Freedom of Movement Rights of Turkish Nationals in the European Union

Yalincak, Orhun Hakan

University of Durham, Unitersity of Oxford

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FREEDOM OF MOVEMENT RIGHTS

OF

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By

Orhun Hakan Yalincak*

Abstract

This paper is concerned with the evolving free movement rights of Turkish nationals in the European Union ('EU'). The right to move freely represents one of the fundamental freedoms of the internal market, as well as an essential political element of the package of rights linked to the very status of citizenship in the EU. Given the fact that the holding of the nationality of a Member State is the *condition sine qua non* for acquiring citizenship of the EU, Turkish nationals are clearly not yet citizens of the EU; at best, they can be described as "EU citizens in being." While the rights granted to Turkish nationals by the EU are amongst the most extensive granted to third country nationals ('TCNs'), the outer limits of their freedom of movement rights are firmly rooted in the specific free movement provisions in EU-Turkey Association Law. This naturally gives rise to several inter-related question: how far should the free movement rights granted to EU nationals be extended to Turkish nationals as citizens of an accession state? How do the freedom of movement rights of Turkish nationals compare with EU nationals? The freedom of movement rights for Turkish nationals, within the context of Turkey-EU relations, has been an important issue for Turkish citizens ever since 1980 when strict visa requirements were introduced. This problem confronts all strata of Turkish society, including the business community, the academic world, students, journalists, and almost three million family members of Turkish nationals living in the EU. This paper shows that the free movement rights of Turkish nationals under EU-Turkey Association law is independent of the political talks surrounding the re-admission agreement and "visa dialogue," which are aimed at gradually permitting free movement in the EU for Turkish nationals. This paper shows that under the text of the Ankara Agreement ('AA'), and as confirmed by ECJ case law, Turks have substantial free movement rights within the EU arising from EU-Turkey Association Law, and these new agreements and requirements are evidence that the political considerations of the EU bloc continue to trump the legal considerations. This paper also touches on the ECJ's much anticipated pending judgement in C-221/11 *Demirkan*, which holds the potential to significantly expand the free movement rights of Turkish nationals in the EU.

*MSc Candidate, Exeter College, University of Oxford, 2013; LL.B., St. Mary's College, The University of Durham, 2012.

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Introduction

This article is concerned with the evolving free movement rights of Turkish nationals in the EU. The right to move freely represents one of the fundamental freedoms of the internal market as well as an essential political element of the package of rights linked to the very status of European Union ('EU') citizenship.[1] This naturally gives rise to several interrelated questions: how far should the free movement rights granted to EU nationals be extended to Turkish nationals, as citizens of an accession state? How do the freedom of movement rights of Turkish nationals compare with those of EU nationals? The freedom of movement rights for Turkish nationals, within the context of Turkey-EU relations, have been an important issue for Turkish citizens ever since 1980 when strict visa requirements were introduced.[2] This problem confronts all strata of Turkish society, including the business community, the academic world, students, journalists, and almost three million family members of Turkish nationals living in the EU.[3]

Turkey signed the EEC-Turkey Association Agreement ('AA') nearly a half-century ago.[4] The AA is a framework agreement with a political and economic nature determining the basic principles of association by introducing rights and obligations based on reciprocity.[5] The AA is also considered a legal document, which aims, *inter alia*, to secure Turkey's full membership in the EU, and serves as the primary source for the freedom of movement rights for Turkish nationals.[6] Nevertheless, Turkish nationals seem no closer to enjoying the full panoply of rights enjoyed by EU citizens or, for that matter, granted to them under the AA.[7] Turkey has been an associate member of the EU since the signing of the AA in 1963.[8] In 1970, the parties signed an Additional Protocol ('AP')[9] with more detailed rules.[10] This AP contained provisions to regulate the free movement of Turkish workers in a more concrete way and sought to ensure that the freedom of movement of workers between the EU and Turkey would be secured in progressive stages between the end of the twelfth and the twenty-second year after the Agreement entered into force – in essence between 1976 and 1986.[11] However,

[1] S. Carrera, 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU' (2005) 11(6) E.L.J.
[2] K. Groenendijk and E. Guild, 'Visa Policy of Member States and the EU Towards Turkish Nationals after *Soysal',* Economic Development Foundation Publications, No 232,2010, 38
[3] *id.* 13.
[4] OJ 1977 L.361/29, entry into force on 1 December 1964.
[5] E. Duzenli, (2010), 'Free Movement of Turkish Workers In the Context of Turkey's Accession to the EU', 29,32.
[6] *id.*
[7] N. Tezcan-Idriz, and P.J. Slot, 'Free Movement of persons between Turkey and the EU: the Hidden Potential of Article 41(1) of the AP',CLEER Working Papers 2010(2) The Hague: T.M.C.Asser Instituut., p 3.
[8] B. Aral, 'Making Sense of the Anomalies in Turkish European Relations' (2007) 7(1) J.Econ.Soc.R. 99.
[9] Additional Protocol to the Association Agreement, 23 November 1970, OJ EC No. C-113/17, 24.12.1973.
[10] Groenendijk and Guild (n.2) 11; *see also* M. Ateş, *The Legal Basis of the Free Movement Rights for Turkish Nationals within the EU* (Ankara: DPT Yayın 1999) 7.
[11] Duzenli (n.5) 35.

the full free movement of workers was not realized by 1986, due to a variety of political and economic developments inside Turkey.[12]

At the Helsinki Summit in December 1999, Turkey was given the status of an EU candidate country.[13] The EU's commencement of accession negotiations with Turkey in October 2005 represented a watershed moment in Turkish-EU relations; however, even in the area of technicalities, the negotiations were linked to a wider set of unresolved and highly sensitive political issues.[14] Although the European Council's ('EC') decision to open accession negotiations with Turkey was hailed as a success by many, subsequent events have exposed the pressure implicit in that decision.[15] More than six years later after negotiations were formally opened, the accession process is at a *de facto* standstill with more than half the negotiation chapters frozen. In addition, vocal opposition of Turkey and debate by Member State(s) as to Turkey's "European credentials" and place, *if at all*, in the European Union continues.[16] The reasons and issues underlying these blocked chapters are substantial and involve the collision of political, social, cultural, religious, and policy considerations.[17] Given the huge and complex content of these issues, which could constitute the subject of a separate paper, they will not be dealt with and are kept out of the main scope of this paper. Suffice it to say, it does not appear that the EU-Turkey negotiation gridlock will be resolved anytime soon.

The original EC Treaty did not provide for the freedom of movement to all persons. To qualify, the individual had to be engaged in economic activity: as a worker,[18] a self-employed person[19] or as provider or receiver of services.[20] However, during the discussions between the EC members at Maastricht at the end of 1991, the concept of 'European citizenship' was launched, giving every national of an EU MS the status of citizen of the EU, along with specific rights and obligations.[21] The later enactment of the Citizens Rights Directive 2004/38 ('CRD'),[22] which aimed to capture and demarcate the rights and the limits of EU citizenship, codified the Court's jurisprudence. All EU

[12] *id.*
[13] Aral (n.8)110.
[14] G. Aybet, 'Turkey and the EU After the First Year of Negotiations: Reconciling Internal and External Policy Challenges' (2006) 37 Security Dialogue 529-530.
[15] *id.* 530.
[16] *id.* 532; *see also* A. Ruiz-Jimenez and J. Torreblanca, *European Public Opinion and Turkey's Accession: Making Sense of Arguments For and Against* (Brussels,CEPS,2007) 8-9.
[17] V. Morelli, 'EU Enlargement: A Status Report on Turkey's Accession Negotiations', Congressional Research Service (2011) 5-9.
[18] Article 45 TFEU. All treaty provisions referred to will be those provided in the Treaty on the Functioning of the European Union (TFEU), Mar. 30, 2010, 2010 OJ (C 83) 47.
[19] Article 49 TFEU. All treaty provisions referred to will be those provided in the TFEU.
[20] Article 56 TFEU.
[21] K. Pieters, 'The Integration of the Mediterranean Neighbours into the EU Internal Market' (T.M.C. Asser Press, The Hague 2010) pp 9-15.
[22] Directive 2004/38/EC, OJ L 158/77, 30 April 2004.

citizens now have the initial right of entry into another MS,[23] a free standing and directly effective right of residence in another MS,[24] and the right to enjoy social advantages on equal terms with nationals for those lawfully resident in another MS.[25] Even so, the conceptual relationship between citizenship and economic free movement rights has not yet been fully resolved, as the strongest indicator of the outer limits of EU citizenship continues to be seen when citizenship is posited 'against' economic activity.[26]

Given the fact that the holding of the nationality of a MS is the condition *sine qua non* for acquiring citizenship of the EU,[27] Turkish nationals are clearly not yet citizens of the EU. While the rights granted to Turkish nationals by the EU, are amongst the most extensive granted to third country nationals ('TCNs'),[28] the outer limits of their freedom of movement rights are firmly rooted in the specific free movement provisions of the AA and its AP.[29] Similar to the development of EU citizenship, the most significant developments in the legal framework on free movement rights of Turkish nationals have been through cases brought in front of the ECJ.[30] Nonetheless, given the political obstacles that have prevented the realization of the full aims of the AA and the accession negotiations, the ECJ has played a critical role by gradually strengthening and expanding the legal position of Turkish nationals.[31]

This paper argues that framing the legal limits of Turkish nationals' freedom of movement rights involves identifying the missing components, which prevent a full "apples to apples" comparison against EU nationals. The first chapter outlines the legal framework governing Turkish nationals' freedom of movement rights under the AA and AP and distinguishes the key features between the free movement provisions in the AA and TFEU. The approach is comparative, drawing on the free movement provisions of the AA, AP, the TFEU, secondary legislation, and ECJ case law. This chapter also notes that the accession state factor has taken a backseat and has delivered no new meaningful rights for Turkish nationals. The second chapter examines the freedom of movement rights of economically inactive Turkish nationals as compared to both economically active and inactive EU nationals. It shows that the legal concept of EU citizenship has become a distinct and

[23] Case C-357/98 *Ex p. Yiadom* [2000] ECR I-9265.
[24] Case C-413/99 *Baumbast* [2002] ECR I-7091.
[25] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-86/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193.
[26] N. Shuibhne, 'The Outer Limits of EU Citizenship', in C. Barnard and O. Odudu, 'The Outer Limits of European Union Law' (Hart Publishing, Oregon, 2009) 195.
[27] Carrera (n.1) 704; *see also* C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, (3rd ed., OUP, Oxford 2010) 226.
[28] Barnard (n.28) 548-553.
[29] *id.*
[30] M.T. Karayigit, 'Vive La Clause de Standstill: The Issue of First Admission of Turkish Nationals Into the Territory of A Member State Within the Context of Economic Freedoms' (2011) E.J.Mig.Law 411.
[31] *id*.

residual source of additional rights for EU nationals above and beyond the internal market rationale and principle of non-discrimination approach seen in the ECJ's early case law. [32] By comparison, the third and fourth chapters examine the freedom of movement rights of economically active Turkish nationals where the citizenship dimension and internal market rationale are completely absent. These two chapters show that the absence of a full internal market between Turkey and the EU, as well as the absence of a citizenship dimension, has constrained the outer limits of economically active Turkish nationals' freedom of movement rights. The fourth chapter also discusses some of the consequences arising from the unequal treatment of Turkish nationals. The final section of this paper returns to the accession state factor and offers a conclusion, which examines a way forward from the *status quo*.

