

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER SOYSAL

by

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VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER SOYSAL

Foreword

According to Council Regulation No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders, Turkish nationals require a visa to travel to the EU. Turkish nationals encounter cumbersome procedures and grave problems in order to obtain Schengen visas. An exhausting list of necessary documents is demanded by the Consulates or intermediary agencies for visa application. The list contains documents that harm business secrecy and commercial ethic such as letter of invitation from the corresponding company, updated documents showing original income of the applicant as well as financial strength of the company, full transcript of bank account; other documents such as details of bank accounts, credit cards, real estate ownerships, land registries and vehicle licenses infringe privacy and confidentiality of personal information. While the task is difficult for Turkish citizens, businessmen from Member States visit Turkey either without a visa or with a visa which can be easily obtained on the border for 15 Euros. After all, who are these intermediary agencies or companies demanding these documents and who would not even return them to the applicants?

Turkish people consider that as a country, which has been implementing Customs Union since 1995 and an accession country since 2005, with an association agreement dating back to 1963, there is discrimination and unjust treatment with respect to the visa issue.

Although the public at large and various professional groups such as academics, students, journalists, artists, sportsmen are affected negatively by the visa application, Turkish business community is perhaps the first and foremost group, which experiences the negative impact most directly. While the goods circulate freely, the business people, who produce and trade these goods, have to overcome the visa barrier. Usually goods are sent to trade fairs or exhibitions on time without a problem, but the business man and their co-workers often receive their visas after the closure of the event. Therefore, the visa barrier in respect to certain Member States not only violates Article 41(1) of the Additional Protocol, it creates unfair competition within the framework of the Customs Union in all Member States as well.

(*) I would like to report a personal experience in order to illustrate the extent of the detrimental effects visa obligation imposes on Turkish people. As Erasmus coordinator of my University, I was invited to participate in the Rotterdam Erasmus Consortium meeting in Lisbon. However, for this purpose, I need to go to Ankara to apply in person for a Schengen visa even though I have a green or "special" passport which doesn't require visa for all Schengen countries except Portugal. As this country does not have a Consulate in Istanbul, I have to travel to Ankara -one hour flight from Istanbul- for applying and when they inform me that the visa is ready -in minimum four days- I must again travel to Ankara to Portuguese Embassy Consular section to collect the passport. (The frustration this creates is immense and not describable. This helped me to understand the overall frustration of whole Turkish citizens). Likewise, I simply did not have time to spend for this visa masquerade and could not go to the European Community Studies Association meeting in Porto as the President of Turkish ECSA. According to press reports Prof. Dr. Mrs. Nüket Yetiş, the President of prestigious scientific institution TÜBİTAK (The Scientific and Technological Research Council of Turkey) who allocated several hundred millions of Euros from her budget for Turkey's contribution to Sixth and Seventh EU Framework Programmes, was turned back from the border due to the visa requirement.

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Foreword

Looking at the problem from a legal point of view, visa requirement is clearly in breach of the principle of free movement, which constitutes the basis of the Customs Union established by the Association Council Decision 1/95 and also Article 41 of the Additional Protocol. This was reconfirmed in the recent *Soysal* ruling of the European Court of Justice (ECJ) on 19 February 2009. In the *Soysal* ruling, different from the previous case law such as *Abatay-Şahin* and *Tüm-Darı*, it was expressly stated that visa requirement as such constitutes a new restriction and if the Member State in question did not require such a visa at the time of the entry into force (1 January 1973) of the Additional Protocol of 23 November 1970, then Turkish nationals traveling to that Member State for provision of services do not require a visa. As Prof. Groenendijk and Prof. Guild further points out, with regards to the Member States that acceded to the EU in 1981, 1986, 2004 and 2007, the reference point is the date of accession of these countries.

The *Soysal* case, which was awaited with great interest, had different repercussions in Turkey and in EU Member States, due to its complex nature. First of all, the persons covered by this decision are citizens, who fall into the scope of Additional Protocol 41(1). Notably businessmen, lawyers, sportspeople, doctors, academics, students, artists and indeed all Turkish citizens, who wish to travel to EU countries for business, touristic, study-related or medical purposes, are covered in this regard. Hence, views expressed by some experts and academics from Turkey and EU Member States, most particularly Germany, which argued that *Soysal* decision only concerns lorry drivers and/or service providers do not completely reflect the reality. As Prof. Groenendijk and Prof. Guild clearly express, the ECJ has stated more than once that the provision of the Agreement which states that its interpretation is to be guided by the similar rules in the TFEU must be given effect. Assuming this is the case then the judgment applies not only to service providers but also to service recipients.

Secondly, it needs to be born in mind that the reference date for each Member State is the time of the entry into force with regard to that Member State of the Additional Protocol. For instance, for Germany in the *Soysal* case this date is 1 January 1973, for Spain 1986 and for Romania 2007, in other words the accession date to the Union. Thus, for the *Soysal* ruling to be implemented, Member States in line with the rule of law have to take necessary measures to ensure the enforcement of this decision.

Despite the *Soysal* ruling, unfortunately there is yet no satisfactory progress on the side of the Member States. It is necessary to remind that while the decisions of the ECJ are binding, the current approach of some Member States' are not in line with the Decision. One of the issues of incompatibility is whether "freedom to provide services" covers service recipients and the other one is which EU Member States are encompassed. Referring to the Note from the Commission, which was delivered to guide Member States, it is stipulated that visas should be lifted in Germany for certain categories and in Denmark for all service providers. The standstill provision will only be applicable according to written law but also to factual situation. Back in 1973 none of the 12 Member States had required a visa for Turkish citizens for touristic purposes up to 2 or 3 months.

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Foreword

TOBB (Union of Chambers and Commodity Exchanges of Turkey) and IKV (Economic Development Foundation) have frequently brought up the grave problems related with the visa requirements imposed on the Turkish citizens in their visits to the EU Member States since the first inception of visas by EU Member States. We have conducted extensive academic studies, organized seminars and workshops in Turkey and abroad on the issues of the free movement of Turkish citizens in the EU, visa procedures and requirements which we find unjust and against the Association Law was held by the ECJ in *Soysal* ruling (please see IKV Publication No: 231 and 228 for further analysis). An important step pursued on the issue was the launch of a project titled as “Visa Hotline Project” realized by IKV and European Citizen Action Service (ECAS) with the support of TOBB.

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

The report of the “Visa Hotline Project” was published recently, accompanied by a number of publications further analyzing the issue from different view points. Adding to these, this impressive and interesting paper written by two distinguished scholars in the area of European Immigration Law, **Prof. Kees Groenendijk** and **Prof. Elspeth Guild** aims to describe the legal implications of the *Soysal* judgment, the implementation and the impact of the judgment in the Member States, the follow-up of the judgment in EU institutions and to reflect on possible implications of the judgment for the EU visa policy towards Turkey. The paper draws attention to how EU Member States have implemented the *Soysal* judgment in their jurisdictions with regards to the national law on short stay visas for Turkish nationals as of 1 January 1973; political debate on *Soysal*; Rule changes after *Soysal*; current national law for Turkish nationals including national case law on *Soysal* and legal literature on the case.

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List of Abbreviation

EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
FYRM	Former Yugoslav Republic of Macedonia
MEP	Member of the European Parliament
NATO	North Atlantic Treaty Organisation
TFEU	Treaty on the Functioning of the EU
The UK	The United Kingdom

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Chapter 1: Introduction

The Historical Context

After four years of negotiations, on 12 September 1963 the European Economic Community and its six original Member States in Ankara signed the Association Agreement with Turkey. A year before the EEC had signed its first association agreement with Greece. The EEC Member States wanted to avoid difference in treatment between the two Mediterranean countries that both were members of NATO. In 1961 the wall in Berlin had been built, effectively stopping the constant flow of workers from Eastern Europe to West Germany. Thus that Member State had to look for foreign workers elsewhere. At the time, Turkey played an important role in the defense of South Eastern Europe against the threat from the Soviet Union.

The Dutch Minister of Foreign Affairs, Luns, acting at the occasion of the signing of the Ankara Association Agreement as the chairman of the EEC Council of Minister, spoke about the diversity in Europe as a source of its originality. 'The movement of European integration has begun and has to be continued with respect for this diversity'. The Turkish minister of Foreign Affairs stated that the political aspect of the Agreement was as important as its economical side. He referred to the Turkey membership of the OECD, the Council of Europe and NATO. In 1963 almost 36,000 Turkish worker were employed in Germany, 5,600 in Belgium and 700 in the Netherlands (Groenendijk 1996:101)

The Ankara Agreement (the Agreement) aimed to promote the continuous and balanced strengthening of trade and economic relations between Turkey and the EEC. This includes progressively securing the free movement of workers (Article 12), the abolition of restrictions on freedom of establishment (Article 13) and the abolition of the freedom to provide services (Article 14). The Contracting Parties agreed to be guided by the corresponding provisions in the EEC Treaty for the purpose of establishing those three freedoms. The Agreement provided for three stages: a preparatory stage, a transitional stage of not more than twelve years during which a customs union would be progressively established between Turkey and the Community and a final stage.

In 1970 the Parties signed a Protocol to the Agreement with more detailed rules. The Protocol provided in Article 36 that the freedom of movement for workers between the EEC Member States and Turkey would be secured by progressive stages between the end of the twelfth and the twenty-second year after the entry into force of the Agreement, i.e. between 1976 and 1986. The Association Council should decide on the necessary rules. Indeed the Council agreed on three occasions on more detailed ruled on the status of workers from the parties: in Council Decision 2/76, Council Decision 1/80 and Council Decision 3/80. However, the free movement of workers was not established in 1986. With regard to the right to establishment and the provision of services the Protocol in Article 41 only provided for a standstill clause: *'The Contracting Parties shall refrain from introducing between themselves any new restriction on the freedom of establishment and the*

freedom to provide services.' So far, the Association Council has not used its competence to determine the timetable and rules for the progressive abolition of restriction on those freedoms.

Over the years, the number of states bound by the rules on the association with Turkey increased with the widening of the EU. The states that acceded to the EEC or later to the EU on the moment of accession were bound by the Ankara Association Agreement and the rules adopted on the basis of that agreement, being part of the *acquis communautaire*. In 2004 the European Council decided on the commencement of the accession negotiations with Turkey. The actual negotiations on the first series of chapters started in October 2006.¹

The EC Court of Justice has played an important role in interpreting rules based on the Association Agreement. Since 1987 the Court in 45 judgments has explained and developed those rules. Those cases arose in four Member States: Germany, the Netherlands, Austria and the UK. A list of all judgments is to be found in Annex C. Most of those judgments (41) relate to the three Decisions on workers. Three relate to the standstill clause and the freedom of establishment. The judgment in the *Soysal*² case of 19 February 2009 is the second one on the free provision of services. The *Soysal* judgment is the first one on the issue whether requiring visas of Turkish nationals, desiring to travel to the EU, is compatible with the Association rules.

Turkish nationals may well acquire rights under the directives and regulation adopted under Title VI of the Treaty on the Functioning of the EU (TFEU). Those measures supplement the rights of Turkish nationals under the Association Agreement (C-294/06 *Payir*, [2008] ECR I-203). They cannot restrict the rights acquired under the EC-Turkey association rules (C-337/07 *Altun*, [2008] ECR I-10323 and *Soysal*).

The Demographic Context

Since 1963 the number of Turkish nationals resident in the Member States increased considerably. The data provided by national statistical offices and by Eurostat underestimate the actual number of Turkish nationals because those persons who have acquired the nationality of a Member State whilst retaining their Turkish nationality or who are born as dual nationals are not counted in the statistics on foreign nationals. In the table below we present the available data on Turkish nationals registered with Turkish consulates in the Member States in 2006 and the Eurostat data on resident Turkish nationals in 2008 published by Eurostat.

From the data in this table it appears that in Germany, Austria and Switzerland the number of Turkish nationals in the Turkish registers is almost equal to the numbers registered by the state of residence. In France, the Netherlands, Denmark and Sweden the number of Turkish nationals registered as such in the host Member States is half or even less of the number registered by the Turkish authorities. This is an indication that in those four Member States a large share of the resident Turkish nationals are dual nationals, having acquired the nationality of that Member State at birth or naturalisation. In the other three states, apparently, only a small minority of the Turkish nationals has acquired the nationality of their state of residence whilst retaining their original nationality. **According to the Eurostat data in total 2.4 million Turkish nationals are living in the EU, making up 8% of all registered third-country nationals resident in the EU.** From data provided by the Turkish authorities

¹ The European Commission in its 2004 report on Turkey's progress towards accession suggested that 'permanent safeguards' for the free movement of workers could be considered, see COM(2004) 656 final of 6 October 2004, p. 10. There has been no follow-up to this isolated suggestion.

² C-228/06, 19.02.2009.

it appears that that number actually may be close to 3 million. Approximately 75% of the Turkish nationals living outside Turkey live in the EU.

Table 1: Turkish nationals resident in EU Member States and Switzerland

	Turkey (2006)	Eurostat (2008)
Germany	1.740,000	1.830.000
France	425,000	221.000
Netherlands	365,000	94.000
Austria	115,000	109.000
Switzerland	75,000	73.000
Sweden	65,000	<30.000
Denmark	55,000	29.000
UK	55,000	n.d.
Greece	50,000	n.d.
Belgium	40,000	n.d.
Italy	15,000	n.d.
Romania	12,000	n.d.
Finland	7,000	n.d.
Poland	2,500	n.d.

Research Questions and Methodology

Several Member States introduced the requirement for Turkish nationals to have a visa for short visits in the 1980s. Ever since, the issue of visa has been an urgent practical question for many Turkish nationals, intending to do business, visit family members or friends or study in the EU. Our study focuses on the possible effects of the *Soysal* judgment on the visa rules and practices of the Member States. The data in the table above allowed us to select the Member States where the *Soysal* judgment could have the most impact, considering the number of Turkish nationals living in that state.

The aim of this study is to describe the legal implications of the *Soysal* judgment, the implementation and the impact of the judgment in Member States, the follow-up of the judgment in EU institutions and to reflect on possible implications of the judgment for the EU visa policy towards Turkey.

We asked experts in eleven EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Romania and the UK) and in Turkey to provide with answers to the following questions:

- What were the national rules on visas for Turkish nationals in force in your Member State on 1 January 1973 or at the later date of its accession were Turkish nationals exempted from the short stay visa obligation?
- Was a bilateral or multilateral agreement on short stay visas in force between your Member State and Turkey on the relevant date mentioned and if so, to what extent did the agreement(s) provide for exemption of Turkish nationals from the visa obligation?

- Does your Member State actually exempt Turkish nationals from the visa obligation and did this practice change after the *Soysal* judgment?

The experts were also asked to report on national case law implementing the *Soysal* judgment in the Member State (or failing to do so), on legal publications in the State on the *Soysal* judgment and whether the *Soysal* judgment or possible liberalization of the EU visa policy regarding Turkish nationals had been the subject of debate or questions in the national parliament.

The answers we received relate to the situation in February 2010, one year after the *Soysal* judgment. We are most grateful to the experts for their quick and informative answers to our questionnaire. The names of the participating experts are mentioned in Annex B. We also acknowledge the kind financial support by Prof. Dr. Halûk Kabaalıoğlu of the Yeditepe University in Istanbul for this part of the study.

Our report begins with a summary of the facts of the case and the findings of the *Soysal* judgment (chapter 2). In chapter 3 the relevant international agreements on visas for Turkish nationals are discussed. The follow-up of the *Soysal* judgment in Member States is analyzed in chapter 4 and the follow-up in EU institutions in chapter 5. The visa policy of Turkey regarding EU nationals is summarized in chapter 6 and a short overview of the EU visa policy with regard to candidate Member States, neighboring states and Turkey is presented in chapter 7. In the final chapter we present our main conclusions and recommendations.

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Chapter 2: *Soysal* Case and Judgment

Introduction

Since the late 1980s, cases regarding the scope of the Agreement and its subsidiary legislation began to arrive before the European Court of Justice (ECJ). **Following the landmark judgment *Demirel*,³ Turkish nationals seeking to enjoy residence rights, employment entitlements, access to the EU territory and protection from expulsion increasingly began to rely on the Agreement and subsidiary legislation to support their claims.** While not always successful, nonetheless the jurisprudence of the ECJ has come to constitute an increasingly important source of law regarding the treatment of Turkish nationals across the EU.

The *Soysal* decision (see Annex H for the full text of the judgment), while not so surprising as regards the reasoning and outcome in light of the constant jurisprudence of the ECJ on the Agreement does, however, extend the logic of the application of the Agreement to the field of service provision. On this basis, there is a right of access by Turkish nationals to move to the territory of the EU for this purpose on the basis of that legislation which applied to service providers at the time when the provisions on Services became effective – 1973 for all the original Member States and Denmark, Ireland and the UK which joined the EU on 1 January 1973 – and on the date of accession for the remaining Member States.

