain the 'perpetual peace'[40].

Years were passing and Europe was getting accustomed to the Turks. Almost a century after the Grand Design, the Turks were regarded as eligible to take part at European stage. William Penn, in his work entitled "An Essay towards the Present and Future Peace of Europe by the Establishment of an European Dyet, Parliament or Estates[41]" in 1693, devised an assembly called 'Dyet' which is in charge of solving the inter-state conflicts in Europe. Dyet would be composed of the representatives of the European states. Moreover,

[34] Kabaalioğlu, p. 23.
[35] http://www.newadvent.org/cathen/11596a.htm
[36] Kabaalioğlu, p.24-25.
[37] http://en.wikipedia.org/wiki/Duc_de_Sully
[38] Kabaalioğlu, p. 26.
[39] http://en.wikipedia.org/wiki/Gottfried_Leibniz
[40] Ward, p. 2-3.
[41] Available at http://olldownload.libertyfund.org/Texts/LFBooks/Penn0200/PDFs/0479_Pt13_Peace.pdf

Turkey, should it wishes, would be entitled to be represented by ten representatives[42] provided that it abandons Islam and accepts Christianity![43].

John Beller did also have an imagination of unification. In "Some Reasons for a European State Proposed to the Powers of Europe" in 1710, Beller planned a 'European Army' and a 'European Senate' at which 100 cantons of Europe would take part through their representatives[44]. In Beller's view, Turkey should also have been a part of the unified Europe[45].

A further plan for 'perpetual peace' was formulated in 1713 by again a French monk, Charles Castel de St Pierre, who advised the European nations to unite under a confederation[46]. In "Projet pour rendre la paix perpétuelle en Europe[47]", the French is said to have heralded the beginning of the Age of Enlightenment.

D. Seeds of Change: The Federations

In the 18th century, the law and politics were behind the science. Kant predicted that a genius legislator would emerge like great scientific thinkers[48]. In Perpetual Peace[49], the German philosopher asserted that "the law of nations should be founded on a federation of free states". He suggested a federation of nations rather than a state of nations. He was after the idea of 'confederated state' based on common European jurisprudence[50].

Napoleon was well acquainted with the philosophers[51]. But the French general was an extra ordinary figure. After the French revolution, he instigated the Napoleonic Wars but

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[42] Kabaalioğlu, p. 26.
[43] B. Lewis, **Islam and the West**, Oxford University Press, 1994, p. 33.
[44] Chalmers, p. 4.
[45] Kabaalioğlu, p. 27.
[46] Davies, p. 7.
[47] Available at http://gallica.bnf.fr/ark:/12148/bpt6k105087z
[48] A. Briggs, and P. Clavin, **Modern Europe 1789-1989**, 2nd impression, Addison Wesley Longman Limited, 1998, p. 29.
[49] I.Kant, **Perpetual Peace**, M. Campbell Smith (trans.), p.128-129 at http://www.scribd.com /word/full/261743?access_key=6dqxlt9zlbai
[50] Ward, p. 3-4.
[51] Briggs and Clavin, p. 29.

nevertheless wrote in his Memorial that he had fought for the idea of a "federation of free peoples in Europe"[52]. Napoleon believed that his victory would lead to liberty but the result of his campaigns ended with the Vienna Settlement, the result of which the German confederation was created and Switzerland was granted neutrality.

Meanwhile, thinkers such as Saint-Simon also argued for a federal Europe. He was inspired by the British parliament and devised a 'European Parliament' which would have sovereign powers to resolve the issues of common nature[53]. But the idea of federation needed to develop. Even in Switzerland, which was the first example of the realization of 'integration' in Europe during the Helvetic Republic of Switzerland (1789-1803)[54], a civil war had broken out between the catholic and protestant cantons soon after the Vienna Settlement. Fortunately, the Swiss people immediately realized the need for peace and enshrined the cantonal rights in a constitution in 1848. However, a proper Swiss federation could only come into existence by virtue of the constitution of 1874[55].

The Swiss integration was taken as an example in German model where 39 princedoms joined the Confederation to form the German State. Confederation was established but the princedoms were reluctant to relinquish their sovereign rights. Eventually, the Constitution of 1871 was drafted and the German federation was born[56].

Until the WWI, the notion of "United States of Europe" was discussed at many stages by many philosophers and writers. Victor Hugo, the famous French writer, was the staunchest supporter of the idea. He even claimed that he was the representative of a political party which would establish the United States of Europe[57] that would cover the Ottoman Empire and Russia[58].

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[52] Briggs & Clavin, p. 48.
[53] Chalmers, p.4.
[54] Orhan Oğuz, **Ortak Pazar**, İstanbul, Eskişehir İktisadi ve Ticari İlimler Akademisi No. 37-13, 1966, p. 10.
[55] Ibid
[56] Ibid, p. 11.
[57] Ibid, p. 12.
[58] İnan, p. 7.

E. The Interim

On the verge of WWI, the idea of 'united Europe' emerged once again in order to prevent a possible war among the nation-states of Europe. Another goal was to give an answer to the emerging economic powers of that time, e.g. USA, Japan[59]. Nevertheless, the war broke out and the continent was devastated.

The First World War fought between the Allies (France, the UK, Russia and the US) and Germany, Ottoman Empire and Austria-Hungary, and it had catastrophic consequences. Between 1914 and 1918, 1.3 million French, nearly 2 million Germans, half a million Italians and almost 1 million soldiers of British empire lost their lives in the war[60]. The 'Great War' was ended by the Treaty of Versailles as a result of which international organizations such as the League of Nations[61] and the International Labour Organization ("ILO")[62] were established.

In 1922, a well-born Austro-Hungarian count, Count Richard Nikolaus von Coudenhove-Kalergi, founded the Pan-European Union. Coudenhove-Kalergi invited the eminent politicians of Europe to join the Pan-Europa movement. In his book entitled "The Fight for Paneuropa", the Japanese born Count defended and revitalized the idea of 'European Union'[63].

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[59] Chalmers, p. 4-5.
[60] K. Robbins, **The First World War**, Oxford University Press, 2002, p. 153.
[61] The League of Nations was the harbinger of the United Nations. The League did not succeed in achieving its goal which was "to promote international cooperation and to achieve peace and security". In 1946, following the WWII, the powers of the League was given to the United Nations. For detailed information go to http://www.library.northwestern.edu/govinfo/collections/league/
[62] The ILO continues to exist today. Since 1946, it has been a specialized agency of the United Nations. The official web site of the ILO is at http://www.ilo.org/global/lang--en/index.htm
[63] Also see İnan, p. 7 and Oğuz, p. 13.

III. EMERGENCE OF THE EUROPEAN COMMUNITIES

A. WWII and Afterwards

Subsequent to the WWII, France and the United Kingdom were determined to co-operate to prevent any renewal of German aggression. They were intended to strengthen the economic relations between them in the interests of general prosperity[64]. In fact, co-operation among the states was not a new idea. In 1941, the Allied countries had inserted the following into the Declaration of St. James's Place: "The only true basis of enduring peace is the willing cooperation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security"[65].

On 24 October 1945, the United Nations[66] (UN) was established and the United Nations Charter[67] came into force. The Charter provided for provisions that prevent Germany from armaments but France and the United Kingdom, in addition to the shield of the UN, agreed to act in relation to Germany in the event of any threat[68].

Another threat was the Union of Soviet Socialist Republics (USSR). As M. Paul-Henri Spaak, the Belgian Prime Minister and Minister of Foreign Affairs, emphasized at the General Assembly of the United Nations in 1948, there was one Great Power that emerged from the war having conquered other territories, and that Power was the USSR[69]. In USA's view, only a unified and economically powerful Europe could be a hindrance to the USSR. For this reason, the USA began to back Europe. General of the USA Army, George C. Marshall made a speech at Harvard University and initiated the European

[64] Extracted from the Preamble of the 'Treaty of Alliance and Mutual Assistance between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the French Republic' which was signed at Dunkirk, on 4 March 1947. Such Treaty is also known as the Dunkirk Treaty and available on internet at http://www.ena.lu?lang=2&doc=3147
[65] http://www.un.org/aboutun/charter/history/index.shtml
[66] A detailed history of the United Nations is available at http://www.un.org/aboutun/unhistory/
[67] To view the United Nations Charter go to http://www.un.org/aboutun/charter/index.html
[68] Article 1 of the Dunkirk Treaty. supra no. 64 above.
[69] http://www.nato.int/archives/1st5years/chapters/1.htm

Recovery Programme[70]. He believed that the requirements of Europe were more than her ability to pay and hence Europe must have substantial additional help from the USA. As a result, $12.4 billion of aid poured into Western Europe between 1948 and 1951[71]. This amounts to more than $70 billion in today's world.

In 1949, following the preliminary talks, the North Atlantic Treaty was signed in Washington by and between Belgium (by Paul-Henri Spaak), Canada, Denmark, France (by Robert Schuman), Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the USA[72]. Under the North Atlantic Treaty, the USA agreed that an armed attack against one of the European signatories shall be considered an attack against the USA and it undertook to assist such European state by taking actions as it deems necessary, including the use of armed force[73].

B. The Schuman Plan

On 9 May[74] 1950, one of the signatories of the North Atlantic Treaty, Robert Schuman, the Foreign Minister of France, read a declaration[75] to the press on behalf of the French Government. He stressed that the coming together of the nations of Europe required the elimination of the age-old opposition of France and Germany and emphasized the French government's proposal according to which Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe[76]. In France's view,

[70] The Programme is also known as the Marshall Plan.
[71] L. Reichlin, "The Marshall Plan Reconsidered", **Europe's Post-War Recovery**, B. Eichengreen (Ed.), Cambridge University Press, 1995, p.39.
[72] http://www.nato.int/archives/1st5years/chapters/1.htm
[73] Article 5 of the North Atlantic Treaty. Text of the Treaty is available at www.nato.int/ docu/ basictxt/ treaty.htm
[74] At the Milan Summit of European Union leaders in 1985, it was decided to celebrate 9 May as "Europe Day".
[75] Also known as the Schuman Plan.
[76] Quoted from the text of Schuman Declaration. Full text of the Declaration is at http://europa.eu/ abc/symbols/9-may/decl_en.htm

the solidarity in production would make any war between France and Germany not merely unthinkable, but materially impossible[77].

Monsieur Schuman addressed the French government's proposal to all of the Europe[78] but the number of the European states that endorsed the proposal was just six: France, Federal Republic of Germany, Italy, the Netherlands, Belgium and Luxembourg. These six states signed the Treaty of Paris[79] [80] on 18 April 1951 and the Treaty entered into force on 24 July 1952. By the Treaty, the European Coal and Steel Community ("ECSC") was established[81] [82].

C. The ECSC

The ECSC was established "to contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution, in harmony with the general economy of the member States and of a common market"[83]. The common market for coal and steel meant that import and export duties on the movement of coal and steel; measures or practices discriminating among producers, among buyers or among consumers; subsidies or state assistance, or special charges imposed by the state; and restrictive practices tending towards the division of markets or the exploitation of the consumer would be abolished and prohibited[84].

The six founders of the ECSC had designed a Community with four institutions, i.e. High Authority, Common Assembly, Special Council, Court of Justice[85].

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[77] Ibid.
[78] R.H. Folsom, **European Union Law**, 3rd edition, St. Paul, Minn., West Group 1999, p. 2.
[79] For the English version of the Treaty of Paris go to http://www.ena.lu?lang=2&doc=823
[80] Also known as the Treaty Establishing the European Coal and Steel Community.
[81] The Treaty of Paris, Article 1.
[82] On the Schuman Plan and the establishment of the ECSC, see A. Arnull, A. Dashwood, and D. Wyatt, **Wyatt and Dashwood's European Union Law**, 4th edition, London, Sweet & Maxwell, 2000, p. 3-4 ; S. Weatherill and S. Beaumont, **EU Law**, 3rd edition, Penguin Books, 1999, p. 2-3; and E. Szyszczak and A. Cygan, **Understanding EU Law**, 1st edition, London, Sweet & Maxwell, 2005, p. 6-7.
[83] The Treaty of Paris, Article 2.
[84] Ibid, Article 4.
[85] Ibid, Article 7.

The ECSC was the first 'Community' and it was concluded for a period of fifty years from the date of its entry into force[86]. Therefore, it expired on 23 July 2002. While it was in force, the Treaty of Paris was amended by the following treaties: Merger Treaty (Brussels, 1965), Treaties amending certain financial provisions (1970 and 1975), Treaty on Greenland (1984), Treaty on European Union (TEU, Maastricht, 1992), Single European Act (1986), Treaty of Amsterdam (1997), Treaty of Nice (2001) and the Treaties of Accession (1972, 1979, 1985 and 1994)[87] [88].

D. The Treaties of Rome

Despite the ECSC, the political integration in Europe was limited and the idea of integration lacked clear and tangible objectives[89]. The parties to the ECSC were in need of a closer integration[90].

Before the Messina Conference, which was to be held on 1-3 June 1955, the Belgian, Luxembourger and Dutch governments had submitted a Memorandum[91] on 20 May 1955. The three Benelux countries had called for greater economic integration in Europe, especially in the areas of transport and energy, and the peaceful use of nuclear power. The Memorandum was discussed at the Conference at the end of which a Resolution was adopted by the governments of the German Federal Republic, Belgium, France, Italy, Luxembourg and the Netherlands. Let me quote some essential passages from the Resolution:

" (We) believe the moment has come to go a step further towards the construction of Europe. …. this step should first of all be taken in the economic field. (We) consider that the further progress must be towards the setting up of a united Europe by the development of common institutions, the gradual merging of national economies, the creation of a

[86] Ibid, Article 97.
[87] http://europa.eu/scadplus/treaties/ecsc_en.htm#EXPIRATION
[88] For the Official Journal numbers see foot note 114.
[89] Szyszczak and Adam, p. 7.
[90] Arnull, Dashwood and Wyatt, p. 7.
[91] For the original version of the Memorandum go to http://www.ena.lu?lang=1&doc=13819

common market, and the gradual harmonization of their social policies. (We) have agreed on the following objectives:

1- The expansion of trade and the movement of persons call for the common development of large-scale communication facilities.

2- The development of nuclear energy for peaceful purposes will open up prospects of a new industrial revolution far beyond anything achieved during the past hundred years.

3- The setting up of a common European market, free from all customs duties and all quantitative restrictions, is the aim of their work in the field of economic policy"[92].

At the Conference, a committee of experts, under the chairmanship Paul-Henri Spaak, was tasked with drawing up a report as to whether the above mentioned objectives were possible and were likely to work. On 21 April 1956, the Committee submitted its report entitled 'the Report of the Heads of Delegation on the Common Market and Euratom'[93]. According to the Committee:

"The object of a European common market should be to create a vast area with common political economy which will form a powerful productive unit and permit a steady expansion, an increase in stability, a more rapid increase in the standard of living, and the development of harmonious relations between member states"[94].

The ECSC members were intrigued by the 'Spaak report'[95]. The foreign ministers of six Member States gathered in Venice on 29 and 30 May 1956 to deliberate on the report, the Common market and the Euratom projects[96]. Following the Venice Conference,

[92] For the English translation of the Resolution go to http://www.ena.lu?lang=2&doc=987
[93] For the original version of the Report go to http://www.ena.lu?lang=1&doc=13904
[94] Ward, p. 16.
[95] As Spaak, the Belgian Minister for Foreign Affairs, was the Chairman of such Committee, the Report is also known as the Spaak Report.
[96] For the original text of the 'Communiqué de presse' at the end of the Venice Conference go to http://www.ena.lu?lang=1&doc=24126

Le Monde said on 1 June 1956 that: "For the first time, France's partners no longer have the impression that the France's only objective was to delay the advent of a common market..[97]".

The six continued to hold intergovernmental meetings and their work was built on the Spaak report. Eventually, they met on the Capitoline Hill in Rome and on 25 March 1957;

- The Treaty establishing the European Economic Community[98] [99]("EEC"),

- The Treaty establishing the European Atomic Energy Community[100] [101]("EAEC" or "Euratom") and

- a Convention on certain institutions common to the EEC, the EAEC and the European Coal and Steel Community (ECSC) were signed.

E. The EEC

The EEC[102] and the Euratom[103] were set up by the Treaties of Rome. The aim of the EEC was "by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States"[104].

To reach its aim the Community members would:

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[97] For the English translation of "Optimisme à Venise" in Le Monde go to http://www.ena.lu? lang=2&doc= 24127
[98] The Official Journal number of the EEC Treaty is not published. For the English version of the EEC Treaty go to http://www.ena.lu?lang=2&doc=3800
[99] Also known as the Treaty of Rome.
[100] For the English version of the EAEC Treaty go to http://www.ena.lu?lang=2&doc=865
[101] Also known as the Euratom Treaty.
[102] The EEC Treaty, Article 1.
[103] The EAEC Treaty, Article 1.
[104] The EEC Treaty, Article 2

- *"(between themselves) eliminate customs duties, quantitative restrictions in regard to the importation and exportation of goods and all other measures with equivalent effect,*

- *establish a common customs tariff and a common commercial policy towards third countries,*

- *(between themselves) abolish the obstacles to the free movement of persons, services and capital,*

- *introduce a common agricultural policy and a common transport policy, and*

- *establish a system ensuring that competition shall not be distorted in the Common Market"*[105].

Four institutions were brought into being by the EEC Treaty:

- The Assembly which would be composed of 142 delegates from six members and which would exercise the powers of deliberation and of control[106],

- The Council which would be composed of one delegate from each Member State's governments and which would ensure the co-ordination of the general economic policies of the Member States, and dispose of a power of decision[107],

- The Commission which would be composed of 9 members appointed by the Member State's governments and which would ensure the functioning and development of the Common Market[108], and

- The Court of Justice which would be composed of 7 judges with the assistance of two advocates-general and which would ensure observance of law and justice in the interpretation and application of the EEC Treaty[109].

[105] Ibid, Article 3.
[106] Ibid, Articles 137-144.
[107] Ibid, Articles 145-154.
[108] Ibid, Articles 155-163.

The EEC did not have a supranational character like the ECSC. The latter did have the 'High Authority', the members of which were ought to exercise their functions in complete independence without soliciting or accepting instructions from any government or from any organization. Each Member State had agreed to respect this supranational character and to make no effort to influence the members of the High Authority in the execution of their duties[110]. In contrast to the ECSC, the EEC Treaty empowered the Council which is composed of the delegates from the Member States' governments. Within the EEC, the Commission was the "initiator" but "the decision making power was in the hands of the Council"[111]. The Council had the power to approve most Commission legislative proposals[112].

The 'Convention on Certain Institutions Common to the EEC, the EAEC and the ECSC' provided that the Assembly and the Court of Justice of the EEC and the Euratom[113] were to be shared with the ECSC. According to the Convention, the Assembly and the Court of Justice would have jurisdiction over three Communities.

The EEC Treaty is still in force today. However, many amendments[114] have been made. The Treaty is entitled the EC Treaty for the time being[115]. In addition, the original

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[109] Ibid, Articles 164-188.
[110] The ECSC Treaty, Article 9.
[111] Arnull, Dashwood and Wyatt, p. 9.
[112] P. Craig, and G. De Burca, **EU Law - Text, Cases and Materials**, 3rd edition, Oxford University Press, 2003, p. 12.
[113] The EAEC Treaty, like the EEC Treaty, established four institutions: The Assembly, the Council, the Commisson and the Court of Justice.
[114] The EEC Treaty has been amended by: the Merger Treaty in 1965 (OJ 152 of 13.07.1967), the Treaty amending Certain Budgetary Provisions in 1970 (OJ L 2 of 02.01.1971), the Treaty amending Certain Financial Provisions in 1975 (OJ L 359 of 31.12.1977), the Treaty on Greenland in 1984 (OJ L 29 of 01.02.1985), the Single European Act (SEA) on 28 February 1986 (OJ L 169 of 29.06.1987), the Treaty on European Union (the Maastricht Treaty) on 7 February 1992 (OJ C 191 of 29.07.1992), the Treaty of Amsterdam on 2 October 1997 (OJ C 340 of 10.11.1997), the Treaty of Nice on 28 February 2001 (OJ C 80 of 10.03.2001) and also by the Accession Treaties; the Treaty of Accession of the United Kingdom, Denmark and Ireland in 1972 (OJ L 73 of 27.03.1972), the Treaty of Accession of Greece in 1979 (OJ L 291 of 19.11.1979), the Treaty of Accession of Spain and Portugal in 1985 (OJ L 302 of 15.11.1985), the Treaty of Accession of Austria, Finland and Sweden in 1994 (OJ C 241 of 29.08.1994), the Treaty of Accession of Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, the Czech Republic, Slovakia and Slovenia in 2003 (OJ L 236 of 23.09.2003) and the Treaty of Accession of Bulgaria and Romania in 2005 (OJ L 157 of 21.06.2005).

numbers of the Articles were changed by the Amsterdam Treaty[116]. For this reason, when I make reference to the EC Treaty, the Articles will appear as renumbered unless it is necessary to cite also the old numbers.

IV. EUROPE and the TURKS

A. The Turks

Western authors state that the name 'Turk' originated in China where they called the Turks Tujue (T'u-chüe)[117], T'u-küe[118] or Tu-kiu[119]. Turkish historians' theory is different; they assert that the name Turk was first used in a Persian text[120]. As to the time of the use of the word, both sources agree: 5th or 6th century AD (CE). It is noteworthy that the name Turk is not of ethnic origin but of political[121]. Therefore, Turks are people who speak Turkish[122].

The issue of Turks' native land is contentious too. It was either Mongolia and southern Siberia[123] or Minusinsk region (Southern Siberia) according to Soviet archaeologists[124]. From a romantic point of view, Turks dwelled on the edges of the northern steppes and forests from Finland to Pacific[125].

Turks were in the east by contrast to the Europeans. But they were nomads[126] who were travelling to find fresh pasture. The proto-Turks had begun to migrate as early as 1700

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[115] See page 30 below.
[116] OJ C 340 of 10.11.1997
[117] C.V. Findley, **The Turks in World History**, Oxford University Press, 2005, p. 21.
[118] Nicole Pope and Hugh Pope, **Turkey Unveiled-A History of Modern Turkey**, United States, The Overlook Press, 2004, p. 9.
[119] P.B. Henze, "Turks and Turkish", **Wilson Quarterly**, Vol. 16, Issue 3 (Summer 92), p. 24.
[120] H. Salman, "Türk Adı, Türklerin Anayurdu ve Göçler" **Türk Tarihi ve Kültürü**, Cemil Öztürk (Ed.), 2nd edition, Ankara, Pegem A Yayınları, 2004, p. 3.
[121] Ibid
[122] J-P. Roux, **Türklerin Tarihi**, 6th edition, İstanbul, Milliyet Yayınları,1998, p. 16.
[123] Findley, p. 21.
[124] Salman, p. 4.
[125] Andrew Mango, **The Turks Today**, Great Britain, John Murray Publishers, 2004, p. 15.
[126] Mango, p. 15; Salman, p. 4 et seq. and Roux, p. 14 et seq.

AD[127] and their direction was usually towards the west[128]. There were reasons for the migration but one of them played a decisive role: the food shortage[129]. Climate change caused drought which led Turks into migration for 'greener pastures' and inevitably into war with others. Turks needed to fight to maintain their existence and they indeed had such power within their organization: tribes composing steppe nations, the rule of which was 'more powerful one prevails'[130].

Since Turks were organized as tribes they had difficulty in settling in and they appeared at the world stage only in 6th century AD[131] when "Bilge Kaghan re-established the nation, led 22 campaigns and managed to bring into being a Turk empire"[132]. This empire was called Göktürks (or Türk Empires[133]) and it was the first state to bear the name Turk[134].

B. Muslim Turks and First Encounter with Christianity

Despite the Prophet's (Muhammed) death in 632, Islam was expanding under the leadership of the caliphs, the successors of the Prophet. Damascus, Syria, Jerusalem, Egypt, Azerbaijan and Cyprus were conquered one after another in less than fifteen years. In 648, Arabs launched a campaign against Byzantines and attacks continued for the sake of Islam Empire. Under the Umayyads (7th-8th century) and the Abbasids (8th-13th century), the Caliphate's borders extended to Spain in the west and to Pakistan in the east.

Historians' belief is that the Turks made the acquaintance of Muslim Arabs in Maveraünnehir in 651. At the outset, the relations were based on military matters[135]. The

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[127] Salman, p. 4.
[128] Salman, p. 4 et seq.; Pope, p. 9.
[129] Salman, p. 7.
[130] Roux, p. 24.
[131] Mango, p. 15; Findley, p. 21 and 37.
[132] Henze, p. 24.
[133] To have detailed information on Göktürks, see Salman, p. 18 et seq.; Findley, p. 37 et seq. and Roux, p. 48 et seq.
[134] Salman, p. 11 and Findley, p. 37.
[135] N. Yazıcı, "İlk Müslüman Türk Devletleri", **Türk Tarihi ve Kültürü**, Cemil Öztürk (Ed.), 2nd edition, Ankara, Pegem A Yayınları, 2004, p. 33.

Umayyads were discriminative in dealing with Turks but as a result of the missionaries' personal efforts, the Turks had begun to embrace Islam in smaller groups[136].

Turks were skilful in horsemanship and archery. Thus, Arabs used the Turkish prisoners as slave-soldiers[137]. However, conversion to Islam among Turks continued to happen owing to the fact that the Abbasids, in contrast to the Umayyads, were meritocratic rulers[138].

Having been recruited on merit, Turks climbed rapidly in the Caliphate and the slave-soldiers of the past turned out to be trustworthy commanders, governors and eventually the founders of local dynasties[139], such as Tulunids in Egypt[140]. Turkic dynasties continued to be founded in or out the Caliphate, however Turkish presence could not persist[141] until Selçuk Bey's founding of the Seljuk Empire which was "the second of the four empires founded by the Turks in history and the first Muslim Turkish empire founded before the Ottomans"[142].

Selçuk Bey was a member of the Kınık tribe of Oghuz Turks. Most probably due to the inadequateness of pasture, he had left the capital of Oghuz State and headed towards south east[143]. He arrived Cend (Jand), where there was Muslim Turkish population. Selçuk Bey embraced Islam in 985[144] and he became the first Muslim in his family[145].

The Selçuk (Seljuk) Turks were the first Turks encountered with the Christian world or rather with the Eastern Roman Empire. In 1071 at Malazgirt (Manzikert) a Seljuk

[136] Yazıcı, p. 34.
[137] Findley, p. 67.
[138] Yazıcı, p. 34.
[139] Findley, p. 67.
[140] Yazıcı, p. 37; Roux, p. 108.
[141] Findley, p. 68.
[142] Yazıcı, p. 47.
[143] Ibid, p. 48.
[144] Findley, p. 68.
[145] Roux, p. 116.

army won a victory over the Eastern Romans and the way into Anatolia was opened for the Turks[146]".

From the Eastern Roman's point of view "Byzantium was the first Christian adversary of Islam[147]". Alexios I Komnenos, the Byzantine emperor, had made an urgent request to the 'Western world' through his ambassadors. Housley expresses in straightforwardness that the Emperor sought "Western assistance to drive the Turks out of the Byzantine lands in Asia Minor"[148]. Alexios' 'request' is believed[149] to have caused the Pope Urban II to preach at Clermont in 1095. Urban II had spoken to a large group people comprising bishop and knights[150]. Pope Eugene III is quoted as saying that Pope Urban II "had summoned the sons of the Roman church from various parts of the world to free Jerusalem and the Holy Sepulcher from the filth of the pagans"[151]. Authors view that the Pope Urban II's sermon made the Crusades (the First Crusade) start[152].

The rivalry between the Western Christians and the Eastern Churh caused the Byzantines not to benefit from the Crusades. The Pope was furious at the Eastern Romans because his power had not been recognized. As a result, the Romans burned and destroyed İstanbul[153]. The Western Christians had a new enemy: the Eastern Romans.

C. The Turks in Europe: The Ottomans

The history of Ottomans begins with Osman whose forefathers migrated to Iran[154] or Armenia[155] along with the Seljuk Turks. Osman's family was a member of Kayı tribe

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[146] Turgut Özal, **Turkey in Europe and Europe in Turkey**, Nicosia, K. Rustem & Brother, 1991, p. 115.
[147] P. Lock, **The Routledge Companion to the Crusades**, Routledge, 2006, p. 299.
[148] N. Housley, **The Crusaders**, Tempus Publishing, 2002, p. 13.
[149] Housley, 13; Lock 299;
[150] Davies, p. 345.
[151] Otto of Freising, cited by G. Constable, "Historiography of the Crusades", **The Crusades from the Perspective of Byzantium and the Muslim World**, Angeliki E. Laiou and Roy Parviz Mottahedeh (eds.), Washington D.C., Dumbarton Oaks Research Library and Collection, 2001, p. 6.
[152] Housley, p. 13; Locke p. 299; Özal, p.123.
[153] Özal, p. 121-126.
[154] E. Oral, "Osmanlı İmparatorluğu", **Türk Tarihi ve Kültürü**, Cemil Öztürk (Ed.), 2nd edition, Ankara, Pegem A Yayınları, 2004, p. 107.
[155] Roux, p. 190.

from the Oghuz Turks[156]. Due to the Mongol pressure, the tribe had to head to Van and later to Bursa, a city "on the borders of the much diminished Byzantine state"[157].

The Ottoman era lasted from 1299 to 1922. Osman's followers had first stepped on Europe when "they crossed Çanakkale Boğazı (the Straits of Gallipoli)[158]". They stayed in the continent until almost the beginning of the WWI. In this period, İstanbul was conqured and Vienna, now the capital of Austria, was besieged twice. Bulgaria, Romania and Hungary were all owned by Osman's grandsons.

At the beginning, in the eyes of Europeans, Muslims were enemies from different ethnic background. But later, especially the church, viewed that they were infidels who must be converted to true faith[159]. This was true for the Ottomans as well. Ottomans had founded the second and the last Muslim Turkish empire and their dominance had quickly spread through Europe, likewise their image had. They were "the 'other' for Europe and they symbolized the feared, abhorred and natural enemy of Christians"[160]. Turks' empire was "the present terror of the world"[161] and in Luther's view Turks were "the people of the wrath of God"[162]. The truth is, Europe was in the Middle Ages, may be still in the Dark Ages. Lewis asserts that Christians could overcome these kinds of prejudices only in the Age of Reason when they showed an interest in Islam[163]. It is certain that Renaissance opened the Europeans' eyes to the issue of religion but Lewis[164] himself can not give a pro-Turkish quotation dated before 1652.

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[156] Findley, p. 107.
[157] Mango, p. 17.
[158] Lewis, p. 73.
[159] Lewis, p. 73.
[160] Çiğdem Nas, "Turkey-EU Relations and the Question of Identity", **The European Union Enlargement Process and Turkey**, Muzaffer Dartan and Çiğdem Nas (eds.), İstanbul, Marmara University European Community Institute, 2002, p. 222.
[161] Lewis, p. 72.
[162] Ibid, p. 73.
[163] Ibid.
[164] Ibid, p. 78 et seq.

The Ottoman expansion was hard for Christians to stomach[165]. The fall of İstanbul produced an angry reaction from Latin Christians who began to regard Europe as a political unity. Consequently, the hostility towards the Ottomans was used to support the idea of community in Europe which changed the Latin Christians into Europeans[166].

The Europeans regarded the Ottomans with intense dislike until the Age of Reason. Owing either to the decline of the Ottomans or to the impact of enlightenment, Europeans began to view their Muslim rivals 'tolerable'. However, the religion was still an obstacle. William Penn's suggestion should be recalled in this respect. In his opinion the Ottomans could only join the European association if they embraced Christianity[167].

In 19th century the politics was major determinant of Europe's attitude towards the Ottomans. Russia was on the horizon and the Ottomans could not be left alone. In 1856, by virtue of Article 7 of the Treaty of Paris, the Ottoman Sultan was "formally admitted to the Concert of Europe[168]" [169].

The Ottoman Empire ended in 1922 when the Sultanate was abolished by the Grand National Assembly. The Modern Turkish Republic was recognized by the Europeans in 1923 by virtue of the Treaty of Lausanne[170].

Between 1071 and 1922, the Turkish identity was the opposite of the European identity[171]. Today we still experience Europe's fears for Turkey and Turkishness. Among the personal statements[172] that have been made so far, Cardinal Ratzinger's (the then Pope Benedict XVI) interview in Le Figaro in 2004 is worth noting. The Cardinal made a

[165] İnan, p. 29.
[166] Mastnak, p. 207-208.
[167] See pages 8-9 above.
[168] The Concert of Europe was founded by Britain, Russia, Austria and Prussia. It had an official status like the League of Nations.
[169] Lewis, p. 33.
[170] English version of the Treaty of Lausanne is available at wwi.lib.byu.edu/index.php/Treaty_of_Lausanne
[171] İnan, p. 29.
[172] For the views of the leading European figures, see İnan, p. 30 et seq.

statement[173] to the effect that the EU is a Christian union where the Turks have no place[174]. Moreover, Bolkestein, a European commissioner, is quoted as saying that "the European Union is in danger of imploding in its current form if 70 million Turkish Muslims were allowed to join"[175]. Apparently, Turkey's way towards the EU is indeed long and thin[176].

V. TURKEY and the EEC

A. The Appeal

The first ten years of the European Economic Community was a real success. Between 1958 and 1968, the founders of the EEC experienced an increase in internal revenue of 60 % whereas the unemployment rate decreased by 47 %[177]. The rate of per capita income increased 8.9 % between 1958 and 1964[178]. In the same period, the EEC members almost doubled the export figures[179].

The economic success had attracted the developing countries to the EEC. First Greece[180] then Turkey[181] signed Association Agreements with the Community. The aim of such agreements was the inclusion of the signatories in the EEC. Malta and Spain followed the first two countries[182].

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[173] The Cardinal is quoted as saying that "The roots that have formed Europe, that have permitted the formation of this continent, are those of Christianity. Turkey has always represented another continent, in permanent contrast with Europe. There were the [old Ottoman Empire] wars against the Byzantine Empire, the fall of Constantinople, the Balkan wars, and the threat against Vienna and Austria. It would be an error to equate the two continents...Turkey is founded upon Islam...Thus the entry of Turkey into the EU would be anti-historical". Extracted from Bencivenga's article on Christian Science Monitor at http://www.csmonitor.com/2005/0422/dailyUpdate.html

[174] İnan, 30.
[175] http://www.asianews.it/index.php?l=en&art=1442
[176] Stated by Turgut Özal, soon after Turkey's application to the EEC for full membersip, İnan, p. 5.
[177] Keskin, p. 49.
[178] Oğuz, p. 49.
[179] Ibid, p. 65.
[180] The Athens Agreement
[181] The EC-Turkey Association Agreement
[182] Keskin, p. 49.

B. Turkey's Motivation

1. *Political Reasons*

Since the foundation of the republic, Turkey had adopted a pro-Western policy. During the WWII, the country "made a historic choice"[183] and stood by the 'West'. She was one of the founding members of the Council of Europe and had acceded to the NATO and to the GATT. Turkey's thesis was that she was a part of Europe[184]. Hence, Turkey viewed the EEC as an integration project to which she must join[185].

Another political reason was that Turkey could not let Greece be only state in association with the EEC[186]. When the Turkish Foreign Ministry was in receipt of the news that Greece aimed to conclude an association agreement with the EEC, the Minister Zorlu went mad. The Minister had the application letter drafted in two weeks. At the Council of Ministers, Zorlu argued that Turkey should make an application to the EEC for political reasons. When another Minister put forward that the EEC membership had also its disadvantages!, Menderes, the Prime Minister at that time, flatly rejected the idea and asked his ministers: 'Is there anyting that the Greeks can but we can not?'. On the next day, Turkey's letter for membership was submitted[187].

Turkey's application was political for the EEC as well. When France blocked the UK's entry to the EEC, the Community had divided into two sides. The British government had promoted the foundation of the EFTA which was a concern to the EEC. Hence, Turkey's application was a political success for the Community. The six founders had to opportunity to prove that they were open to the outer world[188].

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[183] Extracted from the information provided on the web site of the Turkish Foreign Ministry as regards the NATO membership. See it at http://www.mfa.gov.tr/nato.en.mfa#I

[184] Tuğrul Arat, "Avrupa Birliği ile Türkiye Arasındaki İlişkiler ve Gümrük Birliğinin Yeri" **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Cilt 44, 1995, p. 588.

[185] Keskin, p. 50.

[186] İnan, p. 37.

[187] Mehmet Ali Birand, **Türkiye'nin Ortak Pazar Macerası**, 3rd edition, Milliyet Yayınları, 1987, p. 55-58.

[188] Ibid, p. 62-63.

2. *Economic Reasons*

The governing Democrat Party had facilitated the importation, and investment projects were on the way. But there was a problem. The country did not have enough foreign currency. First signs of an ecominic crisis were seen in 1953-1954 and the IMF urged Turkey to take measures. Turkish lira was devalued in 1958 for the first time. Hence, membership to the EEC meant a new credit agreement for Prime Minister Menderes[189].

Turkey feared that the Common Market could close its doors to the non-member countries. At that time, 35 % of Turkey's total export was to the EEC[190]. However, as it turned out, Turkey's fear was groundless. Despite the duties on Turkish exports, Turkey's export to the EEC would increase in the following years. In Savaş's opinion, the rise was mainly due to the short distance between Turkey and Europe[191].

Most important reason was that, as a non-member country, Turkey would not have the privilege of exporting to the EEC without customs duties. The Common Market might put Turkey at a disadvantage because the products which France and Italy manufactured were similar to Turkey's and, moreover, Greece and Turkey were alike in many ways. For this reason, the consequences of the Common Market were a major factor in Turkey's application[192].

[189] Ibid, p. 58-59.
[190] Keskin, p. 50.
[191] V. F. Savaş, **Türkiye ve AET**, Istanbul, AR Basım Yayım ve Dağıtım, 1983, p. 82.
[192] Oğuz, p. 166.

SECOND CHAPTER

EU LAW GOVERNING THE LAW OF

THE EC-TURKEY ASSOCIATION

I. INTRODUCTION

The Law of the EC-Turkey Association is an integral part of the EU legal system. What is written in the Law of the EC-Turkey Association is a source of EU law and for this reason the EU is responsible for guaranteeing the commitments made by the Member States towards Turkey in the context of association.

The founding fathers of the EC-Turkey Association were guided and inspired by the founding treaty of the EC. Therefore, (a) there exists a parallelism between EU law and the Law of the EC-Turkey Association, and (b) the interpretation and the implementation of the Law of the EC-Turkey Association depend on how EU law approaches to an international agreement concluded with a non-member state and how the European Court of Justice interprets an association agreement.

The similarity between EU law and the Law of the EC-Turkey Association makes it possible to overcome the problems arising from the vague provisions contained in the latter and thus there is no reason why the ECJ should not refer to the founding doctrines and the fundamental principles of EU law whilst it is interpreting the commitments of the EU and its Member States towards Turkey.

For the reasons above, the comprehension of the judgments of the European Court Justice necessitates a detailed analysis of EU law, the European Court of Justice and its methodology.

II. EU LAW – EC LAW

In 1992, the Maastricht Treaty[193] (also known as the Treaty on European Union) brought in a new structure. The European Union (EU) was established and the EEC was renamed the EC. The Maastricht Treaty built a 'temple' and named it the EU which was supported by three 'pillars': The European Communities (EC, ECSC and EAEC), Common Foreign and Security Policy ("CFSP")[194] and Cooperation in the Fields of Justice and Home Affairs ("JHA")[195]. The three-pillar structure remains today[196].

The EC, as one of the two Communities composing the first pillar of the EU, applies the method of community integration instead of intergovernmental cooperation under the other pillars. Most 'legal' issues fall within the scope of the EC. Hence some jurists call it the EC Law instead of EU Law, at least for present. Even though the Irish people voted no[197] to the Treaty of Lisbon[198] [199], the Treaty has been approved by all MSs except Ireland. In case it comes into effect, it will amend both the Maastricht Treaty and the EC Treaty. Moreover, the Treaty of Lisbon provides that the European Union shall replace and succeed the EC[200]. Therefore, if the Irish problem can be overcome, the jurists will have no choice but to use the term EU law.

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[193] OJ C 191, 29 July 1992
[194] The Maastricht Treaty, Article J et seq
[195] Ibid, Article K et seq
[196] Slight changes have been made in the three-pillar structure of the EU by the amending treaties. In the Amsterdam Treaty, a new name was given to the CFSP which is now the Police and Judicial Cooperation in Criminal Matters ("PJCC"). The number of the European Communities reduced to two following the expiry of the ECSC Treaty and this change was inserted in the Nice Treaty.
[197] The Irish referandum took place on 13 June 2008. 53.4 % of the Irish voters rejected the Treaty of Lisbon. At the Brussels summit on 12 December 2008, Ireland agreed to hold a second ballot in 2009 once the concerns of Irish voters are addressed. For detailed info on the subject go to http://ec.europa.eu/news/economy/081212_1_en.htm
[198] OJ 2007/C 306/01
[199] The Treaty of Lisbon was signed by the Heads of the Member States on 13 December 2007.
[200] The Treaty of Lisbon, Article 1 (2).

III. EUROPEAN COURT OF JUSTICE

A. The First Court Of Justice

The Court of the ECSC was the first Court of Justice. The function of the Court was "to ensure the rule of law in the interpretation and application of the (ECSC) Treaty and of its implementing regulations"[201].

Under the ECSC Treaty, a Member State or the Council could appeal to the Court of Justice for the annulment of decisions and recommendations of the High Authority[202]. The High Authority was supposed to give effect to the judgments of annulment or else an appeal for damages could be brought before the Court[203].

The Court of Justice also had jurisdiction over the appeals brought by the States or by the Council when the High Authority failed to issue a decision or recommendation[204].

Of the powers of the Court of Justice, the most crucial one was its exclusive jurisdiction over the issues in litigation before a national court of the Member States where the validity of acts of the High Authority or the Council was debated[205]. This procedure was (and still is) called the preliminary ruling. As Dehousse[206] views, the Court's power to give preliminary ruling, even within the ECSC, was a latent quality which could not have predicted at the outset[207].

The Court of Justice of the ECSC had officially started working on 10 December 1952 under the presidency of Massimo Pilotti. The Court gave its first judgments in Case 1/54 *France v High Authority* and Case 2/54 *Italy v High Authority* on 21 December

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[201] The ECSC Treaty, Article 31.
[202] Ibid, Article 33.
[203] Ibid, Article 34.
[204] Ibid, Article 35.
[205] Ibid, Article 41.
[206] Renaud Dehousse, **The European Court of Justice**, The European Unions Series, Macmillan Press Ltd., 1998, p.5.
[207] A. Arnull, **The European Court of Justice**, Oxford University Press, 2003, p. 3.

1954[208]. The Court of Justice had 7 judges, 2 advocates general and 57 members of staff, and it had seated at the Villa Vauban in Luxembourg[209]. The amount of work before the Court of the ECSC was not heavy, namely that "most of the cases concerned a levy on purchases of scrap which had been instituted by the High Authority in order to even out differences in the prices"[210].

B. The European Court of Justice

The EEC and the EAEC Treaties had established the Court of Justice of the European Communities[211]. By virtue of the 'Convention on Certain Institutions Common to the EEC, the EAEC and the ECSC', which was signed together with the EEC and EAEC Treaties, the Court of Justice of the ECSC was replaced by the European Court of Justice ("ECJ") which would have jurisdiction over the ECSC, the EAEC and the EEC.

The ECJ's function was incorporated in the Treaties as: "to ensure observance of law and justice in the interpretation and application of the (EEC and EAEC) Treaties"[212]. At present, the task of the ECJ is being defined slightly different. The EEC (now the EC)[213] Treaty, which was amended[214] and renumbered[215] by the subsequent Treaties, provides that: "ECJ (and the Court of First Instance[216]) each within its jurisdiction shall ensure that in the interpretation and application of this Treaty the law is observed"[217].

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[208] http://curia.europa.eu/en/instit/services/dpi/historiq.pdf, p. 3.
[209] Ibid, p. 6 and 11.
[210] "The Evolution of the work of the European Court of Justice" **Reports of a Judicial and Academic Conference**, 27-28 September 1976, Luxembourg cited by Arnull, p. 3.
[211] Article 4 of the EEC Treaty and Article 3 of the EAEC Treaty.
[212] Article 164 the EEC Treaty and Article 136 of the EAEC Treaty.
[213] The Treaty on European Union changed the name of the European Economic Community to simply "the European Community".
[214] supra no. 114.
[215] The Treaty of Amsterdam (1997) simplified and renumbered the articles of the Treaties in 1997.
[216] The Single European Act (1986) first pronounced the possibility of establishing a court of first instance to the ECJ. Later, on 24 October 1988, the Council decided to establish a Court of First Instance of the European Communities (CFI). The ECJ, on 11 October 1989, declared that the CFI was constituted. Today the CFI has 27 judges like the ECJ.
[217] Article 220 of the EC Treaty. From now on, the new numbers of the Articles shall also be provided whenever it is necessary.

When it was established as per the EEC Treaty of 1957, the ECJ had 7 judges and 2 advocates general. Today the ECJ has 27 judges[218] and 8 advocates general[219]. The number of the judges and the advocates general increased in parallel to the enlargement processes.

The European Court of Justice is supplemented by the Court of First Instance[220] ("CFI") which was created in 1989. The CFI has jurisdiction[221] over "direct actions brought by natural or legal persons against acts of Community institutions[222] or against a failure to act on the part of those institutions[223]; actions brought by the Member States against the Commission; actions brought by the Member States against the Council relating to acts adopted in the field of State aid, 'dumping' and acts by which it exercises implementing powers; actions seeking compensation for damage caused by the Community institutions or their staff; actions based on contracts made by the Communities which expressly give jurisdiction to the Court of First Instance; actions relating to Community trade marks; and appeals, limited to points of law, against the decisions of the Civil Service Tribunal"[224]. Should the CFI finds that it has no jurisdiction to hear and determine the action, then it will refer that action to the ECJ[225].

Any party which has been unsuccessful, in whole or in part in its submissions, can bring an appeal before the ECJ against final decisions of the CFI[226]. The right of appeal is

[218] Article 221 of the EC Treaty.
[219] Article 222 of the EC Treaty.
[220] supra no. 216.
[221] The relevant provision is Article 225 of the EC Treaty as it was amended by the Nice Treaty.
[222] Natural or legal persons can bring direct actions against Community acts only if such acts are addressed to them or directly concerning them as individuals.
[223] For example, a case brought by a company against a Commission decision imposing a fine on that company.
[224] Extracted from http://curia.europa.eu/en/instit/presentationfr/index_savoirplus.htm
[225] Statute of the Court of Justice (OJ L 24 of 29 January 2008, p. 42), Article 54.
[226] Ibid, Article 56.

confined to the "points of law only"[227] and the time limit is two months commencing from the notification of the decision appealed against[228].

In 2004, the Civil Service Tribunal ("CST") was added[229] to the 'duo'. The CST "exercises at first instance in disputes between the Communities and their servants, including disputes between any all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice"[230]. The CST consists of 7 judges[231] and its decisions are subject to appeal before the CFI within two months of notification of the decisions appealed against[232].

C. The Jurisdiction of the European Court of Justice

In this part I shall focus on direct actions (Articles 226, 227 and 230 of the EC Treaty) and references for a preliminary ruling (Article 234 of the EC Treaty) which together constituted the major portion of the Court's workload from 1952 to 2007. The facts speak for themselves[233]:

	New cases (1952-2007)	**2007**
Direct actions	8129	221
References for a preliminary ruling	6030	265
New cases in total (incl. appeals)	15068	573

[227] Article 225 of the EC Treaty.
[228] Statute of the Court of Justice, Article 56.
[229] The CST was established by the Council decision of 2 November 2004 (OJ 2004 L 333/7).
[230] Statute of the Court of Justice, Annex, Article 1.
[231] Ibid, Annex, Article 2.
[232] Ibid, Annex, Article 9.
[233] http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_cour_stat.pdf, p. 20.

Direct actions are divided into two groups: Actions for failure to fulfill obligations (Articles 226 and 227) and actions for annulment (Article 230). The latter group seems to have been less preferred than the former. Take the new cases in 2007. Out of 221 direct actions in total, only nine actions for annulment were brought before the Court[234].

1. *Actions for Failure to Fulfill Obligations (Articles 226 and 227 EC)*

Article 226 of the EC Treaty is worded as:

"If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice".

The wording of the Article is not vague. There are different stages and the Commission follows each through. It is at the discretion of the Commission to complete a stage and to move on to the next one[235]. Let's go into detail:

In order for the Commission to institute the procedure in Article 226, it needs to realize a 'breach' "either through its own monitoring of the application of Community law" or after such breach was brough to its attention by another Member State[236]. If the Commission views that there is a potential violation then it will first get in touch with the Permanent Representative of the Member State concerned[237]. If the Member State persists in its violation, the Commission this time will send the first formal letter and ask such Member State to submit its observations on the issue. The Commission and the Member State may settle following this stage but if they can not, then the Commission will send the so called reasoned opinion and wait for such Member State to comply with it. If the issue

[234] http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_cour_stat.pdf, p. 3.
[235] Kabaalioğlu, p. 266.
[236] Arnull, Dashwood and Wyatt, p. 212.
[237] Ibid, p. 213.

can not be resolved, the Commission will file an Enforcement Action against the Member State concerned.

