THE CONCEPT OF FREEDOM OF ESTABLISHMENT IN RELATION WITH TURKEY AND EUROPEAN ECONOMIC COMMUNITY

1. Introduction

Historical Background of Turkey - EEC relations

As prominent French Historian and Turcologist, Prof. Dr. Jean-Paul Roux said "Turks always aspired Europe like aspiring a beautiful woman, sometimes passionately, sometimes with disappointments and sometimes with grudge". As a matter of course, author's purpose was to define Ottoman society's frame of mind in a particular time period. However when taking account of Turkey-EC relationship, it can be said that striking feature of today coincides in this respect with the past.

Unfortunately, Turks have a somewhat negative image in the European Union, not because of any abnormal behaviour but because they reflect, or seem to reflect, negative western image of Islam. However, Turkey's negative image is overdrawn and today represents something of a throwback to certain realities of earlier decades. With each new generation, the Turks living in Europe are gradually becoming better educated, more professionally skilled, and more integrated into European life. Furthermore, Turks are developing a clear European identity. While they still have a long way to go and mostly live in close-knit communities in a few key cities, by objective measures the profile of the Turkish reality in Europe is on the rise and encouraging. [1]

In consideration of the longstanding relationship with EC-Turkey, there is always doubt about the sincerity and the aspiration of the Western European countries concerning with economic and political integration of Turkey mainly due to the fact mentioned above and some other fears such as geographical location and man-power emigration . In the process of Turkish integration, the approach of the member state countries to Turkey is generally based on maintaining their relations in minimum level with Turkey to secure their national interest. On the contrary from the Turkish perspective, the integration process was regarded as an important instrument to reach the ultimate goal of Turkish modernization project which had been successfully envisioned and implemented by the founder of Turkish Republic, Mustafa Kemal Ataturk.[2]

The first contractual relationship with then European Economic Community (EEC) dates back to 1963, with the signature of the association agreement. The subsequent decades witnessed a series of ups and downs in EEC – Turkey Relations, mainly as a result of Turkey's domestic

---

[1] Graham Fuller, *New Turkish Republic: Turkey As a Pivotal State in the Muslim World*, (United States Institute of Peace Press, Washington DC 2008) Page 148

[2] Prof. Dr. Enver Bozkurt , Associate Prof. Dr. Mehmet Özcan and Prof. Dr. Arif Koktas, *European Union Law*, (4th Edn, Asil Yayın Dagitim Ltd. Sti.,Ankara 2008)p.368

turmoil. However, even the most difficult moments, Turkey never abandoned its rhetorical goal of moving closer to the Community.[3] Ultimately, In 2004, the European Union delivered the historical and long awaited decision to open the formal accession negotiations with Turkey.[4]

In October 2005, the European Union started the accession negotiation with Turkey. This was a ground breaking event of the long history of the EU-Turkey relations. A close, special relationship is now being built in a constructive manner and with the long-term prospect of EU membership. Yet, the EU has exclusively underlined an 'open ended' nature of accession negotiations, 'outcomes of which cannot be guaranteed beforehand. 'Therefore question of as to whether EU membership will be the final outcome of the negotiations for Turkey still unclear thus remains to be seen in the foreseeable future.[5]

EU-Turkey relations have experienced serious difficulties resulting from the essential incompatibility of both parties' policies with the declared objectives of their association agreement. In particular, it seems unlikely that the ultimate objective of the Association agreement – Turkish accession to the EU will be achieved in the foreseeable future. On the one hand, this is because the EU has always considered Turkey to be an awkward candidate for EU membership: Turkey is different, problematic and thus, by the implication, a more difficult case than any of the other applicants. The EU's scepticism towards the prospect of Turkish membership can be seen in its policies, which have basically sought to maintain and strengthen the existing association agreement. However, this has been inadequate to prepare Turkey for EU membership.[6] Despite of mentioned difficulties, customs union which is envisaged by the Association Agreement was established on 31 December 1995.[7] Therefore one of the freedoms of The Community currently functions between Turkey and EU countries. This development must be deemed as an important signal for future integration of Turkey to EU.

Association relationship between Turkey and EEC has been also developed by the various decisions of EC-Turkey Association Council which was established as a superior organ of association relation. Certain rights had been granted to Turkish nationals however, these rights were not properly implemented by the member states. This controversial situation is commonly perceived as an unfair and hypocritical by Turkish academicians and also by Turkish public opinion. In this sense, European Court of Justice (Herein after ECJ) played an active and important role to interpret and to improve the rights granted to Turkish nationals by its own decisions.

Firstly, in 1987 legal struggle of Turkish Nationals had become a current issue by decision of *Meryem Demirel Case* and continued with the improvement of subsequent 37 decisions which

---

[3] Susannah Verney & KostasIfantis, *Turkey's road to European Union Membership : National Identity and Political Change* (Routledge,Newyork,2007) p.21

[4] Kerim Yildiz& Mark Muller, *The European Union and Turkish Accession : Human rights and the Kurds*, (Pluto Press,London) p.1

[5] Harun Arikan, *Turkey and The EU* : *An awkward candidate for EU membership?* (2nd edn, Ashgate, Hampshire, April 2006) p.1

[6] Ibid Page 2

[7] Decision 1/96 of the EC-Turkey Customs Cooperation Committee laying down detailed rules for the application of Decision 1/95" (O.J. 1996 L 200/14)

came until today and which appears as a notable judicial precedent in this particular legal field. The process had been initiated by European Court of Justice recognizing that agreement establishing association between Turkey and EEC is integral part of the Acquis Communautaire and ECJ also considered itself as an authorized body for the disputes concerned. Subsequently, ECJ also considered decisions of EC-Turkey Association Council as integral part of the Acquis Communautaire. In this process, the most significant development was recognition of the *direct applicability* in relation to the content of the Additional Protocol and decisions of EC-Turkey Association Council.[8]

When considering the context of the Association Agreement, three main titles such as rights granted to Turkish workers in the framework of the decisions of EC-Turkey Association Council, freedom to provide services and freedom of establishment attract the attention of the media and public opinion in Turkey. Additionally, 37 decisions of ECJ is relevant with this mentioned fields.

In this study, the freedom of establishment and the disputes arises from the restrictions in relation to freedom of establishment towards Turkish nationals by EC member states will be evaluated under the legal scope of Association Agreement and annexed protocol. The study will be also touched briefly on the subject of freedom of establishment and its perception in European Community which constitutes necessity to comprehend the concept of freedom of establishment in real terms.

2. Concept of Establishment

Article 13 of the Ankara agreement lays down that "*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."* Therefore, the agreement underlines the guidance of above mentioned articles of EEC treaty in regard to the freedom of establishment. In this sense, the definition of the concept of the establishment under the EC and EU treaties also requires to be comprehended entirely in order to construe the concept which set out by the Ankara Agreement.

2.1 The Right of Establishment Under EC Treaty

The right of establishment is described by the ECJ as 'Fundamental Community rights'. The principle on which these rights are based is the principle of non-discrimination on ground of nationality, whether arising from legislation, regulation or administrative practice. The principle is binding on all competent authorities as well as legally recognized professional bodies.[9]

The principle of freedom of establishment and all the rights connected to it constitute in substance a possibility for individuals (natural persons as nationals of a Member State) and companies (within the Community), without any distinction as regards nationality or residence,

---

[8] Prof. Dr. Haluk Kabaalioglu & Dr. Rolf Gutman,*The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union* : *The Trend developed out of Standstill Provision Within Association Agreement* (December 2007,Istanbul), *p.3*

[9] Josephine Steiner & Lorna Woods, *Textbook on EC LAW*, (7th edition, BlackStone Press, London,2000) P.329

to start up with economic activity in any Member State in a stable and continuous way. This applies also to the state owned companies. The freedom of establishment, one of those freedom-principles is provided in the EU Treaty (Articles 43-48, ex 52-58). The freedom itself is a fundamental (right), effective and very broadly interpreted principle. Its restrictions, on the other hand, must be interpreted narrowly and literally. This freedom should be guaranteed as much for companies as it is guaranteed to physical persons.[10] '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' (Article 48(1) (ex 58(2)) EC). 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 (Article 48(1) (ex 45(1)) EC) The Community nationals may also buy shares of companies in all member States. It may be mentioned too that the Treaty has changed not anything in the system of law of private property of Member States (Article 295 (ex 222))

2.2 Distinguishing Between Right of Establishment and Right to Provide Services

The criteria for distinguishing between self-employed activities and employment in the labour market are not very clear. The courts have repeatedly established this and insisted on publication of clear criteria. Sometimes they specified that the bearing of entrepreneurial risks and the actual management of the enterprise could be central criteria.[11]

Title III of the EC Treaty includes chapter 2 on the right of establishment, followed by chapter 3 on services. Commentators frequently consider these to be two aspects of the same right, namely, the right to conduct freely commercial, financial or professional activities throughout the Community, and find the line of demarcation between the two difficult to discern. There is a great deal of truth to this observation. Implementing legislation and interpretative case law often apply to the exercise of both rights, without any distinction drawn between them. However, in some instances, a particular aspect of the exercise of a right, or a particular limit on a right, is specific either to the provision of services or to establishment. Accordingly, one should try to keep the two Treaty rights distinct.[12]

Articles 43 and 49 of the EU treaty may appear to overlap, but in separating their application a rule of thumb may be employed; art 43 relates to the freedom to establishment. This entails the 'actual pursuit of an economic activity through a fixed establishment in another Members State

---

[10] *Dr. Markku Kiikeri,'The Freedom of Establishment in the European Union',(2002),Report to the Finish Ministry of Trade and Industry, p.29* http://www.helsinki.fi/publaw/opiskelu/Eurooppaoikeus/Sijoittautumistutkimus.englanti.Kiikeri.pdf accessed 01 February 2009

[11] Anita Bocker & Elspeth Guild*, Implementation of the Europe Agreements in France, Germany, The Netherlands and the UK: movement of Persons* (Platinium Publishing, London 2002) p.67

[12] George A. Bermann, Roger J. Goebel, William J. Davey and Eleanor M. Fox, *Cases and Materials On European Union Law,* (2nd edition, West Group Publishing Company, St. Paul 2002), P.654

for an indefinite period': *R v Secretary of State for Transport, ex parte Factortame Ltd and Others Case*[13]. According to the case of *Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano*[14], establishment requires the activity to be carried out on a 'stable and continuous basis'.

Article 49 applies where a person simply conducts professional forays into another Member State without establishing a business presence there, or, as we shall see, wishes to receive services for a Temporary period in another Members State. A community national will therefore rely on this provision when their activities are temporary will be decided by reference to 'not only the duration of the service, but also of its regularity, periodicity or continuity'. [15]

2.3 Restrictions on Freedom of Movement and Residence in EC

Directive 73/148 applies to both the right of establishment and the provision of services. The Directive abolished restrictions on the movement and residence of:

(a) Nationals of member states who are established in one member state and wish to establish in another member state or to provide services.
(b) Nationals who wish to go to another member state as the recipients of services (e.g. as tourists)
(c) Spouses and children under 21 years of nationals
(d) Relatives (both ascendant and descendant) of nationals and of spouses where dependent. [16]

Under the Directive (similar in scope to Directive 68/360 for workers), those who benefit may leave and re-enter the territory on production of the necessary identity card. Those entering for the purpose of establishment have permanent right of residence and are entitled to a five-year, automatically renewable residence permit. Directive 75/34 also applies to both establishment and the provision of services. It provides for the self-employed and their families to remain after retirement.[17]

3. Association Agreements Concluded with Non-Member States in Relation To Freedom Of Establishment

The Association Agreements concluded with non-member states must be considered when speaking about the freedom of establishment - especially those with countries in the process of accessing to the European Union. Therefore, it is worthy to give a place in this study in order to

[13] Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd and Others Case* (ECJ 19 June 1990)
[14] Case C-55/94 *Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* (ECJ 30 November 1995)
[15] Joanne Coles, *Law of the European Union*, (3rd Edition, Old Bailey Press, London, 2001) p. 190
[16] Penelope Kent, *Law of the European Union*,(3rd Edition, Pearson Education Limited, Edinburgh, 2001) p. 175, 176
[17] Ibid

comprehend the freedom of establishment in the context of Association Agreements concluded with non-member states-EC.