What does this case mean? In order to analyze the decision and in the following chapters to move to its implications for other Member States of the EU than Germany against which the case was brought, I will divide it into the following parts:

- The facts;
- The Agreement;
- The finding;
- The personal and material scope of the right;
- The question mark – service providers too?

The Facts

In 1980 Germany introduced a visa requirement for all Turkish nationals seeking entry into Germany. However, until 2000 Germany easily issued visas, including to Turkish lorry drivers moving goods between Turkey and Germany. However, from 2001 and 2002 onwards it became increasingly difficult for these lorry drivers to renew their visas to continue their professional activities. Many were flatly refused new visas making it impossible for them to continue to work the Turkey-Germany routes. Two Turkish lorry drivers, *Mr. Soysal* and *Mr. Savatlı* were refused visas to drive to Germany.

³ 12/86 ECR [1987] 3719.

They appealed against the refusal to the administrative court in Berlin on the basis that under the Agreement it was unlawful for Germany to require them to obtain visas to travel to Germany at all, at least in their capacity as lorry drivers.

The Agreement

In 1963 the EC and Turkey signed the Agreement which aimed to promote the continuous and balanced strengthening of trade and economic relations between them. This includes progressively securing the free movement of workers (Article 12); the abolition of restrictions on freedom of establishment (Article 13) and the abolition of the freedom to provide services (Article 14). For the purposes of the judgment Article 14 is particularly important as it states:

‘The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community [now: Articles 51, 52 and 54 to 61 TFEU] for the purpose of abolishing restrictions on freedom to provide services between them.’

An Additional Protocol (the Protocol) entered into force on 1 January 1973 which included at Article 41(1) that ‘the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services’. This is generally known as a standstill clause as what it does is freeze legislation as at the date of the entry into force of the provision preventing either party from making the conditions more onerous for the exercise of the activity.

However, across Europe, from 1973 onwards, Member State after Member State has introduced new restrictions on access to their territory for Turkish nationals in the forms of visa requirements. Most of the States we study here have introduced complicated and time consuming rules on getting visas, increased amounts of money which individual must have to get visas etc. since the entry into force of the Agreement. The problem of the Turkish lorry drivers is not an isolated one, it affects all Turkish nationals coming to EU Member States (see chapter 7).

So the question arose, does the Additional Protocol prohibit the introduction of these new measures by Member States which have the consequence of making the exercise of service provision more difficult for Turkish nationals seeking to come to the EU?

The Finding

The ECJ noted that it has jurisdiction to hear cases regarding the meaning of the Agreement contrary to the claims of some Member States regarding competence in *Sevince*.⁴ It confirmed its jurisprudence that Article 41(1) of the Protocol has direct effect in the Member States in *Abatay and Others*.⁵ The reason for this is that the provision is clear, precise and unconditional as regards its intentions and effects. Member States are in no doubt as to what the scope of the standstill clause is or what it entails. It requires the Member States *not* to act, a matter which the ECJ considered fairly simple for Member States to understand and apply. The effect of this part of the finding is that a Turkish national seeking to go to any EU Member State is entitled to rely directly on Article 41(1) of the Protocol to defeat any provision of national law which fails to comply with the standstill obligation (*Tüm and Darı*).⁶ This is important as the direct effect of the standstill means that Member States cannot justify obstacles which have been placed in the way of movement of Turkish service

⁴ C-192/89 [1990] ECR I-3461.

⁵ C-317/01 and C-369/01 [2003] ECR I-12301.

⁶ C-16/05 [2007] ECR I-7415.

providers on the basis of national law which has been adopted since the relevant date. Instead, the offending national law has to be set aside, even by the courts and the correct national law, that which was in effect at the relevant date substituted, even by the national court for that on which the State relies.

What does this mean? Quite simply, Member States must apply the law on access to the territory and service provision for Turkish nationals which applied on 1 January 1973 if they are original or first enlargement Member States or at the date of accession for all the rest.

What does this *not* mean? It does not mean that Turkish nationals have an EU right to service provision in the EU. National law applies, but it is that national law which was in force at the relevant date.

The next question is whether a visa requirement is in fact an additional obstacle to a Turkish service provider seeking to go to exercise services in Germany. Here the ECJ was quite clear: visa requirements interfere with the actual exercise of service provision because of the additional and recurrent administrative and financial burdens involved in obtaining such a visa and its limited time validity. Further, as in the cases of *Mr. Soysal* and *Mr. Savatli*, where the visa was refused they could not exercise service provision at all (para 55). So it is now recognised by the ECJ, visa requirements restrict economic freedoms.

The German authorities were concerned, however, that the visa requirement for Turkish service providers was a requirement of EU law as Turkey is on the black list of the EU's Visa Regulation 539/2001 (as amended). The ECJ had no difficulty with this argument – it merely confirmed its constant jurisprudence that international agreements of the EU take priority over secondary Community legislation. Thus the Protocol must be applied and the Visa Regulation disapplied as regards Turkish service providers.

So simply put, the *Soysal* judgment gives a personal right to any Turkish national who wishes to come to the EU to provide services to enjoy access to the territory of any Member State on the basis of the same conditions which applied either in 1973 or on the date when the relevant Member State joined the EU. This includes the right *not* to have to obtain a visa to go to the Member State in question if such a requirement did not exist at the relevant time.

The Personal and Material Scope

In order to benefit from the judgment the individual must be:

- A Turkish national – this is a matter for the Turkish authorities to determine and is evidenced by a passport;
- A service provider.

The Agreement provides at Article 14 (above) that the meaning of service provision is to be guided by the equivalent in the TFEU. Here Article 57 TFEU states that:

‘services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for good, capital and persons. ‘Services’ shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;

- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.’

This must be applied to the meaning of service provider for the purposes of the Protocol. This means that Member States can apply for instance the same restrictions which apply to their own nationals as regards qualifications and regulated professions. Further, where an individual is employed by a Turkish enterprise and the enterprise seeks to send the individual from Turkey to a Member State to carry out services for it (such as in the case of the lorry drivers in *Soysal* who were actually employees of a company), the business enjoys the right of service provision on the basis of the national rules at the relevant date. Thus it is entitled to send its workers to the EU Member State to provide the service under the same conditions as those which applied in 1973 or the otherwise relevant date (*Rush Portuguesa*).⁷

For example, if a Turkish national seeks to go to a Member State to provide services in the form of negotiating the purchase of goods, he or she is a service provider. If the individual goes to a Member State to install a computer program working free lance, he or she is a service provider. If he or she goes to a Member State as a free lance reporter to write an article for a journal or make a film, he or she is probably a service provider. If however, the Turkish national in any of the above situations is working for a Turkish company and is an employee paid to carry out the work as part of his or her employment contract then the employer is the service provider and the individual is the means through which the service is carried out.

So, self-employed Turkish nationals are entitled to benefit from the standstill on new restrictions on service provision. **The Turkish employees of Turkish companies who are being sent to an EU Member State to carry out service provision for their employer also enjoy the benefit of the standstill provision through the exercise by the employer of a service provision activity.** However, workers who are not being sent to an EU Member State for service provision cannot enjoy the benefit of the standstill. Family members cannot benefit from the standstill unless under national law at the relevant date they were included.

Another point is worth bearing in mind, the standstill condition applies not only to the substantive conditions which a Member State may apply to access for Turkish nationals for service provision such as a visa condition. It also applied to procedural conditions – so appeal rights and other matters related to procedure are also subject to the standstill obligation (para 50).

The Question Mark – Service Providers Too?

The wider implications of *Soysal* do not end with service providers. The reason for this is that the ECJ has consistently held that the right contained in Article 57 TFEU also includes the right of individuals to go to receive services. From as early as 1984 the ECJ confirmed this as an inherent part of the right of service provision:

‘In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided is established or else the latter may go to the state in which the person providing the service is established. Whilst the former is expressly mentioned in the third paragraph of [Article 54 TFEU], which permits the person

⁷ C-113/89 [1990] ECR I-1417.

providing the service to pursue his activity temporarily in the Member State where the service is provided the latter is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by free movement of goods, persons and capital' (*Luisi and Carbone*).⁸

The ECJ has not resiled from this position and indeed consolidated it in 2003 'the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions.' (*Gambelli*).⁹

If the ECJ's position in *Soysal* is consistent, then the application of Article 14 of the Agreement to Article 41(1) of the Protocol means that this jurisprudence also applies to the EC Turkey Agreement. If this is the case, as would seem so, then any Turkish national seeking to go to a Member State as a recipient of services is also entitled to benefit from the standstill on new obstacles to movement. The ECJ has recognized, for instance, tourists, as recipients of services within the meaning of the TFEU. **Thus for almost all Turkish nationals coming temporarily to the EU and not planning to take up employment, the visa requirement may now be an additional obstacle, in so far as it did not exist at the relevant date for the Member State in question, which is not permitted by Article 41(1) of the Protocol. This is the most developed of the possible meanings of the *Soysal* judgment and needless to say the least popular among most Member State Interior and Justice Ministries.**

⁸ Joined cases 286/82 & 26/83 [1984] ECR 377.

⁹ C-243/01 [2003] ECR I-5145.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER SOYSAL

Chapter 3: Relevant International Agreements on Visa Freedom

Bilateral agreements

Eight of the eleven EU Member States covered by this study concluded a bilateral visa agreement with Turkey: Germany in 1953, the Netherlands in 1953, Finland in 1954, France in 1954, Ireland in 1955, Belgium in 1956, the UK in 1960 and Romania in 1968. All these agreements provided for visa free travel for nationals of the parties to the territory of the other with limited exceptions. Finland had such an agreement but denounced it in 1976, thus before its accession to the EC. The 1968 bilateral agreement between Romania and Turkey was replaced by a new bilateral agreement in 2004, apparently because Romania had to comply with the EU Visa Regulation as part of the *acquis communautaire*. The new agreement abolished the visa freedom and provided exemption of the visa obligation for a few special categories only. One of those categories is: Romanian and Turkish nationals with a valid residence permit issued by a member of the European Union, Switzerland, Canada, USA or Japan, can enter and remain in the territory of the other Contracting Party without a visa for a period of up to 30 days.

The bilateral agreements between Turkey and the UK, Belgium, France, Germany, Ireland and the Netherlands all six were in force in 1973. All agreements except the UK one, however, have a clause that excepts nationals traveling for the purpose to exercise professional activities. The Dutch-Turkish agreement provides that nationals of both countries coming for a visit of less than three months to the other country do not need a visa. But it explicitly excludes nationals going to the other country '*dans le but d'y exercer un métier, une profession ou toute autre occupation lucrative*' ('in order to exercise a job, a profession or any kind of lucrative occupation'). Those persons have to apply for a visa.¹⁰ The Franco-Turkish agreement contains a similar exception to the general rule that for visits up to three months, no visa was required.¹¹ The agreement between Ireland and Turkey provides that Turkish nationals going to Ireland shall not be required to obtain a visa before entering Ireland. But it has an almost identical clause excluding nationals of both countries desiring to go to the other country for the purpose of exercising a trade, profession or other occupation.¹² This clause in those agreements excludes professional Turkish service providers. But tourist, family visitors and / or other Turkish nationals coming for a short visit (e.g. students) were exempted from the visa obligation by these bilateral agreements in 1973. This was explicitly stated by the Belgian Secretary of State Wathelet in answer to parliamentary question.¹³ In Belgium the relevant clause in the visa agreement, according to our national expert, was directly applicable in the national legal order. In Germany the 1953 bilateral visa agreement with Turkey was still in force on 1 January 1973 (Kanein

¹⁰ Points 1 and 6 of the Agreement of 4 November 1953, UN Treaties Series 1958, No. 4289 and *Tractatenblad* 1953, 118.

¹¹ Point 3 of the Agreement of 29 June 1954, see www.doc.diplomatie.gouv.fr/BASIS/pacte.

¹² Points 2 and 3 of the Agreement of 27 September 1955, UN Treaties Series 1966, No. 8087 and Article 3 of the Agreement of 2 January 1956 between Belgium and Turkey.

¹³ CRIV 52 COM 795 of 10 February 2010, p. 20-22.

1980:670)¹⁴. Entries for more than three months or for income producing activities (*Erwerbstätigkeit*) are excluded (Westphal 2009:134).

If the standstill clause in Article 41 applies to recipients of services as well (see chapter 2), the ruling of the Court in *Soysal* would apply to Turkish tourists, family members or students, coming for a stay of less than three months, in Belgium, France, Germany, Netherlands, Ireland and the UK.

The UK-Turkey agreement of 1 March 1960 replaced an earlier agreement of 9 October 1952. By an exchange of notes on 28 June 1961 which modified the 1960 visa abolition agreement. It was made applicable to Turkish nationals normally resident in the UK to make them exempt from visa requirements.¹⁵ The agreement provides that Turkish citizens holding a valid Turkish passport shall be free to travel from any place to the UK without the necessity of obtaining a visa in advance. In accordance with provisions of the Agreement, the UK authorities gave their Turkish counterparts the required one month's notice, on 23 May 1989, that they would be applying a mandatory visa requirement on all Turkish nationals coming to that country.¹⁶ Turkey was added to the UK's visa black list in June 1989.¹⁷

In all bilateral agreements, there is a clause that the visa exemption shall not exempt the persons concerned from the obligation of conforming to the laws and regulations concerning the entry, short stay, residence or employment of foreigners in the other country. This clause cannot be interpreted as taking away the visa exemption granted by the agreement.

Agreement on Movement of Persons between Member States of the Council of Europe

The *European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe* was opened for signature in 1957. The agreement entered into force on 1 January 1958. It provides for abolition of visa requirements for the nationals of the parties to the agreement. The text of the agreement is reproduced in Annex D.

Article 1 provides for visa free visits of up to three months for the nationals of other parties holding a travel document listed in the Annex to the agreement. Nationals of the other state parties, using the exemption may be required to cross the border at authorized points (Article 2). They also will have to comply with the national immigration legislation of the country they visit (Article 3). Article 4 allows for more favorable provisions in national law or international agreements and Article 5 deals with the list of approved travel documents.

In March 2010 a total of 16 states were bound by the 1957 agreement. 12 EU Member States are party to the agreement: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia and Spain. The agreement entered into force for Turkey in 1961. In 1973, the agreement was in force between Turkey and the six original Member States of the EEC. The agreement was in force between Turkey and Austria, Greece, Malta, Portugal, Slovenia and Spain at the time of accession of those states to the EC/EU. Three of those states made use of Article 7 of the agreement in order to suspend the application of the agreement with regard to nationals of Turkey before their accession to the EU: Austria in 1990, Malta in 2003 and Slovenia in 2002. Hence, this

¹⁴ Agreement of 30 September 1953, *Gemeinsames Ministerialblatt der Bundesministerien* 1953, p. 576 and 1955, p. 23.

¹⁵ Treaty Series 1960 No. 27 and 1962 No. 32.

¹⁶ <http://www.publications.parliament.uk/pa/cm198889/cmhansrd/1989-06-06/Writtens-5.html>: Hansard House of Commons Col 45, 6 June 1989 (written answers).

¹⁷ House of Commons Paper 388 of 1989.

agreement has no significance for the implementation of the *Soysal* judgment in those three Member States. Portugal suspended the application of the agreement with regard to nationals of Turkey in 1991, five years after Portugal became an EU Member State. Greece in 1959 declared that it would apply the agreement to the six original EEC Member States. According to the registration of the Council of Europe Treaty Office, Greece did not suspend its application of the agreement with regard to Turkish nationals after the Turkish ratification in 1961. But Greece introduced visa for Turkish nationals in 1965 in relation with the increasing political tension with Turkey (Kirişçi 2005:352, Doğan and Genç 2009:9). Five of the six original EEC Member States suspended the application of the agreement to nationals of Turkey on the basis of Article 7 in 1980, more than seven years after 1973. Italy has not made any declaration under Article 7 so far. Spain ratified the agreement in 1982 and has not suspended its application with respect to nationals of Turkey.

From the above it appears that the six original Member States together with Greece, Portugal and Spain were bound to the 1957 agreement with respect to nationals of Turkey on the moment the EEC-Turkey Protocol, as part of the *acquis communautaire*, entered into force for those states. According to the Dutch official register of international agreements, Turkey at the time of ratification of the agreement in 1961 made the following declaration:

‘En vertu, de l’article 7, le Gouvernement turc declare ne pas appliquer immediatement le present Accord en ce qui concerne ses propres ressortissants pour des raisons relatives à la sécurité; le present Accord s’appliquera donc pour le moment aux ressortissants des autres Parties.’

