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Özden İHTİYAR

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Supervisors:
Prof. Dr. Wolfgang VOEGELI
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Akdeniz Üniversitesi

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Tez Başlığı : Türkiye ve Avrupa Birliği Arasında Var Olan Ortaklık Hukuku'nda Standstil Klozunun Hizmetlerin Serbest Dolaşımına Etkisi / Türkiye Vatandaşlarının Ankara Anlaşması'ndan Doğan Avrupa Birliği'nde Hizmetlerin Serbest Dolaşım Hakkı Var mı?

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Onay : Yukarıdaki imzaların, adı geçen öğretim üyelerine ait olduğunu onaylarım.

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Prof. Dr. Zekeriya KARADAVUT
Müdür

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LIST OF ABBREVIATIONS

ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
EURATOM	European Atomic Energy Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

ÖZET

Türkiye ve Avrupa Birliği Arasında Var Olan Ortaklık Hukuku'nda Standstil Klozunun Hizmetlerin Serbest Dolaşımına Etkisi / Türkiye Vatandaşlarının Ankara Anlaşması'ndan Doğan Avrupa Birliği'nde Hizmetlerin Serbest Dolaşım Hakkı Var mı?

Çalışmada, Türkiye ile Avrupa Birliği arasında imzalanan Ankara Anlaşması ve Katma Protokol hükümleri gereğince Türk vatandaşlarının Birliğe üye devletler içinde sahip olduğu hizmetlerin serbest dolaşımı özgürlüğü ele alınacaktır. Öncelikle Türkiye ve Avrupa Birliği arasındaki Ortaklık Hukuku'nun Avrupa Birliği Hukuku içerisinde yer aldığı tezi açıklanacaktır. Ortaklık Hukuku'nda yer alan standstill hükmüne rağmen üye devletler tarafından Türk vatandaşlarının hizmetlerin serbest dolaşımı özgürlüğü ihlal edilmektedir. İhlal sebeplerinin başında vize uygulaması gelmektedir. Bu çalışmada üye devletlerin neden ve nasıl Avrupa Birliği Hukuku'nu ihlal ettikleri gözler önüne serilecektir.

Anahtar Kelimeler: Avrupa Birliği Hukuku, Ortaklık Hukuku, Standstill klozu, Türk vatandaşlarının AB'de hizmetlerin serbest dolaşımı özgürlüğü, vize

SUMMARY

'The impacts of Standstill Clause in Association Law between the European Union and Turkey regarding the freedom to provide services: Do Turkish citizens have the freedom to provide services around the EU by virtue of the Ankara Agreement?'

This study dwells upon the Turkish citizens' freedom to provide services around the European Union, which is stipulated by the provisions set forth in Ankara Agreement and the Additional Protocol concluded by and between Turkey and the European Union. To this end, it will first and foremost explain that the Association Law between Turkey and the European Union is a part of the European Union Law. Despite the standstill clause provided in the Association Law, Member States act in violation of the freedom to provide services conferred upon the Turkish citizens. The most common way to violate this freedom is the visa application by Member States. This study will make an attempt to depict the reasons why and how the Member States violate the European Union Law.

Keywords: The European Union Law, Association Law, Standstill Clause, Turkish citizens' freedom to provide services around the EU, visa

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Özden İHTİYAR

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INTRODUCTION

The European Union [1] is a unique supranational organization with an exclusive structure. Although the European Union did not have its current characteristics when it was first established, the ultimate goal was to achieve its current structure. European Court of Justice with its case law is among the most important organizations that contributed significantly to the European Union in achieving its current structure, which was initially considered as a dream.

The ECJ relies on the acquis communautaire[2] when it has to take a decision on any subject matter. The legal basis for ECJ's decisions includes the pre-accession agreement towards full membership[3], known as the "Ankara Agreement", which was signed between Turkey and the EU only 4 years after the Treaty of Rome. The Additional Protocol, which is an integral part of the Ankara Agreement, came into force in 1973. The legal characteristic of the Additional Protocol, which is a text that added new articles to Ankara Agreement, is a complementary part of the Ankara Agreement. The Association Law has arisen based on the Ankara Agreement and Additional Protocol provisions.

Turkish citizens have rights arising from the Association Law. This study will analyze the freedom of Turkish citizens to provide services, which is ignored by the EU Member States despite the decisions of the European Court of Justice.

It would be incorrect to say that Turkish citizens have the freedom to provide services in each of the EU Member States. Pursuant to Article 41, paragraph 1, of the Additional Protocol, *"The*

[1] The unique organization established in 1957 under the name of European Economic Community. With the Maastricht Treaty, which came into force in 1993, the organisation was renamed as the European Union. We will use the term the "European Union" throughout this study.

[2] The Community acquis is the body of common rights and obligations, which bind all the Member States together within the European Union. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; the legislation adopted in application of the treaties and the case law of the Court of Justice; the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's activities, http://www.avrupa.info.tr/Files/File/RECOURCE_CENTRE/key_links/002-Acquis%20Communautaire.doc, 12.04.2012.

[3] The Ankara Agreement is usually referred to as the Association Agreement in the literature. Ankara Agreement is also referred to as the Association Agreement in the ECJ decisions. However, Professor Harun Gümrükçü has used the term "Preliminary Membership Agreement towards Full Membership" to talk about the Ankara Agreement, for a better understanding of what the agreement involves as its core. The common term shall be used in this study to refer to the Ankara Agreement.

Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services."[4].

Article 41, paragraph 1, is quite obvious. As it is clear in Article 41, paragraph 1, the EU Member States cannot provide for restrictive arrangements on the freedom of establishment and freedom to provide services for Turkish citizens as from the date when the Additional Protocol entered into force. First of all, it is emphasized that Turkish citizens need to have the freedom of movement in order to avail themselves of the freedom to provide services. It is clear that people who want to provide services in a country should have the right to enter the country without any constraint. Therefore, it is against the Association Law that the EU Member States require visa as from the effective date of the Additional Protocol.

The effects of the Standstill Clause on the Association Law constitute the starting point of this study. The main problem is that Turkish citizens' rights are more restricted than ever before, despite the Standstill Clause and several decisions of the European Court of Justice regarding this issue.

This study tries to analyze that some the EU Member States have been violating the rights of Turkish citizens under the Ankara Agreement and the Additional Protocol. In doing so, the study will not focus on the political relations between the European Union and Turkey, but the legal aspects. The study will also examine the freedom to provide services related to visa-free entry to the EU Member States. Illegal acts will be analyzed in consideration of the decisions of the European Court of Justice.

Visa-free Europe has been handled in several studies. However, the main problem not only concerns visa-free Europe. The Soysal decision (ECJ-Case-228/06) triggered a deeper examination regarding the freedom to provide services in respect of Turkish citizens. There is still a gap in the literature about this issue. Therefore, I would like to study the freedom to provide services in the EU for Turkish citizens.

With a view to do that, the first chapter of this study will make an attempt to explain the sui generis character of the European Union Law. Following this, the chapter will describe what the Association Law between the European Union and Turkey entails. Along with that, ECJ decisions will be mentioned to put forward how and why the Association Law is an integral part of the European Union Law.

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21970A1123(01):EN:HTML, 29.01.2011.

The second chapter will dwell upon the Standstill Clause concerning the freedom to provide services regulated under Article 41 of the Additional Protocol, which is nowadays the most popular provision in the Association Law. In this framework, this chapter will first talk about what is meant by the freedom to provide services under the European Union Law, and then about the Standstill clause and what it brings about.

The third chapter will also mention the regulations that violate the freedom to provide services for Turkish citizens.

Finally, the study will conclude by suggesting some remedies for such violation.

CHAPTER 1
ACCEPT TO ASSIGN THE SUPREMACY AND THE EUROPEAN UNION

The European States had long been involved in competition and fight, and although they occasionally attempted to act in solidarity instead of making war, they could not prevent World War II from happenning. After the devastating consequences of World War II, the European Community was gradually established laying the grounds for the European Union. The legal structure of the Union will be explored.

1.1 Post-World War II European Political Environment and Emergence of the European Union

After World War II, European Statesmen quickly engaged in the efforts to bring a state of permanent peace in Europe. Relying on the proposal by Jean Monnet, the former Secretary General of the League of Nations[5], on 9 May 1950, Robert Schuman (French Foreign Minister) called European States to create an independent and supranational institution, which would take decisions on their behalf for coal and steel production. According to the Schuman Plan, to bring peace into Europe, it was imperative to end the centuries-old opposition between France and Germany. This was done in order to ensure that the abovementioned body had to supervise the common production of coal and steel and allow all European States to become members of such an organization[6].

Thus, Schuman Declaration paved the way for the European Coal and Steel Community (ECSC) founded in 1951 to comprise of Belgium, Federal Republic of Germany, Luxemburg, France, Italy and the Netherlands as its six members. The ECSC transformed the coal and steel from being raw materials of the war to instruments of peace, and it enabled the States, for the first time in world history, to willfully delegate some part of their sovereignty to a supranational body.

Later in 1957, the six Member States decided to establish an economic community to allow for the free movement of labour, products and services. Thus, the European Economic Community

[5] During a meeting of the French Committee of National Liberation committee on 5 August 1943, Jean Monnet, the forefather of the EU, declared: "There will be no peace in Europe, if the states are reconstituted on the basis of national sovereignty... The countries of Europe are too small to guarantee their peoples the necessary prosperity and social development. The European states must constitute themselves into a federation...",http://europa.eu/about-eu/eu-history/founding-fathers/pdf/jean_monnet_en.pdf, 17.10.2013.