The agreements promote trade and harmonious economic relations so as to foster the development of prosperity in those States and facilitate their future accession. In 1998, the EU formally launched the process that should lead to its enlargement to Central and Eastern Europe. The process embraces ten central and Eastern European Countries (Herein after CEECS). Accession negotiations were opened with five of these countries (CEECs). Accession negotiations were opened with five of these countries (the Czech Republic, Estonia, Hungary, Poland and Slovenia) on 31 March 1998, and with five other countries (Romania, the Slovak Republic, Latvia, Lithuania and Bulgaria) on 15 February 2000. All these agreements have granted the right of establishment of CEEC companies, branches and agencies, including small-service companies, even sole proprietorships, and in nearly all cases also the establishment of self-employed persons.[18]

Again the provisions in the Agreements are very similar in particular as regards the Agreements with Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia. As regards the three Baltic States and Slovenia the Agreements are more different – in particular, the right to self employment is specifically aimed at companies from the parties, but then extended by a separate provision to natural persons at the end of the transitional periods. The Estonia Agreement provides for the extension of the right to the self-employed only where the individual is established although the definition of the right is "to take up economic activities as self-employed persons…".This particularity has been considered significant by some commentators.[19]

The Europe Agreements define EC and CEEC companies as companies or firms that have been set up in accordance with the laws of one of the parties to the EA in question, and whose registered office, central administration or principle place of business is located in territory of within the EC or in the other Contracting Party. Partnerships are included in this definition, because the right of establishment grants individuals the right to set up and manage companies.[20]

In most of these association agreements there exist provisions prohibiting discrimination on grounds of nationality, i.e., discrimination against nationals of those States. Those can be self-employed workers or persons setting up and managing companies (right of establishment) (in the context of freedom of establishment). Such nationals are entitled to treatment that is no

[18] Anita Bocker & Elspeth Guild, Implementation of the Europe Agreements in France, Germany, The Netherlands and the UK: movement of Persons (Platinium Publishing, London, 2002) p.1
[19] ibid page 14
[20] Andrea Ott, Kirstyn Inglis & Marescae, *Handbook on European enlargement : a commentary on the enlargement process* (T.M.C Asser instituut, The Hague 2002) p. 468

less favourable than that accorded to companies and nationals of the Member States.[21] This applies also to companies from those countries. The right to entry and residence is also included.[22]

In some recent decisions the Court has maintained (and confirmed) that the nationals from those countries having the association agreement with the Community may invoke the right to free establishment in national courts (direct applicability)[23]. In other words, those nationals are granted a right of establishment, i.e., a right to take up activities of an industrial or commercial character, activities of craftsmen, or activities of the professions, and to pursue them in a self-employed capacity, and they may enforce their right legally in the host country.

However – contrary to the "normal" establishments, the Member States may retain the right, under those agreements, to regulate rights of entry and residence of nationals of those countries, and apply certain rules of stay, work, and labour. Doing this, however, they must be sure that the domestic immigration rules must not nullify or impair the benefits granted to such nationals under the right of establishment provided for in the agreements. This right of the member States means, however, that even if the residence and entry cannot be refused on the basis of nationality, the nature and the possibilities for the business activity can be examined more *closely* in a preliminary procedure (unlike in the case of EU nationals). This concerns also the control of the purpose of the visit. Furthermore, the abuse and misuse of law can result consequences (just like for EU nationals).[24]

Hence, the right to establishment is not as unconditional as for the EU nationals. This means that the scope of the principle of proportionality and the meaning of the wording is different, and the interpretation of the rights and freedoms is different too. In the end, however, the measures taken by the national authorities must not affect the very substance of the rights of entry, stay and establishment. Furthermore, they are also protected by the fundamental rights (the right to respect for family life and the right to respect for property), which rules derive from the European Convention for the Protection of Human Rights and Fundamental Freedoms of Article 291, Article 294 and 295**.** As mentioned also in the Court's case law, any restrictions relating to the control of capital by natural or legal persons are contrary to the Article 294 (ex 221). It explicitly maintains that no national discrimination may exist for owning capital in companies of a country.[25]

---

[21] See further information, *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*, [31 December 1993] OJ L 348/3, *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, [31 December 1994]* OJ L 358

[22] See further information, Case C-37/98 *Savas v The Queen Secretary of State for the Home Department* (ECJ 11 May 2000) paragraph 60/63

[23] Case C-262/96 *Sema Sürül* and Bundesanstalt für Arbeit (ECJ 4May 1999) paragraph 60

[24] *Dr. Markku Kiikeri,'The Freedom of Establishment in the European Union',(2002),Report to the Finish Ministry of Trade and Industry, p.93* http://www.helsinki.fi/publaw/opiskelu/Eurooppaoikeus/Sijoittautumistutkimus.englanti.Kiikeri.pdf accessed 01 February 2009

[25] Ibid Page 94

Considering the subject matter, it is noteworthy to touch on some ECJ decisions concerning right of establishment in relation to Europe Agreements which were concluded by CEECs in advance of their accession to EU. Among these decisions *Glozczuk*[26], *Kondava*[27] and particularly *Barkaci* and *Malik*[28] decisions must be specified.[29]

In *Barkaci and Malik Case*[30], Mr. Barkoci and Mr. Malik applied for political asylum in the United Kingdom in 1997. They stated that they were from the Czech Republic (CEECs country), but their applications were unsuccessful. They also submitted applications in 1998 to become established in the United Kingdom under the relevant Association Agreement as a self-employed gardener (Mr. Barkoci) and a provider of domestic and commercial cleaning services (Mr Malik). The authorities chose to treat those applications as applications for initial leave to enter, even though Mr. Barkoci and Mr. Malik were already present within the territory of the United Kingdom. In regard to their plans for establishment, the authorities were not satisfied that these would be financially viable and that the activities contemplated would be carried on in a self-employed capacity, and for those reasons dismissed their applications.[31] The Court's respond to it can be seen below:

'The condition set out at the end of the first sentence of Article 59(1) of that Association Agreement must be construed as meaning that the obligation on a Czech national, prior to his departure to the host Member State, to obtain entry clearance in his country of residence, grant of which is subject to verification of substantive requirements, such as those laid down in paragraph 212 of [the United Kingdom] Immigration Rules [(House of Commons Paper 395) "the Immigration Rules"], has neither the purpose nor the effect of making it impossible or excessively difficult for Czech nationals to exercise the rights granted to them by Article 45(3) of that Agreement, provided that the competent authorities of the host Member State exercise their discretion in regard to applications for leave to enter for purposes of establishment, submitted pursuant to that Agreement at the point of entry into that State, in such a way that leave to enter can be granted to a Czech national lacking entry clearance on a basis other than that of the Immigration Rules if that person's application clearly and manifestly satisfies the same

---

[26] Case 63/99, *The Queen, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk v. Secretary of State of Department* (ECJ 27 September 2001)

[27] Case 235/99 *The Queen, ex parte Eleanora Ivanova Kondova v Secretary of State for the Home Department* (ECJ 27 September 2001)

[28] Case 257/99 Barkoci and Malik (ECJ 27 September 2001)

[29] *Associate Dr. Sanem Baykal,'*The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(December 2007,Istanbul*),Interpretion and scope of Standstill provison regulated by the additional protocol 41/1 under the context of Association Law between Turkey-EC and decisions of ECJ, p.14*

[30] See n 28

[31] *Press and Information Division of European Court of Justice,*'Judgments of the Court in Cases C-63/99, C-257/99 and C-235/99 *The Queen* v *Secretary of State for the Home Department*, ex parte *Wieslaw Gloszczuk and Elzbieta Gloszczuk*, *The Queen* v *Secretary of State for the Home Department*, ex parte *Julius Barkoci and Marcel Malik*, *The Queen* v *Secretary of State for the Home Department*, ex parte *Eleonora Ivanova Kondova*',*(27 September 2001),Press Release no:45/01, p.93* http://curia.europa.eu/en/actu/communiques/cp01/aff/cp0145en.htm accessed 01 February 2009

substantive requirements as those which would have been applied had he sought entry clearance in the Czech Republic.'[32]

And continued as:

'… without even addressing the question whether Article 59(1) of the Association Agreement allows the competent authorities of the host Member State to refuse admission to its territory for a Czech national who does not hold entry clearance, it will be sufficient to examine whether the application by the United Kingdom authorities of national immigration legislation, including the exercise of the Secretary of State [for the Home Department]'s discretion to determine whether the condition relating to possession of entry clearance may be set aside in individual instances, appears on the whole to be in accordance with the condition set out at the end of the first sentence of Article 59(1) of the Association Agreement.'[33]

It is also noteworthy to take into account of subsequent *Lili Georgieva Panayotova and Others v Minister voor Vreendelingenzaken en Integratie* case which is also referring to *Barkaci and Malik* decision in its justification.

'Articles 45(1) and 59(1) of the Association Agreement between the Communities and Bulgaria, read together, Articles 44(3) and 58(1) of the Association Agreement between the Communities and Poland, read together, and Articles 45(3) and 59(1) of the Association Agreement between the Communities and Slovakia, read together, do not in principle preclude legislation of a Member State involving a system of prior control which makes entry into the territory of that Member State with a view to establishment as a self-employed person conditional on the issue of a temporary residence permit by the diplomatic or consular services of that Member State in the country of origin of the person concerned or in the country where he is permanently resident. Such a system may legitimately make grant of that permit subject to the condition that the person concerned must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources for carrying out the activity as a self-employed person and has reasonable chances of success. The scheme applicable to such residence permits issued in advance must, however, be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings.

Those provisions of the Association Agreements must be interpreted as likewise not in principle precluding such national legislation from providing that the competent authorities of the host Member State are to reject an application for a full residence permit with a view to establishment in accordance with the Association Agreements submitted in the territory of that State when the applicant lacks the temporary residence permit thus required by that legislation.

---

[32] Case 257/99 *Barkoci and Malik* (ECJ 27 September 2001) Paragraph 4 of The Operative Part of Judgement
[33] ibid Paragraph 69

It is immaterial in this regard that the applicant claims to satisfy clearly and manifestly the necessary substantive requirements for grant of the temporary residence permit and the full residence permit with a view to such establishment or that the applicant is legally resident in the host Member State on another basis on the date of his application where it appears that the latter is incompatible with the express conditions attached to his entry into that Member State and in particular those relating to the authorized duration of the stay.'[34]

The provisions in the Europe Agreements on the establishment of self-employed persons and undertakings from the CEECs are to be understood in accordance with the definition of establishment in Article 43(1) of EU Treaty. The provision takes the form of a prohibition against discrimination and is interpreted as having direct effect in case-law of the ECJ. In accordance with the precedents of the ECJ, the right of establishment laid down in the Europe Agreements implies an ancillary right of entry and residence for nationals of the countries of Central and Eastern Europe who want to exercise industrial, commercial, craft and freelance activities in an EU member state.[35]

In *The Queen, ex parte Eleanora Ivanova Kondova v Secretary of State for the Home Department case*[36], The Court also accreted that :

It must, however, also be borne in mind that, according to settled case-law, a mere similarity in the wording of a provision of one of the Treaties establishing the Communities and of an international agreement between the Community and a non-member country is not sufficient to give to the wording of that agreement the same meaning as it has in the Treaties (see Case 270/80 Polydor and RSO Records [1982] ECR 329, paragraphs 14 to 21; Case 104/81 Kupferberg [1982] ECR 3641, paragraphs 29 to 31; Case C-312/91 Metalsa [1993] ECR I-3751, paragraphs 11 to 20).

According to that case-law, the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends, inter alia, on the aim pursued by each provision in its own particular context. A comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard (see Metalsa, cited above, paragraph 11).