‘According to the Article 7, the Turkish Government has declared not to immediately implement the present Agreement regarding to its own citizens for security reasons; therefore the present Agreement will be only applied to the citizens of other Parties for the time being’

According to the same official Dutch publication this declaration was withdrawn by the Turkish government on 28 August 1980¹⁸, two weeks before the military coup of 12 September 1980. Neither this declaration nor its withdrawal is reported on the list of declarations with this agreement on the website of the Council of Europe’s Treaty Office.¹⁹ If this declaration was effectively made by the Turkish government in 1961, the other states parties to the agreement may argue that, considering the last sentence of Article 7, between 1961 and 1980 they were not bound to apply the agreement to Turkish nationals. In this case, the 1957 agreement would only be relevant for the implementation of the *Soysal* judgment in the three EU Member States that were party to the agreement and had not suspended its application with regard to Turkish nationals when they acceded to the EU after 1980, i.e. Greece, Portugal and Spain.

If we take it that the standstill clause in Article 41(1) of the Protocol also covers recipients of services, this implies that the rules of those bilateral or multilateral agreements that were in force on 1 January 1973 or at a later date of accession, still have to apply to Turkish tourists or short term students or visitors as service recipients. The result is that international agreements are relevant for the implementation of the *Soysal* judgment with regard to Turkish recipients of services in Belgium, Ireland and the Netherlands, with regard to Turkish providers and recipients of services in the UK and with regard to Turkish nationals providing or receiving services in Greece, Portugal and Spain and, depending on the reality and significance of the aforementioned 1961 declaration by Turkey in the original six Member States as well. A table specifying the date of accession and the date of introduction of the visa requirement for Turkish nationals for each Member State is to be found in Annex E.

¹⁸ *Tractatenblad* 1968, no. 47 and *Tractatenblad* 1981, no. 212.

¹⁹ See www.conventions.coe.int.

However, international agreements are only one side of the story on the consequences of the *Soysal* judgment in Member States. For all Member States their national law concerning visa for Turkish nationals on 1 January 1973 or at the later accession date will determine the effect of the judgment for that Member State as well. That issue is the subject of the next chapter.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *Soysal*

Chapter 4: Follow Up of *Soysal* in Eleven Member States

Introduction

In this chapter we examine how eleven Member States have implemented the *Soysal* judgment in their jurisdictions. This section has six parts:

- National law on short stay visas for Turkish nationals as 1 January 1973;
- Political debate on *Soysal*;
- Rule changes after *Soysal*;
- Current national law on short stay visas for Turkish nationals including national case law on *Soysal*;
- Legal literature on the case;
- Scope of *Soysal* revisited.

National Law

The **first** group of states to consider is that where there was no visa requirement on Turkish nationals seeking to enter for short stays in 1973 but those states joined the EU later than that date. *Austria* is one such country as it acceded to the EU in 1995 and by 1990 it had introduced a mandatory visa requirement for Turkish nationals. *Finland* is another such Member State. Although there was no visa requirement on Turkish nationals in 1973 as a result of a bilateral agreement between the two countries which was denounced in 1976, by 1995 when it joined to the EU, the mandatory visa requirement on Turkish nationals had been in place for almost twenty years. *Romania*, likewise, joined the EU after the relevant date, in fact on 1 January 2007 and by that date there was in place a general visa requirement for Turkish nationals. However, holders of diplomatic passports, members of diplomatic missions and consular posts, members of official delegations, members of air crews, railway companies, employees of transport companies (air, water and rail) provided the employer had made a notification were exempt from the visa obligation.

The **second** group of states contains those where at the relevant date there was no mandatory visa restriction on Turkish nationals coming for short stays. In *Belgium* there was no mandatory visa requirement on Turkish nationals going to that country for short stays applicable on 1 January 1973 unless they were going for the purpose of work.

Similarly, this was the case in *Denmark* which joined the EU on 1 January 1973. No mandatory visa requirement applied for Turkish nationals until 1 May 1981. At the time of Denmark's accession, its immigration rules were covered by a selection of measures dating from 1954 to 1964 which dealt mainly with short stay rules on the basis of nationality alone with fairly limited attention to what

activities the short stay visitors were entering into other than where they were workers. In the later case work permits were required.²⁰

In *Germany* the relevant date was 1 January 1973 at which time there were no visa requirements on Turkish nationals so long as they were tourists (i.e. service recipients) coming for less than three months, workers of a Turkish enterprise coming for service provision for less than two months and artists, researchers or sportsperson coming for less than two months. Similarly, traveling businessmen, lorry drivers and assembly workers employed by Turkish businesses coming to Germany for less than two months were not subject to work permit requirements. On the basis of the 1953 bilateral visa agreement Turkish nationals could, according to the German immigration law, come for a visit of no more than three months without a visa (Kanein 1980:70).²¹

Likewise, for *Ireland* the relevant date is 1 January 1973. At that time the national rules in place did not require visas from Turkish nationals going to Ireland *unless* the trip was for the purpose of exercising a trade, profession or other occupation. Turkish nationals exempt from the visa requirement, were however, required to comply with entry, short stay, residence or employment rules.

In the *Netherlands* irrespective of the objective of the visit, Turkish nationals were exempt from a visa requirement by the national legislation applicable on 1 January 1973 provided that their intended stay was for three months or less. This right of visa free presence only changed where the individual evidenced an intention to stay longer than three months. Where a Turkish national intended to work for less than three months in the Netherlands a labor permit was, in principle required but there was a long list of excluded categories. The law was changed in 1982 when Turkish nationals were included on the mandatory visa list.²²

In *France* the national law in 1973 appears to have been determined to some extent by the 1954 bilateral visa agreement that allowed for visa free visits up to three months unless the visitor came for work or professional purposes. In practice a Turkish national could come as a tourist without a visa for three months and provide and receive services during that period (Minces 1973:135; GISTI 1974:24).

In the *UK* there was no visa requirement on Turkish nationals coming to the UK for visits at the relevant date which was 1 January 1973. The relevant rules were divided into those applicable on entry into the state²³ and those applicable after entry.²⁴ Paragraph 10 of the on-entry rules provides that only nationals of countries in the annex are obliged to have a visa for entry to the UK and Turkey is not a country on that list. The visa free admission rules apply to visitors, *au pairs*, businesspersons, persons of independent means and self-employed persons (paragraph 34 – if the individual has no visa the immigration officer may admit the individual for up to two months and advise him or her to make a further application to the UK authorities).

The **third** group of states contains those where the relevant date is indeed 1 January 1973 but the Member State already had in place mandatory visa requirements for Turkish nationals. *Italy* is such a country. There may have been a visa requirement for Turkish nationals based on the 1931 public

²⁰ Ministry of Justice Regulation No 237 of 25 June 1954 Section 2(1)(1); Commissioner of Police Circular No 18/1958, Part IV, Section 2; Regulation No 107 of 22 April 1958, Section 291(2); Regulation 30 December 1960, Section 2(1)(a); Regulation No 220 of 23 June 1964, Section 10.

²¹ Par. 5(5) *Ausländergesetz* 1965 and par. 5(1)(2) and Annex *Verordnung zur Durchführung des Ausländergesetzes*.

²² Aliens Act 1967 Articles 6 and 8; Aliens Decree 46(1)(c) and (d); Aliens Regulation 1966 Article 16(a).

²³ Statement of Immigration Rules for Control on Entry, 23 October 1973.

²⁴ Statement of Immigration Rules for Control After Entry, 23 October 1972.

security legislation and a circular on visa of 28 December 1970.²⁵ Other sources however, indicate that Italy (re-)introduced a visa requirement for Turkish nationals only on 3 September 1990 after it enacted a modern immigration law with the Martelli Act of 28 February 1990 (thus long after 1973). Apparently the visa for Turkish nationals was introduced in order to bring Italy's visa policy in line with the Schengen visa rules, shortly before Italy joined the Schengen group.²⁶ This also raises the question whether the law or the actual visa practice at the relevant time is decisive for the application of the standstill clause.

Political Debate

In some Member States there has been no political debate at all or virtually none since the judgment. Among these states one finds *Austria, Finland, Ireland, Italy* and *Romania*. It is unclear why this is, though the exceedingly limited effects of the judgment are very likely to be a cause in some but not in others such as Ireland. The reaction of the authorities, particularly their silence, may also be an explanation.

In *Belgium* the Government twice answered parliamentary questions whether the judgment allowed for visa free entry of Turkish workers. In his answers to the second question on 10 February 2010 the minister stated that Turkish workers and service providers were not exempted under the bilateral agreement, only tourists, family visitors and other persons coming for short visits were exempted.²⁷ He further mentioned that the judgment had effects for Denmark and Germany and referred to the Guidelines adopted by the European Commission (see chapter 5). No further discussion has taken place. In *Denmark* where there were rule changes as a result of the judgment, there was more political discussion. The Minister for Integration informed the parliament about the *Soysal* judgment, a few weeks after it was pronounced by the Court. The Minister of Foreign Affairs in October 2008 wrote to the Parliament's European Committee explaining the position which the Danish Government was taking in the proceedings in Luxembourg and why. The key reason for the Danish argument before the ECJ for a restrictive interpretation of Article 41(1) of the protocol was to enable Denmark to maintain flexibility over its immigration laws. Still there was no parliamentary debate on the issue or follow up from the Minister after the decision. Interestingly in *Finland* the debate within the administration which has not been resolved is how the Finnish authorities would be required to act if a Turkish national applied for a visa at the Finnish consulate with the purpose of traveling to another Member State in respect of which the *Soysal* judgment means that the individual must be exempt from the visa requirement.

In *Germany* there has been substantial debate in the *Bundestag* both before and after the judgment was handed down. A lively discussion also took place within various parts of the German administration regarding the correct interpretation of the judgment and its impact on national legislation. Members of Parliament of two opposition parties (*Die Linke* and *Bündnis 90/Die Grünen*) during 2009 repeatedly filed questions or motions on the consequences of the judgment. They asked, among other things, for instructions to the border police to accept Turkish service providers who arrived without visa and to instigate amendment to the EU Visa Regulation to bring it in conformity with the Agreement. The government in its replies denied that the *Soysal* judgment applied to Turkish service recipients but admitted that participation in a language course could be covered

²⁵ The ECJ in *Abatay* has held that the standstill clause of Article 41(1) Protocol works as of the entry into force of the Protocol (1.1.1973). The Protocol was signed by Italy and the other five original EEC Member States on 23 November 1970, a month before the circular of 28 December 1970. This prompts the question whether Italy under international law was bound not to introduce a restriction that would severely hamper the realization of the freedom to provide services, one of the aims of the Protocol it had just signed.

²⁶ *Migration News Sheet*, July 1990, p. 2/3; *Migration News Sheet*, October 1990, p. 3; Doğan and Genç 2010.

²⁷ See fn 13 above.

under provision of services.²⁸ Similarly, in the *Netherlands* there was an immediate and lively debate following the judgment. The judgment was debated in the Parliament in March 2009 and the Ministry indicated it would be studying the situation. The political interest in the case continued for some time causing substantial headaches for the ruling coalition. The solution found was further study of the consequences of the case which has still not been completed.

In the *UK* there has been substantial interest in the *Soysal* judgment among lawyers and non-governmental organizations. On 18 February 2009, the day before the judgment, a Turkish national arrived in the UK without a visa for the purpose of attending the Intercontinental Stage Magic Championships in Blackpool. He was refused admission and return to Spain from where he had arrived on the basis of the lack of a visa. The UK authorities issued a press release on 1 March 2009 (after the *Soysal* judgment) stating that 'Visitors to the UK must play by the rules. If they need a visa to come here and they haven't got one, there's no magic wand they can wave to get in. They will just be sent back.'²⁹ The UK authorities made no direct reference to the judgment however, from the timing of the press release it would seem that they have taken the view that the judgment does not affect the legality of refusing Turkish nationals entry to the UK for the purposes of attending trade fairs where those nationals do not have the UK visas. While the UK parliament considered relations with Turkey on numerous occasions after the *Soysal* judgment, this was mainly in two areas – the question of abuse of student visas in the UK³⁰ (House of Lords) and property rights in Turkish Republic of Northern Cyprus (House of Lords).³¹ There was no mention of the judgment.

In *Turkey* there has been political interest in the judgment but this seems directed exclusively at ensuring that the EU Member States give a wide interpretation to it and implement it quickly. The Turkish Foreign Ministry has been engaged in political discussions with EU representatives seeking to achieve visa liberalization, which at the moment appears to be stuck around the issue of readmission agreements (see chapters 5 and 7).

Rule Changes after Soysal, the Current Law on Visas for Turkish Nationals and National Jurisprudence

There are two main groups of Member States as regards this heading – those where there have been some rule changes, albeit minor and those where nothing has been changed so far.

Denmark heads up the **first** group of states. After having studied the *Soysal* judgment for almost a year the relevant Ministry, in February 2010, published new rules on visa exemption for Turkish citizens who are to perform a service in Denmark. The visa exemption only applies to Turkish nationals who are resident and employed (or economically active) in Turkey and have been designated as a service provider. The elements in the rules regarding the definition of a service provider are that the person receives payment from another person for performing services for a temporary and time-limited period without actually being employed. The individual must either own a business in Turkey or be employed by one there. The duration of entry is three months maximum.

²⁸ <http://dip21.bundestag.de/dip21/btd/16/127/1612743.pdf>;
<http://dip21.bundestag.de/dip21/btd/16/140/1614028.pdf>;
http://dokumente.linksfraktion.net/drucksachen/7767478405_1612562.pdf;
<http://dip21.bundestag.de/dip21/btd/16/133/1613327.pdf>.

²⁹ <http://www.bia.homeoffice.gov.uk/sitecontent/newsarticles/nowyouseehim>.

³⁰ http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=turkish%20visa%20provis%20servic&ALL=Turkish%20visas&ANY=&PHRASE=%22provision%20of%20services%20%22&CA
TEGORIES=&SIMPLE=&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=muscat_highlighter_first_match&URL=/pa/cm/c
medm/100120e01.htm#muscat_highlighter_first_match.

³¹ *Ibid.*

The test of the elements of the definition takes place at the Danish border.³² No national jurisprudence was mentioned.

Germany also belongs to this group – the German authorities changed the mandatory visa requirement to reflect the position as it was in 1973. Thus some of the groups of Turkish nationals who were not subject to the visa requirement then were removed from the visa list. The main exceptions are lorry drivers, workers servicing installations, important artists, researchers and sportsmen. However, these individuals need to obtain a document from the German consulate evidencing their right to visa free travel before they go to Germany.³³ The Interior ministry has provided a circular on the legal interpretation of the judgment.³⁴ Several German courts have applied the *Soysal* judgment. Some of those cases concerned immigration detention, criminal prosecutions for illegal residence or interim injunctions against expulsion. The courts confirmed that the judgment does not apply to Turkish nationals seeking entry for employment or family reunification.³⁵ But lower courts have held that Turkish visitors coming by car, businessmen or a trader and Turkish tourists could rely on *Soysal*.³⁶ But a Turkish national who said at the border that he only intended to stay with his family, could not rely on Article 41(1) since the court held that he sought to come as a recipient of services.³⁷

In the **second** group one finds *Austria* and *Finland* not least as their date of accession to the EU means that the standstill provision only applies after the mandatory short stay visa requirement was already inserted into national law. *Italy* is also in this group if at the relevant date it already applied mandatory visas to all Turkish nationals. *Austria*, *Finland* and *Italy* simply apply the EU Regulation 539/2001 without problem as none of these states is affected by the judgment. In *Belgium* and *France* although original Member States and thus affected, there has been no change to the legislation on Turkish nationals and the administration has taken no steps to implement it. Regulation 539/2001 is applied fully and irrespective of the *Soysal* judgment according to our correspondents and there has been no national case law. *Ireland* also belongs to this group notwithstanding the relevant date of 1973 applying to it. No change has been made to the law or practice there. Under the prerogative powers vested in the Minister for Justice and under which visa obligations are regulated, no change has been made – Turkish nationals in all categories are required to obtain visas. Further Regulation 539/2001 does not apply in *Ireland* so there is no need to examine its compatibility with the judgment.

The Netherlands also has not changed its visa rules as a result of the judgment. The current rules apply Regulation 539/2001 without modification to Turkish nationals. Like *Ireland*, the rules were substantially more favorable for Turkish nationals at the relevant date but there appears to be a political reluctance to do anything. However, in *the Netherlands* the courts have already been required to consider the judgment in three cases. Only one case deals substantively with the visa issue and here the national court affirmed the finding in *Soysal* placing on the state authorities the burden of proof of providing clarity regarding the relevant rules at the relevant date and on the

³² Ministry of Integration (23 February 2010) *Visa exemption for Turkish citizens who are to perform a service in Denmark*, see http://www.nyidanmark.dk/en-us/coming_to_dk/visa/need_visa/visa_exemption_turkish_service_in_denmark.htm. A detailed note on the issue (“Visa Conditions for Turkish Citizens who are to Perform a Service In Denmark - the *Soysal* Decision”) has been published on the website of the Danish Embassy in Ankara, see <http://www.ambankara.um.dk/en/menu/ConsularServices/Visaandresidencepermits/VisaConditionsForTurkishCitizensWhoAreToPerformAServiceInDenmarkTheSoysalDecision/>.