At the judicial phase, the burden of proof is on the Commission[238], namely that the Commission has to prove to the Court that the Member State against whom the action was filed had violated the Community law and that such Member State had not healed the breach. If the Court holds that there is indeed a violation of Community law, it will specify the act or omission that caused the case but it will not order how the Member State concerned will remedy the situation[239]. This lack of judicial certainty used to pave the way for further problems, e.g. enforcement of the Court's ruling. Article 228, after being amended, helped a lot to overcome the enforcement problem[240].

The procedure in Article 226 operates effectively. In most situations the Commission and the offending State reach a settlement before the matter is brought before the Court[241].

The second type of 'action for failure to fulfill an obligation' is governed by Article 227 which is an alternative to Article 226[242].

Article 227 of the EC Treaty provides that:

"A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

[238] Ibid, p. 216.
[239] Ibid, p. 217.
[240] For explanations on Article 228, see pp. 37-39.
[241] Kabaalioğlu, p. 257 and p. 264-265; Szyszczak & Cygan, p. 43.
[242] Kabaalioğlu, p. 268.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice".

It should be noted that the 'claimant' Member State first applies to the Commission not to the offending Member State. Dehousse says that the Commission acts as an arbiter[243] in this procedure but the 'arbitration' here is not a binding one since the claimant State can bring the case before the Court despite the Commission's negative opinion. .

An action under Article 227 has not been resorted to very often[244] [245] because;

- The State which brings an action against another may face with an action in return given that no State is faultless as to the fulfillment of its obligations under the Treaty[246] and

- Such an action might cause animosity between the claimant State and the defendant State[247].

The Member States, which are found by the Court not to have fulfilled their obligations under the Treaty, are required to comply with the judgment of the Court. This obligation is governed by Article 228 of the EC Treaty according to which the Commission monitors the State's compliance with the judgment and lays a time limit for the State to take the necessary measures. If the State persists in non-compliance, then the Commission

[243] Dehousse, p. 20.
[244] Kabaalioğlu, p. 268.
[245] Rare actions are: *France v. UK*, Case 141/78 [1979] ECR 2923 and *Belgium v. Spain*, Case C-388/95 (judgment given on 16.5.2000).
[246] Josephine Steiner and Lorna Woods, **Textbook on EC Law**, 8th ed., Oxford University Press, 2003, p. 590.
[247] Craig and De Burca, p. 429.

will bring the issue to the Court and specify the lump sum or penalty payment to be paid by the State. If the Court agrees that there is a violation of non-compliance and the specified amount of the lump sum or penalty payment are appropriate, then it rules in this respect.

This procedure is an outcome of the Maastricht Treaty which gave a new shape to Article 228 to "impose financial sanctions on the States which fail to comply with the rulings against them"[248]. Szyszczak and Cyan[249] put that Article 228, in its new form, is effective since it has become "economically unattractive to violate the law" and that it has applied pressure on the Member States to comply with the judgments.

As to Article 228, following remarks should be made:

- The Commission has issued several Communications relating to Article 228. The last one was issued in 2005.

- In its Communication, the Commission lays the general principles regarding the fixing of the sanction to ensure the deterrent effect provided in Article 228 (Communication of 2005, para. 6-8).

- In 2005, the Court ruled[250] in *Commission v France*[251] that both a periodic penalty payment and a lump sum fine be paid simultenausly (around 78 million Euros in total) by France as a result of her non-compliance with a previous judgment of 1991. Hence, the Commission, in its Communication of 2005, declared that it had left its 'either lump sum or penalty payment' application and that it would instead specify periodic penalty payments (a penalty by day of delay) and lump sums or both sanctions simultenaously (Communication of 2005, para. 10.3).

[248] Arnull, p. 29.
[249] Szyszczak and Cyan, p.43.
[250] Until 2005, as to Article 228 procedure, the Court had ruled in two cases: *Commission v. Greece,* Case C-387/97 [2000] ECR I-5047 and *Commission v. Spain*, Case C-278-01 [2003] ECR I-14141.
[251] Case C-304/02.

- The Communication provides detailed data on the calculation of the periodic penalty payments[252] and lump sums[253] (Communication of 2005, para. 14 et. seq).

2. *Actions for Annullment (Article 230 EC)*

Article 230 of the EC Treaty provides that a Member State, the European Parliament, the Council or the Commission can, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to the Treaty's application, or misuse of powers, challenge the legality of the regulations, directives and decisions before the Court of Justice. In addition to the above mentioned claimants, natural or legal persons have the locus standi but they can only challenge the decisions and hence they are called 'non-priviliged' claimants in contrast to first group of 'privileged' claimants[254].

It is noteworthy that the natural or legal persons' capacity to bring an action for annulment is not just confined to the decisions. They can also challenge the validity of the regulations which are in fact decisions. In other words, as the Article provides, the natural or legal persons can bring an action against a decision in the form of a regulation. This principle is expanded by Wyatt and Dashwood who go further and assert that "decisions which do not have the characteristics of a real decision" can not be challenged[255].

There is a time limit stipulated in Article 230. Both the privileged and non-privileged claimants have to institute proceedings within two months commencing from the time they are deemed to have learned the act in question.

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[252] Periodic penalty payments are calculated by multiplying the basic flat rate amount penalty payment, coefficient for seriousness, coefficient for duration and the factor taking into account the capacity to pay of the Member State concerned.

[253] Lump sums are calculated by means of a minimum fixed lump sum which is, for instance, 12.700.000 Euros for Germany and 350.000 Euros for Cyprus.

[254] Szyszczak and Cyan, p.44; C. Vincenzi and J. Fairhurst, **Law of the European Community**, 3rd edition, Longman, 2001, p. 166-167.

[255] Arnull, Dashwood and Wyatt, p. 232.

If the Court, in the action brought before it by either the privileged or non-priviliged claimant, finds that there is legal basis for challenge, then it will declare the act in question to be void. As per Article 233 of the EC Treaty, the institution, whose act has been declared void, is under a duty to take the necessary measures to comply with the judgment of the Court of Justice.

3. *The Preliminary Ruling (Article 234 EC)*

The preliminary ruling, which was first inserted into the ECSC Treaty[256], is viewed as the "jewel in the crown of the existing regime"[257]. Only the ECJ has jurisdiction to give preliminary ruling which is regarded as the Court's most important tool to interpret and implement the EU law. Most of the founding doctrines and fundamental principles of EU law were developed by the ECJ through preliminary ruling procedure. In this regard Ward[258] cites the case of *Foglia*[259] in which the ECJ stated that: "the preliminary ruling procedure is the artery which keeps the heart of the Community pumping".

a. Background

Originally, the Court of Justice was imagined as a final court of appeal to make sure that the Community law develops in a harmonious way. But the founding members viewed as if the supremacy of national laws is questioned and hence refused the idea. As an alternative, a system of reference by national courts was devised[260]. So, in the preliminary ruling procedure, the ECJ does not act as a court of appeal. It can not rule on the validity of national laws[261] nor can it rule on the case before the referring national court.

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[256] See page 31.
[257] P. Craig, "The Jurisdiction of the Community Courts Reconsidered", **European Court of Justice**, G. de Burca and J.H.H. Weiler (eds.), Oxford University Press, 2001, p. 181.
[258] Ward, p. 81.
[259] *Pasquale Foglia v Mariella Novello*, Case 244/80, (1981) ECR 03045
[260] Vincenzi and Fairhurst, p. 125.
[261] Weatherill, p. 185.

b. Vital statistics

The ECJ is busy dealing with the preliminary ruling procedure. From 2000 to 2007 (except 2003), the references for a preliminary ruling were issue number one on the agenda of the ECJ[262]. For the year 2007 for example, the number of the references for preliminary ruling was the highest[263] in the history of the ECJ: 265[264] references out of 580 new cases before the ECJ. In total, 6030[265] new references for a preliminary ruling were made from 1961 to 2007 by the member states. Germany, by 1601[266] references, has resorted to the preliminary ruling procedure more than any other member state. Germany is followed by Italy, France and Netherlands[267].

c. The benefits

The preliminary ruling serves as a mechanism for the uniform interpretation and application of EU law in all the Member States[268], in other words divergent interpretations are prevented[269].

The procedure is based on cooperation between the ECJ and the national court[270]. The latter refers questions on EU law and the former rules on them. As a result, the national courts, which should take the ruling of the ECJ in consideration[271], make the EU law a part of their national laws[272]. The legitimacy of EU law is enhanced[273].

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[262] The Annual Report 2007, Statistics of Judicial Activity of the Court of Justice. The relevant part of the report is available at http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_cour_stat.pdf, p.2.
[263] Ibid, p. 20.
[264] Ibid, p. 2 and 20.
[265] Ibid, p. 22.
[266] Ibid
[267] Ibid
[268] Information Note on References from National Courts for a Preliminary Ruling (OJ 2005 C143/1), Article 1.
[269] Szyszczak and Cygan, p. 49.
[270] Information Note on References from National Courts for a Preliminary Ruling, Article 3.
[271] Arnull, Dashwood and Wyatt, p. 279.
[272] Ward, p. 181.
[273] Ibid

d. The governing provisions

Article 234 of the EC Treaty rules the preliminary ruling. Besides, the procedure is regulated in detail in the Statute of the Court of Justice[274] and more specifically in 'Information Note on References from National Courts for a Preliminary Ruling'[275] and in 'The Supplement Following the Implementation of the Urgent Preliminary Ruling Procedure Applicable to References Concerning the Area of Freedom, Security and Justice'[276].

e. Who can refer?

Article 234 (2) provides that "any court or tribunal of a Member State may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon". So, a national court or tribunal uses its discretion to decide whether or not the referral is necessary. Upon the receipt of the reference, the ECJ examines if the referring body can be categorized as a court or tribunal for the purpose of Article 234[277]. Until now, the ECJ has widely interpreted the phrase 'any court of tribunal of a Member State'[278]. The ECJ views that a body can be deemed to be a court or a tribunal provided that: "it is established by law, it is permanent, its jurisdiction is compulsory, its procedure is inter partes, it applies rules of law, it is independent"[279] and "its decision-making function is recognized by the state"[280]. To give an idea, the Court ruled that an arbitrator did not have to the right to refer. Instead, the Court recognized the authority of the court or tribunal which heard the appeal against an arbitrator's decision[281].

[274] supra no. 225.
[275] supra no. 268.
[276] Available at http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/noteppu.pdf
[277] Craig and De Burca p. 436.
[278] Steiner and Woods, p. 555; Arnull, Dashwood and Wyatt, p. 267.
[279] Craig and De Burca, p. 436.
[280] Vincenzi and Fairhurst, p. 129.
[281] Arnull, Dashwood and Wyatt, p. 268.

f. What can be referred?

According to Article 234 (2), the national courts or tribunals, with regard to a case brought before them, can forward questions to the ECJ when they consider that they need the ECJ's answers to give a judgment. Such a question should relate to the EU law[282] but it does not "need to be a final one"[283]. In other words, the national court or tribunal "may refer a question which will not automatically resolve the dispute"[284].

g. The subject of the questions referred

Article 234 of the EC Treaty provides that:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

a) the interpretation of this Treaty;

b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide".

The Article provides information on the ECJ's jurisdiction and also on what the national court or tribunal can ask for. So, there are four kinds of subjects that the ECJ can rule on or four kinds of questions that the national court or tribunal can refer.

- Interpretation of the Treaty: The national court or tribunal can ask the ECJ to interpret the Treaty or a provision thereof. The 'treaty' means not only the EC Treaty but also the amending Treaties and the Treaties of Accession[285].

[282] Ibid, p. 265.
[283] Ibid, p. 266.
[284] Ibid.
[285] Vincenzi and Fairhurst, p. 128; Arnull, Dashwood and Wyatt, p. 266.

- Interpretation of the acts of the institutions of the Community and of the ECB: The term 'acts' covers regulations, directives, decisions, opinions, recommendations[286], acts of the European Parliament[287] and the association agreements concluded by and between the EC and a third country[288].

- Ruling on the validity of the acts of the institutions of the Community and of the ECB: In this case what the national court asks is whether the act in question is void or not[289]. Since the term 'acts' can not be extended to the 'Treaty (ies)', the ECJ can not question the validity of the EC Treaty, the other founding Treaties or the amending Treaties[290].

- Interpretation on the statutes of bodies established by an act of the Council, where those statutes so provide.

It is noteworthy that in addition to what the Article provides, a national court or tribunal can ask the ECJ to interpret an Agreement (or provisions thereof) concluded by the Community with a third state. This has happened several times, in particular with respect to the Association Agreement concluded between the EEC and Turkey in 1963. I shall elaborate on this issue under the title of 'Direct Effect of International Agreements'.

h. To refer or not to refer

It is mentioned earlier that as per Article 234 (2) a national court or tribunal may forward questions to the ECJ when it considers that it needs the ECJ's answers to give a judgment. What is stressed by the Article is that the national court has the "widest

[286] Vincenzi and Fairhurst, p. 128

[287] Arnull, Dashwood and Wyatt, p. 266.

[288] EC-Turkey Association Agreement is an act whin the meaning of the preliminary ruling procedure. See *Demirel* (n 475 below), para. 7 and explanations on the *Haegeman* case on page 73-74.

[289] Vincenzi and Fairhurst, p. 128.

[290] Ibid.

discretion"[291] to make reference to the ECJ and that the national court can not be denied its rights to refer because of national rules[292] or "by the rulings of superior national courts"[293].

By contrast to the default rule that the referral is discretionary, referral under Article 234 (3) is mandatory[294].

Article 234 (3) provides that: "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice". Article 234 (3) refers to the situations where there is no further appeal. Take the House of Lords in the UK. Its decisions can not be appealed and hence it is required to ask the ECJ to give preliminary ruling[295]. Same conclusion can be drawn for some lower courts' whose decisions can not be appealed because the amount of the claim is below the threshold for the appeal[296].

Despite the clear wording of Article 234 (3), the ECJ has taken a soft stance on the mandatory referral and ruled that a final court is not required to make a reference if[297]:

- it views that it does not need the ECJ's answer to resolve the case even though the parties ask for a preliminary ruling[298],
- the ECJ did previously discuss the same kind of question and
- the resolution of the question of Community law is clear[299].

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[291] Arnull cites *Rheinmühlen* (Case 166/73) in which the ECJ stated that the "national courts have the widest discretion in referring matters to the ECJ…". See Arnull, p. 56.
[292] Vincenzi and Fairhurst, p. 132.
[293] Arnull, p. 56.
[294] Steiner and Woods, p. 558.
[295] Vincenzi and Fairhurst, p. 132.
[296] Ibid.
[297] Arnull, Dashwood and Wyatt, p. 277-278.
[298] See *CILFIT v Ministry of Health*, Case 283/81 [1982] ECR 3415 cited by Arnull, Dashwood and Wyatt, p. 277.
[299] This principle is called 'acte clair'.

i. Effects of the preliminary ruling

In *Luigi Benedetti v Munari F.lli s.a.s.*,[300] the ECJ held that: "…preliminary ruling is binding on the national court as to the interpretation of the community provisions and acts in question". The national court or tribunal, which made a reference for a preliminary ruling and asked the ECJ to interpret a provision of the Treaty or of a Community act, is required to implement such provision or the act in accordance with the ECJ's interpretation and to give precedence to such interpretation if there is any national law against it[301].

In the case of preliminary rulings on the validity of a Community act, the national court is ought to show regard for the ECJ's ruling. The matter was discussed in *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato*[302] in which the ECJ held that:

"Although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier".

Having viewed the above judgment, Wyatt and Dashwood assert that the ECJ's rulings on the validity of a Community act are binding on the referring court[303]. One may argue that it is not that certain since (a) the Court does not explicitly use the word

[300] Case 52/76 [1977] ECR 00163
[301] Arnull, Dashwood and Wyatt, p. 279.
[302] Case 66/80 [1981] ECR 01191
[303] Arnull, Dashwood and Wyatt, p. 280.

'binding', (b) the Court says that the validity of the same act can be brought to the ECJ by other national courts, (c) as Wyatt and Dashwood acknowledge it[304], the Court held in *Pretore di Salò v Persons unknown*[305] that: "(ECJ's) judgment does not preclude the national court to which such a judgment is addressed from making a further reference to the Court of Justice if it considers it necessary in order to give judgment in the main proceedings".

j. Urgent preliminary ruling procedure

Article 23 (a) of the Statute of the Court of Justice[306] provides for an urgent procedure for references for a preliminary ruling relating to the area of freedom, security and justice. The Urgent Preliminary Ruling Procedure is specifically governed by the 'Supplement Following the Implementation of the Urgent Preliminary Ruling Procedure Applicable to References Concerning the Area of Freedom, Security and Justice'[307].

Urgent procedure is available for certain areas of EU law[308], i.e. Title VI (Articles 29 to 42) of the Treaty on European Union concerning police and judicial cooperation in criminal matters, and Title IV (Articles 61 to 69) of Part Three of the EC Treaty concerning visas, asylum, immigration and other policies related to free movement of persons, including judicial cooperation in civil matters.

Generally, the ECJ follows the urgent procedure upon a reasoned request from the national court. However, the ECJ may decide of its own motion to apply the procedure[309].

Urgent procedure is carried in exceptional circumstances. The national court should ask for urgent procedure when it needs the ECJ's decision in order to give ruling

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[304] Ibid.
[305] Case 14/86 [1987] ECR 02545
[306] See foot note no 225.
[307] The Supplement Following the Implementation of the Urgent Preliminary Ruling Procedure Applicable to References Concerning the Area of Freedom, Security and Justice.
[308] Ibid, Article 3.
[309] Ibid, Article 5.

regarding the persons whose liberty or security is at risk, e.g. detainees, people in custody or children[310].

IV. LEGISLATION

The answer to the question of who makes the EU law is short, simple and straight. The law makers are the Commission, Council and the Parliament. But the big question is: How do they legislate?

There are six procedures according to which an act is made in the EU:

1. The Commission as the Sole Legislator: The Commission can exceptionally make legislation on its own account. For instance the Commission can, as to the freedom of movement of workers, draw up regulations relating to the conditons to which the workers are subject[311].

2. The Council and the Commission**:** The Council as well can legislate without the Parliament but it needs to base its legislation on a proposal from the Commission. To give an example, the Council can fix the 'Common Customs Tariff' duties on a proposal from the Commission. Other fields, in which the Council can legislate without the Parliament, are free movement of workers and of capital and economic policy. Craig and De Burca assert that, in this kind of procedure, the decision to consult the Parliament is left to the discretion of the Council[312].

3. Consultation Procedure: Consultation procedure is the original procedure of the EC. In this, the Council, which acts upon a proposal put forward by the Commission, asks for opinion from the Parliament, the Economic and Social Committee and, if appropriate, the Committee of the Regions. The Council is required to consult only, namely

[310] Ibid, Article 7.
[311] Article 39.3 (d) of the EC Treaty.
[312] Craig and De Burca, p. 140.

that it may disobey such opinion[313]. Since the emergence of a more powerful Parliament in the amending Treaties, the consultation procedure has lost its importance and now it is used when the Treaty does not explicitly refers to the cooperation, co-decision and assent procedure.

4. Cooperation Procedure: Certain parts of economic and monetary policy[314] are subject to the cooperation procedure which was given effect by the Single European Act to increase the balance between the institutions in favour of the Parliament. The procedure is similar to the previous ones up to a certain point. Article 252 of the EC Treaty details how the procedure is applied: The Council, upon a proposal from the Commission, asks for opinion from the Parliament and adopts a common position afterwards. The Parliament has the power to approve, amend or reject the common position but the Council has the final say and it can, despite the Parliament's rejection, adopt the proposal.

5. Codecision procedure: The 'codecision' is the main procedure by which the Commission, Council and the Parliament co-legislate to make law. Such procedure took effect after the Maastricht Treaty and its scope was expanded by the Treaty of Amsterdam and the Treaty of Nice. Article 251 of the EC Treaty regulates the codecision procedure and 43[315] areas (including Article 12: non-discrimination on grounds of nationality, Article 18(2): right to move and reside freely, Article 40: freedom of movement for workers, Article 42: social security for migrant workers in the Community and Article 46(2): right of establishment: special treatment for foreign nationals[316]) under the first pillar (EC) are dealt with according to the codecision procedure.

As per the codecision, the Commission initiates the law-making, that is to say, it proposes for a new act and submits it to the European Parliament and the Council for 'first reading'. The Parliament reads the proposal and amends it if necessary. The Commission may or may not reflect the Parliament's view on its amended proposal but under the "Joint

[313] Ibid, p. 141.
[314] Ibid, p. 143.
[315] http://ec.europa.eu/codecision/procedure/index_en.htm
[316] For the areas covered by Article 251 go to http://ec.europa.eu/codecision/procedure/legalbasis_en.htm

Declaration of 4 May 1999 on Practical Arrangements for the New Co-decision Procedure[317]", the Commission is obliged to "exercise its right in a constructive manner with a view to making it easier to reconcile the positions of the European Parliament"[318].

There will be three possibilities when the proposal is brought before the Council:

a- The Council accepts the Commission's proposal which the Parliament has not amended. If this happens, the act will be adopted.

b- The Council accepts the Commission's proposal which the Parliament has amended. If this happens, the act will be adopted as amended.

c- The Council adopts a common position. If this happens, the co-decision procedure continues.

In the case of 'common position', the Council communicates the proposal to the Parliament. The Commission also delivers its opinion to the Parliament and in its 'communication', the Commission states if it supports or rejects the 'common position'.

The Parliament's 'second reading' starts with the receipt of the common position and the Commission's communication. At the end of the time limit of three months, the Parliament may:

a- Approve the common position and the act in question is be deemed to have been adopted.

b- Reject[319] the common position and the act in question is be deemed not to have been adopted.

c- Propose amendments to the common position.

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[317] OJ C 148, 28. 5. 1999, p. 1.
[318] Section I, para.3 of the Joint Declaration of 4 May 1999 on Practical Arrangements for the New Co-decision Procedure.
[319] The EP is said to have never exercised this prerogative.

In the third possibility, the procudure is not ended. The Commission delivers its opinion on the Parliament's amendments and this time the Council's 'second reading' begins. The Council 'reads' the amended common position and either approves it or not. If it approves it, then the act in question will be adopted as amended and the procudure will be ended. But if it does not approve it then the Conciliation Committee will be convened. The Committee comprises the members/representatives of the Council and the representatives of the Parliament. The Commission takes part in the proceedings and tries to reconcile the positions of the Council and the Parliament. If the Committee approves a joint text, the Council and the Parliament are required by the Treaty to adopt the act in question in accordance with the joint text. If either the Council or the Parliament[320] does not approve[321] the proposed act, then it shall be deemed not to have been adopted. In the second scenario where the Committee does not agree on a joint text, then the act in question will not be adopted.

Viscenzi and Hurst point that the co-decision procedure holds the balance of power among the institutions[322]. Similarly, Craig and De Burca view it as "successful in accommodating the different interests"[323] in terms of statistics[324]. Steiner and Woods[325], like many jurists[326], accept that the co-decision procedure has made the Parliament more powerful, but they, in contrast, criticize the procedure for being lengthy[327] and complicated.

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[320] "In the Conciliation Committee, the Parliament is represented by 25 members and thus the approval may be more problematic because the Parliament has 732 members" at http://ec.europa.eu/codecision/stepbystep/text/index6_en.htm

[321] At http://ec.europa.eu/codecision/stepbystep/text/index6_en.htm, it is stated that there have been two cases of non-adoption".

[322] Vincenzi and Fairhurst, p. 84.

[323] Craig and De Burca, p. 147

[324] According to statistics, from May 1999 to December 2006, out of 564 co-decision files, 217 files (% 38.5) have been concluded at the first reading stage, 249 (% 44.1) at the second reading stage and 98 (%17.4) at the conciliation stage. To have a detailed statistical information on the co-decision procdedure, go to http://ec.europa.eu/codecision/institutional/analysis/codecision_stat_en.pdf

[325] Steiner and Woods, p. 52.

[326] Ward, p.67-68; Szyszczak and Cygan, p. 25.

[327] For the average length of the co-decision procedure at different stages, see statistical data at http://ec.europa.eu /codecision/institutional/statistics_en.htm

6. Assent Procedure: This procedure, by which the Parliament was given "an infinite power of delay and an absolute power of rejection"[328], came into effect after the Single European Act. Assent procedure is carried in the following cases:

- When the Council, following a proposal from the Commission, confers upon the European Central Bank (ECB) specific tasks, the assent of the European Parliament will be required[329];

- When the Council, after consulting/on a proposal from the Commission, amends certain articles of the Statute of the ECB, the assent of the European Parliament will be required[330];

- When the Council defines tasks and organisation of the 'Structural Funds', the assent of the European Parliament will be required[331];

- In the case of some international agreements the assent of the European Parliament will be required;

- When a state applies to the Council to become a member of the European Union, the assent of the European Parliament (absolute majority of its component members) will be required. In this case, as per the wording of Article 49 of the EU Treaty, the Council will act unanimously after consulting the Commission and after receiving the assent of the Parliament. Therefore, Lasok views that: "Since a positive opinion of the Commission is not required, the Council may decide to open negotiations despite an adverse opinion of the Commission and conversely any Member State may block the proceedings despite a positive opinion of the Commission[332]". I agree with Lasok and moreover assert that Turkey's resolute political will to be a member of the EU should be

[328] Craig and De Burca, p. 148.
[329] Article 105(6) of the EC Treaty.
[330] Ibid, Article 107(5).
[331] Article 161 of the EC Treaty.
[332] K.P.E. Lasok and D. Lasok, **Law and Institutions of the European Union**, 7th edition, Butterworths, 2001, p. 80.

praised more than ever given that Article 49's stipulation opens possibilites for those who may use the Article for their own advantage.

V. SOURCES OF EU LAW

A. Primary Legislation

Primary legislation comprises founding treaties, treaties amending the founding treaties and accession treaties[333].

The founding treaties are the ECSC Treaty, EC Treaty, Euratom Treaty and Maastricht Treaty (also known as the Treaty on European Union). These four treaties can be deemed to be the constitution of the Communities[334]. They differ from ordinary international agreements in two main respects: a- Founding treaties had created institutions with supranational powers and b- The contracting parties do not have control over the implementation of the founding treaties[335].

The treaties amending the founding treaties are Merger Treaty, Budgetary Treaties, Treaty on Greenland, Single European Act, Treaty of Amsterdam and Treaty of Nice[336]. The accession treaties[337] are agreements that are being referred to in Article 49 of the Maastricht Treaty which states that:

"Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member

[333] For a list of the amending treaties and the accession treaties, supra no. 114.
[334] Kabaalioğlu, p. 103
[335] Ibid.
[336] For the dates and OJ numbers of the treaties, supra no 114.
[337] See supra no 114.

States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements".

As the Article explains, accession treaties are concluded between the (existing) Member States and the applicant state. This kind of agreement has been made six times so far. The last accession treaty related to the accession of Bulgaria and Romania, and it entitled 'Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union'[338].

B. Secondary Legislation

Secondary legislation consists of regulations, directives, decisions, recommendations and opinions. They are made by the Community institutions that are empowered by the founding treaties. For this reason the term of 'secondary' is used[339].

Article 249 of the EC Treaty provides more information. The Article states that:

"In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force".

The Article demonstrates that the secondary legislation divides into two types: Binding and non-binding. Regulations, directives and decisions are binding legal acts but

[338] OJ L 157 of 21 June 2005
[339] Kabaalioğlu, p. 106.

recommendations and opinions are non-binding. The latter type has "persuasive force only"[340].

C. International Agreements

The EC "constitutes a new legal order of international law"[341]. The Community "has legal personality"[342] and "it can conclude agreements with one or more states or international organisations"[343]. "Such agreements are negotiated by the Commisson; however the decision of the Council is required to conclude them."[344] International agreements that are concluded in this way are one of the sources of EU law. This fact was illustrated with the decisions of the ECJ which held that a free trade agreement concluded between the Community and a state[345] or an international agreement concluded between the Community and the GATT[346] were sources of EU law[347]. An association agreement signed between the Community and a non-member state is also included in the sources of EU law[348].

According to the European Commission's Treaties Office, the EU has signed 171 multileteral agreements and 571 bilateral agreements so far. To give an example by country, EU has signed 61 agreements and 8 protocols with Turkey. Beginning with the EC-Turkey Association Agreement[349] in 1963, 13 bilateral agreements were executed with Turkish government[350].

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[340] Steiner and Woods, p. 57.
[341] Extracted from *Van Gend en Loos*, Case 26/62.
[342] Article 281 of the EC Treaty.
[343] Ibid, Article 300.
[344] Ibid, Article 300 para. 2-6.
[345] See the explanations on *Kupferberg* case on page 71.
[346] See the explanations on *International Fruit* case on page 69.
[347] Arnull, Dashwood and Wyatt, p. 59.
[348] See page 73 and Chapter 3 on page 76 et seq.
[349] Agreement Establishing an Association Between the European Economic Community and Turkey', OJ 1973, C113.
[350] Treaties Office web site at http://ec.europa.eu/world/agreements/default.home.do

D. The Jurisprudence of the ECJ and the CFI, and of the European Courts

The case law of the ECJ and the CFI[351] [352] and also, as far as it relates to the law of the Communities, of the European Courts are viewed to be a source of EU law[353]. The term jurisprudence includes the decisions, general principles[354] and opinions[355].

VI. FOUNDING DOCTRINES

A. Supremacy

If the Treaty Establishing a Constitution for Europe[356] (the European Constitution) had not been rejected by France and the Netherlands in 2005, the present author would have probably started this section by citing Article I-6 from the said Constitution which stated that:

"The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".

The European Constitution did not come into force and the principle of supremacy did not change from being de facto to de jure. Accordingly, no provision of the 'Founding Treaties' makes a reference[357] to the principle of supremacy for the time being, but the principle does exist and it has long been a cornerstone of the EU law.

Despite the fact that the EC Treaty is "silent"[358] on supremacy then how could it be "a keystone in the edifice"[359]? The answer is, it is the European Court of Justice which developed and reinforced such principle through the preliminary procedure[360].

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[351] Arnull, Dashwood and Wyatt, p. 60.
[352] Vincenzi and Fairhurst, p. 40.
[353] Steiner and Woods, p. 57.
[354] For a similar view see Arnull, Dashwood and Wyatt, p. 60.
[355] Steiner and Woods, p. 57.
[356] OJ 2004/C 310/01
[357] Some provisions of the EC Treaty implied that the EC law is superior to the national law. See Kabaalioğlu, p. 117.
[358] Dehousse, p. 41.

The principle of supremacy was introduced by the Court in *Costa v ENEL*[361]. In such case, an Italian lawyer claimed that the nationalisation legislation was contrary to the EC Treaty. The Court in Milan opted to use the 'reference for a preliminary ruling' procedure despite the Italian government's counterclaim that the national courts are obliged to apply the national law. In its judgment, the Court of Justice established the doctrine of supremacy by means of the following statements:

"…the law stemming from the Treaty, could not, because of its special and original nature, be overridden by domestic legal provisions…"

In reaching the conclusion that the Community law takes precedence over the national legislation, the Court based its ruling on the following:

- Article 249's (Article 189 at the time of the judgment) explicit provision that "a regulation shall be binding and directly applicable in all Member States" would be meaningless if a national legislative measure prevailed over Community law, and,

- The Member States limited their sovereign rights by being a member to the Community.

Court's decision in *Costa v ENEL* was actually a result[362] of its previous judgment in *Van Gend en Loos v Nederlandse Administratie der Belastingen*[363] in which the Court was clear about its view on the European Community law:

"… the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals".

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[359] F. Mancini and D. Keeling "From *Cilfit* to *ERT*: The Constitutional Challenge Facing the European Court", YBEL, Vol. 11 (1991), p. 2-3
[360] Craig, p. 182.
[361] Case 6/64 [1964] ECR 585
[362] Steiner and Woods, p. 65-66; Szyszczak and Cygan, p. 63.
[363] Case 26/62 [1963] ECR 1

In *Costa v ENEL*, the fact was that there was a conflict between the EC Treaty and the pre-existing national law. And the Court of Justice, as to such conflict, had held that the EC law took precedence over national legislation. In *Amministrazione delle Finanze dello Stato v Simmenthal SpA*[364], in contrast to *Costa v ENEL*, the problem was the incompatibility of a subsequent national legislation with the Community law. Given the complexity of the case and in order to "clarify the procedural implications of *Costa*"[365], the Court had to be more direct and precise in its judgment:

"… a national court which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".

The Court is, by mentioning "the national courts' duty to give full effect to the provisions of the EC Treaty", seen to have emphazised the principle of effectiveness of the Community law[366]. It is also believed that the Court "conferred on the EC Treaty an authority similar to that of a constitution in a federal system"[367].

The supremacy of Community law is a legal precedent followed in many subsequent cases[368] by the Court. The standard formula is: "The validity of Community law, which is the highest source of law, cannot be questioned by national courts[369]". Supremacy is the "most important constitutional issue of the Community legal order"[370] and such 'constitutional' feature entails a reciprocal relationship between the 'supreme' Court of Justice and the national court. Supremacy of Community law can remain largely

[364] Case 106/77, [1978] ECR 629
[365] Dehousse, p. 44.
[366] Craig and De Burca, p. 282
[367] Dehousse, p. 43.
[368] *Ministero delle Finanze v IN.CO.GE.'90 SRL and Others*, Joined Cases C-10-22/97; *R v Secretary of State for Transport ex parte Factortame*, Case C-213/89 [1990] ECR I-2433
[369] Ward, p. 73.
[370] P. Eleftheriadis "Begging the Constitutional Question", **Journal of Common Market Studies,** Vol. 36 (1998), p. 257 cited by Ward, p. 73.

unchanged as long as the national courts effectively apply it and their approving reactions have reinforced the principle so far[371].

B. Direct Applicability and Direct Effect

1. *Direct Applicability*

Under international law there exist three theories as to the affect of international law and national law to each other: "Monistic view suggests the supremacy of national law; dualistic doctrine suggests that international law and national law systems constitute two separate legal orders; and the monistic theory suggests that various legal systems are in unity and that international law has primacy"[372].

The abovementioned theories relate to the problem of transposition of international law into the national law. The term 'direct applicability' deals with the same problem: How is the EU law transposed to the national laws of the Member States?

Winter states that the direct applicability is "the status of the Community provisions in the domestic legal order[373]". Moreover, Article 249 sheds light on what is meant by the term 'direct applicability'.

The Article provides that:

"*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

A directive shall be binding, as to the result to be achived, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

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[371] Dehousse, p. 43.
[372] A. Cassese, **International Law**, Oxford University Press, 2001, p. 162-163 ; Kabaalioğlu, p. 119-120.
[373] J. Winter, "Direct Effect and Direct Applicability:Two Distinct and Different Concepts in Community Law", **Common Market Law Review,** Vol. 9 (1972), cited by Szyszczak and Cygan, p. 67.

Recommendations and opinions shall have no binding force."

So, the regulations are directly applicable. They are implemented in the national law without need to transposition[374], in other words they are transformed into the national law automatically[375] and without the discretionary power of the Member States[376].

On the other hand, the directives are not transposed into national law automatically. In order for a directive to be implemented, a national procedure is necessary. For this reason, the direct effect of the directives has caused a lot of argument.

The terms 'direct applicability' and 'direct effect' are closely linked with each other. Before analyzing the direct effect, it is noteworthy that only the provisions, which are directly applicable, can have direct effect. Therefore one might think that no Community act other than the regulations can be invoked by the individuals before the national courts. This theory has been refuted by the Court of Justice which has held many times that Treaty articles, directives, decisions and provisions of the international agreements do have direct effect as well[377].

2. *Direct Effect*

a. Definition

The direct effect relates to the matter of as to whether or not individuals can invoke a Community act before the national courts[378]. Individual rights are guaranteed by the implementation of this constitutional principle[379]. Direct effect, in combination with the doctrine of supremacy, is believed to have "made the EC law 'the law of the land'[380].

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[374] Szyszczak and Cygan, p. 67.
[375] Craig and De Burca, p. 113.
[376] Kabaalioğlu, p. 109.
[377] Steiner and Woods, p. 89-90.
[378] Kabaalioğlu, p. 120.
[379] P. Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law", **European Law Review,** Vol. 8 (1983), p. 158 cited by Szyszczak and Cygan, p. 67.
[380] S. Prechal, "Does Direct Effect Still Matter?", **Common Market Law Review**, Vol. 37 (2000), p. 1047.

Direct effect is categorized according to the status of the party against whom the claimant individual invokes the Community act before the national court. If the obligation in a Community act rests on the Member State itself or an organ thereof then it is called the vertical direct effect. But if it is another individual on whom an obligation in a Community act is imposed, then it is the horizontal direct effect we will be talking about.

b. Emergence of the doctrine and the direct effect of the treaty provisions

The doctrine was established by the Court of Justice in the previously mentioned *Van Gend en Loos v Nederlandse Administratie der Belastingen*[381] which was brought before the Court through a reference for a preliminary ruling. The national court had referred the question of "whether nationals of a state can, on the basis of a Treaty Article, lay claim to individual rights which the courts must protect". The Court of Justice's answer was:

"… the object (of the reference for a preliminary ruling) is to secure uniform interpretation of the (EEC) Treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage"[382].

In its decisions, the Court also mentioned why Article 12 of the EEC Treaty (now Article 25 of the EC Treaty) had direct effect:

[381] Case 26/62 [1963] ECR 1
[382] Ibid, para. 10.

"The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects".

Costa v ENEL[383], as a result of which the principle of supremacy was established, made it possible for the Court to elaborate further as to the doctrine of direct effect. The Court sticked to its principle in *Van Gend en Loss* and applied its 'formula' to different Treaty provisons. The judgment can be summarized as: A provision of the EEC Treaty will have direct effect if such provision is a clearly expressed provision and if it is not accompanied by any reservation which might make its implementation subject to any positive act of national law.

In the following years, the Court followed its precedent in many cases and dealt with the direct effect of various Treaty provisions. However, the criteria for a Treaty provision to have direct effect could not have been explained in a clearly organized way prior to *Reyners v Belgium* in 1974. The Advocate General of the said case expressly put the prerequisites[384]:

"The provision in question must be sufficiently clear and precise for judicial application; it must establish an unconditional obligation; and the obligation must be complete and legally perfect, and its implementation must not depend on measures being subsequently taken by Community institutions or Member States with discretionary power in the matter."

As mentioned earlier, direct effect is divided into two sub categories: Vertical and horizontal direct effect. The *Van Gend en Loos* is a typical example of the vertical direct

[383] supra no. 361.
[384] Arnull, Dashwood and Wyatt, p. 75.

effect of the Treaty provisions. A Dutch private firm called Van Gend en Loos claimed before the Dutch court that the Netherlands state could not introduce new customs duties because Article 12 of the EEC Treaty prevented the Netherlands from doing so. Van Gend en Loos invoked a Community act, Article 12 of the EEC Treaty, against the Netherlands and the vertical direct effect of such act was discussed by the Court of Justice after the Dutch court's reference for a preliminary ruling.

Horizontal direct effect is an issue when the Community act in question does not create an obligation on the Member State but on another individual. In the case of Treaty provisions this was best exemplified[385] in *Defrenne v SABENA* (No. 2)[386] where Ms Defrenne, a stewardess, claimed before the Belgium court that her employer Sabena, a Belgium airline company, had paid more to stewards and that the company had violated Article 119 of the EEC Treaty (now Article 141 of the EC Treaty) which provides equal pay for male and female workers. The Court of Justice, upon being referred to as to whether Article 119 had direct effect on Sabena, held that:

"…the prohibition on discrimination between male and female workers applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals"[387].

In Court's view some Treaty provisions have both vertical and horizontal effect. In *Cowan v The French Treasury*[388], Article 7 of the EEC Treaty (now Article 12), which prohibits discrimination on grounds of nationality, was held to be effective in both directions. Also Articles 28 and 29 in *Dansk Supermarked*[389], Article 39 in *Dona v Mantero*[390] and Articles 43 and 49 in *Thieffry v Paris Bar Association*[391] were declared by

[385] Arnull, Dashwood and Wyatt (p.77) assert that horizontal direct effect of Treaty provisions was first discussed by the ECJ in *Belgische Radio en Televise v SABAM*, Case 127/73 [1974] ECR 51.
[386] Case 43/75
[387] Ibid, para. 39.
[388] Case 186/87
[389] Case 58/80
[390] Case 13/76

the Court as both vertically and horizontally effective. Provisions particularly on the freedom of movement have been treated by the Court as fundamental rights of individuals, a right which inherently encompasses the direct effect[392].

c. Direct effect of the regulations

It was mentioned earlier[393] that regulations, by virtue of Article 249, are directly applicable in all Member States. Nevertheless, they are subject to same conditions like the Treaty provisions, to say, they have to be clear, precise and unconditional in order to be invoked by the individuals before the national courts[394]. Therefore, if a regulation fulfills the criteria laid down in Van Gend en Loos, it will have direct effect, either vertically or horizontally[395]. If not, it will not. Take *Azienda Agricola Monte Arcosu v Regione Autonoma della Sardegna*[396]. In such case, the regulation in question was found not to be directly effective because it was not precise[397].

d. Direct effect of the directives

This issue has caused a lot of argument. To better understand the discussions, it is once more necessary to refer to Article 249 which says that:

"A directive shall be binding, as to the result to be achived, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

The wording is clear. Since directives need national implemention legislation, they can not be directly effective. Is this true? Well, no. At least in the ECJ's view.

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[391] Case 71/76
[392] Vincenzi and Fairhurst, p. 185.
[393] See page 60.
[394] Similar views expressed by Steiner and Woods, p. 93; Vincenzi and Fairhurst, p. 186; Craig and De Burca, p. 190; Kabaalioğlu, p. 128.
[395] Vincenzi and Fairhurst, p. 186
[396] Case C-403/98
[397] Craig and De Burca, p. 190.

In *Van Duyn v Home Office*[398], the Court ruled that "the useful effect of directives would be weakened if individuals could not invoke them in national courts". It justified its decision by stating that the reference for a preliminary ruling procedure enabled the national courts to refer to the Court questions on the validity and interpretation of all the Community acts and thus the individuals should be able to rely on directives in the national courts.

Following the *Van Duyn v Home Office,* two critical judgments were rendered in France and Germany. First, in *Minister of the Interior v Cohn-Bendit*, Daniel Cohn-Bendit, upon his refusal to work in France, relied on Directive 64/221 and claimed that he must have been provided with the reasons for refusal by virtue of the said Directive. The Paris administrative court referred the matter to the ECJ but its decision was appealed by the Ministry. As to the appeal, the French Council of State held that "directives could not be invoked by nationals of Member States in the course of proceedings against an individual administrative act"[399]. Second, in Germany, the Federal Tax Court, upon the appeal of the Lower Tax Court's decision, held that directives can never be directly effective"[400].

The *Ratti* case[401] was an opportunity for the ECJ to 'reach an agreement' with the Member States which rejected the direct effect of the directives. The Court first reiterated its view in *Van Duyn* and stated that if the obligation in a directive is unconditional and sufficiently precise (*Van Gend en Loos* criteria), the Member State must not apply the national law provision which is incompatible with the directive not incorporated into the internal legal order[402]. The Court then brought a condition for Member State's such negative obligation and held that "after the expiration of the period fixed for the implementation of a directive, a Member State may not apply its internal law"[403].

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[398] Case 41/74 [1974] ECR 1337
[399] T.C. Hartley, **European Union Law in a Global Context**, Cambridge University Press, 2004, p. 169.
[400] Hartley, p. 170.
[401] Case 148/78 [1979] ECR 1629
[402] Ibid, para. 23.
[403] Ibid, para. 24.

Next problem was the horizontal direct effect of the directives, to say, whether a directive can be relied on against an individual before the national court. The issue was discussed in *Marshall v Southampton and South-West Hampshire Area Health Authority*[404]. Ms Marshall was dismissed at 62 and the sole reason was that she had passed the retirement age. She sued her employer, Southampton and South-West Hampshire Area Health Authority, and argued that the relevant national law was contrary to Directive 76/207. The Court of Appeal asked two questions to the ECJ:

1- Was the treatment to Ms Marshall an act of discrimination and therefore a violation of Directive 76/207?

2- Can the Directive be relied upon by Ms Marshall in the national court?

The ECJ answered the first question in the affirmative and said that the employer's treatment had constituted discrimination on grounds of sex, contrary to such Directive. With respect to the second question, the Court first stated that Ms Marshall's employer was a crown body and that it can not be deemed to be a private employer (an individual) as UK put it. Then the Court held that the Directive concerned was sufficiently precise to be relied on by an individual and to be applied by the national courts against the state. The Court explicitly specified that since the directives are binding on the Member States to which it is addressed, they may not impose obligations on an individual[405]. Hence, according to the Court, a provision of a directive may not be relied upon against a person. As a result, the Court found that the directives are not horizontally effective.

e. Direct effect of the decisions

Franz Grad v Finanzamt Traunstein[406] is usually referred to[407] as an example of how the ECJ views the direct effect of decisions. In this case the ECJ, as it did in almost all

[404] Case 152/84 [1986] ECR 723
[405] Ibid, para. 48.
[406] Case 9/70 [1970] ECR 825
[407] Craig and De Burca, p. 192-193.

the previous cases relating to the direct effect, cited Article 189 of the EEC Treaty (now Article 249 of the EC Treaty) which provides that decisions are binding upon those to whom they are addressed. In the ECJ's opinion, it "would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision". According to the Court, regulations and decisions differ in terms of their effects but as to the right of the individual to invoke the community acts before the courts, both regulations and decisions are similar to each other.

f. Direct effect of international agreements

In this section, direct effect of different types of international agreements shall be examined. But first, it is necessary to analyze the relevant article of the EC Treaty.

Article 300 of the EC Treaty, which details the procedure as to the conclusion of an international agreement between the EC and one or more States or international organisations, provides that the Commission, after being authorized by the Council, shall conduct negotiations in consultation with the special committees and as per the directives issued by the Council.

Eeckhout sheds light on the wording of Article 300 by saying that the term 'directives' mean the legislative instruments (not the 'directives' in Article 249 of the EC Treaty) addressed to the Council which also appoints the special committees. Therefore the author is of the opinion that although the Commission has the prerogative, it is under intense scrutiny regarding its activities in negotiationg an international agreement[408].

A detailed examination of the procedure in Article 300 is not within the limits of this study but paragraph 7 of the said Article can not be omitted to mention. Such paragraph relates to the "international agreements concluded under the conditions set out in Article 300" and adds that those agreements shall be binding on the institutions of the Community

[408] P. Eeckhout, **External Relations of the European Union-Legal and Constitutional Foundations**, Oxford University Press, 2004, p.171.

and on Member States. So does this provision imply that international agreements take precedence over national laws or that they have direct effect? Eeckhout answers in the negative. He asserts that paragraph 7 describes the binding character of international agreements not the legal consequences or direct effects, because both supremacy and direct effect doctrines were developed by the Court of Justice as a result of no explicit reference to those in the founding Treaties. He views that although the Court's judgments on the direct effect of the international agreements are open to criticism, the idea that international agreements are either supreme or directly effective can not be founded on paragraph 7 of Article 300[409]. I agree with the opinion that international agreements can not be deemed to be supreme or directly effective because of the very wording of Article 300 (7). However, the ECJ has consistently held that the association agreements[410] concluded by the EC in accordance with Article 300 (then Article 228) form an integral part of the Community legal order and that they are an act within the meaning of the preliminary ruling procedure[411]. To clarify the issue, the Union, in drafting the Treaty of Lisbon, could have taken a bold decision and inserted in Article 216 of the Treaty on the Functioning of the European Union that international agreements would be more than 'binding' but the terms 'supremacy' and 'direct effect' are so frightening that (most probably for the dualist states) Article 216 just reiterates Article 300 of the EC Treaty. Thus the subject is waiting to be explicitly dealt with in a future 'amending Treaty' or a Constitution.

In the following paragraphs I shall do an analysis of the Court's case law on the direct effect of the international agreements which jurists find incoherent[412] or inconsistent[413].

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[409] Eeckhout, p. 277.
[410] EC-Turkey Association Agreement is an integral part of the EC legal order. Therefore, national laws can not be in contravention with the directly effective provisions of that Agreement. See page 83 et seq.
[411] See pages 73-74.
[412] S. Douglas-Scott, **Constitutional Law of the European Union**, Longman, 2002, p. 287.
[413] Steiner and Woods, p. 104.

(1) GATT-WTO rules

The Court's case law began with its judgment in *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*[414]. What the International Fruit company challenged was restrictions on the importation of apples from third countries. The College Van Beroep Voor Het Bedrijfsleven, a Dutch court, asked the Court of Justice whether the validity of a measure taken by the Community institutions can be judged with reference to a provision of international law, and second, whether regulations in question are invalid as they are contrary to Article 11 of the GATT 1947[415].

As to the first question, the Court replied in the affirmative and ruled that the incompatibility of a Community measure with a provision of international law could be judged provided that the Community is bound by such provision. In Court's view, Article 11 of the GATT had the effect of binding the Community because the Community, in the EEC Treaty, had assumed the powers previously exercised by Member States in the area governed by the GATT.