---

[34] Case C-327/02 *Lili Georgieva Panayotova and Others v Minister voor Vreendelingenzaken en Integratie (ECJ 16 September 2002) Paragraph 39 Operative part 1-3*

[35] Evtimov Erik*,' The freedom of movement for workers under the Europe Agreements of the EC with Central and Eastern European countries' : Comment on the ECJ decision of 29 January 2002 - C-162/00 - Land Nordrhein Westfalen v Beate Pokrzeptowicz-Meyer',(2002), The European Legal Forum (E) 4-2002, 235 - 239 , p.3*

[36] Case 235/99 *The Queen, ex parte Eleanora Ivanova Kondova v Secretary of State for the Home Department* (ECJ 27 September 2001)

The Association Agreement is designed simply to create an appropriate framework for the Republic of Bulgaria's gradual integration into the Community, with a view to its possible accession, whereas the purpose of the Treaty is to create an internal market, establishment of which involves the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital (see Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC)). [37]

This approach of the Court is crucial for further parts of our study in order to understand the scope of freedom of establishment which grants ancillary rights such as the right of entry and residence to Turkish Citizens.

Finally, it must be borne in mind that decisions concerned do not deal with the standstill clause which will be clarified in the further part of the study. Accordingly, this additional info must not be disregarded in course of comparison between cases arise from Ankara Agreement and cases arise from Europe Agreements.

3.1 Jurisdiction of European Court of Justice Over Association Agreements Concluded by The Community with Non-Member States and The Evaluation of Decisions Related to EC-Turkey Association Council in Parallel With The Subject Matter

In the *Demirel Case*[38], the court ruled that it has jurisdiction to interpret the provisions on freedom of movement for workers contained in the Ankara Agreement and its additional protocol with reference to Community's responsibility for the due performance of the international agreements. The provision on the movement of persons will also come under scrutiny with currently five case pending before ECJ in the form of preliminary ruling from national courts.[39]

There is some argument about whether the concept of the mixed agreement is one which should be recognized in Community Law. However, there can be no doubt that the court of justice recognizes such concept and indeed has referred specifically to the Ankara Agreement as such an agreement. The essential feature of mixed agreements is that some provisions fall within the competence of the community, while others fall within the competence of the Member States. However, the court of justice is reluctant to allocate exact division of competence. Instead it emphasizes the need for common action or "close co-operation" thus requiring double common standards to be reached and uniform to be reached and uniform interpretation of provisions contained within the agreements.[40]

---

[37] Ibid paragraph 51-53

[38] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* (ECJ 30 September 1987)

[39] Kronenberger Vincent & Captain Paul Joan George*, The European Union and The International Legal Order* (1st Edition, T.M.C Asser Press, Brussels) p. 106

[40] Nicola Rogers, *A practitioners' guide to the EC-Turkey Association Agreement* , (Kluwer Law International, The Hague 2000), Page 5

How far the court can go in determining issues of interpretations in mixed agreements is a source of anguish for member states, which would rather preserve greater proportions of agreements to their exclusive jurisdiction. In *Demirel Case*[41], the German and the United Kingdom governments argued that the court did not have jurisdiction to rule on the interpretation of a provision in a mixed agreement over which the Member States had exclusive jurisdiction. Even the Commission agreed that it would be 'illogical' to refer for review by the court of justice provisions over which the member states have exclusive jurisdiction. The court side-stepped the issue by holding that the relevant provisions concerned the free movement of workers which fell within the power in conferred on the community article 310[42]

The court held in *Demirel* decision as follows:

'An agreement concluded by the council under articles 228 and 238 of the EEC treaty is, as far as the Community is concerned, an act of one of the institutions of the community within the meaning of Article 177 (1) (B), and, as from its entry into force, the provisions of such an agreement form an integral part of the community legal system; within the framework of that system the court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.

In the case of provisions in an association agreement concerning the free movement of workers, doubt cannot be cast on that jurisdiction of the court by the argument that, in case of a "mixed" agreement, its powers do not extend to provisions whereby the member states have entered into commitments in the exercise of their own powers. Since freedom of movement for workers is, by virtue of article 48 et seq. of the EEC treaty, one of the fields covered by that treaty, commitments regarding freedom of movement fall within the powers conferred on the community by article 238.

Nor can the jurisdiction of the court be called in question by virtue of the fact that in the field of freedom of movement for workers, as community law now stands, it is for the member states to lay down the rules which are necessary to give effect in their territory to the provisions of the agreement or the decisions to be adopted by the association council, in ensuring respect for commitments arising from an agreement concluded by the community institutions the member state fulfil, within the community system, an obligation in relation to the community, which has assumed responsibility for the due performance of the agreement. '[43]

In *Sevince case*[44], The Court referred to the *Demirel case* and also ruled that '*the same criteria apply in determining whether the provisions of a decision of the Council of Association can have*

[41] See n 38
[42] Ibid, Page 6
[43] See n 38
[44] Case C-192/89 *S. Z. Sevince v Staatssecretaris van Justitie (*ECJ 20 September 1990)

direct effect.'[45] And additionally The Court determined the scope of the decisions in reply to the Raad van State of the Netherlands:

'The interpretation of Decision No 2/76 of 20 December 1976 and Decision No 1/80 of 19 September 1980 of the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey falls within the scope of Article 177 of the EEC Treaty .

Article 2(1)(b) of Decision No 2/76, cited above, and Article 6(1) of Decision No 1/80, cited above, and Article 7 of Directive No 2/76 and Article 13 of Decision No 1/80 have direct effect in the Member States of the European Community'.[46]

3.2 The Content of Ankara Association Agreement With Turkey

The association Agreement with Turkey was signed in Ankara on 12 September 1963. The Ankara Agreement provided for an EC-Turkey Association Council that met regularly and evaluated the outcomes of the association. The Additional Protocol to the Association Agreement that was signed on November 23, 1970, and came into force on January 1, 1973, contained a road map for the realization of the customs union within twenty-two years.[47] It's also noteworthy to bear in mind that article 28 of the Agreement envisages possible accession to EC, article concerned lays down that:

'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.'[48]

The Ankara Agreement is divided into three Titles:

Title I sets out the principles of the agreement. Title II lays down the framework for the transitional stage of the Association. Title III contains the final provisions to the Agreement. The Additional Protocol is divided into four titles, relating to specific free movement areas. Title I relates to the free movement of goods. Title II entitled "movement of persons and services". Chapter 2 of the protocol is concerned with the right of establishment, services and transport.[49]

The study of the Association Agreement with Greece and the ensuing accession process of Greece to the EC is particularly useful for the proper understanding of the relationships between the EC/EU and Turkey. The Agreement was very much inspired by the Athens

[45] Ibid Paragraph 15
[46] Ibid Opperative Part of the Judgement 87
[47] Martin Sajdik & Micheal Schwarzinger, *European Union Enlargement : Background, Developments, Facts Central and Eastern European Policy Studies, Volume 2*, (Transaction Publishers, London 2008)p.283
[48] *Agreement Establishing an association between the European Economic Community and Turkey, [12 September 1963]* OJ L 361/3
[49] Nicola Rogers and Rick Scannell, Free *Movement Of Persons In The Enlarged European Union*, (Sweet and Max Well,London 2005) Page 326-327

Agreement and it is probably correct to say that without the Athens Agreement the Ankara Agreement would have looked very different. However compared to the Athens Agreement, its provisions were less detailed, were formulated in more general terms and most of them needed further implementation, something which, in practice, would prove to be a difficult, slow and sometimes even a painful exercise.[50]

According to the preamble of the agreement (referred to herein as Ankara Agreement), one of the objective was *"to ensure a continuous improvement in living conditions in Turkey and in the European Economic Community through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the economies of the Member States of the Community."*[51] The Ankara Agreement implied that much had to be done, through a bilateral additional protocol in particular, for the transfer from the "preparatory stage" to the "transitional stage" of the association – which was agreed in 1970.[52] Article 4 of the Ankara Agreement stress that one of the contracting parties' obligation is to "*align the economic policies of Turkey and the Community more closely in order to ensure the proper functioning of the Association and the progress of the joint measures which this requires*. "

3.3 Freedom of Establishment In the Content of Ankara Association Agreement

Unlike the association agreements concluded by Malta and Cyprus, Ankara Agreement does not merely envisage establishment of customs union, moreover the agreement refers to the free movement of workers, freedom of establishment and the freedom to provide services.[53]

Under Additional Protocol, as regards to the transitional stage of the relations with EEC, transfer from "preparatory stage" to the "transitional stage" requires a decision of EC-Turkey association council which had been envisaged under the agreement. An Additional Protocol to the Ankara Agreement was signed between Parties in 1970 (came into force in 1973) to coordinate the transitional stage.[54] As mentioned above, Title III and Chapter II of the Additional protocol is the part which concerns with the right of establishment. Under this chapter, the standstill which constitutes the core of this study exists.

Particular importance is Article 41(1) which contains a standstill provision relating to establishment and the freedom to provide services. Article 41(2) empowers the council of

---

[50] Alan Dashwood & Marc Maresceau, *Law and Practice of EU External Relations: Salient Features Of A Changing Landscape*(Cambridge University Press 2008) p.326

[51] O.J. English Special Edition, [1973] c 113/1

[52] Ibid page 326.

[53] *Associate Dr. Sanem Baykal,*'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union'*Interpretion and scope of Standstill provison regulated by the additional protocol 41/1 under the context of Association Law between Turkey-EC and decisions of ECJ,* ,(December 2007,Istanbul*), p.23*

[54] Additional Protocol to the Assoclation Agreement, 23 November 1970, (OJ EC No. C 113/17, 24.12.1973)

association to adopt rules and timetable for the progressive abolition of restrictions on freedom of establishment and the freedom to provide services.[55]

According to article 41(2) of The Additional Protocol 'The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services. The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.'[56]

On the contrary of this statement as ECJ already mentioned in *Tum and Dari Case*, 'To date, it is true, the Association Council has not adopted any measure on the basis of Article 41(2) of the Additional Protocol with a view to the actual removal by the Contracting Parties of existing restrictions on freedom of establishment, in accordance with the principles set out in Article 13 of the Association Agreement. Furthermore, it is apparent from the case-law of the Court that neither of those two provisions has direct effect (*Savas*, paragraph 45).' [57] Therefore considering lack of The Council Association decisions with regard to abolition of restrictions on freedom of establishment article 41(2) of Additional Protocol has no direct effect.

There is no express right contained within the Ankara Agreement or its Additional Protocol for Turkish nationals to establish in the territory of the Member States. Whilst Article 13 and 14 of the Ankara Agreement make reference to Treaty provisions in order to "guide" Contracting Parties on the abolition of restrictions in those areas, neither provision creates any directly effective right.[58] In *Demirel Case*[59] the court explicitly stated that "examination of Article 12 of the agreement and article 36 of the protocol therefore reveals that they essentially serve to set out a program and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers"[60]

The Court recalled its two stage analysis of direct effect of agreements. Referring to its reasoning in *Demirel case* it first held that Article 13 of the Association Agreement, by analogy with article 12 concerning free movement of workers, did not do more than lay down in general

---

[55] Nicola Rogers and Rick Scannell, *Free Movement Of Persons In The Enlarged European Union*, (Sweet and Max Well,London 2005) Page 327

[56] Additional Protocol to the Assoclation Agreement, 23 November 1970, (OJ EC No. C 113/17, 24.12.1973) Article 41(2)

[57] Case C-16/05 *Veli Tum & Mehmet Dari v Secretary of State for the Home Department* (ECJ 20 September 2007) Paragraph 62

[58] See n 55

[59] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* (ECJ 30 September 1987),

[60] Ibid paragraph 23

terms, with reference to the corresponding provisions of the EC Treaty, the principle of eliminating restrictions on freedom of establishment.[61]

The category of entry to set up a business is a broad one. No particular kind of business is contemplated, and the form of the business may be as a sole trader. This broad approach to assessing self-employed or business applications has now been replaced with very detailed rules requiring minimum investment, creation of employment and so on.