³³ Supplement to the *Visa Handbook* of the German Ministry of Foreign Affairs, *Türkische Staatsangehörige (Dienstleistungserbringung)* of 27 May 2009.

³⁴ Circular of the Federal Ministry of Interior of 28 May 2009, *Informationsbrief Ausländerrecht* 2009, p. 269.

³⁵ Verwaltungsgericht Berlin, 22 April 2009, no. 2, L 50.09 V (webdesigner), Verwaltungsgericht Frankfurt, 22 May 2009 (living with family members and study for a semester).

³⁶ Amtsgericht Cham 29 July 2009 (entry for buying a car) and Amtsgericht Erding, 29 April (businessman).

³⁷ Verwaltungsgericht Berlin, 25 February 2009, no. VG 19 V 61.08.

Turkish national to make a plausible case that he or she is actually going to provide services or is self-employed.³⁸ Similarly, *the UK* has not made any change to its national rules following the *Soysal* judgment. There have been no decisions from the national courts which make reference to the judgment. *Romania* similarly has not changed its legislation and applies Regulation 539/2001. However, it does make use of the exceptions in the Regulation to exclude diplomatic passport holders, members of missions etc. However, railway teams which were not subject to visa requirements at the relevant date are now subject to them. There have not been any cases before the national courts on the matter. *Turkey* has lifted visa requirements for Romanians going there for short stays.

Legal Literature

It would be expected that in Member States where there are potentially very important implications regarding the *Soysal* judgment, there would be more attention in the legal press about it. This seems to be the case.

For example, in *Austria*, *Finland* and *Italy* where no immediate legal consequences arise, there has been no evident legal literature published on the subject. Nonetheless, in *Denmark* where there have been substantial changes in the immigration rules as a result of the judgment, there also has been no legal literature on the case. This may be due to the fact that the Danish government published its position only in February 2010. In *Ireland* where one might expect legal consequences, there has been no literature or discussion either. The same is the case in *Romania*.

In *Germany*, however, there has been substantial legal literature already. All the main German legal journals which include information on migration have covered the case and its implications. Similarly, in the *Netherlands* there has been substantial discussion in the legal press about the judgment aimed at practitioners. In *Belgium* nothing has been done but the judgment does have substantial implications. There is one article now available on the case.

Most legal publications in *Germany* deal with two issues: a reconstruction of what exactly was the German law on visa for Turkish nationals on 1 January 1973 and the question whether *Soysal* applies only to service providers or to service recipients as well. The latter position is subscribed by the majority of the authors (Dienelt 2009, Gutmann 2009, Mielitz and Westphal 2009). The main arguments of those who argue for the restrictive interpretation (Haylbrunner 2009, Hecker 2009 and Welte 2009) are: (1) this is not what the parties had in mind when signing the Association Agreement in 1963, (2) recipients of services, especially tourists, are not considered to be economically active in the EU law, (3) the reception of services is linked to the residence rights of Union citizens, and (4) in the broader interpretation market freedom and freedom of movement would merge, while this are two separate issues.

We are not convinced by these arguments. The first argument disregards that service recipients were already explicitly included in 1964 in Directive 64/221/EEC. The second argument is more related with a discussion in German immigration law than to the ECJ case law on tourists as recipients of services (see chapter 2). The third argument forgets that the first relevant ECJ judgments (*Cowan*; *Luisi and Carbone*) date from 1987 and 1988, long before the Union citizenship was conceived and introduced in the Treaties. The fourth argument fails to distinguish between visa free travel for a short period and free movement of persons that implies a right of residence for a period for more than three months.

³⁸ District Court The Hague (Aliens Chamber Haarlem), 23 November 2009, LJN: BK4610.

In *the UK* there has been some case notes on the judgment in the specialist legal press to advise lawyers about the impact of the decision. Twice the immigration lawyers' association has held meetings for its members regarding the decision and circulated the relevant immigration rules which were applicable in 1973.

In Turkey, the judgment received wide publicity and was welcomed as a real opening of borders towards Turkish nationals. So far, however, that promise has not yet been realized.

Conclusions

There is a very varied picture of the implications of the *Soysal* judgment for the Member States and their reactions to it. First, the Member States come within three different categories as regards to their visa rules at the relevant date. Of those we have studied, only *Italy* had a visa requirement on Turkish nationals on 1 January 1973. But it is questionable whether that requirement was compatible with *Italy's* obligations under the 1957 Council of Europe agreement discussed in chapter 3. All the others, for which 1973 is the relevant date did not have blanket visa requirements. The responses in *Denmark* and *Germany* show the greatest efforts to comply with the judgment whilst the reaction of governments in *Belgium*, *France*, *Ireland*, *the Netherlands* and *the UK* appears to be something like that of ostriches. Some Member States, like *the Netherlands* appear to be struggling between politics and law and not yet finding a satisfactory solution.

So far, only in *Germany* and *the Netherlands* have the national courts been required to consider the application of *Soysal*. For the moment the national case law appears satisfactory, fully respecting the ECJ's judgment and applying a reasonable evidential and burden of proof test.

Three main conclusions arise:

- Those Member States which have sought to adapt their national law to take into the account of the *Soysal* judgment are tempted to replace the visa with the equivalent of a visa - an authorization issued at the consulate on the basis of similar evidence which would be required for a visa. If this is a visa by another name then it is questionable whether such practices are consistent with the judgment;
- Those Member States which have simply ignored the judgment need to take it seriously and adjust their laws. Even if this means a careful analysis of which categories of Turkish travelers are exempt from the visa requirement, for instance artists, researchers etc. and which are not, this must be done and applied in good faith;
- The EU institutions and the Association Council need to provide clarification to the parties and Member States on the position of tourists. In our view, tourists, family visitors and students coming for a short stay as recipients of services are included in the scope of the judgment and thus a visa requirement which did not exist for those categories at the relevant date is not legally applicable now.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *SOYSAL*

Chapter 5: EU Institutions and *Soysal*

The *Soysal* case, from the very beginning, was not only on the agenda of the ECJ. It was on the table of several other EU institutions, the Council, the Commission and the Parliament, as well.

The Council's Working Party on Admission discussed the possible consequences of *Soysal* and other cases on the interpretation of the EC-Turkey association rules already in 2007.³⁹ In October 2008, a few days before the hearing of the *Soysal* case before the Court, at a meeting of the Visa Working Party of the Council of Ministers, the Commission asked the delegations of the Member States to provide information on the date on which their authorities introduced a visa requirement for Turkish nationals. Apparently, the Commission wanted to be prepared in advance for a judgment that the standstill clause in Article 41 Protocol did not only apply to long stay visas, as the Court had ruled in *Tüm* and *Darı*, but for short stay visas too. At that meeting the French EU Presidency proposed that the Commission's question should be reduced to 'whether and when Member States had introduced a visa exemption for Turkish nationals coming to the Schengen area with a view to providing services'.⁴⁰ The effect of the adoption of this suggestion was that the question whether or not other Turkish nationals, such as Turkish service recipients and self-employed persons needed a visa at the relevant date was left outside the scope of the enquiry.

At a meeting of the Visa Working Party on 15 April 2009, less than two months after the judgment, the Commission presented a note entitled 'Guidelines on the movement across the external borders of Member States applying the Schengen *acquis* of Turkish nationals in order to provide services in a Member State'. The aim of these guidelines was 'to provide clarifications regarding the short-stay visa obligations for Turkish nationals residing and exercising their activities in Turkey and wish to enter the territory of a Member State in order to provide services there'.⁴¹ The Commission explicitly stated that the guidelines are a provisional reaction to the Court ruling and do not prejudice a full analysis of the ruling in *Soysal*. 'Nor do they give detailed consideration to the issue of travel in the context of the right of establishment or as a recipient of services.' The Commission is aware that the *Soysal* judgment may have consequences for the (exemption of) visa obligations of Turkish recipients of services. The guidelines were written on the basis of information provided by the Member States that was explicitly restricted to the visa obligations of Turkish service providers only.

The Commission on the one hand underlines that it is for each Member State to give appropriate instructions to its competent authorities on the implementation of the judgment. But on the other hand the Commission states that the Guidelines will be inserted into the *Practical Handbook for Border Guards* (Schengen Handbook),⁴² a recommendation of the Commission to the border guards

³⁹ Council document 7338/07 of 13 March 2007, p. 1.

⁴⁰ Council document 14908/08 of 29 October 2008, p. 3.

⁴¹ Council document 9997/09 of 29 May 2009, p. 5-10.

⁴² In the draft of a Commission Decision establishing a fully revised Handbook for the processing of visa applications this subject the consequences of the *Soysal* judgment are mentioned in par. 1.1.3 entitled "Turkish nationals who are

and the consular authorities of the Member States. The guidelines, according to the Commission, are part of the *Schengen acquis* and applicable in all Member States except for the UK and Ireland, which must nevertheless comply with the *Soysal* judgment. Thus, it appears that the legal status of the guidelines is more than a simple clarification. It is a recommendation of the Commission that is part of the *Schengen acquis*. The legal status of the guidelines will become more clear, once they will be transformed into an Annex of the new Visa Code.⁴³ At the April 2009 meeting of the Visa Working Party, the delegations were asked to send their comments on the draft within to the Commission.

Subsequent versions of the draft guidelines were discussed by the officials of the Members States with the Commission at meetings of the Visa Working Party in May and June 2009.⁴⁴

At the meeting in May the Commission informed the delegations that draft had been discussed with the Turkish authorities on 8 May 2009. Germany offered to perform a limited representation for other Member States in order to solve the issue of the transit of Turkish service providers travelling without a visa to Germany. But this suggestion was not accepted. The Commission stated 'that requesting a Turkish national to go to the German consulate to get a visa without needing a visa to enter Germany would be illogical'.⁴⁵

Commissioner Barrot in on 25 September 2009 stated in his answer to a written question by MEP Emine Bozkurt that '[from] the preliminary assessment of this ruling, carried out notably on the basis of information communicated to the Commission by the Member States, it appears that, at the time the standstill clause entered into force for them, 16 Member States required a visa from all Turkish nationals; they are therefore not affected by the *Soysal* ruling. Out of the 11 other Member States that did in principle exempt Turkish citizens from the visa obligation at the relevant dates, seven of them did require a visa from Turkish citizens that came to their territory in order to carry out a paid activity or pursue a professional activity there. Therefore, it appears that the exemption from the visa requirement only benefits, under certain circumstances, Turkish nationals travelling to some Schengen countries (i.e. Germany and Denmark), as well as to the United Kingdom and Ireland, in order to provide services there.' He added that the guidelines were in a process of formal adoption and had been shared with the Member States and with Turkey. Moreover, the Commissioner Barrot in his answer stated: 'The *Soysal* ruling has no impact on the future of the accession negotiations, which are based on Turkey's progress in meeting the requirements for membership.'⁴⁶

The final version of the guidelines had yet not been published by mid March 2010, probably because the Danish government had not yet concluded its study on the consequences of the judgment for Denmark (see chapter 4). The text of the draft guidelines of 7 May 2009 is reproduced in Annex G. According to that draft version Turkish nationals residing and exercising their activities in Turkey can enter only two Schengen countries (Denmark and Germany) without a visa and only in order to provide services on the territory of those states. A transit visa will be required to transit through the territory of other Member States. At the external border of the Schengen area, a Turkish national without a visa for the Member State where he intends to provide services, must prove that he meets the conditions to be exempted from the visa obligation. According to the draft he must prove that he or his employer is legally established in Turkey (e.g. by a certificate delivered by a Chamber of Commerce) and that he is traveling in order temporarily to provide a service in the Member State concerned (for example, by a contract with the service recipient).

service providers may be exempt from the visa requirement". The draft decision refers to the Guidelines to be reproduced as Annex 6 to the Handbook.

⁴³ The Visa Code is an EU Regulation adopted by the Council on 13 July 2009, OJ 2009 L 243/1, and will enter into force on 5 April 2010.

⁴⁴ Council documents CM 2432/1/09 REV1 and CM 1880/09.

⁴⁵ Council document 10475/09 of 29 May 2009, p. 3.

⁴⁶ Parliamentary Questions E-3747/2009.

Parliamentary questions on the consequences of the judgment have been tabled in the European Parliament in March by the MEPs Cem Özdemir and Joost Lagendijk (Greens/ALE) to the Commission and in July 2009 by MEP Emine Bozkurt (SD) to the Commission and the Council.⁴⁷ On 6 May 2009 MEP Joost Lagendijk, co-chair of the EU-Turkey Joint Parliamentary Committee, organized a hearing in Strasbourg on the EU Visa Regulation and the *Soysal* judgment. At the hearing, academic and other experts from Member States and Turkey were present. In June 2009 the EP Committee on Petitions declared a petition by the German lawyer Ünal Zeran and 105 other persons admissible and decided to request information from the Commission on the petition. On 25 September 2009 the Commission did answer both the written question by Bozkurt and the request by the Committee on Petitions with an almost identical reply.⁴⁸ The Committee on Petitions did not take further action on the petition.

On 19 May 2009 the EC-Turkey Association Council convened in Brussels. At the meeting the Turkish Minister of Foreign Affairs Davutoğlu raised the issue of the EU visa policy regarding Turkey (see chapter 7). With reference to the *Soysal* judgment, he affirmed that visas for Turkish service providers should be removed as they constitute a new restriction to the right of establishment and freedom to provide services. He stated that the Court had affirmed the primacy of international agreements concluded by the Community over the provisions of secondary Community legislation, like the Council Regulation which sets out the visa black and white lists of the EU. Moreover, he stated that Turkey expects the European Commission to take the necessary measures in respect of any EU Member State that does not comply with the Agreement and the Additional Protocol.⁴⁹

In November 2009 the Swedish Presidency of the Council and Commissioner Barrot made a visit to Turkey. From the joint EU-Turkey statement published after the meeting with the Turkish government it appears visa policy was one of the issues under discussion. Both sides agreed to reinforce the cooperation in the area of visa policy and related areas, with a view to further promoting people to people contacts, starting with ensuring the efficient application of the *Soysal* judgment and other relevant ECJ decisions on Turkish service providers' rights stemming from the 1970 Additional Protocol.⁵⁰ The visa policy of Turkey and of the EU with regard to each other is the subject of the next two chapters.

⁴⁷ See written questions P-2414/09, E-3746/09 and E-2747/09. For the formal answer by the Commission to the questions by Özdemir and Lagendijk, see <http://www.oezdemir.de/show/2461045.html>.

⁴⁸ Committee on Petitions, Petition 0399/2009, PE429.646.

⁴⁹ Council document CE-TR 105/09 of 20 May 2009, p. 31.

⁵⁰ Council document 17789/09 of 22 December 2009, p. 4 and Migration News Sheet December 2009, p. 9.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *SOYSAL*

Chapter 6:

Visa Policy of Turkey Regarding EU Nationals

The two relevant provisions, Article 14 Association Agreement and Article 41(1) Protocol, both are formulated in a reciprocal way. According to Article 14 the contracting parties agree to abolish 'restrictions on freedom to provide services *between them*'. In a similar vein, in Article 41(1) Protocol the parties agree to refrain from introducing *between themselves* any new restrictions on the freedom of establishment and the freedom to provide services. Not only the EU Member States but Turkey also is obliged not to introduce new restrictions on the provision and receipt of services by EU nationals. If on the date the Protocol entered into force for a Member State, Turkey did not require the nationals of that Member State to have a visa, Turkey may not require a visa for nationals of that Member State coming to provide or receive services. This will apply with regard to nationals of EU Member States with which Turkey had concluded a bilateral visa agreement or that, like Turkey, was party to the 1957 Council of Europe agreement on the date the Protocol entered into force for that Member State (see Chapter 3).

In his answer to parliamentary questions of MEP Bozkurt (see Chapter 5), Commissioner Barrot was right to mention that the *Soysal* judgment has to be read 'in the context of the Association Agreement between the EEC and Turkey, which establishes reciprocal rights and obligations on both sides.' It is all the more surprising that the Council in its answers to the questions of the same MEP a few weeks later stated: 'Turkey has different visa regimes for different Member States. It is a matter for Turkey to decide on its visa requirements.'⁵¹ The first sentence is correct, the latter one is clearly incompatible with the text of Association rules as interpreted by the Court in the *Soysal* judgment.

In this chapter we look at the other side of the coin, observing the issue from the Turkish side of the relationship. **Our question here is whether the Turkish visa policy is in compliance with its obligations under the Association Agreement and the Protocol.** Which bilateral visa agreements have been concluded by Turkey with the old and new EU Member States and what is the current visa policy of Turkey with regard to nationals of EU Member States?

In Chapter 3, we noted that Turkey had concluded bilateral visa agreements with *Belgium* in 1956, *France* in 1954, *Germany* in 1953, *Ireland* in 1955, *the Netherlands* in 1953 and *the UK* in 1960. All six agreements were in force in 1973. All agreements except the one with *the UK*, however, have a clause that excepts nationals traveling for the purpose to exercise professional activities. Moreover, Turkey in 1973 with regard to *Luxembourg* and *Italy* was bound by the 1957 Council of Europe Convention. Thus at the time the Protocol entered into force Turkey was bound by bilateral or multilateral agreements with eight of the nine EEC Member States. Only with *Denmark* no agreement was in force on this issue at that time.