[32] E. Spaventa, 'From *Gebhard* to *Carpenter* Towards A (Non-)Economic European Constitution' (2004) 41 C.M.L.Rev. 743-773.

Chapter One

EU-Turkey Association Law

The AA and the AP are the primary legal sources on the free movement of Turkish nationals in the EU.[33] The Association Council Decisions ('Decisions'), as well as judgments of the ECJ, constitute secondary sources.[34] The AA is the only agreement between the EU and a third country regulating the rights of non-EU nationals to free movement within the EU.[35] The first section of this chapter will examine the legal status and role of the AA and AP within the EU legal order. This section argues that, since the AA is an international treaty, it has supremacy over secondary EU legislation. It also addresses the issue of whether provisions of the AA are capable of direct effect.[36] The second section focuses on the logic and aim of the AA and argues that the ultimate aim of the association was accession. The third section focuses on the interpretation of the relevant provisions of AA, AP, and related Decisions by the Association Council in relation to the free movement provisions of the TFEU and related secondary EU legislation.[37]

Next, on the candidacy of Turkey for EU accession, the existence of freedom of movement rights for Turkish nationals is one of the most politically charged issues, with Turkish nationals often being compared to "barbarians at the gate."[38] Owing to the importance of the ongoing accessions negotiations, which have the potential, if successfully completed, to resolve many of the issues identified in this paper, section four of this chapter will briefly discuss the present state of accession negotiations.

1.1 Legal Status of the AA

The legal basis for the Association Agreement with Turkey is Article 217 TFEU, stating that "[t]he [EU] may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."[39]

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[33] Duzenli (n.5) 35.
[34] The term EU-Turkey Association Law comprises the AA, its AP, the Association Council Decisions and the case law generated around these instruments.
[35] Barnard (n.28) 548-551; *see also* A. Koktas, 'Avrupa Birliğinde Işcilerin Serbest Dolaşim Hakki ve Tűrk Vatandaşlarin Durumu (NYD, Ankara, 1999) 141.
[36] This principle permits individuals to rely on certain provisions of EU law directly before national courts when certain conditions of justiciability are satisfied. Case-26/62 *Van Gend & Loos* [1963]E.C.R. 1.
[37] Aral (n.8) 100.
[38] B. Çiçekli, *The Legal Reception and Status of Turkish Immigrants in the EU: A Comparative Study of Germany*, The Netherlands and the UK, Ph.D. Dissertation, 1996, University of London, 111.
[39] Duzenli (n.5) 31.

Association Agreements are defined as "mixed type" agreements[40] "where competence is shared between the [EU] and the Member States."[41] Consequently, they create rights and obligations both at the MS and EU level.[42] Over the years, the number of states bound by the rules on association with Turkey has increased from the original six members of the European Community to include all of the ever-increasing number of EU Member States.[43]

The ECJ's seminal 1974 *Haegeman*[44] ruling provided the watershed moment pertaining to the legal effect of Association Agreements, such as the AA.[45] In *Haegeman*, a Belgian court had put several questions to the ECJ concerning the Greek Association Agreement.[46] The key question in the case focused on the establishment of jurisdiction. The ECJ held that it had jurisdiction to give preliminary rulings concerning the interpretation of acts of EU institutions by noting that the Agreement was concluded by the Council and was "therefore...an act of one of the institutions of the [EU] within the meaning of...[Article 267 TFEU]."[47] The ECJ's subsequent decisions in *Bresciani*[48] and *Pabst & Richarz*[49] confirmed that association agreements are capable of possessing the two central distinguishing attributes of EU law: supremacy and direct effect.[50] That the accession dimension present in *Pabst & Richarz* was not a dispositive factor in the direct effect determination was subsequently confirmed in the ECJ's *Kupferberg*[51] ruling, which concerned various provisions of the bilateral Trade Agreement with Portugal.[52]

As to supremacy, as established by the ECJ in *Commission v Germany*[53] and most recently confirmed in its *Soysal* judgment,[54] the AA, as an international agreement, has supremacy over secondary EU legislation and domestic legislation. Turning to the issue of direct effect, it was not until 1987 that the ECJ was given an opportunity to clarify the scope of the association agreement with Turkey and its

[40] *id*. (citing N. Rogers, 'A Practitioner's Guide to the EC-Turkey Association Agreement' (Martinus Nijhoff Publishers, 1999) p 6).
[41] *Ibid. (Duzenli)*; and O. Doukoure and H. Oger, *The EC External Migration Policy, The Case of the MENA Countries* (EUI, Italy: Badia Fiesolana, 2000) 8.
[42] H. Pazarci, 'Uluslararasi Hukuk Açisindan Avrupa Ekonomik Topluluğu'nun Yaptiği Anlasmalar'(AUSBFY No. 418, (1978)) 156-159; *see also* Duzenli(n.5)31.
[43] Groenendijk, and Guild (n.2) 11-12.
[44] Case 181/73 [1974] ECR 449.
[45] M. Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21(1)E.J.I.L. 83, 86.
[46] *id.*
[47] P. Eeckhout,'EU External Relations Law' (2nd ed., OUP, Oxford 2011) 125.
[48] Case 87/75 [1976] ECR 129.
[49] Case 17/81 [1982] ECR 1331.
[50] Mendez (n.45) 86-89.
[51] Case 104/81[1982] ECR 3641.
[52] Mendez (n.45) 87-88.
[53] Case C-61/94 [1996] ECR I-3989, para. 52.
[54] Case C-228/06 *Soysal* [2009] ECR.I-1031, para. 59.

role in the EU legal order.[55] *Demirel*[56] concerned a Turkish national, who in 1984 came to Germany under a tourist visa.[57] She remained in the country after the expiry of her visa and was threatened with expulsion.[58] Before the *Verwaltungsgericht*, Ms. Demirel sought to rely on Article 12 and Article 36 of the AA.[59] The Administrative Court referred questions, *inter alia*, on jurisdiction, interpretation, and direct effect to the ECJ.[60] The ECJ held that, since the agreement was an association agreement creating "special, privileged links with a non-member country which [was required], at least to a certain extent, to take part in the [EU] system,"[61] Article 217 TFEU necessarily empowered the EU to guarantee commitments towards non-member countries in all fields covered by that Treaty.[62] As to interpretation, the ECJ held that the provisions must be interpreted and guided by the corresponding provisions in the EU Treaties.[63] As to direct effect, the ECJ acknowledged that provisions of the AA were capable of having direct effect but found that the provisions in question were not sufficiently precise and unconditional to have direct effect.[64]

1.2 Logic and Aim of the AA

The broad *logic* of the AA is highlighted in the preamble, which identifies as its purpose the:[65]

> continuous improvement in living conditions in Turkey and [the EU] through accelerated economic progress and the harmonious expansion of trade...to reduce the disparity between the Turkish economy and the economies of the Member States...[66]

In the same vein, as noted in Article 2(1), the *aim* of the Agreement is identified as:[67]

> the continuous and balanced strengthening of trade and economic relations between the Parties...the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people.[68]

These provisions, when read in conjunction with Article 28 of the AA, set out the ultimate goal of the association: "As soon as the operation of this Agreement has advanced far enough…the Contracting Parties shall examine the possibility of the accession of Turkey to the Community."[69]

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[55] Eeckhout (n.48) 125-126.
[56] Case C-12/86 [1987] ECR 03719, paras. 23 and 25
[57] Eeckhout (n.48) 125-126.
[58] *id.*
[59] *id.*
[60] *id.*
[61] M. Wathelet,'The Case Law of the ECJ and Nationals of Non-European Community Member States' (1996) 20(3) Fordham Int'l.L.J. 603,610; *Demirel* (n.57) para 9.
[62] Eeckhout (n.48) 126.
[63] *id.*
[64] *id.*;*see also* R.V. Ooik, 'Freedom of Movement of Self-Employed Persons and the Europe Agreement' 4 E.J.Mig.Law377, 380(citing Case C-262/96 *Sürül* [1999] ECR I-2685, para 60).
[65] Duzenli (n.5) 31-32.
[66] AA (n.4).
[67] Duzenli (n.5) 33.
[68] AA (n.4), Article 2(1).
[69] *id.* (Article 28).

1.3 Comparing the Specific Free Movement Provisions in AA and TFEU

The AA also aimed to secure the free movement of workers,[70] the abolition of restrictions on freedom of establishment,[71] and the abolition of restrictions on the freedom to provide services.[72] Each of these provisions contain a distinct reference to the EU system for freedom of movement and require that their interpretation be "guided by" the similar rules in the TFEU.[73]

For instance, Article 12, which aims to secure the free movement of workers, states:

> 'The Contracting Parties agree to be guided by Articles [45, 46 and 47 TFEU] for the purpose of progressively securing freedom of movement for workers between them.'[74]

Article 13, which aims to abolish restrictions on the freedom of establishment, states:

> 'The Contracting Parties agree to be guided by Articles [49 to 52 TFEU] and [54 TFEU] for the purpose of abolishing restrictions on freedom of establishment between them.'[75]

Article 14, which aims to abolish restrictions on the freedom to provide services, states:

> 'The Contracting Parties agree to be guided by Articles [51, 52 TFEU] and [54] to [61 TFEU] for the purpose of abolishing restrictions on freedom to provide services between them.'[76]

However, these specific free movement provisions in the AA are not directly effective.[77] Nevertheless, the objectives of these provisions and the "guided by" requirement have influenced the Court's interpretation of the AA, AP, and related Decisions.[78] The outer limits of Turkish nationals rights is set by Article 59 AA, which provides that Turkish nationals shall not receive more favourable treatment than that which the Member States grant to one another pursuant to the TFEU. [79]

Turning to the specific free movement provisions in the TFEU, individuals need to be engaged in "economic activity" to take advantage of Articles 45, 49 and 56 TFEU.[80] The requirement of economic activity is "the decisive factor" that brings an activity within the scope of the provisions of

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[70] *id.*Article 12.
[71] *id*.Article 13.
[72] *id.*Article 14.
[73] Wathelet (n.62) 611.
[74] Groenendijk and Guild (n.2) 63.
[75] *id.*
[76] *id.*
[77] *Demirel* (n.57); and Groenendijk and Guild (n.2) 63.
[78] Barnard (n.28) 548-553.
[79] *Soysal* (n.55) para.61.
[80] *id*.227; and O. Odudu, 'Economic Activity as a Limit to Community Law', in C. Barnard, and O. Odudu, (eds.) *The Outer Limits of EU Law* (Hart Publishing, Oxford 2009), 226-227.

the Treaties.[81] As will be seen in the following chapters, this requirement of economic activity also plays a significant role in delineating the outer limits of Turkish nationals' freedom of movement rights.