[6] History of the European Union, http://www.abgs.gov.tr/index.php?p=105&l=1, 17.10.2013.

(EEC) was established by the Treaty of Rome adopted in 1957, with a view to introduce economic cooperation in sectors additional to coal and steel[7]. The EEC aimed at creating a common market for ensuring the free movement of labour, goods, services and the capital, as well as ultimately political coherence among the Member States.

The Treaty of Rome, which came into force on 1 January 1958, created the European Atomic Energy Community (EURATOM) in addition to the European Economic Community. The purpose of EURATOM was stated as to coordinate the Member States' research programs to ensure the peaceful and safe use of nuclear energy.

The Treaty merging the executives of the three Communities (ECSC, EEC, EURATOM) was signed in 1965 in Brussels. The Merger Treaty (Brussels Treaty) signed in 1965 set out a single Council and a single Commission for the three bodies mentioned above (European Coal and Steel Community, European Economic Community and European Atomic Energy Community), which led to these bodies' being referred to as the European Communities[8].

The European Community has constantly developed with its exclusive character and expanded its field of cooperation. The Treaty of the European Union was signed in Maastricht, 1992. It was a major EU milestone, setting clear rules for the future single currency as well as for foreign and security policy along with closer cooperation in justice and home affairs. Under the treaty, the name 'European Union' officially replaced the 'European Community'[9].

The latest treaty is the Treaty of Lisbon, which is called Treaty on the Functioning of the European Union and was signed by 27 EU Countries[10]. The Treaty of Lisbon was ratified by all EU countries before entering into force on 1 December 2009[11]. With the accession of Croatia on 01.07.2013, the number of the Member States increased to 28[12].

[7] The Agreement came into force on 1 January 1958, http://europa.eu/about-eu/eu-history/1945-1959/1958/index_en.htm, 17.10.2013.
[8] http://europa.eu/about-eu/eu-history/1960-1969/1965/index_en.htm, 17.10.2013.
[9] http://europa.eu/about-eu/eu-history/1990-1999/index_en.htm, 17.10.2013.
[10] The EU had 27 Member States in 2007. The names and date of accession of the non-founding members can be listed as: 1973; Denmark, Ireland, United Kingdom, 1981; Greece, 1986; Spain, Portugal, 1995; Austria, Finland, Sweden, 2004; Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, 2007; Bulgaria, Romania.
[11] http://europa.eu/about-eu/eu-history/2000-2009/index_en.htm, 20.10.2013.
[12] http://ec.europa.eu/enlargement/policy/from-6-to-28-members/index_en.htm, 08.11.2013.

1.2 European Union Law

Like in every other international organization[13], Founding Treaties are the main legal basis for the Union Law. The primary sources of EU Law consist of EU Founding Treaties, including numerous annexes, appendices and protocols attached thereto as well as later additions and amendments. These founding Treaties and the instruments amending and supplementing them (chiefly the Treaties of Maastricht, Amsterdam, Nice and Lisbon) along with various Accession Treaties[14] form the Union Law.

The secondary sources of EU Law, which are binding on the contracting states, arise from Regulations, Directives and Decisions. The non-binding secondary sources of EU Law are recommendations and opinions[15].

The Court of Justice of the European Union relies on the abovementioned sources while making its decisions on the cases referred thereto. The main types of cases referred to the Court include Enforcement Actions, Annulment Actions, Actions for Failure to Act and Preliminary Ruling Procedure[16]. Since many of the cases, which will be mentioned in this study, were concluded by Preliminary Ruling, it is useful to mention about this type of cases briefly.

A preliminary ruling is a decision to be taken by the ECJ in respect of a dispute submitted to a national court of a European Union Member State, which requires interpretation of the European Union law or a validity check of an action taken by EU institutions for resolution. A case referred to the ECJ is called a "pending case", against which there is no judicial remedy under the national law. In such a case the national court shall halt the procedure and bring the matter before the Court and wait for the ruling by the Court. Upon receiving the ruling of the Court, the national court shall make its judgement on the dispute having regard to this ruling[17].

Before reflecting on a couple of preliminary rulings by the ECJ, it is useful to consider some assumptions regarding the Member States. It would be incorrect to suggest that the Member States had a thorough understanding of their legal liabilities when the Founding Treaties were signed. Being used to exercising the unlimited power granted by the sovereignty of the modern

[13] The supranational characteristic of the EU was not so obvious in its early years.
[14] Klaus- Dieter Borchardt, *The ABC of European Union Law*, (Publication of European Union, 2010).
[15] Faruk Altıntaş, *Avrupa Birliği Hukukunun Kaynakları*, (Avrupa Müdürlüğü Genel Daire Başkanlığı, 2007).
[16] Deniz Kızılsümer, 'AvrupaToplulukları Adalet Divanı ve İlk Derece Mahkemesi', *Journal of Faculty of Business, Vol. 5, No. 2*, (2004).
[17] Deniz Kızılsümer, *Ibid,* p.39.

state, the Member States believed that any international organization would always have limited power over them.

The first impact to the unlimited exercise of sovereignty came with the Van Gend & Loos[18] judgement. Netherlands Administrative Tribunal requested a Preliminary Ruling from the ECJ for N.V. Algemene TRANSPORT— en Expeditie Onderneming VAN GEND & Loos vs. Netherlands Inland Revenue Administration. The case revolved around the principle of free movement of goods. Van Gend & Loos, a transportation company, imported a product from West Germany to the Netherlands. The ad valorem import duty, which had been 3% previously, was increased to 8% by the Netherlands due to a reclassification of the related good by Benelux countries. The company objected and filed action against this practice before the Netherlands Administrative Tribunal submitting that it was contrary to EC law since Article 12 of the EEC Treaty stated:

> *"Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other."*

Therefore, Netherlands Administrative Tribunal inquired ECJ *"whether Article 12. of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay a claim to individual rights which the courts must protect"*[19].

Van Gend & Loos judgment was one of the most important judgements of the ECJ, in other words a landmark case, since it entailed groundbreaking consequences for the international law due the bold and epoch making grounds put forward by the Court.

The EEC Treaty aims at the establishment of a Common Market. Thus, the Treaty is not a mere agreement providing for mutual obligations for the Member States, since functioning of the Common Market is of a direct concern to all interested parties in the European Union. Such a view has also been reflected in the preamble to the Treaty referring not only to the governments

[18] Judgment of 05.02.1963- Case 26/62, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=914636, 16.08.2013.
[19] *Ibid.*

but also to people. Based on the EEC Treaty, some institutions were established and endowed with sovereign rights. These institutions and their operations affect both the Member States and their citizens. Above all, it should be underlined that the European Parliament and the Economic and Social Committee are indicated as the intermediary bodies to help nationals of the States in the Community, who are called upon to cooperate in the functioning of this Community[20].

Thus, it can be concluded that in the new legal order provided by the Union, the States have limited their sovereign rights, though in limited fields, for a better functioning of the Community. And this new legal order to international law concerns not only the Member States but also their nationals[21].

The Union law imposes some obligations on individuals and these obligations are independent of the Member States' legislation. By doing so, the European Union grants some rights to the individuals, which become part of their legal heritage. The Treaty explicitly provides for these rights, but one can also infer such rights as being present from the obligations clearly imposed by the Treaty upon individuals and the Member States as well as upon the institutions of the Community[22].

Article 12 sets forth a clear and unconditional prohibition in its wording, and such a prohibition is not a positive but a negative obligation. Furthermore, the States do not have a reservation on this prohibition. A reservation could have enabled the Member States to set forth a positive legislative measure in the national law, and thereby provide for a conditional implementation of such a prohibition. This prohibition can easily be adapted to produce direct effects in the legal relationship between the Member States and their subjects[23].

Thus, the spirit, the general scheme and the wording of the Treaty imply that Article 12 must be interpreted as producing direct effects and creating individual rights, which must be protected by national courts[24].

One year after the direct effect principle was ascertained through the Van Gend en Loos judgment, the Primacy principle was put forward, as a supplemental principle, in the case

[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

Flamino Costa & ENEL[25]. A new legal order was created by the ECJ in this judgment by stating *"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."*[26].

Principles of direct effect and primacy comprise of the most distinctive characteristics of the European Union compared to other international organizations. Although, 50 years after these rulings, many Member States still insist on having national legal norms to be primarily applicable due their dualistic point of view[27], the supremacy principle is still firmly applicable thanks to the strong and deep-rooted case law of the ECJ.

1.3 Association Law between Turkey and the European Union

The Association between Turkey and the European Union was created by 1963 Ankara Agreement[28] and the Additional Protocol that entered into force on 1 January 1973[29]'. The legal status of the association created by Ankara Agreement along with the rights and liabilities of the Contracting Parties, which arise from such association, have always been controversial.

Within such controversy, while supporters of duality considered association only as a ground for international relations, supporters of supranationality defended that this kind of agreements must be considered as an integral part of Union Law[30]. This argument was essential, because if association agreements could be accepted as agreements with supranational effects, provisions stated in such agreements would be interpreted by the ECJ as a part of the preliminary ruling procedure and the judgment would have direct effect. As a matter of fact, ECJ has put an end to

[25] Judgment of 15.07. 1964, Case 6/64, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87399&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=397180, 16. 08.2013.

[26] *Ibid.*

[27] For more details, Aisi Zhang, 'Supremacy of EU Law: A Comprative Analysis', *presentation at the European Union and World Politics Conference*, Buffalo, NY, (2012).