⁵¹ Reply of 12 October 2009 to question E-3746/09.

We were not able to establish whether nationals of Member States at the relevant date under Turkish law were required to have a visa if they desired to enter Turkey with the purpose of providing or receiving services. The history and development of the national Turkish visa policy is documented by Kirişçi (2005: 350-353) and Ertuna (2010:175-180). But it is clear that, currently nationals of five of the nine EU Member States, who were EEC Member States in 1973 are exempted from visa for travels up to 90 days. Holders of ordinary passports from *Denmark, France, Germany, Italy* and *Luxembourg* are exempted from visa. Nationals of the other four Member States, *Belgium, Ireland, the Netherlands* and *the UK* are required to have visa (three month, multiple entry) to enter Turkey which can be obtained at the Turkish border for 15 Euros. The Turkish Council of Ministers, apparently in reaction to the suspension of the bilateral agreements by *Belgium* and *the Netherlands* in 1980, on 27 October 1980 abolished the exemption of visa and visa fees for Belgium and the Dutch citizens (Council of Ministers Decision No. 96/7925, 28.03.1996, *Resmi Gazete*, 12.06.1996, no. 22664).

Professional service providers from the four Member States (*Belgium, Ireland, the Netherlands and the UK*) were not covered by the exemption in the bilateral agreements between Turkey and those states in 1973. But tourists, students and other recipients of services were covered by the exemption. Paying 15 Euros at the border may be considered a minor nuisance, but it undoubtedly constitutes a less favorable treatment compared to the visa free entry the nationals of those four Member States enjoyed in 1973.

With regard to the three Member States that acceded to the EEC in the 1980s, *Greece* in 1981, *Portugal* and *Spain* in 1986, there were no bilateral agreements with Turkey in force at the time of accession. *Portugal* and Turkey signed an agreement in 2000 but it only exempts nationals holding a diplomatic passport. In 1984 Turkey exempted nationals of *Greece* holding an ordinary or official passport from visa for their travels up to 90 days (Council of Ministers Decision 03.04.1984, *Resmi Gazete*, 06.04.1984, no. 18364). That exemption still applies today. *Portugal, Spain* and Turkey, all three were bound by the 1957 Council of Europe Convention at the time of accession of *Portugal* and *Spain* to the EEC. Currently, nationals of Portugal and Spain are required to have a visa to enter Turkey. This three month, multiple entry visas can be obtained at the Turkish border for 15 Euros. This requirement with regard to service recipients is not compatible with the visa exemption under the Council of Europe Convention in force in 1986. But the provision made with regard to the visa for service recipients from the four Member States mentioned above, applies here as well.

Nine of the ten states that joined the EU in 2004 had concluded visa agreements with Turkey. We do not know whether all nine agreements were suspended or denounced before the accession date. But we know that *Malta* and *Slovenia* well before their accession to the EU suspended the application of the 1957 Council of Europe Agreement on movement of persons with regard to Turkish nationals.

A visa agreement was signed between Turkey and *the Czech Republic* on 18 February 1991 allowing visa free travel for both countries' citizens for visits up to 90 days for a period of 6 months (*Resmi Gazete*, 10.04.1991, no. 20841). Currently nationals of Czech Republic are exempt from visa for their travels up to 90 days.

A visa agreement was signed between Turkey and *Hungary* in 1992 allowing visa free travel was extended to citizens of both countries for visits up to 90 days within a period of six months (*Resmi Gazete*, 14.08.1992, no. 21315). With an agreement signed in 1995 the scope extended for Turkish citizens' transit to Hungary (*Resmi Gazete*, 21.07.1995, no. 22350). Currently nationals of Hungary are required to have visa (one month, multiple entry) to enter Turkey which can be obtained at the Turkish border for 15 Euros.

A visa agreement was signed between Turkey and *Lithuania* on 11 June 1994 allowing visa free travel for both countries' citizens for visits up to 90 days for a period of 6 months (*Resmi Gazete*, 05.10.1994, no. 22072). Currently nationals of Lithuania are exempt from visa for their travels up to 90 days within 180 days starting from the first entry date.

A visa agreement was signed between Turkey and *Malta* on 6 May 1966 allowing visa free travel for both countries' citizens for visits up to 90 days within a period of six months (*Resmi Gazete*, 29.09.1966, no. 12413). Currently for nationals of Malta; ordinary passport holders are required to have visa (three month-multiple entry) to enter Turkey which can be obtained without payment at the Turkish border.

A visa agreement was signed between Turkey and *Poland* allowing visa free travel for both countries' citizens for visits up to 90 days within a period of six months. With an additional agreement signed on 02 May 1989 the scope of the visa free travel was extended to "people who are appointed on temporary and permanent basis" (*Resmi Gazete*, 14.04.1996, no. 22611). Currently, for nationals of Poland required to have visa (one month-multiple entry) to enter Turkey which can be obtained visas at the Turkish border for 15 Euros.

A visa agreement was signed between Turkey and *Slovakia* on 18 February 1991 allowing visa free travel for citizens of both countries for visits up to 90 days for a period of 6 months (*Resmi Gazete*, 10.04.1991, no. 20841). Currently, for nationals of Slovakia are required to have visa (one month-multiple entry) to enter Turkey which can be obtained visas at the Turkish border for 15 Euros.

A visa agreement was signed between Turkey and *Slovenia* on 29 November 1999 allowing visa free travel for both countries' citizens for visits up to 90 days within a period of six months (*Resmi Gazete*, 13.01.2000, no. 23932). Currently, nationals of Slovenia are required to have visa (three month-multiple entry) to enter Turkey which can be obtained visas at the Turkish border for 15 Euros.

Turkey signed bilateral visa agreements with *Latvia* and *Estonia* in 1996. But these agreements only provide visa free travel for the holders of diplomatic passport. Currently nationals of Latvia and Estonia are exempt from visa for their travels up to 90 days.

It is difficult to find the logic in the present Turkish visa policy towards those nine Member States. Why are the nationals of *Estonia* and *Latvia* exempted, although there was no bilateral agreement with those two countries? Why are the nationals of *Hungary*, *Poland* and *Slovakia* issued with multiple entry visas valid for one month only and the nationals of *Malta* and *Slovenia* with a visa valid for three months? Why are the nationals of *Malta* exempted from fees altogether, whilst the other not-exempted EU nationals have to pay 15 Euros. From the above data, no clear relation with the conclusion of a bilateral agreement or not is apparent.

Another question is to what extent nationals from the non-exempted Member States traveling to Turkey as service providers or as service recipients can today rely on those agreements. On the other a similar question arises with regard to Turkish service providers and service recipients traveling to those Member States. If the bilateral agreements have not been suspended or denounced by one of the parties, the crucial question is whether the exemption covered professional service providers or not. Tourists, students and other service recipients most probably were covered by the exemption of those agreements. Does the bilateral agreement, if still in force at the date of accession, prevail over the EU Visa Regulation? The Court in the *Soysal* judgment held that an agreement concluded between the Community and a third country prevails over secondary EU law. But these bilateral agreements were concluded by a Member State with a third country before the accession of that Member State to the EU.

The nationals of *Bulgaria* and *Romania*, the two Member States that acceded to the EU in 2004, currently, are exempted by Turkey from visa for their travels up to 90 days within 180 days from the first entry date. In Chapter 3, we noted already that *Romania* and Turkey concluded a visa agreement in 1992, allowing visa free travel for citizens of both countries for visits up to 60 days. The agreement was signed on 20 November 1967 (*Resmi Gazete*, 06.05.1968, no. 12891). This agreement was replaced by a new bilateral agreement in 2004, apparently because ***Romania*** had to comply with the EU Visa Regulation as part of the *acquis communautaire*.

A visa facilitation agreement was signed between Turkey and *Bulgaria* on 10 March 1993. This agreement provided visa free travel for diplomatic passport holders, but not for service passport holders. It provide also for an accelerated visa procedure. In terms of time, for businessmen (only invitation letter or a document granted by the Chamber of Commerce ofr Chamber of Industry), journalists (relevant ID card stating that the person is a member of a press group), sport persons, artists and people participating to scientific occasions (relevant documents stating the programme and purpose of the event). In 2001, this visa facilitation agreement was expanded to a visa-free regime just for Bulgarian citizens willing to visit to Turkey by decision of the Turkish Council of Ministers (*Resmi Gazete*, 15.06.2001, no. 24433).

The result is that, Turkey provides visa free travel to nationals of six of the twelve Member States that acceded to the EU in 2004 and 2007. The nationals of five other Member States can obtain a multiple-entry visa at the Turkish border for 15 Euros or for free (*Malta*). These facilities do not apply for the nationals of Cyprus. With regard to nationals of eleven Member States, the visa policy of Turkey is far more liberal than the visa policy of the EU towards Turkish citizens. The same discrepancy occurs with regards to the nationals of the EU-15: nationals of eight of those Member States are exempted from the visa and the nationals of the other seven can buy three months multiple-entry visa for 15 Euros. This practise is known as 'bandrol' visa in Turkish (Kirişçi 2005:351). The above also makes clear how the freedom of Turkish nationals to travel without a visa in Central Europe was severely restricted by the accession of the EU-12 to the EU.

The levy of the 15 Euros may be a minor violation of the rules under the Association Agreement EEC-Turkey with regard to professional service providers from a few Member States and with regard to the recipients of service from some of the 13 Member States that have not be fully exempted from the Turkish visa (See Annex F for the current Turkish visa rules regarding the nationals of EU Member States). But this offense is very minor indeed when compared to the administrative burden, costs, long waiting periods, insecurity at the external Schengen border and other nuisances created by governments and consulates of several of the EU-15 Member States with regard to Turkish service providers and, possibly, also with regard to recipients of services in violation of their obligations under Article 41(1) of the Protocol as interpreted by the Court of Justice in the *Soysal* judgment.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *SOYSAL*

Chapter 7: EU Visa Policy towards Turkey and Other Candidate Countries and Neighboring States

The EU Visa Black List

Ever since Germany in 1980 decided to introduce visa for Turkish nationals in reaction to the sharp increase of the number of asylum seekers from Turkey and four other Member States felt compelled to follow suit, Turkey has been on successive lists of countries whose nationals who need a visa for a short stay in EU Member States. The first of such lists was adopted at the meeting of the immigration ministers of the Member States in Copenhagen on 11 December 1987. The adoption of that list was the first concrete product of the intergovernmental cooperation in the Ad Hoc Group Immigration. Turkey was on the far longer black list agreed behind closed doors by the Schengen states in 1989,⁵² and on the visa list adopted by the Schengen Executive Committee in 1993,⁵³ the list of EC Regulation 2317/95⁵⁴ that was replaced by the list annexed to EC Regulation 574/1999⁵⁵ and, finally, the negative list of EC Regulation 539/2001 that incorporated the Schengen rules into EU law.⁵⁶ The *Soysal* judgment has made it clear that the obligations of the Member States under the Association Agreement prevail over the secondary law, such as the Visa Regulation, agreed within the EU (see chapter 2).

Nationals of the three other candidate countries Croatia, the Former Yugoslav Republic of Macedonia (FYRM) and Iceland do not need a visa for a short stay in an EU Member State: Croatia and FRYM are on the visa white list and Iceland is member of the Schengen group. In December 2009 the Council decided to abolish the visa obligation for three neighboring states of the EU. FYRM, Montenegro and Serbia were transferred from the black to the white list of EU Visa Regulation.⁵⁷ Negotiations on accession to the EU are under way only with FYRM. The Turkish Minister of Foreign Affairs Davutoğlu called it ‘unacceptable that certain Balkan countries that are in the initial stages of the membership process and have not begun negotiation have been given the Schengen privilege (visa-free travel within the Schengen Area), while Turkey, considering the level that Turkish-EU relations have reached, has not.’⁵⁸

The Practice of Issuing Visa at EU Consulates in Turkey

The obligation to acquire a visa for a short trip to EU Member States has been an important problem for Turkish citizens ever since 1980. This problem confronts all strata of Turkish society, the business community, the academic world, students, journalists and the large class of the Turkish population that has close family members among the almost 3 million Turkish nationals living in the EU. The

⁵² Tweede Kamer 1988-1989, 19326, no. 11, p. 22.

⁵³ SCH/II-Visa (93)11.

⁵⁴ OJ 1995, L 234/1

⁵⁵ OJ 1999, L 72/2.

⁵⁶ OJ 2001, L 81/1.

⁵⁷ EU Regulation 1244/2009, OJ 2009 L 336/1.

⁵⁸ *Migration News Sheet*, January 2010.

practical problems experienced by businessmen, by family visitors and others have been documented in recent studies. Those studies reveal complaints about the costs and the time consuming and bureaucratic process. The visa process is perceived by many applicants as a violation of their human rights and by businessmen as unfair competition considering the Customs Union between Turkey and the EU. The practice of German consulates to require prepayment for an appointment was subject of outspoken criticism (Doğan and Genç, 2009 and Narin Idriz Tezcan 2010).

In recent years more than half a million visa have been issued by the consulates of EU Member States in Turkey each year. Those visa make up a considerable share of the yearly total of between 11 and 12 million visa issued by EU/EEA countries in recent years. From the table below it appears that only a small minority of the visa applications by Turkish nationals are denied. The data relates to visas issued for a short stay visa (C visa) by the consulates of 22 Member States. Data on the consulates of *Cyprus, Ireland, Luxembourg, Malta and the UK* are not available.

Table 2: Short stay visas issued by EU consulates in Turkey in 2006-2008⁵⁹

<i>Year</i>	<i>C visas issued</i>	<i>percentage of all applications for C visa</i>
2006	568,469	93.2%
2007	578,920	93.3%
2008	556,861	91.3%

In 2008 most visas (85%) are issued by the consulates of seven Member States: Germany (139,000), France (103,000), Italy (68,000), Greece (55,000), Bulgaria (51,000), Romania (30,000) and the Netherlands (24,000). The percentage of visa applications that is refused varies between the Member States. In 2008 the highest refusal rates occurred in the consulates of Latvia (20%) Belgium (19%), Germany (13.5%), Estonia (12%), Denmark (11%) and the Netherlands (10%).

Visa Facilitation and Readmission Agreements

The EU has concluded visa facilitation agreements with almost all of its neighboring states and the Western Balkan states: Albania, Bosnia-Herzegovina, FYRM, Moldova, Montenegro, Russia, Serbia and Ukraine (though these are no longer relevant for FYRM, Montenegro and Serbia). The main purpose of visa facilitation agreements is to facilitate the issue of short-stay visas for certain categories of persons on the basis of reciprocity. **The EU policy aims at linking the conclusion of a visa facilitation agreement to the conclusion of a readmission agreement. Visa facilitation is used as an incentive for the conclusion of a readmission agreement** (Trauner and Kruse 2008; Roig and Huddleston 2007). Visa-free travel has been made conditional on the fulfilment of a series of conditions, such as the introduction of biometric passports, a comprehensive system of border controls and the signing of a readmission agreement, covering not only nationals of the country but also third-country nationals that have transited through the country to reach the Schengen Area. The EU and Turkey formally opened negotiations of a readmission agreement in May 2005. For several years the negotiations have made little progress.

During the meeting of the EC-Turkey Association Council in May 2009 the Turkish minister of Foreign Affairs complained that 'Turkish businessmen, academics, students, scientists, artists, sportsmen and professional drivers face substantial difficulties during their visa application to the consular units and

⁵⁹ Data calculated on the basis of data in Council documents nos. 10700/07, 8215/08 and 12493/09.

even at the border gates of the Member States. The extensive list of supporting documents requested during visa applications, the lengthy visa examination periods, the high visa fees are major sources of complaint. In most cases the admission procedure is time-consuming, costly and discouraging.’ According to the minister the EU visa practice towards Turkish businessmen constitutes a non-tariff barrier as compared to the businessmen of the third countries, who are on the visa white list of the EU (Brazil, Mexico, Malaysia, South Korea etc.), as they can travel to the EU countries without a visa. ‘As a negotiating country which has a Customs Union with the EU since January 1996 and in the framework of the Additional Protocol between the Community and Turkey, we expect a simple and expeditious visa procedure for our citizens, in particular for our businessmen, academics, students, scientists, artists, sportsmen and professional drivers.’⁶⁰ The last sentence could be interpreted as a implicit reference to a visa facilitation agreement. At the Association Council meeting, the EU called negotiations on a readmission agreement a priority and urged Turkey to resume negotiations with a view of concluding in the shortest delay.⁶¹ Turkey heeded that call and later in 2009 resumed the negotiations.