EC exclusive agreements are binding on new Member States from the date of accession. In the case of EC mixed agreements and other related agreements, new Member States "undertake to accede" to them in due course in accordance with the conditions in their respective Act of accession and national constitutional procedures. New Member States must take appropriate measures where necessary to adjust their position in international ongoing process of political integration within the EU. Firstly, new Member States must accede to decisions and agreements adopted by the Representatives of the Governments of the Member States meetings within The Council.[62]

In the light of this information, new member states must be part of Ankara Agreement and its annexed protocol in order to become a member of the community. Additionally the agreement and the protocol are binding from the date of accession. In other words, the standstill provision (examined below) of additional protocol entered into force in 1st January 1973 is applicable to a member state at the time of its accession to the community.

4. The Standstill Provision

4.1 The Concept of Standstill Provision

The Community law has long recognised the concept of a standstill provision. Indeed article 53 of Rome contained such a standstill clause as a first step in the transitional period towards the progressive abolition of restrictions on establishment provided for in Article 52 of the same Treaty [Now Art. 43 EC Treaty]. Whilst national laws still had some application to the situation of those wishing to establish themselves in other Member States, the Member States were directed to ensure than those in existence at the time when the Treaty came into force. Indeed, the provision also prevents a Member State to revert back to less liberal measures then have been imposed during the transitional period by Community Law.[63]

---

[61] M. Maresceau, *Bileteral Agreements Concluded by the European Community*(The Hague: Nijhoff 2006) p.270

[62] Roman Petrov, '*The External Dimension of the Acquis Communautaire',* (02 2007, San Domenico di Fiesole), EUI Working Paper MWP No. 2007/02 p.13

[63] Nicola Rogers and Rick Scannell, Free Movement Of Persons In The Enlarged European Union, (Sweet and Max Well,London 2005) Page 356

The standstill provision contained in Article 41(1) of the additional Protocol to the Ankara Agreement is very similarly worded to Article 53 of the Treaty of Rome. Considering wording of the provisions concerned, as a comparison:

Article 53 of the Rome Treaty states:

Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty.

Article 41(1) of the Additional Protocol states:

The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.[64]

The Provision of additional protocol has been interpreted by the ECJ in such as way as to give it same effect as Article 53.

4.2 The Standstill Provision In The Ankara Agreement

A Member State is thus prevented from imposing any new measure having the "object or effect" of making the establishment of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force for the particular Member State in question. In this sense, *Savas* decision in year 2000 and *Abatay* decision in year 2003 subsequently *Tum and Dari* decision ruled in 20 September 2007 is weighty.[65]

The pre-1973 rules however are preserved in the case of Turkish nationals because of the ruling of the European Court of Justice in the case of *Savas*. The court applied the standstill clause in article 41 of the Additional Protocol to the EC-Turkey Association Agreement, which provided that EU countries should not, after the date of the agreement, introduce new obstacles to Turkish Nationals, and these give more favourable conditions, for instance allowing switching into self-employment from visitor status. All business applications require entry clearance with the exception of Turkish nationals as mentioned above [66]

[64] Additional Protocol to the Assoclation Agreement, 23 November 1970, (OJ EC No. C 113/17, 24.12.1973)
[65] *Prof. Dr. Haluk Kabaalioglu & Dr. Rolf Gutman,'*The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union', *The Trend developed out of Standstill Provision Within Association Agreement* (December 2007,Istanbul*), p.3*
[66] Gina Clayton, *Text book on Immigration and Asylum Law*, (1st Edition, Oxford University Press, New York 2004) p.123

In the context of Ankara Agreement and EC-Turkey Council Decisions, there are two such standstill types: one relating to the conditions of access to employment and the other to the conditions of self-employment in the member states.[67]

4.3 Applicability of the Standstill Clause

The question of whether a provision of Community law has direct effect is of significance in terms of its applicability and consequences. If a provision has direct effect then all those falling within its scope are able to rely upon it before national courts and authorities without need for any transposition into domestic law. In *Savas Case,* ECJ had no difficulty in accepting the direct effect of Article 41(1) of the Additional Protocol which "confers on individuals rights which national court must safeguard". In *Abatay Case*[68], the second judgement concerning Art.41(1) of the Additional Protocol, the ECJ confirmed that the provision has direct effect resulting from the fact that the provision, as with other standstill provisions under the Ankara Agreement, lays down "...*clearly, precisely and unconditionally, unequivocal standstill clauses, which contain an obligation entered into by the contracting parties which amounts in law to a duty not to act*".[69]

In *Tum and Dari Case*, ECJ also set out that "*it is not disputed that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. "*[70] Furthermore, In *Mehmet Soysal Case*[71] concerning opinion had been once again repeated.

This conclusion is reinforced when the purpose and subject-matter of the Ankara Agreement is examined. As with other provisions in the Ankara Agreement the ECJ affirmed that the essential object of the Agreement, namely to promote the development of Turkey, trade and economic relations between the Contracting parties, lends support to the conclusion that this provision has direct effect in Community law.[72]

The Court simply repeats in this respect its old case-law in *Costa v. Enel*[73] where it had already confirmed direct effect of a similar standstill clause in the EEC Treaty. [74]

---

[67] Nicola Rogers, *A practitioners' guide to the EC-Turkey Association Agreement* , (Kluwer Law International, The Hague 2000), P.29

[68] Case C-317/01 *Eran Abatay and Others and Nadi Sahin v Bundesanstalt für Arbeit* (ECJ 21 October 2003)

[69] Nicola Rogers and Rick Scannell, Free Movement Of Persons In The Enlarged European Union, (Sweet and Max Well,London,2005) Page 357

[70] Case C-16/05 *Veli Tum & Mehmet Dari v Secretary of State for the Home Department* (ECJ 20 September 2007), Paragraph 46

[71] Case C-228/06 *Mehmet Soysal & Ibrahim Savatli v Bundesrepublik Deutschland* (ECJ 19 February 2009), Paragraph 45

[72] Nicola Rogers and Rick Scannell, Free Movement Of Persons In The Enlarged European Union, (Sweet and Max Well,London 2005) Page 327

[73] Case C-6/64 *Costa v Enel (*ECJ 15 July 1964)

[74] M. Maresceau, *Bileteral Agreements Concluded by the European Community* (The Hague: Nijhoff 2006) p.271

In *Costa v Enel Case*[75], the court in its judgement held as follows:

'In so far as the question put to the court is concerned, it prohibits the introduction of any new measure contrary to the principles of article 37(1), that is, any measure having as its object or effect a new discrimination between nationals of member states regarding the conditions in which goods are procured and marketed, by means of monopolies of bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between member states, and secondly must play an effective part in such trade'[76]

4.4 The Scope of the Standstill Clause

First-time ECJ evaluated the "standstill provision" as a subject matter under association agreement called Athens Agreement (mentioned above) which has close similarity with Ankara Agreement. In *Anastasia Peskeloglou v Bundesanstalt für Arbeit case*[77], Greek national Peskeloglou brought a law suit against federal employment office of Nuremberg, Germany in 1982. ECJ held that after entry force of the Athens agreement, subsequent restrictions on Greek nationals are inconvenient with article 45(1) of the Athens agreement.[78] As stated by the ECJ :

Article 45 (1) of the act concerning the conditions of accession of the Hellenic Republic) and the adjustments to the treaties (Official Journal 1979, L 291, p.17) must be interpreted as not permitting national provisions concerning the first grant of a work permit to a Greek national to be made more restrictive after the entry into force of that act.[79] Moreover unlike Greece, it took 14 years for Turkey to realize the presence and consequences of the standstill clause.

The ECJ has applied the provision in Art.41(1) to any measure having the object or purpose of making the establishment, and as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Member State become party to the Additional Protocol.[80]

Scope of Article 41(1) of Additional Protocol and its interpretation had been firstly examined in *Savas Case* with the decision which had been made by ECJ in 2000. On one hand, concerning issue had been attempted to be clarified with the decision of *Savas Case* and with the subsequent precedent on the other hand, academicians from Turkey and also Europe had been comprehensively entered into a discussion in the matter of the interpretation of the Court's

---

[75] Case C-6/64 *Costa v Enel (*ECJ 15 July 1964)

[76] ibid

[77] Case 77/82 *Anastasia Peskeloglou v Bundesanstalt für Arbeit* (ECJ 23 March 1983)

[78] Dr.Murat Aksoy,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(6 November 2007, Istanbul),*Report concerning the evaluation of obligatory visa implementation on Turkish Nationals under European Law ,* Economic Development Foundation Publish no:213, p.14

[79] See n 77 Paragraph 17

[80] Nicola Rogers and Rick Scannell, Free *Movement Of Persons In The Enlarged European Union*, (Sweet and Max Well,London,2005) Page 357

precedent. When considering direct applicability feature of *Savas Case*, a vast scale of academicians reached on the consensus that the decision concerned revealed by the ECJ can be deemed as a judgement which provides a right for Turkish nationals to assert their rights in national courts and national administrative bodies without any regulation requirement in national stage. The other consensus is the parties concerned cannot implement new restrictions towards Turkish nations as regards to freedom to provide services and freedom of establishment after ratification date of The Additional Protocol.[81]

It is plain from the facts of Mr. Savas that such a Turkish national does not have to be lawfully resident in the Member State in question in order to obtain the benefit of the standstill provision in Article 41(1) Mr. Savas had obtained lawful entry to the United Kingdom as a visitor for one month with his wife. By the time of his application to remain in the United Kingdom as a self-employed person he had overstayed that visa by some 11 years plainly unlawfully resident in the United Kingdom. Nevertheless, ECJ held that the standstill provision in article 41 EC meant that the UK could not apply provisions on establishment to Turkish nationals that were more restrictive than those which obtained at the time of the commencement of the Ankara Agreement. For the UK this was 1 January 1973 when the UK joined the EU. Immigration rules on self-employment were then more favourable to the individual then they are now. The Ankara agreement has a developing case law and is of importance as Turkish accession to the EU is still some way off.[82]

The scope of the standstill provision in Article 41(1) therefore extends to all Turkish nationals, whatever their legal status in the Member State in which they wish to establish themselves. No distinction in the application of the standstill clause can be made on the basis of whether the Turkish national is lawfully resident, unlawfully resident or only a prospective resident wishing to obtain entry to particular Member State. The effect of the provision is to ensure that any immigration laws or laws relating to conditions of establishment to which the Turkish national is made subject are no stricter than those that would have been applicable to a Turkish national in the same position at the time when the Additional Protocol came into force in the Member State in question. The benefit of the provision extends to both such a provision can be significant.

At the time at which the Additional Protocol came into force in a large number of the original Member States or those which joined in the 1960s and 1970s, Member States' immigration regimes were extremely liberal. In a quest to stimulate post-war economies in Western Europe, non-EU nationals who could bring skills and economic benefit to a Member State were encouraged to migrate. Domestic immigration laws and policies have undoubtedly become far harsher in the last two decades. The Turkish national who wishes to establish himself in the

---

[81] Associate Dr. Sanem Baykal,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(December 2007,Istanbul*),Interpretion and scope of Standstill provison regulated by the additional protocol 41/1 under the context of Association Law between Turkey-EC and decisions of ECJ, p.7*

[82] Gina Clayton, *Text book on Immigration and Asylum Law*, (1st Edition, Oxford University Press, New York, 2004) p.301

territory of a Member State will likely be in a better position if able to rely on the liberal immigration regimes of the 1960s and 1970s than current immigration laws.