[28] Agreement establishing an Association between the European Economic Community and Turkey, OJ L 217, 29/12/1964, p.3687, http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=172, 12.11.2013.

[29] Additional Protocol signed on 23 November 1970, OJ L 293, 29.12.1974, p.4., http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21970A1123(01):EN:HTML, 12.11.20013.

[30] The practical principal basis for this opinion is the Haegeman ruling no 181/73. This ruling, based on which the rights of Greek nationals were decided before the ECJ as per the provisions of the Athens Agreement setting the association between the European Economic Community and Greece, constituted a precedent indicating that provisions of Ankara Agreement were also supranational.

such controversy[31] by firmly establishing in its rulings that association agreements were supranational agreements; and thus, integral parts of the Union Law[32].

Although the Demirel decision[33], as the first judgment given within the framework of the Association Law, was against the plaintiff, Meryem Demirel[34], it constituted a significant landmark in the Association Law. As opposed to those claiming that a Turkish national was not entitled to any rights before the ECJ since the Association Agreement did not constitute a part of the European Union Law, the ECJ ruled that an agreement concluded by the Council under Articles 228 and 238 of the EEC Treaty[35] constituted an act taken by one of the institutions of the Community under Article 177 (1) (b)[36], and, upon its entry into force, provisions stated in such an agreement formed an integral part of the Community legal system; within the framework of which the Court had jurisdiction to render preliminary rulings concerning the interpretation of such an agreement[37].

A provision stated in an agreement made by the Community must be regarded as being directly applicable, even if such an agreement is made with a non-member country. The wording and the purpose and nature of the agreement must be regarded. The related provision clearly and precisely provides for an obligation, which is not subject to any other subsequent measure in its implementation or effects[38].

After laying down the abovementioned essential grounds, the Court ruled against Meryem Demirel in the Demirel case, stating that provisions of Ankara Agreement and the Additional

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[31]Harun Gümrükçü, *Türkiye ve Avrupa Birliği İlişkileri İlşkinin Unutulan Yönleri, Dünü, Bugünü*, (Avrupa Türkiye Araştırmaları Enstitüsü, Avrupa Dizisi 15, 2002), p.52.

[32]Despite consistent decisions of the ECJ in this respect, one view in the doctrine holds that the most significant shortcoming of the association is the lack of any institutional structure (judiciary) to settle the disputes between the Parties concerning the interpretation and enforcement of Association Agreements. See Hacı Can, 'Türkiye-Avrupa Topluluğu Ortaklık İlişkisinin Hukuki Çerçevesi', *Ankara Avrupa Çalışmaları Dergisi, 3.1*, (Güz 2013), p. 43.

[33]Judgment of 30.09.1987, Case 12/86, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=94569&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=16809, 01.12.2013.

[34]The facts of the case involves Meryem Demirel, whose husband worked in Germany as an immigrant worker. Meryem Demirel went to Germany on a touristic visa to see her husband, but she did not leave the country although her visa expired and gave birth to her second child during her stay. The national court decided for her deportation, upon which Meryem Demirel started a legal struggle including the ECJ as the last resort.

[35] Article 218 and 288 TFEU.

[36]Article 267 TFEU.

[37] Summary- Case 12/86, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=94544&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=16809, 01.12.2013.

[38]*Ibid.*

Protocol, as subjects to the Demirel Case only impose a general obligation on the Contracting Parties to cooperate for achieving the aims set forth by the Agreement, and such an obligation cannot directly confer the rights, which are not already vested in the individuals by other provisions of the Agreement. However, as indicated earlier, this judgment proved to be the first link in the chain of rulings concerning the Association Law and after this judgment the scope and power of the Association Law started to be obvious as ascertained by the case law of the ECJ.

Sevince Ruling[39] was another important link in the chain in the aftermath of the Demirel case. The Court decided in favour of Salih Zeki Sevince[40], based on facts of the case holding the opinion that provisions of Decisions No. 2/76 and 1/80 of the Council of Association contained a clear and precise obligation. The ruling on this case confirmed that all documents of the Association Law, namely Ankara Agreement, the Additional Protocol and Decisions No. 2/76 and 1/80 of the Council of Association were included as a part of the European Union Law and had direct effects if the provisions were clear, precise and unconditional.

Later, the most important rulings for the free movement of workers were the Kuş[41] and Bozkurt[42] rulings. However, as this study principally concerns the free movement of services, these rulings will not be taken up in great detail within the scope of this study.

[39]Judgment of 20.09.1990, Case 192/89, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=96692&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=19832, 01.12.2013.

[40]After divorcing his Dutch wife, Sevince's residence permit was denied for renewal by the Dutch government. Sevince objected this practice and claimed that he was lawfully employed during the judicial procedure (4 years) and therefore defended that he was entitled to continue working in a job of his preference within the Netherlands as required by the provisions of the Association Agreement.

[41]Judgment of 16.12.1992, Case 237/91, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98199&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=24806, 15.12.2013.

[42]Judgment of 06.06.1995, Case 434/93, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=25464, 15.12.2013.

CHAPTER 2
FREE MOVEMENT OF SERVICES AND THE STANDSTILL CLAUSE IN THE EU LAW and THEIR PLACE WITHIN THE ASSOCIATION LAW

As stated earlier, the European Union is a sui generis organization with its specific nature and legal structure. However, within this organization some long-living principles of the international law surely survived, though, on the other hand, some novel sets of relations were established between the States.

This section of the study will make an attempt to dwell upon the meaning denoted by the free movement of services as one of the fundamental principles set forth during the foundation of the EU, which include free movement of goods, capital, workers and the services. Later the study will make another attempt for the purpose of discussing what is legally meant by the Standstill clause. Finally, the reflections of these two principles on the Association Law will be determined.

2.1 Principle of the Free Movement of Services

The services sector has been increasingly dominant within today's economy. Today, many professions, which may be considered under the free movement of goods and capital or the public sector at a first glance, are assumed under the provision of services. For instance, banking, insurance and postal services, legal and health-care services, contracting and transportation activities along with many others are treated as per the rules governing services provision[43].

The concept of the free movement of services has been described by Article 57 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)[44]. Article 57 of the TFEU says:

"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 goods, capital and persons.

'Services' shall in particular include:

[43] Enis Coşkun, *Avrupa Birliği'nde Hizmetlerin Serbest Dolaşımı ve Türkiye*, (Cem Yayınevi 2002), s. 9.
[44] Article 60 of the ECC, Article 50 of the TEC.

(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."

The freedom to provide services and the right of establishment (Article 49 of the TFEU[45]) were regulated separately in the Founding Treaties of the EU. In fact, these two subjects often overlap and lead to confusion. If a service activity is not covered by the provisions governing the right of establishment, services-related provisions of the Treaty shall be applicable. For instance, a health-care professional or a lawyer may wish to provide services in a Member State either temporarily or permanently (as a resident). The services-related provisions shall apply for the former, while provisions governing the freedom of establishment shall be applicable for the latter [46].

The free movement of services is related to the provision of services normally provided for remuneration in so far as they are not governed by the free movement of people. The freedom to provide services and the freedom of establishment concern the freedom of self-employment and labour. Freedom of establishment refers to the free movement right of the self-employed. Those entitled to this right can carry on a profession or an economic activity under self-employment uninterruptedly in one or more the Member States while enjoying the same conditions granted to the nationals of that Member State. Resident nationals of the Member States are entitled to this freedom. Services that are not provided for remuneration and services that are not cross border are excluded. The requirements to enjoy the free movement of services include being a national of a Member State, provision of services for remuneration and provision of cross border services[47].

[45] Article 52 of the EEC, Article 43 of the TEC.
[46] Enis Coşkun, *Ibid*, s. 25.
[47] Nazlı Aydoğan Kaplan, *A.B. Mevzuatında Hizmetlerin Serbest Dolaşımı ve Yerleşme Hakkı*, http://www.nazliaydogan.av.tr/?p=250, 22.12.2013.

Articles 56 and 57 of TFEU do not mention the recipients of services. However, in Luisi and Carbone case[48], the ECJ stated that the Treaty covered the situation of both recipients and providers of services and ruled that the necessary corollary of the freedom for the provider was the freedom for the recipient to move [49].

In addition to the abovementioned, Gutmann[50] emphasized that the passive freedom to provide services was not created by the ECJ, since it was established by Article 1, paragraph 1 of Directive 64/221/EEC[51]. In 2004 Directive 2004/38/EC of the European Parliament and of the Council repealed the Directive 64/221/EEC[52]. However, both directives had similar provisions.

2.2 Standstill Clause

The term standstill is used to denote stagnation and it means recession and no progress in the economy. However, standstill has a different meaning within the acquis communautaire[53].

Within the context of the acquis communautaire a standstill clause refers to "a provision in an agreement that forbids a party from changing conditions to the detriment of the applicant from how they stand at the time of entry into force of the agreement"[54]. Briefly, a standstill clause prohibits changing existing conditions for the worse by introducing new and more stringent restrictions[55]. There are several ways for expressing the so-called standstill clause.

For instance, Article 53 of EEC Treaty, which was repealed by Amsterdam Treaty, explained the prohibition to change conditions for the worse, by stating *"Member States shall not, subject to the*

[48]Judgment of 31.01.1984, Joined Cases 286/82 and 26/83, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=92216&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=16330, 22.12.2013.

[49]Paul Craig and Grainne De Burca, *EU Law, Text, Cases, Materials,* Fifth Edition, (Oxford Press, 2011), p. 792.