During the EU Mission to Turkey in November 2009, the Swedish Minister for Integration, representing the EU, and the Turkish Minister of Interior agreed to establish a regular dialogue on mobility, migration, asylum and visa between senior officers. The resumption of the formal negotiations on the Turkey-EC readmission agreement was noted ‘as a positive step and their timely conclusion as a shared aim’. Apparently, Turkey is afraid of accepting obligations that will bring significant financial and administrative burdens for many years to come by concluding a readmission agreement without the perspective of full EU membership in the near future. Moreover, it does not want a visa facilitation agreement to interfere with rights Turkish nationals already have obtained under the Association Agreement and the Protocol. The key problem is application of rights. As the ‘Visa Hotline Project’ run by Union of Chambers and Commodity Exchanges of Turkey (*Türkiye Odalar ve Borsalar Birliği* – TOBB) and Economic Development Foundation (*İktisadi Kalkınma Vakfı* – İKV) together with Brussels’ based NGO European Citizen Action Service (ECAS) shows, Turkish citizens have many problems with their visa applications to EU consulates in Turkey. The project received more than 1000 complaints in just two months, ranging from the amount of money requested, to documents that needs to be submitted and from the lack of facilities to treatment by consular staff (Z. Özler and M. Özsöz, 2010)

Asylum seekers

The issue that triggered the abolition of visa-free travel between Turkey and the EC Member States in 1980 was the sharp increase of Turkish asylum seekers in Germany. Their number increased from 18,000 in 1979 to almost 58,000 in 1980 (Böcker and Groenendijk 2006:182), primarily due to the political unrest around the military coup of September 1980. In the mean time the number of Turkish asylum seekers in the EU has diminished considerably. The total number of asylum applications filed by Turkish nationals in all 27 Member States was 6,200 in 2007 and 6,300 in 2008.⁶² In Germany the number of Turkish asylum seekers both in 2008 and 2009 was just over 1,400.⁶³ The main reason for ending visa free travel with Turkey in 1980 has almost completely disappeared over the past thirty years.

⁶⁰ CE-TR 105/09 of 20 May 2009, p. 30.

⁶¹ CE-TR 104/09 of 20 May 2009, p. 14.

⁶² UNHCR Statistics, Asylum levels and trends in industrialized countries.

⁶³ *Migration und Bevölkerung*, February 2010, p. 3.

Conclusions

Clearly, Turkey is being treated quite differently regarding visas from the other countries with continuous land borders with the EU and specifically with the other countries in the Balkan region. This is notwithstanding the fact that Turkey is the country with the longest standing candidature to the EU. From the earlier chapters, it appears that most Member States placed mandatory visa requirements on Turkish nationals after the 1980 coup in that country and before 1990. Over this period there were substantial numbers of asylum applicants from Turkey in some Member States. This phenomenon seems to have diminished very substantially since the turn of the millenium.

It is also apparent that the visa requirement has been transferred from individual Member State rules to EU rules in a rather seamless manner. However, from the statistics on the issue of short stay visas to Turkish nationals, it appears that there are very substantial numebers of Turkish nationals who visit friends and family or provide services in the EU every year and very few of them are refused visas. Now that the ECJ's judgment has raised questions about the very legality of the mandatory visa requirement in a number of Member States (and indeed those which the largest concentrations of Turkish nationals resident on the territory) it may be time to reconsider the reasons for maintaining Turkey on the EU's visa black list at all.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *SOYSAL*

Chapter 8: Conclusions

In this report we have examined:

- The historical context of the Agreement and the demographic information available on Turkish nationals resident in the EU;

In this regard, it is important to bear in mind when considering the implications of the *Soysal* judgment that the Agreement is hard law in the EU which takes priority over EU secondary legislation and that Turkey has been a candidate for membership of the EU since 1963. Turkish citizens comprise the largest single nationality of long resident third country nationals in the EU and make up 75% of Turkish nationals living outside Turkey.

- The *Soysal* judgment: the ECJ has held that the standstill provision on service provision has direct effect for the Member States; visas are an obstacle to free movement of service providers and their employees and thus if introduced after 1 January 1973 (for most Member States considered in this study but later for those which acceded after that date) will be contrary to the standstill provision.

This finding is not surprising in light of the ECJ's constant jurisprudence on the Agreement. Member States are obliged to apply their national rules applicable at the relevant date (for most 1 January 1973) to Turkish nationals entering for service provision which means, in many Member States dusting off the old rules and remembering what they mean. The ECJ has stated more than once that the provision of the Agreement which states that its interpretation is to be guided by the similar rules in the TFEU must be given effect. Assuming this is the case then the judgment applies not only to service providers but also to service recipients. As the ECJ's case law in respect of the TFEU provisions on services shows, just about anyone is a service recipient – tourists, students etc. According to this reasoning, the only group clearly excluded from the effect of the standstill provision are workers and those coming for family reunification. The position of the latter group is now regulated by Directive 2003/86/EC.

- The visa abolition agreements between EU Member States and Turkey most of which date from the 1950s and 1960s and the Council of Europe 1957 Agreement on Movement of Persons.

It seems that most Member States had visa abolition agreements with Turkey dating from the early 1950s onwards. While some of them exclude some categories of service providers others are very wide indeed. Most of these agreements were not denounced until the late 1970s or 1980s when the Member States introduced mandatory visa requirements for Turkish nationals. Similarly, many Member States did not denounce the Council of Europe Agreement on the accession of Turkey and indeed seem to have taken a rather *cavalier* attitude towards its application to Turkish nationals when introducing mandatory visa requirements for Turkish nationals in the 1980s.

- Member States' responses to the *Soysal* judgment have been somewhat half-hearted to say the least. With the notable exception of Denmark which appears to have taken serious steps over the 12 months since the judgment at least to adapt their rules and practices to the most restrictive possible interpretation of the judgment, the others have either done nothing or very little indeed.

While Austria, Finland and Romania, as late joiners to the EU are not directly affected by the judgment as their national law included mandatory visa requirements for Turkish nationals before accession, they still have a problem: what if a Turkish national seeks a short stay visa from one of their consulates with the intention of transiting directly a Member State where no visa requirement can be required under the *Soysal* judgment? Requiring such a Turkish national to obtain a visa may be an obstacle to his or her exercise of a right.

In Germany and the Netherlands there is a positive admission on the part of the authorities that the judgment has consequences for their visa rules but the measures taken so far seem somewhat inadequate. Germany has created the possibility for certain categories of service providers to apply at a German consulate for a declaration that they do not need a visa. In the Netherlands, the process appears to be driven by the courts rather than the government which is both heartening from the perspective of the independence of the judiciary but discouraging from that of the Member State's duty of good faith to EU law.

In the rest of the Member States, there is an ostrich approach as if ignoring the rights of Turkish nationals within the personal scope of the judgment to visa-free travel will somehow go away. Belgium, France, Italy and the UK are particularly noticeable in this regard. The question of good faith is even more problematic in respect of the UK which only days after the ECJ's judgment issued a press release claiming the legality of refusing admission to and expelling a Turkish self-employed person seeking entry to attend a trade fair on the grounds of his failure to have a visa.

- The EU institutions so far have been most noticeable for their astonishing lack of courage in facing the Member States in the Council regarding the application of the judgment.

The Commission, as guardian of the Treaties, has a particularly important role to ensure that the Member States follow faithfully EU law including and most importantly as interpreted by the ECJ. So far, it appears to be letting the Member States continue to flout EU law on this matter with impunity. This may not be a wise strategy in light of the importance of coherence and correct application of EU law. The European Parliament, on the other hand, appears to be taking a fairly robust role in seeking the correct application of the judgment. With its increased powers after the entry into force of the Lisbon Treaty, this may be helpful to encourage the Commission to take some Member States' feeble responses to the judgment more seriously.

- Regarding regional coherence, a policy objective of the EU external dimension, the visa obligation for Turkish nationals is an anomaly in the Balkans. The EU institutions have removed the mandatory visa requirement for some of the Balkan states from the beginning of 2010 and it is coming off for the rest in April.

Turkey remains the exception in this region to visa free travel for its citizens going to the EU for short stays. From an examination of the state of negotiations, there is a suspicion, we hope unfounded, that the EU's lack of enthusiasm for lifting the short stay visa requirement is linked with a hope that the Turkish authorities will accept a readmission agreement with the EU. Such a consideration is of course fully extraneous to the correct application of the *Soysal* judgment.

Further, as the statistics on the issue of short stay visas to Turkish nationals indicate, the refusal rates are fairly low, the numbers are high, so much would be gained in terms of administrative staff time in EU consulates in Turkey and it is not clear what would be lost in terms of control by lifting the mandatory visa requirement altogether.

The Tricky Issue of Service Recipients

One of the questions which seems to be contributing to cold feet in some Member State ministries is whether the *Soysal* judgment applies both to service providers and recipients. **If this is the case, and the Commission appears to consider this so, then all Turkish tourists are included within the scope of the judgment. The legal world appears to be divided on the question though the majority of academic and practitioner commentators so far appear to agree with the Commission.**

It is difficult to see how the judgment can be limited exclusively to service providers without potentially damaging the coherence of the ECJ's jurisprudence in the field. From the mid 1980s the ECJ has consistently held that there is only one rule which encompasses both providers and recipients. If it changes this position for the Agreement then its own jurisprudence will be out of kilter. In view of the existing difficulty in convincing the Member States that the ECJ is serious when it hands down a judgment and that there is no point just delaying and hoping the Court will change its mind (sooner or later), the ECJ may find it more attractive to insist on one and only one interpretation of service provision whether this be for the TFEU or the Agreement.

Coherence within the EU

One must consider the following: is it a problem if Turkish service providers and tourists are not obliged to get visas to go to some Member States but are for others? Of course, for the Schengen states it is not a problem if Turkish tourists do not need visas to go to Ireland and the UK as they do not enter the Schengen territory. As both Ireland and the UK appear to have had very generous provisions in their bilateral agreements with Turkey on visa free travel and wide provisions on the admission of self-employed and tourists, it seems that Turkish nationals would benefit from those two countries applying their 1973 rules to both categories as quickly as possible. It is noticeable that both those countries' authorities have made no move regarding *Soysal* at all.

As regards to the Schengen zone, it clearly states whether the judgment applies only to service providers or to service providers and recipients, it drives a coach and horses through the coherence of Schengen rules on admission of third country nationals. **So if Austria can apply visa requirements to Turkish nationals but Germany cannot, there is simply no consistency. If a Turkish national wishing to visit friends or provide services in both Munich and Salzburg has any sense he or she will go to Germany first under the visa-free regime and then pop across the Schengen control free border and sort out business in Austria.**

For conscientious Member States like Finland, the problem has already been identified – can Finnish consular authorities lawfully receive visa applications from Turkish nationals (service providers or recipients) who are seeking to go to another Member State, for instance Denmark, where visas are no longer required. This is a problem which will affect fully half of the Schengen Area countries. **Clearly a better solution is simply to remove Turkey from the EU's visa black list. This would resolve the problem immediately.**

Finally, for coherence of EU law, clearly it is unacceptable for Member States to impose obligations which are the equivalent of visas but called by a different name (and resulting in the issue of a different piece of paper). This is just a rather transparent attempt to get around the judgment and for the Member States to continue their visa practices but renaming them something else. The ECJ has never shown much sympathy for these kinds of displacement activities. Moreover, as observed by a Dutch court, this does not solve the question how Member States are going to apply *Soysal* when a Turkish service provider or service recipient arrives at the external border without such a quasi-visa.

The Role of the EU Institutions

So far the greatest activity around the *Soysal* judgment has been on the part of the EU institutions and the Turkish authorities. After an encouraging start, the Commission seems to have been knobbled somewhat by the Member States or at least some of them. **While on the one hand it has accepted that the judgment must apply to both service providers and recipients, it seems to have taken its foot off the accelerator as regards ensuring that the Member States correctly implement the judgment. For instance, by allowing the French EU Presidency to rewrite the question that the Commission proposed to the Member States regarding their national legislation at the relevant date for the standstill provision into one requesting information on any change subsequent to the judgment, the Commission made it impossible for itself to check the state of affairs.** Instead of carrying out proper research on the relevant legislation at the relevant date, the Commission appears to have relied on the answers provided by a Member State without supporting documentation. **The result then in the form of the Commission's proposed Guidelines is unreliable. It seems quite clear that the Commission is working with partial information about the state of Member States' legislation at the relevant date and thus what it comes up with as guidance is flawed.** One wonders where the Legal Service of the Council is in respect of this matter. Surely it should be ensuring the correctness of the legal information provided by the Member States.

The European Parliament appears to take the issue of correct application of the judgment more seriously. Some pressure has been applied to the other institutions, though only time will tell whether this pressure will be concerted.

Security or Insecurity or Both?

The *Soysal* judgment forces us all to think again about the objectives and efficiency of mandatory visa requirements for Turkey. If the EU can abolish, in the space of a few months, mandatory visa requirements on all the rest of the Western Balkan countries, is it really necessary to retain them for Turkish nationals? Even Albania, which has been a source of irregular migrants to Italy in numbers which have greatly annoyed the Italian authorities throughout the 1990s, will have the mandatory visa requirement lifted in April 2010.

What are the arguments which are usually made to justify the retention or application of visa requirements? They all relate to the security-insecurity continuum: international relations, crime, irregular migration and regional coherence. On all counts Turkey and Turkish nationals do not appear to raise substantial security issues. The country is gradually settling into liberal democracy. EU police and judicial cooperation in criminal matters has improved substantially with Turkey over the last five years. Irregular migration by Turkish nationals to the EU no longer appears to be an important issue. The considerable drop in the number of Turkish nationals seeking asylum in EU states attests to greater human rights protection in the country. The fairly low rates of refusal of short stay visas to Turkish nationals at EU consulates in Turkey indicates that most applications are well documented

and evidenced. The Western Balkan region is now one where Turkey alone stands out as being subject to the mandatory visa requirement.

The accession negotiations between the EU and Turkey are still dragging on and likely to do so for some time. In the meantime, the *Soysal* judgment is likely to take up more and more judicial time in the EU Member States. From the evidence so far, most Member States are doing nothing to implement the judgment. So lawyers, non-governmental organisations and individuals will have to seek to establish their right to visa-free entry on the basis of the Member State national rules at the relevant time before national courts. The wider the group of people seeking to establish their rights, the slower the Member State authorities are in applying the judgment, the more cases will clog up the national courts. Rather than waste these scarce and expensive resources, perhaps the EU might better rethink the necessity of mandatory visas for Turkish nationals and free up their judges for other work.

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Annex B:

List of National Experts

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Annex C:

Judgments of the European Court of Justice on the Association Agreement EEC-Turkey and its Secondary Legislation

<i>Case Name</i>	<i>Date</i>	<i>Case Number</i>	<i>ECR Reference</i>
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Sevince	20.9.1990	C 192/89	1990, I-3461
Kus	16.12.1992	C 237/91	1992, I-6781
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Bozkurt	6.6.1995	C 434/93	1995, I-1475
Tetik	23.1.1997	C 171/95	1997, I-329
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Soysal	19.02.2009	C-228/06	n/a
Sahin	17.9.2009	C-242/06	n/a
Bekleyen	21.1.2010	C-462/08	n/a
Genc	4.2.2010	C-14/09	n/a

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Annex D:

Text of 1957 Council of Europe Agreement on Movement of Persons



European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe

Paris, 13.XII.1957

The governments signatory hereto, being members of the Council of Europe,
Desirous of facilitating personal travel between their countries,
Have agreed as follows:

Article 1

Nationals of the Contracting Parties, whatever their country of residence, may enter or leave the territory of another Party by all frontiers on presentation of one of the documents listed in the Appendix to this Agreement, which is an integral part thereof.

The facilities mentioned in paragraph 1 above shall be available only for visits of not more than three months' duration.

Valid passports and visas may be required for all visits of more than three months' duration or whenever the territory of another Party is entered for the purpose of pursuing a gainful activity.

For the purposes of this Agreement, the term 'territory' of a Contracting Party shall have the meaning assigned to it by such a Party in a declaration addressed to the Secretary General of the Council of Europe for communication to all other Contracting Parties.

Article 2

To the extent that one or more Contracting Parties deem necessary, the frontier shall be crossed only at authorised points.

Article 3

The foregoing provisions shall in no way prejudice the laws and regulations governing visits by aliens to the territory of any Contracting Party.

Article 4

This Agreement shall not prejudice the provisions of any domestic law and bilateral or multilateral treaties, conventions or agreements now in force or which may hereafter enter into force, whereby more favourable terms are applied to the nationals of other Contracting Parties in respect of the crossing of frontiers.

Article 5

Each Contracting Party shall allow the holder of any of the documents mentioned in the list drawn up by it and embodied in the Appendix to this Agreement to re-enter its territory without formality even if his nationality is under dispute.

Article 6

Each Contracting Party reserves the right to forbid nationals of another Party whom it considers undesirable to enter or stay in its territory.

Article 7

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. This measure shall immediately be notified to the Secretary General of the Council of Europe, who shall inform the other Parties. The same procedure shall apply as soon as this measure ceases to be operative.