In the second question, the Dutch court, in fact, did not ask whether Article 11 of the GATT was directly effective. What was referred to the Court of Justice was the validity of the Community measures which contradicted with the said Article of the GATT. In Court's view, in order to rule on whether or not the invalidity of a Community measure can be relied on in the national court, an examination as to the direct effect[416] of Article 11 should be examined. And for such an examination "the spirit, the general scheme and the

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[414] Cases 21 to 24/72 [1972] ECR 01219

[415] The General Agreement on Tariffs and Trade (GATT 1947), whose objective was the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, was signed by 23 countries (including Belgium, UK, France, the Netherlands, India, USA, China etc.) in 1947 and remained in force until 1994. In Uruguay Round negotiations (1986-1994), GATT 1947 was revised and replaced by GATT 1994 which is now the World Trade Organisation's principal rule-book for trade in goods. The original text of GATT 1947 is available at http://www.wto. org/ english/docs_e/legal_e/gatt47_e.doc For GATT 1994 go to http://www.wto.org/english/docs_e/legal_e/06-gatt.doc

[416] Instead of 'direct effect', the Court of Justice mentioned "Article 11's capability of conferring on the citizens rights which they can invoke before the national courts". In order to put it expressly the present writer preferred the term 'direct effect' which the Court implied.

terms of the GATT" have to be analysed. As a result of its consideration, the Court found that Article 11 did not confer on the citizens rights which they could invoke before the courts. The Court's ruling had founded on its consideration that the GATT was based on negotiations and that it was characterized by great flexibility and included consultations between the signatory states[417].

Following *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, the Court of Justice restated in *Schlüter v Hauptzollamt Lörrach*[418], in *SIOT v. Ministero delle Finanze*, and in *Amministrazione delle Finanze dello Stato v SPI and SAMI* that GATT rules were not directly effective. What was challenged in such cases was not a Community act (as it was in *International Fruit Company*), but a charge in Italy[419].

The above-mentioned rulings were spelled out by the Court of Justice in *Germany v Council*[420] wherein the Court reiterated its view on the GATT rules but then, in contrast to its previous judgments, added that GATT rules could be directly effective in situations where "the adoption of the measures implementing obligations assumed within the context of the GATT is in issue or where a Community measure refers expressly to specific provisions of the general agreement". In Court's view, if either of such two situations occurs, then the legality of the Community measure in the light of the GATT rules must be reviewed.

As to the WTO[421] rules, the ruling of the ECJ in *Portuguese Republic v Council of the European Union*[422] is noteworthy. In this case where Portugal had filed for the

[417] Eeckhout, p. 281.
[418] Case 9-73 [1973] ECR 01135
[419] Eeckhout, p. 283.
[420] Case C-280/93 [1994] ECR I-4973
[421] The WTO stands for the World Trade Organization which "deals with the rules of trade between nations at a global or near-global level". Extracted from the WTO's web site at www.wto.org
[422] Case C-149/96 [1999] ECR I-08395

annulment of a Council Decision[423], the Court of Justice applied its consideration in *Germany v Council* to the matter in question and held that the legality of a Community measure in the light of the WTO rules can only be reviewed by the Court only if there is a Community measure whose objective was to implement an obligation in the WTO agreements or if such measure makes an express reference to the specific provisions of the WTO agreements.

(2) Free trade agreements

The case of *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*.[424] (the 'Kupferberg' case) concerned Kupferberg's (a German undertaking importing wines from Portugal) challenging of the German customs duty on the ground that Article 21 of the Free Trade Agreement[425] concluded between the EEC and Portugal had abolished customs charges and charges having equivalent effect and that such Agreement was directly effective in Germany and thus superior to the national legislation. German high court referred the matter to the ECJ which eventually held that "Article 21 of the Free Trade Agreement between the EEC and Portugal was directly applicable and capable of conferring upon individual traders rights which the courts must protect".

The Court founded its judgment on the following considerations:

1- The Community institutions, by virtue of the EEC Treaty, can make agreements with non-Member countries and international organisations ("international agreements").

[423]Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products

[424] Case 104/81 [1982] ECR 3641

[425] 'Agreement between the European Economic Community and the Portuguese Republic', OJ L 301, 31.12.1972, p. 165

2- International agreements, as per Article 228 (2) of the EEC Treaty (now Article 300 (7) of the EC Treaty), are binding on the Community institutions and on the Member States which are required to comply with the obligations of such agreements.

3- Member States, in their relations with the Community or the non-EEC country concerned, are obliged to show respect to the commitments in international agreements. Because of this, provisions of the international agreements "form an integral part of the Community legal system"[426].

4- The effect of the provisions of the international agreements should not vary from one Member State to another and the ECJ, in interpreting such provisions, shall "ensure uniform application throughout the Community".

5- To determine whether or not Article 21 of the Free Trade Agreement is directly effective, object and purpose of such agreement and its context need to be analysed.

6- The purpose of the Free Trade Agreement concerned is precise and Article 21 is an "unconditional rule against discrimination against taxation". Thus, the said Article is directly effective and "may be applied by a Court".

According to Eeckhout[427], the Court's finding in the Kupferberg case infers that the Community institutions, when concluding an international agreement, are empowered to determine what effects the provisions of an international agreement will produce in the internal legal orders of the Member States. Such effects, in Eeckhout's view, can be determined by the interpretation of the Court only if the international agreement does not bring a solution to the problem[428]. This suggestion seems to be the ideal one but it must be remembered why the Court of Justice developed the principles of supremacy and direct effect. Had the Member States willingly relinquished their sovereign powers and left

[426] *R. & V. Haegeman v Belgian State*, ("Haegeman"), Case 181-73 [1974] ECR 00449.
[427] Eeckhout, p. 285.
[428] Ibid

behind their approach to sources of international law and to international agreements, then there would have been no need for the Court of Justice to establish the founding doctrines. But the founding members, even today in the wake of the Lisbon Treaty, hesitate to refrain from possessing their sovereign rights and to comply with the international law principle of *pacta sunt servanda*[429], thus it is likely that it will continue to be for the Court to interpret the status of the EU law or of the international agreements against the internal rules of the Member States.

(3) Association agreements

The direct effect of an association agreement between the Community and a non-member state was discussed by the Court of Justice first[430] in *R. & V. Haegeman v Belgian State*[431]. Haegemans had challenged the charge on Greek wines imported into the Belgium and Luxembourg on the ground that such charge was contrary to the 'Agreement Creating an Association between the European Economic Community and Greece' ("Athens Agreement"). The Tribunal de Premiere Instance of Brussels referred preliminary questions to the ECJ on the interpretation of Article 9 (3) of Regulation no 816/70 of the Council[432] and of certain provisions of the Athens Agreement, concluded as per Council's decision dated 25 September 1961.

In its ruling the ECJ did not approve Haegeman's submissions[433] but drew two conclusions which are essential as to the status of an association agreement within the Community law:

1- Athens Agreement was concluded by the Council as per the Council decision of 25 September 1961 and thus it can be deemed to be an 'act' within the meaning of Article 177 of the EEC Treaty (now Article 234 of the EC Treaty).

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[429] Ibid
[430] Actually, *Haegeman* is the first case in which an 'agreement' was brought to the ECJ's attention.
[431] supra no. 426.
[432] Regulation dated 28 April 1970 (OJ 1970, L 99)
[433] Eeckhout, p. 233.

2- Provisions of the Athens Agreement form an integral part of community law and hence the ECJ has jurisdiction to give preliminary ruling to interpret such Agreement.

Hartley views that there is a mistake in the ECJ's finding. In his opinion, the Belgian court asked the interpretation of the Athens Agreement, not the Council decision. The Athens Agreement, which was a bilateral act, was an act of the Community and hence the ECJ had no jurisdiction to interpret it[434]. Eeckhout, who disagrees with Hartley and finds his argument not persuasive, asserts that the term 'act' in Article 234 does not confine itself only to the unilateral acts. The author considers it correct for the ECJ to take a broad approach to its jurisdiction to interpret the agreements concluded by the Community[435].

The Athens Agreement was a 'mixed agreement'[436]. In other words, "some provisions of such Agreement fall within the jurisdiction of the Community and some within the jurisdiction of the Member States"[437]. EC-Turkey Association Agreement is a mixed agreement as well[438]. To put it in practical terms, competence in Turkey Agreement is shared between the Community and the Member States[439]. That is why, in *Meryem Demirel v Stadt Schwäbisch Gmünd*[440], the German Government and the United Kingdom asserted that the Member States had entered into commitments with regard to Turkey in the exercise of their powers in the case of workers and that the ECJ did not have jurisdiction on the provisions (of the EC-Turkey Association Agreement) on freedom of movement for workers. The EC-Turkey Agreement shall be dealt with in detail in the following chapters but it should be noted that the issue of direct effect of an association agreement was first

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[434] Hartley, p. 253.
[435] Eeckhout, p. 234.
[436] "A mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third State are parties and for the execution of which neither the organization nor its Member States have full competence". Henry G. Schermers, "A Typology of Mixed Agreements", **Mixed Agreements**, David O'Keeffe and Henry G. Schermers (eds.), Deventer, Kluwer, 1983, p. 25–26, cited by M. Björklund, "Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?", **Nordic Journal of International Law,** Vol. 70 (2001), p. 373.
[437] Hartley, p. 253.
[438] N. Rogers, **A Practitioner's Guide to the EC-Turkey Association Agreement**, Kluwer Law International, 2000, p. 5.
[439] Ibid
[440] Case 12/86, [1987] ECR 03719

brought before the Court in *Haegeman* in which the Court recognized an association agreement as an act within the meaning of Article 234 of the EC Treaty.

THIRD CHAPTER

THE JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE REGARDING TURKEY

I. INTRODUCTION

The EC[441] and Turkey have been in 'association'[442] for more than forty-five years and the EC-Turkey Association Council that was established pursuant to the Association Agreement has adopted more than fifty-six decisions so far. Furthermore, Turkey was accorded the status of candidate country at the Helsinki European Council of December 1999 and the accession negotiations[443] with Turkey were opened on 3 October 2005. Nevertheless, the EC and Turkey are having problems relating to the 'association' and some political circles in the EU are obstructing the membership process which has been already provided for in the Association Agreement of 1963[444] and which has been confirmed by the ongoing accession negotiations.

In order to maintain the rule of law and to comply with the *pactum*, the ECJ, unlike most of the Member States, has talked 'law', corrected politicians who have

[441] The EC stands for the European Community which is the new name given to the European Economic Community by the Treaty on European Union (the Maastricht Treaty) in 1992.
[442] 'Agreement Establishing an Association Between the European Economic Community and Turkey', OJ 1973, C113, p.2.'

[443] By its 'Communication of 6 October 2004 to the Council and the European Parliament: Recommendation of the European Commission on Turkey's progress towards accession [COM(2004) 656 final - Not published in the Official Journal]', the EU Commission considered that Turkey sufficiently fulfilled the Copenhagen political criteria and suggested opening accession negotiations subject to certain conditions. It also proposed - for the first time - establishing a tight framework for the negotiations using a three-pillar strategy.

[444] EC-Turkey Association Agreement, Article 28: "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".

approached the legal problems in a political way and made the lawyers wake up to the fact that Turkish nationals can rely on the Law of the EC-Turkey Association and that their cases can be brought before the ECJ.

Despite dissenting voices among the EC Member States and neglectful public authorities which have devised methods for circumventing the provisions of the Law of the EC-Turkey Association, the ECJ and the EC Commission have endeavoured to give Turkish nationals what they are entitled to. Therefore, even though the judgments have been given following a reference for a preliminary ruling[445] and the ECJ has only provided answers to the questions posed by the national courts, the findings of the ECJ have shaped the future of the 'association', its law and most importantly of the lives of millions of Turkish nationals living in the EU.

The aim of this chapter is to draw firm conclusions from forty one[446] [447] judgments delivered by the ECJ in relation to Turkish nationals. To do so, all the judgments

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[445] For the preliminary ruling procedure see page 40 et seq.

[446] The ECJ has delivered forty one judgments which are as follows in chronological order: ***Demirel*** (Case 12/86 [1987] ECR 03719); ***Sevince*** (Case C-192/89 [1990] ECR I-03461); ***Kuş*** (Case C-237/91 [1992] ECR I-06781); ***Eroğlu*** (Case C-355/93 [1994] ECR I-05113); ***Bozkurt*** (Case C-434/93 [1995] ECR I-01475); ***Taflan-Met*** (Case C-277/94 [1996] ECR I-04085); ***Tetik*** (Case C-171/95 [1997] ECR I-00329); ***Kadıman*** (Case C-351/95 [1997] ECR I-02133); ***Eker*** (Case C-386/95 [1997] ECR I-02697); ***Kol*** (Case C-285/95 [1997] ECR I-03069); ***Günaydın*** (Case C-36/96 [1997] ECR I-05143); ***Ertanır*** (Case C-98/96 [1997] ECR I-05179); ***Akman*** (Case C-210/97 [1998] ECR I-07519); ***Birden*** (Case C-1/97 [1998] ECR I-07747); ***Sürül*** (Case C-262/96 [1999] ECR I-02685); ***Nazlı*** (Case C-340/97 [2000] ECR I-00957); ***Koçak&Örs*** (Joined cases C-102/98 and C-211/98 [2000] ECR I-01287); ***Ergat*** (Case C-329/97 [2000] ECR I-01487); ***Savaş*** (Case C-37/98 [2000] ECR I-02927); ***Eyüp*** (Case C-65/98 [2000] ECR I-04747); ***Kurz*** (Case C- 188/00 [2002] ECR I-10691); ***Wahlergruppe Gemeinsam*** (Case C-171/01 [2003] ECR I-04301); ***Abatay and others*** (Joined cases C-317/01 and C-369/01 [2003] ECR I-12301); ***Öztürk*** (Case C-373/02 [2004] ECR I-03605); ***Ayaz*** (Case C-275/02 [2004] ECR I-08765); ***Çetinkaya*** (Case C- 467/02 [2004] ECR I-10895); ***Dörr&Ünal*** (Case C-136/03 [2005] ECR I-04759); ***Aydınlı*** (Case C-373/03 [2005] ECR I-06181); ***Gürol*** (Case C -374/03 [2005] ECR I-06199); ***Doğan*** (Case C-383/03 [2005] ECR I-06237); ***Sedef*** (Case C-230/03 [2006] ECR I-00157); ***Torun*** (Case C-502/04 [2006] ECR I-01563); ***Güzeli*** (Case C-4/05 [2006] ECR I-10279); ***Derin*** (Case C-325/05 [2007] ECR I-06495); ***Tüm and Darı*** (Case C-16/05 [2007] ECR I-07415); ***Polat*** (Case C-349/06 [2007] ECR I-08167); ***Payır&Akyüz&Öztürk*** (Case C-294/06 [2008] ECR I-00203); ***Nihat Kahveci*** (Case C-152/08 [2008]); ***Er*** (Case C-453/07 [2008]; ***Altun*** (Case C-337/07 [2008]) on 18.12.2008 and ***Soysal*** (Case C-228/06) on 19.02.2009.

[447] As of 7 June 2009, eight cases are pending: *Federal Republic of Germany v D* ("**D**"), Case C-101/09; *Hava Genc v Land Berlin* ("**Genç**"), Case C-14/09; *Ümit Bekleyen v Land Berlin* ("**Bekleyen**"), Case C-462/08; *Yaşar Erdil v Land Berlin* ("**Erdil**"), Case C-420/08; *Nural Örnek v Land Baden-Württemberg* ("**Örnek**"), Case C-371/08; *Metin Bozkurt v Land Baden-Württemberg* ("**Bozkurt**"), Case C-303/08; *Raad*

shall be analyzed according to the status of Turkish nationals who have taken legal actions in the national courts of the EC Member States.

Further, with respect to EC-Turkey Customs Union, five[448] legal actions that were taken by Turkish and European companies against the Community institutions shall be dealt with in this chapter. Even though most of those cases were heard by the CFI, they relate to the Customs Union and they are likely to create a precedent in respect of the Law of the EC-Turkey Association.

II. KEY INFORMATION

A. The Law of the EC-Turkey Association

The EC-Turkey Association Agreement[449] was concluded on 12 September 1963 in accordance with Article 238 of the EC Treaty (now Article 300[450]) by and between Belgium, Germany, France, Italy, Luxembourg, the Netherlands and the European Economic Community of the one part, and Turkey, of the other part.

The aim of the EC-Turkey Association Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the EC and Turkey, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people[451]. In order to achieve such aim, the signatories concluded that a customs union

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van bestuur van het Uitvoeringsinstituut werknemersverzekeringen v H. Akdaş and Others ("**Akdaş and others**"), Case C-485/07**;** *Minister voor Vreemdelingenzaken en Integratie and T. Şahin* ("**Şahin**"), Case C-242/06 (OJ C 212 of 02.09.2006, p.10)

[448] ***Söktaş*** (Case T-75/96 R. [1996] ECR II-00859); ***Kaufring and Others*** **v** ***Commission*** (Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 [2001] ECR II-1337); ***Yedaş*** (Case T-367/03 [2006] ECR II-00873); ***C.A.S.*** (Case C-204/07 P. [2008] ECR 00000); and ***UND***.

[449] supra no. 442.

[450] "The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".

[451] EC-Turkey Association Agreement, Article 2 (1).

would be progressively established[452]. The Parties also agreed that the Association would comprise a preparatory stage, a transitional stage and a final stage[453].

The EC-Turkey Association Agreement is unique[454] in many aspects. For instance, by comparison with the Cooperation Agreement between the European Community and the Kingdom of Morocco[455], the EC-Turkey Association Agreement pursues a more ambitious objective[456] which is 'to eventually reach the free movement of nationals of the EC and Turkey'[457]. Therefore, the Morocco Agreement can not be 'interpreted by analogy with the EC-Turkey Association Agreement'[458] and a Moroccan national does not have a concomitant right of residence whilst he/she is in employment in a Member State of the EU[459].

Further, in comparison to the Partnership and Cooperation Agreement between the EC and the Russian Federation[460] or to the Europe Agreements concluded between the EC and Poland[461], Bulgaria[462], Czech Republic[463] and Hungary, the EC-Turkey Association Agreement additionally[464] envisages the possibility of the accession of Turkey to the EC[465].

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[452] Ibid, Article 2 (2).
[453] Ibid, Article 2 (3).
[454] For detailed information see Arat, p. 589 et seq.
[455] 'Cooperation Agreement between the European Economic Community and the Kingdom of Morocco', signed in Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978, OJ 1978 L 264, p. 1.
[456] *Ayaz* (n. 446), para. 47.
[457] Barbara, Melis, "Case C416/ 96, *Nour Eddline ElYassini* v. *Secretary of State for the Home Department*, Judgment of the European Court of Justice of 2 March 1999, Full Court, [1997] ECR I1209", **Common Market Law Review,** Vol. 36 (1999) p. 1361.
[458] Ibid.
[459] Ibid.
[460] 'Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part' OJ L 327, 28.11.1997, p. 1–69
[461] 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part' OJ L 348 , 31/12/1993 P. 0002 – 0180.
[462] 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part' OJ L 358 , 31/12/1994 P. 0003 – 0222.
[463] 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part' OJ 1994 L 360, p. 1.
[464] EC-Russian Federation Agreement, Article 1: "The objectives of this Partnership are….to create the necessary conditions for the future establishment of a free trade area between the Community and Russia

Interestingly enough, it is told that during the negotiations on the Europe Agreement, the Hungarian delegation, as being inspired by the EC-Turkey Association Agreement, demanded for the inclusion of the term of 'accession' to their agreement but the EC side flatly rejected the idea by stating to the effect that the Europe Agreement with Hungary can not be modelled on the EC-Turkey Agreement since the latter was a young man's sin which must not be committed again[466].

According to the EC-Turkey Association Agreement, the EC and Turkey meet in a Council of Association to ensure the implementation and the progressive development of the association between them[467]. Until now, the Council of Association[468] has adopted more than fifty-six decisions, the first of which was Decision No 1/64 that was adopted at Brussels on 1 December 1964. Of those dozens of decisions, only four have been referred to in the judgments of the ECJ regarding Turkey or rather Turkish nationals: Decision No 2/76[469], Decision No 1/80[470], Decision No 3/80[471] and Decision No 1/95[472].

There exists also the Additional Protocol[473] which was signed between the EC and Turkey on 23 November 1970. The Additional Protocol lays down the conditions, arrangements and timetables for implementing the transitional stage referred to in the

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covering substantially all trade in goods between them, as well as conditions for bringing about freedom of establishment of companies, of cross-border trade in services and of capital movements".

[465] EC-Turkey Association Agreement, Article 28.

[466] Arat, p. 590 and 591 and Haluk Kabaalioğlu, **Avrupa Birliği'nde İşçilerin Serbest Dolaşımı Konferansı**, İstanbul Barosu, İstanbul, 1 Şubat 2008.

[467] EC-Turkey Association Agreement, Article 6.

[468] Hereinafter shall be referred to as the EC-Turkey Association Council

[469] 'Decision No 2/76 of the Association Council of 20 December 1976 on the implementation of Article 12 of the Ankara Agreement'.

[470] 'Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association'.

[471] 'Decision No 3/80 The Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families'.

[472] 'Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union', (OJ 1996 L 35, p. 1).

[473] 'The Additional Protocol, signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Regulation (EEC) No 2760/72 of the Council of 19 December 1972', (OJ 1972 L 293, p. 1).

Association Agreement[474]. The Protocol and its annexes form an integral part of the EC-Turkey Association Agreement[475].

The Association Agreement, the Additional Protocol and the Decisions of the EC-Turkey Association Council collectively constitute the Law of the EC-Turkey Association[476] which is legally binding and the commitments of which are guaranteed by the EC and the Member States[477].

B. Jurisdiction of the ECJ with regard to the Law of the EC-Turkey Association and the *Locus Standi* of Turkish Nationals

Since *Haegeman*[478] the ECJ has taken the view that the interpretation of the association agreements are within its jurisdiction[479] as those agreements are an 'act' of one of the institutions of the EC within the meaning of the preliminary ruling procedure[480]. Similarly, in the Law of the EC-Turkey Association, it has been undisputed since *Demirel*[481] that the ECJ has jurisdiction to interpret the provisions of the EC-Turkey Association Agreement and the Additional Protocol. Furthermore, it has been common knowledge since *Sevince* that the ECJ is competent to interpret the Decisions of the EC-Turkey Association Council[482].

The ECJ has been interpreting the provisions of the Law of the EC-Turkey Association by means of the preliminary ruling procedure. In other words, the interpretation of the Law of the EC-Turkey Association falls within the scope of the

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[474] Ibid, Article 1.
[475] Ibid, Article 62.
[476] The EC-Turkey Association Agreement, the Additional Protocol and the Decision of the EC-Turkey Association Council shall be hereinafter collectively referred to as 'the Law of the EC-Turkey Association'.
[477] *Demirel* (n. 446), para. 9.
[478] supra no. 426.
[479] See pages 73-74.
[480] See pages 73-74.
[481] *Demirel*, para. 7 and 12.
[482] *Sevince* (n. 446), para. 10.

preliminary ruling procedure[483]. Until now[484] forty one cases[485] have been referred to the ECJ for preliminary ruling by the national courts in respect of the disputes between Turkish nationals and the public authorities in the EC Member States. In addition, two[486] actions for annulment were filed by two Turkish companies in the CFI[487] against the EC Commission and the Council.

In the Member States where they are residing, working or being self-employed, Turkish nationals have the right to rely on the provisions of the Law of the EC-Turkey Association as long as the provision on which they are relying on has direct effect[488]. According to the Court, a provision of the Law of Association has direct effect in the Member States if it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure[489]. Until now, the ECJ has analyzed the terms of many provisions of the Law of the EC-Turkey Association in accordance with the said condition. The ECJ has held that Articles 37[490] and 41(1)[491] of the Additional Protocol, Articles 2(1)(b)[492] and 7[493] of Decision No 2/76 of the EC-Turkey Association Council, Articles 6(1)[494], 7(1)[495], 7(2)[496], 9[497], 10(1)[498] and 13[499] of Decision No 1/80 and Article 3(1)[500] of Decision No 3/80 have direct effect.

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[483] Ibid, para. 12
[484] As of 7 June 2009
[485] supra no. 446.
[486] supra no. 448.
[487] supra no. 216 and page 33.
[488] See the explanations on direct effect on page 61 et seq.
[489] *Demirel*, para. 14.
[490] *Nihat Kahveci* (n. 446), para. 29
[491] *Savaş* (n. 446), para. 54
[492] *Sevince*, para. 26
[493] Ibid
[494] Ibid
[495] *Kadıman* (n. 446), para. 28
[496] *Eroğlu* (n. 446), para. 17.
[497] *Gürol* (n. 446), para. 26.
[498] *Wahlergruppe Gemeinsam* (n. 446), para. 57
[499] *Sevince*, para. 26
[500] *Sürül* (n. 446), para. 74.

C. Primacy of the Law of the EC-Turkey Association

As mentioned before, the EC-Turkey Association Agreement was concluded pursuant to Article 300 (ex Article 228) of the EC Treaty. What is important in this regard is that agreements concluded according to Article 300 are binding on the Community institutions and on Member States[501].

Furthermore, according to the court's finding in *Demirel*, the EC-Turkey Association Agreement is an integral part of the community legal system[502] or in other words, it takes part in the EC system[503]. Therefore, the Member States have an obligation towards the EC which has assumed responsibility for the due performance of the EC-Turkey Association Agreement[504]. Similarly, Decisions of the EC-Turkey Association Council do also form an integral part, as from their entry into force, of the Community legal system[505].

So, do the provisions of the Law of the EC-Turkey Association have primacy over the national laws of the Member States? The answer must be in the affirmative. My reasoning is as follows.

First of all, the EC-Turkey Association Agreement is binding on the Member States by virtue of Article 300(7) of the EC Treaty. Secondly, as the ECJ stated, the EC-Turkey Association Agreements is an integral of the Community law which has certainly supremacy over the national laws[506]. Thirdly, according to the ECJ's finding in *Kupferberg*[507], the Member States are required to comply with the obligations of the international agreements and they are obliged to show respect to the commitments in those agreements. And fourthly, if the EC-Turkey Association Agreement did not take

[501] Article 300(7) of the EC Treaty.
[502] *Demirel*, para. 7.
[503] Ibid, para. 9.
[504] Ibid, para. 11.
[505] *Sevince*, para. 9.
[506] See the explanations on supremacy of the EU law on page 56.
[507] See the explanations on the *Kupferberg* case on page 71.

precedence over the national laws, then it would be meaningless to refer to the ECJ for the interpretation of the compatibility of the national laws with the EC-Turkey Association Agreement.

The Law of the EC-Turkey Association also has primacy over the secondary law of the EU (regulations and directives), since the international agreements, as sources of the EU law[508], take precedence over the secondary legislation of the EU[509]. The reasoning behind that primacy is that the subsequent regulations or directives should not make the international agreements ineffective[510]. To that effect, the ECJ has concluded that international agreements concluded by the Community have primacy over the provisions of secondary Community legislation[511]. Such conclusion has been confirmed in *Soysal*[512] where the ECJ held that "it is sufficient to recall that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements"[513].

D. The Standstill Effect

Standstill means "a situation in which there is no movement or activity at all"[514]. So, a person who is standing still, "cannot go forwards or backwards"[515].

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[508] See the explanations on the sources of EU law on page 54.
[509] Klaus Dienelt, "Türk Vatandaşlarının Avrupa'ya Seyahat Özgürlüğü'nün Kısıtlanması", **Türk Vatandaşlarının AB Ülkelerinde İş Kurma ve Hizmet Sunma Serbestisi Semineri** , İKV, İstanbul, 14 Mart 2008, İKV Yayınları No 219, İstanbul, Haziran 2008, p. 14.
[510] Ibid.
[511] *Commission of the European Communities v Federal Republic of Germany* Case C-61/94 ECR 1996 I-03989, para. 52.
[512] *Mehmet Soysal, İbrahimSavatli v Bundesrepublik Deutschland* Case C-228/06
[513] Ibid, para. 59.
[514] Longman Dictionary of Contemporary English, 2004, p.1615.
[515] Lasok, K.P.E.: "The Rights of Turkish Nationals in the Light of *Tüm and Darı*", speech made at İKV, İstanbul, on 30.05.2008.

In economy jargon standstill intends to convey the stagnancy[516]. In legal jargon on the other hand, the word 'standstill' is used in two phrases: 'Standstill agreement' and 'standstill clause'. The 'standstill agreement' is, in general definition, "an agreement to preserve the status quo"[517] or "any agreement to refrain from taking further action"[518]. Standstill agreements are common in merger and acquisitions and they are "contracts that stall or stop the process of a hostile takeover"[519]. The second phrase, the 'standstill clause', is not as concrete as the standstill agreement and hence it is difficult to give any general definition of it save for the one given by Rogers:

"(Standstill is) a provision in an agreement that forbids a party from changing conditions to the detriment of the applicant from how they stand at the time of entry into force of the agreement"[520].

Standstill clauses may appear in many different types of agreements. With respect to the international agreements concluded by the EC, the Europe Agreements[521] for instance contain standstill clauses. Article 56 (4) of the Europe Agreement with Poland[522], with respect to the supply of services between the EC and Poland, states that "the Parties (12 Member States + EC and Poland) shall not take any measures or actions which are more restrictive or discriminatory as compared to the situation existing on the day preceding the day of entry into force of the (Europe) Agreement". Article 57 (4) of the Europe Agreement between the EEC and Bulgaria[523] has the same statement.

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[516] Rolf Gutman, "Ortaklık Anlaşması'nda Standstill Hükmünün Getirdiği Hareketlilik", **Türk Vatandaşlarının AB Ülkelerinde İş Kurma ve Hizmet Sunma Serbestisi**, İstanbul, İKV Yayınları No. 216, Şubat 2008, p. 8.

[517] B.A. Garner, **A Dictionary of Modern Legal Usage**, 2nd edition, Oxford University Press, 1995, p. 826.

[518] **Black's Law Dictionary**, 8th edition, Thomson West, 2004, p. 1442.

[519] For detailed information, see http://www.investopedia.com/terms/s/standstill_agreement.asp (30.07.2008)

[520] Rogers, *A Practitioner's Guide to the EC-Turkey Association Agreement*, p. 27.

[521] "The Europe agreements constituted the legal framework of relations between the European Union and the Central and Eastern European countries", excerpted from the EU Commission's web site at http://ec.europa.eu/enlargement/glossary/terms/europe-agreement_en.htm (30.07.2008)

[522] 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part', OJ L 348, 31/12/1993, p. 0002-0180.

[523] 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part', OJ L 358 , 31/12/1994 p. 0003-0222.

The EC-Turkey Association Law does contain standstill clauses which are:

Article 7 of Decision No 2/76[524]

"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"

Article 13 of Decision No 1/80[525]

"The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories".

Article 41(1) of the Additional Protocol[526]

"The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

Before coming to the standstill effects of those provisions, the personal scope of them should be mentioned. First provision, Article 7 of Decision No 2/76, covers workers of the EC or Turkish nationality whereas Article 13 of Decision No 1/80 covers workers and their family members of the EC or Turkish nationality. So, the personal scope of Article 13 is broader than Article 7 of Decision No 2/76. The third provision, Article 41 of the Additional Protocol, is related to the freedom of establishment and the freedom to provide services. Therefore, a different category of persons are within the personal scope of Article 41(1), i.e. the self-employed persons and the service providers/service recipients of the EC or Turkish nationality.

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[524] The Article entered into force on 20 December 1976.
[525] The Article entered into force on 1 July 1980.
[526] The Article entered into force on 1 January 1973.

As to the legal effects of those standstill provisions, it should be first pointed out that the first provision, Article 7 of Decision No 2/76 is no longer in force. As it was confirmed by the ECJ, Decision No 2/76 constituted the first stage in securing the freedom of movement for the workers of the EC Member States and of Turkey. Decision No 2/76 was drafted to last for four years as of the date it entered into force[527]. So, after four years of implementation, Decision No 2/76 was superseded by Decision No 1/80 which constitutes a further stage in securing freedom of movement for workers[528]. Article 41(1) of the Additional Protocol on the other hand, is still enforceable and it is likely to be referred to in many future decisions of the ECJ. Consequently, in the Law of the EC-Turkey Association, there are two existing standstill provisions applying to four different categories of persons.

Both Article 13 of Decision No 1/80 and Article 41(1) of the Additional Protocol prohibit the same thing, the introduction of new restrictions. Thus, if the EC Member States or Turkey introduces new restrictions on workers, the family members of the workers, the self-employed persons or on the service providers/recipients, then that restriction will fall within the scope of Article 13 and of Article 41(1). This raises the question about the effective date of the prohibition of new restrictions. The answer was provided by the ECJ in the *Savaş*[529]and the *Abatay and others*[530] cases in which the Court held that the prohibition of introducing new restrictions would be effective as of the date on which Decision No 1/80 or the Additional Protocol entered into force in the state which imposed new restrictions on the persons mentioned above. In other words, neither the EC Member States nor Turkey can impose stricter conditions than those which applied at the time when Decision No 1/80 or the Additional Protocol entered into force in the Member State concerned or in Turkey[531].

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[527] *Bozkurt* (n. 446), para. 14.
[528] Ibid.
[529] *Savaş* (n. 446), para. 69.
[530] *Abatay and others* (n. 446), para. 117.
[531] Ibid.

Article 13 of Decision No 1/80 and Article 41(1) of the Additional Protocol imposes on the EC member States and on Turkey a duty not to act[532]. This negative obligation has effects on the persons who are covered by the two standstill clauses. This raises the question of whether the two standstill clauses have direct effect or of whether the individuals or legal persons can rely on those clauses before the national courts. The answer was given by the ECJ in *Sevinc*e, and *Savaş*, and *Abatay and others*. The Court first ruled in *Savaş*[533] that Article 41(1) is identical to Article 53 of the EC Treaty[534] and that is directly applicable in the Member States. Article 13 of Decision No 1/80 has direct effect as well. The Court ruled first in *Sevince*[535] that Article 13 is directly applicable and that it can be relied on by Turkish nationals in the national courts of the Member States.

Until now the ECJ has discussed the direct effect of Article 13 and Article 41(1) only as regards Turkish nationals. According to the ECJ, a Turkish national can rely on Article 13 if he is a worker within the meaning of Decision No 1/80 and if he resided for a sufficient period to allow him progressively to become integrated in the host Member State of the EC[536]. And, a Turkish national can rely on Article 41(1) in the national courts of the Member States if: (a) he is to get engaged in business in the host Member State as a self-employed person[537], or (b) he is being employed as an employee of a service provider[538], or (c) he is an asylum seeker wishing to establish business in the host Member State[539]. The Court also indirectly acknowledged that a legal person, which was established in Turkey and which provides service to a Member State, can rely on Article 41(1) in the national courts of an EC Member State[540].

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[532] *Savaş*, para. 47.
[533] *Savaş*, para. 48 and 54.
[534] EC Treaty, Article 53 (no longer in force): "Member States shall not, subject to the provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other Member States".
[535] *Sevince* (n. 446), para. 18, 19 and 26 and
[536] *Abatay and others* (n. 446), para. 89-91 and 117.
[537] *Savaş*, para. 71.
[538] *Abatay and others*, para. 106 and 117.
[539] *Tüm and Darı* (n. 446), para. 69.
[540] *Abatay and others*, para. 117 (indent 5).

The direct effect of Article 13 and Article 41(1) has not been raised as regards the EC nationals so far. In my view, the reason for this is the asymmetrical nature of the EC-Turkey Association. But in theory, a national of an EC Member State can rely on both Article 13 and Article 41 since those provisions explicitly imposes an obligation on Turkey not to apply new restrictions on EC nationals[541].

E. Background Details

The subject of this thesis is the judgments of the ECJ regarding Turkey or Turkish nationals. In all the judgments within the confines of the study herein, the ECJ has given decisions following a reference for a preliminary ruling from a national court of a Member State. Interestingly enough, all of the references as regards the Law of the EC-Turkey Association have been made by the national courts of four Member States: Germany, Austria, the Netherlands and the UK.

The German courts have asked more questions to the ECJ on Turkish nationals than any other national court of a Member State. The reason behind this might be the fact that Germany is the Member State which has made the most references for a preliminary ruling throughout the history of the ECJ[542]. Or one might argue that German courts referred to the ECJ most because Germany has the highest[543] Turkish migrant population among the EC Member States. Another reason why German courts most refer to the ECJ as regards Turkish nationals might be Germany's or rather the German laws' approach to the Law of the EC-Turkey Association or to Turkish nationals in general. For instance, in a comparative study of law and practice relating to long-term migrants, the analysts state that some German courts "have opted for a more restrictive interpretation of Article 14 of

[541] See page 235 et seq.
[542] See page 41, vital statistics.
[543] According to the Federal Office for Migration and Refugees, there were 1.713.551 Turkish nationals living in Germany in 2007. Further, 30.720 Turkish nationals entered into Germany in 2006. See Markus Richter, "Turkish Citizens in Germany-Measures of Integration", **Türkiye-AT Ortaklık Hukuku: 1963 Ankara Anlaşması'ndan Günümüze Gelişmeler (AB Vatandaşlarının Türkiye'de ve Türk Vatandaşlarının AB Ülkelerinde Hakları) Konferansı**, Koç Üniversitesi, Dr. Nüsret-Semahat Arsel Uluslararası Ticaret Hukuku Araştırmaları Merkezi, 16-17 Haziran 2008, İstanbul.

Decision No 1/80[544] of the EC-Turkey Association Council regarding expulsion of Turkish citizens and that such interpretation is followed in the draft of the separate general instructions on the implementation of Decision 1/80, which the Federal Minister of the Interior sent to his colleagues of the Länder for their comments in 1997"[545]. In the Netherlands on the other hand where, in the analysts' view, "Turkish workers and their family members enjoy a similar protection as a result of the implementation of the rules made under the EC-Turkey Association Agreement"[546], "the Dutch Ministry of Justice stipulated in the Aliens Circular that Article 14 of Decision 1/80 grants Turkish workers, covered by that Decision the same protection against expulsion as provided to nationals of the EU member states under Community law"[547]. Similarly, another comparative study hints that before the adoption of a new law in Germany in 1999, which grants German nationality at birth to children born in Germany if one of the parents has eight years of legal residence in Germany, a German born Turkish national, who has a criminal record, used to be expelled whereas a national of a EU Member State used not to be[548].

Consequently, although a further research is necessary to draw a final conclusion, it can be maintained that a Member State's implementation of the Law of the EC-Turkey Association and the legislator's approach to Turkish nationals in that Member State is a key factor in the general trend towards the national courts' referring cases to the ECJ with respect to Turkish nationals. The population of Turkish nationals in a Member State must also be seen to be relevant to the frequency of the references for a preliminary ruling because otherwise a Turkish national, who was not entitled to social assistance in Greece,

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[544] Decision No 1/80, Article 14: "The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals".

[545] Kees Groenendijk, Elspeth Guild and Halil Dogan, "**Security of Residence of Long-term Migrants- a Comparative Study of Law and Practice in European Countries**", Centre for Migration Law, University of Nijmegen, The Netherlands, February 1998, p. 43.

[546] Ibid, p. 105.

[547] Ibid, p. 52.

[548] Steve Peers, Robin Barzilay, Kees Groenendijk and Elspeth Guild, "**The Legal Status of Persons Admitted for Family Reunion- a Comparative Study of Law and Practice in Some European States**", Centre for Migration Law, University of Nijmegen, The Netherlands, January 2000, p. 29.

would have long ago relied on the relevant provision of the Law of the EC-Turkey Association before the Greek courts which apply the national law that "in Greece social assistance can only be granted to Greek citizens and to citizens of one of the EU Member States"[549].

III. JUDGMENTS REGARDING TURKISH NATIONALS' FIRST ENTRY TO A MEMBER STATE OF THE EU

A. Legal Background

A Turkish national, who wishes to enter an EU Member State, first needs to leave Turkey from one of the Turkish border gates[550] at which he must submit a valid passport[551] to the police officers at the gate[552]. He can present one of the four types of passports that the Turkish state issues[553]. The type of the passport presented is of importance in determining whether or not that passenger needs a visa[554] to enter an EU Member State. If the voyager holds a diplomatic, special or an official passport, he will be exempt from the visa requirement in the EU Member State to which he is to enter[555]. But if he is an ordinary passport holder, then a visa will be required by the Member State[556]. To exemplify, a Turkish national who is either a diplomatic, special or an official passport holder, can enter Austria, Belgium, the Czech Republic, Denmark, France, Germany, Italy, Spain, Sweden or

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[549] Kees Groenendijk, Elspeth Guild and Robin Barzilay, "**The Legal Status of Third Country Nationals who are Long-Term Residents in a Member State of the European Union**", Centre for Migration Law, University of Nijmegen, Netherlands, Nijmegen, April 2000, p. 51.
[550] Law No 5682 (Passport Law), published in the Official Gazette of 24.07.1950 No. 7564, Article 1.
[551] Instead of a passport, the passenger has the right to submit a valid document that can replace a passport.
[552] Law No 5682, Article 2.
[553] Ibid, Article 12.
[554] The visa is regulated in EU law by the 'Council Regulation (EC) 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' ("the Visa Regulation"), OJ L 081 , 21/03/2001 p. 0001 – 0007.
[555] The Visa Regulation, Article 4(1).
[556] The Visa Regulation, Article 1(1): "Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States". Turkey is on the list in Annex I.

the Netherlands and stay there up to three months without need to have a visa[557]. By contrast, a Turkish ordinary passport holder can only enter the said countries by a valid visa[558] which means that he has to make a visa application, provide a long list of documents with the consulate of the relevant Member State, prove that he has sufficient income and to pay the visa fee plus the application fee. Accordingly, obtaining a visa to enter an EU Member State is a problem only for Turkish nationals who are ordinary passport holders.

B. The Judgments

1. *First judgments*

Since the *Kuş*[559] case, the ECJ has been stating to the effect that the Law of the EC-Turkey Association does not entitle a Turkish national to the free entry to a Member State of the EC. It can be argued that the Court's constant repetition is to allay concerns about the influx[560] of Turkish migrants to the EC.

In *Kuş*, even though the referring court did not pose a question on the Turkish nationals' first entry into a Member State, the Court nevertheless expressed its view:

"…Decision No 1/80 does not encroach upon the competence retained by the Member States to regulate the entry into their territories of Turkish nationals…"[561]

The Court repeated the above statement in *Eroğlu*[562], and in *Tetik*[563] although neither Mrs. Eroğlu's nor Mr. Tetik's entry into Germany was illegal. In *Kadıman*, the Court reiterated that statement in respect of family members and held that the Member

[557] Detailed information is available on Turkish Foreign Ministry's web site at http://www.mfa.gov.tr/turk-vatandaslarinin-tabi-oldugu-vize-uygulamalari.tr.mfa (30.08.2008).
[558] Ibid.
[559] Case C-237/91 [1992] ECR I-06781
[560] Zuleeg, M. "Case C-355/93, *Eroğlu* v. *Land Baden-Württemberg*, Judgment of 5 October 1994, ECR (1994) I-5113". **Common Market Law Review**. Vol. 33, 1996, p. 95.
[561] *Kuş*, para. 25
[562] *Eroğlu* (n. 446) , para. 10
[563] *Tetik* (n. 446), para. 21.

States have the right to authorize or withhold the entry of a Turkish woman who wishes to join her husband who was legally employed in Germany[564].

In *Ertanır*, the Court made it more explicit by expressing that Decision No 1/80 "does not in any way affect the competence of the Member States to refuse the entry into their territories of Turkish nationals"[565].

The Court broadened its view in *Ayaz*[566] and stated that (all) the provisions of the EC-Turkey Association do not affect the competence of the Member States in relation to Turkish nationals' first entry.

Further, in Court's view, a Turkish national, who unlawfully enters a Member State, can not claim a right of employment in that Member State. To that effect the Court pointed out in *Nazlı* that Turkish worker's entitlement to the rights under Article 6(1) of Decision No 1/80 is "subject only to the condition that the worker has complied with the legislation of the host Member State governing entry into its territory"[567].

2. *'Savaş' – 'Abatay' – 'Tüm and Darı'*

Like the previous cases, Turkish nationals' right of entry to a Member State was not at issue in *Savaş*. However, *Savaş* paved the way for the recognition of the importance of Article 41(1) of the Additional Protocol[568] relating to Turkish national's first entry into a Member State.

Mr. Savaş was a self-employed Turkish national and he was already in the UK. But he had overstayed and he would be deported. In those circumstances, Mr. Savaş and his lawyers relied on Article 41(1). First they argued that Mr. Savaş has a right of establishment and a corresponding right of residence by virtue of Article 41(1). But then

[564] *Kadıman* (n. 446), summary, para. 3.
[565] *Ertanır* (n. 446), para. 30
[566] Ayaz (n. 446), para. 35.
[567] *Nazlı* (n. 446), para. 32, *Kurz* (n. 446), para. 41
[568] "The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

they changed their view to benefit from the standstill effect of the Article. Mr. Savaş and his lawyers succeeded in drawing the ECJ's attention to the standstill effect of Article 41(1). Accordingly, despite its holding that Turkish national's first admission to the territory of a Member State is governed exclusively by that State's own domestic law[569], the Court pointed out that Article 41(1) applies to Turkish self-employed persons.

In *Abatay and others*, Mr. Abatay and his friends were Turkish lorry drivers who were employed by a company established in Turkey. The ECJ confirmed their right to rely on Article 41(1) despite their status as an employee of a service provider, i.e. the transport company[570]. Accordingly, the Court held that despite their competence to regulate the first admission of Turkish nationals to their territories, the Member States are obliged by Article 41(1) not to adopt any new measures which restrict the establishment and residence of a Turkish national[571].

Tüm and Darı is the third and the crucial step in the recognition of Turkish nationals' right of entry in the light of Article 41(1) of the Additional Protocol. In *Tüm and Darı*, the Court, in the light of Article 41(1), expressly referred to Turkish nationals' first admission to a Member State[572]. The Court pointed out that Article 41(1) imposes on the Member States a duty not to act and limits their room for manoeuvre for immigration policy[573]. So, it remarked that Article 41(1) is applicable to rules relating to the first admission of Turkish nationals into a Member State where they intend to exercise their freedom of establishment[574]. Consequently, the Court held that Member States can not introduce new restrictions relating to substantive and/or procedural conditions governing the first admission of Turkish nationals intending to get engaged in business as self-employed persons[575].

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[569] *Savaş* (n. 446), para. 65.
[570] *Abatay and others*, para. 106.
[571] Ibid, para. 66.
[572] *Tüm and Darı* (n. 446), para. 50
[573] Ibid, para. 58.
[574] Ibid, para. 63.
[575] Ibid, para. 69.

Tüm and Darı has produced an inevitable result, imposing obligation on the Member States to determine whether the existing domestic rules are restrictive by comparison with the rules that were in force at the time of the entering into force of the Additional Protocol[576] in the Member States. So, on comparison, Member States must "apply the less restrictive rules"[577] to Turkish nationals.

3. *Consequences of 'Tüm and Darı'*

The ECJ explicitly stated in *Tüm and Darı* that Article 41(1)'s standstill effect applies to Turkish self-employed persons' first entry into a Member State. However, it was not obvious whether visa is covered by Article 41(1). The Court did not elaborate[578] the term of 'substantive and/or procedural conditions governing the first admission of Turkish nationals' in *Tüm and Darı* and hence it may have been argued that Member States are not prohibited from introducing new visa requirement for Turkish nationals. Such a contention does not remain any more after *Soysal*[579] which will be dealt with in the following pages.

Tüm and Darı brought reactions from the Member States. The case dominated the national agenda in Germany where "the Federal Government was asked the question of how it would deal with the visa problem relating to Turkish service providers or recipients, or to Turkish tourists, students or businessmen who wish to remain in Germany"[580]. Despite the fact that Article 41(1) applies both to freedom of establishment and the freedom to provide services, the Federal Government provided an "opportunist answer to the effect

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[576] Piet Jan Slot and Narin Tezcan, "Recent Developments in Case Law Concerning Free Movement Rights of Persons under the EEC-Turkey Association Agreement" **Türkiye-AT Ortaklık Hukuku: 1963 Ankara Anlaşması'ndan Günümüze Gelişmeler (AB Vatandaşlarının Türkiye'de ve Türk Vatandaşlarının AB Ülkelerinde Hakları) Konferansı**, Koç Üniversitesi, Dr. Nüsret-Semahat Arsel Uluslararası Ticaret Hukuku Araştırmaları Merkezi, 16-17 Haziran 2008, İstanbul, p. 4.
[577] Ibid.
[578] Sanem Baykal, "Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu", **Türk Vatandaşlarının AB Ülkelerinde İş Kurma ve Hizmet Sunma Serbestisi**, İKV Yayınları No 214, İstanbul, Şubat 2008, p. 29.
[579] *Mehmet Soysal, Cengiz Salkım, İbrahim Savatli v Bundesrepublik Deutschland* (C-228/06).
[580] Dienelt, *Türk Vatandaşlarının Avrupa'ya Seyahat Özgürlüğü'nün Kısıtlanması*, p. 12.

that the ECJ in *Tüm and Darı* dealt with the application of Article 41(1) in respect of freedom of establishment, not of the freedom to provide services"[581].