Article 45 TFEU, which confers rights on workers, applies when a person "performs services for and under the direction of another person in return for which he receives remuneration."[82] In contrast to Article 12 AA, in *French Merchant Seamen*[83] and confirmed in *Van Duyn*,[84] the ECJ held that Article 45(1) and (2) TFEU had direct effect.[85] Neither Article 45 TFEU nor Article 12 AA provides a definition of a worker. As established by the ECJ in *Hoekstra*,[86] the definition of a worker depends upon EU law, not national law.[87] The essential feature of an employment relationship was established by the ECJ in *Lawrie-Blum*[88] as requiring 'that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'[89] Article 45(1) TFEU sets down the principle of free movement for workers, Article 45(2) TFEU prohibits discrimination on grounds of nationality, and Article 45(3)(a) TFEU provides a non-exhaustive list of the rights, subject to limitations on grounds of public policy, public security, or public health, and the limitations in Article 45(4) TFEU with respect to employment in public service, as follows:

-the right to accept offers of employment; and
-the right to move freely within the territory of the MSs for this purpose; and
-the right to stay in a MS for the purposes of employment; and
-the right to remain after employment has ceased.

The initial right to enter and reside under Article 45 TFEU is now codified in Articles 4-7 CRD.[90] These provisions are to be read in conjunction with Article 18 TFEU, which prohibits "any discrimination on grounds of nationality," Article 20(1) and 20(2) and 21(1) TFEU, in regards to EU citizenship, as well as Article 7(2) Regulation 1612/68 and Article 24(1) CRD, which prohibit discrimination on grounds of nationality regarding accessing employment and conditions of employment.

[81] Barnard(n.28) 226;*see also* Case C-281/06 *Jundt v Finanzamt Offenburg* [2007] ECR I-12231, para. 32-33.
[82] *Ibid. (Barnard)* 226.
[83] Case 167/73 *Commission v. France* [1974] ECR 359, para. 41.
[84] Case 41/75 [1974] ECR 1337.
[85] Barnard (n.28) 233.
[86] Case 75/63 [1964] ECR 1771; Case 53/81 *Levin* [1982] ECR 1035.
[87] *Ibid. (Hoekstra).*
[88] Case 66/85 [1986] ECR 2121.
[89] *id.*
[90] Barnard (n.28) 225.

With regards to Turkish workers, the ECJ has moved to interpret the notion of 'worker' so as to approximate it to the EU definition, although this convergence is subject to some important limitations in EU-Turkey Association Law, as discussed in Chapter 3 *infra*.[91] However, as compared to EU nationals who exercise their freedom of movement rights as workers, as illustrated in Chapter 2-3 *infra*, Turkish worker's right to enter, stay and reside depends upon a complex interplay between the immigration rules of the relevant MS on the effective date of the pertinent standstill clause and the application of the non-discrimination provisions in Article 9 AA, 37 AP, and Article 10(1) of Decision 1/80.[92] Furthermore, Article 14(1) of Decision 1/80 provides for the same statutory derogations as Article 45(3) TFEU.[93]

Turning to Article 49 TFEU, the freedom of establishment "include[s] the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms...under the conditions laid down for its own nationals by the law of the country where such establishment is effected," subject to the limitations laid down in Articles 51 and 52 TFEU. Article 49 is directly effective.[94] The ECJ defined establishment in *Klopp*[95] and held that a self-employed person is somebody who works:

> -outside any relationship of subordination concerning the choice of the economic activity, working conditions, and conditions of remuneration; and
> -under that person's own responsibility; and
> -in return for remuneration paid to that person directly and in full.[96]

Similar to workers, the freedom of establishment rights of EU nationals include the right to leave their own country, to enter and remain in another country,[97] to bring family members, and to move within the territory of another country.[98] In addition, under Articles 18, 55 TFEU and Article 24 CRD, this category of EU nationals has the right to equal treatment;[99] the right not to be discriminated against on

[91] P. Shah, 'Activism in the ECJ and Changing Options for Turkish Citizen Migrants in the UK' QMULRP No. 25/2009, 7; and *See. e.g.* Case C-434/93 *Ahmet Bozkurt* [1995] ECR I-01475, paras. 22–24.
[92] C. Tobler, 'Equal Treatment of Migrant Turkish Citizens in the EU' (2010) 7(1) A.L.R. 1,14.
[93] *id.*
[94] Case 2/74 *Reyners* [1974]ECR 631, para 21;Case C-55/94 *Gebhard* [1995] ECR I-4165, para 25; and Case C-386/04 *Centrodi Musicologia Walter Stauffer* [2006]ECR I-8203, paragraph 18; Case C-438/05 *Viking* [2007] ECR I-10779, para. 61.
[95] Case C-107/83 *Klopp* [1984] ECR 2971, para. 19 (primary and secondary establishment); and N. Bernard, "Discrimination and Free Movement in EC Law" (1996) 45.I.C.LQ. 82, 89-91.
[96] Case C-268/99 *Jany* [2001] ECR I-8615.
[97] Barnard (n.28) 226-230.
[98] *id.*
[99] C-168/91 *Commission v Belgium* [1993] ECR I-851.

grounds of nationality,[100] movement, or right of establishment.[101] Article 13 AA does not provide a separate definition applicable to Turkish nationals, and there are no related Decisions by the Association Council limiting its scope, thus its interpretation is to be "guided by" the definition provided in Article 49 TFEU and related ECJ case law.

Turning to Article 56 TFEU, which confers the right to provide services, it provides that "restrictions on freedom to provide services within the EU shall be prohibited in respect of nationals of Member States who are established in a MS other than that of the person for whom the service is intended."[102] Services are defined in Article 57 TFEU and fall within the scope of the Treaty if "normally provided for remuneration" and include industrial, commercial, and professional activities.[103] As with freedom of establishment, Member States may impose restrictions on the freedom to provide services provided they are objectively justified.[104] As observed by the ECJ in *Van Binsbergen*,[105] Article 56 is capable of having direct effect.[106] The TFEU makes no reference to recipients of services; the right to enter and remain in another MS for this purpose was originally contained in Directive 73/148 and currently arises from the general provisions on entry and residence in the CRD.[107] However, the ECJ has recognized that Article 56 TFEU includes the right to receive as well as to provide services.[108] As with other free movement rights, the rights of service providers and recipients may be restricted on grounds of public policy, public security, or public health.[109] Article 13 AA does not provide a separate definition applicable to Turkish nationals, and there are no related Decisions by the Association Council limiting its scope, thus the underlying principles and concepts employed in those provisions are to be interpreted "so far as possible" in line with EU law.

[100] *Reyners* (n.95)(direct discrimination); C-292/86 *Gullung* [1988] ECR 111(indirect discrimination); Tobler (n.92) 13 (noting that the same distinction applies in the context of EU-Turkey Association Law)(citing Case C-373/02 *Ozturk* [2004]ECR I-3605)).
[101] Case C-212/97 *Centros Ltd*. [1999] ECR I-1459, para. 34; and Case 79/85 *Seger* [1986] ECR. 2375.
[102] S. Enchelmaier, 'Always At Your Service(Within Limits): The ECJ's Case Law on Article 56 TFEU' (2006-2011)' (2011) E.L.Rev.615.
[103] Article 57 TFEU.
[104] Case C-281/06 *Jundt* (n.82) paras.32-33
[105] Case 33/74 *Van Binsbergen* [1974] E.C.R.1299.
[106] *id*. para.27.
[107] Barnard (n.28) 370-371.
[108] Joined Cases 286/82 and 26/83 *Luisi and Carbone v. Ministero del Tesoro* [1984] ECR 377, para. 10, 16; C-186/87 *Cowan* v. *Trésor Public* [1989] ECR 195,para.15; Case C-243/01 *Gambelli and Others* [2003] E.C.R. I-13031, para. 55.
[109] Barnard (n.28) 480-496; *see also* C. Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in C. Barnard and O. Odudu, *The Outer Limits of European Union Law* (Hart Publishing, Oregon, 2009) 274.

1.4 Present State of Accession Negotiations

Following the opening of accession negotiations in October 2005, the EC in its December 2006 meeting decided that eight chapters will not be opened and no chapter will be provisionally closed until Turkey had opened its ports and airports to Greek Cypriot vessels.[110] In addition to this conditionality, another ten chapters cannot be opened to negotiations because they have been blocked by France, due to its adamant opposition to any possibility for Turkish membership in the EU, and by Cyprus, due to the ongoing dispute over the northern part of the island. Consequently, eighteen chapters out of the thirty-five negotiation chapters are currently blocked.[111] Out of the thirteen chapters that have so far been opened to negotiations, only one chapter has been provisionally closed and no new negotiation chapters have been opened since June 2010.[112] Moreover, Turkey is the only country granted candidate status in view of EU membership that has been denied visa-free travel for its citizens.[113]

1.5 Conclusion

This chapter established that the interpretation of the specific free movement provisions in the AA should be "guided by" the corresponding free movement provisions in the TFEU. It highlighted that the key distinguishing features between the free movement provisions in the AA and TFEU are the lack of direct effect of Articles 12, 13, and 14 AA, as compared to Articles 45, 49 and 56, and the lack of a concept similar to citizenship of the EU. This chapter also observed the consistent opposition to Turkish membership and free movement of Turkish nationals in the EU and the kind of 'sclerosis' that has developed in the EU political organs to the prospect of Turkish accession to the EU.[114] Consequently, Turkish nationals have gained no new meaningful rights from their status as citizens of an accession state. These points also highlight the fact that the legal considerations involved in EU-Turkey relations have been largely driven by political considerations. The next chapter addresses the role of economic activity in the AA, AP, TFEU, secondary EU legislation, and ECJ case law, as well as the role of EU citizenship.