A Contracting Party which avails itself of either of the options mentioned in the preceding paragraph may not claim the application of this Agreement by another Party save insofar as it also applies it in respect of that Party.

Article 8

This Agreement shall be open to the signature of the members of the Council of Europe, who may become Parties to it either by:

- a. signature without reservation in respect of ratification;
- b. signature with reservation in respect of ratification followed by ratification.

Instruments of ratification shall be deposited with the Secretary General of the Council of Europe.

Article 9

This Agreement shall enter into force on the first day of the month following the date on which three members of the Council shall, in accordance with Article 8, have signed the Agreement without reservation in respect of ratification or shall have ratified it.

In the case of any member who shall subsequently sign the Agreement without reservation in respect of ratification or shall ratify it, the Agreement shall enter into force on the first day of the month following such signature or the deposit of the instrument of ratification.

Article 10

After entry into force of this Agreement, the Committee of Ministers of the Council of Europe may invite any non-Member State to accede to it. Such accession shall take effect on the first day of the month following the deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 11

Any government wishing to sign or accede to this Agreement which has not yet drawn up its list of the documents mentioned in Article 1, paragraph 1, and appearing in the appendix, shall submit a list of such documents to the Contracting Parties through the Secretary General of the Council of Europe.

This list shall be considered to be approved by all the Contracting Parties and shall be added to the appendix to this Agreement if no objection is raised within two months of its transmission by the Secretary General.

The same procedure shall apply if a signatory government wishes to alter the list of documents drawn up by it and embodied in the appendix.

Article 12

The Secretary General of the Council of Europe shall notify members of the Council and acceding States:

- a. of the date of entry into force of this Agreement and the names of any members who have signed without reservation in respect of ratification or who have ratified it;
- b. of the deposit of any instrument of accession in accordance with Article 10;
- c. of any notification received in accordance with Article 13 and of its effective date.

Article 13

Any Contracting Party may terminate its own application of the Agreement by giving three months' notice to that effect to the Secretary General of the Council of Europe.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at Paris, this 13th day of December 1957, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to the signatory governments.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER SOYSAL

Annex E:

Accession to the European Union and Visa Requirement for Turkish Nationals

<i>Member State</i>	<i>Accession</i>	<i>Introduction of Visa Requirement</i>
France	1957	5 October 1980
Germany	1957	5 October 1980
Belgium	1957	1 November 1980
Netherlands	1957	1 November 1980
Luxembourg	1957	1 November 1980
Italy	1957	3 September 1990 (?)
Denmark	1.1.1973	1 May 1981
Ireland	1.1.1973	10 December 1989
United Kingdom	1.1.1973	22 June 1989
Greece	1.1.1981	25 April 1965
Portugal	1.1.1986	24 June 1991 (1957 CoE)
Spain	1.1.1986	1 October 1991
Austria	1.1.1995	17 January 1990
Finland	1.1.1995	12 March 1976
Sweden	1.1.1995	20 February 1976
Cyprus	1.1.2004	(1974) (1957 CoE suspended on 23.6.2003)
Czech Republic	1.1.2004	before accession
Estonia	1.1.2004	before accession
Latvia	1.1.2004	before accession
Lithuania	1.1.2004	before accession
Hungary	1.1.2004	before accession
Malta	1.1.2004	1 September 2003 (1957 CoE)
Poland	1.1.2004	before accession
Slovakia	1.1.2004	before accession
Slovenia	1.1.2004	1 January 2002 (1957 CoE)
Bulgaria	1.1.2007	before accession
Romania	1.1.2007	2004

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER SOYSAL

Annex F:

Current Turkish Visa Rules Regarding Nationals of EU Member States

<i>Member State</i>	<i>Visa Requirement</i>	<i>Visa Fee</i>
Austria	Yes	15 Euros
Belgium	Yes	15 Euros
Bulgaria	No	
Cyprus	Yes	15 Euros
Czech Republic	No	
Denmark	No	
Estonia	No	
Finland	No	
France	No	
Germany	No	
Greece	No	
Hungary	Yes	15 Euros
Ireland	Yes	15 Euros
Italy	No	
Latvia	No	
Lithuania	Yes	15 Euros
Luxembourg	No	
Malta	Yes	Gratis
Netherlands	Yes	15 Euros
Poland	Yes	15 Euros
Portugal	Yes	15 Euros
Romania	No	
Slovenia	Yes	15 Euros
Slovakia	Yes	15 Euros
Spain	Yes	15 Euros
Sweden	No	
United Kingdom	Yes	15 Euros

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *SOYSAL*

Annex G:

Text (draft) Guidelines of European Commission Accession

7 May 2009

NOTE FROM THE COMMISSION

Guidelines on the movement across the external borders of Member States applying the Schengen acquis of Turkish nationals in order to provide services in a Member State

Foreword

The objective of these Guidelines is to provide clarifications regarding the short-stay visa obligation for Turkish nationals residing and exercising their activities in Turkey and wishing to enter the territory of a Member State in order to provide services there (referred below as "Turkish nationals").

The need for this clarification has arisen from the ruling of the European Court of Justice of 19 February 2009 in Case C-228/06, *Soysal*, in which the Court ruled that Turkish nationals residing in Turkey travelling to a Member State in order to provide services there on behalf of an undertaking established in Turkey do not require a visa to enter the territory of that Member State, if the Member State in question did not require such a visa at the time of the entry into force, with regard to that Member State, of the Additional Protocol of 23 March 1970 to the Association Agreement of 12 March 1963 concluded between the EEC and Turkey¹.

It is for each Member State to give appropriate instructions to its competent authorities.

These Guidelines are to be inserted as update of the Commission Recommendation of 6 November 2006 establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons (C(2006) 5186 final). They therefore concern only the issue of Schengen visas but the analysis that they contain can be transposed to the issuing of national visas. They should also be of help to Member States' consulates in responding to enquiries on the effects of the Court of Justice's ruling of 19 February 2009.

As part of the Schengen acquis, these Guidelines are applicable in all EU Member States, except for the United Kingdom and Ireland, who should nevertheless comply with the case law of the ECJ.

¹ These Guidelines are a provisional reaction to this Court ruling. They do not prejudice the outcome of a full analysis of this Court ruling. Nor do they give detailed consideration to the issue of travel in the context of the right of establishment or as a recipient of services.

Limited exemption from the visa requirement

In principle, Turkish nationals require a visa to enter one or several Member States for a short stay (of no more than three months in any six-month period).

However, a Turkish national residing and exercising his/her activities in Turkey can enter a Member State without a visa in order to provide services on the territory of that State only when the following conditions are cumulatively met:

1. Entry without a visa is only possible in the following [two] Member States: [Denmark and] Germany.

However, when a Turkish national wishes to enter the territory of one of these two Member States **via the territory of one or more other Member States**, he/she still requires a visa to transit through the territories of these other Member States.

2. The purpose of the visit falls within the scope of the "standstill clause" of the Additional Protocol, i.e. cases where, on the date that the Additional Protocol entered into force for Germany [and Denmark], these Member States did not require Turkish nationals entering their territory in order to provide services there to hold a visa.

For Germany: cases where a Turkish national residing and exercising his/her activities in Turkey enters the territory of Germany for a stay of less than two months

- for the purpose of legally providing services there as employee of an employer established in Turkey, either as a mobile worker (driver) employed in the cross-border transport of passengers or goods (excluding itinerant trade), or to perform assembly or maintenance work or repair on delivered plants and machinery.

or

- for the purpose of legally providing there services consisting of paid lectures or performances of special artistic or scientific value or consisting of paid sports performances.

[For Denmark: cases where a Turkish national residing and exercising his/her activities in Turkey enters the territory of Denmark, for one or several visits, the duration of which does not exceed three months in any half-year from the date of first entry, for the purpose of legally providing services there on a temporary basis, either on his own behalf (Turkish nationals exercising self-employed activities) or on behalf of an undertaking established in Turkey (Turkish nationals legally employed by the undertaking temporarily sent by their employer to provide services in Denmark). For example, a Turkish lorry driver established in Turkey travelling to a Member State in order to deliver goods to an undertaking established in that Member State is to be considered as providing services in that Member State. Likewise, a Turkish architect, builder, lawyer, computer scientist, commercial agent, etc. established in Turkey and travelling to a Member State in order to carry out his/her services under a contract is also to be considered as providing services.]

In any case, when a Turkish national presents himself/herself at the external border without a visa for the Member State where he/she intends to provide services, he/she must be in a position to **prove** that he/she meets the conditions to be exempted from the visa obligation as service provider as defined above. The Turkish national must e.g. prove that he/she is legally

established in Turkey (by presenting, for example, a certificate delivered by a Chamber of Commerce or any other means of proof that he/she is actually carrying out service activities in Turkey), and where applicable that the employer for whom he/she works is legally established in Turkey and that he is legally employed, and that he/she is travelling in order to temporarily provide a service in the Member State concerned (by presenting, for example, a contract concluded with the service recipient). It is for each Member State to give more detailed instructions to its competent authorities on which documentation the service provider shall present.

Practical instructions

Case 1. Entry into a Member State from a third country (including the United Kingdom and Ireland)

1.1. Turkish national travelling to Poland (or to any of the other Member States that do not permit entry without a visa) by plane or ship in order to provide services there

A visa is required to travel to Poland.

1.2. Turkish national travelling to Germany [or Denmark] (Member States that permit entry without a visa) by plane or ship in order to provide services there

If the Turkish national presents himself/herself at the German [or Danish] border without a Schengen visa, the competent authorities shall establish, by examining the presented documents, whether, due to the purpose of his/her travel, the Turkish national meets the conditions to be exempted from the visa obligation. If so, the border guards shall allow him/her to enter into the territory of Germany [or Denmark] without a visa.

If the Turkish national applies for a short-stay visa from the German [or Danish] consular authorities, those authorities shall inform him/her that he/she can benefit from a visa exemption to enter Germany [or Denmark] (if the authority in question can reasonably assume – based on the known facts – that a visa-free entry is indeed possible) and they shall therefore refrain from issuing him/her a visa.

Case 2. Entry into a Member State by transiting through one or several other Member States

2.1. Turkish national travelling to Poland (or to any of the other Member States that do not permit entry without a visa) through amongst others Germany, to provide services in Poland

A visa is required to travel to Poland. A Schengen visa issued by Poland, as the main destination of the travel, enables its holder to transit through all other Schengen States.

2.2. Turkish national travelling to Germany [or Denmark] (Member States that permit entry without a visa) through Bulgaria, Hungary and Austria (Member States that do not permit entry without a visa) to provide services in Germany [or Denmark] only

Although a Turkish national is exempted from the visa obligation to enter the territory of Germany [or Denmark] in order, for example, to drive lorries or to deliver goods to a German [or Danish] undertaking, a visa is still required to transit through Bulgaria, Hungary and Austria.

If the Turkish national applies for a short-stay visa from the German [or Danish] consular authorities, they shall inform him/her that he/she can benefit from a visa exemption to enter Germany [or Denmark] and they shall therefore refrain from issuing him/her a visa. However, they shall inform him/her that he/she needs a visa for some part of his/her journey.

As he/she does not require a visa for entering into the Member State that constitutes his/her main destination, but for passing through other Member States, the Turkish national shall apply for a short-stay visa from the consular authorities of the Member State of his/her first entry in the Schengen Area (in this case Hungary).

If a Turkish national presents himself/herself at the Hungarian border without a visa, the border guards shall refuse him/her entry into the Schengen Area (on the basis of Articles 5 and 13 of the Schengen Borders Code²). In exceptional cases (when the visa applicant can prove that he/she was not in a position to apply for a visa in advance, namely due to time constraints and submits documentary evidence of the existence of unforeseeable and imperative reasons for entry), they shall issue him/her a visa at the border.

Romania and Bulgaria do not issue Schengen visas but allow the holder of a Schengen visa to transit through their territory.

Case 3. Entry into a Member State after a stay in another Member State

Turkish national, *lawfully staying without a visa in Germany* (Member State that permits entry without a visa), where he/she provides services, *travelling to [Denmark* (Member State that permits entry without a visa) *or to* Austria (or to any of the other Member States that do not permit entry without a visa) to provide services there

[In these circumstances, a Turkish national is exempted from the visa obligation to enter Denmark.] On the other hand, a visa is still required to enter Austria; the Turkish national shall obtain this visa before travelling to Germany, if his/her travel to Austria is already planned, or at the latest in Germany, before arriving at the Austrian border.

A Turkish national travelling directly to Germany by air without a visa, for example to replace another lorry driver who fell ill in Germany and drive this lorry from Germany back to Turkey, needs a visa to drive this lorry through other Schengen States on his/her way back to Turkey. [In this situation, he/she will also be exempted from the visa obligation to drive this lorry through Denmark, provided all the other conditions are satisfied.]

² Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105, p. 1.

VISA POLICY OF MEMBER STATES AND THE EU TOWARDS TURKISH NATIONALS AFTER *SOYSAL*

Annex H:

Judgment of the Court in Case C – 228/06 *Soysal* Case

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JUDGMENT OF THE COURT

(First Chamber)

19 February 2009 (*)

(EEC-Turkey Association Agreement – Freedom to provide services – Visa requirement for admission to the territory of a Member State)

In Case C-228/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberverwaltungsgericht Berlin-Brandenburg (Germany), made by decision of 30 March 2006, received at the Court on 19 May 2006, in the proceedings

Mehmet Soysal,

Ibrahim Savatli,

v

Bundesrepublik Deutschland,

joined party:

Bundesagentur für Arbeit,

⁶⁴<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=228/06&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&dovacav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher>

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet and J.-J. Kasel (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 8 October 2008,

after considering the observations submitted on behalf of:

- Messrs Soysal and Savatli, by R. Gutmann, Rechtsanwalt,
- the German Government, by M. Lumma and J. Möller, acting as Agents,
- the Danish Government, by R. Holdgaard, acting as Agent,
- the Greek Government, by G. Karipsiadis and T. Papadopoulou, acting as Agents,
- the Slovenian Government, by T. Mihelič, acting as Agent,
- the Commission of the European Communities, by M. Wilderspin and G. Braun, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 41(1) of the Additional Protocol, which was signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60) ('the Additional Protocol').
- 2 The reference was made in the context of proceedings brought by Messrs Soysal and Savatli, Turkish nationals, against the Bundesrepublik Deutschland in respect of the requirement for Turkish lorry drivers to obtain visas in order to provide services consisting in the international transport of goods by road.

Legal context

Community legislation

The Association between the EEC and Turkey

- 3 According to Article 2(1) of the Agreement establishing an Association between the European Economic Community and Turkey, which was signed on 12 September 1963 at Ankara by the Republic of Turkey, of the one part, and the Member States of the EEC and the Community, of the other part, and which was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1; 'the Association Agreement'), the aim of that agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties which includes, in relation to the workforce, the progressive securing of freedom of movement for workers (Article 12 of the Association Agreement), and the abolition of restrictions on freedom of establishment (Article 13) and on freedom to provide services (Article 14), with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later date (fourth recital in the preamble and Article 28 of that agreement).
- 4 To that end, the Association Agreement involves a preparatory stage, enabling the Republic of Turkey to strengthen its economy with aid from the Community (Article 3 of the agreement), a transitional stage covering the progressive establishment of a customs union and the alignment of economic policies (Article 4) and a final stage based on the customs union and entailing closer coordination of the economic policies of the Contracting Parties (Article 5).
- 5 Article 6 of the Association Agreement is worded as follows:

'To ensure the implementation and progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred on it by this Agreement.'
- 6 According to Article 8 of the Association Agreement, in Title II headed 'Implementation of the transitional stage':

'In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the provisional Protocol, determine the conditions, rules and timetables for the implementation of the provisions relating to the fields covered by the Treaty establishing the Community which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.'
- 7 Articles 12 to 14 of the Association Agreement also appear in Title II thereof, under Chapter 3 headed 'Other economic provisions'.
- 8 Article 12 provides:

'The Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them.'
- 9 Article 13 provides:

'The Contracting Parties agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them.'
- 10 Article 14 states:

‘The Contracting Parties agree to be guided by Articles [45 EC], [46 EC] and [48 EC] to [54 EC] for the purpose of abolishing restrictions on freedom to provide services between them.’

- 11 Article 22(1) of the Association Agreement provides as follows:

‘In order to attain the objectives of this Agreement, the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the parties shall take the measures necessary to implement the decisions taken ...’

- 12 The Additional Protocol, which, according to Article 62 thereof, forms an integral part of the Association Agreement, lays down, in Article 1, the conditions, detailed arrangements and timetables for implementing the transitional stage referred to in Article 4 of that agreement.

- 13 The Additional Protocol includes Title II, headed ‘Movement of persons and services’, Chapter I of which concerns ‘[w]orkers’ and Chapter II of which concerns ‘[r]ight of establishment, services and transport’.