In practice in Germany, it can be argued that the German judges found a way around *Tüm and Darı* and Article 41/1. In a judgment delivered by a court in Aachen in May 2008[582], the Court held that if the residence title was rejected in the past by the competent authorities and the Turkish national failed to appeal against that decision, then that Turkish national could no longer invoke Article 41/1 and ask for the application of German rules in 1974.

By comparison with their German counterparts, the judges in the Netherlands opted to take *Tüm and Darı* into account instead of insisting on their previous considerations. To that effect, the Council of State applied *Tüm and Darı* in the *Güneş*[583] case of 6th March 2008[584]. The Council of State concluded that "the prohibition of Article 41(1) of the Additional Protocol not to introduce new restrictions relates to the law as it was interpreted by the Dutch courts"[585]. That interpretation brought about the application of the laws of 1973 according to which the possession of temporary residence authorization is not a condition to fulfil to enter the Dutch territory[586]. Furthermore, a court in the Hague (Rechtbank's-Gravenhage) followed the footsteps of the Council of State and based its judgment[587] on *Tüm and Darı* and *Güneş*[588].

[581] Ibid.
[582] VG Aachen 8. Kammer, Entscheidungsdatum: 16.5.2008, Aktenzeichen: 8L 445/07.
[583] LJN: BC6595, Raad van State, 200409217/I-A.
[584] Slot and Tezcan, p. 5
[585] Ibid.
[586] Ibid, p. 6.
[587] LJN: BD 0956.
[588] Slot and Tezcan, p. 6.

4. *'Soysal': Good things come to those who wait*

The *Soysal* case[589] is the first of its kind where a referring court inquired as to whether or not the visa requirement for Turkish nationals is in compliance with the Law of the EC-Turkey Association. Upon reference for a preliminary ruling, the ECJ discussed in detail the consistency of paragraphs 4(1) and 6 of the German Law on residence, and Article 1(1) of Regulation No 539/2001 with Article 41(1) of the Additional Protocol.

Owing to its importance in the context of EC-Turkey Association, the two questions posed by the Administrative Court of Berlin-Brandenburg must be transcribed verbatim:

" Is Article 41(1) of the Additional Protocol of 23 November 1970 to the Agreement establishing an Association between the European Economic Community and Turkey to be interpreted in such a way that it constitutes a restriction on freedom to provide services if a Turkish national who works in international transport for a Turkish undertaking as a driver of a lorry registered in Germany has to be in possession of a Schengen visa to enter Germany under Paragraph 4(1) and Paragraph 6 of the Aufenthaltsgesetz (German law on residence) of 30 July 2004 and Article 1(1) of Regulation (EC) No 539/2001 even though on the date on which the Additional Protocol entered into force he was permitted to enter the Federal Republic of Germany without a visa?

If the answer to the first question is in the affirmative, should Article 41(1) of the Additional Protocol be interpreted as meaning that the Turkish nationals do not require a visa to enter Germany?" [590].

Soysal was a source of contention both in Europe and Turkey. Before the judgment was delivered, there were two different predictions as to what the line of the ECJ on visa

[589] *Mehmet Soysal, Cengiz Salkım, İbrahim Savatli v Bundesrepublik Deutschland* ("Soysal"), Case C-228/06.
[590] OJ C190/8, 12.08.2006.

requirement for Turkish nationals would be. Baykal[591] viewed that the issue of visa fell within the scope of the term of "substantive and/or procedural conditions" [592] which govern the first admission to the territory of a Member State of Turkish nationals intending to establish themselves in business there and that therefore the Court's judgment in *Tüm and Darı* and Article 41(1) would apply to Mr. Soysal and his friends[593]. The author's prediction was that there was a low probability that the ECJ would rule that visa requirement for Turkish nationals who wish to benefit from the freedom of establishment is (in all aspects) unlawful in the light of Article 41(1)[594]. The author's reasoning[595] can be summarized as follows:

- In the case of *Barkoci and Malik*[596], a case relating to the interpretation of Articles 45 and 59 of the Europe Agreement with the EC and the Czech Republic, the ECJ held that a Member State may use a system of "prior control which makes the issue by the immigration authorities of leave to enter subject to the condition that the applicant must show that he genuinely intends to take up an activity" as a self-employed person. In Court's view, Mr. Barkoci and Mr. Malik's requirement to "obtain entry clearance in Czech Republic before departing for the UK does not make it impossible or excessively difficult for Czech nationals to exercise the rights granted to them by Article 45(3)[597] of the EC-Czech Agreement"[598];

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[591] Baykal, *Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, p. 29.
[592] *Tüm and Darı*, para. 69.
[593] Baykal, *Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, p. 29.
[594] Ibid, p. 32.
[595] Ibid, p. 20 and 30-32.
[596] *The Queen v Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik* ("Barkoci and Malik"), Case C-257/99, ECR 2001 I-06557.
[597] "Each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Czech Republic companies and nationals and shall grant in the operation of Czech Republic companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals".
[598] *Barkoci and Malik*, para. 83, the second and third indents.

- According to the opinion of the Advocate General Geelhoed[599] in *Tüm and Darı*, the freedom of establishment referred to in Article 41(1) of the Additional Protocol does not include the conditions governing the entry of Turkish nationals to the Member States[600];

- The social, economic and political circumstances may prevent the ECJ from declaring that visa is totally unlawful.

So, Baykal asserted that the ECJ was very likely to hold that visa requirement is not unlawful. It is also noteworthy that the author differentiated[601] between Article 41(1) of the Additional Protocol and the Article 45(3) of the EC-Czech Agreement which the ECJ interpreted in *Barkoci and Malik*.

By contrast, Dienelt, the chairman of the Administrative Court in Darmstadt, Germany, firmly believed that the ECJ would hold in *Soysal* that Article 41(1) of the Additional Protocol has supremacy over the EC Visa Regulation[602]. According to the German judge, the ECJ would answer the referring court's questions in the affirmative[603].

Dienelt went further and asserted that Turkish tourists, patients, businessmen, artists and sportspersons, provided that they receive services in return for payment, would not be required to obtain visa since they are service recipients within the meaning of Article 41(1) of the Additional Protocol[604]. In order to support his argument, Dienelt quoted from the judgment of the ECJ in *Calfa*[605]: "The principle of freedom to provide services established in Article 59 of the (EC) Treaty, which is one of its fundamental principles, includes the freedom for the recipients of services to go to another Member State in order

[599] Opinion of Mr Advocate General Geelhoed delivered on 12 September 2006.
[600] Ibid, para. 61.
[601] Baykal, *Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, p. 30.
[602] Dienelt, *Türk Vatandaşlarının Avrupa'ya Seyahat Özgürlüğü'nün Kısıtlanması*, p. 14.
[603] Ibid, p. 31.
[604] Ibid, p. 14.
[605] Case C-348/96, ECR 1999 I-00011.

to receive a service there, without being obstructed by restrictions, and that tourists must be regarded as recipients of services"[606].

Prior to the delivery of the judgment, the present author's contention was that in *Soysal* the ECJ would follow its findings not only in *Tüm and Darı* but also in *Abatay and others*. The Court would contradict itself if it strayed from its case law. Therefore, as to Mr. Soysal and his friends, Turkish nationals who work in international transport for a Turkish undertaking as drivers of lorries registered in Germany, the Court could not hold that:

- Article 41(1) of the Additional Protocol does not apply to international transport en route from Turkey to Germany *because*

  In *Abatay and others*, the Court held that "Article 41(1) is applicable to international road haulage of goods originating in Turkey, where those services are carried out in the territory of a Member State"[607].

- Mr. Soysal and his friends are not within the personal scope of Article 41(1) as it is their employer which provides services in Germany *because*

  In *Abatay and others*, the Court held that "Article 41(1) can be relied on not only by an undertaking established in Turkey which performs services in a Member State, but also by the employees of such an undertaking"[608].

- Freedom to provide services is not restricted in Germany since the service (transportation) is carried out by lorries which are registered in Germany *because*

  Mr. Abatay and his friends were also the drivers of vehicles registered in Germany[609].

[606] Ibid, para. 16.
[607] *Abatay and others* (n. 446), para. 117, fourth indent.
[608] Ibid, fifth indent.
[609] Ibid, para. 28.

- Visa requirement that was introduced subsequent to the entering into force of the Additional Protocol in Germany does not restrict a Turkish firms' or its employees' freedom to provide services in Germany *because*

> In *Abatay and others*, the Court held that, "Article 41(1) precludes the introduction of a requirement of a work permit in order for an undertaking established in Turkey to provide services in the territory of that State, if such a permit was not already required at the time of the entry into force of the Additional Protocol"[610].

- Article 41(1) does not apply to visa requirement to enter a Member State *because*

> In *Tüm and Darı*, the Court held that the "standstill' clause set out in Article 41(1) of the Additional Protocol must be regarded as also applicable to rules relating to the first admission of Turkish nationals into a Member State"[611].

For the reasons above, in the present author's view, there was high probability that the ECJ would rule in favour of Mr. Soysal and his friends and answer at least the first question of the referring court in the affirmative. Baykal's assertion was that in *Soysal* the Court would not find visa requirement for Turkish self-employed persons (persons who wish to benefit from the right of establishment) unlawful. In fact, it was obvious that the Court would not touch the problem of visa requirement relating to the freedom of establishment because it was not asked by the referring court to do so. The German court had inquired about "a restriction on freedom to provide services" and Mr. Soysal and his friends were not self-employed persons but service provider-drivers like Mr. Abatay and his friends. Further, as to the Court's finding in *Barkoci and Malik*, the Court in *Soysal* would inevitably prefer to refer more to *Abatay and others* and *Tüm and Darı* as they were newer cases and more relevant to what was asked by the referring court in *Soysal*.

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[610] Ibid, para. 117. sixth indent.
[611] *Tüm and Darı* (n. 446), para. 63.

Finally, on 19 February 2009, the ECJ gave its decision. The Court perfectly based its judgment on its findings in *Savaş*; *Abatay and others*; and *Tüm and Darı*. In this respect, the Court found that lorry drivers such as Mr. Soysal and his friends could validly invoke Article 41(1) of the Additional Protocol[612] and challenge the German Law on residence and Regulation No 539/2001 which require them to obtain visa to enter Germany[613].

The Court's reference to *Savaş*; *Abatay and others*; and *Tüm and Darı* confirmed its line on Article 41(1) of the Additional Protocol, i.e. the standstill clause. To be specific, the Court reiterated that Article 41(1) prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of the freedom of establishment and the freedom to provide services on the territory of a Member State subject to stricter conditions than those which applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned[614].

In order to rule on the visa requirement, the Court, as it was expected, made use of *Abatay and others*; and *Tüm and Darı* in which it respectively held that Article 41(1) of the Additional Protocol, with respect to Turkish nationals who seek to provide services or establish themselves in business in a EU Member State, precludes the introduction of a requirement of a work permit[615] and the adoption of any new restrictions relating to the substantive and/or procedural conditions governing the admission to the Member State territory[616].

The novelty of the judgment is that the ECJ expressly stated that:

[612] *Soysal*, para. 46.
[613] Ibid, para. 51 and 62.
[614] Ibid, para. 47.
[615] Ibid, para. 48.
[616] Ibid, para. 49.

- The term "substantive and/or procedural conditions for Turkish nationals wishing to gain access to the territory of a Member State or to a professional activity" covers requirement to obtain visa[617],

- The current requirement that Turkish nationals must possess a visa to enter German territory, in comparison with paragraph 1(2)(2) of the Regulation Implementing the Law on Aliens which was in force on 1 January 1973 and which stated that Turkish nationals were entitled to enter Germany without a visa[618], constitutes a 'new restriction' within the meaning of Article 41(1) of the Additional Protocol[619].

In the light of those two new conclusions, the Court ruled that Article 41(1) of the Additional Protocol precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey[620].

5. *Consequences of 'Soysal'*

Soysal has attracted a lot of interest from the media and the general public in Turkey. Victorious Soysal and his driver friends were considered as pioneers. The Turkish Foreign Ministry spokesman stated on 24 February 2009 that *Soysal* was a strong case and that the Ministry would endeavour to make the EC-Turkey Association agenda include *Soysal* and the visa issue[621].

Before the judgment was delivered, the leading experts had argued that it would be a direct challenge to Schengen System and to the Visa Regulation if the Court gave a ruling

[617] Ibid, para. 50 and 51.
[618] Ibid, para. 21.
[619] Ibid, para. 57.
[620] Ibid, para. 62.
[621] http://www.mfa.gov.tr/bakanlik-sozcusu_nun-olagan-basin-toplantisi_-ankara_-24-subat-2009.tr.mfa

favourable to Turkish nationals. According to them, the situation in EU[622] with respect to Turkish nationals would be as it was in 1973[623] and the EU Visa Regulation would have to be amended[624] for the fifth time. However, following the delivery of the judgment in *Soysal*, the EC side did not make any official statement.

Different from the EC institutions, Germany has concerned herself about the judgment in *Soysal.* First, the German Embassy in Turkey, the leading opponent in the visa argument, denied the rumours that the visa requirement for Turkish nationals would be abolished and expressed that the issue was being deliberated among the Member States[625]. Further, the German ambassador to Turkey strikingly stated that *Soysal* was about the free movement of services and that it did not affect the visa requirement for Turkish nationals who wish to enter Germany to establish business, to work or to unify a family[626].

Shortly after, the German Parliamentary State Secretary Peter Altmeier, upon a question posed at the Parliament, stated that *Soysal* deals exclusively with the visa-free entry of Turkish nationals for short-term use of the freedom to provide services and that the ruling of the ECJ does not change anything relating to the visa requirement for Turkish nationals who stays longer than three months[627].

In the meantime, the Administrative Court in Berlin,[628] in a case regarding a Turkish national who seeks to enter Germany to visit his four children, stated that:

"This type of earmarking aimed at a commercial activity does not refer to a visit to friends or relatives. The receipt of services talkes place, in this cases, almost inevitably and

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[622] The United Kingdom and Ireland are not bound by Visa Regulation so theoretically they may continue to require Turkish nationals to obtain visa even if Visa Regulation is amended.
[623] Gutman, p. 19.
[624] Steve Peers, - Law Professor at the University of Essex- talk on "Turkish nationals and visa", Brussels, 2 July 2008.
[625] http://www.ankara.diplo.de/Vertretung/ankara/tr/03/Pressemitteilungen/2009__10__pressemitteilung.html
[626] http://www.ankara.diplo.de/Vertretung/ankara/tr/03/Pressemitteilungen/2009__09__pressemitteilung.html
[627] http://www.migrationsrecht.net/nachrichten-auslaenderrecht-politik-gesetzgebung/1300-innenministerium-visumspflicht-fuer-tuerkische-staatsangehoerige-bleibt.html
[628] VG 19 V 61.08 on 25.02.2009. To see the judgment please go to http://www.migrationsrecht.net/component/option,com_docman/Itemid,127/task,cat_view/gid,177/ and click on the frist link entitled "VG Berlin visumsfreie".

simply now and then during visits for other purposes and should therefore, given a broad understanding of the passive freedom of services, not affect the rationale behind Article 41 of the Additional Protocol"[629].

Dienelt asserts that Peter Altmeier's statement is incompatible with the above finding of the Berlin court[630], the general agreement in the German literature and with the case law of the ECJ[631] which deem that the receipt of services falls within the scope of freedom to provide services which is covered by Article 41(1) of the Additional Protocol[632]. According to the author, Turkish service recipients, namely tourists, patients and businessmen must no longer require visa to enter a Member State provided that they receive a service in that state in return for payment. Indeed, in the opinion of the ECJ in *Luisi and Carbone*[633] (1984) "freedom to provide services includes the freedom, for the recipients of services, to go to another member state in order to receive a service there"[634]. Furthermore, with reference to *Luisi and Carbone*, it is arguable that Turkish students studying at EU schools/universities can also rely[635] on Article 41(1) of the Additional Protocol and maintain that they are service recipients in the Member State where they are studying. Hence, they can demand for the disapplication of visa requirement if the Member State they are studying did not used to require that Turkish students have to hold a visa at the time the Additional Protocol entered into force in that Member State. For those who might oppose to this conclusion I would like to quote from *Luisi and Carbone* again:

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[629] Klaus Dienelt, "Effects of the Soysal decision by the ECJ on the visa process for Turkish nationals", **EU Visa Regulations and the EU-Turkey Treaty of Association following the ECJ ruling of 19th February of 2009, C 228/06 (Soysal) Conference,** European Parliament, Strasbourg, 6 May 2009, p. 6. The presentation is available at http://www.migrationsrecht.net/european-immigration-migration-law/

[630] Ibid, p. 5.

[631] See page 99.

[632] See page 99.

[633] *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* ("Luisi and Carbone"), Joined cases 286/82 and 26/83 ECR 1984 00377.

[634] Ibid, para. 16; Vassilis Hatzopoulos and Thien Uyen Do, " The Case Law of The ECJ Concerning the Free Provision of Services: 2000-2005", **Common Market Law Review**, Vol. 43 (2006), p. 947.

[635] Similarly, see Slot and Tezcan, p. 5.

"…tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services"[636].

Notwithstanding such strong opinions, the last statement made by the German embassy in Ankara on 6 June 2009[637] shows that Germany still does not acknowledge that Turkish service recipients are covered by *Soysal* and the standstill clause in Article 41(1) of the Additional Protocol. The embassy's stament follows only the wording of the ECJ's judgment in *Soysal*, not the objective of the standstill clause. And hence Germany introduced that only the following persons can enter Germany without a visa for up two months[638]: (a) Turkish drivers who are employed by companies established in Turkey in the international road haulage industry, (b) Turkish mechanics that are charged with assembling and repairing systems or machinery delievered from Turkey, (c) renowned or internationally recognized Turkish artists who will make artistic presentations or perform artistic shows in return for remuneration, (d) Turkish persons who will make scientific presentations in return for remuneration, and (e) Turkish sportspeople who will perform in a sporting event in return for remuneration.

As a result of all those developments, Turkey is expected to ask Germany to broaden its policy to follow the rationale behind the ECJ's judgment and the objective of the standstill clause in Article 41(1) of the Additional Protoocol. The case law of the ECJ and the legal literature refute Germany's limited acknowledgement of the Soysal judgment and therefore the present author's view is that Germany will have to amend its policy in the long run either due to dissenting voices or a new case which confirms Turkish service recipients' rights under Article 41(1).

With respect to the tension between Turkey and the EU as regards the visa issue, the latter will have difficulty to defend the status quo after *Soysal*. Turkey on the other hand, will continue to oppose a Visa Facilitation Agreement which is used by the EU as a tool to

[636] Ibid.
[637] www.istanbul.diplo.de/Vertretung/istanbul/tr/07/VisaMerkblaetter/Allgemeine__Informationen/Visa__Erleichterung__Pressemitteilung__S.html
[638] Ibid

make third countries sign readmission agreements[639]. To give additional information, the EC Commission 'was given mandate to sign readmission agreement with Turkey in November 2002'[640] but Turkey responded to the effect that it does not want to be 'transformed into an irregular migrant dumping ground for the rest of Europe'[641]. Interestingly enough, the EC offered Hong Kong and Macao to lift the visa requirement but even the Commission accepts that it is an option in exceptional cases[642]. Therefore, Turkey is, especially after *Soysal*, expected not to sign a visa facilitation agreement but to demand the removal of the visa requirement owing to the fact that Turkish nationals were not subject to visa when the Additional Protocol was signed, that visa requirement is a contravention of Article 41(1) and that Turkish nationals are victimized and they deserve to be exempt from visa requirement like the Croation nationals whose country is a candidate for EU membership same as Turkey.

IV. JUDGMENTS REGARDING TURKISH WORKERS

A. Legal Background

One, who examines the case law of the ECJ regarding Turkish workers, notices that the legislation which is most referred to by the Court in its judgments is Decision No 1/80[643] of the EC-Turkey Association Council.

Decision No 1/80 has been in force since 1 December 1980. It replaced[644] Decision No 2/76[645] which established the first stage of the freedom of movement for workers between the EC member States and Turkey. Compared to Decision No 2/76,

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[639] Annalisa Meloni, "The Development of a Common Visa Policy Under the Treaty of Amsterdam", **Common Market Law Review**, Vol. 42, Issue 5 (2005), p. 1358.
[640] Annabelle, Roig and Thomas, Huddleston, "EC Readmission Agreements: A Re-evaluation of the Political Impasse", **European Journal of Migration and Law**, Vol. 9 (2007), p. 372.
[641] Ibid, p. 374.
[642] Meloni, p. 1365.
[643] **Turkey–European Union Association Council Decisions 1964-2000 Cilt 2,** T.C. Başbakanlık Devlet Planlama Teşkilatı, Ankara, Yayın No: DPT 2596, 2001, p. 155-165.
[644] See also page 87.
[645] **Turkey–European Union Association Council Decisions 1964-2000 Cilt 2,** T.C. Başbakanlık Devlet Planlama Teşkilatı, Ankara, Yayın No: DPT 2596, 2001, p. 125-128.

Decision No 1/80 "constitutes a further stage in securing freedom of movement for workers"[646].

Early judgments of the ECJ related to the interpretation of Article 2(1)[647] of Decision No 2/76 which gave a Turkish worker the right to: (a) Respond to an offer of employment for the same occupation after three years of legal employment in a Member State, and (b) Have free access to any paid employment of his choice after five years of legal employment in a Member State.

Article 6(1)[648] of Decision No 1/80, which introduced more favourable provisions than Article 2(1) of Decision No 2/76, improved in the social field, the treatment accorded to Turkish workers[649]. Article 6 does provide progressive rights depending on the duration of the employment of a Turkish worker in a Member State. Accordingly, a duly registered Tırkish worker has the right to: (a) Renew work permit for the same employer after one

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[646] *Bozkurt* (n. 446), para. 14.

[647] Article 2: "1. After three years of legal employment in a Member State of the Community a Turkish worker shall be entitled, subject to the priority to be given to workers of Member States of the Community, to respond to an offer of employment, made under normal conditions and registered with the employment services of that State, for the same occupation, branch of activity and region.
(b) After five years of legal employment in a Member State of the Community, a Turkish worker shall enjoy free access in that country to any paid employment of his choice.
(c) Annual holidays and short absences for reasons of sickness, maternity or an accident at work shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.
2. The procedures for applying paragraph 1 shall be those established under national rules".

[648] Article 6: "1. Subject to Article 7 on free access to employment for members of his family, 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 services 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.
2. Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.
3. The procedures for applying paragraphs 1 and 2 shall be those established under national rules".

[649] *Akman* (n. 446), para. 20.

year's legal employment, (b) Respond to another offer of employment for the same oocupation after three years of legal employment, and (c) Have free access to any paid employment of his choice after four years of legal employment.

The vague concepts contained in Article 6(1) brought about a lot of references for preliminary ruling from the national courts of the Member States. For this reason, the terms of 'worker', 'legal employment', 'duly registered' and 'same employer' have been interpreted many times by the ECJ in its judgments regarding Turkish workers.

Besides the first paragraph of Article 6, second [6(2)] and the third [6(3)] paragraphs thereof have come up ın the case law of the ECJ. Article 6(2) "regulates the consequences, for the application of Article 6(1), of certain breaks in employment"[650] whereas Article 6(3) opens the door to subjective interpretation of Article 6(1).

Article 10(1)[651] of Decision No 1/80 and Article 37[652] of the Additional Porotocol have kept the ECJ busy as well. Both of those provisions provide for nationality-related discrimination clauses exclusively favouring Turkish workers.

Last but not least, Article 14(1)[653] of Decision No 1/80 has arisen in the Court's case law. Especially in the references inquiring the application of that article to expulsion orders, the ECJ expounded on the limits of the Member State competence in the implementation of Article 14(1).

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[650] *Bozkurt* (n. 446), para. 38.

[651] Article 10: "1. 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.
2. Subject to the application of Articles 6 and 7, the Turkish workers referred to in paragraph 1 and members of their families shall be entitled, on the same footing as Community workers, to assistance from the employment services in their search for employment".

[652] Article 37: "As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community".

[653] Article 14: "1. The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.
2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals".

B. The Judgments

1. *Judgments concerning the right of residence*

a. The *Sevince* case[654]

Mr. Sevince played a pioneering role in relying on the Decisions of the EC-Turkey Association Council before a national court of an EC Member State. He was the first Turkish migrant worker who mounted a legal challenge to a public authority's refusal to extend the residence permit.

Mr. Sevince was in paid employment in the Netherlands. Upon the refusal to extend his residence permit due to 'family circumstances'[655], Mr. Sevince went to law and relied on Article 2(1)(b)[656] of Decision No 2/76, and on the third indent of Article 6(1)[657] of Decision No 1/80.

The national court referred the case to the ECJ and inquired as to whether (a) the ECJ can interpret the Decisions of the EC-Turkey Association Council Decision under the preliminary ruling procedure, (b) Articles 2(1)(b) and 7[658] of Decision No 2/76 and Articles 6(1) and 13[659] of Decision No 1/80 have direct effect, and (c) the expression "legal employment" contained in Article 2(1)(b) of Decision No 2/76 and in the third indent of Article 6(1) of Decision No 1/80 covers a situation where a Turkish worker is authorized to

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[654] *S. Z. Sevince v Staatssecretaris van Justitie* ("Sevince"), Case C-192/89 [1990] ECR I-03461.
[655] Ibid, para. 3.
[656] "After five years of legal employment in a Member State of the Community, a Turkish worker shall enjoy free access in that country to any paid employment of his choice".
[657] "A Turkish worker duly registered as belonging to the labour force of a Member State shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment".
[658] "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".
[659] "The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories".

work during the period for which the operation is suspended of a decision refusing him a right of residence, against which he has appealed.

As to the first question, the ECJ reminded[660] that an association agreement concluded pursuant to Article 228 of the EC Treaty (now Article 300) and the decisions of a Council of Association which are directly connected with such an association agreement are integral parts of the EC legal system[661]. The Court also reminded[662] that it has jurisdiction to interpret the provisions of an association agreement. Depending on these two considerations, the Court concluded that it has jurisdiction to give preliminary ruling concerning the decisions of an Association Council, such as EC-Turkey Association Council[663].

As to the direct effect of Articles 2(1)(b) and 7 of Decision No 2/76 and Articles 6(1) and 13 of Decision No 1/80, the Court followed the formula that it used in *Demirel* in which the direct effect of Article 12 of the EC-Turkey Association Agreement and of Article 36 of the Additional protocol was analyzed. Accordingly, the Court took the view that Articles 2(1)(b) of Decision No 2/76 and 6(1) of Decision No 1/80 have direct effect in the Member States of the EC since they contain clear, precise and unconditional terms as to a Turkish worker's employment in a Member State[664]. Articles 7 of Decision No 2/76 and 13 of Decision No 1/80 on the other hand were also found directly effective by the since those two provisions 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"[665]. In its analysis of the direct effect of those articles, the Court also took into account the purpose and nature of the EC-Turkey Association Agreement[666]. Moreover, the Court viewed that the direct effect of the above-mentioned

[660] See *Demirel* (n. 446), para. 7 and *Greece v Commission*, para. 12.
[661] *Sevince*, para. 8 and 9.
[662] *Haegeman*, Case 181/73 [1974] ECR 449. The Court could have cited *Demirel* as well; see *Demirel*, para. 7-12.
[663] *Sevince*, para. 10.
[664] Ibid, para. 17.
[665] Ibid, para. 18.
[666] Ibid, para. 20.

Articles are not contested by the fact that Decisions 2/76 and 1/80 are unpublished and that those Decision contain safeguard clauses. So, a private individual can invoke them against a public authority[667].

As to the third question concerning the 'legality' of Mr. Sevince's employment during the time he was authorized to work provisionally as a result of the suspensory effect of his appeal, the Court first pointed out that since the right of employment and the right of residence are closely linked, a Turkish worker, who has access to any paid employment of his choice after a specified period[668] of legal employment in a Member State, is concomitantly entitled to the right of residence in that Member State[669]. Then the Court applied for the first time the formula[670] that it was going to use in the subsequent cases regarding the legality of the employment of Turkish workers, according to which the employment of a Turkish worker is 'legal' if his situation is stable and secure as a member of the labour force that he was registered to[671]. In Court's view Mr. Savaş did not meet the 'condition of stability and security' since he was, as a result of the suspensory effect of his appeal, authorized to work only until end of the trial in the national court. As a result, the Court held that although Mr. Savaş can directly rely on the Articles that he invoked, he is not regarded as a worker who is under legal employment[672].

b. The *Kuş* case[673]

Kazım Kuş was a Turkish national who entered Germany to marry a German woman. Mr. Kuş was granted a residence permit as he was the spouse of a German citizen. However, after he and his German wife got divorced, Mr. Kuş's residence permit was not renewed by the Wiesbaden State. Mr. Kuş went to law and won the case in the

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[667] Ibid, para. 24.
[668] Five years according to Decision No 2/76 and/or four years according to Decision No 1/80.
[669] *Sevince*, para. 29.
[670] Wherever it is necessary, such formula shall hereinafter be called as "the Sevince formula for the legality of the employment".
[671] Sevince, para. 30.
[672] Ibid, para. 32 and 33.
[673] *Kazım Kuş v Landeshauptstadt Wiesbaden* ("Kuş"), Case C-237/91 [1992] ECR I-06781.

Administrative Court which retrospectively suspended the State's decision and which ordered that State to renew Mr. Kuş's residence permit ("judgment of the Administrative Court"). The State lodged an appeal and the higher administrative court, which was to refer the case to the ECJ, held that Mr. Kuş had no right to be granted a residence permit. However, it questioned whether Mr. Kuş might have a right by virtue of Article 6 of Decision No 1/80. The referring court asked the ECJ to rule as to whether Mr. Kuş: (a) was a worker within the meaning of third indent of Article 6(1) of Decision No 1/80 of the EC-Turkey Association Council, (b) was entitled to the renewal of his work permit under first indent of Article 6(1)[674] of Decision No 1/80 even though, at the time of determination of his application for renewal, his marriage has been dissolved and (c) may rely directly on first or third indent of Article 6(1) of Decision No 1/80 in order to obtain the renewal not only of his work permit but also of his residence permit.

As to the first question, the ECJ based its view on the *Sevince* case wherein it ruled that a Turkish worker is not in a stable and secure situation while a decision refusing him the right of residence was suspended in his favour as a result of the judicial proceedings brought by him[675]. The ECJ was of the opinion that the *Kuş* case resembled the *Sevince* case in this respect. Therefore, the Court held that Mr. Kuş was not in a stable and secure situation as a Turkish worker, that he was not legally employed and that he was not a worker in respect of third indent of Article 6(1) of Decision No 1/80[676].

As to the second question of whether Mr. Kuş was entitled to the renewal of his work permit under first indent of Article 6(1) of Decision No 1/80, the ECJ answered that since Mr. Kuş was employed for more than one year under a valid work permit, he had fulfilled the conditions in the first indent of Article 6(1) of Decision No 1/80, even though

[674] "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".
[675] *Kuş*, para. 12.
[676] Ibid, para. 18.

his residence permit was initially granted to him to get married, not to engage in employment[677].

In its answer to the third question, the Court reminded that it had ruled in *Sevince* that Article 6(1) of Decision No 1/80 has direct effect and that Turkish worker's right to employment and the right of residence are closely linked[678]. Mr. Kuş's right to renewal of his permit to work for the same employer would be meaningless without the right of residence[679] and thus the Court disagreed with the German government[680] and held that if Mr. Kuş satisfies the requirements in the first or third indents of Article 6(1) of Decision No 1/80, he can rely on such provisions in order to obtain the renewal of his residence permit as well as his work permit[681].

c. The *Bozkurt* case[682]

Ahmet Bozkurt was an international lorry-driver who was employed by a Dutch company with its head office in the Netherlands. Mr. Bozkurt was carrying the goods en route from the Netherlands to the Middle East and he lived in the former when he was on leave. Under the Dutch law, Mr. Bozkurt held only a visa valid for multiple journeys but he was not required to have a work permit or a residence permit in order to carry out his work as an international lorry-driver because of the usually short periods that he remained in the Netherlands between his journeys. In his ninth year of employment with the Dutch firm, Mr. Bozkurt had an accident which rendered him incapable of employment. He received incapacity benefits and then applied for an unrestricted residence permit in the Netherlands. As his application was rejected ("the rejecting decision"), Mr. Bozkurt went to law, invoked Article 2 of Decision No 2/76 and Article 6 of Decision No 1/80 and asked the Council of State to nullify the rejecting decision and to allow him to stay in the

[677] Ibid, para 23
[678] Ibid, para. 28-29.
[679] Ibid, para. 30.
[680] Ibid, para. 32.
[681] Ibid, para. 36.
[682] *Ahmet Bozkurt v Staatssecretaris van Justitie* ("Bozkurt"), Case C-434/93 [1995] ECR I-01475.

Netherlands. Upon this, the Council of State decided to refer the case to the ECJ and asked four questions on the interpretation of Article 6 of Decision No 1/80[683] with respect to Mr. Bozkurt.

In its first question, the Council of State wondered if the case of *Lopes da Veiga* could be applied to Mr. Bozkurt's case and if Mr. Bozkurt in that respect could be deemed to be in legal employment within the meaning of Article 6 of Decision No. 1/80. As an answer to such question, the ECJ first reminded that it held in *Lopes da Veiga* that the national courts should, in determining the location of the legal relationship of employment, take into account circumstances apparent from the case, such as the location of the company that employs the worker in question, the governing law and the social security system to which the worker is subject[684]. Then the Court cited Article 12 of the EC-Turkey Association Agreement[685] which requires the EC and Turkey to be guided by Articles 48, 49 and 50 of the EC Treaty for the purpose of progressively securing freedom of movement for workers between them[686]. Further, the Court stated that[687] Article 6(1) of Decision No. 1/80 must be in accordance with the principle laid down in Article 12 of the Agreement, and that therefore an analogy can be drawn between a Turkish worker and a worker of an EC Member State whose location of employment was determined according to the principles in *Lopes da Veiga*. The ECJ heard the objection raised to such analogy by the German, Greek, Netherlands and the UK Governments[688], but it held that it was up to the Council of State of the Netherlands to determine the link between Mr. Bozkurt's employment and the Netherlands territory, and that that Council could take account the

[683] As a matter of fact, the Council of State had asked the ECJ to interpret Article 2 of Decision No 2/76 as well as Article 6 of Decision No.1/80 but the ECJ noted that Decision No 2/76 was replaced by Decision No. 1/80 as of 1 December 1980.
[684] *Bozkurt*, para. 16.
[685] "The Contracting Parties agree to be guided by Articles 48, 49 and 50 the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them".
[686] *Bozkurt*, para. 17.
[687] Ibid, para. 22.
[688] Ibid, para. 18.

place where Mr. Bozkurt was hired, the territory where the paid employment was based, the law which governs and the social security law which applies[689].

The second and the third questions aimed at enlightening as to whether Mr. Bozkurt, a Turkish worker who does not need to hold a work permit or a residence permit, is legally employed within the meaning of Article 6. In its answer, the ECJ cited *Sevince* wherein it ruled that "legality of employment for the purposes of Article 6(1) presupposes a stable and secure situation as a member of the labour force of a Member State"[690] and *Kuş* wherein it ruled that the rights under 6 (1) of Decision No. 1/80 necessarily imply the existence of a right of residence for the person concerned[691]. Further, the Court stated that to hold an administrative document, such as work permits or residence permits, is not a condition to fulfill for a Turkish worker who wishes to benefit from Article 6 (1)[692]. As a result, the Court held that Mr. Bozkurt, who is not required to have a work permit or a residence permit in the Netherlands, is deemed to be legally employed within the meaning of Article 6 (1) and that his right of residence was corollary to his employment[693]. In other words, the Court held that Mr. Bozkurt was 'legally' employed and that he could claim a right of residence for so long as he is in legal employment in the Netherlands.

The fourth and the last question related as to whether or not Mr. Bozkurt could, to remain in the Netherlands, derive a right from Article 6(2) of Decision No. 1/80[694]. The German and the UK Governments argued that the term 'absence' in Article 6(2) implied a break of limited duration and that such Article would not be applied in the event of

[689] Ibid, para. 23-24.
[690] Ibid, para. 26.
[691] Ibid, para. 28.
[692] Ibid, para. 30.
[693] Ibid, para. 31.
[694] Decision No 1/80, Article 6(2): "Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary employment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment".

permanent incapacity for work[695]. The ECJ agreed with the said governments and stated that:

"Article 6 covers the situation of Turkish workers who are working or are temporarily incapacitated for work, not the situation of a Turkish worker who has definitively ceased to belong to the labour force of a Member State because he has, for example, reached retirement age or, as in the present case, become totally and permanently incapacitated for work"[696].

Therefore, the Court held that a Turkish national, who was permanently incapable of employment in consequence of the accident he had at work, do not have the right of residence, and that such worker did not have the right to remain in the territory of that State following the accident[697]. In other words, Mr. Bozkurt, in Court's view, would not be able to rely on Article 6(2) to remain in the Netherlands after the accident he had.

d. The *Tetik* case[698]

In the *Tetik* case, the action before the national court was about Recep Tetik, a Turkish national who worked as a seaman on various German sea-going vessels for eight years. Mr. Tetik was granted successive residence permits that limited to employment in shipping. After he voluntarily terminated his employment as a seaman, Mr. Tetik moved to Berlin and applied for an unlimited residence permit with the purpose of starting to work on land. Further, he stated that he had the intention to reside in Germany until about 2020. The authorities in Berlin might have taken fright at what Mr. Tetik articulated because his application for unlimited residence permit was refused and then confirmed by the Administrative Court and the Higher Administrative Court in turn. In the meantime, Mr. Tetik was given a registration certificate but he was not authorized to work. Besides, he had been unemployed since he left his work. So, Mr. Tetik thought that the best remedy would

[695] *Bozkurt*, para. 36.
[696] Ibid, para. 39.
[697] Ibid, para. 40-42.
[698] *Recep Tetik v Land Berlin* ("Tetik"), Case C-171/95 [1997] ECR I-00329.

be to appeal to the Federal Administrative Court. In the proceedings, the Federal Court became confused about two issues with respect to the application of Article 6 (1) of Decision No 1/80 of the EC-Turkey Association Council: First, Mr. Tetik's residence permit was limited to employment in shipping, not on land in Berlin. And second, Mr. Tetik voluntarily terminated his work. But later, the Federal Court stated to the ECJ that the first issue that it wondered did not require a reply since the *Bozkurt* case had settled it. So, the ECJ, upon the reference made by the Federal Court, was to clarify the second issue, i.e. the voluntary termination of work.

In its answer, the ECJ cited Article 12 of the EC-Turkey Association Agreement, referred to its own reasoning in *Bozkurt* and stated that the principles enshrined in Articles 48, 49 and 50 of the EC Treaty could be transposed to Turkish workers who benefit from Decision No. 1/80. In Court's view, like an EC national who as a result of his freedom of movement can reside in another Member State to seek employment, Mr. Tetik "must be able, for a reasonable period, to seek effectively new employment in Germany and must have a corresponding right of residence during that period" [699] even though he voluntarily left his work. Further, the Court elaborated the term 'reasonable period' and stated that a period of a few days would not suffice to effectively look for a new job[700]. At that point, the German and French Governments objected and maintained that because of the *Bozkurt* case, Mr. Tetik can not remain in Germany after he left the German labour force[701]. The Court did not take such objection into account and stated that Mr. Tetik's situation was different since he was looking for a new job whereas Mr. Bozkurt was incapable of employment after the accident that he had[702]. Despite such dissenting voices, the Court insisted that during the period he seeks work, Mr. Tetik would continue to be duly registered as belonging to the German labour force[703]. As a result, the Court ruled in favour

[699] Tetik, para. 30.
[700] Ibid, para. 34.
[701] Ibid, para. 44.
[702] Ibid, para. 45-46.
[703] Ibid, para. 46.

of Mr. Tetik but laid two conditions: that he in fact seeks new employment in Germany[704] and that he takes steps which might be required to make himself available to the German employment authorities[705].

What is striking in *Tetik* is the German and French Governments based their views on *Bozkurt* and reiterated the Court's already-settled finding that Turkish workers' right of residence is corollary to the right to employment[706]. For this reason, the *Tetik* case marks the end of an era wherein the EC Member States objected to the direct link between the employment and the residence.

e. The *Eker* case[707]

The *Eker* case relates to the legal action taken by Süleyman Eker against the decision which refused to extend his residence permit and ordered him to leave Germany. Mr. Eker's challenge was upheld in the fist instance court but then dismissed on appeal on the ground that he could not rely on the first indent of Article 6(1) of Decision No 1/80, since he did not have one year's legal employment with the same employer[708]. However, Mr. Eker argued that he had met the requirement in that Article. The case was brought before the Federal Court which asked the ECJ to rule on whether or not Mr. Eker met the requirement in the first indent of Article 6(1) of Decision No 1/80.

In its answer to the preliminary question, the ECJ first reminded that Article 6(1) of Decision No 1/80 has direct effect in the Member States[709] and that the rights given to Turkish workers by virtue of Article 6(1) necessarily imply the existence of a right of residence for such worker[710]. From the first indent of Article 6 (1), the Court inferred that the Article does not confer on Mr. Eker the right to choose another employer before he

[704] Ibid, para. 42.
[705] Ibid, para. 43.
[706] Ibid, para. 44.
[707] *Süleyman Eker v Land Baden-Württemberg* ("Eker"), Case C-386/95 [1997] ECR I-02697.
[708] Ibid, para. 11.
[709] Ibid, para. 18
[710] Ibid, para. 19

completes the first year of employment[711]. In Court's view, Mr. Eker could only rely on the said Article provided that he completed a further one year employment[712]. Further, the Court looked at its case law and asserted that although Mrs. Eroğlu had changed her employer after one year, the finding in *Eroğlu* could give support to reach a conclusion in the *Eker* case[713]. Eventually, the Court held that Mr. Eker could not rely on the first indent of Article 6 (1)[714].

f. The *Ertanır* case[715]

Kasım Ertanır was a Turkish national who entered Germany to work as a specialist chef. At the outset, Mr. Ertanır obtained a work permit and a temporary residence permit. But then his residence permit was not extended since a German regulation (" the Regulation") provides that specialist chefs permitted to work in Germany must be nationals of the country in the cuisine of which the restaurant specializes (Ertanır was working in a Greek restaurant). Nevertheless, Mr. Ertanır was allowed to continue. He obtained several residence permits and made them extended consecutively except the last occasion where he applied for extension six days after the expiry of the previous permit. In his last application for extension of his residence permit, Mr. Ertanır was said no on the ground that the maximum duration of the residence permits to be issued to specialist chefs in Germany was three years and that the Ministry of the Interior for Hessen had issued a Decree saying that Decision No 1/80 would not be applied to specialist chefs[716]. The Turkish chef went to law and the case was brought before the Administrative Court of Darmstadt which referred to the ECJ the legal problems below.

In its answers, the ECJ produced convincing explanations. As to the Regulation and a Member State's right by Article 6 (3) of Decision No 1/80[717] to exclude specialist

[711] Ibid, para. 24
[712] Ibid, para. 25
[713] Ibid, para. 28-30.
[714] Ibid, para. 31
[715] *Kasim Ertanır v Land Hessen* ("Ertanır"), Case C-98/96 [1997] ECR I-05179.
[716] Ibid, para. 11.
[717] "The procedures for applying paragraphs 6 (1) and 6 (2) shall be those established under national rules".

chefs from the rights in Article 6 (1), the ECJ first cited *Sevince*, and *Kuş*, and stated that Article 6(3) of Decision No 1/80 obliges Member States to take necessary administrative measures for the implementation of Article 6, but does not empower them to lay conditions to or restrict the application of the precise and unconditional rights of Turkish workers under Article 6[718]. The Court added that it was already found in *Kuş* that Article 6 regulates the situation of Turkish workers already integrated into the labour force of a Member State[719]. Consequently, the Court held that Germany was not allowed by Article 6 (3) to exclude whole categories of Turkish migrant workers, such as specialist chefs, from the rights conferred on them by Article 6 (1)[720].

As to the problem whether Mr. Ertanır was duly registered as belonging to the labour force of Germany, the Court applied its *Bozkurt* formula[721] and found that Mr. Ertanır's legal relationship of employment was in Germany[722]. At that point Germany argued that specialist chefs differ from other workers since they must be for example Greek nationals if the restaurant they are working is specialized in Greek cuisine. The ECJ disagreed and stated that Mr. Ertanır, a specialist chef working in Germany, was in no way different than other Turkish workers, since Mr. Ertanır was also in employment relationship in return for remuneration. So, he was involved in genuine and effective economic activity[723].

As to whether Mr. Ertanır's employment was 'legal', the Court cited the classic cases wherein it interpreted the meaning of legal employment, i.e. *Sevince*, *Kuş*. Accordingly, it took the view that Mr. Ertanır's right to reside in Germany was not disputed and his situation was not insecure[724] so his employment was legal enough to allow him to rely on Article 6 (1) of Decision No. 1/80.

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[718] *Ertanır*, para. 28.
[719] Ibid, para. 29.
[720] Ibid, para. 37.
[721] *Bozkurt*, para. 16
[722] *Ertanır*, para. 39 and 40.
[723] Ibid, para. 43.
[724] Ibid, para. 52.

As to the argument that the authorities told Mr. Ertanır that the specialist chef's residence permit was maximum for three years, the ECJ reiterated its view and asserted that Member States may not make conditional or restrict the application of the rights which Turkish nationals derive from Article 6 (1) after they met the conditions in that Article[725].

As to Mr. Ertanir's belated application for the extension of his permit and the calculation of those six days during which he did not hold a valid residence permit, the ECJ reminded *Bozkurt* and held that even without a specific administrative document, such as a work permit or residence permit, Turkish workers can derive rights from Article 6 (1). Therefore, Mr. Ertanır, who belatedly applied for extension of his permit, could still rely on Article 6 (1) of Decision No 1/80[726].

g. The *Günaydın* case[727]

Faik Günaydın entered Germany, learned German and studied engineering there. Ten years after his entrance, he was offered a job. Siemens was planning to train Mr. Günaydın in its factory in Germany. After the training, Mr. Günaydın would be sent to Turkey as a manager for a Siemens subsidiary. Mr. Günaydın confirmed that he would return to Turkey after the course and in consequence he obtained work and residence permits issued to him on the condition that he would go back to his home country. During his time in Germany, Mr. Günaydın obtained several temporary work permits all of which restricted to employment at the Siemens factory. Almost four years after his being employed by Siemens, Mr. Günaydın applied for permanent residence but his application was rejected. The Turkish worker was told that his residence permit would neither be changed to be permanent nor would it be extended as his permanent residence would not be compatible with the German development aid policy which aimed at encouraging foreigners trained in Germany to work in their home countries. Mr. Günaydın and his family had to resort to legal action. In the proceedings before it, the Federal Court

[725] Ibid, para. 57.
[726] Ibid, para. 66-67.
[727] *Faik Günaydın, Hatice Günaydın, Güneş Günaydın and Seda Günaydın v Freistaat Bayern* ("Günaydın"), Case C-36/96 [1997] ECR I-05143.

wondered whether Mr. Günaydın, (a) was duly registered as belonging to the German labour force within the meaning of Article 6(1) despite his temporary work to prepare for his subsequent employment in Turkey, and (b) abused Article 6(1) by saying that he had the intention to return to Turkey after the training course.

In order to ascertain whether Mr. Günaydın was duly registered in German labour force, the ECJ reminded its formula in *Bozkurt* and stated that Mr. Günaydın's employment located within Germany[728]. Then the Court applied its *Ertanır* test and analyzed if Mr. Günaydın pursued a genuine and effective economic activity in return for remuneration. As a result, the Court found that Günaydın's situation was not different from that of other Turkish workers[729].

In its analysis of the 'legality' of Mr. Günaydın's employment within the meaning of Article 6(1), the ECJ repeated its method in *Ertanır*: The Court first reiterated its case law in *Sevince*; *Kuş*; and *Bozkurt* and found that by contrast to Mrs. Sevince, Mr. Kuş and Mr. Bozkurt, Mr. Günaydın's right to reside in the Germany was not disputed and his situation was not insecure[730] [731].

As regards the third issue in the first question, the conditional permit issued to Mr. Günaydın, the Court repeated that:

"Article 6(1) does not make the recognition of the rights it confers on Turkish workers subject to any condition connected with the reason the right to enter, work or reside was initially granted"[732].

Therefore, in Court's view, Mr. Günaydın could not be deprived of his rights under Article 6 (1) despite: (a) the residence permit issued to Mr Günaydın was for a

[728] Ibid, para. 29-30.
[729] Ibid, para. 33.
[730] Ibid, para. 46.
[731] Similar finding was made in *Ertanır*.
[732] *Günaydın*, para. 52.

specific purpose and, (b) he had expressed that he wished to pursue his professional career in Turkey after the training course[733].

Consequently, the Court held that Mr. Günaydın was both duly registered and legally employed in respect of Article 6 (1) so that he could rely on that Article to demand the renewal of his permit to reside in Germany[734].