[50] Rolf Gutmann, 'Döner and the Customs Union', *in Turkey on the Way to a Visa Free Europe*, ed. by Harun Gümrükçü and Wolfgang Voegeli, (Vizesiz Avrupa Dizisi-5, 2012), p.215.

[51] "The provisions of this Directive shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services.", http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31964L0221:EN:HTML, 29.12.2013.

[52]http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/annexb.pdf?view=Binary, 29.12.2013.

[53]Rolf Gutman, *Ortaklık Anlaşması'nda Standstill Hükmünün Getirdiği Hareketlilik*, (İKV Yayınları No: 216, 2007), p. 8.

[54]Sanem Baykal, *Türkiye- AT Ortaklık Hukuku ve ATAD Kararları Çerçevesinde Katma Protokol'ün 41/1 Maddesinde Düzenlenen Standstill Hükmünün Kapsamı ve Yorumu*, (İktisadi Kalkınma Vakfı Yayınları No:214, 2007), p.6.

[55] Rolf Gutmann, *Ibid*, p. 209.

provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other Member States."

In addition to what is stated above, it must be noted that both the Association Agreement and Accession Agreement undersigned by the European Union provide for the prohibition mentioned in a standstill clause. There are ECJ judgments based on the standstill provision.

For example, in Anastasia Peskeloglou (a Greek citizen) versus Federal Employment Office, Nuremberg (Bundesalt für Arbeit Nürnberg)[56] ECJ confirmed that the standstill prohibition was provided in Article 45 of the Act of Accession[57] concluded by and between the European Union and Greece. The second subparagraph of Article 45 paragraph 1 of the Act of Accession provides:

> *"The present Member States and the Hellenic Republic may maintain in force until 1 January 1988, with regard to Hellenic nationals and to nationals of the present Member States respectively, national provisions submitting to prior authorization immigration undertaken with a view to pursuing an activity as an employed person and/or the taking up and pursuit of paid employment."*

Based on this article ECJ concluded:

> *"12. That provision, which is intended to prevent disturbance of the labour market both in Greece and in the other member states as a result of immediate and substantial movements of workers following accession, constitutes derogation from the principle of the free movement of workers laid down in Article 48 of the EEC treaty. As such it must be interpreted restrictively, as is apparent from Article 44 of the act of accession, which lays down the principle that Article 48 of the treaty is immediately applicable, subject to the transitional provisions contained inter alia in Article 45.*
>
> *13. From that it follows that the federal republic of Germany is authorized to maintain existing restrictions but may not in any circumstances during the transitional period make*

[56] Judgment of 23. 3. 1983, Case 77/82, https://www.jurion.de/Urteile/EuGH/1983-03-23/77_82?q=Peskeloglou&sort=1, 02.01.2014.
[57] Official Journal of the European Communities 19.11.1979, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1979:291:FULL:EN:PDF, 02.01.2014.

> *more stringent the conditions on the taking up and pursuit of employment by Greek nationals through the introduction of fresh restrictive measures."*[58].

Apparently, the term standstill is not clearly stated in the provisions of the Act. However, the standstill prohibition is denoted by the wording of the relevant provision. Gutmann phrases that situation as "An Unwritten Standstill Clause"[59].

Within the context of the Association Law between Turkey and the EU, the standstill prohibition is included in Article 13 of Decision No 1/80 and Article 41 paragraph 1 of the Additional Protocol[60].

The Article 13 of Decision No:1/80 states:

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

The Salih Zeki Sevince judgment, which was previously indicated in this study, had been based on this article, and it was the first case in which the standstill principle was applied within the context of Association Law between Turkey and the EU. The judgment explained that any introduction of more stringent or stricter restrictions on residency or the intention to terminate a Turkish citizen's residence in the Federal Republic of Germany by introducing such restrictions would impede access to the labour market, which would subsequently mean that the rights provided by the Association Law would be changed for the worse. Therefore, it was concluded that such a situation would constitute a violation of the provisions on standstill[61].

Article 41 paragraph 1 of the Additional Protocol, another provision including the standstill principle, states:

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

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[58]Judgment of 23. 3. 1983 Case 77/82, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61982CJ0077:EN:PDF, 04.01.2014.
[59]Rolf Gutmann, *Ibid*, p. 207.
[60]Sanem Baykal, *Ibid*.
[61]Birgit Schröder, *Anwendungsbereiche und Auswirkungen der Stillhalteklausel im Assoziationsrecht der EU mit der Türkei*, Deutscher Bundestag, Wissenschaftliche Dienste, WD 3 – 3000 - 188/11, http://www.migrationsrecht.net/doc_details/1543-anwendungsbereiche-und-auswirkungen-der-stillhalteklausel-im-assoziationsrecht-der-eu-mit-der-tuerkei.html, 25.12.2013.

The first judgment based on this provision was pronounced for Abdulnasir Savaş versus Secretary of State for the Home Department[62]. This judgment, which referred to Article 41 paragraph 1 in its commentary, is quite important as it was the first one on self-employment and service provision after a series of judgments on "workers" (a person working under an employment contract). This judgment later served as a useful reference for the Court as it had set a precedent for evaluating other relevant articles in the Protocol and making comparisons[63]. This judgment will be further evaluated in the following sections of this study.

It is worthwhile to dwell upon the right conferred upon by the standstill provision. Article 41 paragraph 1 of the Additional Protocol does not grant a material right to Turkish citizens to enter a Member State's territory. The Union Law does not imply a right of this kind. It is indisputable that such a situation must be regulated by the national law of each and every Member State. Thus, the standstill provision indicated in Article 41 paragraph 1 of the Additional Protocol should not be treated as material law that replaces and brings prejudice to another material law, but as a *quasi-procedural* law indicating which provisions under a Member States' legislation shall apply *ratione temporis* when Turkish citizens place an application for enjoying the freedom of establishment in a Member State[64].

On the other hand, the following formula should be noted for entry into force of Article 41 of the Additional Protocol: for the countries that were members to the EEC before the Additional Protocol entered into force, the date of enforcement for "the prohibition to introduce new restrictions" is the date of entry into force of the Additional Protocol, i.e. 1 January 1973. As for the countries that joined the Community afterwards, the date of enforcement is their respective date of accession. Thus, the date of enforcement varies for the Member States that joined the Community after the abovementioned date, and is considered as the date each Member State joined the Community and adopted the acquis communautaire.

[62]Judgment of 11.5.2000 Case C-37/98, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45263&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=913693, 25.12.2013.

[63] The Savaş Decision (C-37/98; 11.05.2000), http://www.uni-koeln.de/studenten/turk-unid/kararlar/20savas.htm, 21.11.2011.

[64]Sanem Baykal, *Ibid*, p.26,27.

2.3 Free Movement of Services for Turkish Citizens within the Context of Association Law between Turkey and the EU

Ankara Agreement and the Additional Protocol are the primary sources for the Association Law between Turkey and the European Union, while Decisions of the Council of Association constitute secondary legal sources[65].

Ankara Agreement was signed[66] based on Article 238 of the Treaty of Rome[67] *" The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.*

….".

Gümrükçü refers to different authors and provides the following description for the status of Association between Turkey and the European Union [68] among the various Association Agreements only those signed with Turkey and Greece aim at preparing a candidate country for membership and converging it towards the EU when conditions allow. To this end, the European Union created a preliminary step for the full membership of a country that is eligible for being a candidate but not yet eligible to be a full Member State due to some economic and political reasons. Thus, Ankara Agreement, which provides for coordination and harmonization in the field of free movement and freedom to provide services, right of establishment and free movement of capital, has gone beyond mutual free trade and cooperation for development and created a specific kind of association that assumes prospective membership[69].

The relevant provisions of the Association Law are the following:

Article 13 of Ankara Agreement, which states:

[65]Harun Gümrükçü, *Ibid*, p. 378.
[66]Harun Gümrükçü, *Ibid*, p. 57.
[67] Article 310 of TEC, Article 217 of TFEU.
[68] European Economic Community, when the Agreement was signed.
[69]Harun Gümrükçü, *Ibid*, p.58.

> *"The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them."*[70]

Article 14 of Ankara Agreement, which states:

> *"The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose abolishing restrictions on freedom to provide services between them."* [71]

Article 41 paragraph 1 of Additional Protocol, which states:

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

It is indicated in the abovementioned three articles that within the context of the Association Law, the Treaty establishing the Community shall guide the Contracting Parties in respect of the freedom of establishment and the freedom to provide services, while any new restrictions on these freedoms shall be prohibited as from the date of entry into force of the Additional Protocol. The following section of this study will discuss some judgments based on the abovementioned articles to explain the rights granted to Turkish citizens by means of these articles.

At this point it is essential to note that the ECJ respected the rule of law before and after the Savaş Decision and pronounced judgments that protected the rights of Turkish citizens, which ensured consistency within the case law of the Court. However, in Leyla Ecem Demirkan versus Bundesrepublik Deutschland[72], the ECJ surprisingly gave in to the political pressure and undersigned a judgment with some rather weak legal justifications. Demirkan decision will be further discussed in the following sections along with the other decisions.

[70] Articles 43 to 46, 48 of TEC, Articles 49 to 52, 54 of TFEU, respectively.
[71] Articles 45, 46, 48 to 54 of TEC, Articles 56, 57, 59 to 62 of TFEU, respectively.
[72] Judgment of 24.09.2013, Case C-221/11.

2.3.1 The Savaş Decision

The Savaş Judgment[73] occupies a very significant place within the case law of Association since it was the first judgment based on Article 41 paragraph 1 of Additional Protocol.