The scope of the standstill provision extends to "any new measure" which has the object or effect of making establishment more difficult for Turkish nationals. Such measures would include the imposition of new procedures, for instance a requirement to obtain certain permits, as well as substantive provisions, such as the imposition of a new requirement to invest a certain sum of money in the Member State in question.[83]

It's noteworthy to underline that standstill provision does not grant any right upon Turkish Nationals such as a right of establishment. In *Savas Case,* The Court held that:

'Finally, according to consistent case-law, even if the 'standstill' clause set out in Article 41(1) of the Additional Protocol is not, in itself, capable of conferring on Turkish nationals – on the basis of Community legislation alone – a right of establishment or, as a corollary, a right of residence, nor a right to freedom to provide services or to enter the territory of a Member State (see Savas, paragraphs 64 and 71, third indent; Abatay and Others, paragraph 62, and Tum and Dari, paragraph 52), the fact remains that such a clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of those economic freedoms on the territory of that 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…'.[84]

5. The Decision of Veli Tum and Mehmet Dari v Secretary of State for the Home Department

Mr. Tum and Mr. Dari arrived in the United Kingdom by ship, Mr. Tum in November 2001 from Germany and Mr. Dari in October 1998 from France.[85]

As their applications for asylum were refused, their removal was ordered pursuant to the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p. 1), but that measure was not put into effect by the competent national authorities, with the result that the persons concerned are still in United Kingdom territory.[86]

As, under section 11(1) of the Immigration Act 1971, they were granted only temporary admission to the United Kingdom, which does not amount to formal clearance for entry to the United Kingdom for the purposes of its national legislation and was, moreover, subject to a

[83] See no 80 Page 358
[84] *Savas v The Queen Secretary of State for the Home Department Case* Paragraph 47
[85] Case C-16/05 *Veli Tum & Mehmet Dari v Secretary of State for the Home Department* (ECJ 20 September 2007), Paragraph 27
[86] ibid, Paragraph 28

restriction on taking employment, Mr. Tum and Mr. Dari applied for visas to enter the United Kingdom for the purposes of establishing themselves in business on their own account.[87]

To that end, the parties concerned relied on the Association Agreement, claiming in particular that, under Article 41(1) of the Additional Protocol, their applications for leave to enter the host Member State should be assessed on the basis of the national Immigration Rules applicable at the date of the entry into force of that protocol with regard to the United Kingdom, namely the rules in force on 1 January 1973.[88]

The Secretary of State, however, applying the national Immigration Rules in force at the time when Mr. Tum and Mr. Dari's applications were lodged, refused to grant those applications.[89]

Mr. Tum and Mr. Dari applied for judicial review of the decisions rejecting their applications; their cases were heard together by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), and determined in their favour by judgment of that court of 19 November 2003.That decision was essentially upheld by the judgment of the Court of Appeal (England and Wales) (Civil Division) of 24 May 2004.[90] According to those courts, the position of the two Turkish nationals was not based on deception of any kind and did not call in question the protection of a legitimate national interest such as public policy, public security or public health. Those courts also found that the parties concerned were entitled to rely upon the 'standstill' clause set out in Article 41(1) of the Additional Protocol and claim that their applications to enter the United Kingdom for the purpose of establishing themselves in business on their own account should be considered on the basis of the 1973 Immigration Rules. [91]

The Secretary of State was then given leave to appeal to the House of Lords.

Since the parties to the main proceedings disagree as to whether the 'standstill' clause set out in Article 41(1) of the Additional Protocol applies to the United Kingdom rules on first admission as regards Turkish nationals seeking to benefit from freedom of establishment in that Member State, the House of Lords decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling: 'Is Article 41(1) of the Additional Protocol … to be interpreted as prohibiting a Member State from introducing new restrictions, as from the date on which that Protocol entered into force in that Member State, on the conditions of and procedure for entry to its territory for a Turkish national seeking to establish himself in business in that Member State?'[92]

The Slovak Government and the Commission of the European Communities to a large extent support the interpretation advocated by Mr. Tum and Mr. Dari.

---

[87] Ibid, Paragraph 29
[88] Ibid, Paragraph 30
[89] Ibid, Paragraph 31
[90] Ibid, Paragraph 32
[91] Ibid, Paragraph 32
[92] Ibid, Paragraph 34

And finally, ECJ held that Article 41(1) of the Additional Protocol, which was signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, is to be interpreted as prohibiting the introduction, as from the entry into force of that protocol with regard to the Member State concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account.[93] However national court did not indicate an explicit question concerning visa restriction to ECJ, due to this fact ECJ did not precisely clarify the subject matter of visa restriction.[94] It requires to be mentioned that, up to the recent *Soysal case*, there has been no precise clarification for visa issue.

Firstly, ECJ prohibited any new restrictions on the exercise of freedom of establishment, and it also included those relating to the substantive and/or procedural conditions governing the *first admission* into the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account. Prior to Tum and Dari decision, there was no precise ruling concerning the entry conditions of the territory of member states in the context of ECJ decisions.[95]

On the other side, ECJ pointed out the deficiency of Association Council decision and affirmed by stating as follows:

To date, it is true, the Association Council has not adopted any measure on the basis of Article 41(2) of the Additional Protocol with a view to the actual removal by the Contracting Parties of existing restrictions on freedom of establishment, in accordance with the principles set out in Article 13 of the Association Agreement.[96]

Accordingly, considering the consequences of the decision of *Veli Tum & Mehmet Dari v Secretary of State for the Home Department* Case ,it's noteworthy to underline that the decision concerned is a landmark decision related to the evaluation of freedom of establishment in relation with Turkey and EEC.

5.1 Recent Developments after the Decision of The Case Veli Tum & Mehmet Dari v Secretary of State for the Home Department

[93] Ibid, Paragraph 60

[94] Dr.Murat Ugur Aksoy,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(6 November 2007, Istanbul),*Report concerning the evaluation of obligatory visa implementation on Turkish Nationals under European Law ,* Economic Development Foundation Publishment no:214, p.29

[95] *Dr. Sanem Baykal,'*The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union' Page 28

[96] Case C-16/05 *Veli Tum & Mehmet Dari v Secretary of State for the Home Department* (ECJ 20 September 2007), Paragraph 62

In course of preparation of this study, recent developments concerning freedom of establishment have been revealed particularly in United Kingdom due to the decision of European Court of Justice related to the case of *Tum and Dari v Secretary of State*. The case concerned has changed the way in which applications from Turkish nationals are considered under the Ankara Agreement. This decision made it possible for a Turkish applicant to make an application to establish a business in the UK under the provisions of the Ankara Agreement regardless of whether they are inside or outside of the UK. Applications to establish a business under the provisions of the Ankara Agreement must be considered according to the immigration rules as they existed in 1973 (The date entry into force of the Ankara Agreement for UK) . As mentioned above the Additional Protocol includes a 'stand-still' provision that has the effect of requiring Member States, including the UK, not to introduce any new restrictions on the rights of Turkish nationals to set up in business as self-employed persons after the Agreement gained effect in 1973. The 1973 rules of UK immigration law make it easier to qualify to enter the UK to establish a business than the current immigration rules.[97]

Although it does not provide the Turkish national with a directly effective right of establishment (as is enjoyed by EEA nationals), The Additional Protocol means that the Immigration Rules that should be applied to them are not those in force now but the Immigration Rules in force in 1973, which imposed much less stringent requirements on being allowed to set up in business.

When considering freedom of establishment as in many other areas, the early immigration rules were rather open and flexible. For instance, Command 1716 (UK), the instructions to immigration officers which accompanied the Commonwealth Immigrants Act 1962 stated that: [98]

'[s]elf-employed people and persons seeking to set up business on their own account should be admitted freely unless it seems unlikely that they will make a sufficient living and may therefore need to seek employment for which a voucher would ordinarily be necessary or to have recourse to public funds.' This broad approach to assessing self-employed or business applications has now been replaced with very detailed rules requiring minimum investment, creation of employment and so on.[99]

Reflection of this recent development can be also seen on the official website of Home Office of United Kingdom Border Agency Department which informs that the applications of Turkish nationals as an entrepreneur considered in another immigration category than others due to the European Community Association Agreement. The Department underlines that:

'If you are a Turkish citizen who is legally in the United Kingdom under a different immigration category, you can apply to establish yourself in business under the European Community

[97] See the details, *Veli Tum & Mehmet Dari v Secretary of State for the Home Department Case*
[98] Cina Glayton, *Textbook on Immigration and Asylum Law* (First Edition, Oxford University Press, Oxford, 2004) Page 301
[99] Ibid

Association Agreement with Turkey. We will consider your application under different rules from those for entrepreneurs.'[100]

In 1st June 2009, to the extent that UK issued *immigration directorates' instructions*[101]. At this point, it is important to touch on the title of 'Applicants who cannot take the benefit of the standstill clause' in summary. Therefore, the applicants who cannot take the benefit of the standstill clause listed as below:

Fraudulent / abusive practice
It is a well established principle, in both domestic and Community case law, that Community law (in this case the standstill provisions in the ECAA with Turkey) cannot be relied on for abusive or fraudulent ends.

Leave sought or obtained by deception
Where it can be shown that an applicant has created the opportunity to establish or apply to establish in business only by virtue of obtaining or seeking leave by deception i.e. has made false representations, has presented false documentation or failed to disclose material facts, the applicant is considered to have engaged in abuse. This includes applications to which paragraph 322(2) of the current rules applies e.g. if entry clearance in another category has been obtained by deception.

Breach of the conditions of leave to enter or remain

Applicants who breach the conditions of businessperson leave given under the ECAA should only be treated as abusive and denied the benefit of the standstill clause if it can be shown that their original application was abusive e.g. if they never had any intention to establish in business in accordance with the 1973 business provisions. Applicants who nonetheless can show that they have continued to run their business should not be denied the benefit of the standstill clause, although may be penalised in other ways e.g. for working illegally in addition to running their business.

Establishing in business whilst on temporary admission

The most generous permission given in relation to economic activity whilst on temporary admission is that to engage in employment. Permission to engage in employment whilst on temporary admission has never extended to permission to establish in business. This includes

---

[100] Home office UK Border Agency, 'Entrepreneurs Section' http://www.ukba.homeoffice.gov.uk/workingintheuk/tier1/entrepreneur/#header1 accessed 2nd June 2009

[101] Home office UK Border Agency, 'Immigration Directorates' Instruction' Chapter 6 Section 6 business applications under the Turkish-EC Association Agreement (1 June 2009) http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter3/section3/section3.pdf?view=Binary

applicants who fail to comply with the terms of their temporary admission and during that time establish in business.

Asylum/human rights claim that is subject to adverse credibility findings

Claiming protection on the basis of asylum/human rights and having that claim refused is not considered to be fraudulent per se. However, applicants who base their application on a business set up whilst in the UK by virtue of claiming asylum/human rights protection on the basis of an account which is discredited on the grounds that false representations have been made should not be allowed to take the benefit of the standstill clause.

Liability to deportation
If an applicant is, or becomes, liable to deportation s/he should be handled in accordance with domestic legislation and guidance governing deportation.

Extant deportation orders

If an extant deportation order against an applicant comes to light the case should be referred to Criminal Casework Directorate for further guidance.

Non-conducive and national security

If it becomes apparent that an applicant falls for refusal under paragraph 322(5) of HC395 refusal should proceed on this basis.[102]

5.1.1 Proof Requirement Related to Investment to Establish a Business In the Scope of the UK Immigration Rules

Considering the provisions of the immigration rules, the critical difference between the self-employment immigration category under UK law applicable to non EU and non CEEC nationals and the provisions on CEECs is that the former must have available and invest in the UK business at least 200,000£ and created new employment for at least two persons who already belong to the labour force. In the wording of the relevant rule there must also be a need for the business though in practice this is not a hurdle to the success of an application.[103]

The requirement to show the investment is needed seems to be intended to ensure that the application is a genuine one. The question is not whether the applicant can demonstrate that the UK economy needs their services. This would be a question of market forces and feasibility well beyond scope of immigration decisions. The question is whether this business can be demonstrated to need 200,000£ worth of investment. If very little investment is needed then the application will not succeed. Despite the very open wording of paragraph 200 of

[102] Ibid
[103] Anita Bocker & Elspeth Guild, *Implementation of the Europe Agreements in France, Germany, The Netherlands and the UK: movement of Persons* (Platinium Publishing, London, 2002) p.81

Immigration rules, this requirement influences the kind of business that can be set up or joined by nationals of countries outside the EEA or with EC agreements. For instance starting or joining a business as a window cleaner or street trader would be unlikely to require an investment of 200,000£.[104]

Since 1994 there have been provisions in the immigration rules to enter the UK as an investor. An investor must have at least £1 million of their own money, of which they intend to invest not less that £750,000 in the UK 'by of UK Government bonds, share capital or loan capital in active and trading UK registered companies'. The investor must also intend to make the UK their main home and be able to support themselves and dependants without recourse to public funds- a rather extraordinary requirement as of course the possessor of such wealth would not qualify for any means-tested benefit. They must also be able to support themselves without taking employment, as again this would circumvent the work permit scheme. Leave may be granted for 12 months in the first instance extendable to four years, and entry in this capacity may lead to settlement.[105] Considering the date (1994) when the immigration rules came into the force (enacted after entry into force of the Additional Protocol) , this measure must be considered as a new restriction on Turkish legal entities in the context of freedom of establishment due to its restricting character which requires considerable capital to establish a business.