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[110] Morelli (n.18) 5.
[111] *id.*
[112] *id.*
[113] Y. Baydar, '*Schengen Requirements for Turks Are Illegal*' 15 March 2012. <http://www.sundayszaman.com/sunday/columnistDetail_getNewsById.action?newsId=274432&columnistId=81> (last accessed 23April 2012).
[114] Shah (n.92) 15.

Chapter Two
Economically Inactive Turkish Nationals and the Role of EU Citizenship in EU Nationals' Free Movement Rights

To compare and distinguish the rationale and legal basis for the broader and more generous set of freedom of movement rights granted to EU nationals, the first section briefly compares the freedom of movement rights of economically inactive Turkish nationals with EU nationals. It argues that this category of Turkish nationals do not have any freedom of movement rights in the EU, subject to a few exceptions, such as being the family member of an economically active Turkish national.[115]

Building on the first section, the second section examines the role of economic activity and citizenship in determining the outer limits of free movement law for EU nationals. This section traces the evolution of the freedom of movement rights of EU nationals and observes the relationship between the free movement of persons provisions and the other free movement provisions. It observes the distinction between economically active and economically inactive EU nationals and outlines the extent to which the limits to citizenship law are the same as but also different from the outer limits of free movement law. This section shows that the ECJ's citizenship jurisprudence has been mostly about pushing the outer limits of the legal concept of citizenship further outwards and challenging its original economic moorings.[116]

The third section examines the specific limits imposed on EU citizenship by economic activity and argues that the freedom of movement rights of EU nationals are not unconditional. It observes that, beyond the three-month point, the requirement of economic activity continues to be a limiting factor on the freedom of movement rights of economically inactive EU nationals.[117]

2.1 The Economically Inactive

[115] Karayigit (n.31) 412. *See also* Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.
[116] Shuibhne (n.27) 194.
[117] C.J. Chido, 'Peril of Movement: Migrating Roma Risk Expulsion as EU Member States Test the Limits of Free Movement' (2005) Tul.J.Int'l.&Comp.L. 233, 242.

Nothing in EU-Turkey Association Law confers on this category of Turkish nationals a free standing, automatic or directly effective right of entry into the EU.[118] Rather, the rights of Turkish nationals' are firmly tilted to those who participate in economic activity, can be described as economically active, or can be described as family members of economically active Turkish nationals.[119] Thus, a Turkish national cannot freely enter any Member State of his choosing without having regard for two considerations.[120] First, the Turkish national must take notice of the effect of the relevant standstill clause vis-à-vis that MS's immigration rules as they existed upon the date the standstill clause came into operation in that MS.[121] Second, the Turkish national must be participating in an economic activity or be the family member of an economically active Turkish national exercising his or her freedom of movement rights under the AA.[122] In other words, unlike EU nationals, discussed below, a Turkish national cannot freely enter any MS, This changes, subject to the statement in the preceding sentence above, if, amongst other things, the Turkish national intends to travel to a MS to exercise his rights as a qualifying worker, take advantage of his freedom of establishment rights, or to provide or receive services.[123]

By comparison, EU nationals,[124] as well as their family members,[125] have an individual and primary right,[126] under Article 21(1) TFEU, now codified in Article 5(1) and 6(1) CRD as to EU citizens and Article 5(2)-(5) and Article 6(2) CRD as to their family members, to enter and reside in another MS for up to three months, without conditions or formalities other than the requirement that they hold a valid identity card or passport.[127]

2.2 The Evolution of the Freedom of Movement Rights of EU Nationals

Several provisions of the TFEU confer personal free movement rights, however the substantive provisions of the original Treaty of Rome did not provide a general right of free movement for all people, rather free movement across EU borders was tethered to economic activity.[128] At Maastricht, the gradual erosion of the link between economic activity and free movement and the shift in perception away from viewing migrants as merely factors of production to seeing them as individuals

[118] Karayigit (n.30) 412.
[119] Barnard (n.28) 548-553.
[120] Karayigit (n.30) 412-420.
[121] *id.*
[122] *id.*
[123] *id.*
[124] Article 2(1) CRD(definition)
[125] Article 2(2) CRD(definition).
[126] Article 21(1) TFEU and CRD Art. 4-7.
[127] *id.*; *see also* Chido (n.118) 233-242.
[128] Barnard (n.28) 421, 421 n.22; *see also* P.v. Elsuwege, 'Shifting Boundaries? EU Citizenship and the Scope of Application of EU Law (2011) 38 Legal Issues of Econ.Integration 263, 266-268.

with rights against the State culminated in the recognition of the status of 'citizen of the Union' for every national of a MS, with specific rights and duties attached.[129]

2.2.1 Contribution of Citizenship

The material content of EU free movement law is strongly grounded in principles developed within the other free movement provisions.[130] During the EU's early years in the 1970s and 1980s, the ECJ used a policy decision to define the scope of the four freedoms differently, which was likely triggered by a greater emphasis on economic as compared with social rights.[131] On one hand, the free movement of goods provision was interpreted to have a vast and sweeping reach, catching all trade rules "capable of hindering directly or indirectly, actually or potentially, intra-Community trade," [132] regardless of whether they were distinctly applicable measures (directly discriminatory), indistinctly applicable measures (indirectly discriminatory), or non-discriminatory measures.[133] On the other hand, with respect to free movement of persons, non-discrimination on grounds of nationality was the key principle.[134] Thus, if the Court found that a measure was non-discriminatory, the measure did not breach the Treaty.[135] However, beginning in the late 1980s and 1990s, with regard to persons, the Court became less tolerant of measures inhibiting the free movement of persons.[136] This marked an undeniable shift away from the discrimination model towards one built upon market access restrictions, even if caused by non-discriminatory measures.[137] The first signs of this shift appeared in the services sphere,[138] before spreading to the establishment provisions[139] and finally affecting the rules on the free movement of workers.[140] However, at the same time, the Court moved in the opposite direction where the free movement of goods was concerned. For instance, in seeking to qualify its

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[129] *id.*
[130] Shuibhne (n.27) 170. Spaventa (n.33); and P. Oliver and S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law' (2007) 44 C.M.L.Rev.649.
[131] V. Yeo, 'Discrimination or Market Access? Re-Evaluating the EU's Organisation of its Internal Market' (2008) C.S.L.R. 315, 316-317.
[132] *id*. (citing Case 8/74 *Dassonville* [1974] E.C.R. 837; Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung fűr Brantwein* (*Cassis de Dijon*) [1979] E.C.R. 649).
[133] *id.* 316 (citing *Dassonville* and *Cassis de Dijon*).
[134] *id. See also* L. Daniele, 'Non-Discriminatory Restrictions on the Free Movement of Persons' (1997) 22 E.L.Rev. 191, 195.
[135] *id.* (citing. Case C-221/85 *Commission v Belgium* [1987] E.C.R. 719;and Case C-52/79 *Procureur du Roi v Mark J.V.C Debauve and others* [1981] E.C.R. 833).
[136] *id.*
[137] *id.* (citing J. Steiner and L. Woods, 'Textbook on EC Law' (5th edn, Oxford 1996) p 293).
[138] *id.* (citing C-76/90 *Manfred Säger v. Dennemeyer & Co. Ltd.* [1991] E.C.R. I-4421).
[139] *id.* (citing C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165)
[140] *id.* (citing C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] E.C.R. I-4921)

wide and all-encompassing *Dassonville*[141] formula in *Keck*[142] with a nuanced distinction between "product requirements" and "certain selling arrangements", the Court seemed to favor a more lenient approach towards indistinctly applicable measures affecting the free movement of goods.[143] As noted by AG Maduro, comparing both trends, the Court's divergent strategy appears to have shifted to "less activism on the free movement of goods [and] more activism with regard to other movement rules."[144]

Looking at citizenship jurisprudence as a narrative, one can see the development of citizenship as a residual source of free movement rights.[145] In the first phase, submissions based solely on citizenship tended to be very tersely dismissed, outlining the irrelevance of citizenship or ignoring citizenship altogether.[146] However, the ECJ recognised the potential weaknesses of the discrimination approach to the internal market rationale and shifted its course regarding the concept of "citizenship."[147]

In the second phase, the specific freedom of movement provisions and characteristics of EU citizenship exhibited a more nuanced relationship, although the Court's approach was still clearly based on a market access restrictions model.[148] The ECJ extended free movement rights under the principle that states cannot impose unjustified obstacles on free movement, even if those obstacles are non-discriminatory.[149] For instance, in *Bosman*,[150] the requirement of transfer fees between clubs constituted an obstacle to free movement, even though the transfer fee rules applied regardless of player nationality and without regard to whether the transfer was cross border.[151] In *Bickel and Franz*,[152] it is not quite clear where services end and citizenship begins.[153] On the one hand, this transitional phase in the ECJ's jurisprudence suggests the beginnings of an inter-changeability at play, with citizenship and the traditional free movement rights often meaning and conferring the same thing.[154] On the other hand, looking at this shift from an internal market rationale, for a court inspired by the goal of market integration, its stance can be easily understood:[155] the desire to attain a fully

[141] *Dassonville* (n.133) para 4.
[142] Yeo (n.132) 316 (citing C-267-8/91 *Keck & Mithouard* [1993] ECR I-6097).
[143] *id.* 316-317.
[144] *id.* (citing P. Maduro, 'We the Court: The European Court of Justice & the European Economic Constitution' (Oxford 1998) p 99)
[145] Shuibhne (n.27) 170; *see also* F. Jacobs, 'Citizenship of the EU: A Legal Analysis' (2007) 13.E.L.J.591.
[146] *id.*(citing Case C-348/96 *Donatella Calfa* [1999] ECR I-11, para.30).
[147] C. Barnard, 'Restricting Restrictions: Lessons for EU from the U.S.?' (2009) 68(3) C.L.J. 575. 583-584.
[148] *id.*
[149] *id.*
[150] *Bosman* (n.141) paras. 83-85.
[151] A. Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the US and the EU' (2005) 41 Colum.J.L. & Soc.Probs. 81, 96 & 96 n.73.
[152] *Bickel and Franz* (n.26).
[153] Shuibhne (n.27) 171; *see also* C-370/90 *Surinder Singh* [1992]ECR I-4265.
[154] Shuibhne (n.27) 171.
[155] Barnard (n.110) 274.