The case concerns the Savaş couple, which went to England on 22 December 1984 with a tourist visa granted for one month. Their visa was endorsed only for visiting purposes, which meant that employment, entering into business or self-employment was prohibited. Although the period had expired, the couple continued to stay in England illegally. They went on to operate a shirt enterprise in November 1989 without being granted any permit or license. Assisted by their lawyers, Savaş couple placed an application to the relevant authority for a residency permit in 1991 only to see that the authorities decided to deport Savaş couple in 1994. This decision of the authorities was based on the English law, which stated that a foreigner may only be granted with a permanent resident permit if he/she the continuously and legally resides for 10 years or continuously and illegally for 14 years. In the meantime, they started operating two fast food buffets in two different places; one was opened in 1992, while the other in 1994[74].

The Savaş couple objected several different matters and insisted on the rights conferred upon them by Article 41 paragraph 1 of Additional Protocol when they were brought before the English Supreme Court for the final judgment. The English Supreme Court referred the case to the ECJ for preliminary ruling by asking 6 very complex questions.

Briefly, the English Supreme Court asked whether a Turkish national had a right of establishment and a right of residence in a Member State, in the territory of which he remained and carried on self-employed business activities in breach of that Member State's immigration laws, according to Article 13 of the Association Agreement and Article 41 of the Additional Protocol[75].

The ECJ provided the following answers by means of referring to Amsterdam Treaty Article 53 and Costa Enel Decision:

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[73]Judgment of 11.05.2000, Case C-37/98, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45263&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=616562, 05.12.2013.

[74]Hamdi Pınar, 'The Freedom of Establishment and Free Movement of Service Between European Union Member States and Turkey in the Light of the ECJ Decisions', in *Vizesiz Avrupa'ya Giden Yol, İnişler Çıkışlar, Vurdumduymazlıklar ve Bir Hak Arama Kavgasının Anatomisi*, ed. by Harun Gümrükçü and Beyhan Aksoy, (Vizesiz Avrupa Dizisi-3, 2009), p. 68.

[75] Case 37/98 para. 37.

The wording of this provision [Article 41 of Additional Protocol] states clearly, precisely and unconditionally, an unequivocal 'standstill' clause, based on which the contracting parties are prohibited from introducing new restrictions on the freedom of establishment as from the date of entry into force of the Additional Protocol[76].

The 'standstill' clause in Article 41 paragraph 1 of the Additional Protocol requires that a Member State shall refrain from adopting any new measures having the object or effect of making the establishment, and, subsequently, the residence of a Turkish national in its territory due to some conditions that are more stringent than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned[77].

Within the context of Savaş Decision it is important to highlight that according to the ECJ judgment, the Member States shall continue shaping the rules of entry into their own territory, which primarily concern the application of visa, unless otherwise provided by the Community Law. A Turkish citizen shall enjoy the freedom of self-employment derived from the Association Law before a national court, only if he/she has been entitled to this freedom through lawful means[78]. Thus, although the judgment did not lead to a very favourable result for Savaş couple, it is still important for being the first judgment on the standstill principle and the prohibition concerning the free movement of services visa vis Turkish citizens as per the Association Law.

2.3.2 The Abatay/ Şahin Decision

After the decision of Savaş case, the second important decision concerning the rights of Turkish citizens derived from Additional Protocol Article 41 paragraph 1 came for Abatay/Şahin versus German's Federal Employment[79].

In Abatay case no C- 317/01, the international logistics company that employed the plaintiff as a lorry driver acted as the Turkish subsidiary of a company based in Germany. Fruits and vegetables cultivated in Turkey were forwarded to Germany in the German parent company's

[76]Para 46.
[77]Para 69.
[78] Mehmet Özcan and others, *Bundan Sonrası Senaryo Analizleriyle Türkiye- AB İlişkileri*, (Usak Yayınları, 2009), p. 70.
[79]Judgment of 21.10.2003, Joined Cases C- 317/01 and C-369/01, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48341&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=294439, 08.01.2014.

lorries driven by Turkish national lorry drivers[80]. Amendments in the German law gradually provided for more stringent measures concerning the working conditions of foreign lorry drivers. These new and stricter provisions were to the detriment of Abatay and his colleagues. Before the amendment in the relevant legislation, they could work as drivers of lorries transporting goods without a work permit endorsed by the German State. However, the new legislation required them to apply for such a permit. This requirement alone was enough to constitute a violation of the Standstill prohibition. What made the situation even worse was the refusal of the competent authorities in Germany to renew the work permit for Abatay and his colleagues. As a result Abatay and his colleagues took an action. Subsequently, the case was referred to the ECJ for preliminary ruling.

Şahin case no C-369/01 regards a Turkish origined German citizen called Nadi Şahin. Şahin had an international logistics company based in Germany. He was also the owner of a company located in Turkey, which was a subsidiary of the Germany-based logistics company. There is an 'agency agreement' between the parent and the subsidiary, under which the subsidiary uses the plaintiff's lorries for international haulage operations[81]. The amended legislation made it mandatory for the employees of the subsidiary to obtain work permits ensorsed by the German State, although they were not employed in the Federal State of Germany. Şahin took an action against this requirement claiming that it was contrary to the Association between Turkey and the EU, and his case was referred to the ECJ for preliminary ruling.

Since the facts of the abovementioned two cases were very similar, the ECJ granted one preliminary ruling to resolve both cases at once. The decision stated that the rights of Turkish citizens shall be protected under the Association Law, provided that amendments in the national legislation resulted in the violation thereof.

Abatay and Şahin Decision had very significant consequences for the Association Law. Most importantly, it was the first time for ECJ to provide an interpretation for the free movement of services produced in Turkey. ECJ indicated that international logistics operations originating from Turkey could be considered under the framework of free movement, only if they were delivered to a Member State. ECJ also stated that not only the companies located in Turkey but also their employees could enjoy the freedom to provide services. For the first time in Abatay and

[80]Para 28.
[81]Para 42.

Şahin Decision, the Court interpreted the work permit required by the national legislation after the entry into force of the Additional Protocol under the framework of the Standstill prohibition between the Parties, and ruled that the new requirement was contrary to the Association Law[82].

2.3.3 The Tüm and Darı Decision

The preliminary ruling[83] in the Secretary of State for the Home Department of United Kingdom versus Veli Tüm/ Mehmet Darı is of paramount importance for the purposes of this study.

The facts of the case concern Mr. Tüm, who set off from Germany in 2001, and Mr. Darı, who set off from France in 1998, both arriving in the United Kingdom in the abovementioned years through illegal means of marine transport. After their arrival in the United Kingdom, they placed applications seeking asylum. State Authorities denied their applications for the asylum, but did not take action to deport Mr. Tüm and Mr. Darı.

Meanwhile, Mr. Darı and Mr. Tüm indicated that they wanted to set up business to engage in economic activities in Great Britain, and insisted that they were entitled to enjoy the abolished provisions of the Immigration Act instead of those currently applicable, arguing that it was a requirement of the Association between Turkey and the European Union along with the Additional Protocol Article 41 paragraph 1, since the abolished provisions of the Immigration Act provided for less stringent measures.

The State of Great Britain objected against their application showing Savaş Decision as a precedent, and stated that Mr. Tüm and Mr. Darı entered the territory via illegal means, and entry to the territory was an exclusive area for regulation by each Member State. Thus, the State of Great Britain denied the application defending that the provisions of Association Law did not apply in respect of this area.

The House of Lords of Great Britain decided to stay the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

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[82] Mehmet Özcan ve diğerleri, *Ibid*, p.74.

[83] Judgment of 20.09.2007 Case- C-16/05, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dbd7fc6e6635ad40c38017e1fd0ae5416b.e34KaxiLc3qMb40Rch0SaxuMbx50?text=&docid=62973&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18540, 08.01.2014.

> *"'Is Article 41(1) of the Additional Protocol to be interpreted as prohibiting a Member State from introducing new restrictions, as from the date on which that Protocol entered into force in that Member State, on the conditions of and for entry to its territory for a Turkish national seeking to establish himself in business in that Member State?"*

ECJ responded to the abovementioned question, but it did not take account of the commentary made by the British State referring to Savaş Decision. ECJ responded that in the judgments resulting from cases concerning Savas and Abatay and Others, the Court did not have to rule on that issue, as Mr. Savas and the other lorry drivers in the ruling for Abatay and Others had been admitted to the related the Member States under visas issued in accordance with the relevant national legislation[84].

It was the first ruling of ECJ, which established that as required by the Additional Protocol A

rticle 41 paragraph 1, the freedom of establishment and the free movement of services conferred upon Turkish citizens by the Association Law shall also cover the rules concerning entry to territory[85]. Therefore, this decision is highly important.

2.3.4 The Soysal and Savatlı Decision

Mehmet Soysal and İbrahim Savatlı versus Federal Employment Agency of Germany (Bundesagentur für Arbeit)[86] was referred to the ECJ with the accompanying request for a preliminary ruling, since the plaintiffs claimed that the case should be interpreted under the Association Law.

The facts in Soysal/Savatlı case can be summarized as follows: Mr. Soysal and Mr Savatlı worked as lorry drivers employed by a Turkish company engaged in international logistics operations. The company had its headquarters in Turkey and the goods were transported between Turkey and Germany. For many years both plaintiffs drove lorries that had Turkish license plates for the company's logistics operations and they could get their visas endorsed by the relevant German authorities without facing any problems. However, when they started driving lorries with German license plates for a German company after the year 2000, the authorities rejected their

[84] *Ibid*, para 51.
[85] See Paragraps 55 and 63.
[86] Judgment of 19.02.2009, Case C-228/06, http://curia.europa.eu/juris/document/document.jsf?text=&docid=74024&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=472827, 13.01.2014.

visa applications. Subsequently, Soysal and Savatlı took action before the Administrative Court of Berlin and argued that they were not required to get a visa for entry to the German territory as per Article 41 paragraph 1 of the Additional Protocol. The first instance court denied their application, and they appealed to the Higher Administrative Court of Berlin-Brandenburg[87].