In its answer to the second question on Mr. Günaydın's premise, the ECJ restated the above-mentioned reasoning and ruled in favour of the Turkish national. However, the Court added that Mr. Günaydın will not be able to derive rights in the event of false premisses[735], i.e. fradualent conduct[736].

h. The *Birden* case[737]

Mehmet Birden entered Germany and he got married to a German national there. Mr. Birden thereby obtained residence permit and an unconditional work permit of unlimited duration. But then as he could not find a job, he entered into an employment contract which was wholly funded by the Workshop Bremen in accordance with the Federal Law on Social Assistance. In the meantime, he got divorced from his German wife, an occasion of refusal of his application for the extension of his residence permit. Mr. Birden went to law, invoked Article 6 (1) and maintained that he was entitled to an extension as he had, at the time of his application, worked for the same employer for more than one year. The Administrative Court of Bremen referred the case to the ECJ and asked the latter to rule whether Mr. Birden was duly registered to the German labour force despite his funded-job.

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[733] Ibid, para. 53 and 54.
[734] Ibid, para. 55.
[735] Ibid, para. 60.
[736] See the *Kol* case on page 133.
[737] *Mehmet Birden v Stadtgemeinde Bremen* ("Birden"), Case C-1/97 [1998] ECR I-07747.

In order to give an answer, the ECJ discussed three concepts: The concept of worker, the concept of being duly registered as belonging to the labour force and the concept of legal employment.

As to the first concept, the Court, as usual, cited its relevant case law in regard to Turkish workers and stated that the principles enshrined in the EC treaty could be applied to Turkish workers by virtue of Article 12 of the EC-Turkey Association Agreement. So, like it did in *Ertanır* and *Günaydın*, the Court found that Mr. Birden, who worked 38.5 hours per week and who received a certain amount of money, pursued a genuine and effective economic activity, a situation which must suffice to show that he can be considered as a worker within the meaning of Article 6(1) of Decision No 1/80[738] .

As to the second concept, the Court first applied its *Bozkurt* formula in order to ascertain whether Mr. Birden's legal relationship of employment can be located with the German territory. As a result of its analysis, the Court held that Mr. Birden met such condition since he pursued a paid activity in Germany where he was offered employment subject to the German legislation and its social security law[739]. With respect to the Germany's arguments that Mr. Birden was employed temporarily, the Court cited previous judgments and reminded that Germany was not permitted to modify unilaterally the scope of the system of gradual integration of Mr. Birden in German labour since he pursued a genuine and effective economic activity for a continuous period of more than one year with the same employer[740]. And with respect to Germany's second argument that Mr. Birden was distinguished from other Turkish workers since he could not find a job and his employment was of social nature, the ECJ first reminded that Mr Birden's legal position was not different from that of other Turkish workers[741], and that, as it was previously held in *Günaydın*, the specific purpose of Mr. Birden's employment was not capable of

[738] Ibid, para. 24-27, and 32.
[739] Ibid, para. 33-34.
[740] Ibid, para. 35-37.
[741] Ibid, para. 42

depriving him of his rights under Artilce 6 (1)[742]. Consequently, the Court held that Mr. Birden was duly registered to the German labour force[743] and that he could continue working for that employer until, after three years, he had the possibility of changing employer[744].

As to the third concept, i.e. as to whether he was in legal employment in Germany for the purposes of Article 6(1) of Decision No 1/80, the Court reminded that legal employment assumes stable and secure situation as a member of the labour force of a Member State[745], a condition which Mr. Birden fulfilled as being a worker whose right of residence in Germany was never challenged and whose situation was not called into question[746].

As a result of its analysis of the three concepts above, the Court held that since Mr. Birden, in return for remuneration, lawfully pursued a genuine and effective economic activity in Germany under an unconditional work permit for an uninterrupted period of more than one year for the same employer, he must be regarded as a worker who is duly registered as belonging to the German labour and who is in legal employment there within the meaning of Article 6 (1)[747].

i. The *Doğan* case[748]

Mr. Doğan was a Turkish national who lived in Austria for twenty seven years and worked there legally for more than four years. Therefore, he acquired the rights laid down in the third indent of Article 6(1) of Decision No 1/80. But the problem was his three years' imprisonment, which led the authorities to impose him a permanent ban on residence in Austria. Mr. Doğan challenged the order and the national court referred the matter to the

[742] Ibid, para. 43.
[743] Ibid, para. 54.
[744] Ibid, para. 44.
[745] Ibid, para. 55
[746] Ibid, para. 60.
[747] Ibid, para. 69.
[748] *Ergül Dogan v Sicherheitsdirektion für das Bundesland Vorarlberg* ("Doğan"), Case C-383/03 [2005] ECR I-06237.

ECJ. The referring court wondered whether Mr. Doğan forfeited the rights he acquired under Article 6(1) of Decision No 1/80 after being held in custody under a prison sentence for a period of three years.

The ECJ first noted that Mr. Doğan has, as a Turkish worker who met the conditions in the third indent of Article 6/1, two rights which must exist together: The right to free access to any paid employment of his choice in Austria and the right of residence there[749].

As to the application of Article 6(2)[750] to Mr. Doğan's situation and to the arguments of Germany and Austria to that effect, the Court stated that Article 6(2) serves to calculate the various periods of employment set out in Article 6(1)[751], and that Article 6(2) was no longer applicable to Mr. Doğan who had already satisfied the conditions laid down in the third indent of Article 6(1)[752].

Further, the Court cited *Nazlı*, and *Tetik* and concluded that a Turkish worker is entitled to a temporary interruption of his employment relationship. According to the Court, a worker would be considered as duly registered to the labour force of the host Member State during the period which is necessary for him to find a new job. So, he can ask for extension of his residence permit if he genuinely looks for a new hob and makes him known to the employment services[753].

The Court was of the view that above conclusion must be applied to a Turkish worker as long as his absence from the labour force is temporary[754]. Mr. Doğan's imprisonment was for limited period, so the Court applied the same principle to Mr.

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[749] Ibid, para. 14.
[750] "Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment".
[751] *Doğan*, para. 15.
[752] Ibid, para. 16.
[753] Ibid, 19.
[754] Ibid, para. 20

Doğan[755]. But it added that Austria can restrict the rights which Mr. Doğan derives from the third indent of Article 6(1) on the basis of Article 14(1), if Mr. Doğan is unlikely to rejoin the labour force or he can not find new employment in the reasonable time given to him after the end of his prison term[756].

As a result, the Court ruled that Mr. Doğan did not forfeit his rights under the third indent of Article 6(1) even he was not employed during (limited/temporary) imprisonment[757].

j. The *Sedef* case[758]

Mehmet Sedef was a Turkish national who worked in German shipping industry for more than fifteen years. During that that time, Mr. Sedef's periods of employment have been interrupted 17 times.

After having been found unfit to work on ships, Mr. Sedef applied for a residence permit which will allow him to work on land. He stated that he was employed for more than four years and thus he had met the conditions set out in the third indent of Article 6 (1). His application was rejected, but the Administrative Court ordered the authorities to grant him the residence permit. The authorities appealed by maintaining that Mr. Sedef had not worked for four years continuously. The Higher Administrative Court held that Mr. Sedef could not rely on the third indent of Article 6(1) since he could not prove the four years of uninterrupted employment required under that provision. In Court's view, the breaks in Mr. Sedef's employment relationship were neither holidays nor periods of unemployment within the meaning of Article 6(2). Upon that judgment, Mr. Sedef brought the case before the Federal Administrative Court which referred the case to the ECJ.

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[755] Ibid, para. 21.
[756] Ibid, para. 23.
[757] Ibid, para. 25.
[758] *Mehmet Sedef v Freie und Hansestadt Hamburg* ("Sedef"), Case C-230/03 [2006] ECR I-00157.

In its ruling, the ECJ first noted that Mr. Sedef had worked for more than one year for the same employer and subsequently worked for him for two further years. Therefore, the Court held that Mr. Sedef could not rely on the third indent of Article 6(1) since it must be inferred from the case law that (a) the conditions laid down in the three indents of Article 6(1) must be fulfilled in turn[759], and (b) the third indent of Article 6(1) presupposes that the Turkish worker has already fulfilled the conditions set out in the second indent of that paragraph[760].

As to the breaks in Mr. Sedef's employment and their effect on his situation, the ECJ first stated that Article 6(2) would be applied to such breaks since Mr. Sedef did not fulfill the conditions in the third indent of Article 6(1). And in Court's view, the 17 breaks did not seem to be legitimate causes of interruption within the meaning of Article 6(2)[761].

Notwithstanding above, the ECJ was keen to base its judgment on a liberal interpretation. It first stated that the national court could regard the breaks in Mr. Sedef's employment as periods of involuntary unemployment within the meaning of the second sentence of Article 6(2)[762]. Besides, the Court cited Advocate General's observation to the effect that the interruptions at issue were beyond Mr. Sedef's control[763]. And moreover, the relevant national authorities had repeatedly and without interruption issued residence permits to Mr Sedef[764] and they had never called Mr. Sedef's status into question until he applied for authorization to work on land[765]. In the light of those, the Court held that the interruptions in Mr. Sedef's employment were covered by Article 6(2), and that therefore he could rely on the third indent of Article 6(1) of that decision to obtain an extension of his residence permit in order to continue in paid employment in Germany[766].

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[759] Ibid, para. 37
[760] Ibid, para. 43.
[761] Ibid, para. 55.
[762] Ibid, para. 56.
[763] Ibid, para. 57.
[764] Ibid, para. 64.
[765] Ibid, para. 66.
[766] Ibid, para. 68.

k. The *Payır & Akyüz & Öztürk* case[767]

Payır & Akyüz & Öztürk is a revolutionary new case which has, in the present author's view, paved the way for an increasing integration of Turkish nationals in the societies of the Member States.

The case is about the legal challenge mounted by three young Turks to the decisions refusing them to remain in the United Kingdom. At first glance, the cases of Ezgi Payır, Burhan Akyüz and Birol Öztürk seem similar to those of Turkish workers who claim for an extension of their residence permit in the EC Member State where they worked. However, the novelty is Ms. Payır, Mr. Akyüz and Mr. Öztürk did not enter the UK as workers but on the contrary as an au-pair and as students.

Ms. Payır, whose leave to enter the UK was subject to the condition that she did not enter employment, paid or unpaid, other than as an au pair. Indeed, Ms. Payır engaged as an au pair by a family, for whom she worked for more than one year and in return for 70 pounds per week. Before the expiry of her leave, Ms. Payır applied to the Secretary of State for leave to remain in the UK and relied on Article 6(1). However, her application was rejected. Accordingly, Ms. Payır went to law.

Mr. Akyüz and Mr. Öztürk on the other hand, were granted leave to enter the UK as students. Since both of them were granted permission to remain as student and to work, they worked part-time as waiters in a restaurant, the employer of which offered them a contract extension. Mr. Akyüz and Mr. Öztürk made the same application as Ms. Payır and their applications were also rejected. Therefore, they went to law.

The two cases, first of which related to Ms. Payır and the second to Mr. Akyüz and Mr. Öztürk, were joined by the High Court of Justice, the Court which referred the matter to the ECJ. The High Court's inquiry was about the application of Article 6(1) to the claimants.

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[767] *Ezgi Payır, Burhan Akyüz, Birol Öztürk, v Secretary of State for the Home Department* ("Payır& Akyüz& Öztürk), Case C-294/06 [2008] ECR 00000 (Judgment of the ECJ of 24 January 2008).

Before the ECJ, UK Government and the German, Italian and Netherlands Governments argued that Article 6(1) was not applicable to Ms. Payır, Mr. Akyüz and Mr. Öztürk since the claimants did not enter the UK as workers and they were not duly registered to the British labour force. Further, the governments submitted a political argument to the effect that if it were to be adjudicated by the ECJ that the claimants could rely on Article 6(1), then more people would present themselves as an au pair or student in order to circumvent the national legislation which in that case would no longer serve to govern the entry of Turkish nationals to the EC Member States[768]. Moreover, the governments maintained that it will be in contradiction to Council Directive 2004/114/EC[769] if the situations of the claimants are regarded as similar to the situation of an ordinary worker[770].

The ECJ was of the view that the circumstances in *Payır & Akyüz & Öztürk* were similar to those in *Günaydın*, and *Birden*. Mr. Günaydın entered Germany to follow a course and expressed his intention to return to Turkey afterwards. Mr. Birden on the other hand, could not find a job just after his entrance to Germany and had to enter into an employment which was funded by the state. Having kept such similarity in mind, the Court analyzed whether the claimants are workers within the meaning of Article 6(1).

As to the status of worker, the ECJ stated that the claimants satisfied the three conditions necessary to be regarded as a worker: Having pursued a genuine and effective economic activity[771], being duly registered to the labour force[772] and having been employed legally[773]. The fact that the claimants received remuneration, played a large part in the ECJ's consideration of the claimants as workers.

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[768] Ibid, para. 24 and 25.
[769] 'Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service', OJ 2004 L 375, p. 12.
[770] *Payır & Akyüz & Öztürk*, para. 26.
[771] Ibid, para. 31.
[772] Ibid, para 32.
[773] Ibid.

As to the fact that the claimants entered the UK as an au pair and as students, the Court pointed out that the aim of Article 6(1) is to consolidate progressively the position of Turkish workers in the host Member State[774]. Then the Court reminded Mr. Birden who could not find a job at the outset, and Mr. Kurz who entered Germany while he was just 15. Mr. Günaydın also was regarded as a worker even if he had expressed that he would return to Turkey after spending a number of years in Germany[775]. Therefore, the Court held that the claimant's entry into the UK and their initial intentions not to remain there would not prevent their being able to rely on Article 6(1)[776].

And as to the arguments submitted by the governments, the ECJ took the view that except in the circumstances where a Turkish worker deceives the national authorities by identifying himself as a student or an au pair, a honest student or an au pair, who is exercising his rights under Decision No 1/80, could not be regarded as a migrant circumventing the national legislation[777].

Lastly, as to the issue of consistency with Directive 2004/114, the ECJ held that the said Directive would not have an effect on the situation of the claimants since it clearly states that it would be applied without prejudice to more favourable provisions of the agreements concluded between the EC and the third countries. Therefore, the said Directive can not be applied in case a Turkish national relies on Article 6 (1)[778].

As a result, the aforementioned consideration led the Court to rule that Ms. Payır, Mr. Akyüz and Mr. Öztürk were all workers wihin the meaning of Aritcle 6(1) of Decision No 1/80 and that they can claim benefit from that Article to remain in the UK[779].

[774] Ibid, para. 37.
[775] Ibid, 40.
[776] Ibid, 44.
[777] Ibid, 46.
[778] Ibid, 47 and 48.
[779] Ibid, para. 49.

2. *Judgments concerning the expulsion orders*

a. The *Kol* case[780]

Suat Kol was a Turkish national who got married to a German national after he had legally entered Germany. The couple declared that they lived together as man and wife and as a result of that Mr. Kol was granted unlimited residence permit. But later, it was ascertained that what they entered into was a sham marriage and that the couple intended to deceive the authorities. Accordingly, Mr. Kol was ordered to leave Germany, a decision against which he lodged an appeal on the ground that he had been in employment and that he had the right to remain in Germany under Articles 6(1) and 14(1) of Decision No. 1/80[781] [782]. The Higher Administrative Court of Berlin referred the case to the ECJ asked the latter to rule as to whether: (a) Mr. Kol, a Turkish worker who worked in Germany by means of the residence permit that he obtained deceitfully, can be deemed to be legally employed within the meaning of Article 6(1) of Decision No 1/80, and (b) the reasoning behind the decision to expel Mr. Kol is compatible with Article 14(1) of Decision No 1/80.

As to the first question, the ECJ first noted that on the date he made a false statement, Mr. Kol had not worked for more than one year with the same employer. Therefore, by analogy to *Eker*, the Court stated that, before that fraudulent conduct which led Mr. Kol to have been convicted, Mr. Kol did not derive any right under Article 6(1)[783].

As to the period of Mr. Kol's employment after the false declaration, the Court again cited its case law, i.e. *Sevince*, *Kuş* and *Bozkurt*, and stated that the fact that Mr. Kol obtained the residence permit as a result of a false declaration was not in compliance with

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[780] *Suat Kol v Land Berlin* ("Kol"), Case C-285/95 [1997] ECR I-03069.

[781] "The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.
They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals".

[782] *Kol*, para. 11.

[783] Ibid, para. 18-20.

the Court's settled finding that legal employment within the meaning of the first indent of Article 6(1) assumes a stable and secure situation[784]. In other words, the Court was of the opinion that because of his false declaration, Mr. Kol was not in legal employment within the meaning of Article 6(1). And as regards Mr. Kols's conviction, the Court asserted that the conviction could not give Mr. Kol any rights, or evoke any legitimate expectation on his part[785].

As to the second question on the compatibility of the reasoning of the expulsion order with Article 14 of Decision No 1/80, the ECJ did not provide an answer since the referring court had asked that question on condition that the ECJ answered the first question in favour of Mr. Kol[786].

b. The *Nazlı* case[787]

Ömer Nazlı was a Turkish worker who received a 21 month suspended sentence for drug trafficking in Germany. Following his trial, Mr. Nazlı continued to work again and applied for the extension of his residence permit. However, the authorities rejected his application and ordered his expulsion on the ground that he had committed a narcotics-related offence. Mr. Nazlı appealed and the case was brought before the Bavarian Administrative Court which asked the ECJ if: (a) Mr. Nazlı forfeited the rights he derived from the third indent of Article 6(1) of Decision No 1/80 following his receipt of a suspended sentence, and (b) Mr. Nazlı's expulsion, which was ordered on general preventive grounds, would be compatible with Article 14(1) of Decision No 1/80.

In its answer to the first question, the ECJ, as usual, reminded that the third indent of Article 6(1) confers on a Turkish worker the unconditional right to seek and take up any employment freely chosen by him[788], that the worker which derives rights from the third

[784] Ibid, para. 21-25.
[785] Ibid, para. 28.
[786] Ibid, para. 30 and 31
[787] *Ömer Nazlı, Çağlar Nazlı and Melike Nazlı v Stadt Nürnberg* ("Nazlı"), Case C-340/97 [2000] ECR I-00957.
[788] Ibid, para. 27.

indent also derives a corresponding right of residence[789], that the Member States are not permitted to modify unilaterally the scope of the system in Article 6(1)[790], that Mr. Nazlı, with respect to entry into Germany and pursuit of employment, met the only condition which Germany may lay as a Member State in respect Turkish workers' entitlement to the rights under Article 6(1)[791], that any absence of a Turkish worker from the labour force of a Member State does not automatically lead to the loss of the rights acquired under Article 6(1), and that Article 6 of Decision No 1/80 relates not only to the situation where a Turkish worker is in active employment but also to the situation where he is temporarily incapacitated for work[792]. As a result, the Court took the view that Mr. Nazlı did not forfeit the rights he derived from the third indent of Article 6(1) of Decision No 1/80 since he could find a new job within a reasonable period after his release and he could participate in working life again[793].

As to the expulsion order and its compatibility with Article 14 of Decision No 1/80, the Court first cited its case law wherein it ruled that, by virtue of Article 12 of the Association Agreement, Article 36 of the Additional Protocol and the objective of Decision No 1/80, the principles enshrined in Articles 48, 49 and 50 of the Treaty must be extended to Turkish nationals who enjoy the rights conferred by Decision No 1/80[794]. Therefore, the Court stated that the following findings in the context of EC law and as to Article 48(3) of the EC Treaty could be applied to Turkish workers:

a) "the concept of public policy presupposes, in addition to the disturbance of the social order which any infringement of the law involves, the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society"[795],

[789] Ibid, para. 28
[790] Ibid, para. 30
[791] Ibid, para. 32-34
[792] Ibid, para. 38
[793] Ibid, para. 41,42.
[794] Ibid, para. 55.
[795] Ibid, para. 57.

b) "the public policy exception must be interpreted restrictively, so that the existence of a criminal conviction can justify expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy"[796],

c) "Member States can not expel an offender for the purpose of deterring other aliens and without taking into account the personal conduct of the offender or of the danger which that conduct represents for the requirements of public policy"[797].

As a result, the Court concluded that, by virtue of Article 14(1) of Decision No 1/80 which is almost identical to Article 48(3)[798], a MS can only expel a Turkish national if his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy[799]. So, the order to expel Mr. Nazlı, which was on the basis of general preventive grounds having the sole objective of deterring other aliens[800], was considered by the ECJ to be incompatible with Article 14(1) Decision No 1/80[801].

c. The *Dörr & Ünal* case[802]

Dörr & Ünal, which is a joined case, is of great significance since it was the first case wherein the ECJ courageously made direct comparison between the nationals of EC Member States and of Turkey. At issue in *Dörr & Ünal* was, as regards Mr. Dörr, the compatibility of the Austrian national legislation with EC Directive 64/221[803] ("the Directive"). In respect of İbrahim Ünal, what the referring court asked the ECJ concerned the applicability of Articles 8 and 9 of the Directive to Turkish nationals who enjoy legal

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[796] Ibid, para. 58.
[797] Ibid, para. 59.
[798] Ibid, para. 56.
[799] Ibid, para. 61.
[800] Ibid, para. 62.
[801] Ibid, para. 63.
[802] *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and İbrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg* ("Dörr&Ünal"), Case C-136/03 [2005] ECR I-04759.
[803] 'Council Directive 64/221/EEC of 25 February 1964 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, English Special Edition 1963-1964, p. 117)'.

status under Articles 6 and 7 of Decision No 1/80 of EC-Turkey Association Council. Within the confines of this study, emphasis shall be placed on the second part of the judgment which deals with Mr. Ünal.

Mr. Ünal was a legally employed Turkish worker in Austria. But his criminal record included three convictions; thereby he faced with expulsion order pursuant to Federal Law on the entry, residence and establishment of aliens. Considering that he was victimized, Mr. Ünal went to law and challenged the order. In the proceedings, the referring court wondered whether Mr. Ünal was protected by the Directive.

As a matter of fact, before *Dörr & Ünal*, the ECJ had held in *Çetinkaya* that Article 3 of the Directive could be extended to Turkish workers[804]. However, what was discussed in *Dörr & Ünal* was the applicability to Turkish workers of Articles 8[805] and 9[806] of the Directive which provided guarantees of judicial protection[807].

Before the ECJ, Austria and Germany argued that the said Articles of the Directive could not be applied to Turkish nationals. The opposing governments cited *Nazlı*, a legal precedent in which the ECJ dealt with Article 14/1 of Decision No 1 /80, not the procedural aspects relating to Directive 64/221[808].

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[804] *Çetinkaya* (n. 446), para. 46 and 47.

[805] "The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration".

[806] "Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal can not have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion".

[807] *Dörr & Ünal*, para. 35 and 58.

[808] Ibid, para. 59.

The ECJ began answering the referring court's question by reiterating that the EC and Turkey, in Article 12 of the Association Agreement between them, had agreed to be guided by Articles 48, 49 and 50 of the EC Treaty for the purpose of progressively securing freedom of movement for workers between them. The Court also cited Article 36 of the Additional Protocol and the objective of Decision No 1/80, which is to improve the treatment accorded to workers and members of their family[809]. Further, the Court reminded *Çetinkaya* wherein it held that "Article 14(1) of Decision No 1/80 imposes on the competent national authorities limits analogous to those which apply to such a measure affecting a national of a Member State"[810]. Therefore the Court, who already held in *Çetinkaya* that Article 3 of the Directive could be extended to Turkish workers[811], concluded that Articles 8 and 9 of Directive were also capable of extension to Turkish workers who derive the rights under Articles 6 and 7 of Decision No 1/80[812].

Furthermore, in order to support its conclusion, the Court surprisingly came out in favour of Turkish workers, who, in Court's view, should be granted the same procedural guarantees as those granted by Community law to nationals of Member States[813] and who, as regards the rights granted to them by Decision No 1/80, should not be given a protection lower than that laid down in Articles 8 and 9 of the Directive[814]. The present author is of the view that the Court's such consideration is like a master key that one can use whenever it is necessary.

[809] Ibid, para. 61.
[810] *Çetinkaya*, para. 46
[811] Ibid
[812] *Dörr & Ünal*, para. 65.
[813] Ibid, para. 67.
[814] Ibid, para. 68.

3. *Judgments concerning non-discrimination*

a. The *Wahlergruppe Gemeinsam* case[815]

Wahlergruppe Gemeinsam is the first case where the ECJ discussed the application of Article 10(1) of Decision No 1/80[816]. Wahlergruppe Gemeinsam's *causa petendi* was the deletion of the five Turkish nationals from the list of candidates that it put forward in the general assembly of the chamber of workers. Turkish nationals' candidacy was rejected on the ground that they were not Austrian nationals. Wahlergruppe took the dispute to the court and maintained that the election committee's decision infringed Article 10(1) of Decision 1/80. The national court asked the ECJ whether: (a) Article 10 precludes the Austrian law which excludes Turkish workers from eligibility for the general assembly of a chamber of workers, and (b) Article 10(1) has direct effect in the EC.

The Court noted that Article 10(1) of Decision is a specific expression of Article 9 of the EC-Turkey Association Agreement which is general principle of non-discrimination on grounds of nationality. And after analyzing its terms and looking at the relevant case law the Court held that Article 10(1) has direct effect[817].

Then the Court pointed out that Article 10(1) is almost identical to Article 48(2) of the EC Treaty (now Article 39(2)). That similarity and the Court's settled case law regarding the transposition of the principles in Articles 48, 49 and 50 of the EC Treaty to Turkish workers who enjoy the rights under Decision No 1/80, made the Court apply its previous findings in the context of the freedom of movement for EC workers to Turkish workers. Therefore, the Court held that the Austrian law, which requires Austrian

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[815] *Wählergruppe "Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG", and Bundesminister für Wirtschaft und Arbeit and Others* ("Wahlergruppe Gemeinsam"), Case C-171/01 [2003] ECR I-04301.

[816] "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".

[817] *Wahlergruppe Gemeinsam*, para. 67.

nationality for being elected to the chamber of workers, was incompatible with Article 10(1) of Decision No 1/80[818].

b. The *Güzeli* case[819]

Hasan Güzeli was a Turkish national who worked in Germany in two different firms. Mr. Güzeli had worked for his first employer for more than one year, but with interruption. After he left his first employment, Mr. Güzeli began his second employment. On the date of expiry of his residence permit, he was employed by the second employer. He applied for an extension of his residence permit but he was turned down. Accordingly, he went to law and the national court referred the case to the ECJ for preliminary ruling. The referring court inquired whether the decision refusing to allow Mr. Güzeli to continue his residence in Germany was in compatible with Article 10(1) of Decision No 1/80[820].

In order to give an answer to the question posed, the ECJ opted to analyze Mr. Güzeli's status in respect of Article 6(1) of Decision No 1/80. The referring court implied in its questions that Mr. Güzeli was duly registered to the German labour force. In this respect, the ECJ reminded its case law that a Turkish worker will be duly registered to the labour force of the host Member State if he/she complies with the law and regulations of the that Member State relating to entry to its territory and to employment there[821]. Therefore, the ECJ left it to the national court to establish whether, on the date his residence permit expired, Mr. Güzeli complied with the conditions imposed by the German authorities for his paid employment[822]. So, it was up to the national court to determine whether Mr. Güzeli's employment was 'legal'. If it is legal, then he can rely on the first indent of Article 6(1) of Decision No 1/80.

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[818] Ibid, para. 78.
[819] *Hasan Güzeli v Oberbürgermeister der Stadt Aachen* ("Güzeli"), Case C-4/05 [2006] ECR I-10279.
[820] "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".
[821] *Güzeli*, para. 32.
[822] Ibid, para. 36.

And, as to the applicability of Article 10(1) to the expulsion order, the Court noted that because of its very wording, Article 10(1) requires that the Turkish worker be duly registered as belonging to the labour market of the Member State concerned. Therefore, only a Turkish worker, who is dully registered to the labour force of the host Member State, will be able to rely on Article 10. In this respect, the ECJ left it to the national court to establish whether Mr. Güzeli was duly registered or his employment was 'legal'[823].

c. The *Nihat Kahveci* case[824]

Nihat Kahveci is an exceptional case in terms of the claimant, Nihat Kahveci, a Turkish professional football player playing in the Spanish football league. After his transfer to Real Sociedad, Nihat was given a licence for non-EU players. In order not to be subject to limitation on the number of the foreign players that a club can field, Nihat and Real Sociedad applied for a licence given to players of EU nationality and they invoked the EC-Turkey Association Agreement and the Additional Protocol. However, the application was rejected by the Spanish Football Federation on the ground that Nihat Kahveci was a Turkish national and he did not satisfy the condition laid down in Article 173 of the General Regulations of the Spanish Football Federation which stipulates that the football players must have Spanish nationality or be a national of a Member State of the European Union or the European Economic Area to be registered and obtain the license of a professional player. Nihat and his club appealed and took the dispute to the Court in Madrid. The Court heard the parties and referred the case to the ECJ by inquiring as to whether the Spanish Football Federation's application of the General Regulations was in compatible with Article 37 of the Additional Protocol[825].

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[823] Ibid, para. 48 et seq.

[824] *Real Sociedad de Fútbol SAD and Nihat Kahveci v Consejo Superior de Deportes and Real Federación Española de Fútbol* ("Nihat Kahveci"), Case C-152/08 [2008] ECR 00000 (Order of the ECJ of 25 July 2008). The authentic language of the case is Spanish. In this study, the unofficial English translation of the case was used.

[825] "As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community".

In its answer, the ECJ first noted that the *Nihat Kahveci* case was very similar to the *Deutscher Handballbund*[826], and *Simutenkov*[827] cases. In *Deutscher Handballbund* the ECJ held that the rule of the German Handball Federation, according to which the handball clubs are allowed to field only a limited number of players from the third countries outside the EU, was incompatible with the first paragraph of Article 38 of the Europe Agreement between the EC and Slovakia[828]. *Simutenkov* on the other hand, resembled more to the dispute between Nihat Kahveci and the Spanish Football Federation. Simutenkov was a Russian professional football player who was given by the Spanish Football Federation a licence for non-EU players. After his application for the replacement of his non-EU player licence with the EU player licence was rejected, Simutenkov went to law and invoked Article 23(1) of the Partnership and Cooperation Agreement between the EC and Russia[829]. The ECJ held that the Spanish Football Federation's application was incompatible with the said Article of the EC-Russia Agreement.

In *Deutscher Handballbund,* and *Simutenkov*, the Court expressed that if the rule that limits the number of the foreign players has direct impact on the players and it precludes them from being fielded, then such a rule will be related to the working conditions[830]. And, since Article 37 of the Additional Protocol was very similar to the said provisions of the EC-Slovakia and EC-Russia Agreements[831], the Court's finding in

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[826] *Deutscher Handballbund eV v Maros Kolpak* ("Deutscher Handballbund"), Case C-438/00 [2003] ECR I-04135.

[827] *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* ("Simutenkov"), Case C-265/03 [2005] ECR I-02579.

[828] 'The Europe Agreement establishing an association between the European Communities and their Member States on the one hand, and the Slovak Republic, on the other hand', signed in Luxembourg on October 4, 1993 and approved on behalf of the Communities by Decision 94/909/EC, ECSC, Euratom and the Commission of 19 December 1994 (OJ L 359 , p. 1).

[829] 'The Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States on the one hand, and Russia, on the other hand' (OJ L 327/3, 28.11.1997).

[830] *Nihat Kahveci*, para. 24.

[831] Ibid, para. 25.

Deutscher Handballbund, and *Simutenkov* can be transposed to Nihat Kahveci's situation and further Nihat Kahveci can rely on Article 37 of the Additional Protocol[832].

Consequently, the Court held that Spanish Football Federation's application, which made Nihat Kahveci subject to foreign player limitation, was in contravention of the non-discrimination principle in Article 37 of the Additional Protocol.

V. JUDGMENTS REGARDING FAMILY MEMBERS OF TURKISH WORKERS

A. Legal Background

The judgments of the ECJ on members of the family of a Turkish worker have moved around four provisions of the Law of the EC-Turkey Association Council: Articles 7[833], 9[834] and 14[835] of Decision No 1/80 of the EC-Turkey Association Council and Article 59[836] of the Additional Protocol.

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[832] Ibid, para. 28

[833] Article 7(1): "The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized to join him:
- shall be entitled - subject to the priority to be given to workers of Member States of the Community - to respond to any offer of employment after they have been legally resident for at least three years in that Member State,
- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years".
Article 7(2): "Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years".

[834] Article 9: "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".

[835] Article 14(1): "The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health".

Article 7 of Decision No 1/80 is at the centre and its objective is to create conditions contributing to family reunification[837]. In that regard, Article 7 provides "two separate rights"[838]: One for the family members and one for the children.

According to the first paragraph of Article 7, the family members have progressive rights depending on the duration of their residence in the host Member State. After three years of legal residence, the family members are entitled to respond to any offer of employment whereas after five years of legal residence they have free access to any paid employment they freely choose.

Second paragraph of Article 7, which relates to the cildren of Turkish workers, is a more favourable provision than the first paragraph of Article 7 because it is easier to fulfil the conditions laid down in the former[839]. Second paragraph provides that the children of a Turkish worker can respond to any offer of employment provided that: (a) they complete a course of vocational training in the host Member State, and (b) one of their parents has been legally employed in the host Member State for at least three years.

Article 7 contains more favourable provisons compared to Article 6(1) of Decision No 1/80. Further, Article 6(1) states that it is applied subject to Article 7. In these circumstances, it is clearly evident that Article 7 takes precedence over Article 6(1). In other words, a family member of a Turkish worker, who meets the condtions in Article 7, does not have to meet the conditions in Article 6(1)[840].

Article 14(2):"They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals".

[836] Article 59: "In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community".

[837] *Çetinkaya* (n. 446), para. 25.

[838] Steve Peers, "Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union", **Common Market Law Review**, Vol. 33 (1996), p. 24.

[839] *Akman* (n. 446), para. 35.

[840] *Aydınlı* (n. 446), para. 31.

Article 7 contains key terms such as 'family member', 'duly registered worker' and 'legally resident'. Those vague concepts inevitably prompted litigation and the ECJ has expounded on them in its case law.

Article 9 of Decision No 1/80 has come up only in two cases but that specific non-discrimination clause is a cornerstone of the rights of the children of Turkish workers.

Article 14 is a safeguard clause which has been narrowly interpreted by the ECJ in respect of expulsion orders given by the Member States against Turkish nationals. The implementation of Article 14 has kept the ECJ busy most of the time but the Court has settled on the way how a Member State should limit the rights of Turkish nationals in the light of Article 14.

Lastly, Article 59 of the Additional Protocol has arisen once on the judgments of the Court regarding the family members of Turkish workers. Article 59, which uniquely favors EC nationals over Turkish nationals, is a key provision whose potentail has not been exploited by the Member States yet.

B. The Judgments

1. *Judgments concerning the right of residence*

a. The *Eroğlu* case[841]

Hayriye Eroğlu was a Turkish national who entered Germany to study at the University of Hamburg. Mrs. Eroğlu's father had been working in Germany for several years. She graduated from the university and worked for more than a year for one employer. Then she began to work, with the authorities' permission, for another employer. In the tenth month of her second employment, Mrs. Eroğlu applied for an extension of her residence permit in order to enable her to work for her first employer again. As her application was rejected, Mrs. Eroğlu went to law claiming that she had a right of residence. The court in Karlsruhe referred the case to the ECJ since it wondered if Mrs.

[841] *Hayriye Eroğlu v Land Baden-Württemberg* ("Eroğlu"), Case C-355/93 [1994] ECR I-05113.

Eroğlu (a) had met the requirement in the first indent of Article 6(1) of Decision No 1/80 as a worker who worked for more than a year for one employer and then for ten months for another employer and (b) can, as a person who can respond to any offer of employment by fulfilling the condition in the second paragraph of Article 7[842] of Decision o. 1/80, demand the extension of her residence permit.

As regards the first question the ECJ first noted that Article 6 (1) was found to have direct effect in *Sevince*[843]. Then, the Court stressed that:

"The aim of the first indent of Article 6(1) is to ensure solely continuity of employment with the same employer and is, accordingly, applicable only where a Turkish worker requests an extension of his work permit in order to continue working for the same employer after the initial period of one year' s legal employment"[844].

Such a consideration led the Court to state that Mrs. Eroğlu did not have the right to the renewal of her work permit since she had changed employers, a right which is given by the second indent of Article 6 (1)[845] to Turkish workers who worked for three years[846]. What is interesting is that the Court stated that a Community worker can not receive the priority given to him in the second indent of Article 6 (1) if a Turkish worker is allowed to change employer before three years of employment[847].

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[842] "Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years".
[843] *Eroğlu*, para. 11.
[844] Ibid, para. 13.
[845] "A Turkish worker duly registered as belonging to the labour force of a Member State 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 services of that State, for the same occupation".
[846] *Eroğlu*, para. 14.
[847] Ibid.

As to the second question, the Court based its view on its previous judgments in *Sevince*, and *Kuş*, and stated with respect to the link between the right to the employment and the right of residence that:

"The right conferred on a person by the second paragraph of Article 7 of Decision No 1/80 to respond to any offer of employment necessarily implies the recognition of a right of residence for that person"[848].

Therefore, the Court held that Mrs. Eroğlu, a Turkish national who satisfied the conditions in the second paragraph of Article 7 of Decision No 1/80 and who may therefore respond to any offer of employment in Germany, may also rely on the said provision to obtain the extension of her residence permit[849].

b. The *Kadıman* case[850]

The *Kadıman* case concerns the legal challenge launched by Selma Kadıman against the decision refusing to grant her a residence permit. Mrs. Kadıman entered Germany to join her husband but the couple began to live separately after a while. While they were on vacation in Turkey, Mr. Kadıman concealed his wife's passport, an unlucky situation which obliged Mrs. Kadıman to stay in Turkey for five months until she got a visa. When she set foot in Germany again, the authorities threatened to deport her since she was not living with her husband. At that point, Mr. Kadıman declared that he and his wife would resume living together again and in consequence Mrs. Kadıman was granted a new residence permit. But the couple had a sort of love-hate relationship that they did not come together and Mrs. Kadıman was ordered to leave Germany. The reasoning behind such order was that the residence permit she was granted was for the purpose of family unity but Mrs. Kadıman was no longer living with her husband. Mrs. Kadıman challenged the order

[848] Ibid, para. 20.
[849] *Eroğlu*, para. 23
[850] *Selma Kadıman v Freistaat Bayern* ("Kadıman"), Case C-351/95 [1997] ECR I-02133.

and argued that it was against the first paragraph of Article 7 of Decision No. 1/80[851] since she legally resided and worked in Germany for more than three years. The case was brought before the Administrative Court of Bavaria which upon its consideration decided to ask the ECJ to rule on as to whether or not the first paragraph of Article 7 (a) assumes that the family must be living together, (b) assumes three years' uninterrupted legal residence, and (c) covers in its calculation of the period of three years' legal residence the voluntary or forced intermediate stay in Turkey.

The ECJ began answering the national court's questions by holding that the first paragraph of Article 7 of Decision No 1/80 has direct effect in the Member States[852]. Then the Court allayed the Member States by stating that they had the power to lay down the conditions under which a family member may enter their territory and reside there until he or she becomes entitled to respond to any offer of employment[853]. In Court's view a Member State which allows a family member to enter its territory to join a Turkish worker, must also be able to require such family member to continue actually to reside with the migrant worker until he or she becomes entitled to work[854]. Otherwise Turkish nationals might, in order to get around Article 6, enter into false marriages to exploit the favourable conditions of Article 7[855]. Therefore, the Court held that Mrs. Kadıman can be required by Germany to live with her husband for the period of three years in order to be entitled to reside there.

As to the second and third questions, the Court inferred from the first indent of the first paragraph of Article 7 that the family member must reside in the Member State

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[851] "The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized to join him:
- shall be entitled - subject to the priority to be given to workers of Member States of the Community - to respond to any offer of employment after they have been legally resident for at least three years in that Member State,
- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years".

[852] *Kadıman*, para. 28.
[853] Ibid, para. 32-33.
[854] Ibid, para. 37.
[855] Ibid, para. 38.

concerned uninterruptedly during those three years with the Turkish worker[856]. But in Court's view, Mrs Kadıman's situation was an exception to the rule since her stay in Turkey was for reasons beyond her control[857]. Therefore, the Court held that the period of her unwilling stay must be taken into account for the purpose of calculating the three-year period of legal residence within the meaning of the first indent of the first paragraph of Article 7 of Decision No 1/80[858]. As regards the period in which Mrs. Kadıman has no residence permit, the Court, by analogy to *Bozkurt*[859], held that the period that Mrs. Kadıman did not hold a residence permit could not affect the running of time for the purposes of the three-year period under the first indent of the first paragraph of Article 7 of Decision No 1/80[860].

c. The *Akman* case[861]

The Akman case is about the interpretation of the second paragraph of Article 7 of Decision No 1/80[862]. The central figure in the case is Haydar Akman, a Turkish national who entered Germany and there obtained a residence permit of limited duration for the purpose of training as an engineer. At the outset, Mr. Akman resided with his father, a Turkish worker who was employed in Germany for four-teen years. Then his father returned to Turkey and Mr. Akman moved to another city in Germany. After finishing the training course and being employed by two employers, Mr. Akman applied for a residence permit of unlimited duration. But his application was rejected and he was granted only a limited residence permit. Accordingly, Mr. Akman went to law and invoked the second paragraph of Article 7 of Decision No 1/80, according to which he would be entitled to

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[856] Ibid, para. 47.
[857] Ibid, para. 49.
[858] Ibid, para. 50.
[859] Ibid, para. 51.
[860] Ibid, para. 53.
[861] *Haydar Akman v Oberkreisdirektor des Rheinisch-Bergischen-Kreises* ("Akman"), Case C-210/97 [1998] ECR I-07519.
[862] "Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years".

respond to offers of employment made to him and to claim a residence permit for the purpose of actually taking up employment[863]. The defendant authority maintained that Mr. Akman could not rely on Article 7 since his father was not in Germany at the time Mr. Akman applied for unlimited residence. The case was brought before the Administrative Court of Cologne which asked the ECJ to rule on whether it was necessary for Mr. Akman's father to continue to reside in Germany in order for Mr. Akman to rely on the second paragraph of Article 7.

The ECJ, as usual, began answering the national court by reiterating its case law to the effect that the second paragraph of Article 7 of Decision No 1/80 has direct effect in the Member States[864], that the rights conferred by that provision with regard to employment imply the existence of an associated right of residence for the child of the worker[865], and that that provision lays down two conditions, i.e. the completion of a course of vocational training in the Member State concerned and the legal employment of the child's parent there for at least three years[866]. In this respect, the Court faced opposition from Germany and Greece[867] but it insisted that Mr. Akman's father had fulfilled the condition as he had worked in Germany for more than four teen years[868]. Mr. Akman also fulfilled the condition in the said provision since he had completed in Germany a course of study in engineering[869].

Next, the Court compared the first and second paragraphs of Article 7 and noted that it is easier to fulfill the conditions laid down in the second paragraph of Article 7 which applies only to children[870]. The second paragraph of Article 7 is a more favourable provision than the first and is intended to provide specific treatment for children[871] who are

[863] *Akman*, para. 15.
[864] Ibid, para. 23.
[865] Ibid, para. 24.
[866] Ibid, para. 25.
[867] Ibid, para. 26.
[868] Ibid, para. 27.
[869] Ibid, para. 28.
[870] Ibid, para. 35.
[871] Ibid, para. 38.

not, unlike the family members, required by Article 7 to have been authorized to join their parents[872]. Therefore, the Court viewed that the second paragraph must not be interpreted strictly, in a manner which requires the Turkish migrant worker still to be employed in the host Member State at the time of his child's application for employment[873]. At that point, the Court cited Article 9 of Decision No 1/80 and gave serious consideration to that Article which provides that:

"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".

In Court's view, the legislator had clearly specified in Article 9 that parents who are no longer working in the Member State concerned are not obstacles in the way of children wishing to gain access to education or vocational training[874]. The Court therefore held that same reasoning could be applied to the requirement of present employment on the part of the parent whose child wishes to take up employment following completion of vocational training[875].

It is noteworthy that in Akman, Germany argued that a child, whose parent has already returned to his home country at the time when his child wished to engage in employment, would be subject to Article 6 (1). The Court refuted that argument by pointing to the fact that Article 6(1) applies subject to the provisions of Article 7[876].

d. The *Ergat* case[877]

Sezgin Ergat entered Germany to join his parents who were both migrant workers belonging to the German labour force. Following his entry, Mr. Ergat was in possession of

[872] Ibid, para. 37.
[873] Ibid, para. 39.
[874] Ibid, para. 41.
[875] Ibid, para. 42-44.
[876] Ibid, para. 48.
[877] *Sezgin Ergat v Stadt Ulm* ("Ergat"), Case C-329/97 [2000] ECR I-01487.

residence permits and had them extended. But, on the last occasion, he belatedly applied for the extension of his residence permit, i.e. 26 days after the permit expired. Upon this, the Aliens Department rejected Mr. Ergat's application. The Turkish worker was of the view that he was entitled to the extension of his residence permit under the first paragraph of Article 7 of Decision No 1/80[878] and therefore he brought an appeal against the rejecting decision. The Federal Administrative Court referred the matter to the ECJ and asked it whether Mr. Ergat satisfied the conditions in the first paragraph of Article 7.

In its answer, the Court first noted that Mr. Ergat fell within the scope of the second indent of the first paragraph of Article 7 of Decision No 1/80 as he was legally resident in Germany for more than five consecutive years[879].

Then, the Court reminded *Kadıman* wherein it concluded that:

a) The first paragraph of Article 7 has direct effect in MS[880] and,

b) The MSs do have the power (1) to authorize a Turkish national to join a Turkish worker and to regulate their stays until the end of the period of three years, i.e. until Turkish national becomes entitled to respond to any offer of employment[881], and (2) to make the extension of the residence permit subject to actual cohabitation in a household with the worker for the period of three years[882].

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[878] "The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:

- shall be entitled - subject to the priority to be given to workers of Member States of the Community - to respond to any offer of employment after they have been legally resident for at least three years in that Member State;

[879] *Ergat*, para. 30
[880] Ibid, 34
[881] Ibid, 35
[882] Ibid, 36-37

In Court's view, its findings in *Kadıman* would also mean that MSs can not attach conditions to the residence of a member of a Turkish worker's family after that period of three years, a conclusion which must be applied also to Mr Ergat[883].

Having considered that Mr Ergat met all the conditions made by the second indent of the first paragraph of Article 7[884], that he was in a stable and secure position on the date of expiry of his last residence permit[885], and that the residence permit was merely evidence of the existence of the right or residence[886], the Court held that Mr. Ergat did not lose his rights under Article 7 since he was not in illegal residence during the time he did not hold a permit because of his belated application for extension[887].

e. The *Eyüp* case[888]

Safet Eyüp married in Austria a Turkish man who had been duly registered to the Austrian labour force for eight years. Upon her marriage, Mrs. Eyüp was granted a residence permit as a family member. The couple got divorced after two years but they continued to cohabit. And eight years later they got married again in Austria. Mrs. Eyüp did not fulfil the conditions regarding legal employment in Article 6(1) of Decision No 1/80 since she had entered into only short-term employments. At that time, she applied to authorities for a certificate ("the certificate") indicating that she had met the conditions under the second indent of the first paragraph of Article 7 of Decision No 1/80. But her application was rejected on the ground that she was, after the divorce, a cohabitee not a spouse. The authorities argued that the interim period, during which she was a cohabitee, could not be added in the calculation of the legal period required by Article 7. Mrs. Eyüp appealed and maintained that she was entitled to rights under the first indent of the first paragraph of Article 7. She also applied to the national court for interim measures

[883] Ibid, 38
[884] Ibid, 59
[885] Ibid, 60
[886] Ibid, 61 and 62
[887] Ibid, 65 and 67.
[888] *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* ("Eyüp"), Case C-65/98 [2000] ECR I-04747.

preserving her right to work in an employed capacity until the end of the case. So, the problem at issue before the national court was whether or not Mrs. Eyüp was a family member within the meaning of Article 7.

In its answer to the referring court, the ECJ viewed that:

"Mr. and Mrs. Eyüp did not at any time reside separately or cease to live together in Austria, so that they constantly maintained a common legal residence within the meaning of the first paragraph of Article 7 of Decision No 1/80. Their conduct was thus permanently in accordance with the objective underlying that provision, namely de facto family unity in the host Member State"[889].

Accordingly, the Court held that Mrs. Eyüp was entitled to free access to any paid employment of her choice under the first paragraph of Article 7 of Decision No 1/80 since she had, at the time of her application for the certificate, cohabited for 13 years with Mr. Eyüp in Austria[890].

f. The *Kurz* case[891]

Bülent Yüce was born in Germany as the illegitimate child of a Turkish migrant worker who was duly registered to the German labour force. After attending a vocational training and concurrently working for a firm in return for monthly wage, Mr. Yüce was adopted by a German couple and he changed his surname to Kurz. In the meantime, he applied for residence permit but he was turned down on the ground that he obtained only a temporary residence authorisation during his training, that he was no longer the son of a Turkish worker, that he did not finish his training, and that his biological father had left Germany before he began his vocational training there. Mr. Kurz argued that he was

[889] Eyüp, para. 34.
[890] Ibid, para. 38 and 48.
[891] *Bülent Kurz, né Yüce v Land Baden-Württemberg* ("Kurz"), Case C- 188/00 [2002] ECR I-10691.

entitled to residence permit by virtue of Article 6(1) and the second paragraph of Article 7 of Decision No 1/80[892].