unified market would be frustrated so long as the discrimination model was in place.[156] For instance, the (non-discriminatory) transfer fees in *Bosman*[157] would remain on the rule book as would the (non-discriminatory) rule in *Commission v. Greece* (opticians),[158] which allowed qualified opticians to operate only one optician's shop in Greece.[159]

The ECJ's judgments in *Gebhard* (establishment), *Martínez Sala*,[160] *Grzelczyk* (minimex), *Carpenter* (services),[161] and *Baumbast* marked the beginning of a third phase, a turning point after which citizenship was found to generate meaningful rights beyond those grounded in the more specific free movement provisions.[162] The ECJ's decision in *Grzelczyk*,[163] where it famously held "Union citizenship is destined to be the fundamental status of nationals of the Member states,"[164] paved the way for its decision in *Baumbast*.[165] In *Baumbast*, the ECJ expanded the freedom of movement rights of EU citizens and held that the treaty-based ideas of citizenship conferred the right directly to every person holding the nationality of a Member State.[166] This marked a significant turning point for freedom of movement in the EU, altering the general understanding that economically inactive citizens had no such right under the EU Treaties.[167] What has changed in the third phase of the ECJ's jurisprudence is its willingness to find and the frequency with which it has found a material contribution to the outer limits of the specific free movement provisions through the use of citizenship.[168] This is the case because other Treaty provisions cannot provide the same benefits.[169]

However, while Article 21(1) TFEU is now the residual source of free movement rights for EU nationals, the ECJ has always held, and continues to affirm, that Articles 45, 49 and 56 TFEU constitute specific expressions of free movement rights and thus, where possible, should be used in preference to the more generic rights associated with EU citizenship under Article 21(1) TFEU.[170] Therefore, even with EU nationals, it remains the case that the question of economic self-sufficiency marks the boundary between specific and general rights of free movement. Nevertheless, this is not an

[156] Barnard (n.148) 583.
[157] *Bosman* (n.141).
[158] Case C-140/03 [2005] E.C.R. I-3177.
[159] Barnard (n.135) 583.
[160] Case C-85/96 [1998] ECR I-2691 (child raising allowance for economically inactive Spanish national residing in Germany).
[161] Case C-60/00 [2002] ECR I-6279.
[162] Shuibhne (n.27) 170; and Spaventa (n.33) 744, 773.
[163] [2001] ECR I-6193.
[164] Barnard (n.28) ; and *Grzelczyk* (n.26) para. 18 (echoing La Pergola AG in *Martínez Sala* (n.145))
[165] *Baumbast* (n.25) paras. 81-86; and Barnard (n.28) 423.
[166] Barnard (*Ibid*) 226-227, 423; *Baumbast* (*Ibid*) para 83; *See also* Jacobs AG in case C-148/02 *Garcia Avello* [2003], para 61 and Cosmas AG in Case C-378/97 *Wijsenbeek* [1999] ECR I6207, para 85.
[167] Chido (n.118) 241, Shuibhne (n.22) 171.
[168] Shuibhne (n.22) 171.
[169] *id.*
[170] Shuibhne (n.22) 170.

absolute line.[171] The ECJ's case law has taken things considerably further for those who do not come within the specific free movement provisions at all and who do not properly meet the economic criteria.[172] A prime example of the foregoing is the ECJ's case law on maintenance grants for students, as the Court expressly drew from the introduction of citizenship rights to overturn its own more limited free movement case law from the 1980s.[173]

2.2.2 CRD 2004/38

The rights provided by Article 21(1) TFEU must now be viewed in the context of the CRD, which came into force on April 30, 2004.[174] The CRD, like the wording of the citizenship provisions, is firmly rooted in the rights associated with movement and residence in other states.[175] The CRD has as its basic premise the idea that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident in another Member State.[176] In particular, during the first three months of migration and after five years of exercise there is no need to show any economic activity at all.[177] Beyond consolidating two regulations and nine directives on the topic, the CRD also incorporated and clarified ECJ case law.[178] In some areas the CRD went further, expanding previous rights and establishing new ones for the first time.[179] For the first time, nearly all other conditions on residency were eliminated for citizens exercising their freedom of movement rights for up to three months.[180] Specific categories such as worker, student, and self-employed were removed and replaced with "citizen."[181] Nevertheless, beyond the three-month point the scale is decidedly tipped in favor of those who are economically active, unless they are persons of independent means, students, or job seekers.[182]

2.3 Freedom of Movement Rights of EU Nationals Are Not Unconditional

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[171] *id.* 176 (noting that the case law on part-time workers provides a good example of this point); *see e.g.* Case *Levin* [1982] ECR 1035 and Case 344/87 *Bettary* [1989] ECR 162, para 15, *confirmed in* Case C-456/02 *Trojani* [2004] ECR I-7573).
[172] Shuibhne (*Ibid*.)(citing *Martínez Sala* (n.161), *Trojani* (n.172), *Grzelczyk* (n.26)(insufficient resources) and *Baumbast* (n.25)(non-comprehensive medical insurance).
[173] Shuibhne (n.22) 176. (citing Case C-209/03 *Bidar* [2005] ECR I-2119, paras 38-39, confirming para 35 of *Grzelcyk* (n.26) *supra* and reversing Case 39/86 *Lair* [1988] ECR 3161).
[174] Barnard (n.28) 424; *see also* Case C-127/08 *Metock* [2008] ECR I-6241(noting that this directive is central to citizens' rights and must not be interpreted restrictively).
[175] *Ibid.* (*Barnard*).
[176] Barnard (n.28) 225.
[177] *id.*
[178] Chido (n.118) 241.
[179] *id.*
[180] *id.* (citing CRD Art. 6)
[181] *id.* (citing CRD Art. 4)
[182] *id.*

The recent expansion of EU nationals' free movement rights may lead some to believe that EU nationals' free movement rights are unconditional.[183] This is not the case. First, beyond the three-month point economic activity becomes the touchstone of free movement rights.[184] In the case of workers under Article 45 TFEU, those established in business under Article 49 TFEU, or those who are receiving or providing services under Article 56 TFEU, the legal concept of citizenship combined with the general and specific non-discrimination provisions of each category accentuates the rights provided under the specific free movement provisions.[185] With regard to the economically inactive, beyond the three-month point, unless they are persons of independent means, students, or job seekers, the limitations of citizenship become crystal clear.[186]

Second, movement is still necessary to trigger the application of EU law,[187] especially the provisions of the CRD.[188] However, as can be seen from the ECJ's *Chen*,[189] *Rottman*,[190] and *Zambrano*[191] judgments, even where the situation can be described as potentially "purely internal," the ECJ has expanded the substantive scope of free movement rights to bring about the application of EU law to different factual situations through the use of citizenship.[192]

Third, the CRD establishes substantial restrictions.[193] For instance, economic activity once again becomes a defining criterion for the right of residency beyond three months.[194] Finally, on a more practical level, the CRD is not always correctly transposed in national legislation. Recent studies have

[183] Chido (n.118) 242.
[184] *id.*
[185] *id.*
[186] *id*.
[187] Schuibhne (n.22) 171; *see also* Barnard (n.28) 228; Barnard (n.148) 575-606 (examples of 'wholly internal' situations); and Joined Cases C-64 and 65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23; Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, para 34; Case C-127/08 *Metock* (n.175) para. 77 ("citizenship of the Union is not intended to extend...to internal situations which have no link with [Union] law"); Case C-212-06 *Walloon Government* [2008] ECR I-1683). For further discussion *See* C. Dauticourt and S. Thomas, 'Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope?' (2009) 34 E.L.Rev. 433 (discussion of situation of reverse discrimination).
[188] M. Hailbronner, S.I. Sanchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status' (2011) 5(4) Vienna Journal on International Constitutional Law 498, 509-510.
[189] Case C-200/02 *Chen* [2004] ECR I-9924.
[190] Case C-135/08 *Rottmann* [2010] E.C.R. I-0144 D. Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter In the Development of the Union in Europe' (2011) 56(18) Colum.J.E.L. 55.
[191] Case C-34/09 *Ruiz Zambrano* [2011] ECR 000; and L. Ankersmith and W. Geursen, '*Ruiz Zambrano*: De Interne Situatie Voorbij' (2011) Asiel & Migrantenrecht 156.
[192] Schuibhne (n.22) 171; *Cf.* Case C-434/09 *McCarthy* [2011] E.C.R. I-0000 (limiting *Zambrano*); and C-256/11 *Dereci* [2011] n.y.r.; *see also* Kochenov (n.167) 86-91 (discussion of post-*Zambrano* ECJ jurisprudence). The effects of these judgments have yet to be fully resolved and due to the brevity of this dissertation, any detailed assessment is excluded; and Bernard (n.97) 86-88.
[193] Chido (n.118) 242; *see also* Kochenov (n.170) 87-88.
[194] *id.;* and CRD Art. 7.

concluded that the transposition of the CRD by Member States has been "far from satisfactory"[195] and "considerable parts and crucial provisions [have been] wrongly or not transposed"[196] at all.[197] For instance, the recent expulsion of Roma from France, which narrowly averted the start of EU enforcement proceedings at the close of 2010 for failure to correctly transpose the CRD, serves as a prime example.[198]

2.4 Conclusion

At the beginning of this chapter, it was established that economically inactive Turkish nationals, subject to a few exceptions, do not enjoy any freedom of movement rights comparable to economically inactive EU nationals. To explain this distinction, this chapter highlighted the contribution of citizenship in delineating the outer limits of EU nationals' freedom of movement rights. It also highlighted the limitations of citizenship. It also observed that the Court's free movement of persons case law creates a certain sense of déjà vu.[199] Similar to the field of goods prior to *Keck*,[200] the ECJ has adopted a very wide view of the scope of the free movement of persons provisions, tackling rules that are capable of impeding or dissuading free movers of making the exercise of free movement rights less attractive.[201] The main limit to the market access test appears to be in relation to purely hypothetical restrictions.[202] However, this internal market rationale does not provide a one-stop answer.[203] If, as suggested by some academic commentators, the answer is to be found in the advent of citizenship, then, arguably,[204] the effect of the ECJ's shift is to "protect[] the citizen *qua* citizen, rather than simply *qua* mover"[205] and to impose a duty upon Member States to refrain from disproportionate interference with fundamental economic and non-economic rights, a duty not to interfere with individual rights,[206] and a duty to respect individual rights.[207]

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[195] *id.*
[196] *id.*
[197] *id. see also* Commission Guidance for Better Transposition and Application of Dir.2004/38: COM(2009) 313, 3.
[198] *id.*
[199] J. Snell, 'The Notion of Market Access: A Concept or A Slogan?' (2010) 47 C.M.L.Rev. 437, 465.
[200] *id.*
[201] *id.*
[202] *id. See e.g.* Case 69/88 *Krantz* [1990] ECR I-583.
[203] Yeo (n.132) 326-328.
[204] *id.*
[205] *id.* (citing E. Spaventa (n.33) 772).
[206] *id.* (*Gebhard* (n.95)).
[207] *id*. (*Carpenter* n.162)).