- 14 Article 36 of the Additional Protocol, which is included in Chapter I, provides that freedom of movement for workers between Member States of the Community and Turkey is to be secured by progressive stages in accordance with the principles set out in Article 12 of the Association Agreement between the end of the 12th and the 22nd year after the entry into force of that agreement and that the Council of Association is to decide on the rules necessary to that end.

- 15 Article 41 of the Additional Protocol, which is in Chapter II of Title II, is worded as follows:

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

2. 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.’

- 16 It is common ground that, to date, the Council of Association, which was set up by the Association Agreement and consists, on the one hand, of members of the Governments of the Member States, of the Council of the European Union and of the Commission of the European Communities and, on the other hand, of members of the Turkish Government, has not adopted any decision on the basis of Article 41(2) of the Additional Protocol.

- 17 Article 59 of the Additional Protocol, which appears in Title IV headed ‘General and final provisions’, is worded as follows:

‘In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community.’

Regulation (EC) No 539/2001

- 18 Article 1(1) of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders [of the Member States] and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1) provides:

‘Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States.’

- 19 It is apparent from Annex I that the Republic of Turkey is one of the States on that list.
- 20 The first recital in the preamble to Regulation No 539/2001 recalls that Article 61 EC cites determination of the list of those third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States and those whose nationals are exempt from that requirement ‘among the flanking measures which are directly linked to the free movement of persons in an area of freedom, security and justice’.

National legislation

- 21 It is apparent from the order for reference that, on 1 January 1973, the date on which the Additional Protocol entered into force with regard to the Federal Republic of Germany, Turkish nationals who, like the appellants in the main proceedings, were engaged in that Member State for no more than two months in the international transport of goods by road, did not need a permit to enter Germany. Under Paragraph 1(2)(2) of the Regulation Implementing the Law on Aliens (Verordnung zur Durchführung des Ausländergesetzes), in the version published on 12 March 1969 (BGBl. 1969 I, p. 207), such Turkish nationals were entitled to enter Germany without a visa.
- 22 Turkish nationals were not subject to a general visa requirement until the Eleventh Regulation amending the Regulation Implementing the Law on Aliens of 1 July 1980 (BGBl. 1980 I, p. 782) came into force.
- 23 Today, the requirement that Turkish nationals such as the appellants in the main proceedings must be in possession of a visa to enter Germany is based on Paragraphs 4(1) and 6 of the German Law on residence (Aufenthaltsgesetz) of 30 July 2004 (BGBl. 2004 I, p. 1950; ‘the Aufenthaltsgesetz’), which replaced the Law on Aliens (Ausländergesetz) and entered into force on 1 January 2005, and Article 1(1) of Regulation No 539/2001 in conjunction with Annex I thereto.
- 24 Headed ‘Residence authorisation requirement’, Paragraph 4(1) of the Aufenthaltsgesetz provides:

‘(1) Aliens shall require residence authorisation to enter and reside within Federal German territory unless the law of the European Union or regulations should provide otherwise or unless there is a right of residence under the Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey ... Residence authorisation shall be granted as

1. a visa (Paragraph 6)
2. a residence permit (Paragraph 7), or

3. authorisation for establishment (Paragraph 9).’

25 Paragraph 6 of the Aufenthaltsgesetz, headed ‘Visa’, provides:

‘(1) An alien may be granted:

1. a Schengen visa for transit purposes, or

2. a Schengen visa for residence of up to three months within a period of six months from the date of first entry (short stays)

if the conditions for the grant of a visa laid down in the Schengen Convention and its implementing regulations are satisfied. In exceptional cases a Schengen visa may be granted for reasons of international law, on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany if the conditions for the grant of a visa laid down in the Schengen Convention are not satisfied. In such cases validity shall be geographically confined to the sovereign territory of the Federal Republic of Germany.

(2) A visa for short stays can also be granted for multiple stays with a period of validity of up to five years provided that the duration of each stay does not exceed three months within a period of six months from the date of first entry.

(3) A Schengen visa granted under the first sentence of subparagraph 1 can be extended in special cases for a total period of three months within a period of six months from the date of first entry. This applies even if the consular representative of another Schengen Agreement State has granted the visa. The visa may be extended for a further three months within the six-month period concerned only in accordance with the conditions laid down in the second sentence of subparagraph 1.

(4) For long-term stays a visa for Federal German territory is required (national visa), which must be granted before entry. The grant of a visa is governed by the provisions applicable to residence permits and authorisations for establishment. ...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

26 The order for reference states that Messrs Soysal and Savatli are Turkish nationals resident in Turkey working for a Turkish company engaged in the international transport of goods, as drivers of lorries that are owned by a German company and registered in Germany.

27 Until 2000, upon receipt of applications, the Federal Republic of Germany had on many occasions issued each of the appellants in the main proceedings with an entry visa as drivers of lorries registered in Turkey, for the purposes of providing services in Germany.

28 After it was found that the appellants in the main proceedings were driving lorries registered in Germany, Germany’s consulate-general in Istanbul rejected further visa applications submitted by them in the course of 2001 and 2002.

29 Messrs Soysal and Savatli brought actions before the Verwaltungsgericht Berlin (Administrative Court, Berlin) against the decisions refusing them visas, for a declaration that, as lorry drivers providing services consisting in the international transport of goods, they are entitled to enter Germany without a visa for that purpose. They based their claim on the ‘standstill’ clause in

Article 41(1) of the Additional Protocol, which prohibits the application to them of conditions for access to German territory that are less favourable than the conditions that were applicable on the date of entry into force of the Additional Protocol with regard to the Federal Republic of Germany, namely 1 January 1973. On that date, no visa was required for the activity they are engaged in; a visa requirement was introduced only in 1980. Moreover, the 'standstill' clause takes priority over the visa requirement provided for under Regulation No 539/2001, which was adopted after 1 January 1973.

- 30 After the Verwaltungsgericht Berlin had dismissed their actions by judgment of 3 July 2002, Messrs Soysal and Savatli lodged an appeal with the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg) which takes the view that the outcome of the proceedings before it depends on the interpretation of Article 41(1) of the Additional Protocol.
- 31 In this respect, the Oberverwaltungsgericht Berlin-Brandenburg observes that the appellants in the main proceedings are employed as lorry drivers by a company whose registered office is in Turkey, which lawfully provides services in Germany. In particular, the appellants do not carry out their work for the German company, in whose name the lorries used to transport the goods are registered, in the course of a contracting-out of labour that requires a permit under German law, since the right to give work-related instructions to the employees at issue is essentially exercised by the Turkish company that employs them, even during the period for which they work on behalf of the German company.
- 32 In addition, the judgment in Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 106, shows that Turkish workers such as the appellants in the main proceedings may invoke, in respect of the activity carried out, the protection of Article 41(1) of the Additional Protocol.
- 33 Finally, at the time of the entry into force of the Additional Protocol, Turkish workers engaged in Germany in the international transport of goods by road had the right to enter the territory of that Member State without a visa, since a visa requirement was introduced into German law only from 1 July 1980 onwards.
- 34 However, there is as yet no case-law of the Court of Justice on the question of whether the introduction of a visa requirement under national legislation on aliens or under Community law is one of the 'new restrictions' on the freedom to provide services within the meaning of Article 41(1) of the Additional Protocol.
- 35 On the one hand, although paragraphs 69 and 70 of the judgment in Case C-37/98 *Savas* [2000] ECR I-2927 support the interpretation that Article 41(1) of the Additional Protocol imposes a general prohibition on the worsening of a situation even in respect of the right to enter and reside, so that it is enough to determine whether the measure at issue has the object or effect of making the Turkish national's position with respect to freedom of establishment or freedom to provide services subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force (see, to the same effect, *Abatay and Others*, paragraph 116), an argument against such an interpretation is that Article 41(1) of the Additional Protocol cannot obstruct the general legislative power of the Member States that may affect the position of Turkish nationals in one way or another.
- 36 On the other hand, even though the wording of Article 41(1) of the Additional Protocol, which refers to the 'Contracting Parties', supports the argument that the 'standstill' clause in that

provision applies not only to the rules of the Member States but also to those under secondary Community legislation, the Court has not yet ruled on the matter.

- 37 In those circumstances, the Oberverwaltungsgericht Berlin-Brandenburg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is Article 41(1) of the Additional Protocol ... to be interpreted in such a way that it constitutes a restriction on freedom to provide services if a Turkish national who works in international transport for a Turkish undertaking as a driver of a lorry registered in Germany has to be in possession of a Schengen visa to enter Germany under Paragraphs 4(1) and 6 of the Aufenthaltsgesetz ... and Article 1(1) of Regulation ... No 539/2001 even though on the date on which the Additional Protocol entered into force he was permitted to enter ... Germany without a visa?
- (2) If the answer to the first question is in the affirmative, should Article 41(1) of the Additional Protocol be interpreted as meaning that the Turkish nationals mentioned in (1) do not require a visa to enter Germany?’

Jurisdiction of the Court

- 38 The German Government submits that this reference for a preliminary ruling is ‘inadmissible’, on the ground that the reference was made by a court that is not amongst those against whose decisions there is no judicial remedy under national law within the meaning of Article 68(1) EC, even though the questions referred concern the validity of a Council regulation adopted on the basis of Title IV of Part Three of the EC Treaty.
- 39 However, that argument cannot be accepted.
- 40 The wording of the questions referred by the Oberverwaltungsgericht Berlin-Brandenburg shows, in and of itself, that the questions concern, explicitly and exclusively, the interpretation of the law governing the association between the EEC and Turkey and, more specifically, Article 41(1) of the Additional Protocol.
- 41 Therefore, the bringing of the matter before the Court under Article 234 EC is valid (see Case C-192/89 *Sevince* [1990] ECR I-3461, paragraphs 8 to 11, and the case-law cited), and it is irrelevant that the court making the reference for a preliminary ruling is not among those mentioned in Article 68(1) EC, which derogates from Article 234 EC.
- 42 In those circumstances, the Court has jurisdiction to rule on the questions referred by the Oberverwaltungsgericht Berlin-Brandenburg.

The questions referred for a preliminary ruling

- 43 By its two questions, which must be examined together, the referring court essentially asks whether Article 41(1) of the Additional Protocol is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey.

- 44 It must be recalled, as a preliminary point, that the appellants in the main proceedings are Turkish lorry drivers – resident in Turkey and employed by an international transport company established in Turkey – who at regular intervals transport goods between Turkey and Germany using lorries registered in Germany. In this respect, the referring court found that both the transport operations and the drivers’ activities in that connection are entirely lawful.
- 45 With a view to determining the exact scope of Article 41(1) of the Additional Protocol in a situation such as that at issue in the main proceedings, it must be recalled, first, that, in accordance with consistent case-law, the provision has direct effect. It lays down, clearly, precisely and unconditionally, an unequivocal ‘standstill’ clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see *Savas*, paragraphs 46 to 54 and 71, second indent; *Abatay and Others*, paragraphs 58, 59 and 117, first indent, and Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 46). Consequently, the rights which Article 41(1) of the Additional Protocol confers on the Turkish nationals to whom it applies may be relied on before the courts of the Member States (see, in particular, *Savas*, paragraph 54, and *Tum and Dari*, paragraph 46).
- 46 Further, it must be noted that Article 41(1) of the Additional Protocol may be invoked validly by Turkish lorry drivers such as the appellants in the main proceedings who are employed by an undertaking established in Turkey that lawfully provides services in a Member State, on the ground that the employees of the provider of services are indispensable to enable him to provide his services (see *Abatay and Others*, paragraphs 106 and 117, fifth indent).
- 47 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 concerned (see *Savas*, paragraphs 69 and 71, fourth indent; *Abatay and Others*, paragraphs 66 and 117, second indent; and *Tum and Dari*, paragraphs 49 and 53).
- 48 Therefore, the Court has held that Article 41(1) of the Additional Protocol precludes the introduction into the legislation of a Member State of a requirement – not in place at the time of the entry into force of that protocol with regard to that Member State – of a work permit in order for an undertaking established in Turkey and its employees who are Turkish nationals to provide services in the territory of that State (*Abatay and Others*, paragraph 117, sixth indent).
- 49 Similarly, the Court has held that Article 41(1) of the Additional Protocol also precludes the adoption, as from the entry into force of that protocol, of any new restrictions on the exercise of freedom of establishment relating to the substantive and/or procedural conditions governing the admission to the territory of the relevant Member State of Turkish nationals intending to establish themselves in business there on their own account (*Tum and Dari*, paragraph 69).
- 50 In those cases, the issue was whether national legislation that introduced substantive and/or procedural conditions for Turkish nationals wishing to gain access to the territory of a Member

State or to a professional activity, that were stricter than those that had applied to them in the relevant Member State at the time of the entry into force of the Additional Protocol, could be considered to be new restrictions within the meaning of Article 41(1) of that protocol.

- 51 That is also true of the case in the main proceedings. The order for reference shows that, at the time of the entry into force of the Additional Protocol with regard to the Federal Republic of Germany, namely 1 January 1973, Turkish nationals such as the appellants in the main proceedings, engaged in the provision of services in Germany in the international transport of goods by road on behalf of a Turkish undertaking, had the right to enter German territory for those purposes without first having to obtain a visa.
- 52 It is only as from 1 July 1980 that the German legislation on aliens made nationals of non-member countries, including Turkish nationals, who wished to carry out such activities in Germany, subject to a visa requirement. At present, the requirement that Turkish nationals such as the appellants in the main proceedings must possess a visa to enter German territory is laid down in the Aufenthaltsgesetz, which replaced the legislation on aliens as of 1 January 2005.
- 53 It is true that the Aufenthaltsgesetz merely implements, at the level of the Member State concerned, an act of secondary Community legislation, namely Regulation No 539/2001, which, as is clear from the first recital in its preamble, is a flanking measure directly linked to the free movement of persons in an area of freedom, security and justice which was adopted on the basis of Article 62(2)(b)(i) EC.
- 54 It is also true, as the Commission submitted at the hearing, that the conditions governing a Schengen visa, such as that referred to in Paragraphs 4(1) and 6(2) of the Aufenthaltsgesetz, have certain advantages compared with the conditions that applied in Germany, at the time of the entry into force of the Additional Protocol in that Member State, to Turkish nationals in the position of the appellants in the main proceedings. Whereas the right of access enjoyed by such nationals was limited to the territory of Germany alone, a visa issued under Paragraph 6(2) of the Aufenthaltsgesetz allows them to move freely throughout the territories of all the States that are parties to the Agreement on the gradual abolition of checks at their common borders, signed at Schengen (Luxembourg) on 14 June 1985 by the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic (OJ 2000 L 239, p. 13), an agreement which was implemented by the signature at Schengen, on 19 June 1990, of a convention (OJ 2000 L 239, p. 19), laying down cooperation measures designed to ensure, as compensation for the abolition of internal borders, the protection of all the territories of the contracting parties.
- 55 The fact remains that, as regards Turkish nationals such as the appellants in the main proceedings, who intend to make use in the territory of a Member State of the right to freedom to provide services under the Association Agreement, national legislation that makes that activity conditional on the issuing of a visa, which can moreover not be required from Community nationals, is liable to interfere with the actual exercise of that freedom, in particular because of the additional and recurrent administrative and financial burdens involved in obtaining such a permit which is valid for a limited time. In addition, where a visa is denied, as in the case in the main proceedings, legislation of that kind prevents the exercise of that freedom.
- 56 It follows that such legislation, which did not exist on 1 January 1973, has at least the effect of making the exercise, by Turkish nationals such as the appellants in the main proceedings, of

their economic freedoms guaranteed by the Association Agreement subject to conditions that are stricter than those that were applicable in the relevant Member State at the time of the entry into force of the Additional Protocol.

- 57 Under those circumstances, it must be concluded that legislation such as that at issue in the main proceedings constitutes a 'new restriction', within the meaning of Article 41(1) of the Additional Protocol, of the right of Turkish nationals resident in Turkey freely to provide services in Germany.
- 58 That conclusion cannot be called into question by the fact that the legislation currently in force in Germany merely implements a provision of secondary Community legislation.
- 59 In this respect, it is sufficient to recall that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (see Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52).
- 60 Moreover, the objection, also raised by the referring court, according to which application of the 'standstill' clause in Article 41(1) of the Additional Protocol would obstruct the general legislative power devolved to the legislature, cannot be accepted.
- 61 The adoption of rules that apply in the same manner to Turkish nationals and to Community nationals is not inconsistent with the 'standstill' clause. Moreover, if such rules applied to Community nationals but not Turkish nationals, Turkish nationals would be put in a more favourable position than Community nationals, which would be clearly contrary to the requirement of Article 59 of the Additional Protocol, according to which the Republic of Turkey may not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty.
- 62 In the light of all the foregoing considerations, the answer to the questions referred is that Article 41(1) of the Additional Protocol is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.

Costs

- 63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 41(1) of the Additional Protocol, which was signed on 23 November 1970 at 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 meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory

of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.

[Signatures]