The referring court asked *inter alia* the ECJ whether Mr. Kurz derived rights from Article 6 (1) of Decision No 1/80. In its answer, the Court first discussed the concept of worker and held that Mr. Kurz must be regarded as a worker as he pursued a genuine and effective economic activity for and under the direction of a firm in return for monthly wage[893]. Then, the Court discussed the concept of being duly registered to the labour force. In Court's view, Mr. Kurz had legally entered Germany and he was authorised there to pursue vocational training[894]. Moreover, he was in legal employment since he was an apprentice who pursued a genuine and effective economic activity with an employer for more than four years[895]. Therefore, he must have been regarded as duly registered to the labour force. And, as to the concept of legal employment, the Court viewed that Mr. Kurz's situation as a worker was stable and secure[896] and that his employment was legal even though his work and residence permits were limited to temporary employment with a specific employer[897].

As to the defendant's argument that Mr. Kurz was not employed after his training contract and thereby he forfeited his rights, the Court reminded that Mr. Kurz would not lose his rights for a reasonable time after his employment (training) ended, provided that he does not only respond to job offers, but also seeks a new job[898].

Consequently, the Court held that Mr. Kurz enjoys in Germany the right of free access to any paid employment of his choice and a corresponding right of residence by

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[892] "Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years".
[893] *Kurz*, para. 35 and 36.
[894] Ibid, para. 42.
[895] Ibid, para. 45.
[896] Ibid, para. 51.
[897] Ibid, para. 53.
[898] Ibid, para. 59.

virtue of the third indent of Article 6(1) of Decision No 1/80. The ECJ can be criticized for not answering the questions of the referring court on the second paragraph of Article 7[899]. The Court probably thought that the crux of the matter was the issue of residence permit and the interpretation of Mr. Kurz's status wihin the meaning of Article 6(1) would suffice for concluding whether he had the right to residence.

g. The *Ayaz* case[900]

Engin Ayaz was a Turkish national who entered Germany to live with her mother and stepfather there. Mr. Ayaz's stepfather had been duly registered to the German labour force for more than ten years whereas his mother was not authorized to work. Mr. Ayaz did not finish the vocational training that he began but he worked sporadically as a driver. In the meantime, he was convicted of various criminal offences in Germany. Problems arose when Mr. Ayaz applied for an extension of his residence permit for a limited period. His application was rejected and confirmed on the ground that he posed a high risk to public policy and public security due to his criminal record. The referring court was of the view that the ECJ's finding in *Nazlı* could be applied to the case before it and thus it only questioned the situation of Mr. Ayaz, a stepson, within the meaning of the first paragraph of Article 7 of Decision No 1/80.

The ECJ, in its answer, first reminded that Turkish nationals, who wish to invoke first paragraph of Article 7, must be a family member of a Turkish worker and must have been authorized to join such worker[901]. In this respect, the Court viewed that Mr. Ayaz's situation was uncertain as to the first requirement only[902].

To ascertain whether a stepson is a family member within the meaning of Article 7, the Court used its classic method and extended to Mr. Ayaz the principles that it applied

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[899] Hacı Can, Avrupa Toplulukları Adalet Divanının "Kurz" Kararı, **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Vol. 52, Issue 4 (2003), p. 298.
[900] *Engin Ayaz v Land Baden-Württemberg* ("Ayaz"), Case C-275/02 [2004] ECR I-08765.
[901] *Ayaz*, para. 34
[902] Ibid, para. 36.

in EC law context in relation to freedom of movement for workers. To be specific, the Court cited the *Wählergruppe Gemeinsam*, and the *Commission v Austria* cases[903]. Further, it referred to *Mesbah*[904] and stated that the first paragraph of Article 7 of Decision No 1/80 does not imply a 'blood relation'[905]. Consequently, the Court held that Mr. Ayaz, a stepson, must be considered as a family member under the first paragraph of Article 7 of Decision No 1/80[906]. The Court's reference to *Mesbah* is noteworthy since the Court made one thing crystal clear- it views that the EC-Turkey Association Agreement pursues a more ambitious objective than the EC-Morocco Cooperation Agreement[907].

h. The *Er* case[908]

Er concerns a legal action taken by Hakan Er, a 23 years old Turkish national who joined his father living in Germany, against the Aliens Authority. The latter rejected the application for extension of Mr. Er's residence on the ground that according to the first paragraph of Article 7 of Decision No 1/80, in order for a family member to be entitled to extension of his/her residence permit, that family member must be present on the employment market and have real job prospects. Indeed, Mr. Er did not engage in paid employment since he left the school when he was 16, he did not complete the government job-support schemes and he was not receving social security benefits without which he is unlikely to survive. However, Mr. Er was of the opininon that he was entitled to residence permit extension since he resided with his father for more than five years and that he could claim benefit from the first paragrapgh of Article 7 which does not require the family member seek employment.

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[903] Ibid, para. 45.
[904] Ibid, para. 47.
[905] Ibid, para. 46.
[906] Ibid, para. 48.
[907] Ibid, para. 47.
[908] *Hakan Er v Wetteraukreis* ("Er"), Case C-453/07 [2008] ECR 00000 (Judgment of the ECJ of 25 September 2008).

Being totally confused, the referring court in Giessen inquired whether Mr. Er could rely on the first paragraph of Article 7 even he did not enter an employment and he was reluctant to seek a job.

The ECJ, first of all, reminded that the first paragragraph of Article 7 has direct effect[909], that the child of a Turkish worker has, under the first paragraph of Article 7, a concomitant right of residence bedises his right to employment[910], that the Member State can neither attach conditions or restrictions[911] nor adopt measures[912] relating to the residence of a Turkish national who meets the conditions laid down in Decision No 1/80, and that a Turkish national, who complied with Decision 1/80, can not be deprived of his residence right if he has the prospect of becoming permanently integrated in his host Member State[913].

Next, the Court cited its previous findings that: (a) the rights of a Turkish national under the first paragraph of Article 7 can only be restricted if his/her conduct constitutes a genuine and serious threat to public policy, public security or public health and if he/she leaves the host Member State for a significant length of time without legitimate reason[914], and (b) a Turkish national, who derived rights from Article 7, can not be deprived of his rights because he is umemployed due to imprisonment or because he never acquired rights relating to employment and residence pursuant to Article 6(1)[915].

In the light of the foregoing, the Court concluded that a Turkish national can still rely on the first paragraph of Article 7 even if he/she did not enter into a paid employment in the host Member State at the time he/she applied for extension of his residence permit. Consequently, the Court delivered a judgment favouring Mr. Er and found him right to rely on Article 7 to demand the extension of his residence permit.

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[909] *Er*, para. 25.
[910] Ibid, para. 26.
[911] Ibid, para. 27.
[912] Ibid, para. 28.
[913] Ibid, para. 29.
[914] Ibid, para. 30.
[915] Ibid, para. 31.

Interestingly enough, no Member State has intervened in *Er* and raised objections to the broad interpretation of the the Court of Article 7. One, who has sharp eye for detail, can notice that in *Er* the Court has applied the principles that it established as regards Turkish nationals who are absent from employment due to imprisonment. Mr. Er was not imprisoned and thus he could have engaged in employment after he left the school. Nevertheless, the Court once more took into consideration the fact that Article 7 provides more favourable rights to family members and children of Turkish workers. The Court's implication that after five years of legal residence, a children of a Turkish worker can lead a peaceable life without being required to work, may bring about new cases where the national courts inquire as to whether there is a **reasonable time** until when a Member State must stand! to unemployed young Turkish nationals.

2. *Judgments concerning the expulsion orders*

a. The *Çetinkaya* case[916]

İnan Çetinkaya was a German born Turkish national who held an unlimited residence permit in Germany. Mr. Çetinkaya's father had been employed in Germany until he retired. The present writer is of the view that Mr. Çetinkaya, like Mr. Ayaz, was probably one of those deprived children who could not integrate in German society. Mr. Çetinkaya had begun two traineeships, both of which he could not complete. And, he entered into employment only for short periods. Further, he was sentenced to three years' youth custody as a result of drug-related offences. While he was being kept in detention center, the authorities ordered to expel him and excluded the possibility of the application of Article 7 since, in their view, Mr Çetinkaya would no longer be available for work due to his imprisonment and the detoxification course that he had to follow afterwards. But, after Mr. Çetinkaya was released from custody, the authorities amended the immediate expulsion order so that Mr. Çetinkaya could leave Germany voluntarily before a specific date

[916] *İnan Çetinkaya v Land Baden-Württemberg* ("Çetinkaya"), Case C- 467/02 [2004] ECR I-10895.

("factual matters/a change in the circumstances after the expulsion decision"). Accordingly, Mr. Çetinkaya brought the expulsion order before the Administrative Court of Stuttgart.

The Stuttgart court's first question was on the application of the first paragraph of Article 7 of Decision No 1/80 to Mr. Çetinkaya who was born and has always lived in Germany. In other words, the question was whether Mr. Çetinkaya could derive rights from the said Article even though he was not a family member who was 'authorized to join' a worker in Germany[917]. In its answer, the Court fist noted that the authors of Decision No 1/80, i.e. the legislators, intended neither to exclude from the rights in Article 7 the children who were born in an EC Member State[918] neither to differentiate between the children of Turkish workers on the basis of their place of birth[919]. Such an interpretation was also in accordance with the objective of Article 7 which is to create conditions contributing to family reunification[920].

As to Germany's argument that Mr. Çetinkaya could not rely on the first paragraph of Article 7 since his retired father was no longer a worker who is duly registered to the German labour force, the Court took the view that the principle, which prevents Member States from attaching conditions to a family member after his three years' legal residence with the Turkish worker to whom he/she was authorized to join[921], should also be applied to a family member of a Turkish worker who has resided with that worker for five years[922].

As a result of the above-mentioned considerations, the Court held that Mr. Çetinkaya could derive rights from the first paragraph of Article 7 even though he was born in Germany and his father was retired[923].

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[917] *Çetinkaya*, para. 18 and 19.
[918] Ibid, para. 21.
[919] Ibid, para. 24.
[920] Ibid, para. 25.
[921] Ibid, para. 30.
[922] Ibid, para. 31.
[923] Ibid, para. 33 and 34.

In its second question, the referring court wondered whether Mr. Çetinkaya, who was absent from the labour force due to his imprisonment, may still claim the benefit of the first paragraph of Article 7. The Court answered in the affirmative since it was of the opinion that Mr. Çetinkaya's custodial sentence and the detoxification that he had to follow were not one of the two situations on the basis of which a Member State can limit the right of residence of family member of a Turkish worker[924]. In other words, according to the ECJ case law, Germany could have expelled Mr. Çetinkaya only if (a) his conduct, according to Article 14/1 0f Decision No 1/80, had constituted a genuine and serious threat to public order, public security or public health, and (b) he had left Germany for a significant length of time without legitimate reason[925].

The other question which the Court answered concerned 'the factual matters/a change in the circumstances after the expulsion decision'. To be more specific, the referring court asked whether it must, when assessing the legality of the expulsion decision, take into account the change in the circumstances, i.e. the amendment of the immediate expulsion decision. The Court, in its answer, used its classic method and applied the principles laid down in Articles Article 48, 49 and 50 of the EC Treaty to Turkish nationals who enjoy the rights conferred by that decision[926]. Therefore, the Court held that :

"…national courts must take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy"[927].

So, the ECJ ruled that the referring court must, before reaching a decision whether Mr. Çetinkaya's expulsion order was in conformity with Article 14/1 or not, consider the

[924] Ibid, para. 36.
[925] Ibid, para 38 and 39.
[926] Ibid, para. 42-45.
[927] Ibid, para. 47.

fact that the immediate expulsion order was amended by the authorities due to change in Mr. Çetinkaya's situation.

b. The *Aydınlı* case[928]

Like Mr. Kurz and Mr. Çetinkaya, Ceyhun Aydınlı was born in Germany and he was one of the second-generation Turkish migrants. Mr. Aydınlı was 27 years old and he was no longer living with his parents. Mr. Aydınlı could claim benefit from the third indent of Article 6(1) of Decision No 1/80 because he had legally worked in Germany for more than four years consecutively. He could also derive rights from the second indent of the first paragraph of Article 7 since he had, as a child of a Turkish worker, legally resided in Germany for at least five years. Furthermore, Mr. Aydınlı could claim rights by virtue of the second paragraph of Article 7 of Decision No 1/80 as he had completed vocational training in Germany. However, his criminal record was a handicap. He was given an unconditional prison sentence of several years during which he was absent from the labour market. His imprisonment caused the authorities to order to expel him. Accordingly, the Turkish worker went to law and the case was brought before the ECJ.

The main question of the referring court was whether Mr. Aydınlı, as a result of his imprisonment, forfeited his right to free access to any paid work. Since Article 6 applies subject to the provisions of Article 7, the ECJ merely answered the questions in the light of Article 7.

Before reaching a conclusion, the Court repeated its previous findings: (a) An independently living adult child of a Turkish worker can also be protected by the first paragraph of Article 7[929], (b) Member States can not attach conditions to the residence of a family member after his/her three years' or five year's residence with the worker whom he/she joined to[930], (c) Family members' right to free access to employment implies a concomitant right of residence irrespective of the existence of the conditions for access to

[928] *Ceyhun Aydınlı v Land Baden-Württemberg* ("Aydınlı"), Case C-373/03 [2005] ECR I-06181.
[929] *Aydınlı*, para.22
[930] Ibid, para. 24.

those rights[931], (d) Member States can limit the right of residence of a family member only if his/her conduct is considered to be a genuine and serious threat to public policy, public security or public health or if he/she leaves the territory of that Member State for a significant length of time without legitimate reason[932], (e) Member States can not limit the rights of a Turkish national if he/she faces with a custodial sentence of several years[933], (f) The family members are not, in order to benefit from the first paragraph of Article 7, obliged to work[934], (g) By comparison with Article 6 (1), Article 7 provides less stricter rules but the family members can rely on the first paragraph of Article 7 and they do not have to meet the conditions in Article 6 (1)[935].

As a result of the seven reasons above, the Court held that Mr. Aydınlı, who met the conditions in the second indent of the first paragraph of Article 7, did not forfeit his rights deriving from that Article even if he was (a) absent from the labour market due to imprisonment, and (b) an adult who was no longer living with the Turkish worker whom he joined to[936].

It is noteworthy that in *Aydınlı*, the compatibility of Mr. Aydınlı's expulsion order with Article 14 (1) of Decision No 1/80 was not referred to the ECJ, since the referring national court had learnt important lessons from *Nazlı* and considered that Article 14 (1) would not be applied to Mr. Aydınlı as he did not present any real danger of his re-offending the offences that he had committed[937].

c. The *Torun* case[938]

Ergün Torun, a second-generation Turkish migrant, was born and has always resided in Germany. Mr. Torun was the son of a Turkish national who was legally

[931] Ibid, para. 25.
[932] Ibid, para. 27.
[933] Ibid, para. 28
[934] Ibid, para. 29.
[935] Ibid, para. 31.
[936] Ibid, para. 32.
[937] Ibid, para.12 and 13.
[938] *Ergün Torun v Stadt Augsburg* ("Torun"), Case C-502/04 [2006] ECR I-01563.

employed in Germany. Mr. Torun completed an apprenticeship and worked in various firms, mostly for periods of two to three months. After he was sentenced to a term of imprisonment totalling three years for armed robbery and drug offences, the authorities ordered for the expulsion of Mr. Torun. The Turkish worker mounted a legal challenge to the order and the case was eventually brought before the Federal Administrative Court which referred the case to the ECJ.

The referring court wondered whether Mr. Torun satisfied the conditions in Article 7 (2). In its answer the Court used the comparison method and cited its case law relating to Article 7 (1) and 6 of Decision No. 1/80. According to the Court, Article 7 (2) is a more favourable provision than Article 7 (1) and therefore it can not be interpreted more restrictively than Article 7 (1)[939].

The Court had held in *Çetinkaya* and *Aydınlı* that Article 7 (1) applies to an adult child of Turkish worker. Since, Article 7 (2) can not be interpreted restrictively than Article 7 (1), the Court concluded that the finding in such cases should be applied to Mr. Torun's status. Accordingly, Mr. Torun can not be deprived of his rights under Article 7 (2) due to his age[940].

As to Mr. Torun's three years' imprisonment and its effect on his status under Article 7 (2), the Court this time compared Articles 6 and 7 (2) of Decision No 1/80. According to the Court, the two Articles can not be limited in the same way, that is to say, the Turkish national accorded rights under Article 7 (2) can not be deprived of his rights because he was unemployed on account of being condemned to a three year prison sentence[941].

Consequently, the Court held that Mr. Torun fell within the scope of Article 7 (2).

[939] Ibid, para. 24.
[940] Ibid, para. 28.
[941] Ibid, para. 26.

d. The *Derin* case[942]

In *Derin*, the referring court preferred to try something different than the previous referring courts. The Administrative Court of Darmstadt openly defied the ECJ, brought a new perspective and cited Article 59 of the Additional Protocol to prove that Turkish nationals should not be in a more favorable position than the nationals of the EC Member States, a novel idea which can boomerang.

To return to the facts of the case, İsmail Derin entered Germany to join his parents who were both employed there. After having attended a vocational school, Mr. Derin worked for several employers, but the period of employment with the same employer was always less than one year. When he was 21, Mr. Derin began living independently. Eight years later, he was sentenced to a term of imprisonment of more than two-and-a-half years for smuggling foreign nationals into Germany. This caused the authorities to order for his expulsion. Mr. Derin challenged the order and the action was brought before the national court which referred the case to the ECJ.

The referring court asked the ECJ to ascertain whether Mr. Derin was capable of relying on the second indent of the first paragraph of Article 7 of Decision No 1/80 in respect of free access to any paid employment of his choice and residence.

The ECJ first discussed Mr. Derin's age. In accordance with *Aydınlı*, and *Torun*, the Court concluded that Mr. Derin did not lose a right acquired on the basis of the first paragraph of Article 7 even he is an adult[943].

What came up next was the fact that Mr. Derin was living independently. In accordance with its case law in *Torun*, the Court concluded that Mr. Derin could claim benefit from the second indent of the first paragraph of Article 7, even he is a Turkish national working separately from his migrant parents[944]. And, again by citing its case law,

[942] *Ismail Derin v Landkreis Darmstadt-Dieburg* ("Derin"), Case C-325/05 [2007] ECR I-06495.
[943] *Derin*, para. 49 and 50.
[944] Ibid, para. 50-53.

the Court added that the right of residence of Mr. Derin could only be limited in the circumstances provided for in Article 14 (1) of Decision No 1/80 and if he leaves Germany for a significant length of time without legitimate reason[945].

In *Derin*, Article 59 of the Additional Protocol[946] was also discussed as a result of the referring court's argument that Turkish workers should, in order to preserve their rights under Article 7 of Decision No 1/80, "comply with the criteria provided for under secondary Community law and, in particular, Articles 10(1) and 11 of Regulation No 1612/68 which apply only to children who are under the age of 21 years or who are dependants of the worker"[947]. In other words, the national court argued that the family members of a Turkish worker are in a more favourable position than the nationals of the EC Member States since such family members do not lose their rights when they reach the age of 21. In its answer to that argument, the Court made a direct comparison between the family members of a Turkish worker and the family members of an EC national in terms of the rights they have in the context of EC-Turkey Association and concluded that the Turkish nationals are not in a more favourable position for the reason below:

- The ability of the family members to join a Turkish worker depends on a decision of the national authorities taken solely on the basis of the national law[948],

- Unlike the children of an EC national-worker, the children of a Turkish worker can take up any activity as an employed person only after 5 years of legal residence in the host Member State bu virtue of Article 7 of Decision No 1/80[949],

- Unlike workers from the Member States, Turkish nationals are not entitled to freedom of movement within the EC but can rely only on certain rights in the territory of the host Member State alone[950],

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[945] Ibid, para. 57.
[946] "In the fields covered by this Protocol, Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community".
[947] Ibid, para. 59.
[948] Ibid, para. 64.
[949] Ibid, para. 65.

- The rights of Turkish nationals under Article 7 of Decision No 1/80 can be limited according to 14/1, the application of which is same as the application of the relevant EC law (Article 39/3) to EC nationals. However, unlike EC nationals, Turkish nationals' rights can also be limited if they leave the host Member State for a significant length of time without legitimate reason[951]. And those who wish to resettle must apply to the national authorities again to be authorized to join the Turkish worker if they are still dependent on that worker, or to be admitted as a worker according to Article 6 of Decision No 1/80[952].

Consequently, the Court held that Mr. Derin did not forfeit his rights under the second indent of the first paragraph of Article despite his age, independent residence and absence from the labour force during his imprisonment[953], and that his right can only be limited according to Article 14/1 which requires Germany to assess Mr. Derin's conduct and the risk thereof to the German public policy.

e. The *Polat* case[954]

Murat Polat's situation was same as that of Mr. Derin. Moreover, the referring courts in the two cases were same: The Administrative Court of Darmstadt. Therefore, the national court's inquiries were answered by the ECJ in accordance with its judgment in *Derin*.

The referring court, which seems to have not learnt lessons from *Derin*, first questioned whether Mr. Polat lost his rights deriving from the second indent of the first paragraph of Article 7 of Decision No 1/80 and its relevance to Article 59 of the Additional protocol. The ECJ repeated its finding in *Derin* and stated that Mr. Polat did not lose his rights under the said provision even if he was a person who was 21, independently living and sentenced to imprisonment. The Court added that Mr. Polat's rights could only be

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[950] Ibid, para. 66
[951] Ibid, para. 67
[952] Ibid.
[953] Ibid, para. 75.
[954] *Murat Polat v Stadt Rüsselsheim* ("Polat"), Case C-349/06 [2007] ECR I-08167.

limited in the event of the application of Article 14/1 or if he leaves Germany for a significant length of time without legitimate reason[955]. With respect to the compatibility of such conclusion with Article 59 of the Additional Protocol, the Court repeated that Article 59 was not infringed[956].

As an answer to the referring court's inquiry as to whether Directive 2004/38 applies to Mr. Polat's situation, the Court noted that the said Directive was not in force on the date of the expulsion order of the national authorities and of the action lodged by Mr. Polat. Therefore, the Court held that Directive 64/221, which was replaced by Directive 2004/38, would be applied instead[957].

And lastly, as to the minor offences committed by Mr. Polat and their relevance to his expulsion order, the ECJ, in accordance with its case law, held that Mr. Polat's several criminal convictions should not be taken into account since (a) it was ascertained that Mr. Polat's personal conduct did not indicate a specific risk of new and serious prejudice to the requirements of German public policy and (b) it is the case law of the ECJ that a measure (an expulsion order) limiting the right of residence of a Turkish worker can not be ordered automatically on general preventive grounds following a criminal conviction[958].

One can infer from the ECJ's above findings that a Turkish national working or residing in an EC Member State can rely on the relevant EC secondary law provided that such law is in force at the time when such Turkish national lodged a challenge to the contested decision concerned.

f. The *Altun* case[959]

Altun was about İbrahim Altun whose application for a further extension of his residence permit was refused by Stadt Böblingen in April 2004 on the gorund that the

[955] Ibid, para. 21.
[956] Ibid.
[957] Ibid, para 25-27.
[958] Ibid, para. 35.
[959] *İbrahim Altun v Stadt Böblingen* ("Altun"), Case C-337/07

offence he committed was serious and constituted according to German law[960]. İbrahim was the son of Ali Altun, a Turkish worker who entered Germany as a political refugee. On the date İbrahim's application was rejected, his father Ali had been employed in Germany for two and a half years before being made redundant in the following six months[961].

Upon the decision to refuse the extension of his residence permit, İbrahim went to law and argued that his right of residence was not to be assessed only with regard to national law, but also on the basis of Article 7(1) of Decision No 1/80[962].

The case was brought before Verwaltungsgericht (Administrative Court) Stuttgart who referred five questions to the ECJ. In the view of the ECJ, the first two questions concerned as to whether İbrahim can derive rights from the first indent of Article 7(1) of Decision No 1/80 even though his father Ali worked in Germany for two and a half years. In its answer, the Court stated that the two conditions attached to the first indent of Article 7(1), i.e. the worker's being duly registered as belonging to the labour force of the Member State concerned and the child's being legally resident in that Member State for at least three years, were fulfilled in the case brought by İbrahim since he lived with his father for more than four years and his father was duly registered to the German labour force despite his unvoluntary unemployment[963]. Thus, the Court held that İbrahim could rely on the first indent of Article 7(1) and benefit from the concomitant right of residence[964].

The third question posed by the Stuttgart court inquired whether İbrahim could benefit from Article 7(1) even though his father was a political refugee. In its answer the ECJ referred to its previous case law regarding Decision No 1/80[965] and stated specifically with respect to Article 7(1) of Decision No 1/80 that such Article does not make the recognition of the right of access to employment in the host Member State and,

[960] Ibid, para. 16.
[961] Ibid, para. 19.
[962] Ibid, para. 17.
[963] Ibid, para. 19-38.
[964] Ibid, para 21, 39 and 40.
[965] Ibid, para. 42.

concomitantly, the right of residence in that State of family members of a Turkish worker, dependent on the circumstances in which the right of entry and residence were obtained by the latter[966]. Thus, the Court held that Ali's obtaining the right of residence in Germany and, accordingly, the right of access to the German labour market as a political refugee does not prevent İbrahim from enjoying the rights arising under Article 7(1) of Decision No 1/80[967].

The last two questions asked by the German court related to the evidence that İbrahim's father obtained the status of political refugee on the basis of false statements. In this respect, the ECJ reminded its case law in which it held that the legality of the employment of a Turkish national in the host Member State presupposes a stable and secure situation as a member of the labour force of that Member State and implies, by virtue of that situation, an undisputed right of residence[968]. Indeed, the ECJ had held in *Kol* that the employment of a Turkish national under a residence permit issued as a result of fraudulent conduct which has led to a conviction, cannot give rise to any rights in favour of the Turkish worker, or arouse any legitimate expectation on his part[969]. Thus, as regards İbrahim Altun's situation, the Court concluded that Ali Altun's false statements are capable of having effects as regards legal rights of İbrahim[970]. However, in the ECJ's view, such a conclusion was only applicable if the family member of the worker did not fulfil the condition relating to the period of actual cohabitation with the worker and if he did not acquire an autonomous right of access to the employment market of the host Member State[971]. İbrahim Altun had lived with his father for more than four years, more than the three year period laid down in Article 7(1). Therefore, the Court held that the rights İbrahim

[966] Ibid, para. 43.
[967] Ibid, para. 50.
[968] Ibid, para. 53.
[969] Ibid, para. 54 and 55.
[970] Ibid, para. 56.
[971] Ibid, para. 57-59.

derives from Article 7(1) of Decisin No 1/80 cannot be called into question due to his father's false statements made at the time the status of political refugee was obtained[972].

3. *Judgment(s) concerning non-discrimination*

Unlike the other cases relating to family members of Turkish workers, *Gürol*[973] is the only case where Article 9[974] of Decision No 1/80 was discussed. The case concerns Gaye Gürol, a German born Turkish national who lives with her parents in Germany. Ms. Gürol was, unlike the other migrant Turkish nationals whose cases were brought before the ECJ, keen to have university education in Germany. At the beginning of her university life at the Tübingen University, Ms. Gürol resided in Tübingen and declared her parent's residence as her secondary residence. Then she decided to follow a course at the Bogaziçi University in Turkey and applied for an education grant for the period of her studies in Istanbul. But her application was rejected on the ground that she was a foreigner within the meaning of the relevant law which provides to the effect that a foreigner can only be entitled to education grant abroad only if it is a must for that foreigner to study abroad. Ms. Gürol challenged the rejecting decison. Nevertheless, she went to İstanbul to follow such course and declared her parents' home as her main residence.

Article 9 of Decision No 1/80 came up in the main proceedings, thereby the national court asked the ECJ to rule whether (a) that Article has direct effect in the Member States, (b) the condition of residing with parents in accordance with the first sentence of Article 9 is met in the case of Ms. Gürol who declared two addresses, (c) the first and second sentences of Article 9 guarantee in favour of Ms. Gürol a non-discriminatory right of access to an education grant in respect of a course of higher education in Turkey.

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[972] Ibid, para. 64.
[973] *Gaye Gürol v Bezirksregierung Köln* ("Gürol"), Case C -374/03 [2005] ECR I-06199.
[974] Article 9 is worded 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".

As to the first question, the Court reminded *Sevince*, the first case wherein it laid the necessary conditions[975] for an article of the Law of Association to have direct effect. Article 9 containes a clear, precise and unconditional obligation and thus the Court held that it is directly effective[976]. In order to support its view, the Court stated that "Article 9 of Decision 1/80 was the application and concrete form of the general principle of non-discrimination on grounds of nationality laid down in Article 9 of the Association Agreement, a provision that refers to Article 7 of the EC Treaty (now Article 6)"[977].

As to the second question, the Court first noted that Article 9 of Decision No 1/80 does necessitate the existence of a home common to children and parents[978]. As a second remark, the Court confirmed that by virtue of the objective of Article 9, "Turkish children should be entitled to education and vocational training in their parents' host State without their choice being restricted as to the kind of education or training provided"[979]. As a result, the Court held that Ms Gürol fulfilled the condition of residing with parents in accordance with the first sentence of Article 9 of Decision No 1/80[980].

In its answer to third question on the education grant, the Court first noted that the equal access to education for the purposes of Article 9 extends to all forms of education, including courses in economic science[981]. Then the Court stressed that Turkish nationals must be, by virtue of the second sentence of Article 9, entitled to education grants in just the same way as the nationals of the Member State[982]. Even in the case of an education grant to be provided for a study abroad, the Court viewed that the Member States must

[975] According to the ECJ's settled case law, a provision in a decision of the EEC-Turkey Association Council must be regarded as having direct effect when, regard being had to its wording and to the purpose and nature of the decision of which it forms part and of the agreement to which it relates, that provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.
[976] *Gürol*, para. 20 and 21.
[977] Ibid, para. 24.
[978] Ibid, para. 30.
[979] Ibid, para. 31.
[980] Ibid, para. 33.
[981] Ibid, para. 36.
[982] Ibid, para. 37 and 38.

assure equal rights to Turkish nationals[983], otherwise it will be impossible to attain in full the objective pursued by Article 9 which is "to guarantee equal opportunities for Turkish children and those of nationals of the host Member State in the sphere of education and vocational training"[984]. Therefore, the Court held that Ms. Gürol can rely on the second sentence of Article 9 of Decision No 1/80, which is directly effective like the first sentence of that Article[985], and that she can not be deprived of the benefit of equal treatment simply because she decided to pursue a part of her university education in Turkey[986].

VI. JUDGMENTS REGARDING TURKISH WORKERS' SOCIAL SECURITY RIGHTS

A. Legal Background

The thirty-fifth decision of the EC-Turkey Association Council, Decision No 3/80[987], concerns the application of the social security schemes of the EC Member States to Turkish workers and members of their families.

Compared to Decision No 1/80[988], Decision No 3/80 does not contain a provision as to when it will enter into force. Such omission caused a problem but the ECJ resolved it in *Taflan-Met* by holding that because of the binding character of the Decisions of the EC-

[983] Ibid, para. 39
[984] Ibid, para. 40
[985] Ibid, para. 43
[986] Ibid, para. 44
[987] 'Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families', (OJ 1983 C 110, p. 60).
[988] According to Article 30 of Decision No 1/80, the Decision entered into force on 12 July 1980.

Turkey Association Council[989], Decision No 3/80 must be deemed to have entered into force on the date on which it was adopted, i.e. 19 September 1980[990].

Decision No 3/80 refers to two EC Council Regulations: First, Regulation 1408/71[991] which is intended to coordinate the different legislation of the Member States within the EC, and second, Regulation 574/72[992] which lays down the procedure for implementing Regulation 1408/71. Decision No 3/80 is so closely connected with the said Regulations that it either copies from or incorporates of the key provisions therein[993]. For instance, within the meaning of Decision No 3/80, the terms 'member of the family', 'survivor', 'residence', 'stay', 'insurance periods', 'periods of employment', 'benefits', 'pensions', 'family benefits', 'family allowances' and 'death grants' have the same meanings assigned to them in Regulation 1408/71[994].

In order to implement Decision No 3/80 in the EC, Turkey and the Community agreed to take the 'necessary' steps[995]. However, the 'necessary' Regulation[996], which was proposed by the EC Commission to detail the application of Decision No 3/80 in the EC, was not adopted by the Council[997]. For this reason, the ECJ held *in Taflan-Met* that Decision No 3/80 can not be applied so long as the 'necessary' Regulation has not been adopted by the Council[998]. In other words, because of the Council's disdain[999] for the implementation of Decision No 3/80 in the EC, the ECJ "adopted a very ambiguous

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[989] *Taflan-Met* (n. 446), para. 21.
[990] Ibid, para. 22.
[991] 'Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community', (OJ, English Special Edition 1971(II), p. 461).
[992] 'Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71', (OJ, English Special Edition 1972(I), p. 159).
[993] Steve Peers, "Social Security Equality for Turkish Nationals", **European Law Review**, Vol. 24 (1999), p.628 and 629.
[994] Decision No 3/80, Article 1.
[995] Ibid, Article 32.
[996] 'Council (EEC) Regulation implementing within the European Economic Community Decision No 3/80', (OJ 1983 C 110, p. 19).
[997] *Taflan-Met*, para. 36, *Sürül*, para. 27 and *Öztürk*, para. 19.
[998] *Taflan-Met*, para. 37.
[999] Peers, *Social Security Equality for Turkish Nationals*, p. 629.

position"[1000] in *Taflan-Met* by holding that Decision 3/80 is inapplicable despite some clear and precise provisions therein[1001]. The ECJ corrected itself three years later in *Sürül*[1002] which it saw as a golden opportunity to interpret the applicability of Decision No 3/80 again. As a result, the Court amended that some provisions of Decision No 3/80 have direct effect within the Community[1003].

Peers states that the EU has 'adopted legislation which coordinates the social security rights of all third-country nationals who move within the Community'[1004] and puts that the adoption of the 'necessary Regulation' for the implementation of Decision No 3/80 is no longer necessary.

B. The Judgments

1. *The 'Taflan-Met' Case*[1005]

The *Taflan-Met and others* case is the first case wherein the ECJ dealt with Decision No 3/80 of the EC-Turkey Association Council. The case was referred to the ECJ by the District Court of Amsterdam before which four Turkish nationals brought four actions against the Netherlands social security institutions. The first three actions were brought by three women who claimed widows' pension in the Netherlands where their late husbands had been in employment. Their applications were rejected by the authorities as their husbands had died in Turkey, not in the Netherlands. The fourth action was taken by a worker who claimed for invalidity pension in the Netherlands where he had previously worked. His claim was also rejected on the ground that his incapacity for work had occurred when he was working in Germany, not in the Netherlands. So, the crux of the

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[1000] Herwig Verschueren, "The *Sürül* Judgment: Equal Treatment for Turkish Workers in Matters of Social Security", **European Journal of Migration and Law**, Vol. 1, (1999), p. 374.
[1001] See page 177.
[1002] See page 177 et seq.
[1003] Ibid
[1004] Steve Peers, **EU Justice and Home Affairs**, 2nd ed., Oxford University Press, 2006, p. 207.
[1005] *Z. Taflan-Met, S. Altun-Baser, E. Andal-Bugdayci v Bestuur van de Sociale Verzekeringsbank and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* ("Taflan-Met"), Case C-277/94 [1996] ECR I-04085.

problem in those cases was the aggregation of periods completed in different Member States.

In its reference for a preliminary ruling, the Amsterdam court inquired whether (a) the Decision No. 3/80 came into effect in the EC, and (b) as to whether Articles 12[1006] and 13[1007] of Decision No 3/80 (the coordinating rules) have direct effect.

In its answer to the first inquiry, the ECJ gave careful consideration to Articles 6[1008], 22 (1)[1009] and 23[1010] of the EC-Turkey Association Agreement and held that because of the binding effect of the Decision of the EC-Turkey Association Council, Decision No

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[1006] "The rights to benefits of a worker who has successively or alternately been subject to the legislation of two or more Member States shall be established in accordance with Article 37(1), first sentence, and (2), Articles 38 to 40, Article 41(1)(a), (b), (c) and (e) and (2), and Articles 42 and 43 of Regulation (EEC) No 1408/71. However: (a) for the purpose of applying Article 39(4) of Regulation (EEC) No 1408/71, all the members of the family, including children, residing in the Community or in Turkey, shall be taken into account; (b) the reference in Article 40(1) of this Regulation to the provisions of Title III, Chapter 3, of Regulation (EEC) No 1408/71 shall be replaced by a reference to the provisions of Title III, Chapter 3 of this Decision".

[1007] "The rights to benefits of a worker who has been subject to the legislation of two or more Member States, or of his survivors, shall be established in accordance with Article 44(2), first sentence, Articles 45, 46(2), Articles 47, 48, 49 and 51 of Regulation (EEC) No 1408/71. However: (a) Article 46(2) of Regulation (EEC) No 1408/71 shall apply even if the conditions for acquiring entitlement to benefits are satisfied without the need to have recourse to Article 45 of the said Regulation; (b) for the purposes of applying Article 47(3) of Regulation (EEC) No 1408/71, all the members of the family, including children, residing in the Community or in Turkey shall be taken into account; (c) for the purposes of applying Article 49(1)(a) and (2) and Article 51 of Regulation (EEC) No 1408/71, the reference to Article 46 shall be replaced by a reference to Article 46(2)".

[1008] "To ensure the implementation and the progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred upon it by this Agreement".

[1009] "In order to attain the objectives of this Agreement, the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken".

[1010] "The Council of Association shall consist of members of the Governments of the Member States and members of the Council and of the Commission of the Community on the one hand and of members of the Turkish Government on the other. The Council of Association shall act unanimously".

3/80 must be deemed to have entered into force at the time it was adopted (19 September 1980), and that it had been binding on the EC Member States since then[1011].

As to the second question, namely whether Articles 12 and 13 have direct effect in the EC, the Court applied the criteria that it had introduced in *Demirel* and in *Sevince*. In this respect, the Court examined whether Decision No 3/80 contains clear, precise and unconditional obligations. Accordingly, it concluded that Decision No 3/80 does not contain unconditional provisions as (a) the Decision itself sets out the fundamental principle of aggregation for the branches sickness and maternity, invalidity, old age, death grants and family benefits by reference to Regulation No 1408/71[1012], and (b) the Decision necessitates the adoption of a subsequent act of the EC Council which was not adopted at that time[1013]. In other words, the Court concluded that the provisions of Decision No 3/80 were clear and precise[1014], but not unconditional. So, it held that Decision 3/80 did not have direct effect.

Consequently, the Court held that Mrs. Taflan-Met and other claimants could not rely on Articles 12 and 13 of Decision No 3/80 before the national court since that Decision is not directly effective due to lack of unconditional provisions therein[1015].

2. *The 'Sürül' Case*[1016]

The *Sürül* case was referred to the ECJ by the Social Court in Aachen, Germany. The central figure in the case was Sema Sürül, a Turkish national who joined her husband in Germany. Mrs. Sürül was not authorized to work like her husband but after she gave birth to a child in Germany, she was paid family allowances as she was the one who raises the child. Mrs. Sürül also received supplementary allowance for persons with a low

[1011] *Taflan-Met*, para. 22.
[1012] Ibid, para. 32
[1013] Ibid, para. 36.
[1014] Ibid, para. 37.
[1015] Ibid, para. 38.
[1016] *Sema Sürül v Bundesanstalt für Arbeit* ("Sürül"), Case C-262/96 [1999] ECR I-02685.

income. But later, the national authorities stopped payment arguing that she did not have a residence permit. Mrs. Sürül went to law and claimed that she was entitled by the EC-Turkey Association Agreement to be treated in the same way as German nationals and to continue to receive family allowances as being the person bringing up her child.

In *Sürül*, the crux of the matter was Article 3 (1) of Decision No 3/80[1017]. Therefore, in order to provide the referring court with answers, the ECJ analyzed whether that Article (a) has direct effect, (b) covers Mrs. Sürül, and (c) precludes Germany from making the grant of family allowances subject to more restrictive conditions for Mrs. Sürül than for EC nationals[1018].

In the hearings, German, French, Netherlands, Austrian and the UK Governments argued that Article 3 (1) is not directly effective since the ECJ held in *Taflan-Met* that Decision No 3/80 did not have direct effect[1019]. The ECJ rejected that argument for two reasons: First, Mrs. Sürül relied on Article 3 (1) of Decision No 3/80 whereas Mrs. Taflan-Met and her friends relied on Articles 12 and 13 of that Decision[1020], and second, Articles 12 and 13, on which Mrs. Taflan-Met and her friends relied, necessitate additional measures for their application in practice, whereas Article 3 (1) can be applied without need to subsequent measures[1021].

As a result of its analysis, the Court held that Article 3 (1) has direct effect as it "lays down in clear, precise and unconditional terms a prohibition of discrimination, based on nationality, against Turkish nationals residing in the territory of any Member State"[1022]. The Court supported its view by stating that Article 3 (1) is the "concrete expression, in the

[1017] "Subject to the special provisions of this Decision, persons resident in the territory of one of the Member States to whom this Decision applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State".

[1018] *Sürül*, para. 47.
[1019] Ibid, para. 48-54.
[1020] Ibid, para. 55.
[1021] Ibid, para. 57.
[1022] Ibid, para. 62.

particular field of social security, of the general principle of non-discrimination on grounds of nationality laid down in Article 9 of the EC-Turkey Association Agreement, which refers to Article 7 (now Article 12) of the EC Treaty"[1023].

As to whether Mrs. Sürül is covered by Article 3 (1), the ECJ held that national court should interpret and apply national law in order to ascertain whether Mrs. Sürül is regarded to be a worker[1024].

And, as to whether Article 3 (1) precludes a Member State from making the grant of family allowances subject to more restrictive conditions for Turkish nationals than for EC nationals, the Court pointed out that the relevant German legislation requires aliens, such as Mrs. Sürül, to hold a particular type of residence permit in order to be entitled to family allowances[1025]. Since such requirement is not applicable to an EC national, it constitutes unequal treatment on grounds of nationality[1026] or in other words discrimination within the meaning of Article 3(1) of Decision No 3/80[1027]. Therefore, the Court held that Article 3 (1) precludes Germany from implementing a national law which stipulates to the effect that Turkish nationals' entitlement to the family allowances is conditional on their holding a residence entitlement or a residence permit[1028].

Sürül is regarded as a step towards the recognition of non-discrimination principle for Turkish / third country nationals in the field of social security law[1029]. Further, it made it possible for many Turkish nationals to demand the application of Decision No 3/80 against public authorities.

[1023] Ibid, para. 64.
[1024] Ibid, para. 95.
[1025] Ibid, para. 100.
[1026] Ibid, para. 102.
[1027] Ibid, para. 104.
[1028] Ibid, para. 105.
[1029] Verschueren, p. 383.

3. *The 'Koçak & Örs' Case*[1030]

Koçak & Örs concerns the applications of Mr. Koçak and Mr. Örs for retirement pension in Germany where every insured male is entitled to a retirement pension at the age of 65. Both men argued that they were entitled to the pension earlier, since their dates of birth were amended by the judgment of a Turkish court. The authorities rejected their applications on the ground that neither Mr. Koçak nor Mr. Örs proved that they were born earlier than the date they had initially declared to the social security authorities. Both men went to law.

The crux of the matter in this case is, according to the German legislation (shall be referred to as the 'national law' hereinafter), the date of birth may be amended only if different date of birth results from a document ("the document/s") whose original was issued before the date on which the date of birth was first declared by the insured. Therefore, the referring court inquired whether such law is applied to Turkish nationals despite the prohibition of discrimination in Decision No 3/80.

In its answer, the ECJ initially noted that Article 3 (1) of Decision No 3/80 applies to Mr. Koçak and Mr. Örs since (a) they were persons defined in Article 2[1031] of that Decision, (b) the national law is one of those legislations which Article 4 (1) c[1032] of Decision No 3/80 refers to[1033], and (c) Article 3 (1) is, as it was held in *Sürül*, directly effective in the EC.

[1030] *İbrahim Koçak v Landesversicherungsanstalt Oberfranken und Mittelfranken (C-102/98) and Ramazan Örs v Bundesknappschaft (C-211/98)* ("Koçak&Örs"), Joined cases C-102/98 and C-211/98 [2000] ECR I-01287.

[1031] "This decision shall apply to workers who are, or have been, subject to the legislation of one or more Member States and who are Turkish nationals".

[1032] "This Decision shall apply to all legislation concerning the following branches of social security: .. (c) old-age benefits;".

[1033] *Koçak & Örs*, para. 34.

As to whether the national law discriminates Turkish nationals, the ECJ viewed that the national law does not differentiate between the documents in terms of their type and the place where they are issued[1034].

Next, the Court analyzed whether Turkish nationals are in less favourable position than German nationals as regards the application of the national law. In this respect, the Court gave serious consideration to the system in Turkey according to which the date of birth of a person is registered. It stated that the records in Turkey lack precision and certainty, thereby the German authorities do not trust them. It further argued that the crux of the problem lay in Turkish legislation on the keeping of the registers of civil status. So, the German legislator does not have to take the special nature of the Turkish legislation into account when drafting the national legislation[1035].

Consequently, the Court held that Germany's application of the national law to Turkish nationals would not be a contravention of Article 3(1) of Decision No 3/80[1036]. So, Mr. Koçak and Mr. Örs lost the opportunity cite the judgments delivered by Turkish courts.

4. *The 'Öztürk' Case*[1037]

The *Öztürk* case is about Mr. Öztürk, a Turkish national who had paid his contributions in respect of compulsory old-age insurance in Austria and Germany where he had worked in turn. Mr. Öztürk was unemployed in Germany for fifteen months and during that period he received unemployment benefit from the Employment Office in Bremen. Mr. Öztürk thought that he could apply for early old-age pension due to his unemployment. He did so and the German pension fund granted him early old-age pension in the event of unemployment. However, same application was rejected by the Austrian pension fund on the ground that before his application he had received unemployment benefit in Germany,

[1034] Ibid, para. 41 and 42.
[1035] Ibid, para. 55.
[1036] Ibid, para. 55
[1037] *Şakir Öztürk v Pensionsversicherungsanstalt der Arbeiter* ("Öztürk"), Case C-373/02 [2004] ECR I-03605.

not in Austria. Thus, the Austrian fund did not accept Mr. Öztürk as an unemployed and did not deem that the unemployment benefit he received in Germany corresponded to unemployment benefit in Austria. Mr. Öztürk lodged an appeal against such consideration and, in consequence, the action was brought before the Oberster Gerichtshof which, before referring the matter the ECJ, had taken the view that the Austrian pension fund's not taking account of periods during which Mr. Öztürk received unemployment benefit in Germany could constitute indirect discrimination contrary to Article 9 of the EC-Turkey Association Agreement[1038], not to Article 3(1) of Decision No 3/80. The reasoning behind the Austrian court's view was that Article 3(1) relates only to the situation of a Turkish national in the Member State in which he resides. So, the Court's question to the ECJ was on the compatibility of the Austrian pension fund's refusal with Article 9 of the EC-Turkey Association Agreement and with Article 45(1) of Regulation No 1408/71, the legislation that Decision No. 3/80 refers to[1039].

Contrary to the referring court's argument that Article 3 (1) of Decision No 3/80 would not be applied to Mr. Öztürk, the ECJ pointed out that it was quite the opposite. In other words, the ECJ viewed that Article 3 (1) would be the applicable provision instead of Article 9 of the EC-Turkey Association Agreement since the latter is, because of its very wording, applicable only if there is no specific non-discrimination rule adopted by the EC-Turkey Association Council. So, the Court held that Mr Öztürk is entitled to rely on Article 3(1) of Decision No 3/80 against the Austrian authorities[1040].

Then the Court analyzed whether it is nationality-related discrimination in case Austria makes the entitlement to early old-age pension in the event of unemployment subject to the worker's prior receipt of unemployment benefits in Austria. Since both overt and covert forms of discrimination are prohibited by the rule of equal treatment, Article 3

[1038] "The Contracting Parties recognise 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".
[1039] See page 174 above.
[1040] *Öztürk*, para. 53.

(1) would also ban indirect discrimination. In this respect, the Court held that even though the Austrian legislation at issue applies regardless of the nationality of the workers, it is easier for an Austrian worker than a Turkish worker to receive unemployment benefits before he applies for old-age pension in respect of unemployment[1041]. In Court's view, the Austrian legislation concerned is likely to affect migrant workers rather than Austrian workers. Therefore, even if it is not based directly on nationality, that national legislation constitutes indirect discrimination[1042]. As a result, the Court held that Austrian legislation, which requires that Mr. Öztürk receives unemployment benefits in Austria before his application for early old-age pension in respect of unemployment, constituted indirect discrimination which is prohibited by Article 3 (1) of Decision No 3/80 in the field of social security[1043].

VII. JUDGMENTS REGARDING TURKISH SELF-EMPLOYED PERSONS

A. Legal Background

According to Article 13[1044] of the EC-Turkey Association Agreement, the EC and Turkey agreed to be guided by Articles 52 (now Article 43[1045]) to 56 (now Article 46[1046])

[1041] Ibid, para. 56.
[1042] Ibid, para. 57
[1043] Ibid, para. 67 and 68.
[1044] EC-Turkey Association Agreement, 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".
[1045] EC Treaty, Article 43: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital".
[1046] EC Treaty, Article 46: "1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

and Article 58 (now Article 48[1047]) of the EC Treaty for the purpose of abolishing restrictions on freedom of establishment between them. Although Article 13 was not found to have direct effect[1048], it is because of Article 13 that the ECJ can apply the principles enshrined in the above-mentioned Articles of the EC Treaty to Turkish self-employed persons[1049].