Chapter Three

Freedom of Movement of Turkish Workers

This chapter focuses on the freedom of movement rights of Turkish workers in the EU. The first section examines Decision 1/80, which regulates the implementation of Articles 12 and 36 AA. This Decision sets forth the rights and conditions applicable to Turkish workers and their family members' rights to access employment, conditions of employment, and remuneration, as well as the corollary rights to enter and reside in a Member State. The second and third sections examine the role of the non-discrimination provisions in EU-Turkey Association Law. These sections show that, in the absence of EU citizenship or a full internal market between the EU and Turkey to justify a parallel approach with the freedom of movement of EU workers, the ECJ has used the non-discrimination provisions in EU-Turkey Association Law to bring the position of the two groups closer together. It characterizes the ECJ's approach to Turkish workers as a qualified non-discrimination approach and observes the inherent limitations of this approach.[209]

3.1 Association Council Decision 1/80

In *Sevince*,[210] the ECJ held that Article 6(1) of Decision 1/80, which replaced Decision 2/76, is directly effective.[211] Decision 1/80, in particular Articles 6(1), 7, 10(1) and 13, regulates not only the employment rights of Turkish workers, who are workers already legally resident and employed in the EU, but also their rights to enter, stay, and reside and their right to equal treatment with EU workers. Each provision is addressed in turn below.

3.1.1 Article 6(1) of Decision 1/80

Article 6(1) of this decision provided,[212] *inter alia*, that a Turkish worker, duly registered as belonging to the labour force of a Member State, is entitled to:[213]

-the renewal of his permit to work for the same employer after one year's legal employment; and

-to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that state, for the

[209] Duzenli (n.5) 35-37.
[210] Case C-192/89 [1990] E.C.R. I-3461.
[211] Karayigit (n.30).
[212] Barnard (n.28) 548-553(noting that the rights provided for in this decision are also directly effective)(citing. Case C-188/00 *Kurz* [2002] ECR I-10691).
[213] *Ibid*. (*Barnard*) 549-551.

same occupation, after three years of legal employment and subject to the priority to be given to workers of the Member States of the Union; and

-to free access in that Member State to any paid employment of his choice, after four years of legal employment.[214]

In contrast to the position of EU nationals discussed in §§1.3 and 2.2 *supra*, Member States retain some competence, discussed *infra*, subject to Article 13 of Decision 1/80, to regulate the entry to their territory and the conditions under which Turkish nationals take up their first employment, as well as their rights to residence.[215] The basic premise under Article 6(1) is that the longer Turkish workers are employed, the more integrated they will be considered in the host state and so the greater the rights they enjoy under that Decision.[216]

The rights provided for Turkish workers in Article 6(1) are conditional upon:

-being a worker,[217] and
-being "duly registered as belonging to the labour force of a Member State,"[218] and
-on a period of "legal employment."[219]

As established in *Sedef*,[220] these provisions, including the time provisions discussed above,[221] are strictly enforced so as not to "undermine the coherence of the system set up by the Association Council with a view to gradually consolidating the position of Turkish workers in the host Member State."[222]

[214] *id.* 551(citing Case C-355/93 *Eroğlu* [1994]ECR I-5113, para.14; *see also* Case C-386/95 *Eker* [1997] ECR I-2697).
[215] *id*. 551.
[216] *id.*
[217] Barnard (n.28) 548-552 (noting this condition is interpreted consistently with the equivalent term in Article 45 TFEU).
[218] *Ibid. (Barnard)* 550(noting that this requires that the legal relationship of employment be located within the territory of a Member State)(citing Case C-98/96 *Ertanir* [1997] ECR I-5719,para. 39; Case C-4/05 *Güzeli* [2006] ECR I-10279, para 37; *See* Case C-337/07 *Altun* [2008] ECR I-10323, paras. 23-26.)
[219] Barnard (n.28) 550.
[220] Case C-230/03 [2006] ECR I-157, para. 37.
[221] *See also* Case C-355/93 *Eroğlu* (n.214), para.14; and Case C-386/95 *Eker* (n.214).
[222] Barnard (n.28) 550.

This "limited" improvement on Decision 1/76 and the decision in *Bozkurt* highlight the unfavorable position in which Turkish nationals find themselves in the absence of express legislation, equivalent to the CRD, which protects their position.[223]

3.1.2 Article 7 of Decision 1/80

Turning to Article 7 of Decision 1/80, it provides, *inter alia*, that once Turkish workers are duly registered as belonging to the labour market of the host state, Turkish workers do enjoy equal treatment with Union workers in respect of remuneration and other conditions of work under Article 10 of Decision 1/80.[224] In addition, Article 7 of Dec. 1/80 provides that the members of the family of a Turkish worker are entitled to:

> -respond to any offer of employment after they have been legally resident for at least three years in that Member State; and
> -enjoy free access to any paid employment of their choice provided that they have been legally resident there for at least five years.[225]

In *Kadiman*,[226] the ECJ held the raison d'être of this provision is to "create conditions conducive to family unity" by, amongst other things, enabling family members[227] to be with a migrant worker and then by consolidating their position by granting them the right to obtain employment in the host state and a concomitant right of residence.[228] Once the three-year period has expired, a Member State can no longer attach conditions to the residence of a member of a Turkish worker's family.[229] And, once five years have transpired, the person derives "an individual employment right directly from Decision 1/80" and "a concomitant right of residence."[230] In *Eroglu*, the ECJ extended its rulings in *Sevince* and *Kuş*[231] to Article 7, saying that "any offer of employment necessarily implies the recognition of a right of residence for that person" and held the provision to be directly effective.[232]

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[223] Duzenli (n.5) 39 (referring to *Bozkurt* (n.92) where ECJ refused right to stay for incapacitated Turkish worker); and S. Özdemir, *Türkiye-Avrupa Birliği İlişkilerinde İşçilerin Serbest Dolaşımı*, (DPT Uzmanlık Tezi, Ankara: DPT Yayın No:2494, 1999) 78.
[224] Barnard (n.28) 548-553 (noting that this provision is directly effective); *see also* Case C-171/01 *Wahlergruppe Gemeinsam Zejedno/Birklikte Alternative und Grune GewerkschafterInnen/UG* [2003] ECR I-4301, para.57.
[225] *Ibid.* (*Barnard*).
[226] *id.*(citing Case C-351/95 *Kadiman* [1997] ECR I-2133,para. 33).
[227] *Ibid.* (*Barnard*) 553; *see also* Case C-275/02 *Ayaz* [2004] ECR I-8765, para. 45 (for definition of family members).
[228] Case C-325/05 *Derin* [2007] ECR. I-6495.
[229] Case C-329/97 *Ergat* [2000] ECR. I-1487.
[230] *id*.; *see also* Case C-467/02 *Cetinkaya* [2004] ECR I-10895, paras32-33.
[231] C-237/91 [1992] ECR I-06781.
[232] Duzenli (n.5) 40.

3.1.3 Standstill Clause in Article 13 of Decision 1/80

The standstill clause in Article 13 of Decision 1/80 provides in relevant part:

> The Member States...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.[233]

As held by the ECJ in *Abatay and Others,*[234] *Sahin*,[235] and *Tum and Dari*,[236] it imposes an obligation upon the parties, which amounts in law to a duty not to act to preclude the parties from having the object or effect of making the conditions of the exercise of an economic activity more burdensome.[237] In essence, Article 13 of Decision 1/80, as well as Article 41(1) AP, and the standstill clause applicable to Turkish nationals exercising their freedom of establishment and freedom to provide services rights are comparable to a quasi-procedural rule and do not operate in the same way as a substantive rule.[238] Rather, these two standstill clauses simply stipulate *ratione temporis*, which are the relevant provisions of the legislation that must be referred to when assessing the position of the applicants.[239]

In its *Sahin* and *Commission v Netherlands*[240] judgments the ECJ distinguished the scopes of Articles 6 and 13 of Decision No 1/80.[241] The ECJ stated that whereas Article 6 governs the conditions in which actual employment permits the gradual integration of the relevant person in the Member State, Article 13 concerns the measures relating to access to employment and "is not intended to protect Turkish nationals already integrated into a Member State's labour force, but is intended to apply precisely to Turkish nationals who do not yet qualify for the rights in relation to employment and, accordingly, residence under Article 6(1) of Decision No 1/80."[242]

In *Commission v Netherlands*, the ECJ clarified that the concept of access to employment as encompassing the issue of the first admission of Turkish workers into the territory of a Member State.[243] Consequently, whether a Turkish national has a right of first entry into a Member State

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[233] Barnard (n.28) 548-553.
[234] Case C-317/01 [2003] ECR I-12301.
[235] Case C-242/06 [2009] ECR I-8465.
[236] Case C-16/05 *Veli Tum and Mehmet Dari* [2007] ECR I-7415, para. 53.
[237] Karayigit (n.30) 413-422; *see also* Joined Cases C-317/01 & C-369/01 *Abatay and Others* [2003] ECR I-12301, paras 58, 66.
[238] *Ibid.* (*Karayigit*).
[239] *id.*(citing A. Hoogenboom, 'Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on *Commission v Netherlands* (Administrative Fees)' (2010) 35 E.L.Rev.707–719.)
[240] C-92/07 [2010] ECR I-0000.
[241] Karayigit (n.30) 424.
[242] *Abatay and Others* (n.237), paras 73, 117.
[243] Karayigit (n.30) 426.

depends upon whether the relevant Member State required a visa from Turkish nationals on the effective date of Article 13(1) of Decision 1/80.[244]

3.2 Qualified Non-Discrimination Model?

In EU-Turkey Association Law, there are three non-discrimination provisions: Article 9 AA, Article 37 AP, and Article 10(1) of Dec. 1/80. Article 9 AA is, in principle, just like the general non-discrimination provisions in the TFEU. With respect to Article 10(1) of Decision 1/80, it is a specific non-discrimination clause that prohibits the discrimination of Turkish workers with regard to "remuneration and other conditions of work."[245] Article 37 AP is worded almost identically to Article 10(1) of Decision 1/80 and similarly regulates "conditions of work and remuneration" of Turkish nationals.