> Higher Administrative Court, 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?'*[88]

To our surprise, the Commission, which previously interpreted the provisions of Ankara Agreement and the Additional Protocol in favor of Turkish citizens, opted for changing its established opinion before the proceedings were concluded. Judges of the Court also reacted against such a sudden change. The Commision asserted that visa application was in fact for the benefit of Turkish citizens, since they could use Schengen visa for entering to several territories. The ECJ did not ratify this objection and elaborated on the legitimacy of visa application focusing on the case of Germany[89].

According to the decision of ECJ, the visa application for Turkish citizens was regulated after 1 January 1973, the date of entry into force of the Additional Protocol concluded by and between Turkey and the European Union. Therefore, the relevant provision in the current legislation was contrary to what had been stipulated by the Standstill provision, since it provided for more

[87] *Ibid* Paragraphs 26-31.
[88] *Ibid*, para 37.
[89] *Ibid*, para 54.

stringent measures concerning the legal status of Turkish citizens. The ECJ ruled that although the standtill provision did not confer upon Turkish citizens the right to enter to the territories of a Member State and the right of establishment by itself, providing for more stringent measures on the legal status of such persons would constitute a violation of the Association Law. Thus, Turkish citizens entering into the German territory for the purposes of free movement of services were not obliged to obtain a visa[90].

The ECJ ruling for the case of Soysal/Savatlı is quite significant since it is the first decision to articulate that the visa requirement regulated as a new provision after entry into force of the Additional Protocol constituted a violation of the Association Law and consequently the Community Law concerning the free movement of services. On the other hand, ECJ confirmed by its ruling that Ankara Agreement and the Additional Protocol were the primary sources of Community Law within the European Union; and therefore, the provisions stipulated by the Association Law must prevail as the primary source, in case of a conflict between the Additional Protocol and the Council Regulations.

The gradual attempts of restriction on the Turkish citizens' active freedom to provide services within the EU and confirmation of the fact that such attempts constituted a violation of the Community Law apply for both Savaş Decision and Soysal and Savatlı Decision. Lawyers and academics that specialized on this field defended that Turkish citizens had passive freedom to provide services for some countries. This opinion can be considered as the correct path to follow, considering the Community Law as a whole. Leyla Ecem Demirkan versus Germany is the next case, which will indicate whether these lawyers were correct to think that their opinion would be confirmed by the ECJ.

2.3.5 The Demirkan Decision

Academics and lawyers were quite curious about the ruling for Leyla Ecem Demirkan versus Federal Republic of Germany[91] for two reasons. Firstly, it was a case which could potentially lead to the confirmation of Turkish citizens' passive freedom to provide services. Secondly, they were accustommed to the fact that the ECJ consistently provided for rulings that complied with

[90] *Ibid*, para 63.
[91] Judgment of 24.09.2013, Case C-221/11, http://curia.europa.eu/juris/document/document.jsf?text=&docid=142081&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=761506, 13.01.2014.

the Community Law. However, the Advocate General's opinion submitted to the Court on 11 April 2013 was a strong sign showing that expectations might end up in frustration. Nevertheless, academics and lawyers, who firmly believed in the rule of law and assumed that it would be protected, never gave up on their expectation from the ECJ to take a position in line with its already established case law, only to see that all those would be in vain. The ECJ ruled against Leyla Ecem Demirkan, and supported the very same meritless arguments previously put forward in the Advocate General's Opinion.

The plaintiff, Leyla Ecem Demirkan placed a visa application before the German Embassy in Turkey stating that she wanted to visit her step father, who lived in the Federal republic of Germany as a German citizen. Upon the rejection of her visa application, she took action before the Administrative Court of Berlin arguing that she had the right to enter the German territory without a visa, as per Article 41 paragraph 1 of the Additional Protocol. She appealed to Higher Administrative Court of Berlin-Brandenburg as the Administrative Court denied her case. The Higher Administrative Court requested the ECJ to provide a preliminary ruling for the case of Demirkan, who defended that visa requirement applied for her, the service receiver, was contrary to the Association Law, and consequently to the Community Law, as per Article 41 paragraph 1 of the Additional Protocol[92].

The following questions were placed before the ECJ:

> *"(1) Does passive freedom to provide services fall within the scope of the concept of freedom to provide services within the meaning of Article 41(1) of the [Additional Protocol]?*
>
> *(2) In the event that the first question is answered in the affirmative: does the protection of passive freedom to provide services under Article 41(1) of the Additional Protocol also extend to Turkish nationals who – like the appellant in the main proceedings – do not wish to enter the Federal Republic of Germany in order to receive a specific service, but for the purposes of visiting relatives for a stay of up to three months and rely on the mere possibility of receiving services in Germany?*[93]"

[92] For more detailed Information, Wolfgang Voegeli, 'Visa-Free Acces to the Member States of the EU', in *Turkey on the Way to a Visa Free Europe*, ed. by Harun Gümrükçü and Wolfgang Voegeli, (Vizesiz Avrupa Dizisi-5, 2012) pp. 154-163.

[93] Case C 221-11 para 31.

As indicated earlier, before the ECJ announced its decision on the Demirkan case, the Advocate General submitted an opinion that was quite contrary to the Community case law, which easily made one think that he could not defy the political pressure. To provide an overview about his opinion, it is useful to note that the Advocate General referred to Association Agreements between Turkey and the European Community as deriving from a simple economic cooperation, and stated that it was impossible for the Turkish citizens, as service receivers, to enjoy the freedom to provide services. This opinion of the Advocate General faced harsh criticism by lawyers and academics[94].

Unfortunately though, the ECJ ruling was parallel to the Advocate General's Opinion and read as:

> *"The notion of 'freedom to provide services' in Article 41(1) of the Additional Protocol signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 must be interpreted as not encompassing freedom for Turkish nationals who are the recipients of services to visit a Member State in order to obtain services.*[95]"

The ECJ decision on Demirkan case brought thousands of other ECJ decisions defending the rule of law into disrepute. In Soysal and Savatlı case the Commission changed its verbal opinion and submitted a written opinion that was completely against Turkish citizens and in Demirkan case the Advocate General's Opinion was shaped by the political pressure, which all in all can be recognized as the material signs of ECJ's being surrounded by political pressure in Demirkan case. The Readmission Agreement[96] dated 16.12.2013, which was signed between Turkey and the European Union after Demirkan Case, set forth the political concerns that underlied the ECJ's decision against Demirkan.

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[94]For more detailed Information; Harun Gümrükçü ve Tamer İlbuğa(Ed.), *Hukuki İnkârcılığın Yarattığı ABAD'ın Demirkan Davası, Sorgulanan Avrupalılık – Yorumlar – Belgeler*, (Vizesiz Avrupa Dizisi-6, 2013).

[95]Para 66.

[96]We are of the opinion that Turkey made a great mistake in signing the Agreement, which foresaw a gradual visa-free entry to the Schengen Zone for Turkish citizens, provided that illegal immigrants who are found to have entered the EU from Turkey will be extradited to Turkey. For the Agreement text see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0239:FIN:EN:PDF, 15.01.2014.

CHAPTER 3
EVALUATION AND CRITICISM

Unfortunately, the ECJ misinterpreted the rights conferred upon the Turkish citizens, as service receivers, in respect of the freedom to provide services within the EU. This decision, which is contrary to the Community Law, violates the Turkish citizens' rights to enjoy the freedom to provide services as service receivers. It has already been indicated that this study will not dwell upon the political aspects. However, it is inevitable to assume that the true reasons underlying this unlawful decision are purely political. The ECJ's Demirkan Decision, which was announced during the course of negotiations between the EU and Turkey for the signing of Readmission Agreement in return for visa-free entry for the Turks, was not only surprising as such a decision was not expected from the ECJ, but also quite anticipated due to the political environment. The possible consequences of Readmission Agreements for Turkey will not be discussed in this study[97]. However, the decision in Demirkan Case made one consider whether specialist lawyers and academics invested all their efforts in vain.

It is unfair to suggest that Demirkan Decision was a mere indication of lawyers' and academics' hitting their heads against the brick wall. On the contrary, the decision suggests that this legal struggle shall be maintained. For many years, lawyers have defended before the ECJ the thesis of academics, who ascertained the existence of these rights, and thereby the opposing opinions stated by other academics have been invalidated in practice. In fact, this is the requirement of the rule of law.

It is not certain whether the ECJ will insist on its position for the Demirkan case. The only way to see that is to make sure other cases are referred to the ECJ. Demirkan case primarily focused on the denial of the passive freedom to provide services for the purposes of a family visit. Although the conclusion did not mention a word about the family visit and ruled for denial of the passive freedom to provide services for Turkish citizens, the decision in its entirety discussed the family visit. This should be considered useful for determination in the pursuit of the legal struggle in respect of other rights violations concerning the passive freedom to provide services, for instance

[97] For the characteristics of Readmission Agreements and their consequences in Balkan States See; Melih Özsöz, *Batı Balkan Ülkelerinde Vize Serbestliği Süreci: Vize Kolaylaştırma, Geri Kabul, Yol Haritası ve Vize Vize Serbestliği*, (İktisadi Kalkınma Vakfı Yayınları, Yayın No:261, 2013).

a visit planned to discover a historical artefact exhibited in a museum or a visit planned to see a specialist doctor or clinic for the treatment of a disease.