Another source of law for Turkish self-employed persons is Article 41(1) of the Additional Protocol which is almost identical to then Article 53 of the EC Treaty[1050]. Article 41(1) directly deals with the self-employed persons. What it provides is that the EC and Turkey are obliged to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services[1051]. The ECJ has held that Article 41(1) has direct effect in the EC[1052]. Therefore, it is the main provision on which Turkish self-employed persons can rely in the proceedings before the national courts of the EC Member States.

One can inquire as to whether freedom of establishment covers Turkish self-employed persons. By virtue of Article 43(2) of the EC Treaty, the provision to which

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2. The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the abovementioned provisions".

[1047] EC Treaty, Article 48: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".

[1048] *Savaş* (no.1054), para. 45.

[1049] *Abatay and others*, para. 101.

[1050] EC Treaty, Article 53 (no longer in force): "Member States shall not, subject to the provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other Member States".

[1051] Additional Protocol, Article 41(1): "The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

[1052] *Savaş*, para. 54.

Article 13 of the EC-Turkey Association refers, freedom of establishment includes the right to take up and pursue activities as self-employed persons[1053].

Until now, the ECJ has given two judgments on Turkish self-employed persons. The first judgment was given in the *Savaş* case and the second in the *Tüm and Darı* case. Both of the judgments were delivered as a result of a reference for a preliminary ruling from English courts: High Court of Justice and House of Lords.

B. The Judgments

1. *The 'Savaş' case*[1054]

Mr. and Mrs. Savaş got an entry visa for the United Kingdom and entered the country as tourists for one month. Their visas were conditional, that is to say, they were not allowed to take employment or engage in any business or profession in the UK. Although the visas expired, the couple overstayed. The UK authorities did not notice them and may be, would not have if the couple had not gathered courage to regularise their stay by applying for leave to remain in the country. Mr. Savaş and his wife had overstayed for more than six years but the Secretary of State was so sluggish that they refused the application for leave to remain only nine years after the expiry of the couple's visas. By contrast, Mr. Savaş was very agile that before the Secretary of State's reply, he had already started to operate a shirt factory and set up his first fast food business in the UK.

The Secretary of State's refusing decision coupled with an expulsion order. Mr. Savaş appealed against that order but his request was dismissed. He intended to appeal

[1053] EC Treaty, Article 43(2): "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisionsof the Chapter relating to capital".

[1054] *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savaş* ("Savaş"), Case C-37/98 [2000] ECR I-02927.

again but he was not given permission due to the expiry of the statute of limitations. Until that point, Savaş and his lawyer had based their arguments only on UK law.

Not long after the deportation order was served on Mr. and Mrs. Savaş, the couple's quick-witted representatives relied on something different than the English law, i.e. Article 41 of the Additional Protocol. They maintained that the UK can not restrict the right of a Turkish national to establish himself in the UK by virtue of a law which is beyond those that existed on the date of the accession of the UK to the Community. The Secretary of State rejected the arguments and responded that Mr. Savaş had overstayed and therefore could not rely on the then Immigration Rules (HC 510[1055]).

The next venue for the case was the High Court of Justice. Mr. Savaş argued that Article 41 has direct effect and that he has the right to be subject to HC 510. In Savaş's view, HC 510 should be interpreted as including all persons admitted to the UK as visitors, irrespective of their immigration status at the time of their application. On the contrary, the Secretary of State contended that the EC-Turkey Association Agreement could not be relied upon by Mr. Savaş, that Article 41 of the Additional Protocol was not directly effective, and that the UK should not be required to apply HC 510 to Mr. Savaş who was unlawfully present in the country at the time of his application. The High Court was certain about the direct effect of Article 41 but not about the application of the Association Agreement to a Turkish national who is unlawfully present in the UK. Therefore, the High Court of Justice made a reference for a preliminary ruling and asked the ECJ to rule as to whether (a) the Association Agreement applies to a Turkish national who entered and remained in a MS in breach of the immigration laws of that Member State, (b) Article 13 of the Association Agreement or Article 41 of the Additional Protocol have direct effect, (c) the Association Agreement together with the Additional Protocol prohibit the application by a MS of a

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[1055] Paragraph 21 of HC 510: "People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on their own account or as partners in a new or existing business. Any such application is to be considered on its merits ... Where the application is granted the applicant's stay may be extended for a period of up to 12 months, on a condition restricting his freedom to take employment ...", cited in *Savaş*, para. 30.

conflicting national provision, and (d) a MS is, despite its national law, obliged to take into account the existence of the Association Agreement together with the Additional Protocol.

In order to answer the first three questions, the ECJ first discussed the direct effect of Article 13 of the EC-Turkey Association Agreement and Article 41 of the Additional Protocol. As to Article 13, the Court referred to *Demirel* wherein it ruled that Article 12 of the EC-Turkey Association Agreement was not directly applicable in the Member States. According to the Court, Article 13, which resembles Article 12 of that Agreement, does not contain a precise rule to be directly effective[1056]. Article 41(1) of the Protocol on the other hand, in Court's view, "lays down, clearly, precisely and unconditionally, an unequivocal standstill clause, prohibiting the contracting parties from introducing new restrictions on the freedom of establishment as from the date of entry into force of the Additional Protocol"[1057]. Further, the Court noted that Article 41(1) is very identical to Article 53 of the EC Treaty, the direct effect of which was confirmed in *Costa Enel*[1058]. Accordingly, the Court held that Article 41(1) has direct effect in the EC Member States.

The Court then analyzed whether Article 41(1) is capable of conferring upon Mr. Savaş a right of establishment and a corresponding right of residence in the UK where he remained in the breach of the existing immigration laws. At that point, the change in Mr. Savaş's argument and the Commission's submission made it easier for the Court to check if Article 41(1) gives an automatic right of establishment and of residence. So, the Court concentrated on the standstill effect of Article 41(1).

Having considered that the first entry of Turkish nationals into a Member State is governed exclusively by the Member States[1059], the Court took the view that Mr. Savaş, an

[1056] *Savaş*, para. 42.
[1057] Ibid, para. 46.
[1058] Ibid, para. 47-48.
[1059] Ibid, para. 65.

overstayer who engaged in business as a self-employed person, could not derive a right of establishment and of residence from Article 41(1)[1060].

However, Mr. Savaş could claim benefit from the standstill effect of Article 41(1) which stipulates that a Member State, wherein the Additional Protocol entered into force, can not introduce any new restrictions on the freedom of establishment of Turkish nationals. Therefore, the Court held that the referring court should determine whether the existing immigration rules are stricter than those (HC 510) which were in force on the date on which the Additional Protocol entered into force in the UK[1061].

2. *The 'Tüm and Darı' case*[1062]

Tüm and Darı, the second case relating to Turkish self-employed persons, is a milestone in the Law of Association. This auspicious case was a legal challenge launched in the United Kingdom by two Turkish nationals, Mr. Tüm and Mr. Darı, who were asylum seekers arriving in the UK from Germany and France respectively. The British authorities refused their applications for asylum but they could not send them back according to Dublin Convention since Mr. Tüm and Mr. Darı were still in the UK territory. So, the Turkish nationals were admitted temporarily without a formal clearance to enter the UK. Further, Mr. Tüm and Mr. Darı would not be able to take employment in the country. Notwithstanding obstacles, these two quick-witted Turks applied for visas to enter the UK as self-employed persons and relied on Article 41(1) of the Additional Protocol. They maintained that their applications should be assessed on the basis of the national Immigration Rules which were in force on 1 January 1973, the date on which the Additional Protocol entered into force in the UK. However, the Secretary of State applied the new national Immigration Rules and refused Mr. Tüm's and Mr. Darı's applications. The couple did not accept the fate and went to law with stubborn determination.

[1060] Ibid, para. 67.
[1061] Ibid, para. 70.
[1062] *The Queen, Veli Tüm and Mehmet Darı v Secretary of State for the Home Department* ("Tüm and Darı"), Case C-16/05 [2007] ECR I-07415.

Consequently, the House of Lords, being content with the ECJ's rulings in *Savaş*, and *Abatay and others*, forwarded the ECJ only one simple question: Can Article 41(1) of the Additional Protocol be applied to the conditions and procedures[1063] whereto a Turkish national is subject when he wishes to enter a MS (the UK) as a self-employed person (as a person who seeks to establish himself in business)?

In Tüm and Darı, the Court was faced with something different than *Savaş,* and *Abatay and others* because by comparison with Mr. Tüm and Mr. Darı; Mr. Savaş, Mr. Abatay and his driver friends entered the Member State concerned with visas issued in accordance with the relevant national legislations[1064].

In order to answer the House of Lords' awkward question, the ECJ first noted that, according to its case law, Article 41(1) has direct effect and that Turkish nationals (self-employed & service providers) can rely on it to disapply the inconsistent rules of national law.

Next, the Court reminded that Article 41(1) is a " 'standstill' clause which must be understood as prohibiting the introduction of any new measures having the object or effect of making the establishment of Turkish nationals in a Member State subject to stricter conditions than those which resulted from the rules which applied to them at the time when the Additional Protocol entered into force with regard to the Member State concerned".[1065]

In order to relieve the Member States' anxieties, the Court stated that Article 41(1) neither confers on Turkish nationals a right of entry into the territory of a Member State nor calls into question the competence of the Member States to conduct their national immigration policies[1066].

[1063] Barrister Nicola Rogers, the representative of Mr. Tüm and Mr. Darı before the ECJ, states that "she fought a lot to ensure that the House of Lords include in its question to the ECJ the inquiry as to whether the standsill has applicaiton in respect of procedural reqirements". Nicola Rogers, "Avrupa Toplulukları Adalet Divanı ve İngiltere Mahkemelerinin Türk Vatandaşlarının Ülkeye Giriş Koşullarına İlişkin Son Kararları", **Türk Vatandaşlarının AB Ülkelerinde İş Kurma ve Hizmet Sunma Serbestisi Semineri**, İstanbul, İKV Yayınları No. 215, Şubat 2008, p.13.
[1064] Ibid, para. 51.
[1065] Ibid, para. 53.
[1066] Ibid, para. 54-58.

However, the Court remained fair and stated that Article 41(1) imposes on the Member States a duty not to act and limits their room for manœuvre on immigration matters[1067].

Then, having taken into consideration the aim of Article 13 of the EC-Turkey Association Agreement which is the progressive abolition of national restrictions on freedom of establishment, the Court stated that no new obstacle, which obstructs the gradual implementation of freedom of establishment, can be introduced by a Member State. And because the Association Council have not adopted any decision under Article 41(2) to progressively abolish between the EC and Turkey the existing restrictions on freedom of establishment, the Court substituted for the Association Council and reached the conclusion that Article 41(1) must apply to rules relating to the first admission of Turkish nationals[1068].

Consequently, the Court ruled that Article 41(1) prevents Member States from introducing new restrictions on the exercise of freedom of establishment, including those relating to the **substantive and/or procedural conditions governing the first admission of Turkish self-employed persons to the Membert States**[1069].

It is noteworthy that in the proceedings before the ECJ, the UK Government made an argument that Mr. Tüm and Mr. Darı were failed asylum seekers and that it will be the endorsement of fraud if they can rely on Article 41(1). The ECJ rejected such argument by noting that the documents sent to it did not indicate the accusation of any fraud. So, the ECJ gave careful consideration to analyzing "whether or not the sole intentions of Mr. Tüm and Mr. Darı were abusive"[1070].

[1067] Ibis, para. 58.
[1068] Ibid, para. 61-63.
[1069] Ibid, para. 69.
[1070] Rogers, *Avrupa Toplulukları Adalet Divanı ve İngiltere Mahkemelerinin Türk Vatandaşlarının Ülkeye Giriş Koşullarına İlişkin Son Kararları*, p. 14.

VIII. JUDGMENTS REGARDING TURKISH SERVICE PROVIDERS

A. Legal Background

In order to achieve the aim of the EC-Turkey Association Agreement, which is "to promote the continuous and balanced strengthening of trade and economic relations between the EC and Turkey and to improve the standard of living of the Turkish people and facilitate the accession of Turkey to the Community at a later date[1071],,[1072], the EC and Turkey, in Article 14 of the EC-Turkey Association Agreement, agreed to be guided by Articles 55 (now Article 45), 56 (now Article 46) and 58 (now Article 48) to 65 (now Article 54) of the EC Treaty for the purpose of abolishing restrictions on freedom to provide services between them.

Because of the reference made by Article 14 to the comparable provisions of the EC Treaty, the principles established in EU law in relation to the freedom to provide services, must be extended to Turkish nationals who are service providers and/or recipients[1073].

For this reason, the Law of the EC-Turkey Association in respect of freedom to provide services has the potential for development in the future owing to the fact that 'services'[1074], according to Article 50 of the EC Treaty, include activities of: (a) an industrial character, (b) a commercial character, (c) craftsmen, and (d) the professions. Furthermore, the ECJ has ruled that freedom to provide services also covers the service recipients such as businessmen, students and so on[1075].

[1071] EC-Turkey Association Agreement, Article 28.
[1072] *Abatay and others* (n 1053 below), para. 3.
[1073] Ibid, para. 112.
[1074] The legislator of the EC Treaty in Article 50 lays two conditions: that the services be provided for remuneration and that provisions relating to other fundamental freedoms do not govern the 'service' concerned.
[1075] See page 105.

B. The *Abatay and others* Case[1076]

Abatay and others is a joined case in which the ECJ gave preliminary ruling as to the questions forwarded by the German Federal Social Court. The first case concerned Mr. Abatay and his friends who were lorry drivers of Turkish nationality. The second case was brought by Mr. Şahin, a Turkish born German national who owned a transport company established in Germany. What caused the claimants to go to law in Germany was common. At the outset, Mr. Abatay and his friends were all exempt from the requirement for a work permit, but after 1995 they were told that they had no longer work permit exemption. The claimants' *causa petendi* was that the German authorities refused to issue work permits and that such change in the policy towards them was not compatible with Article 13 of Decision No 1/80[1077] and Article 41(1) of the Additional Protocol, the standstill clauses which prohibit a Member State from introducing any new national restrictions to workers, self-employed persons and service providers of Turkish nationality. Eventually, the referring court asked the ECJ to rule on (a) the effective date of application of Article 13 of Decision No. 1/80, (b) the applicability of Article 13 to long-distance lorry drivers, the workers who do not belong to the German labour force, and (c) the interpretation of Article 41(1) as regards the restrictions on the access of Turkish workers to the employment market and the abolition of existing work permit exemption for Turkish drivers.

In its judgment, the ECJ first reminded that the direct effect of Article 13 of Decision No 1/80 and of Article 41(1) of Additional Protocol was adjudicated in *Sevince,* and in *Savaş* respectively.

As to the effective date of Article 13, contrary to Germany's argument that Article 13 is only applicable to Turkish nationals who already integrated into the employment

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[1076] *Eran Abatay and Others and Nadi Şahin v Bundesanstalt für Arbeit* ("Abatay and others"), Joined cases C-317/01 and C-369/01 [2003] ECR I-12301.

[1077] "The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories".

market of a Member State[1078], the Court held that Article 13 also applies to Turkish workers and members of their families who are legally resident and employed in the EC Member States. In other words, according to the ECJ, Turkish workers and members of their families can rely on Article 13 if they comply with the rules of the host Member State as to entry, residence and, where appropriate, employment[1079]. So, in Court's view, even after the entry into force of Article 13 in a Member State, that Member State may attach stricter conditions to Turkish workers and their families whose status are unlawful in respect of entry, residence and employment[1080].

As to the applicability of Article 13 to Mr. Abatay and his friends, long-distance lorry drivers, the Court held that Article 13 is not applicable since Mr. Abatay and his friends, who present in Germany only while they are unloading the goods, do not intend to become integrated in the employment market of Germany[1081].

As to the application of Article 41(1) to Mr. Abatay and Mr. Şahin, which is the crux of the matter, the Court held that Mr. Abatay and his driver friends could rely on Article 41(1) even their employer is established in Turkey[1082]. However, the Court found that Mr. Şahin, the owner of a transport company in Germany, could not rely on Article 41(1) since a German transport company can not maintain that its freedom to provide services is restricted in Germany. So, Mr. Şahin could have relied on Article 41(1) if the recipient of his services (the transported goods) were established in a Member State other than Germany[1083].

And finally, with respect to the effect of Article 41(1) on German legislation which abolished Turkish drivers' existing work permit exemption, the Court held that such legislation constitutes a restriction on the right of natural and legal persons freely to provide

[1078] *Abatay and others*, para. 75.
[1079] Ibid, para. 84.
[1080] Ibid, para. 85.
[1081] Ibid, para. 90.
[1082] Ibid, para. 106.
[1083] Ibid, para. 108.

services in a Member State, as a result of which providers of transportation services can not use his staff who are no longer exempt from work permit[1084].

Consequently, the Court ruled to the effect that Mr. Abatay and his friends, the employees of a service provider transporting goods from Turkey to Germany, can rely on Article 41(1) and demand the nullification of a requirement of a work permit which was not in force at the time the Additional Protocol came into effect in Germany.

C. The *Soysal* Case[1085]

Soysal is the second case where the ECJ applied Article 41(1) of the Additional Protocol to Turkish service providers. Mehmet Soysal and his friends were Turkish nationals resident in Turkey working for a company engaged in the international transport of goods, as drivers of lorries that are owned by a German company and registered in Germany. Until 2000, Soysal and his friends were issued an entry visa as drivers of lorries but afterwards their applications were rejected by the German embassy in İstanbul. Soysal and his friends challenged the rejection and asserted that they were entitled to enter Germany without visa according to Article 41(1) of the Additional Protocol which prohibits the application of visa. The Administrative Court in Berlin dismissed their claims and the claimants applied to the High Administrative Court which, upon its observation of the claims, stated that at the time of the entry into force of the Additional Protocol, Turkish workers engaged in Germany in the international transport of goods by road had the right to enter Germany without a visa since the visa requirement was introduced into German law only from 1 July 1980 onwards[1086].

The High Administrative Court referred the case to the ECJ since it viewed that the ECJ had not ruled on before as to whether the introduction of a visa requirement under national legislation on aliens or under Community law was one of the 'new restrictions' on

[1084] Ibid, para. 114.
[1085] *Mehmet Soysal, Cengiz Salkım, İbrahim Savatli v Bundesrepublik Deutschland* Case C 228-06
[1086] Ibid, para. 33.

the freedom to provide services within the scope of Article 41(1) of the Additional Protocol.

Upon the reference, the ECJ dealt with the application of Article 41(1) to Turkish lorry drivers. As it ruled in *Abatay and others*, the ECJ stated that Turkish lorry drivers, who are employed by an undertaking in Turkey, may validly invoke Article 41(1)[1087].

As to the link between the provision of services and the visa requirement, the ECJ, by applying its findings in *Abatay and others*, and *Tüm and Darı*, came to the conclusion that Turkish lorry drivers were made subject to visa requirement only as from 1 July 1980 and that the existing legislation constituted a 'new restriction' within the meaning of Article 41(1), of their rights to freely provide services in Germany[1088].

IX. JUDGMENTS REGARDING EC-TURKEY CUSTOMS UNION

A. Nature of the Judgments

It must be pointed out that unlike the judgments regarding Turkish nationals, the judgments given by the European Courts as regards the Customs Union differ in many respects. The details of the cases in this context are as follows:

1. *The 'Söktaş' case*[1089]

Söktaş was heard by the Court of First Instance ("CFI")[1090] which delivered 'orders' relating to the legal action taken by Söktaş, a Turkish company established in Aydın, Turkey.

[1087] Ibid, para. 46.
[1088] Ibid, para. 57.

[1089] *Söktaş Pamuk ve Tarım Ürünlerini Değerlendirme Ticaret ve Sanayii AŞ v Commission of the European Communities* ("Söktaş"), Case T-75/96 R. [1996] ECR II-00859.

In its action, Söktaş sought the annulment of the EC Commission's decision to initiate anti-dumping proceedings concerning imports of unbleached cotton fabrics originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey.

2. *The 'Kaufring and others' case*[1091]

Kaufring and others was brought against the EC Commission by German, French, Dutch and Belgian companies which imported television sets from Turkey between 1991 and 1993 and early in 1994. The reason why Kaufring AG and other applicants asked the CFI to annul the EC Commission's decisions is that the Commission, depending on a report in which it was ascertained that the Turkish authorities were validating A.TR.1 certificates without any compensatory levy being collected, instructed the German, French, Dutch and Belgian governments to recover customs duties on imports of colour television sets made under A.TR.1 certificates issued before 15 January 1994.

3. *The 'Yedaş' case*[1092]

In *Yedaş*, the CFI delivered a judgment in the legal action brought by Yedaş, a Turkish company established in Ümraniye, İstanbul, Turkey.

In its legal action, Yedaş filed an action for compensation for damages allegedly caused by the implementation of the procedures of the EC-Turkey Customs Union. After losing the case, Yedaş brought an appeal against the judgment of the CFI. However, the ECJ, the appellate court[1093], dismissed[1094] the appeal.

[1090] For detailed information about the CFI see page 33.

[1091] *Kaufring and Others* v *Commission* ("Kaufring"), Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 [2001] ECR II-1337

[1092] *Yedaş Tarım ve Otomotiv Sanayi ve Ticaret AŞ v Council of the European Union and Commission of the European Communities* ("Yedaş"), Case T-367/03 [2006] ECR II-00873.

[1093] See pages 33-34.

Despite its negative result, *Yedaş* has increased public consciousness of the legal effects of the customs union issue. Tezcan[1095] regards the case as a success since the ECJ acknowledged Yedaş's *locus standi* and heard its submissions. But the author warns the future claimants that *Yedaş* might have set a precedent.

4. *The 'C.A.S. SpA' case*[1096]

C.A.S. SpA, an Italian company, brought an action for annulment of Article 2 of the Commission's decision of 18 October 2002 concerning an application for remission of import duty. After its action was dismissed by the CFI, C.A.S. brought an appeal to the ECJ.

The judgment of the ECJ in *C.A.S.* is written in a technical language however it is very enlightening as to the institutional mechanism of the EC-Turkey Customs Union.

5. *The 'UND*[1097] *(Kässbohrer)' case*

As a matter of fact, neither the ECJ nor the CFI has delivered a judgment relating to an action taken by UND or Kässbohrer. However, a member of the UND has filed a lawsuit in Germany in order to bring to the ECJ the quota problem faced by Turkish transporters.

B. Legal Background

1. *Association Agreement and the Additional Protocol*

[1094] *Yedaş Tarım ve Otomotiv Sanayi ve Ticaret AŞ v Council of the European Union and Commission of the European Communities* ("Yedaş-appeal"), Case C-255/06 P., [2007] ECR I-00094.

[1095] Ercüment Tezcan, "Yedaş Kararı ve Düşündükleri", Uluslararası Stratejik Araştırmalar Kurumu, 24.04.2006. The Article is available at http://www.usakgundem.com/ yazarlar.php?type= 12&id=290 (20.10.2008).

[1096] *C.A.S. SpA v Commission of the European Communities*, ("C.A.S.") Case C-204/07 P., ECR 2008 00000

[1097] Uluslararası Nakliyeciler Derneği (International Transporters Association).

The Association Agreement between the EC and Turkey provided that the 'association' would comprise a preparatory stage, a transitional stage and a final stage[1098]; and that a customs union would be established gradually over a period of time[1099]. Indeed, after the Additional Protocol had been signed by and between the EC and Turkey, the transitional stage began[1100] and the customs union came into effect[1101]. To put it bluntly, contrary to popular opinion[1102], the customs union started by virtue of the Additional Protocol, not of Decision No 1/95 of the EC-Turkey Association Council. The latter marked the beginning of the final stage and concerned the implementation of the final phase of the customs union[1103], a period which will last until Turkey becomes a member of the EU.

In the Additional Protocol, the EC and Turkey pledged to refrain from introducing between themselves any new customs duties on imports or exports or charges having equivalent effect, and from increasing those already applied[1104]. The Parties also agreed to abolish the said duties and charges in the long run[1105]. Moreover, the EC gave an undertaking to abolish the duties and charges on Turkish imports on the entry into force of the Protocol, i.e. on 1 January 1973[1106]. In spite of that, the relationship was so asymmetrical that the EC had already met its obligation before the Protocol came into force and decreased its customs duties on Turkish industrial imports to zero on 1 September 1971[1107]. Turkey could not shoulder the costs as much as the EC did and thus she undertook to abolish the customs duties on Community imports in twelve or twenty two years

[1098] EC-Turkey Association Agreement, Article 2(3).
[1099] Ibid, Article 2(2).
[1100] Additional Protocol, Article 1.
[1101] Ibid, Articles 7, 8 and 9.
[1102] Owing particularly to misleading statements made by the politicians of the time, the public has believed that an agreement as to the customs union was signed between the EC and Turkey; and that the customs union was a concept introduced in 1995.
[1103] Decision No. 1/95, Article 1.
[1104] Additional Protocol, Article 7.
[1105] Ibid, Article 8.
[1106] Ibid, Article 9.
[1107] **Avrupa Birliği ve Türkiye**, 6. baskı, DTM Avrupa Birliği Genel Müdürlüğü, Ankara, Eylül 2007, p. 299.

following the entry into force of the Additional Protocol[1108]. Indeed, Turkey could only put an end to customs duties on the Community industrial imports in the beginning of 1996[1109].

2. Decision No 1/95 of the EC-Turkey Association Council

Decision No 1/95, the fortieth decision of the EC-Turkey Association Council, laid down the rules concerning the final phase of the customs union. The Decision is best understood in the broader context of developments in the EU and of the aim of the EC-Turkey Association Agreement[1110]. With its sixty six provisions and ten annexes, the Decision deals with the following issues: Free movement of goods and commercial policy, agricultural products, customs, approximation of laws and the institutional mechanism. Compared to the Decisions which were discussed earlier, Decision No 1/95 does not contain any provisions relating to the free movement of persons or of services, establishment, or capital movements[1111].

a. Free movement of goods

With respect to the free movement of goods between the EC and Turkey, Decision No 1/95 provides that[1112]:

- Import or export customs duties and charges having equivalent effect shall be wholly abolished, and

- Quantitative restrictions on imports/exports and all measures having equivalent effect shall be prohibited.

In practice, Turkey abolished the customs duties and charges on the Community industrial imports as of 1996[1113]. In return, the EC put an end to the tariff quota that was

[1108] Additional Protocol, Article 10 et seq.
[1109] Avrupa Birliği ve Türkiye, p. 322.
[1110] Ibid, p. 314.
[1111] Steve Peers, "Living in Sin: Legal Integration Under the EC-Turkey Customs Union", **European Journal of International Law,** Vol. 7 (1996), p. 414.
[1112] Decision No 1/95, Articles 4 and 5.

applied to petroleum oils refined in Turkey, and to the restrictions on Turkish textile products[1114]. Quantitative restrictions on Community imports and all measures having equivalent effect have been eliminated by Turkey to a large extent. The EU's Progress Report of 2006 does not refer to any kind of failure on Turkey's side. However, Turkish exporters in general and Turkish road transporters[1115] in particular have been experiencing problems.

b. The commercial policy

In Decision No 1/95, as to the commercial policy, Turkey undertook that she would apply[1116]:

- Provisions and implementing measures which are substantially similar to those of the EC's commercial policy, and
- The same policy that the EC follows in the GATT.

And as to the common customs tariff and preferential tariff policies, Turkey undertook to[1117]:

- Align itself on the common customs tariff in relation to countries which are not members of the EC,
- Align itself progressively with the preferential customs regime (the autonomous regimes and preferential agreements with third countries) of the EC, and

[1113] Avrupa Birliği ve Türkiye, p. 322.
[1114] Ibid
[1115] See the *UND (Kässbohrer)* case on page 212 et seq.
[1116] Decision No 1/95, Article 12
[1117] Ibid, Articles 13 and 14.

- Take the necessary measures and negotiate agreements on mutually advantageous basis with the countries to which the EC applies preferential customs regime.

In practice, Turkey has had a major problem with respect to third countries with which the EC made a preferential agreement. The crux of the problem is Turkey has been, by virtue of Decision No 1/95, under an obligation to negotiate preferential agreements whereas the third countries are not[1118]. Therefore, such countries pretend to be unsympathetic towards trade agreements in order to drive a hard bargain with Turkey.

Time is another concern. The longer the negotiations with third countries last the more Turkish economy is damaged. "Turkey can not participate in the EC-third country negotiations and thus she enters the third country markets late in any way"[1119]. Besides that, the third countries use delaying tactics to gain more for themselves in the agreements. As a result, Turkey's loss increases. Time is of essence for Turkey in this respect.

The perfect solution to the above mentioned problems might be "to back Turkey politically and technically. For instance, the EC can, while it is negotiating a free trade agreement with a third country, conduct parallel negotiations with Turkey and inform Turkey of any new developments. The Community can also help to persuade the third countries which exploit Turkey's disadvantageous position"[1120].

c. Approximation of laws

Approximation of laws concern harmonization of Turkish legislation with that of the EU in the fields of intellectual property law, competition law, public procurement law and tax law. In practice, Turkey has made dramatic improvements in the fields of

[1118] **Avrupa Birliği'nin Gümrük Birliği, Malların Serbest Dolaşımı, Ortak Dış Ticaret Politikaları ve Türkiye'nin Uyumu**, Hürrem Cansevdi (Ed.), İstanbul, İKV, Mart 2002, p. 55.
[1119] Ibid
[1120] Ibid

intellectual property and competition laws but there is still room for improvement in public procurement law.

d. The institutional mechanism

As to the institutional mechanism, the major step was to create EC-Turkey Customs Union Joint Committee whose task is to "carry out exchange of views and information, formulate recommendations to the Association Council and deliver opinions with a view to ensuring the proper functioning of the Customs Union"[1121]. The Committee held its last meeting (21st term) in Brussels on 14 October 2008[1122].

C. The Judgments

1. *The 'Söktaş' case*[1123]

The EC Commission, the defendant in *Söktaş*, initiated anti-dumping proceedings as a result of a complaint lodged by Committee of the Cotton and Allied Textile Industries of the European Union (Eurocoton). Eurocoton alleged that imports of unbleached cotton fabrics originating in China, Egypt, India, Indonesia, Pakistan and Turkey were being dumped and were thereby causing material injury to the EC industry[1124].

Söktaş brought an action and sought annulment of the Commission's decision to initiate anti-dumping proceedings on the ground that the conditions laid down in Article 47 of the Additional Protocol[1125] were not met. Söktaş also asked the CFI to make an order

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[1121] Decision No. 1/95, Article 52.

[1122] For detailed information please go to http://www.euractiv.com.tr/fileadmin/Documents/08-12_GBOK_-_21_Donem_Toplantisi.pdf

[1123] *Söktaş Pamuk ve Tarım Ürünlerini Değerlendirme Ticaret ve Sanayii AŞ v Commission of the European Communities* ("Söktaş"), Case T-75/96 R. [1996] ECR II-00859.

[1124] *Söktaş*, para. 1.

[1125] Additional Protocol, Article 47: "1. If, during the period of twenty-two years, the Council of Association, on application by a Contracting Party, finds that dumping is being practised in trade between the Community and Turkey, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.
2. The injured Party may, after notifying the Council of Association, take suitable protective measures where:

that its loss caused by the Commission be compensated. Further, "Söktaş made an application under Article 185 of the EC Treaty for suspension of operation of Commission's decision in so far as it affects it and Turkey in general"[1126].

Before the Court, the EC Commission contended that[1127]:

- The initiation of anti damping procedures was a preparatory act which can not alter Söktaş' legal position,

- Even if it was established that the conditions in Article 47 of the Additional Protocol were not met, it would have no effect on the nature of the decision which Söktaş challenged,

- The Association Council was informed and Turkey did not claim that the initiation of anti-damping proceedings were in contravention to Article 47 of the Additional Protocol, and

- Since Söktaş is not the only exporter of the products concerned, Söktaş can not be affected by the Commission's decision.

(a) the Council of Association has taken no decision pursuant to paragraph 1 within three months from the making of the application;
(b) despite the issue of recommendations under paragraph 1, the dumping practices continue. Moreover, where the interests of the injured Party call for immediate action, that Party may, after informing the Council of Association, introduce interim protective measures which may include antidumping duties. Such measures shall not remain in force more than three months from the date of the application, or from the date on which the injured Party takes protective measures under (b) of the preceding subparagraph.
3. Where protective measures have been taken under (a) of the first subparagraph of paragraph 2, or under the second subparagraph of that paragraph, the Council of Association may, at any time, decide that such protective measures shall be suspended pending the issue of recommendations under paragraph 1. The Council of Association may recommend the abolition or amendment of protective measures taken under (b) of the first subparagraph of paragraph 2.
4. Products which originated in or were in free circulation in one of the Contracting Parties and which have been exported to the other Contracting Party shall, on reimportation, be admitted into the territory of the former Contracting Party free of all customs duties, quantitative restrictions or measures having equivalent effect. The Council of Association may make any appropriate recommendations for the application of this paragraph; it shall be guided by Community experience in this field".

[1126] *Söktaş,* para. 4.
[1127] Ibid, para. 7-9.

Söktaş maintained that it was affected by the Commission's decision to initiate anti-damping procedures because the procedure in Article 47 was disregarded. The Turkish company also argued that it would not incur loss if the friendly settlement procedure in Article 47 was followed. In Söktaş's view, the EC-Turkey Association Council should have assessed the existence of anti-damping. Therefore, the Commission, which did not make a prior application to the Association Council, infringed the first and second paragraphs of Article 47.

As a result of its analysis, the CFI found Söktaş's application inadmissible. The reasoning behind the Court's decision is as follows:

- According to Article 47, informing the Association Council suffices for the initiation of anti-damping proceedings[1128];

- The initiation of anti-damping procedures constitutes a preparatory measure so Söktaş can challenge its legality when the procedures are completed[1129];

- The Commission's decision is not prima facie constitute a decision which an action for annulment would lie[1130]; and

- Since Commission's act has no legal effect for Söktaş, the latter can not claim compensation and in any event Söktaş did not indicate the nature and extent of its loss caused by the initiation of anti-damping proceedings[1131].

2. *The 'Kaufring and others'*[1132] *case*

Kaufring AG and several European firms imported into the EC colour television sets manufactured in Turkey. The sets were imported under A.TR.1 certificates and thus

[1128] *Söktaş*, para. 23-27.
[1129] Ibid, para. 29.
[1130] Ibid, para. 30.
[1131] Ibid, para. 31.
[1132] *Kaufring and Others* v *Commission* ("Kaufring"), Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 [2001] ECR II-1337

qualified for the exemption from customs duties provided for by the EC-Turkey Association Agreement and the Additional Protocol. The EC Commission, the defendant in *Kaufring and others*, found out that Turkey validated A.TR.1 certificates without any compensatory levy being collected. Hence, the Commission instructed the German, French, Dutch and Belgian governments to seek payment of the customs duties from the companies having imported the television sets. The Commission finally declared that the custom duties should be recovered and the national authorities notified the importers. Kaufring AG and the other importers challenged such decisions before the CFI.

In *Kaufring and others*, Kaufring AG and other importers, having been supported by their governments before the court, succeeded in their claims and the CFI annulled the abovementioned decisions of the Commission. What is important with regard to the subject of this dissertation is that the importers pleaded in support of their application for remission that serious errors were made by the EC and Turkey in implementing the EC-Turkey Association Agreement and the Additional Protocol. Those errors, they submitted, constituted a special situation within the meaning of Article 13(1) of Council Regulation No 1430/79 on the repayment or remission of import or export duties. Consequently, the CFI discussed as to whether there were deficiencies attributable to Turkey and the EC.

Following its analysis, the CFI found out that[1133] Turkey, in spite of Article 7 of the EC-Turkey Association Agreement which provides that the contracting parties are to take all appropriate measures to ensure the fulfilment of the obligations arising from the Agreement and to refrain from any measures liable to jeopardise the attainment of its objectives, did not transpose legislation on the compensatory levy laid down in Article 3(1) of the Additional Protocol[1134] and Association Council Decision No 2/72. Further, the

[1133] *Kaufring and others*, para. 238.

[1134] "Chapter I, Section I, and Chapter II of this Title shall likewise apply to goods obtained or produced in the Community or in Turkey, in the manufacture of which were used products coming from third countries and not in free circulation either in the Community or in Turkey. These provisions shall, however, apply to those goods only if the exporting State charges a countervailing levy, the rate of which is a percentage of the duties laid down in the Common Customs Tariff for third country products used in their manufacture. This percentage, fixed by the Council of Association for each of such periods as it may determine, shall be based on the tariff reduction granted on those goods in the importing State. The Council of Association shall also

Court concluded that "Turkey introduced measures which either did not comply with the provisions of the Association Agreement or the Additional Protocol or did not allow the correct implementation of those provisions as regards the exportation of goods (including colour television sets) to the Community"[1135]. Mainly because of these two reasons, the Court held that: "Turkish authorities were responsible for serious deficiencies in the implementation of the Association Agreement and Additional Protocol. Those deficiencies undoubtedly contributed to the occurrence of irregularities in connection with exports of television sets from Turkey to the Community. They also give rise to doubts about the will of the Turkish authorities to ensure the proper implementation of the provisions of the Association Agreement and the Additional Protocol as regards those exports"[1136].

As to the EC Commission and the deficiencies attributable to it, the CFI first put that the Commission had a duty to ensure the proper application of the Association Agreement and the Additional Protocol pursuant to Article 211 of the EC Treaty, Articles 6[1137], 7 and 25[1138] of the Association Agreement, various decisions adopted by the Association Council on the application of Articles 2 and 3 of the Additional Protocol, and the principle of good administration[1139]. Mainly because the Commission was slow to react

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lay down the rules for the countervailing levy, taking into account the relevant rules in force before 1 July 1968 in trade between Member States".

[1135] *Kaufring and others*, para. 239.

[1136] Ibid, para. 256.

[1137] "To ensure the implementation and the progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred upon it by this Agreement".

[1138] "1. The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey. 2. The Council of Association may settle the dispute by decision; it may also decide to submit the disputc to the Court of Justice of the European Communities or to any existing court or tribunal. 3. Each Party shall be reguired to take the measures necessary to comply with such decisions. 4. Where the dispute cannot be settled in accordance with paragraphs 2 of this Article, the Council of Association shall determine, in accordance with Article 8 of this Agreement, the detailed rules for arbitration or for any other judicial procedure to which the Contracting Parties may resort during the transitional and final stages of this Agreement".

[1139] *Kaufring and others*, para. 257 and 258.

to the problems in the implementation of the Association Agreement and the Additional Protocol by the Turkish authorities and failed to fulfil its obligations in not contacting the Association Council and the various bodies falling within its remit, in particular the customs cooperation committee, in good time in order to clarify the situation and to take, if necessary, the measures required to ensure that the Turkish authorities respected the terms of the Association Agreement and the Additional Protocol, the CFI held that the EC Commission "has been seriously remiss in monitoring the implementation of the Association Agreement and the Additional Protocol and that that contributed to the occurrence of irregularities concerning imports of colour television sets from Turkey at the material time"[1140].

3. *The 'Yedaş' case*[1141]

The *Yedaş* case concerns Yedaş's claim for compensation for its losses caused by the manner in which the EC-Turkey Customs Union has been implemented by the EC Commission and Council.

Yedaş argued that the reasons for its losses are:[1142]

- Turkey's exclusion from the discussions on the common policies on trade,
- The Council and the Commission's failure to honour an undertaking to give financial support to Turkey under Decision No 1/95 of the EC-Turkey Association Council,
- The Council and the Commission's failure to take action against Greece concerning its opposition to the financial support, and

[1140] Ibid, para. 273.
[1141] *Yedaş Tarım ve Otomotiv Sanayi ve Ticaret AŞ v Council of the European Union and Commission of the European Communities* ("Yedaş"), Case T-367/03 [2006] ECR II-00873.

[1142] *Yedaş*, para. 21-24.

- The abolition of customs duties and the negative effect of the Customs Union.

The Commission and the Council demanded the dismissal of Yedaş's action on the ground that[1143]:

- Decision No 1/95 was an act neither of the Council nor of the Commission and thus it can not be a basis for an action for damages,
- The statute of limitations had expired,
- The application failed to fulfil the criteria provided in Article 44 (1) of the Rules of Procedure of the Court,
- The assertion that there was an inadequate financial support to Turkey was incorrect,
- The fact that Turkey was not involved in the reduction or abolition of customs duties affecting imported goods from third countries did not infringe the law,
- No "economic operator" can ask for compensation as a result of loss of market share following the abolition of customs and barriers, and
- Yedaş could not establish casual link between the conduct and the loss.

In its judgment, the Court first referred to its jurisprudence and to Article 288(2)[1144] of the EC Treaty, and stated that in order for the non-contractual liability of the

[1143] Ibid, para. 26 and 27.
[1144] "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

EC, the alleged conduct of the Community institutions must be unlawful, the damage must be real and the causal link must be present between the conduct and the alleged damage[1145].

As to the first condition, the Court based its consideration on its jurisprudence and stated that the conduct of the Community institutions will be unlawful if there is a sufficiently serious breach of a rule of law intended to confer rights on individuals. In this regard, the Court concluded that neither the Commission's nor the Council's conduct was unlawful for the following reasons[1146]:

- Turkey's exclusion from discussions related to the Customs Union can not give rise to any right which Yedaş can use,

- The Community did not declare to give financial aid to Turkey under neither the Decision No 1/95 nor the declarations annexed thereto,

- The Community was not obliged to bring an action against Greece under Article 226 of the EC Treaty even it is assumed that Greece is, by opposing to the financial aid to Turkey, in breach of the EC Treaty.

As to the third condition for non-contractual liability of the EC, the causal link, the Court stated that Yedaş could not prove that there was a direct link of cause between its losses and the inadequacy of the financial aid. Nor it established a link between its losses and the exclusion of Turkey from the discussions regarding the measures with respect to Customs Union. So, the Court held that there was no causal link between the conduct of the Commission and of the Council, and the alleged losses[1147].

As a conclusion, the Court dismissed Yedaş's action which failed in satisfying the necessary conditions for the non-contractual liability of the EC. The Court did not analyze whether the damage was real, because, according to the case law, if any one of the

[1145] *Yedaş*, para. 34.
[1146] Ibid, para. 35-56.
[1147] Ibid, para. 57-61.

conditions for non-contractual liability of the EC Community is not satisfied, the action must be dismissed entirely[1148].

According to Tezcan[1149], the lawyers of Yedaş should not have based their argument on Article 2 of the EC-Turkey Association Agreement which serves to set out a programme. The author implies that such a case should have been filed by relying on one of the directly effective provisions of the Law of the EC-Turkey Association. Indeed, Yedaş could have won the case if it had (a) relied on a directly effective provision of the Law of the EC-Turkey Association, (b) targeted at a specific conduct of the Commission or Council and (c) established a causal link between the conduct of the Commission/Council and its loss by providing concrete financial data.

4. *The 'C.A.S.' case*[1150]

Between 1995 and 1997, C.A.S. SpA imported and put into free circulation in the EC apple and pear juice concentrates declared as being from and originating in Turkey. In one of the import operations, the Italian customs authorities asked their Turkish counterparts to verify the authenticity of the A.TR.1 certificate submitted by C.A.S. The Turkish side notified that the certificate was not authentic. Then, Permanent Representation of the Republic of Turkey to the European Union notified the Italian authorities that 18 certificates submitted by C.A.S. were neither issued nor validated by the Turkish authorities. Italian authorities reached the conclusion that the certificates were either forged or invalid, and that the goods to which they related can not qualify for the preferential treatment accorded to imported Turkish agricultural products. Accordingly, the Italian customs administration asked C.A.S. to pay the sum of EUR 2 686 068.63 from as unpaid customs duties. In the course of the proceedings, the Commission took a decision, which

[1148] Ibid, para. 62.
[1149] Tezcan, "Yedaş Kararı ve Düşündükleri", Uluslararası Stratejik Araştırmalar Kurumu, 24.04.2006.

[1150] *C.A.S. SpA v Commission of the European Communities*, ("C.A.S."), Case C-204/07 P. [2008] ECR 00000 (Judgment of the ECJ of 25 July 2008).

was the subject of a court action taken by C.A.S. against the Commission. The CFI dismissed the pleas and in consequence C.A.S. brought an appeal to the ECJ.

At the end of the case, the ECJ set aside the judgment of the CFI and annulled the Commission's decision. What is important as to the subject of this dissertation is that the ECJ made critical remarks about the Commision's role in the EC-Turkey Customs Union:

> "…the Commission cannot reasonably claim…that it is in the same position as C.A.S. as regards the checking of events which occurred in Turkey. On the contrary, it is for the Commission to make full use of the rights and powers which it has under the provisions of the Association Agreement and the decisions adopted in respect of its implementation so as to fulfil its obligation of supervising and monitoring the proper implementation of the Association Agreement"[1151].
>
> "The full use of the rights and powers which the Commission has in connection with its duty of supervising and monitoring the proper implementation of the Association Agreement is also called for because the assessments made by the Turkish authorities as regards the inauthentic or irregular nature of the certificates at issue show some ambiguities or, at the very least, some inconsistencies"[1152].
>
> "Had the Commission not failed to fulfil its obligations, the forgeries of the certificates at issue could have been discovered and elucidated as soon as the first imports into the Community were made and the scale of the financial loss, both for the Community budget and for the appellant, could have been limited. Furthermore, the Commission could, as soon as those forgeries were

[1151] *C.A.S.*, para. 104.
[1152] Ibid, para. 106.

discovered, have warned importers in good time and, if necessary, have brought the matter before the Joint Committee"[1153].

It is noteworthy that although the ECJ held that the Commission failed to fulfil its obligations to supervise and monitor the proper implementation of the Association Agreement[1154], the Court stated that the assessments made by the Turkish authorities as regards the inauthentic or irregular nature of the certificates at issue showed some ambiguities or, at the very least, some inconsistencies. In this respect, Turkish authorities have to take *C.A.S.* seriously and accept the ECJ's criticism to better implement the Customs Union.

5. *The 'UND'*[1155] *Case*

Hungary, Italy and Austria have been applying strict quotas to Turkish transporters. Furthermore, in July 2007, Bulgaria declared that Turkish trucks, which pass through the Bulgarian territory, would pay 83 Euro fee for one-way transit and 166 Euro fee for return[1156]. UND campaigned against Bulgaria's initation and reached the conclusion that Turkish transporters were subject to unfair transport permit quotas and that foreign investors began to shift the direction of their investments toward other countries. Accordingly, the UND initiated the '2008 Action Plan For Quota-Free European Union' campaign against the quota implementation to the transporters, which carries Turkish export goods in Europe. The campaign targeted at encouraging Turkish transporters to take legal actions in the European Courts against Bulgaria's application of transit fees.

Indeed[1157], the German office of Kässbohrer[1158], which is a sister company of one of the members[1159] of the UND, filed a lawsuit in Bonn, Germany, for the annulment of the

[1153] Ibid, para. 129.
[1154] Ibid, para. 128.
[1155] Uluslararası Nakliyeciler Derneği
[1156] "Avrupa Yolu Engel Dolu", **Taşıyanlar**, 2008/6-7, p. 26.
[1157] Information given by the UND Secretariat.
[1158] Kässbohrer Germany Plant and Sales Office at Siemensstrasse 74, D-47574 Goch / Germany
[1159] Tırsan

quotas. Kässbohrer maintained that quotas are quantitative restrictions and that as a company importing goods from Turkey it suffered loss in consequence of the quotas imposed on Turkish imports. The claimant invoked Article 28[1160] of the EC Treaty, Article 25[1161] of the EC-Turkey Association Agreement and Article 5[1162] of Decision No 1/95 of the EC-Turkey Association Council.

The case law of the ECJ might be helpful to talk on the *Kässbohrer* case. Take Case C-265/06 wherein the ECJ held that:

> "According to settled case law, all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions, prohibited by Article 28 EC (see, inter alia, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 25; and Case C-143/06 *Ludwigs-Apotheke* [2007] ECR I-0000, paragraph 25)"[1163] .

The Court in Germany might take the foregoing into consideration .But the problem is whether that Court will regard the collection of transit fees as a rule hindering the intra-Community trade.

[1160] EC Treaty, Article 28: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".

[1161] EC-Turkey Association Agreement, Article 25: "1. The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey. 2. The Council of Association may settle the dispute by decision; it may also decide to submit the disputc to the Court of Justice of the European Communities or to any existing court or tribunal. 3. Each Party shall be reguired to take the measures necessary to comply with such decisions. 4. Where the dispute cannot be settled in accordance with paragraphs 2 of this Article, the Council of Association shall determine, in accordance with Article 8 of this Agreement, the detailed rules for arbitration or for any other judicial procedure to which the Contracting Parties may resort during the transitional and final stages of this Agreement".

[1162] Decision No 1/95, Article 5: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Parties".

[1163] C-265/06, para. 31.