In an effort to limit the various accumulated rights of Turkish nationals, Member States have often argued before the ECJ that Turkish nationals do not enjoy the same rights as EU citizens because the scope of Article 18 TFEU is wider than the scope of Article 9 AA and Article 10(1) of Decision 1/80.[246] This argument was recently put forward and rejected in the *Commission v Netherlands* case, which involved the Netherlands Law on Integration Article 5(2)(a)-(d).[247] The ECJ referred to Article 2(1) AA,[248] which aims to bring the situation of Turkish nationals and citizens of the Union closer together,[249] as well as to the general and specific non-discrimination provision in Article 10(1) of Decision 1/80, and held:

> Article 10(1) lays down for workers of Turkish nationality…a right to equal treatment ...of the same extent as that conferred in similar terms by [Article 45(2) TFEU] on nationals of the Member States.[250]

In relation to Article 37 AP, the ECJ made references to its *Kolpak*[251] and *Simutenkov*[252] judgements in *Kahveci*[253] and held that Article 37 AP applies to "workers of Turkish nationality employed in the

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[244] *id.*
[245] *Kurz* (n.212) para. 39.
[246] N. Tezcan-Idriz, 'Dutch Courts Safeguarding Rights under the EEC-Turkey Association Law' (2011)13 E.J.Mig.Law. 219, 234.
[247] *id.*
[248] *id.*;and *Commission v. Netherlands* (n.209), para.66–68.
[249] See also C-265/03 *Simutenkov* (prohibiting discrimination against Turkish
[250] *id.*; *Wählergruppe Gemeinsam* (n.193) para. 89.
[251] *See* C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECR I-4135 (concerning the non-discrimination clauses in the EU's Association Agreement with Slovenia).
[252] *See* C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Others* [2005] I-02579. This case concerned the non-discrimination clause in the Partnership and Cooperation Agreement (PCA) with Russia. The ECJ compared the non-discrimination clauses in the EU's Association Agreement with Slovenia, which was at

[Union]."[254] The *Kahveci* case concerned a professional football player who was denied a professional player's license on the grounds of nationality.[255] Similar to Articles 9 AA and 10(1) of Decision 1/80, the ECJ held that Article 37 AP has direct effect and prohibits discrimination, such as applying quotas for non-EU players to Turkish citizens, in the context of a professional football license.[256]

In comparison to the three free movement models for EU nationals discussed in Chapter 2 *supra*, the ECJ's approach to Turkish workers reveals a qualified non-discriminatory model. In other words, it only applies if a Turkish worker is admitted and legally employed in the Member State. However, this is far from a complete non-discriminatory model since the initial right of entry and residence are subject to the effects of the standstill clause and are subject to the conditions and limitations set down in the AA, AP, and related Decisions.

While there have been no cases decided by the ECJ where a restriction has been argued in the context of the non-discrimination provisions, given its previous case law, such as *Demirel*, it is likely the ECJ would reflect the fundamental difference between the two legal regimes.[257] In such a scenario, it is likely that the ECJ would note the lack of a full internal market between Turkey and the EU and the fact that Turkish workers do not have an unconditional right to access the employment markets in the EU, and thus interpret the non-discrimination provisions in such a way that they contain no more than what they say, prohibition against discrimination.[258]

By comparison with EU nationals, the combined effect of Articles 18 and 21(1) TFEU is to confer upon any migrant the right not to be discriminated against, directly or indirectly, on grounds of nationality.[259] Moreover, since the situation is brought within the material scope of the TFEU by the

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issue in the *Kolpak* case, and the non-discrimination clauses in the EU's Association Agreement with, past and current associate members, such as Greece and Turkey, and held that the scope of the non-discrimination clause in the PCA with Russia was directly effective and of the same scope, although not of the same nature, as comparable non-discrimination clauses in the EU's Association Agreement with other states. The conclusion to be drawn from these decisions is that, if a Russian national is treated as on an even footing with EU nationals, than *a fortiori* a Turkish national, as a national of an Associate Member State, should have the same rights as EU nationals with respect to non-discrimination with regard to working conditions. See for further discussion, A. Schrauwen and T. Vandamme, 'Towards a Citizenship of the Association', http://www.rechten.unimaas.nl/iuscommune/activities/2012/2012-11-29/workshop13_Schrauwen_Vandamme.pdf , (last accessed on 7 December, 2012).

[253] Case C-152/08 [2008] ECR I-6291.

[254] Tobler (n.92) 9.

[255] *id.*

[256] *id*., (citing *Kahveci* (n.253) paras.29 and 30).

[257] *Ibid.* (*Tobler*) 9-14. *See e.g.*, Opinion of AG Bot in C-268/11 *Gűlbahce* [2012] WLR (D) 313 (arguing that the scope of the non-discrimination clause be limited as Turkish nationals are on a different footing than EU nationals). However, in deciding the case the ECJ appears to have avoided demarcating the limits of the non-discrimination provision and resolved the case on narrower grounds.

[258] *id.*

[259] Spaventa (n.1) 27-28.

exercise of the right to move, rather than, for example, the exercise of an economic activity, there is no inherent limit to the possibility to invoke the right to equal treatment.[260] Thus, with EU nationals, since the link with the Treaty is provided by the mere fact of moving, there is no benefit or rule that is excluded *a priori* from the scope of the Treaty.[261]

3.3 Reviving the Corpse of Article 12 AA?

By ruling that Article 13 of Decision 1/80 and Article 41(1) AP are directly effective, the ECJ has revived the corpse of Article 12 AA with regard to workers by prohibiting any new "obstacles" or "restrictions" after the effective date of the standstill clause. However, this approach only freezes the most favorable conditions for Turkish workers and goes no further. Moreover, while the AA, AP, and related Decisions act as a minimum floor of rights for Turkish workers, they also act as a ceiling given the conditions on residence, family reunion, and the absence of any similar rights for EU workers. For instance, given the absence of a full internal market between Turkey and the EU and the lack of full freedom of movement for workers, there is no legal basis in EU-Turkey Association Law for Turkish work seekers to enter the EU. This is in stark contrast to the position of EU work seekers.[262] Consequently, this approach is far from matching the ECJ's market access restrictions model in the case of EU nationals[263] and does not provide Turkish nationals similarly expansive rights of entry or residence, such as those that flow from citizenship.[264]

3.4 Conclusion

In contrast to the more broad and generous rights granted to EU workers discussed in §§1.3 and 2.2 generally, Turkish workers' freedom of movement rights are quite limited. In the absence of citizenship, the ECJ has attempted to bring the position of Turkish workers and EU workers closer together through the non-discrimination provisions in EU-Turkey Association Law. However, this approach is no substitute for the 'fundamental status' of citizenship of the EU or the market access restrictions model, which flows from the internal market rationale discussed in Chapter Two.[265] This observation in the context of Turkish workers applies with equal force to Turkish nationals in relation to establishment and services discussed in the next chapter.

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[260] *id.*
[261] *id.*(citing *Bidar* (n.174).
[262] Case 48/75 *Royer* [1976] ECR 497(extending Article 45 TFEU to work seekers); and Case C-292/89*Ex parte Antonissen* [1991] ECR I-1745 (reasonable period to find work).
[263] *e.g. Bosman* (n.141), *Commission v Greece* (n.159), and *Säger* (n.139) *supra*.
[264] Tezcan-Idriz (n.246) 235.
[265] *id.*;and Tobler (n.92) 22-23.

Chapter Four

Self-Employed Turkish Nationals and Turkish Service Providers

Similar to the freedom of movement rights of workers under Article 12 AA, the freedom of establishment provision in Articles 13 and freedom to provide services provision in Article 14 AA are not directly effective. The first three sections of this chapter discuss the interaction between Article 13 and Article 14 AA and the standstill clause in Article 41(1) AP, which is directly effective. In contrast to Turkish workers discussed in the previous chapter, these sections demonstrate that, since there are no specific conditions or limitations set down by the Association Council, Turkish nationals are, in theory, entitled to complete free movement in Member States that had no restrictions in place for Turkish nationals upon the effective date of the standstill clause. The fourth section examines the resulting fragmentation of immigration rules in EU territory arising from the different effective dates of the standstill clauses in each Member State.

4.1 Effect of Article 41(1) AP on Articles 13 and 14 AA

Article 41(1) AP provides:

> The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.[266]

In *Toprak and Oguz*,[267] the ECJ noted that the common objective of the standstill clauses enshrined in Article 41(1) of the AP and Article 13 of Decision No 1/80 is to create conditions conducive to the gradual and progressive establishment of economic freedoms by way of an absolute prohibition on national authorities from creating any new obstacle to their exercise by making more stringent the conditions which exist at a given time.[268] A "new obstacle" under the standstill clause has been found to include, *inter alia*, introducing a work permit requirement for service providers,[269] making stricter immigration rules with regard to those seeking entry to establish themselves in a Member State,[270] introducing a visa requirement for service providers,[271] increasing the fees charged for issuing or extending residence permits, [272] and mandating integration courses.[273]

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[266] AP (n.9).
[267] Case C-301/09 [2010] ECR I-0000.
[268] *id*. paras. 52-53, 57 and 62; and Karayigit (n.30) 414, 419-423.
[269] *id*. and Tezcan-Idriz (n.246) 226 (citing Case C-37/98 *Savas* [2000] ECR.I-2927, paras 63, 64, 69).
[270] *Ibid.* (*Karayigit*); *see also Tum and Dari* (n.236)); and N. Tezcan/Idriz, 'Free Movement of Persons between Turkey and The EU: to move or, not to move? The response of the judiciary' (2009) 46(5) CMLRev.1625–1633.
[271] *Ibid.* (*Karayigit*)(citing *Soysal* (n.55)); *see also* Groendendijk and Guild (n.2).
[272] Tezcan/Idriz (n.7) (citing *Sahin* (n.236)).
[273] District Court Rotterdam 12 August 2010, LJN: BN3934; District Court Rotterdam 12 August 2010, LJN:

4.2 Freedom of Establishment

Under Article 13 AA, a Turkish national's initial entry into a Member State is regulated by the individual Member State, subject to the standstill clause in Article 41(1) AP.[274] In *Tum and Dari*, the ECJ had an opportunity to rule on the scope of Article 41(1) AP on the freedom of establishment.[275] It held that Turkish nationals may rely on Article 41(1) AP to invoke the preclusion of any restrictions, such as visas, on the exercise of that freedom, including those governing the conditions relating to the first admission to that Member State.[276] Once admitted, however, Turkish nationals exercising their right to freedom of establishment, and their family members, enjoy the benefit of the non-discrimination provisions in Article 9 AA and are, in principle, entitled to equal treatment with nationals of the relevant Member State.[277] This was confirmed by the ECJ in *Savas*, when it held that so far as the position of the Turkish national is lawful, similar to EU nationals, "the person concerned may claim...rights under [EU] law in relation to...exercising self-employ[ment] activity, and correlatively, in relation to residence."[278] Thus, the Court confirmed that the principles established in the context of free movement of workers under the AA, by analogy, also apply in the context of the provisions of the AA concerning the right of establishment.[279]