It should also be noted that Turkish citizens enjoy the active freedom to provide services under the EU Law. An evaluation of the date of entry into force of the Additional Protocol for each Member State and dates of entry into force of visa application for Turkish citizens regulated by those Member States indicates that Turkish citizens enjoy the right to enter the territories of France, Germany, Belgium, Netherlands, Luxembourg, Italy, Denmark, Ireland, United Kingdom, Portugal and Spain without a visa, as required by their active freedom to provide services[98]. Some countries provided for new regulations concerning Turkish citizens' active freedom to provide services, while others only had attempts. The sections below will briefly touch upon the acts and attitudes of Members States, which provided or attempted for new regulations in this area. Finally, the study will provide an evaluation of the position taken by Turkey, a non-member, whose citizens had ECJ to resolve disputes concerning their rights.

3.1 The United Kingdom

The first decision concerning the rights of Turkish citizens to enjoy free movement of services within the EU was taken under the scope of Abdulnasir Savaş versus Secretary of State for the Home Department of UK. Unfortunately, the UK government did not take any action to regulate the situation of Turkish citizens after this decision[99]. Action was taken for Turkish citizens only after the conclusion of Tüm and Darı case. Approximately 2 months after the decision was declared for Tüm and Darı, the UK government announced on its official website that a new regulation was underway for the special case of Turkish citizens[100]. However, the regulation came exactly two years after the Tüm and Darı decision.

On 3 September 2009, the British competent authorities officially declared the rules that apply for Turkish citizens, who go to the UK to engage in economic activities. According to the new regulation, Turkish citizens to provide services within the UK were entitled to obtain a UK residence permit for establishing themselves in investment or business by placing an application

[98] Kees Groenendijk and Elspeth Guild, *Visa Policy of Member States and the EU Towards Turkish Nationals After Soysal*,(Economic Development Foundation Publications, 2012), p. 55,

[99] In fact this decision applies not only to the UK, but also all the other EU Member States.

[100] Harun Gümrükçü, *A(E)T/AB Türkiye Ortaklık Hukuku'nun Türkiye'ye Yansımaları ve Hizmet Sektörü*, (Vizesiz Avrupa Dizisi-2, 2008), p.120.

before the British Consulates in Turkey. Tüm and Darı decision explains the reason for this regulation by stating:

On 1 January 1973, the date of entry into force of the Additional Protocol in respect of the United Kingdom, the Immigration Rules concerning establishment in business and provision of services were contained in the Statement of Immigration Rules for Control on Entry (House of Commons Paper 509, 'the 1973 Immigration Rules'.)[101]

The wording of Paragraph 30 of the 1973 Immigration Rules, under the heading 'Businessmen', read as follows[102]:

> *'Passengers who are unable to present ... [an entry] clearance [for the purpose of establishing themselves in business] but nevertheless seem likely to be able to satisfy the requirements of one of the next 2 paragraphs should be admitted for a period of not more than 2 months, with a prohibition on employment, and advised to present their case to the Home Office.'*

In Paragraph 31, those Rules required that the applicant shall have sufficient funds to put into a business, if the business is already established, and to bear his share of its losses. Among others, it provided that the applicant must be able to support himself and his dependants and he must be actively concerned in the running of the business[103].
Paragraph 32 of the Rules provided:

> *"If the applicant wishes to establish a business in the United Kingdom on his own account, he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required."* [104]

The United Kingdom has gradually introduced immigration rules that are significantly stricter for those wishing to enter the United Kingdom for the purposes of establishing a business or providing services[105].

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[101] Case C-16/05 Para 20.
[102] *Ibid*, Para 21.
[103] *Ibid*, Para 22.
[104] *Ibid*, Para 23.
[105] *Ibid*, Para 24.

To this end, detailed provisions were stipulated in paragraphs 201 to 205 of the Immigration Rules passed by the House of Commons in 1994 (United Kingdom Immigration Rules 1994, House of Commons Paper 395), to be applicable as of 1 October 1994, and they are still in force as amended ('the 1994 Immigration Rules')[106].

After all ECJ concluded that the 1994 Immigration Rules, currently in force in the United Kingdom, were more restrictive in respect of the applications for entry clearance from persons wishing to establish a business on their own account, compared to the corresponding provisions of the 1973 Immigration Rules[107].

As indicated above, under 1973 Immigration Rules, the United Kingdom created the Turkish European Community Association Agreement (ECAA) for Turkish citizens. Users refer to this as the ECAA visa, since it was described neither under visa nor under the work permit on the UK Home Office website[108].

With the introduction of this facility, the provision of 1994 Immigration Rules for the applicants wishing to establish a business in the United Kingdom that required them show they will be bringing £200.000 into the country was abolished in respect of Turkish citizens. Thus, Turkish citizens regained the facility to establish business in the UK with less funds. For example, the ECAA application placed by a shoeshine guy was initially rejected, but as a result of the action he took before the court his application was accepted for the £500 he indicated as his funds. Consequently, the shoeshine guy started exercising his profession in the streets of Britain[109].

Despite the practical fact that British Authorities handle the applications overcautiously and are inclined to reject many of them, according to the legal advisors the well-prepared applications usually get accepted or appeals on rejections are accepted through court decisions[110].

Although the UK was too late to set out the required provisions after Savaş decision, it is today the only country that provided for a tangible solution. The other 11 Member States indicated above should take the case of UK as an example and Turkey should adopt a more demanding position for encouraging them to stipulate for the required regulations.

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[106] *Ibid*, Para 25.
[107] *Ibid*, Para 26.
[108] http://www.ukba.homeoffice.gov.uk/aboutus/contact/contactspage/turkish-ecaa/, 15.01.2014.
[109] *Victory of the Shoe Polish Guy*, http://www.ntvmsnbc.com/id/25434754/, 15.01.2014.
[110] *Ibid*.

3.2 The Netherlands

The Netherlands is among those Member States that should not require Turkish citizens to obtain a visa when they want to enter its territory to provide services, but it is still impossible to talk about a full implementation of this freedom. However, some significant developments have been observed[111].

For the first time a national court of one of the Member States made reference to the Association Law and decreed that Turkish citizens shall be exempt from visa application under the freedom to provide services.

The story behind the abovementioned decision concerns Cahit Yılmaz, who placed an application under the EU-Turkey Association Law for obtaining a residence and work permit as a Turkish Businessman during his lawful stay in Belgium and had his application denied on grounds that he did not meet the criteria for businessmen and commercial activities. In the meantime, Mr. Yılmaz left the EU territory from the Netherlands and arrived in Turkey. Later, he made an attempt to leave Turkey for entering to the Dutch territory without a visa. However, he could not succeed in doing so without a visa. Subsequently, his attorneys started the litigation[112].

After the initial proceedings, the case was finally referred to the Council of State of the Netherlands (Raad van State). The Council of State of the Netherlands resolved the case without any further need for a referral to the ECJ, decisions taken so far were adequate for guidance. The following statements were made by the Council of State of the Netherlands:

> *"From this it ensues that in the Netherlands on 1 January 1973 no visa-requirement was applied on Turkish nationals for a stay shorter than three months and that that visa-requirement was first included in 1982 in the Prescript for Foreigners. Aside from the question of whether on 1 January 1973 -the date on which the Additional Protocol took*

[111] One of the most important developments for the Dutch Government concerns the court case filed by the Association Commission, against the Dutch government based on a complaint made to the Commission by a Turkish-origin Dutch citizen, Ali Durmuş, attorney at law, who was registered to the Rotterdam Bar Association. In Case 92/07 European Commission vs. Kingdom of the Netherlands, the ECJ underlined that article 13 of the Decision No 1/80 prohibited the introduction of new restrictions to the free movement of Turkish workers after the date of effect of the abovementioned decision for the related Member State, and decreed that act of increasing the residence permit fee was contrary to the EU Law. For more detailed information See Durmuş Ali, 'Integration requirements in EU migration law and the EEC- Turkey Association', in *Turkey on the Way to a Visa Free Europe*, ed. by Harun Gümrükçü and Wolfgang Voegeli, (Vizesiz Avrupa Dizisi-5, 2012),pp.239-250.

[112] Avukat Ali Durmuş Tarafından Karar İle İlgili Açıklama, in *Turkey on the Way to a Visa Free Europe*, ed. by Harun Gümrükçü and Wolfgang Voegeli, (Vizesiz Avrupa Dizisi-5, 2012),pp.293-294.

effect in the Netherlands- the possibility existed, on the basis of the treaties and agreements as listed before under 2.2, to subject Turkish citizens to a visa-requirement, it ensues from the above that in any case at that particular moment no use was being made of that possibility.

This means that - in line with the conclusion of the Court- the amendment of the Prescript for Foreigners in 1982, with which, as of that moment, also for a residence of shorter than three months a visa-requirement for Turkish subjects was introduced, is to be regarded as a new and therefore forbidden restriction in the sense of Article 41, first paragraph, of the Additional Protocol. The consequence that after the intended amendment Turkish subjects were treated less favorably than before, is to that effect already decisive by itself, also when, as the Minister argues in this case, the international regulations in themselves offered room for a stricter national practice than was actually used preceding that amendment[113] ,,

It was the first time a Member State's Court, confirmed the Turkish citizens' active freedom to provide services. Therefore, this decision is very important. In the aftermath of this decision, the Dutch Minister for Immigration, Integration and Asylum Services wrote an official letter dated 13 July 2012, with file reference number 2012-0000406445, and stated that Turkish nationals did not require a visa for travelling to the Dutch territory for business purposes that involved a stay of 3 to 6 months. In his letter, the Minister reminded that Turkish citizens wishing to go on a business trip to the Netherlands could obtain a document from the Dutch Consulate and Embassy offices, which confirms visa-free entry to the Dutch territory, provided that these citizens certify their ownership of and/or employment in a Turkish-origin company, and he stated that this document was not obligatory, but their entry would be facilitated upon presenting this document[114].