It's noteworthy to emphasize that companies also fall into the scope of freedom of establishment. As also mentioned above, Article 13 of the Ankara agreement lays down that

"*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.*"

Therefore, ex articles 52 to 56 and article 58 which replaced by articles of 43-48 covers provisions concerned with freedom of establishment. In the interpretation of legal matters concerning freedom of establishment related to Turkey, provisions concerned must be taken into account in order to be 'guided' from the wording of them.

Accordingly, Article 43 states as follow:

'…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.'[106]

As regards the definition of the companies within the context of EC treaty:

[104] See N 86 page 302
[105] Ibid, Page 303
[106] Article 43 of 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.'[107]

Accordingly, the content of these provisions also extensively applies to the evaluation of freedom of establishment in relation to Turkey. In this sense, restricting measures implemented on Turkish legal entities are inconvenient in the terms of standstill provision.

5.1.2 Guler Kasmaz and Gurbuz Sanatci Case

In consideration of the current restricting measures related to right of establishment in the legislation of the member states, legal remedies become apparent for Turkish nationals.

As a matter of fact, the main important change came after the *Tum and Dari v Secretary of State Case* in the area of immigration category of Turkish entrepreneurs, the case concerned can be regarded as landmark decision but it is also noteworthy to clarify the recent Gurbuz Sanatci's Case to British Consulate and Guler Kasmaz cases which remained in national level of United Kingdom.

5.1.2.1 Guler Kasmaz Case

As regards Guler Kasmaz Case, Kasmaz who earlier resided in Britain, applied for a residence permit under the Ankara Agreement, which allows Turkish citizens conducting business in European Union to acquire residence permits. Her application was rejected by the UK Home Office, which also decided to expel Kasmaz. The businesswoman then applied to the British Consulate General in Istanbul, which said Kasmaz would fall under the category of an "investor's visa," which it does not grant as investors and have to prove possession of 200,000 pounds in resources for investing in the UK, a requirement that does not normally apply to Turkish nationals under the Ankara Agreement.

Deputy of Guler Kasmaz explained that the consulate general opted to refuse to issue Kasmaz an investor's visa, treating it as a normal application. The law firm then filed a lawsuit against the consulate general at a court in Britain, which ruled that the officers of the consulate general had made an inaccurate evaluation. The consulate general then reviewed the case and issued a

[107] Article 48 of EC Treaty

one-year residence permit, making Kasmaz the first person to be granted a permit after being expelled from Britain[108]

Significant feature of *Kasmaz Case* shows itself by abolishing restriction of 200,000 pounds in order to benefit from status of entrepreneur which was not necessary prior 1973 considering immigration law of UK. Despite the fact that capital requirement for setting up business has never been brought to The ECJ, as can be seen, government of UK is admitted to make arrangement by itself in order to abolish incompatible restrictions due to the standstill provision and its direct effect character which is mentioned above.

5.1.2.2 Gurbuz Sanatci Case

Last year, the British Consulate General in Istanbul accepted an application from Gurbuz Sanatci, requesting a work and residence permit. This was the first time British authorities in Turkey accepted such an application filed from within Turkey -- as based on rights granted to Turkish citizens via the additional protocol and in line with a verdict of the European Court of Justice[109]

The official, however, warned that the fact that the British Consulate General in Istanbul accepted Sanatci's application should not be considered a guarantee that he will be granted residence and work permits.

Applicants who wish to enter or remain in Britain as self-employed persons under the provisions of the Ankara Agreement are required to have a genuine intention to establish a business in Britain, provide a detailed breakdown of setup costs of the intended business in Britain and possess sufficient funds to establish and run the business. Consulate also notified that an applicant can be refused a visa under the agreement if the immigration authorities feel that approving the applicant's request could lead to public security or health risks.[110]

According to the recent news on one of the most prominent Turkish Newspaper Hurriyet in 1st August of 2009 (after almost 2 years), Sanatci possessed residence permit despite of the refusal from the British Consulate. Hereupon, Sanatci filed a case against Home Office in UK and had been granted to a residence permit.[111]

Importance of Gurbuz Sanatci Case derives from its feature of being first person who is granted to residence permit concerning right of establishment without entry to UK by applying from Turkey.

---

[108] Today's Zaman, 'News Diplomacy: Bussinesswoman gives UK residence permit under 1963 deal' (3rd June 2009) <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=177063> accessed (5th June 2009)

[109] http://en.timeturk.com/businesswoman-given-uk-residence-permit-under-1963-deal--20714-haberi.html

[110] Today's Zaman, 'News Diplomacy: Turkish Business People closer to free access to UK' (21th May 2008) <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=142480> accessed (5th June 2009)

[111] Hurriyet: 'Economy : UK granted Residence and Work Permit' (1st August 2009) <http://arama.hurriyet.com.tr/arsivnews.aspx?id=12192242> accessed (2nd August 2009)

6. RESTRICTIONS ON TURKISH NATIONALS IN RELATION TO FREEDOM OF ESTABLISHMENT

6.1 Visa Restrictions on Turkish Nationals

In the course of preparation of this study, EU has just decided to lift the visa barriers towards Western Balkan Countries.[112] Unlike Western Balkan Countries, Turkey is still in the list of council regulation laying down the nationals must be in possession of visas when crossing the external borders of EU.[113] The earlier regulations of the single member states were according to Amsterdam contract replaced by a regulation applying to all member states. Following the regulation 509/2001/EC Turkish nationals have to possess visa. This regulation does not provide an exception for Turkish nationals in the context of standstill clauses.[114]

Before evaluation of the status of Turkish nationals, it requires necessity to touch on the status of Central and East European Country nationals under The Europe Agreements in order to comprehend the subject matter by analogy with other association agreements. As already mentioned, the main difference between Ankara Agreement and Europe Agreements is the standstill clause which is lacking in Europe Agreements regarding freedom of Establishment.

Under Europe agreements member states can have laws on visas/entry clearances for CEES nationals who seek to be self-employed these can only apply where:

1. The individual has entered the territory unlawfully or remained unlawfully;

2. The individual arrives at the border with an application for entry as a self-employment person which does not satify the legitimate requirements of the state to verify that he or she will genuinely be taking up self-employment and has sufficient financial resources to do so.

In other words, Member States cannot apply a blanket visa/entry clearance requirement of CEEC nationals seeking to be self-employed in member states. They must accept applications to change status from persons lawfully within the territory and they must entertain applications made at the border by CEEC nationals without visa/entry clearance for admission as self-employed persons.[115]

---

[112] Elitsa Vucheva, 'Macedonia, Serbia and Montenegro offered EU visa-free travel' (Journal of EU Observer) (15th June 2009) <http://www.euobserver.com/9/28515> accessed 15th June 2009

[113] *See* Council Regulation (EC) 1932/2006 of 21 December 2006 amending regulation (EC) No 539/2001 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. [2003] OJ L29/10

[114] Dr. Rolf Gutmann, 'Standstill as a new form of movement in the association EEC-Turkey : Article regarding European and German Immigration Law' [2009] <http://www.migrationsrecht.net/component/option,com_docman/Itemid,125/task,doc_download/gid,1004/ accessed 01 July 2009

[115] Anita Bocker & Elspeth Guild, Implementation *of the Europe Agreements in France, Germany, The Neherlands and the UK: movement of Persons* (Platinium Publishing, London, 2002) p.23

Turkish Nationals aim to obtain entry to particular Member State in order to establish a business encounters visa restrictions. Thus in our study, visa barriers on Turkish nationals must be regarded as an essential obstacle in the context of freedom of establishment. Considering this fact, the issue in question requires to be mentioned in this study.

As regards to Turkish nationals, a Turkish businessman is currently granted a 90-day visa if his application is approved by a country in the Schengen area, in which systematic border controls are removed between participant countries. Prof Dr. Haluk Kabaalioglu, the dean of the faculty of law at Yeditepe University and also the president of the Turkish Universities Association in European Community Studies, argued that EU countries are afraid of possible public pressure in the event that they completely lift visa procedures for Turkish nationals since every year thousands of illegal immigrants are deported from their territories, even if a vast majority of them are not Turkish citizens and actually come from North Africa and the Middle East.[116]

It is worthy to note that there is a particular attention-grabbing argument increasing day by day in regard to abolishment of the visa barriers for Turkish businessmen under the association council decisions. Under Article 32 of decision numbered 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, it is asserted that the article laying down the competition rules which maintain the proper functioning of the Customs union must be interpreted broadly.[117] The article concerned states as follows:

'The following shall be prohibited as incompatible with the proper functioning of the Customs Union, in so far as they may affect trade between the Community and Turkey:
all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:

(d) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'*[118]

Under this provision, it is argued that the current picture such as visa restrictions implemented on Turkish business results in unfair competition due to the fact that EU citizens such as businessmen and industrialists travel without any visa requirement to Turkey while Turks are incapable of travelling to EU countries without visa possession. As an example under the terms of the decision establishing customs union, Turkish merchant are capable of sending its

[116] Today's Zaman, 'Bussiness National: Visa-free path to the EU still not wide open for Turks' (22nd February 2009) <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=167653> accessed (15th May 2009) Paragraph 7

[117] See further information *Dr. Sanem Baykal,*'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union' Page 21

[118] Article 32 of Decision No 1/95 Of The EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (O.J. 96/142/EC)

products to EU countries meanwhile they are incapable of presenting and follow-up its product due to the visa restrictions.[119] As regards to freedom of establishment, restrictions as capital requirements to establish a business or visa restrictions in member states countries which prevents the proper functioning of the Customs Union can be also argued as an inconvenient situation under the terms of Article 32.