4.3 Freedom to Provide Services

Turning to Turkish service providers under Article 14 AA, their initial entry is also regulated by the Member State, subject to the standstill clause in Article 41(1) AP.[280]

The following categories seem to benefit from the standstill clause in order to invoke the preclusion of any restrictions in this category:[281]

a. Turkish undertakings established in Turkey, including self-employed Turkish nationals, who provide services in a Member State;[282] and
b. Turkish employees of these Turkish undertakings sent to a Member State to provide services;[283] and

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BN3935; and District Court Roermond 15 October 2010, LJN: BO1206.
[274] Karayigit (n.30) 413-421.
[275] Karayigit (n.30) 418.
[276] *id.*
[277] *id.*
[278] Tezcan-Idriz (n.7) 13(citing *Savas* (n.270); *see also* A. Ott, 'The *Savas* case –Analogies between Turkish Self-Employed and Workers?' (2000) 2 E.J.M.L.445–458.
[279] *Ibid.* (*Tezcan/Idriz*) 13.
[280] Karayigit (n.30) 419.
[281] *id.*
[282] *id.*

c. Turkish nationals who enter into a Member State to receive services therein may rely upon it.[284]

The ECJ's *Soysal* judgment expressly confirmed the inclusion of the former two categories into the *ratione personae* scope of Article 41(1) of the AP.[285] The *Soysal* case concerned a Turkish national who worked in international transport for a Turkish company as a driver of a truck registered in Germany and who had to be in possession of a visa to enter Germany even though, on the date on which the AP entered into force, there was no visa requirement.[286] The ECJ held that since there was no visa requirement when the AP entered into force with regard to Germany, the subsequent introductions of a visa requirement for Turkish nationals was a new restriction contrary to Article 41(1) AP. According to the parties' submissions, it was revealed that the visa requirement for Turkish nationals was only introduced on 1 July 1980 and later replaced by the *Aufenthaltsgesetz*, which implemented Regulation No. 539/2001.[287] The ECJ reaffirmed that international agreements concluded by the EU have primacy over secondary EU legislation, which in practice means that the provisions of the latter must be interpreted, in so far as possible, in a manner consistent with the former.[288]

While the ECJ has not expressly ruled on the third category, drawing from the clear wording of Article 14 of the AA, which explicitly refers to the corresponding provisions in the TFEU as a guide for the purpose of abolishing restrictions on freedom to provide services, the freedom to provide services *includes* the freedom to receive services.[289] Consequently, it is reasonable to expect that the same scope will eventually apply to Turkish service recipients as well, thus opening the door to free movement for diverse groups of individuals such as tourists, students and patients. [290]A request for a preliminary ruling on this exact question has recently been submitted to the ECJ by the *Oberverwaltungsgericht* Berlin-Brandenburg in the *Demirkan*[291] case, and, until the ECJ decides that case, neither the EC nor Member States are likely to take steps regarding service recipients.[292] However, given the pre-eminence of international treaties over secondary EU legislation, the future *Demirkan* judgement may require many Member States to abolish their visa requirements for Turkish

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[283] *id.*
[284] *id.*
[285] *id.*
[286] *id.*
[287] *id*
[288] *id* ; *see also Commission v Germany* (n.54) and *Soysal* (n.55).
[289] Karayigit (n.30) 420.
[290] Tezcan/Idriz (n.7) 9-10.
[291] Case C-221/11 *Demirkan* reported at OJ C 232 from 06.08.2011, 15.
[292] Tezcan-Idriz (n.7) 9-10. A decision is expected in this case sometime in 2013.

nationals, thereby weakening the EU's negotiating power with Turkey with regard to ongoing negotiations for visa liberalization for Turkish nationals.[293]

4.4 Fragmentation

The approach determined under the standstill clauses towards the first admission of Turkish nationals, seeking to exercise their rights as workers, self-employed, or service providers, into the territories of the Member States has led to diverging national conditions and approaches.[294] It is impossible at present to create a uniform chart of Turkish nationals' freedom of movement rights across the 27 Member States precisely because of the different effective date in each Member State of the pertinent standstill clause. Under the current structure there cannot be a common territorial border, common visa policy, uniform visa, or common rules and procedures with respect to Turkish nationals.[295] It is also questionable how effective it would be to combine entry of Turkish nationals into a Member State without a visa requirement but no right to free movement within the EU with the free travel mechanism within the Schengen area.[296]

4.5 Conclusion

This chapter established that, in contrast to Turkish workers, where an EU Member State did not have any restrictions in place at the time when the AP entered into force, the effect of Article 41(1) AP is that Turkish nationals seeking to exercise their freedom of establishment and freedom to provide or receive services rights are entitled to complete free movement.[297] These two categories of Turkish nationals' rights are the most similar to corresponding EU nationals, and the ECJ's pending decision in *Demirkan* holds significant potential to increase the convergence in rights by expanding the freedom to provide services in EU-Turkey Association Law to the freedom to receive services. Moreover, even where a Member State did have restrictions, these restrictions must still be viewed with regard to the relevant non-discrimination provisions. However, one further observation must be noted. There are significant differences between the theoretical and practical implications of the case law. For instance, despite the ECJ's *Soysal* decision, which cleared the way for visa free travel by

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[293] *See* S. Peers, 'Statewatch Analysis: Amending the EU's Visa List Legislation', <http://www.statewatch.org/analyses/no-175-visa%20list.pdf>, last accessed 7th December 2012 (noting that "Turkey's unwillingness to serve as a further external border for the EU" and "the EU's unwillingness to consider further visa liberalisation for Turkish nationals is clearly contributing to the pressures placed on the EU's Dublin and Schengen systems" and observing that "Member States apparently believe that these [problems] are not as unpleasant as the medicine (visa liberalisation for Turkey) which might help cure them.").
[294] *id.*
[295] *id.*
[296] *id.*
[297] Tobler (n.92) 14-23.

Turkish service providers to, amongst others, Germany, Denmark, the UK, and Ireland, there has been little in the way of implementation of this decision with the Member States waiting for action from the EC.[298]

[298] Groenendijk and Guild (n.2).

Conclusion

The comparison of the freedom of movement rights of Turkish nationals and EU nationals highlights several key distinctions. The former, if economically inactive, have no directly effective rights to enter, reside, or stay in the EU. In the case of economically active Turkish nationals, they likewise have no directly effective rights to freedom of movement of workers, freedom of establishment, or freedom to provide services under Article 12-14 AA. Rather, their rights are derived largely from the interplay between the Decisions, the suspensory effect of the applicable standstill clauses, and the non-discrimination provisions in EU-Turkey Association Law. By contrast, EU nationals, even if economically inactive, have directly effective rights of entrance, permanent residence, and temporary residence for up to three months under the TFEU and related secondary EU legislation, such as the CRD. In addition, where the EU national is economically active and exercising his rights under one of the specific free movement provisions such as Article 45, 49 or 56 TFEU, or is a student, a pensioner, or a person of independent means, this right extends beyond the initial three months. The stark contrast between the respective legal frameworks underscores the missing components preventing an "apples to apples" comparison: the lack of a full internal market between Turkey and the EU, the lack of direct effect of the specific free movement provisions in the AA and AP, and, most crucially, the lack of any legal concept such as citizenship of the EU to serve as a distinct and residual source of free movement rights. The latter element is especially important since, as established in Chapter One, no new meaningful rights have been derived from Turkish nationals' status as citizens of an accession state.

The ECJ's response to this stalemate in negotiations began with a series of constitutional-like principles, such as primacy[299] and direct effect[300] in the late 1980s and early 1990s.[301] More recently, the Court has employed the latter principle to adopt the accumulated rights approach under the standstill clauses to freeze the most favourable conditions for Turkish nationals exercising their rights under EU-Turkey Association Law and prohibiting Member States from taking backward steps.[302] As was established in Chapter Two, the legal concept of citizenship has been used by the ECJ to push the outer limits of the specific free movement provisions in EU law further outwards, beyond the explanation proffered by an internal market rationale. As shown in Chapters Three and Four, the ECJ has used the generic non-discrimination provisions in EU-Turkey Association Law to fill the gaps beyond the standstill clauses.[303] However, this approach has finite limits. Moreover, as shown in

[299] Mendez (n.45) 86-91(for parallel approach in EU law *see* Case 6/64 *Costa v E.N.E.L* [1964] 585.)
[300] *Ibid.* (*Mendez*).
[301] *id.*
[302] Tezcan/Idriz (n.246) 227 n.48.
[303] *id.*

Chapter Four, even if the directly effective rights of Turkish nationals under the standstill clauses and non-discrimination provisions are realised to their potential limits, it would not resolve the matter of fragmentation of immigration rules in EU states. Nevertheless, there is a promise of further expansion of the free movement rights of Turkish nationals, especially service recipients, if the ECJ decides the *Demirkan* case by interpreting Article 14 AA in the same manner as its interpretation of Article 56 TFEU, which led to the conclusion, with respect to EU nationals, that the freedom to provide services included the freedom to receive services.[304]

However, recalling the ultimate aim and logic of the AA and AP, a continuation of the *status quo*, at a time when the EU faces greater economic and international challenges than ever before, begs the question:[305]

> [I]s not the ultimate objective of the [AA]...to bring the situation of Turkish nationals and citizens of the Union closer together through the progressive securing of free movement for workers and the abolition of restrictions on freedom of establishment and freedom to provide services...[?][306]

Unmistakably, this was the very purpose of the AA and the AP. Since the EU political organs and the Member States are equally responsible, under the duty of cooperation in EU law and the principle of *pacta sunt servanda* in international law, for the failure to attain the objectives of the AA, initiatives should be taken to give practical effect to the aims of the AA and AP, if not to prepare Turkey for EU accession then for the coherence of the substantive law of the EU, the establishment of common immigration rules towards Turkish nationals, and the prevention of the fragmentation of the European integration.[307]

[304] See discussion in §1.3 and cases cited therein.
[305] Karayigit (n.30) 435 (citing S. Peers, 'EC Immigration Law and EC Association Agreements: Fragmentation or Integration' (2009) E.L.Rev. 628).
[306] *id.*
[307] *id.*

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