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[113] Judgement of Raad van State, Case Number: 201102803/1/V3 in *Turkey on the Way to a Visa Free Europe*, ed. by Harun Gümrükçü and Wolfgang Voegeli, (Vizesiz Avrupa Dizisi-5, 2012), pp.283-291.

[114] Dutch Minister for Immigration, Integration and Asylum Services letter dated 13 July 2012 with file no 2012-0000406445,
https://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%3A%2F%2Fwww.rijksoverheid.nl%2Fbestanden%2Fdocumenten-en-publicaties%2Fkamerstukken%2F2012%2F07%2F13%2Fkamerbrief-over-de-visumplicht-voor-turkse-dienstverrichters-en-zelfstandigen%2Fkamerbrief-over-de-visumplicht-voor-turkse-dienstverrichters-en-zelfstandigen.pdf&ei=f-

The Dutch regulation introduced by the Minister's letter was not as precise as the British regulation. Unfortunately, it has not been possible to obtain data concerning how the Minister's letter was enforced in the Dutch practice.

3.3 The Germany

As a Member State hosting a large Turkish immigrant community, the Federal Government of Germany has been highly cautious about the Turkish citizens' rights arising from the Association Law. Although the Federal Government exerted maximum effort for restricting the rights conferred upon Turkish citizens, some significant and promising developments took place in this Member State. Recently, the ECJ ruling in Germany vs. Soysal/Savatlı clearly confirmed that Turkish citizens enjoyed the active freedom to provide services in Germany without a visa.

According to the provisions in 1973, when the Additional Protocol took effect, Turkish citizens who entered the German territory on a business trip of maximum two months were not required to get a visa[115]. After the Savaş Decision, the State Secretary at the Bavarian Ministry of Interior, published a Circular (Rundschreiben) on 10.08.2001. In this Circular 31, Mr. Beckstein, the State Secretary at the Bavarian Ministry of Interior, indicated that Turkish service providers, especially the Turkish long-distance drivers could enter to the German territory and stay there for two months without a visa[116].

However, the Bavarian territory does not count as federal territory, unless someone is following the land route for entry. In response to this Circular, Otto Schily, the Federal Minister of the Interior of Germany, published a counter Circular 32 on 25.09.2001, and indicated that neither Article 13 of the Association Council no 1/80 nor Article 41, paragraph 1 of the Additional Protocol constituted a direct effect. Schily stated that there were no general rules of practice since the European Communities did not take a joint decision on the related matter and the Court decisions were binding only on the related parties[117].

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bfUtHQL8WQhQfa24H4DA&usg=AFQjCNHFzhb83pFvqaOI_6GUN1JwKNy9hA&sig2=ZwNkfZAFuGD-axWLOJreoQ&bvm=bv.59568121,d.ZG4, 21.01.2014.

[115] Westpal, Volker, Visumbefreiung für Türkische Staatsangehörige nach der Rechtslage am 01.01.1973, in Vizesiz Avrupa'ya Giden Yol, 2009, p.91.

[116] Murat Uğur Aksoy, *Avrupa Hukuku Açısından Türk Vatandaşlarına Uygulanan Vize Alma Mecburiyetinin Değerlendirilmesi Raporu*, (İKV Raporu, 2007), p. 13.

[117] Murat Uğur Aksoy, *Ibid*.

The Bavarian Ministry of Interior had to take back its Circular due to the eight-page-long justified Circular published by the Federal Ministry of the Interior of Germany. The State of Bavaria made an attempt of lifting the visa for Turkish citizens, which lasted for only a month. Due to some political concerns, the Federal Ministry of the Interior of Germany misinterpreted both the content and wording of many rulings made by the European Court of Justice. Thus the State of Bavaria re-introduced visa for Turkish citizens based on the Federal Ministry's Circular[118].

Another important development in Germany came in the aftermath of Tüm and Darı Decision. The Federal Ministry for Foreign Affairs gave a statement on 24 October 2007, stating that it had reservations concerning the consequences of the ECJ ruling. Furthermore, the Ministry announced the impossibility of a visa-free entry in respect of the passive freedom to provide services and other matters, by making reference to the Schengen Agreement[119].

The Soysal/Savatlı decision by the ECJ clearly confirmed that visa application in respect of the Turkish citizens' active freedom to provide services constituted a barrier for the freedom to provide services. However, Germany has so far provided for neither a new regulation like in the British case, nor has it made a Ministerial declaration like in the Dutch case. It is now indisputable that Germany should make an intervention in respect of the situation.

3.4 Criticism

The rights conferred by the Association Law between Turkey and the European Union did not emerge years after the establishment of this Association. In fact, specialized academics and lawyers have long defended the existence of these rights, but they had to be confirmed by the Courts until their enforcement could start in practice. Despite many instances of confirmation by Court decisions, long standing attempts were made to make others believe that these decisions were binding only for the Parties of the relevant court case. Not only the EU Member States, but also Turkey itself contributed to the building of this perception. To make matters worse, the Commission, the guarantor of the EU Law, made positive contribution to the building up of this perception by staying silent for many years.

Turkish citizens' freedom to provide services have been defended thanks to the long standing efforts of lawyers and academics in Europe along with the devoted efforts of dedicated civil

[118] Murat Uğur Aksoy, *Ibid*.
[119] Hamdi Pınar, The Freedom of Establishment, *Ibid*, p. 58.

society organisations, businessmen, lawyers and academics in Turkey. Consequently, a certain amount of progress has been made. The firm stand and action taken by the rights owners must also be highlighted by all means. However, it must be noted that the biggest criticism is spared for the relevant officials working under the Ministry of Foreign Affairs of Turkey and the Ministry for EU Affairs of Turkey[120], since it is believed that the relevant Ministries should assume the task of recognising the careful work undertaken by tens of specialists and bodies for ensuring coordination and facilitation and of preparing the required strategic plan. The relevant Ministries have not fulfilled these tasks yet. Instead, civil society organisations such as the Economic Development Foundation, Young Businessmen Association of Turkey and Open Society Foundation have been in the pursuit of these rights along with initiatives like the Visa-Free Europe Research Group. The legal struggle against the restrictions on the Turkish citizens' right of free movement has always been individual struggles both in Turkey and in Europe. However, it is obvious that these individual struggles are not effective enough. And, statements made by Turkish officials confirming the lawfulness of visa application further complicate the situation. Turkish officials must immediately correct their mistake and do whatever it takes to protect the rights conferred upon Turkish citizens before the abovementioned 11 Member States. Otherwise, political pressure will continue violating the rule of law, as observed in the Demirkan decision.

[120] Ministry for EU Affairs was established based on the Statutory Decree no 634, published in the Official Gazette no 27958 (bis) dated 8 June 2011. Ministry for EU Affairs, http://www.abgs.gov.tr/files/rehber/01_rehber.pdf, 21.01.2014.

CONCLUSION

This study has primarily focused on the argument that the Association Law is a part of the European Union Law, although some academics have stated otherwise. Thus, the Association Law enjoys the nature of the EU Law. Moreover, the focal point shifted on the Turkish citizens' freedom to provide services under the Association Law, in the light of the Standstill principle. It is believed that Turkish citizens' freedom to provide services exists for both the providers and the receivers of services. This is the requirement of the main argument underlining that the Association Law is a part of the EU Law. However, the ECJ ruling in Demirkan Case restricts the practical enforcement of the argument in question. On the other hand, the ECJ has established its case law concerning the Turkish service providers' freedom to provide services. Despite the case law, many Member States insist on violating the rights of Turkish citizens, acting contrary to the direct applicability of the EU law and supremacy principle.

Some positive outcomes have been achieved so far through individual legal struggles supported by civil society organisations and civil initiatives. New methods are now required to ensure that these outcomes are applied also for the non-litigated Member States and in respect of all Turkish citizens. There is no doubt that the Commission is required to adopt stricter measures, since the situation concerns a violation of the EU law. Nevertheless, the cases of Soysal and Demirkan indicated that, the Commission may be guided by political pressure and rather than the rule of law, when it comes to Turkey. Thus, other efforts are needed to make the Comission stick to the rule of law. Action must be taken by Turkish citizens, whose rights are violated. Therefore, it is the officials of the Turkish Government, who must assume the biggest responsibility. The experience gained so far suggests that these officials have failed to accomplish their mission in this respect. For this reason, people involved in the fight should never give up encouraging the relevant officials to focus on this issue. By the same token, civil society organisations and initiatives are expected to engage in a more intensified communication with official bodies.

With a view to promote the individual legal struggle, this issue must continue to be a hot topic. The internet must be utilized to communicate the information as much as possible, and short informative fact sheets should be prepared for guidance in respect of individual rights' violations. This type of guidance documents can be published on related websites.

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I declare that this thesis and the work presented in it are my own and have been generated by me as the result of my oriqinal research.

None of the part of this thesis has previously been submitted for a degree of any other qualification at this University or any other institution

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