The Member State concerned can submit arguments that the quotas are necessary for public policy reasons. But even in that case, the competence of the Member States is limited:

"According to settled case law, a measure having an effect equivalent to a quantitative restriction on imports may be justified only by one of the public-interest reasons laid down in Article 30 EC or by one of the overriding requirements referred to in the judgments of the Court (see, in particular, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8), provided in each case that that measure is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 64; Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665, paragraph 42; and Case C-254/05 *Commission* v *Belgium*, paragraph 33)"[1164].

[1164] Ibid, para. 37.

FOURTH CHAPTER

THE FUTURE OF THE JUDGMENTS OF THE ECJ REGARDING TURKEY

I. PRESENT SITUATION IN GENERAL

The ECJ has been interpreting the Law of the EC-Turkey Association since 1987. Or, to be blunt, for twenty-one years, the ECJ has been forcing the EC Member States to honour the commitments they made as to the Law of the EC-Turkey Association.

Even though it has been sandwiched[1165] between the EC Member States and the rule of EU law, the ECJ has delivered judgments which have upset the Member States more than Turkish nationals who have, by the Court's decisions, progressively gained attention and recognition.

The ECJ's liberal interpretation of the Law of the EC-Turkey Association appears to have led to "many objections raised by governments of Member States"[1166] and to criticism[1167] directed at the Court's deductive reasoning in its judgments.

However, the scholars who approach the issue from a wide angle assert that the whole third-country nationals in the EU could derive benefit from the ECJ's interpretation of the Law of the EC-Turkey Association if that interpretation was used as a basis for further development of rights for non-EU nationals[1168].

[1165] The phrase 'sandwiched' was borrowed from Steve Peers, "Case C-434/93, Ahmet Bozkurt v. Staatssecretaris van Justitie, Judgment of 6 June, 1995", **Common Market Law Review**, Vol. 33, 1996, p. 111.
[1166] Kay Hailbronner, **Immigration and Asylum Law and Policy of the European Union**, Kluwer Law International, 2000, p. 229.
[1167] Ibid, p. 229-231.
[1168] Groenendijk, Guild and Barzilay, p. 111.

It is certainly true that the ECJ's judgments on Turkish nationals shed light on the Law of the EC-Turkey Association. Accordingly, the Member States' attitudes towards the ECJ and Turkish nationals have changed over the years. In the beginning, the Member States had serious doubts as to whether the ECJ can interpret the EC-Turkey Association Agreement[1169] or the Decision of the EC-Turkey Association Council[1170]. Further, they were uncertain whether a Turkish national could rely on the provisions of the Law of the EC-Turkey Association[1171]. However, after having encountered strong resistance from the ECJ, the Member States acknowledged that Turkish nationals have standing to claim benefit from the Law of the EC-Turkey Association. In addition, the national courts of the Member States took lessons from the ECJ's case law and followed its findings before referring the cases[1172]. And most importantly, the national courts tried to make Turkish nationals subject to secondary EC law in order not to grant them a more favourable position than an EC national[1173]. So, the referring courts acquiesced in the assumption of the equality between a Turkish national and an EC national within the meaning of EU law[1174].

The Law of the EC-Turkey Association has evolved as a result of the ECJ's judgments. The Court's role is so crucial that the EC-Turkey Association could not have been implemented without the Court. A new association agreement might have been on the agenda and "the bureaucratic inertia and political evasion"[1175] might have shaped the association rather than the Court. It is undisputed that the Court made the EC-Turkey Association operate to a certain degree by correcting the deficiencies in the association, "substituting EC-Turkey Association Council"[1176] and correcting the Member States who failed to meet their commitments[1177].

[1169] *Demirel* (n. 446), para. 6.
[1170] *Sevince* (n. 446), para. 5.
[1171] See *Demirel,* and *Sevince.*
[1172] *Nazlı* (n. 446), para. 19, 21, and *Ayaz* (n. 446), para. 29.
[1173] *Derin* (n. 446), para. 59.
[1174] Ibid, para. 61.
[1175] The phrases were borrowed from Steve Peers, *Social security equality for Turkish nationals*, p. 637.
[1176] Hailbronner, Immigration and Asylum Law and Policy of the European Union, p. 231.
[1177] Ibid.

II. PRESENT SITUATION IN PRACTICE

It is settled case law that the preliminary rulings, which are given as to the interpretation of the Community provisions and of the Community acts, are binding on the national courts. Further, a national court which asks the ECJ to interpret an act of the Community is required to implement that act in accordance with the ECJ's interpretation and to give precedence to such interpretation if there is any national law against it[1178]. Accordingly, the judgments of the ECJ on Turkish nationals are, since they have been delivered by means of preliminary ruling procedure[1179], binding on the national courts of the EU Member States.

What about the Member States? Are they bound by the judgments of the ECJ regarding Turkish nationals? The answer must be in the affirmative because the preliminary rulings serve for the uniform application of EU law[1180]. It is through the preliminary ruling procedure that EU law is made a part of the national laws[1181]. Broadly speaking, a Member State that does not take the preliminary rulings into consideration violates the EU law. Thus, the Member States are bound by the judgments of the ECJ and those judgments tell the Member States what they can/can not do relating to Turkish nationals.

Similarly, the judgments of the ECJ tell a lot about what a Turkish national can or can not do in the context of the EC-Turkey Association. Turkish nationals are bound by the judgments of the ECJ, no doubt about it.

[1178] See the explanations on page 46 relating to the effects of the preliminary rulings on Member States.
[1179] Save for the cases analyzed under the EC-Turkey Customs Union on page 202 et seq.
[1180] See page 41.
[1181] See page 41.

A. Turkish Workers

In an EU Member State, Turkish workers can enjoy certain rights under Article 6(1) of Decision No 1/80[1182] if they satisfy four conditions:

First of all, Turkish worker must enter that state lawfully because the Member States are competent to regulate Turkish nationals' first entry into their territories[1183]. He is not required to be a worker at the time he entered. He can still rely on Article 6(1) if he entered as a student[1184], an au-pair[1185] or a trainee[1186]. And he does not have to find a job immediately after his entry. He might have found himself unemployed in the beginning. He can enter into paid employment later[1187].

Second he must acquire the status of worker. To do so, he must have pursued in the Member State he entered a genuine and effective economic activity in return for remuneration for a certain period of time[1188].

Third, he must have been duly registered as belonging to the labour force of the state that he entered, that is to say, he must have satisfied the conditions laid down by law or regulation of that Member State[1189].

And last, his employment must be legal, i.e. undisputed, stable and secure[1190].

[1182] "Subject to Article 7 on free access to employment for members of his family, 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 services 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".
[1183] *Kuş* (n. 446), para. 25.
[1184] *Payır&Akyüz&Öztürk* (n. 446), para. 38.
[1185] Ibid.
[1186] *Kurz* (n. 446)
[1187] *Birden* (n. 446)
[1188] *Ertanır* (n. 446), para. 43
[1189] *Birden*, para. 51.
[1190] *Ertanır*, para. 52.

Turkish workers can claim right to residence throughout their employments in that Member State because there is a close link between the right of employment and the right of residence[1191]. A Turkish worker does not lose his rights even if (a) his residence permit is limited to specific purpose[1192] or (b) his residence permit is limited to temporary employment[1193], or (c) he initially expressed that he would return the Turkey after spending a number of years in that Member State[1194] or (d) he does not hold an administrative document such as residence permit or work permit[1195].

Turkish workers can change employer within the same occupation after three years of employment with the same employer[1196]. And after four years of legal employment, they can seek and take up any employment they choose[1197].

In case Turkish workers face nationality-related discrimination as regards remuneration and other conditions of work, they can rely on Article 10(1) of Decision No 1/80[1198] as long as they are covered by Article 6(1)[1199].

In case a Turkish worker is sent to prison or detained in that Member State, he can still derive rights from Article 6(1) if he finds a new job within a reasonable period after his release[1200].

Next, so long as they fulfill the conditions laid down in Article 6(1), Turkish workers can ask for the transposition to them the principles enshrined to workers of EU nationality[1201].

[1191] *Sevince* (n. 446) , para. 29.
[1192] *Günaydın*
[1193] *Kurz* (n. 446), para. 53.
[1194] *Günaydın*
[1195] *Bozkurt* (n. 446), para. 30.
[1196] *Birden* (n. 446), para. 44.
[1197] *Tetik* (n. 446), para. 26.
[1198] "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".
[1199] *Güzeli* (n. 446), para. 48.
[1200] *Nazlı* (n. 446), para. 41.

Lastly, Turkish workers can rely on the secondary EC law (regulations, directives) so long as those provisions are in force[1202]. Directive 2003/109[1203], Directive 2004/38[1204] and Directıve 2004/114/EC[1205] may be given as examples of the secondary law of the EC which Turkish nationals may benefit. All of those Directives provide that they shall be applied wihout prejudice to more favourable provisions of multileteral agreements concluded by the EC, the Member States and by a third country. Therefore, the EC-Turkey Association Agreement falls within that scope and the Association Agreement takes precedence over the secondary law. Turkish nationals can rely on those Directives if more favourable rights are accorded to them. For instance, in *Dörr&Ünal*, the ECJ extended the applicability of the procedural guarantees in Articles 8 and 9 of Directive 64/221 to Turkish nationals[1206].

In case the provisons of the Law of the EC-Turkey Association and the of the secondary law overlap, 'highest standard of protection'[1207] will be applied So, for example, a Turkish national who is a researcher within the meaning of Directive 2004/114[1208], 'will have the right to continue working for his or her employer after one year, the right to take up any work within the same occupation (presumably research work) after three years, and

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[1201] *Tetik*, para. 28.
[1202] *Dörr&Ünal* (n. 446), para. 69.

[1203] 'Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents', OJ L 016 , 23/01/2004 p. 0044 – 0053.

[1204] 'Directıve 2004/38/EC of the European Parliament and of the COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC', OJ L 158/78, 30.04.2004.
[1205] 'Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service', OJ L 375/12, 23.12.2004.
[1206] Evelien Brouwer "Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?", **European Journal of Migration and Law**, Vol. 7 (2005), p. 225.
[1207] Steve Peers, "Key Legislative Developments on Migration in the European Union", **European Journal of Migration and Law**, Vol. 7 (2005), p. 114.
[1208] supra no. 1205.

the right to take up any work in the Member State concerned after four years, with corollary rights to reside'[1209].

It should be mentioned that the ECJ case law does not confirm a limitless degree of protection for Turkish nationals. False declarations/statements are prohibited. Therefore, Turkish workers can not deceive the public authorities in a Member State in order to induce them to issue residence permit[1210]. If they do, then the Law of the EC-Turkey Association will not protect them from being deprived of their rights under Article 6(1) of Decision No 1/80[1211].

B. Family Members of Workers

In an EU Member State, members of the family of a Turkish worker, who is legally employed in that Member State, can enjoy certain rights under Article 7 of Decision No 1/80[1212] even if: (a) the family member concerned is a stepson[1213], or (b) the family member concerned was born in that Member State[1214], or (c) the family member concerned is an independently living adult child of a Turkish worker[1215], or (d) the family member concerned did not work during his/her residence with Turkish he/she joined[1216], or (e) the family member concerned did not enter into any employment after 7 years he/she left the

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[1209] Peers, *Key Legislative Developments on Migration in the European Union*, p. 114.
[1210] *Kol* (n. 446), para. 29
[1211] *Günaydın* (n. 446), para. 60.
[1212] "The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized to join him: (a) shall be entitled – subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State; (b) shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years". .
[1213] *Ayaz* (n. 446)
[1214] *Çetinkaya* (n. 446)
[1215] *Aydınlı* (n. 446), para. 22
[1216] Ibid, para. 29.

school[1217], or (f) the never-employed family member does not have the intention to enter into any paid employment[1218], or (g) Turkish worker to whom that family member joined was retired[1219], or (h) Turkish worker to whom that family member joined returned to Turkey after being employed in that Member State[1220].

Like the workers, the family members' right to free access to employment implies a concomitant right of residence so that they can apply for the extension of their residence permits throughout their employment[1221].

According to the first paragraph of Article 7 of Decision No 1/80, the members of the family of a Turkish worker in an EU Member State can respond to any offer of employment after being legally resident there for at least three years and take up any paid employment of their choice after being legally resident for at least five years[1222]. A family member of a Turkish worker does not lose his rights even if: (a) he is absent for a period of several years from the labour market due to imprisonment[1223], or (b) his residence permit had expired before the date on which he lodged an application to extend it[1224].

C. Self-Employed Persons

Turkish self-employed persons can rely on Article 41(1) of the Additional protocol and demand the disapplication of the inconsistent national rules[1225]. In case there exist stricter rules in the Member State they are to enter or to establish business, Turkish self-employed persons can ask for the application of more favourable rules[1226] which were in force when the Additional Protocol came into effect in that Member State.

[1217] *Er* (n. 446)
[1218] Ibid.
[1219] *Çetinkaya* (n. 446)
[1220] *Akman* (n. 446), para. 27.
[1221] *Ergat* (n. 446), para. 40.
[1222] *Kadıman* (n. 446), para. 27 and 28.
[1223] *Aydınlı* (n. 446), para. 32.
[1224] *Ergat*, para. 67.
[1225] *Tüm and Darı* (n. 446), para. 46.
[1226] Substantive and/or procedural. See *Tüm and Darı*, para. 69.

Further, self-employed persons can benefit from Article 7 of the EC-Turkey Association Agreement if the Member State concerned insists on applying stricter rules despite the directly effective standstill clause in Article 41(1) of the Additional Protocol.

As to the limits of Turkish self-employed persons' freedom of establishment fradualent conduct or rather the submission of false documents are not permitted.

D. Service Providers/Recipients

Like self-employed persons, Turkish service providers (individuals or legal persons) can benefit from the standstill effect of Article 41(1) of the Additional Protocol and demand the application of the rules which existed when the Additional Protocol came into effect in the Member State to which they are to provide services. The employees of a service provider can demand the application of Article 41(1)[1227] as the restriction on them, including the visa requirement, hinders the provision of the service.

Moreover, service recipients can benefit from the standstill clause in Article 41(1) of the Additional Protocol. The ECJ case law on EU nationals allows Turkish students, tourists and the patients to become entitled to rely on Article 41(1).

E. Member States

Member States can regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment[1228]. In other words, they can authorize or not the entry and the engagement into employment.

But, Member States can not, by relying on Article 6(3) of Decision No 1/80[1229], adapt as they please the rules (Article 6(1) of 1/80) governing Turkish workers. Nor can

[1227] *Abatay* (n. 446), para. 117.
[1228] *Kuş* (n. 446), para. 25 and *Nazlı* (n. 446), para. 32.
[1229] "The procedures for applying 6(1) and 6(2) shall be those established under national rules".

they adopt unilaterally measures preventing Turkish workers who already satisfy the conditions of Article 6(1) from benefiting from the rights under Article 6(1)[1230].

In the event of imprisonment, the Member States can not expel a Turkish worker/ family member of a Turkish worker if his/her personal conduct does not indicate a specific risk of new and serious prejudice to the requirements of public policy[1231]. Nor they can order the expulsion of a Turkish national if she/he did not leave the Member State concerned for a significant time[1232].

As regards family members of Turkish workers are subject to national laws of the Member State in which that worker is employed. Accordingly, that Member State can authorize the joining of a Turkish national to a Turkish worker and regulate such family members' stay in that Member State until the end of three years of residence[1233]. That Member State can also require that family member actually cohabit with the worker to whom he joined for the period of three years, i.e. until that family member becomes entitled to enter the labour market pursuant to the first indent of the first paragraph of Article 7 of Decision No 1/80[1234]. However, after that family member's three years of residence with Turkish worker, the Member States can not attach new conditions for that family member[1235].

By virtue of the standstill clauses, Member States can not introduce new restrictions on Turkish workers, self-employed persons and service providers. The term 'new restrictions' also covers the visa requirement and hence Member States can not make Turkish self-employed persons and service providers subject to visa requirement if such persons did not have to obtain visa to enter a Member State at the time the Additional Protocol entered into force in that Member State.

[1230] *Ertanır* (n. 446), para. 31.
[1231] *Nazlı* (n. 446), para. 61.
[1232] *Ergat*, para. 45, 46 and 48; *Cetinkaya*, para. 36 and 38; *Derin*, para. 54; *Aydinli*, para. 27; *Torun*, para. 21; and *Polat*, para. 21.
[1233] See the *Kadıman,* and *Ergat* cases.
[1234] *Kadıman*, para. 36 and 37.
[1235] *Ergat*, para. 38.

Further, discrimination on grounds of nationality is outlawed and therefore Member States can not victimize Turkish nationals directly or indirectly.

III. THE JUDGMENTS IN THE FUTURE

A. Potentially Reliable Provisions of the Law of the Association

1. *Article 9 of the EC-Turkey Association Agreement*

In the case law of the ECJ regarding Turkish nationals, Article 9 of the EC-Turkey Association Agreement has not been directly at issue. The Article was cited by Turkish nationals[1236] only in order to supplement the main provisions they relied on. According to Peers, Article 9 is a 'wild card whose effect is entirely unknown'[1237].

Article 9 provides that:

"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".

It is clear that Article 9 refers to Article 7 (now 12) of the EC Treaty but what is striking is that both articles are identical in wording.

Let's start with quoting what Article 12 provides:

"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination".

[1236] Sema Sürül in the *Sürül* case on page 177 et seq.
[1237] Peers, *Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union*, p. 18.

Article 12 'prohibits in general terms all discrimination based on nationality'[1238]. The Article 'applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'[1239]. So, it might be unnecessary to rely on Article 12 for the individuals who fall within the scope of a specific non-discrimination rule[1240].

The ECJ has found that Article 12 has direct effect in Member States[1241]. In *Phil Collins* the Court ruled that[1242]:

"…the first paragraph of Article 7 of the (EC) Treaty is conferred directly by Community law. That right may, therefore, be relied upon before a national court as the basis for a request that it disapply the discriminatory provisions of a national law which denies to nationals of other Member States the protection which they accord to nationals of the State concerned".

Further, Tridimas[1243] refers to *Angonese; Union Royale Belge des Societes de Football Association and Others v Bosman; Walrave;* and *Dona v Mantero*[1244] and concludes that the Article 12 has both vertical and horizontal direct effect[1245].

[1238] Case 90/76 [1977] ECR 1091, para. 27, cited by N. Rogers and R. Scannell, **Free Movement of Persons in the Enlarged European Union**, Sweet & Maxwell, London, 2005, p. 198.

[1239] *Kremlis v Greece* (C-305/87 [1989] ECR 1476, para. 13, cited by Rogers and Scannell, p. 198.

[1240] Rogers and Scannell, p. 198.

[1241] Groenendijk views that Article 12 applies also to third country nationals working or residing in a Member State. The logic behind the author's statement is that the EC Treaty's Title IV has covered the entry and residence of third country nationals since 1999; and that Article 12, as central clause of the Treaty, has been applying to the said Title. To support his argument, the author gives a striking example from the Netherlands where the government has introduced a mandatory language and integration test for foreign spouses who wish to reunite with their partners in the Dutch territory. EU, EEA, Swiss, Japanese, Canadian, Surinamese, New Zealand and American nationals are exempted from taking such test because long-term residence visa is not a requirement for them. Groenendijk states that visa is not an issue related to the ability to learn Dutch, and implies that a Chinese spouse, who is required to take the test only because of her/his nationality, can invoke Article 12 and argue that she/he is subject to discrimination based on nationality. Kees, Groenendijk, "Citizens and Third Country Nationals: Differential Treatment or Discrimination", J. Carlier and Elspeth Guild (superv.), **Collection du Centre des Droits de L'Homme de L'Universite Catholique de Louvain – Volume 2 The Future of Free Movement of Persons in the EU**, Brussels, Bruylant, 2006, p. 84-86.

[1242] *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH.* ("Phil Collins"), Joined cases C-92/92 and C-326/92, ECR 1993 05145, para. 34.

From the foregoing, one can draw a conclusion that Article 9 has also direct effect owing to the reason that it is identical to Article 12, and that it "explicitly embraces the general prohibition of discrimination embodied in Article 12 of the EC Treaty"[1246].

Even if it were found that Article 9 is not directly effective just because Article 12 is, we could still argue by looking at the details hidden in ECJ case law regarding Turkish nationals that Article 9 has direct effect. My reasoning is as follows:

- The ECJ has held that Article 9 of the EC-Turkey Association Agreement can be applied only if there is no specific non-discrimination rule[1247]. But the Court held that the specific rules, such as Articles 9[1248] and 10(1)[1249] of Decision No 1/80 and Article 3(1)[1250] of Decision No 3/80 are concrete/specific expressions of Article 9 of the EC-Turkey Association Agreement and that they are all directly effective. Thus, I am of the view that if the concrete expressions of Article 9 are directly effective, then Article 9 must be too.

- The Commission views that Article 9 has direct effect. It submitted in the *Öztürk* case that Article 9 of the EC-Turkey Agreement is directly applicable[1251].

- Further, AG La Pergola concluded that Article 9 is a directly applicable provision and that the persons to whom it applies are entitled to rely upon it before national courts[1252]. AG La Pergola stated that: "Article 9 of the EC-Turkey Association Agreement embodies, in clear, precise and unconditional terms, an obligation to achieve a result on the contracting parties: that of ensuring equal treatment for Community and Turkish citizens in the areas covered by the agreement. It is a

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[1243] Takis Tridimas, **The General Principles of EU Law**, 2nd edition, Oxford University Press, 2007, p. 119.
[1244] Tridimas, p. 119, fn. 305.
[1245] See page 63.
[1246] Opinion of AG Jacobs in the *Wahlergruppe Gemeinsam* case. Opinion, para. 37.
[1247] *Öztürk* (n. 446), para. 49.
[1248] *Gürol* (n. 446), para. 24.
[1249] *Wahlergruppe Gemeinsam*(n. 446), para. 57 and 67.
[1250] *Sürül* (n. 446), para. 64 and 74; *Koçak* (n. 446), para. 36.
[1251] *Öztürk*, para. 46.
[1252] Opinion of AG La Pergola in the *Sürül* case. Opinion, para. 12.

prohibition of discrimination on grounds of nationality, which is not conditional, in its implementation or its effects, upon the adoption of any subsequent measure. It thus meets the requirement of a Community rule which can be relied on before the national court: moreover, it does not differ from the similar provisions laid down by EC Treaty in Article 12"[1253].

In the light of the above, my contention is that Article 9 must be found directly effective by the ECJ in a future case[1254].

What benefit does Article 9 bring to Turkish nationals? If we assume that it has direct effect, we may reach the conclusion that it has vertical and horizontal direct effect like Article 12. Thus, we may maintain that Turkish nationals can oppose discrimination based on nationality against either public authorities or individuals in the EU Member States[1255]. Accordingly, Turkish nationals, who are neither workers nor the children of workers employed in the EU, are given protection against discrimination. For instance, Turkish students, who have to pay higher tuition fees to the European universities, become entitled to rely on Article 9, cite *Blaizot*[1256] and to maintain that Turkish students' requirement to pay more than any other EU student is a contravention of Article 9 since the Court held that: "Supplementary enrolment fee charged to students who are nationals of other member states and wish to enrol for such studies constitutes discrimination on grounds of nationality contrary to article 7 of the EEC Treaty"[1257] [1258].

Furthermore, it can be argued that Article 9, by analogy with Article 12, affords protection against direct and indirect discrimination. Direct discrimination is easier to

[1253] Ibid, para. 7.
[1254] According to Peers (1996), 'the ECJ will either declare Article 9 nugatory because of the lack of EC Treaty parallels or begin to develop a sui generis interpretation of Article 9'. Peers, *Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union*, p. 18 and 19.
[1255] For the vertical and horizontal direct effect of Article 12 see Tridimas, p. 119.
[1256] *Vincent Blaizot v University of Liège and others* ("Blaizot"), Case 24/86 [1988] ECR 00379 cited by Peers, *Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union*, p. 18.

[1257] *Blaizot*, conclusion, indent 1.
[1258] For further explanation on the application of Article 12 to students see Tridimas, p. 124-128.

identify[1259] and to prove in the Court. Turkish national is deemed to have faced direct discrimination if "national provisions or practices which make his/her enjoyment of, or eligibility for, a certain right, benefit or opportunity explicitly conditional upon the nationality of the host State or upon conditions which only nationals of other Member States have to meet"[1260]. Indirect discrimination on the other hand, has a 'more complex nature'[1261] and hence the Court interprets it more broadly than direct discrimination[1262]. According to the Court, a national provision that in practice affects non-nationals more than nationals and that puts non-nationals at a particular disadvantage is indirectly discriminatory[1263]. Further, by virtue of the broad interpretation, it is asserted that the victimized individual does not have to prove that there is an existing national provision which adversely affects him. He can also challenge a discriminatory national rule if it is likely to affect him in the future[1264]. Thus, Turkish nationals can rely on Article 9 and oppose discrimination whether it is direcor indirect.

2. *Article 7 of the EC-Turkey Association Agreement*

Article 7 of the EC-Turkey Association Agreement is another provison which is potentially useful for Turkish nationals. The Article has not been invoked yet by a Turkish national in the case law of the ECJ regarding the Law of the EC-Turkey Association.

Article 7 is worded as:

"The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement. They shall refrain from any measures liable to jeopardize the attainment of the objectives of this Agreement".

[1259] M. Bell, **Anti-discrimination Law and the European Union**, Oxford University Press, 2002, p. 34.
[1260] *Hoeckx* (C-249/83 [1985] ECR 982) and *Lair* (C-39/86 [1988] ECR 3161) cited by A.P. Van der Mei, **Free Movement of Persons within the European Community**, Hart Publishing, 2003, p. 69-70.
[1261] Evelyn Ellis, **EU Anti-Discrimination Law**, Oxford University Press, 2005, p. 91.
[1262] Van der Mei, p. 500.
[1263] *Commission v Belgium*, C-278/94 [1996] ECR I-4307, para. 20 and *O'Flynn v Adjudication Officer,* C-237/94 [1996] ECR I-2617.
[1264] Robin C.A. White, **Workers, Establishment, and Services in the European Union**, Oxford University Press, 2004, p. 54.

The CFI touched upon Article 7 first in *Kaufring and others*[1265] and then in *CAS*[1266]. The Court's statement in *Kaufring and others* is essential for everyone who wishes to rely on Article 7. The Court stated that:

"Article 7 of the Association Agreement provides that the contracting parties are to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from the Agreement and to refrain from any measures liable to jeopardise the attainment of its objectives. The provision expresses the *pacta sunt servanda* principle and the principle of good faith which must govern the conduct of the parties to an agreement in public international law (Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 90)"[1267].

Despite the CFI's decisive statement, the contention remains as to whether a Turkish national can rely on Article 7. In order to determine that, an analogy should be made with Article 10 (ex Article 5[1268]) of the EC Treaty by which the legislators of the EC-Turkey Agreement were inspired while drafting Article 7[1269].

Article 10 provides that:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".

[1265] supra no. 1091.
[1266] supra no. 1096.
[1267] *Kaufring and others,* para. 237.
[1268] Article 5 of the EC Treaty is the equivalent of Article 86 of the ECSC Treaty. See Ian B. Lee, **IN SEARCH OF A THEORY OF STATE LIABILITY IN THE EUROPEAN UNION**, Harvard Jean Monnet Working Paper 9/99, Cambridge, Harvard Law School, 2000, p. 8.
[1269] Article 7 is identical to Article 10 of the EC Treaty. See Baykal, *Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, p. 23.

Article 10 is known as the loyalty clause[1270] and it imposes a duty of fidelity[1271] and cooperation[1272] on the Member States, i.e. the 'duty to assist the EU in achieving the objectives set out in the EC Treaty'[1273].

In EU law, Article 10 has been at issue since the *Francovich*[1274] case wherein the ECJ held that Article 10 'is a basis for the obligation of Member States to make good loss and damage caused to individuals as a result of breaches of Community law'[1275]. Having assumed that Article 10 lays down an obligation on the Member State to cooperate with the Community, the Court established[1276] in *Francovich* the principle of state liability and accordingly has 'developed a minimum standard of judicial protection for individuals relying on Community law'[1277].

The principle of state liability enables individuals to take an action for compensation for damages against the Member State which commits a breach of EU law[1278]. In order for a Member State to be hold liable for the loss and damage, three conditions must be met[1279] [1280]. First, the rule of law infringed should grant rights to

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[1270] Baykal, *Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, p. 23 and Sanem Baykal, **AT Hukukunun Etkili Biçimde Uygulanması ve Bireysel Haklar**, Ankara Üniveristesi Avrupa Toplulukları Araştırma ve Uygulama Merkezi Araştırma Dizisi No. 14, Ankara, 2002, p. 4 and 86.

[1271] Tamara K. Hervey and Philip Rostant, "After *Francovich:* State Liability and British Employment Law", **Industrial Law Journal**, Vol. 25. So. 4. (December 1996), p. 260.

[1272] Jane Convery, "State Liability in the United Kingdom after *Brasserie du Pecheur"*, **Common Market Law Review,** Vol. 34 (1997), p. 621.

[1273] Lucia Serena Rossi and Giacomo Di Federico, "Case C-129/00, *Commission* v. *Repubblica Italiana,* judgment of 9 December 2003, Full Court, nyr", **Common Market Law Review**, Vol. 42 (2005), p. 839.

[1274] *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ("Francovich"), Joined cases C-6/90 and C-9/90**,** ECR 1991 I-05357.

[1275] *Francovich*, para. 35-36.

[1276] Hacer Soykan Adaoğlu*,* "Francovich'ten Köbler'e AT Hukukunda Devletin Dorumluluğu Prensibi", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Vol 54, No. 2 (2005), p. 251.

[1277] Opinion of AG Léger in *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.,* Case C-5/94, ECR 1996 I-02553, para. 56.

[1278] Adaoğlu, p. 251.

[1279] Ibid, p. 254.

[1280] For the configuration of the preconditions in *Francovich*, see Hervey and Rostant, p. 259.

individuals. Second, the breach should be sufficiently serious. And third, there should be a causal link between the Member State's breach and the individual's alleged loss.

The principle of state liability was established as a reaction to the unwillingness of the Member States to transpose the EC directives to their national laws. One may ask at this point whether the principle of state liability can also be applied in the event of unwillingness of the Member States to implement the international agreements concluded with a third country.

Since the principle of state liability imposes an obligation of loyal cooperation on the Member States to achieve the objective of the EC Treaty, an analogy can be drawn to the effect that Member States are also liable for the attainment of the objective of the international agreement to which they are party.

In his study aiming at analyzing the possibility of extending the state liability principle to international agreements, Gasparon[1281] concludes that a Member State may be held liable if (a) the international agreement concerned can be categorized as EU law, (b) the three conditions that have been attached by the ECJ to the Member State liability are fulfilled.

Gasparon first points out that an international agreement which forms an integral part of EU law can be categorized as EU law[1282]. According to the author[1283] the EC-Turkey Association Agreement exemplifies an international agreement that forms an integral part of EU law, a conclusion which was made by the Court in *Demirel*. Gasparon then discusses the possibility of the fulfillment of the three conditions laid down by the ECJ, i.e. the norm should confer rights on individuals, the breach should be serious and there should be a causal link between the breach and the loss. According to the author, an

[1281] Philipp Gasparon, "The Transposition of the Principle of Member State Liability into the Context of External Relations", **European Journal of International Law**, Vol. 10, No.3 (1999), pp. 605-624.
[1282] Gasparon, p. 606-608.
[1283] Ibid, p. 610 and 612.

international agreement which has direct effect satisfies the first condition[1284]. As to the second condition, the author asserts that Article 300(7) of the EC Treaty imposes a duty to act on the Member States and thus a serious breach in the implementation of an international agreement may be committed as long as the 'contents of the rights which the international agreement grants are identifiable'[1285]. And with respect to the casual link between the breach and the loss, the author states[1286] that it is high probability that the ECJ's finding to leave to the national courts the determination of the causal link and the damage sustained by the individual may be applied in the event of Member State liability for breach of the international agreement concerned.

Impressed by Gaspason's findings, I am of the view that the principle of state liability can be applied in the implementation of the Law of the EC-Turkey Association and a Member State can be held liable for infringing the directly effective provisions of the Law of Association. My reasoning is as follows:

- First of all, the Law of the EC-Turkey Association has its own fidelity clause, Article 7 of the EC-Turkey Association Agreement, which imposes a duty on the EU Member States to 'ensure the fulfilment of the obligations arising from the Agreement and to refrain from any measures liable to jeopardize the attainment of the objectives of the Agreement'[1287].

- Second, the ECJ has been interpreting the Law of the EC-Turkey Association for twenty one years and it is now common ground that the EC-Turkey Association Agreement is an integral part of EU law and that the Agreement and the Additional Protocol which is an integral part[1288] of the former create special and privileged links with Turkey[1289],

[1284] Ibid, p. 616.
[1285] Ibid, p. 618.
[1286] Ibid.
[1287] EC-Turkey Association Agreement, Article 7.
[1288] Additional Protocol, Article 62.
[1289] *Demirel*, para. 9

- Third, the ECJ has found in its judgments that several provisions of the Decisions of the EC-Turkey Association and Articles 37 and 41(1) of the Additional Protocol have direct effect in the Member States. Besides, as mentioned earlier, Article 9 of the EC-Turkey Association Agreement has direct effect, an inevitable consequence of the findings of the Commission and AG La Pergola[1290]. Thus, the directly effective rules of the Law of the EC-Turkey Association fulfill the first condition required for Member State liability.

- Fourth, as to the condition of the existence of serious breach, Gasparon's conclusion finds a place in the Law of the EC-Turkey Association since the EC-Turkey Association Agreement 'has been concluded by the EC Council under Article 228'[1291] (now Article 300) and therefore it must be binding on the Member States by virtue of Article 300(7). Furthermore, the directly effective provisions of the Law of the Association grant identifiable rights to Turkish national, an example of which is Turkish nationals' right under Article 41(1) of the Additional Protocol to demand the disapplication[1292] of 'inconsistent national rules of the host Member State'[1293] 'including those relating to the substantive and/or procedural conditions governing the first admission of Turkish nationals into the territory of that State'[1294]

- Fifth, as to the condition of the existence of a causal link between the breach of the Member State and the loss, one can argue that the Member States which introduce new restrictions on Turkish nationals' freedom of establishment and the freedom to provide services are in breach of Article 41(1) and that Turkish self-employed persons and service providers/recipients suffer losses as a result

[1290] See p. 227.
[1291] *Demirel*, para. 7.
[1292] "Article 7 puts an obstacle in the way of Member States introducing stricter rules for the first admission of Turkish nationals into theor territories". See Baykal, *Türkiye-AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1. Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, p. 23.
[1293] *Tüm and Darı*, para. 46.
[1294] Ibid, para. 69.

of the introduction of new restrictions, e.g. visa requirement and/or work permit requirement. Same conclusion must be valid for Article 37 of the Additional Protocol according to which Turkish workers can not be discriminated as regards conditions of work and remuneration[1295].

Thus, if a Member State commits a breach of the directly effective provisions of the Law of the EC-Turkey Association, it may be held liable for failing its duty by virtue of Article 7 of the EC-Turkey Association Agreement. In other words, Turkish nationals in the EU can file actions for compensation for damages against the Member State which is in breach the directly effective provisons.

B. Application of the Law of Association to EU Nationals in Turkey

The ECJ has not delivered any judgment (or preliminary ruling) yet as regards a dispute between an EC national and Turkey. In this regard, Kaiser quotes 'Turkish law professors' as arguing that Turkey is outside the scope of the jurisdiction of the ECJ and that therefore EU residents can not take their cases to the Court of Justice[1296]. Indeed, Turkey is not a member of the EU and Turkish courts can not refer a case to the ECJ pursuant to Article 234 of the EC Treaty even though the ECJ widely interprets the phrase of 'any court or tribunal' in the said Article[1297].

A Turkish court has evidently no competence to be a 'referring court' in the context of the EU-Turkey Association. But there is no reason why an EU national can not invoke the relevant provisions of the Law of the EC-Turkey Association before a Turkish court. In Kaiser's opinion, EU nationals in Turkey, especially with respect to the issues relating to the access to employment, hesitate to take legal action because they do not trust the Turkish legal system and fear of getting into trouble with Turkish authorities[1298]. But it

[1295] See *Nihat Kahveci* case on page 141 et seq.
[1296] Bianca Kaiser, "German Migrants in Turkey: The 'Other' Side of the Turkish-German Transnational Space", **Transnational Social Spaces**. Thomas Faist and Eyüp Özveren (Ed.), Ashgate Publishing, 2003, p. 95.
[1297] See page 42 as to 'who can refer a case to the ECJ'.
[1298] Kaiser, p. 95.

should be pointed out that, as it was acclaimed by the EC Commission in its Progress Report of 2007[1299], Turkey took important steps to improve the situation of the EU nationals and amended the Law on the Work Permits for Foreign Nationals[1300] which exempts EU nationals and their family members from obtaining work permits without being subject to the time limits laid down in the Law[1301]. Such amendment is criticized for allowing the EU nationals to work without work permits in Turkey, a country which is not yet a member of the EU[1302].

As to *locus standi* of the EU nationals in Turkish courts, my contention is that an EU national can rely on the EC-Turkey Association Agreement and the Additional Protocol provisions which entitle him/her to certain rights, i.e. Article 9 of the EC-Turkey Association Agreement[1303], and Articles 41(1)[1304] and 57[1305] of the Additional Protocol. The reason is that the EC-Turkey Association Agreement and the Additional Protocol, which is an integral part of the former, can be deemed to be an international agreement within the meaning of Article 90(5) of the Constitution of the Republic of Turkey[1306] which

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[1299] Commission Staff Working Document, Turkey 2007 Progress Report, COM(2007) 663 final, Brussels, 6.11.2007, p. 34.

[1300] Law No. 4817, OG 06.03.2003, No. 25040.

[1301] Law No. 4817, Article 8(e).

[1302] Aysel Çelikel and Günseli (Öztekin) Gelgel, **Yabancılar Hukuku**, 12th ed., İstanbul, Beta, Şubat 2005, p. 134.

[1303] "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".

[1304] "The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

[1305] "The Contracting Parties shall progressively adjust the conditions for participation in contracts awarded by public authorities and public undertakings, and by private undertakings which have been granted special or exclusive rights, so that by the end of the period of twenty-two years there is no discrimination between nationals of Member States and nationals of Turkey established in the territory of the Contracting Parties".

[1306] Article 90 of the Constitution, which was amended on 22 May 2004, is as follows: "The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.

Agreements regulating economic, commercial and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements must be brought to the knowledge of the Turkish Grand National Assembly within two months of their promulgation.

provides that international agreements duly put into effect bear the force of law and that they have supremacy over domestic laws in terms of fundamental rights and freedoms. Hence, the Association Agreement and the Additional Protocol bear the force of law and EU nationals can rely on the abovementioned provisions before the Turkish courts which are, in Can and Özen's view, positive about the effects of international agreements in Turkish law[1307].

Besides Article 9 of the EC-Turkey Agreement and Articles 41(1) and 57 of the Additional Protocol, one may argue that there is also Article 11 of Decision No 1/80[1308] [1309] which entitles the EU nationals to certain rights. But, in order to argue that Article 11 can also be invoked before a Turkish court by say a German national, it must first be ascertained as to whether the Decisions of the Association Council are 'agreements' which bear the force of law within the meaning of Article 90(5) of Turkish constitution.

Başlar views that there is no reason to differ the Decisions of the EC-Turkey Association Council from the Decisions of the Association Councils between the EU and

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Agreements in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on the authorisation as stated in the law shall not require approval of the Turkish Grand National Assembly. However, agreements concluded under the provision of this paragraph and affecting economic, or commercial relations and the private rights of individuals shall not be put into effect unless promulgated.

Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph.

International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".

[1307] Hacı Can and Çınar Özen, "**Türkiye-Avrupa Topluluğu Ortaklık Hukuku**", Gazi Kitabevi, Ağustos 2005, p. 371.

[1308] "Nationals of the Member States duly registered as belonging to the labour force in Turkey, and members of their families who have been authorized to join them, shall enjoy in that country the rights and advantages referred to in Articles 6, 7, 9 and 10 if they meet the conditions laid down in those Articles".

[1309] Additionally, Article 4 of Decision No 2/76 could be given as an example but that Article is no longer enforceable as Decision No 1/80 superseded Decision No 2/76. Article 4 of 2/76 provıded that: "Nationals of the Member States who are in paid employment in Turkey, and their children, shall enjoy in that country rights and advantages referred to in Articles 2 and 3 if they meet the conditions laid down in these Articles".

the then candidate countries such as Estonia, Hungary, Slovakia and Slovenia[1310]. In this respect, Başlar asserts that the Decisions of the EC-Turkey Association Council may be deemed to be an 'agreement' as in the then candidate countries[1311]. However, the author expresses a reservation and states that a further analysis is necessary to determine whether the decisions need a law approving the ratificiation and whether they were published in the Official Gazette[1312].

Arat on the other hand, states that the Decisions of the EC-Turkey Association Council are the decisions of a joint committee which was established pursuant to an international agreement[1313]. According to the author, Turkey is obliged to comply with the Decisions of the EC-Turkey Association Council by virtue of the EC-Turkey Association Agreement however; such decisions do not have binding force in Turkish law. Hence, the author asserts that Turkish courts can not directly apply the provisions of Decisions of the EC-Turkey Association Council unless the Decisions are transposed to Turkish law by means of a national law[1314].

As a matter of fact, there is only one point different between the two opinions above. Başar implies that a Decision of the EC-Turkey Association Council might not need a national approving law to be transposed to Turkish law, whereas Arat views that all Decisions of the EC-Turkey Association Council require an implementing/approving law to be transposed to Turkish law or be applied directly.

It is therefore too difficult under Turkish law to assert that an EU national can invoke a provision of a Decision of the EC-Turkey Association Council and that the Court is bound by such provision. However, it is arguable that Article 11 of Decision No 1/80 can be applied by Turkish courts. The reason is that in legal literature, except for Decision No

[1310] Kemal Başlar, "Gümrük Birliği Anlaşması'nın Hukuksal Niteliği" **Ankara Avrupa Çalışmaları Dergisi**, Vol 4 No 1 (2004), p. 153-161, and 162.
[1311] Ibid, p. 162.
[1312] Ibid.
[1313] Arat, p. 597.
[1314] Ibid.

1/95 relating to Customs Union[1315], none of the Decisions of the Association Council has been considered as null or void. Further, by virtue of the reciprocity principle, Turkey should respect Article 11 of Decision No 1/80 which refers to Article 6 and 7 of the same Decision, the two provisons that Turkish nationals/workers most invoked before the courts of the EU Member States. Therefore, I am of the view that Article 11 of Decision No 1/80 is a potentially reliable provision for EU nationals living or working in Turkey. If we assume that Article 11 can be invoked by EU nationals before Turkish courts, then the Article will lead us to Articles 6, 7, 9 and 10 of Decision No 1/80 and we will acknowledge that an EU worker and his/her family members in Turkey will have the same rights as Turkish workers and their family members have in the EU Member States. Let me give some examples to illustrate the effects of Article 11 and its reference to Articles 6, 7, 9 and 10.

- An EU worker can maintain that throughout his employment in Turkey he has a concomitant right of residence under Article 6(1) of 1/80.

- After four years of legal employment in Turkey, an EU worker can seek and take up any employment he chooses under Article 6(1) of 1/80.

- After five years of legal residence with an EU worker, the family members can enjoy free access to any paid employment of their choice in Turkey under the first paragraph of Article 7 of 1/80.

- Children of the EU worker can get access to general education under the same educational entry qualifications as the children of Turkish nationals under Article 9 of 1/80.

- An EU worker can, as regards remuneration and other conditions of work, oppose a nationality-related discrimination in Turkey according to Article 10 of 1/80. Although discrimination is a vague concept, the limitation on the number of

[1315] Başlar, p. 197.

foreign players that a football club can field in Turkish leagues exemplifies discrimination as regards conditions of work. So, in accordance with the *Nihat Kahveci* case, a Spanish born EU player, who is employed by a Turkish football club in Turkey, can maintain that his being subject to foreign player limitation is in contravention with Article 10[1316] [1317].

[1316] See the *Nihat Kahveci* case on p. 141.
[1317] It can also be argued that an EU player can rely on Article 9 of the EC-Turkey Agreement. In that case, the player and his/her lawyers avoid the risk of being confined to the contentious area wherein the Decisions of the EC-Turkey Association Council lose their effectiveness.

CONCLUSION

Never in their wildest dreams could have the Byzantine emperors thought that millions of Turks would be living in Europe, taking legal actions against Europeans and winning their cases. Similarly, the initial six members of the EEC could not have predicted that the illiterate Turkish working poor would bring many cases to the ECJ and that the Court's judgments would favour Turkish nationals. Miserably, Feridun Cemal Erkin, the then Turkish Foreign Minister, could not have foreseen that his prideful country would still be an associate of the Community on the forty-fifth anniversary of the Association Agreement in September 2008.

However, the signatories gathered in Ankara in September 1963 must have estimated that the Law of the EC-Turkey Association would develop in parallel with EC Law. The reason is, the ECJ could not have created an exclusive case law despite the parallelism between the main sources of the Law of the EC-Turkey Association and of the Community legal system. The Court had to follow the precedents. It could not have set aside *Kupferberg*, and *Haegeman* just because an agreement with Turkey was concerned.

As a result of the ECJ's judgments on Turkish nationals, it is now common ground that the Law of the EC-Turkey Association is an integral part and a source of EU law. That integrity brings interaction between the Law of the Association and the Law of the Community. Therefore, the judgments are not one-sided. The ECJ's findings safeguard the interests of Turkish nationals, EU nationals and also of other third-country nationals. Moroccans are inspired by the Turkey Agreement and demand the analogous interpretation of their rights with Turkish nationals. On the other hand, Turkish nationals exercise their rights given by the Additional Protocol and the Decisions of the EC-Turkey Association Council and demand equal treatment with other EU workers, students or players. For this reason, Turkish nationals are regarded as denizens, i.e. foreigners similar but not yet equal to citizens.

Since the ECJ's judgments on Turkish nationals are a source of the Law of the EC-Turkey Association and of the EU law, the interpretation of the judgments on Turkish nationals should not vary according to the nationality of the persons who interpret them. By its very wording, the case law is the law as established by the outcome of previous cases and the judgments of the ECJ on Turkish nationals are based on the judgments delivered as regards EU nationals who are in the same status under EU law. This is the inevitable consequence of the references made in the Law of the EC-Turkey Association to the EC Treaty but also of the aim of the EC-Turkey Agreement which is to facilitate the accession of Turkey to the Community.

Similarly, the judgments of the ECJ should not be seen as decisions favouring only Turkish labour migrants working in the EU. Had a well-born Turkish businessman relied on the standstill clause in Article 41(1) of the Additional Protocol and challenged the entry requirements before poor Mrs. Demirel invoked the provisions of the EC-Turkey Association Agreement to stay more with her worker husband in Germany, the Law of the Association would have been more publicized in Turkey than it is now and no one, including the signatories of the Decisions of the Association Council, would ever have suggested that the Association Agreement is null. Quite the contrary, at present the Law of the Association Agreement, the Additional Protocol and the Decisions of the Association Council are being implemented at full speed and they have long been the favourite litigation of lawyers in Europe. By the same token, the Law of the Association should not be treated as if it only deals with the issue of free movement of workers. Turkish self-employed persons, Turkish service providers and Turkish service recipients have been accorded rights by the Law of the Association. Therefore, a transport company owner who is subject to work permit, a lorry driver who is required to obtain visa, a Turkish student who has to pay higher tuition fee to a European university than her Romanian friend and Turkish tourists who have to pay dues and spend hours in the queues at the consulates do enjoy certain rights under the Law of the Association.

Moreover, the Law of the EC-Turkey Association is such a useful tool that by virtue of the aim of the Association Agreement and of the links established with the EC

Treaty, any development in the case law serves a point of reference for the ECJ itself and for the lawyers. Most importantly, Turkish nationals benefit from the EU legislators' and the Court's new and positive approach to EU nationals. Judicial guarantees and the secondary EU law are applied to Turkish nationals and accordingly they reach the same standarts as EU nationals.

In order to drive maximum benefit from the Law of the EC-Turkey Association and of the ECJ's judgments, what the legislators of the Association have in their minds or what the ECJ has put forth should be taken as legal matters and they should be handled according to the jurists' understanding. In other words, legal matters should be dealt with from a jurist's point of view and the possibilities of extension to Turkish nationals of the principles in EU law should be constantly explored. Otherwise, legal matters will be politicized and the long-term development of Turkish nationals' rights will be hampered. For this reason, even though it is useful to bring public pressure on EU law makers to adopt the necessary measures to implement the Association Agreement and the decisions of both the ECJ and of the Association Council, lack of legal understanding will mean that the Member States will defend the status quo, circumvent the rules of law and devise new methods to go around the ECJ judgments.

Consequently, the findings of the present dissertation verify that the Law of the EC-Turkey Association and the judgments of the ECJ need to be closely studied. The Law of the Association will be highly beneficial and of utmost importance for Turkey until she becomes a Member in the EU. In addition, everyone would agree that the Association Agreement, Additional Protocol and the Decisions of the Association Council can not be replaced with a more favourable and consolidated piece of international agreement owing to the reason that the EU side has long been regretful about including the term 'accession' to an agreement with Turkey and that Turkey should recall the old adage that a bird in the hand is worth two in the bush.

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