6.2 Status of Turkish Nationals Within The Context Of German Aliens Act of 1965

When considering historical trend of member states with respect to the visa implementation on Turkish nationals, Germany can be considered as heading state. Federal Republic of Germany sent diplomatic note to Turkey in 4th July 1987, noting the annulment of German-Turkish visa agreement of 1953 (Rundschreiben des Bundesministers des Inneren Zur Aughebung des Gichtvermerkzwangs Gegenüber der Türkei). Germany relied on article 7 of European Agreement on Regulations governing the movement of persons between member states of the council of Europe[120] which states as follow:

'…Each Contracting Party reserves the option, on grounds relating to *ordre public*, security or public health, to delay the entry into force of this Agreement or order the temporary suspension thereof in respect of all or some of the other Parties, except insofar as the provisions of Article 5 are concerned.'[121] Hereupon, Germany's implementation of visa requirement had been also followed by other member states. Considering this fact, Turkey faces a patchy structure regarding the visa applications in a large number of Member States. At least the following countries, which were parties to the agreement concerning free movement of persons between the Member States of the Council of Europe concluded in 1957, are affected: Belgium, Germany, France, Greece, Italy, Luxembourg, Netherland, Portugal and Spain. The United Kingdom is also affected by the standstill clause even it was not a party of the agreement.[122]

The need to obtain a visa before entering Germany was governed, at the time when the Additional Protocol came into force by Article 5 Paragraph 1 of DVAuslG provisions for implementation of the Aliens Act of 10.09.1965 in the version of 13.09.1972. According to the Act, Turkish tourists were allowed to stay for 2 months without residence permit and as regards to truck drivers, it was for 3 months. Apart from this, longer residence was only possible for the

---

[119] *Prof. Dr. Haluk Kabaalioglu & Dr. Rolf Gutman,*'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(December 2007,Istanbul*),The Trend developed out of Standstill Provision Within Association Agreement p.7*

[120] Dr.Murat Ugur Aksoy,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(6 November 2007, Istanbul),*Report concerning the evaluation of obligatory visa implementation on Turkish Nationals under European Law ,* Economic Development Foundation Publishment no:214, p.6

[121] European Agreement on Regulations governing the movement of persons between member states of the council of Europe, CETS No:025 (entered into force 01.01.1958) , Article 7

[122] Dr. Klaus Dienelt, 'Effects of the Soysal decision by the European Court of Justice on the visa process for Turkish citizens in Germany' [22 July 2009] <http://www.migrationsrecht.net/european-immigration-migration-law/1390-soysal-decision-european-court-justice.html> accessed 1st June 2009, Paragraph 4

purpose of long duration vacations and medical treatments[123]. According to the list annexed to the statute (Turkey was also in the list), sportsmen, artists and scientists were allowed to stay for 2 months in Germany without residence permit. However, after 2 months of stay the residence permit was required to be possessed from the government.[124]

As regards to freedom of establishment, since additional protocol came into force, trading opportunities have been deteriorated for foreigners within the framework of German Aliens Act of 1965 (Aufenth.G&21). However considering second sentence of article 2 (1), permission from the authorities for setting up a self-employed business herewith residence permit was in foreigner department's discretion. Herein, the criteria were closely related to foreigner's adequate orientation to the German economic environment. Consequently considering the time at issue, as compared to today, there was no any condition requiring an orientation to German living conditions or proficiency in German language. On that date, it was sufficient for a foreigner to have basic knowledge concerning the business intended to be established and adequate language ability in German language to enter into relations with German authorities in the field of the business.[125] Therefore, current version of German Aliens Act comparing with previous act of 1965, it contains aggravating restrictions and conditions on Turkish nationals wishing to establish a business. The current Act imposes new conditions such as condition of having proficiency in language or cultural orientation to the country. In that case considering relevant decisions of ECJ, German Aliens Act of 1965 must be implemented to Turkish nationals by excluding current restrictions.

However, according to relevant provisions of the statute regulating implementation of the German Aliens Act of 1965 (Article 5(1) Nr.1, Herein after DVAusIG) possession of visa was obligatory in regard to freedom of establishment for Turkish nationals. Turkish citizens, who, according to the positive list, were in principle exempt from the need to obtain a visa, only needed a visa before entry pursuant to 5 Paragraph 1 no. 1 DVAuslG 1965 when they wished to take up employment within federal territory. Employment, in this regard, was considered as any self-employed activity or employment, designed to obtain an income or for which a wage was agreed or was expected, depending on the circumstances.

But as mentioned above, visa was not required for other purposes. For other visits, there was, without time limits, basically no obligation to obtain a visa, as this was only introduced by the 11th amendment regulation to DVAuslG from 01.07.1980 for Turkish citizens. By the same token, the obligation to obtain a visa could come into force on 05.10.1980 because of the

---

[123] *See Further information* Von Volker Westphal & Edgar Stoppa, 'EuGH zur visumfreien Einreise Von Turken' (16 October 2007) (Report Concerning Foreigners and European Law), Nr. 16 <http://www.westphal-stoppa.de/O-Report/16ReportOktober2007.pdf> accessed (15th May 2009)

[124] Prof. Dr. Klaus Dienelt, *Prof. Dr. Haluk Kabaalioglu and Dr. Murat Ugur Aksoy ,*'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(14 March 2008 Istanbul*),The Restriction on Turkish Nationals In Respect of Freedom of Travel p.14*

[125] Dr.Murat Ugur Aksoy,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(6 November 2007, Istanbul),*Report concerning the evaluation of obligatory visa implementation on Turkish Nationals under European Law ,* Economic Development Foundation Publishment no:214, p.28

withdrawal of the German-Turkish visa agreement of 1953 (Rundschreiben des Bundesministers des Inneren Zur Aughebung des Gichtvermerkzwangs Gegenüber der Türkei).

The general restriction on visits without a visa to a period of three months was likewise introduced at a later date, namely by the 14th amendment regulation to DVAuslG of 13.12.1982 with effect from 18.12.1982; it thus also does not apply to Turkish citizens, who are able to refer to the standstill clause. If a visa was only to be obtained before entry when taking up employment, it follows from § 1 Paragraph 2 nos. 1 to 4 DVAuslG 1965, that certain purposes were exempt not only from the visa process, but altogether from the requirement to obtain a residence permit. This means that after entry, the visit was lawful without obtaining a residence permit. According to these rules, Turkish citizens, who were holders of national passports, did not need a residence permit,

"1. if they do not stay for longer than three months within the area of application of the aliens act and do not wish to take up employment,

2. if they stay in the service of a service provider not based in the area of application of the aliens act for the purpose, by its very nature, of a temporary service as an employee within the area of application of the aliens act, so long as the length of the stay does not exceed two months. The exemption does not apply to foreigners who wish to take up an itinerant trade with the area of application of the aliens act (Article 55 of trade regulations),

3. if they while maintaining their usual stay abroad, wish to become involved, within the area of application of the aliens act, in lectures or presentations of an artistic, scientific or sporting nature, so long as the length of the stay does not exceed two months,

4. if they holders of seaman's record books, which have been issued by the authorities within the Federal Republic of Germany, so long as they only stay to exercise or in connection with their activity as crew members of ships within the area of application of the aliens act."

For the purposes of tourism, this means the following: After entry, a Turkish citizen needed a residence permit, if he/she wished to stay in Germany for longer than three months or to take up employment. Should a Turkish citizen have intended to stay for more than three months, entry for this without a visa was possible, however, after entry, a residence permit needed to be obtained, as the exemption situation outlined in Article 1 Paragraph 2 no. 1 DVAuslG 1965 only applied for scheduled stays of up to three months. [126]

In this regard, improper action of the states disregarding relevant provisions mentioned above may cause compensation liability. Due to this fact, Federal State of Germany, Bavaria

[126] Dr. Klaus Dienelt, 'Effects of the Soysal decision by the European Court of Justice on the visa process for Turkish citizens in Germany' [22 July 2009] <http://www.migrationsrecht.net/european-immigration-migration-law/1390-soysal-decision-european-court-justice.html> accessed 1st June 2009

temporarily abolished the visa requirement for Turkish nationals which are within the scope of the provisions concerned.

In this sense, it's important to emphasize on the recent *Soysal Case* and its related consequences concerning freedom to provide service. The ECJ's *Soysal Case* ruling constitutes one of the milestone decisions in terms of its consequences. The current ECJ decision arose because of changes to German law requiring Turkish truck drivers resident in Turkey to obtain visas in order to drive their vehicles on German roads – even though no such obligation existed on the date on which the relevant protocol to the association agreement entered into force.[127] The case concerned obligated Germany to remove visa restrictions on a large scale towards Turkish nationals aim to provide services. Accordingly German government amended its legislation related to visa regulations in accordance to the German Aliens Act of 1965 as mentioned follow:

'Some specific professional groups are enlisted and two pre-conditions are required: 1) Those Turkish nationals should preserve their usual place of residence in Turkey. 2) The maximum duration of stay in Germany with the aim to provide services should not exceed two months. In this context, Turkish nationals who belong to the professional groups specified below are exempt from obtaining a visa to travel:

1) Those who are employed by a Turkish company established in Turkey and who travel to Germany with the aim to provide services for a temporary period: a) driver personnel and ship/plane crew members engaged in the international transportation of goods and passengers, b) maintenance workers.

2) Those who will travel with the aim to carry out activities of a commercial character: a) Those who will make a presentation or performance that is of great artistic value (internationally recognized artists or groups of artists whose performances are distinguished from their counterparts.) b) Those who will make a presentation that is of great scientific value or, c) Those professional sportsmen who predominantly earn their living from this profession'.[128]

It's also noteworthy to mention that in advance of *Soysal Case,* there were attempts to amend visa regulations in Germany. The ministry of internal affairs of Federal State of Germany (Bundesland), Bavaria issued a circular letter (Rundschreiben vom 10.08.2001 |A2-2082.10-210/F) referring Savas Decision of 11 May 2001 in 10 August 2001 due to institutionalized precedent and upcoming cases arises from the provision 41(1) of Additional Protocol stating '*The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.* Interior Minister of Bavaria expressed clearly that under the circular letter concerned Turkish service providers

[127] *See* Case C-228/06 *Mehmet Soysal & Ibrahim Savatli v Bundesrepublik Deutschland* (ECJ 19 February 2009)

[128] Ceren Mutus, 'Germany's Visa "Exemption Application: A test of the EU's Sincerity' (Article of Center for European Studies Turkish International Strategic Research Organization or USAK, ' (21st July 2009) <http://www.hurriyetdailynews.com/n.php?n=germanys-visa-exemption-a-test-of-the-eus-sincerity-2009-07-13 > accessed (22nd July 2009) Paragraph 6

particularly Truck drivers have right of entry without visa requirement and right of stay for 2 months. Hereupon, German federal interior ministry had been published a new circular letter as a respond to Bavaria's Circular letter and after a month Bavaria Federal State took step backward. Nevertheless, as can be seen from the case, visa restriction on Turkish Nationals had been abolished for a month in Bavaria.[129]

6.3 Status of Turkish Nationals Within the Context of Dutch Aliens Act 1965 by Analogy with Dutch Aliens Act of 2000

Admission and expulsion of aliens is governed by the Dutch Aliens Act of 1965[130]. This act is implemented by means of the Aliens Decree and Aliens Regulation. As regards our subject matter, provisions regarding right of establishment were governed, at the time when the Additional Protocol came into force by this Act. [131] Currently, Dutch Aliens Act of 2000 is in effect and Aliens Circular 2000 also governs the provisions related to right of establishment. Therefore, The Government of the Netherlands did not preserve her Aliens Act of 1965 which was in force at the time when the Additional Protocol came into force and enacted an Aliens Act and Aliens Circular which covers the self-employment matters lastly in 2000. Accordingly, this situation requires to be examined in order to reveal new measures which restrict the rights of Turkish nationals regarding the right of establishment within the context of standstill provision.

The establishment permit (vergunning tot vestiging) confers a right of residence and is regulated in Articles 10, 13 and 14 of the Aliens Act. It is mainly a permit which is intended for aliens who have already resided in The Netherlands for a considerable time and it gives them a stronger legal position than does the residence permit. The act has entrusted the grand and the withdrawal of this permit exclusively to the Minister of Justice. [132]

For the grant of the establishment permit, The Aliens Act makes a distinction between two categories of aliens. As regards those aliens who have not yet resided in the Netherlands for five years, the minister has full freedom of action. The position is different for aliens who have had their principle residence in the Netherlands for five years or more. In principle the Act accord them a right to an establishment permit. In this case, according to article 13(3) of Aliens Act, the permit can only be refused on two grounds. The first is that there is no reasonable guarantee that the alien will have sufficient means of support in the long term. The second is that he has been guilty of serious violation of public peace or public order, or that he constitutes a serious

---

[129] Dr.Murat Ugur Aksoy,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(6 November 2007, Istanbul),*Report concerning the evaluation of obligatory visa implementation on Turkish Nationals under European Law ,* Economic Development Foundation Publishment no:214, p.21

[130] The Aliens Act or Vreemdelingenwet of 13 January 1965 (The Netherlands), Stb, 1965, No. 40.

[131] H.F Van Panhuys, 'International Law in the Nederlands' (Vol 3, Suthoff&Nordhoff Ocena, 1980), Page 82 < http://books.google.com/books?id=PPseXaPHxmwC&pg=PA82&lpg=PA82&dq=vreemdelingencirculaire+1965+english&source=bl&ots=JQAWqamkL3&sig=13-KzNbSte58mdWuqWog4NJTzTU&hl=tr&ei=EGd7StfcCMiE-Qbnj4A0&sa=X&oi=book_result&ct=result&resnum=2#v=onepage&q=vreemdelingencirculaire%201965%20english&f=false> accessed 15 May 2009

[132] Ibid, Page 88

threat to national security. After a ten years' residence the first mentioned ground for refusal can no longer be adduced.

The act does not expressly require that the alien's residence in the Netherlands for five years or more should have been lawful. From the legislative history of the Act it appears, however, that a prolonged residence in the absence of a right to such residence may give rise to refusal of the permit on the ground that the alien has been guilty of serious violation of public order may give rise to refusal of the permit on the ground

An establishment permit is granted for an unlimited period of time; it never requires renewal. No limitations or conditions may be attached to such a permit. In some other respect, too, the holder of the permit enjoys certain advantages over the holder of a residence permit.

Article 14(1) of the Act enumerates four grounds for withdrawal of the establishment permit. The first ground for its withdrawal is that the alien has made false statements leading to the grant of permit. The permit can be also withdrawn when the alien has repeatedly violated criminal provisions of the Aliens Act. The third ground for withdrawal mentioned in The Act is that the alien has been convicted of an offence involving a deliberate violation of criminal law and carrying a maximum penalty of at least 3 years imprisonment. Finally, the permit can be withdrawn if the alien constitutes a serious threat to national security.

Article 14(2) of the Aliens Act also contains a rule with respect to the loss of the establishment permit. By operation of law, without intervention by Minister of justice, the permit is lost when its holder establishes his principle residence outside the Holland, i.e., when he removes the centre of his life from the Holland. Since the act omits to mention a fixed time limit, this rule causes a good deal of uncertainty and difference of opinion on the question of when a permit is, or is not, lost by operation of the law. [133]

As a summary,

In consideration of the Aliens Circullar 2000 which is current act of the Netherlands governs the right of establishment provisions, non-EU nationals who seek to come to the Netherlands to set up in business have to satisfy the following general admission requirements for self-employed individuals:

1. They have to satisfy the requirements for practising their profession or running their business.
2. They have to prove that their economic activities (will) yield sufficient means of subsistence. Their net income must be at least equal to the relevant social security level under the National Assistance Act (Algemene Bijstandwet). According to the Aliens Circular, the application must be accompanied by satisfactory documentation, for example bank statements. Where a renewal of the residence permit is concerned, a balance sheet and profit-and-loss account can be accepted as evidence for the applicant's business providing him with sufficient income. These documents should be provided by a recognised administrative office, or, in case of private limited company

[133] Ibid Page 89

or a limited liability company, an accountant. Where a first application for residence permit or an application for a visa is concerned, the applicant can be asked to submit a business plan, which should include personal data, information about the personal business, legal aspects, a commercial plan, management plan and financial plan.

3. An application can be rejected on grounds of public peace or order or national security. It is important to note that the public order exception in the Dutch Aliens legislation goes further than the European public order exception.

4. An application can be rejected on the ground that their activities do not serve a substantial Dutch interest or on the ground that they do not have to reside in the Netherlands to pursue their business or professional activities. Their applications therefore must be submitted to the ministry of Economic Affairs for consideration and advice.

5. They can be rejected on the ground that the business is not a new business;
6. They can be rejected on the ground of their age (limit is 60 years)[134]

Therefore when considering current requirements of the Government of the Netherlands, there are notable new measures on Turkish nationals in comparison with the old version of the Aliens Act. In consideration of the requirements of Aliens Circular 2000 for establishing business:

The requirement of number 1 arises out of as a new restricting measure seeking to satisfy the requirements for practising the profession or running the business.

The requirement of number 2 arises out of as a new restricting measure requiring detailed sufficient means of subsistence and procedure for establishing business. This requirement did not exist in Aliens Act of 1965.

The requirement of number 4 arises out of as a new restricting measure for serving a substantial Dutch interest or on the ground that they do not have to reside in the Netherlands to pursue their business or professional activities. Additionally, requirement for application submission to the ministry of Economic Affairs for consideration and advice did not also exist in Aliens Act of 1965.

The requirement of number 5 arises out as a restricting new measure requiring a business which is not a new business.

The requirement of number 6 arises out as a restricting new measure envisaging an age limit (60 years) to establish a business.

[134] Anita Bocker & Elspeth Guild, *Implementation of the Europe Agreements in France, Germany, The Netherlands and the UK: movement of Persons* (Platinium Publishing, London, 2002) page 63-64

As regards the requirements of the aliens who have had their principle residence in the Netherlands for five years or more, the other measures excluding the requirements of number 2 (In some respects excluding the detailed procedure) number 3 must be regarded as a new restricting measure.

Conclusion

On 31st July 1959, Turkey's Prime Minister Adnan Menderes made the first partnership application to join the economic bloc of what was then six countries, Belgium, France, Germany, Italy, Luxembourg and the Netherlands, created only two years before in 1957.[135] Therefore, this study had been prepared in the fiftieth anniversary of the first diplomatic contact with EEC.

From that day on, Turkey's relationship with the EU remains unresolved. We have witnessed ups and downs and critical moments in this relationship. Her 'wait and see policy' and the reluctance of EU to take Turkey into the Union lessens credibility of EU not only in Turkey and also in the countries consisting of muslim majority population.

A U.S German Marshall fund survey made in Turkey in mid-2007 reported that support for EU membership among Turks had fallen to less than half of the population, a mere 40 percent, in 2007 as compared to 54 percent in 2006.[136] The last poll of 2009 falls 35 percent.[137]

The key point is that Turks can approach the "Eurasian strategic alternative" from different several vantage points and find coincidence of interest among themselves even as they represent different ideological points of departure. Distrust of the West as well as a fierce loyalty to Turkey characterizing them all. On balance, the trend toward an increasingly independent Turkish foreign policy is the most powerful force in Turkey today and is increasingly supported by domestic, regional and global events.[138]

It's noteworthy to take into account that Turkey was rewarded to conclude the Association Agreement with EEC during the cold war and nowadays, after 20 years of the cold war, new notable powers such as China and India have become apparent. In this sense, it can be said that a new bloc and a new invisible wall between Europe and Asia arises like it arose during the cold war. In the light of this recent development, there is no doubt that Turkey needs to be integrated to EU institutions and become a member of the union in the long run. As former

---

[135] Lucia Kubosova, 'Turkey Marks 50 years as a suitor' (Journal of EU Observer) (31st June 2009) <http://www.euobserver.com/9/28515> accessed 31st June 2009

[136] Graham Fuller, New Turkish Republic: Turkey As a Pivotal State in the Muslim World, (United States Institute of Peace Press, Washington DC, 2008), Page 149-

[137] The Copenhagen Post:, 'Poll finds Turkish EU membership generation gap (31st June 2009) <http://www.euobserver.com/9/28515> accessed 31st June 2009

[138] Ibid, Page 174

Prime Minister of Belgium, Verhofstad said "The Turkish entrance to the EU is not only wanted, it is necessary."[139]

In this context, the concept of freedom of establishment has crucial role in order to establish strong, stabilized and effective economic integration between Turkey and EU. In 2007, €0.3 billion of EU inflows came from Turkey, while €12.4 billion of EU out-flows went to Turkey.[140] Therefore, there is huge amount of investment deficit considering the statics concerning Turkish investment. The abolition of all barriers on Turkish persons and legal entities will assist to narrow the deficit. In other words, integration of Turkey to European Union can only be achieved by means of deep and effective economic partnership and this requires proper implementation of the Association Agreement.

Turkey, as a negotiating country with the European Union, should be treated on an equal footing with member states already admitted to the Union and have gone through the same EU process. As in the case of Bulgaria and Romania, Turkey should be presented a roadmap on visa liberalization that is in conformity with Turkish nationals' granted legal rights. It is an undeniable fact that easy travelling conditions will increase mutual understanding between parties and ease full integration of Turkey into the European Union.[141]

According to Dr. Murat Ugur Aksoy,

There must not be an high expectation for imminent abolition of visa restrictions by EU countries. Turkish government and the people who suffered from these restrictions must take a step in order to reach an achievement. He has two recommendations to the government.

1. Visa restrictions must be discussed in the stage of Turkey-EC Association council's negotiations.
2. The European Commission must be actuated because European Commission is the protector and caretaker of Acquis Communautaire.[142]

After *Tum and Dari decision*, necessity to abolish current restrictions in the terms of standstill provision has one more time become apparent. In the course of the preparation of this study, as can be seen in previously mentioned part of the study, EU members began to change their legislations and their rules. From this point forth, it's worthy to touch on the legal ambiguity in

---

[139] See Column of Verhofstadt, 'It is necessary that Turkey joins the EU' (7th August 2009) < http://www.liberales.be/cgi-bin/en/showframe.pl?column&pamukengels>

[140] http://ec.europa.eu/trade/issues/bilateral/countries/turkey/index_en.htm

[141] Ceren Mutus, 'Germany's Visa "Exemption Application: A test of the EU's Sincerity' (Article of Center for European Studies Turkish International Strategic Research Organization or USAK, ' (21st July 2009) <http://www.hurriyetdailynews.com/n.php?n=germanys-visa-exemption-a-test-of-the-eus-sincerity-2009-07-13 > accessed (22nd July 2009) Paragraph 13

[142] See further information, Dr.Murat Ugur Aksoy,'The Freedom of Establishment and Providing Services of Turkish Nationals in the Member States of European Union',(6 November 2007, Istanbul),*Report concerning the evaluation of obligatory visa implementation on Turkish Nationals under European Law ,* Economic Development Foundation Publishment no:214, p.30

the European Union countries. As explained above, every member states have different legislation in terms of freedom of establishment which applies foreigners. Additionally, the time when the additional protocol entered into force differs from member state to member state in accordance with the date of their participation to the community. This situation brings along complexity in order to clarify the restrictions regarding freedom of establishment. Relevant decisions of ECJ generally refer to one particular member state's legislation and its immigration rules. In this sense, there is no unanimity of rules within the framework of EC law. Mainly under the Schengen Rules and the principle of Single Market due to the lack of one single regulation on Turkish nationals aiming to establish a business, Turkish nationals confront with difficulties and various implementations when they wish to enter into EU countries and establish a business. Accordingly, it's important to gather compatible legislations in accordance with freedom of establishment in relation to Turkey and enact them under one single roof.

When all decisions considered, an important responsibility emerges for Turkish government and Turkish NGOs. Turkish lawyers specialized on EC law must be gathered and they must designates incompatible legislations of the members states which restricts Turkish nationals' right of establishment and their right to provide services. Therefore, the establishment of relevant commissions constitute necessity to organize and lead the Turkish nationals who suffered from incompatible implementations by member states. Following cases must be brought to The Courts in order to apply pressure on the member states and EU. Turkey can achieve to abolish the restrictions on Turkish nationals by this way.

It is as clear as crystal that Turkey acted inefficiently up until today. The first case in this field, Meryem Demirel case, was brought to the agenda after 14 years of entry into force of the additional protocol. In the light of this fact, it is apparent that effective legal remedies have not been exercised as it should be. Turkey, as matter of being a responsible state is obliged to claim Turkish nationals' rights and to organize efficient institutions for the purpose of abolishing the legal obstacles. Approximately, 4 million Turkish nationals live abroad in European Union and facilitation of business establishment and providing services are essential for many of them. In this sense, Turkey should give weight to institutionalization in the field of EU law in order to cope with the disputes arises from them. Lastly, the statement of Ataturk must be kept in the mind 'External relations must be based on internal institutionalization because the external relations which is not relied on internal institutionalization is doomed to failure.